

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

ORDER WR 2026-0002

In the Matter of Water Right Applications A033106 and A033107

Barbara R. Banke

SOURCES: Unnamed Stream and No Name Creek, both tributary to Bidwell Creek thence Franz Creek thence Maacama Creek thence the Russian River and Yellowjacket Creek tributary to Redwood Creek thence Maacama Creek thence the Russian River

COUNTY: Sonoma

**ORDER GRANTING REQUEST FOR A CASE-BY-CASE EXCEPTION AND
ACCEPTING TWO APPLICATIONS**

BY THE BOARD:

1.0 INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) pursuant to two water right applications and a request for a case-by-case exception to the Policy for Maintaining Instream Flows in Northern California Coastal Streams (North Coast Instream Flow Policy or Policy) filed by Barbara R. Banke (Applicant). Applications A033106 and A033107 seek approval to divert water to storage in existing reservoirs formed by onstream dams within the Russian River watershed in Sonoma County. Applications A033106 and A033107 were filed to supplement the season of diversion for pending applications A030954 and A030955, which were filed as part of the corrective actions required by State Water Board [Order WR 99-06](#) to address the unauthorized diversion of water to storage.¹

¹ Applications A030954 and A030955 were filed by Jess Jackson in 1999. Primary ownership changed to Jackson Wine Estates Vineyards on February 14, 2007, then to

Due to the onstream dams, the Policy prohibits the Board from accepting applications A033106 and A033107 for processing without granting a case-by-case exception request. The State Water Board's Division of Water Rights (Division) has assessed the Applicant's exception request, and the Deputy Director for the Division recommends that the Board approve the exception request for the reasons set forth below. In this order, the State Water Board grants the exception request and accepts applications A033106 and A033107, subject to the conditions at the end of this order.

2.0 PROCEDURAL BACKGROUND

By letter dated December 24, 1997, the State Water Board served notice to the previous landowner that several reservoirs located in Sonoma County were not authorized by any water rights known to the State Water Board. In that letter, the Board requested that the previous landowner provide information identifying existing water rights authorizing the storage of water at these reservoirs or file applications for the existing storage of water. In April 1999, the State Water Board issued an Administrative Civil Liability Complaint to the previous landowner, alleging the diversion of surface water to storage in seven reservoirs for later use without a basis of right constituted an unauthorized diversion of water in violation of Water Code section 1052, subdivision (a).

On July 13, 1999, the Board's Executive Director issued State Water Board Order WR 99-06, which imposed reduced administrative civil liability pursuant to a settlement agreement finalized in June 1999. Order WR 99-06 documented that six of the seven reservoirs constituted unauthorized storage of water and the previous landowner agreed to exercise diligence in obtaining water right permits authorizing storage of water in these six reservoirs. Applications A030954 and A030955 were filed as a result.

Applications A030954 and A030955 were accepted in 1999, and a public notice of these applications was issued in 2000. Since then, work associated with evaluation of water availability, public trust considerations, and protest resolution has been ongoing. To facilitate processing Applications A030954 and A030955, the Applicant consulted with

Jackson Family Wines, Inc. on September 9, 2010, before it was changed to Barbra R. Banke, the current primary owner, on May 1, 2014.

the California Department of Fish and Wildlife (CDFW) and the National Marine Fisheries Service (NMFS). After an extensive dialogue, informed in part by a 2016 study titled Existing Habitat Assessment Report,² CDFW, NMFS, and the Applicant developed a riparian and salmonid conservation program to achieve a demonstrable conservation benefit in Yellowjacket Creek and Kellogg Creek within the Applicant's property.³ This program was designed to promote the conservation, enhancement of survival, and recovery of the endangered Central California Coast (CCC) coho salmon (*Oncorhynchus kisutch*) and threatened CCC steelhead (*O. mykiss*). Enhancement opportunities include modifications to structures on Yellowjacket Creek to improve fish passage, commitments to diversion criteria designed to improve hydrological conditions during low flow months, and riparian habitat restoration.

The Applicant agreed to implement this program by executing a Safe Harbor Agreement (SHA) with NMFS, which prescribes terms as well as mitigation and avoidance criteria for the Applicant's water diversions to comply with the federal Endangered Species Act and the California Endangered Species Act.⁴ While CDFW was not a signatory to the SHA, the SHA grants CDFW certain access and notification rights. CDFW subsequently issued a Consistency Determination under Fish and Game Code section 2080.1, concluding that the SHA is sufficient for compliance with the California Endangered Species Act.

As noted above, the SHA was informed, in part, by a study produced by the Applicant's consultant entitled Existing Habitat Assessment Report. The study was initially tailored to applications A030954 and A030955, but over time the Applicant, NMFS, and CDFW concluded that a longer season of diversion with protective bypass flows would benefit

² Mike Podlech. Existing Habitat Assessment Report. September 23, 2016.

³ NMFS has designated reaches of Yellowjacket Creek and Kellogg Creek within the Applicant's property as critical habitat for threatened and endangered anadromous salmonids. NMFS also identified these perennial reaches as priority streams in the Maacama Creek watershed for restoration and threat abatement actions in its 2012 Central California Coast Coho Recovery Plan.

⁴ National Marine Fisheries Service. Kellogg Ranch Safe Harbor Agreement (July 1, 2019), at https://media.fisheries.noaa.gov/dam-migration/kellogg_ranch_safe_harbor_agreement_final_signed_july_1_2019.pdf [as of July 11, 2025].

salmonids. A longer season of diversion under post-1914 appropriative rights would allow the Applicant to meet their water demands while further reducing diversions under their claimed riparian and pre-1914 appropriative rights during the low flow summer and fall periods. The SHA assumes the continued existence of the reservoirs and contemplates additional water right applications to extend the season of diversion of A030954 and A030955, consistent with the SHA's minimum bypass flows and maximum water diversion rates, in order to provide for this environmental benefit.

In accordance with the commitments in the SHA, the Applicant filed applications A033106 and A033107 on February 3, 2020. CDFW and NMFS submitted letters of support for these applications to the Division in August 2020.

3.0 WATER RIGHT APPLICATIONS

The Applicant's predecessor-in-interest filed applications A030954 and A030955 with the Division in 1999. On March 19, 2014, petitions for change for applications A030954 and A030955 were filed, seeking to redistribute storage and modify the place of use. The 2014 petitions for change request to add a licensed onstream reservoir as a point of rediversion and storage,⁵ add an existing offstream reservoir as a place of storage, update the description of a requested point of diversion to also include a point of rediversion designation, and reduce the place of use by 10 acres. The pending petitions for change, together with applications A030954 and A030955, propose to divert water from December 15 to March 31 from Yellowjacket Creek and two unnamed tributaries to Bidwell Creek (No Name Creek and Unnamed Stream) for storage in seven existing reservoirs.

As discussed in section 2.0 above, the Applicant filed applications A033106 and A033107 on February 3, 2020, to supplement the season of diversion for applications A030954 and A030955. Applications A033106 and A030954, and applications A033107 and A030955 are companion applications, respectively; with the 2014 change petitions, each set of companion applications are intended to have the same points of diversion

⁵ In addition to applications to appropriate water, the Policy also applies to petitions for change; petitions requesting to move or add an onstream reservoir are generally subject to the Policy's onstream dam requirements. (Policy sections 3.3 and 3.3.2.3.)

and rediversion, and proposed place of use. The Applicant intends to file change petitions on applications A030954 and A030955 in the future to align the purposes of use amongst the four applications. In effect, applications A033106 and A033107 seek a longer season for the diversions to storage requested by their prior companion applications.

Application A033106 requests a permit to divert to storage up to 198 acre-feet of water per year⁶ via five onstream dams located on No Name Creek, one onstream dam located on Unnamed Stream, and the weir⁷ located on Yellowjacket Creek. Storage is requested in the five onstream reservoirs on No Name Creek (House Pond, East Twin Lake, West Twin Lake, Waterfall Lake, and Birthday Lake), the onstream reservoir on Unnamed Stream (Ballpark Reservoir), and one offstream reservoir (Frog Pond).

Application A033106 proposes a season of diversion of October 1 to December 14 and April 1 to May 31 on No Name Creek and a season of diversion of October 1 to December 14 on Yellowjacket Creek. Stored water would be used for the purposes of domestic, irrigation, frost protection, heat control, industrial, recreational, stockwatering, and incidental fire protection.

Application A033107 requests a permit to divert and store up to 355 acre-feet of water per year⁸ via one onstream dam located on an Unnamed Stream (Ballpark Reservoir) and the weir located on Yellowjacket Creek. Storage is requested in the onstream reservoir on Unnamed Stream (Ballpark Reservoir) and an offstream reservoir (Frog Pond). Water diverted at Yellowjacket Creek would be re-diverted at one onstream reservoir on No Name Creek (West Twin Lake) enroute to storage at Ballpark Reservoir

⁶ The total combined amount of water to be diverted under application A033106 and its companion application A030954 shall not exceed 198 acre-feet per year.

⁷ The Division evaluates whether a weir amounts to an onstream dam under the Policy on a case-by-case basis. The Division has concluded that the weir on Yellowjacket Creek does not constitute an onstream dam under the Policy's definition of that term. (See Policy section 2.4 [defining an onstream dam as "a structure in a stream channel that impedes or blocks the passage of water, sediment, woody debris, or fish."]). The Applicant's weir on Yellowjacket Creek was remediated to minimize potential impacts to salmonids to de minimis levels prior to the filing of applications A033106 and A033107.

⁸ The total combined amount of water to be diverted under application A033107 and its companion application A030955 shall not exceed 355 acre-feet per year.

or Frog Pond. Application A033107 proposes a season of diversion of October 1 to December 14 and April 1 to May 31 on Unnamed Stream and a season of diversion of October 1 to December 14 on Yellowjacket Creek. Stored water would be used for the purposes of domestic, irrigation, frost protection, heat control, industrial, recreational, stockwatering, and incidental fire protection.

The Applicant's diversion and storage facilities are shown in Figure 1 below; reservoir details are summarized in Table 1 below.

Figure 1: Diversion Facilities for A030954, A030955, A033106, and A033107

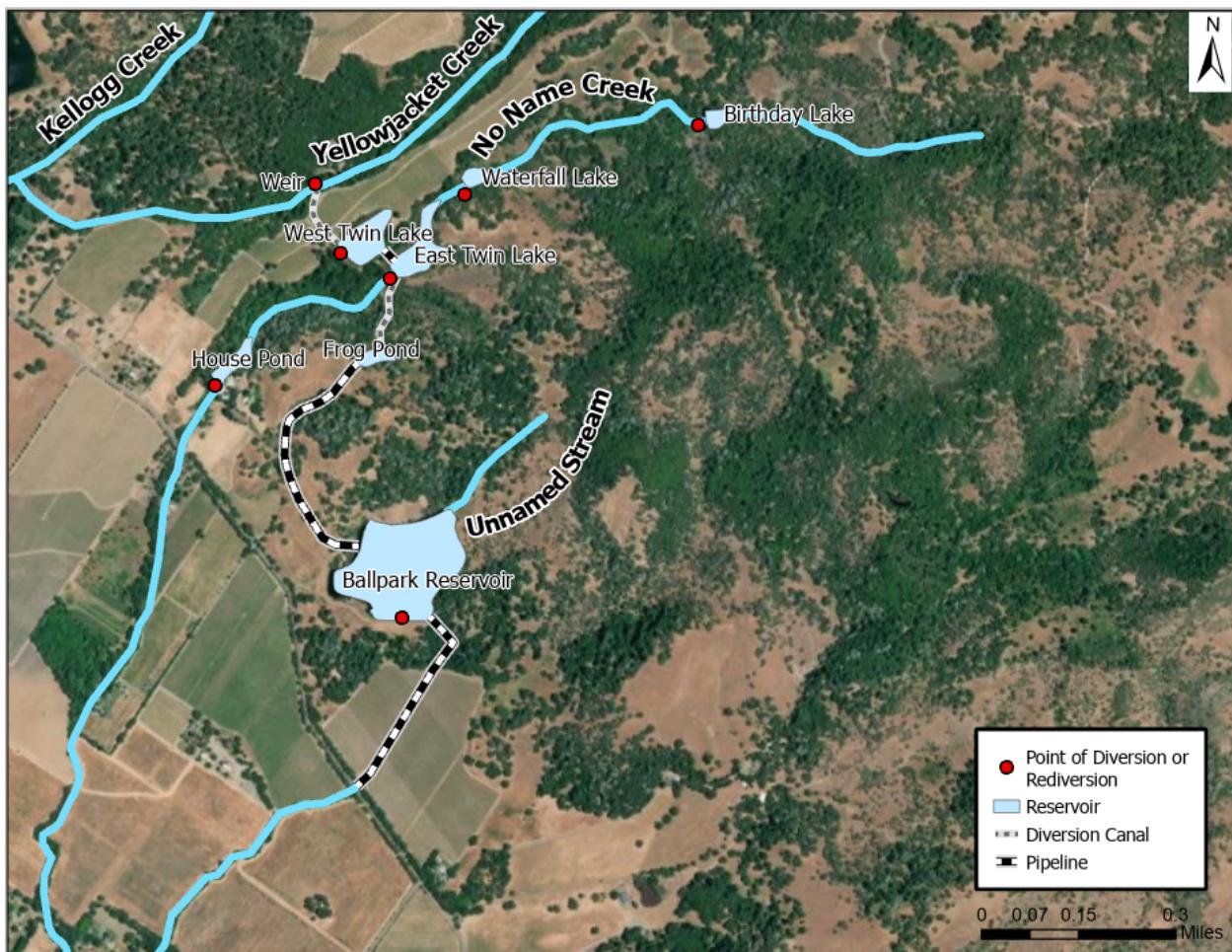


Table 1: Storage Reservoir Details

Reservoir Name	Estimated Capacity (acre-feet)	Onstream or Offstream	Stream Class	Associated Water Right Filings
No Name Creek Watershed				
Birthday Lake	6.9	Onstream	Class 2	A030954, A033106
Waterfall Lake	1.9	Onstream	Class 2	A030954, A033106
East Twin Lake	27.7	Onstream	Class 2	A030954, A030955, A033106, A033107
West Twin Lake	24.8	Onstream	Class 2	A030954, A033106
House Pond	8.5	Onstream	Class 1	A030954, A033106
Frog Pond	6	Offstream	N/A	A030954, A030955, A033106, A033107
Unnamed Stream Watershed				
Ballpark Reservoir	355	Onstream	Class 2	License 5831, A030954, A030955, A033106, A033107

4.0 NORTH COAST INSTREAM FLOW POLICY

The North Coast Instream Flow Policy became effective on February 4, 2014, and establishes principles and guidelines for maintaining instream flows for the protection of fishery resources, while minimizing water supply impacts on other beneficial uses, including irrigation, municipal use, and domestic use. The geographic scope of the Policy encompasses coastal streams from the Mattole River to San Francisco as well as coastal streams entering northern San Pablo Bay and extends to five counties: Marin, Sonoma, and portions of Napa, Mendocino, and Humboldt counties.

As the water right applications in question propose to divert water from sources tributary to Maacama Creek in Sonoma County, these applications are within the geographic area of the Policy and are subject to the Policy's provisions.

The primary objective of the Policy is to ensure that the State Water Board administers water rights in a manner that maintains instream flows needed for the protection of fishery resources with a particular focus on anadromous salmonids and their habitat. It prescribes protective measures regarding the season of diversion, minimum bypass flow, and maximum cumulative diversion. The Policy also contains measures to restrict approval of onstream dams to avoid adverse effects on instream flows needed for fishery resources.

An onstream dam is defined in Policy section 2.4 as “a structure in a stream channel that impedes or blocks the passage of water, sediment, woody debris, or fish.”

Onstream dams can impact salmonids by (1) preventing fish passage and blocking access to upstream spawning and rearing habitat; (2) intercepting and retaining spring and summer flows without providing continuous flow releases below the onstream dam (i.e., bypass flows); (3) intercepting and retaining sediments/gravels that would otherwise replenish downstream spawning gravels; (4) intercepting and retaining large wood that would otherwise provide downstream habitat structure; (5) causing loss of riparian habitat or wetlands; and (6) creating slow-moving, lentic (lake-like) habitats that favor non-native species that may prey on anadromous salmonids or compete for food and shelter.

The Policy contains requirements for the permitting of onstream dams to address the adverse effects that onstream dams have on fish and their habitat. These requirements are specific to the stream classification where the onstream dam is located. Among these requirements, Policy sections 2.4.1 and 2.4.2 generally prohibit the acceptance of new applications to divert water by means of an onstream dam on a Class 1 or Class 2 stream. Class 1 streams are characterized by the presence of fish always or seasonally, either currently or historically; and habitat to sustain fish. Class 2 streams are characterized by the presence of seasonal or year-round habitat for aquatic non-fish vertebrates and/or aquatic benthic macroinvertebrates.

The Policy also contains a provision that allows applicants to request a case-by-case exception to any Policy provision. Section 9.0 of the Policy provides that the Board may grant a case-by-case exception request where it determines that: (1) the exception will not compromise maintenance of instream flows in the Policy area; and (2) the public

interest will be served. A request for a case-by-case exception must include the following: (1) a detailed description of the reason for the request; (2) the Policy provisions that are involved; (3) documentation of the reasons why the exception will not compromise maintenance of instream flows in the Policy area; and (4) an explanation of how the public interest will be served by the exception. The Board's consideration of a case-by-case exception request is limited to the Policy provisions stated in the case-by-case exception request. The Policy places the burden on applicants to provide sufficient information for the Board to make the required findings and grant the exception request.

According to the Policy's stream classification system, four of the onstream dams located on No Name Creek (East Twin Lake, West Twin Lake, Waterfall Lake, and Birthday Lake) are situated on a Class 2 stream segment; the remaining onstream dam located on No Name Creek (House Pond) is situated on a Class 1 stream segment; and the sixth onstream dam (Ballpark Reservoir, located on Unnamed Stream), is located on a Class 2 stream segment.⁹

Five of the onstream dams on No Name Creek (House Pond, East Twin Lake, West Twin Lake, Waterfall Lake, and Birthday Lake) requested in applications A033106 and A033107 have not been previously authorized and are therefore subject to Policy sections 2.4.1 and 2.4.2. Therefore, applications A033106 and A033107 cannot be accepted without the Board granting an exception request.

The sixth onstream dam (Ballpark Reservoir, located on Unnamed Stream) requested in applications A033106 and A033107 was previously authorized pursuant to License 5831 (application A013716), issued in 1959. The Division has concluded that inclusion of the Ballpark Reservoir dam in applications A033106 and A033107 and the 2014 change petitions on applications A030954 and A030955 does not constitute a request for a new onstream dam within the meaning of the Policy.¹⁰ Ballpark Reservoir was

⁹ State Water Resources Control Board, Division of Water Rights. Policy Section A.1.6.1 Initial Stream Classification Determination for Applications A030954, A030955, A033106, and A033107 of Barbara Banke, Sonoma County. May 25, 2022.

¹⁰ The Policy restricts the construction and permitting of new onstream dams. (Policy section 2.1.) The Division evaluates whether an application or petition for change subject to the Policy that requests to divert water by means of a previously authorized

previously constructed to have a capacity of 355 acre-feet. Neither these applications nor the 2014 change petitions propose any alterations to the structure of the dam or the footprint of the reservoir. Accordingly, for these projects, Ballpark Reservoir is not subject to the prohibition in Policy section 2.4.2 and will not be discussed further in this order.¹¹

In accordance with State Water Board [Order WR 2012-0011-EXEC](#),¹² by letter dated March 3, 2020, the Division informed the Applicant that applications A033106 and A033107 would be rejected due to the prohibitions in Policy sections 2.4.1 and 2.4.2, unless the Applicant submitted a request for a case-by-case exception to these prohibitions. On April 30, 2020, the Applicant acknowledged that the onstream dams requested in applications A033106 and A033107 were located on Class 1 and 2 streams and filed a request for a case-by-case exception¹³ to the prohibitions in Policy sections 2.4.1 and 2.4.2.

4.1 Case-by-Case Exception Request: Maintenance of Instream Flows

The Applicant's exception request asserts that granting the exception will not compromise the maintenance of instream flows. The request does not explicitly address each of the six potential impacts of onstream dams on salmonids (enumerated in section 4.0 of this order); however, supplemental materials referenced in the exception request contain information that the Division assessed to evaluate each of the potential impacts. The supplemental materials referenced include the SHA, proposed permit terms developed by CDFW and NMFS in July 2020,¹⁴ a July 2019 Stream Classification

onstream dam constitutes a request for a new onstream dam subject to the prohibitions in Policy section 2.4 on a project-specific basis.

¹¹ The inclusion of Ballpark Reservoir in the 2014 change petitions was the only component of those petitions potentially subject to the prohibition in Policy section 2.4.2. Therefore, these change petitions will likewise not be discussed further in this order.

¹² Order WR 2012-0011-EXEC provides that when applications are subject to rejection due to the prohibitions in Policy sections 2.4.1 and 2.4.2, applicants should be afforded the opportunity to either contest the stream classification or request a case-by-case exception.

¹³ Wagner and Bonsignore, CCE. Water Right Applications 33106 and 33107, Request for Case-by-Case Exception. April 30, 2020.

¹⁴ National Marine Fisheries Service. Letter to the Division of Water Rights.

Report,¹⁵ and the Existing Habitat Assessment Report (consisting of a hydrologic analysis, field assessments of aquatic and riparian habitat, and a critical riffle analysis to determine fish passage flows).

The State Water Board has evaluated the Applicant's exception request and the accompanying supplemental materials with respect to the maintenance of instream flows and six potential impacts of onstream dams on salmonids. The following sections discuss the Board's evaluation of the maintenance of instream flows, organized by the list of potential impacts to salmonids contained in section 4.0 of this order.

Applications A030954, A030955, A033106, and A033107 collectively would further the Applicant's commitment to undertake actions to benefit endangered CCC coho salmon and threatened CCC steelhead in Yellowjacket Creek and Kellogg Creek under the SHA. Beneficial management actions in the SHA—including fish passage improvement modifications to structures on Yellowjacket Creek, water diversions consistent with criteria proposed to maintain instream flows needed for the protection of fishery resources, allowing access to the Russian River Captive Coho Broodstock Program, and riparian habitat improvements—are described in more detail in the sections below.

Granting the exception request and allowing applications A033106 and A033107 to proceed will not compromise the maintenance of instream flows in the Policy area, provided that any eventual permits are consistent with the SHA, the proposed permit terms and diversion criteria provided by CDFW and NMFS dated July 13, 2020 are included in any eventual permits, and these applications are conditioned to comply with the Policy's onstream dam mitigation plan requirements described below.

4.1.1 Preventing Fish Passage and Blocking Access to Upstream Spawning and Rearing Habitat

The July 2019 Stream Classification Report prepared by the Applicant's consultant documents that four of the five reservoirs created by onstream dams on No Name Creek (East Twin Lake, West Twin Lake, Waterfall Lake, and Birthday Lake) are located above the upper limit of anadromy, which the Policy defines as the upstream end of the

August 18, 2020.

¹⁵ Mike Podlech. Kellogg Ranch Stream Classification Report. July 24, 2019.

range of anadromous fish that currently are, or have been historically, present year-round or seasonally, whichever extends the farthest upstream. Thus, those four dam structures will not prevent anadromous fish passage at their respective points of diversion. Although the remaining onstream dam on No Name Creek (House Pond) is located within the range of anadromy, the Division has determined that the effects of the dam structure preventing fish passage to upstream spawning and rearing habitat are likely minimal. This determination is based on the evaluation that No Name Creek has minimal value to serve as salmonid habitat given the small watershed size and limited seasonal flow, the stream segment the dam is located on and the downstream stream segment likely only have potential to serve as seasonal winter refuge habitat for juvenile salmonids, and a barrier to migration is located 1,000 feet upstream of the dam.

The 25-year SHA went into effect on February 3, 2020, and commits the Applicant to undertake management actions to benefit endangered CCC coho salmon and threatened CCC steelhead in Yellowjacket Creek and Kellogg Creek. While the beneficial management actions of the SHA focus on Yellowjacket Creek rather than No Name Creek, where the onstream dams are located, the Applicant's case-by-case exception request explains that applications A030954, A030955, A033106, and A033107 collectively would further the goals of the SHA. Under the SHA, the Applicant has taken mitigatory measures, such as completing fish passage and fish screen improvements to the weir on Yellowjacket Creek to ensure that fish passage and access to upstream spawning and rearing habitat on Yellowjacket Creek will not be blocked. The Applicant has also agreed to allow access to the Russian River Captive Coho Broodstock Program to stock and monitor coho salmon in Yellowjacket Creek and Kellogg Creek, to assist with the program's goal of reestablishing self-sustaining runs of coho salmon in tributaries to the Russian River.

As part of the study documented in the Existing Habitat Assessment Report, a critical riffle analysis was conducted on Yellowjacket Creek to identify streamflow levels that would allow for unimpeded migration passage of adult and juvenile steelhead and coho salmon. Under the terms of the SHA, diversions under all four applications (A030954, A030955, A033106, and A033107) will occur in accordance with minimum bypass flows developed to ensure the maintenance of instream flows needed for fishery resources.

CDFW and NMFS analyzed the effects of the proposed diversion rates and bypass flows on salmonids downstream. In their August 2020 letters of support, CDFW and NMFS explained that their analyses determined the proposed diversion criteria are protective and would not adversely affect salmonids or other species downstream. For the purpose of determining whether the project can be granted an exception from the prohibitions in Policy sections 2.4.1 and 2.4.2, the Board acknowledges that the proposed diversion criteria demonstrate the project can be implemented in a manner that will not compromise the maintenance of instream flows. Evaluation of water availability for the requested diversions will be completed separately as part of the permitting process as required by Water Code sections 1375, subdivision (d) and 1243.

4.1.2 Intercepting and Retaining Spring and Summer Flows

As explained in the exception request and Existing Habitat Assessment Report, operating over an extended diversion season with protective bypass flows, as requested in applications A033106 and A033107, would allow the Applicant to further reduce diversions on the perennial, salmonid-bearing Yellowjacket Creek during the low flow summer and fall periods and shift more diversions to the intermittent streams (No Name Creek and Unnamed Stream), which CDFW and NMFS recommend be managed as non-anadromous. This has the potential to provide an environmental benefit and may amplify the benefits of the completed Yellowjacket Creek fish passage remediation and planned riparian restoration efforts under the SHA.

The SHA states that diverting water in accordance with the diversion criteria developed by CDFW and NMFS has the potential to provide a more natural flow regime that includes sufficient variability, duration, and magnitude of stream flows to support a variety of ecological functions, such as salmonid passage, spawning, and rearing in Yellowjacket Creek. CDFW and NMFS determined that the proposed diversion criteria, including the reservoir fill/spill/refill conditions, are protective and would not adversely affect salmonids or other species downstream.

4.1.3 Intercepting and Retaining Sediments/Gravels and Large Wood

While not explicitly described in the exception request materials as an impact of the onstream dams on No Name Creek, the Existing Habitat Assessment Report

documents that channel conditions within the lower reach of No Name Creek appear to have been degraded by historic and ongoing land use practices, including channelization and riparian habitat loss. The Stream Classification Report prepared by the Applicant's consultant documents the limited presence of spawning gravels, pools, and large woody debris on No Name Creek. The proposed permit terms developed by CDFW and NMFS include a riparian habitat replacement plan for the lower reach of No Name Creek to be developed in coordination with CDFW. Implementation of this plan is anticipated to increase large woody debris recruitment which could create low velocity areas that will result in gravel aggradation. In addition, the SHA describes a large woody debris enhancement plan in the vicinity of the barrier mediation project on Yellowjacket Creek. Absent an assessment of onstream dam impacts, it is not clear whether and how the proposed permit term and the large woody debris enhancement plan will sufficiently mitigate for any reduction in sediment/gravel and large woody debris transport associated with the dams over the entire project area.

For projects that include onstream dams, Appendix D of the Policy requires the Applicant to prepare mitigation plans developed by qualified individual(s), where needed, to address potential impacts of the onstream dams unless the Board determines such mitigation plans are unnecessary. Proposed mitigation plans shall be submitted to the State Water Board for review and approval during the environmental review of the water right applications. The Board's review and approval of these mitigation plans or waiver of this requirement is necessary to ensure that the requested exception will not compromise maintenance of instream flows in the Policy area. This order conditions its approval of the exception request by requiring the Applicant to develop and implement gravel and wood augmentation plan(s) or submit detailed information showing why such plan(s) are ecologically unnecessary after which the Board may waive this requirement, consistent with Policy Appendix D.

4.1.4 Causing Loss of Riparian Habitat or Wetlands

As explained in the Existing Habitat Assessment Report and noted in the previous section, channel conditions within the lower reach of No Name Creek appear to have been degraded. This report does not explicitly describe the degradation as an impact of the onstream dams on No Name Creek. The proposed permit terms developed by CDFW and NMFS require that a riparian habitat replacement plan be developed for this lower reach of No Name Creek in coordination with CDFW. Implementation of this plan is anticipated to improve riparian habitat conditions and increase large woody debris recruitment. Absent an assessment of onstream dam impacts, it is not clear whether and how this term will sufficiently mitigate for any loss of riparian habitat or wetlands associated with the dams. As noted above, Appendix D of the Policy requires Applicants with projects that include onstream dams to submit mitigation plans to address the loss of riparian habitat or wetlands caused by the dams unless the Board determines a mitigation plan is unnecessary. The Board's review and approval of this mitigation plan or waiver of this requirement is necessary to ensure that the requested exception will not compromise maintenance of instream flows in the Policy area. This order conditions the grant of the exception on development and implementation of this mitigation plan or submittal of detailed information showing why this plan is ecologically unnecessary after which the Board may waive this requirement, consistent with Policy Appendix D.

4.1.5 Creating Slow-Moving, Lentic Habitats

According to the Existing Habitat Assessment Report, non-native game fish have the potential to be present in the reservoirs located on No Name Creek due to historical stocking operations. Under the proposed permit terms developed by CDFW and NMFS, a bullfrog control plan shall be developed in coordination with CDFW for all reservoirs. It is not clear whether and how a bullfrog control plan will sufficiently address the eradication of the non-native game fish which have the potential to be present in the reservoirs located on No Name Creek. Accordingly, a non-native species eradication plan pursuant to Appendix D of the Policy is needed to address issues related to the dams creating slow-moving, lentic habitats and the eradication of non-native species, and is a condition of this order.

4.2 Case-by-Case Exception Request: Public Interest

The exception request asserts that granting the exception is in the public interest. In support of this assertion, the exception request states that applications A033106 and A033107 would optimize the operations of the Applicant's existing onstream dams by allowing the Applicant to shift diversions from periods of lower streamflow to higher streamflow so more water will remain instream during lower flow periods in a manner that enhances the survival of threatened or endangered salmonid species in Yellowjacket Creek. The exception request also notes that the SHA contemplated applications A033106 and A033107 as a necessary part of the diversion and operational criteria CDFW and NMFS developed to provide for the survival of endangered CCC coho salmon and threatened CCC steelhead in Yellowjacket Creek and Kellogg Creek. Furthermore, the exception request asserts that processing applications A033106 and A033107 concurrently with applications A030954 and A030955 would result in more efficient use of Board staff resources as well as other resource agency resources.

The State Water Board has evaluated the Applicant's exception request with respect to the public interest. Granting the exception request for the onstream reservoirs on No Name Creek and allowing the Applicant to proceed with applications A033106 and A033107 would create a pathway to achieve a net conservation benefit, as, collectively, applications A030954, A030955, A033106, and A033107 would allow the Applicant to achieve the goals of the SHA, which include: enhancing salmonid habitat, improving hydrological conditions during low flow months, providing access for stocking of coho salmon broodstock in Kellogg Creek and Yellowjacket Creek, and facilitating fish passage in Yellowjacket Creek. Additionally, processing applications A033106 and A033107 concurrently with applications A030954 and A030955 would result in more efficient use of Board and other agency staff resources.

5.0 CONCLUSION

This order is limited to the matter of whether to grant an exception request to the prohibitions against accepting applications as specified in Policy sections 2.4.1 and

2.4.2.¹⁶ The accepted applications will be subject to all other applicable provisions of the Policy.

Once an application is accepted, the State Water Board must fulfill its obligations under the California Environmental Quality Act (CEQA) prior to any potential approval of the proposed project. (Pub. Res. Code, § 21000 et seq.) In addition to fulfilling its CEQA responsibilities, the State Water Board must comply with its obligations under the Water Code, the California Code of Regulations, the public trust doctrine, and all Board policies applicable in the context of processing the water right applications. After acceptance of the applications, as part of the Board's public notice process, Division staff will conduct tribal outreach in accordance with the State Water Board's Tribal Consultation Policy and the California Environmental Protection Agency Tribal Consultation Protocol.

The Division considered the supplemental materials submitted with the exception request to assess each of the six potential impacts of onstream dams on salmonids (enumerated in section 4.0 of this order). Through the Applicant's collaboration with CDFW and NFMS, they have developed a program to enhance salmonid habitat, facilitate fish passage, improve hydrological conditions during low flow months, and provide access for stocking of coho salmon broodstock in Yellowjacket Creek. Under this program, the Applicant has committed to future actions to promote the conservation and recovery of endangered CCC coho salmon and threatened CCC steelhead. As discussed in sections 4.1 and 4.2 above, the Board finds that if applications A033106 and A033107 are conditioned with timelines to demonstrate consistency with the SHA and compliance with the Policy's onstream dam mitigation requirements, granting the exception request and accepting these applications will not compromise the maintenance of instream flows and will serve the public interest.

The Applicant's onstream dams are currently in place and the associated potential impacts described in section 4.1 of this order may be ongoing. Given the risk of harm in a sensitive area, the Board finds it is appropriate to impose requirements for timely

¹⁶ An exception to a specific Policy provision does not constitute an exception to any other Policy provisions.

completion of the deliverables identified in the order section below. The Board considered the prioritization criteria for enforcement in chapter 8 and Appendix G of the Policy to assess the risk to instream flows in deciding to impose these timelines. Under those criteria, the onstream dams implicate potential violations within Class 1 and 2 streams and potential injury to endangered species (prioritization criteria 1 and 3 respectively). Therefore, imposing the timelines specified in the Order section below will ensure diligent pursuit of the deliverables described in section 4.1 and minimize harm to instream flows needed for fishery resources.

If the Applicant fails to comply with the conditions specified below within the required time periods, applications A033106 and A033107 are subject to cancellation.

ORDER

IT IS HEREBY ORDERED THAT:

The case-by-case exception request that would allow Barbara R. Banke to proceed with applications for permits is granted, and applications A033016 and A033107, as conditioned by the terms below, are accepted.

1. While applications A033106 and A033107 are being processed, the Applicant must notify the Division of any expiration, termination, modification, or extension of the July 1, 2019, SHA or any changes affecting the proposed permit terms and diversion criteria provided by CDFW and NMFS dated July 13, 2020, within 30 days of the occurrence and provide a corresponding statement addressing how the applications will not compromise maintenance of instream flows and will serve the public interest.
2. Within 30 days of the date of this order, and annually thereafter, the Applicant shall inform the Division of the status and proposed approach for compliance with section 10 of the Safe Harbor Agreement.

3. Any permits issued for applications A033106 and A033107 shall be consistent with the July 1, 2019, SHA and include the proposed permit terms and diversion criteria provided by CDFW and NMFS dated July 13, 2020, or more protective terms and conditions as determined by the Deputy Director for Water Rights.
4. The Applicant shall develop and implement mitigation plans for gravel and wood augmentation and riparian habitat replacement in accordance with Policy section 7.0 and Appendix D or submit detailed information showing plans are ecologically unnecessary. Within 60 days of the date of this order, Applicant shall submit a request to the Division for approval of qualified individual(s) to develop such plans, or detailed information showing plans are ecologically unnecessary. The Applicant shall submit any plans prepared by approved qualified individual(s) within 120 days of Division approval of qualified individual(s).
5. The Applicant shall develop and implement a mitigation plan for non-native species eradication in accordance with Policy section 7.0 and Appendix D. Within 60 days of the date of this order, the Applicant shall submit a request to the Division for approval of qualified individual(s) to develop the plan. The Applicant shall submit any plans prepared by approved qualified individual(s) within 120 days of Division approval of qualified individual(s).

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 3, 2026.

AYE: Chair E. Joaquin Esquivel
 Vice Chair Dorene D'Adamo
 Board Member Sean Maguire
 Board Member Laurel Firestone
 Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None

Courtney Tyler
Courtney Tyler
Clerk to the Board