March 19, 2025

Via Electronic Email Only

Board Members and Executive Officers
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95814-0100

Re: Motion to Cancel Department of Water Resources' Petition for Change of Water Permits 16478, 16479, 16481, and 16482 Pursuant to Water Code Section 1701.4

Chair Esquivel, Board Members, Executive Director Oppenheimer, and Deputy Director Bishop:

Please find attached a Motion to cancel the Department of Water Resources' ("DWR") Petition for Change of Water Rights Permits 16478, 16479, 16481, and 16482.

This Motion is submitted pursuant to Water Code section 1701.4 due to DWR's failure without good cause to meet the Administrative Hearing Officer's already-extended deadline of January 21, 2025 to submit supplemental information under Water Code section 1701.3 regarding DWR's maximum diversion, export, and use of water under the subject permits prior to expiration of the deadline to perfect its water rights for the State Water Project on December 31, 2009. As the Administrative Hearing Officer has repeatedly confirmed, the supplemental information is fundamental to resolution of each noticed hearing issue and to the Board's decision on DWR's Change Petition.

Because proceeding with hearings on DWR's case-in-chief, scheduled to commence on March 24, 2025, will be prejudicial to protestants and will compromise the integrity and utility of the record in these proceedings, the undersigned protestants respectfully urge the Board to act swiftly on this Motion and ensure that any proceedings comport with the law and are fair to all participants.

The Motion is jointly submitted by Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, San Francisco Baykeeper, California Indian Environmental Alliance, Golden State Salmon Association, California Sportfishing Protection Alliance, Sierra Club California, Center for Biological Diversity, North Coast Rivers Alliance, Planning and Conservation League, Friends of the River, Save California Salmon, and California Water Impact Network.

Respectfully Submitted,

/s/ *Stephanie Safdi*

Stephanie L. Safdi, Supervising Attorney
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Counsel for Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising and Restore the Delta

/s/ *Eric Buescher*

Eric J. Buescher
Managing Attorney
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Motion to Cancel Petition for Change of Water Rights Permits 16478, 16479, 16481, and 16482 (Applications 5360, 14443, 14445A, and 17512, respectively) for the Delta Conveyance Project Pursuant to Water Code Section 1701.4

Protesting parties Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, California Indian Environmental Alliance, Restore the Delta, Golden State Salmon Association, California Sportfishing Protection Alliance, Sierra Club California, Center for Biological Diversity, North Coast Rivers Alliance, Planning and Conservation League, Friends of the River, Save California Salmon, California Water Impact Network, and San Francisco Baykeeper ("Protestants") hereby move the State Water Resources Control Board ("Board") to cancel the California Department of Water Resources' ("DWR") water rights change petition for permits 16478, 16479, 16481, and 16482 ("Change Petition") because DWR has repeatedly failed to timely respond to the Administrative Hearing Officer's ("AHO") requests for information on DWR's historic water use under the subject permits pursuant to Water Code section 1701.3. Under such circumstances, Water Code section 1701.4 requires the Board to cancel the Change Petition unless DWR demonstrates good cause for an extension of time. DWR has not and cannot. Protestants previously sought this relief from the AHO, who determined that only the Board, as well as its Executive Director and Deputy Director for Water Rights, have jurisdiction to cancel a change petition under section 1701.4. Protestants respectfully request that the Board do so.

Failing to cancel DWR's Change Petition as section 1701.4 requires will cause profound prejudice to Protestants and severely compromise the integrity of the instant proceedings. Hearings on DWR's Change Petition are scheduled to commence on March 24, 2025 with direct and cross-examination of DWR witnesses without the necessary water diversion, export, and use information. As a consequence, Protestants will be deprived of the opportunity to examine DWR's witnesses on information about DWR's historic use of water under its State Water Project ("SWP") permits, which is fundamental to the noticed hearing issues and the Board's decision on DWR's Change Petition. To alleviate this prejudice and ensure that proceedings on DWR's Change Petition follow state law, the undersigned Protestants respectfully urge the Board to cancel these proceedings and require DWR to submit complete applications with the requisite information about its historic water use for SWP operations or, in the alternative, submit the appropriate application following the Board's decision on DWR's pending request to extend time to perfect its water rights under the SWP permits.

PROCEDURAL BACKGROUND

DWR filed the instant Change Petition on February 22, 2024 seeking to change Water Rights Permits 16478, 16479, 16481, and 16482 ("SWP Permits") to construct and operate the Delta Conveyance Project ("DCP"), a proposed 45-mile-long underground tunnel with capacity to divert 6,000 cubic feet per second (cfs) of water from the Sacramento River north of the Delta to south Delta pumping stations. The Board issued the four SWP Permits on September 26, 1972, collectively authorizing DWR to appropriate up to 10,350 cfs of water from the Feather River and Sacramento/San Joaquin Delta channels to operate the State Water Project. The SWP Permits required DWR to complete construction of facilities by September 1, 1980 and complete application of water to the proposed uses by December 1, 1990. On DWR's petition, the Board subsequently extended the permit deadline for construction to December 31, 2000 and the

deadline for DWR to put the subject water to beneficial use to December 31, 2009. On December 31, 2009, DWR applied for a further five-year extension of time to "place the water currently authorized under the permits to beneficial uses prior to licensing."[1] Multiple parties protested the extension requests based on DWR's lack of diligence, among other grounds. The Board took no action on either the protests or the extension requests. Issues raised in the unresolved protests, including DWR's failure to exercise due diligence, were later reasserted in timely protests to DWR's current DCP Change Petition.[2]

On August 21, 2024, DWR withdrew its 2009 permit extension requests and, two days later, submitted a request under Water Code section 1700.4 to amend its Change Petition to retroactively extend its deadline to construct facilities under the SWP Permits by fifty-five years, from December 31, 2000 to December 31, 2055. Protestants objected that the Water Code does not authorize amendment of an accepted change petition and urged the AHO to stay proceedings on the Change Petition while DWR exhausted efforts to retroactively extend the SWP Permits' construction and beneficial use deadlines through appropriate petitions or sought licensing for its water rights.[3] During the October 17, 2024 Pre-Hearing Conference, the AHO clarified that the Change Petition would "if approved, cover the full face value of the [SWP Permits]," both the portion that DWR had perfected as of 2009 and its unperfected portion.[4] Accordingly, the AHO explained that the Change Petition proceeding must address DWR's "historical maximum use [of water] for each of the permits at issue."[5] On questioning from the AHO, DWR's counsel stated that DWR intended to submit evidence about its historical water use under the SWP Permits with its case-in-chief.[6] DWR also represented to the AHO that "information about the pre-2009

[1] DWR, by contrast, did not apply for an extension of time for construction under the permits. Instead, DWR assured the Board and the public that "[a]ll facilities required for the storage, diversion, and conveyance of the water-related to this project, from its sources to its points of diversion and rediversion for both authorized consumptive and non-consumptive uses, have been completed." Dept. of Water Resources, Petition for Extension of Time for Permits 16478, 1649, 16481, and 16482 (Application 5630, 1443, 1445A and 17512, respectively) at Att. 1 (Dec. 31, 2009).

2 See, e.g., Protest of California Water Impact Network (CWIN) at 4-5 (May 13, 2024).

[3] Buena Vista Rancheria of Me-Wuk Indians et al., Statement on October 17, 2024 Pre-Hering Conference Issues at 3-7, 9-10 (Oct. 10, 2024). During the October 17, 2024 Pre-Hearing Conference, DWR's counsel represented that DWR anticipated filing a petition for an extension of its 2009 deadline to perfect water rights under in Permits "after the completion of this [change petition] hearing process." October 17, 2024 Pre-Hearing Conference Transcript at 91:8-12; see also id. at 92:5-12 (confirming that DWR anticipated submitting a petition for extension of Term 7 of the Permits "after this hearing process but before the project has been constructed").

[4] October 17, 2024 Pre-Hearing Conference Reporter's Transcript at 35:11-14.

[5] *Id.* at 70:10-18 ("I think no matter what direction this hearing goes, we will need to know what that number is.").

[6] *Id.* at 70:19 to 71:11.

maximum diversion and use of water under the SWP Permits is readily available and could be submitted to the AHO within a relatively short period of time."[7]

On November 18, 2024, the AHO issued an Amended Notice of Public Hearing and Procedural Ruling denying DWR's request to enlarge the scope of the proceedings through its proposed amendment.[8] Pursuant to Water Code section 1701.3, the AHO ordered DWR to submit supplemental information to the AHO by **December 9, 2024** regarding DWR's maximum volumes and rates of diversion, export, and use under each of the SWP Permits prior to December 31, 2009, specifically:

1. For water right Permits 16478 and 16479, 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.

2. For water right Permits 16478, 16479, 16481, and 16482, the maximum volume of water exported from the southern Delta (directly diverted, rediverted, or diverted to off stream storage), during any water year before December 31, 2009.

3. For water right Permits 16478, 16479, 16481, and 16482, the maximum rate of water exported from the southern Delta (directly diverted, rediverted, or diverted to off stream storage), measured in cubic feet per second, before December 31, 2009. Identify the date(s) of the maximum rate of direct diversion, re-diversion, and diversion to off stream storage (combined).

4. For water right Permits 16478, 16479, 16481, and 16482, the maximum volume of water beneficially used under each water right during any water year before December 31, 2009.[9]

The AHO explained in issuing the section 1701.3 supplemental information order that the requested information "is necessary for the Board to determine the portion of the SWP permits that [DWR] has perfected and the portion that remains unperfected and contingent upon future-filed petitions for extension of time or other action by the Board (such as a licensing or revocation proceeding)."[10] The AHO further explained that the "requested quantification is directly relevant to the Board's consideration of whether an approval of the change petitions would effectively initiate a new water right," as well as to the Board's assessment of each of the other hearing issues "because the Board must decide whether to approve the change petitions

[7] November 18, 2024 Notice at 9 n.2; October 17, 2024 Pre-Hearing Conference Transcript at 93:24-94:7; *see also id.* at 92:20-24 ("[O]ur water use is currently reported to the State Water Board and has been for many, many, many years. So that information is also not new and has been available to the public.").

[8] November 18, 2024 Notice at 6 (clarifying that the "appropriate procedure to seek an extension of a construction or beneficial use deadline in an existing permit is to file a petition of time extension in accordance with Water Code section 1398 and section 844 of the State Water Board's regulations").

[9] *Id.* at 10.

[10] *Id.* at 9 (emphasis added).

both with and without approval of future-filed petitions for extension of time."[11] In addition to the required quantitative reports, the AHO directed DWR to submit information explaining how it calculated each volume and rate.[12]

On December 2, 2024, DWR submitted a Petition for Reconsideration objecting to the AHO's section 1701.3 supplemental information order and requesting an extension of the deadline to submit the supplemental information to January 20, 2025, concurrent with DWR's deadline for submittal of its case-in-chief.[13] On December 6, 2024, the AHO granted DWR's request to extend its submittal deadline to January 20, 2025.[14] However, on January 17, 2025, the AHO otherwise denied the Petition of Reconsideration and reiterated the necessity of the supplemental information to adjudication of DWR's Change Petition. The AHO further extended DWR's deadline to submit the supplemental information as well as its case-in-chief to **January 21, 2025** in consideration of the January 20 federal holiday.[15]

In the January 17 Procedural Ruling, the AHO explained that the requested supplemental "information is necessary to the Board's consideration of the potential impacts of any approval of the change petition and necessary to condition any approval of the project to ensure operation within existing legal limitations."[16] The AHO also noted that, contrary to DWR's arguments, "[t]he Board cannot accept DWR's assurance that it will comply with legal limitations on the SWP Permits absent some method of verification."[17] Indeed, as the AHO observed, "not even DWR knows the volumetric limits that currently apply to diversions or beneficial uses under its permits. . . . If those limitations remain unknown both to DWR and to the Board, 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 or requested changes that would significantly increase diversion capacity for the SWP Permits."[18]

DWR submitted its case-in-chief exhibits on January 20, 2025 but again failed to submit the requested supplemental information. Instead, DWR stated in a cover letter to its case-in-chief

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[11] *Id.* (emphasis added).

[12] *Id.* at 10.

[13] *See* Dept. of Water Resources, Objection to and Petition for Reconsideration of the Hearing Officer's November 18, 2024 Amended Notice and Procedural Ruling at 3 (Dec. 2, 2024) (objecting to the "prejudicially short timeframe" for submittal of the requested supplemental information and asserting that "it would not be prejudicial to Protestants to allow DWR to file the supplemental information on January 20, 2025," concurrent with DWR's case-in-chief submittal deadline).

[14] Email from Nicole Kuenzi to Ann Carroll, RE Response to Department of Water Resources' Objection to and Petition for Reconsideration (DCP) (Dec. 6, 2024).

[15] Second Amended Notice of Public Hearing and Procedural Ruling at 24 (Jan. 17, 2025).

[16] *Id.* at 9 (emphasis added).

[17] *Id.* at 7.

[18] *Id.*

submittal that it would provide the supplemental information at some unstated future point in a separate proceeding on its newly filed petition for extension of time to perfect its SWP Permits.[19]

On January 31, 2025, various protesting parties submitted a Joint Motion to the AHO requesting cancellation of the Change Petition under Water Code section 1701.4, as DWR had then twice failed to provide the supplemental information by the deadline ordered by the AHO and failed to state any (let alone good) cause for not meeting the extended January 21, 2025 deadline.[20] DWR submitted a response to the Joint Motion on February 18, 2025, the first day of hearings on its Change Petition, in which it again objected to the supplemental information requests on the same grounds already rejected by the AHO. DWR's only attempted justification for its failure to meet the January 20, 2025 deadline was its assertion that the "requested information is voluminous" and "requires manual review of over 35 years of daily records."[21] DWR did not explain why it had been unable to produce the information by the deadline DWR had itself proposed in its December 2, 2024 Petition for Reconsideration, did not state how much additional time it would require to submit the information, and did not explain why information it had described as readily available to the public in October 2024 was now so difficult to identify and submit.

During the February 18, 2025 hearing, the AHO confirmed that DWR had not submitted the bulk of the requested supplemental information, including information on its annual maximum water diversion, export, and use volumes, and noted the AHO's consternation with DWR's failure to timely submit the required information.[22] In response to the AHO's questioning about why DWR had been unable to submit the information by the extended deadline, DWR's counsel stated only that it was "mostly because of how the data is, you know, patched" and that the agency needed to examine paper data to quantify annual maximum volumes of exported water.[23]

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[19] Dept. of Water Resources, Letter to AHO RE Submittal of Case-in-Chief, Time Extensions Petition, and Hearing Issues at 3 (Jan. 21, 2025)

[20] County of Sacramento et al., Joint Motion for Cancellation of the Water Right Change Petition (Jan. 31, 2025); *see also* Buena Vista Rancheria of Me-Wuk Indians et al., Request to Continue February 18, 2025 Pre-Hearing Conference (Feb. 7, 2025) (concurring in Joint Motion and requesting opportunity for party comment on the Joint Motion and DWR's newly submitted petition for extension of time to perfect the SWP Permits); CWIN, Hearing Management Statement at 2 (Feb. 11, 2025) (contending that DWR's omissions compromised the fairness of the scheduled hearings and made it "impractical, risky, and legally problematic" to proceed as scheduled).

[21] Dept. of Water Resources, Response to Protestants' Motion to Cancel or Delay the Hearing for Petitions for Change of Water Rights at 3 (Feb. 18, 2025). DWR also chastised the AHO for issuing the procedural ruling four days prior to DWR's deadline for submittal of the supplemental information, evidently forgetting that the AHO had granted DWR's extension request on December 6, 2024, only four days after DWR submitted the request.

[22] February 18, 2025 Hearing Reporter's Transcript at 91:6-13, 92:2-18 ("[F]irst I wanted to get a better understanding of, frankly, why this is – DWR has hundreds of smart engineers; right? . . . . I honestly didn't foresee that this would be as challenging as it is. And I set the schedule with the assumption that this wasn't going to be as difficult.").

[23] *Id.* at 92:19-24.

In a February 28, 2025 Procedural Ruling, the AHO opined that she does "not have delegated authority to cancel the water rights change petitions" and that authority to cancel a change petition under section 1701.4 "lies with the Board, the Executive Director, and the Deputy Director of the Division of Water Rights."[24] Thus, rather than cancel the proceedings based on section 1701.4's mandatory language, the AHO again extended DWR's deadline to submit the supplemental information to May 27, 2025, a month after conclusion of direct and cross-examinations on DWR's case-in-chief witnesses and approximately six weeks prior to the July 11, 2025 deadline for Protestants' submittal of their cases-in-chief. The AHO required DWR to produce a witness to testify to the supplemental information on June 10 or 11, 2025 but did not require DWR to recall its case-in-chief witnesses for examination based on the supplemental information. The AHO again confirmed that the supplemental information is "fundamental to determining the amount of water that DWR might be able to divert at the proposed additional points of diversion" and the need for it could not be obviated by DWR's proposed permit terms.[25]

Finally, on March 14, 2025, the AHO issued a partial ruling continuing direct and cross-examination of most DWR case-in-chief witnesses until at least one month after DWR provides modeling files for its Incidental Take Permit updated baseline and DCP scenarios; the procedural ruling did not similarly continue examinations of DWR's witnesses pending submittal of the required supplemental information under section 1701.3.

DISCUSSION

A. Water Code Section 1701.4 Requires Cancellation of the DCP Change Petition Proceedings

As a result of DWR's conduct, Water Code section 1701.4 makes dismissal of the Change Petition mandatory. Section 1701.3 authorizes the Board, after a petition has been filed, to "request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information" required for inclusion in the petition; the Board must provide a "reasonable period" for the submittal.[26] Section 1701.4 explains that if the petitioner fails to

[24] Third Amended Notice of Public Hearing and Procedural Ruling at 9 (Feb. 28, 2025).

[25] *Id.* at 9-10 (emphasis added); *see also id.* at 6 ("In short, all of the supplemental information requested, including information concerning the maximum annual volume of water exported and the maximum amount of water applied to beneficial use, is germane to the scope of DWR's existing rights under its permits, and therefore is relevant to this proceeding.").

[26] Wat. Code § 1701.3. The Board delegate section 1701.3 and 1701.4 authority to the Deputy Director for the Division of Water Rights, who has redelegated authority to the AHO to "use the Board's statutory authority under Water Code sections 1701.3-1701.4" to refine protest issues and require presentation of technical documents, including water availability, hydrologic analyses, and public trust analyses. Memorandum from Erik Ekdhal, Deputy Director, Division of Water Rights to Eileen Sobeck, Executive Director, State Water Resources Control Board RE Processes for Assignments of Water-Right Permitting Projects to Administrative Hearings Office and Subsequent Proceedings at 7 (July 10, 2020); *see* Resolution No. 2012-0029 ¶¶ 4.2.3, 4.2.5 (authorizing Deputy Director for Water Rights to exercise Board authorities under Water Code sections 1701.3 and 1701.4 and to redelegate these authorities); Memorandum from Eric Oppenheimer, Executive Director, State Water Resources Control Board, to

provide the information within the period provided under section 1701.3, "the board shall cancel the petition, unless, for good cause shown, the board allows additional time to submit the requested information."[27] Under the Water Code, "'[s]hall' is mandatory."[28]

There is no apparent dispute here that: (a) the AHO properly issued an order for relevant and necessary information, (b) DWR sought and received additional time to provide that information through January 21, 2025, and (c) DWR has not provided that information. Thus, the only relevant question for whether the petition "shall" be canceled is whether "good cause" exists for DWR's failure to comply. It does not.

Neither the Water Code nor the Board's implementing regulations define "good cause" for purposes of section 1701.4. However, other provisions of the Water Code and its implementing regulations are instructive. For instance, the regulations define "good cause" for extension of time to complete an application to:

> require[] a satisfactory showing that a diligent effort has been made to complete the application within the time previously allowed and that failure to do so has been occasioned by obstacles which could not reasonably be avoided. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay.[29]

Good cause to extend time to commence or complete permitted construction, to put water to beneficial use, or to complete an application similarly require the petitioner to show that granting the extension is "in the public interest," and to show to the "board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress

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Nicole Kuenzi, Presiding Hearing Officer RE Assignment to the Administrative Hearings Office of Petition Requesting Change in Water Rights of the Department of Water Resources for the Delta Conveyance Project (June 14, 2024) (assigning DCP Change Petition to the AHO to conduct adjudicative hearing and prepare draft water rights order for Board consideration and authorizing the AHO to issue rulings on procedural and other matters as necessary for these purposes).

[27] Wat. Code § 1701.4 (emphasis added); *see also* 23 Cal. Code Regs. § 683 (failure by an applicant to comply with a request for supplemental information "within a reasonable time and in a responsive manner may be cause for the board to cancel or reject the application"). As noted above, Protestants understand the Deputy Director for Water Rights to have redelegated authority to cancel a change petition under section 1701.4 on the AHO authorized to conduct adjudicative proceedings on the petition, along with the authority to issue supplemental information requests under section 1701.3. Regardless, it is without dispute that the Board, Executive Director, and Deputy Director for Water Rights all have authority to cancel a change petition under section 1701.4. *See* Resolution No. 2023-0036; Resolution No. 2012-0029.

[28] Wat. Code § 15 ("'Shall' is mandatory and 'may' is permissive.").

[29] 23 Cal. Code Regs. § 681 (emphasis added).

will be made if an extension of time is granted."[30] The Board may order a hearing as necessary to interrogate good cause.[31]

Here, it is undisputed that DWR has failed to meet its January 21, 2025 deadline set by the AHO to submit the required supplemental information, even after the deadline was extended on DWR's request from December 9, 2024. The Board accordingly must dismiss the Change Petition unless DWR has made a satisfactory showing of good cause for additional time beyond that already provided. It has not.

First, DWR has not explained why it was unable to provide the supplemental information on time. As far back as October 17, 2024, DWR assured the AHO and protestants that it intended to submit volumetric information on its maximum historic use of water under the SWP Permits with its case-in-chief submittal. After the AHO set an earlier deadline on DWR's assurance that information about DWR's pre-2009 maximum diversion and use of water under the SWP Permits was "readily available" and could be swiftly provided to the AHO, the AHO extended this submittal deadline at DWR's request to align with its case-in-chief submittal. DWR never attempted an explanation as to why it was unable to meet the deadline set by the AHO or the one that DWR itself proffered.

Second, DWR's only explanation for its delay in providing information beyond the original December 9, 2024 deadline—that it needed to pull the information from paper records and disaggregate by water year—falls well short of "good cause." These are conditions "incident to the person"—that is, to DWR—and thus do not constitute good cause for an extension under the Board's regulations.[32] Indeed, they are problems of DWR's own making attributable to its own record-keeping practices and lack of diligence in compiling information that, even DWR concedes, it knew would be necessary to secure an extension of time for its permits or to license its water rights.[33] Even if this rationale were cognizable, DWR was well aware of these constraints when it requested an extension until January 20, 2025 to submit the supplemental information. These are not, in other words, the sort of exogenous obstacles "which could not be reasonably avoided" and that might contribute to good cause.[34] A further extension is not warranted.

Third, DWR's highly unusual Change Petition has directly put this information at issue, as the AHO clarified at the October 17, 2024 pre-hearing conference and in repeated procedural rulings since. DWR has applied for a change in points of diversion for water rights permits

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[30] 23 Cal. Code Regs. § 844.

[31] *Id.*

[32] 23 Cal. Code Regs. §§ 681, 844.

[33] Dept. of Water Resources, Response to Protestants' Motion to Cancel or Delay the Hearing for Petitions for Change of Water Rights at 3 (Feb. 18, 2025) ("DWR has now filed a petition for an extension of time and will continue to complete the data review task for processing of that petition."); Dept. of Water Resources, Letter to AHO RE Submittal of Case-in-Chief, Time Extension Petition, and Hearing Issues at 3 (Jan. 21, 2025) ("[T]he requested Supplemental Information will be part of the record for the Time Extension Petition.").

[34] 23 Cal. Code Regs. §§ 681, 844.

whose deadline for perfection lapsed in December 2009. DWR now has at best a claim to divert, export, and use only the amounts of water it perfected as of December 31, 2009. Yet the project at issue in the Change Petition, the DCP, would have capacity to divert water well beyond DWR's perfected rights and is explicitly intended to do so. Indeed, Secretary Crowfoot asserted in a policy statement during the February 18, 2025 DCP hearing that the California Natural Resources Agency's "estimate suggests that if this project was in place last water year, last winter, we would have been able to capture *an additional million acre-feet of water*."[35] And, as the AHO has repeatedly confirmed, both the Change Petition and the DCP environmental analyses incorporated into it are clear that DWR intends to operate the DCP to export up to the total face value of the SWP Permits.

This disjuncture is a problem of DWR's own making and has created significant confusion in the instant Change Petition proceedings. In trying to adjudicate the Change Petitions before resolving DWR's petition for extension of time to perfect water rights under the SWP Permits, the AHO has required DWR and protestants to submit case-in-chief information under two scenarios: one in which DWR's extension is granted and one in which it is not. The pitfalls of this approach extend well beyond the burden and expense of dual scenario submittals: It, for instance, entirely fails to account for the possibility that the Board grants or denies the time extension petition in part or issues a conditional approval, mooting both scenarios adjudicated in the instant proceeding. It also subjects California Native American Tribes, non-profit organizations, and community members, many representing themselves, to severe burdens that comprise their ability to effectively exercise their rights to protest and to participate as parties to these proceedings.

Ultimately, the supplemental information order, like the dual scenario approach, is designed to accommodate DWR's insistence that its Change Petition be adjudicated while its subject water rights are unquantified, unlicensed, and unperfected. The far simpler and more certain approach—and the one that holds DWR to the same standards as any other applicant before the Board—would be to simply stay the Change Petition proceedings until the Board has ruled on DWR's petition for extension of time and its water rights permits are certain. Absent that, DWR had no choice but to timely submit the supplemental information, as the AHO has required since the October 17, 2024 pre-hearing conference.

Fourth, DWR cannot contend the requested information request is surprising, or that it was unaware it would be required to track and ultimately provide the information to the Board. This information would be necessary in any licensing proceeding to perfect DWR's rights. And separately, DWR has been on explicit notice for more than fifteen years that it would need to compile and submit the supplemental information. For example, in one of several 2010 protests to DWR's 2009 petition for an extension of time to perfect water rights under the SWP permits, the California Sportfishing Protection Alliance et al. set forth as a protest condition that DWR

[35] February 18, 2025 Hearing Reporter's Transcript at 15:18-20 (statement by Secretary Crowfoot) (emphasis added); *see also id.* at 15:at 15:23-25 (asserting that "the *additional water we would be able to capture* would actually go to recharge groundwater basins in the Central Valley") (emphasis added).

"must complete an accounting of water used under each permit."[36] DWR's response to that request was that specific accounting under each permit was irrelevant to resolution of the protest and petition for extension of time because the SWP is a single project operated under the permits as a whole.[37] DWR did not provide an accounting of water used under its permits, either individually or collectively, before its last approved period to perfect its rights expired. The issue again recurred during adjudicatory proceedings before the Board on DWR's prior WaterFix project, where it was addressed extensively during case-in-chiefs by Restore the Delta and other protestants, and yet DWR still failed to provide historical water usage information. Nor evidently had DWR compiled the information when it resubmitted its petition for an extension of time on January 21, 2025 and recognized that such information would be required for its adjudication.

Fifth, DWR has fallen well short of demonstrating the requisite diligence in attempting to meet the AHO's prior submittal deadlines, which the Board's regulations require for a further extension.[38] Indeed, DWR has demonstrated no diligence at all. DWR submitted on December 2, 2024 a single table with a partial summary of what it called "annual diversion to storage, south of Delta, and the direct diversion rate from the Delta" in response to item three of the four supplemental information items, but even as to that item, it failed to provide maximum year and other required data or any information documenting how it calculated the reported rates.[39] The table also implausibly reports that DWR reached a combined export rate for all four water permits of 10,350 cfs—the maximum combined value of the SWP Permits—even though DWR itself has confirmed that it fell well short of putting the maximum face value of the Permits to beneficial use prior to December 31, 2009. DWR has not supplemented its submittal in any respect since December 2, 2024 and has made no effort to document its progress in compiling and producing the missing information. DWR's once again asks the Board and the parties to simply take the agency at its unsubstantiated word. Good cause requires much more.

Because DWR has not made the requisite showing of good cause for a further extension of its deadline for submittal of the supplemental information, Water Code section 1701.4 requires that the Board dismiss the Change Petition.

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[36] Cal. Sportfishing Protection Alliance ("CSPA") Protest to Applications 5629, 14444, 5630, 14443, 14445A, and 17512 (Permits 16480, 16478, 16479, 16481, and 16482, respectively) at 4 (Oct. 13, 2010). A copy of CSPA's protest is attached. Also attached is a letter to the Board dated August 12, 2011 from CSPA, the California Water Impact Network, and AquAlliance jointly responding to DWR's reply to the protests and updating the Board on the status of the protests.

[37] Memorandum from Dept. of Water Resources to CSPA RE Response to California Sportfishing Protection Alliance's Formal Protest of the Department of Water Resources' Petition for Extension of Time Regarding the State Water Project Permitted Water Rights Applications 5629, 14444, 5630, 14443, 14445A, and 17512 (Feb. 10, 2011). A copy of DWR's Memorandum is attached.

[38] 23 Cal. Code Regs. §§ 681, 844.

[39] Dept. of Water Resources, Objection to and Petition for Reconsideration of the Hearing Officer's November 18, 2024 Amended Notice at 4 (Dec. 2, 2024).

B. Allowing DWR to Put on Its Case-in-Chief Witnesses Prior to Submitting the Required Supplemental Information Prejudices Protestants and Compromises the Integrity of the Record

In a February 28, 2025 procedural ruling, rather than cancelling the proceedings, the AHO provided DWR until May 27, 2025 to submit the supplemental information. The AHO's action does not affect the Board's decision on the instant Motion, as the AHO was clear that she had, in her view, no delegated authority to cancel the Change Petition under section 1701.4 and thus no choice but to further extend DWR's submittal deadline. Failing to dismiss the Change Petition under section 1701.4 and allowing hearings to go forward without the required information will cause prejudice to Protestants and comprise the record on which the Board's eventual decision on the Change Petition would be based.

Although the AHO stated in the February 28, 2025 procedural ruling that the AHO "would not recommend that the Board or its delegees cancel the change petitions," the AHO did not provide reason for this position nor point to anything that would constitute good cause for a further extension.[40] Indeed, the AHO's confirmation in the same ruling that "the requested information about diversion and use under the SWP Permits is fundamental to determining the amount of water that DWR might be able to divert at the proposed additional points of diversion" undercuts the rationale for a further extension.[41] So too does the AHO's assurance that she "will not require Protestants to submit their case-in-chief evidence until after DWR has satisfied the request for supplemental information."[42] DWR's and Protestants' respective cases are directed to the same noticed hearing issues, and the supplemental information is just as relevant to both.

Under the current schedule, DWR will be prejudicially allowed to put on all fourteen of its witnesses for direct and cross-examination before it submits its historical water usage information. Protestants will not be able to examine DWR's witnesses on the yet-to-be-reported information or how limitations to DWR's perfected rights revealed by that information would affect the witnesses' testimony. The AHO's allowance for Protestants to cross-examine a DWR witness about historical water usage information in June 2025 following close of DWR's case-in-chief does not cure this prejudice, as it will not allow Protestants to interrogate the implications of that information for modeling, water quality, fisheries, groundwater, terrestrial species impacts, or any of the other subjects that DWR's fourteen witnesses are addressing.

The result will be a severely compromised and disjointed record that would compromise the fairness of the proceedings and exercise of the Board's key duties in reaching its decision on a change petition. As the AHO has explained, quantification of DWR's historical water usage information is "fundamental" to this proceeding and to each of the noticed hearings issues; this is particularly so as the AHO is requiring the parties to develop a record under a scenario in which DWR is restricted to its (yet-to-be-established) maximum water usage prior to December 31, 2009.[43] It follows that the supplemental information must be available to the AHO and to

[40] Third Amended Notice of Public Hearing and Procedural Ruling at 10 (Feb. 28, 2025).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 9; *see* November 18, 2024 Notice at 9-10.

protestants in advance of hearings on DWR's case-in-chief so that this scenario, and its implications for the testimony of DWR's witnesses, can be fully developed. As the AHO previously acknowledged, without this still-unavailable information, "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."[44] Under these circumstances, proceeding with the merits of DWR's Change Petition would either be a time-consuming exercise in futility, severely prejudicial to the protestants, or both.

CONCLUSION

According to the AHO, the supplemental information is "necessary," "fundamental," and "directly relevant" to the resolution of DWR's Change Petition. And according to DWR, the information has been tracked over time, is readily available, is not new, and will be submitted (at some unidentified time in the future) in connection with DWR's request to extend its beneficial use deadline. Yet when the AHO ordered DWR to provide the information, DWR objected, stalled, and refused. DWR offers no real justification for this conduct, and whatever its rationale, it does not meet the requirements of good cause under the Water Code. Given the AHO's legitimate order for supplemental information, DWR's failure to comply, and the AHO's determination that she lacks jurisdiction to cancel the proceedings, the Board must act. Failing to require DWR to comply with the AHO's orders undermines the authority of the AHO to conduct orderly proceedings and to ensure that DWR's Change Petitions are adjudicated according to the law.

For the reasons stated above, Protestants respectfully request that the Board dismiss DWR's Change Petition pursuant to Water Code section 1701.4. The Board should instruct DWR to resubmit its water rights applications for the DCP once the scope of DWR's permits are known based on the Board's decision on DWR' pending petition for extension of time to put water under its SWP Permits to beneficial use. At minimum, DWR must resubmit its petition for a change to its SWP Permits with the required supplemental information subject to a new protest period.

Respectfully submitted,

Terra A. Baer, Student Attorney
Danna Castro Galindo, Student Attorney
Shehla Chowdhury, Student Attorney
Stephanie Prufer, Student Attorney
Naji N. Thompson, Student Attorney
Stephanie L. Safdi, Supervising Attorney
Environmental Justice Law and Advocacy Clinic

[44] January 17, 2025 Procedural Ruling at 7.

Jerome N. Frank Legal Services Organization
Counsel for **Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta**

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Counsel for **Center for Biological Diversity and North Coast Rivers Alliance**

Roger B, Moore
Attorney
California Water Impact Network

ATTACHMENTS

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. BOX 2000, Sacramento, Ca. 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: http://www.waterrihts.ca.gov

PROTEST – (Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS

APPLICATION: 5629 PERMIT: 16480
APPLICATION: 14444 PERMIT: 16480
APPLICATION: 5630 PERMIT: 16478
APPLICATION: 14443 PERMIT: 16479
APPLICATION: 14445A PERMIT: 16481
APPLICATION: 17512 PERMIT: 16482

We, the **California Sportfishing Protection Alliance; Chris Shutes, 1608 Francisco St., Berkeley, CA 94703; Bill Jennings, 3536 Rainier Ave, Stockton, CA 95204; and Michael Jackson, P.O. Box 207, 429 West Main St., Quincy, CA 95971,** have read carefully the August 19, 2010 notice relative to the petitions for extension of time of the **State Water Project of the Department of Water Resources** for above-listed permits under the above-listed applications. The summaries of the permits, including counties, places of use, points of diversion, amounts, and seasons are given in the Notice for these petitions, which is available on the Board's website at http://www.swrcb.ca.gov/waterrights/water_issues/programs/applications/petitions/2010/5629not.pdf.

It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:
(1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
(2) not best serve the public interest **x**
(3) be contrary to law **x**
(4) have an adverse environmental impact **x**

State Facts, which support the foregoing allegations:

In Water Rights Order WR 2008-045, the State Water Resources Control Board described the law regarding petitions for extension of time:

> The Board's regulations provide that the Board will grant a petition for an extension of time only upon such conditions as the Board determines to be in the public interest, and only upon a showing that (1) due diligence has been exercised, (2) failure to comply with previous time requirements was caused by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension is granted. (Cal. Code Regs., tit. 23, § 844.)

There is no definition of a project that will be analyzed under CEQA in support of the requested permit extensions. However, petitioner states that it anticipates that it will construct no new facilities within the time period covered by its request for a five-year extension of time on the subject permits.

If new facilities are contemplated, then these petitions are legally incomplete since they do not include descriptions of the new facilities, points of diversion and rediversion, and other relevant information necessary to understand operation and impacts of such new facilities; in such case, these petitions should be denied.

Assuming that no new facilities will be constructed during the next five years pursuant to these permits, there is no reasonable expectation that petitioner will increase the amounts of maximum use compared to previous use during the allowed time for the permit. Since no "satisfactory progress will be made if an extension is granted," the petitions should be denied. Moreover, if petitioner were to divert amounts greater than the maximum amount diverted heretofore under any aspects of the affected permits, whether direct diversion or to storage, this would have adverse environmental impacts and be contrary to the public interest.

In the petitions, petitioner analyzes the aspects of the subject permits where maximum permitted use has been achieved, and those aspects where maximum permitted use has not.

Water use under Permit 16477 (Application 5629) has already reached the maximum rate of direct diversion and maximum amount of storage. There is no need to extend the time for this permit; it should be licensed subject to conditions resulting from a public trust analysis by the State Board.

Water use under Permit 16478 (Application 5630) has also already reached the maximum rate of direct diversion and maximum of storage. There is no need to extend the time for this permit; it should also be licensed subject to conditions resulting from a public trust analysis by the State Board.

Direct diversion at Oroville Dam under Permit 16479 (Application 14443) has already been achieved. "Maximum annual diversion to storage from the Feather River at Lake Oroville is 2,488,607 AF during the 1977/78 water year" (Petition for 5630 et al, Supplement, point 5). 1977 was the driest water year in recorded history in California. There is no hydrologic or operational explanation that would support a reasonable expectation of increasing the annual amount diverted to storage at that facility. Given DWR's own advocacy of the importance of maintaining the coldwater pool in Oroville, withdrawals from Oroville that would occasion exceedence of the previous maximum diversion to storage would have a clear adverse environmental impact to fisheries downstream of Oroville Dam, and such impact would not be in the public interest.

Diversion to storage at San Luis Reservoir from Delta Channels has already exceeded the maximum storage amount allowed under Permit 16479 (Application 14443). The direct

diversion from Delta Channels of the maximum amount allowed under this permit would have an adverse environmental impact and would not be in the public interest. Indeed, the recent Delta Flow Informational Proceeding, its extensive record, and the resulting Delta Flow Criteria Report (*Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem,* approved by the Board August 3, 2010) demonstrate that existing and historic levels of diversion by the State Water Project from Delta Channels has had tremendous adverse environmental impacts; increased diversion through these facilities would clearly have adverse environmental impacts on a Delta ecosystem in crisis, impacts that would not be in the public interest.

Permit 16479 (Application 14443) should therefore be licensed, subject to reductions and other appropriate conditions pursuant to a public trust analysis that should be conducted by the State Board.

Direct diversion at Oroville Dam under Permit 16480 (Application 14444) has also already been achieved. "Maximum annual diversion to storage from the Feather River at Lake Oroville is 2,488,607 AF during the 1977/78 water year" (Petition for 5630 et al, Supplement, point 5). 1977 was the driest water year in recorded history in California. There is no hydrologic or operational explanation that would support a reasonable expectation of increasing the annual amount diverted to storage at that facility. Given DWR's own advocacy of the importance of maintaining the coldwater pool in Oroville,[1] withdrawals from Oroville that would occasion exceedence of the previous maximum diversion to storage would have a clear adverse environmental impact to fisheries downstream of Oroville Dam, and such impact would not be in the public interest. Permit 16480 (Application 14444) should therefore also be licensed subject to conditions resulting from a public trust analysis by the State Board.

Water use under Permit 16481 (Application 14445A) has already reached the maximum rate of direct diversion and maximum amount of storage. There is no need to extend the time for this permit; it should be licensed subject to conditions resulting from a public trust analysis by the State Board.

Water use under Permit 16482 (Application 17512) is not described in the subject petitions. However, it has likely already reached the maximum amount of storage or something very close to it. Either there is no need to extend the time for this permit, and it should be licensed for that reason; or else full use of maximum annual storage amounts would have adverse fish and wildlife impacts at San Luis Reservoir, and would likely have adverse environmental impacts due to Delta pumping, and it should be licensed for that reason. In the latter case, the permit should be licensed subject to conditions resulting from a public trust analysis by the State Board.

[1] See Comments of Mark Cowin, DWR, on draft *Delta Flow Criteria Report*, July 29, 2010, p. 2. http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/comments072910/mark_cowin.pdf

In the Supplement to Petition of Extension of Time for Permit 16477 (Application 5629), and Permit 14444 (Permit 16480), petitioner states that DWR must "maintain operational flexibility to meet DWR contractual obligations, and maximize power generation to allow the SWP to reduce its reliance on fossil fuel based power sources to met meet the Project's annual power demand." However, the more contractual obligations DWR meets, the greater the need for fossil fuel-based power generation it creates, because the State Water Project consumes more power than it produces. The petitions do not describe how flexibility can be achieved by increasing diversions, or how greater diversions under the permits will decrease use of fossil fuel for power generation; they simply state a generality based on a generalization of a public interest. The same Supplement also states that "sufficient demand exists for the power that could be generated by maximum diversions authorized under the Power Permits." It is not in the public interest for DWR to be given special dispensation to be allowed to justify its time extension petition based on demand alone; it must demonstrate that "satisfactory progress will be made if an extension is granted," just as every other petitioner for extension of time must demonstrate. DWR has made no such showing whatever.

DWR's discussion of the complexity of the State Water Project equally should not be grounds to grant DWR special dispensation. In addition, the speculated future of the State Water Project has no appropriate place in the subject petitions. The Supplement to the Petition for Application 5630 et al states: "The Delta Plan is intended to further restoration of the Delta ecosystem and a reliable water supply. The implementation of the Delta Plan is likely to influence future construction of SWP facilities and SWP water supply delivery." However, Attachment 1 to the same petition says: "The project does not involve the construction of any new facilities or expansion of authorized uses beyond those currently authorized under the permits listed above." Speculated future actions or changes related to the State Water Project have no place in the subject petitions, and should be ignored by the Board in considering these petitions on the merits.

Under what conditions may this protest be disregarded and dismissed?

1. Complete project-specific environmental documentation for the extension of time of these permits must be completed. A full range of alternatives, including reduced use of the permits, must be analyzed in a manner that is compliant with CEQA. CSPA reserves the right to revise or add to its dismissal terms based on review of environmental documents.

2. DWR must complete an accounting of water used under each permit, and describe how it plans to use additional water in the future. CSPA reserves the right to revise or add to its dismissal terms based on analysis of that accounting.

3. The petitions for extension of time should be denied, and the permits should be licensed for operation that is consistent with applicable law, including the Public Trust Doctrine, The Clean Water Act, Section 5937 of the Fish and Game Code, the California Water Code (and particularly its provision in Section 275 against unreasonable method of diversion), salinity standards under D-1641, and the Porter-Cologne Water Quality

Control Act. The licenses should be required to comply with all applicable Biological Opinions.

A true copy of this protest has been served upon the petitioner by mail.
(Personally or by mail)

Date: October 13, 2010.

Chris Shutes, Water Rights Advocate
Bill Jennings, Executive Director
Michael Jackson
California Sportfishing Protection Alliance

Chris Shutes
(signed on his own behalf and for Bill Jennings and Michael Jackson)

Protestant(s) Authorized Representative sign here

cc:
Erick D. Soderlund
Department of Water Resources
1416 Ninth St.
Sacramento, CA 95818

Memorandum

Date: February 10, 2011

To: Mr. Chris Shutes
Water Rights Activist
California Sportfishing Protection Alliance
1608 Francisco Street
Berkeley, CA 94703

From: **Department of Water Resources**

Subject: Response to California Sportfishing Protection Alliance's Formal Protest of the Department of Water Resources' Petition for Extension of Time Regarding the State Water Project Permitted Water Right Applications 5629, 5630, 14443, 14445A, and 17512

Dear Mr. Shutes,

This letter is the Department of Water Resources' (DWR) response to the allegations contained in the formal protest filed by the California Sportfishing Protection Alliance (CSPA) on October 13, 2010.

In the protest, CSPA contends that the petition materials are not clear regarding what progress DWR will make if an extension is granted. Without evidence that satisfactory progress will be made, CSPA argues, the petition for extension of time should be denied. CSPA also identifies several permits that allegedly have already reached the maximum rate of direct diversion and maximum amount of storage. Accordingly, there is no need to extend the time for these permits and they should go to license. In support of their claim, CSPA points to the fact that the maximum annual diversion to storage from the Feather River at Lake Oroville occurred during the 1977/78 water year and therefore there is no hydrologic or operational explanation that would support a reasonable expectation of increasing the maximum annual diversion. As such, CSAP contends, the relevant permit should be licensed. Lastly, CSPA asserts that speculated future actions or changes related to the State Water Project (SWP) have no place in the petitions for extension of time and should be ignored by the State Water Resources Control Board (State Water Board) when considering the petitions.

The responses below are organized into two parts. Part 1 provides a brief explanation of the progress DWR expects to make during the requested extension period. In this explanation, DWR demonstrates good cause exists for an extension of time so that DWR can complete a planning process that will provide a realistic projection of future SWP operations. Part 2 explains why DWR does not believe it is appropriate at this time to proceed to license for the listed permits.

1. Satisfactory Progress Will Be Made During The Requested Extension Period Through 2015

CSPA states that if no new facilities will be constructed during the next five years,

there is no reasonable expectation that DWR will increase the amounts of maximum use. As such, no satisfactory progress will be made if an extension is granted.

As will be discussed below, DWR's plan for projected, long-term State Water Project (SWP) Delta operations is being developed in the Bay-Delta Conservation Plan (BDCP) process. Until the BDCP is completed, projections of future SWP operations (including diversions and use) would be very speculative. As such, the limited 5-year extension period that DWR requested is to allow time for the BDCP to be competed and a Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) to be issued. During the extension period the projected operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions.

DWR has at times diverted at the maximum instantaneous rate allowed under the Feather River/Delta Permits, but due to various factors DWR has not directly diverted, rediverted, or diverted to storage the maximum annual amounts allowed under the Feather River/Delta Permits. If DWR proceeded to license, SWP diversions would be limited to the maximum rates and quantities diverted to date. However, DWR is unsure that the maximum historic rates and annual maximum diversions will be sufficient to meet future water needs, including DWR's contractual obligations, the State's future projected water demands, or possible needs to address vulnerabilities in the State's water supply associated with emergencies, drought and the effects of climate change. As such, it is in the public interest to continue evaluation of DWR's ability to make full use of the Feather River/Delta Permits so DWR can maintain operational flexibility in order to meet the SWP's water supply needs in the future.

Due to current uncertainties related to future operations in the Delta, it is not possible at this time to accurately predict what the ultimate diversions under the Feather River/Delta Permits will be, or a date at which the full permitted quantity will be put to beneficial use. Factors such as the outcome of the current BDCP process, recent legislation, current litigation, and potential impacts of climate change create tremendous uncertainty in predicting future operations and diversions. It is clear, however, that demand exists for the additional SWP water supply and demand is expected to grow as the service area of the SWP continues to develop.

DWR believes that the primary activity that will address the current uncertainty and, ultimately, provide a realistic projection of future SWP operations is the BDCP process. The BDCP will provide the basis for SWP and Central Valley Project (CVP) compliance with the state and federal endangered species acts and the Natural Community Conservation Planning Act. The BDCP will result in systemic changes in SWP and CVP conveyance infrastructure as well as restoration and enhancement of ecological resources. The outcome of the BDCP is expected to result in more long-term regulatory stability for the SWP. It will support the issuance of take permits from the US Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS) and the state Department of Fish and Game (DFG). The BDCP is expected to have a significant impact on project operations. Program documents will include an EIR/EIS analyzing the potential impacts of project operations and the restoration and

enhancement efforts. The current BDCP schedule projects a final BDCP and EIR/EIS by the end of 2012. As noted earlier, DWR will be able to more accurately predict future allowable diversions from the Feather River and Delta following completion of the BDCP process. DWR thus limited the scope of the current petition to a short term extension of only five years to allow for the BDCP to be completed.

In addition, limiting the current time extension request to five years also allows DWR to reasonably predict and evaluate future operations for the period of the extension. DWR published its most recent delivery reliability report in August 2010, *The State Water Project Delivery Reliability Report 2009* (2009 Report). The 2009 report evaluates the ability of the SWP to deliver water to its contractors under existing conditions (Water Rights Decision 1641 (D1641) and current Biological Opinions). The report projects that under current hydrology and regulatory restrictions, maximum SWP deliveries will be less than 3.4 million acre-feet which is less than the maximum historic SWP deliveries. Because of the limited term of the extension, it is reasonable to expect that the water rights terms and conditions and regulatory restrictions will not change substantially before the end of 2014. Consequently, the current conditions analysis in the 2009 Report is a reasonable estimate of the level of deliveries during the period of the requested extension. If DWR were to instead proceed to license, DWR would expect to continue to operate under the same terms and conditions and regulatory restrictions. Continued operation up to maximum historic rates and annual maximum diversions (license case) is thus the baseline against which the current project will be assessed.

DWR recognizes that full beneficial use under the listed permits will not be reached in the next five years and that additional time will be required to reach full beneficial use. However, since the BDCP will offer the best opportunity to provide a realistic projection of future, long-term SWP operations, good cause exists to extend DWR permits until the BDCP is completed. At the end of the extension period, DWR anticipates filing for a longer term time extension and will comply with the California Environmental Quality Act (CEQA) for any petition filed at that time.

Importantly, during the period of the five year extension, DWR will continue to divert and redivert water to direct use and storage in accordance with the terms and conditions of its permits, as well as any additional regulatory restrictions imposed on the SWP, such as D 1641, and any biological opinions or permits for threatened and endangered species from federal and state agencies.

2. DWR Is Not Prepared To Proceed To License With Any Of Its Water Rights Permits At This Time

CSPA highlighted several permits that, in its opinion, should proceed to license. The rationale for this position is that DWR maximum rate of diversion and annual diversions to storage and use have exceeded the quantities allowed for in certain permits and, as such, there is no need to extend the time for these particular permits. For Permit 16479 (Application 14443), specifically, CSPA contends that there is no reasonable expectation that DWR will divert to storage more than its historical

maximum and thus this particular permit should also proceed to license.

For the reasons discussed below, DWR does not believe the time is ripe to proceed to license with any of the permits at issue in this current extension process.

A. The SWP is Operated and Regulated as a Single Project and its Operation is Not Segmented By Permit

The permits at issues here authorize the diversion and use of water at Lake Oroville and the Thermalito Complex, downstream in the Feather River and within the Sacramento-San Joaquin Delta and rediversion at the North Bay Aqueduct, Delta pumping facilities and the SWP reservoirs south of the Delta. The permits authorize water use for numerous purposes from multiple water courses and contain numerous points of diversion and rediversion for both direct use and diversion to storage. The project is thus operated as a single project and its operation is not segmented by permit.

Given the nature of how the SWP is operated, DWR believes the Feather River/Delta permits should proceed to license jointly at the appropriate time in the future. Approaching licensing in this manner will provide a more comprehensive picture of total diversions from the particular locations and ultimate use of water by the SWP. It will also allow the State Water Board to address public trust issues and apply terms and conditions uniformly. D-1641 provides a good example of regulating the SWP as a single project, where DWR's various permits are not separated out but are amended in an uniform manner.

B. In the Long-Term DWR Has A Reasonable Expectation of Increasing the Maximum Annual Diversion Storage From the Feather River at Lake Oroville

CSPA asserts that there is no hydrologic or operational explanation that would support a reasonable expectation of increasing the annual amount diverted to storage at Lake Oroville over that which occurred in the 1977/78 water year. DWR disagrees with this assertion.

While it is difficult to predict the future, there are certainly hydrological and operational circumstances in which DWR could exceed the historic maximum direct diversion and annual amount diverted to storage. While 1977/78 was the driest year on record, demands for SWP water were substantially below existing demands. Level of demand affects project operations and places additional demands on the SWP. It is reasonable to expect that SWP operations at Oroville could result in storage levels below that experienced in 1977/78. For example, storage in Lake Oroville at the end of December 2009 was the lowest since the reservoir was completed in 1964; including 1977, the driest year on record. Had hydrologic conditions in 2010 been sufficiently wet, total diversion to storage could have exceeded the historic maximum. DWR acknowledges that opportunities to increase its maximum direct diversion and diversion to storage from the Delta have decreased given the more stringent water

quality and regulatory requirements. However, the fact that these opportunities are decreasing (in the face of increased level of development within the state) is all the more reason to maximize storage if and when the opportunity arises. As such, DWR not only believes that it can reasonably plan for greater diversion to storage, but it is in the public interest to allow for that possibility. Thus, permit 16479 should not proceed to license.

Lastly, DWR is currently conducting an environmental review process in compliance with CEQA. As stated above, continued operation up to maximum historic rates and annual maximum diversions with the existing regulatory restrictions (the license case) is the baseline against which the current project will be assessed.

DWR appreciates CSPA's interests in the extension of time process and hopes that the above information addresses the concerns raised in the protest letter. If you have any questions regarding DWR's responses, please contact me at (916)653-8826 or esoderlu@water.ca.gov.

Sincerely,



Erick Soderlund
Staff Counsel

cc: Katherine Mrowka, Chief
Inland Streams Unit
State Water Resources Control Board
1001 'I' Street, 14th Floor
Sacramento, CA 95814





AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS

August 12, 2011

Mr. Erick Soderlund, Staff Counsel
California Department of Water Resources
1416 Ninth Street
Sacramento, CA 95814

Dear Mr. Soderlund:

Thank you for your reply on behalf of the California Department of Water Resources which responds to our protests of the Department's petition for time extensions for its State Water Project permits. C-WIN, AquAlliance, and CSPA provide you a copy of our letter to the State Water Resources Control Board updating the Board on how our organizations see the status of our protests of the Department's requests for time extensions for its State Water Project water rights permits. If you have questions about this letter please contact any of us, or Tim Stroshane, with the California Water Impact Network (510/524-6313, Tim.Stroshane@c-win.org), or Chris Shutes, with California Sportfishing Protection Alliance (510/421-2105, blancapaloma@msn.com).

Sincerely,

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Attachment





AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS

August 12, 2011

Kate Gaffney
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: **Department of Water Resources' Petitions for Time Extension for Water Right Permits 16477, 16478, 16479, 16480, 16481, and 16482 (Applications 5629, 5630, 14443, 14444, 1445A, and 17512) for the California State Water Project; SWRCB Reference: KMG:5629, 5630, 14443, 14444, 14445A, 17512**

Dear Ms. Gaffney:

The California Water Impact Network (C-WIN), AquAlliance, and the California Sportfishing Protection Alliance (CSPA) have reviewed responses from the California Department of Water Resources (DWR) to our protests of the above-referenced petitions. With this letter, we respond jointly to separate letters from Mr. Erick Soderlund of DWR, both dated February 10, 2011, addressed to C-WIN and AquAlliance on the one hand and to CSPA on the other. We also address once again DWR's legally inadequate approach to California Environmental Quality Act (CEQA) compliance for its petitions, and request that the State Board direct DWR to commence CEQA compliance immediately. Finally, we provide the State Water Resources Control Board with an update on the still-unresolved status of our protests.

1. **Granting DWR's petitions would be contrary to law.**

The California Code of Regulations, Title 23, Section 844, states in pertinent part:

> An extension of time within which to complete an application, to commence or complete construction or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of

> time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay.

DWR is unabashed about the fact that it does not foresee additional rates or quantities of diversion within the requested five year period. DWR's letter to C-WIN and AquAlliance explicitly acknowledges this: "Until the BDCP is completed projections of future SWP operations (including diversions and use) and potential impacts would be very speculative….Regarding project operations during the extension period, the projected operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions."[1] Equally, DWR's letter to CSPA affirms: "Until the BDCP is completed, projections of future SWP operations (including diversions and use) would be very speculative. As such, the limited 5-year extension period that DWR requested is to allow time for the BDCP to be competed [*sic*] and a Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) to be issued. During the extension period the project operations under the current regulatory regime will not exceed historical maximum rates of diversion and annual maximum diversions."[2]

Since DWR clearly acknowledges that it will not make satisfactory progress in the five years for which it has applied, its petition is contrary on its face to the legal requirements for a petition for extension of time. The State Water Resources Control Board should deny the petitions and move to license DWR's State Water Project permits.

DWR continues to refuse to account for its use of water under each permit. In its petition to the State Water Resources Control Board, DWR claims: "the SWP is a complex system and, as such, it is difficult to separate water diverted under the provisions of specific individual permits. The permits operate together consistent with the provisions governing overall SWP operations. The water is commingled to meet overall project purposes."[3] DWR restates this point in its letter to CSPA: "The project is thus operated as a single project and its operation is not segmented by permit."[4]

DWR is required to perform such accounting as a condition of its permits. On September 14, 2009. the State Board issued an unnumbered order that covers DWR water right applications 5630, 14443, 14445A, and 17512. Condition 11 of this order states:

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[1] California Department of Water Resources Memorandum to Tim Stroshane, California Water Impact Network, February 10, 2011, p. 5.

[2] California Department of Water Resources Memorandum to Chris Shutes, California Sportfishing Protection Alliance, February 10, 2011, p. 2.

[3] See Supplement to Petition for Extension of Time for Application 5629 et al, point 5, pdf page 4.

[4] See DWR Memorandum to Chris Shutes, p. 4.

> 11. Upon the request of the Board, Permittee [DWR] shall make such measurements and maintain and furnish to the Board such records and information as may be necessary to determine compliance with the terms and conditions of this permit including the recognition of vested rights and for the further purpose of determining the quantities of water placed to beneficial use under this permit, both by direct diversion and storage.[5]

DWR's evasion of accounting in its petitions is neither credible nor logical. It also suggests DWR may willfully decline to comply with its water rights permit condition 11, which is also contrary to law and not in the public interest. In addition to the requirements of Condition 11, DWR must account for every release from Oroville, and every acre-foot pumped from Banks Pumping Plant, to and from its portion of San Luis Reservoir, to and from all other State Water Project reservoirs, aqueduct extensions, and turnouts along the California Aqueduct system. DWR meters water throughout this system precisely so that it can ensure at a minimum State Water Project contract compliance, compliance with the terms of water transfers it facilitates (e.g., its wheeling of water for non-contractors), and accuracy of its participation in "joint points of diversion" activity authorized under Water Rights Decision 1641 (D-1641). Considerable amounts of data are collected and presented by DWR annually in Bulletin 132, *Management and Operation of the State Water Project*.[6]

While compliance with existing permits per se is not subject to evaluation in a water rights petition, petitioners are required to adequately describe baseline conditions, if for no other reason than to comply with CEQA. Protestants continue to maintain that absent adequate accounting of use to date, DWR's petitions remain legally incomplete. C-WIN, CSPA, and AquAlliance urge the State Water Resources Control Board to reject DWR's failure to account for water use under each of its permits, and to require a complete petition that describes water put to use under each permit as a prelude to licensing State Water Project permits.

2. Granting DWR's petitions would not serve the public interest.

There is no disagreement from our organizations that there is a public interest in the continued operation and public purposes of the State Water Project. Instead, there is no public interest in allowing DWR an extension of five years on its permits when DWR itself has acknowledged that it has no expectation of making any additional progress toward full beneficial use of water. In effect, DWR asks for a procedural "time-out" from regulations that implement appropriative water rights doctrine.

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[5] State Water Resources Control Board, Order Approving Change in Place of Use and Issuing Amended Permits in the Matter of Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 1445A and 17512) of the California Department of Water Resources, September 14, 2009, p. 7.

[6] However, DWR has still not completed Bulletin 132s for water years 2007 through 2010, and 2011 concludes on September 30, 2011.

There are several reasons why granting DWR's petitions is not in the public interest. First, DWR gives no reasonable expectation of progress toward any additional beneficial use. DWR plainly and simply acknowledges that it will not make any progress toward increasing its diversions and contributions to storage to the amounts and volumes found in its permits. This directly contravenes California Code of Regulations, Title 23, Section 844, which requires that reasonable progress be made.

Second, Board approval of DWR's petitions would violate the co-equal goals of "providing a more reliable water supply protecting, restoring and enhancing the Delta ecosystem," as required in SB7X1 (2009). In Water Rights Decision 1650 (2011), the State Water Resources Control Board recently granted a permit to the cities of Davis and Woodland to divert up to 45,000 acre-feet per year from the Sacramento River. In arriving at this decision, the Board rejected CSPA's argument at hearing that the Board should defer decision on this permit until a known and ongoing process required by SB7X1 to determine and institute Delta flows was completed. In essence, the Board denied as invalid a suspension of decision pending completion of a process designed to provide ecosystem protection, restoration and enhancement. However, through DWR's petitions for time extensions, the Board is asked to suspend its decision whether to license a water supply project until a regulatory process also required by SB7X1 is allowed to reach a conclusion.

If the Board issues an order on DWR's petitions to suspend applicable water rights law, the Board would procedurally treat ecosystem protection and of water supply reliability unequally. This is not only contrary to legislative intent as expressed in SB7X1, but also to goal 6 of the Board's 2008 Strategic Plan: "Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures."[7]

Third, it is not in the public interest to accord DWR special treatment and allow it to play by different rules than other permit holders. The State Water Resources Control Board should treat all permit holders equally as it implements California Code of Regulations, Title 23, Section 844.

In sum, the State Water Resources Control Board should apply its due diligence regulation consistently, reject DWR's time extension requests, and license DWR's State Water Project permits.

Additionally, granting DWR's petitions for extension of time is not in the public interest because such action would have adverse environmental impacts, as described below.

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[7] Final Draft, Strategic Plan Update 2008-2012, adopted September 2, 2008, p, ii.

3. Extension of time of the State Water Project permits would have adverse environmental impacts.

DWR is required to operate the State Water Project in conformance with applicable biological opinions. DWR also is an active participant in the Bay Delta Conservation Plan planning process. The reasons for these requirements and actions are simple and direct: SWP operations (deriving from DWR's State Water Project permits) generate extensive and cumulating environmental impacts on listed aquatic species that use the Delta as habitat. There are also severe impacts on non-listed species: just this summer, it was well documented that operation of the Banks and Jones pumping plants killed literally millions of Sacramento splittail and thousands of individual fish from numerous other species, including fall-run salmon, the backbone of California's sport and commercial salmon fisheries.

DWR's own actions contribute to its inability to put water to full beneficial use under its permits. The regulatory limits imposed under biological opinions became necessary because DWR filed water right applications and the Board issued permits that allowed Delta pumping and project reservoir storage at levels that became highly detrimental to the ecosystems of the Delta estuary and its Central Valley watershed's rivers. This resulted in the listing of several species under the Endangered Species Act, some as early as the early 1990s. These detrimental effects could have been avoided by reducing Delta export pumping levels and by increasing project reservoir releases at appropriate times. The regulations imposed are intended to redress the unreasonable uses and methods of diversion DWR has employed under its State Water Project permits.

In August, 2010, the State Water Resources Control Board concluded that there is sufficient scientific information to support the need for greatly increased flows to protect Delta public trust resources. In making this conclusion, the Board asserted that "scientific certainty is not the standard for agency decision making."[8] In the Delta Stewardship Council's fifth staff draft of the Delta Plan (August 2, 2011) is a proposed requirement of the State Water Resources Control Board:

> The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan objectives and establish flows as follows:
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> a) By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals.[9]

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[8] State Water Resources Control Board, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem: Prepared pursuant to the Sacramento-San Delta Reform Act of 2009*, adopted August 3, 2010, p. 4.

[9] Fifth Staff Draft, Bay-Delta Plan, August 2, 2011, p, 86.

DWR offers no explanation in its petitions of how increased diversions under its State Water Project permits might be achieved, let alone without exacerbating the adverse environmental impacts of the State Water Project that have already occurred and continue to occur under historic and present levels of diversion. On the contrary, flows that would help recover species as analyzed by the State Water Resources Control Board in its *Delta Flow Criteria Report,* and that will be required under the Bay-Delta Plan, will almost certainly need to come in substantial part from *reductions* in State Water Project direct diversions, both in the Delta and in diversions to storage at Oroville.

Unwilling to explain how it expects to put more water to full beneficial use under its permits while protecting the public trust and complying with biological opinions, DWR only offers as justification that demand exists[10], and (using its own term) "speculates" that the outcome of various stakeholder and regulatory processes may create more advantageous regulatory conditions to the State Water Project than at present.

The adverse environmental impacts of State Water Project operations are known, ongoing, and destructive. The State Water Resources Control Board should instead license the Project's permits and reject DWR's petitions for a five-year "time-out" during which more environmental damage would occur.

4. California Environmental Quality Act (CEQA) Compliance

DWR has neither defined nor described a project to analyze under the California Environmental Quality Act (CEQA). Without a project description, C-WIN, CSPA, and AquAlliance request that both the State Water Resources Control Board and DWR clarify how DWR will achieve compliance of its petitions with CEQA. DWR's February responses to our protests repeatedly invoke the Bay Delta Conservation Plan (BDCP) process as justification for its petitions. The Bureau of Reclamation has suggested that it may rely on BDCP environmental documents for its own time extension request petitions for that agency's Central Valley Project permits. Our organizations previously stated that such reliance on BDCP would be inappropriate.[11] Reliance by DWR on the BDCP environmental review process for these State Water Project petitions would be similarly inappropriate.

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[10] Just as the map is not the same as the terrain, neither contractual obligations nor projected water demands constitute *real* water demands. As economic analysis demonstrates, demand for a commodity (including water) is a function of price, and prices may be either elastic or inelastic. The very drought conditions DWR uses to justify its State Water Project time extension requests regularly trigger water use reduction responses (such as rate hikes and voluntary reduction targets) from state water contractors, their customer agencies, and the customers at their taps. Demand and need are malleable and speculative, not fixed. The State Water Resources Control Board should ignore this rationale from DWR.

[11] See October 31, 2009 protest of CSPA and combined October 1, 2009 protests of C-WIN to Bureau of Reclamation Petitions for Extension of Time, Application 5625 et al.

On page 8 of its response to C-WIN and AquAlliance, DWR states that it is "currently conducting an environmental review process in compliance with CEQA." We have not been notified of the preparation of this environmental review either by DWR or by the State Board. We request that the Board require clarification of the nature and progress of this review, including the project to be analyzed, the date of the Notice of Preparation, and contact information, so that protestants may further inquire and be placed on the mailing list for this review process.

We are further confused by DWR's statement that it would comply with CEQA after this "extension period."[12] But because DWR mentions as many as *three* distinct potential environmental review processes associated with its time extension petitions for the State Water Project water rights, it is unclear to us as engaged participants how CEQA is being complied with at this time. We request that the State Water Resources Control Board provide clear direction to DWR that clarifies how CEQA compliance for DWR's petitions will be handled. Clarity on CEQA matters here will benefit all concerned.

5. The protests of C-WIN, AquAlliance and CSPA remain unresolved

In sum, DWR simply reasserts positions it stated in its earlier petitions to the State Water Resources Control Board to justify time extensions for State Water Project permits. Except for its February 2011 responses to our organizations, DWR has made no effort to contact us or to initiate discussions to resolve our protests. While our organizations would make representatives available for any such discussions, we believe it is unlikely that agreement on protest dismissal terms could be reached.

Any new increments of diversion and storage resulting from the current public processes outlined by DWR in its February letters to protestants are not only speculative, they also almost surely assume major modifications to existing permits that will require still further petitions, and not only for extension of time. They might well require new facilities, including both storage and diversion works. They may have new places of use. Large portions of them would likely bear little resemblance to existing permits. Future major changes in the State Water Project should be the subject of new water right applications, and present State Water Project permits should be licensed.

If you have questions about this letter please do not hesitate to contact any of us, or Tim Stroshane, with the California Water Impact Network (510/524-6313, Tim.Stroshane@c-win.org), or Chris Shutes, with California Sportfishing Protection Alliance (510/421-2105, blancapaloma@msn.com).

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[12] See DWR Memorandum to Chris Shutes, p. 3: "At the end of the extension period, DWR anticipates filing for a longer term time extension and will comply with the California Environmental Quality Act (CEQA) for any petition at that time."

Sincerely,



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