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10 **STATE OF CALIFORNIA**

11 **STATE WATER RESOURCES CONTROL BOARD**

12 **HEARING ON YUBA COUNTY WATER) YUBA COUNTY WATER**
13 **AGENCY'S PETITION TO CHANGE THE) AGENCY'S CLOSING BRIEF**
14 **EFFECTIVE DATE OF THE LONG-TERM)**
15 **INSTREAM FLOW REQUIREMENTS)**
16 **ESTABLISHED IN REVISED WATER-)**
17 **RIGHTS DECISION 1644)**
18 _____)

19 This brief addresses the four "KEY ISSUES" that are listed on page 4 of the November 22,
20 2005 hearing notice that the State Water Resources Control Board ("SWRCB") issued for this
21 hearing on the petition of the Yuba County Water Agency ("YCWA") to change the effective date
22 of the long-term instream-flow requirements in the SWRCB's Revised Water Rights Decision 1644
23 ("RD-1644") from April 21, 2006 to March 1, 2007.

24 **Key Issue 1: Would approval of the petition to change the effective date of the long-**
25 **term instream flows requirements established in RD-1644 result in injury to any legal user of**
26 **water?**

27 As explained in the testimony of Teresa Geimer, the Chief of the Water Supply and Transfers
28 Branch of the Department of Water Resources ("DWR"), neither DWR nor any other legal user of
water would be injured by approval of YCWA's petition. DWR and the Bureau of Reclamation
("Reclamation") are obligated under their water rights and SWRCB Water Rights Decision 1641 to
maintain water quality conditions in the Delta to protect beneficial uses of water, and they will
continue to be obligated to do so even if the SWRCB approves YCWA's petition, so no harm to any
other legal user of water would occur from approval of YCWA's petition. (See exh. DWR-2.)

1 Consistent with this conclusion, no other legal user of water offered any evidence or argument at
2 the hearing regarding any alleged impact to his, her or its water rights. Also, neither DWR nor
3 Reclamation has alleged that its water rights would be injured by the change, and during the hearing
4 both DWR and Reclamation supported YCWA's petition.

5 Moreover, as YCWA's attorney mentioned during the January 4 prehearing conference, this
6 issue is not a proper hearing issue. The SWRCB ordered the long-term instream-flow requirements
7 in RD-1644 to protect and enhance instream beneficial uses in the lower Yuba River, not to protect
8 any legal user of water. Because the SWRCB did not order these requirements to protect any legal
9 user of water, the SWRCB does not need to, and in fact should not, consider whether or not a change
10 in the effective date of these requirements would affect any legal user of water. Because YCWA's
11 petition was filed under title 23, section 791(e) of the California Code of Regulations, there also is
12 no applicable statute that would require such consideration.

13 **Key Issue 2: Would approval of the petition to change the effective date of the long-**
14 **term instream flow requirements established in RD-1644 unreasonably affect fish, wildlife or**
15 **other instream beneficial uses?**

16 YCWA's hearing testimony demonstrated that approval of YCWA's petition would not
17 unreasonably affect fish, wildlife or other instream beneficial uses. This conclusion was supported
18 by substantial, quantitative evidence.

19 Civil engineer Stephen Grinnell developed flow-exceedance and temperature-exceedance
20 curves for the lower Yuba River for each of the 11 months from April 2006 through February 2007
21 during which flow or temperatures could be affected by approval of the petition. Mr. Grinnell
22 prepared these curves for the 2006 Pilot Program, under which both the RD-1644 interim instream-
23 flow requirements and the requirements specified in exhibit 1 of the Fisheries Agreement for 2006
24 Lower Yuba River Pilot Program ("2006 Pilot Program Fisheries Agreement;" exh. YCWA-7)
25 would be implemented, and for the RD-1644 long-term instream-flow requirements. (See exh.
26 YCWA-1, pp. 3-4, ¶ 8.) Mr. Grinnell determined the flow probabilities using the actual New
27 Bullards Bar Reservoir storage on September 30, 2005 and the range of hydrologies that occurred
28 during the two-year pairs from 1922-1923 through 2004-2005. The development of these

1 exceedance curves is explained in detail in Mr. Grinnell's written testimony. (See exh. YCWA-1,
2 pp. 4-15, ¶¶ 9-37.)

3 Fisheries biologist Paul Bratovich used the flow-exceedance and temperature-exceedance
4 curves to determine the 2006 Pilot Program's potential effects on fish in the lower Yuba River. Mr.
5 Bratovich made this analysis on a month-by-month basis for the five fish species and runs of concern
6 in the lower Yuba River (steelhead, spring-run Chinook salmon, fall-run Chinook salmon, green
7 sturgeon and American shad), for all of the life stages of these species/runs that may be present in
8 the lower Yuba River during each month of analysis. (See exh. YCWA-3, pp. 1-4, ¶¶ 4-11, & slides
9 1-5, 13-29.) Based on this month-by-month analysis over the entire period of the 2006 Pilot
10 Program, Mr. Bratovich concluded that the 2006 Pilot Program would result in less-than-significant
11 impacts on these fish and would provide an equivalent or higher level of protection, relative to either
12 the RD-1644 interim instream-flow requirements (which are in effect now) or the RD-1644 long-
13 term instream-flow requirements (which are scheduled to go into effect on April 21, 2006). (See
14 exh. YCWA-3, pp. 4-6, ¶¶ 12-13 & slides 6-12.)

15 These conclusions and YCWA's conclusions regarding the 2006 Pilot Program's potential
16 effects on New Bullards Bar Reservoir fisheries, other aquatic resources, wildlife and other
17 terrestrial resources are explained in detail in the initial study that YCWA prepared for the proposed
18 project. (See exh. YCWA-9, pp. 4-18 through 4-63, 4-104 through 4-110.) The initial study also
19 discusses the 2006 Pilot Program's potential effects on Delta fisheries, relying on the EIS/EIR that
20 Reclamation and DWR prepared for the Environmental Water Account. (See *id.*, pp. 4-53 through
21 4-55, 4-107 through 4-108.)¹ Finally, the initial study also discusses in detail the 2006 Pilot
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24 ¹CSPA may argue in its closing brief that YCWA erred when it relied on the EIS/EIR that
25 the Bureau of Reclamation prepared for the Environmental Water Account Program (see exh.
26 YCWA-9, pp. 3-5, 4-62, 7-7), because the Court of Appeal held in *In re Bay-Delta Programmatic*
27 *Environmental Impact Report Coordinated Proceedings* (2005) 133 Cal.App.4th 154 that some parts
28 of the EIS/EIR for CALFED program, of which the EWA is a part, did not comply with CEQA.
However, because there was no legal challenge to the EWA EIS/EIR, a separate certified
NEPA/CEQA document, YCWA did not err when it relied on this latter EIS/EIR in its initial
study/mitigated negative declaration.

1 Program's potential effects on other resources. (See *id.*, pp. 4-1 through 4-18 & 4-63 through 4-
2 120.) Following these detailed, quantitative analyses, the initial study concluded that the 2006 Pilot
3 Program will not have any significant impacts on any environmental resources. (See *id.*, pp. 1-6
4 through 1-7.)

5 The conclusion that approval of YCWA's petition would not unreasonably affect fish,
6 wildlife or other instream beneficial uses is strongly supported by the fact that both the California
7 Department of Fish and Game and the National Marine Fisheries Service expressly supported
8 YCWA's petition at the hearing.

9 While the California Sportfishing Protection Alliance ("CSPA") submitted evidence
10 opposing YCWA's petition, CSPA's evidence suffers from several serious defects.

11 First, the first two pages of Jerry Mensch's testimony discusses the RD-1644 interim
12 instream-flow requirements in isolation (see exh. CSPA-1, pp. 1-2), ignoring the fact that the 2006
13 Pilot Program consists of both the RD-1644 interim requirements and the requirements specified in
14 exhibit 1 of the 2006 Pilot Program Fisheries Agreement (exh. YCWA-7). Second, the statements
15 in Mr. Mensch's testimony about the 2006 Pilot Program (see exh. CSPA-1, pp. 3-4) are only very
16 general, qualitative statements, without any quantitative discussion regarding the specific flows that
17 are predicted to occur in the lower Yuba River with and without the proposed project on a month-by-
18 month basis. Mr. Mensch's criticism of YCWA's initial study's use of the RD-1644 interim
19 requirements as the "basis for comparison" (see exh. CSPA-1, p. 4) also is incorrect. YCWA's
20 initial study actually analyzes the 2006 Pilot Program against both the RD-1644 interim
21 requirements (see exh. YCWA-9, pp. 4-1 through 4-102), as required by CEQA (see CEQA
22 Guidelines, §§ 15125(a), 15126.2(a)) and the RD-1644 long-term requirements (see exh. YCWA-9,
23 pp. 4-102 through 4-120). The statements in Mr. Odenweller's testimony (exh. CSPA-2) likewise
24 are very general and not supported by any specific, quantitative information.² YCWA's rebuttal
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26 ²Also, a substantial portion of Mr. Odenweller's testimony focuses on fish-screen
27 requirements at Daguerre Point Dam (see exh. CSPA-2, p. 2), even though YCWA's petition does
28 not ask for any changes in the fish-screen requirements in RD-1644 (see RD-1644, pp. 180-181,
185-189).

1 testimony thoroughly and completely rebuts every statement in Mr. Odenweller's and Mr. Mensch's
2 testimony. (See exhs. YCWA-13 & YCWA-14.)³

3 **Key Issue 3: Would the public interest be served by changing the effective date of the**
4 **long-term flow requirements established in RD-1644 as requested in the petition?**

5 The public interest would be served by approving YCWA's petition. Approval of YCWA's
6 petition would allow YCWA and other interested parties to test the flows of the proposed Lower
7 Yuba River Accord ("Yuba Accord"), which is an unprecedented agreement among numerous water
8 users, resource agencies and conservation organizations. (See exh. YCWA-5, pp. 1-3.) As Thomas
9 Johnson testified, the Yuba Accord and the 2006 Pilot Program represent a "paradigm shift" in how
10 lower Yuba River instream flows are determined and managed that will provide both higher instream
11 flows and flows more tailored to the hydrology patterns and reservoir carryover storage. (Exh.
12 YCWA-5, p. 2, ¶ 10.) Approval of YCWA's petition also will allow YCWA to generate revenues
13 to help YCWA pay its share of the cost of the Environmental Impact Report/Environmental Impact
14 Study ("EIR/EIS") for the Yuba Accord and for core fisheries monitoring and focused fisheries
15 studies on the lower Yuba River. (*Ibid.*) (YCWA, the SWRCB and all other action agencies still
16 will have to make new discretionary decisions in 2007, after reviewing the Yuba Accord EIR/EIS,
17 to decide whether or not to approve the Yuba Accord.)

18 **Key Issue 4 (first question): Should the State Water Board approve the petition to**
19 **change the effective date of the long-term flow requirements established in RD-1644?**

20 The SWRCB should approve YCWA's petition, so that the 2006 Pilot Program can proceed

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22 ³One paragraph of Mr. Mensch's testimony makes legal arguments regarding YCWA's
23 alleged need for "review by" the Federal Energy Regulatory Commission ("FERC") and an
24 amendment to YCWA's 1966 Power Purchase contract with the Pacific Gas and Electric Company
25 ("PG&E"). (See exh. CSPA-1, p. 3, 5th ¶.) However, Mr. Mensch does not provide any specific
26 support for these general allegations, and they are not correct. YCWA does not need any approval
27 from FERC to implement the proposed project for 2006 and, as Thomas Johnson testified at the
28 hearing, YCWA already has made arrangements with PG&E for the 2006 proposed project.

29 In his cross-examination questions, CSPA's attorney suggested that YCWA must have
30 conjunctive-use agreements with its Member Units to implement the 2006 Pilot Program. However,
31 there is no evidence in the record to support this suggestion.

1 with the RD-1644 interim requirements as the applicable regulatory baseline. As discussed above,
2 approval of YCWA's petition would not result in injury to any legal user of water and would not
3 unreasonably affect fish, wildlife or other instream beneficial uses, and approval would be in the
4 public interest. YCWA, as the lead agency under the California Environmental Quality Act
5 ("CEQA"), has adopted a mitigated negative declaration for YCWA's petition (exh. YCWA-11),
6 so the SWRCB now, as a CEQA responsible agency, may rely on this mitigated negative declaration
7 for its CEQA compliance.⁴

8 Although CSPA has suggested that the SWRCB may not approve YCWA's petition because
9 the 2006 Pilot Program is part of the Yuba Accord, that suggestion is not correct. While the 2006
10 Pilot Program and the proposed Yuba Accord contain very similar instream-flow requirements, they
11 are separate proposed projects that will be approved or not approved in separate discretionary
12 decisions, and they have non-overlapping time frames. Even if the SWRCB approves YCWA's
13 petition and the 2006 Pilot Program is implemented, YCWA, the SWRCB and other all other action
14 agencies still will have to make separate discretionary decisions in 2007 on whether or not to
15 approve the Yuba Accord, which they will make after reviewing the Yuba Accord EIR/EIS.

16 During the January 10 hearing, SWRCB staff counsel raised the question of whether
17 approval of YCWA's petition is necessary, because there is a high probability (approximately 92
18 percent at the time of the hearing) that the 2006 water year will be a below-normal, above-normal
19 or wet year under RD-1644, and the RD-1644 long-term and interim instream-flow requirements
20 are the same or essentially the same in these types of water years.⁵ However, this question actually
21 proves the opposite just as well: because the interim and long-term requirements are the same or
22 essentially the same in these types of water years, if it turns out that the 2006 water year is a below-

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24 ⁴See *ante*, page 3, footnote 1.

25 ⁵The requirements are the same in above-normal and wet years. In below-normal years, the
26 only differences are: (a) the interim requirements are 550 cfs at the Smartville Gage during Sept. 15
27 through Oct. 14, while the corresponding long-term requirements are 700 cfs; and (b) the interim
28 requirements are 900 cfs at the Marysville Gage during April 21-30, while the corresponding long-
term requirements are 1,000 cfs. (See RD-1644, pp. 174, 176.)

1 normal, above-normal or wet year, then there will be no reason for the SWRCB to deny YCWA's
2 petition and denying the petition would not result in any benefits.

3 Moreover, there are two important reasons why YCWA's petition should be granted.

4 First, if the 2006 water year turns out to be a dry or critical year, which still could occur,
5 then the impacts of denying the petition could be severe. Specifically, the September 30, 2006
6 storage in New Bullards Bar Reservoir would be reduced by an average 30,000 acre-feet, and by
7 40,000 to 70,000 acre-feet in the driest 10% of all water years. (Exh. YCWA-1, pp. 15-16, ¶ 38.)
8 If such dry conditions were followed by dry conditions in 2007, then YCWA would suffer severe
9 water shortages, which could not be completely replaced with groundwater. (*Id.*, p. 16, ¶¶ 39-40.)

10 Second, regardless of what type of water year ends up occurring in 2006, the September 30,
11 2006 storage in New Bullards Bar Reservoir will be significantly lower if YCWA operates to the
12 2006 Pilot Program's flows than it would be if YCWA were to operate to the RD-1644 long-term
13 requirements. (*Id.*, pp. 16-17, ¶ 41 & fig. 6.) With such lower carryover storage going into 2007,
14 YCWA would have substantial risks of water-supply deficiencies in 2007, if the RD-1644 long-term
15 requirements were in effect in 2007. (*Id.*, p. 17, ¶ 42.) And, as a practical matter, if the SWRCB
16 were to deny YCWA's petition now and allow the RD-1644 long-term requirements to go into effect
17 on April 21, 2006, then it would be significantly less likely that the SWRCB would revoke these
18 requirements and shift back to the RD-1644 interim requirements in 2007, even if water year 2007
19 turns out to be a dry or critical year. Because, as discussed above, there is a high probability that
20 granting YCWA's petition will not significantly change the regulatory instream-flow requirements
21 that will be in effect in 2006, the SWRCB should grant YCWA's petition to preserve the SWRCB's
22 flexibility to address the hydrological conditions that occur in 2007.

23 **Key Issue 4 (second question): If so, what conditions should be included in an order**
24 **approving the petition?**

25 The SWRCB should not include any condition in its order that would require YCWA to
26 implement the flow requirements in exhibit 1 of the 2006 Pilot Program Fisheries Agreement.
27 Because the 2006 Agreement already contains very strong remedies for violations of the agreement's
28 flow schedules (see exh. YCWA-7, pp. 8-9, 21-26, §§ 5.1.2, 6.1.4, 6.2.2, 6.2.4, 6.2.6, 6.2.8, 6.2.9),

1 it is not necessary for the SWRCB also to include the agreement's flow requirements in its order.
2 Moreover, as DWR engineer Teresa Geimer testified, if the SWRCB were to do this, then DWR
3 would take the position that it would not pay for any water that YCWA had to release to implement
4 those requirements. And, if DWR did not make the contemplated payments to YCWA, then YCWA
5 would not be able to fund core monitoring and focused studies, as required by the 2006 Agreement.
6 (See exh. YCWA-7, pp. 15-16, § 5.3.2.)

7 Although the flow schedules in 2006 Agreement should not be included in any condition in
8 the SWRCB's order approving YCWA's petition, YCWA would not object if the SWRCB's order
9 required YCWA to submit monthly reports to the SWRCB (with copies to all interested parties)
10 regarding the actual flows that occurred in the lower Yuba River during the preceding month and
11 comparing the actual flows with the flow requirements in exhibit 1 of the 2006 Agreement. YCWA
12 also would not object if the SWRCB's order contained a condition allowing the SWRCB to re-
13 consider its approval of YCWA's petition if, at any time between April 21, 2006 and March 1, 2007,
14 the actual flows in the lower Yuba River were significantly less than the flow requirements in
15 exhibit 1 of the 2006 Agreement.

16 Dated: January 24, 2006

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18 By _____
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