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10 STATE OF CALIFORNIA

11 STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of Yuba County Water Agency's)
13 Petition to Modify Revised Water Right Decision 1644) YUBA COUNTY WATER
14 related to Water Right Permits 15026, 15027, and) AGENCY'S PETITION
15 15030 (Applications 5632, 15204, and 15574) and) FOR RE-
16 Petition for Long-Term Transfer of up to 200,000) CONSIDERATION OF
17 Acre-Feet of Water Per Year from Yuba County) ORDER WR 2008-0014;
18 Water Agency to Department of Water Resources and) MEMORANDUM OF
19 the United States Bureau of Reclamation under Permit) POINTS AND
20 15026 (Application 5632), Yuba County Water) AUTHORITIES
21 Agency, Petitioner and Permittee.)
22 _____)
23)

24 Pursuant to Water Code sections 1122-1124 and title 23, California Code of Regulations
25 ("Cal. Code Regs."), sections 768-769, the Yuba County Water Agency ("YCWA") files this
26 petition for reconsideration of Water Right Order 2008-0014 ("Order WR 2008-0014"), adopted
27 by the State Water Resources Control Board ("SWRCB") on March 18, 2008.

28 **I. Grounds For Petition**

29 YCWA petitions for reconsideration of Order WR 2008-0014 to correct some errors in
30 Order WR 2008-0014. These errors are discussed in the accompanying memorandum of points
31 and authorities.

32 **II. Specific Facts Regarding Petition**

33 Pursuant to title 23, Cal. Code Regs., section 769, subdivision (a), YCWA submits the
34 following information:
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(1) Name and address of the petitioner:

Yuba County Water Agency
1220 F Street
Marysville, California 95901

(2) Specific SWRCB action of which petitioner requests reconsideration:

Water Right Order 2008-0014

(3) Date on which the order or decision was made by SWRCB:

March 18, 2008

(4) Reason action was inappropriate or improper:

See accompanying memorandum of points and authorities.

(5) Specific action that petitioner requests:

The changes to Order WR 2008-0014 that are indicated in pages attached to this petition at tabs A through F.

(6) Statement that copies of the petition and any accompanying materials have been sent to all interested parties.

See attached proof of service.

MEMORANDUM OF POINTS AND AUTHORITIES

The Yuba County Water Agency (“YCWA”) supports the SWRCB’s adoption of Order WR 2008-0014 and the changes to the draft order that the SWRCB made during its March 18, 2008 meeting before it adopted Order WR 2008-0014. However, there are a few errors and inconsistencies in Order WR 2008-0014 that need to be corrected. These errors and inconsistencies are discussed in the following sections of this memorandum. YCWA’s requested changes to Order WR 2008-0014 to correct these errors and inconsistencies are shown in the pages attached to this memorandum at tabs A through F. These requested changes are consistent with the changes to the draft order that the SWRCB approved during the March 18, 2008 meeting.

A. Potential SWRCB Hearing Regarding Conference Year Flows

On page 52, in line 3, Order WR 2008-0014 states that the SWRCB “may” conduct a hearing regarding the imposition of additional flows in Conference Years. On March 18, the

1 SWRCB inserted this “may” (replacing a “will”) in response to a request from YCWA, to make
2 it clear that the SWRCB will decide whether or not it needs to hold such a hearing in any
3 Conference Year.

4 However, on page 22, in the first line of section 4.2.1.5, Order WR 2008-0014, the
5 corresponding change was not made, so this text still states that the SWRCB “will” hold such a
6 hearing. To make the text on page 22 consistent with the text on page 52, the text on page 22
7 should be edited as indicated on the page attached to this memorandum at tab A.

8 **B. Reservation of Jurisdiction Regarding North Yuba Basin Groundwater Levels**

9 During the March 18 meeting, the SWRCB amended the draft order on pages 35-36, 45-46
10 and 49 of Order WR 2008-0014 to make it clear that the triggers for the SWRCB’s retained
11 jurisdiction to address groundwater levels in the North and South Yuba Basins were different,
12 because groundwater levels in the South Yuba Basin historically had dropped significantly while
13 groundwater levels in the North Yuba Basin had not.

14 The corresponding edits were not made in some of the other text in Order WR 2008-0014.
15 To make this other text consistent with the changes on this issue that the SWRCB made on March
16 18, the changes to text on pages 49, 54-55 and 63 that are indicated in the pages attached to this
17 memorandum at tab B should be made.

18 **C. Deputy Director’s Approval of Petitions Regarding December-June Transfers**

19 During the March 18 meeting, the SWRCB edited the text on pages 53-54 of Order WR
20 2008-0014 to provide that the 20,000 acre-foot (“20 TAF”) limit on December-through-June
21 water transfers on the Yuba Accord will not apply when additional transfer water is being released
22 for purposes other than the transfer, for example, if the release is required to meet instream flow
23 requirements, or if the transfer will not involve pumping from Jones or Banks Pumping Plants.
24 In such cases, YCWA and DWR may petition the Deputy Director to allow pumping in excess
25 of 20 TAF during this period, and the Deputy Direct “shall” approve the petition if YCWA or
26 DWR can make the required showing. (See Order WR 2008-0014, pp. 53-54.)

27 However, all of the corresponding edits were not made to the text on page 59 of Order WR

1 2008-0014. To be consistent with the text on pages 53-54, the text on page 59 should be edited
2 as indicated in the page attached to this memorandum at tab C.

3 **D. Adjustments of Flow Schedules In Schedule 5 Years**

4 In footnote 29 on page 42, Order WR 2008-0014 correctly recognizes that the Lower Yuba
5 River Fisheries Agreement includes automatic, mandatory adjustments in the October-through-
6 February lower Yuba River flow schedules, from 500 to 400 cfs, in Schedule 5 years when
7 September 30 New Bullards Bar Reservoir (“NBBR”) storage is less than 400,000 acre-feet (“400
8 TAF”). These automatic adjustments are specified in exhibit 3 to the Lower Yuba River Fisheries
9 Agreement (exh. YCWA-9), and were included in the hydrological modeling for the Yuba Accord
10 EIR/EIS (see Reporter’s Transcript of Dec. 5, 2007 Hearing, pp. 131-132; exh. YCWA-1, app.
11 D, p. A-20, table A-8, fn. e; exh. YCWA-2, pp. 4-15, 4-49.) In contrast, in Schedule 5 years
12 where September 30 NBBR storage is greater than or equal to 400 TAF but less than 450 TAF,
13 the adjustment will be discretionary with the River Management Team and subject to approval
14 by the Deputy Director.

15 Although footnote 29 on page 42 of Order WR 2008-0014 recognizes that whether these
16 adjustments will be automatic or discretionary will depend on September 30 NBBR storage, the
17 text in several places of Order WR 2008-0014 does not make this distinction and instead treats
18 all of these adjustments as discretionary. To properly distinguish between the mandatory
19 adjustments and the discretionary adjustments, the text on pages 21, 52 and 57 of Order WR
20 2008-0014 needs to be edited as indicated in the pages attached to this memorandum at tab D.

21 **E. Narrows Powerhouse Intake Extension Project**

22 During the March 18 meeting, the SWRCB added the text in the last paragraph on page
23 25 of Order WR 2008-0014. This text states that the SWRCB will delegate to the Deputy
24 Director the authority to review evidence and determine whether YCWA should be required to
25 continue its diligent pursuit of funding for the Narrows Powerhouse Extension Project.

26 In contrast, the text in paragraph (g) on page 58 of Order WR 2008-0014 provides only
27 for the Deputy Director to relieve YCWA of this requirement “on an annual basis.” Under this

1 provision, YCWA would be required to submit new documentation regarding this requirement
2 every year forever. Based on the text on page 25 of Order WR 2008-0014, this does not appear
3 to have been the SWRCB's intent. The SWRCB therefore should edit the text on page 58 as
4 indicated in the page attached to this memorandum at tab E.

5 **F. Typographical Errors**

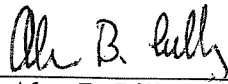
6 There also are some typographical errors in Order WR 2008-0014. Corrections to these
7 errors are indicated in the pages attached to this memorandum at tab F.

8 **CONCLUSION**

9 For the reasons stated in this memorandum, the Yuba County Water Agency requests that
10 the State Water Resources Control Board issue an order granting YCWA's petition for
11 reconsideration and making the changes to Order WR 2008-0014 that are shown in the pages
12 attached to this memorandum at tabs A through F. YCWA requests that the SWRCB adopt this
13 order during its May 20, 2008 meeting, so that YCWA can work with the Department of
14 Resources to begin implementing the Lower Yuba River Accord as soon as possible.

15 Dated: April 8, 2008

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

17 By 
18 Alan B. Lilly

19 Attorneys for the Yuba County Water Agency

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Tab A

its protection of the public trust resources. (YCWA-2, pp. 4-15 to 4-16.) Because the flexibility built into the Fisheries Agreement also has the potential to harm public trust resources, however, the State Water Board must have the ability to oversee and enforce measures that would potentially conflict with the permit. (See SWRCB Order 2002-0002 at p. 11 [If the State Water Board gave authority to others to modify permit flow requirements without State Water Board approval of the changes, “the SWRCB would be abdicating its public trust responsibilities”].) In order to meet public trust responsibilities, yet at the same time encourage adaptive management and broad stakeholder engagement, the State Water Board will require that all the above-listed adaptive management measures be submitted to the State Water Board Deputy Director for Water Rights (Deputy Director; also referred to as Chief of the Division of Water Rights) for approval. (See SWRCB Order WR 98-05 at p. 25 [“The delegation of authority to the Chief of the Division of Water Rights establishes a workable procedure allowing for adaptive management”].)

In recognition of the importance of acting quickly in adaptive management, the Deputy Director will raise any objections to the above-listed measures within 10 days. If the Deputy Director raises no objections, the measure will go into effect. This process mirrors the one already outlined in the Fisheries Agreement for changes to the instream flow schedules and for implementation of the discretionary dry year storage adjustment. (YCWA-9, Section 5.2.1, p. 14.)

4.2.1.5 Conference Year Flows

Additionally, for conference year flows, the State Water Board ~~may~~will schedule a hearing under the emergency drought provisions of California Code of Regulations, title 23, section 767, if by April 1 of the conference year, the River Management Team’s Planning Group has not put forward a suggestion for additional flows, or if, by April 11, the Deputy Director has not approved a flow recommendation. This procedure will permit the State Water Board to gather evidence based on real-time information regarding any suitable additional flows, and to set such additional flows, if the RMT is unable to reach consensus or the Deputy Director does not approve this consensus. The State Water Board will request that evidence be submitted at the hearing by members of the Planning Group. The State Water Board will issue a decision within 30 days after the hearing. Because the particularities of each conference year will affect water availability, and therefore the balancing of reasonable uses on the Lower Yuba River, the State Water Board finds it reasonable to exercise approval authority over the conference-year

Tab B

For each of these potential impacts, mitigations incorporated into the project and required as a condition of this order will reduce the impact to a less than significant level, and monitoring and reporting of compliance is required as part of this order. (*Id.* § 15091, subd. (d).)

6.2.1.1 A change in groundwater pumping that could impact local groundwater users in the Yuba Region.

The groundwater substitution portion of the Yuba Accord will result in increased groundwater pumping in some years. As described in section 5.1.1 above, YCWA will implement a Groundwater Monitoring and Reporting Program that will guide decisions regarding discretionary groundwater pumping under the Yuba Accord. (YCWA-2, pp. 6-8 to 6-13.) YCWA and the Member Units will also implement a Third Party Impacts Action Plan that will address third-party impacts related to the Yuba Accord's groundwater substitution program. Finally, the State Water Board will reserve jurisdiction to reopen the proceedings, should groundwater aquifer levels in the South Yuba Basin fall below those recorded in 1991 or upon a showing of substantial injury or the threat of substantial injury to legal North Yuba Basin groundwater users, based on lowered groundwater levels. With these mitigation measures, the State Water Board finds that the effect will be avoided or substantially lessened.

6.2.1.2 A change in salinity and chloride concentrations that could degrade water quality conditions in the Delta

The project could result in a change in salinity and chloride concentrations that could degrade water quality in the Delta. To mitigate this potential impact, YCWA will include "carriage water." (YCWA-2, p. 6-14.) "Carriage water" is an amount of water released in addition to that which will be pumped through the CVP or SWP pumps, which will be dedicated to increase Delta outflow in order to mitigate any changes in salinity and chloride concentrations in the Delta. Carriage water is calculated on a real-time basis using a DSM2 model, and generally results in additional releases of water between 0% and 25% of the amount of water to be transferred. Because YCWA will release additional water for Delta outflows, calculated at an amount to cause no increase in salinity or chloride concentrations in the Delta, the State Water Board finds that this effect will be avoided or substantially lessened.

upon a showing that the transfer does not involve pumping from the Jones or Banks pumping plants during the December through June period (for example, where the transfer serves to reduce releases that would otherwise have to be made from SWP or CVP reservoirs to meet Delta water quality objectives, allowing additional water to be stored in those reservoirs without increasing Delta pumping during the December through June period). During the November through June period, the State Water Board, through delegation to the Deputy Director, may further condition or cease water transfers at the Jones and Banks pumping plants under this order, if real-time monitoring data indicate that the transfer will cause or threatens to cause a negative impact on Delta fisheries. Because this reservation of authority is intended to protect the Delta fishery in the face of uncertainty, it is limited to those times in which a cessation of the transfer will reduce cumulative pumping from the Banks and Jones pumping plants.

In the traditional July through October transfer period, water transfers under this order will be limited to a rate of 15,000 cubic feet per second, with a limit in this period of 200,000 acre-feet, as well as an annual total limit of 200,000 acre-feet.

The terms of the Yuba Accord Conjunctive Use Agreements will govern groundwater substitutions for transfer purposes.

Any water transfers under this order will be subject to DWR and USBR compliance with regulations under RD-1641, including compliance with the plans that are prerequisites for the use of Joint Points of Diversion, as well as compliance with all applicable biological opinions and any court orders.

7.2.2 Reservations of Jurisdiction

The State Water Board will specifically reserve jurisdiction to modify any action subject to this order or to amend or add any condition thereto:

- upon issuance of any new Biological Opinion for the Central Valley Operations Criteria and Plan or if the Interim Remedial Order in *NRDC v. Kempthorne* is stayed or overturned on appeal,
- upon issuance of a new FERC license for the Yuba River Development Project,
- at any time in which the groundwater aquifer levels in the ~~North or South~~ Yuba Basins fall below their autumn 1991 levels, or upon a showing of substantial injury or the threat

of substantial injury to legal North Yuba Basin groundwater users, based on lowered groundwater levels.

- upon a change in listing status of any species in the Delta.

7.2.3 Summary of Findings

The record shows that the requested transfer is in accord with the State Water Board's responsibilities under the public trust and reasonable use doctrines.

The record shows that the requested transfer, as conditioned, will not injure any legal user of water.

The record shows that the requested transfer, as conditioned, will not unreasonably harm fish, wildlife, or other instream beneficial uses of water.

Approval of the Transfer Petition is in compliance with the California Environmental Quality Act. Mitigation measures described in Section 6.2.1 will avoid or substantially lessen significant, mitigable changes in (1) salinity and chloride concentrations that could degrade water quality conditions in the Delta; (2) groundwater pumping that could impact local groundwater users and the Yuba Region; and (3) reservoir refilling that could impact water quality in the Delta, or in the export service areas south of the Delta.. The benefits of the Yuba Accord override the contribution of the Yuba Accord to cumulative unavoidable significant effects, as described in Section 6.2.2. The transfer will be subject to the additional mitigation measures as described in sections 7.2.1 and 7.2.2.

The record shows that the requested transfer, as conditioned, will not unreasonably affect the overall economy of the region from which the water is being transferred.

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Forebay unless DWR is in compliance with Mitigation Measure 9-1, and shall not divert water at the Jones Pumping Plant unless USBR is in compliance with Mitigation Measure 9-1.

11. This order does not authorize any act which results in the taking of a threatened, endangered or candidate species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this temporary transfer, the permittee shall obtain authorization for incidental take prior to commencing transfer of water. Permittee shall be responsible for meeting all requirements of the state and federal Endangered Species Acts for the temporary transfer authorized under this order.

12. The State Water Board specifically reserves jurisdiction to add, amend, revise, supplement, or delete terms and conditions in the portions of this order that concern YCWA's transfer petition, at the following times:
 - Upon issuance of any Biological Opinion for the Central Valley Operations Criteria and Plan, if the State Water Board determines that changes are appropriate.
 - Upon issuance of a new license for the Yuba Development Project by the Federal Energy Regulatory Commission, if the State Water Board determines such changes to be necessary or appropriate in light of any changes to the release, bypass, reservoir capacity, fish protection or related requirements in the Federal Energy Regulatory Commission license.
 - At any time in which the groundwater levels in the ~~North or South~~ Yuba groundwater basins go below 1991 levels, or at any time in which groundwater levels in the North Yuba groundwater basin are causing or threatening substantial injury to legal North Basin groundwater users, based on lowered groundwater levels, if the State Water Board determines such changes to be necessary or appropriate to protect legal users of water.
 - Upon a change in listing status for any species in the Delta, if such change is appropriate to ensure that the actions approved in this order do not adversely impact the

Tab C

5. Appendix 1 (Definition of Yuba River Index)

Appendix 1 of Revised Decision 1644 is revised and replaced with the definition of the North Yuba Index as described in Exhibit 2, Exhibit 4 and Exhibit 5 of the Lower Yuba River Fisheries Agreement on file with the State Water Board as Exhibit YCWA-9 of this proceeding.

IT IS HEREBY FURTHER ORDERED that the petition of Yuba County Water Agency (YCWA) for Long-Term Transfer of up to a total of 200,000 acre-feet per calendar year of water under Permit 15026 (Application 5632) until December 31, 2025 is approved, subject to the following terms and conditions. All existing terms and conditions of Permit 15026 as modified by the State Water Board Revised Decision 1644 (RD-1644) and this order remain in effect, except as temporarily amended by the following provisions:

1. The transfer of water is limited to the period from April 1, 2008 through December 31, 2025.
2. The place of use of Permit 15026 is amended as follows:
The authorized place of use is expanded to include the service areas of the State Water Project (as shown on maps 1878-1, 2, 3, & 4 on file with Application 5629) and the Central Valley Project (as shown on map 214-208-12581 on file with Application 5626).
3. The Clifton Court Forebay and the Jones Pumping Plant are temporarily added as points of diversion under Permit 15026. During the time period between December 1 and June 30, diversion of water at the Clifton Court Forebay and the Jones Pumping Plant is subject to a combined rate of diversion of 500 cubic feet per second, and the annual limit of water transferable through the Jones and Banks pumping plants during this period is 20,000 af, unless YCWA and DWR petition the Deputy Director to allow pumping in excess of 20,000 af and demonstrate that this additional water was released for purposes other than transfer involving the Jones or Banks pumping plants, and therefore will not increase cumulative pumping from the Jones and Banks pumping plants during the December 1 through June 30 period. Upon such a demonstration, the Deputy Director shall approve the petition. During the time period between July 1 and November 30, the maximum combined rate of diversion at the Clifton Court Forebay and the Jones Pumping Plant is 1,500 cubic feet per second.

Tab D

In order to avoid any confusion as to the applicability of the various flow alteration measures discussed in the Fisheries Agreement, the State Water Board will incorporate only the flow schedule itself into the order, rather than the Fisheries Agreement

4.2.1.3 Processes to Change the Fisheries Agreement Flow Schedules

Because the State Water Board will incorporate just the flow schedules specified in Exhibit 1 of the Fisheries Agreement, without incorporating the Fisheries Agreement itself, it is necessary to specify how compliance will be measured and how some of the flexibility included in the Fisheries Agreement can be maintained.

In general, the State Water Board can address the short-term, RMT-guided changes, such as those described in Fisheries Agreement section 5.2.1, because such changes occur within defined temporal and rate limits incorporated into the EIR/EIS's impact analysis. (YCWA-9, sec. 5.1.4.) However, because reaction to major, unanticipated changes requires flexibility and knowledge of real-time conditions, it is not State Water Board practice to incorporate provisions for addressing such changes in individual permits: such changes are typically requested through either the Temporary Urgency Change or Change Petition processes. (See Water Code, §§ 1435, 1701; Cal. Code Regs., tit. 23, §791, subd. (e).) The potential future changes caused by what is described in the Fisheries Agreement as *Force Majeure* or a Regulatory Change Event, are, by their nature, unknown: therefore, they have not received any analysis as to their potential environmental and water right consequences. (See YCWA-9, Sec. 5.1.6.) The State Water Board will therefore not incorporate them into the permit directly.

4.2.1.4 Adaptive Management Measures

The Fisheries Agreement contains numerous adaptive management measures, which the River Management Team's Planning Group may recommend. (YCWA-9, sec. 5.2.1, pp. 13-15.) For example, it may agree to certain temporary alterations of instream flow requirements in March-October of Schedule 1-6 years; determine whether to reduce instream-flows at Marysville Gage in certain Schedule 5 years (when September 30 New Bullards Bar Reservoir storage is between 400 and 450 TAF); and determine operation of NBBR upper and lower intakes and any temperature adjustment devices constructed at Englebright Dam (YCWA-9, pp. 9-10, 14.)

As described above (section 5.2.1), approval of the Yuba Accord will benefit public trust resources on the Lower Yuba River, will provide valuable data for other river reaches in the state, and will improve water reliability and management throughout the state. It will also allow for settlement of litigation concerning RD-1644: if that decision were vacated, the public trust values on the Lower Yuba River would be left severely under-protected. The Accord will benefit the economy of Yuba County, and the flood control management will bring humanitarian benefits as well. The State Water Board finds that these benefits provide the justification to override the potential contribution of the Yuba Accord to cumulative significant effects.

7.0 SUMMARY AND CONCLUSIONS

7.1 Petition for Modification of Water Right Permit Nos. 15026, 15027 and 15030.

The Petition is approved subject to the following conditions.

7.1.1 Instream Flow and Water Quality Requirements

The Fisheries Agreement flow schedule (including the mandatory adjustment of October through February flows to 400 cfs in Schedule 5 years when September 30 New Bullards Bar Reservoir storage is less than 400 TAF) will be incorporated into the permits by reference.

The FERC license flows will be included in the permits by reference for conference years.

The State Water Board, under delegation to the Deputy Director, will have 10 days to object to the adaptive management measures described below. If the Deputy Director does not object, the recommendation of the River Management Team's Planning Group will go into effect. This condition will apply to the following adaptive management measures:

- Certain temporary alterations of instream flow requirements in March - October of Schedule 1 – 6 years, as described in Fisheries Agreement Section 5.1.4. (YCWA-9, p. 10.)
- The determination of whether to reduce instream flows at the Marysville Gage in Schedule 5 years when September 30 New Bullards Bar Reservoir storage is greater than or equal to 400 and less than 450 TAF, as described in Fisheries Agreement, Section 5.2.1(3), and Exhibit 3. (YCWA-9, p. 14, Exhibit 3.).
- Any supplemental conference year flows.

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ORDER

IT IS HEREBY ORDERED that the petition of the Yuba County Water Agency for modification of water right Permits 15026, 15027 and 15030 (Applications 5632, 15204 and 15574), filed on April 27, 2007, is approved subject to the provisions of this order, and Permits 15026, 15027, and 15030 are amended by making the following changes to Revised Decision 1644:

1. Term 1 on pages 173-176 of Revised Decision 1644 is amended to read as follows:

1. For the protection of fish and other public trust resources in the lower Yuba River, permittee shall release, immediately upon adoption of this order, water in accordance with the flow schedules contained in Exhibit 1 of the Lower Yuba River Fisheries Agreement on file with the State Water Board as exhibit YCWA-9 of this proceeding (including the mandatory adjustment of October through February flows to 400 cfs in Schedule 5 years when September 30 New Bullards Bar Reservoir storage is less than 400 TAF, which is described in Exhibit 3 of that agreement). Streamflow shall be maintained at or above the flows specified as measured at the USGS gauging installations at Marysville and Smartville. Application of the flow schedules shall be in accordance with the following terms and conditions. Only those terms and conditions of the Yuba Accord Fisheries Agreement expressly stated below are included in the permit.

- a. YCWA will comply with the Schedule 1 through 6 and A-B instream flow requirements in Exhibit 1 (plus the 30,000 acre-feet (af) of additional groundwater substitution transfer water in Schedule 6 Water Years that is described in section 5.1.3 of the Fisheries Agreement), unless modified under the terms and conditions contained in this permit or by a subsequent order issued by the State Water Board.
- b. The minimum flow requirements shall be maintained as measured by a 5-day running average of average daily streamflows, with instantaneous flows never less than 90 percent of the specified flow requirements. In addition,

Tab E

Water Board. Subsequent enforcement action shall be taken at the discretion of the State Water Board.

2. Term 2 in RD-1644, pages 176-178, is supplemented with the following text, as new sub-parts (f) and (g).

(f) The State Water Board will suspend operation of Terms 2(b) and 2(c), during the period of operation of the Yuba Accord Fisheries Agreement. During that period, the River Management Team's Planning Group's determinations of the operation of the upper and lower outlets at NBBR, and any temperature control devices that might be built at Englebright Dam, will be submitted to the Deputy Director, and the permittee shall implement temperature control operations as approved. Upon termination of the Fisheries Agreement for any reason, Terms 2(b) and (c) shall automatically be reinstated as terms and conditions of RD-1644.

(g) If YCWA demonstrates to the satisfaction of the Deputy Director that Term 2(a) should no longer be pursued, then the Deputy Director may ~~on an annual basis~~ relieve YCWA of compliance with Term 2(a) ~~for the upcoming year.~~

3. Term 10 in RD-1644, pages 181-183, is deleted.

4. The following terms are added to RD-1644, directly following Term 11 on page 183.

12. The State Water Board specifically reserves jurisdiction to add, amend, revise, supplement, or delete terms and conditions in this order upon issuance of a new license for the Yuba Development Project by the Federal Energy Regulatory Commission, if the State Water Board determines such changes to be necessary or appropriate in light of any changes to the release, bypass, reservoir capacity, fish protection or related requirements in the Federal Energy Regulatory Commission license.

13. The State Water Board reserves jurisdiction over the long-term changes authorized in this Order to supervise the diversion, release, and use of water under this Order and to coordinate or modify terms and conditions, for the protection of other legal users of water, fish, wildlife, instream beneficial uses, and the public interest as future conditions may warrant.

Tab F

planning methods also include the input of fisheries agencies, the State Water Board finds that those agencies, with State Water Board approval, will provide an appropriate equivalent to the existing temperature planning requirements under RD-1644. The State Water Board will therefore suspend operation of RD-1644's Conditions 2 (b) and (c) unless and until the Fisheries Agreement terminates for any reason.

The central thrust of the other temperature terms in RD-1644 Condition 2 are to require diligent pursuit of the Narrows II Powerhouse Intake Extension at Englebright Dam, mandate hourly temperature monitoring at specified points, and reserve the State Water Board's jurisdiction to set specific temperature requirements in the future. (RD-1644, condition 2 (a), (d)-(e), pp. 176-78.) RD-1644 discussed a series of temperature recommendations for anadromous fish in general and for the Lower Yuba River in particular, and concluded that construction of additional facilities was required to meet temperature requirements for anadromous fish. (RD-1644, pp. 78-87.) YCWA's WY 2005-2006 operations report, required under RD-1644 conditions 1, 2, 3 and 7, demonstrates that operation under the Yuba Accord flows does not meet CDFG and NMFS' maximum water temperature objectives for anadromous fish in the months of May through September, even in a wet year. (See Appendix, Figure 5.) Additionally, the wet year Yuba Accord flows did not meet the index temperature of 60° set in the Draft EIR/EIS in August and September at the Marysville Gage.

Because the evidence does not demonstrate that temperature objectives will be met in the Lower Yuba River, or that RD-1644's temperature objectives are inaccurate or otherwise invalid, the State Water Board declines to delete Conditions 2 (a), (d) and (e). To assure compliance with all public trust permit conditions, the State Water Board will also impose reasonable monitoring and reporting requirements.

However, YCWA claims in section 5 of its March 11, 2008~~2007~~, comments on the Proposed Draft Order, that the change in river flows under the Yuba Accord obviates the need for the Narrows Powerhouse Intake Extension Project at Englebright Dam, and states that CDFG and NMFS agree with this assessment. In order to permit review of this contention, the State Water Board will delegate to the Deputy Director the authority to review evidence and determine whether YCWA should be required to continue its diligent pursuit of funding for the project.

Board will permit transfers in this sensitive time period, within the constraints that DWR and YCWA testified to as being within the modeled range: namely, limited to a pumping rate of 500 cfs, and an annual limit of 20,000 acre-feet, when the transferred water will be pumped at the Banks and Jones pumps. This limit will ensure that the Delta transfers during this sensitive period remain as small as expected, yet not interfere with the transfers as anticipated in the Yuba Accord. In order to ensure that this pumping limit will only take effect when the restriction would actually reduce pumping, YCWA and DWR may petition the Deputy Director to approve the transfer of amounts of water greater ~~than~~ than 20,000 af under this order during the December through June time period, and the Deputy Director shall approve such petition upon a showing that the water to be transferred was released for a purpose other than transfer, such as meeting minimum instream flow requirements.

YCWA and other commenters have also expressed concern regarding the Proposed Draft Order's delegation of authority to the Deputy Director. Water Code Section 7 permits delegation of State Water Board authority to "a deputy of the officer...unless this code expressly provides otherwise." Delegated decisions made by the Deputy Director do not mean an absence of due process. The Deputy Director's decisions are reviewable upon a request for reconsideration by the State Water Board.

Additionally, in anticipation of new information and a changing regulatory framework, the State Water Board will reserve the authority to review and make changes to the transfer portion of this order upon issuance of any Biological Opinion for the Central Valley Operations Criteria and Plan, if the Interim Remedial Order in *NRDC v. Kempthorne* is stayed or overturned on appeal, or upon issuance of a new FERC license for the Yuba Project.

These reservations of authority allow the State Water Board to act on best information before it now, while maintaining the flexibility to address the likely changes in both the scientific understanding of the Delta and in the regulatory structures that manage it.

Because of the small size of the transfer during the sensitive period, the State Water Board does not find that additional transfer restrictions should be imposed at this time. However, the State Water Board is aware that ongoing research into the causes of the POD may shift the balance of what is considered unreasonable in the future. Therefore, the State Water Board will reserve the authority, delegated to the Deputy Director, to order YCWA transfer diversions at

(~~measured~~ measures as electrical conductivity) and the chloride ion concentrations at various locations.²⁶ (YCWA-1, pp. 9-37 to 9-42.)

Results of this modeling indicated very little change in water quality parameters due to implementation of the Accord and the resulting redirection of water at the project pumps. Instances where modeling indicated adverse changes in water quality were limited in frequency of occurrence and typically would be within the range of conditions that could be mitigated to a level of no significant impact with real-time operational changes. (YCWA-1, pp. 9-53 to 9-52.) John Leahigh, Chief of the SWP Operations Planning Branch, testified that the proposed redirection of water at the project pumps will only occur if all applicable regulatory requirements, including those contained in D-1641, are met. (DWR-4, pp. 2.)

The temporary transfers approved pursuant to the Pilot Programs (State Water Board Orders 2006-0010-DWR and 2007-0012-DWR) include conditions to protect other legal users of water. One of these conditions subjects redirection of water at the project pumps pursuant to the transfer to compliance with response plans developed to minimize water level, water quality, and fishery impacts from Joint Points of Diversion (JPOD) pumping.²⁷ (Order 2006-0010-DWR, p. 10; Order 2007-0012-DWR, p. 8; D-1641 pp. 150-153, 155-158.) These conditions are intended to ensure that redirection of water at the project pumps does not cause injury to other legal users of water. (Order 2006-0010-DWR, pp. 7-8; Order 2007-0012-DWR, pp. 5-6.) In order to ensure that redirection of water at the project pumps does not adversely impact other legal users of water within the Delta through water quality impacts or reductions in water levels, this order continues to condition this redirection with compliance with the water level response plan and the water quality response plan.

²⁶ Old River and Middle River flows were also modeled for this analysis. However, since these flows are used as a management tool to address Delta smelt salvage from the pumps, these modeling results are discussed below in Section 4.1.4.

²⁷ Joint Points of Diversion or JPOD refers to the Projects' use of each other's southern Delta diversion facilities. JPOD actions are typically taken to allow the CVP to make use of available SWP diversion capacity. While the transfer of water utilizing the Project pumps is not a JPOD action, subjecting redirection of water at the Project pumps to the JPOD response plans is one method of ensuring that the transfer of water does not injure other legal users of water (or unreasonably impact fish, wildlife or other instream beneficial uses).

that it receives from surface water transfers for fisheries and conjunctive-use programs, as described below. In addition, YCWA will use substantial remaining revenues to use to pay the local share costs for flood protection studies and projects, which are crucial to economic development and well-being of the county, which has suffered severe flooding in the past. It also may use remaining funds for other conjunctive use water projects in Yuba County, with further potential economic benefits. (YCWA-1, pp. 1-4 to 1-7, 3-13 to 3-21; YCWA-12, p. 5.)

- Under the Yuba Accord, YCWA would provide over \$5 million in funding for fisheries monitoring and enhancement activities to protect and enhance Lower Yuba River fisheries. This would likely result in significant recreation and associated economic benefits for Yuba County, which has a strong recreational economy. (YCWA-12, p. 4.)
- By resolving the pending litigation regarding the RD-1644 instream flow requirements, the Yuba Accord will provide stability and certainty to YCWA's ability to provide surface water supplies to its Member Units in the future, which will benefit Yuba County agriculture and the portions of the Yuba County economy that rely upon agriculture. (*Ibid.*)
- Local farmers will benefit from having to pump less groundwater to make up for deficiencies in their surface-water supplies under the Yuba Accord than they would have to pump under RD-1644. (YCWA-2; pp. 4-98 and 4-99; Table La2-2.)
- Under the Yuba Accord Conjunctive Use Agreements, YCWA will provide about \$4 million to the participating Member Units, which they will use to help make their landowners' wells available to pump groundwater. Also, YCWA will make additional payments to the Member Units to pay for the costs of pumping these wells for deficiency pumping. (YCWA-12, p. 4.)
- The Yuba Accord Conjunctive Use Agreement will also provide substantial additional economic benefits to the Member Units and landowners that participate in the Yuba Accord's groundwater substitution transfers. The Draft EIR/EIS estimates that these additional benefits will average \$625,000 per year, with average annual revenues to participating landowners ranging from \$6,000 to \$10,500. (YCWA-1; pp. 17-13; YCWA 12, p. 4.)

The Final EIR/EIS for this project determined that there was a potential for significant groundwater impacts from the Yuba Accord, with potential impacts on local farmers. However, this potential impact was found to be mitigated to a less than significant level through

1 **PROOF OF SERVICE BY MAIL**

2 I, Alan B. Lilly, declare:

3 I am over the age of eighteen and not a party to this action and work in Sacramento
4 County at 1011 Twenty-Second Street, Sacramento, California 95816. On April 8, 2008, I e-
5 mailed a pdf file of the attached Yuba County Water Agency's Petition for Re-Consideration
6 of Order WR 2008-0014 and Memorandum of Points and Authorities to the following e-mail
7 addresses:

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11 Nancee Murray
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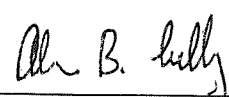
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I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 8, 2008



Alan B. Lilly