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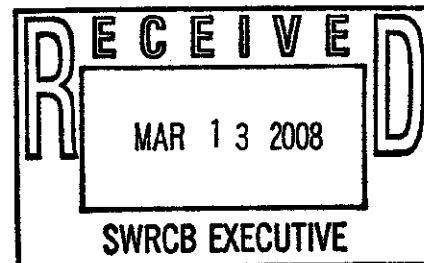
7021-11-20

JAMES M. BOYD, JR., Of Counsel

March 13, 2008

VIA E-MAIL (commentletters@waterboards.ca.gov) AND MAIL

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board, Executive Office
P.O. Box 100
Sacramento, California 95812-0100



Re: March 18 SWRCB Meeting: Comments on Lower Yuba River Accord
Draft Order

Dear Ms. Townsend:

On behalf of the Yuba County Water Agency, I am submitting the enclosed supplemental comments on the February 29 draft order on the Lower Yuba River Accord. Please transmit copies of these supplemental comments to the five Board members and the six members of the SWRCB staff that are working on this matter (Les Grober, Larry Lindsay, Ernie Mona, Greg Wilson, Jane Farwell and Marianna Aue), and please transmit one copy to the Division of Water Rights Records Unit for filing with the hearing records for this proceeding.

I have served copies of these comments via e-mail on the parties listed on the SWRCB's list of parties to be served with written testimony, exhibits and other documents.

Very truly yours,


ALAN B. LILLY

ABL:tmo

Encl.

7021\2007 SWRCB Hearing\L031208abl.wpd

**YUBA COUNTY WATER AGENCY'S SUPPLEMENTAL COMMENTS ON
FEBRUARY 29, 2008 DRAFT SWRCB ORDER ON
YCWA CHANGE PETITIONS FOR LOWER YUBA RIVER ACCORD
March 13, 2008**

On March 11, the Yuba County Water Agency ("YCWA") submitted its comments on the draft order (the "Draft Order") for the Lower Yuba River Accord ("Yuba Accord") that was issued by the State Water Resources Control Board ("SWRCB") on February 29, 2008. The first, second and third specific comments in those comments address three proposed delegations of authority in the Draft Order to the Deputy Director for Water Rights. These delegations would authorize the Deputy Director to order YCWA: (1) to provide additional instream flows in the Lower Yuba River during Conference Years; (2) "to take actions under this reservation of jurisdiction when the action is consistent with this Order;" and (3) to reduce or eliminate "YCWA transfer diversions at the Delta pumps."

Although YCWA's March 11 comments explained why YCWA objects to these delegations, and noted that the Draft Order would provide that the SWRCB itself (as opposed to the Deputy Director) also would reserve jurisdiction to amend the new instream-flow requirements and other requirements in YCWA's water-right permits, these comments did not mention the reservation of jurisdiction that was added to YCWA's water-right permits in 1988 and still is in these permits today, and these comments did not explicitly describe the several additional reservations of jurisdiction that are specified in the Draft Order and that YCWA does not oppose. To make these points clearer, YCWA is submitting these supplemental comments, which discuss these existing and proposed reservations of jurisdiction.

Because the SWRCB will have these broad reservations of jurisdiction over YCWA's water-right permits, the SWRCB should not also include the Draft Order's proposed delegations of authority to the Deputy Director in its final order. These proposed delegations of authority are not necessary, because the SWRCB's reservations of jurisdiction already authorize the SWRCB to take any necessary actions in any of the categories of actions that are covered by the proposed delegations.

1. Standard Permit Term 12

Under the December 23, 1988 orders amending YCWA's water-right Permits 15026, 15027 and 15030, the SWRCB added Standard Permit Term 12 as a new condition in each of these permits. This standard permit term remains in each of these permits. It provides:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

Copies of the December 23, 1988 SWRCB orders that added this standard permit term to YCWA's water-right Permits 15026, 15027 and 15030 are included at the end of these comments. (These orders are parts of staff exhibits 1.a, 1.b and 1.c for the present hearing.)

Even with adoption of an order approving YCWA's Yuba Accord petitions, YCWA's water-right permits will remain subject to Standard Permit Term 12.

2. New Reservations of Jurisdiction in Draft Order Approving YCWA Modification Petition

On page 55, the Draft Order contains proposed new Terms 12 and 13 of Revised Decision 1644. These new terms would add the following additional reservations of jurisdiction to YCWA's permits:

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 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.

YCWA does not object to these proposed new reservations of SWRCB jurisdiction.

3. New Reservations of Jurisdiction in Draft Order Approving YCWA's Long-Term Transfer Petition

On pages 58-59, the Draft Order contains a proposed Term 12 that would be added to YCWA's water-right Permit 15026 during the term of the order approving YCWA's long-term transfer petition. This Term 12 would provide:

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 basin go below 1991 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 species, or that the protections specified in the order do not unduly interfere with the beneficial transfer of water.
 - When appropriate to coordinate the operations of this project with (1) water quality objectives adopted to protect the beneficial uses of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Estuary) or (2) water right decisions or orders implementing the order. The State Water Board will make such additions or modifications to this order only when reasonably necessary to achieve the water quality objectives or protect the beneficial uses of water in the Bay-Delta Estuary.

YCWA does not object to these proposed new reservations of SWRCB jurisdiction (except for the reference to the North Yuba Basin, which is discussed in Specific Comment 4 of YCWA's March 11 comments).

With all of these reservations of jurisdiction, the SWRCB will have ample authority to conduct further proceedings, including, if necessary, temporary urgency change proceedings, to consider amending the instream-flow requirements and other provisions in YCWA's water-right permits, if such further proceedings are appropriate because of changed conditions or other relevant factors.

As discussed in YCWA's March 11 comments, YCWA objects to the Draft Order's proposed delegations of authority to the Deputy Director for several reasons. First, the delegations are not required for environmental reasons, because the Yuba Accord EIR/EIS concluded that, even without these delegations, implementation of the Yuba Accord will not have any significant impacts on fish or other aquatic resources. Second, the delegations could seriously undermine the carefully negotiated balance among competing uses of Yuba River Project water that was achieved with the Yuba Accord. Third, the Draft Order does not specify any standards for the Deputy Director to apply in making discretionary decisions that would require re-balancing the competing demands for Yuba River Project water. Fourth, because implementing the delegations would involve the exercise of discretion, they are not authorized by law. Finally, as explained in the third specific comment in YCWA's March 11 comments, the delegation of authority to reduce or eliminate "YCWA transfer diversions at the Delta pumps," would not provide any benefits to any fish in the Delta.

Many SWRCB water-right orders and decisions contain delegations of authority to the Deputy Director to take non-discretionary actions like reviewing monitoring and measurement plans that must be prepared by the permittees and submitted to the Deputy Director, to make sure that the plans are technically sound and are consistent with the applicable term or terms in the order or decision. The Deputy Director also often issues orders for the SWRCB in uncontested matters. These are appropriate delegations of the SWRCB's authority.

The fundamental problem with the proposed delegations in the Draft Order is that they would not be for such non-discretionary or uncontested actions. Instead, these proposed delegations would authorize the Deputy Director to make discretionary policy decisions that would require the balancing of the various competing uses of Yuba River Project water and determinations of which uses to favor during times of shortages. Because such decisions could upset the careful balance among these competing uses that has been achieved with the Yuba Accord, and because such delegations are neither necessary nor proper under the applicable laws, YCWA asks the SWRCB to delete these proposed delegations to the Deputy Director from the Draft Order before the SWRCB approves this order.

YCWA's proposed changes to the Draft Order to remove these proposed delegations of the SWRCB's authority are attached to YCWA's March 11 comments at tabs 1, 2 and 3.

Dated: March 13, 2008

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

By Alan B. Lilly
Alan B. Lilly

Attorneys for the Yuba County Water Agency

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 5632

PERMIT 15026

LICENSE _____

ORDER TO ADD A POINT OF DIVERSION AND REDIVERSION
AND AMENDING THE PERMIT

WHEREAS:

1. Permit 15026 was issued to Yuba County Water Agency on March 28, 1966 pursuant to Application 5632.
2. A petition to add a point of diversion and rediversion on the Yuba River has been filed with the State Water Resources Control Board (Board).
3. The Board has determined that the petitioned changes do not constitute the initiation of a new right nor operate to the injury of any other lawful user of water.
4. Permit Condition 13 pertaining to the continuing authority of the Board should be updated to conform to Standard Permit Term 12 as contained in Section 780(a), Title 23 of the California Code of Regulations.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The points of diversion under this permit shall be as follows:
 1. New Bullards Bar Dam - South 54°30' East 2,350 feet from NW corner of Section 25, T18N, R7E, MDB&M, being within SE¼ of NW¼ of said Section 25. Also described as California Coordinate System, Zone 2, North 629,700 East 2,242,800.
 2. Proposed Marysville Afterbay Dam - within SW¼ of SW¼ of Section 29, T16N, R5E, MDB&M, (precise location to be determined at time of construction).

Point of Diversion and Rediversion

3. For Browns Valley Irrigation District - South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E, MDB&M, being within SE¼ of NE¼ of said Section 29. Also described as California Coordinate System, Zone 2, North 565,000 East 2,161,550.
2. Condition 13 of the permit be amended to read:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

(000001)

3. Condition 22 is added to this permit as follows:

Permittee shall not divert water from Browns Valley Irrigation District's "Pumpline Diversion Facility" located South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E; being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, MDB&M, until the permittee has installed fish screening devices satisfactory to the Department of Fish and Game, in accordance with "Agreement for the Installation of a Rock Barrier at the Diversion Facilities of Browns Valley Irrigation District", entered in April 27, 1982, between the Browns Valley Irrigation District and the Department of Fish and Game.

(0000999)

Dated: DECEMBER 23 1983

for Lloy Johnson
Walter G. Pettit, Chief
Division of Water Rights

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 15204

PERMIT 15027

LICENSE _____

ORDER TO ADD A POINT OF DIVERSION
AND REDIVERSION, AND AMENDING THE PERMIT

WHEREAS:

1. Permit 15027 was issued to Yuba County Water Agency on March 28, 1966 pursuant to Application 15204.
2. A petition to add a point of diversion and rediversion on Yuba River has been filed with the State Water Resources Control Board.
3. The Board has determined that the petitioned changes do not constitute the initiation of a new right nor operate to the injury of any other lawful user of water.
4. Permit Condition 13 pertaining to the continuing authority of the Board should be updated to conform to Standard Permit Term 12 as contained in Section 780(a), Title 23 of the California Code of Regulations.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The points of diversion under this permit shall be as follows:
 1. New Bullards Bar Dam - South 54°30' East 2,350 feet from NW corner of Section 25, T18N, R7E, MDB&M, being within SE¼ of NW¼ of said Section 25. Also described as California Coordinate System, Zone 2, North 629,700 East 2,242,800.
 2. Proposed Marysville Afterbay Dam - within SW¼ of SW¼ of Section 29, T16N, R5E, MDB&M, (precise location to be determined at time of construction).

Point of Diversion and Rediversion

3. For Brown Valley Irrigation District - South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E, MDB&M, being within SE¼ of NE¼ of said Section 29. Also described as California Coordinate System, Zone 2, North 565,000 East 2,161,550.
2. Condition 13 of the permit be amended to read:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

(0000012

3. Condition 21 is added to this permit as follows:

Permittee shall not divert water from Browns Valley Irrigation District's "Pumpline Diversion Facility" located South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E; being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, MDB&M, until the permittee has installed fish screening devices satisfactory to the Department of Fish and Game, in accordance with "Agreement for the Installation of a Rock Barrier at the Diversion Facilities of Browns Valley Irrigation District", entered in April 27, 1982, between the Browns Valley Irrigation District and the Department of Fish and Game.

(0400500)

Dated: DECEMBER 23 1988

Walter G. Pettit
for Walter G. Pettit, Chief
Division of Water Rights

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 15574

PERMIT 15030

LICENSE _____

ORDER TO ADD A POINT OF DIVERSION AND REDIVERSION,
AND AMENDING THE PERMIT

WHEREAS:

1. Permit 15030 was issued to Yuba County Water Agency on March 28, 1966 pursuant to Application 15574.
2. A petition to add a point of diversion and rediversion on Yuba River has been filed with the State Water Resources Control Board.
3. The Board has determined that the petitioned changes do not constitute the initiation of a new right nor operate to the injury of any other lawful user of water.
4. Permit Condition 13 pertaining to the continuing authority of the Board should be updated to conform to Standard Permit Term 12 as contained in Section 780(a), Title 23 of the California Code of Regulations.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The points of diversion under this permit shall be as follows:
 - (a) Hour House Diversion Dam on Middle Yuba River located South 19°00' East 2,850 feet from NW corner of Section 20, T18N, R9E, MDB&M, being within SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of said Section 20. Also described as California Coordinate System, Zone 2, 629,700 East 2,242,800.
 - (b) Log Cabin Diversion Dam on Oregon Creek located North 21°30' East 1,700 feet from SW corner of Section 11, T18N, R8E, MDB&M, being within NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Section 11. Also described as California Coordinate System, Zone 2, North 647,000 East 2,266,000.
 - (c) New Bullards Bar Dam on North Yuba River located South 54°30' East 2,350 feet from NW corner of Section 25, T18N, R7E, MDB&M, being within SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of said Section 25. Also described as California Coordinate System, Zone 2, North 629,700 East 2,242,800.
 - (d) Browns Valley Irrigation District on Yuba River South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E, MDB&M, being within the SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of said Section 29. Also described as California Coordinate System, Zone 2, North 565,000 East 2,161,550.
 - (e) Proposed Marysville Afterbay Dam on Yuba River precise point of rediversion to be determined at time of construction and proposed to be within SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 29, T16N, R5E, MDB&M.

2. Condition 13 of the permit be amended to read:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.


(000001

3. Condition 21 is added to this permit as follows:

Permittee shall not divert water from Browns Valley Irrigation District's "Pumpline Diversion Facility" located South 1,800 feet and West 1,300 feet from NE corner of Section 29, T16N, R5E; being within SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 29, MDB&M, until the permittee has installed fish screening devices satisfactory to the Department of Fish and Game, in accordance with "Agreement for the Installation of a Rock Barrier at the Diversion Facilities of Browns Valley Irrigation District", entered in April 27, 1982, between the Browns Valley Irrigation District and the Department of Fish and Game.

(0400500)

Dated: DECEMBER 23 1983


Walter G. Pettit, Chief
Division of Water Rights