
State Water Resources Control Board

May 12, 2025

Jennifer Pierre
General Manager
State Water Contractors
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Hearing on Water Right Change Petitions for Delta Conveyance Project

Dear Ms. Pierre:

This responds, on behalf of the State Water Resources Control Board (State Water Board or Board), to a March 21, 2025 letter from the State Water Contractors (SWC) to Governor Gavin Newsom and the Members of the Board. In the March 21 letter, the SWC express concern about a recent ruling issued by the Presiding Hearing Officer in the evidentiary hearing that the State Water Board's Administrative Hearings Office (AHO) is conducting on the water right change petitions for the Delta Conveyance Project (DCP). Those petitions seek to add two authorized points of diversion to the water right permits for the State Water Project (SWP). The ruling directed the Department of Water Resources (DWR) to submit supplemental information concerning the maximum amount of water diverted and used under the SWP permits before the 2009 deadline to maximize diversion and use under the permits. The SWC assert that this information is outside the scope of the hearing and its consideration will delay the hearing schedule. In a policy statement submitted to the AHO on March 24, 2025, DWR's Director, Karla Nemeth, expressed similar concerns.¹

The SWC appear to recognize that procedural rulings issued in an AHO hearing are not subject to reconsideration by the Board. Nonetheless, they ask the Board to narrow the scope of the hearing to preclude consideration of the supplemental information. The basis of the request is a claim that their due process rights will be violated by consideration of the information in the hearing on the change petitions, and they claim that they will incur significant costs because of a delay in the hearing schedule.

¹ The SWC advanced similar arguments in a March 28, 2025 letter responding to a motion to cancel the DCP change petitions that was filed by several parties to the hearing who have filed protests against the change petitions. On March 31, 2025, a group of hearing protestants submitted a joint letter in response to the SWC's letters and DWR's policy statement.

As the Board emphasized in Order WR 22-087 at pp. 8-11, there are sound public policy reasons against the full board taking up objections to preliminary or procedural rulings by the AHO before the AHO completes its proceeding—including the potential for delay—and it has not been the Board’s practice to do so. Moreover, it is unnecessary in this case because the Board Members are monitoring the hearing closely and meeting regularly with the Presiding Hearing Officer in closed session to deliberate on matters pertaining to the conduct of the hearing. They have full confidence in the AHO’s ability to conduct the hearing fairly and efficiently, and to structure the hearing in a manner designed to ensure that an adequate administrative record is developed to support the Board’s decision on the change petitions for the DCP.

As to the particular issues raised by the SWC and DWR, the Board Members have followed, and at this time support, the Hearing Officer’s determination, explained in several rulings, that the supplemental information is necessary to make an informed and defensible decision on the change petitions. In addition, rather than causing delay, the supplemental information request is part of the AHO’s larger approach for structuring the hearing in a manner that will allow the Board to consider the change petitions without undue delay, notwithstanding uncertainty concerning the scope of the SWP permits, which has complicated the hearing.

As previously explained by the AHO, the fact that the deadline to maximize the beneficial use of water under the SWP permits was December 31, 2009, means that, as a matter of law, diversion and use under the permits is limited to the maximum amount of water actually diverted and used before the deadline, whether the DCP is approved or not, unless the Board grants an extension of time to further develop appropriate water rights under the permits. DWR has not fully developed its rights by maximizing the full “face value” of its permits before the deadline. Approval of a time extension would increase significantly the amount of water DWR could divert using existing SWP infrastructure, as well as the additional capacity that would be added to the SWP by the DCP. Thus, the uncertainty concerning the status of the SWP permits has engendered uncertainty concerning how the DCP would be operated, the extent of the water supply benefits of the project, and the nature and extent of the project’s potential impacts on other legal users of water and the environment.

To address the uncertainty concerning how the DCP will be operated, many parties in the hearing advocated for the hearing to be delayed pending the Board’s decision whether to grant a time extension. Under the current schedule, however, granting this relief would have meant delaying the hearing on the change petition for several years.²

² On January 21, 2025, DWR filed a time extension petition, seeking a 76-year extension of time to fully develop the SWP permits, but the petition is incomplete. DWR has estimated that data concerning the maximum amount of water diverted and used under the permits, which are required to be submitted in support of time extension petitions, would not be compiled until the end of May of this year, and CEQA documentation for the petition will not be complete until early 2026. DWR has requested

Instead, the AHO has structured the hearing so that it can proceed without delay by framing the key hearing issues in the alternative, and directing the parties to submit testimony and other evidence concerning the benefits and the impacts of the DCP under both possible scenarios: (i) a scenario that assumes that a time extension will be approved, and (ii) a scenario that assumes that it will not. This approach requires evidence to be submitted in the hearing concerning how much water DWR may divert without a time extension, which was the reason for the AHO's supplemental information request.³

In a recent ruling, the Presiding Hearing Officer explained that the supplemental information is relevant to the key hearing issue of whether the DCP would be in the public interest, taking into consideration the water supply benefits of the project, if a time extension is not approved. (February 28, 2025 Third Amended Notice of Public Hearing and Procedural Ruling, pp. 8-9.)⁴ The SWC and DWR maintain that this ruling is incorrect because consideration of the public interest is outside the scope of the hearing. The AHO's ruling, however, is consistent with the State Water Board's long-standing practice of considering the public interest in all aspects of its administration of water rights, including its consideration of water right change petitions. The Board has explained its authority and rationale for considering whether change petitions are in the public interest in several precedential Board orders. (See, e.g., Order WR 2009-033, p. 6, fn.4; Revised Water Right Decision 1641, pp. 117, 129.)

Citing Governor Newsom's policy statement in support of the DCP, the SWC also argue that the Board should not consider the public interest because the Governor and DWR have already determined that the DCP is in the public interest as a climate resiliency project, regardless of its water supply benefits. The Board will, of course, give careful consideration to the Governor's policy statement, as well as all the other policy statements, both for and against the project, that are made during the hearing. But the Board's findings of fact, including its public interest finding, must be supported by evidence in the record, and policy statements are not evidence. (Cal. Code Regs., tit. 23, § 648.1, subd. (d).)

The SWC also accuse the Board of having improperly prejudged the issue of whether the project is in the public interest as a climate resiliency project. Contrary to this

the Board to process the time extension petition separately from the DCP change petitions.

³ DWR has modeled DCP operations consistent with a scenario that assumes a time extension will be granted but has not modeled or otherwise evaluated how the project would be operated if DWR is limited to its historical maximum level of diversion and use because a time extension is not granted.

⁴ The Presiding Hearing Officer also explained that the supplemental information may be relevant to the key hearing issues of whether the proposed changes would, in effect, initiate a new water right or result in injury to other legal users of water, but DWR has proposed a condition of approval that may resolve those issues. (See February 28, 2025 Third Amended Notice of Public Hearing and Procedural Ruling, pp. 7-8.)

argument, neither the AHO nor the Board have prejudged whether the DCP may be in the public interest as a climate resiliency project, irrespective of its water supply benefits. The AHO has merely determined that the water supply benefits of the project, with or without a time extension to fully develop the SWP permits, is *relevant* to the issue of whether the project is in the public interest.⁵ DWR and the other parties, including the SWC, will have an opportunity to present evidence and legal argument on this issue during the hearing.

Finally, the SWC assert that they would be deprived of due process by the consideration of information concerning DWR's historic water use "outside of the proper legal construct and process" As stated previously in footnote two, DWR has already committed to supporting its request for a time extension by submitting to the Board information concerning the maximum historical diversion and use amounts under the SWP permits. Thus, the only issue is whether this information should be considered in the DCP hearing as well. The SWC have not explained why it would be improper to do so, given that the information is germane to DCP project operations and one or more key hearing issues. Nor have the SWC explained how their due process rights would be violated by the Board's consideration of information concerning existing legal constraints on the SWP's permits. As a hearing party, the SWC will be afforded ample opportunity to present evidence and argument on this issue to protect their interests.

In sum, the Board appreciates the SWC's and DWR's concerns about the scope and schedule of the DCP hearing. The Board is confident, however, that the supplemental information requested by the AHO is necessary to allow the hearing to proceed expeditiously and in a manner that will ensure the defensibility of both the hearing process and the Board's ultimate decision whether and under what conditions to approve the change petitions.

Sincerely,



Michael A.M. Lauffer
Chief Counsel
State Water Resources Control Board

⁵ It is the SWC who would have the Board prejudge an issue, as they would have the Board find, based on non-evidentiary policy statements, that the DCP is in the public interest as a climate resiliency project, irrespective of its water supply benefits, and narrow the scope of the hearing to preclude consideration of the public interest on that basis. Doing so would be procedurally improper.

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