

State Water Resources Control Board

September 3, 2026

Re: Procedural Ruling on Evidentiary Objection to Supplemental Evidence and Official Notice of AHO Exhibits

TO ALL PARTIES:

This procedural ruling addresses the evidentiary objection submitted by the NGO Parties¹ on August 10, 2026, to supplemental evidence offered by the Sites Project Authority (Authority) and takes official notice of certain documents as Administrative Hearings Office (AHO) Exhibits.

Authority's Supplemental Evidence

Background

On May 22, 2026, the Authority submitted with its comments on the March 20, 2026 Draft Decision and Draft Permit: (1) a technical memorandum prepared by Jacobs Engineering (2026-05-22 Sites Comments on Draft Decision-Draft Permit, Attachment A, pp. 91–110 [Exh. Sites-425]), associated CalSim 3 model files (Exhs. Sites-429 through Sites-439), and a spreadsheet containing the CalSim 3 model results (Exh. Sites-428); and (2) a technical memorandum prepared by MBK Engineers, “Water Supply Effects of Draft Water Right Permit Terms 23, 30, and 31” (2026-05-22 Sites Comments on Draft Decision-Draft Permit, Attachment B, pp. 111–127 [Exh. Sites-426]) and an associated Historical Water Availability Analysis Tool spreadsheet (Exh. Sites-440).

As described in Attachment A, Jacobs Engineering used 10 CalSim 3 simulations to analyze the effects on diversion and corresponding yield of the proposed Sites Reservoir Project from limitations on diversion in Draft Permit Terms 23, 30, and 31 as compared to conditions on diversion in the 2024 Incidental Take Permit (2024 ITP). (Exh. Sites-425.) Results of these model runs are provided in the CalSim 3 model result

¹ The NGO Parties are San Francisco Baykeeper, California Sportfishing Protection Alliance, Friends of the River, Sierra Club, Save California Salmon, Center for Biological Diversity, and Water Climate Trust.

spreadsheet. (Exh. Sites-428.) As described in Attachment B, MBK Engineers incorporated the diversion criteria in Draft Permit Terms 23, 30, and 31 into the “Sites Historical Water Availability Analysis (WAA) Tool” to analyze the effects on diversion and corresponding yield of the proposed Sites Reservoir Project. (Exh. Sites-426, p. 1.) MBK initially prepared this tool, and the Authority used this tool to estimate water availability with the diversion criteria in the 2024 ITP and it was updated to incorporate the limitations on diversion in the Draft Terms. (*Ibid.*)

In its comments, the Authority relies on results from these additional model runs and analyses to support proposed changes to the Draft Permit that it asserts are in the public interest. The Authority proposed that the proffered analyses be considered by the Board in conjunction with the Authority’s comments and included in the evidentiary record without otherwise re-opening the evidentiary record. (2026-05-22 Sites Comments on Draft Decision-Draft Permit, pp. 13–14, fn. 5.)

On June 5, 2026, the NGO Parties filed an objection seeking to strike Attachments A and B as new evidence and to strike the arguments and assertions in the comments that referenced or relied upon the analyses or conclusions contained in the memoranda. (2026-06-05 Objection to New Evidence Submitted by Sites Authority.)

On June 26, 2026, the AHO issued a Notice of Supplemental Hearing and Procedural Ruling. I concluded that Attachments A and B, and the associated underlying models and tools, offered important information that would substantially enhance the Board’s consideration of appropriate terms and conditions if a water right permit is issued to the Authority, and justified a limited re-opening of the record to allow for admission of the additional evidence. (2026-06-26 Notice of Supplemental Hearing, p. 4.) I required the Authority to make available the author or person most knowledgeable about the contents of the technical memoranda for cross-examination by the opposing parties during a supplemental day of hearing held on July 24, 2026. (*Id.* at pp. 4, 6.)

Evidentiary Objections by NGO and SDWA Parties

The NGO and SDWA Parties filed timely objections to acceptance into the evidentiary record of the supplemental evidence submitted as Attachments A and B, supporting files, and associated testimony (Exhs. Sites-425 through Sites-443) by the Authority’s witnesses during the July 24, 2026 hearing. (2026-08-10 - Final Evidentiary Objections; 2026-08-10 SDWA Parties Supplemental Comments.) The NGO and SDWA Parties argue that (1) re-opening the evidentiary record requires a showing as to why the evidence was not previously presented, citing California Code of Regulations title 23, sections 768 and 769; (2) the Authority could have submitted the additional evidence while the evidentiary record was still open; (3) the opportunity to cross-examine the Authority’s witnesses about the new evidence was not an adequate opportunity to

respond to the evidence, and (4) the additional evidence is not reliable. (2026-08-10 - Final Evidentiary Objections, pp. 3–6; 2026-08-10 SDWA Parties Supplemental Comments, pp. 5–11.)² The Authority filed a response to the objections on August 17, 2026. (2026-08-17 Sites Response to Protestants Evidentiary Objections.)

The hearing officer may, as a discretionary matter, reopen the evidentiary record to admit additional relevant and material evidence so as to fully develop the record on which the agency is to base its decision. (See Cal. Code Regs., tit. 23, § 648.5; State Water Board Decision 1494 (1979), p. 6, fn. 3 [allowing limited re-opening of evidentiary record].) A hearing officer has significant discretion to conduct hearings in a manner deemed most suitable to the particular case. Hearing officers conducting administrative hearings have “wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed.” (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560, disapproved on other grounds in *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1273; see also Manual for Administrative Law Judges (2004) 23 J. Nat'l Ass'n Admin. L. Judges I, p. 7, fn. 24 [describing ALJ's responsibility to develop accurate and complete record, which may require affirmative measures such as re-opening evidentiary record sua sponte].)

The NGO and SDWA Parties cite sections in the Board's regulations applicable to petitions for reconsideration in support of their assertion that the party seeking to reopen the evidentiary record must demonstrate that the evidence could not previously have been produced with the exercise of reasonable diligence and must submit to the Board an affidavit or declaration under penalty of perjury stating why the evidence was not previously presented. (2026-08-10 - Final Evidentiary Objections, p. 3; 2026-08-10 SDWA Parties Supplemental Comments, p. 5; Cal. Code Regs., tit. 23, §§ 768, 769.) Those provisions of the Board's regulations are not applicable here, prior to any final action by the Board and apart from any petition for reconsideration of a final action. The regulations do not purport to constrain a hearing officer's discretionary authority to reopen the evidentiary record as necessary to develop an accurate and complete record before the Board reaches a final decision.

As I concluded in the June 26, 2026 Notice of Supplemental Hearing and Procedural Ruling, the Authority could not have anticipated with any reasonable precision the

² The SDWA Parties' objections (2026-08-10 SDWA Parties Supplemental Comments) are styled as a supplemental brief and saved in the “Supplemental Briefs” subfolder in the Hearing Documents folder in the administrative record. The objections from the NGO Parties (2026-08-10 - Final Evidentiary Objections) and the response from the Authority (2026-08-17 Sites Response to Protestants' Evidentiary Objections) are saved in the “Objections, Motions and Responses” subfolder in the administrative record.

content of the terms and conditions that the Board would be likely to impose on the proposed appropriation. (2026-06-26 Notice of Supplemental Hearing, p. 4.) The evidentiary record and the arguments of the Authority and the Protestants present a broad range of potential terms for which analysis of each iteration would not have been reasonably possible. (*Ibid.*) In addition, absent acceptance into the evidentiary record of the Authority's additional analyses, the evidentiary record before the Board would have lacked a quantitative analysis of the likely impact of the terms and conditions being considered on the yield of the proposed project. (*Ibid.*) This information is highly relevant to the Board's determination as to whether the terms appropriately balance the various interests of the public that are at stake and "best develop, conserve, and utilize in the public interest the water sought to be appropriated." (*Id.* at p. 3; Wat. Code, § 1253.)

The Protestants had an adequate and fair opportunity to address the additional evidence through cross-examination of the authors of the technical reports, who were available for cross-examination during the supplemental hearing day on July 24, and through submission of supplemental briefs. Through the submission of supplemental briefs, the parties were able to respond to the supplemental evidence and raise related arguments about the significance of the yield analyses to the Board's consideration of the public interest and other hearing issues. (2026-06-26 Notice of Supplemental Hearing, p. 6.) And although the NGO and SDWA Parties objected to consideration of the supplemental evidence, none of the Protestants filed an explicit request, such as an offer of proof, to submit evidence to rebut the Authority's analyses.

The NGO Parties also object that the Authority's analyses of the impacts of Draft Permit Term 31³ on project yield was speculative and therefore is inadmissible expert opinion. (2026-08-10 - Final Evidentiary Objections, p. 6.) This objection is appropriately addressed by the Board in determining the weight to be afforded the testimony rather than as a threshold question of admissibility. Similarly, the SDWA parties object that the Authority's CalSim analysis (Exh. Sites-425) is unreliable and fails to account for changes in water quality and water levels. (2026-08-10 SDWA Parties Supplemental Comments, pp. 8–11.) The Revised Draft Decision circulated on September 3, 2026, reflects consideration of the arguments raised by the NGO and SDWA Parties, including arguments about the assumptions underlying the Authority's analyses of Draft Permit Term 31. (See, e.g., 2026-09-03 Revised Draft Decision, pp. 132–134.)

³ Draft Permit Term 31 addressed protection of flow contributions by Healthy Rivers and Landscapes Program Parties pursuant to the Voluntary Agreement Pathway described in the August 2026 Draft Bay-Delta Plan.

The NGO Parties' and the SDWA Parties' objections to admission of the Authority's supplemental evidence are therefore overruled and Exhibits Sites-425 through Sites-443 are accepted into the evidentiary record.

Official Notice of AHO Exhibits

The State Water Board may take official notice of such acts as may be judicially noticed by courts of this state. (Cal. Code Regs., tit. 23, § 648.2.) The AHO takes official notice of the following documents for the following reasons:

1. AHO-336, State Water Resources Control Board, Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (July 2025).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
2. AHO-337, State Water Resources Control Board, Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (December 2025).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
3. AHO-338, State Water Resources Control Board, Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the Sacramento River and Its Tributaries, Delta Eastside Tributaries, and Delta, Partially Recirculated Draft, Chapter 13 (December 2025).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
4. AHO-339, U.S. Fish and Wildlife Service, Biological and Conference Opinion for the Sites Reservoir Project (July 16, 2025).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
5. AHO-340, Sites Project Authority and U.S. Bureau of Reclamation, Sites Reservoir Project Draft Environmental Impact Report/Draft Environmental Impact Statement (Aug. 2017).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state

of the United States.” (Evid. Code, § 452, subd. (c).)

6. AHO-341, Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (December 2018).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
7. AHO-342, Final Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions.
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
8. AHO-343, Federal Register Vol. 90 (2025).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
 - The courts may take official notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).)
9. AHO-344, Sites Project Authority, Water Storage Investment Program Quarterly Report (Jan. 27, 2026).
 - The courts may take official notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).)
10. AHO-345, Legislative Analyst’s Office, Assessing Early Implementation of Urban Water Use Efficiency Requirements (Jan. 2024).
 - The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)
11. AHO-346, State Water Resources Control Board, Draft Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Watershed (August 2026).
 - The courts may take official notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)

12.AHO-347, State Water Resources Control Board, Final Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the Sacramento River and Its Tributaries, Delta Eastside Tributaries, and Delta (August 2026).

- The courts may take official notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)

13.AHO-348, State Water Resources Control Board, Letter Approving the Water Level Response Plan (July 19, 2004).

- The courts may take official notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)

14.AHO-349, Sites Project Authority, Draft Contract between the Sites Project Authority and California Department of Fish and Wildlife Regarding the Proposition 1 Water Storage Investment Program.

- The courts may take official notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).)

Sincerely,



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

Attachments:

- Attachment 1 – Service List

ATTACHMENT 1

SERVICE LIST

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

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

Harrison Beck
John Buse
Center for Biological Diversity
hbeck@biologicaldiversity.org
jbuse@biologicaldiversity.org

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

Steven L. Evans
CalWild
sevens@calwild.org

Richard Morat
rjmorat@gmail.com

Clarke F. Ornbaun
clarkeornbaun@yahoo.com

Keiko Mertz
Jann Dorman
Ronald Stork
Gary Bobker
Friends of the River
keiko@friendsoftheriver.org
janndorman@friendsoftheriver.org
RStork@friendsoftheriver.org
gbobker@friendsoftheriver.org

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

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

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

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

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

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

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

Adam Keats
California Water Impact Network
adam@keatslaw.org

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

Caty Wagner
Molly Culton
Sierra Club
caty.wagner@sierraclub.org
molly.culton@sierraclub.org

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

Allison Mitchell, Esq.
Amy Aufdemberge, Esq.
Allison Jacobson
Lisa Holm
United States Department of Interior
Bureau of Reclamation
allison.mitchell@sol.doi.gov
Amy.Aufdemberge@sol.doi.gov
ajacobson@usbr.gov
lholtm@usbr.gov

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

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

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

Brook Thompson
Kasil Willie
Save California Salmon
brook@californiasalmon.org
kasil@californiasalmon.org

Matthew Clifford
Trout Unlimited Inc.
mclifford@tu.org

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

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

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

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

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

Angela Smelser
Elston Bill
Chairman Wayne Mitchum
Vice Chairperson Amanda Mitchum
Cachil DeHe of Wintun Indians of the
Colusa Indian Community Council
asmelser@colusa-nsn.gov
m1bigman@icloud.com
mitchum530@gmail.com
amitchum@colusa-nsn.gov

Theresa Moore
Chhé'ee Fókkaa Band of
Northeastern Pomo
theresajmoore@gmail.com
zmcfarla@calpoly.edu

Laverne Bill
Nathan Bill
Paskenta Band of Namlaki Indians
lbill@paskenta.org
nbill@paskenta.org

Margaret Rosenfeld
Elaina Erola
margaret@fsrlegal.net
admin@fsrlegal.net
Attorney for Colusa Tribe

Greg Wilson
Wilson Water Resources
wilson.wr@yahoo.com

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