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EXEMPT FROM FILING FEES PURSUANT  
TO GOVERNMENT CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

CENTRAL DELTA WATER AGENCY,  
CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE, CALIFORNIA  
WATER IMPACT NETWORK, AND  
AQUALLIANCE,

Plaintiffs,

v.

STATE WATER RESOURCES CONTROL  
BOARD,

Defendant.

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES,

Real Party in Interest.

Case No. 24CECG01666  
Judge: Hon. Maria G. Diaz

**STATE WATER CONTRACTORS'  
NOTICE OF MOTION AND MOTION  
FOR PROTECTIVE ORDER;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

*[Filed concurrently with  
1. Declaration of Miles Krieger in support of  
Motion for Protective Order;  
2. Declaration of Miles Krieger pursuant to  
CCP 2016.040  
3. [Proposed] Order for Granting State  
Water Contractors' Motion for  
Protective Order]*

Date: June 4, 2025  
Time: 1:30 p.m.  
Dept: 97E

Action Filed: April 16, 2024  
Trial Date: Not Set

**NOTICE OF MOTION FOR PROTECTIVE ORDER**

PLEASE TAKE NOTICE that on June 4, 2025 at 1:30 p.m., in Department 97E, or as soon thereafter as the matter may be heard, Intervenor State Water Contractors will and hereby does move this Court for an order granting a protective order barring the State Water Board from continuing to demand the Supplemental Information and corresponding testimony of witnesses while proceeding with the DCP CPOD proceeding .

This motion is made as a matter of right pursuant to Code of Civil Procedure sections 2019.030; 2025.420, subdivision (b)(1), (11); 2031.060, subdivision (a), and Water Code section 1100. SWC brings this motion to protect its members' contractual rights to water from the State Water Project, which conveys water through and diverts water from the Sacramento-San Joaquin River Delta.

This Motion is based on the notice of motion, the attached supporting Memorandum of Points and Authorities, the Declaration of Miles Krieger in support of Motion for Protective Order, the Declaration of Miles Krieger pursuant to CCP 2016.040, and all other papers, filings, and records in this case.

Dated: May 9, 2025

BEST BEST & KRIEGER LLP

By: 

MILES KRIEGER  
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State Water Contractors

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

This is an urgent matter arising from a discrete but highly prejudicial administrative order by defendant/respondent State Water Resources Control Board (State Water Board) in a pending water rights matter related to four water rights permits for the State Water Project (SWP). The permits for the SWP (SWP Permits) are held by the California Department of Water Resources (DWR), but proposed intervenor State Water Contractors' (SWC) member agencies rely on water made available under the SWP Permits to supply water to tens of millions of Californians and hundreds of thousands of acres of irrigated agricultural lands.

The State Water Board is acting through its Administrative Hearings Office (AHO) to process DWR's pending petition to add points of diversion and rediversion to the SWP Permits for a proposed diversion facility on the Sacramento River called the Delta Conveyance Project (DCP). The DCP is critically important for the SWP's ability to respond to climate change and minimize the impacts of major disruptions in the Sacramento River-San Joaquin River Delta (Delta). The process for the State Water Board to decide whether to approve or grant the petition to add points of diversion and rediversion to the SWP Permits is commonly referred to as the Change in Point of Diversion proceeding (herein DCP CPOD).

This motion for protective order (Motion) is based on the AHO's determination that evidence only potentially relevant to the perfection of the SWP Permits in a licensing (Licensing) proceeding must be provided for improper purposes and in excess of the AHO's authority in the DCP CPOD proceeding. To that end, the AHO ordered DWR to generate and produce historic SWP diversion volumes (Supplemental Information) and produce persons most knowledgeable to testify under oath about the Supplemental Information in DCP CPOD. The Supplemental Information is only part of the potentially relevant information to determine the maximum extent of DWR's beneficial use of water for its SWP Permits in a Licensing proceeding, which is not properly before the AHO in the DCP CPOD proceeding. The AHO's Supplemental Information request violates due process rights and exceeds the State Water Board's jurisdiction in DCP

1 CPOD. It is vitally important that a protective order be issued so that the information sought by  
2 the State Water Board is not misused in DCP CPOD in furtherance of an unlawful act.

3 It is important to emphasize that SWC is not seeking to prevent the production and use of  
4 the Supplemental Information in the appropriate legal forums, which will be explained herein.  
5 The necessity for this Motion instead arises from the fact that the Supplemental Information is  
6 being compelled in DCP CPOD to support improper legal determinations that will prejudice the  
7 outcome of the pending request to extend DWR's time to fully build out its water rights. The  
8 Licensing process or the process to extend time to apply water to beneficial use (Time Extension),  
9 are the appropriate forums to consider historic SWP diversion information in relation to the  
10 development of water rights.

11 The Motion is appropriate for adjudication in this action (Action). The original Complaint  
12 for Declaratory Relief and Petition for Writ of Traditional Mandamus seeks to compel the State  
13 Water Board to limit the SWP Permits to historic diversion amounts prior to 2009. Similarly, the  
14 First Amended and Supplemental Complaint for Declaratory Relief required to be filed by May 1,  
15 2025 puts the State Water Board's cap-related determinations in DCP CPOD directly at issue. It  
16 is therefore appropriate for the Court to exercise its authority to prevent the State Water Board  
17 from violating SWC's due process rights and exceeding its jurisdiction in DCP CPOD by  
18 continuing to demand Supplemental Information without giving SWC and DWR the opportunity  
19 to fully present their case in the proper Time Extension water rights processes as established by  
20 the Legislature. Accordingly, good cause exists to issue a protective order.

## 21 **II. FACTUAL AND LEGAL BACKGROUND**

### 22 **A. SWP and SWC**

23 Constructed, operated and maintained by DWR, the SWP is the largest state-built, multi-  
24 purpose water storage and delivery project in the United States. (Declaration of Jennifer Pierre In  
25 Support of State Water Contractors' Motion to Intervene, filed May 1, 2025 (Pierre Decl.), ¶ 4.)  
26 Precipitation and watershed runoff are stored in Lake Oroville in Butte County, conveyed to the  
27 Delta, and pumped into the California Aqueduct. (*Ibid.*) The SWP sometimes also diverts  
28 unregulated flow, i.e. flow that was not previously stored, in the Delta. (*Ibid.*) The California

1 Aqueduct then conveys SWP supplies to water agencies and districts in Southern California, the  
2 Central Coast, the San Joaquin Valley, and portions of the San Francisco Bay Area. (*Ibid.*) The  
3 SWP provides water to 27 million Californians and 750,000 acres of agricultural land. (*Ibid.*) On  
4 average, the SWP conveys 2.7 million acre feet of water annually. (*Ibid.*) Actual diversions  
5 using existing SWP facilities are limited by regulatory, environmental, hydrological, and other  
6 constraints in a given year. (*Ibid.*)

7 The SWC is a not for profit mutual benefit corporation composed of and representing 27  
8 public agencies throughout California that receive water from the SWP through long term water  
9 supply contracts with DWR. (*Ibid.*) Collectively, these member agencies provide water to more  
10 than 27 million people and 750,000 acres of irrigated agricultural land in a geographic area than  
11 spans from Yuba City in the north to San Diego County in the south. (*Ibid.*)

12 **B. SWP Permits**

13 On September 26, 1972, the State Water Board issued the SWP Permits to DWR,  
14 authorizing the appropriation of water from the Feather River and the Delta to operate the SWP.  
15 (Stip. & Order to File First Am. & Supp. Compl. (Stip.), Ex. A, Ex. 17, p. 2.) Water appropriated  
16 under the SWP Permits may be used in Butte, Glenn, Sutter, Yuba, Yolo, Sacramento, Napa,  
17 Marin, Sonoma, Solano, San Joaquin, Contra Costa, Alameda, Santa Clara, Stanislaus, Monterey,  
18 Santa Cruz, San Benito, Fresno, Kings, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura,  
19 Los Angeles, San Bernardino, Riverside, Orange, San Diego, and Imperial counties. (*Id.*) The  
20 SWP Permits allow DWR to divert water at various points of diversion using various diversion,  
21 storage, and conveyance facilities.

22 **C. DWR Has Diligently Sought to Develop the SWP Permits for Decades**

23 DWR has been operating the SWP for more than 50 years. (*Id.*) The SWP spans more  
24 than 600 miles from Northern to Southern California, and is comprised of 32 storage facilities, 17  
25 pumping plants, three pumping-generating plants, five hydroelectric power plants, and  
26 approximately 700 miles of canals and pipelines. (*Ibid.*) DWR has been maximizing its SWP  
27 operations but has been limited by several layers of environmental regulation intended to protect  
28 several state and federally listed fish species, navigation, and water quality throughout the Delta.



1 (Stip., Ex. A, Ex. 17, pp. 3-4.) As a way to increase operational flexibility while continuing to  
2 protect the environment and fully build out its water rights, DWR has pursued several large-scale  
3 projects for the SWP. (*Id.*, at p. 4.) These large-scale projects include the Peripheral Canal  
4 (1980s), the Bay-Delta Conservation Plan (2006-2015), and California WaterFix (2015-2019).  
5 (*Id.*) DWR also filed a petition for extension of time to apply water to beneficial use under the  
6 SWP Permits in 2009, but the State Water Board refused to act on that petition. (Stip., Ex. 15, at  
7 p. 2.)

8 DWR is currently proposing the Delta Conveyance Project, i.e. the DCP. The DCP is a  
9 SWP facility intended to modernize SWP water infrastructure in the Delta by adding two points  
10 of diversion and rediversion along the Sacramento River north of the Delta, connected by a single  
11 tunnel to the Bethany Complex in the south Delta. (Pierre Decl., at ¶ 8.) DCP is intended to  
12 restore and protect the reliability of SWP water deliveries in the face of climate change, sea level  
13 rise, seismicity, and other risks to SWP water supplies. (*Id.*, at ¶ 10.) The DCP is expected to  
14 help mitigate variability in SWP supplies due to climate change and other substantial disruptions,  
15 and thus is important for increasing the reliability of SWP supplies. (*Ibid.*)

16 The urgency of the DCP cannot be overstated. The Governor's Office has made it very  
17 clear that DCP is a critical climate adaptation tool to increase the reliability of the SWP.  
18 (Declaration of Miles Krieger In Support of Motion for Protective Order (Krieger Decl. II), ¶ 2,  
19 Ex. A, pp. 1-2 [Governor Newsom's Policy Statement].) DCP is designed to help maximize the  
20 rapid swings between wet and dry periods, which are exacerbated by climate change. (*Id.*, at p.  
21 2.) DWR estimated that this year alone, over 500,000 acre feet of water—enough to supply 2  
22 million homes for a year—could have been diverted and stored within the SWP system had DCP  
23 been operational. (*Id.*, at ¶ 3, Ex. B, at p. 3 [Secretary Crowfoot Policy Statement].) DWR again  
24 updated that figure as of April 2025, showing that up to 984,000 acre feet of water could have  
25 been diverted and stored. (*Id.*, at ¶ 8, Ex. G.) Accordingly, the DCP CPOD should proceed  
26 expeditiously, unencumbered by highly prejudicial procedural and evidentiary obstacles.  
27  
28

1           **D.     DWR’s Pending Petitions for the DCP Specifically and the SWP Generally**

2                   **1.     The CPOD Petition for DCP**

3           In February 2024, DWR filed a CPOD petition (DCP CPOD Petition) to add two new  
4 points of diversion (and redirection) to the SWP permits for the DCP . (Declaration of Miles  
5 Krieger In Support of State Water Contractors’ Motion to Intervene, filed May 1, 2025 (Krieger  
6 Decl. I), ¶ 3, Ex. A.) The DCP CPOD Petition does not request any other changes to the SWP  
7 Permits. (*Id.*) The State Water Board deemed the DCP CPOD Petition complete and assigned it  
8 to an administrative hearing officer in the State Water Board’s Administrative Hearings Office in  
9 June of 2024. (*Id.*, ¶ 4, Ex. C.)

10           Change petitions, like that at issue in DCP CPOD, are governed by a discrete set of  
11 statutes under Water Code section 1701, et seq (Change Petition Statutes). Change Petition  
12 Statutes allow for changes to be made to specific features of water rights applications, permits, or  
13 licenses issued by the State Water Board. Specifically, the Change Petition Statutes allow for  
14 changes to “the point of diversion, place of use, or purpose of use from that specified in the  
15 application, permit or license; but such change may be made only upon permission of the [State  
16 Water Board].” (Wat. Code, § 1701.) The Change Petition Statutes require the State Water  
17 Board to determine that legal users of water will not be injured prior to granting permission to  
18 change a point of diversion, place of use, or purpose of use. (Wat. Code, § 1702.) By regulation,  
19 the State Water Board has also added a requirement that a Change Petition cannot “in effect  
20 initiate a new water right.” (Cal. Code Regs., tit. 23, § 791, subd. (a).)

21           The Change Petition Statutes apply to the DCP CPOD Petition. However, certain  
22 opponents of the DCP, including Plaintiffs, have protested and are seeking to insert issues only  
23 relevant to the Time Extension in the DCP CPOD process. Acknowledging the importance of the  
24 Time Extension, which DWR is pursuing in a separate petition process, DWR has proposed a  
25 permit condition for DCP that would prevent it from being operated until the State Water Board  
26 issues a decision on the Time Extension. (Krieger Decl. I, ¶ 4, Ex. C, pp. 7-8.) The AHO  
27 acknowledged that the proposed permit term addresses its concerns related to potential injury of  
28 existing legal users of water and the initiation of a new water right. (*Id.*, at Ex. C, p. 8.) The

1 AHO nevertheless ordered DWR to provide the Supplemental Information in the DCP process for  
2 the purposes of defining the SWP historic beneficial use, which is an issue that is only relevant to  
3 Time Extension.

## 4 **2. DWR's Time Extension Petition for the SWP Generally**

5 In January of 2025, prior to the commencement of DWR's case in chief in DCP CPOD,  
6 DWR filed a new petition to extend time (Time Extension Petition). According to DWR, creating  
7 the evidence for the Time Extension Petition requires manually reviewing more than 35 years of  
8 daily records, many of which predate electronic submission, and reconciling the applicable  
9 reporting requirements of the State Water Board Division of Water Rights, which have changed  
10 over the years. (Krieger Decl. II, ¶ 5, Ex. D, pp. 92-93.) Accordingly, relevant diversion data  
11 collection and review is ongoing and will be disclosed to support the Time Extension Petition.  
12 DWR has estimated that appropriate environmental review for the Time Extension Petition will  
13 be complete in early 2026. (*Id.*, at p. 93.) The Time Extension Petition applies to the SWP  
14 Permits in their entirety, that is, all existing facilities and any future facilities, including but not  
15 limited to DCP, that are necessary to put the full amount available under the SWP Permits to  
16 beneficial use.

17 Water Code section 1398 (Time Extension Statute) allows a water rights applicant or  
18 permittee additional time to apply water to beneficial use upon a showing of good cause and due  
19 diligence: "The period specified in the permit for beginning construction work, for completion of  
20 construction work, for application of the water to beneficial use, or any or all of these periods  
21 may, for good cause shown, be extended by the [State Water Board]." (Wat. Code, § 1398, subd.  
22 (a).) Time Extensions are available for extending the time to apply water to beneficial use prior  
23 to the deadline to do so in an existing permit and also before a permit is perfected into a license,  
24 even if the permit deadline to apply water to beneficial use has expired. (*Ibid.*; Wat. Code, §  
25 1610.5.) The State Water Board's regulations require that extensions of time be granted on  
26 conditions that are in the public interest. (Cal. Code Regs., tit. 23, § 844.) If the Time Extension  
27 Petition is denied, DWR would move to license, which is where the Water Board would  
28 determine how much water it has put to beneficial use. (Wat. Code, § 1610.) Until the Water

Board has made a determination regarding the extent of beneficial use, the full extent of DWR's water right is undetermined, which is particularly true for the SWP because a significant portion of its beneficial use involves utilizing water for the protection of the environment, meaning that historic diversion volumes is not the only relevant consideration.

### 3. The AHO's Determinations in DCP CPOD at Issue in this Motion

To date, the AHO has issued five (5) procedural rulings identifying the hearing issues the AHO deems relevant to DCP CPOD, which should be specific to the DCP and not the SWP generally. The evidentiary portion of the DCP CPOD commenced on March 24, 2025. Of critical importance here, there is an upcoming May 27, 2025 deadline for DWR to produce the Supplemental Information and put on witnesses that are the subjects of this Motion.

In the February 2025 ruling, the AHO required DWR to produce Supplemental Information and to produce a person-most-knowledgeable witness to testify on direct and under cross examination under oath as to that information. The stated, albeit improper, purpose of the Supplemental Information is to determine a potential cap on the SWP Permits as part of the decision to approve or deny the DCP CPOD Petition.<sup>1</sup> The Supplemental Information requests are as follows:

- For water right Permits 16478 and 16479 [two of the SWP Permits], the maximum volume of water diverted to storage at Oroville Reservoir during one authorized storage period (September 1 through July 31 of the succeeding year) before December 31, 2009, and the first and last day of diversion to storage during that period.
- For water right Permits 16478, 16479, 16481, and 16482 [all of the SWP Permits], the maximum volume of water exported from the southern Delta (directly diverted, rediverted, or diverted to offstream storage), during any water year before December 31, 2009.
- For water right Permits 16478, 16479, 16481, and 16482 [all of the SWP Permits], the maximum rate of water exported from the southern Delta (directly diverted, rediverted, or diverted to offstream storage), measured in cubic feet per second, before December 31, 2009. Identify the date(s) of the maximum rate of direct diversion, rediversion, and diversion to offstream storage (combined).
- For water right Permits 16478, 16479, 16481, and 16482 [all of the SWP Permits], the maximum volume of water beneficially used under each water right during any water year before December 31, 2009.

<sup>1</sup> DWR and SWC objected to the Supplemental Information on several occasions. (See SWC's Motion to Intervene, filed May 1, 2025, at pp. 12-13.)

1 (Krieger Decl. I, ¶ 4, Ex. C, pp. 4-5.)

2 The AHO correspondingly ordered DWR to produce a person-most-knowlegeable  
3 witness or witnesses to testify directly and under cross examination, under oath, to the  
4 Supplemental Information and related methodology used to create it. (Krieger Decl. I, ¶ 4, Ex. C,  
5 at pp. 7, 8.)

6 The AHO described its improper intent to cap SWP water rights in the DCP CPOD as  
7 follows:

8 The SWP Permits include a limit on the rate of water directly diverted, re-diverted, and  
9 diverted to storage from the Delta. Based on fundamental principles of water right law as  
10 well as the Division's well-established practices, DWR's permitted rights are not only  
11 limited to the maximum rate of water diverted and beneficially used before December 31,  
12 2009; they are also limited to the maximum annual volume of water diverted from the  
13 Delta and applied to beneficial use before that deadline. In short, all of the supplemental  
14 information requested, including information concerning the maximum annual volume of  
15 water exported and the maximum amount of water applied to beneficial use, is germane to  
16 the scope of DWR's existing rights under its permits, and therefore is relevant to this  
17 proceeding.

14 (*Id.*, ¶ 4, Ex. C, p. 6.)

15 To this end, the AHO improperly included hearing issue 1(a) to be adjudicated in DCP  
16 CPOD related to a cap on the SWP Permits, as follows:

17 Should the Board include a term in any amended permits that limits the amount of water  
18 that may be directly diverted, diverted to storage, exported from the southern Delta, or  
19 beneficially used under the amended permits unless and until the Board approves an  
20 extension of the 2009 deadline to complete beneficial use under those permits? **If so, what  
numerical limitations should the Board impose?**

21 (*Id.*, at p. 14 [emphasis added].)

22 Separately the State Water Board itself also confirmed the AHO's determination that the  
23 Supplemental Information was necessary to include in the record to determine a potential cap on  
24 the SWP Permits. (Krieger Decl. II, ¶ 6, Ex. E, pp. 2-3.)

1 **III. ARGUMENT**

2 **A. Legal Standard**

3 **1. The Court has Jurisdiction over the State Water Board and AHO in**  
4 **this Proceeding**

5 As a threshold matter, the Court has subject matter jurisdiction over water rights matters  
6 concurrently with the State Water Board. It is long established that courts and the State Water  
7 Board have concurrent jurisdiction to resolve water rights controversies. (*National Audubon*  
8 *Soc’y. v. Super. Ct.* (1983) 33 Cal.3d 419, 426.) Further, the Court has authority to “nullify or  
9 rescind [] void acts” of an administrative agency like the State Water Board. (*Aylward v. State*  
10 *Bd. of Chiropractic Examiners* (1948) 31 Cal. 2d 833, 839.) It is axiomatic that the State Water  
11 Board’s jurisdiction to administer water rights cannot be expanded by its own regulations.  
12 (*Wilson v. Fair Emp. & Hous. Com.* (1996) 46 Cal.App.4th 1213, 1225 [“As a general rule an  
13 administrative agency’s jurisdiction is controlled by the underlying constitutional or statutory  
14 provisions”]; Gov. Code, § 11342.600.) Thus, this Court exercises its own independent judgment  
15 of the application and scope of statutory water rights procedures in water rights matters. (*Yamaha*  
16 *Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8.)

17 In addition, the Court has jurisdiction over the AHO in this Action because the AHO is a  
18 part of the State Water Board, that is, it is “within the [State Water Board].” (Wat. Code, § 1110.)  
19 Water Code section 1112 allows the State Water Board to assign adjudicative hearings before it to  
20 the AHO. Specifically, “[i]n an adjudicative hearing presided over by the board or a board  
21 member, all of the following shall apply: ... (2) the board may assign an adjudicative hearing, in  
22 whole or in part, to the Administrative Hearings Office.” (Wat. Code, § 1112, subd. (c)(2).) The  
23 State Water Board did so under Water Code section 1112, subdivision (c)(2), in a June 2024  
24 memorandum assigning the CPOD process to the AHO. (Krieger Decl. II, ¶ 2, Ex. A.) The June  
25 2024 assignment memorandum is limited to DCP CPOD. That is, it only authorizes the AHO to  
26 “issue rulings on procedural and other matters necessary to conduct the hearing and prepare a  
27 draft water right order for the State Water Board’s consideration” regarding the DCP CPOD. (*Id.*,  
28 at p. 2.) The assignment memorandum provides no authority to make determinations about Time  
Extension or Licensing as it relates to the SWP. Accordingly, the Court has jurisdiction over both

1 the State Water Board and the AHO with respect to the Supplemental Information determination  
2 in CPOD.

3 **2. The Civil Discovery Act Applies to the Supplemental Information and**  
4 **PMK Testimony**

5 Protective orders are available to any “affected...organization” any time “before, during,  
6 or after” a deposition. (Code Civ. Proc., § 2025.420, subd. (a).) Upon a showing of “good  
7 cause,” the Court may “make any order that justice requires to protect any party, deponent, or  
8 other natural person or organization from unwarranted annoyance, embarrassment, or oppression,  
9 or undue burden and expense.” (*Id.*, at § 2025.420, subd. (b).) Protective orders are available to  
10 prevent compelling disclosure of information in violation of statutory or constitutional rights,  
11 including due process. (See, e.g., *GT, Inc. v. Superior Ct.* (1984) 151 Cal.App.3d 748, 753; see  
12 also *In re James Q.* (2020) 81 Cal.App.4th 255, 266 [“A party must be able to make its best case,  
13 untrammelled by evidentiary obstacles arbitrarily imposed by the courts without legislative  
14 sanction”].) The Water Code authorizes the State Water Board to notice depositions under the  
15 Civil Discovery Act. (Wat. Code, § 1100.) The Civil Discovery Act contemplates persons-most-  
16 knowledgeable depositions. (Code Civ. Proc., § 2025.230.) A deposition can occur in various  
17 forums and formats, including here where a referee like the AHO oversees the taking of  
18 testimony. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 176 [“There are also depositions  
19 where the court gets involved by, for example, issuing a protective order, ruling on objections, or  
20 appointing a referee to supervise the taking of testimony”].) Witness deposition demands may  
21 also include document demands. (*Maldonado v. Superior Ct.* (2002) 94 Cal.App.4th 1390, 1397.)  
22 The Supplemental Information is demanded in the context of the witness order and thus both are  
23 subject to a protective order.<sup>2</sup>

24 **B. A Protective Order Is Necessary to Protect the Due Process Rights of SWC**

25 The AHO’s order for Supplemental Information and witness(es) is not appropriate for  
26 DCP CPOD because it is being issued to support legal determinations that are not available under

27 <sup>2</sup> Even standing alone, the Supplemental Information requests have the legal effect of  
28 administrative subpoenas because failure to comply could expose the CPOD Change Petition to  
cancellation. (Wat. Code, § 1701.4.) Protective orders are likewise available to protect against  
unwarranted document or information demands. (Code Civ. Proc., § 2031.060, subd. (a).)

1 the Change Petition Statutes. Instead, the Supplemental Information and witness(es), to the  
2 extent they are relevant, are appropriate for separate licensing procedures or, possibly, the Time  
3 Extension process. Accordingly, SWC's due process rights to support the full development of the  
4 SWP Permits on which millions of water users and irrigated acreage depend, will be violated by  
5 having the AHO determine issues relevant to the entire SWP without applying the proper legal  
6 standards, and without providing an opportunity for the appropriate parties to be present,  
7 including but not limited to SWP water contractors that are not proponents of the DCP but rely on  
8 their SWP water contracts.

9 Starting with the Water Commission Act of 1913, the Legislature has established a  
10 "comprehensive system for development, issuance, and administrative regulation of appropriative  
11 water rights." (*Env't Def. Fund, Inc. v. E. Bay Mun. Util. Dist.* (1980) 26 Cal.3d 183, 195.) As  
12 part of that system, the Legislature enacted the Change Petition Statutes, Time Extension Statute,  
13 and Licensing statutes (Licensing Statutes), the latter of which are necessary to "perfect" water  
14 rights based on the amount of water a water rights permittee has applied to reasonable and  
15 beneficial use during the development of the water right. (*Madera Irr. Dist. v. All Persons* (1957)  
16 47 Cal.2d 681, 690, reversed on other grounds ["the final procedural step in perfecting a water  
17 right is the issuance of a license ..."]; *Environmental Defense Fund, Inc., supra*, at p. 197 ["If  
18 the board finds that the permittee has completed construction and has applied the water to  
19 beneficial use in accordance with the law and the permit, it issues a license which confirms the  
20 appropriation [citing Water Code section 1610]".]) The Licensing Statutes are set forth in Water  
21 Code section 1600, et seq. Licensing begins when a water rights permittee submits a report  
22 demonstrating that construction works and application of water to beneficial use under the permit  
23 are complete. (Wat. Code, § 1600.) Licenses determine the amount of water that can be  
24 beneficially used by the licensee based on the historic amount of water that has been applied to  
25 beneficial use under the permit. (Wat. Code, § 1610.) If the amount of water historically applied  
26 to beneficial use is less than allowed by the permit, the State Water Board **must** provide the  
27 permittee an opportunity to request an extension of time pursuant to Water Code section 1398 or  
28 show why the amount of water should not be reduced, unless the permittee consents to the lesser



1 amount. (Wat. Code, § 1610.5, subds. (a),(b).) Accordingly, during Licensing, it may be possible  
2 to extend the time to apply water to beneficial use under a water rights permit so as to perfect a  
3 larger quantity that will be included in the License. Indeed, State Water Board guidance indicates  
4 that a water rights permit holder can claim additional diversions made under an existing permit  
5 after the permit schedule ends by way of a time extension approval during the licensing  
6 proceeding. (Krieger Decl. II, ¶ 6, Ex. E.) These legal protections and opportunity for seeking  
7 Time Extensions are not available in the DCP CPOD.

8 The Change Petition Statutes, Time Extension Statute, and Licensing Statutes are  
9 statutorily distinct, with the exception that Time Extension is available during Licensing. The  
10 Time Extension Statute and applicable standard for granting it, “good cause,” are distinct from  
11 the Change Petition Statutes that are the framework for DCP CPOD. Indeed, the Change Petition  
12 Statutes do not reference the Time Extension Statute and do not incorporate Time Extension  
13 considerations into Change Petition proceedings. Moreover, DCP CPOD only applies to the DCP  
14 intakes and related facilities and does not involve changes in operational criteria to any other  
15 SWP facility. Thus, DCP CPOD and Time Extension are legally and factually distinct for  
16 purposes of water rights administrative purposes.

17 Similarly, the Change Petition Statutes and Licensing Statutes are distinct. Nonetheless,  
18 the AHO has concluded that it is necessary to make a Licensing determination to limit the SWP  
19 Permits based on historical diversions and beneficial use. As explained in Section II.D.3, *supra*,  
20 the extent of beneficial use is a Licensing determination related to the extent a water rights permit  
21 has been “perfected.” Indeed, the AHO cited the Licensing Statutes and related case law in  
22 reaching the conclusion that a potential cap on the SWP Permits was appropriate to determine in  
23 DCP CPOD. (Krieger Decl. I, ¶ 4, Ex. C, p. 6.) Nothing in the Change Petition Statutes or  
24 Licensing Statutes provides the AHO with authority to make this determination in DCP CPOD.

25 Further, DWR has not had the opportunity in the appropriate legal process—Time  
26 Extension or Licensing—to develop and produce relevant information that it determines most  
27 accurately reflects its historic beneficial use of water, which includes its historic dedication of  
28 environmental water that is not included in the information the AHO ordered DWR to produce.

1 For instance, the Supplemental Information does not include historic dedication of environmental  
2 water, such as from bypass flows or export reductions that nonetheless remain under DWR's  
3 control and which other water users may not divert. Instead, DWR is being compelled to create,  
4 disclose, and testify under oath about information that is amalgamated to comply with the AHO's  
5 directive, regardless of whether it accurately and fully represents the historic operations and  
6 conditions affecting SWP beneficial use of water. Accordingly, the Supplemental Information  
7 will be used to determine a potential cap on the SWP Permits that is less than what DWR has  
8 actually put to historic beneficial use.

9 Further, the testimony, evidence and any rulings in the DCP CPOD could prejudice  
10 DWR's ability to fully present its case regarding diligence and historical beneficial use in its  
11 pending Time Extension Petition and future Licensing process. As a threshold matter, if a cap is  
12 determined in DCP CPOD, DWR may not even have the opportunity to present a Time Extension  
13 case because the State Water Board has previously refused to consider DWR's Time Extension  
14 requests like that filed in 2009. Thus, a cap in DCP CPOD could be wrongly construed as a de  
15 facto cap for all future (and concurrent) proceedings. Moreover, the AHO appears to assume that  
16 DWR is currently moving to license, which has informed its Supplemental Information request,  
17 despite the fact all that is before the Water Board, albeit in a separate forum, is a request for a  
18 Time Extension. By forcing DWR to constitute, disclose, and testify about the Supplemental  
19 Information, the State Water Board is commandeering DWR's ability to present all relevant  
20 evidence and describe its historic beneficial use in a process where the proper legal standards are  
21 being applied with all appropriate parties present.

22 Not only does the Supplemental Information in DCP CPOD create improper evidentiary  
23 issues for future Time Extension or Licensing proceedings, it will be used under the wrong legal  
24 standards. Time Extensions are granted if there is good cause to do so. This is a very different  
25 legal standard than the legal standard set by the Change Petition Statutes. Thus, not only is DWR  
26 being forced to produce new evidence in the DCP CPOD in the form of the Supplemental  
27 Information, it is being forced to do so to support the wrong legal standard. This deeply  
28 prejudices SWC because SWC's member agencies pay for the SWP and rely on reliable SWP

1 water supplies, which will continue to be a critical component of their water supply and related  
2 management efforts.

3 For all of these reasons, the AHO cannot require the Supplemental Information be  
4 included in the DCP CPOD record to inform an improper legal question, relying on incomplete  
5 evidence, without all proper parties. Accordingly, a protective order is necessary to protect SWC  
6 from the legally oppressive effect of the Supplemental Information requests and related  
7 testimony.

8 C. **A Protective Order Is Necessary to Protect Against the Misuse of the**  
9 **Supplemental Information**

10 The unfortunate reality is that the Supplemental Information will be misused by SWP  
11 opponents. The Supplemental Information is not representative of the evidence DWR would  
12 present if it were moving its water rights to license and the AHO was applying the correct legal  
13 standard, yet those seeking to limit SWP water rights will characterize this evidence as defining  
14 the extent of DWR's water rights. SWP and DCP opponents will use it to object in court, before  
15 regulatory bodies, before the State Legislature, and it will be used to shape public opinion to  
16 argue that DWR is violating its water rights. DWR will be characterized as a bad actor. SWC's  
17 and its member agencies' rights will be threatened by the gross mischaracterizations. It will be  
18 used to punish DWR and to limit SWC's member agency water supply. The prejudice that results  
19 from this inevitable misuse grossly outweighs any benefit, because there is none. A protective  
20 order is essential. (*See GT, Inc. v. Superior Ct.* (1984) 151 Cal.App.3d 748, 755 [weighing  
21 legitimate need for information and potential for misuse in reviewing protective order]; *Fowler v.*  
22 *Golden Pac. Bancorp, Inc.* (2022) 80 Cal.App.5th 205, 220 [protective order fashioned to limit  
23 misuse of information].) At the same time, SWC is not advocating for an absolute bar to the  
24 production of information like the Supplemental Information in the appropriate proceeding, for  
25 instance, in a Licensing proceeding. Relevant and appropriate information will be produced in  
26 the proper proceeding because the legal requirements in those proceedings will require it. DCP  
27 CPOD is not the appropriate proceeding to do so, particularly where Time Extension is now  
28 pending and the SWP Permits will, once they are sufficiently developed, be subject to a future

1 Licensing proceeding. SWC should be afforded the opportunity to present and advocate for the  
2 relevant and appropriate information in the proper legal process in accordance with due process.  
3 Forcing DWR to concoct, produce, and testify to the Supplement Information in a legally  
4 improper effort to limit the SWP Permits in DCP CPOD directly affects SWC.

5 **D. A Protective Order Is Necessary to Ensure the State Water Board Does Not**  
6 **Exceed the Jurisdictional Limits of the Change Petition Process by**  
7 **Predetermining Time Extension or Licensing Issues**

8 As explained in Section III.B, *supra*, the Change Petition Statutes are not available to the  
9 State Water Board to adjudicate whether the SWP Permits consist of perfected and unperfected  
10 portions. The determination of whether a water rights permit has been “perfected” occurs in a  
11 Licensing proceeding. (Wat. Code, §§ 1611; 1410; 1398, subd. (b).) Further, whether there is  
12 good cause to allow a water rights permittee to further develop their water right permit is  
13 governed by the Time Extension Statute, not the Change Petition Statutes. These distinct  
14 statutory processes are part of the Legislature’s “comprehensive scheme for administering  
15 appropriative rights ... .” (*Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.* (1980)  
16 26 Cal.3d 183, 198.) This administrative scheme is “commensurate in scope with the  
17 constitutional amendment” of reasonable and beneficial use in Article X, section 2. (*Modesto*  
18 *Properties Co. v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856, 860.) While the Change  
19 Petition Statutes are available to change points of diversion, purposes of use, or places of use of  
20 water, they are not the mechanism for perfecting or extending time to develop a water rights  
21 permit. Indeed, the June 2024 memorandum assigning authority to the AHO does not mention,  
22 let alone authorize, taking the SWP Permits to License or resolve Time Extension issues; the  
23 assignment is limited to setting and resolving procedural matters, managing the hearing, and  
24 drafting an order for the State Water Board to consider. (Krieger Decl. II, ¶ 4, Ex. C.) Further,  
25 the Time Extension Petition that DWR filed in January 2025 is not part of the DCP CPOD and is  
26 a separate proceeding. But, the AHO is attempting to adjudicate Time Extension or Licensing  
27 issues in DCP CPOD in excess of their jurisdiction using the Supplemental Information request  
28 and witness deposition, and therefore a protective order is necessary to prevent that information  
from being used improperly.

1 Finally, because the Supplemental Information is prejudicial and improper for production  
2 and consideration in the DCP CPOD, the DCP CPOD hearing should continue without delay if a  
3 protective order is issued. As explained in Section II.C, *supra*, DCP is of critical importance to  
4 the state and its ability to respond to climate change and to protect against major disruptions  
5 affecting SWP water supplies for millions of people and hundreds of acres of irrigated  
6 agricultural lands. There is no basis to delay the DCP CPOD proceeding for such an important  
7 project based on any bar or limitation on the production and use of prejudicial information in the  
8 wrong legal forum. Further, this Motion seeks a protective order that is narrowly tailored to the  
9 Supplemental Information and thus will only impact the sole deadline (May 27th) and two  
10 hearing dates (June 10-11th) associated with it. There is no cause or grounds to delay or  
11 otherwise modify the CPOD schedule and the CPOD hearing should proceed as scheduled, with  
12 the minor modifications engendered by the granting of this Motion.

13 **IV. CONCLUSION**

14 SWC respectfully requests that the Court issue a protective order barring the State Water  
15 Board from continuing to demand the Supplemental Information and corresponding testimony of  
16 the witness or witnesses while proceeding with the DCP CPOD proceeding.

17  
18 Dated: May 9, 2025

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19  
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