



Meeting: **Joint Reservoir Committee & Authority Board**
Agenda Item 2.2

August 23, 2023

Subject: **North Delta Water Agency Memorandum of Understanding (MOU)**
Regarding Sites Water Right Application

Requested Action:

Reservoir Committee and Authority Board consider authorizing the Executive Director to enter into a Memorandum of Understanding with the North Delta Water Agency, subject to legal counsel review, regarding issues and concerns on the Sites water right application.

Detailed Description/Background:

Staff have been working diligently with North Delta Water Agency (North Delta WA) to address and resolve concerns with the Authority's water right application. North Delta WA has a water contract with the California Department of Water Resources (DWR) for a specified quality and adequate quantity of water available for the use of diverters within North Delta WA's boundaries. That contract imposes year-round water quality criteria as measured at seven monitoring locations identified in the contract.

North Delta WA has expressed concerns that the Project may affect water users within its boundaries by reducing freshwater flows and altering surface water elevations in the Delta or by impacting DWR's ability to operate the State Water Project (SWP) in compliance with its contract with North Delta WA. Staff are proposing that the Authority enter into a MOU with North Delta WA to address its concerns. The proposed MOU is attached and includes the following key terms and mutual understandings:

- The Authority agrees to operate to its final permit approved diversion criteria and water right permit terms, including but not limited to, the proposed Wilkins Slough bypass flow criteria, the Project's proposed diversion season and amount, along with the Central Valley Project (CVP) and SWP special term proposed by the Authority.
- With regard to the CVP and SWP special term, the Authority considers DWR's contractual obligations to the North Delta WA "state law" requirements, as that phrased is used in the term.
- With regard to the Delta Conveyance Project (DCP), the Sites Project is independent of the DCP and will function with or without the proposed DCP as reflected in the Project's RDEIR/SDEIS. The Parties agree this to

mean that Sites water cannot be diverted into the DCP's proposed north Delta points of diversion without a future modification of the Sites water right permit. If there are any future consideration of a DCP north Delta points of diversion for Sites water, North Delta WA would have an opportunity to protest such change at that time.

- The Authority will contact North Delta WA if it plans to request modifying its operational criteria or if another agency proposes a modification to the Project's operational criteria.

In reliance upon these commitments and mutual understandings by the Authority in the MOU, North Delta WA would not file a formal protest to the Authority's water right application. However, North Delta WA reserves the right to challenge the Project in the future in the event of changes in the Project that would cause harm to North Delta WA or its constituents.

Staff proposes that the Reservoir Committee and Authority Board authorize the Executive Director to enter into a Memorandum of Understanding with the North Delta WA consistent with the general form and content of the attached Memorandum of Understanding, subject to legal counsel review.

Prior Action:

None.

Fiscal Impact/Funding Source:

None. Activities under the MOU can be accomplished within the Amendment 3 Work Plan amounts.

Staff Contact:

Ali Forsythe

Primary Service Provider:

Somach/MBK

Attachments:

Attachment A – Memorandum of Understanding Between the North Delta Water Agency and the Sites Project Authority

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE NORTH DELTA WATER AGENCY
AND THE SITES PROJECT AUTHORITY**

This Memorandum of Understanding (“MOU”) is dated and effective this ___ day of _____, 2023, by and between the North Delta Water Agency (“NDWA”) and the Sites Project Authority (“Sites”). These entities are hereinafter collectively referred to as the “Parties” and individually as a “Party.”

RECITALS

A. NDWA represents water users within approximately 300,000 acres in the Delta. NDWA is a party to a Contract for the Assurance of a Dependable Water Supply of Suitable Quality (“1981 Contract”) with the California Department of Water Resources (“DWR”), under which NDWA makes certain payments to DWR in exchange for DWR’s making water of a specified quality and adequate quantity available for the use of diverters within NDWA boundaries. The 1981 Contract, as amended in 1997, imposes year-round water quality criteria as measured at seven monitoring locations as identified in the 1981 Contract.

B. Sites was formed by seven regional agencies in August 2010 as a Joint Powers Agency to develop, construct, and operate a water storage reservoir project (“Sites Reservoir”) located west of Maxwell, California, that currently includes the diversion and storage of up to 1.5 million acre-feet of water from the Sacramento River, at a rate not to exceed 4,200 cubic feet per second, with dams at Stone Corral Creek and Funks Creek, between September 1 and June 14.

C. Sites conducted extensive water availability analyses to confirm its ability to comply with Water Code section 1260(k) by demonstrating that a “reasonable likelihood that unappropriated water is available for the proposed appropriation.” The analysis looked at six water supply scenarios, ranging from historical conditions to climate change predictions through 2070, and a specific unimpaired flow scenario requested by the State Water Resources Control Board (“State Water Board”). The scenarios showed the amount of available water varies annually from an average of 658,000 acre-feet to an average of over 1.5 million acre-feet of water that would be available for appropriation to storage in Sites Reservoir. Sites’s CalSim hydrologic modeling results suggest about 300,000 acre-feet of water would be diverted to Sites as an annual average.

D. On May 11, 2022, Sites submitted a water right application (A025517X01) to the State Water Board for authorization to divert water to the proposed Sites Reservoir under certain conditions, in conjunction with a petition requesting partial assignment of state-filed application A025517 and petitions requesting release from priority of state-filed applications A025513, A022514, A022235, A023781, and any unassigned portion of state-filed application A025517 in favor of application A025517X01.

E. The State Water Board noticed the Sites water right application and associated filings on June 2, 2023, with a deadline for protests of August 1, 2023. Pursuant to Water Code sections 1330 and 10504.01, the notice advised any interested person may file a protest that

specifically sets forth their objections and the bases for those objections, accompanied by statements of fact supporting the allegations being made.

F. On June 13, 2023, NDWA submitted a letter to the State Water Board requesting an extension on the deadline to consider whether it will file a protest to the Sites water right application, citing a need to consult with its scientific and technical experts and its constituents who may be adversely affected by the proposed project. The State Water Board extended the deadline for protests to August 31, 2023.

G. To better understand the proposed project and ascertain whether the Parties can resolve NDWA’s potential protest, representatives of the Parties met and conferred on April 19, 2023, and August 10, 2023, in advance of a formal protest proceeding before the State Water Board and continued communications between meetings.

H. In the course of its communications with Sites, NDWA raised concerns that diverting Sacramento River water upstream from the Delta to the Sites Reservoir could adversely affect water users within NDWA by reducing freshwater flows and altering surface water elevations in the Delta, or by impacting DWR’s ability to operate the State Water Project in compliance with the 1981 Contract.

I. In response, Sites has provided NDWA information on the contemplated operational conditions that are currently proposed in its project description and which it expects will be imposed by the State Water Board, the California Department of Fish and Wildlife (“CDFW”), DWR, and the United States Bureau of Reclamation. The operational conditions are identified below.

J. Sites expects CDFW to issue an incidental take permit for Sites Reservoir that includes a project-specific diversion criteria requiring flows measured in the Sacramento River at Wilkins Slough to exceed the following minimums for Sites to divert from the Sacramento River:

- (i) 10,700 cubic feet per second (cfs) from October 1 through June 14; and
- (ii) 5,000 cfs from September 1 through September 30.

In addition, to provide pulse flow protection for fish migration, Sites will not be permitted to divert for seven days when flows measured in the Sacramento River at Bend Bridge exceed 8,000 cfs and combined tributary flow (Cow Creek, Cottonwood Creek, and Battle Creek) exceeds 2,500 cfs. Sites anticipates CDFW will issue an incidental take permit before the State Water Board acts on application A025517X01. Any water right permit issued by the State Water Board is expected to include a term requiring compliance with the incidental take permit.

K. Sites has proposed and expects that any permit to divert water to storage pursuant to application A025517X01 will be limited by the State Water Board to the period of September 1 through June 14 (the period the Sacramento River is not deemed fully appropriated), and only when all of the following conditions are present:

(i) The Delta is in “excess” conditions, as determined by Reclamation and DWR under their Coordinated Operations Agreement. Excess conditions are delineated as periods when it is mutually agreed that releases from upstream reservoirs plus unregulated flow exceed Sacramento Valley in-basin uses plus exports. During excess conditions, sufficient water is available to meet all beneficial needs and the Central Valley Project (“CVP”) and State Water Project (“SWP”) are not required to supplement the supply with water from the projects’ reservoir storage.

(ii) Senior downstream water rights have been satisfied.

(iii) Flows are available above those needed to meet all applicable laws, regulations, incidental take permit conditions, biological opinions, and court orders in place at the time of diversion.

Sites’ modeling shows that based on these operational criteria the majority of its diversions will occur during wet months of wet years, which historically occurred during periods when water quality within NDWA was well within the 1981 Contract criteria.

L. Sites anticipates that releases from Sites Reservoir may be made available in the form of exchanges during dry periods to meet the demands of CVP and SWP contractors that would otherwise be released from Shasta or Oroville, which could result in enhanced cold water storage.

M. Sites anticipates the release of water from Sites Reservoir for its members will occur during drier years when the members’ demands cannot be met from existing sources. Releases for south of Delta members will occur during the water transfer conveyance window (roughly, July through November), when capacity is available at existing export facilities. Sites conducted modeling analyses based on these operational conditions for its environmental review processes and Water Availability Analyses and shared an evaluation specific to changes in NDWA water quality. The analyses performed and shared by Sites show increased flow into the Delta during these periods, which may result in water quality benefits within NDWA.

N. The principal purpose of this MOU is to memorialize the Parties’ mutual understanding that the contemplated operational conditions for Sites Reservoir will avoid adverse effects on water quality and supply within NDWA’s boundaries.

O. In the event one or more of the discussed operational conditions may be altered after initial approvals that would enable Sites to divert outside of the prescribed season, at lesser bypass flow levels, at greater rates or quantities, or at different points of diversion or redirection than are currently proposed, NDWA will have opportunities to participate in the public administrative and legal proceedings that will occur, both pursuant to CEQA and State Water Board processes, including the ability to file complaints if Sites is not in compliance with its water right permit terms and conditions.

UNDERSTANDINGS

1. This MOU shall be effective between Sites and NDWA, for the purpose of establishing Sites and NDWA's mutual understanding that the Sites Reservoir's proposed operations, including the proposed operational terms and conditions applicable to the Sites Reservoir, will not adversely affect compliance with the water quality criteria and water supply assurances of NDWA's 1981 Contract.
2. Sites agrees that if the State Water Board issues a water right pursuant to application A025517X01, its annual diversion of water to storage will be limited to the period of September 1 through June 14.
3. Sites expects that its diversion of water will be further subject to the following proposed operational conditions, either in its water right permit or in an incidental take permit to be issued by CDFW:
 - a. The Delta must be in excess conditions.
 - b. The following minimum bypass flows in the Sacramento River as measured at Wilkins Slough shall be met:
 - i. Greater than 5,000 cfs from September 1 through September 30.
 - ii. Greater than 10,700 cfs in October through June 14.
4. Sites will operate its release of stored water for south of Delta members during the summer and fall months (roughly, July through November), when supplemental water is needed, and during periods when water released from Sites Reservoir is able to be rediverted at state and federal facilities such as at the existing Delta export facilities.
5. Sites agrees it does not currently intend to seek modification of the terms and conditions of the incidental take permit it shall obtain from the California Department of Fish and Wildlife or any water right permit under application A025517X01 that would enable it to deviate from the minimum bypass flows proposed at Wilkins Slough identified in Paragraph 3.
6. Sites agrees it will comply with the specific term it has proposed to be incorporated in its water right permit that prohibits any diversion to Sites Reservoir that would adversely affect the operation of the CVP or SWP.
7. The proposed term defines adverse effects to include diversions at any time Reclamation and DWR have declared the Delta to be in balanced water conditions pursuant to their Coordinated Operation Agreement, unless otherwise agreed by Reclamation and DWR.
8. The proposed term defines adverse effects to also include any time that such diversion would directly or indirectly require the CVP or SWP to release water from storage or to reduce their diversion or rediversion of water from the Delta to provide or assure flow in the Delta required to meet any applicable provision of state or federal law.

9. Sites agrees that the flows in the Delta needed to meet applicable provisions of state law include any flows DWR is contractually obligated to supply to NDWA under the 1981 Contract.

10. Sites asserts that the Sites Reservoir will function independently, with or without a new Delta conveyance system. The 2021 Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement for the Sites Reservoir evaluates Sites Reservoir as a standalone project. Therefore, NDWA understands this to mean that the currently proposed Delta Conveyance Project, or successor conveyance project, cannot divert water released from the Sites Reservoir at proposed North Delta points of diversion without a modification of the Sites water right permit, at which time NDWA would have an opportunity to protest such changes to terms and conditions cited herein.

11. Sites commits to contact NDWA in advance of any Sites generated request or decision by others to alter or modify the proposed terms and conditions of its water right permit, incidental take permit, or other operational conditions, and will transmit future related development and planning updates to NDWA to avoid inadvertent missed communications.

12. NDWA has determined that the Sites Reservoir’s proposed operations will not adversely affect its contractual rights under the 1981 Contract and agrees that it will not file a formal protest to application A025517X01.

12. NDWA reserves all rights to challenge the Sites Reservoir project in future administrative or judicial proceedings in the event of changes in the project that will cause harm to NDWA or its constituents.

13. This document contains the entire understanding of the Parties regarding the Sites Reservoir project and supersedes all prior understandings, agreements or representations, written or oral, regarding that project.

NORTH DELTA WATER AGENCY

By: _____
Melinda Terry
Title: Manager

Date: _____

SITES PROJECT AUTHORITY

By: _____

Title: _____

Date: _____

DRAFT