January 31, 2025

State Water Resources Control Board
Administrative Hearings Office
Nicole L. Kuenzi, Presiding Hearing Officer
P.O. Box 100 Sacramento, CA
95814-0100
DCP-WR-Petition@Waterboards.ca.gov

RE: Joint Motion for Cancellation of the Water Right Change Petition Regarding Water Right Permits 16478, 16479, 16481, and 16482 (Delta Conveyance Project Change Petition Proceeding); In the Alternative, Joint Motion to Vacate the Hearing Dates and Hold the Change Petition Proceeding in Abeyance

Dear Presiding Hearing Officer Kuenzi:

The undersigned protesting parties (Joint Protestants)[1] hereby jointly move the State Water Resources Control Board's (Board) Administrative Hearings Office (AHO) to cancel the California Department of Water Resources' (DWR) water right change petition for Permits 16478, 16479, 16481, and 16482 (SWP Permits) because DWR has *twice* failed to provide the critical supplemental information ordered by the AHO. (Wat. Code, § 1701.4.) DWR neither complied with the AHO's orders nor provided good cause for its failure to do so by the extended due date of January 21, 2025. On that date, DWR initiated a separate new petition for water rights extension of time, proposing to postpone consideration of all issues related to its permitted due date until a subsequent, separate hearing.

Allowing DWR to continue to disregard the AHO's orders and rulings will set a precedent that the AHO lacks authority to hold water right change petitioners to statutory requirements or, at the very least, that the AHO's authority in that regard may turn on the status of the petitioner (i.e., the state versus every other petitioner). DWR has no special privilege under the law and no such privilege should be administratively created out of whole cloth for *one* petitioner. DWR *must* be treated like similarly situated petitioners in other water right change petition proceedings.

In the alternative, Joint Protestants request that the AHO vacate the current hearing dates and hold the change petition proceeding in abeyance until the recently filed petition for extension of time is either resolved or consolidated with the change petition proceeding and DWR produces all necessary and relevant supplemental information regarding its historical diversions and beneficial uses of water under the SWP Permits as directed in the AHO's November 18, 2024 and January 17, 2025 rulings. The decision whether to proceed with the evidentiary hearing

[1] The protesting parties jointly submitting this motion are the County of Sacramento, Sacramento County Water Agency, City of Stockton, Sacramento Area Sewer District, Byron-Bethany Irrigation District, North Delta Water Agency, Reclamation District 999, Reclamation District 2060, Reclamation District 2068, County of Contra Costa and Contra Costa County Water Agency, County of San Joaquin, County of Solano, Local Agencies of the North Delta, and California Water Impact Network.

under the present circumstances must be based on a balancing of factors including fairness, due process, efficiency, timeliness, and the development of an adequate evidentiary record. In this instance, those factors all weigh in favor of the requested relief because DWR filed the petition for extension of time on the day that its case-in-chief exhibits and testimony were due, and DWR has refused and/or been unable to provide the required supplemental information in compliance with the AHO's rulings. There is no point in commencing the hearing on February 18 to discuss procedural and housekeeping matters or in moving forward with the evidentiary hearing on March 24. Moving forward with the current schedule would preclude full and meaningful public participation and require a hearing based on an incomplete and inadequate record.

Because the Critical Supplemental Information Must be Produced in This Change Petition Proceeding, It Would Be Inefficient and Prejudicial to Proceed to Hearings Separate From and Prior to the Petition for Extension of Time Proceeding.

The Delta Conveyance Project (DCP), if approved, would be one of the largest water infrastructure projects ever constructed in the State of California. On numerous occasions since the Board publicly noticed DWR's petition for change for the DCP on February 29, 2024, the Joint Protestants and other parties have expressed concerns that an evidentiary hearing on the change petition was premature for a variety of reasons, including complications arising from the expired deadlines in the SWP Permits.[2] In an April 17, 2024 letter regarding the change petition protest period, the Board's Executive Director stated that if DWR were to amend the 2009 petition for extension of time or submit a new one, the Board would need to "evaluate the extent to which the two petitions are interrelated and … provide the opportunity for public input." (Exec. Dir. Response, April 17, 2024 Letter, at p. 4.) Similarly, in the July 31, 2024 Hearing Notice, the AHO informed DWR that if it is not presented a petition for extension of time to consider with the change petition, the AHO will need to incorporate appropriate conditions for any approval of the change petition, and the public will be afforded an opportunity to provide input on those conditions. (July 31, 2024 Hearing Notice, at p. 8.)

In its September 17, 2024 Ruling, the AHO advised DWR to consider submitting a petition for extension of time to be addressed in the same proceeding as the change petition, warning DWR that its insistence on holding separate petition hearings "seems likely to cause inefficiencies and complexity by requiring the Board to conduct two proceedings when the underlying issues are significantly interrelated." (September 17, 2024 Ruling, at p. 5.) The AHO's November 18, 2024 and January 17, 2025 Rulings allowed hearings to proceed and set scheduling dates, but

[2] See, e.g., 2024-03-15 Joint Letter – California Water Impact Network et al.; 2024-06-27 Joint Objection to Notice of Assignment and Pre-Hearing Conference – County of Contra Costa et al.; 2024-07-10 Objection to Notice of Assignment and Pre-Hearing Conference – County of Sacramento et al. 2024; 2024-08-07 Pre-Hearing Conference Statement – North Delta Water Agency; 2024-09-03 Joint Objection to Purported Minor Change – County of Sacramento et al.; 2024-10-10 Pre-Hearing Conference Statement – Sacramento County et al.; 2024-10-10 Pre-Hearing Conference Statement – North Delta Water Agency; 2024-10-10 Joint Pre-Hearing Conference Statement – County of Contra Costa et al; 2024-8-9, 2024-10-10 and 2024-12-9 Prehearing Conference Statement – California Water Impact Network.

made clear that DWR was specifically required to submit the supplemental information described in the rulings.

While DWR did belatedly submit a new petition for extension of time on January 21, 2025, it asserts that the change petition should be considered on its own, separate from the petition for extension. DWR acknowledges that its supporting data remain incomplete and that it does not expect to complete environmental review until early 2026. (2025-01-21 Submittal of Case-in-Chief, Time Extension Petition, Hearing Issues – DWR, at p. 1.) DWR further states that it will provide the supplemental information as "part of the record for the Time Extension Petition." (*Id*. at p. 3.)

As the AHO stated in the January 17, 2025 Ruling, however, without having the supplemental information that DWR has refused and/or been unable to provide *in the change petition proceeding*, "it is unclear how the Board could conclude that other legal users of water would not be injured and DWR would not in effect initiate a new water right by approval of requested changes that would significantly increase diversion capacity for the SWP Permits." (January 17, 2025 Ruling, at p. 7.) Under these circumstances, proceeding to hear and decide DWR's change petition proceeding on the merits would either be a time-consuming exercise in futility or severely prejudicial to the protestants. If the supplemental information ordered by the AHO will not be produced and made available by DWR until sometime in 2026, the protestants in the change petition proceeding cannot address the critical information ordered by the AHO in DWR's case-in-chief or prepare their own cases-in-chief on the hearing issues under the current schedule.

The AHO has already considered and rejected DWR's assertion that the AHO should consider the change petition in a vacuum, "separate from the future-filed petitions for extension of time to complete beneficial use under the Subject Rights." (See, e.g., September 17, 2024 Ruling at p. 5.) As the AHO explained, "the Board, the Petitioner, and the Protestants will likely need to address many of the same factual and legal issues [to be addressed in the change petition proceeding] in any proceeding on the [now filed] petitions for extension of time." (November 18, 2024 Ruling, at p. 5.) Accordingly, it would be inefficient and wasteful of everyone's time, as the AHO noted, to address the change petition without simultaneous consideration of the petition for extension of time. (*Id.* at p. 6.)

To act on DWR's petition for change in the absence of a petition for extension of time, the AHO needs to consider dual scenarios to understand whether approval, either with an extension of time granted or denied, would effectuate a new water right, injure other legal users of water, unreasonably affect fish, wildlife, and instream uses, cause impacts to the public trust, and be in the public interest. (November 18, 2024 Ruling, at p. 5.) The protestants have similarly been put in the burdensome position (as to time, effort, resources, and cost) to respond to DWR's case-in-chief and to present their own cases-in-chief under dual scenarios.

DWR's environmental review for the DCP contemplates utilization of the full face-value of the SWP Permits. (January 17, 2025 Ruling, at p. 6.) To account for the possibility that DWR will be granted less than the full face value of the SWP Permits, the AHO made clear in its November 18, 2024 Ruling that additional information about DWR's historical diversions and beneficial

use under the SWP Permits was necessary to identify what portion of the SWP Permits "remain unperfected and contingent upon future-filed petitions for extension of time or other action by the board (such as a licensing or revocation proceeding)." (*Id*. at p. 9.) Invoking its authority under Water Code section 1703.1, the AHO ordered DWR to provide supplemental information regarding the maximum volume of water directly diverted, diverted to storage, and beneficially used under each of the SWP Permits. (*Id.* at pp. 9-10.) Water Code section 1701.3 subdivision (a) provides that after a change petition is filed, the Board may request "additional information reasonably necessary to … supplement the information required to be submitted…." If a petitioner fails to provide the requested information within the time period provided, "the board *shall* cancel the petition, unless for good cause shown, the board allows additional time to submit the requested information." (Wat. Code, § 1701.4, emphasis added.) The word "shall" is mandatory. (*Id.*, § 15 [" 'Shall' is mandatory and 'may' is permissive"].) Accordingly, the Board *must* cancel the petition unless the Board/AHO finds good cause otherwise. DWR has provided *no basis* for finding good cause in its failure to comply with the supplemental information ruling.

DWR argues it is not necessary to decide whether to approve the change petition under scenarios with and without approval of an extension of time, because "by operation of law, there is a legal limitation to DWR's operations under its Water Rights permits until a time extension petition is heard and granted by the State Water Board." (2024-12-02 Objection to and Petition for Reconsideration – DWR, at p. 2.) As the AHO explained, however, DWR ignores the rationale underlying the AHO's prior ruling—that even though these undisclosed legal limitations conceptually apply, the AHO (and all of the parties) must know what those limitations are and what effect different possible limitations might have. If the limitations cannot be volumetrically quantified, the Board cannot ensure that DWR will not initiate a new water right. (January 17, 2025 Ruling, at pp. 6-7.)

Although DWR has been urging the AHO to expedite the evidentiary hearing process for the change petition, DWR's filing of a closely interrelated petition for extension with an environmental review completion date *of early 2026* presents a clear opportunity for the Board/AHO to consolidate the hearings and avoid the unfairness, complexities, and time consumption of conducting a dual-scenario hearing in 2025 followed by an extension of time hearing less than a year later.

DWR Cannot and/or Refuses to Provide the Critical Supplemental Information.

Earlier in the proceedings, DWR stated that it could provide the requested supplemental information on its maximum use of the SWP Permits prior to 2009 in "short order." (November 18, 2024 Ruling, at p. 9, fn. 2 [citing October 17, 2024 Pre-Hearing Conference Transcript].) Yet DWR failed to meet the December 9, 2024 deadline and, even though its request to provide the supplemental information with its case-in-chief was granted, DWR failed to meet the extended deadline as well. (2024-12-02 Objection to and Petition for Reconsideration – DWR, at p. 3; 2025-01-21 Submittal of Case-in-Chief, Time Extension Petition, Hearing Issues – DWR, at p. 3 ["Further, the requested Supplemental Information will be part of the record for the Time Extension Petition."].) DWR's repeated failures to provide information responsive to the AHO's ruling suggest that it cannot and/or refuses to provide the supplemental information that the

Hearing Officer has deemed critical for the Board to consider the merits of DWR's change petition.

It is not enough for DWR to assert that it is legally limited by its maximum historical use as of 2009, and DWR has no authority to unilaterally deem the AHO's "rationale for including historical maximum use in the [change petition] proceeding . . . moot." (2025-01-21 Submittal of Case-in-Chief, Time Extension Petition, Hearing Issues – DWR, at p. 3.) DWR's proposed permit term (*id.* at p. 2) also does not address the AHO's sound rationale for ordering DWR to provide the supplemental information. The submission of an incomplete petition for extension of time that apparently cannot be acted on until 2026 has not caused any change in the relevance or authority of the AHO's ruling, nor does it satisfy DWR's obligation to provide the required information under Water Code section 1701.3. To the contrary, the information on the maximum volumes of water diverted and used under the SWP Permits achieved by 2009 remains essential to "determining whether approval of the change petitions would be in the public interest if the Board does not approve petitions for extension of time, and to condition any approval to avoid injury or the effective initiation of a new right." (January 17, 2025 Ruling, at p. 19; Cal. Code Regs., tit. 23, § 791.)

In addition to quantified figures for each permit, the supplemental information order required DWR to explain how it calculated each volume and rate. (November 18, 2024 Ruling, at p. 10.) If the calculation is based on information not already submitted to the Board, DWR is obligated to submit any other information it relied upon. Further, DWR was required to present evidence *in its case-in-chief* that addresses the hearing issues under the two alternative extension of time scenarios: "(A) if future-filed petitions for extension of time are approved up to the face-value of the SWP Permits; and (B) if future-filed petitions for extension of time are not approved, and diversions under the SWP Permits are limited to the perfected portion of the rights based on diversion and beneficial use achieved as of December 31, 2009." (*Id*.) DWR has disregarded the AHO's ruling in this respect as well.

Despite the AHO's explicit instructions, DWR does not appear to have provided any analysis of the alternative scenarios in its case-in-chief, let alone equivalent levels of information and analyses for both scenarios, including quantitative analyses of the volume and rate of water expected to be directly diverted, stored, and exported from the Delta, and anticipated impacts from DWR's operation of the DCP on flow and water quality in the Sacramento River and the Delta. Nor has DWR provided sufficient information to support an evidentiary record on the hearing issues for the Board's consideration and final action.

In the January 17, 2025 Ruling, the AHO rejected DWR's request for reconsideration and its selective response to item 3 of the supplemental information order:

> DWR does not explain why the maximum volume of water exported from the southern Delta under the SWP Permits (item 2) and the maximum volume of water beneficially used under the SWP Permits (item 4) are not similarly necessary, nor does DWR explain how operation of the DCP will not affect the maximum volumes exported or beneficially used. The maximum authorized volume of diversion and beneficial use are also fundamental elements of the scope of an appropriative water right that would be

> considered in any licensing proceeding, and accordingly relevant to quantify existing limits on DWR's exercise of the permits.

(January 17, 2025 Ruling, at pp. 7-8.) The information contained in the petition for extension of time does not rise to the level of detail required by the AHO. The supplemental information order requires the submission of specific and quantifiable information regarding the SWP Permits. First, it requires DWR to produce information regarding the maximum volume of water diverted to storage under each SWP Permit 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. The petition for extension of time identifies maximum amounts of water stored under each permit but does not specify the first and last day of diversion to storage for any period under any of the four permits.

The supplemental information order also requires DWR to submit information on the maximum annual volume of water directly diverted under each SWP Permit. DWR, however, does not identify a maximum annual amount of water directly diverted, rediverted, or diverted to offstream storage for Permit 16478 in its petition for extension or its December 2, 2024 request for reconsideration.

In its December 2, 2024 request for reconsideration, DWR merely reported in a table that it achieved the maximum annual diversion to storage for Permits 16479, 16481, and 16482, while it reached maximum rates of direct diversion exported from the southern Delta under Permits 16479 and 16481, of 6,185 cfs and 2,115 cfs, respectively. Data for DWR's diversion to storage south of Delta and direct diversion under Permit 16478 was listed as inapplicable.

Instead of calculating beneficial use based on water deliveries, the information provided in DWR's petition for extension of time appears to estimate beneficial use based on a sampling of data from SWP contractors with populations and per capita use averages sourced from a third-party database regarding urban water use. It is unclear if the table presented is just a representative sample or intended to account for full beneficial use under the SWP Permits. Plainly, the information provided does not comport with the AHO's ruling.

Conclusion

Procedural rules governing this hearing require that it "shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board." (Cal. Code Regs., tit. 23, § 648.5.) The AHO indicated it would wait until DWR submitted its case-in-chief and the requested information "to consider whether an additional or supplemental request would be appropriate." (January 17, 2025 Ruling, p. 19.) DWR's incomplete case-in-chief and newly filed petition for extension of time warrant a determination that the change petition hearing is premature. DWR's failure and/or refusal to provide the supplemental information ordered by the AHO further warrants cancellation of its change petition. For the foregoing reasons and others, the Joint Protestants respectfully request that the AHO grant this Joint Motion and cancel the DCP change petition. In the alternative, Joint Protestants respectfully request that the AHO vacate the current hearing dates and hold the

change petition proceeding in abeyance until the time extension petition is either resolved or consolidated with the change petition proceeding, and DWR produces all necessary and relevant supplemental information, as ordered by the AHO.

[*Signature blocks on following page*]

North Delta Water Agency, Reclamation District 999, Reclamation District 2060, Reclamation District 2068



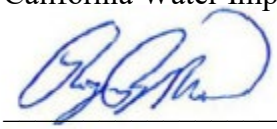
Kevin M. O'Brien

County of Contra Costa and Contra Costa County Water Agency, County of Solano, County of San Joaquin, Local Agencies of the North Delta



Osha R. Meserve

California Water Impact Network



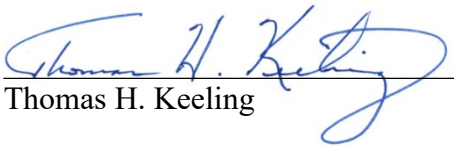
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