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VIA ELECTRONIC MAIL ONLY

Chair E. Joaquin Esquivel and Board Members
Dorene D'Adamo, Sean Maguire, Laurel
Firestone, and Nichole Morgan
State Water Resources Control Board

Nicole L. Kuenzi
Presiding Hearing Officer
Administrative Hearings Office
State Water Resources Control Board
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Sacramento, CA 95814
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Re: Written Comments on the Draft Decision and Draft Permit to Divert and Use Water on the Petition for Assignment of State-Filed Application 25517, Accompanying Water Right Application 22517X01, and Petitions for Release from Priority of State-Filed Applications 25513, 25514, 25517 (Unassigned Portion), 22235, 23780, and 23781 in Favor of Water Right Application 25517X01 of the Sites Project Authority

Dear Chair Esquivel, Board Members, and Presiding Hearing Officer Kuenzi:

The Sites Reservoir Project (“Sites”) presents a generational opportunity to bolster California’s water supplies as climate change brings more extreme swings between wet and dry periods. As proposed, Sites stands to bring water supply reliability to multiple beneficial uses across the Sacramento Valley. Reclamation District No. 108 (“RD 108”) appreciates the opportunity to comment on the Draft Decision and Draft Permit released by the Administrative Hearings Office of the State Water Resources Control Board, and urges the State Water Resources Control Board (“State Water Board”) to approve Sites as proposed by the Sites Project Authority (“Authority”) so that the multitude of water supply and environmental benefits offered by Sites becomes a reality.

I. Introduction

Since 1870, RD 108 has been a leader and partner in Sacramento Valley water management. RD 108 provides irrigation, drainage, and flood control services to approximately 48,000 acres in southern Colusa and northern Yolo Counties. Levees on three of RD 108’s borders protect RD

108's landowners from floodwaters in the Sacramento Valley: to the west by levees against the Sacramento River, to the south by levees against a slough, and to the east by levees against the Colusa Basin Drain. RD 108 supplies its landowners by diverting water from the Sacramento River and Colusa Basin Drain under a collection of riparian and appropriative water rights. Additionally, RD 108 is party to a Sacramento River Settlement Contract with the United States Bureau of Reclamation in recognition of RD 108's senior water rights to the Sacramento River Basin.

RD 108 is also a champion of multi-benefit programs that responsibly allocate water resources to consumptive and non-consumptive uses alike. For example, RD 108 knows firsthand that reconnecting the channelized Sacramento River with the historic floodplain habitat is key to salmon survival and recovery. For that reason, RD 108 is a member of the Floodplains Forward Coalition, a program to identify and create projects to reconnect habitat for the benefit of species and growers alike. Similarly, RD 108 is fully engaged in the Healthy Rivers and Landscapes ("HRL") program as an alternative pathway to meeting the water quality objectives in the forthcoming Sacramento/Delta Update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin River Delta Watershed ("Bay-Delta Plan Update"). RD 108 is committed to making flows available and constructing habitat to achieve HRL's critical and attainable goals.

RD 108 has long been a proponent Sites. Indeed, RD 108 is a founding member of the Authority (Sites-014), and a member of RD 108's Board of Trustees, Trustee Fritz Durst, sits as the Chair of the Authority Board of Directors. RD 108's involvement in Sites is two-fold: participating in Sites will bolster RD 108's water supply portfolio and help ensure that the Sacramento Valley is represented in this critically important multi-benefit water conservation project. RD 108 prides itself on leading the way for Sacramento Valley water users and ensuring that the Sacramento Valley has the water supply it needs both for its development and for restoring and enhancing its ecosystems.

With that support comes RD 108's concern that Sites to be able to effectively provide the water supplies requested by its water right application. Sites offers a drought resiliency tool for conserving flows from wet years for use when that stored water is needed most to supply consumptive and non-consumptive demands in the Sacramento Valley and beyond. However, the Draft Decision and Permit undermine the efficacy of that tool in key ways. First, the Draft Decision denies the Authority's request for a 1977 seniority on an expansive public interest standard that would incorporate otherwise inapplicable area of origin statutes, despite lacking any evidence that Sites will deprive the area of origin of water necessary for its development. (Draft Decision at pp. 32–34.) Second, the Draft Decision cites the numerous subordination agreements—a common tool for resolving water right injury protests—as an issue that will complicate the State Water Board's administration of water rights and thus grounds for denying assignment. (*Id.* at pp. 34–35.) Lastly, the Draft Decision imposes several unjustified terms that severely limit diversions without providing incremental benefits to support such restrictions. These components of the Draft Decision and Permit should be revised to avoid unnecessarily limiting the ability for Sites to enhance California's water supply portfolio.

II. Sites is a Right-Sized, Multi-Benefit Water Storage Project that Merits Assignment of the State-Filed Application as Requested by the Authority.

A. Sites will serve the multitude of needs in the Sacramento Valley.

Sites is a multi-benefit project that will support consumptive and non-consumptive uses in the state, Sacramento Valley, and Delta alike. (See generally Sites-001 [describing ecosystem, flood control, and recreation benefits of Sites]; and see Sites-070 [describing reservoir operations and beneficial uses supplied].) Regarding environmental beneficial uses, Sites as proposed will support to instream beneficial uses in the Sacramento Valley and Delta when that water is needed most. (AHO-005 at pp. 6–7; Sites-070 at ¶ 16.) These uses include supplementing flows to meet Delta outflow requirements and prevent seawater intrusion. (Sites-071c at ¶ 63.) Similarly, Sites will deliver water to wildlife refuges, move fish food into the Sacramento River and Delta, and create in-reservoir habitat for warm water species. (*Ibid.*) And, Sites will also provide water to support cold-water habitat in the upper Sacramento River through innovative management and exchanges between Sites and Shasta Lake. (AHO-314 at Attachment D, pdf pp. 78–80.) These are tangible benefits to instream uses in the Sacramento Valley and Delta.

Two of the largest water purveyors in the Sacramento Valley, RD 108 and Glenn-Colusa Irrigation District, are invested in Sites. (AHO-028.) Also participating are Colusa County, Cortina Water District, Davis Water District, Dunnigan Water District, Colusa County Water District, LaGrande Water District, and Westside Water District. (*Id.*) Collectively, the Sacramento Valley accounts for 249,690 acre-feet of storage in Sites, which amounts to nearly a quarter of the water in Sites that is not dedicated to the environment (244 thousand acre-feet (“TAF”)), held by USBR (91 TAF), or committed to dead pool (120 TAF). (*Id.*) Their involvement demonstrates that Sites will supply water to meet reasonable, beneficial uses within the Sacramento Valley.

B. Sites will not deprive the Counties of Origin of Water for its Development.

The Draft Decision denies partial-assignment of the state-filed application because of a concern that Sites will export water and deprive the Sacramento Valley from water reasonably required to adequately supply its beneficial uses. (Draft Decision at pp. 31–34.) RD 108 appreciates that the Draft Decision reflects a concern about protecting the area of origin. In this case, however, the area of origin protections are already provided because Sites will not deprive the counties of origin of water needed for development.

The area of origin principle that applies to Sites—the county of origin statute—supports granting the Authority’s petition for assignment of the state-filed application. California’s Legislature had the foresight in 1927 to enable the future development of the State’s water resources by enacting the Feigenbaum Act, Water Code sections 10500 and following. The Feigenbaum Act authorizes the state to file applications with senior priority dates to support future water development projects that are consistent with a general or coordinated plan for developing, utilizing, and conserving the state’s water resources. (Wat. Code, §§ 10500, 10504.) Proponents of these future projects then may petition for assignment of the state-filed water right application and benefit from the senior priority date. (*Id.* at § 10504.) The Legislature, however, struck a careful balance in enacting the Feigenbaum Act: these projects could benefit from a senior

priority date to ensure their utility, so long as they did not deprive the county of origin “of water necessary for the development of the county.” (*Id.* at § 10505.5.)

Instead of applying the legislature’s chosen approach to state-filed applications, the Draft Decision applies an expansive public interest standard requiring that Sites be subject to a distinct, otherwise inapplicable set of area of origin statutes. (Draft Decision at pp. 32–33.) The Draft Decision finds that the public interest requires that Sites be subject to the so-called “Protected Area Statutes,” Water Code section 1215 through 1222, because Sites will be exporting water to southern California. (*Id.* at pp. 33–34.) These statutes, by their own terms, only apply to applications filed after January 1, 1985. (Wat. Code, § 1215.) These provisions should not apply here because state-filed application 25571 has a priority date of September 30, 1977. By introducing area of origin requirements that would not apply as a component of the public interest standard, the Draft Decision improperly expands the area of origin requirements that should apply here. It would be patently unfair to deny the Authority assignment of a state-filed application when it meets the statutory requirements for such a water right, particularly when the Draft Decision also denies the applications to divert from the Stone Corral and Funks Creeks.

Even when viewed under the Protected Area Statutes, Sites will not deny the area of origin the water to which it is entitled. Water Code section 1216 prohibits “protected areas,” including the Sacramento River System, from being “deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area.” (Wat. Code §1216.) The Authority analyzed the needs and projected uses in the Sacramento River Basin and determined that there was water available to meet Sites’ demands in addition to projected demands in the area of origin. (Sites-070c at ¶¶ 21–22 [describing analysis of present and future demands in the Sacramento Valley].)

Tellingly, the Draft Decision does not point to any evidence that exports would deprive the Sacramento Valley—let alone the counties of origin—of water that could be used for future development. (Draft Decision at pp. 33–34.) Instead, the Draft Decision presupposes that because certain participants are also CVP and SWP contractors, Sites will strategically export water when CVP and SWP are subject to area of origin restrictions. (*Ibid.*) There is simply no evidence to support this hypothesis. That (i) Sites will export previously-stored water and (ii) some participants are also SWP or CVP contractors does not mean that Sites will deprive the Sacramento Valley of water needed for its development. In any case, there is no reason an assignment could not be approved with the condition of complying with the post-1985 area of origin requirements to avoid a scenario where CVP/SWP exports are restricted when Sites otherwise would not be. In sum, the Draft Decision lacks support for denial of the assignment on public interest grounds.

III. Difficulty Administering the Priority System is not a Valid Reason to Deny Assignment.

The Draft Decision’s second grounds for denying the Authority’s petition for assignment of state-filed application 25571 is that the subordination agreements would make administering the priority system difficult. (Draft Decision at pp. 34–35.) Subordination agreements are a common tool used by water right applicants to cooperatively resolve water right injury protests and avoid needless conflict by subordinating the applicant’s priority to the potential protestant’s.

In some instances, these agreements can enable water projects by proactively resolving protests. Thus, it is remarkable that subordination agreements that effectuate the water supply system would challenge the State Water Board's administration of the water rights system.

Given the vast importance that the State has placed on Sites Reservoir, the State Water Board should not limit Sites by denying assignment because it would be difficult to apply the priority system. The State Water Board should instead promote negotiated solutions between certain water right holders, while still enforcing the priority system generally. Accordingly, there is little support to deny the assignment of the state-filed right for an issue that the State Water Board is charged with administering properly.

The State Water Board's ability to account for subordination agreements in administering the water right system is particularly important given the anticipated implementation of Bay-Delta Plan Update's "Regulatory Pathway," which is expected to result in more frequent and widespread curtailments. (See AHO-337 at pdf pp. 70–71 [detailing implementation through curtailments].) In that context, a rigid approach that disregards negotiated priority arrangements risks discouraging cooperative solutions and increasing conflict. Indeed, discouraging subordination here would discourage its use in negotiating the "local cooperative solutions" called for in the Regulatory Pathway to allocate burdens for complying with the inflow and coldwater habitat requirements. (*Id.* at pdf pp. 65–66.) Thus, the State Water Board's ability to efficiently and effectively administer the priority system requires that it integrate subordination agreements into its implementation methodology.

IV. The Draft Decision Proposes to Limit Diversions in a Manner that Detract from the Ability for Sites to Support the Sacramento Valley and State in Dry Times.

The Draft Decision would impose four terms—terms 23, 29, 30 and 31—that dramatically limit the Authority's ability to divert unappropriated water to storage for use in drier years without grounding these terms in evidence or the public interest. RD 108 joins in the Authority's and Sacramento River Settlement Contractors' comments on these terms and incorporates them here by reference. More broadly, it is imperative that any terms that restrict diversions be properly tailored, supported by the evidence, and necessary when weighed against the public interest in the ability for Sites to supply multiple beneficial uses when needed most.

A. The Draft Permit Should Not Impose More Restrictions on Diversions to Storage than CDFW's Incidental Take Permit.

The first term, term 23, would further restrict diversions to storage beyond what the California Department of Fish & Wildlife required in its incidental take permit for Sites operations. The rationale for Term 23 presented in the Draft Decision, however, is questionable at best and is inconsistent with the best available science, as detailed in the Authority's comment letter. Yet Term 23 would reduce the amount of water supplied by Sites without a proven biological benefit, meaning there is less stored water for consumptive and non-consumptive uses when that water is most needed, without a corresponding benefit to species during those wet times when Sites, but for Term 23, would have diverted to storage. Moreover, the Draft Decision does not consider the downstream impacts of Term 23, including whether there are alternative, less restrictive means of achieving the same goals.

B. Any Terms Related to the Bay-Delta Plan Update Must be Narrowly Targeted on Sites Itself.

Terms 29 and 30 restrict the Authority’s diversions into Sites purportedly to implement the Regulatory Pathway of the Bay-Delta Plan Update. These terms effectively place the onus on Sites to maintain the Bay-Delta Plan’s salinity, inflow, and inflow-based outflow water quality objectives by itself and reduce the annual yield of project by nearly fifty percent. Placing this burden on Sites is inequitable as Sites should not be responsible for maintaining water quality objectives systemwide. Additionally, these terms are shortsighted as they prevent Sites from storing water for later use to meet the same water quality objectives or support the beneficial uses for which those water quality objectives exist. Lastly, these terms will make Sites water more expensive by cutting water supply yield in half but leave the same project costs unaffected. The State Water Board cannot impose these systemwide obligations on one project and expect that economics will remain unchanged.

Instead of Terms 29 and 30, consideration should be given to the Authority’s proposed terms to integrate Sites into the Bay-Delta Plan. These terms are tailored to achieve the same goal—compliance with water quality objectives applicable to Sites.

C. Term 31 Unnecessarily Precludes the Diversion of Unappropriated Water.

Term 31 is likewise inappropriate. The Draft Decision proposes Term 31 to prevent Sites from undermining the intended benefits of Healthy Rivers and Landscapes (“HRL”) flow assets or otherwise directly diverting these flows. (Draft Decision at p. 115.) However, Term 31 is overbroad and prevents Sites from diverting unappropriated water in a manner that goes beyond just protecting HRL assets.

Specifically, Term 31 prohibits Sites from diverting “on any day when flow commitments provided pursuant to the VA pathway are present in the mainstem of the Sacramento River” (Term 31(a)), or when HRL flows “are contributing to Delta outflow and Delta outflow remains below the sum of Delta outflow requirement for diversion under Term 30 and the amount of VA Pathway flow commitments contributing to Delta outflow” (Term 31(b)). (Draft Permit at p. 11.) However, this term, assumes, without establishing, that there is no unappropriated water available for diversion on days when HRL flows are in the mainstem of the Sacramento River. Nor is there any indication that the Draft Decision is the result of the statutorily mandated process for declaring a stream system fully appropriated. (See Wat. Code §§ 1205–1207.)

Moreover, the Draft Decision misinterprets the HRL program as described in the December Draft Update to the Bay-Delta Plan and analyzed in Chapter 13 of the Draft Staff Report and relies on an overbroad definition of base flows to include “unregulated and uncaptured flow” that is otherwise available for diversion. The Draft Decision describes the HRL flow assets as “intended to provide a net additive Delta inflow and outflow that is not only above existing requirements but above a baseline of required flow and otherwise unregulated and uncaptured flow present in the Bay-Delta system at the time the HRL proposal was submitted.” (Draft Decision at p. 102, emphasis added.)

However, the December Draft Bay-Delta Plan Update does not state that HRL flow assets are supposed to be additive to “otherwise unregulated and uncaptured flow present in the Bay-Delta system.” (Draft Decision at p. 102.) The Sacramento Mainstem’s reference conditions—i.e., the base flows—do not include any reference to unregulated and uncaptured flow. (AHO-337 at pdf p. 169.) Instead, the reference conditions include Water Right Order 90-5, the 2024 Reinitiated Consultation on Long-Term Operations of the Central Valley and State Water Projects, in-basin diversions and deliveries, Wilkens Slough minimum water elevation, Water Right Decision D-1641, the Coordinated Operations Agreement between USBR and DWR, and USACE’s Water Control Manual for Shasta Dam. (AHO-337 at pdf pp. 200–202 [Appendix B.1 at B.1-37 – B.1-39].) By expanding the definition of “base flows” to include “otherwise unregulated and uncaptured flow,” Term 31 goes beyond the requirements of the Draft Bay-Delta Plan and functionally prohibits Sites from diverting unappropriated water in the system while HRL flows are also in the system. (Draft Decision, p. 115.)

As a result, Term 31 dedicates this unappropriated flow to instream flow and arguably forecloses future diversions of that water. Term 31 thus hinders the feasibility of future water right applications for winter flows in the Sacramento River for groundwater recharge projects to lessen demand on strained surface water supplies and to meet the requirements of the Sustainable Groundwater Management Act. For these reasons, the State Water Board should reject inclusion of Terms 23, 29, 30, and 31 as proposed by the Draft Decision and adopt the Authority’s proposed terms.

V. Conclusion

In sum, RD 108 appreciates the substantial time and effort that the AHO has committed to this important project. The Draft Decision and Permit, however, call for careful review and revision to avoid undermining the important water supply benefits proposed by Sites and supported by water users throughout the state. RD 108 looks forward to continued engagement as the State Water Board brings this water right proceeding to conclusion.

Sincerely,



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cc: Lewis Bair, General Manager (lbair@rd108.org)
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