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JAMES M. BOYD, JR., Of Counsel

October 11, 2002

Mr. Arthur G. Baggett, Jr., Chairman
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, California 95812

Re: September 23, 2002 Draft Order WRO 2002-___, Regarding Water Right
Permits 1267, 1268, 1271 and 2492 of Oroville-Wyandotte Irrigation
District (OWID) and Permits 11516 and 11518 of OWID and Yuba
County Water District

Dear Mr. Baggett:

This firm represents the Yuba County Water District ("YCWD"). This letter discusses the September 23, 2002 Draft Order (the "new Draft Order") regarding the above permits, which is scheduled to be considered by the SWRCB at its October 17, 2002 meeting.

The principal difference between the new Draft Order and the May 6, 2002 draft Order (the "old Draft Order") is that the new Draft Order would give YCWD and OWID the opportunity to prepare a CEQA document for the petitions for extension of time of Permits 11516 and 11518, and would leave open the possibility that the SWRCB may extend the deadline for applying water to beneficial use in these permits to December 1, 2004. For YCWD, this is a significant improvement, because YCWD now may be able to obtain a water right for the full 3,700 acre-feet per year ("af/yr") and surpluses that it receives through the Forbestown Ditch, and for the 4,500 af/yr that it is authorized to receive from the South Fork Project under its 1959 agreement with the OWID and that now is being sold to Yuba City.

Unfortunately, the new Draft Order still contains some very serious defects that should be corrected by the SWRCB before it adopts any final order in this matter. This letter discusses those defects and submits proposed changes.

1. Confusion Regarding Direct Diversions At Yuba City

In my July 12 comments on the old draft order, I noted that the first full paragraph on page 15 of the old draft order just discussed direct diversions, and not re-diversions of water released from storage, which were discussed in the next paragraph. I also pointed out that Yuba City has its own direct-diversion water rights. I therefore proposed making two edits to the last sentence of this paragraph. These edits are necessary so that it is clear that this paragraph just discusses direct

diversions under Permit 11518, and not re-diversions of water released from storage, which are discussed in detail in the following paragraph, and not diversions under Yuba City's own water rights, which are not involved in this proceeding. I also proposed parallel changes in the order on pages 30-31.

The new Draft Order does not contain these changes. Because of the potential for confusion between direct diversions and re-diversions of water released from storage, and because of the potential for confusion between Yuba City's diversions under Permit 11518 and its diversions under other rights, these changes should be made. YCWD's proposed changes to these provisions of the new Draft Order are attached at tab 1.

2. Need For New OWID/YCWD Agreement

My July 12 letter discussed the old Draft Order's provision that OWID and YCWD would have to execute a new agreement. My letter explained why such a new agreement is not necessary. Specifically: (a) YCWD already has the right under the 1959 OWID/YCWD agreement to require OWID to provide 4,500 af/yr of South Fork Project water to YCWD at Miners Ranch Reservoir; (b) the subsequent 1963 agreement among YCWD, OWID and PG&E already gives YCWD the right to elect not to take this water at Miners Ranch Reservoir, and instead to have it pass through the Kelly Ridge powerplant and into the Feather River; and (c) both of these agreements and YCWD's agreements with Yuba City specify the same monthly amounts and the same 16 cfs maximum diversion rate.

These existing agreements therefore already give YCWD the right to require OWID to operate the South Fork Project so that the 4,500 af/yr will flow out of the Kelly Ridge powerplant and into the Feather River for subsequent diversion or re-diversion by Yuba City, at the maximum rate and according to the monthly schedule specified in the agreements. For this reason, no new OWID/YCWD agreement is necessary to assure that Project operations will provide these deliveries. If any issues regarding the proper accounting of South Fork Project water and water diverted by Yuba City under Permit 11518 arise, then these issues will be addressed in the reservoir operations plan that would be required by the new Draft Order.

YCWD therefore renews its request that the new Draft Order be amended to delete the requirement for a new OWID/YCWD agreement. YCWD's proposed changes to these provisions of the new Draft Order are attached at tab 2.

3. Other Technical Corrections

The 3rd through 8th paragraphs of section 1 on pages 28-30 of the New Draft Order contain several paragraphs that would apply if the portions of the time extension petitions that will be held in abeyance ultimately are denied. These paragraphs contain detailed provisions regarding the

licensing of the water rights based on the 1960-1975 levels of use that would apply if these petitions are denied. However, while the intent of the order is that these paragraphs will not apply if the time extension petitions are granted, the order is not clear on this point. To make it clear, YCWD requests the proposed changes to the New Draft Order that are attached at tab 3.

Section 3 on pages 31-32 of the new Draft Order proposes that YCWD submit a water conservation plan for Permit 11518, and that OWID submit a water conservation plan for Permits 1267, 1268, 1271, 2492 and 11516. Because the most likely accounting of water will be for all of OWID's use to be under Permits 1267, 1268, 1271 and 2492, and all of YCWD's use to be under Permits 11516 and 11518, the water conservation plan requirements should be amended to be consistent with this allocation of water.

Also, both OWID and YCWD have on-going obligations to provide water to their municipal customers, and it will take some time to prepare water-conservation plans. The New Draft Order's proposed requirement that no water may be diverted for municipal purposes until the Division Chief accepts the plans thus would, immediately upon adoption of the order, force OWID and YCWD to either violate the order or stop all deliveries of water to their municipal customers. Such a draconian result would not make sense.

YCWD's proposed changes to address both of these points are attached at tab 4.

4. Use Of South Fork Project Water To Meet Future Demands

The most serious defect of the new Draft Order is that it would not allow any extensions of the deadlines to apply water to beneficial use under Permits 11516 and 11518 after December 1, 2004, or for anything above current levels of use. Even though both districts supply water to municipal customers and have ever-increasing populations in their service areas, and even though the South Fork Project can supply substantial amounts of additional water for municipal purposes without any new facilities, the new Draft Order nevertheless would not allow any increased levels of deliveries to supply such increased demands.

Such a result would be contrary to Water Code section 106.5, the relevant part of which provides:

It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, . . .

(Emphasis added.)

Here, the undisputed evidence in the record demonstrates that both OWID and YCWD have projected future municipal demands that exceed their present levels of use. While YCWD is not asking the SWRCB to rule now on any request for extensions of time past 2004, the SWRCB should not foreclose such extensions now. As the SWRCB recognized in its Order WR 2000-13:

A municipality, such as San Luis Obispo, is to be afforded some latitude in putting water to beneficial use, because the municipality must be able to plan for, and meet, the needs of its existing and future citizens. (Wat. Code §§ 106.5, 1203.)

In its discussion of due diligence, the new Draft Order focuses on the overall limit of 810,000 af/yr that the SWRCB imposed on the six permits in 1985 and the total diversion of 768,080 af/yr that theoretically would be possible if the maximum authorized direct diversions occurred under Permits 11516 and 11518 every authorized day and the maximum storage also occurred. (See new Draft Order, p. 19 & fn. 13.) Based on these very large numbers, the new Draft Order states that OWID "has only appropriated a small quantity of water," and that there is no evidence that OWID's demand ever will reach the 275,000 af/yr authorized under the separate permits. (New Draft Order, pp. 22-23.) The new Draft Order then concludes that it will hold in abeyance the portions of the time extension petitions that are necessary to allow "current levels of use." (*Id.*, p. 26.)

The problem with this discussion is that it uses very high theoretical total diversion numbers to conclude that there has not been due diligence. By taking this approach, the new Draft Order ignores the basic fact that municipal demands in both OWID's and YCWD's service areas have grown and continue to grow, and that extensions of time are appropriate to accommodate this continued growth. Thus, the new Draft Order should be edited so that, while it continues to prohibit the high theoretical diversions, it does not prevent the parties' existing and reasonably foreseeable future diversions. Issues regarding the parties' demand forecasts and plans for the South Fork Project after the 2010 expiration of the OWID/PG&E contract should not be addressed now. Instead, such issues should only be considered in 2004, when the new diligence period will end.

YCWD's proposed changes to address these points are attached at tab 5.¹

¹These proposed changes also request the maximum total historical use by both parties be changed from 27,000 to 35,200 af/yr. This proposed change appears at the top of page 21 of the pages at tab 5. This change is necessary because the 27,000 only includes OWID's use. As discussed elsewhere in the new Draft Order, YCWD's historical use includes 3,700 af/yr in its service area and an additional 4,500 af/yr to Yuba City. The total of all of these amounts is 35,200 af/yr. (27,000 + 3,700 + 4,500 = 35,200.)

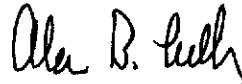
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CONCLUSION

For the reasons discussed in this letter, the Yuba County Water District respectfully requests that the State Water Resources Control Board amend the new Draft Order to make the requested changes that are attached to this letter.

Very truly yours,



ALAN B. LILLY

ABL:tmo

Encls.

cc: (w/encls.): Peter S. Silva
Richard Katz
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Attached Service List

OWID Mailing List

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Mr. Dennis Parker
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ATTACHMENT 1

5.1.3.3 Initiation of New Right

YCWD's petition seeks, in part, to add points of diversion and rediversion from the Feather River at Yuba City. The Feather River is not identified as a source under Permit 11518 and to ensure that the addition of a point of diversion would not effectively initiate a new right, this Order contains a condition requiring the permittee to demonstrate that the SWRCB's approval of the change will not result in a net increase in diversion. The permittee must demonstrate that the natural and abandoned flow at the Lost Creek or South Fork Feather River points of diversion for Permit 11518 is sufficient to cover both existing direct diversions by the co-permittees and the new direct diversion at Yuba City under Permit 11518.

The Feather River also may be added as a point of rediversion for water stored and released under Permit 11518. In order for the diversion of water at Yuba City to be considered a point of rediversion under Permit 11518, the water must originate in one of the storage facilities authorized under the permit, be released from storage, and then be rediverted at Yuba City. To ensure that the reservoir releases are coordinated with the rediversion at Yuba City, YCWD must submit a reservoir operations plan that, at a minimum, identifies the reservoir(s) that will be used to serve Yuba City, specifies the dates when reservoir releases will be made to serve Yuba City and the rate (in cubic feet per second (cfs)) that water will be released from storage for subsequent rediversion at Yuba City, and includes a provision for measuring diversions at Yuba City. If releases will vary on a seasonal basis, all release rates must be specified. The reservoir operations plan shall be subject to the review, modification, and approval of the Chief, Division of Water Rights. The plan shall be updated whenever there is a modification in the reservoir

2. The petition to add Yuba City to the place of use under Permit 11518 and to add a point of diversion and rediversion on the Feather River is approved, subject to the following conditions:

No water shall be directly diverted for consumptive use from the Feather River at Yuba City under Permit 11518 until the permittee submits a direct diversion operations plan to the Chief, Division of Water Rights (Division Chief) and the Division Chief approves the plan. The operations plan must identify the following: (1) the quantity of natural and abandoned flow at the Lost Creek and South Fork Feather River points of diversion when Yuba City is diverting water; and (2) the quantity of natural and abandoned flow diverted by the permittees under Permits 1267, 1268, 1271, 2492, 11516, and 11518 at the Lost Creek and South Fork Feather River points of diversion to serve the permittees' place of use when Yuba City is diverting water. The plan must demonstrate that the direct diversion at Yuba City under Permit 11518 is always less than or equal to the quantity of natural and abandoned flow (1, above) minus the quantity diverted (2, above). All quantities shall be calculated after deducting from the quantity of natural and abandoned flows any bypass flows required now or in the future.

No water shall be rediverted for consumptive use from the Feather River at Yuba City under Permit 11518 until the permittee submits a reservoir operations plan to the Division Chief and the Division Chief approves the plan. The plan must identify the following: (1) the reservoir(s) that will be used to serve Yuba City; (2) the dates when reservoir releases will be made and the daily release rate (in cfs); and (3) a means for metering diversions at Yuba City. If releases will vary on a seasonal basis, all release rates must be specified. If reservoir releases are modified, the reservoir operations plan shall be updated and the revised reservoir operations plan is subject to approval of the Chief, Division of Water Rights.

If YCWD is responsible for the rediversion of water from the Feather River at Yuba City, the reservoir operations plan shall also identify the basis of YCWD's right to control such rediversions. Accordingly, no water shall be rediverted from the Feather River at Yuba

ATTACHMENT 2

releases to serve Yuba City and the revised information shall be submitted to the Chief, Division of Water Rights for approval.

YCWD, however, does not have physical or operational control over the South Fork Project facilities and the diversions of water. (R.T. 208:10-13.) OWID owns the facilities, makes all diversions (direct diversion, rediversion, and diversion to storage), and operates all weirs and control valves to release the water and measure the water. (R.T. 117:22-25.) YCWD receives its water via conveyance through the OWID diversion works and does not control the water by requesting releases from specified reservoirs or diversions from a specific source. The water in the system is commingled, and at any time, YCWD may receive water from reservoir releases, direct diversion, or a combination thereof. (R.T. 120:2-20.) Because YCWD does not have physical control over, or access to, the storage facilities, ~~it must reach an agreement with OWID to coordinate reservoir operations with the rediversion of water at Yuba City.~~ The reservoir operations plan must identify the basis of YCWD's authority (i.e., agreement) to require control such releases.

The SWRCB approves the addition of Yuba City as a place of use under Permit 11518, subject to these conditions. Absent compliance with these conditions, YCWD may be subject to an enforcement action for the unauthorized diversion of water if YCWD continues to serve Yuba City. (Wat. Code § 1052.) In the meantime, Yuba City has a water supply under its own permits and its contract with the Department of Water Resources. (R.T. 220:20-222:3.)

City until the following actions are taken: (1) OWID and YCWD have execute-an agreement establishing sufficient control by YCWD over reservoir operations for the redirection of water at Yuba City; (2) OWID and YCWD provide a copy of the agreement to the Division Chief; and (3) the Division Chief advises the co-permittees in writing that the agreement provides YCWD with the necessary operational control.

The permittee must separately report daily diversions at Yuba City on the Progress Reports by Permittee for Permit 11518 (and any subsequent license issued pursuant to Permit 11518).

ATTACHMENT 3

ORDER

IT IS HEREBY ORDERED,

If the portions of the time extension petitions held in abeyance are is-denied or deemed denied, Permits 11516 and 11518 shall be licensed based on the quantities of water diverted, collected, stored, and placed to beneficial use between July 12, 1960, and December 1, 1975 (the "licensing perfection period"), and the following conditions shall apply:-

_____ (a) The co-permittees shall furnish all available meter records for its diversions under these permits to the Division of Water Rights (Division) within 180 days of the date the time extension is denied or deemed denied and shall furnish any other materials requested by the Division for licensing purposes within 90 days of any written request from the Division.

(b) For Little Grass Valley Reservoir, Lost Creek Reservoir, Slate Creek Reservoir, and Sly Creek Reservoir, the permittees shall document the reservoir capacity, maximum amount of water collected to storage in any one season of diversion, the maximum amount

of water held in storage at one time, the maximum withdrawn from storage and put to beneficial use within one season of use, and the maximum rate(s) of diversion to offstream storage from each source during the licensing perfection period.

(c) For direct diversion from South Fork Feather River, Lost Creek, and Slate Creek, the permittees shall document the maximum rate of direct diversion, the 30-day average diversion rate for irrigation, and the 7-day average diversion rate for domestic and municipal use, from each source during the licensing perfection period.

(d) The permittees shall document the maximum total amount of water appropriated and put to beneficial use in a twelve-month period by combined direct diversion and withdrawal from storage under Permits 11516 and 11518 during the licensing perfection period.

(e) Licensing shall be based on the quantities collected to storage and off-stream storage, directly diverted, and put to beneficial use, after deducting the quantities diverted and beneficially used under Permits 1267, 1268, 1271 and 2492. The permittees shall submit new engineered drawings for Permits 11516 and 11518 if the maps on file do not accurately reflect the as-built project(s), including points of diversion, rediversion, and diversion to offstream storage, conveyance facilities, and place of use (service area). The permittees shall document compliance with all permit conditions during the licensing perfection period.

(f) The permittees shall furnish the water diversion and use records and the engineered maps (if necessary) within 180 days of the date the partial time extension is denied or deemed denied. If the required information, including permit compliance information, is not submitted in a timely manner, the Chief, Division of Water Rights is delegated authority to revoke any permit elements for which the required information is not submitted.

ATTACHMENT 4

3. The petitions to add municipal and industrial purposes of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 are approved subject to the permittee's submission of a water conservation plan that meets the requirements for an urban water management plan under Water Code section 10620 et seq. and that is acceptable to the Chief, Division of Water Rights (Division Chief). YCWD shall submit a water conservation plan for use under Permits 11516 and 11518. OWID shall submit a water conservation plan for use under Permits 1267, 1268, 1271 ~~and; 2492, and 11516~~. In addition, the water conservation plans submitted by OWID shall evaluate and address ditch conveyance losses. ~~No water shall be diverted for municipal and industrial purposes until the Division Chief accepts the plan.~~ The permittee also shall submit to the Division Chief any updates made in accordance with Water Code section 10621 and, at the same time, provide information regarding the permittee's implementation of any measures previously required by the Division Chief that are contained in the water conservation plan.

All cost effective measures in the water conservation program shall be implemented in accordance with the schedule for implementation found therein.

4. The petitions to change OWID's place of use under Permits 1267, 1268, 1271, 2492, 11516, and 11518 are approved.

ATTACHMENT 5

5.2.3. Time to Complete Beneficial Use of Water

As explained herein, the SWRCB partially denies and partially holds in abeyance OWID's petitions for extension of time. The evidence in the record does not support a finding that there is good cause to extend the time for the co-permittees to make full beneficial use of the 768,080 af of water authorized under Permits 11516 and 11518. A full denial of the time extension, however, would limit the co-permittees to their 1975 levels of water use when a license for the project is issued to the co-permittees. The SWRCB finds that it is in the public interest to give the co-permittees an opportunity to pursue a time extension to the extent it would allow the co-permittees to use water be licensed at their current or reasonable foreseeable levels of water use instead of their 1975 levels of use.

5.2.3.1 Due Diligence

In determining whether there is good cause to approve OWID's request for an extension of time to complete the beneficial use of water, the SWRCB must consider whether the co-permittees have exercised diligence over the past 40 years 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 permits. (But see 25 Ops. Cal. Atty. Gen. 32, 40 (1955) (noting that diligence may require something more than simply complying with time limits in permits).)

OWID appropriates water from the South Fork Project under its six water rights, including jointly held Permits 11516 and 11518. The total annual diversion and use allowed under the six permits is limited to 810,000 afa. (See, e.g., SWRCB 3 (Permit 1271, Order dated July 25, 1985).) Permits 11516 and 11518 authorize the total diversion of 768,080 af,¹³ subject to the

¹³ Converting direct diversion into acre-feet. Permit 11516: 109,296 af by direct diversion (300 cfs x 185 days x 1.98 af/day/cfs = 109,890 af) + 35,000 af storage = 144,890 af. Permit 11518: 252,945 af by direct diversion (350 cfs x 365 days x 1.98 af/day/cfs) (SF Feather) + 117,300 af storage (SF Feather + Lost Creek) + 252,945 af by direct diversion (350 cfs x 365 days x 1.98 af/day/cfs) (Lost Creek) = 623,190 af. The total for both permits is 768,080 af.

Nonetheless, even if the SWRCB considered quantities of water used outside the authorized places of use, the co-permittees at best have put approximately 35,200 ~~27,000~~ afa of water to beneficial use under the combined permits during the past four decades.¹⁴ To the extent OWID's water rights are duplicative, a portion of this amount would be credited to its senior permits before being credited to the junior jointly held permits.¹⁵ Moreover, as discussed below, neither co-permittee has complied with the requirements of the CEQA in filing the time extension petitions. The co-permittees have not exercised diligence in putting the full amount of water authorized under the jointly held permits—768,080 afa—to beneficial use.

5.2.3.2 Obstacles Not Reasonably Avoided

The SWRCB must also consider whether the co-permittees' 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.)

YCWD asserts that its inability to apply more water to beneficial use under Permits 11516 and 11518 has been occasioned by obstacles that could not reasonably be avoided, specifically the limits on water diversions imposed by the 1960 power purchase contract between OWID and PG&E. It is unclear why YCWD identifies the power purchase contract as an obstacle because it limits the amounts of South Fork Project water that may be delivered to YCWD before 2010. Although ~~the~~ The contract identifies the amounts that OWID may divert for its use and YCWD's use, and the total maximum amounts are the same as those contained in the agreement between OWID and YCWD. (YCWD 13, p. 2 (part II.C.1-2); 15, pp. 13-14 (¶ I.C-2(a)-(b)).) ~~YCWD negotiated and accepted the terms of the OWID-YCWD agreement, including the limitations on the district's diversion and use of water. YCWD's inability to apply more water to beneficial use~~

¹⁴ ~~This amount is comparable to OWID's diversions in 1955, OWID when the district diverted a total of 27,500 af (gross duty) at its various points of diversion in its service area. (YCWD 6, p. 80.)~~

¹⁵ OWID's four senior water right permits were issued in 1923 and 1926. (R.T. 28:12-23.) Diverted water is first credited to the senior right to the limit of that right. (SWRCB Order WR 85-4, p. 5.) Only diversions in excess of the senior right or under conditions not authorized by the senior right can be credited to the junior right.

~~under the permits has been occasioned by its own agreement, and not by any unavoidable obstacle.~~

~~Moreover, The 1960 power purchase contract provided a revenue source to fund bonds for the construction of the South Fork Project. (YCWD 2, p. 2; 15.) The availability of this revenue source allowed the project to proceed in the first place. (YCWD 2, p. 2.) Thus, the contract has been a necessary is not an obstacle that has limited to YCWD's development of project facilities or use of water and will continue to limit that use until 2010; instead, it is a necessary component of the South Fork Project's development. However, it will not be a limit after 2010.~~

~~In any event, YCWD has not developed all of the water supply facilities allowed under either the OWID-YCWD agreement or the power purchase contract. For example, the OWID-YCWD agreement allows YCWD to construct facilities to store up to an additional 10,500 afa and the power purchase contract allows YCWD to increase its diversions from the Forbestown Ditch from 12 cfs to 72 cfs on completion of YCWD's proposed diversion from Canyon Creek. (YCWD 13, p. 2 (part II.C.3); YCWD 15, p. 13, (¶ C 2(a)).) Even if YCWD was unable to fund construction of these facilities, lack of finances is not generally accepted as good cause for delay. The evidence does not support a finding that the delay was occasioned by obstacles not reasonably avoided.~~

5.2.3.3 Satisfactory Progress

Evidence in the record before the SWRCB indicates that the co-permittees will not make satisfactory progress if the SWRCB grants an extension of time to complete beneficial use of the 768,080 afa of water. Instead, any extension of time should be allowed only to allow the co-permittees to make satisfactory progress toward complete beneficial use of present and reasonably foreseeable amounts of water.

OWID

To date, OWID has only appropriated a small quantity of water, approximately 27,000 afa under its six water right permits, compared to the total amount of 768,080 afa allowed under Permits

service area, through 2040, to be 51,250 afa. (R.T. 164:9-166:2; YCWD 4, p. 20.) Even if OWID's growth rate increased, its diversions would need to more than double to reach the contractual limit of roughly 71,000 afa and they would need to increase by about ten times to reach the 275,000 afa allowed under Permits 1267, 1268, 1271 and 2492.¹⁷ There is no evidence indicating that such extraordinary growth would occur in that area.

YCWD

YCWD asserts that satisfactory progress will be made if a time extension is granted. YCWD's General Manager testified that YCWD needs additional water supplies and that it cannot add new irrigation customers given its current supplies. (R.T. 184:17-24; YCWD 2, p. 4; 4, pp. 3-4.) YCWD's peak delivery demand of 16 cfs from the Forbestown Ditch exceeds the maximum delivery rate of 12 cfs. (YCWD 5, p. 3.) YCWD's historic rate of growth has ranged from 1 to 3 percent and the district estimates its long-term (to 2040) water supply demand within its service area to be 27,100 afa. (R.T. 206:12-19; YCWD 4, p. 5, table 2.) Of this amount, 23,700 afa can be supplied from the South Fork Project through the Forbestown Ditch under Permits 11516 and 11518. The district plans to develop a conveyance project, the Forbestown Conveyance Project, to deliver this supply from the Woodleaf Penstock to YCWD's service area. (YCWD 4, p. 1.)

The agreement to which the jointly held permits are subject, however, limits the amount of water supplied to YCWD to 3,700 afa plus certain requested surplus water diverted at Forbestown Ditch and 4,500 afa diverted at Miners Ranch Reservoir or the Kelly Ridge Powerhouse. (YCWD 4, p. 3; R.T. 119:10-15.) ~~Further, While~~ OWID owns and operates the South Fork Project's facilities and YCWD has no access to or operational control over the project. Although YCWD asserts that it has several potential mechanisms for obtaining rights of access to additional South Fork Project water, including the imposition of certain conditions by Federal Energy Regulatory Commission on relicensing, ~~these mechanisms are speculative at best.~~ Moreover, ~~although~~ YCWD also identified potential sources of money to finance the project, including the revenue it will receive from hydroelectric generation in 2010, ~~it has neither specific construction plans nor financing in place.~~ (R.T. 194:18-196:18; 197:22-199:2.) Thus, although

¹⁷ Again, diversions would be credited against the senior rights before the junior jointly held rights.

the amounts of water that YCWD may receive from the South Fork Project presently are limited by the applicable contracts, those amounts may increase after 2010. The SWRCB will defer consideration of whether or not to grant any extensions of time past 2004 until 2004.

~~Accordingly, the record does not support a finding that YCWD will make satisfactory progress in completing beneficial use.~~

5.2.4 CEQA Compliance

Moreover, the co-permittees have not diligently pursued fulfilling their responsibilities under CEQA. CEQA applies to discretionary projects proposed to be carried out or approved by public agencies. (Pub. Resources Code, § 21080.) The SWRCB's decision whether to grant an extension of time is a discretionary act subject to CEQA. (Cal. Code Regs., tit. 14, § 15002, subd. (i); see tit. 23, § 844 (identifying factors to evaluate when considering a request for extension of time).) OWID, as the petitioner for an extension of time, is the lead agency for the preparation of environmental documentation for the proposed time extension. Because the SWRCB's approval of a time extension and subsequent amendment of Permits 11516 and 11518 would authorize OWID (and YCWD) to complete the project and to apply water to beneficial use, the SWRCB's approval constitutes an approval of the project. Thus, the SWRCB is a responsible agency for purposes of considering whether to approve OWID's petitions.

The Division previously has informed the co-permittees that CEQA compliance is necessary to process a time extension petition. When OWID initially filed its change petitions, it also filed a petition to add Yuba City as a place of use. The Division explained that the SWRCB's approval of a time extension is one of the necessary elements for addition of Yuba City as a place of use and that OWID must prepare the appropriate environmental documentation to address any potential impacts related to the change and time extension petitions. (SWRCB 6 (letters from Katherine Mrowka, Division, to Jeffrey Meith, OWID dated Sept. 20, 1991, and Dec. 16, 1991).) The Division also explained that approval of the time extension petitions is a discretionary act subject to CEQA. (SWRCB 6 (letter from Katherine Mrowka, Division, to Jeffrey Meith, OWID (Dec. 16, 1991).) The Division provided YCWD with a copy of the letter. Without the co-permittees' compliance with CEQA, the SWRCB cannot approve the time extension petitions.

5.2.5 Public Interest

OWID and YCWD assert that approval of the time extension petitions is in the public interest. As discussed above: (1) the evidence in the record does not support a finding of good cause to grant an extension of time to make full beneficial use of the 768,080 afa authorized under Permits 11516 and 11518, and (2) the increased use of water after the time to put water to beneficial use expires cannot be counted for purposes of licensing the water right. (SWRCB Decision 1629, p. 36.) Consequently, the time to complete beneficial use of water under Permits 11516 and 11518 will have ended in 1975 and any water use since that time cannot be counted for licensing purposes unless an extension of time is granted. The SWRCB finds that it is in the public interest to give the co-permittees an opportunity to pursue a time extension through 2004, which to the extent it would allow the co-permittees to continue to use water be licensed at their current level of water use, including amounts used in areas covered by the change petitions approved in this Order, instead of their 1975 level of use. Accordingly, the SWRCB will hold in abeyance the portion of OWID's time extension petitions that would allow the co-permittees to use water at be licensed based on their current needs and current levels of use.¹⁸

The SWRCB, however, cannot approve any time extension without compliance with CEQA. Accordingly, the co-permittees have one year from the adoption date of this Order to comply with CEQA and prepare environmental documentation.¹⁹ The co-permittees then may file a motion with the SWRCB to reopen the hearing record for the sole purpose of admitting this

¹⁸ OWID has requested an extension until December 1, 2004. Providing an extension until that date will give the co-permittees the ability to provide records for use over a multi-year period, thus providing a more accurate picture of the amount needed to support existing uses than would reliance on records for any single year. Providing the extension as requested would also mean that the licensing period includes years for which the co-permittees are required to report separately the water use under each permit, in accordance with this order. The SWRCB defers until after 2004 deciding whether or not any additional extensions of time are appropriate. By holding the requests for extension in abeyance it is not the intent of the State Water Resources Control Board to authorize or encourage any expansion in water delivery or use beyond that necessary to continue deliveries in accordance with current needs and current use patterns.

¹⁹ Preparation of the environmental documentation should not be difficult because the environmental impacts should be easy to assess. In practical effect, the effect of granting the extension will be to allow an increase in water use from 1975 levels to current levels. Ordinarily, the SWRCB will presume that any environmental impact report or negative declaration prepared by the petitioner is adequate for purposes of CEQA. (See Cal. Code Regs., tit. 14, § 15096, subd. (e).) This presumption applies only where the petitioner as lead agency has prepared environmental documents; it does not apply where the petitioner fails to comply with CEQA or concludes that the activity is exempt. (See *id.* § 15050 et seq.; Pub. Resources Code § 21167.3.)

documentation and any party may object to such motion. The SWRCB then will consider the portion of the time extension held in abeyance. Absent compliance with CEQA by the above date, the petitions for time extension will be deemed denied in full.

In sum, the SWRCB denies the request for extension of time to make full beneficial use of the 768,080 af authorized under Permits 11516 and 11518, but will hold in abeyance the portion of the time extension petitions to the extent necessary to allow the co-permittees to divert and use water under the permits consistent with their current and reasonable foreseeable levels of use.

5.2.6 Licensing

The SWRCB directs the Division of Water Rights to conduct a licensing inspection and to license Permits 11516 and 11518, if the portion of the time extension petitions held in abeyance is denied or deemed denied, ~~or if approved, on the conclusion of the extension period.~~ The Division of Water Rights shall license Permits 11516 and 11518 for the project elements and quantities of water put to beneficial use that are not duplicative of project elements and beneficial use under Permits 1267, 1268, 1271, and 2492. If either co-permittee fails to timely provide the Division with the information needed to license the jointly held permits, the Division will revoke the permit elements for which the Division does not receive licensing information.

5.3 Partial Revocation of Permit 1268 (New York Flat Reservoir)

The SWRCB may revoke a permit if it finds that cause exists. (Wat. Code § 1410.) “There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with the this division and the rules and regulation of the [SWRCB].” (*Id.* at subd. (a).) Based on the evidence in the record, the SWRCB finds that OWID has not commenced, diligently pursued, or completed construction of New York Flat Reservoir and finds that there is cause for partial revocation of Permit 1268.

Permit 1268 (Application 2142) authorizes the diversion to storage of 5,000 afa in the Lost Creek Reservoir and 40,000 afa in New York Flat Reservoir on Lost Creek. OWID has received numerous extensions of time to develop the project since Permit 1268 was issued in 1923, but

New York Flat Reservoir has not been built. The most recent extension of time to complete construction under Permit 1268 expired on December 1, 1990, and OWID has not filed a petition for extension of time to construct the facility.

In nearly eighty years, the permittee has not constructed New York Flat Reservoir and there is no evidence that permittee intends to construct the facility. Accordingly, the portion of Permit 1268 that authorizes diversion to storage of 40,000 afa at New York Flat Reservoir is revoked. The portion of Permit 1268 that authorizes diversion to storage at Lost Creek Reservoir is retained.

In its closing brief, YCWD suggests that Permit 1268 should be split into two permits and the New York Flat Reservoir portion should be assigned to YCWD. YCWD is not a co-permittee for Permit 1268 and there is no evidence in the record supporting such an assignment. Moreover, YCWD's General Manager testified that the district has no plans to proceed with construction of the reservoir. (R.T. 194:5-15.) YCWD must obtain its own water right if it wants to construct the reservoir.

6.0 CONCLUSION

Based on the evidence in the record, the SWRCB conditionally approves OWID's and YCWD's petitions for change in the purpose of use and place of use. The SWRCB will require a water conservation plan for municipal and industrial uses under Permits 1267, 1268, 1271, 2492, 11516, and 11518 and operations plans for diversions of water to Yuba City under Permit 11518. The Division will issue amended permits for all six permits that include updated permit terms and conditions.

The evidence in the record does not support a finding of good cause to extend the time to complete construction and beneficial use of 768,000 afa of water under Permits 11516 and 11518. The SWRCB, however, finds that it is in the public interest to hold in abeyance the portion of the time extension petitions that would allow the co-permittees an opportunity to be licensed at their current and reasonable foreseeable levels of water use instead of their 1975 levels of use. The SWRCB also finds good cause to partially revoke Permit 1268.

ORDER

IT IS HEREBY ORDERED,

1. The petitions for extension of time are partially denied and partially held in abeyance. The portion of the petitions that would allow the co-permittees to complete construction is denied. The portion of the petitions that would allow the co-permittees to complete application of 768,000 afa of water to beneficial use under Permits 11516 and 11518 is also denied. No further time extension to put this entire amount of water to beneficial use shall be granted for these permits, but further petitions for time extensions to apply reasonably foreseeable amounts of water to beneficial use may be filed.

The portions of the petitions for extension of time that would allow the co-permittees to apply water to beneficial use until December 1, 2004, ~~and thus be licensed at their current level of water use, is~~ are held in abeyance. The co-permittees have one year from the adoption date of this Order to comply with CEQA and prepare environmental documentation in support of approval of the time extensions. Absent compliance with CEQA by this date, OWID's petitions for time extension will be deemed denied in full.