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State Water Resources Control Board

Executive Office

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Gray Davis
Governor

NOTICE OF RESUMPTION OF PUBLIC HEARING

IN THE MATTER OF DELTA WETLANDS PROJECT REGARDING WATER RIGHT APPLICATIONS 29062, 29066, 30268, and 30270 AND PETITIONS TO CHANGE THESE APPLICATIONS

Commencing on October 10, 2000 at 9:00 a.m. and continuing if necessary on
October 11 and 12, 2000 and additional days

at

**State Water Resources Control Board
Paul R. Bonderson Building
First Floor Hearing Room
901 P Street, Sacramento**

SUBJECT OF HEARING

The subject of this hearing is whether the State Water Resources Control Board (SWRCB) should approve, subject to terms and conditions, all or any of the water right applications and associated petitions for change listed above.

Applicant Delta Wetlands Properties (Applicant or DW) seeks to appropriate water by storage and direct diversion from the channels of the Sacramento-San Joaquin Delta by diverting water onto Webb Tract and Bacon Island in the Delta after converting these islands into reservoirs. Specifically, Applicant is seeking approval of Applications 29062 and 30268 for diversion onto Webb Tract and Applications 29066 and 30270 for diversion onto Bacon Island.¹ Applicant also seeks approval of petitions for change of each of these applications.

HISTORY OF THIS PROCEEDING

The SWRCB issued a notice of public hearing in this matter on March 11, 1997 and conducted a twelve-day hearing commencing on July 8, 1997 and concluding on August 20, 1997. The SWRCB took this matter under submission and reviewed the entire hearing record, including the draft Environmental Impact Report/ Environmental Impact Statement (draft EIR/EIS) prepared for the Project. The SWRCB, after deliberation, determined that several matters required further proceedings, including additional evidence, before the SWRCB could adopt a decision. The SWRCB

¹ Originally, Applicant also sought approval of Applications 29061 and 30267 for diversion onto Bouldin Island and Applications 29063 and 30269 for diversion onto Holland Tract. Applicant now proposes to use those two islands for wildlife habitat to offset the potential impacts on wildlife and wetlands of the Webb Tract and Bacon Island reservoirs. Irrigation for wildlife habitat would be accomplished using only Applicant's claimed riparian and senior appropriative water rights. Therefore, in connection with the 1997 hearing in this matter, Applicant stated that it intends to withdraw Applications 29061, 29063, 30267, and 30269. Those applications will not be considered in this hearing.

directed its staff to write a letter to the applicant inquiring as to its preferred courses of action, in light of certain concerns expressed in the letter. The letter, dated November 25, 1998, highlights several points, including the following: that additional information was needed to prepare the final EIR/EIS; that the additional information might require recirculation of the EIR; that DW's request to include a newly issued Biological Opinion in the hearing record would require further hearing; that the SWRCB could not make all of the findings necessary before the applications could be approved, due to substantial uncertainty regarding several significant hearing issues; and that there was no assurance the public would not have to bear the cost of mitigation and dismantling if the project was abandoned after construction.

Applicant has elected to have the state and federal lead agencies (SWRCB and the U.S. Army Corps of Engineers (USACE)) complete additional environmental documentation. The SWRCB will then conduct a further hearing to obtain more evidence. As a result, the lead agencies have circulated a draft revised EIR/EIS for public comment.

APPLICANT'S PROPOSED PROJECT

Applicant's proposed project is fully described in the environmental documentation prepared for this proceeding. Applicant proposes to convert Webb Tract and Bacon Island into water storage reservoirs and to manage Bouldin Island and most of Holland Tract as wildlife habitat. [Figure 1](#) shows the relative location of the islands in the Delta. The project is described in the draft EIR/EIS and in the draft revised EIR/EIS. Water stored on the reservoir islands would be discharged for beneficial uses including irrigation, domestic, municipal, industrial, fish and wildlife preservation and enhancement, and water quality uses. The requested place of use includes the service areas of the federal Central Valley Project and the State Water Project south and west of the Delta, and the San Francisco Bay/Sacramento-San Joaquin Delta Estuary as shown on maps on file with the SWRCB. The applications specify points of diversion of discharged water at the State Water Project Banks Pumping Plant, the Central Valley Project Tracy Pumping Plant, and/or the Contra Costa Canal Pumping Plant at Rock Slough. Additionally, the revised draft EIR/EIS shows point of diversion at the Contra Costa intake on Old River. The sources of water as specified in the applications are False River, San Joaquin River, Middle River, Santa Fe Dredge Cut, and Connection Slough. The revised draft EIR/EIS, reflecting a refined project description, does not include Santa Fe Dredge Cut and Connection Slough as points of diversion. However, these two locations are retained in the permitting process as potential points of diversion.

On Webb Tract, Applicant seeks to divert water under two applications, the first with a season of diversion of December 15 through May 1, to store up to 106.9 thousand acre-feet (taf) per year at a maximum rate of diversion of 5,000 cubic feet per second (cfs), and the second with a full-year season of diversion to divert up to 417 taf, including storage up to 155 taf per year at a maximum rate of diversion of 4,733 cfs and the balance by direct diversion at an average rate of 3,000 cfs. On Bacon Island, Applicant also seeks to divert water under two applications, the first with a season of



diversion of December 15 through May 1, to store up to 110.57 taf at a maximum rate of diversion of 5,000 cfs and the second with a full-year season of diversion to divert up to 405 taf, including storage up to 147 taf at a maximum rate of diversion of 4,809 cfs and the balance by direct diversion at an average rate of 3,000 cfs. Table 1A in the Notice of Public Hearing dated March 11, 1997 tabulates the elements of the applications for Webb Tract and Bacon Island.

ENVIRONMENTAL DOCUMENTATION

The SWRCB, as lead agency under the California Environmental Quality Act (CEQA), and the USACE, as lead agency under the National Environmental Policy Act (42 U.S.C.A. §§ 4321 et seq.), have jointly prepared and circulated a draft EIR/EIS. The draft EIR/EIS was released for comments on September 11, 1995. The lead agencies received comments, and the comment period on the draft EIR/EIS closed. The draft EIR/EIS was accepted in evidence in this proceeding during the part of this hearing that commenced on July 8, 1997. The lead agencies will complete a final EIR/EIS before the SWRCB adopts a decision or order approving any of the Delta Wetlands applications. After the 1997 hearing, the SWRCB notified the parties that additional environmental documentation would be prepared, and conducted a series of meetings with the parties to determine the scope of the additional environmental documentation and the progress of preparation of the additional documentation. The additional documentation, identified as the draft revised EIR/EIS, was released for circulation on May 31, 2000. Comments are due on July 31, 2000. Responses to the comments on both the draft EIR/EIS and the draft revised EIR/EIS will be included in any final EIR/EIS on the Delta Wetlands Project.

Copies of the Executive Summaries for the draft EIR/EIS and for the draft revised EIR/EIS are available at no charge from the SWRCB or from Jones & Stokes Associates, Inc., 2600 V Street, Suite 100, Sacramento, CA 95818-1914 (telephone number (916) 737-3000; fax number (916) 737-3030). Copies of the full documents may be purchased from Jones & Stokes Associates, Inc., for \$110.00 per copy of the draft EIR/EIS or \$95.00 per copy of the draft revised EIR/EIS, including tax, shipping, and handling.

Copies of the current biological opinions under the federal Endangered Species Act, and the incidental take permit under the California Endangered Species Act, for the Delta Wetlands Project are available from the following persons and are included in the draft revised EIR/EIS:

Ken Sanchez or Stephanie Brady
U.S. Fish and Wildlife Service
Endangered Species Division
2800 Cottage Way, Room W-2605
Sacramento, CA 95825
(916) 414-6625
fax: (916) 414-6712



Martha Volkoff
National Marine Fisheries Service
650 Capitol Mall, Suite 6070
Sacramento, CA 95814
(916) 498-6488
fax: (916) 498-6697

Nancee Murray
California Department of Fish and
Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
(916) 654-3818
fax: (916) 654-3805

KEY HEARING ISSUES

This continuation of the Delta Wetlands Project water right hearing is intended only to supplement the evidence already received, not to replace it. The bulk of the hearing already has been conducted. The SWRCB may exclude evidence that was available before September 1997 or is repetitive of evidence it received during this hearing in July, August, and September, 1997. The following issues will be considered during the additional hearing days announced in this notice.

1. At what times and in what circumstances is unappropriated water available to the Delta Wetlands Project? In addressing this question, the SWRCB encourages the parties to focus their evidence on a project that will be operated in accordance with at least the first two, and potentially all of the following constraints: (1) the settlement agreements between Applicant and some of the protestants, (2) the current requirements for the Project under the California and federal Endangered Species Acts, (3) a prohibition against diverting water at times when Contra Costa Water District (CCWD) is unable to divert water because of Endangered Species Act requirements on CCWD that are incorporated into CCWD's water right permits, (4) compliance with the Delta Outflow Objective in the Water Quality Control Plan for the San Francisco Bay/ Sacramento-San Joaquin Delta Estuary, adopted in May 1995 (1995 Bay-Delta Plan), and (5) limits on reservoir operations due to earlier compliance with the Export Limits in the 1995 Bay-Delta Plan. Parties are requested to present only new evidence that has become available since September 1997.

2. How much water would the Delta Wetlands Project be likely to export or sell for export over a period of years, taking into account varying sequences of year types, including critical dry, dry, below average, above average, and wet years? How much water is likely to be applied to instream flows in the Delta? How soon will the Delta Wetlands Project be ready to appropriate and sell water? How much water must the Project appropriate and sell annually to make the project feasible? Parties are requested to present only new evidence that has become available since September 1997.



3. How would operation of the Delta Wetlands Project affect the salinity of water diverted from the Delta during periods when the Project is releasing water into the Delta? What are the effects of both diversion operations and release operations on salinity in the Delta? What terms and conditions would reduce the effects on salinity? Parties are requested to present only new evidence that has become available since September 1997.

4. How would operation of the Delta Wetlands Project affect the organic carbon loading in water diverted from the Delta for municipal use during periods when the Project is releasing water into the Delta? What terms and conditions would minimize increases in organic carbon loading diverted in water from the Delta? Are such terms and conditions necessary to protect drinking water quality and to allow local water purveyors receiving water from the Delta to meet legal requirements? Are such terms and conditions feasible and in the public interest? Parties are requested to present only new evidence that has become available since September 1997.

5. How would the Delta Wetlands Project affect fish, wildlife, and other public trust resources? What terms and conditions should be included in any permit issued for the Delta Wetlands Project to protect these resources? Parties are requested to present only new evidence that has become available since September 1997.

6. What are the likely effects of the Delta Wetlands Project on levee stability, seepage onto neighboring islands, and utilities in the Delta? Is it in the public interest for the SWRCB to approve the Delta Wetlands Project if it has these effects? What actions would mitigate for these effects? Would proposals for mitigating the effects of seepage, such as the use of interceptor wells, have adverse effects on water supplies of senior water right holders or increase the amount of water the Project appropriates from the Delta channels? Are there alternatives to the interceptor wells or the proposed monitoring program that would be more effective and reduce the potential impacts? Parties are requested to present only new evidence that has become available since September 1997.

HEARING PARTICIPATION

A Special Note If You Want To Participate In This Hearing: All persons who plan to participate in this hearing should carefully read the enclosure entitled [“Information Concerning Appearance at Water Right Hearings.”](#) As stated in that enclosure, parties intending to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the SWRCB on or before **4:00 p.m. on August 14, 2000**. Parties are requested to provide electronic copies of their Exhibit Identification Indexes to the SWRCB for posting on the SWRCB website. Electronic copies may be provided on a disk or as an attachment to e-mail sent to:

WrHearing@waterrights.swrcb.ca.gov. Electronic copies of documents must be in a version supported by Microsoft Word 97. New exhibits for this hearing must be received by the SWRCB by 4:00 p.m. on September 15, 2000.



Questions concerning this notice may be directed to James E. Sutton, Senior Environmental Specialist, at (916) 657-2190, Jean McCue, Staff Engineer, at (916) 657-2203, (both at fax no. 657-1485) or Barbara J. Leidigh, Senior Staff Counsel, at (916) 657-2102 (fax no. 653-0428).

PARKING AND ACCESSIBILITY

The [enclosed map](#) shows the location of the Paul R. Bonderson Building in Sacramento. Public parking is available in the state Garage on 10th Street between O and P Streets, in metered spaces on area streets, and in the public parking garages on L Street between 10th and 11th Streets and on P Street between 11th and 12th Streets. The First Floor Hearing Room is accessible to persons with disabilities.

ORIGINAL SIGNED BY:

Maureen Marché
Administrative Assistant to the Board

Dated: June 16, 2000



INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced for purposes of the above-mentioned hearing.

1. **PARTIES:** The parties are the parties who were parties in this hearing in 1997. A person or entity who appears and presents only a policy statement is not a party.
2. **NOTICE OF INTENT TO APPEAR:** Each party intending to participate must submit to the SWRCB and to each of the other parties the name of each witness who will testify in such party's behalf, together with certain other information. Parties who wish to participate in this hearing must file a Notice of Intent to Appear and ten copies thereof which must be received by the SWRCB no later than **4:00 p.m. on August 14, 2000**. Any Notice of Intent to Appear provided to the SWRCB by FAX must be followed immediately by complete hard copies for inclusion in the hearing record.

Each party submitting to the SWRCB any document, including but not limited to exhibits in the form of written testimony, correspondence, notices, and briefs must at the same time send a copy to every party on the service list.

3. **WRITTEN TESTIMONY:** Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing. Each piece of written testimony is, and shall be treated as, a new exhibit (See item 4 below.), and must be submitted with the other new exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded.
4. **EXHIBITS:** Each party wishing to present new exhibits shall submit ten copies of its new exhibits and revised Exhibit Identification Index to the SWRCB and serve one copy of each new exhibit and revised index on each of the other parties on the service list. The new exhibits for this hearing must be received by the SWRCB by **4:00 p.m. on September 15, 2000**.

Parties intending to rely, during their cases in chief, on exhibits previously submitted to the SWRCB for this hearing should not resubmit them to the SWRCB, but shall specifically identify such exhibits in updated exhibit indexes.

New or revised Exhibit Identification Indexes should be supplied to the SWRCB electronically on a disk or as an attachment to electronic mail sent to WrHearing@waterrights.swrcb.ca.gov, with the subject heading of "Delta Wetlands" in addition to paper copies. The electronic copy of the Exhibit Identification List must be in a version supported by Microsoft Word 97.



The Status as Evidence column in the Exhibit Identification Index will be completed by the SWRCB during the hearing. Written testimony and statements of witness qualifications are considered exhibits. A statement of service with manner of service indicated shall be filed with each party's exhibits.

Before **4:00 p.m. on September 15, 2000**, parties who do not intend to present a case in chief during this hearing, but who may wish to cross-examine witnesses or present rebuttal are requested to notify the SWRCB in writing, with copies to the other parties, of their intention to participate.

5. ORAL TESTIMONY:

- a. Oral testimony will be taken only on oath or affirmation. Each party has the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross examination. Board members and the Board's counsel may ask questions at any time, and the Board members and staff may cross examine any witness. Ordinarily, only the party or the party's representative will be permitted to examine witnesses, but the hearing officer may allow the party to designate a person technically qualified in the subject being considered to examine a witness.
 - b. All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Witnesses will be allowed up to twenty minutes to summarize or emphasize their written testimony on direct examination³. Each party will be allowed up to two hours total to present all of its direct testimony. Cross examination will be permitted on the written submittals and any oral testimony. The initial time for cross examination will be limited to one hour. The hearing officer has discretion to allow additional time for direct testimony or for cross examination if there is good cause demonstrated in an offer of proof. The witnesses for each party will be cross examined as a panel. Redirect examination and recross examination may be permitted for good cause at the discretion of the hearing officer, and will be limited to the scope of the cross-examination and the redirect examination, respectively.
- 6. REBUTTAL:** Rebuttal evidence will be allowed after all parties have presented their cases in chief and their witnesses have been cross-examined. At the end of the cases in chief, the hearing officer will set a schedule for parties to present their rebuttal evidence. Rebuttal evidence is new

³ The hearing officer may make an exception to this rule if the witness is adverse to the party presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement. In such a case, the hearing officer may allow presentation of the oral direct testimony without requiring written testimony and may allow additional time for the oral direct testimony of the witness if the hearing officer is satisfied that the party could not produce written direct testimony for the witness.



evidence used to rebut evidence presented in another party's case in chief. New witnesses and exhibits may be presented during rebuttal without previous notice. Rebuttal evidence is limited to evidence that is responsive to evidence presented in a case in chief, and it does not include evidence that should have been presented during the presenter's case in chief. Cross-examination of rebuttal witnesses will be limited to the scope of the witness' rebuttal testimony.

7. **EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there will be no *ex parte* communications between board members or staff of the SWRCB and any of the parties regarding substantive issues within the scope of the proceeding. Communications regarding solely procedural matters will be permissible, but ordinarily should be directed to SWRCB staff, not board members.
8. **SUMMARIES AND LEGAL ARGUMENTS:** At the beginning of each case in chief, the party or the party's attorney may make an opening statement briefly and concisely stating what the proposed evidence is intended to establish. At the close of the hearing or at other times if appropriate, the hearing officers will set a schedule for filing briefs. Ten copies of each brief shall be submitted to the SWRCB, and one copy shall be served on each of the other parties on the service list. A party shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in evidence. A statement of service with manner of service indicated shall be filed with each brief.
9. **POLICY STATEMENTS:** Consistent with its regulation at California Code of Regulations, title 23, section 648.1(d), the SWRCB will provide an opportunity for presentation of nonevidentiary policy statements or comments by interested persons who are not participating as parties. Policy statements are subject to the following provisions in addition to the regulation:
 - a. Policy statements are not subject to the prehearing requirements noted above for testimony or exhibits, except that persons wishing to make policy statements are requested to file a Notice of Intent to Appear, indicating clearly an intent to make only a policy statement.
 - b. The SWRCB requests that policy statements be provided in writing before they are presented. Oral summaries of the policy statements will be limited to five minutes or such other time as established by the hearing officers.
10. **HEARING PROCEDURES:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-649.6 and 760, as they currently exist or may be amended. A copy of the current regulations is attached. (See Enclosure 1(a).)

Parties shall file their requests in writing when seeking exceptions to procedural requirements. To provide time for other parties to respond, the hearing officer will rule on procedural requests



filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

Failure to submit witness information and exhibits in a timely manner may be interpreted by the SWRCB as intent not to appear.

If there is any change in the hearing schedule, only those parties who have filed a Notice of Intent to Appear will be informed of the change.

Materials submitted to the SWRCB should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Attn: **Jim Sutton**
Phone: (916) 657-2190
Fax: (916) 657-1485
Email: WrHearing@waterrights.swrcb.ca.gov

