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EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

OF THE STATE OF CALIFORNIA

IN THE MATTER OF PETITION FOR ASSIGNMENT OF STATE-FILED APPLICATION 25517, WATER RIGHT APPLICATION 25517X01, AND PETITIONS FOR RELEASE FROM PRIORITY OF STATE-FILED APPLICATIONS 25513, 25514, 25517, 22235, 23780, 23781, OF SITES PROJECT AUTHORITY	**STATE WATER CONTRACTORS' COMMENTS ON ADMINISTRATIVE HEARINGS OFFICE DRAFT DECISION AND DRAFT WATER RIGHT PERMIT**

State Water Contractors ("SWC") provides these comments on the March 20, 2026, draft permit and draft decision conditionally approving the water right application for the Sites Reservoir Project ("Sites" or "Sites Project"). SWC is supportive of the Sites Project. Multi-benefit storage projects such as the Sites Project are essential to prepare and adapt California and its water supply portfolio for a rapidly changing climate. At the same time, SWC does not support the draft permit and draft decision as currently written, and requests critical modifications (identified below) to conform the draft permit and draft decision to both the law and the evidence in the record. At a high level, SWC's concerns with the draft decision and draft permit encompass five general themes.

First, the draft permit and the draft decision incorrectly conflate the Sites Project with the State Water Project ("SWP") and Central Valley Project ("CVP"), the result of which is that the draft permit impermissibly imposes conditions that could be construed as, or have the effect of, imposing obligations on the California Department of Water Resources' ("DWR") operation of the SWP. SWC participated in this proceeding to ensure that its interests and the interests of its 27 member agencies in the SWP were not indirectly harmed by these proceedings. While SWC appreciates that the draft permit includes the permit terms most critical to protecting SWP supply reliability, the draft permit and draft decision as written validate SWC's concern throughout the proceeding that the Protestants were attempting to improperly use this proceeding to address their concerns with the existing exports—unrelated to Sites—of the SWP.

Second, the draft decision inexplicably conflicts with and diverges from the State Water Resources Control Board's ("SWRCB" or "Board") findings and conclusions in other past proceedings, such as the very recently permitted Lower Yuba River Accord Extension,[1] and fails to recognize the other ongoing SWRCB processes and forums for addressing the concerns raised in the draft decision. This undermines the SWRCB's authority and results in the draft decision overreaching in unnecessary and harmful ways.

Third, the draft decision reaches conclusions regarding Delta salinity, Delta water levels, and operational conditions to ostensibly protect fish species, based on non-existent, insufficient, or unreliable evidence. Instead, the SWRCB must rely on the best available science and evidence in developing the terms and conditions.

Fourth, the draft permit imposes numerous overlapping, duplicative, and unclear permit terms.

Finally, in adjudicating the Sites water right petitions, the SWRCB should appropriately balance the beneficial uses of water. The Sacramento River is not fully appropriated, and the terms and conditions in the final permit should not be so constraining that water resources development in California becomes unaffordable and infeasible.

[1] SWRCB, Order WR 2026-0001.

Therefore, SWC respectfully requests that, prior to issuing the final permit and decision, the SWRCB correct these issues and revise the draft permit as more fully explained below and in Appendix A.[2]

I. The Draft Decision And Draft Permit Improperly Conflate The Sites Project With The SWP And CVP

Throughout the hearing, the Protestants inappropriately attempted to use this limited water right proceeding to address their existing concerns with DWR's and the U.S. Bureau of Reclamation's ("Reclamation") existing exports. SWC and DWR cautioned the Administrative Hearings Office ("AHO") throughout the process that it would be inappropriate and unlawful to use the Sites Project water right proceeding to address existing concerns related to the CVP and SWP. Yet, the draft decision and the draft permit repeatedly do so. Both the draft decision and draft permit must be revised to correct for and eliminate this mistake.

A. Required Modifications To The Draft Decision

In the draft decision, SWC requests that the SWRCB delete the following statements from pages 34 and 35 and revise the accompanying analysis based on these incorrect statements:

- Page 34: "The evidence in this proceeding suggests that Sites Reservoir would be operated, in part, as an extension of the CVP and SWP to enhance deliveries to CVP and SWP contractors."
- Page 35: " Furthermore, because the Sites Reservoir Project is intended to be operated in close coordination with the CVP and SWP . . ."

Contrary to these statements, the evidence demonstrates that the Sites Project is not part of the SWP or the CVP. Protestants' witnesses acknowledged that the Sites Project is not part of the SWP or the CVP. (*See* SITES Combined Transcript of Proceedings ("Tr.") at 3268:8–13 (Sept. 30, 2024), 3418:15–19: (Oct. 2, 2024); 4713:15–22 (Oct. 22, 2024), 4750: 24–4751:5 (Oct. 22, 2024); 5015:4–25 (Oct. 23, 2024); *see also* Friends of the River Ex. 10 ¶ 52.)

[2] Appendix A contains a consolidated list of proposed modifications to the permit terms discussed herein.

Rediversion of water previously stored in Sites through DWR's Banks Pumping Plant and the Reclamation's Jones Pumping Plant (collectively, "Delta Export Facilities") does not make Sites Project part of the CVP or SWP. The CVP and SWP have their own water rights, which are not subject to this proceeding. It is undisputed that DWR and Reclamation also have existing regulatory approval to move transfer water through Banks Pumping Plant and Jones Pumping Plant, respectively. While such approvals will be relied upon to redivert water released from Sites Reservoir, (SITES-395c ¶ 44; DWR-005 ¶ 5), the approvals authorizing DWR and Reclamation to do so exist independent of the Sites Project. Numerous other water right holders rely on DWR's export facilities to move water South of the Delta, utilizing DWR's available pumping capacity, without being considered an extension of the SWP or CVP. Indeed, DWR is required by statute to make available used capacity at its Delta Export Facilities to bona fide transferors of water. (Cal. Water Code. § 1810.) Doing so does not make such a transfer an extension of the SWP. For example, the SWRCB recently re-approved Yuba County Water Agency's ("Yuba") accord transfer, which allows Yuba to redivert Yuba accord transfer water through the Delta Export Facilities. (SWRCB Order WR 2026-0001 at 32.) Thus, the conclusions that the Sites Project is an extension of the CVP and SWP and operated in "close coordination" with the CVP and SWP are contrary to the evidence in the record.

The Sites Project is intended to deliver water to its participants, just as any water supply project is intended to deliver water to its participants. There is limited overlap in SWP and Sites Project participants. Of the 29 SWP contractors and the 25 entities participating in the Sites Project (SITES-054), only 8 entities overlap. While those 8 entities may obtain increased water supply from the Sites Project, 21 SWP contractors will not and there is no basis on which to conclude that the Sites Project is intended to enhance deliveries to those 21 contractors. Further, Sites Project participants participate in multiple other water supply projects. (*See, e.g.* SWC-2 at 22, 27 (describing Metropolitan Water District of Southern California's varied sources of water supply).) Two water supply projects are not related merely because some of their participants overlap.

B. Required Modifications To The Draft Permit

The draft permit makes the same error of failing to distinguish between the Sites Project and the SWP and CVP, and their independent water rights. As a result, a number of permit terms in the draft permit could be misinterpreted to impose restrictions on SWP and CVP rediversions in general, rather than rediversion of Sites' Project water, specifically, through the Delta Export Facilities. Permit terms 29, 45–49 and 51 must be revised to correct this problem. In addition, the draft permit's failure to properly distinguish between the Sites Project and the SWP/CVP results in conditions that make Sites' compliance contingent on DWR and Reclamation actions that Sites cannot anticipate or control. Thus, permit terms 44 and 51 should be deleted.

1. Permit Term 29

Permit term 29 broadly states "no diversion is authorized . . ." The meaning and intent of this permit term is entirely unclear. There are at least two ways it could be interpreted, one of which could be misinterpreted to impose restrictions on SWP and CVP exports.

One way to interpret this term is as a limitation on Sites Project diversions to Sites Reservoir when the identified conditions are not met. It is not clear that this is the intent of the term because: (1) it does not specify that it is limited to diversions "under this permit;" (2) does not specify that the diversions it is referencing are diversions[3] to Sites Reservoir (as opposed to rediversions in the Delta); and (3) it is not clear what/if any influence Sites Project diversions will have on the water quality criteria identified in the permit term, which are relevant to locations far downstream of Sites' diversions to Sites Reservoir. If the concern being addressed by this term is that the Sites Project should not be able to divert to Sites Reservoir when downstream water quality standards are not being met, this concern is addressed by permit term 15, and thus this term is unnecessary.

The other way to interpret this term is as a limitation on rediversions from the Delta Export Facilities. It is not clear that this is the intent of the permit term because: (1) the permit

[3] Permit term 44 references both Sites Project diversions and rediversions occur at the Delta Export Facilities. As explained below, SWRC disagrees that there are Sites "diversions" at the Delta Export Facilities. Nevertheless, the use of the term diversion in the context of permit term 44 raises the question as to whether "diversions" here could be referring to diversions at the Delta Export Facilities.

term uses the term "diversion" (not rediversion); and (2) Sites Project will not have a water right to divert from the Delta or the Delta Export Facilities. If this permit term was intended to be a limitation on rediversions from the Delta Export Facilities, it must be clarified to: (1) reference "rediversions" rather than diversions; and (2) only apply to rediversions *under this* Permit, for the reasons discussed below with respect to permit terms 45–49. Further, if this permit term is intended to apply to rediversions at the Delta Export Facilities, rather than diversions to Sites Reservoir, it appears redundant of permit terms 46 and 49. As such, in Appendix A, SWC proposes a single term that would clarify and replace permit terms 29, 46 and 49.[4]

2. Permit Terms 45–49

Permit terms 45–49 apply to "rediversion of water at the Export Facilities," with "Export Facilities" referring to the CVP and SWP Delta Export Facilities. Although permit terms 45–49 all reference the Export Facilities, only permit term 47 specifies that it applies only to rediversions of water "stored in Sites." This difference in language between permit terms could be misinterpreted as an intentional distinction between the scope of their applicability and to suggest that terms 45–46 and 48–49 apply to any water rediverted through the Delta Export Facilities, not just Sites Project water. As explained below and in Appendix A, some of these permit terms should be removed entirely or replaced. However, if the Board retains these permit terms, permit terms 45–46 and 48[5]–49 must be clarified that such terms only apply to rediversion of Sites Project water. The SWP and CVP are authorized to move SWP and CVP project water and transfer water of other water users pursuant to Water Right Decision 1641 ("D-1641"). D-1641 is not at issue in this proceeding and cannot be retroactively and indirectly amended through this proceeding. Doing so would constitute a denial of due process. "[O]nce rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process[.]" (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101 [227 Cal.Rptr. 161].) At a minimum, due process

[4] Further explanation related to the proposed replacement term is provided in section I.B.2, II.C and III.C.
[5] Permit term 48 should be revised as shown in Appendix A to be consistent with the applicable limitation on SWP exports, which requires compliance with the federal Endangered Species Act and the California Endangered Species Act.

requires notice and an opportunity to be heard. (*Menefee & Son v. Dept. of Food & Agriculture* (1988) 199 Cal.App.3d 774, 781 [245 Cal.Rptr. 166].) Although DWR participated in this proceeding, that participation was insufficient to afford DWR due process with respect to its vested SWP water rights because DWR was not on notice that its water rights were at issue in the first place. The notices in this proceeding specifically identified the petition for assignment and petitions for release from priority at issue and nowhere indicated that DWR's water rights were at issue. (*See Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 365 [331 Cal.Rptr.3d 589, 620] (water agency's participation in hearing on a motion deemed insufficient to provide due process where the motion did not put the water agency on notice they needed to oppose the request for relief).) Thus, if permit terms 45–49 are not deleted entirely, they must be modified to make clear that the restrictions imposed apply solely to water under the Sites permit.

3. Permit Term 44

Permit term 44 prohibits releases from "Sites Reservoir in exchange for water to be diverted or rediverted through" the Delta Export Facilities "unless the diversion or rediversion of the exchanged water at the Export Facilities complies with Terms 45, 46, 48, 49, and 50." This term should be deleted because it is not within Sites' control and/or attempts to impose new conditions on DWR and Reclamation.

First, Sites has no authority to "divert" water in the Delta, so any references to diversion (rather than rediversion) must be deleted.

Second, at the time Sites releases water from Sites Reservoir, it has no way to know what conditions will exist at the time the exchanged water is later rediverted. There will be passage of time between when water is released from Sites and when the exchanged water is eventually rediverted at the Delta Export Facilities, because the exchange would result in DWR storing water in Oroville before eventually releasing it for rediversion.

Third, Sites has no authority over when and under what conditions DWR eventually rediverts exchanged water.

Finally, DWR's rediversions are not subject to compliance with terms 45–46, 48–50 because this is not DWR's permit and DWR's water rights cannot be modified through this proceeding.

4. Permit Term 51

The same concern applies to permit term 51.[6] At the time Sites releases water from storage, it will have no way to know whether DWR or Reclamation will later violate "any law, regulation, biological opinion, incidental take permit, or court order applicable to the operation of the SWP or CVP," in storing, releasing and rediverting the exchanged water. That being said, this term inappropriately and unjustifiably assumes that DWR and Reclamation would fail to comply with their own regulatory obligations. To the extent that DWR or Reclamation did violate any applicable law, regulation, or permit term in rediverting water, the SWRCB's recourse would be against DWR or Reclamation, not Sites. As such, this term should be deleted because it is not within Sites' control and is unnecessary.

5. Requested New Term

Due to the confusion in the draft decision and draft permit, SWC requests that the SWRCB add a term to the permit which recognizes explicitly that Sites' lacks control and authority over the SWP and CVP facilities. The following term was included in SWRCB 2026-0001 and is appropriate and applicable here:

> This Order does not authorize any physical use of the Central Valley Project (CVP) or State Water Project (SWP) facilities absent independent agreements with DWR or Reclamation for the use of those facilities.

II. The Draft Decision's Findings And Conclusions Related To Delta Water Levels Are Incorrect And Unsupported

The draft decision's findings and conclusions regarding: (1) the impact of Sites Project rediversions on water levels in the Delta; (2) the existing impact of SWP and CVP exports on Delta water levels; and (3) the adequacy of the SWP/CVP Water Level Response Plan are not

[6] Permit Term 51 overlaps with and is redundant of a combination of permit terms 46 and 48. SWC proposes to replace both permit terms 46 and 48, as shown on Appendix A, and such replacement terms would address the concern at which Permit Term 51 is aimed.

supported by the evidence, undermine and conflict with past decisions of the SWRCB, and unnecessarily predetermine the outcome of ongoing SWRCB processes. The numerous errors in the draft decision's Delta water level analysis have far reaching implications beyond this narrow water right proceeding. Both the draft decision and the draft permit term related to water levels must be significantly revised to correct for these errors.

A. The Impact Of Sites Project Rediversions On Water Levels In The Delta

SWC supports the draft decision's conclusion that the Delta Parties'[7] modeling of water levels[8] cannot be relied upon to support the SWRCB's conclusions related to the Sites Project's impact on water levels. (Draft Decision at 55–56, n. 26.) For clarity, SWC reiterates its concerns with such modeling:

- The testimony on water-levels was presented by Mr. Burke on behalf of the Delta Parties. Mr. Burke acknowledged that his analysis of impacts on water levels did not analyze the impact of Sites exports. (Tr. at 4466 (Oct. 21, 2024).)
- The model runs that Mr. Burke did were a comparison of a "with existing [SWP and CVP] export" scenario to a "without existing [SWP and CVP] export scenario." Mr. Burke admitted during testimony that he did not reduce the reservoir releases made to support the exports when he "turned off" the exports. (Tr. at 6569:26–6570:1 (Mar. 4, 2025) ("Mr. Soderlund: So in cutting out the exports you, you didn't also reduce the reservoir releases made to support the exports; is that correct? Panel Member Burke: No, that wouldn't have been done, no.").) Thus, the resulting analysis shows an entirely unrealistic scenario that does not reflect actual conditions that would ever exist because DWR would not release stored water for no reason.
- Mr. Burke failed to provide the modeling analyses or results beyond the very limited information in the figures. (Tr. 6581:20–26.) As was demonstrated during cross-

[7] The Delta Parties include South Delta Water Agency, Central Delta Water Agency, Zuckerman-Mandeville, Inc., Delta Farms Reclamation District No. 2030, Rudy Muissi Investment L.P., and County of San Joaquin.

[8] There is no dispute that the Delta Parties did not model impacts to water levels from Sites. Instead, the Delta Parties modeled a scenario that purported to represent with/without CVP and SWP exports.

examination of Mr. Burke, he did not provide a technical memorandum or otherwise clearly explain how the graphs and analyses he presented could be cross-checked or effectively cross-examined.

Despite correctly concluding that the Delta Parties' modeling is unreliable, the draft decision nevertheless reaches unsupported conclusions regarding injury to water users related to water levels. The only modeling of water levels, other than the disregarded Delta Parties' modeling, is Sites Project modeling, which demonstrates that the Sites Project would cause decreases in Delta water levels of no more than 1.2 inches. Nevertheless, the draft decision assumes, without support, that the Sites Project will cause decreases in water levels greater than 1.2 inches, by: (1) improperly casting doubt on the DSM2 modeling conducted by the Sites Project; and (2) improperly relying on other unreliable and irrelevant figures presented by Delta Parties' witness Mr. Burke.

1. The Draft Decision's Conclusions Regarding DSM2 Are Incorrect

The draft decision improperly concludes that the Sites Project's DSM2 modeling is unreliable for two reasons. First, the draft decision opines that "[b]ecause the Authority's witness, Dr. Samaneh Saadat, presented these model results as a monthly average by water year type, more significant fluctuations at a sub-monthly time step, or in a single month in a particular year, would not necessarily be apparent." (Draft Decision at 56.) However, the draft decision offers no support for this statement.

Second, the draft decision improperly concludes that the DSM2 modeling conducted by Sites is "unlikely to be useful as either a comparative or predictive tool." (Draft Decision at 57.) In particular, the draft decision suggests that because Sites was relying on an older version of DSM2 that does not reflect current channel geometry, that version of DSM2 cannot produce an accurate comparison of water levels with and without the Sites Project. *Id.* This conclusion misunderstands the comparative purpose of the model, is inconsistent with the SWRCB's past decisions, and is not supported by evidence that a version of DSM2 with updated channel geometry would have produced different comparative results.

The draft decision's disregard of the DSM2 modeling is inconsistent with the SWRCB's prior decisions. The updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed ("Bay-Delta Plan") utilizes and relies upon DSM2.[9] Further, in D-1641, the SWRCB relied on DSM2 and dismissed a similar concern raised by South Delta Water Agency—namely, that modeling impacts are unreliable because the results do not reflect historic conditions. The SWRCB rejected these concerns, concluding that the value of the DSM2 model output "is in its comparison of water levels among the alternatives rather than its comparison of the predicted water levels." (AHO 277 at 103.) The DSM2 model is also recognized in the Water Level Response Plan as the appropriate model for modeling water level changes.[10] The draft decision departs from the SWRCB's prior reasoning, without explanation.

There is no evidence in the record that supports the conclusion that the comparative difference between the with-Sites and without-Sites scenarios would be different if the model included more current bathymetry. The draft decision appears to rely on figures presented by the Delta Parties that show differences between the actual water depth and the modeled water depth on a single date (Nov. 20, 2023). (*See* Draft Decision at 56, citing SDWA-2a, Figs. 9–11.) The figures do not support the proposition that DSM2 cannot produce an accurate comparison of *water levels* with and without the Sites Project for several reasons:

- The figures should be disregarded entirely because Mr. Burke did not produce the underlying data or modeling to the AHO, making it impossible to allow effective cross examination and precluding the AHO from being able to evaluate Mr. Burke's opinions.[11]

[9] SWRCB, Draft Staff Report, Sacramento/Delta Update to the Bay-Delta Plan, App. A-2 (Sept. 2023), available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/staff-report/app-a2.pdf.

[10] Water Level Response Plan Pursuant to D-1641 (Jun. 24, 2004), available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/jpod/docs/water_level_response_plan.pdf.

[11] In the Lower Yuba River Accord Extension proceeding, the AHO excluded figures from Mr. Burke's testimony on this very basis, concluding that those figures were inadmissible pursuant to Evidence Code sections 801(b) and 803. (*See* Ruling on Yuba County Water Agency's Written Objections to Admission of South Delta Water Agency, Central Delta Water Agency, and Rudy M. Mussi Investments, L.P.'s Rebuttal (Aug. 29, 2025).)

- These figure represent water depth, not water level, whereas DSM2 is comparing water levels, not water depth.
- The figures represent a single date and do not demonstrate a broader trend.
- The figures purport to show a difference between actual depth and modeled conditions. This is not equivalent to demonstrating that the comparative change in water levels with-Sites vs. without-Sites would be different under newer versions of DSM2 than under the version used by Sites. The latter is the type of evidence that the AHO would need to support the conclusion that Sites' DSM2 modeling is not reliable for comparative purposes, but the AHO did not have any such evidence. Thus, the draft decision takes an unsupported leap from the Delta Parties' figures to the conclusion that the DSM2 version used by Sites is not reliable even for comparative purposes, contrary to past practices of the SWRCB.

DSM2 is DWR's model. It is foundational to countless state agency decisions, including many of the SWRCB's own decisions and findings. It represents the best available technical information available.[12] Updates to the DSM2 model over time do not mean that the older versions are unreliable. DWR, in consultation with the Delta Parties, undertakes ongoing and regular recalibrations of DSM2.

Furthermore, even if the Sites Project rediversions were to cause greater changes in water levels than anticipated by the Sites modeling, Sites rediversions are subject to DWR's implementation of the Water Level Response program. The Delta Parties and the SWRCB have been participating in an ongoing process to improve the DSM2 model as it relates to modeling of the south Delta channels, and the resulting updated DSM2 model will be used in the already existing Water Level Response program for water transfers.

Thus, the draft decision unnecessarily and incorrectly calls into question the usefulness of the comparative nature of DSM2. These statements should be stricken and the analysis revised

[12] SWRCB, Draft Staff Report, Sacramento/Delta Update to the Bay-Delta Plan, App. A-2 (Sept. 2023), available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/staff-report/app-a2.pdf.

accordingly.

2. The Draft Decision Improperly Relies On Unsupported Testimony Regarding Injury To Water Users

The draft decision relies on Mr. Burke's testimony that even a 1.2 -inch drop in water levels can prevent a grower from being able to irrigate under certain conditions. This reliance is unwarranted and inconsistent with the Evidence Code. Mr. Burke acknowledged that determining whether there could potentially be impacts to diverters would require identifying the specific location, pump setup at the location, and the nature of the channel. (Tr. at 4624:9–16 (Oct. 22, 2024).) Yet, in response to cross-examination, Mr. Burke failed to identify a single location where a 1.2 inch drop in water levels would impact a water user or name a single person he had spoken to who confirmed that they would be affected by such a drop. Mr. Burke admitted that he had not "done an analysis, diverter by diverter," to determine which diverters would be impacted by a 1.2 inch reduction in stage. (*Id.* at 4624:17–22.) Indeed, in sworn testimony in another later SWRCB proceeding, Mr. Burke presented similar testimony regarding the apparent injury to water users from current water levels in the Delta. When he was asked to identify the persons being affected by levels in the South Delta, he indicated that he did not "have their names," had not spoken to the people allegedly injured, and could not "tell you on a map exactly which locations." (Yuba Proceeding Tr. 362–77 (Aug. 21, 2025).) Thus, Mr. Burke's testimony lacks foundation, and must be disregarded. (Evid. Code, § 801(b); *Sargon Enter., Inc. v. Univ. of S. Cal.* (2012) 55 Cal.4th 747, 770 [149 Cal.Rptr.3rd 614]("the matter relied on must provide a reasonable basis for the particular opinion offered").)

B. The Impact Of Existing SWP And CVP Exports On Water Levels In The Delta

In addition to making unsupported conclusions regarding Sites Project impacts on water levels, the draft decision reaches unnecessary and incorrect findings regarding the impacts of *existing* SWP and CVP export operations and the adequacy of the Water Level Response Plan. These findings are not legally relevant, are being made without DWR and Reclamation being

given a full and fair opportunity to address such findings, are inconsistent with prior SWRCB decisions, and are not supported by the evidence presented.

1. Exports Within The Authorized Limits Of The CVP And SWP Are Not At Issue In This Proceeding

As a legal matter, rediversion of water previously stored in Sites through the Delta Export Facilities—conditioned upon DWR's and Reclamation's compliance with the then-existing permit limitations—are not caused by the Sites Project. Any such injury arises not from the Sites Project, but from the authorized export limits of the Delta Export Facilities and state law, which requires DWR to make its unused diversion capacity available to other diverters for conveyance of transfer water. (DWR-005 ¶ 6; AHO-277 at 150 (authorizing diversion/rediversion from Banks Pumping Plant of up to 10,350 cfs); *id.* at 155 (authorizing diversion/rediversion from Tracy Pumping Plant of up to 4,600 cfs); Cal. Water Code § 1810.) To the extent that rediversion of water up to the existing pumping capacity of the Delta Export Facilities causes injury, those challenges needed to be raised in a timely manner to the underlying objectives and the existing authorizations. (*See State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 752 [39 Cal.Rptr.3d 189, 251] ("If the Central Delta parties believed the objectives for export pumping limits in the 1995 Bay–Delta Plan were too high, that was an argument they needed to raise in a challenge to the 1995 Bay–Delta Plan itself").)

The Sites proceeding is not the proper time or place to relitigate claims of injury related to SWP and CVP export operations.[13] The Water Board approved the Joint Points of Diversion in D-1641. DWR and Reclamation completed a Water Level Response Plan to comply with D-1641. DWR is operating in compliance with the Water Level Response Plan. As explained above, to use the Sites proceeding to relitigate claims of injury related to the Joint Points of Diversion is a violation of due process. Although DWR participated in this proceeding, that participation was insufficient to afford DWR due process with respect to its vested SWP water

[13] The Delta Parties are not entitled to higher water levels than can be achieved under the existing authorized Delta Export Facilities operations, (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at p. 752), and cannot claim injury to the extent that the Sites Project would reduce the likelihood that Protestants would get something to which they are not entitled to in the first place.

rights because DWR was not on notice that its water rights were at issue in the first place. Further, the SWRCB should decline to issue a decision in this limited water right proceeding that undermines and collaterally attacks its own prior decision in D-1641 and Water Rights Order 2002-0003. Doing so is not only impermissible, but also unnecessary. Even if the SWRCB has concerns about the impacts of Delta exports, the SWRCB has a process for addressing those concerns holistically and is already doing so.

2. The Draft Decision's Findings Regarding The Water Level Response Plans Are Unsupported

The draft decision improperly concludes that compliance with the CVP/SWP Water Level Response Plan will not adequately mitigate the threat of injury from the Sites Project. (Draft Decision at 58.) There is no evidence that the Water Level Response Plan is inadequate. The Delta Parties made general allegations that, at times, water levels are insufficient to allow them to pump. However, as the SWRCB has previously explained:

> Water levels in the southern Delta are affected by diversions at project export facilities, but are affected by other factors as well. The other factors include: low river flows entering the southern Delta canals; local channel depletions by agricultural diversions; natural tidal variations, especially during periods of extreme low tides; fluctuations in atmospheric pressure, local wind direction and velocity; and limited channel capacities.

(AHO 277 at 103.) Delta Parties' witnesses presented no evidence that their inability to pump at various times is within the operational control of DWR and Reclamation, or attributable to inadequacy of the Water Level Response Plan.

Delta Parties presented photographs and videos showing channels on a single date—November 20, 2023. (SDWA-2 at Fig. 8, SDWA-67; Tr. at 4476 (Oct. 21, 2024) (describing the aforementioned video and photographs were taken on November 20, 2023).) But their witnesses admitted that conditions on that date were anomalous. (Tr. at 5231:12–15 (Nov. 7, 2024) (video was taken during low tide); *id.* 5232:10–18 (acknowledging video was taken on a date that was "the worst" witness had ever seen and the condition was "not normal.").)

The draft decision states that the AHO received no evidence as to whether the water elevation criteria in the Water Level Response Plan "remain appropriate to prevent injury."

(Draft Decision at 59.) But there was no reason, much less an obligation, to provide such evidence in this proceeding. Again, the SWRCB previously approved the Water Level Response Plan, and the plan is not at issue in this proceeding. (Order WR-2002–0003.) The process for a party to argue that the Water Level Response Plan is insufficient is not through the Sites hearing; it is through the process set forth under the plan and approved by the Board. Specifically, "[i]f facilities, Clifton Court Forebay operations, or export restrictions change, then the DWR, the USBR and SDWA will consult with the Executive Director of the SWRCB to determine whether the Plan requires changes and further approval."[14] Thus, the draft decision erroneously suggests that evidence is required to justify a prior SWRCB-approved plan that is not at issue in this proceeding. The draft decision departs and contradicts prior SWRCB decisions regarding the adequacy of the water elevation criteria in the Water Level Response Plan, without sufficient supporting evidence.

C. Permit Term 49 Must Be Deleted Or Revised

Proposed permit term 49 would prohibit rediversion of Sites' water at the Delta Export Facilities when water depths in the Delta channels are not adequate to support diversions by "reasonable methods." Permit term 49 should be deleted and replaced for several reasons.

First, as discussed above, it is based on the unsupported and improper findings regarding Sites Project impacts on water levels and the adequacy of the Water Level Response Plan.

Second, permit term 49 must be deleted or revised because it would either: (1) indirectly subject DWR and Reclamation to additional obligations, which the SWRCB cannot do through this proceeding; or (2) would require Sites to dictate operational constraints on the DWR and Reclamation Export Facilities, over which Sites has no authority. In particular, under this permit term, Sites Project rediversions would be subject to different limitations than other exports through the Delta Export Facilities and those limitations would have to be tracked and implemented separately. Because DWR and Reclamation, not Sites, operate the Delta Export

[14] U.S. Dept. of Interior, Water Level Response Plan Pursuant to D-1641 (Jun. 24, 2024), at 5, available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/jpod/docs/water_level_response_plan.pdf.

Facilities, this requirement could be interpreted as imposing a requirement on DWR and Reclamation to track or measure "when water depths in Delta channels are not adequate to support diversions," and imposing additional controls and restrictions on their operation of the export facilities when exporting Sites' water. (Draft Decision at 59.) This is impermissible. Even if this requirement is read as imposing an obligation on Sites to track or measure "when water depths in Delta channels are not adequate to support diversions," (*id.*) Sites still lacks authority and control over the operations at the export facilities and DWR and Reclamation will still have to implement these additional constraints. This is precisely why it is more appropriate to rely on the existing constraints in D-1641 and the Water Level Response Plan, and to address any concern regarding those constraints through the proper established processes. Thus, SWC requests that the SWRCB replace permit term 49 with the language proposed in Appendix A.[15]

Finally, to the extent that the Water Board does not replace permit term 49 with the requested language, it must be clarified in several ways:

- As discussed above, the term is vague because it applies broadly to "rediversion of water at the Export Facilities." This term must be clarified so that it only applies to rediversion of water under the Sites permit, not rediversion of water through the Export Facilities generally.
- It is not clear what the term means by "adequate" water depth or who is responsible for determining whether the water depth is adequate.
- It is not clear what constitutes "reasonable methods" of diversion and who is responsible for determining whether a method is reasonable.
- The permit term must be modified to refer to water level, not water depth. Water level is the appropriate method to determine whether there is injury to water users.

[15] The proposed language in Appendix A would adequately address the issues that the draft permit is attempting to address through permit term 29, 46, and 49.

III. The Draft Decision's Conclusions Related To Delta Salinity Are Incorrect And Unsupported

The draft decision's findings and conclusions regarding: (1) the impact of Sites Project rediversions on salinity in the Delta; and (2) the existing impact of SWP and CVP exports on Delta salinity are not supported by the evidence and conflict with the past decisions of the SWRCB.

A. The Impact Of Sites Project Rediversions On Salinity

The draft decision improperly relies on and cites Mr. Burke's testimony to support the proposition that Sites Project exports through the Delta Export Facilities will impact Delta salinity. (Draft Decision at 63.) As Mr. Burke acknowledges, his analysis did not analyze the impact of Sites exports. (Tr. at 4466 (Oct. 21, 2024).) Further, when asked whether his analysis confirmed whether there would be an exceedance of D-1641 objectives at any compliance location, Mr. Burke admitted that "we didn't look at the exceedances, just the change from exports and operations." (*Id.* at 6539:25–6540:2.) Thus, Mr. Burke's testimony provides no basis to conclude either that Sites will increase salinity or cause exceedances of the salinity standard.

The draft decision also points to Sites' modeling as confirming that the Sites Project will, in some instances, impact salinity, but then discounts this modeling. (Draft Decision at 63.) The implication is that the draft decision concluded that Sites will cause increases in salinity beyond what the Sites modeling shows, despite there being no other modeling presented by any party demonstrating that to be the case. The draft decision's critique of the Sites' modeling—namely that results were reported at a monthly time-step, (Draft Decision at 64), is without merit. Sites provided daily results as well and those results do not show an increase in salinity related to Sites. (AHO-136 at 6, 10–13, 25.)

B. The Impact Of Existing SWP And CVP Exports On Salinity In The Delta

The draft decision not only draws conclusions regarding the impact of Sites Project rediversions on salinity, but also appears to draw conclusions that the existing operations of the Delta Export Facilities are causing increased salinity.

As discussed above with respect to water levels, the impacts of previously authorized CVP/SWP export operations are not at issue in this proceeding, nor was evidence presented that supports the conclusions in the draft decision. The SWRCB should not draw conclusions with respect to the impacts of the SWP and CVP through a hearing in which the operations of those projects is not directly at issue. The SWRCB is currently addressing salinity and water levels in the Delta and Delta channels holistically through the Bay-Delta Plan. (DWR-005 § 16.) Through that process, the SWRCB is ensuring that beneficial uses are protected and that the public interest is served. (Cal. Water Code §§ 13170, 13241.) The Bay-Delta Plan update, not the Sites hearing, is where salinity concerns are properly addressed.

The draft decision's conclusion regarding SWP and CVP impacts on salinity are also not supported by the evidence for several reasons. First, the draft decision points to the testimony of Mr. Burke as support for the proposition that SWP and CVP exports change salinity in the Delta. (Draft Decision at 63 (citing SDWA-2).) However, Mr. Burke's conclusions regarding differences in with and without CVP/SWP exports on salinity are based on the same flawed modeling that the draft decision states is not reliable. (Draft Decision at 55 n. 26.) Second, evidence provided by DWR demonstrates that CVP and SWP exports do not have an impact on and control over water quality at the interior southern Delta salinity locations. (DWR-003 at 18.) DWR's ongoing/existing compliance at the Old River Tracy compliance point arises not from exports, but instead from the fact that DWR cannot improve salinity at the south Delta compliance locations through SWP operations due to the hydrodynamics of the area. (DWR-003 at 18–19.)

C. Applicable Salinity Standards – Condition 46

Contrary to the draft decision's statements, the salinity standards in D-1641 have not been superseded by the 2018 Bay-Delta Plan. The salinity standard in the 2018 Bay-Delta Plan is not self-executing; instead the SWRCB must amend Reclamation's and DWR's water rights before Reclamation and DWR would be required to operate to those standards. (AHO-341 at 35 ("As part of implementing the salinity water quality objective for the interior southern Delta, the State

Water Board will amend DWR's and USBR's water rights to continue to require implementation of the interior southern Delta salinity water quality objectives consistent with this plan."))

DWR must comply with D-1641 until it is amended. DWR cannot wheel Sites Project water at the Delta Export Facilities if the 2018 Bay-Delta Plan salinity standard is met, but exports would be out of compliance with D-1641. Thus, conditioning Sites' redivisions at the Delta Export Facilities on compliance with the 2018 Bay-Delta Plan (permit term 46)[16] is inconsistent with the existing regulatory framework for the Delta Export Facilities. It puts DWR in the untenable position of wheeling Sites water inconsistent with the restrictions that apply broadly to the Delta Export Facilities *or* refusing to transfer Sites water when permit term 46 is met. This is precisely why Sites' permit should be conditioned upon DWR being able to meet its own permit requirements, rather than including extraneous and potentially contradictory terms that are specific to Sites' rediversions. As such, SWC requests that the SWRCB replace permit term 46 with the language proposed in Appendix A.[17]

IV. The Permit Terms Related To Fish Are Not Supported By The Evidence And Create Unnecessary And Unmanageable Conflicts With Other Permits

The draft permit imposes operational criteria that are inconsistent with the operational criteria in the California Endangered Species Act Incidental Take Permit ("ITP"),[18] and terms that unnecessarily second guess the California Department of Fish and Wildlife ("CDFW") and the federal fisheries agencies. By including these terms in the water right permit, particularly on issues that overlap with other agencies' jurisdiction and expertise, the SWRCB is creating inconsistencies with other permits or creating the potential for future inconsistencies with other operating permits. This practice is unmanageable from the perspective of a permittee, creating

[16] The draft decision suggests that "Condition 43 of the Permit prohibits Sites Project exports operations through the Delta Export Facilities when measured EC levels at the three interior southern Delta compliance locations exceed . . . 1.0 mmhos/cm." (Draft Decision at 63–64.) But permit term 43 does not state this. Instead, the relevant permit term appears to be permit term 46.

[17] The proposed language in Appendix A would also adequately address the issues that the draft permit is attempting to address through permit terms 29 and 49.

[18] These include: 1) flow dependent criteria at the Red Bluff point of diversion in January–February; 2) a modified Wilkens Slough bypass trigger from 10,600 cfs as required in the 2024 ITP to 14,125 cfs.; 3) additional pulse flow; and 4) a bypass requirements based on 55 percent unimpaired Delta outflow.

the potential for the permittee to be out of compliance with one permit so that it may be in compliance with another.

SWC agrees with the technical comments prepared by DWR and the Sites Reservoir Participants who are public water agencies located south of the Sacramento-San Joaquin River Delta, which demonstrate the incorrect assumptions regarding the biological benefits of these terms, and reiterates the need for the permit terms to be based on best available science.[19] SWC also offers the following specific concerns related to the fish-related permit terms.

A. Permit Term 22

Permit term 22 must be revised because it requires that Sites continue to operate to the existing 2024 ITP even after the ITP is amended unless and until the water right permit is amended. This creates a scenario where Sites will be out of compliance with the amended ITP unless and until the SWRCB changes the water right permit. This scenario puts water right holders in an untenable position and has unintended consequences with no clear benefit for the species, particularly where there is no reason to believe that CDFW will fail to carry out its obligations in good faith. The SWRCB should defer to CDFW's ITP for protection of listed species, the provisions of which could change over time and should be allowed to do so without impediment by the water rights permit.

B. Permit Term 23

Permit term 23(a), (b), and (c) are not in the public interest. Permit term 23(a), (b) and (c) respectively extend the ITP's flow-dependent diversion criteria for the Red Bluff point of diversion to January and February, require pulse protection, and increase the bypass flows at Wilkins Slough beyond the flows required by the ITP. The draft decision does not address the impacts on the beneficial use of water of any of these operational changes that go beyond what CDFW analyzed for purposes of the ITP. As such, the SWRCB cannot make a legally defensible decision as to whether its public interest analysis appropriately balanced water supply needs

[19] These entities include: The Metropolitan Water District of Southern California, Santa Clara Valley Water, Irvine Ranch Water District, Santa Clarita Valley Water, Coachella Valley Water District, Zone 7 Water Agency, and San Bernardino Valley Water District.

against the benefits to the species. (Cal. Water Code §§ 1253, 1255, 1257.) The public interest analysis requires that the SWRCB not only consider the benefit to fish, but also the reduction in water supply.

C. Permit Term 30

Permit term 30 is unnecessary and inappropriately predetermines the outcome of an ongoing SWRCB process. In particular, permit term 30 imposes a default inflow requirement of 55 percent of unimpaired flow. Presumably, this is imposed to address the period of time between the issuance of the permit and when the SWRCB adopts the update to the Bay-Delta Plan. Permit term 30 is unnecessary because, as a practical matter, there are many years before Sites would become operational and the SWRCB has indicated its intent to complete the update to the Bay-Delta Plan this year. Therefore, this "interim" term is unnecessary because the SWRCB will adopt an update to the Bay-Delta Plan before Sites becomes operational. If the AHO is concerned that Sites would become operational before the Bay-Delta Plan update is complete, this is both contrary to what the SWRCB has indicated about its own timeline for completion of the update and entirely within the control of the SWRCB because the SWRCB is responsible for and in control of the timing of the Bay-Delta Plan update.

Permit term 30 also improperly presumes that a 55 percent unimpaired flow standard is appropriate and necessary, but that standard has not yet been adopted by the SWRCB. Furthermore, the unimpaired flow standard under consideration by the SWRCB is intended to apply to all water right holders on these tributaries, except those with a de minimis effect on flows, and would be achieved through "watershed-wide water supply adjustments."[20] However, currently, no other water user is subject to the same standard because it has not yet been adopted by the SWRCB. As such, Sites alone would bear the burden of achieving this standard.

Finally, permit term 30 locks-in an unimpaired flow approach regardless of the SWRCB's future decision on the Bay-Delta plan. Permit term 30 states:

> *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*

[20] Draft Staff Report (Dec. 2025) at 13–15.

> *flow applicable to this Permit*, and the Board takes regulatory actions to implement these requirements, then Permittee shall comply with those regulatory requirements in lieu of parts (a) and (b).

(emphasis added).[21] This means that the 55 percent unimpaired flow requirement would only be replaced if the SWRCB adopts and implements an unimpaired flow approach in the Bay-Delta Plan update. The Draft Bay-Delta Plan considers unimpaired flow as one of several approaches to implement the narrative objectives; it is not the only approach. The July Draft Bay-Delta Plan provides multiple opportunities for flexibility, including through flow shaping, cooperative agreements and adaptive management. All of these flexibility options should be available to Sites during future discussions with the SWRCB regarding implementation of the then-existing Bay-Delta Plan. Thus, permit term 30 should be deleted in its entirety. If it is not, Permit term 30 should off-ramp the unimpaired flow requirement once the Bay-Delta Plan update is adopted by the SWRCB, regardless of its contents.

D. Permit Term 31

Permit term 31 must be revised. SWC agrees that to be consistent with the pending Bay-Delta Plan update, Sites may not divert Healthy Rivers and Landscapes Program ("HRL") flows or flows provided through the flow implementation path based on percent of the unimpaired hydrograph. However, as written, permit term 31 appears to prohibit Sites from diverting if there is even a single molecule of HRL water in the River. This goes too far. Thus, the term should be revised as shown in Appendix A.

E. Permit Term 45

Permit term 45 should be deleted.[22] It states: "Rediversion of water at the Export Facilities shall only occur from July 1 through November 30 of each year." Permit Term 45's proposed prohibition on rediversion at Delta Export Facilities between December 1 and June 30 is derived from the transfer window identified in U.S. Fish and Wildlife Service and National

[21] Arguably, the 2025 Draft Bay-Delta Plan and permit term 30 do not match because the Draft Bay-Delta Plan considers unimpaired flow as one of several approaches to implement the narrative objectives. The narrative objectives are not "based on" unimpaired flow.

[22] The concern addressed in permit term 45 (i.e., the transfer window) would be addressed by the proposed replacement for permit term 48, which prohibits exports of Sites Project water when the SWP is out of compliance with the federal Endangered Species Act or the California Endangered Species Act.

Marine Fisheries Service Biological Opinions for the Coordinated Operations of the CVP and SWP (collectively, "Delta BiOps") and DWR's incidental take permit for the Long-Term Operation of the SWP ("SWP ITP"). Although the current iterations of the Delta BiOps and the SWP ITP prohibit transfers between December 1 and June 30, those documents are subject to change in the future based on advancements in best available science. Thus, it is possible that the transfer window will be different under future Delta BiOps, and expressly referencing certain months in the permit term would set up the potential for inconsistencies between the Delta BiOps, SWP ITP and the Sites' permit.

If permit term 45 is retained, as discussed in Section I above, it must be clarified that it only applies to rediversion of Sites Project water.

V. The Area Of Origin Analysis Requires Revision

Although SWC takes no position on whether area of origin applies to Sites, the draft decision's area of origin analysis and the draft permit's related terms must be modified.

First, as a basis for justifying the application of area of origin to Sites, the draft decision impermissibly characterizes Sites as an extension of the SWP and CVP. (Draft Decision at 34.) As explained above in Section I, this statement is not correct, not supported by the record, and must be deleted.

Second, the draft decision must recognize that, although a permittee may be entitled to assert a priority to the diversion of natural flow originating in the watershed of origin, "[w]ater users simply cannot assert any superior right to that stored water under area of origin principles. Rather, water rights to previously diverted and stored water are governed by water permits and water contracts." (*Tehama-Colusa Canal Authority v. U.S. Dept. of the Interior* (9th Cir. 2013) 721 F.3d 1086, 1096; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 956, [48 Cal.Rptr.3d 468, 483] ("Nor does seniority over the Projects entitle a water right holder to make use of stored water which the Projects diverted to storage when natural flows were sufficient to divert water under the Projects' priorities."); *Tehama-Colusa Canal Authority v. U.S. Dept. of Interior* (E.D. Cal. 2011) 819 F.Supp.2d 956, 979, *aff'd sub nom. Tehama-Colusa Canal Authority, supra,* 721 F.3d at p. 1096 (Section

11462 categorically precludes a finding that Section 11460 confers a right in users in the area of origin to insist on a preferential water contract to the *Bureau's* "diverted and stored water.").)

Third, if the draft decision continues to recognize that the area of origin statute applies to Sites, it must recognize that area of origin protections are not self-executing. To assert and obtain the protection of area of origin, an inhabitant of the watershed of origin must "*comply with the general law of the state, both substantively and procedurally, to apply for and perfect a water right* for water which he then needs and can then be put to beneficial use." (*Tehama-Colusa Canal Authority, supra*, 819 F.Supp.2d at p. 980.) Thus, the draft decision and the draft permit terms must be modified to recognize that Sites' water rights would be subject to in-basin uses only after in-basin users apply for and obtain water rights for in-basin uses.

SWC requests that permit term 27 be deleted, as it is unnecessary because California Water Code §§ 1215 et al. and their applicability to the Sites Project speak for themselves. If this permit term is retained, the reference to the Sacramento-San Joaquin River Delta is incorrect and should be stricken. Sites will not have a right to appropriate water from the Delta.

VI. Conclusion

SWC is supportive of the Sites Reservoir Project, but believes that critical modifications are needed to both the draft permit and draft decision. SWC respectfully requests that these modifications be made prior to the finalization of the decision or permit.

Dated: May 22, 2026

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Appendix A, Edits to Draft Permit Terms

Permit Term 22 (revise)

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

~~Permittee shall continue to comply with the diversions 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 concurs in writing that the amendments to this Term and Attachment 1 would be equally or more protective of fish and wildlife.~~

(Term Code: 0450300)

Permit Term 23 (delete)

~~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 Hamiliton 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 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 and 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 cs 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 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.~~

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 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.~~

(Term Code: 0560900)

Permit Term 26 (revise)

This permit is subject to prior rights. During some years, water will not be available for diversion during portions or all of the season authorized herein. Permittee shall not divert under this Permit when available natural flow ~~available supplies~~ ~~are~~ is insufficient to satisfy the then-current demand of water rights senior to the priority date of this Permit.~~,~~ ~~including any federal reserved rights, whether or not those senior rights are adjudicated. Permittee shall comply with any regulation or order issued by the Board that curtails diversions under this right.~~

Permit Term 27 (delete)

~~Appropriation of water under this Permit for export from the Sacramento River of 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 within said systems, regardless of when such use initiated.~~

Permit Term 29 (delete or replace)

Option 1:

~~No diversion is authorized when any of the numeric Sacramento River inflow, Sacramento River salinity, 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.~~

Option 2: Replace with Revised Permit Term 46.

Permit Term 30 (delete or replace)

Option 1:

~~The following requirements apply to diversions under this Permit:~~

a. ~~Except as provided in part (d), diversions are not authorized when Delta outflow is less than 55 percent of unimpaired Delta outflow calculated as a~~

~~seven-day running average or if diversion would reduce Delta outflow below 55 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 Amendment 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 until 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 of the other conditions for diversions 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.~~

Option 2

The following requirements apply to diversions under this Permit:

a. Except as provided in part (d), diversions are not authorized when Sacramento River inflow and Sacramento River inflow-based Delta outflow is less than 55 percent of unimpaired ~~Delta out~~flow calculated as a seven-day running average or if diversions would reduce Sacramento River inflow and Sacramento River inflow-based ~~Delta out~~flow below 55 percent of unimpaired ~~Delta out~~flow 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 Amendment 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~~ the Water Board's future implementation decision for the Bay-Delta Plan in lieu of the requirements of parts (a) and (b) of this term, which could include participation in HRL. ~~Applicable Sacramento River inflow and Delta outflow requirements do not include water supply adjustments until 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 of the other conditions for diversions 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.~~

Permit Term 31 (revise)

~~If~~ When the Board updates the Bay-Delta Plan ~~to include a VA Pathway~~, diversions under this Permit must bypass HRL flow commitments, as well as other flows provided by non-HRL parties above Wilkins Slough to meet Water Quality Control Plan water quality objectives.

~~this Permit shall not interfere with the intended benefits of 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~~

~~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 presented in the mainstem of the Sacramento River, and the presence and amounts of 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.

Permit Term 44 (delete)

~~No water shall be released from Sits 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 45, 46, 48, 49, and 50.~~

Permit Term 45 (revise)

~~*Rediversion of water at the Export Facilities shall only occur from July 1 through November 30 of each year.*~~

Preferred Option: replace/combine with revised permit term 48 (below)

Secondary Option: Rediversion under this permit at the Export Facilities shall only occur from July 1 through November 30 of each year.

Permit Term 46 (replace)

~~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.~~

Replace with: No rediversion under this Permit at the Export Facilities shall occur when DWR and Reclamation are deemed to be out of compliance with D-1641, as it may be amended or replaced.

Permit Term 48 (revise)

No rediversion ~~of water~~ under this permit at the Export Facilities shall occur when such rediversion would cause DWR and/or Reclamation to be out of compliance with the federal Endangered Species Act or the California Endangered Species Act. ~~unless all regulatory requirements for the protection of fish, wildlife, and other instream beneficial uses that apply at or to operations of the Export Facilities are being met, including but not limited to biological opinion; court orders; and incidental take permits.~~

Appendix A, Edits to Draft Permit Terms

Permit Term 49 (replace)

~~No rediversion of water at the Export Facilities shall occur when water depths in Delta channels are not adequate to support diversions by reasonable methods pursuant to any valid water right with a priority date senior to this Permit. The Executive Director may approve, after notice and opportunity for public comment:~~

~~a. Water depths at specific measurement locations developed by the Permittee in consultation with South Delta Water Agency (SDWA) that demonstrate adequate water depths to prevent injury to senior right holders; or~~

~~b. A physical solution to prevent injury to senior right holders that is submitted by the Permittee with written concurrence from SDWA.~~

~~Upon approval by the Executive Director, water may be rediverted at the Export Facilities if (a) the approved water depths are met, or (b) the physical solution is implemented to prevent injury.~~

~~In the alternative to the above conditions on rediversion, the Executive Director may approve, after notice and opportunity for public comment, a regulatory program that comprehensively manages operation of the Export Facilities to prevent injury to right holders from inadequate water depths in Delta channels. Such a regulatory program may include but is not limited to a regulation implementing the Bay-Delta Plan or an approved comprehensive plan to address water depths in the southern Delta pursuant to a federal or state-issued permit, license, or other approval. The Executive Director shall find that the regulatory method applies to rediversions under this Permit or amend this term to require Permittee to comply with the regulatory program. Upon approval by the Executive Director, water may be rediverted at the Export Facilities in compliance with the approved regulatory program.~~

Replace/combine with revised Permit Term 46

Permit Term 51 (replace)

~~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, if that exchange results in DWR or Reclamation violating any law, regulation, biological opinion, incidental take permit, or court order applicable to the operation of the SWP or CVP.~~

Replace with revised Permit Terms 46 & 48

New Permit Term Regarding SWP and CVP:

This order does not authorize any physical use of the Central Valley Project (CVP) or State Water Project (SWP) facilities absent independent agreement with DWR or Reclamation for use of those facilities.