

State Water Resources Control Board

August 13, 2024

Re: Procedural Ruling Regarding Time Limits in the AHO Proceeding on the Proposed Sites Reservoir Project

TO ALL PARTIES:

This procedural ruling sets time limits that will apply during the hearing applicable to summaries of direct testimony by witnesses, cross-examination, and evidentiary objections or other motions raised orally by the parties. The purpose of these limits is to ensure an orderly and efficient case-in-chief portion of the hearing that can be completed within the scheduled hearing days. This ruling also sets an order of proceeding for the presentation of policy statements on August 19 and identifies procedural issues to be addressed on August 19 after hearing policy statements.

Direct Testimony and Order of Proceedings

On July 1, 2024, the AHO directed the parties to jointly identify the order in which the parties' witnesses will testify at the hearing, any witnesses who the parties propose to group into panels for cross-examination, and any witnesses who the parties do not intend to cross-examine. The parties did not submit a joint proposal. Instead, the Sites Project Authority, the NGO Parties (AquAlliance, California Sportfishing Protection Alliance, Friends of the River, California Water Impact Network, Restore the Delta, Sierra Club California, Save California Salmon, The Winnemem Wintu Tribe, Center for Biological Diversity, San Francisco Baykeeper, Defenders of Wildlife, Golden State Salmon Association, Water Climate Trust et al., and Pacific Coast Federation of Fishermen's Associations et al.), the Delta Water Agency Parties (Central Delta Water Agency, South Delta Water Agency, Zuckerman-Mandeville, Inc., Delta Farms Reclamation District NO. 2030, Rudy Mussi Investment L.P., and County of San Joaquin), T&M King Farms LLC, the U.S. Bureau of Reclamation, and State Water Contractors submitted separate statements regarding these topics.

Order of Testimony

Based on the parties' submissions set forth above, the AHO sets the order of testimony as follows:¹

1. Sites Project Authority;²
2. NGO Parties³
 - a. Jonathan Rosenfield
 - b. Sherri Norris
 - c. Lester Marston
 - d. Gary Mulcahy
 - e. Chairman Wayne Mitchum
 - f. Vice Chair Malissa Tayaba
 - g. Ronald Stork
 - h. Chris Shutes
 - i. Jacob Kahn, PhD & Eli Asarian (on behalf of Save California Salmon)
 - j. Christina Swanson, PhD
 - k. Scott Artis
 - l. George Bradshaw or Lisa Damrosch
 - m. Shawn Smallwood, PhD
 - n. Mark Easter
 - o. Jeff Michael, PhD
 - p. Eli Asarian (on behalf of Water Climate Trust)
 - q. Bruce Reznik
 - r. Organizational Witnesses (Carolee Krieger, Jeff Miller, Ashley Overhouse, Keiko Merz, Cintia Cortez, Sejal Choksi-Chugh, and Erin Woolley)
3. Delta Water Agency Parties (6)

¹ In ordering the witnesses as set forth herein, the AHO expresses no opinion or ruling about the ultimate admissibility of their direct testimony.

² The AHO accepts Sites Project Authority's proposal to group its witnesses into ten panels as set forth in the July 29 SPA Statement and will impanel those witnesses in the order identified therein.

³ Based on Sites Project Authority's representation that it will not cross-examine Clyde Macdonald (FOR-12) and Tom Stokely (PCFFA-25), the AHO does not intend to permit Mr. Macdonald or Mr. Stokely to orally summarize their direct testimony. Any party who disputes the authenticity of PCFFA-25 or FOR-12, or otherwise intends to cross-examine Mr. Macdonald or Mr. Stokely, shall inform the AHO by email no later than end of the day, August 20.

- a. Thomas K. Burke, P.E.
 - b. Dante John Nomellini, Esq.
 - c. Gregory F. Wilson, P.E.
 - d. Joey Ratto
 - e. Richard Pellegrini
 - f. Bruce Herbold
4. Ben King, T&M King Farms LLC
 5. Clarke F. Ornbaun

The AHO understands that Jonathan Rosenfield and Bruce Herbold have availability constraints that may impact the order of proceedings. The order of testimony set forth above is intended to accommodate those constraints. If the course of the hearing appears likely to conflict with Dr. Rosenfield's and Dr. Herbold's availability, the AHO expects the parties to reach agreement on appropriate modifications to the hearing schedule and promptly inform the AHO of any necessary changes in the order of testimony.

Time Limits for Presentation of Cases in Chief, Cross-examination, and Oral Objections and Motions

In lieu of setting specific time limits for each party's presentation of direct testimony and cross examination, the AHO intends to allocate a total number of hours to all parties using a "chess clock" approach. This approach allocates a specific amount of time to the parties to make opening statements, present direct oral testimony, conduct cross-examination, make evidentiary objections, or otherwise participate in the hearing process as they see fit, subject to the hearing officer's ongoing discretion to manage the hearing.⁴ (See Gov. Code, § 11513, subd. (f); *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560, disapproved on other grounds in *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1273.) AHO staff will track the parties' use of their time. The AHO will not allocate additional time to any party except upon an offer of proof and showing of good cause and will not entertain such requests from any party before it has exhausted all of its allocated time.

After accounting for the proposed site visit, the August 19 policy statement day, appropriate breaks, and the likelihood that various procedural issues will need to be addressed during the hearing, the AHO allocates the anticipated available hearing time as follows:

1. Sites Project Authority: 40 hours.

⁴ Parties who elect to make a policy statement in lieu of an opening statement will not have their policy statements counted against their allocated time.

2. Protesting Parties: 46 hours.
3. U.S. Bureau of Reclamation, California Department of Water Resources, and State Water Contractors: 6 hours.

The AHO expects the protesting parties to meet and confer in advance of the hearing to further allocate their allotted time among themselves but does not intend to track time on an individualized basis.

Order of Proceedings for Presentation of Policy Statements

On August 6, 2024, the AHO requested that any interested person who intends to present an oral policy statement on August 19 submit an NOI by e-mail to **sites-wr-application@waterboards.ca.gov**, indicating the party's intent to speak, by 5:00 pm on Friday, August 9. Based on the NOIs received, the order of proceedings on August 19 shall be as follows:

1. Opening of Hearing
2. Policy Statements
 - a. Secretary Wade Crowfoot, CNRA
 - b. Congressman John Garamendi
 - c. Congressman Mike Thompson
 - d. Kathleen Miller or Shannon Little, California Department of Fish & Wildlife
 - e. U.S. Bureau of Reclamation
 - f. Graham Allen, Placer County Water Agency
 - g. County of Colusa
 - h. Northern California Water Association
 - i. Benjamin Testani, NorCal Resist
 - j. Matt Groody, Northeastern California Building and Construction Trades Council
 - k. Adrian Covert, Bay Area Council
 - l. Valerie Pryor, Zone 7 Water Agency
 - m. Alexandra Biering, California Farm Bureau
 - n. Aubrey Bettencourt or Blake Vann, Almond Alliance
 - o. Mike Wade or Brandon Souza, California Farm Water Coalition
 - p. Tim Johnson, California Rice Commission
 - q. Joshua Rahm, California Walnut Coalition
 - r. Adam Borchard, California Fresh Fruit Association
 - s. Michael Le, Foothill Municipal Water District
 - t. Victoria Llort, Desert Water Agency
 - u. David Pedersen, Las Virgenes Municipal Water District
 - v. Heather Dyer, San Bernardino Valley Municipal Water District

- w. Lance Eckhart, San Geronio Pass Water Agency
 - x. Sandra Jacobs, Santa Margarita Water District
 - y. Sarah Wiltfong, Los Angeles County Business Federation
 - z. March Stange or Jon Switalski, Rebuild SoCal Partnership
 - aa. Charles Wilson, Southern California Water Coalition
 - bb. Robert Cheng, Coachella Valley Water District
3. Discussion of Outstanding Procedural Issues

Evidentiary Issues to be Addressed on August 19

During the June 17 pre-hearing conference, counsel for some of the NGO Parties indicated that they intended to offer testimony to establish the parties' standing. (June 17, 2024, Sites Pre-Hearing Conference Recording at 38:00-40:05.) These parties subsequently submitted testimony from seven witnesses that appears intended to establish their sponsoring organizations' legal standing with respect to the issues to be addressed in this hearing. (See CWIN-1, CFBD-1, FOR-22, RTD-1, BK Ex. 122, Sierra Club-1, DOW-1.) In addition to setting forth the interests of their sponsoring organizations, these witnesses' testimony also included claims about impacts from the proposed Sites Reservoir Project and reasons why the project is not in the public interest.

In its July 29, 2024 Statement Regarding Witness Order, Panel Groupings, and Cross-examination (July 29 SPA Statement), Sites Project Authority indicated that it had reached agreement with San Francisco Baykeeper to admit only paragraphs 1-6 of BK Ex. 122. Sites Project Authority also indicated that if protesting parties agreed to strike specific portions of the other six witnesses' "testimony claiming Project impacts and/or purported reasons the Project is not in the public interest[,]" it would consider stipulating to the admission of these witnesses' testimony.

The protesting parties who submitted these seven witnesses' testimony filed timely protests to Sites Project Authority's application and associated petitions that remain unresolved. Under California Code of Regulations, title 23, section 648.1, subdivision (b), the parties to an adjudicative water right proceeding before the board shall include persons who filed unresolved protests. Therefore, no evidence in addition to the parties' unresolved protests is necessary for these parties to establish standing to participate in this proceeding. Although evidence about the organizational interests of these parties may be relevant in a subsequent court proceeding, it does not appear to be relevant to this hearing.

The testimony included by these witnesses about project impacts does appear relevant to the hearing issues. However, the testimony is relatively general in substance and

may be duplicative and cumulative of other more detailed testimony submitted by the protesting parties' expert witnesses.

Under Government Code section 11513, subd. (f), the hearing officer "has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." I intend to address this evidentiary issue during the hearing on August 19, after hearing policy statements, and invite the parties to comment as to whether I should exercise my discretionary authority to exclude this testimony from the evidentiary record in the interest of conducting an efficient hearing and instead accept the statements as non-evidentiary policy statements.

I also invite the parties to identify during the pre-hearing conference any other testimony the admission of which may result in an undue consumption of time and which may be more appropriately characterized as a policy statement.

Sincerely,

A handwritten signature in blue ink that reads "Nicole Kuenzi". The signature is written in a cursive, flowing style.

Nicole Kuenzi
Presiding Hearing Officer
Administrative Hearings Office
State Water Resources Control Board

Attachments:

-Attachment 1 – Service List

**Attachment 1
SERVICE LIST**

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