STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0002-DWR

In the Matter of the Second Petition to Change the Effective Date of the
Long-Term Instream Flow Requirements
Established in Revised Water Right Decision 1644
(Permits 15026, 15027, and 15030; Applications 5632, 15204, and 15574)

YUBA COUNTY WATER AGENCY
Petitioner and Permittee

SOURCE: Yuba River tributary to Feather River

COUNTY: Yuba

ORDER CHANGING THE EFFECTIVE DATE OF LONG-TERM INSTREAM FLOW REQUIREMENTS

BY THE CHIEF, DIVISION OF WATER RIGHTS:[1]

1.0 INTRODUCTION

The State Water Resources Control Board (State Water Board or Board) adopted Revised Water Right Decision 1644 (RD-1644) on July 16, 2003, to address fishery protection and water right issues involving the diversion and use of water from the Yuba River. The decision established instream flow requirements for protection of fish in the lower Yuba River between Englebright Dam and Marysville as conditions of water right permits for consumptive use held by Yuba County Water Agency (YCWA).[2] The long-term flow requirements established in RD-1644 were scheduled to come into effect on April 21, 2006. Until that date, RD-1644 required YCWA to maintain instream flows in the lower Yuba River that are equal to or greater than specified interim flow requirements. The interim and long-term flow requirements established in RD-1644 vary depending upon the time of year and the hydrologic conditions in a particular year, but the long-term flow requirements that were scheduled to come into effect on

[1] The State Water Board has delegated to the Chief, Division of Water Rights, the authority to act on change petitions where no hearing is held. (Board Resolution No. 2002—0106, attachment, §§ 2.6.5, 2.6.11.)

[2] Water Right Permits 15026, 15027, and 15030 (Applications 5632, 15204, and 15574).

April 21, 2006, are higher than the interim requirements during parts of some years. (RD-1644, pp. 173-178.)

On November 18, 2005, YCWA filed its first petition to change the effective date of the long-term flow requirements established in RD-1644 to March 1, 2007, and to allow YCWA to continue operating subject to the interim flow requirements until that date. The petition was filed to facilitate YCWA's implementation of a Pilot Transfer Program in 2006 (2006 Pilot Program). Following notice to the public and interested parties, the State Water Board held a hearing on YCWA's petition on January 10, 2006. On April 5, 2006, the State Water Board adopted Order WR 2006-0009, which delayed the effective date of the long-term flow requirements established in RD-1644 until March 1, 2007.

On August 23, 2006, YCWA filed a second petition to change the effective date of the long-term instream flow requirements specified in RD-1644 from March 1, 2007 to April 1, 2008, and to allow YCWA to continue operating subject to the interim flow requirements until that date.[3] The petition was filed to facilitate YCWA's implementation of a 2007 Pilot Program that is similar to the 2006 Pilot Program previously approved in Order WR 2006-0009. No protests were filed against the petition following notice to the public and interested parties. Based on the information in the record, this order concludes that it is appropriate to change the effective date of the long-term flow requirements to April 1, 2008, subject to the provisions of this order.

2.0 BACKGROUND

The Yuba River is the fourth largest river in the Sacramento River Basin. The river provides water for agriculture, domestic use, hydroelectric power generation, and recreation, in addition to supporting numerous species of fish including salmon, steelhead and American shad. YCWA diverts water from the Yuba River for consumptive uses under Water Right Permits 15026, 15027, and 15030. The permits authorize diversion of water to storage at New Bullards Bar Reservoir and direct diversion of water for consumptive use at downstream locations.[4] Water diverted under YCWA's water right permits is delivered to Browns Valley Water District, Cordua Irrigation District, Hallwood Irrigation Company, Ramirez Water District, Brophy Water District,

[3] YCWA's Petition for Modification of Water Right Permits was filed pursuant to California Code of Regulations, title 23, § 791(e).

[4] In addition to providing water for consumptive use, water released from New Bullards Bar Reservoir is used for power generation at the Colgate Powerhouse and at the Narrows 1 and Narrows 2 Powerhouses below Englebright Reservoir.

South Yuba Water District, and Dry Creek Mutual Water Company. Beginning in 1987, water appropriated under YCWA's permits has also been transferred to other water users in a series of temporary water transfers that were approved pursuant to provisions of Water Code section 1725 et seq. (RD-1644, pp. 20 and 21.) Over the last 20 years, the State Water Board has addressed numerous issues regarding water use and fishery protection in the lower Yuba River, a 24-mile section of the river between Englebright Dam and the confluence of the Yuba River with the Feather River south of Marysville. (See, e.g., RD-1644, pp. 1-7; Order WR 2003-0016.)

2.1 Instream Flow Requirements Established in RD-1644

The minimum instream flow requirements adopted in RD-1644 were originally established in Decision 1644, adopted on March 1, 2001. The requirements were re-adopted in RD-1644 following the State Water Board's consideration of additional evidence pursuant to the direction of the Yuba County Superior Court. (Order WR 2003-0016.) RD-1644 specifies two sets of instream flow requirements applicable to YCWA's consumptive use permits: (1) interim flow requirements that have been in effect since the original adoption of Decision 1644 in 2001 and which were scheduled to remain in effect until April 21, 2006; and (2) long-term flow requirements which were scheduled to come into effect on April 21, 2006.

The long-term flow requirements were established based on the State Water Board's determination of the minimum average daily streamflows that should be provided for protection of fish in the lower Yuba River. (RD-1644, pp. 75-78 and 173-175.) When the State Water Board adopted Decision 1644 in 2001, however, California was experiencing electrical power supply shortages, and the Board was concerned about providing YCWA operational flexibility with regard to generation of hydroelectric power. Therefore, the State Water Board determined that it was appropriate to establish interim flow requirements and defer imposition of the long-term minimum flow requirements until April 21, 2006. (RD-1644, pp. 34; 125-127; and 175-178.)[5]

Due to the relative abundance of water in the Yuba River in wet and above normal years, the interim and long-term flow requirements for wet and above normal water year types are

[5] The interim flow requirements are very similar to flows that were specified in a YCWA instream flow proposal that was submitted at the 2000 evidentiary hearing. (RD-1644, p. 127.)

identical.[6] In below normal years, the interim and long-term flow requirements are extremely similar; and in dry, critical and extreme critical years, the differences between the interim and long-term flow requirements are more substantial. (RD-1644, pp. 173-178.) The interim flow requirements specified in RD-1644 have been in effect since 2001. RD-1644 expressly recognizes that the instream flow provisions and other requirements established in the decision are subject to the continuing authority of the State Water Board and may be modified based on changed circumstances. (RD-1644, pp. 29-35; 172-173.)

Following adoption of RD-1644, YCWA, several other water purveyors in Yuba County, and several environmental groups filed petitions challenging the decision in Yuba County Superior Court. Among other contentions in the litigation, YCWA and the other water purveyors argue that some of the flow requirements specified in RD-1644 are unsupported and excessive, while the environmental groups contend that the decision provides insufficient protection for fish. The lawsuits have been consolidated and assigned to the San Joaquin County Superior Court, but the litigation is still in a preliminary stage, and no action has been taken with respect to substantive issues.

2.2 Proposed Yuba River Accord, 2006 Pilot Program, and 2007 Pilot Program

With the exception of the State Water Board, the parties to the consolidated litigation over RD-1644 have been involved in extended settlement negotiations to attempt to develop a comprehensive proposal that would meet the litigants' competing needs regarding use of water from the Yuba River.[7] On April 21, 2005, YCWA, several Yuba River water purveyors, the Department of Water Resources (DWR), the U.S. Bureau of Reclamation (USBR), the California Department of Fish and Game (DFG), and several environmental organizations approved principles of agreement for a proposed settlement regarding instream flow requirements and other issues related to diversion and use of water from the lower Yuba River.

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[6] The interim and long-term flow requirements both vary depending on the water year classification of a particular year. Both sets of requirements specify minimum flows to be provided in wet, above normal, below normal, dry, and critical water years, as determined using the Yuba River Index described in Appendix I of RD-1644. In addition, the long-term flow requirements include separate flow requirements for years that are classified as "extreme critical."

[7] State Water Board staff has discussed the procedural requirements that would have to be followed to implement various aspects of the settlement proposal, but was not involved in the negotiations among the parties regarding development of specific settlement proposals.

The proposed Lower Yuba River Accord (Yuba Accord) includes three separate but related agreements: (1) a Fisheries Agreement,[8] (2) a Water Purchase Agreement,[9] and (3) a Conjunctive Use Agreement.[10] The Yuba Accord is intended to form a framework to resolve the lengthy conflicts over minimum instream flows in the lower Yuba River, and it proposes to modify the instream flow requirements established by RD-1644. In addition to complying with modified instream flow requirements that would apply as conditions of YCWA's water right permits, the Yuba Accord also proposes that YCWA provide additional water to meet instream needs pursuant to the terms of a Fisheries Agreement negotiated among YCWA, state and federal fishery agencies, and specified environmental groups.

YCWA and the USBR are serving as lead agencies for preparation of a joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on the proposed Yuba Accord pursuant to requirements of the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). In addition to the present petition, YCWA intends to file additional petitions with the State Water Board to revise the instream flow requirements established in RD-1644 and approve other changes to YCWA's water right permits that would be necessary to implement the agreements composing the Yuba Accord. The State Water Board will not act upon those petitions until completion of the EIR/EIS, which is not expected until late summer 2007.

In addition to requesting amendment of the long-term flow requirements and approval of a long-term transfer of water envisioned in the Yuba Accord, YCWA requested State Water Board authorization to implement the 2006 Pilot Transfer Program. The 2006 Pilot Program called for providing the flow levels specified in the proposed Yuba Accord and proposed a temporary water transfer to DWR for use in the CALFED Environmental Water Account and for possible use in DWR's 2006 Dry-Year Water Purchase Program.[11]

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[8] The Fisheries Agreement for the proposed Yuba Accord would be signed by YCWA, DFG, Friends of the River, the South Yuba River Citizens League, the Bay Institute, and Trout Unlimited. The National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (USFWS) will not be signatories but have signed a statement of support for the Fisheries Agreement.

[9] The Water Purchase Agreement for the proposed Yuba Accord would be signed by DWR, YCWA, and the USBR.

[10] The Conjunctive Use Agreement for the proposed Yuba Accord would be signed by YCWA and most of the water districts and water companies that receive water supplied by YCWA. Cordua Irrigation District does not presently support the Yuba Accord.

[11] On November 16, 2005, YCWA filed a separate petition for a temporary transfer of water under Water Code §§ 1725-1732. The petition requested State Water Board approval of a 2006 water transfer to DWR for use in the CALFED Environmental Water Account and for possible use in DWR's 2006 Dry-Year Water Purchase Program. On April 10, 2006, the Chief of the Division of Water Rights issued an order approving a temporary transfer of water from YCWA to DWR for use in the Environmental Water Account (Order WR 2006-0010-DWR).

The stated goals for the 2006 Pilot Program included the following:

- To implement the Yuba Accord flow schedules from March 1, 2006, through February 28, 2007.
- To make a temporary water transfer in 2006 to produce revenue to help pay for the Yuba Accord EIR/EIS and fisheries studies.
- To begin evaluation of the Yuba Accord flows and provide funding for a River Management Fund (RMF).
- To begin the evaluation of accounting rules developed for the Yuba Accord Water Purchase Agreement.
- To commence a River Management Team (RMT) process, a collaborative body made up of signatories to the Yuba Accord.

On April 5, 2006, the State Water Board adopted Order WR 2006-0009 that changed the effective date of the long-term instream flow requirements specified on pages 173 to 175 of RD-1644 to March 1, 2007. Order WR 2006-0009 also directed that the interim instream flow requirements specified on pages 176 to 178 of RD-1644 shall apply from the date of adoption of the order until March 1, 2007.

Information submitted by YCWA in support of its current petition indicates that the 2006 Pilot Program and the extension of RD-1644 interim flow requirements pursuant to Order WR 2006-0009 allowed YCWA to continue testing various aspects of the proposed Yuba Accord agreements while providing sufficient assurances to YCWA that it would be able to meet water demands in Yuba County. However, due to very wet conditions that resulted in large amounts of inflow to the Sacramento-San Joaquin Delta for the entire potential transfer period, no water was actually transferred from YCWA to other water users pursuant to temporary transfer agreements in 2006. Information submitted by YCWA states that the following aspects of the 2006 Pilot program were implemented: [12]

- YCWA received an up-front payment for the 2006 Pilot Program from the CALFED Environmental Water Account.

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[12] November 12, 2006, written testimony of Thomas R. Johnson and Paul Bratovich.

- YCWA provided funding for the River Management Fund (RMF) for 2006.
- YCWA and CDFG made substantial in-kind contributions to the RMF for 2006 in accordance with the provisions of the 2006 Pilot Program.
- Biologists and operators on the River Management Team (RMT) met regularly to discuss and provide input regarding lower Yuba River operations.
- Water temperature monitoring, spawning escapement, egg retention and upstream migration studies were conducted in 2006, and similar studies are planned for 2007.
- The RMT developed a framework for a long-term monitoring and evaluation program.

The 2007 Pilot Program proposed by YCWA is similar to the 2006 Pilot Program. The 2007 Pilot Program calls for providing the flows specified in the proposed Yuba Accord from March 1, 2007 to April 1, 2008, and proposes a temporary water transfer to DWR for use in the CALFED Environmental Water Account and possible use in DWR's 2007 Dry-Year Water Purchase Program.[13] Information provided by YCWA indicates that the 2007 Pilot Program will continue to allow testing key elements of the proposed Yuba Accord, including the flow schedules, water transfer accounting rules, compliance provisions, and planning for detailed monitoring studies to evaluate the proposed Yuba Accord flows. YCWA contends that the 2007 Pilot Program will maintain the momentum of the Yuba Accord settlement proposal, by promoting cooperation among parties to the Yuba Accord concerning management of the Lower Yuba River resources.[14]

3.0 SUBSTANCE OF PETITION

YCWA's current petition to change the effective date of RD-1644 long-term requirements from March 1, 2007 to April 1, 2008, states that the change is required in order to accomplish a proposed temporary water transfer in 2007. The petition also states that, without the change in the effective date of the long-term flow requirements, the carryover storage in New Bullards Bar Reservoir after September 30, 2007, and after the implementation of the proposed temporary

[13] On August 23, 2006, YCWA filed a separate petition for a temporary transfer of water under Water Code §§ 1725-1732. The petition requests State Water Board approval of a 2007 water transfer to DWR for use in the CALFED Environmental Water Account and for possible use in DWR's 2007 Dry-Year Water Purchase Program.

[14] November 12, 2006, written testimony of Thomas R. Johnson.

transfer of water, would be up to 70,000 acre-feet lower than it would be with the change. The petition states that reduced carryover storage would increase the severity of deficiencies in the amount of water available for delivery to local water users in 2008, if 2008 is a dry year.

Information submitted by YCWA indicates that, if the petition to change the effective date of RD-1644's long-term flow requirements is approved, YCWA proposes to operate its facilities to comply with the interim flow requirements currently in effect. In addition, YCWA proposes to provide the minimum instream flows that are specified in Exhibits 1 through 5 of the proposed Fisheries Agreement for the 2007 Lower Yuba River Pilot Program.[15] YCWA's petition states that its proposed instream flows will provide a level of protection for fish, wildlife, and other instream beneficial uses that will be equivalent to or better than the protection that would be provided by the long-term instream flow requirements in RD-1644.

YCWA filed its petition pursuant to California Code of Regulations, title 23, section 791(e), which applies to petitions for changes in water right permits and licenses that do not involve a change in the point of diversion, purpose of use, or place of use of appropriated water. The State Water Board has broad authority over the administration of previously issued water rights, including authority to control and condition water use to protect the public interest and to ensure utilization of water consistent with the public interest and protection of the environment. (*Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, et al.* (1980) 26 Cal.3d 183, 198 [161 Cal.Rptr. 466].) Review of the present petition involves consideration of: (1) the relationship between the requested change and current year hydrology; (2) possible effects of the requested change on fish, wildlife, and other beneficial uses of water; and (3) the relationship between the requested change and the public interest.

4.0 PUBLIC NOTICE AND COMMENTS ON THE PROPOSED CHANGE PETITION

On September 22, 2006, the State Water Board provided a combined public notice of YCWA's petition to change the effective date of the long-term instream flow requirements established in RD-1644 and a notice of public hearing on the petition. No protests against the proposed

[15] July 25, 2006, Fisheries Agreement for 2007 Lower Yuba River Pilot Program

change were submitted within the time deadline stated in the notice. The State Water Board received policy statements supporting YCWA's petition from the Metropolitan Water District of Southern California, Natural Heritage Institute, the California Department of Fish and Game, the California Department of Water Resources, NOAA-National Marine Fisheries Service, the Northern California Water Association, and the United States Bureau of Reclamation. Each of those parties requested that the State Water Board approve YCWA's petition for a change in the effective date of the long-term instream flow requirements established in RD-1644. In the absence of protests to the petition, a disputed issue of material fact, or other reason to proceed with the hearing, the State Water Board's hearing on the petition was cancelled.

5.0 RELATIONSHIP BETWEEN CHANGES REQUESTED BY PETITIONER AND CURRENT YEAR HYDROLOGY

Information provided by YCWA includes a hydrologic analysis of the Yuba River for water year 2007 through 2008 that evaluates the water supply impacts of operating YCWA facilities to meet different instream flow objectives in the lower Yuba River.[16] The hydrologic analysis compares the effects on the estimated amount of water available for consumptive use in Yuba County in 2007 under two scenarios. The first scenario assumes that YCWA would operate to meet the *interim* flow requirements established in RD-1644 plus provide the additional flows as specified in Exhibit 1 to the Pilot Program Fisheries Agreement. The second scenario assumes that YCWA would operate to meet the *long-term* flow requirements established in RD-1644 plus provide additional flows as specified in Exhibit 1 to the Pilot Program Fisheries Agreement.

The hydrologic analysis indicates that if YCWA were required to meet the RD-1644 long-term flows, in addition to providing the flows called for in the Pilot Program Fisheries Agreement, then the carryover storage in New Bullards Bar Reservoir on September 30, 2007 would be reduced by an average of 30,000 acre-feet if the 2007 water year were in the driest 20 percent of all years simulated. If the 2007 water year were in the driest 10 percent of all years simulated, YCWA's hydrologic analysis indicates that carryover storage would be reduced by between 40,000 and 70,000 acre-feet. If the 2007 water year were in the driest 20 percent of all water years simulated, YCWA's hydrologic analysis concludes that estimated reductions in carryover

[16] Hydrologic analysis by Steven Grinnell, P.E., of MWH Americas, Inc.

storage would result in shortages that could not be replaced through substitution of groundwater pumping by farmers in Yuba County.[17]

The YCWA hydrologic analysis submitted in support of the pending petition is consistent with the evidence presented during the hearing held on January 10, 2006, regarding the 2006 Pilot Program. Because RD-1644's interim flows and long-term flows are identical for wet and above normal years, and nearly identical for below normal years,[18] deferring the long-term flow requirements would not affect the amount of carry-over storage at the end of 2007 in wet, above normal, or below normal water years. YCWA would be able to meet its water supply obligations in those types of water years even if the long-term flow requirements remained in effect and if YCWA also provided the additional flows called for in the Yuba Accord. However, concern about YCWA's ability to meet water demands for consumptive use in 2008 following the possibility of a dry or critical water year in 2007 was one reason that YCWA submitted its petition requesting to defer the effective date of the long-term flow requirements until April 1, 2008.

YCWA's hydrologic analysis provides information regarding the probabilities of occurrence of various water year types (and associated instream flow schedules) under the proposed Yuba Accord based on the probabilities of different inflow volumes to New Bullards Bar Reservoir during the 2007 water year[19] using the Yuba Accord's North Yuba Index. Although the water year classification system specified in the Yuba Accord differs in some respects from the water year classification system adopted in RD-1644, YCWA's hydrologic analysis is helpful in evaluating the probability of different hydrologic conditions in the Yuba River Basin. Due to the large amount of water retained in storage at New Bullards Bar Reservoir following a wet year in 2006, the probability of conditions in which the drier year flow schedules from the Yuba Accord would apply in 2007 was estimated at only 8.9 percent.[20] Similarly, the probability that water year 2007 will be a wetter year subject to higher instream flow requirements was calculated to be 91.1 percent. [21]

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[17] Ibid. pp. 1-2.
[18] During the 10-day period of April 21-April 30, RD-1644 long-term flows and interim flow requirements differ by 100 cubic feet per second in below normal water year types.
[19] The YCWA analysis utilized the North Yuba Index specified in the proposed Yuba Accord. The North Yuba Index is similar but not identical to the Yuba River Index referred to in RD-1644.
[20] The drier year flow schedules referred to in the Yuba Accord are Flow Schedules 4, 5, 6 and the flow schedule for a conference year pursuant to the provisions of the Yuba Accord.
[21] Hydrologic analysis by Steven Grinnell, P.E., of MWH, pp. 7-8.

Testimony regarding equivalent probabilities of occurrence was provided during the 2006 Pilot Program hearing held on January 10, 2006. Based on the hydrologic conditions at the time of the hearing, and applying the Yuba River Index (YRI) as established in RD-1644, YCWA's witnesses made the preliminary estimate that there was a 92 percent probability that water year 2006 would be classified as either a wet, above normal or below normal water year. (Order WR 2006-0009, p 9.) Under the YRI, water year 2006 was ultimately classified as a wet water year.[22]

Due to the probable hydrologic conditions in the Yuba Basin for water year 2007, and the fact that the interim and long-term flow requirements are identical or nearly identical for wet, above normal, or below normal years, the record supports the preliminary conclusion that there is less than a 10 percent probability that continuing the interim flow requirements until April 1, 2008, will result in a significant change in the amount of water that would otherwise have to be released to meet minimum flow requirements in the lower Yuba River, or in the amount of water held in carryover storage for subsequent use by YCWA. The actual flows in the lower Yuba River will depend on numerous factors including water releases to meet consumptive use demands, water releases for hydroelectric power generation, and possible water releases called for in the 2007 Pilot Program.

6.0 EFFECT OF REQUESTED CHANGE ON FISH, WILDLIFE AND OTHER BENEFICIAL USES OF WATER

As discussed in section 5.0 above, the interim flow requirements in RD-1644 for wet and above normal years are identical to the long-term requirements, and the interim requirements for below normal years are very similar to the long-term requirements. The interim and long-term requirements are substantially different only for dry, critical, or extreme critical years, and there is very high probability that water year 2007 will not be classified as a dry, critical, or extreme critical year. Therefore, there is a high probability that extension of the interim flow requirements established in RD-1644 until April 1, 2008, will not have any effect on the minimum instream flows that YCWA will be required to maintain pursuant to the conditions of its water right permits or on the carryover storage at New Bullards Bar. Extension of the interim flow requirements established in RD-1644 would have an actual effect on required minimum flows only in the

[22] Information from DWR's May 6, 2006, Bulletin 120 indicates that 2006 was a wet year under the Yuba River Index as established in RD-1644. (RD-1644, p. 174 and Appendix 1.) The State Water Board takes official notice of the information in the DWR report pursuant to Cal. Code Regs., tit 23. § 648.2. See http://cdec.water.ca.gov/snow/bulletin120/b120may06.pdf.

unlikely event that water year 2007 turns out to be a dry, critical or extreme critical year. In that event, extension of the interim flows until April 1, 2008, would allow YCWA to maintain minimum flows for much of the spring and summer of 2007 at a lower level than would be required under the long-term flow requirements that presently are scheduled to come into effect on March 1, 2007. (Order WR 2006-0009, p. 15.)

The long-term minimum flow requirements established in RD-1644 were based on the State Water Board's conclusions regarding the minimum flows needed to provide reasonable protection for fish in the lower Yuba River on a long-term basis, but the Board recognized that those flow requirements may be subject to change based on further evidence. (RD-1644, pp. 170, 172-173.) In developing flow proposals for the Yuba Accord, the parties to the fisheries agreement reexamined available information on Yuba River fishery conditions and other relevant factors.[23] The support of the Yuba Accord by environmental groups and State and federal agencies responsible for fish and wildlife protection provides a reasonable basis for the State Water Board to consider further review of instream flow requirements on the lower Yuba River following completion of the EIR/EIS for the proposed Yuba Accord. The EIR/EIS is expected to be complete in late 2007. An additional one-year extension of the interim flow requirements proposed by YCWA will allow the parties to the Yuba Accord to implement the 2007 Pilot Program, complete the EIR/EIS for the Yuba Accord, and determine if they believe the Accord provides a reasonable basis for amending the flow requirements established in RD-1644 and adopting a proposed settlement of the ongoing litigation over that decision.

Until completion of the Yuba Accord EIR/EIS, there is insufficient information in the record to conclude that the flows proposed in the Yuba Accord, if implemented on a long-term basis, would provide protection to fishery resources in the Yuba River that is equal to or better than the protection provided by the long-term flow requirements established in RD-1644.[24] In light of the information currently before the State Water Board, however, there is no basis to conclude that extension of the RD-1644 interim flow requirements until April 1, 2008, will have an

[23] November 12, 2006, written testimony of Thomas R. Johnson.

[24] Although the minimum flows proposed in the Yuba Accord are frequently higher than the minimum flows required under either the interim or long-term requirements established in RD-1644, in some cases the Yuba Accord flows are lower than either the interim or long-term requirements. The State Water Board's review of the flows proposed in the Yuba Accord will await completion of the EIR/EIS and other relevant evidence.

unreasonable impact on fish, wildlife, or other instream beneficial uses. The interim requirements have been in effect since 2001.[25] For the reasons explained above, the record establishes that it is very probable that deferring the long-term flow requirements to April 1, 2008, will have no effect on the minimum flow requirements in the lower Yuba River through April 1, 2008.

The petition to defer the long-term requirements was submitted in order to facilitate the 2007 Pilot Program for the Yuba Accord. Among other things, the 2007 Pilot Program proposes a temporary transfer of up to 125,000 acre-feet of water from YCWA to DWR for use primarily by the Environmental Water Account (EWA).[26] DWR expects that the transfer will provide additional information regarding potential effects of future transfers under the proposed Yuba Accord. Under the 2007 Water Purchase Agreement and in furtherance of the 2007 Pilot program, DWR will purchase water for the EWA and, possibly, for the Dry Year Water Purchase Program, if needed.[27]

The proposed transfer is subject to State Water Board approval in a separate proceeding in which impacts on instream beneficial uses will be considered. YCWA submitted a separate petition for the proposed transfer on August 23, 2006, and the State Water Board issued public notice of the petition on September 22, 2006. The State Water Board has not yet acted on the petition. Prior to any approval of a temporary transfer, the State Water Board must find that the proposed transfer will not unreasonably affect fish, wildlife, or other instream beneficial uses. (Wat. Code, § 1725 et. seq.) In addition, recent past water transfers from YCWA to DWR have been subject to the conditions in DWR's and USBR's water right permits requiring DWR and

[25] The actual flows in the river have frequently substantially exceeded the minimum instream flow requirements in RD-1644

[26] The EWA is a program administered by DWR and USBR that is intended to mitigate water supply impacts to State Water Project and Central Valley Project contractors from reductions in exports that are made to protect fishery resources, primarily within the Sacramento-San Joaquin Delta area. DFG, USFWS, and NMFS are the agencies that collaborate to request export reductions. The recommended export reductions typically occur in the winter and spring, but may occur at any time. The fishery agencies have determined that the July through September period is the preferred time to export water. Water that is acquired for the EWA is used to provide make-up water for the curtailment of water exports due to fishery protection concerns and to allow for shifting water exports to other periods. (See Order WR 2006-0009, p. 11.)

[27] December 11, 2006, testimony of DWR engineer Teresa Geimer in support of YCWA petition. Ms. Geimer's testimony indicates that DWR does not expect that a dry year water purchase program will be needed in 2007 due to recent wet years.

USBR to maintain water quality conditions to protect beneficial uses of water in the Delta. (See Order WR 2006-0009, citing R.T. 141:15-142:1.)[28]

In summary, the record establishes that approval of the petition before the State Water Board will not have an unreasonable effect on fish, wildlife, instream uses of water or any other beneficial uses of water. The proposed temporary transfer of water from YCWA to DWR is subject to a separate review process, and potential effects of the proposed transfer will be addressed in that process pursuant to applicable statutory requirements. (Wat. Code, §§ 1725-1732.)

7.0 PUBLIC INTEREST CONSIDERATIONS

RD-1644 is the product of a lengthy hearing process, an extensive evidentiary record and legal briefing, and extensive deliberations by the State Water Board on the evidence and testimony of competing interests. In such situations, the Board ordinarily is not receptive to reopening adopted decisions absent a showing of good cause. In this case, however, RD-1644 is also the subject of complex litigation involving numerous parties. In the more than three years since adoption of RD-1644, most of the parties to that litigation have been involved in settlement negotiations directed at developing a proposal that they believe would provide protection of fishery resources equal to or better than the protections of RD-1644 and that would also better meet demand for water for consumptive use in Yuba County and elsewhere. Those negotiations have resulted in the proposed Yuba Accord that is presently supported by most parties on various sides of the litigation.

YCWA and the USBR are jointly preparing an EIR/EIS for the proposed Yuba River Accord. A public draft of the EIR/EIS is expected to be available in the spring of 2007, with a final document to be available in late summer of 2007. The State Water Board cannot consider revising the requirements of RD-1644 to implement the proposed Yuba Accord until the necessary environmental studies are complete. In the meantime, deferring the effective date of the long-term flow requirements until April 1, 2008, would allow for maintaining the status quo

[28] State Water Board Decision 1641 (D-1641) conditions water diversions by DWR and USBR upon compliance with specified requirements for protection of fish, wildlife, and other beneficial uses of water.

with respect to flow requirements for the Yuba River pending completion of the EIR/EIS and the Board's consideration of the Yuba Accord.

Due to the similarity between the long-term and interim flow requirements for wet, above normal and below normal water years, and the high probability that 2007 will not be classified as a dry, critical, or extreme critical year, approval of YCWA's petition to defer the long-term flow requirements is likely to have little or no effect on the minimum flows that YCWA is required to maintain in the Yuba River during 2007. Approval of the petition would serve the public interest by facilitating further work on the Yuba Accord settlement proposal and related environmental documents, and by helping to minimize litigation costs for the State Water Board and other parties pending the Board's consideration of the Yuba Accord.

8.0 CEQA COMPLIANCE

As lead agency under CEQA, YCWA prepared and submitted an Initial Study/Proposed Mitigated Negative Declaration for YCWA's petition to change the effective date of the long-term instream flow requirements in RD-1644.[29] On November 14, 2006, YCWA's Board of Directors adopted Resolution No. 2006-28, adopting a mitigated negative declaration and notice of exemption for the 2007 Pilot Program, including the petition to change the effective date of the RD-1644 long-term flow requirements. On November 14, 2006, YCWA filed a Notice of Determination pursuant to sections 21108 and 21152 of the Public Resources Code. As a responsible agency under CEQA, the State Water Board has considered the environmental effects of the project as determined by YCWA's initial study and negative declaration before reaching its own conclusions regarding the petition. (Cal. Code Regs., tit. 14, § 15096 (f).) The information in the record and the findings in this order establish that changing the effective date of the long-term flow requirements specified in RD-1644 to April 1, 2008, as directed in this order, will not result in a significant impact to the environment.

9.0 CONCLUSION

There is no information in the record that would lead to the conclusion that, maintaining the current interim flow requirements until April 1, 2008, would result in injury to any legal users of water. Based on the information in the record and the findings above, I conclude that deferral of

[29] October 2006, Initial Study/Proposed Mitigated Negative Declaration, prepared by HDR/SWRI.

the long-term flow requirements established in RD-1644 until April 1, 2008, will not have an unreasonable effect on fish and wildlife and will not adversely affect other uses or users of water. Deferring the effective date of the instream flow requirements will facilitate completion of the EIR/EIS on the proposed Yuba Accord, allow for the State Water Board's consideration of the Yuba Accord following completion of those studies, and reduce litigation over requirements in RD-1644 prior to the Board's consideration of the proposed Yuba Accord in the near future. It is in the public interest to change the effective date of the long-term flow requirements established in RD-1644 to April 1, 2008, as requested by the petition.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED THAT:

1. The effective date of the long-term instream flow requirements specified on pages 173 to 175 of Revised Water Right Decision 1644 (RD-1644) is changed to April 1, 2008.
2. The interim instream flow requirements specified on pages 176 to 178 of RD-1644 shall apply from the date of adoption of this order until April 1, 2008.
3. No other provisions of RD-1644 are changed by this order.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel

for *Victoria A. Whitney, Chief*
Division of Water Rights

Dated: FEB 0 1 2007