

JESSE AVILA
DEPUTY COUNTY COUNSEL
MONTEREY COUNTY WATER RESOURCES AGENCY
168 WEST ALISAL STREET, 3RD FLOOR
SALINAS, CA 93901
TELEPHONE: (831) 755-5366
E-MAIL: avilajj@co.monterey.ca.us

Attorney for Monterey County Water Resources Agency

ROBERT WELLINGTON
AGENCY COUNSEL
WELLINGTON LAW OFFICE
857 CASS STREET, SUITE D
MONTEREY, CA 93940
TELEPHONE: (831) 373-8733
E-MAIL: rob@wellingtonlaw.com

Attorney for Monterey Regional Water Pollution Control Agency

DAVID C. LAREDO
DISTRICT COUNSEL
MONTEREY PENINSULA WATER MANAGEMENT DISTRICT
DE LAY & LAREDO
606 FOREST AVENUE
PACIFIC GROVE, CA 93950-4221
TELEPHONE: (831) 646-1502
E-MAIL: info@laredolaw.net

Attorney for Monterey Peninsula Water Management District

MARY C. LOUM, STATE BAR NO. 300542
STAFF COUNSEL
CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
1416 9TH STREET, 12TH FLOOR
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 651-2903
TELECOPIER: (916) 654-3805
E-MAIL: mary.loum@wildlife.ca.gov

Attorney for Protestant California Department of Fish and Wildlife

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

MONTEREY COUNTY WATER RESOURCES AGENCY (Applicant),
MONTEREY PENNINSULA WATER MANAGEMENT DISTRICT
MONTEREY REGIONAL WATER POLLUTION CONTROL AGENCY

CALIFORNIA DEPARTMENT OF FISH
AND WILDLIFE (Protestant),

The Monterey County Water Resources Agency (“MCWRA”), the Monterey Peninsula Water Management District (“MPWMD”), and the Monterey Regional Water Pollution Control Agency (“MRWPCA”) and the California Department of Fish and Wildlife (“CDFW”) agree as follows:

RECITALS

A. On May 19, 2014, the MCWRA filed Water Right Applications (“Applications”) 32263A, B, and C with the State Water Resources Control Board (SWRCB) to appropriate water from the Blanco Drain, Reclamation Ditch, and Tembladero Slough (respectively) for use in Monterey County as part of the Pure Water Monterey Project.

B. MPWMD and MRWPCA together form the Pure Water Monterey Project Team, working collaboratively with MCWRA per a separate agreement with respect to the water rights at issue here.

C. On April 22, 2015, the MRWPCA issued its Draft Environmental Impact Report (DEIR) (State Clearinghouse Number 2013051094) under the California Environmental Quality Act (“CEQA”) for the Pure Water Monterey Groundwater Replenishment Project (Pure Water Monterey Project) which included in the project description the diversions described in Applications 32263A, B, and C.

D. On June 5, 2015, CDFW submitted comments on this DEIR.

E. The Final Environmental Impact Report (FEIR) was certified on October 8, 2015.

F. On December 18, 2015, the SWRCB issued its public notice of Applications 32263A, B, and C. At the same time, the SWRCB posted these applications on its public website.

G. On January 28, 2016, MCWRA, MPWMD, MRWPCA, and CDFW conducted a site visit of the proposed diversions for Applications 32263A, B, and C.

H. On February 16, 2016, CDFW filed a protest with SWRCB for Applications 32263A, B, and C.

I. On February 19, 2016, the SWRCB advised the MCWRA that it had received protests filed by CDFW and the National Marine Fisheries Service (NMFS) for Applications 32263A, B, and C.

J. Between February 19, 2016 and June 18, 2016, MCWRA, MRWPCA, MPWMD, NMFS, and CDFW participated in numerous joint meetings and conference calls to resolve the protests.

K. During June 2016, staff of the MCWRA, MPWMD, and MRWPCA participated in a meeting with representatives of CDFW and NMFS to discuss actions needed for withdrawal of CDFW's and NMFS' protests of Applications 32263A, B, and C based on a draft Memorandum outlining protest dismissal terms dated June 3, 2016.

L. In the Feb. 16, 2016 protest, CDFW stated as one of the terms of protest dismissal that there must be "a plan to improve water quality of proposed bypass flows." All parties to this Settlement Agreement agree that is no longer a condition for protest dismissal.

M. The CDFW received the Revised Memorandum dated June 21, 2016, from MCWRA, MPWMD, and MRWPCA containing the proposed protest dismissal terms and conditions as discussed and agreed to by MPWMD, MRWPCA, CDFW, and NMFS at the meeting on June 9, 2016.

N. On June 28, 2016 the MCWRA Board of Supervisors approved the proposed protest dismissal terms and conditions of the June 20, 2016, Revised Memorandum. The Board of Directors of MCWRA approved the proposed protest dismissal terms and conditions on June 27, 2016.

O. On June 20, 2016, the Board of Directors for MPWMD approved the proposed protest dismissal terms and conditions of the June 20, 2016, Revised Memorandum.

P. On June 27, 2016 the Board of Directors for MRWPCA approved the proposed protest dismissal terms and conditions of the June 20, 2016, Revised Memorandum.

Q. MCWRA and CDFW now wish to resolve CDFW's protest to Applications 32263A and 32263B according to the terms of this agreement.

NOW, THEREFORE, in consideration of these recitals and the mutual promises stated herein, MCWRA, MPWMD, MRWPCA, and CDFW agree as follows:

1. The preceding recitals are true and correct and are incorporated herein by reference.
2. MCWRA will cease efforts to pursue the Tembladero Slough diversion (Water Right Application 32263C) for the Pure Water Monterey Project. MCWRA reserves the right to pursue Water Right A32263C, independently, only if all of the following circumstances occur:
 - (a) a future, new project (i.e., not the Pure Water Monterey Project) is proposed by MCWRA that would divert and use the diversion,
 - (b) the new project or projects are subject to a new California Environmental Quality Act process,
 - (c) 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 SWRCB, and both NMFS' and the CDFW's protest of Application 32663C would also remain active and be addressed when and if MCWRA proceeds with a new project.

3. MCWRA, MRWPCA, and MPWMD will abide by the following terms and commitments in regards to the Blanco Drain Diversion (Water Rights Application 32263A):

(a) Between April 1 and October 31 of years when the Salinas River Diversion Facility has not operated under the terms of Water Rights Permits 10137, 12261 and 21089; and when the Salinas River Lagoon is closed to the ocean, MCWRA shall:

i. Monitor and provide the SWRCB Division of Water Rights, CDFW, and NMFS monthly reports on 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.

Monthly reports shall include the following:

- Water elevation in the lagoon (daily mean, referenced to the National Geodetic Vertical Datum of 1929 (NGVD 29)).
- Dates of when the slide gate to the Old Salinas River (OSR) was closed versus opened.
- Size of slide opening (inches) and estimated flows released to OSR when flow is required (daily mean, cfs).

ii. Maintain lagoon water surface elevation and provide flows to the Old Salinas River channel by adhering to the following two conditions:

a. 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 seven (7) consecutive days, then cause MRWPCA to limit Blanco Drain diversions to flows above 2.0 cubic feet per second

(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.

- b. If the slide gate between the Salinas Lagoon and the Old Salinas River channel has been closed for more than seven (7) consecutive days, adjust the slide gate to allow 0.5 to 1.0 cfs of Salinas Lagoon water to 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.

- (b) MCWRA will cause MRWPCA to commit to monitoring water quality of diverted water as required by the SWRCB and Regional Water Quality Control Board for construction activities and during operations.

- (c) MCWRA will cause MRWPCA to commit to including a flow meter and totalizer on the Blanco Drain diversion.

4. MCWRA, MRWPCA, and MPWMD will abide by the following terms and commitments in regards to the Reclamation Ditch Diversion (Water Rights Application 32263B):

- (a) 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):

- i. 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 iii, below.
 - ii. Bypass a minimum of 1.0 cfs, as available, from June 1 through June 30 (transitional period).
 - iii. 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.
- (b) 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.
- (c) 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.
- (d) The Right Holder shall provide, on a quarterly basis, graphs comparing the daily mean diversion from Reclamation Ditch and the daily mean flow recorded at the San Jon gage downstream of the diversion.

- (e) MCWRA and MRWPCA would request technical assistance from NMFS' engineer staff and CDFW staff on the design for the new diversion facility on the Reclamation Ditch.

5. The parties will work with SWRCB to ensure that all of the permit terms stated in the attached Appendix A, or substantially similar terms, will be included in any permit issued on Application 32263A or Application 32263B. Should the permits issued on Application 32263A or Application 32263B contain substantially different terms, the parties will meet and confer on appropriate next steps, including but not limited to potential modifications to this agreement. Any modifications or amendments made to this agreement will only be valid with the written consent of all parties.

6. By executing this agreement, CDFW asks the SWRCB to include all of the permit terms that are stated in the attached Appendix A in any permit issued on Application 32263A or Application 32263B and to dismiss CDFW's protest to Application 32263A and 32263B.

Dated: ____, 2016

MONTEREY COUNTY WATER RESOURCES
AGENCY

By _____
David E. Chardavoyne, General Manager

Dated: ____, 2016

MONTEREY COUNTY WATER RESOURCES
AGENCY, approved as to form:

By _____
Jesse Avila, Deputy County Counsel

Dated: ____, 2016

MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT

By: _____
David Stoldt, General Manager

Dated: ____, 2016

MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT

By: _____
David C. Laredo, District Counsel

Dated: ____, 2016

MONTEREY REGIONAL WATER POLLUTION
CONTROL AGENCY

By: _____
Paul Sciuto, General Manager

Dated: ____, 2016

MONTEREY REGIONAL WATER POLLUTION
CONTROL AGENCY

By: _____
Robert Wellington, Agency Counsel

Dated: ____, 2016

CALIFORNIA DEPARTMENT OF FISH AND
WILDLIFE

By: _____
Julie Vance, Regional Manager
Central Region

Dated: ____, 2016

CALIFORNIA DEPARTMENT OF FISH AND
WILDLIFE

By: _____

Mary Loum,
Staff Counsel

DRAFT

APPENDIX A

Proposed Permit Terms

WRA 32263A – Blanco Drain Diversion

SWRCB Standard Permit Term 5G, modified for Blanco Drain Diversion:

- (a) Except as provided in (b) below, the water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed (a) by direct diversion: 6 cubic feet per second from January 1 to December 31 of each year for irrigation and municipal uses; and, (b) by storage: 3,000 acre-feet per year to be collected from January 1 to December 31 of each year for irrigation and municipal uses. The total amount of water to be taken from the source (direct diversion plus collection to storage) for all uses shall not exceed 3,000 acre-feet per year.
- (b) Between April 1 and October 31 of years when the Salinas River Diversion Facility has not operated under the terms of Water Rights Permits 10137, 12261 and 21089; and when the Salinas River Lagoon is closed to the ocean, the following special provisions related to quantity of appropriated water apply:
 - (1) 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 seven (7) consecutive days, the water appropriated shall be limited to the quantity which can be beneficially used in excess of 2.0 cubic feet per second until the lagoon water surface elevation increases to a minimum of 3.2 feet NGVD 29 or until October 31 of that calendar year, whichever occurs first. In the alternative, right holder can provide an alternative source of 2.0 cubic feet per second to the lagoon that does not currently exist, if not prohibited by other regulations.
 - (2) If the slide gate between the Salinas Lagoon and the Old Salinas River channel has been closed for more than seven (7) consecutive days, the water appropriated shall be limited to the quantity which can be beneficially used in excess of 2.0 cubic feet per second until the lagoon water surface elevation reaches 3.2 feet NGVD 29 or until October 31 of that calendar year, whichever occurs first. In the alternative, right holder can provide an alternative source of 2.0 cubic feet per second that does not currently exist, if not prohibited by other regulation.

SWRCB Standard Permit Term 24, modified for Blanco Drain Diversion:

Right holder shall comply with the following provisions which are derived from the agreement between right holder and CDFW dated XXXXX and filed with the SWRCB:

1. Between April 1 and October 31 of years when (1) the Salinas River Diversion Facility has not operated under terms of Water Rights Permits 10137, 12261 and 21089 ; (2) the Salinas River Lagoon is closed to the ocean; and (3) the slide gate between the Salinas Lagoon and the Old Salinas River channel has been closed for more than seven (7) consecutive days: right holder shall adjust the slide gate to allow 0.5 to 1.0 cubic feet per second of Salinas Lagoon water to flow into the Old Salinas River Channel.

Inclusion in this water right of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this water right.

SWRCB Standard Permit Term R, modified for Blanco Drain Diversion:

No water shall be directly diverted under this right unless right holder is monitoring and reporting said diversion of water. This monitoring shall be conducted using a flow meter and totalizer on the Blanco Drain diversion point. All devices shall be properly maintained.

Right holder shall provide the Division of Water Rights with evidence that the device(s) has/have been installed with the first annual report submitted after device installation. Right holder shall provide the Division of Water Rights with evidence that substantiates that the device(s) is/are functioning properly every five years after device installation as an enclosure to the current annual report or whenever requested by the Division of Water Rights.

Right holder shall maintain a record of all diversions under this right that includes the date, time, rate of diversion at time intervals of one hour or less, and the amount of water diverted. The records shall be submitted with the annual report or whenever requested by the Division of Water Rights.

Between April 1 and October 31 of years when the Salinas River Diversion Facility has not operated under the terms of Water Rights Permits 10137, 12261 and 21089; and when the Salinas River Lagoon is closed to the ocean, Right holder shall monitor and provide the SWRCB Division of Water Rights, CDFW, and NMFS monthly reports on 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.

Monthly reports shall include the following:

- Water elevation in the lagoon (daily mean, NGVD 29).
- Dates of when the slide gate to the Old Salinas River (OSR) was closed versus opened.

- Size of slide opening (inches) and estimated flows released to OSR when flow is required (daily mean, cfs).
- Bypass flows from the Blanco Drain at the point of diversion (those flows that are not diverted to treatment plant, daily mean, cfs).

SWRCB Standard Permit Term 103, modified for Blanco Drain Diversion:

No water shall be diverted under this right, and no construction related to such diversion shall commence, unless right holder complies with the requirements of the Clean Water Act. In order to demonstrate such compliance, right holder shall obtain a Clean Water Act section 404 permit from the U.S. Army Corps of Engineers, or evidence that such a permit is not required, and provide such permit or evidence to the Division of Water Rights. If it is determined that a Clean Water Act section 404 permit is required, right holder shall further demonstrate compliance by obtaining a Clean Water Act section 401 certification from the SWRCB. Additionally, Right Holder will monitor water quality of diverted waters as required by the SWRCB and the Regional Water Quality Control Board for construction activities and during operations.

WRA 32263B – Reclamation Ditch

SWRCB Standard Term 60, modified for Reclamation Ditch:

No water shall be diverted under this right unless the flow in the Reclamation Ditch meets the following conditions (as determined at the USGS San Jon Road Gage):

(a) Minimum Bypass Flow Requirements:

- (1) December 1 through May 31 (in- and out-migration period) – bypass minimum of 2.0 cubic feet per second as available, except as allowed by item 3 below.
- (2) June 1 through June 30 (transitional period) – bypass minimum of 1.0 cubic feet per second as available.
- (3) July 1 through November 30 (non-migration period) – bypass minimum of 0.7 cubic feet per second, as available. 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.

- (b) When flows measured at San Jon Road gage are above 30 cubic feet per second, right holder will cease diverting flows from Reclamation Ditch. Diversion may resume when streamflow recedes below 20 cubic feet per second.
- (c) 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.

- (d) The Right Holder shall provide, on a quarterly basis, graphs comparing the daily mean diversion from Reclamation Ditch and the daily mean flow recorded at the San Jon gage downstream of the diversion.

SWRCB Standard Permit Term 24, modified for Reclamation Ditch Diversion:

Right holder shall comply with the following provisions which are derived from the agreement between right holder and CDFW dated XXXX and filed with the SWRCB:

1. Right holder will request technical assistance from NMFS' engineer staff and consult with CDFW staff on the design for the new diversion facility on the Reclamation Ditch.

Inclusion in this water right of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this water right.

SWRCB Standard Permit Term 213, Special permit term regarding fish screen:

No water shall be diverted under this permit except through a fish screen on the intake to the diversion structure, satisfactory to meet the physical and operational specifications of the California Department of Fish and Wildlife, United States Fish and Wildlife Service, and National Marine Fisheries Service to protect species of fish listed as endangered or threatened species under the California Endangered Species Act (Fish and Game Code sections 2050 to 2098) or the federal Endangered Species Act (16 U.S.C. sections 1531 to 1544) that are in effect on [insert date of Agreement]. Construction, operation, and maintenance costs of the required facility are the responsibility of the Permittee.