

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS

DCP-WR-Petition@waterboards.ca.gov

Re: Delta Conveyance Project Water Rights Applications

**REQUEST FOR TIME EXTENSION OF THE PROTEST DEADLINE
REGARDING THE DEPARTMENT OF WATER RESOURCES'
APPLICATIONS FOR THE DELTA CONVEYANCE PROJECT
(Appl. Nos. 5630, 14443, 14445A, AND 17512)**

March 26, 2024

On February 29, 2024, the State Water Quality Resources Control Board (“Board”) published a Notice of Petition Requesting Changes in Water Rights of the Department of Water Resources (“DWR”) for the Delta Conveyance Project regarding certain Water Right Permits (Applications 5630, 14443, 14445A, and 17512). We have reviewed that notice. In the Notice, the Board explained that protests to the water rights application by DWR are due on April 29, 2024.

The Delta Tribal Environmental Coalition¹, the California Indian Environmental Alliance, San Francisco Baykeeper, The Bay Institute, Friends of the River, California Sportfishing Protection Alliance, Golden State Salmon Alliance, Institute for Fisheries’ Resources, Pacific Coast Federation of Fishermen’s Associations, Save California Salmon, AquAlliance, Sierra Club California, and Center for Biological Diversity together request an extension of the protest deadline to ensure a sufficiently resourced, fair, and factually and legally relevant adjudication process. Good cause exists to support that a significant extension of time in this matter is appropriate for practical reasons—haste is neither necessary nor feasible;

¹ The Delta Tribal Environmental Coalition comprises the Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, and Restore the Delta.

legal reasons—the regulatory rules and operational restrictions regarding use of the Tunnel remain in flux; and for equity reasons—to ensure adequate and fair opportunities for public participation, especially by Tribes, BIPOC communities, environmental justice organizations, and public interest non-profits.

First, the cumulative volume of documents, information, and prior testimony combined with the scope of the human and environmental impacts of the project, from pre-construction activities through long-term operations, is enormous. DWR relies primarily on the Final EIR for the Tunnel, issued in December 2023, to provide the underlying information necessary for this adjudication. *See, e.g.*, Petition Supplemental Information at p. 15, § V. The Final EIR contains thirty-six substantive chapters, over 80 appendices, and responses to public comments spanning 1.8 GB of data. CEQA lawsuits challenging the Final EIR and project approval, brought by over two-dozen parties – representing Tribal, municipal, waste management, environmental justice, fishing, agricultural, environmental, and fish and wildlife interests, among others – are pending. In that CEQA litigation, DWR has estimated that the administrative record will not be certified until 2025 and may be over a million pages long.

There is simply too much information already submitted by DWR and available about this project, with significantly more relevant information likely to be provided, to expect protests to be completed with the regulatory timeframe of sixty days. Moving this process ahead when the administrative record remains incomplete risks making decisions in this proceeding in the absence of material information that will later become available. Knowing hundreds of thousands of pages of potentially relevant information are going to be the basis of currently pending CEQA litigation, the Board should not force the parties to meet unreasonable deadlines in light of the circumstances of this application. This alone is good cause for a significant extension.

Second, overlap with the ongoing Sites Reservoir Water Rights adjudication also supports postponing the protest deadline. Practically, there is substantial overlap in the staff and hearing officer[s] responsible for reviewing and adjudicating the ongoing Sites Reservoir water rights application, which is currently slated to begin

with a pre-hearing conference on April 10 and to conclude with post-hearing briefs on November 2, and the newly noticed DCP application. Realistically, given the volume of information already before the Board and contemplated in the Sites Reservoir adjudication, it would be unreasonable and likely infeasible for the Board to review the DCP application, protests, and related evidence until after the Sites adjudication is completed. And if Sites' water rights applications are approved, diversions from the Sacramento River to Sites Reservoir should be included in the analysis of potential future operation of the Tunnel.

As a result, even if speed were imperative here (and it is not), practical constraints will likely prevent the Board, staff, and hearing office from conducting a thorough review of the information submitted by DWR and in protests to its application until sometime in 2025. This too is sufficient good cause to postpone the protest deadline as it will benefit the Board and allow protestants and DWR to move forward on a considered and thoughtful pace and will ensure the parties a complete ability to marshal and present the necessary arguments and evidence in the most efficient manner.

Third, concurrent adjudications of Sites' water rights applications, the DCP water rights application, and CEQA adjudications of both issues stresses limited government resources and places unnecessary and material burdens on Tribes, environmental justice, and other non-profit organizations representing environmental and public interests. Of the seventeen (17) Tribes and organizations who are signatories to this petition, thirteen (13) are parties to CEQA litigation over the DCP, five (5) are parties to CEQA litigation over Sites Reservoir, thirteen (13) are protestants in the Sites Reservoir water rights proceedings, and all are considering, or plan to, protest DWR's DCP water rights applications.

Ultimately, all four of these proceedings are part of intertwined interests and disputes over how water should be cared for, apportioned, and used in San Francisco Bay, the Delta, and throughout the watershed, especially related to the Sacramento River and its tributaries. The Tribes and organizations who present this request all have legitimate and significant sovereign or mission-related interests in the outcome

of *all* these proceedings combined with limited resources, budgets, staffing, and time. As such, proceeding with the standard regulatory deadlines in this case is prejudicial to many potential protestants, including groups representing previously excluded voices and people in water rights proceedings.

These practical constraints each provide good cause and taken together they demonstrate that a significant extension of time to file a protest in this adjudication is appropriate.

Fourth, there is no need to rush this process. The Tunnel's water rights adjudication is just one of many remaining permitting and approval processes that DWR is required to complete. DWR acknowledges it will need at least seven additional federal or state permits, none of which it had obtained at the time of filing the Petition. *See* Petition at p. 3 ("Federal and State Permits"). This, combined with ongoing legal challenges to existing permits related to operations of the State Water Project and Central Valley Project that DWR appears to rely on for operation of the Tunnel, *see* Petition Supplemental Information at 4, demonstrates that even completion of the water rights process will not provide the necessary conditions to move the DCP forward. There is no need to complete this proceeding ahead of the permits that will govern its operations, all of which remain either unissued or under legal challenge.

Fifth, other regulatory matters, which will have a threshold impact on analysis of DWR's application and its impact on fish and wildlife, remain pending. In September 2023, the Board published a Draft Staff Report and Substitute Environmental Document. Public comments on that document were due on January 19, 2024. As the 2023 Draft Staff report explained, the State Board intends to "develop and circulate specific regulatory text for the proposed Sacramento/Delta changes to the Bay-Delta Plan, including the program of implementation (collectively referred to as Plan amendments). These draft Plan amendments will be the specific regulatory text for the Plan itself and will be part of a full public process. Draft language is anticipated to be released for public review and comment in 2024." 2023 Draft Staff Report, pg. 1-20.

The Board's ultimate adoption of a complete, updated Bay-Delta Water Quality Control Plan, and EPA's approval of that plan, will set the ground rules for water quality standards for the Tunnel's operation. To determine whether water rights changes sought to operate the DCP should be approved, the Board will consider the impact on the public interest, public trust, water quality, and a host of other factors, many of which will be analyzed and impacted by the Final Bay-Delta Water Quality Control Plan. This plan should be completed (including EPA's required approval of the plan) before adjudication of the DCP water rights.

This uncertain regulatory and permitting backdrop also weighs in favor of finding good cause supports the requested extension.

Sixth, in response to a Civil Rights Complaint and Petition for Rulemaking brought in December 2022 by the Delta Tribal Environmental Coalition and Save California Salmon under Title VI of the Civil Rights Act of 1964 and the Clean Water Act, EPA informed the Board on August 8, 2023 that it was opening an investigation into the following issues:

1. Whether the [Board's] administration of . . . the Bay-Delta Water Quality Control Plan discriminates against Native Tribes, Black, Asian and Latino residents of the Bay-Delta Region, particularly the South Stockton community, on the basis of race, color, and national origin; and
2. Whether the Board has appropriate safeguards to ensure compliance with Title VI and other federal civil rights laws to ensure compliance with nondiscrimination obligations, and whether the Board has processes policies in place to ensure meaning public access and participation from all groups, especially those protected by federal civil rights laws.

See EPA Letter to E. Sobeck, State Water Resources Control Board, August 8, 2023, Re: Acceptance of Administrative Complaint at p.2, *available at*

<https://www.restorethedelta.org/wp-content/uploads/2023.08.08->

[REC Acceptance 01RNO-23-R9.pdf](#). That Complaint and Petition asks EPA to

withhold any federal approvals of infrastructure projects, specifically noting the Delta

Conveyance Project, while conducting its investigation and until the State Board is in compliance with the CWA and Title VI. EPA's investigation remains ongoing.

Refusing to extend the timeline for the water rights adjudication burdens potential protestants, including Tribes, public interest organizations, and environmental justice groups. It reduces their ability to meaningfully participate in the ongoing host of matters that will impact water quality in the Bay-Delta and its watershed. And it does so in the face of an investigation by the federal government into whether the Board does enough to allow for and ensure meaningful participation by *all* impacted communities. A desire for unneeded and impractical haste cannot justify excluding and burdening the ability of Native Tribes, Black, Asian and Latino residents of the Bay-Delta Region, particularly the South Stockton community, and other public interest organizations, to meaningfully participate in Board adjudications that will materially impact the waters, communities, and wildlife they rely on and advocate for.

Ultimately, there is no need to expedite this process and good cause exists to grant the requested relief. This proceeding need not occur ahead of the regulatory rules that will govern operation of the proposed Tunnel. The significant volume of information about the DCP that will be at issue in the water rights adjudication, the enormous human and environmental impacts the DCP raises, and the significant overlap in participants in the Sites Reservoir and DCP water rights and litigation proceedings, all weigh heavily in favor of granting this request. The current schedule, places unrealistic strains and expectations on limited government resources. It risks inconsistent resolution of related questions from different tribunals at the same time. And it materially burdens Tribal, environmental justice, environmental, fishing, and other public interest organizations. Good cause exists. The protest deadline should be vacated and reset.

Accordingly, we request the following:

1. The Board vacate the pending deadline for filing water rights protests for the Delta Conveyance Project;

2. The Board order that it will provide an Amended Notice with a new protest deadline within 30 days of completion of both:
 - a. The State Board's adjudication of the Sites Reservoir water rights applications and protests; and
 - b. EPA approval of Phase 1 and Phase 2 of the Bay-Delta Water Quality Control Plan adopted by the State Board (or separate EPA adoption of a complete Bay-Delta Water Quality Control Plan (Phase 1 and Phase 2));
3. In the alternative, the Board set the deadline for filing protests for 120 days after the State Board's adoption of Phase 2 of the Bay-Delta Water Quality Control Plan.
4. Finally, again in the alternative, should the Board wish to set a date certain at this time, we respectfully request an extension of no less than 270 days.

Respectfully submitted,



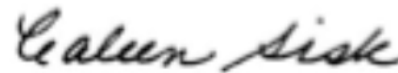
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