

State Water Resources Control Board

September 3, 2024

Re: Procedural Ruling Regarding Evidentiary Issues, Time Limits, and Site Visit in the AHO Proceeding on the Proposed Sites Reservoir Project

TO ALL PARTIES:

This procedural ruling addresses the motions to supplement case-in-chief exhibits filed by T&M King Farms LLC (King Farms) and San Francisco Baykeeper (Baykeeper) on August 9 and 12, respectively; the objections to certain testimony offered by the protesting parties; changes to the case-in-chief time limits discussed orally during the hearing on August 28; and King Farms' August 30 motion for additional time. This ruling also provides further direction regarding the site visit on September 9 and 10.

As discussed in greater detail below, the AHO denies King Farms' motion to add exhibit King-69 to its case-in-chief exhibits, and grants Baykeeper's motion to add exhibits BK-124 and BK-125 to Baykeeper's case-in-chief exhibits. It also excludes the testimony offered as exhibits CWIN-1, CFBD-1, FOR-22, RTD-1, BK-122, Sierra Club-1, DOW-1, SCS-1, and GSSA-20 pursuant to Government Code section 11513, subdivision (f). This ruling is made without prejudice to Mr. King's opportunity to submit King-69 as a rebuttal exhibit, subject to the limitation that rebuttal evidence must respond to an element of the case-in-chief presented by the Sites Project Authority (Authority). This ruling is also without prejudice to the opportunity of the other protestants to submit in rebuttal revised testimony from the witnesses whose testimony is excluded, subject to the limitation that rebuttal evidence must respond to an element of the Authority's case-in-chief. Finally, this ruling allows King Farms limited additional time for an opening statement and summary of direct testimony.

Motions to Supplement Case-in-Chief Exhibits*King Farms' motion to submit Exhibit King-69 as a case-in-chief exhibit*

On August 9, 2024, King Farms (represented by Ben King) submitted a motion requesting to add proposed exhibit King-69 after the exhibit filing deadline. Exhibit King-69 appears to be a slide presentation entitled "Manager's Group Presentation" about the Colusa Basin Drain dated August 4, 2023, along with an email from Kyle Knutson of MBK Engineers to Authority witnesses Alicia Forsythe and JP Robinette dated August 15, 2023. (2024-08-09 T&M King Farms LLC Motion ("King Farms Motion"), p.1). Mr. King stated that he failed to submit Exhibit King-69 by the July 15, 2024, deadline to submit case-in-chief exhibits because he did not realize the presentation differed from others contained in public records King Farms received on January 6, 2024.

The Authority submitted an opposition to King Farms' motion on August 13, 2024. The Authority contends that: (1) King Farms has failed to make a showing of good cause as to why it did not submit Exhibit King-69 by the July 15 deadline; and (2) the Authority would be prejudiced by allowing King Farms to submit the exhibit after the deadline because doing so would impose additional burdens on the Authority after it has already spent resources reviewing testimony and exhibits. On August 15, King Farms filed a reply to the Authority's opposition that discussed the purported relevance of King-69 to these proceedings and generally disputed that accepting the exhibit would prejudice the Authority.

Section 648.4 of the State Water Resources Control Board's (State Water Board or Board) regulations generally addresses the timing of submission of hearing exhibits. Under section 648, subdivision (a), it is the Board's policy to "discourage the introduction of surprise testimony and exhibits" in adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648.4 subd. (a).) To effectuate that policy, section 648, subdivision (c) provides that a hearing notice in an adjudicative proceeding may require written testimony and exhibits to be submitted by a date certain before a hearing begins. (*Id.* at subd. (c).) When a party fails to comply with such requirements, section 648, subdivision (e) further provides that the hearing officer may refuse to admit an exhibit, and must refuse to do so, if any party or the Board shows that it will be prejudiced by acceptance of the late submission. (*Id.* at subd. (e).)

The June 5, 2024 Amended Notice of Public Hearing initially set a deadline of July 1 for parties to submit evidence in support of their cases-in-chief. The hearing officer subsequently extended the deadline to July 15. (2024-07-01 Procedural Ruling (Sites), p. 1 (July 1 Procedural Ruling).) The July 1 Procedural Ruling also allowed King Farms

to submit written testimony despite its failure to identify Mr. King as a witness in accordance with the hearing notice. (*Id.*, at pp. 4-5; see also Cal. Code Regs., tit. 23, § 648.4 subd. (b).) In doing so, the AHO directed all parties to “carefully review the deadlines and directions set forth in the Amended Hearing Notice and any subsequent procedural rulings” and warned that “[f]uture failures to comply with such deadlines and directions” might not be excused. (July 1 Procedural Ruling, pp. 5-6.)

King Farms’ motion fails to provide good cause to justify the late submittal of Exhibit King-69 on August 9, 25 days after the deadline for submission of case-in-chief exhibits. As its motion concedes, King Farms had possession of Exhibit King-69 as of January 6, 2024. (King Farms Motion, p. 1.) King Farms’ failure to timely submit Exhibit King-69 was not a clerical error. Instead, Mr. King admits that he did not review the documents in his possession with sufficient diligence to realize that Exhibit King-69 might be relevant to this proceeding until after the July 15 deadline. (*Id.*) I therefore deny King Farms’ motion as an exercise of my discretion under section 648.4, subdivision (e), without prejudice to any appropriate submission of Exhibit King-69 on rebuttal or use for cross-examination.¹

Baykeeper’s motion to supplement case-in-chief exhibits.

On August 12, 2024, Baykeeper filed a motion to supplement its case-in-chief exhibits with two proposed exhibits: (1) the U.S. Fish & Wildlife Service’s (USFWS) Proposed Rule Listing Longfin Smelt, 87 Fed. Reg. 60957 (BK-124); and (2) USFWS’s Final Rule Listing Longfin Smelt, 89 Fed. Reg. 61029 (BK-125). (2024-08-12 Baykeeper Motion to Add Exhibits (Baykeeper Motion).) Baykeeper contends that its failure to submit BK-124 as an exhibit was purely inadvertent, pointing to Baykeeper witness Dr. Jonathan Rosenfield’s repeated citations to USFWS’ Proposed Rule in his testimony. (Baykeeper Motion, p. 1.) Proposed exhibit BK-125 was not published until July 30, 2024, after the July 15 deadline for submission of case-in-chief exhibits. (See *Endangered and Threatened Wildlife and Plants; Endangered Species Status for the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt*, 89 FR 61029-03 (Jul. 30, 2024).)

¹ In denying King Farms’ motion, I offer no opinion as to whether exhibit King-69 could be properly introduced and accepted into the evidentiary record in the rebuttal phase of this hearing or through use on cross-examination. Mr. King utilized King-69 during his cross-examination of Angela Bezonne on August 28, 2024. (2024-08-28 Afternoon Recording (Sites) 1:25:06-1:28:55).

It would have been impossible for Baykeeper to have submitted BK-125 by the July 15, 2024, deadline, and based on Dr. Rosenfield's repeated references to the document identified as BK-124, I conclude that Baykeeper's failure to submit it was likely inadvertent. Both documents are also publicly available official records published in the Federal Register. Baykeeper's motion is unopposed, and I am not aware that any party or the Board would be prejudiced by accepting the untimely submission of BK-124 and BK-125. Accordingly, I grant Baykeeper's motion.²

Ruling Regarding Organizational Testimony

In my August 13 Procedural Ruling, I identified testimony from seven witnesses that appeared to be offered primarily for the purpose of establishing their sponsoring organizations' standing and invited the parties to comment on whether those witnesses' testimony should be excluded under Government Code section 11513, subdivision (f). (2024-08-13 Procedural Ruling (Sites), p. 5 [citing CWIN-1, CFBD-1, FOR-22, RTD-1, BK-122, Sierra Club-1, DOW-1].) The Authority subsequently requested that the AHO exclude the testimony of two other witnesses (SCS-1 and GSSA-20) on the same grounds.³ During the August 19 pre-hearing conference, representatives of various parties confirmed that the nine exhibits cited above (Organizational Testimony) had been offered primarily for the purpose of establishing their sponsoring organizations' standing in potential future litigation. (2024-08-19 Court Reporter Transcript (Sites), pp. 107:3-109:10.)

The protesting parties who submitted these nine witnesses' testimony filed timely protests to the 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. The parties' standing to seek judicial review of the State Water Board's final decision after this proceeding is not relevant to any of the issues set forth in the hearing notice, nor have the various organizations that sponsored the Organizational Testimony

² The AHO's decision to accept the late submission of BK-124 and BK-125 is not a ruling on the ultimate admissibility of those exhibits.

³ The Authority also objected to the testimony of Gary Mulcahy (FOR-4) during the August 19 Pre-Hearing Conference. As I indicated in an e-mail to the service list on August 28, I do not intend to rule on the objection to Mr. Mulcahy's testimony without providing Mr. Mulcahy with another opportunity to respond. If the Authority maintains its objection to Mr. Mulcahy's testimony, it should renew that objection at the time Mr. Mulcahy is sworn in as a witness.

identified any authority suggesting they will be prejudiced if this testimony is excluded. And although the Organizational Testimony's statements about project impacts do appear relevant to this proceeding, those statements are relatively general in substance and duplicative and cumulative of other more detailed testimony submitted by the protesting parties' expert witnesses. (Compare, e.g., GSSA-1 with GSSA-20.)

Accordingly, I find that that the probative value of the Organizational Testimony is substantially outweighed by the probability that its admission will necessitate undue consumption of hearing time. (Gov. Code, § 11513, subd. (f).) I therefore exercise my discretion to exclude exhibits CWIN-1, CFBD-1, FOR-22, RTD-1, BK-122, Sierra Club-1, DOW-1, SCS-1, and GSSA-20 pursuant to Government Code section 11513, subdivision (f) from the evidentiary record. This ruling does not reflect any judgment as to the merits of future arguments by the protesting parties about standing to participate in future litigation related to this proceeding. Water Code section 1126, subdivision (b), provides that "any party aggrieved by any decision or order may ... file a petition for a writ of mandate for review of the decision or order." The Organizational Testimony will also remain in the administrative record for this proceeding and will be part of any administrative record certified for purposes of judicial review. This ruling is without prejudice to the protestants' opportunity to submit revised testimony from these witnesses in rebuttal, subject to the limitation that rebuttal evidence must respond to an element of the Authority's case-in-chief.

Revised Time Limits

In my August 13 Procedural Ruling, I allocated available hearing time to the parties using a "chess clock" approach:

1. Sites Project Authority: 40 hours.
2. Protesting Parties: 46 hours.
3. U.S. Bureau of Reclamation, California Department of Water Resources, and State Water Contractors: 6 hours.

On August 28, 2024, I orally revised the allocated time limits after considering various parties' requests. This procedural ruling confirms that the parties' revised time limits are as follows:

1. Sites Project Authority: 40 hours.
2. Tribal and NGO Parties:⁴ 40 hours.
3. Delta Water Agency Parties:⁵ 10 hours.
4. T&M King Farms: 4 hours (plus 20 minutes for opening statement and oral summary of testimony, see *infra*).
5. Clarke Ornbaun: 4 hours.
6. U.S. Bureau of Reclamation, California Department of Water Resources, State Water Contractors: 6 hours.

T&M King Farms and Clarke Ornbaun may elect to share unused portions of their time with one another. Any party may submit a request to the hearing officer for additional time upon an offer as to the purpose and need for the additional time demonstrating that the additional time will be used efficiently to elicit evidence with probative value or otherwise further the resolution of the factual and legal issues in this proceeding. The AHO's direction regarding time limits otherwise remains unchanged from the August 13 Procedural Ruling. (2024-08-13 Procedural Ruling (Sites), pp. 3-4.)

Motion for Additional Time by Mr. King

On August 30, Mr. King, on behalf of King Farms, filed a motion for additional time for the case-in-chief portion of the hearing. (2024-08-30 T&M King Farms Motion for More Time). Mr. King requests 95 minutes in addition to the 4 hours already allowed. At this point in the hearing, Mr. King has used approximately three of the four hours that I granted to him, as an individual party, on August 28. Given that I did not separate Mr. King's time as an individual party before he cross-examined the first panel, although I limited his time in total with the other protesting parties to 46 hours, I will allow Mr. King an additional 20 minutes to present an opening statement and an oral summary of his written testimony. Twenty minutes reflects a total of the ten minutes allowed for opening

⁴ 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.

⁵ 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.

statements for all parties and my estimate of the maximum amount of time necessary for Mr. King to summarize the written testimony that he submitted. This additional time may only be used for an opening statement and a summary of direct testimony. If Mr. King exhausts his remaining available time for cross-examination, I will allow Mr. King to submit additional cross-examination questions to me in writing, before the start of cross-examination of that panel of witnesses. I will determine which, if any, of these questions are relevant to the hearing issues, and which are likely to be probative and are otherwise an appropriate use of time during the hearing.

Site Visit – Updated Itinerary, Access, and Testimony

During the hearing on August 28, I indicated that the site visit would begin at 10:00 am on September 9 at the Tehama-Colusa Canal Authority (TCCA) office at 22460 Altube Ave, Red Bluff, California, and at 9:00 am on September 10 at the Authority's office at 122 Old Hwy 99 W, Maxwell, California. On August 29, the Board issued a Notice of Site Visit that included these dates, starting times, and starting locations.

I hereby direct the parties to submit a revised proposed itinerary consistent with these starting times by **September 4 at 5:00 pm**. In doing so, I request that the parties structure each day's itinerary to conclude no later than 5:00 pm and remind the parties that the AHO has identified October 22, 2024, as a potential third day for the site visit that can accommodate points of interest as necessary and appropriate. (2024-08-16 Second Amended Notice of Public Hearing (Sites), p. 19.) **I also direct the parties to submit, with their proposed itinerary, a signed verification that the party has obtained any necessary permission for the public to access the proposed points of interest on the date indicated, including any necessary access to cross private land travelling to and from the point of interest.** I will confirm the site visit itinerary by the end of the day on September 5 so that all parties and other potential attendees may plan accordingly.

I also remind the parties that comments during the site visit "shall be limited to factual matters related to the proposed project's physical setting and features rather than general or opinion testimony." (2024-08-29 Notice of Site Visit, p. 2.)

Any witness who intends to testify during the site visit will be required to swear to or affirm the truth of their testimony. Any witness who testifies during the site visit shall be subject to cross-examination during a regularly scheduled hearing day upon the request of any other party.

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**

Andrew M. Hitchings
Aaron A. Ferguson
Kelley M. Taber
Michelle E. Chester
Crystal Rivera
Pennie MacPherson
ahitchings@somachlaw.com
aferguson@somachlaw.com
ktaber@somachlaw.com
mchester@somachlaw.com
crivera@somachlaw.com
pmacpherson@somachlaw.com
Attorneys for Sites Project Authority

Alycia Forsythe (Sites Project Authority)
Angela Bezzone (MBK Engineers)
aforsythe@sitesproject.org
bezzone@mbkengineers.com

Frances Tinney
John Buse
Center for Biological Diversity
ftinney@biologicaldiversity.org
jbuse@biologicaldiversity.org

Chris Shutes
Sarah Vardaro
California Sportfishing Protection
Alliance
blancapaloma@msn.com
sarah@calsport.org

Keiko Mertz
Jann Dorman
Ronald Stork
Katie Shulte Joung
Doug Maner
Friends of the River
keiko@friendsoftheriver.org
janndorman@friendsoftheriver.org
RStork@friendsoftheriver.org
katiesj@friendsoftheriver.org
earth1stdoug@gmail.com

Steven L. Evans
CalWild
sevans@calwild.org

Richard Morat
rjmorat@gmail.com

Clarke F. Ornbaun
clarkeornbaun@yahoo.com

Osha R. Meserve
Soluri Meserve, A Law Corporation
osha@semlawyers.com
Attorney for County of San Joaquin

Barbara Vlamis
Michael B. Jackson, Esq.
James Brobeck
AquAlliance
barbarav@aqualliance.net
mjatty@sbcglobal.net

Ben King
T&M King Farms LLC
bking@pacgoldag.com

Jenna Rose Mandell-Rice
State Water Contractors
jrm@vnf.com

Miles Krieger
Kira Johnson
Best Best & Krieger
Miles.Krieger@bbklaw.com
Kira.Johnson@bbklaw.com
Attorneys for State Water Contractors

Chief Caleen Sisk
Gary Mulcahy
Winnemem Wintu Tribe
caleenwintu@gmail.com
gary@ranchriver.com

S. Dean Ruiz
John Herrick
Dante J. Nomellini, Jr.
Dante J. Nomellini, Sr.
Brett G. Baker
dean@mohanlaw.net
jherrlaw@aol.com
dantejr@pacbell.net
ngmplcs@pacbell.net
brettgbaker@gmail.com
Attorneys for Central Delta Water Agency, et al.

Adam Keats
California Water Impact Network
adam@keatslaw.org

Barbara Barrigan-Parrilla
Ivan Senock
Cintia Cortez
Spencer Fern
Restore the Delta
barbara@restorethedelta.org
ivan@restorethedelta.org
cintia@restorethedelta.org
spencer@restorethedelta.org

Erin Woolley
Jason John
Caty Wagner
Molly Culton
Sierra Club
erin.woolley@sierraclub.org
jason.john@sierraclub.org
caty.wagner@sierraclub.org
molly.culton@sierraclub.org

Konrad Fisher
Daniel Estrin
Monti Aguirre
Water Climate Trust, Waterkeeper Alliance, and International Rivers
k@waterclimate.org
destrin@waterkeeper.org
monti@internationalrivers.org

Allison Mitchell, Esq.
Amy Aufdemberge, Esq.
Allison Jacobson
Ray Sahlberg
United States Department of Interior
Bureau of Reclamation
allison.mitchell@sol.doi.gov
Amy.Aufdemberge@sol.doi.gov
ajacobson@usbr.gov
RSahlberg@usbr.gov
Sol-org-psw@sol.doi.gov

Erick Soderlund, Esq.
Janice Wu, P.E.
Department of Water Resources
Janice.Wu@water.ca.gov
Erick.Soderlund@water.ca.gov

Eric Buescher
Ashley Overhouse
Gary Bobker
Scott Artis
Barry Nelson
San Francisco Baykeeper, Defenders of Wildlife, Golden State Salmon Association, and The Bay Institute
eric@baykeeper.org
aoverhouse@defenders.org
bobker@bay.org
scott@goldenstatesalmon.org
barry@westernwaterstrategies.com

Lowell Ashbaugh
Fly Fishers of Davis
ashbaugh.lowell@gmail.com

Regina Chichizola
Kasil Willie
Save California Salmon
regina@californiasalmon.org
kasil@californiasalmon.org

Matthew Clifford
Trout Unlimited Inc.
mclifford@tu.org

Donald B. Mooney
Friends of the River, California
Sportfishing Protection Alliance, and
Sierra Club
dbmooney@dcn.org

Mark Rockwell
Northern California Council of Fly
Fishers International
mrockwell1945@gmail.com

Glen Spain
Pacific Coast Federation of Fishermen's
Association et al.
fish1ifr@aol.com
lisa@pcffa.org
georgebradshaw707@gmail.com
sarahjanebates@gmail.com
fjegger@gmail.com

Patrick Porgans
Planetary Solutionaries
pp@porganssolutions.com

Maggie Foley
Kristin Peer
Bartkiewicz, Kronick & Shanahan
mef@bkslawfirm.com
kbp@bkslawfirm.com
Attorney for Contra Costa Water District

Angela Smelser
Colusa Indian Community Council
asmelser@colusa-nsn.gov

Adrian Covert
The Historic Klamath, Pier 9,
The Embarcadero, San Francisco
acovert@bayareacouncil.org

Administrative Hearings Office
Sites-WR-Application@waterboards.ca.gov

Interested Persons and Entities

David Guy
Northern California Water Association
dguy@norcalwater.org

Ben Testani
Araceli Moreno
NorCal Resist
ben@norcalresist.org

Alexandra Biering
California Farm Bureau
Sacramento, CA 95814
abiering@cfbf.com

Adam Borchard
California Fresh Fruit Association
aborchard@cafreshfruit.com

Annie Romero or Blake Vann
Almond Alliance
aromero@almondalliance.org

Kathleen Miller
Shannon Little
California Department of Fish and
Wildlife
kathleen.miller@wildlife.ca.gov
shannon.little@wildlife.ca.gov

Valerie Pryor
Zone 7WA
vpryor@zone7water.com

Mike Wade or Brandon Souza
California Farm Coalition
mwade@farmwater.org

Steve Johnson
Desert Water Agency
sjohnson@dwa.org

Adrian Covert
Bay Area Council Representative
acovert@bayareacouncil.org

Sandra Jacobs
Santa Margarita Water District
saundraj@smwd.com

Heather Dyer
San Bernardino Valley MWD
heatherd@sbsvmwd.com

Charles Wilson
Southern Water California Coalition
cwilson@socalwater.org

Sarah Wiltfong
Los Angeles County Business
sarah.wiltfong@bizfed.org

Andrew Fecko
Placer County Water Agency
afecko@pcwa.net

Tim Johnson or Paul Buttner
California Rice Commission
tjohnson@calrice.org

David Pederson
Las Virgenes MWD
dpedersen@lvmwd.com

Representative Mike Thompson
eric.hoffman@mail.house.gov
Marci Stanage or Jon Switalski
Rebuild SoCal Partnership
marci@rebuildsocal.org
jon@rebuildsocal.org

Matt Goody
Northeastern California Building &
Construction Trades Council
matt@lu228.org

Joshua Rahm
California Walnut Commission
jrahm@walnuts.org

Lance Eckhart
San Geronio Water Agency
leckhart@sgpwa.com

Ian Hart
Congressman Garamendi
ian.hart@mail.house.gov

Nina Jazmadarian
Foothill Municipal Water District
nina.jaz@fmwd.com

County of Colusa
boardclerk@countyofcolusa.com

Alicia Rockwell
Blue Diamond Growers
arockwell@bdgrowers.com

Martin Radosevich
Santa Clara Valley WD
HHamp@valleywater.org

Paul Weghorst
Irvine Ranch WD
weghorst@irwd.com

Graham Allen
Placer County Water Agency
District1@pcwa.net

Robert Kunde
Wheeler Ridge-Maricopa WSD
rkunde@wrmwsd.com

Chris Wilson
Los Angeles Co Business Federation
chris.wilson@bizfed.org

Rebecca Sheehan
Sarah Foley
Metropolitan Water District
rsheehan@mwdh2o.com
sfoley@mwdh2o.com

Pacal Cornejo-Reynoso
Eastern Municipal WD
cornejop@emwd.org

Richard Lambros
Secure Water Alliance
rich.lambros@teamlambros.com

Michael Plinski
San Bernardino Valley Municipal WD
michaelp@sbumwd.com

Michael Lewis
Construction Industry Coalition on WQ
mike@lewisandco.net

George Boutros
Orange County Business Council
gboutros@ocbc.org

Ralph Velador
Southern California District Council of
Laborers
rvelador@lcof.net

Belia Ramos
Association of Bay Area Governments
belia.ramos@countyofnapa.org
Victoria Llort
Desert Water Agency
vlort@dwa.org