

YUBA
COUNTY



WATER
AGENCY

April 18, 2005

Mr. Ryan Broddrick
Director
Department of Fish and Game
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Re: South Yuba River Diversion and Fish Screen

Dear Mr. Broddrick:

This letter confirms and memorializes recent discussions between the Yuba County Water Agency ("Agency") and State Department of Fish and Game ("Department") (the "Parties") concerning the water diversion and fish screen located in Yuba County on the south bank of the Yuba River near Daguerre Point Dam.

Introduction

The Agency, in cooperation with Brophy Water District, South Yuba Water District, Dry Creek Mutual Water Company and Wheatland Water District (the "South Districts"), operates the fish screen and related diversion and canal to deliver surface water to south Yuba County. The current fish screen design was created pursuant to the *Agreement South Yuba Water District/Department of Fish and Game February 1984* dated March 9, 1984 between the Department and South Yuba Water District. Since then, the Department and National Marine Fisheries Service ("NOAA Fisheries") have raised concerns about the adequacy of the existing fish screen.

In a Biological Opinion dated March 27, 2002 ("Biological Opinion") from NOAA Fisheries to the U.S. Army Corps of Engineers ("Corps"), which owns the property where the diversion and screen are located, NOAA Fisheries issued an incidental take statement authorizing the taking of protected fish incidental to the ongoing operation of the fish screen, provided that the taking complies with the terms and conditions of the incidental take statement, including the following:

The Corps will implement interim as well as long-term improvements to the South Yuba-Brophy irrigation diversion to reduce impacts on that facility on juvenile salmonids.

A. The Corps or their licensee (*sic*) (South Yuba Water District) will implement interim actions to improve conditions for juvenile salmonids at the South Yuba-Brophy irrigation diversion by clearing debris from the feeder channel and eliminating the large pool directly in front of the diversion weir. These actions are expected to reduce the take of listed salmonids at the diversion by increasing the rate of flow through the feeder channel and reducing exposure time as fish are transported past the cobble weir. These actions are also expected to reduce the attractiveness of the area for predatory fish such as Sacramento pike-minnow.

B. If the final outcome of the ongoing fish passage improvement program at Daguerre Point Dam maintains the current point of diversion at the South Yuba-Brophy irrigation diversion, the Corps will coordinate with the Brophy Irrigation District, NMFS, DFG, and the FWS to develop and implement a plan to fully screen that diversion to meet all DFG and NMFS screening criteria.

In Revised Water Right Decision 1644 approved by the State Water Resources Control Board on July 16, 2003 ("RD-1644"), the following permit condition was imposed on the Agency:

Permittee, in conjunction with the water districts or other water users receiving water from the Hallwood-Cordua Canal (North Canal) and the South Yuba-Brophy Canal (South Canal), will consult with the Department of Fish and Game, the National Marine Fisheries Service, and the United States Fish and Wildlife Service to develop plans to reduce fish losses resulting from diversion of water into the canals. The plan will identify proposed sources of funding, including any money available under state or federal grants. Conditions of the plans will result in compliance with all applicable requirements of the state and federal endangered species acts. If the Department of Fish and Game or the National Marine Fisheries Service determines that a potential take of listed species will result from diversion of water into the canals, permittee will obtain appropriate authorization for incidental take. In order to continue diversion of water at the Hallwood-Cordua and South Yuba-Brophy canals, the plans to reduce fish losses and any required incidental take authorization will be provided to the Chief of the Division of Water Rights by March 31, 2002. The Chief of the Division of Water Rights will review the adequacy of the plans for protection of fish and the schedule for implementing the proposed actions. If the plans are not adequate, they will be revised in accordance with the direction of the Chief of the Division of Water Rights.

In light of the Biological Opinion and RD-1644, the Agency and Department acknowledge the need to undertake an alternative fish screen feasibility study and pursue the implementation of a new fish screen.

There have been various meetings and discussions about the fish screen among representatives of the Agency, Department, NOAA Fisheries, South Districts, and environmental organizations. In these discussions, the parties have outlined their respective key interests:

- The Department and NOAA Fisheries desire a fish screen that meets applicable state and federal fish screen criteria while also providing for reliable water diversions.
- The environmental organizations share this interest, while also desiring the certainty that a fish screen that meets criteria will be implemented in a reasonable time frame.
- The Agency and South Districts have the following interests:

- A fish screen that provides reliable long-term water diversions.
- A fish screen design approach that minimizes capital and operation and maintenance costs.
- A fish screen that minimizes risks due to flood damage and that minimizes flood damage repair/replacement costs.
- A fish screen that complies with requirements under the Biological Opinion, RD-1644, federal and state Endangered Species Act, and other applicable statutory, regulatory and permit requirements.
- A fish screen that provides the basis for a new, long-term incidental take permit under the federal Endangered Species Act.
- A fish screen improvement process that preserves, as applicable, rights and obligations under existing agreements, e.g., *Agreement South Yuba Water District/ Department of Fish and Game February 1984* dated March 9, 1984 between the Department and South Yuba Water District, and water service and facilities agreements between the Agency and South Districts.

In order to further these various interests, the Agency and Department agree upon the following course of action toward the development and implementation of a new fish screen that meets applicable state and federal fish screen criteria:

1. General

a. The following agencies and organizations will be invited to collaborate with the Parties in the entire fish screen improvement process, including fish screen feasibility study, design and construction, and including the opportunity to review and comment on the scope of work, feasibility study and fish screen improvement project environmental review documents: South Districts; NOAA Fisheries; U.S. Fish and Wildlife Service; and, any of the following organizations that approve and execute the Statement of Support for Proposed Lower Yuba River Fisheries Agreement (the "NGOs") -- The Bay Institute, Friends of the River, South Yuba River Citizens League, and Trout Unlimited. These public and private agencies shall be referred to collectively as the "Supporting Agencies". The fish screen improvement process will be a collaborative process using a fact- and science-based approach. The Parties acknowledge that nothing in this letter/agreement is intended, or shall be construed, to affect or limit the authority of the Department to fulfill its statutory or regulatory responsibilities under applicable law.

b. The Parties and Supporting Agencies will work diligently to obtain the necessary funding as described below. To the extent allowed by law, the Parties and Supporting Agencies will actively support funding requests with letters of support and other support as appropriate.

c. The Parties acknowledge that there is a pending joint Environmental Impact Statement/Environmental Impact Report to evaluate the Daguerre Point Dam Fish Passage Improvement Project. The principal purpose of the project is to improve upstream and downstream fish passage at Daguerre Point Dam. As one of the alternatives, the EIS/EIR is evaluating the removal of the existing Daguerre Point Dam, which would substantially impact the ongoing viability of the existing south Yuba River diversion at its current location. Consistent with the Biological Opinion, the Parties therefore prefer that any final decision made on the improvement of the fish screen be deferred until after there is a final outcome on the Daguerre Point Dam Fish Passage Improvement Project; provided, however, that this preference will not be grounds for delay in the timelines stated in paragraphs 4(d) and 5(d) of this letter/agreement. If there is no final outcome on the Daguerre Point Dam Fish Passage Improvement Project by the time that NOAA Fisheries issues a new biological opinion in place of the 2002 Biological Opinion that will expire in March 2007, then the Parties in consultation with the Supporting Agencies may make a final decision on how to proceed with the fish screen improvement, consistent with this letter/agreement.

d. The Parties acknowledge that the South Districts are independent local government agencies and a corporation separate and distinct from the Agency, and that the Agency does not represent and cannot contractually bind the South Districts or any of them. Consequently, nothing in this letter/agreement will be construed to effect, amend or alter any rights or obligations of the South Districts or any of them.

e. The Parties agree that this letter/agreement is made in part for the benefit of the NGOs (as defined above), and that when a NGO executes the Statement of Support for Proposed Lower Yuba River Fisheries Agreement, then that NGO will become a third party beneficiary of this letter/agreement and obtain the right to enforce this letter/agreement as a third party beneficiary pursuant to Civil Code section 1559. Prior to commencing any lawsuit as a third party beneficiary, any NGO that is such a third party beneficiary must provide at least 30-days prior written notice to the Parties with a description of the alleged breach or breaches of the letter/agreement and allow the alleged breaching Party at least 30 days to cure or correct the alleged breach or breaches. In order to retain status as a third party beneficiary after certification of the final Accord EIR/EIS, a NGO must execute the final Accord Fisheries Agreement.

f. The Parties agree that this letter/agreement has been arrived at through negotiation, and that each Party has had a full and fair opportunity to revise the terms of this letter/agreement. Consequently, the normal rule of construction that any ambiguities are to be resolved against the drafting party shall not apply in construing or interpreting this letter/agreement.

g. The Parties agree that the fish screen improvement plan and process set forth in this letter/agreement satisfy the plan requirements of section 8 of the Order in RD-1644.

2. Funding

a. The funding for the fish screen improvement work will be obtained from a variety of federal, state and local funding sources. The Agency will provide or arrange for the local share of the funding.

b. The Parties agree that the local share of the funding shall not exceed these limits:

- (1) Feasibility study—not to exceed the lesser of 25% of the total cost or \$150,000.
- (2) Design work—not to exceed the lesser of 25% of the total cost or \$250,000.
- (3) Construction—not to exceed the lesser of 10% or \$800,000.

c. The eligible costs of the fish screen improvement work for purposes of determining the amount of the local share expenditures will be determined as follows: If the work or portion of the work is being funded by a federal, state or other grant, then eligible costs shall be determined in accordance with the applicable grant agreement and grant rules. If there is no grant funding applicable, or no grant rules associated with the funding, then eligible costs shall mean the reasonable and necessary costs directly related to the feasibility study, design work and construction, including the engineering, preliminary and final design, environmental studies, permitting, construction, legal costs (limited to Agency's attorneys), and administrative costs (excluding overhead). If there is a lawsuit filed against the Agency challenging the Agency's approval of any portion of the work, then, prior to including legal defense costs as eligible costs, the Parties will meet and confer regarding the handling of the litigation and payment of litigation costs. The Agency will also comply with the local cost share rules applicable to the source of funding. The Agency agrees to keep and maintain accurate accounting and bookkeeping records relating to the local costs expended on the fish screen improvement work. The Department and its employees, accountants, attorneys and agents may review, inspect, copy, audit and challenge these records, including all source documents. The Agency annually shall prepare and submit to the Department an accounting showing the local costs expended on the fish screen improvement work.

3. Amendment of Biological Opinion

a. The current Biological Opinion requires the installation of interim improvements to the existing fish screen. In light of the Agency's commitment to a long-term solution pursuant to this letter/agreement, NOAA Fisheries has indicated that it will modify the Biological Opinion to delete the requirement for interim improvements in order for the costs of the design and installation of the interim improvements to be used toward the long-term solution. (See the letter from Rodney McInnis to Banky Curtis dated November 24, 2004.)

b. The Agency's obligations under this letter/agreement are contingent upon this amendment of the Biological Opinion by NOAA Fisheries. The Parties agree to jointly request NOAA Fisheries to amend the Biological Opinion. If NOAA Fisheries does not amend the Biological Opinion as provided above by May 2006, then the Agency may terminate this letter/agreement by providing written notice of termination to the Department.

4. Feasibility Study

a. The Parties, in consultation with the Supporting Agencies, will jointly develop and agree upon a scope of work for a fish screen alternatives and feasibility study. The scope of work will provide for the development and preparation of a study as described in subsection (b). Preparation of the scope of work will commence immediately after approval and execution of the Yuba River Accord Statement of Support for Proposed Lower Yuba River Fisheries Agreement by the Parties, and will be completed within 90 days thereafter; however, by mutual agreement of the Parties after consultation with the Supporting Agencies, the completion date may be extended.

b. The fish screen alternatives and feasibility study (the "Feasibility Study") will address the following components:

- (1) Satisfy applicable state and federal fish screen criteria.
- (2) Strive to further and satisfy the other key interests of the Parties and Supporting Agencies as outlined above.
- (3) Identify, study and evaluate a reasonable range of alternative fish screen designs and their relative feasibility, cost, location, effectiveness, flood damage risk and other relevant parameters.
- (4) Recognize and address the unique nature of the Yuba River, diversion site, and Yuba Goldfields, and flood-damage risks in developing alternative fish screen locations and designs.
- (5) Identify and compare the estimated operation and maintenance and flood-damage repair/replacement costs of the various alternatives.
- (6) Minimize the costs of studies, capital improvement, operation and maintenance, and flood-damage repair/replacement.
- (7) Strive to produce a design that will limit operation and maintenance costs to the fullest practicable extent.
- (8) Produce a design that will include flood risk damage avoidance as a primary screening element and substantially reduce and limit flood damage risk to the fullest practicable extent.

- (9) Maintain reliable water deliveries at the least possible cost to the South Districts and fulfill the contractual obligations of the Agency to the South Districts, including capacity needed to serve Wheatland Water District.
- (10) Identify potential funding sources to implement the fish screen improvement.
- (11) Coordination with the Federal Emergency Management Agency ("FEMA") and State Office of Emergency Services ("OES") in an effort to maximize the availability of federal and state emergency services funding in the event of flood damage.
- (12) Limit alternatives to an entirely gravity fed system.
- (13) Integrate modifications of the south Yuba River diversion as may be appropriate in light of the final decision on the Daguerre Point Dam Fish Passage Improvement Project.
- (14) Result in a study report adequate to proceed directly to design work (as described below).

b. The Agency will pay up to \$150,000 toward the cost of the Feasibility Study. The Parties and Supporting Agencies will diligently pursue funding for the non-local share of the costs of the Feasibility Study. If by May 2006, the Department and Agency are unable to obtain non-local funding to complete the Feasibility Study, then the Agency will fund the remaining Feasibility Study costs up to a total amount of \$300,000. In this event, the amount of the Agency's contribution toward the design work costs (below) shall be reduced by the amount of Feasibility Study funding provided by the Agency in excess of \$150,000.

c. The Agency will be the lead agency for the preparation of the Feasibility Study. After completion of the scope of work, the Agency, in coordination with the Department, will proceed expeditiously to retain an appropriate consultant to prepare the Feasibility Study and begin work on the Feasibility Study. The consultant will prepare the study in accordance with the approved scope of work. The Agency will complete the Feasibility Study by May 2006; however, by mutual agreement of the Parties after consultation with the Supporting Agencies, the completion date may be extended up to May 2007.

d. Upon completion of the Feasibility Study, if the final Feasibility Study does not determine the most appropriate, cost-effective and preferred fish screen design alternative, then the Parties and the Supporting Agencies shall meet and confer on how to identify and implement an alternative that reasonably meets the Parties' and the Supporting Agencies' respective interests, including the protection of species of concern and delivery of water through the South Canal in an efficient and cost-effective manner.

2. Design Work

a. The design work consists of (1) environmental review of the fish screen project in accordance with the National Environmental Policy Act and California Environmental Quality Act, (2) preparation of construction/bid-ready engineering plans and specifications, construction bid and contract documents, and engineer's estimate for the construction of the preferred fish screen alternative, (3) acquisition of necessary federal, state and local permits, licenses and entitlements for the construction of the project, including compliance with the federal and state Endangered Species Act, and (4) if applicable, acquisition of necessary lands and rights-of-way.

b. At the earliest practicable time, the Parties will diligently pursue funding for the design work, in coordination with and with the support of the Supporting Agencies.

c. The Agency will be the lead agency for the design work (except that a federal agency will need to be the lead agency on the NEPA work). After the Agency has completed the Feasibility Study and the Parties have obtained sufficient funding for the design work to begin, the Agency will retain appropriate engineers and consultants to perform the design work. The Agency's local share will be limited to 25% of the design work costs, with a cap of \$250,000, and less any Agency Feasibility Study expenses in excess of \$150,000. The Department and Supporting Agencies will use best efforts to secure the funding of the balance of the design work costs.

d. Subject to the timely acquisition of funding for the design work costs, the Agency will complete the design work (excluding the NEPA work) by February 2008; however, by mutual agreement of the Parties after consultation with the Supporting Agencies, the completion date may be extended.

3. Construction

a. The construction work consists of the construction and installation of the fish screen in accordance with the final design work plans, specifications and construction documents.

b. At the earliest practicable time, the Parties will diligently pursue funding for the construction work, in coordination with and with the support of the Supporting Agencies.

c. The Agency will be the lead agency for the construction work. After the Agency has completed the design work and the Parties have obtained funding for the construction work, the Agency will solicit bids for the construction of the work and proceed with construction. The Agency's local share will be limited to 10% of the construction work costs, with a cap of \$800,000. The Department and Supporting Agencies will use best efforts to secure the funding of the balance of the construction costs. Construction will commence no later than 18 months after completion of the design work, subject to the acquisition of funding for the construction work and necessary permits, licenses, entitlements, lands and rights-of-way, and paragraph (d) below. Subject to the acquisition of funding for the construction work and necessary permits, licenses, entitlements, lands and rights-of-way, and assuming no construction-

related or other delays beyond the reasonable control of the Agency, the Agency will complete construction within two years after commencement of work. By mutual agreement of the Parties after consultation with the Supporting Agencies, the completion dates in this subparagraph may be extended.

d. Commencement of construction and the Agency's local share of the construction funding is contingent upon the full and final implementation of the following steps of the Yuba River Accord process: certification of the final Yuba River Accord EIR/EIS; approval and execution of the local water districts memoranda of understanding by at least a majority of the local districts, long-term transfer agreement approved by the Department of Water Resources and U.S. Bureau of Reclamation, lower Yuba River fisheries agreement approved by the Department, and Accord-related agreement approved by Pacific Gas & Electric Co.; and, State Water Resources Control Board approval of the Agency petition to implement the Accord.

4. Operation and Maintenance

a. Following completion of construction, the Agency will operate and maintain the improved fish screen.

b. If the fish screen is damaged or destroyed by a flood, then (1) the Parties will cooperate on pursuing flood damage repair/replacement funds from FEMA, OES and other available sources, and (2) the Department will support, to the extent allowed by law, the Agency in requesting emergency incidental take authorization from NOAA Fisheries under the federal Endangered Species Act to allow the Agency to continue to divert water for use in south Yuba County pending the repair/replacement of the damaged fish screen.

5. Amendment and Termination

a. This letter/agreement may be modified or amended only by a subsequent written agreement approved and executed by the Parties after consultation with the Supporting Agencies.

b. This letter/agreement may be terminated by mutual written consent of the Parties after consultation with the Supporting Agencies.

Please indicate the Department's approval of the terms of this letter/agreement by signing where indicated below and returning a signed copy to me. Thank you for your cooperation in this matter. Please contact me if you have any questions.

Sincerely,



DON SCHRADER
Chairman

Mr. Ryan Broddrick
April 18, 2005
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The Department agrees to the terms of this letter/agreement.

Dated: April 18, 2005

California Department of Fish and Game

By: 
RYAN BRODDRICK
Director