May 22, 2026

Via e-mail

Hearing Officer Nicole Kuenzi
Administrative Hearings Office
State Water Resources Control Board
Sites-WR-Application@waterboards.ca.gov

Re: *March 20, 2026 Draft Decision, In the Matter of Petition for Assignment of State-filed Application 25517 and accompanying water right Application 25517X01 and the Petitions for Release from priority of State-filed Applications 25513, 25514, 25517 (unassigned portion), 22235, 23780, 23781 in favor of water right Application 25517X01 of Sites Project Authority*

This letter is submitted as the comments of the San Francisco Baykeeper, California Sportfishing Protection Alliance, Friends of the River, Winnemem Wintu Tribe, Chhé'ee Fókaa Band of Northeastern Pomo, California Indian Environmental Alliance, Fly Fishers of Davis, Golden State Salmon Association, Restore the Delta, Save California Salmon, Sierra Club California, and Water Climate Trust (collectively, NGO Protestants) regarding the State Water Resources Control Board (State Board) Administrative Hearings Office's March 20, 2026 Draft Decision and Draft Permit for the proposed Sites Reservoir Project. Attached to this letter as "Appendix A" is a redline of various Draft Permit terms and explanations for those changes.

If the Hearing Officer believes it would be helpful, we are willing to appear for a brief Zoom Conference with all parties to discuss our comments and proposed permit changes, as well as the changes proposed by other parties or commenters.

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I. Introduction

The proposed Sites Reservoir is expensive, unnecessary, and would have limited water supply benefits. The Sites Project Authority (Sites JPA) proposed minimal restrictions on Project operations in an effort to minimize the exorbitant and increasing costs and to maximize the limited benefits.

The California Department of Fish and Wildlife's (CDFW) Incidental Take Permit (ITP) for the Project increases the guardrails for endangered species. But the ITP is inadequate to protect endangered species and provides no explicit protection for the non-listed native fish that would suffer from increased diversion of water from the Sacramento River before it reaches and flows through the Delta. The evidence and best available science confirms that these minimal restrictions, even with the ITP's constraints, are insufficient to avoid the Project's substantial harm to natural resources, native fish, instream uses of water, and related beneficial uses.

The Draft Decision recognizes the inadequacy of the protections that Sites JPA and the ITP would afford and properly imposes additional restrictions on Project diversions, discharges, and exports. These additional restrictions will materially reduce the harm the Project would cause. The Draft Decision's additional protections correctly recognize that the State Water Board's obligations to protect fisheries, instream beneficial uses of water, and native fish are broader than the protection required by the California Endangered Species Act. These additional restrictions must remain in the final version of the permit.

The Draft Decision also correctly rejects Sites JPA's Petition to assign a 1977 priority date to the project. The Petition for assignment primarily reflected a sense of political entitlement. The Draft Decision hits the mark in rejecting the unwarranted Petition for assignment as a matter of facts, and above all, of law. Similarly, the Draft Decision's application of Area of Origin protections on what is fundamentally an export project is also necessary and well-supported by the evidence and the law.

Despite these positive elements of the Draft Decision, the balancing of water supply benefits and environmental harm does not justify the issuance of a water right permit for the project. This export project remains an expensive and unnecessary attempt to divert and store water that is not in the public interest and will not adequately protect public trust resources.

Sites JPA contends that the proposed Sites Reservoir is a "high-flow" project that will even provide environmental benefits. Any permit, if issued, should strictly hold the Sites project to the standard that it will only divert "excess" flows and explicitly define if and when flows occur that are truly "excess" to fish and wildlife and other beneficial uses and public trust resource needs. If Sites JPA cannot demonstrate that the project is viable, in the public interest, or beneficial as a true "excess" flow project, then the Board should deny the application for a new water right.

Finally, the Draft Decision recognizes, but does not avoid or adequately value, the harm that will be caused to Tribal resources. There is no dispute that moving forward will irreparably damage and destroy Tribal resources, including cultural sites, burial grounds, and cultural and religious practices, by placing important sites under 1.5 million acre-feet of water. There is ample evidence in the record that demonstrates that Sites JPA's consultation process prior to the EIR, and prior to the water rights application and petition, was woefully inadequate. The Draft Permit requires future improvements on those prior failures. However, such future actions cannot

remedy the harms that the Project will cause and do not make up for the past inadequate and unlawful conduct.

In sum, the AHO should revisit the Draft Decision's determination that a water right should be issued and should revisit its balancing of water supply versus environmental harm. Should the AHO proceed with issuing a permit, it should maintain and increase the protections delineated in the Draft Permit.

II. The Draft Decision Correctly Identifies Many of the Board's Legal Responsibilities under the Public Trust and Unreasonable Harm Standards but Gives Too Much Weight to Water Supply and Inadequately Weighs the Ecological Crisis of the Bay-Delta and the Sacramento River

Sites JPA's water right Application contained limited conditions on diversions. Sites JPA also applied for, and received, an Incidental Take Permit from CDFW. The ITP's conditions are, generally, more restrictive of operations than the conditions proposed in the Application, and as a result tend to be more protective of CESA-listed species. Despite this, the ITP's conditions on the Project remain inadequate to avoid unreasonable harm to fish and wildlife, especially non-CESA listed species, to protect public trust resources where feasible, or to reasonably protect fish and wildlife. (See BK-132 [Dr. Rosenfield Rebuttal Testimony] at ¶ 10.)

The State Water Board must ensure more than mere compliance with the California Endangered Species Act to avoid unreasonable impacts on fish and wildlife. In ensuring reasonable protection of fish and wildlife, it must protect non-listed species like fall-run Chinook Salmon, Starry Flounder, and others, and must also act to meaningfully improve conditions for listed species like winter-run Chinook Salmon and Longfin Smelt, not just take steps to avoid (or delay) extinction.

Furthermore, the State Water Board must meet existing (and forthcoming) water quality objectives in the Bay-Delta Water Quality Control Plan ("Bay-Delta Plan"), including the salmon doubling and viability objectives. Ultimately, it is impossible for the State Water Board to reasonably protect fish and wildlife beneficial uses or double salmon populations if fish populations are not viable.

The Draft Decision correctly notes that determining the amount of water available for appropriation requires consideration of the amount of water needed to remain instream to support beneficial uses, including reasonable protection of fish, fisheries, the preservation and enhancement of fish and wildlife, protection of public trust resources, and the public interest. (See Draft Decision at pp. 38, 70 [citing Water Code §§ 1243, 1243.5; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419].) The Draft Decision also correctly notes that the Board's obligations to protect public trust resources, instream beneficial uses of water, meet water quality objectives, and preserve and enhance fish and wildlife more broadly "extend[s] beyond listed species." (Draft Decision at p. 71 [citing State Water Board Decision 1631 (1994) at pp. 87-129; Water Board Order WR 2002-0002 at pp. 10-11]; see also BK-132 at ¶ 10.)

The State Water Board must also evaluate the Application in the context of the availability of alternative water supplies including water recycling, water conservation and efficiency, and urban stormwater capture, in evaluating the reasonableness of protections for fish and wildlife and other beneficial uses. (See, e.g., Decision 1485 at pp. 16-19; Decision 1631 at pp. 165-168, 176-177; Water Rights Order 2009-0034 EXEC; see also Water Code § 13241(f).)

And the Applicant must demonstrate compliance with Water Code section 85021 requiring agencies to reduce reliance on water supplies from the Bay-Delta *and* increase regional self-sufficiency.

The Draft Decision's assessment of what is reasonable or feasible, or how to balance competing interests, is not supported by substantial evidence.

First, it would approve the Project based on demands for increased consumptive uses without evidence or analysis of alternatives to the Project to meet those demands. Second, even with the conditions crafted to avoid harm to native fish (see *e.g.*, Draft Permit Terms 23, 30), the protections remain inadequate or too easily circumvented or amended given the magnitude of the ecological crisis of fish, wildlife, and estuarine habitat in the Bay-Delta. And, third, there was not substantial evidence that proposed restrictions necessary to preserve and enhance wildlife, reasonably protect instream uses of water, and feasibly protect the public trust could not be imposed on the Project's operations.

Protesting parties proposed conditions to reduce harm and attempt to bring the Project into compliance with the Delta Reform Act, the Delta Protection Act, and the State Water Board's precedential decisions and water rights orders. Where these conditions were not included in the Draft Decision and Draft Permit to maintain the alleged need for increased water supply, there was not substantial evidence supporting their exclusion. The State Water Board cannot conclude that protection of public trust resources is "infeasible" in the absence of evidence from Sites JPA that alternative water supplies cannot be used to meet the demands the Project would attempt to fill or that water supplies are the sole determinant of supporting consumptive uses (as opposed to extrinsic factors or demand management or alternative land use or economic choices that support viable local economies). Nor can the Board conclude that harms to fish and instream uses of water are "reasonable" without evidence supporting the necessity of the Project itself to provide the benefits that weigh against those consequences.

III. The Facts and the Law Support the Draft Decision's Determinations Declining Assignment of a State-filed Application and Requiring Area of Origin Protections

The Draft Decision denies the assignment of a state-filed application, with a 1977 priority date, to the water rights application. It also subjects the water right permit for Sites Reservoir to Area of Origin protections. The facts and the law support these determinations.

A. The Draft Decision's Public Interest Findings Support Application of Area of Origin Protections in any Sites Water Rights Permit Issued

One overarching factual basis for applying Area of Origin protections to any Sites water rights permit issued is the recognition that the Sites Project is fundamentally an export project. "The Sites Reservoir Project is intended in significant part to divert water to storage for export south of the Delta … The evidence in this proceeding suggests that Sites Reservoir would be operated, in part, as an extension of the CVP and SWP …" (Draft Decision at p. 34.) An additional relevant fact not cited in the Draft Decision is that the proposed place of use for the Sites Project is the entire service areas of both the CVP and SWP.

The Draft Decision notes that the CVP and SWP are subject to Area of Origin protections. (*Id.*) It further astutely describes a potential scenario in which Sites diversions could be allowed at a time when CVP and SWP diversions were curtailed, violating the general priority of CVP and SWP diversions over diversions to Sites. (*Id.* at p. 35.) The Draft Decision also notes

the opportunity for a workaround wherein CVP and SWP contractors benefitted from diversions to Sites, even during periods of the curtailment of CVP and SWP diversions. (*Id.*)

Speaking in broad terms, the Draft Decision additionally cites to legislative intent in establishing Area of Origin protections. (*Id.*) It further notes that many Area of Origin protections apply to water rights with a priority date later than 1984. (*Id.* at p. 33 [citing Water Code § 1216].)

On a practical basis, the Draft Decision points out that subordination agreements between Sites JPA and existing north-of-Delta diverters would leave other Area of Origin diverters unprotected. This would complicate the administration of water rights priority. It would also constrain potential future water right holders in areas of origin.

For these reasons founded in the public interest, it is appropriate that the Draft Decision subjects Sites JPA's water rights to Area of Origin protections, and would set the priority date at 2022.

B. The Draft Decision Provides Legal Justification for Denying Assignment of a State-Filed Application to any Sites Water Right Permit Issued

The Draft Decision also provides a statutory rationale for denial of the assignment of a State-filed Application (State Filing). It states that mercury methylated in Sites Reservoir could add to loading of methylated mercury in receiving waters. This could cause or add to exceedances of applicable water quality objectives.

More broadly, the Draft Decision correctly declines Sites JPA's reductionist argument that compliance with the minimum requirements in Water Code §§ 10504 and 10505 makes the assignment of a State Filing in the public interest. (*See* Sites JPA Closing Brief at 18:18-21.) These code requirements are a floor, not a ceiling. Nothing in the construction of these statutes clearly states that the enumerated minimum requirements for assignment of State Filings are exclusive criteria for the Board's public interest determinations regarding any water right application. On the contrary, these sections of the Water Code do not discuss the public interest at all.

IV. The Draft Decision Significantly Limits the Harm that Would Have Been Caused by the Initial Proposal by Sites JPA

The Draft Decision appropriately recognizes that the Project, as proposed by Sites JPA and partially constrained by the ITP, would still cause substantial harm to fisheries, water quality, public trust resources, and Tribal resources. The Draft correctly imposes additional restrictions beyond those proposed by Sites JPA and beyond those required for CESA compliance. These added protections reflect the Board's broad obligations to the public, water quality, and public trust resources. (See, e.g., Water Code §§ 1243 and 1243.5; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) We are supportive of the Draft Decision's determinations that do so. While we maintain that the Application should be rejected and that there is not substantial evidence to support the Draft Decision's conclusion to grant a water right, even as conditioned, the following examples were necessary steps to avoid even greater harm.

First, the Draft Decision denies the portion of Application 25517X01 to appropriate water from Funks and Stone Corral creeks. While this was done without prejudice, it accurately reflects

the failure of Sites JPA to demonstrate that water is available for appropriation from these creeks.

Second, the denial of Sites JPA's Petition for assignment of State-filed application 25517, and denial of Sites JPA's Petitions for release from priority of State-filed Applications 25513, 25514, 25517, 23780, and 23781 appropriately recognize that the evidence did not (and could not) meet the requirements of the law to grant the Petitions. (Draft Decision at p. 1.) Denial of State-filed applications and releases from priority are discussed further, *supra*.

Third, the inclusion of additional diversion and flow criteria to reduce Project harms to water quality, fisheries, public trust resources, and Tribal resources is generally correct, though often requires further refinement to be sufficiently protective of fish, wildlife, and public trust resources:

- Incorporation of the Operations ITP Condition 9.4 as a water right permit term. ITP Condition 9.4 reduces maximum annual diversions from the 1,500,000 acre-feet requested by Sites JPA to 986,000 acre-feet (Draft Permit, Term 5);
- The unimpaired flow (UIF) requirement (Draft Permit, Term 30(a)) is necessary and appropriate, but it should be increased above 55 percent, based on the best available science and evidence in the record;
- The increased Wilkins Slough flow threshold from 11,030 cfs required by the ITP to 14,125 cfs (Draft Permit, Term 23(c)), as well as the expansion of this term from two months to four months, will provide additional and necessary protection for both listed and non-listed runs of Chinook Salmon, and will help to avoid or mitigate other harmful impacts of project diversions of flows in this range;
- The inclusion of the flow-dependent-diversion rules in the Permit, rather than just in the ITP, and the expansion of those rules to include January and February (Draft Permit, Term 23(a)), will mitigate harm to migratory fish which depend on these flows;
- The reincorporation of the original pulse flow protection (Draft Permit, Term 23(b)) will further mitigate harm to migratory fish in ways that the flow-dependent-diversion criteria will not;
- The inclusion of ITP restrictions on diversions directly into the water rights permit is appropriate and necessary to ensure the Water Board meets its requirements that are more robust and separate from the requirements of the California Endangered Species Act;
- The inclusion of restrictions on diversions and rediversions when water quality standards are not being met is in the public interest, helps to avoid gamesmanship that harms local water users and the ecosystem, and will help to restrict the operation of the project by eliminating diversions during low-flow years when existing consumptive and ecosystem water demands are not met (Draft Permit, Terms 29, 46);
- The disallowance of diversions on when Voluntary Agreement flows are in the mainstem of the Sacramento River or contributing to Delta outflow will prevent the project from cannibalizing the (theoretical and limited) additional environmental flows that the Voluntary Agreements promise (Draft Permit, Term 31(a));

- Restrictions on releases from Sites Reservoir related to mercury, methylmercury, cyanobacteria, cyanotoxins, and temperature (Draft Permit, Terms 32, 33, 37, 38, and 42) will help to mitigate harms and avoid exceedances of water quality standards or existing identified proactive thresholds from potentially harmful releases;
- The inclusion of the negotiated permit term to prevent diversion or rediversion of Trinity River water to storage in Sites Reservoir (Draft Permit Term 17);
- The inclusion of Sites JPA's promise for "net-zero" greenhouse gas emissions into the water rights permit (Draft Permit, Term 53) will help to ensure that the project and existence of the reservoir does not further contribute to climate change; and
- The requirement to report non-operational streamflow measurement stations or loss of real-time streamflow data needed for compliance (Draft Permit, Term 24).

Taken together, these increased protections would reduce the harms caused by the Project. Some of these protections have loopholes or other workarounds, which are discussed in greater detail in Section V.

Finally, the Draft Permit creates additional mechanisms for transparency associated with the Project, including a requirement to maintain a website that lists water exchanges and that requires those exchanges to be listed *before* occurring (Draft Permit, Term 50), and requiring Sites JPA to submit all water quality monitoring data and lab reports to CEDEN at least annually, and to report temperature data to CDEC in 15-minute resolution in real time (Draft Permit, Term 43). This increased transparency will support compliance with Permit terms and comport with best practices for public data.

Each of these positive developments, and their limitations and ways to improve them, are discussed in greater detail throughout these comments and in the redline of the Draft Permit's terms.

V. The Draft Permit Should Not Allow for Discretionary Administrative Modifications that Substantially Reduce Protections

The Draft Decision appropriately declines to cede the State Water Board's authority to CDFW, provides protections for non-listed species, and takes steps to ensure that public trust resources are protected where feasible and that instream uses of water are reasonably protected. The inclusion of terms for protection of fish and wildlife within a water right permit itself, rather than incorporation by reference of the terms in the CDFW's ITP for operations, is appropriate and necessary. These protections should not be removed. NGO Protestants presented evidence at hearing on the importance of inclusion of public trust protections within the terms of any water right permit. (See Ex. CSPA-101c at 11:22-14:13; see also BK-132 at ¶ 10.)

However, numerous proposed permit terms are inadequate to meet this requirement or that would allow for significant modifications without a formal water rights change petition. The opportunity for administrative modification changes the character of enforceable permit terms. NGO Protestants have deep concerns about language in the Draft Decision and Draft Permit that would allow such future modification. These concerns are both procedural and substantive.

Any requested future changes to Permit Terms that would pose potential risks to fish, wildlife, water quality, or public health, or would materially increase the amount of water that could be diverted from the Sacramento River, should comply with the Water Code and be

considered through a formal change petition. In the alternative, if the Board's decision vests substantial authority to modify Permit Terms in the Executive or Deputy Director, such authority should be governed by the standard articulated in Draft Permit Term 22: the change may only be approved, after notice and opportunity for public comment, and based on the concurrence of CDFW, NMFS, and FWS, if the new criteria would be "equally or more protective" of fish, wildlife, water quality, and public health.

NGO Protestants discuss *infra* important examples of language in the Draft Decision that is too open-ended to fulfill the Board's public trust responsibilities.

A. Draft Permit Term 22

Draft Permit Term 22 properly incorporates specific diversion criteria from the ITP into the water rights permit. This inclusion is necessary and appropriate to ensure that the State Water Board does not cede its authority to protect fish, wildlife, and instream beneficial uses of water to CDFW's obligation to mitigate harms to endangered species. Draft Permit Term 22 should be amended to ensure that the necessary protections that were supported by the evidentiary record remain in effect.

Changes to the diversion criteria in the ITP, especially the criteria that are contained in Attachment 1, should not fall within the discretion of the Executive Director of the State Water Board because changes to those criteria have the potential to harm instream beneficial uses of water, have adverse effects on instream uses of water, could substantially increase water diversions, and because they do not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § 1700.6(a).)

Draft Permit Term 22 would also allow the Executive Director to modify the Permit to conform with a revised ITP following notice and opportunity to comment if the Executive Director and CDFW determined "that the amendments to this Term and Attachment 1 [the ITP] would be equally or more protective of fish and wildlife."

The Permit Term should be amended as proposed in redline in Appendix A.

B. Draft Permit Term 23(d)

Draft Permit Term 23(d) provides near total deference to Sites JPA regarding unreasonable effects to fish and wildlife. This is especially problematic in light of Sites JPA's failure to provide conditions in the initial application that would have protected fish and wildlife, and its subsequent reliance on the ITP to protect all aquatic resources. It is even more troubling considering Sites JPA's claim that the project is environmentally beneficial and will help the Delta's ecosystem.

As drafted, Term 23(d) would allow the Executive Director to modify permit terms "at the request of the Permittee" with the written concurrence of CDFW following public notice and opportunity for public comment. This term is inconsistent with state law, vests too much discretion in the Executive Director, and risks undermining protections found necessary based on the evidence without meeting the standard required for a water rights application or change petition.

First, this structure would be unlawful. Changes to the diversion criteria in Term 23 are not minor changes and therefore cannot be left to the discretion of the Executive Director of the Water Board. Such changes have the potential to harm instream beneficial uses of water, have

adverse effects on instream uses of water, and could allow a substantial increase in water diversions. Indeed, they are likely to do each of these things. These changes would not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § 1700.6(a) [describing changes to permits that do not require a formal change petition].) Changes to the diversion criteria adopted in the water rights permit must comply with the Water Code.

Second, such deference to Sites JPA would be inequitable. No other entity can approach the Executive Director and request a modification of permit terms to implement more stringent measures for the protection of fish and wildlife with the same procedural ease.

Third, the deference and the notice and comment provision would place the burden of proof on an objecting party rather than on Sites JPA. Objecting parties would be required to demonstrate that a change sought by Sites and approved by the Executive Director was an abuse of discretion, not supported by substantial evidence, failed to consider new evidence, and/or was contrary to law. (See 23 C.C.R. § 768 [describing standard for Petition for Reconsideration of Board decisions].) Any exercise of discretion would thus heavily favor the Permittee, despite harming public trust resources.

Fourth, the Term risks eliminating necessary protections. As drafted, it requires no finding that a modified Permit Term would protect fish and wildlife as well or better than the initial Term.

The conditions in 23(a), 23(b), and 23(c) were supported by the evidence. Eliminating them without an evidentiary process based on substantial deference to Sites JPA would be both improper in the instant case and set a dangerous precedent.

C. Draft Permit Terms 30(c) and 30(d)

Draft Permit Term 30 correctly requires that Sites JPA bypass flows based on a percentage of unimpaired Delta outflow.

Draft Permit Term 30(c) allows for elimination of this term in the future, and Draft Permit Term 30(d) allows for avoidance of the unimpaired flow requirement. Draft Permit Terms 30(c) and 30(d) should be deleted.

An unimpaired flow requirement should be a permanent constraint on diversions, not a temporary constraint pending implementation of an updated Bay-Delta Water Quality Control Plan. Indeed, the State Water Board's current approach is to consider and establish protective bypass flows for new water projects like Sites Reservoir in the individual adjudicative processes rather than as part of the updated Water Quality Control Plan. (See AHO-337 [December 2025 Draft Bay-Delta Plan] at p. 65 [§ 4.4.9.1]; see also AHO-336 [July 2025 Draft Bay-Delta Plan] at pp. 46, 64].)

The evidentiary record demonstrates that a bypass requirement based on a percentage of unimpaired Delta outflow is necessary to support salmon doubling, fish viability, reasonable protection of tribal, commercial, and recreational fisheries, instream beneficial uses of water, and public trust resources, and to avoid unreasonable harm to native fish. The flow requirement that implements that evidence should not be "interim" measures dependent on a future Bay-Delta Plan update.

Draft Permit Term 30(c) must be deleted because it is inconsistent with the Water Code. Eliminating the unimpaired flow requirement for a future, yet to be identified standard would

have the potential to harm instream beneficial uses of water and substantially increase water diversions. (See Water Code § 1700.6(a).) Allowing elimination or changes to Draft Permit Term 30(a) without a change petition is inconsistent with the Water Code.

Similarly, Draft Permit Term 30(d)(iii) constitutes an arbitrary and unlawful pre-approval of future conditions without any analysis or even knowledge of what those conditions might allow. There is no evidence that unknown, future "provisions" adopted by the State Water Board would be appropriately applied to Sites JPA's water rights.

Further, Draft Permit Terms 30(d)(i) and 30(d)(ii) are likely impossible to implement. Quantifying the actual and hypothetical diversions as described in these terms invites a water accounting nightmare that is unlikely to be legitimate, verifiable, or understandable to the public or other impacted parties. Because Draft Permit Term 30(d) would not be enforceable, it should be eliminated.

For additional analysis, please see the rationale for the redline of Draft Permit Term 30 in Appendix A.

D. The Water Quality Portfolio (Terms 34, 36, 37, 38, 39, 40, 41, 42)

Term 34 creates a "Water Quality Portfolio" which would house a host of different strategies and management plans related to mercury, harmful algal blooms, and temperatures. These constituents have the potential to cause significant harms to fish, wildlife, water quality, public health, recreation, and other instream uses of water.

Such a wide-ranging and important document should require more inclusive processes surrounding Tribal participation and consultation. It should also allow for more time for the public to review and comment.

Substantively, the Water Quality Portfolio should not be a vehicle to undermine protective terms identified in the Permit and Draft Decision. As it relates to mercury, temperature, and harmful algal blooms, the Water Quality Portfolio and related terms allow the Executive or Deputy Director to change protective conditions. Such discretion should be eliminated. The Water Quality Portfolio should create a path to meet protective standards, not to change them.

VI. The AHO Should Further Revise the Draft Permit Terms to Adequately Protect Aquatic Species, Water Quality, and Public Trust Resources

More flow in the Sacramento River and into, through, and out of the Delta benefits native fish. These benefits exist for anadromous and pelagic species at all their life stages that depend on river flow or the existence of usable habitat upstream of San Francisco Bay. There was no significant dispute about this fact, and the Draft Decision correctly recognizes that a wealth of evidence in the record supported it. The Project would divert water and therefore have negative consequences for native fish that would otherwise benefit from the flows that would be diverted. The Draft Permit attempts to address this issue by imposing bypass requirements and restrictions on diversions. As drafted, these are appropriate and necessary, though not sufficient to avoid unreasonable harm.

A. Specific Bypass Requirements are Necessary, but Inadequate as Drafted

1. The Bypass Requirements at Wilkins Slough and the Points of Diversion, including the Flow Dependent Diversion and Pulse Flow Protections, are Necessary to Reduce Unreasonable Harm and Should Be Retained in the Final Permit

Term 23(c), requiring 14,125 cfs at Wilkins Slough, should remain in the final permit. This term was supported by the evidence, provides meaningful benefit for Chinook Salmon out-migrating from the Sacramento River, and is necessary to reduce harm. It is also feasible, implementable, and enforceable.

The 14,125 cfs criteria is supported by the evidence. The 2013 paper by del Rosario, et al., (BK-21) demonstrates that flows of this magnitude at Wilkins Slough serve as triggers for outmigration of Chinook Salmon. Because outmigration does not occur as a single event, and overlaps with the Project's diversion season, a bypass requirement of 14,125 cfs is necessary and appropriate. (See generally, Draft Decision at pp. 86-89.) More, such a requirement is also supported by other evidence in the record. For example, Hassrick et al. (2022) (BK-28) demonstrates pulse flows provide additional survival benefits to Chinook Salmon until base flows reach 24,270 cfs, and that survival continues to increase as baseflows increase from there. While the Draft Decision rejects a bypass flow criteria based on Hassrick, it correctly notes that flows above the Wilkins Slough bypass criteria proposed by Sites (10,700 cfs), adopted by CDFW (10,930 cfs), and included in the Draft Permit (14,125 cfs) contribute to survival of migrating salmon.

Given the wealth of evidence of the benefits of flow for Chinook Salmon migrating out of the Sacramento River, Draft Permit Term 23(c) should remain in the final version of the Permit. Greater flow helps Chinook Salmon migration. Requiring greater flow at Wilkins Slough that triggers this migration is appropriate.

In addition, the determination that both the pulse flow protection proposed by Sites (Draft Permit Term 23(b)) and the flow dependent diversion criteria imposed by CDFW and expanded in the Draft Permit (Draft Permit Term 23(a); see also ITP Condition of Approval 9.14 [included as Attachment 1 to Draft Permit Terms]), are necessary to reduce unreasonable harm to Chinook Salmon rearing in and migrating out of the Sacramento River. The combination of these terms are especially necessary given the rejection of a more stringent Wilkins Slough bypass criteria and more robust pulse flow protections.

2. An Additional Permit Term to Protect Freeport Flows Is Needed

The failure to include a specific Freeport bypass requirement is not supported by substantial evidence and will allow for harmful impacts on native fish that can be feasibly and reasonably reduced or avoided.

The evidence demonstrates that a bypass requirement of 35,300 cfs at Freeport is necessary to avoid unreasonable harm to migratory salmon. The Draft Decision discusses the Freeport flows and finds that a condition requiring flows of 35,300 cfs at Freeport is unnecessary for two reasons. First, the Draft Decision states that flows required by Term 23(c) (14,125 cfs at Wilkins Slough) "corresponds with Freeport flows of approximately 30,000 cfs." (Draft Decision at p. 89.) Second, it states that flows at Freeport are influenced by the Feather and American

Rivers, tributaries that enter the Sacramento downstream of the Project's proposed diversions. (Draft Decision at pp. 89-90.) These two rationales lack evidentiary support and are inconsistent.

14,125 cfs at Wilkins Slough is not a proxy for 35,300 cfs at Freeport. The equation on the graph demonstrates that 400 cms (~14,126 cfs) at Wilkins Slough correlates to 848 cms (~29,946 cfs) at Freeport. This is just 85 percent of the protective flow (35,300 cfs) that the best available science supports. Allowing Sites to divert when flows at Freeport are between 29,950 cfs and 35,300 cfs would result in decreased survival of Chinook Salmon migrating through the Delta. (See AHO 246 at p. 23.)

The evidence at the hearing demonstrated that adequate Delta inflow (aka 35,300 cfs at Freeport) from December through June was necessary to avoid further unreasonable impacts to fish and wildlife. (*See, e.g.*, BK-01 at ¶ 38 [citing studies].) Term 23(c) only applies from December through April, leaving diversions in May unconstrained by that condition. By relying on Term 23(c) as a proxy for protective Delta inflow, the Draft Decision fails to provide protection related to Delta inflow in May and June, essential months for migration of the endangered spring-run Chinook Salmon and the commercially important fall-run Chinook Salmon (which are not protected under CESA or by the ITP).

In short, no evidence demonstrates that Term 23(c) will require protective flows at Freeport, and a permit term requiring sufficient water to be bypassed to provide protective Delta inflow is necessary.

Beyond the lack of evidence that Freeport flows will be protected by Term 23(c), the Draft Decision's second rationale for rejecting a Freeport condition is inconsistent with its first. The Draft Decision says that a condition for Freeport flows is unnecessary because they correlate with Wilkins Slough flows and then insists a condition for Freeport flows would be inappropriate because flows at Freeport are influenced by tributaries downstream of the diversion point. Both cannot be true.

3. Specific Delta Outflow Criteria Must Be Included in the Final Permit

NGO parties proposed to prohibit diversions unless Net Delta Outflow Index exceeded 42,800 cfs as a running average from January 1 to the date of diversion. (*See* NGO Closing Brief, Appendix A, Term 2D.) The Draft Decision notes, but does not analyze, this request. (*See* Draft Decision at pp.108-109.) The evidence showed that this restriction would benefit Longfin Smelt and would help to mitigate harm to White Sturgeon reproductive success. Such a term should be included.

Longfin Smelt reproductive success is strongly correlated with Delta outflow. The best available science demonstrates that Delta outflow of at least 42,800 cfs (average, January to June) is necessary to provide conditions that make positive population growth more likely than not. (See BK-1 at ¶¶ 126-128; BK-96 at PDF p. 81 [Table 8]; BK-98 [State Water Board 2017] at PDF p. 193.)

Requiring 42,800 cfs Net Delta Outflow would also benefit White Sturgeon. The State Water Board has identified protective flows for White Sturgeon as approximately 37,000 cfs flows from March to July. (See e.g., AHO-279 at Table 3.6-1 (PDF p. 4,167); see also BK-1 at ¶ 87.) Ensuring flows are not diverted when they are less than 42,800 cfs during the Sites diversion season would reduce the frequency of diversions that would harm White Sturgeon.

Under the ITP conditions, Delta outflows greater than or equal to 42,800 cfs are expected to occur over three percent less frequently during January-June than do in the status quo. (BK-132 at 11 [¶ 27].) Given that Longfin Smelt are at high risk of extinction, any reduction of the frequency of conditions where the population increases over the prior generation is unreasonable and must be avoided. (See BK-132 at ¶¶ 32, 34-47.) This reduction in protective flow Delta outflow can and should be avoided.

B. Percentage of Unimpaired Flow Bypass Requirement is Appropriate, but Must be Increased Based on the Evidence

The evidentiary record does not support the draft determination that a criteria allowing diversion of flows above 55 percent unimpaired flow is sufficiently protective of native fish. The best available science, including analysis by the State Water Board over the last sixteen years and a host of other scientific evidence, demonstrates that 75 percent may be "necessary" to fully protect public trust resources. (See BK-96 [State Water Board's 2010 Public Trust Report].) Additionally, the State Water Board has repeatedly demonstrated that 65 percent provides substantially more benefit than 55 percent does. (See AHO-271 [2017 Scientific Basis Report]; AHO-279 [2023 Draft Staff Report]; AHO-337 [2025 Draft Water Quality Control Plan].)

The Draft Decision rejects the Public Trust Report because it considered only fishery protection, not competing beneficial uses of water. (Draft Decision at p. 98 [citing BK-96 at 15].) While this is correct, it misses the point. This Permit will not set any requirements for total Bay-Delta watershed flows, making the Public Trust Report's election not to balance beneficial uses less relevant than its science demonstrating what protects fish and wildlife, and what does not.

The unimpaired flow diversion Term is a restriction on a single project, not a watershed-wide standard. Inclusion of a 75 percent Delta outflow bypass requirement as part of this permit will not reduce existing water supply, because it would not affect water diversions under existing water rights. Instead, it would ensure that this project would not unreasonably affect fish and wildlife, but would still allow water diversions by this project during high flow periods. NGO's Proposed Term would not make unimpaired flows above 75 (or 65 or 55) percent more frequent; instead, it would make flows less than that threshold due to Sites diversions *less* frequent. Avoiding the reduced frequency has meaningful benefits, especially if the percentage of unimpaired flow is increased to 65 or 75 percent.

It is reasonable and feasible to require Sites JPA to bypass water when Net Delta Outflow is less than 75 percent of the unimpaired flow. The Permit, if granted, should require it.

C. The Voluntary Agreement Bypass Requirements Should Remain in the Permit

The Voluntary Agreement flows are allegedly designed to create additional Delta inflow and Delta outflow above the status quo. While we have grave doubts about whether those flows will ever come to fruition, will be measurable, or are remotely near adequate to reasonably protect beneficial uses, the Draft Permit properly limits the ability of the Project to divert those flows. It does so by prohibiting diversions both while the "additional" VA flows are in the Sacramento River and by prohibiting diversions when VA flows are contributing to Delta outflow. (See Draft Permit, Term 31.) These restrictions are necessary to ensure that any added VA flow is not diverted, offset, or subsumed by the Project.

As reflected in the redline of Draft Permit Term 31(b), the reference to Term 30 should be changed and replaced with the specific percentage of required Delta outflow required by Term 30(a).

D. When Bay-Delta Water Quality Control Plan Standards Are Not Met, No Diversions to the Project or Rediversion of Project Water at the Export Facilities Should Be Allowed

The Draft Permit properly restricts diversions to the Project and rediversion of Project Water at the Export Facilities during times when water quality objectives or standards are not met. (Draft Permit Terms 29, 46.) In order to make these Terms sufficiently robust and to best tether them to the actions of the Project, they should be amended as reflected in the Appendix A.

Term 29 should include Sacramento River inflow (including Sacramento River at Rio Vista), Sacramento River salinity, Delta salinity, Export Limits, Delta Cross-Channel Gate Closures, interior Delta water standards, and Delta outflow, including salinity-based Delta outflow, objectives. The failure of the SWP or CVP to be able to comply with any of these standards indicates there is insufficient water instream (measured as Sacramento River flow, Delta inflow, interior Delta flows, or Delta outflow) to reasonably protect fish and wildlife. And given that existing water quality objectives, standards, and criteria in the Bay-Delta Water Quality Control Plan are inadequate to protect public trust resources or instream beneficial uses of water, these failures mean that there is not "excess" water to divert to Sites Reservoir above the needs of downstream water users and instream water uses.

Whether these standards are being met involves measurement of specific criteria (e.g., cfs flow, or salinity concentrations) at a specific time and location. However, those standards exist not just to ensure sufficient flow or water quality at that location, but at upstream and downstream locations as well. As a result, at the time when a violation is identified or occurs, there has likely been insufficient water upstream of that location for several days prior to the violation, and likely will be insufficient water downstream of that location *after* it occurs. Thus, making the prohibition on diversion or rediversion solely contemporaneous with the occurrence of a violation is insufficient to protect instream uses and downstream users of water from the harms those standards are in place to avoid.

Recognizing that the Project will not necessarily be responsible for the failure to meet standards or objectives under the existing or updated Bay-Delta Plan, the redline in Appendix A suggests a limited change to the contemporaneous nature of the prohibitions in Draft Permit Terms 29 and 46. If the Project was diverting water (or where Project water was being rediverted) within the 72-hours prior to the occurrence of a violation, then the prohibition on diversions or rediversions should extend for a period of seven days after the violation has ceased. If Sites was not diverting (or Project water was not being rediverted) during the lead up to the violation, this additional restriction is unnecessary.

E. Draft Permit Terms 41 and 42 Would Limit Sites Water Releases Based on Water Temperature, but Contain Options to Reduce Protection

The Draft Decision correctly explains the preference for specific numeric water temperature objectives rather than general water temperature requirements in the Basin Plan. (Draft Decision at p. 123.) The Draft Decision cites to the Central Valley Basin Plan (Basin Plan) requirement for the Sacramento River between Keswick Dam and the I Street Bridge in

Sacramento, which is 68°F "during periods when temperature increases will be detrimental to the fishery." (*Id.* at p. 121.) The Draft Decision concludes: "68°F is the appropriate water quality objective against which impacts of releases from Sites Reservoir should be assessed ..." (*Id.* at 124.)

However, Draft Permit Terms 41 and 42 taken together would eliminate 68°F as an effective constraint on release from Sites Reservoir to the Sacramento River.

First, Condition 42 would allow releases from Sites through the Knights Landing Outfall Gages to be greater than 68°F when the water temperature in the Sacramento River was greater than the water temperature of water releases from the Gates. This would have the effect of allowing releases that do not meet the Basin Plan because other entities were also in violation. The logic that one was only going with the speed of thermal traffic is an inappropriate offramp and a precedent that is not in the public interest.

Second, Condition 41 would allow complete displacement of the 68°F objective by a Water Quality Portfolio. The Water Quality Portfolio should not be a plan to violate requirements—it should be a plan to meet them.

The redline in Appendix A corrects these problematic contingencies and requires compliance with the 68°F standard for discharges sourced in Sites Reservoir from the Knights Landing Outfall Gates into the Sacramento River.

F. The Permit Should Be Revised to Require the HABs Strategy in Term 36, and that Strategy Must Meet, Not Replace, Cyanobacteria and Cyanotoxin Water Quality Objectives in Term 37

Substantial evidence in the record demonstrates that harmful algal blooms (HABs) and cyanotoxins are likely to occur in Sites Reservoir if built, and demonstrates the need for mitigation. As written, the Draft Permit makes optional a HABs Prevention and Mitigation Strategy. Such a strategy should be mandatory. (Draft Permit Term 36.)

The Draft Permit also sets water quality standards related to cyanobacteria and HABs, but allows those standards to be violated if a HABs Strategy is in place. (Draft Permit Term 37.) The record supports the use of the Harmful Algal Bloom Network “Caution Level” as a protective threshold. That threshold should not be reduced by a HABs Strategy. Rather, the Strategy should demonstrate how Sites JPA will meet the standard.

The redline in Appendix A corrects these deficiencies by clarifying the HABs and cyanobacteria water quality standards and requiring that Sites JPA make a plan to comply with them.

G. The Mercury Removal Prior to Inundation is Necessary but Insufficient, and the Methylmercury Mitigation to Meet ISWBE and Basin Plans Standards should not Allow for Alternative Compliance, Violations, or Exceedances

NGO Protestants support the inclusion of Draft Permit Terms 32 and 33 requiring assessment of ways to control mercury and removal of mercury sources that would pose risks to water quality in Sites Reservoir and in its releases. This is especially necessary given that “Project operations are likely to cause or contributed to exceedances of methylmercury water quality objectives in receiving waters of releases of Sites Reservoir.” (Draft Decision at 36 [citing AHO-073 at 60-62; see also id. at 129-130 [detailing projected mercury and

methylmercury concentrations in Sites which are substantially higher than Oroville or Shasta reservoirs and concentrations in large fish two to four times above objectives]; see also FOR-2s at ¶¶ 30-32 [detailing necessity for additional analysis prior to inundation to avoid significant mercury harms].)

All mercury laden soil should be removed from the reservoir prior to inundation, not just soil in "higher concentrations" or "hot spots." Any mercury remaining in the reservoir at the time of inundation will result in increased methylation and bioavailability which risks making fish within the reservoir, and those impacted by Project releases, unsafe to eat. One gram of mercury is sufficient to contaminate a twenty-acre lake. (See FOR-2s at ¶ 27.)

To ensure effective public health safety, numerical values should correlate with the reference dosages that have been established to be protective of human, animal, and aquatic health and the associated numeric concentrations in fish tissues water and soil levels and should be coordinated with the California Department of Public Health, the California Office of Environmental Health and Hazard Assessment, and the State Water Board.

The Draft Permit also requires the Project to comply with applicable methylmercury water quality objectives in the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISBWE) and the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins. (Draft Permit, Term 38.) It is appropriate to house this in the Permit. NGO Protestants applaud this requirement.

Draft Permit Terms 38 and 39 as written allow for "alternative compliance" where releases cannot meet the protective standards. The Permit should not allow for violations of water quality standards. Moreover, it cannot lawfully do so.

The redline in Appendix A removes alternative compliance language to ensure the Project meets water quality standards.

VII. The Draft Permit Should Require Net Zero Greenhouse Gas Emissions

The Draft Decision recognizes Sites JPA's stated net-zero goal for greenhouse gas emissions associated with the project construction and operation. (See Draft Decision at pp. 156-157.) To this end, the Permit Terms require that Sites JPA meet the requirements in Mitigation Measure GHG 1.1 as set forth in the Final Environmental Impact Report and in Attachment 3 to the Permit. (See Draft Permit Term 53.) Draft Permit Term 53, however, states "This term may be modified or removed by the Deputy Director upon request by the Permittee if GHG emissions resulting from operation the Project are subject to the regulatory authority of another state agency." This provision, however, affords the Permittee the potential to modify or change the commitment of no net GHG emissions.

No net GHG emissions is a commitment made by Sites JPA and recognized by the State Water Board. Any permit issued should hold Sites JPA to its commitment. Thus, the NGO Protestants respectfully request that the AHO remove the last sentence of Draft Permit Term 53.

Draft Permit Term 53's provision granting the Deputy Director authority to remove the term does not provide for any public comment, review, or process. If the Permit persists in granting the Deputy Director the authority to remove or modify the requirement for zero net GHG emissions, then there should be a public process that requires transparency as well as public review and comment.

VIII. The Record Does Not Support a Finding That Project Participants Can Afford the Inflated Project Costs

The Draft Decision concludes that Sites JPA sufficiently demonstrated that the Project will be developed and water placed to beneficial use. (Draft Decision at p. 160.) To this end, the Draft Decision discussed three previous State Water Board decisions where an application was denied on the grounds it was not in the public interest where the applicants could not demonstrate adequate financing, a market for the water sought, or contracts for water or power to be supplied by the project. (Draft Decision at p. 157, citing State Water Board Decision 958, State Water Board Decision 1588, and State Water Board Decision 984.) The Draft Decision seeks to distinguish these cases on the grounds that there were no financial commitments or contracts for implementation and operation of the respective projects that the State Water Board denied. (Draft Decision at pp. 157-158.) Those Decisions, however, stand for the proposition that projects that are uncertain financially may be denied on the grounds that they are not in the public interest.

In the present matter, the record demonstrates that there remains significant uncertainty as to the project's financial feasibility. For instance, the Draft Decision asserts that Sites JPA relies upon the 2023 Draft Plan of Finance to demonstrate that Storage Partners[1] have expressed a willingness to pay for Project water. (Draft Decision at p. 159; citing Sites-219 at pp. 4-7.) The Draft Plan of Finance, however, is based upon outdated information and does not reflect the significant cost increases.

For instance, the Draft Plan of Finance states that it is based upon a projected cost of $4.799 billion over the period from 2022 to 2031. (*Id*. at p. 4.) The record, however, demonstrates that in 2025 the project costs increased to $6.2 to $6.8 billion, with the potential to reach $9 billion under certain scenarios. (Draft Decision at p. 159; citing BK-136, p. 2 and 5; BK-137, p. 9, BK-138, p. 15.) That is a cost increase of up to $2 billion or more. While the Draft Plan of Finance discusses cost escalation factors, it does not discuss, disclose, or even anticipate cost escalation of $2.0 billion. The commitments and cost allocations relied upon by Sites JPA and in the Draft Decision are based on outdated information.

Nothing in the record indicates or supports a determination that the public agencies (including those on the waitlist) have agreed to incur an additional $2.0 billion or more in costs. While Sites JPA has identified agencies willing to participate in the project, it obtained those commitments at a substantially less expensive project. Nothing in the record indicates that the participants have agreed to participate in a project that is nearly 50 percent more expensive than the Project cost that Sites JPA presented at hearing

Further, the water rights decision will ultimately impact the California Water Commission's funding decision and timelines. (*See* February 24, 2026 Letter from the California Water Commission to the State Water Resources Control Board.) It therefore will directly impact the expenditure of taxpayer funds.

[1] "Storage Partners" are as defined on page 14 of the Draft Decision.

IX. The Project's Place of Use is Overly Broad and not Justified by the Evidentiary Record

The Draft Permit awards the entire requested place of use to Sites JPA. (Draft Permit, Term 4.) If finalized as written, the Sites Reservoir Project's place of use would be unprecedented in size. It would have the largest place of use of any water project in the state, encompassing 32,691,036 acres across 31 counties, and over 32 percent of the state's total land area. 53.9 percent of Project storage space is allocated south of Delta (BK-138 at 7.), and 80 percent or more of Sites Reservoir water by storage would be subject to carriage water requirements. (*See* NGO Closing Brief at p. 14:24.) The Project is primarily a water export project, and the Draft Decision and the terms in the Draft Permit recognize that fact. (Draft Decision at p. 34.)

The massive proposed place of use is a liability to the State Water Board. It obscures potential Project beneficiaries, weakens accountability, and poses the risk of expanding future operations beyond what was analyzed and approved in the water rights proceeding. Major uncertainties regarding project operations and participation still exist, including Reclamation's level of investment, future exchanges, and unresolved operational plans and agreements. Thus, the blanket place of use could also complicate enforcement, and could undermine the Board's own authority by authorizing expansive future flexibility now.

The most recent evidence shows that there are twenty-two Storage Partners, plus the U.S. Bureau of Reclamation, and the State of California. (BK-138 at p. 7.) The place of use should be restricted to include just the places of use of Storage Partners, plus the parts of the SWP and CVP that are supported by the evidentiary record.

Thus, for the SWP, the place of use would include (non-exhaustively) known areas related to WSIP benefits, conveyance facilities, and the places of use of Storage Partners that are also SWP contractors.

The place of use should not include the entire CVP place of use without limitations. Reclamation's participation must produce "federal benefits"[2], which are vaguely defined as "water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges."[2] Thus the CVP portion of the Project's place of use should be restricted to federal wildlife refuges and the place of use of Storage Partners that are also CVP contractors. At such time that Sites JPA and Reclamation produce a partnership agreement or operational plan that concretely explains Reclamation's intent for use of its Sites Reservoir water, Sites JPA can file a petition for change pursuant to Water Code section 1701.1.

The evidentiary record does not support issuance of a blank check for place of use to the Sites Project. If it remains geographically expansive, the State Water Board should accept the NGO Protestants' proposed redlines to Permit Term 24 to ensure transparency and accountability by adding reporting requirements for transfers of water to entities that are not Storage Partners.

[2] The Water Infrastructure Improvements for the Nation (WIIN Act) requires that "a proportional share of the project benefits are the Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges." (Public Law 114-322, § 4007 (c)(2)(C).)

X. Since the U.S. Bureau of Reclamation's Level of Investment and Operations Plan for Exchanges Remains Uncertain, the Board Must Evaluate the Need for Modification of Permit Terms or Addition of New Permit Terms after this Information Becomes Available

Two major issues raised throughout the hearing remain unresolved: (1) Reclamation has not yet committed to a percentage level of investment in the Project, and (2) Reclamation and Sites JPA have not produced an operations plan for exchanges.

A. Reclamation's Level of Investment Remains Uncertain

Reclamation has accumulated about $515 million toward the Project (HT Vol. II at 298:4-12), which at current cost estimates of $6.2-6.8 billion would cover 7.5-8.3 percent of construction costs. In order for Reclamation to increase its level of participation, other Storage Partners would have to voluntarily reduce their shares in the Project. (*Id.* at 300:3-6; 298:9-12 [Executive Director Jerry Brown described the project as "tapped out… in terms of capacity available for them without anybody else making adjustments and without them getting more money"]). It would also require the Bureau of Reclamation to secure more appropriations for the Project.

Reclamation and Sites JPA are still actively negotiating Reclamation's Partnership Agreement for federal participation in the Project. The most recent publicly available draft of the partnership agreement states that Reclamation's level of participation will be 16 percent and that $798 million in federal funds have already been appropriated.[3] $798 million is 11.7-12.9 percent of current project costs. The draft partnership agreement states that Reclamation will "diligently pursue" additional funds.

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[3] *"Partnership Agreement Between the United States and the Sites Project Authority Providing for Federal Participation in the Sites Project"* (Draft), May 7, 2026, Reclamation Exhibit 10, Contract No. 25-WC-20-6377, available online at: https://www.usbr.gov/mp/nodos/docs/2026-05-07-sites-partnership-agreement-reclamation-exhibit-10-no-comm.pdf

> "The Sites Authority and Reclamation agree that Reclamation is granted, and Reclamation shall own a 16% Base Facilities Capacity Interest and 16% Downstream Facilities Capacity Interest of the Sites Project and an ability to utilize a proportionate share of Sites Water originating from the Sacramento River as described in this Agreement subject to the following:
>
> (a) Reclamation commits to the Sites Authority the $798 million in federal funds appropriated prior to the Effective Date towards a portion of the grant and ownership of the Capacity Interest and subject to Article 8 and Article 10.
>
> (b) After the Effective Date, Reclamation shall diligently pursue, within its authorities, the remaining funds necessary to pay for the Fixed Project Costs commensurate with the 16% Capacity Interest as further described in Article 4."

There is no guarantee or evidence presented that these funds will be appropriated or that other Storage Partners will voluntarily reduce their shares to accommodate Reclamation's increase to 16 percent.

B. Exchanges with Shasta Remain Uncertain

Exchanges between the Project and Shasta Reservoir remain extremely uncertain. Not only would exchanges be heavily impacted by Reclamation's level of participation, but also, to date, neither Sites JPA nor Reclamation has produced an operations plan for exchanges. The State Water Board has been asked to sign a blank check authorizing the hypothetical exchange scheme without substantial evidence that exchanges would meaningfully create temperature benefits as claimed. During the hearing, experts expressed concerns that exchanges could produce a water supply benefit rather than benefits for fish and wildlife. (HT Vol. XX at 5163:4-9.)

C. The Permit Must Require Sites JPA to Submit an Operations Plan for Exchanges with Shasta, and Update the Permit Terms Governing Exchanges once that Plan is Received

Sites JPA and Reclamation have claimed that exchanges with Shasta would provide a temperature benefit to salmon. Not only is their ability to achieve such benefits not factually supported by the record, Reclamation's pattern is to increase water deliveries at the expense of temperature management. (See CSPA-1c at pp. 12-15.)

Without an operations plan for exchanges or re-operation, Reclamation has not provided any assurances that it will use its portion of Sites water to produce temperature benefits. The most recent draft of the Partnership Agreement also does not provide clarity.

When a final partnership agreement and operations plan for exchanges between Sites JPA and Reclamation becomes available, and the State Water Board deems the information in the operations plan to be adequate, the State Water Board must (1) evaluate the need to modify existing Permit terms, (2) evaluate the need for additional Permit terms, and (3) for any new or modified terms, provide notice and opportunity for comment to the public.

Modification and addition of related terms should be more than a reservation of authority. There should be a required, defined review. NGO Protestants recognize the desire to finalize the Permit expediently. However, Sites JPA and Reclamation have failed to provide the documentation and evidence necessary to support the exchange scheme. They should not be handed a blank check for those operations.

XI. The State Water Board's Racial Equity Resolution Requires that it Deny the Application or Adopt Recommendations by Tribal Parties

The Draft Decision recognizes, but does not adequately remedy or account for, the substantial harm that the Project would cause to Tribal resources, Tribal beneficial uses, and Tribal communities. The record demonstrates that the Project would inundate and permanently destroy Tribal Cultural Resources, ancestral sites, burial grounds, cultural landscapes, and resources tied to living and cultural religious practices. These are not impacts that can be meaningfully mitigated through after-the-fact measures or future planning processes.

The destruction of irreplaceable Tribal resources and places of cultural importance is described in the evidentiary record as "cultural genocide." (FOR-4 at 4:1; FOR-6 at 6:24, 7:12.)

This weighs heavily against issuance of a water right permit and should be given substantially greater weight in the Board's public interest and public trust balancing. Further, the unmitigable loss of significant cultural sites and resources violates the Board's own equity policy and requires denial of the Project.

The Draft Decision and Draft Permit's conclusion that they are consistent with the goals identified in the State Water Board's Racial Equity Resolution and Action Plan requires ignoring the Tribal testimony and evidence in the evidentiary record that the approval of Sites Reservoir is not consistent with racial equity. (Draft Decision at 151.)

A. Enforceable Tribal Consultation Protocols must be Incorporated into Discretionary Approvals that could Impact Tribal Interests

The Draft Permit generally relies too heavily on future discretionary processes without ensuring meaningful Tribal participation and government-to-government consultation. Numerous permit terms delegate substantial authority to the Executive Director or Deputy Director to approve future modifications that may affect Tribal beneficial uses, fisheries, groundwater, culturally significant waterways and species, and other Tribal interests (discussed *supra*). Yet the Draft Permit does not consistently require meaningful Tribal consultation before such decisions are made. Any permit issued should include enforceable requirements for government-to-government consultation prior to discretionary approvals that may affect Tribal interests, as well as meaningful opportunities for Tribal participation in operational planning, adaptive management, groundwater monitoring, and water quality management.

B. The Draft Decision Relies too Heavily on CEQA and Must Have Enforceable Mechanisms for Incorporating TEK

While inclusion of interested Tribes in consultation related to the Water Quality Portfolio is appropriate, the record also demonstrates that Tribal consultation to date has been inadequate. The Draft Decision relies heavily on CEQA-based processes and mitigation determinations despite the continuing and unresolved federal National Historic Preservation Act Section 106 process. The Project's impacts to Tribal Cultural Resources, traditional cultural landscapes, fisheries, and other culturally significant resources remain the subject of ongoing federal review and consultation. In addition, the Permit should more meaningfully incorporate Traditional Ecological Knowledge ("TEK") into future decision-making, monitoring, and implementation. TEK should not merely be acknowledged as conceptually valuable, but treated as an important and independent source of knowledge relevant to fisheries, groundwater, cultural resources, water quality, and ecosystem management.

The NGO Protestants support and incorporate by reference the Tribal Interest Parties' comments and recommendations regarding Tribal consultation, TEK, groundwater monitoring, mitigation, cultural resources, Tribal beneficial uses, and racial equity. Additional detail and specific proposed permit language are included in the Tribal Interest Parties' comments.

XII. The Water Storage Investment Program Benefits Are Overstated, and thus the Permit Should Restrict Application of Benefits to Places Where Delivery of Water for Environmental Enhancement is Likely, Feasible, and Accountable

The Project's purported environmental benefits are highly uncertain and have long been overstated by Sites JPA. For the Project's permit to be consistent with the evidence and the

actual benefits to fish, wildlife, and the environment that are likely to be achieved, changes should be made to Draft Permit Term 4 as reflected in Appendix A.

First, the Yolo Bypass should be deleted as an authorized place of use for Fish and Wildlife Preservation and Enhancement. As CDFW determined, Sites JPA's s purported benefits for Delta Smelt in the Yolo Bypass are not an ecosystem benefit, nor an action that qualifies as "Fish and Wildlife Preservation and Enhancement." (See April 10, 2026 Letter from Jerry Brown to AHO [Sites' releases "into the Yolo Bypass for the benefit of Delta [S]melt cannot currently be considered an ecosystem improvement…"].) As such, the beneficial use of water for the preservation and enhancement of fish and wildlife should not be permitted in the Yolo Bypass.

Second, the NGO Protestants generally support the restriction to the place of use for fish and wildlife preservation and enhancement to refuges, wildlife areas, and wetlands receiving Level 4 Refuge Water under the Central Valley Project Improvement Act's ("CVPIA") Refuge Water Supply Program ("RWSP"). The State Water Board should not expand the place of use for Fish and Wildlife Preservation and Enhancement beyond the RWSP.

To meet the requirements of the CVPIA, approximately 135,000 additional acre-feet of water must still be acquired (either purchased permanently or purchased every year). (See Central Valley Refuge Needs, 2025, at 1, available at https://norcalwater.org/wp-content/uploads/Central-Valley-Refuge-Needs-2025.pdf.) At best, Sites JPA can likely provide no more than 25 percent of that total need. Allowing more places of use beyond locations eligible for Level 4 CVPIA deliveries will reduce the ability of the CVPIA requirements to be met. Reclamation and Sites should be required to use water to benefit fish and wildlife through a regulatory program that needs the water that Sites would (theoretically) donate, not an expanded, new, and uncertain one.

Third, the RWSP deliveries should be limited to "north of Delta" locations. The CVPIA guarantees "firm water supplies of suitable quality." (Public Law 102-575, Title XXXIV, § 3406(d), 106 Stat. 4714 (1992).) Refuge water delivery volumes are based on analysis that identified the historical volume of water delivered to refuges (known as "Level 2" water) and the volume needed for optimal habitat management ("Level 4" water). (See Bureau of Reclamation, Conveyance of Refuge Water Supply Environmental Assessment and Initial Study, October 2003, PDF p. 3, available at https://www.usbr.gov/mp/cvpia/3406d/docs/final-conveyance-south-san-joaquin-kern-pixley-10-2003.pdf.) There is no evidence in the record that the Project can meet the CVPIA's mandate to provide "firm" water supplies given the limited volume of water the Project has available and that is allocated for these purposes. This uncertainty is especially pronounced south of the Delta due to export constraints that exist in dry and critically dry years—the years when certainty surrounding refuge water deliveries are the most important.

As the Central Valley Joint Venture explained in 2025: current estimates for Project water "are not confirmed. . . Current estimates likely between "approximately [and are between] 13,600 to 34,200 acre-feet of Incremental Level 4 with an average of 16,000 acre-feet per year (mostly south of Delta)." (See Central Valley Refuge Needs, 2025, *supra*, at 5.) There is no evidence that the project will be able to "donate" the 34,200 acre-feet of water every year, especially if that water must be exported and shipped south of Delta.

Restricting the Fish and Wildlife Preservation and Enhancement place of use to Level 4 Refuges north of Delta makes those benefits more certain, more likely, and more achievable.

This certainty has environmental benefits, as it allows Reclamation and refuge managers to plan for consistent, "firm," water supplies.

The Permit should not allow Sites JPA to claim credit for deliveries that are unlikely to ever occur, let alone to occur consistently during the years when they are most needed. The CVPIA requires "firm" commitments of water for refuge water supply—the Authority cannot meet that standard.

XIII. Conclusion

The Application for a new water right for the Sites Reservoir should be denied.

In the event that the Project is issued a Permit, these comments highlight the modifications necessary to ensure further protection of the public interest and public trust. We respectfully request these modifications be adopted into the AHO's final recommendation to the State Water Board.

NGO Protestants appreciate the significant effort by the Administrative Hearings Office to produce the Draft Permit and Draft Decision.

Respectfully Submitted,

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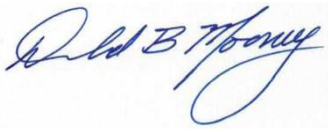

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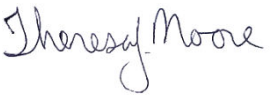

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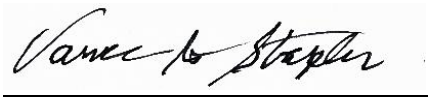

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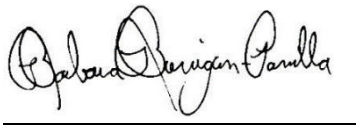
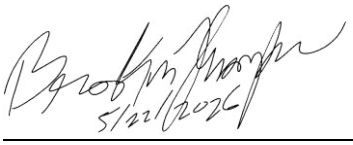


Barbara Barrigan-Parrilla
Executive Director
Restore the Delta

Molly Culton
Chapter Organizing Director
Sierra Club California

Sherri Norris
Executive Director
California Indian Environmental Alliance

Chhé'ee Fókaa Band of Northeastern Pomo



Brook Thompson
Executive Director
Save California Salmon

Konrad Fisher
Executive Director
Water Climate Trust

Lowell Ashbaugh
Conservation Chair
Fly Fishers of Davis

APPENDIX A

PROPOSED REDLINE OF DRAFT PERMIT TERMS

A proposed redline revision to each Draft Permit Term identified above is included along with an explanation of the rationale and evidence supporting those changes

Permit Term 4

Proposed Redline

4. The **PLACE OF USE** of such water is located: Municipal, Domestic, Industrial, Irrigation, Stockwatering, Recreational, Fish and Wildlife Preservation and Enhancement, and Incidental Power uses within a gross area of 32,691,036 acres within portions of Alameda, Colusa, Contra Costa, Fresno, Glenn, Imperial, Kern, Kings, Los Angeles, Madera, Merced, Monterey, Napa, Orange, Riverside, Sacramento, San Benito, San Bernadino, San Diego, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Santa Cruz, Solano, Stanislaus, Sutter, Tulare, Ventura, Yolo and Yuba counties.

Within the area described above, the place of use for the following beneficial use is as follows:

a. Fish and Wildlife Preservation and Enhancement is authorized in:

~~i. The Yolo Bypass,~~

~~ii.~~i. the Sacramento National Wildlife Refuge Complex and national wildlife refuges, state wildlife areas, and privately managed wetlands north of the Delta receiving Incremental Level 4 Refuge Water under the Central Valley Project Improvement Act.

The places of use are shown on a map filed on May 11, 2022 with the State Water Board.

Explanation

First, the Yolo Bypass should be deleted as an authorized place of use for Fish and Wildlife Preservation and Enhancement. According to the California Department of Fish and Wildlife, the Authority's WSIP benefits to fish and wildlife (Delta Smelt) in the Yolo Bypass are not an ecosystem benefit, nor an action that qualifies as "Fish and Wildlife Preservation and Enhancement." (See March 20, 2026 Letter from AHO to Andrew Hitchings for Sites Project Authority; see also April 10, 2026 Response Letter from Jerry Brown to AHO [Sites' releases "into the Yolo Bypass for the benefit of Delta [S]melt cannot currently be considered an ecosystem improvement…"].) As such, the beneficial use of water for the preservation and enhancement of fish and wildlife should not be permitted in the Yolo Bypass. The referenced map should be updated to reflect this change as well.

Second, NGO Protestants support the restriction to the place of use for fish and wildlife preservation and enhancement to refuges, wildlife areas, and wetlands receiving Level 4 Refuge Water under the Central Valley Project Improvement Act ("CVPIA"). There is no evidence in the record that the Project, especially given the reductions in yield that would result from the Incidental Take Permit and the restrictions on diversions contained in the Draft Permit, can meet

the CVPIA's mandate to provide "firm" water supplies. This uncertainty is especially pronounced south of the Delta due to export constraints that exist in dry and critically dry years—the years when certainty surrounding refuge water deliveries are the most important.

The CVPIA guarantees "firm water supplies of suitable quality." (Public Law 102-575, Title XXXIV, § 3406(d), 106 Stat. 4714 (1992).) Refuge water delivery volumes are based on analysis that identified the historical volume of water delivered to refuges (known as "Level 2" water) and the volume needed for optimal habitat management ("Level 4" water). (See Bureau of Reclamation, Conveyance of Refuge Water Supply Environmental Assessment and Initial Study, October 2003, PDF p. 3, available at https://www.usbr.gov/mp/cvpia/3406d/docs/final-conveyance-south-san-joaquin-kern-pixley-10-2003.pdf.)

As the Central Valley Joint Venture explained in 2025: "final refuge water supply benefits [from Sites Reservoir] are not confirmed. Current estimates are approximately 13,600 to 34,200 acre-feet of Incremental Level 4 with an average of 16,000 acre-feet per year (mostly south of Delta)." (See Central Valley Refuge Needs, 2025, at 5, available at https://norcalwater.org/wp-content/uploads/Central-Valley-Refuge-Needs-2025.pdf.) There is no evidence that the project will be able to "donate" the 34,200 acre-feet of water every year, especially if that water has to be exported and shipped south of Delta.

Restricting the Fish and Wildlife Preservation and Enhancement place of use to Level 4 Refuges north of Delta makes those benefits more certain and more likely to actually occur. The Permit should not allow Sites JPA to claim credit for deliveries that are unlikely to ever occur, let alone to occur consistently during the years when they are most needed. The CVPIA requires "firm" commitments of water for refuge water supply—the Authority cannot meet that standard.

Third, the State Water Board should not approve the request by Sites JPA in their April 10, 2026 letter to expand the place of use for Fish and Wildlife Preservation and Enhancement beyond the Refuge Water Supply Program. To meet the requirements of the CVPIA, approximately nearly 135,000 additional acre-feet of water must still be acquired (either purchased permanently or every year). (See Central Valley Refuge Needs, 2025, at 1.) At best, Sites can likely provide no more than around 25 percent of that total need. Allowing more places of use beyond locations eligible for level 4 CVPIA water supplies will reduce the ability of the CVPIA requirements to be met. Reclamation and Sites should be required to use the water to benefit fish and wildlife through a regulatory program that needs the water that Sites would (theoretically) donate, not an expanded, new, and uncertain one.

Permit Term 9

Proposed Redline

9. Construction work shall begin by December 31, 2030, and shall be completed by December 31, ~~2050~~2040. Complete application of the water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2061~~71~~.

Explanation

California law requires that construction begin and be completed within a reasonably prompt time after water right permit issuance. (See 23 C.C.R. § 840; see also 23 C.C.R. § 841 [recognizing specific meaning of promptly depends on the size of the project and other project specific circumstances].) The Water Board's typical standard is that construction on a project should begin within two years of permit issuance. (See "Water Rights Process," State Board's website, https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html.) Given the schedule described by the AHO's transmittal of the draft permit, this would be approximately September 2028. Cognizant of the remaining approvals and work to be done prior to beginning construction, NGO Protestants propose a deadline to begin construction of December 31, 2030. This is eminently reasonable. In July 2025, Sites presented to the California Water Commission and explained that their schedule was to begin construction in early 2027 and to complete it in 2033. (See BK-138, Sites Reservoir Project Overview, presentation by Jerry Brown to California Water Commission, July 16, 2025, p. 18 ["Construction is on the horizon"].)

NGO Protestants propose a deadline for completion of construction of December 31, 2040 – allowing ten years for what is projected to be a six-year process. And NGO Protestants propose the same period from construction to complete application of water to the authorized use as was included in the Draft Permit.

Given the dispute about the availability of water, uncertain regulatory conditions, and California's changing climate and hydrology, the findings by the State Board in 2026 should not be assumed to remain true for a period of two decades. If the project is to move forward, it should do so promptly. There is no reason to believe that conditions will be the same over twenty-years from now, and leaving the approval of this project pending if construction does not begin promptly is not in the public interest.

Permit Term 21

Proposed Redline

21. No water shall be diverted under this right unless the operator of the Red Bluff Pumping Plant and Hamilton City Pump Station operates those water diversion facilities with fish screens that are in good condition. Fish screens must be ~~and~~ designed, ~~and~~ maintained, and operated in accordance with the screening criteria of CDFW, National Marine Fisheries Service ("NFMS"), and U.S. Fish and Wildlife Service ("FWS") to protect species of fish listed as endangered or threatened under the California Endangered Species Act (Fish and Game Code sections 2050 to 2098) ~~or~~, the federal Endangered Species Act (16 U.S.C. sections 1531 to 1544), and other native fish species, as determined by the Deputy Director. Permittee shall provide evidence that demonstrates that the fish screens are maintained and operated in good condition with the Annual Report and whenever requested by the Division of Water Rights.

Explanation

The proposed edits: (1) ensure that non-listed native fish are protected from impacts at the diversion facilities that would result without properly designed, maintained, and operated fish screens; and, (2) are intended to clarify that the screens must not only be designed and maintained according to CDFW criteria but also operated consistent with those criteria, including the approach and sweeping velocity criteria that have been adopted by CDFW, FWS, or NMFS as necessary to protect anadromous and other fish species.

Here, and in several terms below, NGO Protestants propose to add concurrence from NMFS and FWS, in addition to CDFW. While there is overlap between work of CDFW and the two federal fish and wildlife agencies, they regulate different species and have slightly different roles, statutory commands, and expertise. Where the species impacted include federally listed species, like Green Sturgeon here, the relevant federal agency should be required to concur in the Deputy Director's assessment.

Permit Term 22

Proposed Redline

22. No diversion under this right is authorized unless Permittee is operating in compliance with Incidental Take Permit No. 2081-2023-051-00 for operation of the Sites Reservoir Project issued by CDFW on October 24, 2024 (2024 ITP).

a. Permittee shall comply with all applicable diversion requirements specified in the 2024 ITP~~, including but not limited to Conditions of Aproval 9.4, and 9.8 through 9.14, which are also listed in Attachment 1 of this Permit~~.

b. ~~Permittee shall continue to comply with the diversion requirements in the 2024 ITP unless and until this term is amended.~~ Within 30 days of issuance of a new or modified ITP for operations of the Sites Reservoir Project, Permittee shall submit to the Executive Director the new or modified ITP and a summary of any changes relative to the 2024 ITP. The Executive Director may amend this term ~~and Attachment 1~~ without a petition for change by the Permittee to be consistent with the new or modified ITP if, after notice and opportunity for public comment, the Executive Director determines and CDFW, NMFS, and FWS concur~~s~~ in writing that the amendments to this Term ~~and Attachment 1~~ would be equally or more protective of fish and wildlife.

c. Permittee must continue to comply with Attachment 1, with all bypass and flow criteria in this Permit, and with any requirements of a subsequent or amended ITP. Where those requirements differ, the condition that is more protective of fish and wildlife shall control.

Explanation

The State Water Board's obligations are more robust than the requirements of the California Endangered Species Act. There is no guarantee that an amended ITP will provide reasonable protection for fish and wildlife or otherwise comply with the State Water Board's obligations under state law. (See Draft Decision at 71.)

Where the Authority seeks to change operations that are required by the ITP Conditions listed in Attachment 1 (ITP Conditions 9.4, or 9.8 through 9.14), a change petition is required by the Water Code. Changes to the diversion criteria that are reflected in Attachment 1 do not fall within the discretion of the Executive Director of the Water Board because changes to those criteria have the potential to harm instream beneficial uses of water, have adverse effects on instream uses of water, could substantially increase water diversions, and do not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § 1700.6(a).)

The edits to Terms 22.a. and 22.b. are necessary and intended to clarify that the Permit is conditioned on compliance with all terms of the ITP, not just the ones identified in Attachment 1.

Here, concurrence from federal agencies is especially important to avoid the appearance of a conflict of interest. Asking CDFW to concur on changes CDFW made to the ITP that CDFW issued does not provide an adequate check or balance. Ensuring NFMS and FWS concur with the assessment by CDFW of CDFW's proposed changes does provide such a check.

Permit Term 23

Proposed Redline

23. The following requirements shall apply to diversions at the Tehama-Colusa Canal POD (also referred to as the Red Bluff POD) and Glenn-Colusa Irrigation District POD (also referred to as the Hamilton City POD) in addition to the requirements of Term 22.

a. The Flow-Dependent Diversion requirements for the Red Bluff POD specified in the 2024 ITP for the period from March 1 to June 14, as identified in Attachment 1, shall also apply to diversions at the Red Bluff POD from January 1 to February 28 of each year.

b. No diversions are authorized during the first seven days of qualified precipitation-generated pulse flow events (pulse protection). The pulse protection shall be initiated when three-day forecasted average flow at Bend Bridge, as measured at USGS Gage No. USGS-11377100 (Sacramento R AB Bend Bridge NR Red Bluff CA), is greater than 8,000 cfs, and the three-day forecasted average combined tributary flow (as determined by summing the flow in Cow Creek near Millville, Cottonwood Creek near Cottonwood, and Battle Creek below Coleman Fish Hatchery) is greater than 2,500 cfs. The pulse protection shall remain in effect for seven consecutive days upon initiation. If the average daily flow at Bend Bridge exceeds 29,000 cfs, the pulse protection may be terminated before seven days and diversions may resume, provided that flow remains above 25,000 cfs at Bend Bridge during the remainder of the seven-day period. After completion of the pulse protection, resetting criteria must occur before another pulse protection may go into effect. The resetting criteria are met when the three-day moving average flow in the Sacramento River above Bend Bridge is below 7,500 cfs for seven consecutive days and the above-referenced three-day moving average tributary flow is below 2,500 cfs for seven consecutive days.

c. No diversions shall occur if the flow in the Sacramento River at Wilkins Slough, as measured at USGS station 11390500, is below 14,125 cfs, or the diversion will cause the flow in the Sacramento River at Wilkins Slough, as measured at USGS station 11390500, to fall below 14,125 cfs, from December 1 to April 30, inclusive.

e. No diversions shall occur if the flow in the Sacramento River at Freeport, as measured at USGS station 1144765, is below 35,300 cfs, or the diversion will cause the flow in the Sacramento River at Freeport, as measured at USGS station 1144765 to fall below 35,300 cfs, from November 1 to June 14, inclusive.

f. No diversions shall occur between January 1 and June 14, inclusive, if the average of the Daily Delta Outflow from January 1 to the date of diversion is less than 42,800. Daily Delta Outflow shall be calculated as Net Delta Outflow Index

measured as set forth in State Water Board Revised Water Right Decision 1641, Figure 3. (See Attachment 4, § A.4.2, p. A.4-9 to A.4-10 ["Daily Delta Outflow estimates are summed over seven days and averaged to produce a seven-day average. A three-day lag shall be applied to the seven-day average calculation."].)

~~d. Executive Director may amend this term at the request of Permittee based on new information if, after notice and opportunity for public comment, the Executive Director determines and CDFW concurs in writing that the amended term will prevent unreasonable effects on fish and wildlife, including listed species under the California Endangered Species Act (CESA) and non-CESA listed species.~~

[OR, IN THE ALTERNATIVE[1]]

d. The Executive Director may amend this term ~~at the request of Permittee~~ based on new information if, after notice and opportunity for public comment, the Executive Director determines and CDFW, NMFS, and FWS concur~~s~~ in writing that the amended term is equally or more protective of fish and wildlife than existing requirements~~will prevent unreasonable effects on fish and wildlife~~, including listed species under the California Endangered Species Act (CESA), under the Federal Endangered Species Act, and non-~~CESA~~ listed species.

Explanation

NGO Protestants commend the inclusion of bypass requirements for the Sacramento River at Wilkins Slough, the pulse flow criterion, and the expansion of the ITP flow dependent diversion rules in the water rights permit. These Terms are necessary and appropriate to reduce the harmful impacts to native fish, regardless of whether those species are identified as protected under the state and federal Endangered Species Acts. As the Draft Decision notes, "CDFW's responsibilities under the CESA are distinct from the Board's obligations under the Water Code and the public trust doctrine… [T]he Board is obligated in its water right permitting decisions to protect public trust resources where feasible and consider the amount of water required to remain in the source to support preservation and enhancement of fish and wildlife. These obligations extend beyond listed species." (Draft Decision at 71.)

The Draft Permit's inclusion of protective conditions to cover non-listed species, increasing the flow minimums that support those protections, and including overlapping

[1] Term 23.d in the Draft Permit should be deleted. Changes that have the potential to harm to fish and wildlife or to increase diversion of water require a formal change petition to be filed pursuant to Water Code 1701.1. A change to Term 23 is no different. *In the alternative*, if the Permit allows changes that are inconsistent with the Water Code, the standard should match the one articulated in Term 22 – "equally or more protective of fish and wildlife than existing requirements." This document includes a redline of both.

requirements (i.e. flow dependent diversion *and* pulse flow protection) serve to further the Board's obligation to protect native fish and fisheries. Absent these requirements, there would be substantially more harm from the project, including harms that can reasonably and feasibly be avoided.

However, Term 23 also requires amendment to be adequately protective and to ensure they are not undermined by future actions. First, protective standards for Sacramento River flow at Freeport and for Delta outflow must be added as bypass criteria in the Permit. And second, Term 23.d, which allows changes to the bypass criteria, should be deleted.

I. Protective Terms for Freeport Flow and Net Delta Outflow Should be Added

A. A Freeport flow bypass requirement is vital to avoiding harm to Chinook Salmon

The Draft Permit fails to ensure the adequate magnitude and duration of flow into the Delta that is necessary to reasonably protect native fish species.

The Draft Decision discusses the Freeport flows and finds that a condition requiring flows of 35,300 cfs at Freeport is unnecessary for two reasons. First, the Draft Decision states that flows required by Term 23.c (14,125 cfs at Wilkins Slough) "corresponds with Freeport flows of approximately 30,000 cfs." (Draft Decision at 89.) Second, it states that flows at Freeport are influenced by the Feather and American Rivers, tributaries that enter the Sacramento downstream of the Project's proposed diversions. (Draft Decision at 89-90.) These two rationales lack evidentiary support and are inconsistent.

First, the Draft Permit fails to ensure adequate magnitude of flow. 14,125 cfs at Wilkins Slough is not a proxy for 35,300 cfs at Freeport. The Draft Decision cites to the EIR Master Response comments, which shows substantial variation in Freeport flows based on Wilkins Slough flows. That analysis, Figure MR5-7 (AHO 246 at p. 23 ["Alternative 3"]), includes data for December through May for the years 1922 to 2003, or ~500 data points. The equation on the graph demonstrates that 400 cms (~14,126 cfs) at Wilkins Slough correlates to 848 cms (~29,946 cfs) at Freeport. This is just 85% of the protective flow (35,300 cfs) that the best available science supports. Allowing Sites to divert when flows at Freeport are between 29,950 cfs and 35,300 cfs would result in decreased survival of Chinook Salmon migrating through the Delta. More, even if the regression suggested that 400 cms at Wilkins Slough were correlated with protective flows at Freeport on a monthly mean, most of the data on actual Freeport flows are lower than the "line of regression" represented on the graph when Wilkins Slough flow is ~400 cms.[2] In other words, there is no evidence that 400 cms at Wilkins Slough corresponds to even

[2] The slope of the regression line appears to be influenced upward (i.e. made steeper, left to right) by flows in very high flow months: when Wilkins Slough flows are greater than ~625 cms, most of the results tend to be above the regression line. However, when Wilkins Slough flows are between 300 and 450 cms, the results tend to be below the regression line. Relying on correlations that exist in high flow months to protect fish that will be migrating during lower flow months is inconsistent with the evidence presented during the hearing.

30,000 cfs at Freeport, much less the magnitude of fully protective Delta inflow identified in the record (1000 cms or ~35,300 cfs).

Second, the Draft Permit fails to provide the duration of Delta inflow needed to avoid unreasonable harm to native fish. The evidence at the hearing demonstrated that adequate Delta inflow (aka 35,300 cfs at Freeport) from December through June was necessary to avoid further unreasonable impacts to fish and wildlife. (*See, e.g.*, BK-01 at ¶ 38 [citing studies].) However, Term 23.c only applies from December through April, leaving diversions in May and June unconstrained by that condition. By relying on Term 23.c as a proxy for protective Delta inflow, the Draft Decision fails to provide protection related to Delta inflow in May and June, essential months for migration of the endangered spring-run Chinook Salmon and the commercially important fall-run Chinook Salmon (which are not protected under CESA or by the ITP).

Third, the use of Wilkins Slough as a proxy for Freeport is based on data from 1922 to 2003. There is no evidence in the Draft Decision or the record that the correlation has not changed since 2003, and there is no guarantee that it will not change in the future, either due to changed patterns of hydrology or changes to diversions of water that affect Sacramento River flows between Wilkins Slough and Freeport, including (but not limited to) changes in hydrology or operations on the Feather or American Rivers. As a result, even if 14,125 cfs at Wilkins Slough provided protective Delta inflow during the 1922 to 2003 simulations, there is no evidence it will remain protective in the future.

In short, there is no evidence to demonstrate that Term 23.c will require the magnitude or duration of flow at Freeport necessary to reasonably protect native fish or avoid significant harm. A permit term requiring sufficient water be bypassed to provide protective Delta inflow is necessary.

Beyond the lack of evidence that Freeport flows will be protected by Term 23.c, the Draft Decision's second rationale for rejecting a Freeport condition is inconsistent with its first. The Draft Decision says that a condition for Freeport flows is unnecessary because they correlate with Wilkins Slough flows and then insists a condition for Freeport flows would be inappropriate because flows at Freeport are influenced by tributaries downstream of the diversion point. It cannot be true that restrictions at Wilkins Slough will adequately protect Freeport flows *and* that restrictions based on Freeport flows are inappropriate to limit Sites' diversions due to the effect of tributary flows entering the Sacramento River between Wilkins Slough and Freeport.

Finally, while the Draft Decision is correct that an updated Bay-Delta Plan *should* protect flows at Freeport, there is no evidence this will occur. And the December Draft Bay-Delta Plan explicitly requires that conditions related to new water infrastructure projects (like this one) be imposed during those water rights proceedings, not as part of the Bay-Delta Plan. (See AHO-337 [December 2025 Draft Bay-Delta Plan] at p. 65 [§ 4.4.9.1]; see also AHO-336 [July 2025 Draft Bay-Delta Plan] at pp. 46, 64].)

The Permit should include a condition restricting diversions unless protective Delta inflows are met—Proposed Term 23.e would do so.[3]

B. A Net Delta Outflow bypass requirement is necessary to support Longfin Smelt, White Sturgeon and other native fish

NGO Parties proposed a permit term designed to primarily protect Longfin Smelt and White Sturgeon which would prohibit diversions unless Net Delta Outflow Index exceeded 42,800 cfs as a running average from January 1 to the date of diversion. (See NGO Closing Brief, Appendix A, Term 2D.) The Draft Decision notes, but does not analyze, this request. (See Draft Decision at 108-109.)

Longfin Smelt reproductive success is strongly correlated with Delta outflow. The best available science, including several findings by the State Board, support the conclusion that Delta outflow of at least 42,800 cfs (average, January to June) is necessary to provide conditions that make positive population growth more likely than not (i.e. greater than a 50:50 chance). The likelihood of positive population growth increases as flows exceed this level and decrease as flows drop below this threshold (See BK-1 at ¶¶ 126-128; BK-96 at PDF p. 81 [Table 8]; BK-98 [State Board 2017] at PDF p. 193.)

A Net Delta Outflow Index permit term would also benefit White Sturgeon. While the specific flow volumes and season are not identical, providing 42,800 cfs as a running average from January to June would help mitigate impacts of Sites diversions on White Sturgeon reproductive success. The State Board has identified protective flows for White Sturgeon as approximately 37,000 cfs flows from March to July. (See e.g., AHO-279 at Table 3.6-1 (PDF p. 4,167); see also BK-1 at ¶ 87.) Ensuring flows are not diverted when they are less than 42,800 cfs during the Sites diversion season would reduce the frequency of diversions that would harm White Sturgeon.

Under the ITP conditions, Delta outflows greater than or equal to 42,800 cfs are expected to occur over 3% less frequently during January-June than do in the status quo. (BK-132 at 11 [¶ 27].) This reduction in Delta outflow will harm fish and wildlife. It also can and should be avoided. Proposed Permit Term 23.f would do so.

The Wilkins Slough bypass requirements and the ITP conditions limiting annual diversions to 986,000 acre feet and prohibiting diversions unless Delta outflow has increased by 3,000 cfs above "excess conditions" do not ensure that average Delta Outflow will exceed 42,800 cfs for the January to June period.

[3] The best way to do so is to require 35,300 cfs at Freeport (USGS gauge 1144765). However, if the Permit is going to rely on flows at Wilkins Slough as a proxy for Freeport flow, Term 23.c should be amended to require that no diversions occur unless flow at Wilkins Slough is greater than 16,775 cfs and to extend this requirement to apply through June 14. 16,775 cfs at Wilkins Slough is approximately 35,300 cfs at Freeport. (See AHO-246 at Figure MR5-7.)

II. Draft Term 23.d Should Be Deleted

This term is inconsistent with state law, vests too much discretion in the Executive Director, and risks undermining protections found necessary based on the evidence without meeting the standard required for a water rights application or change petition. Changes to the diversion criteria in Term 23 are not minor changes and therefore cannot be left to the discretion of the Executive Director of the Water Board. These changes have the potential to harm instream beneficial uses of water, have adverse effects on instream uses of water, could substantial increase water diversions, and because they do not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § 1700.6(a).) The required finding in the draft Term, that the changes "will prevent unreasonable effects on fish and wildlife," is inconsistent with the statutory standard for a "minor" change that can be accomplished without a change petition. Changes to the diversion criteria adopted in the water rights permit must comply with the Water Code.

In the alternative, if Draft Term 23.d is not deleted, it should be amended as reflected above and consistent with the standard proposed for Term 22. Changes that have the potential to harm to fish and wildlife or to increase diversion of water require a formal change petition to be filed pursuant to Water Code 1701.1. A change to Term 23 is no different. If the Permit allows changes that are inconsistent with the Water Code, the standard should match the one articulated in Term 22 – "equally or more protective of fish and wildlife than existing requirements."

Permit Term 24

Proposed Redline

24. Within five working days of determining that a streamflow measurement station used to establish diversion criteria is not in operation or data from that station is not available in real-time, Permittee shall: (1) cease immediately cease diversions; (~~1~~2) report the flow monitoring station to the Deputy Director; and (3~~2~~) submit to the Deputy Director for review and approval an alternative streamflow measurement method that enables measurement of the applicable diversion-related criteria. No diversions shall occur until the Deputy Director has approved the alternate measurement location or method.

Explanation

This Term is edited for clarity to ensure that diversions stop upon discovery of a non-operational streamflow measurement station needed to establish diversion criteria, rather than up to five working days after such a determination.

As part of the compliance plan required by Term 55, the Permittee could suggest alternative measurement for alternative streamflow measurements if appropriate.

Permit Term 27

Proposed Redline

27. Appropriation of water under this Permit for export from the Sacramento River or the Sacramento-San Joaquin River Delta is subject to the rights of water users within said systems to all of the water reasonably required to adequately supply the beneficial needs, including instream beneficial uses, within said systems, regardless of when such use is initiated.

Explanation

The Term is appropriate but should be amended make clear that it protects all beneficial uses of water, not just consumptive ones. Adding "including instream beneficial uses" accomplishes this objective and ensures the clarity and effectiveness of the proposed term.

Permit Term 29

Proposed Redline

29. No diversion is authorized when any of the numeric Sacramento River inflow (including Sacramento River at Rio Vista), Sacramento River salinity, Delta salinity, Export Limits, Delta Cross- Channel Gate Closures, interior Delta water standards, or Delta outflow, including salinity-based Delta outflow, objectives of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta (Bay-Delta Plan) and any future amendments thereto, are not being met. If Permittee was diverting water within 72-hours preceding the failure to meet the above requirements, no diversions are allowed for seven-days following the end of the exceedance.

Explanation

NGO Protestants commend the inclusion of this Permit Term. Term 29 is necessary and appropriate to ensure that Sites does not divert water from the Sacramento River when Bay-Delta Plan requirements related to those same flows are not being met. The Project is designed to capture high-flows and "excess" water. Times when water quality and flow standards are not met are not high-flow or excess times—they are, by definition, times when there was not sufficient water instream to meet regulatory minimums. To encourage compliance with water quality standards, ensure protection of instream uses as required by the Bay-Delta Plan, and avoid punishing Sites JPA for the conduct of third parties, the term should be expanded and clarified in two ways.

First, in addition to applying contemporaneously (as drafted), if Sites was diverting water from the Sacramento River within 72-hours of the date of any downstream exceedance, diversions to Sites should be prohibited for seven-days following the end of the exceedance.

Violations of the criteria identified in this term are measured at a single place and time. However, when they occur, there were likely harms upstream and before the violation due to lack of sufficient water instream, and likely harms downstream and after the exceedance for the same reason. If Sites was diverting in the three-days leading up to an exceedance, it is likely that those diversions caused or contributed to the violation, and diversions to Sites should be prohibited for seven days after the violation ends.

If Sites was not diverting during the 72 hours preceding a violation, then the violation was likely not a result of Sites diversions and no additional restriction, beyond the contemporaneous prohibition on diversions is required.

Second, the term should apply more broadly than just Sacramento River inflow and salinity, and Delta outflow requirements under the Bay-Delta Plan. It should apply to restrict diversions when Delta salinity, export limits, Delta cross channel gate closures, and interior Delta water quality standards are not being met. The redlines in the second and third lines, specifying additional Bay-Delta Plan water quality requirements, accomplish this objective.

Permit Term 30

Proposed Redline

30. The following requirements apply to diversions under this Permit:

a. ~~Except as provided in part (d), d~~Diversions are not authorized when Delta outflow is less than ~~55~~ 75 percent of unimpaired Delta outflow calculated as a seven-day running average or if diversion would reduce Delta outflow below ~~55~~ 75 percent of unimpaired Delta outflow calculated as a seven-day running average.

b. The methodology and data sources in Attachment 4 shall be used to calculate the requirements of part (a) of this term. The Executive Director may amend Attachment 4 either at their election or upon request of the Permittee or any interested party to improve accuracy of the methodology or data sources. Notice of any change to Attachment 4 will be provided by the Board's email distribution list for Bay-Delta-related matters and to the Permittee and posted on the State Water Board's website at least 60 days in advance of any decision to amend Attachment 4 by the Executive Director.

~~c. If the Board updates the Bay-Delta Plan to include Sacramento River inflow and inflow-based Delta outflow requirements based on a percentage of unimpaired flow applicable to this Permit, and the Board takes regulatory actions to implement those requirements, then Permittee shall comply with those regulatory requirements in lieu of the requirements of parts (a) and (b). Applicable Sacramento River inflow and Delta outflow requirements do not include water supply adjustments unless this Permit is identified as qualifying for water supply adjustments in the Bay-Delta Plan or this term is modified pursuant to the Board's reservation of authority in Term 57.~~

[OR IN THE ALTERNATIVE[4]]

c. If the Board updates the Bay-Delta Plan to include Sacramento River inflow and inflow-based Delta outflow requirements based on a percentage of unimpaired flow applicable to this Permit, and the Board takes regulatory actions to implement those requirements, then Permittee shall comply with parts (a) and (b) unless the Executive Director determines, after opportunity for public comment and hearing, and based on the concurrence of CDFW, NMFS, and FWS that the those new regulatory requirements are equally or more protective of fish and wildlife, including listed and non-listed species, than ~~in lieu of~~ the requirements of parts (a) and (b). Applicable Sacramento River inflow and Delta outflow requirements do not include water supply

[4] Term 30.c in the Draft Permit should be deleted. If it is not deleted, it should at least be edited as reflected here. This document includes a redline of both.

adjustments unless this Permit is identified as qualifying for water supply adjustments in the Bay-Delta Plan or this term is modified pursuant to the Board's reservation of authority in Term 57.

~~d. The conditions on diversion in this Term shall be subject to the following exception:~~

~~i. If Term 23 prohibits or limits diversions when all other conditions for diversion are met, the Permittee may quantify the additional volume of water it would have been able to divert absent the requirements of Term 23. The methodology for quantifying the volume shall take into consideration all relevant factors, including infrastructure capacity, and must be approved by the Executive Director.~~

~~ii. If, in the same water year, Term 30(a) prohibits or limits diversions but all other conditions for diversion are met, including but not limited to Term 23, the Permittee may divert up to the additional volume of water quantified under part (i). The Executive Director may suspend application of this part upon finding that the diversions authorized by this part would have an unreasonable effect on fish or other instream beneficial uses.~~

~~iii. If the Bay-Delta Plan is updated to include adaptive implementation provisions such as flow shaping, and the Board takes regulatory actions applicable to this Permit to implement Delta outflow requirements, then the procedures described in the Bay-Delta Plan shall apply in lieu of part (ii).~~

~~iv. Annually, the Permittee shall report to the Board the volume of water quantified under part (i) of this Term, the dates water was diverted under part (ii) of this Term, and the volume of water diverted under part (ii) of this Term.~~

Explanation

NGO Protestants commend the inclusion of a Permit Term related to percentage of unimpaired flow. The evidence in the record and the best available science strongly support the inclusion of an unimpaired flow criterion. Protective unimpaired flow criteria are vital to avoiding harm, both because it ensures adequate flow remains in stream to support fish, wildlife, fisheries, and other related beneficial uses, and because it helps to mimic the natural hydrology that native fish species evolved with and rely upon to survive variable hydrologic conditions. While the inclusion of such a Term in the permit is necessary and appropriate, to be protective, implementable, and effective, revisions from the Draft Permit are needed. Specifically, the percentage of flow should be increased from 55 percent and the carve outs and limitations in Terms 30.c and 30.d should be deleted.

I. The Required Percentage of Unimpaired Flow Should Be Increased

A. The system-wide concerns with higher unimpaired flow approaches are not applicable to this Permit Term

The evidence does not demonstrate that a criteria allowing diversion of flows above 55 percent unimpaired flow is sufficiently protective of native fish. The best available science, including analysis by the State Board over the last sixteen years and a host of other scientific evidence, demonstrates that 75 percent may be "necessary" to fully protect public trust resources. (See BK-96 [State Water Board's 2010 Public Trust Report].) Additionally, the State Water Board has repeatedly demonstrated that 65 percent provides substantially more benefit than 55 percent does. (See AHO-271 [2017 Scientific Basis Report]; AHO-279 [2023 Draft Staff Report]; AHO-337 [2025 Draft Water Quality Control Plan].)

The State Board's 2010 Public Trust Report concluded that 75% of unimpaired Delta outflow was necessary to protect public trust resources. (See Draft Decision at 98 [citing BK-96 at 110-111, 143]; see also BK-1 at ¶ 23.) The Draft Decision rejects reliance on the Public Trust Report because it identified flows "necessary" to protect public trust resources, *see* BK-96 at 5, but considered only fishery protection, not competing beneficial uses of water. (Draft Decision at 98 [citing BK-96 at 15].) While this is correct, it misses the point. This Permit will not set any requirements for total Bay-Delta watershed flows or affect existing water rights, making the Public Trust Report's election not to balance beneficial uses less relevant than its science demonstrating what flow protects fish and wildlife, and what does not.

The unimpaired flow diversion Term is a restriction on a single project, not a watershed-wide standard. (See Draft Decision at 98 [noting "broader considerations" like balancing were not considered by State Board's 2010 Public Trust Report are "at issue in the Board's process to update the Bay-Delta Plan].) But those "broader considerations" are also not implicated by this Term. (*Id.*) The water supply considerations of reducing diversion opportunities for the proposed project are substantially different than the water supply considerations of requiring 55, 65, or 75 percent unimpaired Delta outflow system-wide.

Inclusion of a 75 percent Delta outflow bypass requirement as part of this permit will not reduce existing water supply, because it would not affect water diversions under existing water rights, but instead would ensure that this project would not unreasonably affect fish and wildlife while still allowing water diversions by this project during truly high-flow periods. While no water right holder has a vested right to water diversions that unreasonably harm fish and wildlife, the water supply considerations for reducing existing diversions are not the same as placing limits on new ones.

Similarly, the potential negative environmental side-effects of requiring higher than 55 percent unimpaired flow system-wide are also not germane. (See Draft Decision at 98 [noting concerns about "cold-water resources" under a 75 percent unimpaired flow system-wide requirement].) Restricting diversions by this project would not impact cold water stored in upstream reservoirs or the resulting water temperature below those reservoirs.

This term would not require increased releases from upstream reservoirs and would not require existing water supply projects to bypass any amount of unimpaired flow; it would only limit the negative effects of Sites' diversions. Fundamentally, the draft Term does not make unimpaired flows above 75 (or 65 or 55) percent more frequent; instead, it makes flows under that threshold due to Sites diversions *less* frequent. Avoiding the reduced frequency has meaningful benefits, especially if the percentage of unimpaired flow is increased to 65 or 75 percent.

B. <u>The best available science demonstrates greater than 55 percent unimpaired flow is necessary to support recovery of native fish and reasonable protection of fisheries</u>

As the Draft Decision explains: the "'best available science … indicates that the requirements [in D-1641 and Biological Opinions for CVP and SWP Delta export operations] are insufficient to protect fish and wildlife.'" (Draft Decision at 99 [quoting AHO 271 (2017 Scientific Basis Report at 28] [brackets in Draft Decision].) According to the State Board, increasing Delta outflow from the existing inadequate requirements to "unimpaired Delta inflows and outflows of 35 to 45 percent would provide 'limited benefits,' inflows and outflows of 55 percent would provide 'modest benefits,' and inflows and outflows of 65 to 75 percent would provide 'more substantial benefits,' for fish and wildlife." (Draft Decision at 99 [quoting and citing AHO 271 at 299].) But "modest" is a generous description of the benefits from a 55 percent requirement.

The Board's analysis that supported its conclusion that the benefits of 55 percent were "modest" shows that those "modest" benefits are largely dependent on unregulated flows above the 55 percent threshold. In the 2017 Scientific Basis Report for the Bay-Delta Plan update (AHO-271), the Water Board analyzed potential unimpaired flow requirements of 35, 45, 55, 65, and 75 percent. (See AHO-271 at 5-31 (PDF p. 299), Table 5.3-3.) The table shows the frequency that certain flow thresholds would be met based on the regulatory requirement alone, not including unregulated flows that are beyond the percentage of unimpaired flow analyzed. Because this project would divert the unregulated flows above the percentages of unimpaired flow analyzed in the table, the 2017 Scientific Basis Report table is illustrative in assessing the benefit of an unimpaired flow permit condition.

For example, without unregulated flow to supplement a 55 percent unimpaired flow requirement, the frequency of protective flows for Longfin Smelt, White Sturgeon, and Green Sturgeon would be lower than the "current" conditions as of 2017. Because those "current conditions" are leading to increased and intolerable extinction risks, requirements that represent a reduction from those conditions are inadequate to avoid unreasonable harm. (*Id.* [showing reduction from 28% frequency to 17% frequency for Longfin Smelt, and a reduction from 15% frequency to 12% frequency for Green Sturgeon and White Sturgeon].)

By comparison, in 2023, when the Board conducted a similar analysis, it included the unregulated flows in assessing the frequency that those flow thresholds would be met.[5] (See

[5] Several of the flow thresholds from 2017 and 2023 no longer represent the best available science and underestimate the flows needed to protect relevant species or habitats. As a result,

AHO 279 [2023 Scientific Basis Report] at Table 7.6.2-5 (PDF p. 1,102).) The difference between the frequency of meeting the same thresholds with the same unimpaired flow requirement represents the frequency with which unregulated flows result in those outcomes. Again, Longfin Smelt and sturgeon are instructive. At 55 percent unimpaired flow *plus unregulated flow*, the frequency of meeting the protective thresholds for those species is 32% (compared to 17%) and 19% (compared to 12%), respectively. (*Compare* AHO 271 at Table 5.3-3 *with* AHO 279 at Table 7.6.2-5.)

These differences led the Board to recognize the necessity and benefit of protecting currently unregulated flows above these thresholds and the need to do so given the existence of future water infrastructure projects, *like Sites Reservoir*. (See AHO 279 at 1-9 (PDF p. 82) ["Existing regulatory minimum Delta outflows would not be protective of the ecosystem, and without additional instream flow protections, existing flows may be reduced in the future, particularly with climate change and additional water development"]; see also BK-1 at ¶¶ 14, 20-22.) The Draft Term, by setting the unimpaired flow threshold at 55 percent, would allow the diversion of the unregulated flows that are necessary to provide the "modest" benefits described by the State Board under a 55 percent unimpaired flow requirement.

While the evidence generally shows that 55 percent unimpaired flow (plus unregulated flow) is better than the current crisis conditions, real protection and the ability of fish, wildlife, and estuarine habitat to recover only exists at 65 or 75 percent unimpaired flow. The best available science dictates that to protect fish and wildlife from unreasonable harm requires more than 55 percent unimpaired Delta outflow. The evidentiary record does not support the conclusion that "modest benefits" from a crisis baseline adequately avoid harm.

C. <u>There is not substantial evidence to show that the water supply cost to the project prevents an adequately protective unimpaired flow requirement</u>

The AHO identified as a hearing issue the "amounts of water needed to remain instream … to ensure consistency with applicable water quality control plans, … to avoid jeopardy to the continued existence of endangered or threatened species, and … to protect public trust resources." (Draft Decision at 27-28 [quoting Hearing Issue 3.a.iii]; see also *id.* at 29 [would the proposed project "cause unreasonable adverse impacts" to native fish (quoting Hearing Issue 3.d.v)].) Protestants identified an unimpaired flow bypass requirement as a condition in their initial protests and with their case-in-chief submissions. (See Baykeeper et al. Protest at p. 23; CSPA et al. Protest at 47; see also Baykeeper, CSPA, FOR, et al., Proposed Permit Terms, submitted July 15, 2024, at p. 4.). Despite this, Sites JPA chose not to model or provide evidence about Sites' operations would be impacted if required Delta outflows were set at 55, 65, or 75 percent of unimpaired flow either in its case-in-chief or its rebuttal.

Given the lack of evidence about the water supply consequences for the project of a Permit Term requiring Delta outflows of 55 percent, 65 percent, or 75 percent of unimpaired

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the frequencies in the 2017 and 2023 State Board analyses likely understate the actual rate of occurrence of protective flows. The tables also do not include protective flow thresholds for Chinook Salmon at Freeport, discussed in Permit Term 23, *supra*.

flow, the decision in this matter should not assume those costs are too high and "balance" away scientifically supported protections. If Sites JPA determines that the project is not economically feasible when scientifically justified restrictions on diversions are imposed that are "necessary," BK-96 at 5, to protect native fish and fisheries, it should not move forward with the project. The State Water Board should not sacrifice public trust resources that are already in crisis.

Draft Term 30.a should be amended to prevent diversions unless actual Delta outflow is at least 75 percent of unimpaired Delta outflow.

II. The carve outs from compliance with an unimpaired flow condition should be deleted

A. Term 30.c should be deleted because it is inconsistent the most recent draft update to the Bay-Delta Plan and with the Water Code's requirements for changes to water rights permits

Term 30.a (amended as described above) should be a permanent constraint on diversions, not a temporary one pending implementation of an updated Bay-Delta Plan.

As the August 8, 2025 Notice of Status Conference accurately reflected, the July 2025 Draft Bay-Delta Plan "provides that for new water rights, the Board would determine based on the record in individual adjudicative proceedings what requirements should be imposed 'to ensure that the use of water is consistent with and supports the salmon protection, fish viability, inflow, inflow-based Delta outflow, and interior Delta flow objectives.'" (Notice at 5 [quoting AHO-336 [July 2025 Draft Bay-Delta Plan] at pp. 46, 64]; see also AHO-337 [December 2025 Draft Bay-Delta Plan] at p. 65 [§ 4.4.9.1].)

The evidence in this proceeding demonstrated that protection of unimpaired flows of greater than 55 percent is necessary to support salmon doubling, fish viability, reasonable protection of tribal, commercial, and recreational fisheries, instream beneficial uses of water, and public trust resources, and to avoid unreasonable harm to native fish, the conditions reflecting that evidence should not be "interim" measures dependent on a future Bay-Delta Plan update.

If the Permittee wishes, in the future, to change the requirements or conditions in its Permit in ways that do not have the potential to harm instream beneficial uses of water or substantially increase water diversions, it may seek to do so as minor changes pursuant to Water Code section 1700.6, subd. (a). However, changes to the percentage of unimpaired flow do not fall within this narrow category of "minor" changes to a water right. As a result, allowing a change to this permit term without a change petition is inconsistent with the Water Code.

Ultimately, there is no need to include Draft Term 30.c because whether a new Bay-Delta Plan is more or less stringent than Draft Term 30.a, either the Permittee or the Board can already take appropriate action consistent with the Water Code to change the conditions in the Permit, either through a change petition or through Term 57.

In the alternative, if Draft Term 30.c. is not deleted in its entirety, and the Permit provides for changes to Term 30.a without a change petition, it should apply the standard identified in Draft Term 22 (as reflected in the *alternative* redline approach included here).

B. Term 30.d should be deleted because it undermines the protection provided by Term 30.a and is unlawful and unworkable

Draft Term 30.d should be deleted in its entirety. It is procedurally and substantively flawed, includes unlawful and arbitrary pre-approvals of future conditions, and is likely to undermine the benefits that would be provided by Term 30.a.

1. Term 30.d would likely undermine the benefits of Term 30.a

Term 30.d should be deleted to ensure that the benefits of Term 30.a apply throughout the diversion season to all of the different species and life stages that depend on higher flows.

Term 30.d allows operations that would (partially) protect flow conditions for winter-run Chinook Salmon while impairing flow conditions that imperiled spring-run Chinook Salmon, fall-run Chinook Salmon, and the fishery rely on. The fact that greater than 55 percent unimpaired flow resulted from Term 23 diversion criteria in January does not mean that different fish relying on flow in May will have benefited from those earlier flows or will not be harmed by a reduction in the later ones.

Term 30.d is substantively flawed and risks eliminating the protections offered by Term 30.a. The purpose of an unimpaired flow regime is to foster actual conditions that more closely match the natural hydrograph. (See AHO 341 [State Board July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan] at 8 ["The science indicates that flows that more closely mimic the shape of the unimpaired hydrograph and the conditions to which native species adapted, including the general seasonality, magnitude, and duration of flows, generally provide for improved ecological functions to support native species."]; see also BK-96 at 90, 96-98, 116-121; BK-1 ¶ 75 [discussing harm associated with deviation from natural hydrograph].) Term 30.d untethers the actual conditions from the natural hydrograph by allowing for diversions later in the season that are greater than what the unimpaired hydrology would supports.

More, by shifting when diversions would occur from early in the diversion season to late in the season, Term 30.d would allow harm to some native fish populations in order to benefit others. Different species, and different life stages of the same species, rely on protective flows both in the winter and in the spring. (See BK-1 at ¶¶ 25-27 [Chinook Salmon], ¶¶ 70-73 [White Sturgeon], 95-99 [Green Sturgeon], 126-129 [Longfin Smelt], 144-147 [Delta Smelt]; see also Draft Decision at 10-13.) For example, winter-run Chinook Salmon enter and mostly exit the Delta by the end of March, but spring-run and fall-run Chinook Salmon mostly enter and exit the Delta in March-June.

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2. Term 30.d is procedurally unworkable

Term 30.d.i and 30.d.ii are vague and likely impossible to implement. Quantifying the diversions which could have occurred when Delta outflow was greater than 55% of unimpaired Delta outflow and when all other conditions are met EXCEPT Draft Terms 23.a, 23.b, and 23.c, AND THEN doing the reverse calculation later in the season when Draft Terms 23a, 23.b, 23.c, and all other permit terms are met but Delta outflow is below 55 percent unimpaired Delta outflow invites a water accounting nightmare that is unlikely to be legitimate, verifiable, or understandable to the public or other impacted parties.

Given the practical measurement and accounting difficulties, it is also unclear as to when these "replacement" diversions could occur. Presumably this term does not expand the diversion season beyond June 14, though that presumption is not clear from the text of Draft Term 30.d. At minimum, it is likely that Draft Term 30.d would shift diversions from January through March into the April to June timeframe. However, there is no indication or evidence that the required calculations and analysis could be performed in a timely and accurate manner to allow for these later-season diversions that would otherwise be disallowed.

Conceptually, if the Permittee can demonstrate, through reporting like that described in Draft Term 30.d.iv, how the proposed conditions in Draft Terms 30.d.i, and 30.d.ii would function, it is welcome to make that showing as part of a change petition to obtain a change to Term 30.a based on evidence that such changes would meet the requirements of California law, including protection of public trust resources and reasonable protection of beneficial uses. But there is no basis for pre-approving that change, in the absence of any evidence, in the Permit.

3. Term 30.d.iii is unlawful

Finally, Term 30.d.iii constitutes an arbitrary and unlawful pre-approval of future conditions without any analysis or even knowledge of what those conditions might allow. The draft Term proposes to adopt future "adaptive implementation provisions such as flow shaping" without evidence or understanding about what those provisions may be. There is no evidence that unknown, future "provisions" adopted by the State Board would be appropriately applied to Sites' water rights. And there is no evidence that future "flow-shaping" provisions in the Bay-Delta Plan will be adopted or implemented in a way that is consistent with maintaining the natural hydrograph in the Sacramento River or the Delta. The changes resulting from Term 30.d have the potential to harm instream beneficial uses of water, have adverse effects on instream uses of water, could substantially increase water diversions, and do not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § 1700.6(a).) Such changes can only result from approval of a petition for change.

While flow-shaping can provide ecological benefits, it is fundamentally different from maintaining the natural hydrograph—the primary rationale for adopting an unimpaired flow standard in the first place. Determining whether future flow-shaping provisions are ecological beneficial as compared to what is required by Term 30.a must be determined *before* such flow-shaping is incorporated into the Permit.

Permit Term 31

Proposed Redline

31. If the Board updates the Bay-Delta Plan to include a VA Pathway, diversions under this Permit shall not interfere with the intended benefits to fish and wildlife beneficial uses of flow and non-flow commitments provided pursuant to the VA Pathway. At a minimum, the following conditions apply:

a. No diversion is authorized on any day when flow commitments provided pursuant to the VA Pathway are present in the mainstem of the Sacramento River.

b. No diversion is authorized on any day in which flow commitments provided pursuant to the VA Pathway are contributing to Delta outflow and Delta outflow remains below the sum of ___% ~~the~~ Delta outflow [specific percentage included in Term 30.a] ~~requirement for diversion under Term 30~~ and the amount of VA Pathway flow commitments contributing to Delta outflow.

c. The accounting methodology in the Bay-Delta Plan shall be used to determine when flow commitments are present in the mainstem of the Sacramento River, and the presence and amount of flow commitments contributing to Delta outflow. During those years when flow commitments are provided pursuant to the VA Pathway, Permittee shall provide reports to the Deputy Director to substantiate Permittee's compliance with this term on a schedule that the Deputy Director determines is consistent with other reporting requirements in the Bay-Delta Plan.

d. The Board reserves the authority to modify this term, following notice and opportunity for public comment, to ensure consistency with the Bay-Delta Plan and approved VAs.

Explanation

If Term 30.d remains included in the final draft of the Permit, this term should be edited to identify the specific percentage that is included under Term 30.a. Referring to Term 30 generally risks inclusion of the carve-out in Term 30.d in determining the requirements of Term 31.b. This is unnecessarily complicated and reduces the protection provided by Term 31. While NGO Protestants believe this edit would be beneficial in general for purposes of clarity and simplicity, if Term 30.d is eliminated, no changes to this term are necessary.

Permit Term 32

Proposed Redline

32. Prior to construction of Sites Reservoir, Permittee shall prepare and submit to the Executive Director, in consultation with the State Water Board, ~~and~~ the Central Valley Regional Water Quality Control Board, the California Office of Environmental Health and Hazard Assessment, the California Department of Public Health, any California Native American Tribe, and any non-governmental organizations requesting to participate, a feasibility assessment of actions that may be taken prior to construction and technologies that may be installed during and after construction to control, prevent, or mitigate production of ~~(1) control~~ cyanobacteria, ~~or~~ cyanotoxins, and ~~production in Sites Reservoir and (2) prevent or mitigate elevated levels of~~ methylmercury in Sites Reservoir and in water released from Sites Reservoir that will be conveyed in the Colusa Basin Drain, Yolo Bypass, or Sacramento River. The feasibility assessment should include consideration of pilot programs to evaluate the feasibility of innovative techniques or technologies, as well as the referenced doses established by environmental or public health agencies for human health and safety. Once the feasibility assessment is approved by the Executive Director, the actions identified in the assessment must be timely implemented by Permittee. The Permittee shall submit regular reports to the Executive Director, public health agencies, and any participating Tribe or NGO about the implementation and effect of the actions identified.

Explanation

First, as drafted, the feasibility assessment requirements for cyanobacteria, cyanotoxins, and methylmercury were inconsistent, requiring "control" for cyanobacteria and cyanotoxins and requiring "prevention or mitigation" for methylmercury. While these standards overlap and may result in similar assessments, the standard should be the same for purposes of the feasibility assessment. The feasibility assessment should include reference to doses and trigger levels for each toxin that have been determined to be protective of public health and water quality. NGO Protestants propose that the Term be amended to harmonize the requirements and to ensure that the assessment identifies actions during and after construction to control, prevent, and mitigate releases of each substance.

Second, the California Office of Environmental Health and Hazard Assessment and the California Department of Public Health should also be included. Both entities work on issues related to Mercury pollution and its environmental and human impacts.[6]

Third, given the feasibility assessment is intended to, at least in part, consider pilot programs and innovative techniques or technologies, the participation of California Native

[6] See, e.g., https://oehha.ca.gov/fish/mercury-fish-and-shellfish (Office of Environmental Health and Hazard Assessment) and https://www.cdph.ca.gov/Programs/CCDPHP/DEODC/EHIB/CPE/Pages/Mercury.aspx (Department of Public Health).

American Tribes and NGOs with experience in mercury and cyanobacteria should be included. Many Tribes and NGOs have significant experience in the evaluation of the fate, transport, and management of mercury and cyanobacteria. Traditional Ecological Knowledge and innovative techniques based on experiences of Tribes, communities, and organizations who have experience with the consequences of these pollutants must be included to ensure the best possible assessment of ways to control, prevent, or mitigate the releases of these constituents or the harms their release may cause.

Fourth, the Term should be amended to ensure that the actions identified in the feasibility assessment are timely implemented. Implementation and reporting should be identified in the feasibility assessment and performed similarly to the proposed implementation and reporting of the mitigation measures identified in Attachment 3. (While Term 36 contemplates implementation of Term 32, as drafted Term 36 is conditional ("may," not "shall") and there does not appear to be an equivalent implementation requirement for methylmercury.)

Permit Term 33

Proposed Redline

33. Prior to construction of Sites Reservoir, Permittee shall conduct pre-construction total mercury sediment screening, sediment coring, and other actions to identify areas that may have ~~higher~~ concentrations of mercury within the inundation area and a combined total of estimated mercury. These concentrations and areas shall be reported to the Executive Director, public health agencies, and the public for review and comment. Permittee shall ~~identify to the Executive Director any~~ take actions ~~that will be taken~~ prior to construction and inundation to identify and remove mercury loading from ~~address~~ any areas that ~~may~~ have ~~increased~~ concentrations of mercury.

Explanation

NGO Protestants appreciate and support the inclusion of this Term to identify potential mercury sources that would pose risks to water quality in Sites Reservoir and in its releases. This term is especially necessary given that "Project operations are likely to cause or contributed to exceedances of methylmercury water quality objectives in receiving waters of releases of Sites Reservoir." (Draft Decision at 36 [citing AHO-073 at 60-62; see also *id.* at 129-130 [detailing projected mercury and methylmercury concentrations in Sites which are substantially higher than Oroville or Shasta reservoirs and concentrations in large fish two to four times above objectives]; see also FOR-2s at ¶¶ 30-32 [detailing necessity for additional analysis prior to inundation to avoid significant mercury harms].) To ensure the term results in actions to reduce or avoid harm from these sources NGO Protestants propose changes to require the Permittee to take actions to address them before construction and inundation of the reservoir.

If mercury in sediments or other sources is present when the reservoir is inundated, the result will be increased methylation and bioavailability which will likely make fish within the reservoir and those impacted by downstream discharges unsafe to eat. The accepted rule is that one gram of mercury is sufficient to contaminate a twenty acre lake. (See FOR-2s at ¶ 27.) As a result, all mercury laden soil should be removed from the reservoir prior to inundation, not just soil in "higher concentrations" or "hot spots." Reservoir water containing mercury or methylated mercury that is released will continue downstream and can be subject to ongoing methylation for decades even without additional loading. Any mercury remaining in the reservoir at the time of inundation, and the resulting methylmercury in reservoir releases risks creating unsafe conditions that can last for decades.

NGO Protestants also request that the Board provide guidance to Permittee and the public about what constitutes "higher concentrations" and "increased concentrations" in this context, as well as identify specific target concentrations of mercury in sediment that must be met prior to construction or inundation. To be transparent and allow for effective public health safety, these numerical values should correlate with the reference dosages that have been established to be protective of human, animal, and aquatic health and the associated numeric concentrations in fish tissues water and soil levels. For mercury, the reference dose established by the U.S. EPA for safety

is below 0.7 micrograms per kilograms (µg/kg). However, for the most at-risk populations, developing fetuses exposed in utero, the reference dose for mercury where exposure from eating fish does not cause neurological impairments is 0.1 micrograms per kilograms (µg/kg) per day. To confirm public health safety in fish tissue, methylmercury goals instream in the inundated reservoir and downstream will need to be coordinated with the California Department of Public Health, California Office of Environmental Health and Hazard Assessment, and the State Water Board.

Permit Term 34

34. Permittee shall consolidate the applicable requirements of Terms 35 through 43 into a Water Quality Portfolio for review and approval by the State Water Board. The Water Quality Portfolio shall include the Reservoir Management Plan (Sites RMP) described in Appendix 2D of the EIS/EIR, and any additional actions or plans under Terms 35 through 43. No diversions or rediversions shall occur unless the Water Quality Portfolio is approved and the actions described by the approved Water Quality Portfolio are conducted in accordance with the deadlines described in the Water Quality Portfolio.

Permittee shall post a draft of the initial Water Quality Portfolio and offer a 90-day period for public review and comment, and drafts of any subsequent updates to the Water Quality Portfolio on its website and offer a ~~30~~60-day period for public review and comment. Permittee shall consider and respond to any comments in writing, and shall submit the Portfolio, comments, and responses to the State Water Board.

Permittee shall consult with the Central Valley Water Quality Control Board, CDFW, and any California Native American Tribe requesting consultation prior to posting the draft Water Quality Portfolio on its website, and shall incorporate responses from the Regional Board, CDFW, and Native American Tribe(s) in the draft published for public comment. ~~submitting the initial Water Quality Portfolio to the State Water Board for its consideration and prior to submitting any update to the Water Quality Portfolio.~~ Permittee shall develop a notification list of representatives of California Native American Tribes by submitting requests to the Native American Heritage Commission (NAHC) for a search of the Sacred Lands Inventory and the NAHC Contact List for Tribal Consultation, to identify Tribes with current or ancestral lands in any county that overlies either the Delta, as defined by Water Code section 12220, or the Sacramento River watershed. The notification list of Tribes shall also include all Tribes that have requested, in writing, notification of the opportunity to consult and all Tribes that participated as parties in the hearing for Decision XXXX or submitted comments (written or oral) to the AHO or the State Board on the Draft Decision. Permittee shall update this list and notify Tribal representatives on the list of the opportunity to consult at least 180 days prior to ~~submission~~ the posting of the draft Water Quality Portfolio on Permittee's website for ~~to~~ the ~~State Water Board~~ public and 180 days prior to submission of update~~d~~s drafts of ~~to~~ the Water Quality Portfolio. Notification attempts must be meaningful and persistent (for example, a single unreturned message does not suffice).

Permittee shall submit updates to the Water Quality Portfolio at least every five years following initial approval by the State Water Board. Updates to the Water Quality Portfolio shall identify actions implemented during the prior five years, the impact of those actions on water quality in waterbodies affected by project operations, and any proposed changes or additions to actions in the Water Quality Portfolio. ~~Proposed updates to the Water Quality Portfolio may include revised criteria for prohibitions of releases to the Colusa Basin Drain, Yolo Bypass, or the Sacramento River based on changes to applicable water quality control plans, including changes to water quality objectives or programs of implementation provisions, or other new information relevant to the protection of beneficial uses or public health.~~ Approval of the Water Quality Portfolio and subsequent updates shall expire six

years after their respective approval dates. Updates to the Water Quality Portfolio shall become effective upon approval by the Executive Director and may include unchanged components of prior Water Quality Portfolios. If the Water Quality Portfolio or its updates proposes to revise criteria for prohibitions on releases of water from Sites Reservoir, such changes may only be implemented upon a formal change petition.[7]

Explanation

First, NGO Protestants propose to expand the time for the public to review and comment on the initial draft Water Quality Portfolio from 30 to 90 days. NGO Protestants also propose to expand the time for comments on subsequent updates from 30 to 60 days. Given the import and likely complex nature of the document, a 30-day comment period is too short to allow for meaningful review, analysis, and submission for many Tribes, NGO organizations, and the public.

Second, the method by which the Permittee consults with California Native American Tribes should be edited in two ways: (a) it should be more inclusive, and (b) consultation should require the incorporation of input from Tribes prior to the release of the Water Quality Portfolio for public comment.

NGO Protestants propose to expand the Tribes that must be offered an opportunity to consult from those who participated in the water rights hearing to any Tribe that either participated as a party or offered comments on the draft decision to the Board. There is no basis in not requiring the Permittee to notify Tribes who have offered comments on this Draft Decision and Draft Permit, or who do so during the next iteration of the document simply because they were not a party to the water rights proceeding. Those Tribes have demonstrated an interest in the outcome of the Permit by commenting, regardless of whether or why they participated as formal parties in the water rights hearing. More, as the evidence demonstrated during the proceedings, these notification efforts must be meaningful and persistent – single emailed messages that are not returned should not suffice.

In addition to increasing the Tribes that must be included in the notification by the Permittee, there must be meaning incorporation of the feedback from Tribes during the outreach required by this Term. Notifying Tribes after the document is completed and available for public review ignores the special sovereign status of Tribes. As a result, NGO Protestants have offered edits to require the outreach to Tribes to begin no less than 180 days prior to posting the draft for public review on Permittee's website and requiring that Permittee incorporate the responses from Tribes, as well as from CDFW and the Regional Water Board, before posting the document for public review and comment.

Third, the Water Quality Portfolio should not be a vehicle to undermine protective

[7] See footnote 1, *supra*, re Permit Term 23. While the Water Code requires a formal change petition, if one is not required by this Term, the heightened standard from Term 22 and replicated in the alternative approach for Term 23.

terms identified in this Permit. For many actions that must be considered and potentially included in the Water Quality Portfolio, they would have the potential to harm instream beneficial uses of water, have adverse effects on instream uses of water, or substantial increase water diversions, rediversions, or releases, and would not qualify as minor adjustments to the point of diversion or place of use. (See Water Code § ~~1700.4(a),~~ 1700.6(a).) Accordingly, allowing changes to the requirements of other Permit Terms should require a formal change petition to the Water Board, not simply an approved Water Quality Portfolio.

If such a requirement is not included, it is necessary to amend the requirements of the last paragraph of this Term so that any changes that are proposed in the Water Quality Portfolio to other requirements or conditions in the Permit only be adopted if the evidence demonstrates that such changes would be equally or more protective of fish and wildlife, beneficial uses, water quality, and public health.

Permit Terms 36 and 37

Proposed Redlines

Term 36

36. Permittee ~~may~~ shall include a HABs Prevention and Mitigation Strategy (HABs Strategy) in the Water Quality Portfolio to prevent or reduce HABs in Sites Reservoir and limit the release of cyanobacteria or cyanotoxins from the reservoir. The HABs Strategy shall meet the objective of Term 37. The plan ~~should~~ shall address the results of the feasibility assessment required by Term 32 and incorporate appropriate technology or other actions identified by that assessment. ~~Upon approval of the Water Quality Portfolio, the requirements in the HABs Strategy shall supersede the requirements of Term 37.~~ The HABs Strategy shall include:

a. Any technology to be installed and other actions to be taken to prevent or reduce HABs in Sites Reservoir and limit the release of cyanobacteria or cyanotoxins from the reservoir.

b. Cyanobacteria or cyanotoxin levels at each monitoring location that trigger operational changes or other actions to prevent or reduce HABs in the reservoir and limit the release of cyanobacteria or cyanotoxins from the reservoir to protect human health and other beneficial uses.

c. Operational changes and other actions to be taken by Permittee if monitoring indicates the presence or threat of HABs in the reservoir or a threat of release of cyanobacteria or cyanotoxins from the reservoir.

d. Pilot studies or other ongoing feasibility assessment of technology, methods, and actions to prevent or mitigate the production or release of cyanobacteria and cyanotoxins.

Term 37

37. ~~If an approved Water Quality Portfolio does not include a HABs Strategy developed pursuant to Term 36, then n~~No water shall be released from Sites Reservoir when cyanobacteria or cyanotoxin levels in the released water are above California's Cyanobacteria and Harmful Algal Bloom Network Caution Level as demonstrated by the monitoring procedures described in the Sites RMP. Caution Level is defined as any of the following being met or exceeded: (1) total microcystins equal or exceed 0.8 µg/L, (2) cylindrospermopsin equals or exceeds 1 µg/L, (3) Anatoxin-a is detected, (4) the cell density of potential toxin producers equals or exceeds 4,000 cells/mL, or (5) there is discoloration, scrum, algal mats, soupy or paint-like appearances, or suspected illness. If an applicable water quality objective for cyanobacteria or cyanotoxin is adopted, that objective must also be met~~will be substituted for the Cyanobacteria and Harmful Algal Bloom Network Caution Level in this term~~. If the two standards differ, the Permittee must meet the requirement that is

more protective of water quality, wildlife, and human health. Permittee shall describe the effectiveness of any HABs management practices used within the reservoir as part of each five-year update to the Water Quality Portfolio.

Explanation

NGO Protestants offer our edits and explanation of these terms together as they both address the requirements for the Permittee related to HABs, cyanotoxins, and cyanobacteria.

First, the Permittee should be required to have a HABs Prevention and Mitigation Strategy. This should not be optional. NGO Protestants take no position on whether the strategy is included in the Water Quality Portfolio or is separate, so long as the strategy is mandatory.

Second, the HABs Strategy must be required to implement the actions identified in Term 32.

Third, the definition of Caution Level should be included in the Term for clarity. (See Draft Decision at 134, fn. 59.)

Fourth, the HABs Strategy must meet, not replace, the requirements of Term 37. The evidence demonstrated that the "caution level" criteria for restricting releases adopted in Term 37 was a useful and appropriate metric for determining whether releases from Sites Reservoir posed a threat to water quality, wildlife, or human health. (See Draft Decision at 132-134 and fn. 59; see also Ex. SCS-8, ¶ 30.) There is no basis for allowing this protective threshold to be changed by the Permittee as part of adopting its HABs Strategy or its Water Quality Portfolio. Thus, the HABs Strategy should be required to demonstrate how the Permittee will meet the standard adopted in Term 37, rather than allowing for the Permittee to change that standard.

Fifth, if a Regional or State Water Board adopts a cyanotoxin, cyanobacteria, or HABs water quality standard, the Permittee must meet that standard and the Caution Level standard identified in Term 37 and defined in Draft Decision footnote 59. Where the standards differ, the more protective of water quality, wildlife, and human health must be met.

Permit Terms 38 and 39

Proposed Redlines

Term 38

38. Permittee shall include in the Water Quality Portfolio a plan to prevent or mitigate elevated levels of methylmercury in Sites Reservoir and in water released from Sites Reservoir to be conveyed in the Colusa Basin Drain, Yolo Bypass, or the Sacramento River (Methylmercury Mitigation Plan). The plan shall be developed in consultation with the Central Valley Regional Water Quality Control Board, Office of Environmental Health Hazard Assessment, the California Department of Public Health, and State Water Board, and shall be consistent with applicable methylmercury water quality objectives in the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWBE) and the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins (Central Valley Basin Plans). The plan shall include the following components:

a. A description of how Mitigation Measure WQ-1.1 will be implemented, including the specific sampling locations, frequency, and procedures, and actions to be taken.

b. Monitoring and sampling of the sediment, water column, and fish tissues within the reservoir to determine the extent of methylmercury in the reservoir and the quantity of methylmercury being released from Sites Reservoir.

c. Actions that will be taken to reduce to the maximum feasible extent the methylation of mercury during the initial filling of the reservoir, such as installation of hypolimnetic oxygenation systems, oxidant addition, or in-reservoir sediment removal or encapsulation, including implementation of actions required under Term 32 and Term 33.

d. A load allocation for methylmercury discharges from the reservoir that is consistent with the methylmercury objectives and Delta Mercury Control Program in the Central Valley Basin Plans and the ISWBE sport fishing objectives.

e. Actions, including operational changes and other actions that will be taken to mitigate methylmercury in the reservoir and ensure releases are within the identified methylmercury load allocation.

f. Thresholds at monitoring locations that will trigger the identified operational changes or other actions.

g. ~~Alternative compliance actions the Permittee shall take if reservoir releases cannot meet the identified methylmercury load allocation through mitigation measures and operational changes, as determined by the Executive Director. Alternative compliance might include mitigating or offsetting existing contributors of mercury outside of the reservoir footprint.~~

h. Pilot studies or other ongoing feasibility assessments of technology, methods, and management actions to reduce methylmercury production and bioaccumulation in the reservoir and concentrations of methylmercury in releases from the reservoir.

Term 39

39. Releases from Sites Reservoir shall comply with the load allocation for methylmercury discharges from the reservoir identified in the Methylmercury Mitigation Plan~~, except that the Executive Director may approve an alternate method of compliance by implementation of the alternative compliance actions identified by the Permittee in the Methylmercury Mitigation Plan~~.

Explanation

NGO Protestants include both terms together as the edits to each are intended to achieve the same objective—compliance with, rather than deviation from, applicable water quality standards.

Term 38 as drafted requires compliance with applicable methylmercury water quality objectives in the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWBE) and the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins (Central Valley Basin Plans). NGO Protestants applaud the inclusion of this requirement. Terms 38 and 39 should also be harmonized with any changes to Terms 32 and 33 related to pre-construction and pre-inundation mercury mitigation or removal practices.

Term 38.g, and the alternative compliance language in Term 39, should be deleted. The Permit should not and legally cannot preemptively allow for violations or exceedances of water quality standards. (See Water Code § 13247.) Those standards must be met to avoid harm to water quality, fish, wildlife, and public health. Allowing water quality standards to be exceeded through undefined "alternative compliance" based on the determination of the Executive Director is not in the public interest and is not consistent with California law.

Permit Term 40

Proposed Redline

40. Temperature monitoring shall be continuous starting at least one week prior to the release of water from Sites Reservoir for conveyance in the Sacramento River (Sacramento River Conveyance Water) and continuing until at least one week after releases cease. Monitoring locations shall include: (1) the point of release from Sites Reservoir, (2) the point of release from Funks Reservoir, (3) the point of release from the Dunnigan Pipeline, (4) the point of release from the Colusa Basin Drain to the Sacramento River, (5) upstream of the confluence with the Colusa Basin Drain in the Sacramento River, and (6) downstream of the confluence with the Colusa Basin Drain in the Sacramento River. ~~Amendment or removal of points (1) through (3) may be modified by the Executive Director as part of updating the Water Quality Portfolio.~~

Explanation

Temperature monitoring is necessary and important. Monitoring temperatures at release points from Sites Reservoir, Funks Reservoir, and the Dunnigan Pipeline should not be optional or left to the discretion of the Water Quality Portfolio and Executive Director.

Permit Terms 41 and 42

Proposed Redlines

Term 41

41. Permittee ~~may~~ shall develop a Sacramento River Temperature Strategy (Temperature Strategy) to address impacts to fisheries from temperature changes in the Sacramento River caused by release of Sacramento River Conveyance Water to be included in the Water Quality Portfolio. Permittee shall receive concurrence from CDFW, NMFS, and FWS that the Temperature Strategy will avoid temperature-related detrimental effects on fisheries in the Sacramento River prior to submitting the Temperature Strategy to the State Water Board. ~~Upon approval of the Water Quality Portfolio, t~~The requirements in the Temperature Strategy shall ~~supersede the numeric~~ meet and implement the requirements of Term 42. The Temperature Strategy must include:

a. Monitoring sufficient to support development and validation of modeling to accurately quantify and forecast temperature changes in the Colusa Basin Drain and the Sacramento River that will be caused by releases of water from Sites Reservoir.

b. Integration of the operation of Sites Reservoir with other reservoir operations affecting temperature in the Sacramento River downstream of Shasta Dam to avoid temperature impacts to fisheries. Specific actions to be evaluated include exchanges between Sites Reservoir and Shasta Reservoir to increase cold-water pool available in Shasta Reservoir for temperature management, or other actions to offset temperature increases that may result from the release of Sacramento River Conveyance Water.

~~c. Temperature thresholds at which releases of Sacramento River Conveyance Water will cease or be reduced to avoid detrimental impacts to fisheries, and the conditions under which each threshold applies.~~

d. The ~~If the~~ temperature thresholds shall ensure that ~~would allow~~ releases of Sacramento River Conveyance Water ~~when such releases may cause or contribute to temperature increases in the Sacramento River above 68 degrees Fahrenheit (F), a description and supporting documentation of conditions under which temperature increases above 68 degrees F between Hamilton City and the I Street Bridge~~ will not be detrimental to fisheries. For salmonids, the determination of whether a temperature impact would be detrimental may take into account the broader condition of the fishery.

Term 42

42. ~~If an approved Water Quality Portfolio does not include a Temperature Strategy developed pursuant to Term 41, then n~~No water shall be released from Sites Reservoir and

conveyed in the Sacramento River unless the water, when released from the Colusa Basin Drain into the Sacramento River, is ~~(a) cooler than the Sacramento River or (b)~~ less than 68 degrees F. Temperatures shall be measured ~~and compared~~ on an instantaneous basis.

Explanation

Similar to our comments on Terms 36 and 37, and Terms 38 and 39, *supra*, the requirements for releases of water from Sites Reservoir related to temperatures must ensure that the releases comply with Basin Plan standards, water quality objectives, and avoid harm to fish and fisheries.

First, Term 42 correctly identifies 68 degrees F as the legally mandated threshold for temperatures in the Sacramento River. However, Terms 42, 41.c, and 41.d potentially allow for releases of water that exceed this threshold. There is no legal basis for doing so. (Water Code § 13247.) As a result, Term 42 should be edited to require releases be less than 68 degrees F regardless of the temperature of the Sacramento River.

Second, Term 41.d should be modified and Term 41.c should be deleted to remove any ability for the Permittee to release water that exceeds the temperature requirements in the Basin Plan. Instead of allowing for a justification for violation of the Basin Plan, or the identification of a higher temperature threshold, the Term should prohibit releases of water that would be harmful to fisheries or inconsistent with the Basin Plan.

Third, NGO Protestants support the inclusion of the status of the fishery in an assessment of what constitutes detriment to the fishery. Taking account of the context and existing condition of the fishery is vital in assessing whether future impacts would be detrimental to that fishery.

Fourth, Term 41 should be edited to make the Temperature Management Strategy mandatory, not optional. And it should be amended to ensure that the Temperature Management Strategy meets, rather than changes, the requirements of Term 42.

Permit Term 44

Proposed Redline

44. No water shall be released from Sites Reservoir in exchange for water to be diverted or rediverted through the Clifton Court Forebay or the Jones Pumping Plant (collectively, the Export Facilities) unless the diversion or rediversion of the exchanged water at the Export Facilities complies with Terms 29, 45, 46, 48, 49, and 50, and the operations of the rediversion facilities are in compliance with all their water rights terms and conditions.

Explanation

Like Term 29, NGO Protestants support the inclusion of Term 44, to prevent the rediversion of water when the Export Facilities are not in compliance with the Bay-Delta Plan, regulatory requirements to protect fish and wildlife, and protection of water rights holders.

NGO Protestants request that this term be amended to: (1) add Term 29 to the list, to ensure that rediversion not be allowed if diversion would be barred by that condition; and, (2) make clear that rediversion of Sites water not be allowed when the Export Facilities are not in compliance with all water rights terms and conditions.

Permit Term 46

Proposed Redline

46. No rediversion of water at the Export Facilities shall occur unless the numeric water quality objectives in the Bay-Delta Plan, as it may be amended, are met. If rediversion of Sites Project water was occurring at the Export Facilities within 72-hours preceding the failure to meet the Bay-Delta Plan's numeric water quality objectives, no rediversions of project water are allowed for seven-days following the end of the exceedance or violation.

Explanation

Like our proposed edit to Term 29, in addition to applying contemporaneously (as drafted), if the identified standards or objectives are not met at a time when Sites Project water was being diverted, the restriction on rediversion should continue for seven-days following the end of the violation or exceedance of Bay-Delta Plan objectives or standards.

Permit Term 50

Proposed Redline

50. Permittee shall maintain and post on a publicly available website in a machine-readable format, a list of (1) the amounts of water exchanged between the Permittee and other water right holders, and (2) Project water transferred to non-Storage Partners. An exchange shall include any water released or delivered by the Permittee pursuant to an agreement between the right holders, in lieu of water being released or delivered pursuant to another water right or bypassed to satisfy downstream demands. A transfer shall include any sale, assignment, lease, or conveyance of Project water by the Permittee to an entity that is not a Project Storage Partner.

Permittee shall not start releases pursuant to an exchange or transfer until the following information about the exchange or transfer has been listed on the website, disaggregated for each water right involved in the exchange or transfer: the water right permit, license, or statement number; the amounts to be exchanged or transferred; the price per acre-foot and total cost of the exchange or transfer; the name of each entity participating in the exchange or transfer; and, if applicable, where water involved in the exchange or transfer will be stored. The website shall be updated to reflect the cumulative volume of exchanged water remaining in storage following release of exchanged water and the dates when those releases occurred. A list of all exchanges and transfers that occurred during the water year, along with the above information, shall be included with the Annual Report. Annual Reports shall be made publicly available on the website.

Explanation

The Draft Permit grants to the Project the largest place of use of any water project in the state, encompassing more than 32% of the state's land area. This creates an enormous need for transparency to avoid abuse. The changes reflected here help ensure that the interested public can understand and evaluate the use of Project water.

Further, transparency regarding the price of transferred or exchanged Project water is directly relevant to the Board's ongoing public interest obligations. The evidentiary record demonstrated substantial uncertainty regarding the cost and affordability of Project water, including evidence that price per acre-foot could be cost-prohibitive in some cases, and evidence that Project construction costs increased by more than 50% during the proceeding. Requiring public disclosure of transfer pricing will assist the Board and the public in evaluating whether the Project's operations, benefits, and allocation of water remain consistent with the public interest.

Permit Term 51

Proposed Redline

51. No water shall be released from Sites Reservoir in exchange for water diverted by ~~either~~ DWR as part of the SWP, ~~or~~ Reclamation as part of the CVP, or another water rights holder, if that exchange results in DWR, ~~or~~ Reclamation or that other water rights holder violating any law, regulation, biological opinion, incidental take permit, ~~or~~ court order or State Water Board decision, order, or water right term and condition applicable to the operation of the SWP, ~~or~~ CVP, or applicable water diversion facility. No water shall be stored in Sites Reservoir in exchange for water released by DWR as part of the SWP, by Reclamation as part of the CVP, or by another water rights holder, if that exchange results in DWR, Reclamation, or another water rights holder violating any law, regulation, biological opinion, incidental take permit, court order, or State Water Board decision, order, or water right term and condition applicable to the operation of the SWP, CVP, or applicable water diversion facility.

Explanation

The exchanges between Sites and other water rights holders, including the SWP and CVP, remain unclear and subject to future analyses. As such, NGO Protestants support the inclusion of this Term to provide some guardrails and constraints on such exchanges. NGO Protestants believe three changes are necessary to ensure that Sites storage and releases not act as a workaround that would allow third parties to skirt or violate legal requirements.

First, the scope of the Term should be expanded beyond just the SWP and CVP to include any other water rights holder that intends to use Sites for exchanged storage or releases of water.

Second, the Term should be clear that the laws and regulations encompassed by the Term include State Water Board decisions, orders, and water rights terms and conditions. For example, Water Rights Order 90-5 requires the Bureau of Reclamation to have and implement temperature management plans for its operate Shasta Reservoir in order to avoid causing harm to the salmon fishery. Exchanges with Sites should require the Bureau of Reclamation to meet the requirements of Water Rights Order 90-5.

Third, this term should also be expanded to encompass exchanges that store water in Sites, not just exchanges that release from Sites. Both types of exchanges can cause unreasonable effects of fish and wildlife, or harm water quality. As such, the restrictions on those operations should match, as reflected in redlined Term 51.

Permit Term 53

Proposed Redline

53. Permittee shall meet the requirements in Mitigation Measure GHG 1.1 in Attachment 3 of this Permit. Every five years after issuance of this Permit, the Permittee shall review and update its accounting of Greenhouse Gas (GHG) emissions using best available science and tools, to ensure the Authority achieves its goal of net-zero GHG emissions. Permittee shall submit any update to its accounting of GHG emissions to the Deputy Director as an attachment to the Annual Report for the year when the review and update occurred~~. This term may be modified or removed by the Deputy Director upon request by the Permittee if GHG emissions resulting from operation of the Project are subject to the regulatory authority of another state agency~~.

Explanation

NGO Protestants support the inclusion of this Term. Permittee has promised "net-zero" emissions. It should be required to meet that target. This should remain true even if emissions from the project are subject to the regulatory authority of a different state agency. The Water Board should require that the Permittee meet its promised net-zero target, whether or not another state agency is also regulating emissions from the project. Recent scientific publications have added to the wealth of evidence that reservoirs in the United States are a significant source of greenhouse gas emission. (See, e.g., FOR-173, FOR-165.)

Meeting net-zero emissions is vital to avoiding substantial unnecessary harm from the proposed project, is a commitment made by the Permittee, and is appropriately included as part of the Terms of the Draft Permit as well as in Attachment 3.

Permit Term 55

Proposed Redline

55. No construction shall begin until the Permittee has developed ~~water shall be diverted under this Permit unless Permittee is operating in accordance with~~ a compliance plan that has been approved by the Deputy Director after public notice and hearing. ~~The compliance plan shall specify how the right holder will comply with the Terms 5, 7,22, 23, 30, 31, 47, Term F, and Term G of this Permit.~~ The compliance plan shall identify the data to be submitted with the Annual Reports to demonstrate compliance with all the Terms of this Permit, including, where applicable, stream gauge flow data. ~~The Deputy Director may require amendments of the compliance plan to address any additional terms and conditions of this Permit.~~ Permittee shall be allowed at least 90 days to submit required amendments to the compliance plan. The compliance plan may incorporate by reference other submittals by the Permittee to the State Water Board~~, such as methodologies submitted pursuant to the reporting requirements of chapter 2.7, title 23, California Code of Regulations~~. The compliance plan shall not amend or change any Terms in this Permit.

Explanation

While the need for a compliance plan to identify the information necessary to demonstrate compliance with the pre-construction, construction, and operational requirements of this Permit is appropriate and necessary, that plan should not be related to operations in any way. As drafted, the Term implies that the compliance plan may impact, identify, modify, or govern operational criteria or requirements.

Separately, the citation to chapter 2.7, title 23, of the California Code of Regulations (the "Model Water Efficient Landscape Ordinance" regulations) did not appear to be relevant to compliance with these Terms, so NGO Protestants have deleted it in this version. NGO Protestants do not have objection to this citation if it is appropriate and necessary.