

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2015-0016-EXEC**

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In the Matter of the Permit 10477 (Application 12842)

Regarding Diversion by

**NORTH SAN JOAQUIN WATER CONSERVATION DISTRICT**

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COUNTY: San Joaquin

STREAM SYSTEM: Mokelumne River

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**ORDER APPROVING A PETITION FOR EXTENSION OF TIME UNTIL 2025,  
CONDITIONALLY APPROVING AN ADDITIONAL EXTENSION OF TIME THROUGH 2040  
AND APPROVING PETITIONS FOR CHANGES IN PLACE OF USE, POINTS OF  
DIVERSION, DISTRIBUTION OF STORAGE, AND PERMIT TERMS AND ISSUING  
AMENDED PERMIT**

**BY THE EXECUTIVE DIRECTOR:**

**1.0 INTRODUCTION**

The North San Joaquin Water Conservation District (District), which holds water right Permit 10477 (Application 12842), has petitioned the State Water Resources Control Board (State Water Board) for an extension of time to complete beneficial use of water by December 31, 2040. The District also seeks permission to change the place of use, points of diversion, and distribution of storage; to modify a permit term limiting the diversion rate to underground storage; and to delete a permit term that limits additional pumping capacity or storage facilities to be constructed under the permit.

*Petition for Extension of Time:*

This order approves an extension of time until December 31, 2025, and conditionally approves an extension of time from January 1, 2026 through December 31, 2040. The approval and conditional approval for this extension considered the recent resolution of the longstanding

disputes regarding diversions on the Mokelumne River <sup>1</sup>, the advanced planning and available funding for several infrastructure improvement projects and groundwater recharge projects, and the project's consistency with state policy for conjunctive use projects and for reversal of groundwater overdraft. As noted in Order WR 2008-0016<sup>2</sup>, the District's fulfillment of the "due diligence" requirement for approval of a petition for extension of time was marginal; since then, the District has not put additional water to use. However, the District has made significant strides in planning and acquiring funding to put water to use, as well as in implementing a pilot project for groundwater recharge. The projects under consideration have the potential to alleviate overdraft in the basins underlying the District's boundaries. In such a situation, where potential harm to other water users or the environment is absent, and the potential benefit of allowing a project to continue without the administrative delay of requiring an applicant to file for a new water right is great, there is precedent for granting petitions for extension of time, even in the absence of diligence. (See State Water Board Order WR 88-26.) The State Water Board anticipates that a time extension until 2025 will allow the District to complete the projects it has shown recent progress in implementing without putting significant federal funding at risk.

The State Water Board further conditionally approves an additional time extension from January 1, 2026 through December 31, 2040 based on the District meeting certain milestones prior to December 31, 2025. If the District does not meet the milestones required by this Order prior to January 1, 2026, the conditional approval until 2040 will be denied under this order. If the District puts all water to beneficial use prior to 2026 the extension through 2040 becomes moot.

*Petition for Changes in Place of Use, Points of Diversion, Distribution of Storage, and Permit Terms*

This order additionally approves the following items requested in the petition for change:

- 1) expands the place of use to the District's boundaries as shown on the map submitted to the Division dated December 17, 2014;
- 2) adds underground storage as a place of storage;
- 3) adds

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<sup>1</sup> In November 2014, the District, East Bay Municipal Utility District, San Joaquin County, Central Delta Water Agency, South Delta Water Agency, and Stockton East Water District entered into a Protest Dismissal Settlement Agreement that provides a framework for necessary funding and water to improve the health of the Eastern San Joaquin Groundwater Basin via water from the Mokelumne River.

<sup>2</sup> Order WR 2008-0016 partially set aside Order WR 2006-0018-DWR. Order WR 2006-0018-DWR was issued on November 30, 2006, and approved both a new point of diversion and underground storage as a place of storage for Permit 10477, and denied the District's December 2000 petition for extension of time. The District filed a petition for reconsideration regarding the denial of the time extension, which was then approved by the Division. WR Order 2008-0016 was subsequently issued on March 18, 2008, conditionally approving a time extension for the District.

two new points of diversion/rediversion (POD/PORD) for two new projects that the District is proposing, the Tracy Lake Groundwater Recharge Project and the City of Lodi (Lodi) Transfer (as described further below); and 4) modifies Permit Term 5 (related to the maximum rate of diversion to underground storage) and deletes Permit Term 20 (regarding the preclusion of the construction of additional capacity and storage facilities).

#### Tracy Lake Groundwater Recharge Project

Approval of the change will allow a U.S. Bureau of Reclamation (Reclamation) Water Smart Grant of \$300,000 to fund a portion of the cost of a new POD/PORD on the Mokelumne River that will provide up to 13,600 acre-feet annually (afa) of water to Tracy Lake, an existing natural terminal lake for the Jahant Slough watershed<sup>3</sup>. The water placed in Tracy Lake will provide surface water for irrigation to lands within the District that currently use groundwater, which will effectuate in-lieu recharge of groundwater. The water placed in Tracy Lake that is not withdrawn for irrigation use can provide direct recharge to groundwater in the Tracy Lake area.

#### Lodi Transfer

Approval of the change petition will also allow the addition of a new POD/PORD at the existing Woodbridge Irrigation District (WID) Dam at Lodi Lake that will allow the District to wheel water to Lodi. Lodi is within the service area of the District and a recent transfer agreement between Lodi and the District will generate approximately \$98,000 a-year in revenue when water is available under Permit 10477 by transferring up to 1,000 afa of water during the winter months.

## **2.0 BACKGROUND**

### **2.1 Issuance of Water Right Permit 10477**

On December 2, 1948, the District filed Application 12842 to appropriate water from the Mokelumne River in San Joaquin County. On July 3, 1956, after a hearing on competing

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<sup>3</sup> The Jahant Slough watershed forms an intermittent stream draining to two terminal lakes: Tracy Lake and an unnamed lake immediately north of Tracy Lake. There is no streamflow data for Jahant Slough, but anecdotal information of existing and previous landowners in the area indicate that the lakebeds are frequently inundated each winter from watershed runoff. There is no natural outlet from the lakes, however both lakes have been drained to the Mokelumne River in years they filled to facilitate drying the lakebeds to support mowing, grazing, and pasture production activities. (Tracy Lake MND, p 118)

water right applications, the State Engineer (the State Water Board's predecessor) issued Decision 858 granting East Bay Municipal Utility District's (EBMUD) Application 13156 priority over the District's Application 12842. Pursuant to Water Code section 1462<sup>4</sup>, the State Engineer issued Permit 10477 to the District for the temporary appropriation of water that is surplus to EBMUD's needs, as discussed in Decision 858<sup>5</sup>. Permit 10477 initially authorized direct diversion, at a rate of 500 cubic feet per second (cfs), and storage of 50,000 afa from about December 1 of each year to about July 1 of the succeeding year. Beneficial uses include irrigation, domestic, municipal, recreational and industrial uses. The permit initially required the District to complete construction by December 1, 1960, and to put water to beneficial use by December 1, 1970.

## **2.2 Previous Time Extensions**

Prior to 2000, Permit 10477 has been extended three times to allow the District to put water to full beneficial use. Following the initial expiration of the permit, the District petitioned the State Water Board on September 6, 1972, to extend the time to complete construction to 1975 and the time to complete beneficial use of water to 1980. According to the District, it had completed construction of diversion and distribution facilities to serve 3,000 acres and had nearly completed diversion and distribution facilities for an additional 3,000 acres. On October 26, 1972, the Division approved a time extension giving the District until December 1, 1975, to complete construction and until December 1, 1980, to apply the water to full beneficial use. The District's maximum use of water was 9,487 af in 1974.

The District filed a second petition for extension of time on March 10, 1983, claiming that the project was eighty percent completed. The petition requested an extension until 1988 to complete construction and until 1989 to complete full beneficial use of water. The Division

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<sup>4</sup> Under Water Code section 1462, when the State Water Board issues a permit to a municipality for a quantity of water exceeding existing municipal needs, the Board may also issue a permit for the temporary appropriation of water that is in excess of those existing needs.

<sup>5</sup> In Decision 858, the State Engineer indicated that the District could look to other sources for a long term water supply. The State Engineer stated that, "The evidence presented at the hearing indicates that for its ultimate requirements (the District) can obtain a cheaper and more dependable supply from other sources [than the Mokelumne River]." (*Id.* p. 73) Also, "Additional sources of water will be available to [the District] and [EBMUD] from the Folsom South Canal, the Feather River Project, and other sources, some of which may be less expensive to develop than the projects on the Mokelumne River." (*Id.* p. 77, No. 6) As directed by the State Engineer, the District then filed an application for a diversion from the American River, but that application was denied in Decision 893. The District was then directed to seek a water right contract with the Bureau of Reclamation (Reclamation) for American River water through the Folsom South Canal. The Folsom South Canal project was never completed and as such the District was not able to obtain a contract for American River water from Reclamation.

granted the second time extension on January 30, 1984, giving the District until December 1, 1988, to complete construction, and until December 1, 1989, to apply the water to full beneficial use.

In 1991 the District filed a third petition for extension of time. In 1992, the District entered into a stipulated agreement with EBMUD, the Department of Fish and Wildlife (DFW), and the California Sportfishing Protection Alliance (CSPA) to resolve the protests over the time extension petition. In the stipulated agreement, the District agreed to limit its direct diversion and diversion to storage to a combined total of 20,000 afa. The District also agreed to limit the maximum rate of direct diversion from the two existing pumping facilities to a combined total rate of 80 cfs with a limit of 40 cfs to be applied to any one pumping facility. Permit 10477 was subsequently amended to include similar, but not identical, provisions.<sup>6</sup> The permit, as amended in 1992, required the District to apply water to full beneficial use by December 31, 2000.

On December 29, 2000, the District filed a fourth petition for an extension of time, requesting an extension until 2010 to complete both construction and use of the water under Permit 10477.

After a hearing, on March 18, 2008, the State Water Board issued Order WR 2008-0016 which conditionally approved an extension of time until December 31, 2010 to complete construction and put water to full beneficial use under Permit 10477. Following are summaries of the primary conditions contained in Order WR 2008-0016 all of which the District has satisfied:

- The District was required to prepare and implement a project construction and operations plan for putting the full amount of water authorized under Permit 10477 to beneficial use by December 31, 2010. If the District was unable to put the full amount of water to beneficial use by December 31, 2010, the District was then required to file a petition for extension of time by March 18, 2009.

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<sup>6</sup> Term 5 of the amended permit, which is dated December 11, 1992, provides that: "The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a combined total of 80 [cfs] by direct diversion. Direct diversion shall be limited to no more than 40 [cfs] at any one pumping facility to be diverted from December 1 of each year to July 1 of the succeeding year and 20,000 [afa] by storage to be collected from December 1 of each year to July 1 of the succeeding year. The total amount of water to be taken from the source shall not exceed 20,000 acre-feet per water year of October 1 to September 30."

- The District was required to prepare and implement a conjunctive use plan prior to placing water into underground storage.
- The District was required to prepare and implement a water conservation plan describing how they would avoid the waste or unreasonable use of water under Permit 10477 and identify possible conservation measures.
- The District was required to submit an annual report regarding progress on groundwater management by the District in the Eastern San Joaquin groundwater basin and any existing or proposed measures to address over-drafting within the District's boundaries.
- The District is not allowed to transfer water diverted to underground storage under Permit 10477 outside the Eastern San Joaquin groundwater basin, as defined in the Department of Water Resources Bulletin 118, without complying with applicable State Water Board procedures and receiving any necessary approvals.
- The District was required to prepare a compliance plan establishing a method, including a proposal for installation and maintenance of devices, to measure the instantaneous rate of diversion and cumulative quantity of water diverted from each point of diversion, and the cumulative quantity of water applied to beneficial use under the permit.

### **2.3 District Financial Resources**

Currently, the District's revenues are generated as a share of local property taxes, at approximately \$240,000 per year. The revenues have been used for District administration/overhead expenses, planning, groundwater management efforts and new projects. The District is currently in the middle of a Proposition 218 process to raise the water rates to cover operation and maintenance for surface water deliveries for its South System users.

In 2007, the District instituted a groundwater pumping charge on all groundwater producing facilities within its boundaries. Approximately \$800,000 was collected in the fall of 2008 for fiscal year 2007-2008, and charges totaling \$800,000 were billed for fiscal year 2008-2009. In November 2008, a local ballot measure repealed the 2007-2008 groundwater charge and

placed a limitation on imposing future groundwater charges. The measure did not require a refund of the fiscal year 2007-2008 or 2008-2009 groundwater charges. The measure indicated District voters' displeasure with a groundwater charge applied to all landowners that funded only localized projects.

In response to the repeal of the groundwater pumping charge, the District moved to an improvement district funding model whereby the District proposes to form smaller improvement districts within its boundaries that are made up of just the lands that will be served by the project. The District also proposes to leverage improvement district landowner funding with grant funding whenever possible. The District has utilized the improvement district model to plan and partially fund the Tracy Lake Groundwater Recharge Project.

With the help of the new funding sources, the District is establishing a financial incentive program to assist landowners with the installation of dual groundwater and surface water supply facilities to increase surface water use. The District is also proposing to offer surface water at a discounted rate to encourage surface water use for farms within District boundaries.

### **3.0 SUBSTANCE OF PETITIONS**

Based in part on requirements in both Order WR 2008-0016 and Order WR 2006-0018-DWR, the District submitted a petition for change on June 1, 2007 and a petition for extension of time on March 17, 2009. The Division first noticed the petitions on May 20, 2009. Since then, the District has filed several amendments to the petitions as a result of settlement negotiations with protestants and changes in circumstances. On December 15, 2014, the Division re-noticed the petitions to include these amendments. This section describes the currently requested changes.

#### **3.1 Petition for Change**

##### Place of Use Expansion:

The District seeks to expand the place of use under Permit 10477. In 2004, the District annexed an additional 105,000 acres to its original 52,000 acre place of use to provide an opportunity for additional irrigation and groundwater recharge with surface water diverted from the Mokelumne River. The District requests that the place of use under Permit 10477

be changed to reflect the 157,000-acre District boundary as shown on the map dated December 17, 2014 submitted with the petition and on file with the Division.

Underground Storage:

The District requests that Permit 10477's 1,000 afa limit on diversion to underground storage be modified to allow up to 17,000 afa of such diversions. The total diversion to both surface storage and underground storage would remain limited to 20,000 afa. The District further requests that that Permit 10477 be amended to include a total area to be developed for groundwater storage and recharge of up to 500 acres within the District boundaries.

Addition of Two New PODs/PORDs

The District requests to add two new PODs/PORDs under Permit 10477. One proposed new POD/PORD at the existing WID Dam at Lodi Lake<sup>7</sup> would permit the District to wheel water to Lodi for municipal use within the city. Lodi has unmet demand for approximately 1,000 af of surface water in the winter months that could be delivered from the Mokelumne River to Lodi's nearby treatment plant. The other proposed new POD/PORD<sup>8</sup> would divert water approximately five miles downstream of the WID Dam for the proposed Tracy Lake Groundwater Recharge Project. The Tracy Lake Groundwater Recharge Project involves adding a new diversion downstream of the Woodbridge Dam, near Tracy Lake. Water will be diverted from the Mokelumne River and conveyed into Tracy Lake. A portion of the water placed into storage will percolate and accomplish direct recharge of the groundwater basin. However, a majority of the water will be pumped out of the lake, as direct diversion from the Mokelumne River, by adjacent landowners to irrigate vineyards that are currently relying on groundwater for irrigation. This will accomplish in-lieu groundwater recharge.

Modification of Permit Terms:

The District requests a modification of Permit Term 5 to allow a diversion rate of 10 cfs at *each* point of diversion/rediversion to underground storage rather than a total maximum

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<sup>7</sup> The WID Dam is identified as POD/PORD #5 in the petition map dated December 17, 2014. POD/PORD #5 is located on the Mokelumne River by CCS83, Zone 3, N. 2,244,462 ft. & E. 6,332,349 ft., being within SW¼ of NW¼ of Section 32, T4N, R6E, MDB&M.

<sup>8</sup> The Tracy Lake diversion is identified as POD/PORD #6 in the petition map dated December 17, 2014. POD/PORD #6 is located on the Mokelumne River by CCS83, Zone 3, N. 2,263,230 ft. & E. 6,319,530 ft., being within NW¼ of SE¼ of projected Section 8, T4N, R6E, MDB&M.



diversion rate of 10 cfs to underground storage. The combined total rate of diversion limitation of 80 cfs would still apply.

The District also requests that Term 20 of Permit 10477 be deleted in its entirety. Term 20, as modified by Order WR-2006-0018-DWR, precludes construction of additional capacity and storage facilities except for the installation of pumping facilities and construction of underground storage facilities necessary to implement the North San Joaquin Pilot Recharge Project.

### **3.2 Petition for Time Extension**

On March 17, 2010, the District filed the petition for extension of time to December 31, 2025. On January 3, 2014, the District requested that the petition be amended to request a time extension to December 31, 2040. The District indicated that the amendment was requested in order to be consistent with EBMUD's petition for extension of time for its Permit 10478<sup>9</sup>, as the District's Permit 10477 is derivative to Permit 10478.

## **4.0 PROTESTS**

### **4.1 Protests Received**

Based on the first public notice in 2009, the Division received protests from the following: WID; California Sportfishing Protection Alliance (CSPA); City of Stockton (Stockton); Jackson Valley Irrigation District (JVID); Reclamation; EBMUD; and approximately 55 protests from property owners living within the District's service area.

### **4.2 Resolved Protests**

#### **4.2.1 Agency and Organization Protests**

All of the protests by public agencies and that of the public interest organization CSPA have been resolved, as described below:

- On March 13, 2014, WID signed a "Resolution #03-13-14-01 and Agreement to Resolve Protests of WID to Change Petitions of NSJWCD".

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<sup>9</sup> EBMUD filed a petition for extension of time for its Permit 10478 on November 27, 2000. EBMUD requested an extension until December 31, 2040 to complete construction work and/or beneficial use of water under Permit 10478.

- On October 14, 2014, CSPA finalized an “Agreement to Resolve Water Right Protest” with the District.
- By letter dated June 16, 2014, Stockton withdrew its protest.
- Since JVID did not comment on the District’s September 14, 2009 protest response, the Division concluded that JVID’s protest concerns were adequately addressed. On July 1, 2010 the Division confirmed that JVID’s protest was dismissed.
- In its June 18, 2009 protest, Reclamation requested that the Division include Standard Permit Terms 80, 90, and 91 in any amended permit issued to the District. Reclamation also requested the Division’s findings that there were both water available for the appropriation and approval of the petitions would not contribute to further decline of the Delta’s environmental health. On August 24, 2009, the Division responded to Reclamation that Terms 80, 90, and 91 were already included in Permit 10477 when it was amended in 1992. The Division also responded that relative to water availability issues protests in a time extension and change proceeding are limited to the effects of the time extension and change. The Division indicated that this is not a new application where the applicant must show that water is available for the proposed use over and above the amounts needed for prior rights and public trust resources as those issues were decided when the permit was originally approved. The Division also indicated that any environmental concerns regarding potential impacts to the Delta would be handled in the California Environmental Quality Act (CEQA) document that would be prepared for the project. The Division further requested that Reclamation provide a statement of facts to substantiate the environmental elements of their protest. Reclamation did not respond. Therefore on July 1, 2010, the Division rejected Reclamation’s protest.
- On December 1, 2014, EBMUD notified the Division that its protests against the District’s petitions were withdrawn pursuant to the Protest Dismissal Settlement Agreement signed in November 2014.

#### **4.2.2 Property Owner Protests**

The property owners’ protests were based on a concern that the petition to change proposes projects not in the public interest. The primary concern for the property owners was that the District should not expand the place of use to provide water outside of the District boundaries, as the originally noticed petition had requested. The property owners contended that that the groundwater pumping fees were being assessed within the District, yet the District’s proposal to transfer water to Stockton would have directed water outside of the District’s boundaries. The District responded to the property owners’ protests by letter, dated September 14, 2009.

Subsequent to the Division’s 2009 public notice of the petitions, on March 19, 2010, the District requested that their change petition be modified to reduce the proposed place of use to only the District’s current boundaries. On May 5, 2010, the District then notified the remaining protestants of the decrease in the petitioned place of use. On January 31, 2013, the District

requested that the change petition be further modified to include the necessary components to implement both the Tracy Lake Groundwater Recharge Project and the Lodi water transfer.

Eighteen of the original 55 property owner protests were still considered active prior to September 2014. The 37 property owner protests that were no longer considered active were either resolved or rejected or canceled based on one or more of the following: 1) the District's modifications to the change petition; 2) communication with District representatives; and/or 3) lack of response to the Division's subsequent requests for information.

#### **4.3 Outstanding Property Owner Protests**

The District's petitions and the protests are being processed pursuant to the requirements of Water Code section 1700, et seq. and California Code of Regulations, title 23, article 15, section 791, et seq.

Water Code section 1703.6 (a) reads as follows:

The board may cancel a protest or petition for failure to provide information requested by the board under this chapter within the period provided.

Additionally, Water Code section 1703.6 (d) reads as follows:

If the protest is based on an allegation other than injury to a legal user of water, the board may cancel the protest for failure to submit information requested by the board if the board determines both of the following:

- (1) The public review period has expired for any draft environmental document or negative declaration required to be circulated for public review and comment pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.
- (2) In the absence of the requested information, there is no substantial evidence in light of the whole record to support the allegation.

In February 2014, the District provided the protestants with a notice of its intent to adopt a Mitigated Negative Declaration (MND) for its pending water right change and time extension

petitions. The MND covered the place of use as modified in 2010 and included the Tracy Lake Groundwater Recharge Project and Lodi water transfer. The District approved the MND on March 10, 2014.

Because the District modified its petition to no longer serve water outside of the District boundaries, the main issue of concern with the remaining protestants was resolved.

On September 12, 2014, pursuant to Water Code sections 1703.6 (a) and (d), the Division provided notice to the 18 remaining protestants that their protests would be considered canceled unless within 30 days each protestant could provide substantive information to support allegations made in the original protests. Thirteen of the remaining protestants did not respond to the Division's September 12 letter, and were therefore deemed canceled.

The five protestants who responded to the Division's September 12 letter are:

1) Bryan Pilkington; 2) Kenneth and Marion Bond; 3) William C. and Wallene B. Castro; 4) Sally Morehead; and 5) Jackson F. Morehead. Following are summaries of the concerns of the remaining protestants:

- 1) Bryan Pilkington – Mr. Pilkington's protest is based on whether the Tracy Lake Groundwater Recharge Project is in the public's interest. Mr. Pilkington provided information indicating that groundwater recharge near the Tracy Lake area will actually benefit the Cosumnes River groundwater subbasin and will not benefit the Eastern San Joaquin groundwater subbasin. Mr. Pilkington believes the District should put the water to beneficial use for the people within the District, not just the residents around the Tracy Lake area.
- 2) Kenneth Bond and Marion Bond – The Bonds indicate that the District's new PODs will provide access to certain landowners and locations which may provide opportunities to sell water to the highest bidder whether or not they are within the District. The Bonds also believe that the District lacks transparency relative to its Board meetings and the District's overall agenda.
- 3) Wallene C. Castro and William B. Castro – The Castros are concerned that the Tracy Lake Groundwater Recharge Project will involve additional landowner assessments within the District.

- 4) Sally Morehead – Ms. Morehead indicates that she lives north of the Mokelumne River and that the District is currently not serving water to her property. She would like to see groundwater levels north of the river to be improved by the District's groundwater recharge projects. She also indicates that she is concerned about how the District is managed.
- 5) Jackson F. Morehead – Mr. Morehead supports his mother's (Sally Morehead) remaining concerns regarding the District's proposed project relative to the area north of the Mokelumne River not being served by the District.

The State Water Board re-noticed the change petition and time extension petition on December 15, 2014 to reflect all changes made to the petitions subsequent to the original public notice. The State Water Board received no comments or protests following the re-notice.

## **5.0 ANALYSIS/DISCUSSION**

### **5.1 Petition for Change**

#### **5.1.1 Applicable Law**

Water Code sections 1700 through 1705 govern changes in the place of use, purpose of use, or point of diversion, of an appropriative water right. Permission to make such change must be granted by the State Water Board and "[b]efore permission to make such a change is granted the petitioner shall establish, to the satisfaction of the [State Water Board], and it shall find, that the change will not operate to the injury of any legal user of the water involved." (Wat. Code, § 1702.) The petitioner also must establish that the proposed change will not effectively initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) A change petition must also be in the public interest and not unreasonably harm fish, wildlife and other instream beneficial uses.

#### **5.1.2 Approval of Change Petition**

The evidence in the record supports a finding that the proposed changes will not result in injury to any legal user of water. The State Water Board analyzed water rights downstream of the proposed points of diversion, and found that the additional points of diversion and permit modifications requested would not injure downstream water users. The State Water Board provided notice of the changes to water users downstream of the District's existing points of diversion and received no protests claiming injury. The majority of water available under Permit

10477 is stored water releases, to which riparian users have no lawful claim. Direct diversion will occur only in very wet years, where injury is unlikely.

Approval of the proposed change petition will not initiate a new right. The changes in point of diversion and place of use could, by themselves, be instituted with no increase in diversion from the stream over current use or over the permit limits in Permit 10477.

As discussed below in section 5.2.1.4, approval of this petition is in the public interest. As discussed below in section 5.4, the proposed changes will not unreasonably harm fish, wildlife or other beneficial instream uses, under the conditions in this order.

Accordingly, the District's petition for change is approved subject to the conditions herein and Permit 10477 will be amended to expand the place of use to include all areas annexed to the District in 2004, to add the two new PODs/PORDs, to add Tracy Lake as a place of underground storage, to modify Permit Term 5 to allow a diversion rate of 10 cfs at each point of diversion/rediversion to underground storage, and to delete Permit Term 20 in its entirety from Permit 10477. In addition, conditions in Order WR 2008-0016 have been included as Terms in Permit 10477, and the conditions have been updated to show that the boundaries of the Eastern San Joaquin Basin in the original Bulletin 118 have been changed to divide the area beneath the District's service area into two basins: the Cosumnes subbasin and the Eastern San Joaquin subbasin.<sup>10</sup>

## **5.2 Petition for Extension of Time**

### **5.2.1 Applicable Law**

Water Code section 1396 requires a right holder to prosecute project construction and beneficial use of water with due diligence, in accordance with the Water Code, the State Water Board's regulations, and the terms specified in the permit. The State Water Board may approve a request for an extension of time if the Board finds that there is good cause for the extension. (Wat. Code, § 1398, subd. (a).) The State Water Board's regulations allow an extension of time to be granted only on such conditions as the Board determines to be in the public interest, and

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<sup>10</sup> Order WR 2008-0016 referenced DWR Bulletin 118 from 1980 which designated the aquifer underlying the District as being the Eastern San Joaquin County Basin. The latest update of Bulletin 118 from 2003 divided the Eastern San Joaquin County Basin into the Eastern San Joaquin subbasin and the Cosumnes subbasin.

on a showing to the Board's satisfaction that (1) due diligence has been exercised, (2) failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and (3) satisfactory progress will be made if an extension of time is granted. (Cal. Code Regs., tit. 23, § 844.) The State Water Board generally will not accept conditions incident to the person and not to the enterprise as good cause for delay. (Ibid.)

#### **5.2.1.1 Due Diligence**

In determining whether to approve a petition for extension of time, the State Water Board must consider whether there is information supporting a finding that the District has exercised diligence in putting water to beneficial use. Due diligence requires a demonstrable effort to put water to beneficial use within the time period specified in the permit. The question of diligence ultimately must be determined on the facts of each case. Order WR 2008-0016 found that the District's diligence at that point was a borderline case.

Order WR 2008-0016 contained several conditions that the District was required to complete as detailed in Section 2.2 above. The District completed all of the required tasks as follows: 1) the District prepared a Construction and Operation Plan for putting the full amount of water under Permit 10477 to beneficial use and the District filed a petition for extension of time as it projected it would be unable to put the full amount of water to beneficial use by December 31, 2010; 2) the District prepared and implemented a conjunctive use plan prior to operating the CALFED conjunctive use project; 3) the District prepared and implemented a water conservation plan; 4) the District has been preparing and submitting annual reports to the Division regarding groundwater management by the District in the Eastern San Joaquin groundwater subbasin; 4) the District prepared and implemented a compliance plan establishing how it would measure water diverted and used pursuant to Permit 10477.

In recent years, the District has taken significant steps to develop conjunctive use projects using water under its water right permit. Since 2000, the District has implemented or identified pilot conjunctive use projects to determine the best area for conjunctive use of water for larger scale projects. The District has also participated in various groups addressing groundwater overdraft and water supply reliability in San Joaquin County. The District also has taken specific actions to develop the use of water under its water right.

#### CALFED Conjunctive Use Project

Since 2001, the District has been working on its CALFED Conjunctive Use Project. The CALFED project, approved by Order WR-2006-0018-DWR, is located on 10 acres north of the Mokelumne River and limits diversions to underground storage to 1,000 afa. The project was constructed during 2007 and 2008 and began recharging water in 2009 during the winter when heavy rains generated sufficient water in the Mokelumne River to utilize the District's direct diversion right. In 2009 the District filed a petition for temporary urgency change to request the ability to put an additional 1,000 af to underground storage that year at the CALFED conjunctive use site. The State Water Board approved the District's petition and the District subsequently reported that 1,200 af were put to groundwater storage in 2009 and 1,036 af were subsequently withdrawn for irrigation.

#### Annexation of an Additional 105,000 acres to the District

In 2004, the District annexed an additional 105,000 acres to provide an opportunity for additional irrigation and groundwater recharge with surface water pumped from the Mokelumne River. To allow the use of the additional 105,000 acres and attempt to maximize use of their water right, the District filed the subject petition to change the place of use, purpose of use, and add underground storage under Permit 10477.

#### South and North Diversion Facility Fish Screens

In October 2008, the District completed construction of a fish screen on the 30 cfs South Diversion facility. In 2009, the District completed construction of a fish screen on its 30 cfs North Diversion facility. The District consulted with DFW on the installation of both fish screens.

#### Tracy Lake Groundwater Recharge Project

The District applied for and received a federal Water Smart Grant of \$300,000 and approximately \$1,500,000 in landowner assessments to fund construction of the Tracy Lake Groundwater Recharge Project. The landowners who can receive water from the project unanimously agreed to form the Tracy Lake Improvement District, pay acreage assessments to fund the planning, permitting and capital improvements and to pay annual operation and maintenance assessments to operate the project. These commitments are for Phase I of the project, which will use between 4,000 and 5,400 af of water per year,



when the water is available under Permit 10477. The federal grant for this project expires in September 2015 with all construction completed, costs reimbursed, and reporting done by September 2015.

#### Lodi Transfer

For the last two years, the District worked with Lodi and WID (which currently sells water to Lodi and conveys that water from the Mokelumne River for Lodi) to evaluate when Lodi had unmet demand for surface water that could be delivered from the river to Lodi's treatment plant by WID. Based on this regional cooperation, the District, Lodi, and WID identified a need of approximately 1,000 af during the winter months.

The respective boards of the District and Lodi approved a transfer agreement in October 2014 under which the District will sell Lodi 1,000 af of water in the winter months for \$100 per af. WID has agreed to wheel this water for Lodi. The project is ready to implement upon approval of the change petition. The approximate \$98,000/year anticipated from this agreement will help to support the South System Rehabilitation Project, as described below.

#### Protest Dismissal Settlement Agreement

In November 2014, the District signed a settlement agreement with EBMUD, San Joaquin County (SJC), Central Delta Water Agency (CDWA), South Delta Water Agency (SDWA), and Stockton East Water District (SEWD) that resolves a number of competing protests for Mokelumne River projects, and outlines a path forward for using Mokelumne River waters to improve the health of the Eastern San Joaquin Groundwater Basin while meeting the needs of a variety of water use interests in the watershed. This agreement not only provides funding and increased water reliability for the South System Rehabilitation Project, described below, but also outlines a broader structure for agreement in what has been a highly disputed watershed. This agreement further increases the likelihood of the District being able to move forward with its planned projects, and is therefore an important step in putting additional water to beneficial use.

#### South System Rehabilitation Project

The lack of funding for maintenance and repair of the District's facilities, coupled with lack of reliability in water deliveries and the resulting need for landowners to finance

groundwater pumping capabilities in preference to surface water delivery, has long been an obstacle to the District putting water to beneficial use. The south distribution system is in particular need of repair. This is, in a large part, due to the overdrafting of groundwater in the southern portion of the District resulting in a greater need for additional surface water for irrigation. Due to the precarious groundwater situation in the southern portion of the District, future groundwater recharge projects will become increasingly important and realization of those projects will depend on a fully functional south distribution system. The November 2014 Protest Dismissal Settlement Agreement signed with SJC, CDWA, SDWA, and SEWD provides \$4 million in funding from EBMUD for a groundwater demonstration project to be located along the District's South System, with \$1.75 million dedicated to improvements on that system. If for any reason the demonstration project does not go forward, EBMUD must pay the \$1.75 million directly to the District so that the District can proceed with the improvements, regardless.

Another part of the settlement is that EBMUD will provide additional water to the District (and other parties to the Agreement) in years that water is not otherwise available under Permit 10477 (subject to appropriate approvals from the State Water Board). The additional water (3,000 af or 6,000 af depending on storage conditions in Camanche Reservoir) will be used along the South System and will assist in increasing the reliability of surface water for District customers on this system. The addition of a dependable source of irrigation water will further justify and encourage landowner investment in the South System Rehabilitation Project.

The South System Rehabilitation Project is anticipated to allow beneficial use of approximately 10,000 afa of surface water or half of the water allowed under the District's permit. Currently, the south system has only been able to serve approximately 3,000 afa of surface water. The District's recent transfer agreement with Lodi will generate approximately \$98,000 a year in revenue that the District can use for the South System Rehabilitation Project. The District anticipates leveraging this new revenue with its property tax revenues (about \$240,000 per year) for that project.

Accordingly, the State Water Board finds the District has exercised due diligence in taking actions to develop the use of water under Permit 10477.

### **5.2.1.2 Obstacles to Completion Not Reasonably Avoided**

The State Water Board must also consider whether the right holder's failure to comply with previous time requirements has been occasioned by obstacles that could not reasonably be avoided. Lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay. (Cal. Code Regs., tit. 23, § 844.)

The District asserts that its inability to use water under Permit 10477 has been occasioned by a number of obstacles that could not reasonably be avoided. In particular, lack of a reliable water supply during drought years turned many of the District's customers to groundwater as an alternative source of water. Many of those customers did not return to surface water use, in part, due to the expense of operating dual (groundwater and surface water) supply systems or updating their surface water systems. The District also has maintained over the years that Permit 10477 involves a temporary, unreliable water supply that has made it difficult to recruit and maintain new water users.

Accordingly, in large part, the variability of the District's water supply in drought years and the temporary nature of Permit 10477 have impaired the District's ability to retain and attract customers. This, in turn, has caused delays in complying with previous time requirements. The reduced customer base and resulting loss in revenues have limited the District's ability to maintain and improve its distribution system. Consequently, the District has not been able to make full beneficial use of the water allowed under Permit 10477 during years when adequate supplies may have been available.

Additionally, considerable controversy concerning water use in the Mokelumne watershed has slowed the ability to implement projects. The November 2014 Protest Dismissal Agreement signed by the District, EBMUD, SJC, CDWA, SDWA, and SEWD provides a framework for moving forward in the face of this obstacle.

The changes in the financing structures that the District may use, including the creation of special districts for funding projects, have also reduced the obstacle of financing projects that the District has faced.

While lack of finances, or an inability to invest in infrastructure due to concerns regarding the reliability of a water supply that is unrelated to hydrologic conditions, will not generally be

accepted as good cause for delay, the State Water Board finds, in this case, that the District has committed to actions that will avoid these obstacles in the future.

### **5.2.1.3 Satisfactory Progress Anticipated**

The District can make satisfactory progress if the State Water Board grants an extension of time to complete construction and put water to full beneficial use, provided that the extension is conditioned to address the problems that have hampered progress to date. The District has provided persuasive evidence that if the State Water Board grants the District's petition for extension of time, the District has the plans, finances, and water users in place to make full beneficial use of the water authorized under Permit 10477.

Since 2000, the District has restructured its funding sources. In 2002, the District was granted the authority to impose a per-acre assessment on property owners within the District. Also, in 2007, the District imposed a controversial groundwater pumping charge on its property owners. The ability for the District to levy that charge was then repealed in 2008. Since then, the District has been pursuing grant funding for projects as well as the formation of local improvement districts to generate revenue for certain improvement projects. The Tracy Lake Groundwater Recharge Project is one such project that is being substantially financed by the recently organized Tracy Lake Improvement District.

The District is also receiving approximately \$240,000 annually in property tax revenue. That money is used to provide the basic administration of the District and fund studies related to some of the proposed projects.

In the past, the District has not had sufficient infrastructure to convey surface water to landowners in the District. Using revenues from the property tax, county drainage fund, water sales, and the newly-implemented acreage charge, and funding from EBMUD, the District has overcome the primary obstacle to improving its infrastructure and providing a more dependable surface water supply. Additionally, the District is establishing a fund to assist landowners with the installation of dual facilities to increase surface water use. The District may also offer surface water at a discounted rate to encourage surface water use. Moreover, as discussed above, the District has annexed an adjoining 105,000 acres to its existing 52,000 acres to allow additional irrigation and groundwater recharge activities.

The District's strides in implementing these plans and the funding and contractual agreement changes indicate that the District is on track put water to full use by 2025. It appears that the District extended its request for time extension to 2040 in order to maximize coordination with EBMUD and other stakeholders, and to avoid potential conflicts and delays if the variability of the District's supply in drought years and the temporary nature of Permit 10477 will continue to make it difficult to retain and attract customers, despite indications. Therefore, the Board approves the time extension petition through December 31, 2025 and conditionally approves the time extension petition from January 1, 2026 through December 31, 2040 subject to amended Permit Term No. 7 as follows:

Application of the water to the authorized use shall be made by December 31, 2025, except that the time for development of the water right shall be extended to December 31, 2040 upon a finding by the Executive Director of the State Water Board that the District has not applied all of the permitted water to beneficial use, but has 1) completed construction of the Tracy Lake Project and 2) applied water to beneficial use through both POD 4 (the Woodbridge Irrigation District Dam POD to Lodi) and POD 5 (the Tracy Lake POD). The District must submit evidence to Executive Director of the State Water Board confirming due diligence with the above two items by December 31, 2025.

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#### **5.2.1.4 Public Interest**

The requirement that an appropriation of water be completed within a reasonable time with the exercise of due diligence is a long-standing principle of California water law intended to protect the public interest by preventing the "cold storage" of water rights. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 618-619 [255 Cal.Rptr. 184].) Accordingly, the State Water Board takes seriously the requirement for a right holder to exercise due diligence in pursuing and perfecting a water right project. There are valid opinions on both sides of this case regarding due diligence in pursuit of full beneficial use. In the fifty years since Permit 10477 was issued in 1956, the District has not put the full 20,000 afa of water under Permit 10477 to beneficial use. The maximum amount put to beneficial use was 9,487 afa in 1973, with diversions in recent years being significantly less. Dating back to the 1970s, many of the District's actions and plans to place water to full beneficial use under its permit were not initiated until after the year 2000. Since Order WR

2008-0016, the District has met all requirements of that order and made significant progress in planning to structurally change longstanding barriers to using the water. Included among these is an agreement with other area water users, which will allow not only the District's projects to move forward, but also those of other water users, helping reduce gridlock in the basin and to address significant groundwater problems. Allowing this significant investment additional time to reach fruition is in the public interest.

The public has a strong interest in addressing the critical overdraft condition in the Eastern San Joaquin groundwater subbasin. It is estimated that the northeastern San Joaquin County groundwater subbasin is overdrafted by 70,000 afa, and the entire San Joaquin Valley Basin is experiencing long term groundwater overdraft of 160,000 afa. Moreover, as a result of pumping in excess of recharge, poor quality groundwater has been moving east along a 16-mile front on the east side of the Delta and has continued to migrate eastward. Large areas of nitrate contamination are also located in the Eastern San Joaquin subbasin.<sup>11</sup> The Cosumnes subbasin has also been experiencing a historical decrease in groundwater elevations. The continued development and use of water under Permit 10477, and the approval of changes that increase the amount of water that may be sent to underground storage, is in the public interest as it constitutes a significant step to remedying both the critically overdrafted Eastern San Joaquin subbasin and the declining groundwater levels in the Cosumnes subbasin.

The State Water Board supports coordinated use of surface and groundwater supplies as a logical vehicle for meeting the Constitution's requirements that the waters of the State be put to their fullest beneficial use and not wasted or unreasonably used. (Cal. Const., art. X, § 2.) Accordingly, the State Water Board finds that the public interest in addressing the groundwater overdraft problem provides good cause for granting the District an extension of time to December 31, 2025, and conditional approval of an extension of time through December 31, 2040, if the District meets milestones to construct additional facilities and begins putting water to beneficial use by 2025.

### **5.3 Remaining Protest Analysis**

The remaining protests concern whether the changes proposed with the petitions are in the public interest of property owners within the District. The protestants' public interest issues are:

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<sup>11</sup> Information obtained from Department of Water Resources CASGEM Groundwater Basin Prioritization, 5/30/2014

1) any groundwater recharge near the Tracy Lake area will benefit the Cosumnes groundwater subbasin, not the critically overdrafted Eastern San Joaquin subbasin; 2) all property owners within the District should not be assessed for a project that only benefits residents near Tracy Lake; 3) the District is not proposing projects that will benefit groundwater levels in areas north of the Mokelumne River and they do not deliver water to property owners north of the river; 4) the District's new PODs will provide access to certain landowners and locations which may provide opportunities to sell water to the highest bidder whether or not they are within the District; and 5) the District is being poorly managed and lacks transparency in its planning and operations.

The Tracy Lake area is north of the Mokelumne River, overlying the Cosumnes groundwater subbasin and just north of the Eastern San Joaquin groundwater subbasin. The Cosumnes groundwater subbasin is designated as a medium priority groundwater basin and is covered by the Sustainable Groundwater Management Act which went into effect on January 1, 2015.<sup>12</sup> Groundwater levels in the Cosumnes subbasin are not considered critically overdrafted in the Department of Water Resource (DWR) California Groundwater Bulletin 118-80. However, groundwater levels in wells analyzed over the period of 1963 to 2007 have exhibited a steady decline of between 10 and 50 feet. Information from a February 2006 update of DWR's Bulletin 118 indicates that the groundwater budget for the Consumes groundwater subbasin shows an average annual net decrease in the groundwater volume. In 2009, the District estimated that annual overdrafting within district boundaries was about 50,000 af.<sup>13</sup>

The majority of the water that will be used in the Tracy Lake Groundwater Recharge Project will be used for surface water irrigation which results in in-lieu groundwater recharge. The water will be delivered to Tracy Lake and will be pumped out for irrigation by nearby landowners who are within the District boundaries. Under Permit 10477 the District cannot serve or sell water outside of its permitted place of use. The use of surface water for irrigation has been the historical use under Permit 10477, and irrigation is a beneficial use of water. (E.g. Wat. Code

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<sup>12</sup> The Sustainable Groundwater Management Act of 2014 provides a framework for sustainable management of groundwater supplies by local authorities in 127 High and Medium priority groundwater basins in California. These basins account for approximately 96 percent of groundwater use in the state.

<sup>13</sup> Initial Study/Proposed Mitigated Negative Declaration for North San Joaquin Water Conservation District Water Right Change Petitions and Tracy Lake Groundwater Recharge Project.

§1254;<sup>14</sup> Cal. Code Regs., tit. 23 §§ 659,<sup>15</sup> 661<sup>16</sup>.) Putting this water to beneficial use would further the constitutional policy supporting water use in California, and no protestant has put forth alternative proposals for the amount of water (up to 13,600 afa) projected for use in the Tracy Lake area. Water that is not directly withdrawn from Tracy Lake for irrigation can serve as direct recharge to groundwater. However, prior to receiving credit for any direct groundwater recharge and subsequent withdrawal for a beneficial use under Permit 10477, the District must submit a plan to the Division for approval detailing their proposed groundwater recharge operations.

No general District funds have been used for the Tracy Lake Groundwater Recharge Project and the District has instead received revenue for the project from a federal grant and the formation of a special district in the Tracy Lake area. Therefore, landowners District-wide will not be paying for the Tracy Lake project and only those parties that will be using the water will be paying for the project.

The protestants have raised no conflicting evidence material to the claim that it is not in the public interest that Tracy Lake area residents use federal funding for an irrigation and in-lieu groundwater recharge project, and supplement the remaining costs with fees. Similarly, they have submitted no evidence that others in the District will be harmed by the project, or lose access to water.

Because the Tracy Lake project will allow farmers to utilize surface water instead of groundwater for irrigation, local groundwater levels will improve, enhancing groundwater supplies around Tracy Lake. The cessation of groundwater pumping for in-lieu projects to maintain supplies and conjunctive use projects are explicitly favored by state law. (Wat. Code, §§ 1005.1, 1011.5, subd. (a).)

The District has submitted additional plans for providing water for irrigation and groundwater recharge in other areas of the District. With increased revenues from new projects such as the

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<sup>14</sup> "In acting upon applications to appropriate water the board shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water."

<sup>15</sup> "Beneficial use of water includes those uses defined in this subarticle. The board will determine whether other uses of water are beneficial when considering individual applications to appropriate water."

<sup>16</sup> "Irrigation use includes any application of water to the production of irrigated crops or the maintenance of large areas of lawns, shrubbery, or gardens."



Tracy Lake project, the District also has plans to rehabilitate its northern distribution system, thereby allowing increased surface water deliveries to areas north of the Mokelumne River. The combined amount of water anticipated to be used for rehabilitation of the northern distribution system and for Tracy Lake does not amount to the face value of Permit 10477. No evidence suggests that approval of the petitions is in conflict with planned efforts to improve groundwater problems and increase surface deliveries north of the Mokelumne River: to the contrary, the record suggests that it makes such projects more likely.

Some of the protests raise concerns about general administration of the District, including allegations concerning financial practices and public involvement, as opposed to issues related to the merits of requested time extension and change petitions. These issues are outside the scope of this decision, and are thus not material to the determination regarding the change petitions at issue here.

Therefore, the remaining protests are cancelled pursuant to Water Code section 1703.6.

#### **5.4 CEQA and the Public Trust Doctrine**

Under CEQA, the District is the lead agency for the preparation of environmental documentation for the project permitted under Permit 10477. Because the State Water Board's approval of the change petition and time extension and subsequent amendment of Permit 10477 would authorize the District to complete its project and apply water to beneficial use, the State Water Board's approval constitutes an approval of the District's project. Thus, the State Water Board is a responsible agency for purposes of considering whether to approve the District's petitions. The State Water Board must review and consider the environmental effects of the project identified in any CEQA document prepared by the District, and any other relevant information in the record, and reach its own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).)

The District has adopted an MND covering the following issues/projects: 1) an extension of time to 2040 to put water under Permit 10477 to beneficial use; 2) expanding the place of use to the District's current boundaries; 3) adding underground storage as a place of storage; and 4) adding the two new PODs/PORDs for the Tracy Lake Groundwater Recharge Project and for the Lodi Transfer. The District adopted the MND and the companion Mitigation Monitoring and Reporting

Program (MMRP) on March 10, 2014. The District prepared a Notice of Determination (SCH# 20141022009) for the project dated March 10, 2014.

#### **5.4.1 Adopted Mitigation Measures**

The State Water Board has reviewed and considered the MND and MMRP in connection with approving the time extension and change petitions.

The MND identified the following potentially significant impacts from construction of the Tracy Lake Groundwater Recharge Project that fall within the State Water Board's purview:

- Reduced water quality due to increased turbidity from construction activities and/or storm water runoff during construction;
- Adverse effects to riparian habitat or other sensitive natural communities due to the activities needed to construct the project pipelines
- Adverse effects to special-status aquatic species due to activities needed to construct project pipelines.

The MND also identified the following potentially significant impact from approval of the petition for time extension for Permit 10477 that falls within the State Water Board's purview:

- Adverse impacts to fish resources from the eventual full diversion of 20,000 afa from the Mokelumne River

The mitigation measures identified below pertain to the protection of resources within the State Water Board's purview, and have been incorporated into the project.

#### *1) Participate in and Implement Requirements of SJMSCP Authorization*

NSJWCD shall obtain authorization from San Joaquin County Council of Government (SJCOG) for the Tracy Lake Recharge Project under the San Joaquin County Multi-Species Habitat Conservation Plan and Open Space Plan<sup>17</sup> (SJMSCP). This coverage will allow NSJWCD to minimize and compensate for potential effects resulting from

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<sup>17</sup> A copy of the SJMSCP can be found in the Division file for Application 12842 and at the following webpage: <http://www.sjcog.org/index.aspx?nid=173>.

construction and operation-related activities associated with the water diversion, pump station, conveyance pipeline, and outfall facilities through implementation of all applicable Measures to Minimize Impacts pursuant to Section 5.2.4 of the SJMSCP. NSJWCD shall provide mitigation pursuant to the compensation methods described in Section 5.3 of the SJMSCP. Additionally, NSJWCD shall pay all appropriate fees associated with coverage under the SJMSCP.

2) *Conduct Pre-construction Surveys for Special-status Plants and Minimize Disturbances.*

Preconstruction special-status plant surveys shall be completed within the construction and staging areas and Tracy Lake lakebed in accordance with Section 5.2.2 of the SJMSCP. The SJMSCP requires that surveys be conducted by a qualified biologist during appropriate blooming times in areas with characteristics likely to support special-status plant species. If special-status plant populations are identified within the Tracy Lake Recharge Project area, NSJWCD shall implement appropriate compensation and minimization measures described in Section 5.2.4.29 of the SJMSCP to the areas that are occupied by the species identified under the SJMSCP.

3) *Conduct Pre-construction Surveys for Special-status Amphibians and Minimize Disturbances.*

Preconstruction surveys for California tiger salamander and western spadefoot toad shall be completed within the construction and staging areas in accordance with Section 5.2.2 of the SJMSCP. The SJMSCP requires that surveys are conducted by a qualified biologist within 30 calendar days of Tracy Lake Recharge Project implementation, using survey methodologies consistent with Section 5.2.2.5 of the SJMSCP. If California tiger salamander or western spadefoot toad are identified within the pipeline alignment portion of the Tracy Lake Recharge Project area, NSJWCD shall implement appropriate compensation and minimization measures described in 5.2.4.5 of the SJMSCP.

4) *Acquire and Implement Requirements of Construction-related Permits to Minimize Habitat Disturbances.*

NSJWCD shall complete and submit a wetland delineation and "significant hydrologic nexus" assessment, for the Tracy Lake Recharge Project area, including proposed construction and staging areas and the Tracy Lake lakebed. Based on U.S. Army Corps of Engineers (USACE) determination of jurisdictional Waters of the U.S. and isolated waters of the state, NSJWCD shall prepare and submit applications to obtain the following permits, as appropriate: (1) Clean Water Act (CWA) Section 404 permit for discharge of dredge and fill material; (2) CWA Section 401 water quality certification from the Central Valley Regional Water Quality Control Board; and (3) Fish and Game Code, section 1602 Streambed Alteration Agreement (SAA) authorization from the California Department of Fish and Wildlife (CDFW) prior to the beginning of construction. All avoidance, protection, and mitigation measures included in these permits shall be implemented.

5) *Conduct Pre-construction Surveys for Special-status Reptiles and Minimize Disturbances.*

Preconstruction surveys for western pond turtle and San Joaquin whipsnake shall be completed within the pipeline construction and staging areas in accordance with Section 5.2.2 of the SIMSGP. The SJMSCP requires that surveys are conducted by a qualified biologist within 30 calendar days of Tracy Lake Recharge Project implementation, using survey methodologies consistent with Section 5.2.2.5 of the SJMSCP. If western pond turtle or San Joaquin whipsnake are identified within the pipeline alignment portion of the project area, NSJWCD shall implement appropriate compensation and minimization measures described in Sections 5.2.4.8 through 5.2.4.10 of the SJMSCP.

6) *Conduct Pre-construction Surveys for Special-status Birds and Minimize Disturbances.*

Preconstruction surveys for special-status birds shall be completed within the pipeline construction and staging areas in accordance with Section 5.2.2 of the SJMSCP. The SJMSCP requires that surveys are conducted by a qualified biologist within 30 calendar days of Tracy Lake Recharge Project implementation, using survey methodologies consistent with Section 5.2.2.5 of the SJMSCP. If special-status birds are identified within the pipeline alignment portion of the project area, NSJWCD shall implement appropriate compensation and minimization measures described in Sections 5.2.4.11 through 5.2.4.22 of the SJMSCP.

7) *Conduct Pre-construction Surveys for Special-status Bats and Minimize Disturbances.*

Preconstruction surveys for special-status bats shall be completed within the pipeline construction and staging areas in accordance with Section 5.2.2 of the SJMSCP. The SJMSCP requires that surveys are conducted by a qualified biologist within 30 calendar days of Tracy Lake Recharge Project implementation, using survey methodologies consistent with Section 5.2.2.5 of the SJMSCP. If special-status bats are identified within the pipeline alignment portion of the project area, NSJWCD shall implement appropriate compensation and minimization measures described in Section 5.2.4.28 of the SJMSCP.

8) *Conduct Pre-construction Surveys for Special-status Mammals and Minimize Disturbances.*

Preconstruction surveys for San Joaquin kit fox, American badger, and ringtail shall be completed within the pipeline construction and staging areas in accordance with Section 5.2.2.5 of the SJMSCP. The SJMSCP requires that surveys are conducted by a qualified biologist within 30 calendar days of Tracy Lake Recharge Project implementation, using survey methodologies consistent with Section 5.2.2.5 of the SJMSCP. If San Joaquin kit fox, American badger, or ringtail are identified within the pipeline alignment portion of the project area, NSJWCD shall implement appropriate compensation and minimization measures described in Sections 5.2.4.25 through 5.2.4.26 of the SJMSCP.

9) *Implement Riparian Habitat Mitigation Requirements of SJMSCP Authorization.*

To compensate for impacts within 100 feet of the dripline of riparian vegetation along the Mokelumne River, NSJWCD shall implement the applicable Incidental Take Minimization Measures described in Section 5.2.4.31 of the SJMSCP.

10) *Conduct Pre-construction Surveys for Protected Raptors and Minimize Disturbances.*

In order to avoid take (Fish and Game Code [FGC] § 86) of protected raptors (FGC § 3503.5), a pre-construction raptor nest survey shall be conducted within a quarter-mile (1320 feet) of the Tracy Lake Recharge Project site, and within 15 days prior to the beginning of construction activities by a CDFW approved biologist in order to identify

active nests in the site vicinity. The results of the survey shall be submitted to the city of Stockton and the CDFW. If active nests are found, a quarter-mile initial temporary nest disturbance buffer shall be established. If project-related activities within the temporary nest disturbance buffer are determined to be necessary during the nesting season, then an on-site biologist/monitor experienced with raptor behavior shall be retained by the project proponent to monitor the nest, and shall along with the project proponent, consult with the CDFW to determine the best course of action necessary to avoid nest abandonment or take of individuals. Work may be only allowed to proceed within the temporary nest disturbance buffer if raptors are not exhibiting agitated behavior such as defensive flights at intruders, getting up from a brooding position, or flying off the nest, and only with the agreement of the CDFW. The designated on-site biologist/monitor shall be on-site daily while construction related activities are taking place within the above quarter-mile buffer and shall have the authority to stop work if raptors are exhibiting agitated behavior.

11) *Avoid Interfering with the Joint Settlement Agreement<sup>18</sup> (JSA) Requirements and EBMUD's Mitigation Measures in its EIR for the Permit 10478 Time Extension Project*  
The JSA flow requirements and East Bay Municipal Utility District's (EBMUD) mitigation measures in its EIR for the Permit 10478 Time Extension Project ensure that the extension of NSJWCD's permit to 2040 will have less-than-significant impacts to fish resources. NSJWCD agrees not to interfere with either the JSA flow requirements or EBMUD mitigation measures.

12) *Implement Construction Erosion Control, Spill Control and Water Quality Protection Measures*

The conservation measures and Best Management Practices (BMPs) outlined below have been incorporated into the Proposed Project by NSJWCD to minimize potential adverse effects of construction-related activities such as soil erosion, discharges of sediment

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<sup>18</sup> In 1996 the JSA was entered into by EBMUD, U.S. Fish and Wildlife Service (USFWS) and CDFG. The JSA includes flow and non-flow measures, and requires EBMUD, USFWS, and CDFG to develop a Water Quality and Resource Management Program for approval by the Federal Energy Regulatory Commission (FERC) relative to EBMUD's Lower Mokelumne River Project No. 2916. In 1998, FERC approved the JSA and amended EBMUD's FERC license for the Lower Mokelumne River Project 2916 to require the JSA flow releases. The State Water Board also approved the JSA flows in Decision 1641, amending EBMUD's water rights on the Mokelumne River to require the JSA flow releases to benefit the Delta.

associated with in-river construction, and spills of contaminants. The conservation measures and BMPs shall be included as conditions of the construction contract between NSJWCD and the responsible construction contractor(s), and as appropriate, shall additionally be included in final project designs and specifications that are prepared for the Tracy Lake Recharge Project. Additionally, construction requirements specified in permits issued for the project, including, but not limited to, the Section 401 Water Quality Certification and Section 1602 Streambed Alteration Agreement, shall be included in the construction contract between NSJWCD and the construction contractor(s).

Construction BMPs:

- Erosion control measures will be installed and maintained in place during the precipitation season (October-April). Soil disturbance activities will cease if adverse weather conditions substantially increase the likelihood of transporting soil off site.
- To reduce potential contamination by spills, all refueling, storage, servicing, and maintenance of equipment will be performed at designated sites. Any fluids drained from the machinery during servicing will be collected in leak-proof containers and taken to an appropriate disposal or recycling facility. If such activities result in spillage or accumulation of a product on the soil, the contaminated soil will be disposed of properly. Under no circumstances will contaminated soils be added to a spoils pile or trench backfill.
- All maintenance materials (e.g., oils, grease, lubricants, and antifreeze) will be stored at staging areas.

#### **5.4.2 Mitigation Measures Monitoring and Reporting**

Implementation, monitoring and reporting on Mitigation Measure 11 is required through two permit terms. A new permit term implementing California Code of Regulations, title 23, section 847's requirement for permittees to file annual reports shall read as follows:

The District shall submit an annual "Progress Report by Permittee" to the Division of Water Rights, on forms provided by the State Water Board. Such report shall additionally include the information specified by the permit terms.

Permit Term 22, which was originally included in Permit 10477 in 1992, will be amended to read as follows in order to require implementation reporting:

The District shall allow any water bypassed or released from Camanche Reservoir by EBMUD under permitted Application 13156 for the protection and/or enhancement of fish and wildlife to continue downstream. Nothing in this permit shall be construed as authorizing the District to appropriate said flows. The District shall report the compliance with this term with the annual "Progress Report by Permittee."

Condition 7 of this Order requires a report on the implementation and completion of Mitigation Measures 1-10 and 12 in accordance with California Code of Regulations, title 14, section 15097 and Public Resources Code section 21081.6(a)(1). The State Water Board will file a NOD within five days of issuance of the amended permit.

#### **5.4.3 Public Trust Doctrine**

Regardless of any obligation the District or the State Water Board may have under CEQA, the State Water Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346].)

The State Water Board will include modified versions of two permit terms in Permit 10477 that address and help mitigate the potential for adverse injury to fishery resources due to approval of the petitions.

When Permit 10477 was amended in 1992, Permit Term 23 was included as follows:

No diversion shall be made under this permit until an agreement has been reached between the permittee and the State Department of Fish and Game [now DFW] with respect to flows to be bypassed for aquatic life; or failing to reach such agreement, until a further order is entered by the State Water Resources Control Board or its successor with respect to said flows.

On June 16, 2008, the District and DFW signed the "Agreement Between the California Department of Fish and Game and the North San Joaquin Water Conservation District Related to Bypass Flows in the Mokelumne River" (Agreement). The Agreement requires that in order



to provide and enhance the aquatic resources of the Mokelumne River, in particular anadromous salmonid species, the District must bypass five percent of its annual allocation of Mokelumne River water as an instream dedication for anadromous fish conservation and enhancement. Therefore, Permit Term 23 has been deleted and in its place, a new term will be added to Permit 10477 requiring the District to comply with the bypass requirement in the 2008 Agreement between the District and DFW.

Order WR-2006-0018-DWR amended Permit 10477 to include the following term requiring a fish screen or approved alternative at the point of diversion proposed for the CALFED conjunctive use pilot project:

No water shall be diverted under this Permit until right holder has constructed a fish screen at the point of diversion to be used for the conjunctive use pilot project or has proposed and constructed an alternative to a fish screen. Any alternative must comply with the Department of Fish and Game's (DFG) criteria and receive DFG's written approval. Right holder shall submit a copy of DFG's written approval of the plans and design calculations to the Division of Water Rights (Division) within 30 days from the date of the approval. Construction, operation, and maintenance of any required facility are the responsibility of the right holder. If the fish screen or any alternative is rendered inoperative for any reason, the right holder shall notify the Division Chief immediately and shall restore the equipment to service as soon as possible.

(0000213)

This Order updates and modifies that permit term to require a fish screen or an approved alternative on the new POD/PORD for the Tracy Lake Groundwater Recharge Project as well. The WID Diversion Dam already has a DFW-approved fish screen in place.

Based on the foregoing, there is no evidence that granting the proposed changes or an extension of time until December 31, 2040, will have any adverse impacts on public trust resources.

## **6.0 CONCLUSION**

The State Water Board finds that there is good cause and it is in the public interest to approve the District's petition for change, and the petition for extension of time is approved until

December 31, 2025, and conditionally approved from January 1, 2026 through December 31, 2040, as described above.

**ORDER**

**NOW, THEREFORE, IT IS ORDERED THAT** the State Water Board hereby cancels the remaining protests, and conditionally approves the petition for change for Permit No. 10477, and approves the petition for extension of time until December 31, 2025, and conditionally approves the petition for extension of time from January 1, 2026 through December 31, 2040. The Deputy Director for Water Rights (Deputy Director) shall issue an amended Permit No. 10477 as follows:

1. Permit Term 2 shall be amended to add the following point of diversion, redirection of stored water released from Camanche Reservoir, and diversion to underground storage

By California Coordinate System of 1983 in Zone 3	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
<b>Tracy Lake Pump</b> (6) North 2,263,230 feet and East 6,319,530 feet	NW¼ of SE¼	8*	4N	6E	MD

2. Permit Term 2 shall be amended to add the following point of diversion and redirection of stored water released from Camanche Reservoir

By California Coordinate System of 1983 in Zone 3	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
<b>Woodbridge Irrigation District Dam</b> (5) North 2,244,462 feet and East 6,332,349 feet	SW¼ of NW¼	35	4N	6E	MD

3. Permit Term 2 shall be amended to add the following place of underground storage

By California Coordinate System of 1983 in Zone 3	40-acre subdivision of public land survey or projection thereof	Section (Projected)*	Township	Range	Base and Meridian
<b>Tracy Lake</b>	SW¼ of SW¼	3	4N	6E	MD
	NE¼ of NE¼	8*			
	S½ of NE¼	8*			
	N½ of SE¼	8*			
	N½	9			
	NW¼ of SW¼	9			
	NW¼ of NW¼	10			

4. Permit Term 5 shall be amended to read:

The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed a total combined rate of 80 cubic feet per second (cfs) by direct diversion from all pumping facilities. Direct diversion shall be limited to no more than 40 cfs at any one pumping facility to be diverted from December 1 of each year to July 1 of the succeeding year.

Diversion to storage shall be collected from December 1 of each year to July 1 of the succeeding year and be limited to a combined total of 20,000 acre-feet per annum (afa) in (a) Camanche Reservoir and (b) underground storage.

Underground storage shall be limited to combined total of 17,000 afa at a maximum diversion rate of 10 cfs at each of PODs 2, 3, 4, and 6. The water diverted at POD 4 shall not exceed 1,000 afa to be collected to underground storage.

The combined rate of direct diversion and diversion to underground storage shall not exceed 80 cfs.

The total amount of water to be taken from the source shall not exceed 20,000 acre-feet per water year of October 1 to September 30.

(0000005E)

5. Permit Term 7 shall be modified as follows:

Application of the water to the authorized use shall be made by December 31, 2025, except that the time for development of the water right shall be extended to December 31, 2040 upon a finding by the Executive Director of the State Water Board that the District has not applied all of the permitted water to beneficial use, but has 1) completed construction of the Tracy Lake Project and 2) applied water to beneficial use through both POD 4 (the Woodbridge Irrigation District Dam POD to Lodi) and POD 5 (the Tracy Lake POD). The District must submit evidence to Executive Director of the State Water Board confirming due diligence with the above two items by December 31, 2025.

(0000009)

6. The following Term shall be added to Permit 10477:

The total area to be developed for groundwater recharge and storage shall not exceed 500 acres within the District's boundaries.

(0560900)

7. The District shall file a report within 10 days of completion of construction of the Tracy Lake Groundwater Recharge Project certifying compliance with mitigation terms 1 through 10 and term 12 included in section 5.4.1 of this Order.

8. Order WR 2006-0018-DWR amended Permit 10477 to include Order Condition 3. Order Condition 3 shall be amended to read as follows:

No water shall be diverted under this permit until right holder has either constructed fish screens at points of diversion/rediversion Nos. 4, 5, and 6, or has proposed and constructed an alternative(s) to a fish screen(s). Any alternative must comply with the Department of Fish and Wildlife's (DFW) criteria and receive DFW's written approval. Right holder shall submit a copy of DFW's written approval of the plans and design calculations to the Division within 30 days from the date of the approval. Construction, operation, and maintenance of any required facility are the responsibility of the right holder. If the fish screen or any alternative is rendered inoperative for any reason, the right holder shall notify the Deputy Director immediately and shall restore the equipment to service as soon as possible.

(0000213)

9. Order WR 2008-0016 included Order Condition 3 which shall be amended to read as follows:

With the exception of underground storage conducted pursuant to the North San Joaquin Pilot Recharge Project, the District must submit a conjunctive use plan to the Deputy Director prior to placing water into underground storage. The plan shall identify the proposed groundwater recharge or storage areas, the location of pumps and other facilities used for injection or percolation to underground storage, and the methods and points of measurement of the water diverted to and withdrawn from underground storage. The plan also must address whether and how placing water to underground storage, and subsequently withdrawing the water, under Permit 10477 will prevent additional overdraft in the Eastern San Joaquin and Cosumnes groundwater subbasins and include measures to avoid any such impacts. If the Deputy Director determines that all or a portion of the plan is not acceptable, then the District must submit any modifications to the plan required by the Deputy Director within 60 days of being notified that the plan is not acceptable. Upon approval of the plan by the Deputy Director, the District shall implement the plan.

(0490900)

10. Order WR 2008-0016 included Order Condition 4 which shall be amended to read as follows:

Within 180 days from the date of issuance of this amended permit, the District must provide the Division an update of the District's September 2008 plan to avoid the waste or unreasonable use of water under Permit 10477 including identifying any current and proposed conservation measures. If the Deputy Director determines that all or a portion of the plan is not acceptable, then the District must submit any modifications to the plan required by the Deputy Director within 60 days of being notified that the plan is not acceptable. Upon approval of the plan by the Deputy Director, the District shall implement the plan. The District shall provide updates of implementation of the plan upon request by the Division.

(0490700)

11. Order WR 2008-0016 included Order Condition 5 which shall be amended to read as follows:

The District must submit an annual report to the Deputy Director regarding progress on groundwater management by the District in the Eastern San Joaquin and Cosumnes groundwater subbasins and any existing or proposed measures to address over-drafting within the District's boundaries. The first report is due one year from the date of this amended permit and subsequent reports are due with the annual "Progress Report by Permittee."

(0580900)

12. Order WR 2008-0016 included Order Condition 6 which shall be amended to read as follows:

The District may not transfer water diverted to underground storage under Permit 10477 outside the Eastern San Joaquin and Cosumnes groundwater subbasins, as defined in the Department of Water Resources Bulletin 118, without complying with applicable State Water Board procedures and receiving any necessary approvals.

(0450900)

13. Order WR 2008-0016 included Order Condition 7 which shall be amended to read as follows:

Prior to diversion of water to underground storage under this permit, right holder shall (1) install devices to measure the quantities of water placed into underground storage and (2) install devices to measure or provide documentation of the method to be used to determine the quantity of water recovered from underground storage and placed to beneficial use. All measuring devices and the method of determining the quantity of water recovered from underground storage shall be approved by the Deputy Director prior to diversion of water at the Mokelumne River points of diversion/rediversion under this permit. All measuring devices shall be properly maintained.

The District shall report the quantity of water placed into, and recovered from, underground storage under Permit 10477 to the State Water Board with the annual "Progress Report by Permittee."

(0080117)

14. Order WR 2008-0016 included Order Condition 8 which shall be amended to read as follows:

The District shall establish a method, and install and maintain appropriate devices, to measure the instantaneous rate of diversion and cumulative quantity of water diverted from each point of diversion, and the cumulative quantity of water applied to beneficial use under this permit. The District must obtain approval from the State Water Board of all devices, the method of determining the rate and amount of water diverted, and the method of determining the amount of water applied to beneficial use. Within three months of the date of this amended permit, the right holder shall submit a plan for approval by the Deputy Director that will demonstrate compliance with this term. The plan shall include as a minimum:

- a. A description of any gages and/or monitoring devices that will be installed or have been installed.
- b. A time schedule for the installation of these devices.
- c. A description of activities that will be taken to ensure the continued maintenance and operation of the devices, including a schedule for inspection of the devices by the right holder.
- d. A description of the frequency of data collection, the methods for recording data, the format for reporting data to the Division, and any calculations required to develop the records.
- e. A description of the method to be used in reporting EBMUD's diversion of water to storage for the District's benefit under Permit 10477, and the amount of that water actually applied to beneficial use by the District.

A record of such measurements shall be maintained by the right holder and made available to interested persons upon reasonable request. A copy of the records shall be submitted to the State Water Board with the annual "Progress Report by Permittee."

(0090900)

15. Order WR 2008-0016 included Order Condition 9 which shall be amended to read as follows:

Right holder shall maintain records of the amount of water diverted and used to enable State Water Board to determine the amount of water that has been applied to beneficial use.

(0000015)

16. Order WR 2008-0016 included Order Condition 10 which shall be amended to read as follows:

If it is determined after permit issuance that the as-built conditions of the project are not correctly represented by the map(s) prepared to accompany the application, right holder shall, at its expense, have the subject map(s) updated or replaced with equivalent as-built map(s). The revision(s) or new map(s) shall be prepared by a civil engineer or land surveyor registered or licensed in the State of California and shall meet the requirements prescribed in section 715 and sections 717 through 723 of the California Code of Regulations, Title 23. The revision(s) or map(s) shall be furnished upon request of the Deputy Director.

(0000030)

17. Permit 10477 is amended to delete Term 20, as modified by Order WR 2006-0018-DWR.

18. Term 22 of Permit 10477 will be amended to read as follows:

The District shall allow any water bypassed or released from Camanche Reservoir by EBMUD under permitted Application 13156 for the protection and/or enhancement of fish and wildlife to continue downstream. Nothing in this permit shall be construed as authorizing the District to appropriate said flows. The District shall report the compliance with this term with the annual "Progress Report by Permittee."

(0140800)

19. Term 23 of Permit 10477 is replaced by the following term:

The District shall comply with the following bypass:

The District will make available five percent (identified in acre-feet) of its annual allocation of Mokelumne River water as an instream dedication for anadromous fish conservation and enhancement, or, in the case of a future amendment to the "Agreement Between the California Department of Fish and Game and the North San Joaquin Water Conservation District Related to Bypass Flows in the Mokelumne River" dated June 16, 2008 that is filed with the State Water Board, shall comply with any increased bypass level described in the amended agreement.

(0140300)

20. The following Term shall be added to Permit 10477:

The District shall submit an annual "Progress Report by Permittee" to the Division of Water Rights, on forms provided by the State Water Board. Such report shall additionally include the information specified by this permit's terms.

(0580900)

21. All other conditions of Permit 10477 remain in full force and effect.

STATE WATER RESOURCES CONTROL BOARD

  
Thomas Howard  
Executive Director

Dated: **MAR 30 2015**

