

DRAFT June 19, 2016

## REVISED MEMORANDUM

**TO:** ALECIA VAN ATTA, JOYCE AMBROSIUS, BILL STEVENS, AND JOEL CASAGRANDE, NATIONAL MARINE FISHERIES SERVICE (NMFS)

**FROM:** PAUL SCIUTO, MONTEREY REGIONAL WATER POLLUTION CONTROL AGENCY (MRWPCA), DAVID STOLDT, MONTEREY PENINSULA WATER MANAGEMENT DISTRICT (MPWMD) AND DAVID CHARDAVOYNE, MONTEREY COUNTY WATER RESOURCES AGENCY (MCWRA)

**SUBJECT:** PROPOSED PROTEST DISMISSAL TERMS - WATER RIGHTS APPLICATIONS 32263A, BLANCO DRAIN, AND 32263B, RECLAMATION DITCH, MONTEREY COUNTY

**DATE:** JUNE 19, 2016

**CC:** SHAUNNA JUAREZ, MCWRA; BILL KOCHER, MRWPCA; DAVE STOLDT, MPWMD; LARRY HAMPSON, MPWMD; MIKE MCCULLOUGH, MRWPCA; ALISON IMAMURA, DD&A; BRENT BUCHE, MCWRA; JULIE VANCE, CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE (CDFW); ANNEE FERRANTI, CDFW; ANNETTE TENNEBOE, CDFW

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This letter is in response to a request for a synopsis of the Pure Water Monterey Project, issues of concern to National Marine Fisheries Service (NMFS), and a proposal of key protest dismissal terms regarding NMFS's protest of Monterey County Water Resources Agency's (MCWRA) Water Rights Applications #32263A (Blanco Drain), #32263B (Reclamation Ditch), and #32263C (Tembladero Slough).

The Pure Water Monterey Project provides safe, resilient, and sustainable replacement water for Monterey County that includes advanced water recycling technology, replenishment of regional groundwater basins to offset use of existing water supplies, and protection of the environment. The Pure Water Monterey Project will be the first of its kind to utilize not just municipal wastewater and stormwater, but also Clean Water Act Section 303(d) listed, impaired surface waters that flow to the Salinas River, Salinas River Lagoon, Reclamation Ditch, Tembladero Slough, and the Monterey Bay National Marine Sanctuary/Pacific Ocean. The proposed Blanco Drain and Reclamation Ditch diversions are key components of the Pure Water Monterey Project. The Blanco Drain and Reclamation Ditch diversions are estimated to provide about a third of the approximately 10,000 AFY of source water, including unused existing winter wastewater flow, needed as influent to the Regional Wastewater Treatment Plant to implement the Pure Water Monterey Project.

We understand NMFS is concerned that the proposed diversions from Blanco Drain, Reclamation Ditch, and Tembladero Slough, individually and in combination, would reduce the amount of water flowing into the lower Salinas Valley watershed area (specifically, the Salinas River Lagoon, the Tembladero Slough and the Old Salinas River Channel) possibly resulting in adverse effects on S-CCC Steelhead Distinct Population Segment (S-CCC steelhead). Key NMFS comments that the local agencies heard and hereby acknowledge include:

- Requests for adequate bypass flows in the Salinas River, Reclamation Ditch, and Tembladero Slough for fish passage.

- Requests for adequate flows, surface water elevations, and water quality in the Salinas Lagoon (between April 1 and October 31 of certain years), Reclamation Ditch, Tembladero Slough, and Old Salinas River Channel, for fisheries, including ensuring adequate water for any potential future restoration or habitat enhancement in these areas.

The Pure Water Monterey Project team consisting of MRWPCA, MPWMD, MCWRA, and their consultants (Hagar Environmental Services, HDR, Schaaf and Wheeler Consulting Hydrologists and Engineers, Denise Duffy and Associates) and others spent considerable time and resources analyzing the effects of reduced flow on S-CCC steelhead and associated habitat in these waterbodies. The extensive analysis concluded that the Blanco Drain, Reclamation Ditch, and Tembladero Slough diversions would not adversely impact S-CCC steelhead individuals or habitat with approved mitigation and there would be substantive water quality benefits by diverting and treating Blanco Drain and Reclamation Ditch flows. Water produced by Pure Water Monterey from these diversions would have greater benefits overall for public trust resources than the existing benefits provided by these waters to the downstream waters because of both the Carmel River and lower Salinas Valley watershed and groundwater benefits.

In light of the urgent need for protest resolution and NMFS's ongoing concerns, the MRWPCA, MCWRA, and MPWMD present the following offer for proposed terms to enable your protest dismissal on the Blanco Drain and Reclamation Ditch water rights applications. Please note that this offer of settlement is made in the context of seeking a global settlement that resolves the protests filed with the State Water Resources Control Board by NMFS and the California Department of Fish & Wildlife. If NMFS is willing to withdraw its protest on the terms outlined below, then MRWPCA, MCWRA, and MPWMD intend to offer the California Department of Fish & Wildlife (CDFW) identical terms as the basis for the withdrawal of CDFW's protest. Finally, this offer of settlement is conditioned on the issuance of Water Recycling Requirements (WRRs) by the Regional Water Quality Control Board, Central Coast Region (Regional Board) for all of the activities associated with the Pure Water Monterey Project and the associated water rights. MCWRA hereby offers the following terms and commitments in the event that NMFS and CDFW agree that SWRCB can dismiss the protests on Water Rights A32263A and A32263B:

1. MCWRA would commit to cease efforts to pursue the Tembladero Slough diversion (Water Right A32263C) for the Pure Water Monterey Project. MCWRA reserves the right to pursue Water Right A32263C, independently, *only* if all of the following circumstances occur: (1) a future, new project (i.e., not the Pure Water Monterey Project) is proposed by MCWRA that would divert and use the diversion, (2) the new project or projects are subject to a new California Environmental Quality Act process, and (3) the water rights application is amended, for example, through filing a petition to change the water right application, to be consistent with that future proposed project. The water right application will remain active with the State Water Control Resources Board, and NMFS protest of application A32663C would also remain active and be addressed when and if MCWRA proceeds with a new project.
2. This term would address recommendation #1 in NMFS protest letter on Water Right A32263A. Between April 1 and October 31 of years when the Salinas River Diversion Facility has not

operated due to dry or drought conditions, and when the Salinas River Lagoon is closed to the ocean, MCWRA shall:

- a. Monitor and report the average daily water levels in the Salinas River Lagoon and the operational characteristics of the slide gate between the lagoon and the Old Salinas River channel.
- b. Maintain lagoon water surface elevation and provide flows to the Old Salinas River channel by adhering to the following two conditions:
  - i. If the water level in the Salinas Lagoon drops below 3.0 feet NGVD 29 (or the then-current lagoon water surface elevation management requirement) for 7 consecutive days, then cause MRWPCA to limit Blanco Drain diversions to flows above 2.0 cfs (or to provide an alternative source of 2 cfs to the lagoon that does not currently exist, if not prohibited by other regulations) until the lagoon water surface elevation increases to a minimum of 3.2 feet NGVD 29 or until October 31 whichever occurs first.
  - ii. If the slide gate between the Salinas Lagoon and the Old Salinas River channel has been closed for more than 7 consecutive days, open the slide gate to provide 0.5 to 1.0 cfs of Salinas Lagoon flow into the Old Salinas River Channel and cause MRWPCA to limit Blanco Drain diversions to flows above 2.0 cfs (or to provide an alternative source of 2 cfs that does not currently exist, if not prohibited by other regulations) until the lagoon water surface elevation reaches 3.2 feet NGVD 29 or until October 31 whichever occurs first.

Regarding NMFS recommendations #2 on Water Right A32263A, the diversions would result in no adverse water quality impacts and would in fact result in substantive and quantifiable pollutant load reductions, as documented in previous correspondence. There is no nexus for requiring that the local agencies treat bypassed flows when the Pure Water Monterey Project is resulting in purely beneficial water quality effects.

3. In compliance with recommendation #3 on Water Right A32263A, MCWRA will cause MRWPCA to commit to monitoring water quality of diverted water as required by the SWRCB and RWQCB for construction activities and during operations.<sup>1</sup>
4. In compliance with NMFS' recommendations #4 and #5 on Water Right A32263A, MCWRA will cause MRWPCA to commit to including a flow meter and totalizer on the Blanco Drain diversion.

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<sup>1</sup> Water treatment measures would not be necessary because the proposed diversions (Water Rights A32263A and A32263B) would not result in any adverse water quality effects on the downstream water bodies during operation.

5. To comply with NMFS's recommendations #1 and #2 in their protest letter to Water Right A32263B, MCWRA will cause MRWPCA to commit to divert no more than 6 cfs under the Reclamation Ditch diversion water right and those diversions would be subject to the following minimum bypass flows (as measured at the USGS San Jon Road Gage and as available):
  - a. Bypass a minimum of 2.0 cfs, as available, from December 1 through May 31 (in-and out-migration period) except as allowed by item c, below.
  - b. Bypass a minimum of 1.0 cfs, as available, from June 1 through June 30 (transitional period)
  - c. Bypass a minimum of 0.7 cfs, as available, from July 1 through November 30 (non-migration period). Note: This bypass minimum applies through the end of February of the following year, if no storm event has occurred that results in a flow of 30 cfs or more at the San Jon Road gage (the flow required for adult steelhead to pass San Jon Road).

To ensure adequate flows for both adult upstream and smolt/kelt downstream migration in the Reclamation Ditch below Davis Road, the MCWRA will cause MRWPCA to commit to cease diverting when flows measured at San Jon Road gage are above 30 cfs (the most conservatively low passage threshold for the San Jon Road USGS gage weir). Diversion may resume when streamflow recedes below 20 cfs at the San Jon Road gage.

Operational decisions will be based on provisional mean daily and real-time USGS stream flow data. Such provisional USGS data used to make flow-related diversion decisions may not always coincide with final published USGS data.

6. In compliance with NMFS' recommendation #3 on Water Rights A32263B, MCWRA and MRWPCA would request technical assistance from NMFS' engineer staff on the design for the new diversion facility on the Reclamation Ditch.

In addition, NMFS has requested additional considerations for dismissal of the Blanco Drain Water Right that are outside the scope of the Pure Water Monterey Project and water right application (specifically, that MCWRA change their Salinas River Lagoon management protocol). As discussed in the memorandum from the Pure Water Monterey/MCWRA team to NMFS dated May 17, 2016, changes to lagoon management protocol such as increasing the water surface elevation is considered infeasible as part of the Pure Water Monterey Project.

Attachment 1 shows the flows proposed for diversion in the original Water Rights Applications for A32263A and A32263B compared to the diversions and resulting yields anticipated with these proposed terms. If the above terms, or other similar terms, are acceptable to NMFS, the project partners request that the federal agencies find that diversions for the Pure Water Monterey Project are not likely to adversely affect S-CCC steelhead per Section 7 of the Endangered Species Act. If the U.S. EPA determines and requests NMFS' concurrence on a finding that the Pure Water Monterey Project may affect, but is not likely to adversely affect, S-CCC steelhead, it is requested that NMFS commit to concur in a letter with the federal lead agency's determination within 30 days.

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Finally, as mentioned above, this offer of settlement has three conditions: (i) written acceptance by NMFS no later than June 20, 2016; (ii) written acceptance of this identical offer by CDFW by June 30, 2016; and (iii) written concurrence by the RWQCB no later than July 31, 2016, that it will provide documentation to satisfy Paragraph 16.15.3 of the November 3, 2015 Amended and Restated Water Recycling Agreement between MRWPCA and MCWRA. In the event that any one of those three events fails to occur in a timely manner, this offer shall have no binding effect on the Pure Water Monterey Project, MRWPCA, MCWRA, or MPWMD. Please also note that, in an effort to expedite reaching resolution on these very complicated matters, MCWRA has not yet presented this proposal either to the MCWRA Board of Directors or to the Board of Supervisors of the County of Monterey. MCWRA staff intends to present these terms for approval to their Board on June 27, 2016. Both governing boards will need to approve any final resolution of these matters and these offers are subject to such approval at an appropriate time.

Because further delays may harm the Pure Water Monterey Project's ability to timely meet Carmel River replacement water supply needs of the Monterey Peninsula related to the State Board Cease and Desist Order, we look forward to reaching a mutually agreeable resolution to the protest very quickly. As you know, the Pure Water Monterey Project is vital to the socioeconomic and environmental conditions of the region, and is universally supported by virtually all Monterey Peninsula cities, the Planning and Conservation League, the Surfrider Foundation, the Monterey Bay Aquarium, and local state and federal legislators. If you should have any questions or require additional information, please contact Shaunna Juarez at [juarezsl@co.monterey.ca.us](mailto:juarezsl@co.monterey.ca.us) or (831) 755-4865.