

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
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PROTEST – (Applications and Petitions)

BASED ON ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS

APPLICATIONS: 1614, 2652B, 5193, 8180, 20017, 20072, 24983, 27132 and 27559

PERMITS: 1481, 11626, 13770, 5815, 13772, 13773, 16953, 18608 and 19158

APPLICATIONS: 1270, 1615, 6229 2372 for water rights licenses 12795, 8808, 8809 and 12798

We, Foothills Water Network, California Sportfishing Protection Alliance, Trout Unlimited, Save Sierra Salmon, South Yuba River Citizen’s League, Northern California Federation of Fly Fishers, Save Auburn Ravine Salmon and Steelhead, Ophir Property Owners Association, and Auburn Ravine Preservation Committee. Friends of the River, Sierra Club – Mother Lode Chapter, American Rivers, and American Whitewater, have read carefully a notice relative to a petition for an extension of time and change of **Nevada Irrigation District**, under Applications 1614, 2652B, 5193, 8180, 20017, 20072, 24983, 27132 and 27559 and for Permits 1481, 11626, 13770, 5815, 13772, 13773, 16953, 18608 and 19158, as well as applications 1270, 1615, 6229 2372 for water rights licenses 12795, 8808, 8809 and 12798 for water appropriations from Deer Creek, Bear River, Middle Yuba River, South Yuba River Systems.

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It is desired to protest against the approval thereof because to the best of our information and belief:

The proposed application/petition for water will:

- (1) not be within the State Water Resources Control Board's (SWRCB) jurisdiction
- (2) not best serve the public interest** **x**
- (3) be contrary to law** **x**
- (4) have an adverse environmental impact** **x**

State Facts, which support the foregoing allegations:

Petitioner is filing Petitions to its water rights for: (1) extensions of time to complete beneficial use, (2) changes in a point of diversion, points of rediversion, places of use, and purposes of use, and (3) redistribution of storage. Petitioner states that approval of the Petitions will provide Nevada Irrigation District (NID) with the authorization to operate its system consistent with historical practices. Petitioner states that approval of the Petitions will also (1) facilitate licensing of these Permits, (2) identify current facilities accurately, and (3) conform the places of use and purposes of use with NID's other water rights. Petitioner also asserts that there will be no change from the historical or current operations of NID as a result of these Petitions being approved by the Division, with the exception of the proposed addition of Combie North Powerhouse.

The undersigned parties protest NID's petition for changes for: (1) extensions of time to complete beneficial use, (2) changes in a point of diversion, points of rediversion, places of use, and purposes of use, and (3) redistribution of storage.

Granting NID's petition for a retroactive extension of time would result in more water being licensed under the permits than NID is entitled to. Furthermore, changes in point of diversion, rediversion, place of use, purpose of use, and redistribution of storage can all have negative environmental impacts.

Granting the petitions may allow NID to cause impacts that would not exist if the Board rejected the petitions. Therefore, the Board should require petitioner to prepare an environmental and Public Trust Resources Assessment to analyze those potential impacts. Accordingly, it is appropriate for the Board to establish conditions as necessary to protect natural resources on these petitions for change.

Description of Critical Habitat and Listed Species, Needs for Environmental Protection, and NID's Water Rights Connections

Threatened and Endangered Species Impacted by NID's Projects

According to NID's Pre-Application Document for the Yuba-Bear relicensing, the following threatened and endangered species occur or potentially occur in the vicinity of the Yuba-Bear hydropower project: California Red-legged frog, Bank swallow, Greater sandhill crane, Bald eagle, American peregrine falcon, Great gray owl, Willow flycatcher, Sierra Nevada red fox, California wolverine, Stebbins' morning glory, Pine Hill flannelbush, and Scadden Flat checkerbloom. In addition, the relicensing studies have recently discovered Foothill Yellow Legged Frogs below NID's Chicago Park Powerhouse in the Bear River.

The Western Placer Creek region hosts steelhead and fall-run Chinook.

The Lower Yuba hosts spring-run Chinook, steelhead, and green sturgeon.

Western Placer Creeks

According to the NMFS Draft Central Valley Recovery Plan¹, Auburn Ravine and Coon Creek are home to Listed Species: Central Valley Steelhead. In 2004, Chinook spawning was recorded below the Lower Falls on Coon Creek.

In its petition, NID does not adequately demonstrate how changes to its water rights would not violate California Water Law. Current conditions appear to violate Section 5937 of the Fish and Game Code. There are currently no requirements for NID to provide an ecologically appropriate flow regime in Auburn Ravine or Coon Creek. Under current terms, NID has no flow requirements below its dams, diversions, or inputs on these creeks and their tributaries, although NID uses Auburn Ravine, Coon Creek, and Coon Creek tributaries Orr Creek, Deadman's Creek, Doty Ravine and Sailor's Ravine for conveyance of water.

NID also lacks upstream fish passage (ladders or barrier removal) and downstream passage (screens) at its dams and diversions on Auburn Ravine (Hemphill Dam, Lincoln Gaging Station, and Gold Hill Dams) and Coon Creek (notably, the Camp Far West Diversion). This appears to violate Sections 5931 and 5901 of the Fish and Game Code.

Auburn Ravine and Coon Creek are part of a the Western Placer Creeks region, which consists of a network of creeks in the low Sierra Nevada Foothills south of the Bear River. Two of the main creek arteries include, from north to south, Coon Creek and Auburn Ravine. A number of other secondary tributaries such as Pleasant Grove, Doty Ravine, Sailor's Ravine, and Deadman's Creek also have potential salmon habitat and are used for conveyance by NID.

¹ NMFS Public Draft Recovery Plan. October 2009.

NMFS has identified critical habitat for Central Valley salmon steelhead on the four main creeks of the Western Placer Creek region. See the map below.



Notes on Map: Orange indicates the stream reach is designated as Critical Habitat for Central Valley Steelhead. Secret Ravine, Miner's Ravine, Auburn Ravine, and Doty Creek are CH for all or almost all of their length. Coon Creek is CH up to the confluence with an unnamed tributary.

The Western Placer Creeks are located in the Sierra Nevada foothills and run through agricultural lands, open space, and urban centers including Auburn, Lincoln, Roseville, and West Sacramento. The Western Placer Creeks function as a region because they are part of a canal-and-creek network used for water delivery conveyance and hydropower water outflows. The Creeks are also commonly characterized as critical habitat for Central Valley steelhead. The salmon and steelhead can only reach the creeks from the Sacramento River via Cross Canal to Main Canal to Coon Creek; Cross Canal to East Side Canal to Coon Creek and Auburn Ravine. Natomas East Main Drainage Canal to Dry Creek. The creek region, as a whole, currently provides diverse habitat for salmon and steelhead recovery in California's inland. The Western Placer Creek region offers potential to further diversify steelhead and salmon habitat, which has become severely disconnected in California.

The creeks all share an urbanized rainfall hydrology, which has changed the flows, temperature, and water quality of the creeks. The four main creeks, as well as many smaller tributaries, all receive additional water exported from the Yuba and Bear watersheds through the Pacific Gas & Electric (PG&E) Drum-Spaulding and NID Yuba-Bear hydropower system, as well as through NID and Placer County Water Agency's (PCWA) water supply systems.² In the absence of a flow – habitat analysis and development of a range of target flows and a water balance model, it is difficult to say with accuracy how any changes in NID's operations will affect the creeks' critical habitat.

Because the creeks receive augmented source water from the Yuba and Bear Rivers, their hydrology is affected by NID's water delivery operations on the Yuba, Bear, and Western Placer Creeks. The effects of NID's water

² The Yuba-Bear and Drum-Spaulding hydropower systems draw water from the Yuba, Bear, and North Fork American Rivers. Auburn Ravine also receives water from the North Fork American via the Auburn Tunnel.

imports to the creeks are profound in terms of flows, timing, and water quality (including turbidity, temperature, water chemistry, etc.). NID operations above Coon Creek and Auburn Ravine sometimes augment the creeks' flows but are not always benefiting the creeks' health. NID uses the creeks as conveyance canals, turning the water off and on according to water demand with little to no requirements for creek health, much less the anadromous fishery struggling to survive there.

PG&E and NID jointly manage and divert water from the Yuba and Bear Rivers. Generally, NID's project operations and facilities are inextricably interlinked with PG&E's project operations. Their operations and management alternatives are interdependent, and both projects affect the Lower Bear, Western Placer Creeks, Deer Creek, and South Yuba, both in terms of hydropower generation and water supply. Water from the system that is not otherwise consumed is ultimately discharged out of PG&E's most downstream facilities: Rock Creek Powerhouse on Rock Creek; Halsey Powerhouse on Dry Creek, tributaries to Coon Creek; and Wise Powerhouse on Auburn Ravine. Consequently, NID's hydropower operations in the upper Yuba and Bear greatly affect PG&E's hydropower operations at Wise, Halsey, and Rock Creek as well as NID's water supply availability for diversion from the Bear River. As a result, changes to NID's rights for powerhouses, incidental power, and rediversion can all have implications for the Western Placer Creeks, which receive the water at the end of the complex system through a variety of canals and for hydropower or water supply reasons, but not for environmental purposes.

Every fall, NID, along with PCWA and PG&E schedule a period of outage during which major sections of the canals are dewatered for maintenance. Subsequently, the creeks are de-watered also as they depend on Yuba and Bear imports to keep the base flows flowing. The outage at this time of year poses serious fish passage and stranding problems for anadromous fish as well as stresses coldwater fish and macroinvertebrates. In 2009, PG&E, PCWA, and NID provided flows through their outage period for the benefit of the fisheries; this could be extended to a long-term agreement for provision of flows during the outage period.

In order to show that its' requested changes will have no environmental impact, NID will need to empirically demonstrate that the requested changes to the rights will not negatively impact the Western Placer Creeks. Flow-habitat studies on Auburn Ravine, and Coon Creek should demonstrate current functionality of the river system under the impact of operations for NID's hydropower and water supply systems

Bear River

Threatened and Endangered Species found on the Bear River in reaches affected by NID's water rights petition include Central Valley Steelhead. NMFS has designated critical habitat for Central Valley Steelhead on the Bear River up to Camp Far West Reservoir, which is operated by South Sutter Water District (SSWD). NID sells water in wet water years to SSWD. Dry Creek, a tributary to the Bear River, supports steelhead and fall-run Chinook.

Dry Creek, a tributary of the lower Bear River, is a perennial creek rising west of Grass Valley and flowing through Spenceville Wildlife and Recreation Area and Beale Air Force Base (AFB). (Note: this is a distinct Dry Creek from the one referred to in the section on West Placer Creeks). Dry Creek and its blue oak watershed habitats support steelhead and fall-run Chinook salmon. NID provides summer flows of 5cfs via the Tarr Ditch to Dry Creek's headwaters, which are diverted from the Bear River.³ This augmentation of water also helps to support terrestrial values in the Wildlife Area, is the largest tract of blue oak woodland habitat in public ownership in the north/central Sierra foothills. There are at least 80 known nesting bird species in Spenceville

³ Terry Mayfield, Nevada Irrigation District Director interview with Allan Eberhart, Sierra Club and David Yargas, Environmental Defense 2/6/03

among the more than 175 species which inhabit the area at some point in their yearly cycle. Included in the bird population are nineteen Special Status Species, including the State Threatened and Federal Special Concern listed Black Rail.⁴ In addition to the above mentioned listed steelhead and fall-run salmon, the Area hosts Valley Elderberry Longhorn Beetle and “does have more herpetoids than most anywhere as well as lots of amphibians”.⁵

Coon Creek receives water as a result from NID’s Rollins Reservoir and Combie Reservoir on the Bear River. After releasing water from Rollins Reservoir on the Bear River, NID picks up that water at its Combie Reservoir and conveys it through Combie Ophir I, Combie Ophir II, and Combie Ophir III Canals. The Bear River downstream of Combie Dam is significantly de-watered by this transfer. There is no fish passage at Combie Dam. These conditions appear to be in violation of Sections 5937 and 5931 of the Fish and Game Code.

Yuba River

NID and PG&E divert substantial volumes of water out of the South and Middle Yuba watersheds into the Bear River. This annual decrease in the magnitude of water in the Yuba River constrains the availability of cold fresh water for instream environmental benefits. The Lower Yuba River below Englebright Reservoir supports spring-run and fall-run Chinook, steelhead, green sturgeon, and lamprey.

The National Marine Fisheries Service has found that the Middle and South Yuba Rivers are suitable for designation as “critical habitat” for endangered anadromous fish species, specifically Central Valley spring-run Chinook and Steelhead. NMFS deferred a final designation, pending outputs from a collaborative scientific process known as the Upper Yuba River Studies Program. In June 2007, the California Department of Water Resources issued a final report from the UYRSP entitled “Upper Yuba River Watershed Chinook Salmon and Steelhead Habitat Assessment.” This report concluded that “analyzed habitat and temperature conditions in the upper Yuba River watershed are capable of supporting anadromous salmonids.”

NID and PG&E’s combined out-of-basin diversions from the Middle and South Yuba diminish the average annual volume of runoff below Englebright by 21%.⁶ NID’s dams in the headwaters of the Middle and South Yuba drainages also affect the timing of runoff and its arrival in the Lower Yuba.

Without the help of water diverted and/or stored by NID upstream, YCWA may not be able to mitigate impacts on the reach of the Middle Yuba below Our House Diversion. At times, accretion alone may not sufficiently augment the minimum instream flow release from Milton Diversion to meet the required instream flow to meet aquatic needs, such as attraction flows and fish passage, downstream of Our House Diversion.

A return of all water that NID and PG&E presently diverted out of the Yuba basin would result on average in a 27% increase in flow in the Lower Yuba compared to today’s flows. Return of water to the Lower Yuba River that is currently diverted out of basin and used solely for electric power generation (not delivered for consumptive purposes) would result in about an 8% increase in flow in the lower Yuba compared to today’s flows. If NID is granted rights to legalize their practice of generating power off of water that only has rights for consumptive use or generation at certain Powerhouses, that will legalize and cement NID’s practice of diverting such significant flows from the Yuba watershed – with negative impacts to environmental and recreational benefits.

⁴ Friends of Spenceville Comments on the Yuba County Water Agency’s Phase II Report. 8/2/99.

⁵ John Nelson, CDFG interview with Allan Eberhart, Sierra Club and David Yargas, Environmental Defense, 12/17/02.

⁶ Figure derived from <http://ca.water.usgs.gov/archive/waterdata/99/index.html>,

Legal Basis for Protest

California Water Code

Section 1701.3 (b) (2) of the California Water Code states that the State Water Resources Control Board may request that a petitioner for a change of a permit provide additional information reasonably necessary to “demonstrate that the change will comply with any applicable requirements of the Fish and Game Code or the Federal Endangered Species Act of 1973.”

Section 1701.2 (3) of the California Water Code states that a petition for change in a permit or license must “include all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.”

Petitioner has failed to fulfill this requirement, contrary to applicable law.

California Water Code Section 730, “Adding Power Plants to Existing Works,” states:

(a) Persons having a permit or license for the use of water may petition the board to add power use to the permit or license as a beneficial use when the use of water for power can be accomplished with no change in the streamflow regime.

See Section 799 concerning petition for change to allow the addition of power plants to existing works.

(b) A new application must be filed when:

(1) Use of the water for power will change the stream flow regime; or

(2) The applicant does not have a permit, license or other legal right to the water to be appropriated;

(3) The applicant has a permit or license, but additional water will be used above the maximum amount of water allowed under the existing permit or license

California Water Code Section 799, “Petition for change to Add a Power Plant to Existing Works,” states:

(a) Persons having a permit or license for the use of water may petition the board to add generation of power to the permit or license as a beneficial use when the water can be used for generation of power without changing the streamflow regime. The criteria that shall be considered in determining whether there would be a change in the streamflow regime include, but are not limited to, the following: (1) Will the rate and volume of flow be changed? (2) Will the water temperature be changed? (3) Will there be changes in the concentration of dissolved oxygen or turbidity? (4) Will there be changes in the timing of water releases from any existing water diversion or storage facility? (5) Will there be a change in the point of discharge or will any additional section of watercourse be bypassed?

Petitioner must demonstrate whether its’ current operations and petition for changed operations is now and will be in compliance with California Water law, specifically with Sections 730 and 799.

Public Trust Doctrine

Petitioner must demonstrate whether it is now, and whether its petition for change will be in compliance with the Public Trust Doctrine.

Water Conservation

Petitioner should demonstrate that their petition for change is in compliance with SWRCB Order WR2000-10, which states:

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of Licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirement for the authorized project.

Other Sierra foothill water agencies, El Dorado Irrigation District and Placer County Water Agency, have taken measures to comply with this Board order. They have been acknowledged as complying members of the California Urban Water Conservation Council who meet the best management practices.

Protest Against NID's Petition to Change Water Rights

It is important to keep in mind that as NID admits in its petition, its current operations are out of compliance with its water rights. The operations that NID seeks to legalize are likely to have negative impacts to public trust resources over and above the impacts created by NID's legally authorized water rights. State water and fish and game law, including the public trust doctrine, require NID to analyze and disclose the potential impacts of its operations as they would be permitted with the petitions granted compared to the impacts of its operations if the permits were denied. Because of uncertainty about the CEQA baseline, in recent years the Board has addressed this type of impact in a public trust resources assessment or similar document.

One of the main thrusts of our protest is that the changes NID seeks would likely create natural resource harm beyond that which is currently permitted. NID is therefore required to conduct an appropriate assessment of those potential impacts, and the Board is required to consider those impacts when it acts on the petition.

What follows is not meant to be a definitive list of impacts or protest dismissal terms; neither list can be created until the public trust resources assessment is completed. Instead, it is meant to describe the impacts we believe are most likely and to initiate the discussion of appropriate dismissal terms.

NID's Claim of No Environmental Impacts

In its Cover Letter for Petition for Change of Licenses, NID writes,

4. Approval of any of the proposed changes do not have the potential to impair the water supply of other legal users of water, nor water available for a habitat, wildlife, or instream beneficial uses because:

- a. there will be no change to NID's current operation, no new construction is proposed, and no additional water use is proposed for these licenses; and
- b. NID and Pacific Gas & Electric Company (PG&E) operate their respective facilities under a Consolidated Contract, dated July 12, 1963, for the Yuba-Bear Hydroelectric Project No. 2266 under the jurisdiction of the Federal Energy Regulatory Commission (FERC) and those operations will not change; and
- c. NID operates under the requirements identified in its FERC license and Department of Fish and Game Agreement to protect instream beneficial uses.

It is unclear how the Consolidated Contract protects habitat, wildlife, or instream beneficial uses. Further, NID has not demonstrated that it is currently in compliance with the Fish and Game Code at each diversion, dam and conveyance reach affected by these permits and licenses, and its petitions lack sufficient information to demonstrate that the proposed changes will keep or place NID in compliance. Third, as stated in the beginning of this protest, many of NID's facilities and operations do not fall under FERC jurisdiction according to FERC, PG&E, and NID's own assertions. Therefore, the undersigned protestors request that the Board ensure NID demonstrates compliance with SWRCB regulations, Fish and Game Code, California Water Code, and the Public Trust Doctrine before dismissal of this protest.

Extensions of Time to Complete Beneficial Use

Petitioner requests an extension of time to complete beneficial use. Moreover, the main thrust of the petitions is to seek a *retroactive* petition for extension of time. Apparently, the Board and NID discovered that the period of maximum use was not during the period specified in the permits to put water to beneficial use. NID now asks Board to reach back and retroactively extend the time so as to gain a license for greater use than the permit would allow.

To start, the protestors doubt that this procedure is consistent with the Water Code. Even if it is, it will by definition result in greater water being licensed than the current permits allow. This additional water use will have impacts to public trust resources. Before the Board can consider granting the retroactive extensions of time, NID must analyze the full extent of those impacts, and the Board should grant, condition, or deny the petitions as appropriate. Although some impacts may prove to be acceptable, protestors submit that NID should be held to a much higher standard (if it is legal at all) than a petitioner that seeks to extend time before the permit term expires as required by the law.

Addition of Powerhouses and Incidental Power

NID is requesting the addition of the following powerhouses to its water rights: Bowman, Spaulding #3, Spaulding #2, Deer Creek, Scotts Flat, Spaulding #1, Drum #1, Drum #2, Dutch Flat #1, Dutch Flat #2, Chicago Park, Rollins, Combie South, Halsey, and Wise. NID is requesting to add Incidental Power at Deer Creek and Jackson Meadows.

Timing of Use

The addition of Powerhouses and Incidental Power to multiple of NID's water rights could extend the time or change the time in which NID could divert water from a bypass channel and through the powerhouse, resulting in negative effects on aquatic ecosystems. In some cases, NID is requesting the addition of powerhouses and Incidental Power to certain water rights that overlap with other water rights, which already include point of use

at those same powerhouses. Despite the overlap in the rights to the powerhouse as a point of use, the timing or season of use may vary widely.

Bypass Reaches in Bear River and Western Placer Creeks

The addition of powerhouses could also have negative effects on bypass reaches and reaches downstream of powerhouses.

In its petition for Incidental Power rights, NID states, “NID’s use of water for power production occurs mostly at times when water is being transported and used for consumptive needs. There are occasions when there is water used for power production and not needed for consumptive uses.”

In order to deliver consumptive water NID does not have to run it through powerhouses. Doing so in many cases requires diverting the water from the river channel into a canal or pipe above the river and then dropping it through the turbines. This leaves miles of river de-watered during critical times of the year, which can strand sensitive species and negatively affecting temperature, water quality, and habitat for fisheries, benthic macroinvertebrates, reptiles and amphibians. If it were to operate legally under its current water rights, NID would at times not generate power at some of the powerhouses it lists in its petition. Water not so used for generation could provide habitat to rainbow trout and foothill yellow-legged frogs as well as provide water for recreational uses such as boating and fishing.

Addition of powerhouses would particularly negatively affect bypass reaches along the Bear River, which are dewatered by NID and PG&E hydropower generation operations. The Bear River’s bypass reaches are already severely dewatered hydropower operations and water exports for consumptive use. Below Rollins Reservoir, PG&E and NID export about 290,000 acre feet of water annually through the Bear River Canal for use through the Halsey, Wise and Newcastle powerhouses and sales to PCWA. At Combie Reservoir, NID diverts about 43,400 acre feet annually through NID’s Combie Phase I Canal. NID diverts additional water at Combie into the Combie/Ophir I, II and III canals. South Sutter Water District diverts 124,535 acre feet annually from the Bear River below Camp Far West. (CDFG (1991) and USFWS (CVPIA Report May 1998)). These cumulative water exports negatively impact the health of the Bear River. Allowing NID to run more water through powerhouses means even less water in the Bear’s natural channel.

NID seeks a Powerhouses place of use right that legalizes an incentive to divert water out of the Bear to generate power at the three PG&E powerhouses and then use the creeks as conveyance to deliver the water to its consumptive use. However, this water routing might not be so attractive to NID if their lack of right to generate power were enforced. Alternatively, NID might leave the water in the Bear River and divert it at its Combie/Ophir Canals, therefore re-watering a currently dewatered stretch of river between Rollins and Combie Reservoir. Furthermore, NID might leave the water in the Bear River below Combie to South Sutter Water District’s Camp Far West Reservoir. At that point, NID could sell it to South Sutter Water District as surplus water as it already does in some years. This would allow the water to stay in the Bear River as long as possible before being delivered to its point of use.

Spaulding Spill on the South Yuba and Bear Rivers

The addition of the powerhouses to NID’s rights also could provide part of the incentive for NID and PG&E to spill water from Spaulding Reservoir into the Bear rather than into the South Yuba. Without the incentive of additional power generation on the Bear River, NID and PG&E would be less likely to continue to spill such large volumes of water from Spaulding Reservoir into the Bear River.

Historic hydrology in the headwaters of the Bear, Bear Valley, show that PG&E and NID have coordinated operations to use the Bear Valley as a waste canal when Spaulding Reservoir overtops. This practice has both harmed the Bear River and the South Yuba. The sudden large volumes of spill water have degraded the headwaters of the Bear's stream function by blowing out its streambanks and incising its channel, resulting in disconnecting the stream channel from the its previous wet meadow ecosystem. This results in degrading the meadow's critical habitat for riparian and terrestrial wildlife.

For its part, the South Yuba would benefit greatly from a letting more of the cold water in Spaulding flow down the Yuba rather than diverting it to the Bear River. The South Yuba's snowmelt hydrology and attendant aquatic species have deteriorated under the PG&E and NID's operations above Spaulding and at Spaulding Reservoir. Rapid up-ramping and down-ramping associated with reservoir spill events during the spring snow melt period is thought to be detrimental to Foothill Yellow Legged Frogs (FYLF) and possibly other species. By coordinating pre-releases from its upstream reservoirs and at Spaulding, and not wasting water down the Bear River, PG&E and NID could restore the critical slow ascent and even slower descent of the snowmelt hydrograph in the South Yuba River. These flows could then travel downstream to further enhance habitat for salmon below Englebright Reservoir.

Where NID is currently diverting water that lacks a water right for point of use at its powerhouses, they should change their practice in order to conform with their current water rights permits and licenses.

Recreational Use

The South Yuba and Bear Rivers have enormous recreational potential for angling, whitewater boating, hiking, and wildlife viewing. NID's petition to add powerhouses to their existing rights would divert more water from the river into powerhouses, decreasing recreational opportunities on these rivers.

The South Yuba alone offers six known whitewater boating runs between the headwaters and Englebright. Three more boating runs below Spaulding are being studied as part of the Yuba-Bear Drum-Spaulding relicensing. Two boating runs are known to exist on the Bear River and the Yuba-Bear Drum-Spaulding is studying two more. All of these boating runs depend on the restoration of the snowmelt hydrograph to opportunistically boat them. NID's petition for water rights changes threatens to give NID legal rights for operations that have degraded the spring snowmelt hydrograph of these rivers' flow regimes. Similar to the environmental uses, recreational uses would be decreased should the Board grant NID's rights to add powerhouses as places of use because NID would be legally be able to divert more water out of the river.

The Western Placer Creeks provide recreational opportunities for angling, hiking, birding, wildlife viewing, and potentially, whitewater boating. One kayaker is known to kayak the lower portion of Coon Creek and reported it as a Class IV potential run at about 150 cfs.

Combie Powerhouse Upgrade

Petitioner is requesting a modification to its water rights for its upgrade at Combie Powerhouse.

Combie Dam used to have a fish ladder that enabled anadromous fish to access the upper reaches. This fish ladder was removed after the construction of South Sutter Water District's Camp Far West Dam downstream. But this facility historically facilitated anadromous fish passage to the upper watershed.

Furthermore, instream flows downstream of Combie Dam may not be adequate to maintain the downstream fishery in good condition.

Point of Diversion and Rediversion Changes

Petitioner requests to abandon the original point of diversion at the top of the China Ditch, which has since been consolidated with the Union Canal. This petition for change could have impacts on potential options for fish passage for salmon around Englebright Reservoir. NMFS and non-governmental organizations are exploring an option for using canals as fish passage for anadromous fish to move from the Lower Yuba to the Middle and South Yubas. NID should demonstrate that abandonment of this original diversion right will not close off the potential for fish passage at this critical site.

Similarly, NID's petition for rediversion of water from the Tarr Ditch, could have negative environmental impacts on Dry Creek Spenceville, which receives 5 cfs from the Tarr Ditch. If NID is going to red divert water from the Tarr Ditch, it should demonstrate that it will not have adverse effect on NID's ability to provide flows that will support the anadromous fish and riparian species in Dry Creek Spenceville.

Purpose of Use Changes

Petitioner requests multiple changes of use from irrigation to domestic and the addition of municipal and industrial as purpose of use. The change to municipal and industrial has a strong potential to facilitate land use change from agriculture and open space to residential and industrial. These land use changes degrade the watershed by changing its hydrologic function, its gross output and flow regime, as well as water quality and temperature, all of which have detrimental effects on aquatic, riparian, and wildlife species, as well as beneficial uses for recreation.

Change in purpose of use from incidental domestic to municipal and industrial will allow uses that harden demand for water, likely reducing water available for instream benefits, particularly in drier water years.

The expansion of NID's service area could be a direct result of NID's request for change of use in that it would allow NID to provide more water to purposes it currently does not have rights for. For example, if the Lincoln Treatment Plant is built, NID could provide water under its changed water rights for municipal use.

NID's request for change of rights could also impact NID's decision on how to transfer the water to Lincoln. NID is currently considering a pipeline from the Bear River to Lincoln, which would essentially divert the water from an already largely dewatered section of Bear River. The alternative is for NID to divert the water further downstream from Garden Bar two to three miles to Lincoln, thus allowing the water to stay in the river to provide the most environmental benefit for as long as possible. However, the requested addition of incidental power rights to NID's water right, could also allow NID to develop a hydropower turbine on the pipeline, potentially making it a more attractive option for water transfer, than diverting it at Garden Bar.

NID's Water Rights Petition and FERC

This is not an administrative issue. NID cannot claim that any mitigation resulting from the current FERC relicensing of their Yuba-Bear hydropower project pre-empts the SWRCB's water rights process. FERC does not make water rights decisions as part of the relicensing. FERC relicenses hydropower projects based on approved existing water rights. FERC does not relicense hydropower projects for operations that require water rights beyond what the licensee can claim legally according to state law. Therefore, this protest is in the complete jurisdiction of the SWRCB and must be decided by that state body before FERC relicenses the Yuba-

Bear hydropower project. In short, the FERC relicensing is contingent on the SWRCB water rights decision, not the other way around.

Furthermore, NID's water rights petition includes all of NID's water supply and hydropower facilities whereas the FERC has determined jurisdiction only over NID's hydropower facilities. In the Yuba-Bear / Drum-Spaulding relicensings, the Foothills Water Network, along with resource agencies, NMFS, FS, DFG, and BLM have argued that the licensees, PG&E and NID, should study the projects' impacts on the Lower Yuba, Deer Creek, Lower Bear, and Western Placer Creeks: Coon Creek, and Auburn Ravine. In response, in the Within the relicensing context, , NID claimed that there is a lack of "project nexus" between their Yuba-Bear hydropower project and the Lower Yuba, Deer Creek, Lower Bear and Western Placer Creeks. Furthermore, NID argued that because of Combie's small size, it is ineligible for FERC relicensing and therefore the Bear River downstream of Combie should also be excluded from study of Yuba-Bear / Drum-Spaulding project's impacts. Likewise, NID argued that their operations affecting Western Placer Creeks and Deer Creek are water supply operations and not part of the Yuba-Bear hydropower project under FERC jurisdiction. In its final study determination FERC agreed.

Even though their operations may influence the Western Placer Creeks, PG&E also denied responsibility to study its' impacts on the full length of Coon Creek and Auburn Ravine under FERC relicensing. PG&E stated in Joint Agencies comment 70b, that [the agencies] have not established a nexus to the Drum-Spaulding Project with Coon Creek, and Orr Creek." They also state that "Due to the activities of numerous other downstream entities on these reaches, the Project is not an essential cause of effects in these reaches."⁷

FERC made its determination in agreement with PG&E and NID's narrow interpretation of FERC's jurisdiction on Deer Creek, Lower Yuba, and Lower Bear, and Western Placer Creeks. With regard to Western Placer Creeks, FERC determined: "We [FERC] agree with the PG&E's assessment of the extent of project effects on the Western Placer County streams (i.e., the nexus), and their intention to study those effects. The joint agencies appear to confuse effects related to non-project consumptive water deliveries with Drum Spaulding project effects on the disputed streams."⁸

Specifically, FERC determined its' jurisdiction for the Yuba-Bear Drum-Spaulding Relicensing on the Middle Yuba to include the Milton Diversion to Our House Dam; on Deer Creek to below the Deer Creek Powerhouse; on the Bear River to Combie (but not including the powerhouse or reservoir). On the Western Placer Creeks, FERC determined that NID had no responsibility under FERC to study or mitigate its impacts at all. FERC also agreed with PG&E that it had limited responsibility under FERC on Coon Creek and Auburn Ravine. FERC determined in agreement with PG&E that its jurisdiction only includes Dry Creek (tributary to Coon Creek) from Halsey Powerhouse to the Red Hawk Ranch Reservoir (private); Rock Creek below Rock Creek Powerhouse to the confluence with Coon Creek; Auburn Ravine from Wise Powerhouse to PCWA's Auburn Tunnel.

Because NID has argued that FERC has no jurisdiction below the aforementioned points, NID cannot claim pre-emption of the FERC process to the Board in most of the Western Placer Creeks, Lower Bear from Combie Powerhouse downstream, Deer Creek below Deer Creek Powerhouse, and the Lower Yuba below Englebright.

⁷ Pacific Gas and Electric Company's (PG&E) comments on the resource agency December 19, 2008, study plan for the Yuba-Bear Drum-Spaulding Hydropower Relicensing.

⁸ FERC Determination Yuba-Bear Drum-Spaulding Hydropower Projects February 23, 2009 p. 11

Last, NID's existing Combie powerhouse and new Combie powerhouse are individually small enough in power production as to be ineligible for relicensing. Foothills Water Network requested that Combie be included in the relicensing due to its combined power generation with its new facility modification making it eligible. However, FERC has determined Combie is not part of the Yuba-Bear relicensing. Therefore, NID cannot claim that this powerhouse, downstream river reaches, and diversions are pre-empted by FERC.

Multiple Parties Doesn't Relieve Individual Responsibility

According to FERC's determination, one might surmise that because neither PG&E nor NID are the "essential cause" of impacts on the Western Placer Creeks, they are relieved of all responsibility under the Federal Energy policy. Though it may be true that many parties' operations affect the Western Placer Creeks, the sheer number and complexity should not relieve each party from their responsibility to mitigate their individual impacts and demonstrate their compliance. We rely on the Board to ensure that NID demonstrate its compliance with state law in the Western Placer Creeks, despite the existence of a number of operators in the region.

Cumulative Effects

In addition, FERC's determination on study plans for Yuba-Bear / Drum-Spaulding does not address the cumulative effects of NID's massive water exports from the Yuba basin on the anadromous fish population in the Lower Yuba. In the Yuba-Bear / Drum-Spaulding relicensing NMFS and Foothills Water Network had requested that PG&E and NID study the cumulative effects of their combined water exports from the Yuba Basin on the anadromous fish below Englebright.

In addition, the FERC process does not address the watershed holistically but rather addresses each project piecemeal even if there are several interdependent projects affecting the same river. This lack of a holistic approach and unwillingness to hold licensees responsible for their cumulative effects upstream and downstream of their projects leaves major gaps in regulation that allow NID and other licensees' operations to impair watersheds and even threatened and endangered species. We look to the Board to ensure that NID cannot claim federal pre-emption where FERC has chosen not to exert its regulatory authority.

Terms of Dismissal

Under what conditions may this protest be disregarded and dismissed?

It is not possible to specify dismissal terms at this time, because the impacts analysis has not been completed. Therefore, what follows is not meant to be a definitive list of impacts or protest dismissal terms. Instead, it is meant to describe the impacts we believe are most likely and to initiate the discussion of appropriate dismissal terms.

The main thrust of our protest is that the changes NID seeks would likely create natural resource harm beyond that which is currently permitted, that NID is therefore required to conduct an appropriate assessment of those potential impacts, and that the Board is required to consider those impacts when it acts on the petition. The undersigned parties to this protest are ready to negotiate terms of dismissal with the petitioner based on new studies that can clearly demonstrate compliance. Study results can inform the final terms of dismissal. After an adequate public trust resources assessment or similar document is prepared, the parties can discuss dismissal terms.

First, in order to dismiss this protest, NID will need to develop information that demonstrates its compliance with the aforementioned California Water Code, Department of Fish and Game Code, and SWRCB jurisdiction.

The current petition lacks a sufficient level of study of the relationship between NID's water rights petition and the health of these rivers.

Most critically, NID should extend its Operations Model to include all of its water supply as well as all hydropower facilities. The Operations Model should include all operations including but not limited to those under FERC and SWRCB jurisdictions. This step is necessary to understand NID's whole operations and make sure that both FERC and SWRCB jurisdictions are clearly delineated. In addition, the model is needed to clearly demonstrate NID's consumptive and non-consumptive uses as well as show that its operations are in compliance independent from PG&E's operations.

Parties to this protest ask that NID and SWRCB consider this preliminary list of protest dismissal terms:

1. Petitioner must become a member of the California Urban Water Conservation Council. As part of their membership, petitioner must develop and conform to a water conservation plan, which includes the California Urban Water Conservation Council best management practices and voluntary conservation targets.
2. Petitioner must agree that any future hydropower enhancement under its permits conform to RPS standards as they exist as of this date, specifically but not exclusively that they not permit peaking operations without an afterbay downstream, and that they not create a new bypass reach.
3. Petitioner must extend the HEC-ResSim Model to include its water supply operations including but not limited to: Lower Bear River to Camp Far West, Dry Creek – Spenceville, Western Placer Creeks, diversions and creeks to the North of the Bear River, and Deer Creek.
4. Petitioner must quantify the amounts of water that would be affected by its petitions for each permit and license, and present that information to protestants in a manner that allows evaluation of the impacts of each change for each permit and license.
5. Petitioner must quantify the present condition of all life stages of the anadromous salmonid fishery in the Lower Bear, Dry Creek (Spenceville), Deer Creek, Coon Creek /Auburn Ravine and their tributaries affected by NID's operations. This should include an analysis of the present condition of spawning habitat.
6. Petitioner must collaboratively develop and agree to maintain a scientifically justified range of target flow regimes for different water years to maintain habitat for all life stages, and all life stages of the anadromous salmon and steelhead fishery in good condition in the Lower Bear, Dry Creek (Spenceville), Deer Creek, Coon Creek /Auburn Ravine and their tributaries affected by NID's operations. Signatories of this protest support NID in coordinating this effort with other responsible water agencies, cities, and treatment plants including but not limited to: PG&E, PCWA, and SSWD.
7. Petitioner must agree to provide flows during the outage period of the Yuba-Bear / Drum-Spaulding canal system that are in keeping with a collaboratively agreed on and scientifically based flow regime. This must include a long-term coordinated management plan for outages with PCWA and PG&E.
8. Petitioner must develop and institute an ongoing monitoring plan that evaluates both the condition of the anadromous salmonid fishery and thermal conditions in Lower Bear, Dry Creek (Spenceville), Deer Creek, Coon Creek /Auburn Ravine and their tributaries affected by NID's operations.
9. If in investigating the current condition of the fishery, it is determined that the fishery is in impaired condition, Petitioner must mitigate to bring the fishery into good condition.
10. Petitioner will conduct a technical analysis of barriers affecting adult migration and spawning. Evaluate fish passage impediments and either remove or replace priority sites with state-of-the-art fish passage facilities that meet NMFS fish passage criteria.

11. Petitioner will conduct monitoring of entrainment, technical study, design, permitting, and installation of fish screens on an agreed timeline to reduce entrainment throughout the watersheds. Petitioner will screen its diversions to ensure fish are not entrained.
12. Petitioner must evaluate the geomorphologic function of the watersheds as related to impacts from operations. This may include evaluation and implementation of spawning gravel supplementation, floodplain function, and riparian health.
13. Petitioner must conduct a study of recreational beneficial uses including angling and boating opportunities on Lower Bear, Dry Creek (Spenceville), Deer Creek, Coon Creek /Auburn Ravine and their tributaries affected by NID's operations.

The undersigned parties are willing to discuss with NID a fixed timeline for removal of barriers, addition of fish screens to avoid entrainment, and development of the flow regime and long-term management plans that address anadromous fish recovery, sediment, and riparian in the Lower Bear, Dry Creek (Spenceville), Deer Creek, Coon Creek /Auburn Ravine and their tributaries affected by NID's operations. Parties are willing to support NID's efforts to coordinate integrated management of the Western Placer Creeks with other water agencies and responsible parties, including but not limited to: PG&E, PCWA, SSWD, Cities, and Wastewater Treatment Plants.

A true copy of this protest has been served upon the petitioner by mail.
(Personally or by mail)

Date: December 20, 2009
Julie Leimbach, Coordinator,
Foothills Water Network

Protestant(s) Authorized Representative sign here

Protests must be filed within the time allowed by the SWRCB as stated in the notice relative to the change or such further time as may be allowed.

(NOTE: Attached supplemental sheets as necessary)

PRO-PET (1-00)

Additional concerns/protest:

Mailed version also sent on this date to the SWRCB.



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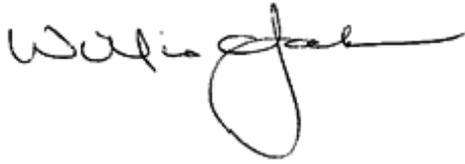


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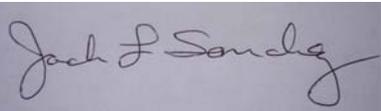
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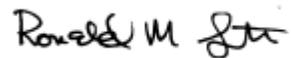


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