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## State Water Resources Control Board

July 1, 2024

### **Re: Procedural Ruling in the AHO Proceeding on the Proposed Sites Reservoir Project**

#### **TO ALL PARTIES:**

On June 17, 2024, the State Water Resources Control Board's (State Water Board) Administrative Hearings Office (AHO) conducted a pre-hearing conference in the matter of the pending petition for assignment of state-filed Application 25517 and accompanying water right Application 25517X01 and the pending petitions for release from priority of state-filed Applications 25513, 25514, 25517 (unassigned portion) 22235, 23780, and 23781 in favor of water right Application 25517X01 of Sites Project Authority (Applicant or Authority). This ruling letter addresses the outstanding procedural issues that arose during the June 17 pre-hearing conference.

#### **Extension of Deadline to File Case-in-Chief Exhibits**

The deadline for parties to file case-in-chief exhibits was July 1, 2024. (Procedural Ruling (Jun. 5, 2024) at p. 2.) Fifteen parties<sup>1</sup> requested in their joint pre-hearing conference statement a two-week extension of time to submit case-in-chief exhibits. Several other parties supported this request during the pre-hearing conference.<sup>2</sup> The NGO Protestors contend that there is good cause to extend the deadline to submit case-in-chief exhibits and that granting the requested extension would not otherwise affect the scheduled hearing. The Sites Project Authority objected to the request but did not identify any specific prejudice that might occur from granting the requested extension.

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<sup>1</sup> Friends of the River, California Sportfishing Protection Alliance, Sierra Club, San Francisco Baykeeper, Defenders of Wildlife, Golden State Salmon Association, The Bay Institute, Water Climate Trust, International Rivers, the Winnemem Wintu Tribe, Waterkeepers Alliance, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, San Francisco Crab Boat Owners Association, and North Coast Rivers Alliance (collectively, "NGO Protestors").

<sup>2</sup> Mr. King, Mr. Ornbaun, Central Delta Water Agency, Delta Farms Reclamation District No. 2030 (McDonald Island), Rudy Mussi Investment L.P., South Delta Water Agency, and Zuckerman-Mandeville, Inc., supported the request for additional time.

After considering the parties' arguments, I find that there is good cause for a modest extension of the deadline to submit case-in-chief exhibits and that a two-week extension will not result in undue prejudice to the Sites Project Authority. The NGO Protestors' request is therefore **granted**, and the deadline to submit case-in-chief exhibits (including exhibits, exhibit identification indices, and proposed permit terms) is **July 15, 2024**.

### **Separate Deadline for Submission of Slide Presentations**

Witnesses may use slide presentations to facilitate the presentation of summaries of their written testimony. These presentations may not add to or enhance the written testimony submitted by the witnesses. These presentations do not need to be submitted with case-in-chief exhibits but must be submitted to the AHO by **August 12, 2024**.

### **Court Reporting Services**

During the pre-hearing conference, the parties indicated that they had not reached agreement about how and whether to secure the services of a court reporter. Sites Project Authority has proposed paying 50 percent of the cost of court reporting services, with all protestants, except for the California Department of Water Resources (DWR) and the United States Bureau of Reclamation, collectively covering the remaining 50 percent. The protestants rejected this proposal. (See 2024-06-13 D. Mooney e-mail to A. Ferguson.)

In AHO hearings, the audio plus visual recording of the proceedings constitutes the official record. However, given the anticipated large number of hearing days and wide range in the scope of the testimony, timely and reliable court reporting services will benefit all parties to this proceeding, particularly in connection with the submission of closing briefs. The AHO strongly encourages the parties to continue their efforts to reach agreement on the retention of a court reporter but will not require any party to bear the full cost of securing court reporting services. The AHO intends to maintain the current hearing schedule regardless of any agreement by the parties. The AHO will retain court reporting services for the opening hearing day for policy statements on August 19, 2024, but does not intend to retain court reporting services for any subsequent hearing day.

If the parties are unable to reach agreement on this issue, the AHO will expect parties to cite the audio plus video recording when citing oral testimony in motions or closing briefs. Any party may independently obtain court reporting services. A party that cites an independently obtained transcript in a submission to the AHO will, however, be required to submit a complete transcript of the proceedings with that submission, which transcript will be made available to all parties at the time of submission.

### **Protest Dismissal Agreement**

On June 12, 2024, the Sites Project Authority, State Water Contractors, and the Department of Water Resources (Settling Parties) jointly notified the AHO that they had executed an agreement to resolve the State Water Contractors' protest to Application 25517X01. To effectuate that agreement, Sites Project Authority and State Water Contractors requested that the State Water Board replace a term included by the Authority in its submittal for Application 25517X01 and add an additional term not included with the Authority's application as conditions in any water right permit issued by the Board on the Authority's application. During the pre-hearing conference, counsel for State Water Contractors stated, and counsel for the Authority indicated his shared understanding, that the Authority was to amend Application 25517X01 to include the revised and new proposed permit terms.

The hearing officer directs Sites Project Authority to clarify for the AHO by **July 5, 2024**, whether it requests to amend Application 25517X01 or whether the Authority supports the inclusion of the revised and new proposed permit terms, instead of the term the Authority submitted with its application materials, in any water right permit issued on Application 25517X01, without formally amending its application. If Sites Project Authority seeks to amend Application 25517X01, then the Authority must either file a change petition or the Authority may seek a minor change under Water Code section 1700.4. The Authority shall address in any submission indicating its intent to pursue an amendment to its application, whether it believes that the procedures for a minor change under Water Code section 1700.4 should apply or whether the Authority intends to file a standard petition for change, and how the proposed process may or should affect the hearing schedule. If the Authority intends to amend its application, other parties may submit responses to the AHO by **July 15, 2024**, about the process for amendment proposed by the Authority.

Because the agreement between the Settling Parties that would resolve the State Water Contractor's protest is conditional, the hearing officer will allow State Water Contractors to continue to participate as a party in this proceeding in accordance with California Code of Regulations, title 23, section 648.1.

### **Witness Testimony and Examination**

The hearing officer and the parties discussed during the pre-hearing conference several issues around the ordering, grouping, and cross-examination of witnesses. By no later than **July 29, 2024**, the parties shall jointly identify:

1. The order in which all witnesses will testify at the hearing;
2. Any witnesses who the parties propose to group into panels for purposes of cross-examination; and
3. Any witnesses who will not be cross-examined during the hearing.

In the absence of an alternative agreement amongst the parties, witnesses who will not be cross-examined must still appear at the hearing to authenticate their written testimony. The AHO strongly encourages the parties to enter appropriate stipulations regarding undisputed witness testimony and the authenticity of written testimony to avoid the undue consumption of hearing time. (See Gov. Code, § 11513.) Any such stipulations should also be submitted to the AHO by **July 29, 2024**.

The hearing officer intends to issue a procedural ruling setting time limits for oral summaries of written testimony and cross-examination of witnesses, or witness panels, after July 29 but before the deadline for submission of witness presentations on August 12.

### **Identification of Additional Witnesses**

The deadline for parties to identify case-in-chief witnesses was June 12, 2024. (Procedural Ruling (Jun. 5, 2024) at p. 2.) Mr. Clarke Ornbaun did not identify any case-in-chief witnesses by the deadline. T&M King Farms, LLC (King Farms) identified Jeffrey Davids of Davids Engineering as an expert witness. Dr. Davids was also listed as a witness by Sites Project Authority and will not testify as a direct witness on King Farms' behalf. (Sites Project Authority, Case in Chief Witness List (Jun. 12, 2024) at p. 1; Sites Project Authority, Opp. To King Farms' and Clarke Ornbaun' S Motions to Present Expert Testimony (Jun. 25, 2024), at p. 2:18-20.)

King Farms and Mr. Ornbaun filed motions seeking an extension of time to identify witnesses on June 19 and 21, respectively. King Farms' motion identified Ben King as an expert witness on a variety of topics. (King Farms, Motion to Present Expert Testimony (Jun. 19, 2024), at p. 1:4-7.) Mr. Ornbaun's motion identified himself and Mr. Darrin Williams as expert witnesses on fourteen different topics. (Clarke Ornbaun, Motion to Present Expert Testimony (Jun. 21, 2024), at Attachment 2.) Both King Farms and Mr. Ornbaun are not represented by counsel and suggest that their failure to identify appropriate witnesses by the June 12 deadline stemmed from a lack of understanding of hearing procedures. (See *e.g., id.* at p. 1:10-15.) Sites Project Authority opposes King Farms' and Mr. Ornbaun's motions, arguing that neither motion demonstrates good cause for an extension of the deadline to identify witnesses and that the motions impermissibly seek a premature decision about whether Mr. King, Mr. Ornbaun, and Mr. Williams qualify as expert witnesses.

Sites Project Authority is correct that any determination of whether Mr. King, Mr. Ornbaun, and Mr. Williams qualify as expert witnesses would be premature. All that was required of the parties as of June 12 was to identify their witnesses and whether

they intended to call identified witnesses as experts.<sup>3</sup> (June 5, 2024 Amended Notice of Public Hearing and Pre-Hearing Conference, at p. 22.) Accordingly, the AHO declines to consider whether any witness qualifies as an expert under Evidence Code sections 801-805 (or other issues related to the admissibility of evidence) until after written testimony is submitted in this proceeding. (See Cal. Code Regs., tit. 23, § 648, subd. (b).)

The primary relief sought by King Farms' and Mr. Ornbaun's motions is relief from the June 12 deadline and the ability to submit written testimony by July 15 in accordance with this ruling letter and the Amended Hearing Notice. As Sites Project Authority correctly argues, hearing notices in AHO proceedings may require that all parties intending to present evidence at a hearing identify witnesses in advance. (*Id.* at, § 648.4, subd. (b).) Sites Project Authority also correctly notes that if a party fails to comply with such requirements, the hearing officer has discretion to admit the proposed testimony unless there is a showing of prejudice to any party or the Board. (*Id.* at § 648.4, subd. (e).)

Although Sites Project Authority argues that King Farms and Mr. Ornbaun could have potentially gained a tactical advantage by designing the scope of their proposed testimony in light of the Authority's timely-disclosed witnesses and topics, it fails to identify any concrete prejudice that will occur if Mr. King, Mr. Ornbaun, and Mr. Williams are allowed to submit written testimony by July 15. (Sites Project Authority, Opp. To King Farms' and Clarke Ornbaun's Motions to Present Expert Testimony (Jun. 25, 2024), at pp. 3:24-6:11.) Further, neither the motions nor the proposed topics identified as the subjects of Mr. King's, Mr. Ornbaun's, and Mr. Williams' testimony indicate that King Farms and Mr. Ornbaun seek such an advantage. Accordingly, the hearing officer has discretion to excuse the untimely identification of witnesses and allow King Farms and Mr. Ornbaun to submit written testimony.

Given the complexity of this hearing, the fact that King Farms and Mr. Ornbaun are unrepresented parties who claim to have misunderstood the deadlines associated with the hearing notice, the potential that they may submit testimony helpful to reaching a decision in this matter, and the lack of concrete prejudice to Sites Project Authority that may result from the untimely identification of Mr. King, Mr. Ornbaun, and Mr. Williams as witnesses, I hereby **grant** King Farms' and Mr. Ornbaun's request to submit those witnesses' written testimony. In doing so, I express no judgment on the ultimate admissibility of that testimony.

All parties should carefully review the deadlines and directions set forth in the Amended Hearing Notice and any subsequent procedural rulings and timely request clarification

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<sup>3</sup> Notably, Sites Project Authority's witness list identified 21 different witnesses who intend to offer expert opinion testimony.

as necessary and appropriate. Future failures to comply with such deadlines and direction may not be excused on the same grounds.

**Updated Pre-Hearing Deadlines and Hearing Schedule**

<b><u>Deadlines / Schedule</u></b>	<b><u>Date and Time</u></b>
Deadline for parties to file case-in-chief exhibits, exhibit identification indices, and proposed permit terms.	<b>July 15, 2024.</b>
Deadline for parties to file statement addressing witness order, groupings, and cross-examination; and any stipulations as to written testimony.	<b>July 29, 2024.</b>
Deadline for parties to file slide presentations for use by witnesses giving oral summaries of written testimony.	<b>August 12, 2024.</b>
Hearing begins with policy statements and discussion of procedural issues.	<b>August 19, 2024, at 9:00 a.m.</b>
Evidentiary portion of hearing begins.	<b>August 27, 2024, at 9:00 a.m.</b>
Additional case-in-chief hearing days.	<b>August 28-29, September 3 &amp; 6, 2024, starting at 9:00 a.m.</b>
Site visit.	<b>September 9 &amp; 10, 2024 (itinerary TBD)</b>
Additional case-in-chief hearing days (and additional days as necessary).	<b>September 11, 16, 18, 23, 24, 30, 2024, and October 2, and 8-10, 2024, starting at 9:00 a.m.</b>
Hold for additional site visit.	<b>October 22, 2024.</b>

Sincerely,

*/s/ Nicole L. Kuenzi*

Nicole Kuenzi  
 Presiding Hearing Officer  
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 State Water Resources Control Board

Attachments:

-Attachment 1 – Service List

**Attachment 1  
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