# SETTLEMENT AGREEMENT

## FOR LICENSING OF THE OROVILLE FACILITIES

FERC Project No. 2100

*March 2006*

**State of California**
**Resources Agency**
**Department of Water Resources**

# SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES

Changes to the Settlement Agreement since March 10, 2006

- Added “Inc.” after State Water Contractors in section 1.1 and signature block

- Entered missing text to A107:

> A107.1 Feather River Fish Hatchery Fish Production Program. Upon license issuance, and until the completion and implementation of the Plan set forth in section A107.3 of this article, the Licensee shall ensure the continued operation of the Feather River Fish Hatchery in cooperation with the California Department of Fish and Game for the production of anadromous salmonids such as steelhead,
> fall-run Chinook salmon, spring-run Chinook salmon, as well as other salmonids that may be stocked as part of the license.

- Added Littlerock Creek Irrigation District as a party in section 1.1 and the signature block

- Changed "Tulare Lake Water SUPPLY District" to "Tulare Lake Water STORAGE District" in Parties list and signature page

- Added California Department of Boating and Waterways as a party in section 1.1 and the signature block

- Added “After the executed Settlement Agreement is approved by the Department of Finance,” to the beginning of Section B100(E)(2.0) on page B-5

- Added Napa County Flood Control and Water Conservation District as a party in section 1.1 and the signature block

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# 1. Introduction

## 1.1 Parties

This Settlement Agreement for Licensing of the Oroville Facilities ("Settlement Agreement") is made and entered into pursuant to Federal Energy Regulatory Commission ("FERC") Rule, 18 C.F.R. § 385.602, by and among:

Alameda County Flood Control & Water Conservation District, Zone 7
Alameda County Water District
American Rivers
American Whitewater
Antelope Valley – East Kern Water Agency
Berry Creek Citizens Association
California Department of Boating and Waterways
California Department of Fish and Game ("Fish & Game")
California Department of Parks and Recreation ("Parks & Recreation")
California Department of Water Resources ("Licensee" or "DWR")
California State Horsemen's Association
California State Horsemen's Association Region II
Castaic Lake Water Agency
Central Coast Water Authority
Chico Paddleheads
Citizens for Fair and Equitable Recreation
City of Oroville ("Oroville")
Coachella Valley Water District
County of Kings
Crestline – Lake Arrowhead Water Agency
Desert Water Agency
Empire West Side Irrigation District
Feather River Low Flow Alliance ("Alliance")
Feather River Recreation and Parks District
International Mountain Bicycling Association
Kern County Water Agency
Kon Kow Valley Band of Maidu
Lake Oroville Bicyclist Organization
Littlerock Creek Irrigation District
Metropolitan Water District of Southern California
Mojave Water Agency
Napa County Flood Control and Water Conservation District
National Marine Fisheries Service ("NMFS")
Oak Flat Water District
Oroville Area Chamber of Commerce
Oroville Downtown Business Association
Oroville Economic Development Corporation
Oroville Parks Commission
Oroville Recreation Advisory Committee

Oroville Redevelopment Agency
Oroville Rotary Club
Palmdale Water District
San Bernardino Valley Municipal Water District
San Gabriel Valley Municipal Water District
San Gorgonio Pass Water Agency
Santa Clara Valley Water District
Solano County Water Agency
State Water Contractors, Inc. ("State Water Contractors")
Town of Paradise ("Paradise")
Tulare Lake Basin Water Storage District
United States Department of the Interior ("Interior"), on behalf of its component bureaus
Certain Individuals as identified on the signature page of this Settlement Agreement;

each referred to individually as a "Party" and collectively as "Parties."

The Parties to this Settlement Agreement agree as follows:

1.2 Recitals

1.2.1 Licensee constructed and operates the Oroville Facilities, FERC Project No. 2100 ("Project"). The Project was developed as part of the California State Water Project, a water storage and delivery system of reservoirs, aqueducts, power plants, and pumping plants. The State Water Project makes deliveries of supplemental water to two-thirds of California's population and over 750,000 acres of agricultural lands. The Project also is operated to provide power generation, improve water quality in the Sacramento and San Joaquin Delta, manage Feather River floodwaters, provide recreation, and enhance fish and wildlife.

1.2.2 The Project operates under a license originally issued by FERC on February 11, 1957 for a term of 50 years. The current license for the Project will expire on January 31, 2007. Under requirements of the Federal Power Act (FPA) and the FERC regulations, Licensee filed a timely application for a New Project License on January 26, 2005.

1.2.3 After consulting with state and federal resource agencies, Native American Tribes, local governments, local agencies, nongovernmental organizations, and the public, Licensee requested and received approval from the FERC to use an Alternative Licensing Process (ALP) for the relicensing of the Project. The ALP is intended to expedite the licensing process by combining the prefiling consultation and federal and State environmental review process into a single process, and to improve and facilitate communications among participants in the process. A Collaborative group was formed (Collaborative), which conducted

numerous meetings, reviewed existing data, commissioned and reviewed additional studies, conducted settlement negotiations, and prepared and relied on a record of its actions.

1.2.4 This Settlement Agreement is the end product of the Collaborative's work.

1.3 Effective Date of Settlement Agreement.

Except as provided in Section 1.3.1, this Settlement Agreement shall become effective upon execution by all Parties listed above and upon approval by California Department of Finance ("Effective Date").

1.3.1 Effective Date of Licensee Obligations.

The contractual obligations of the Licensee under any appendix shall become effective only upon Licensee's affirmative acceptance of a Final New Project License for the Project unless (a) this Settlement Agreement specifically provides for early implementation; or (b) the Licensee provides Notice that it intends to withdraw from this Settlement Agreement pursuant to Section 6. While acknowledging FERC's current policy that the Licensee's regulatory obligations become effective upon issuance of a New Project License, the Parties intend that the contractual obligations shall become effective only upon the Licensee's acceptance of a Final New Project License. Within 45 days of the New Project License becoming Final, Licensee shall provide Notice to all Parties whether it affirmatively accepts the New Project License and its obligations under this Settlement Agreement. If Licensee does not timely provide such Notice, the Licensee shall be deemed to have affirmatively accepted the New Project License and its obligations under the Settlement Agreement to the extent those obligations are not modified by the New Project License.

1.3.2 Effective Date of Parties' Obligations

The Parties' obligations under Sections 2 through 8, including the obligation to support this Settlement Agreement in the licensing and related regulatory proceedings, take effect on the Effective Date.

1.4 Term of Settlement Agreement

The term of this Settlement Agreement shall commence on the Effective Date and shall continue (unless terminated as otherwise provided herein) for the term of the New Project License plus the term(s) of any annual license(s) that may be issued after the foregoing New Project License has expired.

1.5 Definitions

1.5.1 **Collaborative** shall mean the collaborative group that was formed in the Alternative Licensing Process for the relicensing of the Project.

1.5.2 **Commission** or **FERC** shall mean the Federal Energy Regulatory Commission.

1.5.3 **Consultation** shall mean the process by which the Licensee seeks views through providing drafts of proposals, plans and reports, and seeking and considering comments on such proposals, plans and reports as appropriate from relevant Parties. Consultation shall **not** mean consultation under § 7 of the Endangered Species Act or other federal laws specifically requiring consultation unless specifically provided.

1.5.4 **Disputing Party (-ies)** shall mean the Party providing Notice of the dispute, the Party alleged to have not performed an obligation, and any other Party that provides Notice of its intent to participate in the dispute resolution.

1.5.5 **Federal and State Regulatory Parties** shall mean Interior, NMFS, and Fish and Game.

1.5.6 **Final**, with respect to the New Project License under this Settlement Agreement, shall mean Licensee's acceptance of such license after exhaustion of administrative and judicial remedies for any challenge which any Party or other person brings against the New Project License or against any other permit or approval associated with issuance of the New Project License. Such exhaustion shall relate only to a challenge: (A) against the New Project License or any associated approval other than a judicial challenge to the Biological Opinion, brought within 30 days after issuance of the New Project License; or (B) against the Biological Opinion, brought in court prior to the expiration of all appeals of the New Project License.

1.5.7 **Final Mandatory Terms and Conditions** shall mean conditions required pursuant to Section 4(e) or Section 18 of the Federal Power Act.

1.5.8 **Inconsistent with this Settlement Agreement** shall mean:
(i) any material modification to, addition to, or deletion of a Proposed License Article in the New Project License issued by FERC; or (ii) any material modification to or addition to any Proposed License Article in any Final Mandatory Terms and Conditions, ESA Section 7 Biological Opinions or CWA Section 401 Certification issued in conjunction with the New Project License; or (iii) a New Project License issued for a term of less than 50 years. Inconsistent with this Settlement Agreement shall not mean: (A) the inclusion of standard articles from the L-Form (as defined by 18 C.F.R. § 2.9) in the New Project License; (B) FERC's reservation of its authority to require changes to implementation schedules, plans, or other requirements of any of the New

Project License; (C) the inclusion in any Final Mandatory Terms and Conditions or CWA Section 401 Certification of the issuing agency's reservation of authority to reopen its conditions, provided that the reservation of authority is consistent with this Settlement Agreement, including Section 4.4, proposed License Article A109, and the Habitat Expansion Agreement (2006), which is included in draft form in Appendix F, and provided further that each Party reserves its right to contest the exercise of such reserved authority at such time as the agency may exercise the reserved authority; (D) the inclusion in any ESA Section 7 Biological Opinions of the issuing agency's criteria for re-initiation of Section 7 consultation pursuant to 50 C.F.R. § 402.16; or (E) the inclusion in the New Project License or in any Final Mandatory Term and Condition, ESA Section 7 Biological Opinion or CWA Section 401 Certification, of such reasonable reporting requirements as FERC or the issuing agency, respectively, determines are necessary to ensure the Licensee's compliance.

1.5.9 **Licensee** shall mean the California Department of Water Resources, the legal entity to which the Commission issues the New Project License for the Project.

1.5.10 **Material New Information** shall mean significant and relevant new information which: (A) for the purpose of the Parties' obligations before New Project License issuance, is not in the administrative record for the New Project License as of the Effective Date; (B) for the purpose of the Parties' obligations after New Project License issuance but prior to the New Project License becoming Final, is not in the administrative record as of the date the New Project License is issued; or (C) for the purpose of the Parties' obligations after the New Project License is Final, is not in the administrative record as of the date the New Project License becomes Final; or (D) for any purpose, was neither in the administrative record nor otherwise known to the Party who seeks to use the Material New Information, as of the applicable date.

1.5.11 **New Project License** shall mean the new License, not to include any annual license extending the original license, issued by the Commission to the Licensee pursuant to Section 15 of the FPA for the continued operation of Project No. 2100.

1.5.12 **Notice** shall mean a written communication which meets the requirements of Section 7.11 and any other requirements for notice specifically provided in any other applicable section of this Settlement Agreement.

1.5.13 **Party** or **Parties** shall mean the signatories to this Settlement Agreement.

1.5.14 **Project** shall mean the Oroville Facilities, licensed to the California Department of Water Resources as FERC Project No. 2100.

1.5.15 **Project Boundary** shall mean the external geographic boundaries of the Project, which enclose all Project lands, waters, works and other features that

have been or may be approved by FERC, and that are subject to FERC jurisdiction.

1.5.16 **Proposed License Article** shall mean the terms and conditions set forth in Appendix A of this Settlement Agreement that the Parties respectfully recommend the Commission include, without material modification, in the New Project License issued to the Licensee for the continued operation of the Project.

1.5.17 **Public Agency** shall mean Licensee, Interior, NMFS, Fish & Game, Parks & Recreation, Town of Paradise, and City of Oroville.

1.5.18 **Settlement Agreement** shall mean the entirety of this Settlement, including the Appendices.

1.6 Acronyms

1.6.1 ALP – Alternative Licensing Process
1.6.2 CEQA – California Environmental Quality Act
1.6.3 CFS – cubic feet per second
1.6.4 CWA – Clean Water Act
1.6.5 EC – Ecological Committee
1.6.6 ESA – Endangered Species Act
1.6.7 FPA – Federal Power Act
1.6.8 FS – U.S. Department of Agriculture Forest Service
1.6.9 NA – not applicable
1.6.10 NEPA – National Environmental Policy Act
1.6.11 PM&E – protection, mitigation and enhancement measure
1.6.12 RAC – Recreation Advisory Committee
1.6.13 SWP – State Water Project
1.6.14 SWRCB – State Water Resources Control Board
1.6.15 USFWS – U.S. Fish and Wildlife Service

## 2. Purpose of Settlement Agreement

2.1 Purpose

The Parties have entered into this Settlement Agreement for the purpose of resolving all issues that have or could have been raised by the Parties in connection with FERC's order issuing a New Project License. While recognizing that several regulatory and statutory processes are not yet completed, it is the Parties' intention that this Settlement Agreement also resolves all issues that may arise in the issuance of all permits and approvals associated with the issuance of the New Project License, including but not limited to ESA Section 7 Biological Opinions, CWA Section 401 Certification, NEPA and CEQA. This Settlement Agreement also enhances the mutual benefits of the Project for the Licensee, Project beneficiaries, local community, and other Parties. Pursuant to

the Parties' various rights, authorities, and responsibilities under Sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act, as well as other statutory and regulatory authorities and implied powers, this Settlement Agreement establishes the Licensee's obligations for the protection, mitigation and enhancement of resources affected by the Project under the New Project License. It also specifies procedures to be used among the Parties to ensure that implementation of the New Project License is not Inconsistent with this Settlement Agreement, and with other legal and regulatory mandates. For these purposes, the Parties agree that this Settlement Agreement is fair and reasonable and in the public interest, consistent with the standards under the FPA. Except as specifically provided below, each of the Federal and State Regulatory Parties agrees that the Licensee's performance of its obligations under this Settlement Agreement will be consistent with and is intended to fulfill the Licensee's existing statutory and regulatory obligations as to each Federal and State Regulatory Party relating to the relicensing of the Project. The Parties further agree that this Settlement Agreement provides sufficient PM&Es for FERC to find a balance of beneficial uses as required under Section 10 of the FPA.

### 2.2 No Precedent for Other Proceedings

This Settlement Agreement is made with the understanding that it constitutes a negotiated resolution of issues relating to the New Project License, operation of the Project, and local community concerns related to the Project. Accordingly, this Settlement Agreement shall not be offered against a Party as argument, admission or precedent in any mediation, arbitration, litigation, or other administrative or legal proceeding that does not involve or relate to the New Project License or the operation of the Project. Further, no Party shall be deemed to have approved, admitted, accepted, or otherwise consented to any operation, management, valuation, or other principle underlying any of the matters covered by this Settlement Agreement, except as expressly provided herein. With respect to any mediation, arbitration, litigation or other administrative or legal proceeding involving or relating to the New Project License, the Parties rights and responsibilities shall be as set forth in this Settlement Agreement. This Section shall survive any termination of this Settlement Agreement.

## 3. Compliance with Legal Responsibilities and Reservations of Rights

### 3.1 Public Agency Parties

Except as otherwise provided in this Settlement Agreement, by entering into this Settlement Agreement, each Party that is a Public Agency represents that it believes and expects that: (A) the Proposed License Articles set forth in Appendix A satisfy the statutory, regulatory, or other legal requirements for the protection, mitigation, and enhancement of natural resources, water quality,

recreation, and cultural and historic resources affected by the Project under the New Project License; and (B) the Public Agency's statutory, regulatory, or other legal responsibilities are, or can be, met through approval without material modification of this Settlement Agreement and subsequent implementation of the New Project License. This representation applies only to those requirements that the Public Agency administers.

3.1.1 Nothing in this Settlement Agreement is intended or shall be construed to be an irrevocable commitment of resources or a pre-decisional determination by a Public Agency. After the Effective Date of this Settlement Agreement but prior to the issuance of the New Project License, each Public Agency shall participate in the relicensing proceeding, including environmental review and consideration of public comments, as required by applicable law. Further, NMFS and USFWS shall consult with FERC and the Licensee under the ESA. Each Public Agency shall give consideration to any new information arising in the relicensing proceeding or ESA consultation, as required by applicable law.

3.1.2 Nothing in this Settlement Agreement is intended to, or shall be construed to, affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities or to comply with any judicial decision or order. Among other things, as provided in Section 1.5.8, this reservation permits a reservation of authority in the New Project License or any Final Mandatory Term and Condition, or Section 401 Certification, or inclusion in any ESA Section 7 Biological Opinion of the issuing agency's criteria for reinitiation of Section 7 consultation pursuant to 50 C.F.R. § 402.16; provided that each other Party reserves its right to contest the exercise of such reservation. Notwithstanding this Section, any reservation of authority pursuant to Sections 4(e) or 18 shall be consistent with the provisions of this Settlement Agreement, including Section 4.4, proposed License Article A109, and the Habitat Expansion Agreement (2006), which is included in draft form in Appendix F.

### 3.2 Future Relicensings

Nothing in this Settlement Agreement is intended or shall be construed to affect or restrict any Party's participation in or comments about the provisions of any future relicensing of the Project subsequent to the current relicensing, or any other project licensed to the Licensee under the Federal Power Act.

## 4. Settlement Agreement Commitments and Implementation

### 4.1 Parties Bound by Settlement Agreement

The Parties shall be bound by this Settlement Agreement for the term stated in Section 1.4, provided the New Project License is not Inconsistent with this

Settlement Agreement. However, Interior is not a Party to Appendix B of this Settlement Agreement.

4.2 Final Mandatory Terms and Conditions and Section 10(a) and 10(j) Recommendations

4.2.1 Protection, Mitigation, and Enhancement Measures to be included in Final Mandatory Terms and Conditions and Section 10(a) and 10(j) Recommendations

4.2.1.1 Except as to Material New Information, the Parties agree:

(a) Final Mandatory Terms and Conditions and other recommendations under FPA sections 10(a) and 10(j) shall not be Inconsistent with this Settlement Agreement;

(b) except as provided in Section 4.3.1, any information, comments, or responses to comments filed in the context of this relicensing process shall not be Inconsistent with this Settlement Agreement;

(c) they will use reasonable efforts to obtain a FERC order approving this Settlement Agreement and issuing a New Project License not Inconsistent with this Settlement Agreement in a timely manner; and

(d) they will support, in all relevant regulatory proceedings in which they participate, regulatory actions not Inconsistent with this Settlement Agreement.

4.2.1.2 Limitation on Parties to Revisit Settlement Agreement Provisions. No Party will use any Material New Information generated in the environmental review, public comments, or otherwise in this relicensing process to revisit the compromises inherent in this Settlement Agreement for the purpose of improving its bargained-for benefits. Instead, a Party may use such information to submit Section 10(a) and 10(j) recommendations or comments Inconsistent with this Settlement Agreement only if it believes in good faith that such information significantly undermines this Settlement Agreement, taken as a whole for the affected Party, and significantly affects the adequacy of the Proposed License Articles under Sections 10(a) or 10(j).

4.2.2 Final Mandatory Terms and Conditions Inconsistent with Settlement Agreement

4.2.2.1 As provided in Section 4.2.1, the Federal and State Regulatory Parties intend that any Final Mandatory Terms and Conditions submitted to FERC in connection with the issuance of the New Project License will not be Inconsistent with this Settlement Agreement, and shall contain a statement regarding whether they are consistent with this Settlement Agreement. If the Forest Service

submits final 4(e) conditions to FERC that are in all material respects consistent with the draft 4(e) conditions attached to this Settlement Agreement as Appendix E, the Parties agree that those final 4(e) conditions will not be considered Inconsistent with this Settlement Agreement.

4.2.2.2 If any of the Final Mandatory Terms and Conditions are Inconsistent with this Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the inconsistency unless a Party provides Notice to the other Parties that it objects to the inconsistency and initiates dispute resolution within 30 days after the date the inconsistent terms or conditions are filed with FERC.

4.2.2.3 The Disputing Party may, in addition and to the extent provided by applicable law, seek administrative and/or judicial review of any action by a Federal or State Regulatory Party that is Inconsistent with this Settlement Agreement. The Parties shall follow the dispute resolution process to the extent reasonably practicable while any such appeal of an inconsistent action is pursued. If a Party has filed for administrative rehearing or judicial review and the Parties subsequently agree to modify this Settlement Agreement to conform to the Federal or State Regulatory Party's action, the filing Party or Parties shall withdraw the petition or dismiss the judicial action, or recommend such withdrawal or dismissal, as appropriate.

4.2.2.4 Except as provided in Section 4.6.5.4 for omissions based on jurisdiction or if the Settlement Agreement is terminated pursuant to Section 6.6, if any Final Mandatory Terms and Conditions are Inconsistent with this Settlement Agreement after a final and non-appealable administrative or judicial decision, this Settlement Agreement shall be deemed modified to conform to that decision.

4.2.2.5 Regarding any Mandatory Terms and Conditions filed with FERC pursuant to this Section that are not Inconsistent with this Settlement Agreement, each Party waives any right it may have to request an agency trial-type hearing on issues of material fact under Sections 4(e) and 18 of the Federal Power Act and to propose alternatives under Section 33 of the Federal Power Act. The Parties shall not support any trial-type hearing requested by any non-party and will make reasonable efforts to support Interior, NMFS, and the Forest Service, as appropriate, if a trial-type hearing is requested by any non-party. If a non-party requests a trial-type hearing, the Parties may intervene in the hearing to support this Settlement Agreement. Notwithstanding the above, each Party reserves their rights to request a trial-type hearing or propose alternatives with respect to a Section 18 prescription if NMFS or USFWS submits such a prescription pursuant to the Habitat Expansion Agreement or otherwise.

## 4.3 ESA and Magnuson-Stevens Act Consultation

### 4.3.1 Biological Opinion/EFH Conservation Measures

The Licensee has been designated as FERC's non-federal representative for the purposes of preparing (a) a Biological Assessment under the ESA, which will serve as FERC's draft Biological Assessment; and (b) an essential fish habitat (EFH) Assessment, which must be provided to NMFS to begin EFH consultation under the Magnuson-Stevens Fishery Conservation and Management Act. If FERC adopts the provisions of this Settlement Agreement as the proposed action in its draft NEPA document, such proposed federal action shall be the basis for the Section 7 consultation between FERC and NMFS, and FERC and Interior, and any biological opinion relating to the New Project License shall address and evaluate such provisions. If FERC adopts the provisions of this Settlement Agreement as the proposed action in an EFH Assessment, NMFS will evaluate such provisions and provide FERC with recommended EFH conservation measures based on such provisions. As of the Effective Date of this Settlement Agreement, NMFS and Interior represent that they enter into this Settlement Agreement believing that the information in the record supports the PM&E measures provided herein. However, NMFS and Interior are not making a pre-decisional determination of the outcome of any consultation and expressly reserve the right to take such future action or to issue such terms and conditions in any Biological Opinions and Incidental Take Statements as necessary to meet their obligations under the ESA. Further, NMFS expressly reserves the right to recommend such EFH conservation measures as necessary to meet its obligations under the Magnuson-Stevens Act.

### 4.3.2 Biological Opinion Inconsistent with Settlement Agreement

4.3.2.1 Consistent with Section 4.3.1, NMFS and Interior anticipate that the measures contained in this Settlement Agreement will be adequate to avoid a jeopardy finding and minimize any incidental take occurring as a result of implementation of this Settlement Agreement for species presently listed as threatened or endangered, and that any measures contained in the Biological Opinion will not be Inconsistent with this Settlement Agreement, and the Biological Opinion shall be accompanied by a statement regarding whether it is consistent with this Settlement Agreement.

4.3.2.2 If any Biological Opinion issued pursuant to Section 7 of the ESA is Inconsistent with this Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the provisions of the Biological Opinion, unless a Party provides notice to the other Parties that it objects to the inconsistency and initiates dispute resolution within 30 days after the Biological Opinion is filed with FERC.

4.3.2.3 The Disputing Party may, in addition and to the extent provided by applicable law, seek administrative and/or judicial review of any Biological Opinion that is Inconsistent with this Settlement Agreement; such rehearing shall be filed with FERC within 30 days of the issuance of the New Project License or judicial review shall be filed in court within 90 days of the issuance of the New Project License or the Biological Opinion, whichever is later. The Parties shall follow the dispute resolution process to the extent reasonably practicable while such administrative or judicial review is pursued. If a Party has filed for administrative rehearing or judicial review of any provision of the Biological Opinion that is Inconsistent with this Settlement Agreement and the Parties subsequently agree to modify this Settlement Agreement to conform to the inconsistent provision, the filing Party or Parties shall withdraw or dismiss the administrative or judicial action, or recommend such withdrawal or dismissal, as appropriate.

4.3.2.4 Except as provided in Section 4.6.5.4 for omissions based on jurisdiction or if the Settlement Agreement is terminated pursuant to Section 6.6, if any Biological Opinion is Inconsistent with this Settlement Agreement after a final and non-appealable decision on the administrative or judicial action, this Settlement Agreement shall be deemed modified to conform to the final decision.

4.4 Habitat Expansion Agreement

The Parties agree that the Licensee's obligations with respect to the blockage or passage of fish are satisfied if the Licensee enters into and complies with a final, signed agreement on Habitat Expansion in substantial conformity with the draft agreement dated March 9, 2006, attached to this Settlement Agreement as Appendix F.

NMFS and Interior will exercise their authority to prescribe fishways pursuant to Section 18 of the Federal Power Act by reserving that authority during the term of the license. Such reservation will be exercised only as provided in the Habitat Expansion Agreement (2006), which is provided in draft form in Appendix F, and will be finalized, signed and submitted to FERC before FERC acts on proposed License Article A109. In addition, the Parties recognize and agree that NMFS and Interior may include in their reservation of authority that is submitted to FERC the ability to modify that reservation, and may prescribe fishways, in the event that the Habitat Expansion Agreement and the underlying agreement between Pacific Gas and Electric Company and the Licensee are not executed within 30 days following FERC's issuance of a Final EIS. If NMFS and Interior submit reservations of their authority to prescribe fishways that are in all material respects the same as proposed License Article A109 and consistent with this Section, the Parties agree that those reservations of authority will not be considered Inconsistent with this Settlement Agreement.

4.5 CWA Section 401 Certification

4.5.1 Protection Mitigation and Enhancement Measures Recommended to be included in CWA Section 401 Certification

The Parties shall respectfully request that the California State Water Resources Control Board accept and incorporate, without material modifications, as conditions to the Section 401 Certification, all the PM&E measures stated in Appendix A of the Settlement Agreement that are within the California State Water Resources Control Board's jurisdiction pursuant to Section 401 of the CWA and the Porter Cologne Water Quality Control Act. The Parties shall further request that the California State Water Resources Control Board not include as conditions to the Section 401 Certification additional conditions that are Inconsistent with this Settlement Agreement.

4.5.2 Section 401 Certification Inconsistent with Settlement Agreement

4.5.2.1 If the California State Water Resources Control Board denies the Licensee's application for Section 401 Certification for the Project, the Parties agree such a denial shall be considered Inconsistent with this Settlement Agreement. If the California State Water Resources Control Board issues the Section 401 Certification and any provision of the Section 401 Certification is Inconsistent with this Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the provisions of the Section 401 Certification, unless a Party provides notice to the other Parties that it objects to the inconsistency and initiates dispute resolution within 30 days after the issuance of the Section 401 Certification.

4.5.2.2 The Disputing Party may, in addition, file a petition for reconsideration under California Code of Regulations, title 23, sections 3867-3869, and/or judicial review, of any provision of the Section 401 Certification that is Inconsistent with this Settlement Agreement; such petition must be filed within 30 days of the issuance of the Section 401 Certification. The Parties shall follow the dispute resolution process, if appropriate, to the extent reasonably practicable while such petition or judicial review is pursued. If a Party has filed for administrative rehearing or judicial review of any provision of the Section 401 Certification that is Inconsistent with this Settlement Agreement and the Parties subsequently agree to modify this Settlement Agreement to conform to the inconsistent provision, the filing Party or Parties shall withdraw the petition or dismiss the judicial action, or recommend such withdrawal or dismissal, as appropriate.

4.5.2.3 Except as provided in Section 4.6.5.4 for omission based on jurisdiction or if the Settlement Agreement is terminated pursuant to Section 6.6, if any provision of the Section 401 Certification is Inconsistent with this Settlement Agreement after a final and non-appealable decision on the petition or judicial action, this Settlement Agreement shall be deemed modified to conform to the final decision.

4.6 New Project License

4.6.1 Support for Issuance of New Project License

To the extent permitted by applicable law, all Parties shall support and advocate through appropriate written communications to FERC, Forest Service, applicable bureaus within Interior, NMFS, and SWRCB this Settlement Agreement and the PM&E measures stated in Appendix A hereto. Subject to Sections 4.2.1, 4.3.1, and 4.5.1, the Parties agree not to propose, support, or advocate proposed PM&E measures, or license conditions Inconsistent with this Settlement Agreement.

4.6.2 Term of New Project License

The Parties agree to respectfully recommend to FERC that the term of the New Project License be 50 years.

4.6.3 Comments on the NEPA Document

The Parties respectfully request that FERC Staff include Staff's recommended License Articles in the draft or final NEPA document for comment. The Parties shall comment on any recommended License Articles which, if approved in the New Project License, would be Inconsistent with this Settlement Agreement, in an effort to resolve such potential inconsistency before the issuance of the New Project License.

4.6.4 PM&E Measures Recommended to be Included in New Project License

Subject to Sections 4.2.1, 4.3.1 and 4.5.1, the Parties shall respectfully request that FERC accept and incorporate, without material modification, as license articles, all the PM&E measures stated in Appendix A of this Settlement Agreement. Subject to the same limitation, the Parties shall further request that FERC not include in the New Project License articles that are Inconsistent with this Settlement Agreement. The Parties shall respectfully request that measures and actions agreed to among the Parties as set forth in Appendix B not be incorporated in the New Project License.

4.6.5 New Project License Inconsistent with Settlement Agreement

4.6.5.1 Consistency of Final License with Agreement. If the New Project License issued by FERC, either initially or following conclusion of any rehearing or judicial review, is Inconsistent with this Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the inconsistency, unless a Party provides notice to the other Parties that it objects to the inconsistency and, if appropriate, initiates dispute resolution within 30 days after the date of the FERC Order.

4.6.5.2 Disputing Inconsistencies. The Disputing Party may, in addition, if they have intervened in the FERC relicensing proceeding, petition FERC for rehearing or seek judicial review of any New Project License article, or omission of any PM&E measure stated in Appendix A, that is Inconsistent with this Settlement Agreement. If any Party or non-party seeks rehearing or judicial review, the Licensee may seek a stay or an extension of time of the New Project License or other order. The Parties shall follow the dispute resolution process while any such rehearing, appeal or request for stay or extension is pursued. Any Disputing Party may ask FERC or the court to defer action on the merits of any rehearing request or appeal while dispute resolution is pursued. If a Party has filed for administrative rehearing or judicial review and the Parties subsequently agree to modify this Settlement Agreement to conform to the inconsistent action, the filing Party or Parties shall withdraw the appeal or recommend such withdrawal as appropriate.

4.6.5.3 Modification of Agreement if Inconsistency. Except as provided in Section 4.6.5.4 for omission based on jurisdiction and Section 4.6.5.5 for inclusion based on jurisdiction, or if the Settlement Agreement is terminated pursuant to Section 6.6, if an article in the Final New Project License is Inconsistent with this Settlement Agreement, this Settlement Agreement shall be deemed modified to conform to the final decision.

4.6.5.4 Omission Based on Jurisdiction. If the New Project License does not contain all the PM&E measures stated in Appendix A because FERC expressly determines that it does not have jurisdiction to adopt or enforce the omitted PM&E measures, this Settlement Agreement shall not be deemed modified to conform to such omission, and such omission shall not be used as the basis for dispute among the Parties; provided that any PM&E measure that FERC excludes from Appendix A based on a lack of jurisdiction shall be automatically included in Appendix B without material modification (including all funds needed to carryout or implement any such PM&E measure) and such inclusion shall not result in any reduction of funds already allocated under Appendix B.

4.6.5.5 Inclusion Based on Jurisdiction. If the New Project License includes PM&E measures stated in Appendix B of this Settlement Agreement because FERC determines that such measures are within FERC's jurisdiction to enforce, such action shall not be considered Inconsistent with this Settlement Agreement

provided there is no material change to the PM&E measure other than its inclusion in the New Project License. However, Parties may not assert in any regulatory forum including FERC that any PM&E measures in Appendix B of this Settlement Agreement should be included in the New Project License.

4.6.6 Requests for Stay or Extension of Implementation

The Parties support this Settlement Agreement and acknowledge that the operations of the Project as provided for in this Settlement Agreement are important to the Licensee's ability to fund the implementation of the PM&E measures and ensure the resource benefits provided for in this Settlement Agreement. The Parties recognize there may be challenges to the New Project License. As a result of such a challenge, the Licensee may at its discretion request from FERC or a court a stay or extension of implementation of any measure, action, or activity for so long as the New Project License is subject to administrative or judicial review. The other Parties will endeavor to support the Licensee's request to FERC for a stay or extension. If a Party cannot support the request for a stay or extension, that Party may oppose the request for a stay or extension only if:

(1) The challenge, if successful, would not add material requirements to the New Project License; or

(2) The scope of the request for stay or extension is not reasonably justified by the nature of the challenge. The scope of the request would be deemed reasonably justified if the magnitude of the request for stay or extension were comparable to the magnitude of risk posed by the challenge, and either (a) the stay or extension relates to the challenge or to measures physically or biologically linked to the challenge, or (b) the requested stay or extension of time relates to measures that would result in material capital cost to the Licensee or that would materially affect Project generation, operations, or economics; or

(3) The stay or extension is inconsistent with that Party's responsibility under law or regulation; or

(4) The Licensee challenges the New Project License and the opposing Party reasonably disagrees with the Licensee's determination that the New Project License being challenged is Inconsistent with this Settlement Agreement.

If the Licensee intends to seek a stay or extension, the Licensee shall contact the other Parties and make reasonable efforts to meet with the other Parties to explain and discuss the scope and extent of any such request for stay or extension. If any Party opposes a request for stay or extension, that Party shall contact the other Parties and make reasonable efforts to meet with the other Parties to explain and discuss the scope and extent of any opposition.

4.7 Cooperation Among Parties

The Parties shall cooperate in the implementation of this Settlement Agreement and the New Project License. No Party shall exercise discretion in a manner that results in an action or requirement that is Inconsistent with the Settlement Agreement unless necessary to comply with statutory, regulatory or other legal responsibility; in which event, the Party shall provide timely notice to other Parties of this obligation in order to permit Dispute Resolution as provided in Section 5 of this Settlement Agreement.

4.8 Support for Implementation

Upon notification by the Licensee of the need therefore, the other Parties shall provide written communications (or orally, in the event written communication is impossible to obtain due to reasons outside a Party's control) of support in any administrative approval process that may be required for implementation of this Settlement Agreement or related articles of the New Project License, subject to available agency resources and agency authority. The preceding sentence shall not apply to the Federal or State Regulatory Party exercising the authority or to the Federal or State Regulatory Party not participating in the proceeding. All Parties are encouraged to intervene in the relicensing proceeding at FERC and support this Settlement Agreement.

4.9 Defense against Conditions Inconsistent with This Settlement Agreement or Amendment

If a Party files a pleading or other document before FERC or another Regulatory Agency advocating a condition Inconsistent with this Settlement Agreement or a proposed amendment to the New Project License which is not based on Material New Information as provided by Section 4, any other Party may defend by: (a) stating its opposition to the condition Inconsistent with this Settlement Agreement or proposed amendment; (b) requesting that FERC or other Public Agency disapprove the condition Inconsistent with this Settlement Agreement or proposed amendment; and (c) explaining what other reasonable conditions should be included in and/or excluded from the New Project License if the condition Inconsistent with this Settlement Agreement or proposed amendment is approved. Since the Parties recognize that a dispute that results in the defense described in (c) may threaten the viability of this Settlement Agreement or may result in an action for specific performance pursuant to Section 5.3.2, the Parties affirm their commitment to make best efforts to resolve any such dispute regarding advocacy of a condition Inconsistent with this Settlement Agreement or proposed amendment in a timely manner to avoid such results. The Parties recognize that advocacy of conditions Inconsistent with this Settlement Agreement or proposed amendments based on Material New Information is permissible as described in Section 4.

4.10 Flood Control

The Parties agree that the Licensee pursuant to proposed Article A130, will comply with the rules and regulations prescribed by the U.S. Army Corps of Engineers. The Parties reserve the right to present evidence or argument relative to the impacts posed by any flood control proposal raised by any intervenor or otherwise before the Commission or the U.S. Army Corps of Engineers.

4.11 Responsibility for Funding

The Licensee shall ensure that funding needed to implement its obligations under this Settlement Agreement and the New Project License is provided. The Licensee shall not be excused from its duty to provide such funds due to a failure by any other Party, entity or person to provide funding or carry out a duty, obligation, or responsibility it may have with respect to the Project pursuant to other laws or agreements, including but not limited to the Federal Power Act (16 U.S.C. Section 791 et seq.) and the Davis Dolwig Act (California Water Code Section 11900 et seq.). Notwithstanding the foregoing, this Settlement Agreement does not alter or abrogate any duty, obligation or responsibility that any other Party or person may have to provide such funding pursuant to other laws or agreements, nor does this Settlement Agreement prevent the Licensee or any other Party from seeking to enforce such duty, obligation or responsibility. Further, the Licensee shall have no obligation to reimburse or otherwise pay any other Party for its assistance, participation or cooperation in any activities pursuant to this Settlement Agreement of the New Project License unless expressly agreed to by the Licensee or as required by law. In the event of administrative rehearing or judicial review, Parties shall bear their own costs and attorneys' fees.

4.12 Licensee Responsible for Compliance with New Project License

Upon acceptance of the New Project License, the Licensee is ultimately responsible for compliance with the New Project License. By entering into this Settlement Agreement, except as expressly provided herein, none of the Parties are accepting any new or additional legal liability or responsibility for compliance with the obligations under the New Project License. The Licensee shall not be excused from its duty to comply with its obligations under the New Project License due to a failure by any other Party, entity or person to provide funding or carry out a duty, obligation or responsibility it may have with respect to the Project pursuant to other laws or agreements, including but not limited to the Federal Power Act (16 U.S.C. Section 791 et seq.) and the Davis Dolwig Act (California Water Code Section 11900 et seq.). Notwithstanding the foregoing, this Settlement Agreement does not alter or abrogate any duty, obligation or responsibility that any other Party or person may have with respect to the Project pursuant to other laws or agreements, nor does this Settlement Agreement

prevent the Licensee or any other Party from seeking to enforce such duty, obligation or responsibility.

4.13 Availability of Funds

Implementation of this Settlement Agreement by any Party other than the Licensee is subject to the availability of funds. In addition, implementation of this Settlement Agreement by any Federal agency is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. Section 1341 et seq. Implementation of this Settlement Agreement by any State agency is subject to Article 16, Section 7 of the California Constitution. During any such period of deficiency affecting Licensee's obligations under the New Project License or this Settlement Agreement, Licensee shall take prompt action to secure necessary funds to meet its obligations under the New Project License and this Settlement Agreement. Further, nothing in this Settlement Agreement is intended or shall be construed to require the obligation, appropriation or expenditure of any money from the Treasury of the State of California by any State Regulatory Party other than the Licensee except as otherwise provided by law. The Licensee represents that all funds to be provided by it under this Settlement Agreement are not subject to the availability of annually appropriated funds from the State of California. However, the availability of funds may be delayed due to the failure of the state legislature to pass an annual budget by the State constitutional deadline of June 15. If there is such a delay in the state's annual budget, the Licensee shall take prompt action to make the delayed funds available upon passage of the state annual budget. The Parties agree there is no remedy for breach of contract for failure of the state legislature to pass an annual budget.

4.14 Implementation

4.14.1 Implementation Schedule

Licensee shall ensure that implementation of the PM&E measures stated in Appendix A shall begin after acceptance of the Final New Project License and be consistent with any schedule specified in Appendix A (as it may be modified by the New Project License). Licensee and other responsible Parties shall implement the measures stated in Appendix B consistent with the applicable schedules. Within 6 months after acceptance of the New Project License, the Licensee shall prepare and provide to all Parties and FERC the Licensee's planned detailed schedule for implementing the PM&E measures recommended in this Settlement Agreement and incorporated in the Final New Project License. The schedule shall specify dates for initiation, additional environmental review, permitting, design, development, progress reporting, monitoring, and completion, as appropriate, for each such PM&E measure and shall include milestones for major activities.

4.14.2 Permits

Upon acceptance of the New Project License and FERC approval of the applicable plans, Licensee shall apply for and use reasonable efforts to obtain in a timely manner and in final form all applicable federal, state, regional, and local permits, licenses, authorizations, certifications, determinations, and other governmental approvals for purposes of implementing this Settlement Agreement and the New Project License (Permits). The applications for such Permits shall be consistent with the terms of this Settlement Agreement. Each Party, upon the Licensee's request, shall use reasonable efforts to support the Licensee's applications for Permits, and shall not file comments or recommend Permit conditions that are Inconsistent with this Settlement Agreement. However, the duty to affirmatively support the Licensee's applications for Permits, such as filing letters in support, shall not apply to a Federal or State Regulatory Party not participating in the Permit application proceeding. The Licensee shall pay all fees required by law related to such Permits. The Parties shall work together and cooperate as appropriate during the permitting, environmental review, and implementation of this Agreement. Except as expressly provided in this Settlement Agreement, the Licensee shall not be required by this Settlement Agreement to implement an action required under this Settlement Agreement or the New Project License if a Permit has been denied, contains inconsistent or unreasonable conditions, or until all applicable Permits required for that action are obtained. If a proceeding challenging any Permit required for the action has been commenced, the Licensee shall be under no obligation under this Settlement Agreement to implement the action or any related action until any such proceeding is terminated. In the event any Permit has been denied, Licensee determines that the Permit contains inconsistent or unreasonable conditions, or any Permit is not obtained in a timely manner, the Parties shall confer to evaluate the effect of such event on implementation of this Settlement Agreement and seek to develop actions to respond to that event. If the Parties do not agree on actions to respond to that event and nonperformance or prolonged delay in performance of one or more PM&E measures due to the event materially reduces the benefit of this Settlement Agreement, a Party may initiate dispute resolution, except that dispute resolution regarding denial of a Permit shall be restricted to the issue of actions to respond to that event. In addition, if the event results in nonperformance or prevents performance of one or more PM&E measures for a prolonged period, the Parties recognize that re-initiation of consultation under the ESA may be required. Nothing contained in this section shall be construed to limit the Licensee's right to apply for a Permit before issuance of the New Project License, provided that any such applications shall not be Inconsistent with this Settlement Agreement.

### 4.15 Reopener or Amendment of New Project License

#### 4.15.1 Reopener by a Party Other Than the Licensee

A Party to this Settlement Agreement, other than the Licensee, may seek to modify, or otherwise reopen during the term of this Settlement Agreement, the PM&E measures included in the New Project License, only if the Party, relying on Material New Information, reasonably demonstrates that such proposed modification or reopener is required to fulfill statutory, regulatory, or court-ordered responsibilities or is otherwise in the public interest. If the subject matter covered by the proposed reopener is within the scope of the EC, RAC, or other applicable committee, the Party seeking to reopen the license shall first bring the matter to the appropriate committee for consideration, unless an emergency exists wherein committee review is impracticable. The provisions of this Settlement Agreement shall remain in effect as unmodified by any reopener sought by any Party until the effective date of any order by FERC approving the reopener and amending the New Project License. As stated in proposed License Article A109, NMFS and Interior may prescribe fishways consistent with the Habitat Expansion Agreement (2006), attached to this Settlement Agreement as Appendix F.

##### 4.15.1.1 Notice

Prior to seeking modification or reopener, a Party shall provide all Parties at least 90-days Notice to consider the Material New Information and that Party's position. This Notice requirement is satisfied when the Party brings the matter to the EC, RAC or other applicable committee. A Party shall not be required to comply with this 90-day Notice provision if it reasonably believes an emergency situation exists. In such an emergency situation, the Party shall give Notice to the EC, RAC, Forest Service, NMFS, Interior, State Water Resources Control Board, and the State Water Contractors within 5 days of recognition of the need for such modification or reopener. If a Party proposes a modification or reopener that another Party believes would be Inconsistent with this Settlement Agreement and objects, then the Dispute Resolution provisions of Section 5 apply, and the objecting Party must invoke Dispute Resolution during the 90-day Notice period or waive its objection.

#### 4.15.2 Amendment of New Project License

Nothing in this Settlement Agreement is intended, or shall be construed, to affect or limit the right of the Licensee to seek amendments of the New Project License that are not Inconsistent with this Settlement Agreement. The Licensee may seek a Project license amendment that would be Inconsistent with this Settlement Agreement only if the Licensee, relying on Material New Information, or any other Party's proposal to modify or reopen under Section 4.13.1, or a challenge to any Biological Opinion issued for the New Project License after the

New Project License becomes final that results in an inconsistency with this Settlement Agreement, reasonably demonstrates such proposed amendment is required to fulfill statutory or regulatory responsibilities or is otherwise in the public interest. If the subject matter covered by the proposed amendment is within the scope of the EC, RAC, or other applicable committee, the Licensee shall first bring the matter to the appropriate committee for consideration, unless an emergency exists wherein committee review is impracticable. The provisions of this Settlement Agreement shall remain in effect as unmodified by any amendment sought by the Licensee until the effective date such amendment is approved by FERC.

4.15.2.1 Notice

Prior to filing a proposed license amendment that relates to the subject of this Settlement Agreement, the Licensee shall provide the other Parties at least 90-days Notice of its intention to do so. This Notice requirement is satisfied when the Licensee brings the matter to the EC, RAC or other applicable committee. Promptly following the giving of such Notice, the Licensee shall consult with Parties responding within 30 days of such Notice regarding the need for and the purpose of the amendment. If a Party believes the proposed amendment is Inconsistent with the Settlement Agreement and objects, then the Dispute Resolution provisions in Section 5 apply, and the objecting Party must invoke Dispute Resolution within this 90-day Notice period or waive its objection. The Licensee shall not be required to comply with this 90-day Notice provision if it believes an emergency situation exists or if required to meet its responsibilities under applicable law or an order of an agency with jurisdiction over the Licensee and provided further that the Licensee shall comply with any statutory or regulatory requirements for such notice or consultation. In such an emergency or compliance situation, the Licensee shall give Notice to the EC, RAC, Forest Service, NMFS, Interior, State Water Resources Control Board, and the State Water Contractors within 5 days of recognition of the need for such amendment.

4.15.2.2 Consultation on Amendments

Except as provided in the New Project License or in the case of an emergency, the Licensee shall allow a minimum of 30 days for any Party to comment and to make recommendations before filing any study, operating or implementing plan, report, or facility design with the Commission for any application for a Project license amendment that relates to a subject covered by this Settlement Agreement and where consultation with Federal or State Regulatory Parties or other Parties is required. If the Licensee does not adopt a recommendation or comment of a Party, it shall include in any filing with FERC copies of the comments/recommendations and an explanation as to why the comment/recommendation was not adopted.

4.15.2.3 Parties' Option to Intervene in Amendment Proceeding

The Licensee shall not oppose, based on the issue of standing, an intervention request by any Party in a proceeding for a Project license amendment that any Party has concluded would be Inconsistent with this Settlement Agreement. The Parties acknowledge that intervention in the relicensing proceeding docket at FERC does not make the Party an intervener in any post-licensing proceedings, such as an amendment proceeding.

4.16 Amendment of Settlement Agreement

This Settlement Agreement may be amended at any time through the term of the New Project License plus the term(s) of any annual license(s) that may be issued after the New Project License has expired, after Notice by the Party seeking amendment, with the unanimous agreement of all Parties still in existence, including any successor thereto. If the Licensee seeks to amend this Settlement Agreement, the Licensee shall give each Party at least sixty (60) days prior written Notice. Such Notice shall state that failure of any Party still in existence (excepting all such Federal, State, or local governmental agency Parties) to respond in writing or by electronic mail to the Licensee's Notice within the applicable 60-day period shall be deemed to be an approval of such amendment proposed by Licensee. Any amendment of this Settlement Agreement shall be in writing and executed by the responding Parties. The Parties recognize that any amendment to Appendix A of the Settlement Agreement may also require an amendment to the New Project License.

4.17 Consultation on Provisions in New Project License

Except as provided in the New Project License or in the case of an emergency, the Licensee, where consultation with the EC and/or other Party is required by this Settlement Agreement, shall allow a minimum of 30 days for EC and/or such Party to comment and to make recommendations before filing any study, operating, or implementing plan, report, or facility design with the Commission. If the Licensee does not adopt a recommendation or comment of the EC and/or such Party, it shall include in any filing with the Commission copies of the comments/recommendations and an explanation as to why the comment/recommendation was not adopted.

4.18 Project Boundary Modification

The Parties agree that the Licensee may seek the removal of a small amount of acreage from the Foreman Creek Unit of the Lake Oroville State Recreation Area from the Project Boundary for the purpose of making land available to Native American tribes for the purpose of reburial of repatriated human remains.

4.19 Cost Caps

Notwithstanding any inclusion in the New Project License of the Commission's reservation of rights to require the Licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in the New Project License in excess of the agreed-upon cost caps, the Parties agree to be bound by the cost caps in this Settlement Agreement, subject to any conditions or exceptions expressly provided in this Settlement Agreement. The Parties agree not to seek the Licensee's expenditure of additional funds in excess of the agreed-upon cost caps if the Licensee is in compliance with the relevant license article. Cost caps may be adjusted by Section 7.1 of this Settlement Agreement. Cost caps do not include those items identified as cost estimates.

## 5. Dispute Resolution

5.1 General Applicability

5.1.1 All disputes among the Parties regarding any Party's performance or compliance with this Settlement Agreement, including resolution of any disputes related to any provision of the New Project License, Final Mandatory Terms and Conditions, Section 401 Certification, Permits related to the New Project License, or other mandatory license condition that is Inconsistent with the Settlement, shall be the subject to the dispute resolution process provided in this Section 5, unless otherwise specifically provided in this Settlement Agreement. The Parties agree that disputes shall be brought in a prompt and timely manner.

5.1.2 The Disputing Parties shall devote such resources as are needed and as can be reasonably provided to resolve the dispute expeditiously.

5.1.3 The Disputing Parties shall cooperate in good faith to promptly schedule, attend and participate in the dispute resolution.

5.1.4 Unless otherwise agreed among the Disputing Parties, each Disputing Party shall bear its own costs for its participation in this or any administrative dispute resolution process related to the Settlement Agreement.

5.1.5 Each Disputing Party shall promptly implement any resolution of the dispute.

5.1.6 The dispute resolution process in this Section does not preclude any Party from timely filing and pursuing an action for administrative or judicial relief of any FERC order, compliance matter, or other regulatory action related to the New Project License; provided that any such Party shall pursue dispute resolution

pursuant to this process as soon as practicable thereafter or concurrently therewith.

5.1.7 The Party initiating a dispute under this Section shall notify FERC when dispute resolution proceedings are initiated relevant to an issue related to the New Project License. The Parties acknowledge that the initiation of dispute resolution proceedings shall have no effect on filing deadlines or applicable statutes of limitation before FERC.

5.2 Process

5.2.1 Dispute Initiation Notice. A Party claiming a dispute shall give Notice of the dispute. If the dispute includes a claim that the New Project License, or any preliminary or final condition thereof, is Inconsistent with this Settlement Agreement, the Notice shall be issued within the applicable time periods specified in Section 4. Such Notice shall describe: (A) the matter(s) in dispute, (B) the identity of any other Party alleged to have not performed an obligation provided by the Settlement Agreement, and (C) the specific relief sought. The Parties agree that disputes shall be brought in a prompt and timely manner.

5.2.2 Informal Meetings. The Disputing Parties shall hold at least two informal meetings to resolve the dispute, commencing within 30 days after the Dispute Initiation Notice.

5.2.2.1 If the dispute arises after acceptance of the New Project License and falls within the scope of the Ecological Committee or Recreation Advisory Committee, the dispute shall be referred to that committee if: (A) the Settlement Agreement or New Project License expressly assigns the disputed matter to the committee or (B) a quorum of the Committee members provide Notice of their intent to participate in the dispute resolution. In the event of such referral, all members of the Committee shall be deemed "Disputing Parties." For this purpose, a quorum shall mean two-thirds of the voting members of the committee.

5.2.2.2 The committees shall attempt to resolve the matter according to the internal decision rules for the committees. Specifically, in the Ecological Committee, decisions are made by consensus as provided in Section 4.2 of Appendix C. In the Recreation Advisory Committee, advice and recommendations are made by a majority plus one vote as provided in Section 4.4 of the Recreation Management Plan. If the dispute is properly referred to both committees, then the committees shall hold a joint meeting to consider the dispute. Any decisions made in such a joint meeting shall be by consensus as provided in Section 4.2 of Appendix C. A committee's consideration of a dispute under this provision shall fulfill the requirement of the two informal meetings otherwise required for disputes not within the scope of a committee.

5.2.3 Mediation. If the dispute is not resolved in the informal meetings or by the Ecological Committee or Recreation Advisory Committee, the Disputing Parties shall decide whether to use a neutral mediator, such as FERC's Office of Dispute Resolution Services. The decision whether to pursue mediation shall be made within 20 days after conclusion of the informal meeting in Section 5.2.2. The Disputing Parties shall agree on an appropriate allocation of any costs of the mediator employed under this section. Mediation shall not occur if the Disputing Parties cannot agree on the allocation of costs. The Disputing Parties shall select a mediator within 30 days of the decision to pursue mediation, including the agreement of allocation of costs. The mediation process shall be concluded not later than 60 days after the mediator is selected. The above time periods may be shortened or lengthened upon mutual agreement of the Disputing Parties.

5.2.4. Dispute Resolution Notice. The Disputing Parties shall provide Notice of any resolution of the dispute achieved under Sections 5.2.2 - 5.2.3. The Notice shall: (A) restate the disputed matter, as initially described in the Dispute Initiation Notice; (B) describe the alternatives which the Disputing Parties considered for resolution; (C) state whether resolution was achieved, in whole or part, and state the specific relief agreed-to as part of the resolution.

5.3 Enforcement of Settlement Agreement After Dispute Resolution

5.3.1 Enforcement Regarding New Project License. A Disputing Party may seek administrative or judicial relief for an unresolved dispute regarding the Licensee's performance of its obligations under the New Project License only after exhaustion of the dispute resolution process under Section 5. Any such relief shall be sought and obtained from FERC or other appropriate regulatory or judicial forum. No Party to the Settlement Agreement may seek damages for breach of the Proposed License Articles stated in Appendix A, whether before or after acceptance of the New Project License.

5.3.2 Enforcement Regarding Contractual Obligations. A Disputing Party may seek administrative or judicial relief for breach of a contractual obligation established by this Settlement Agreement only after exhaustion of the dispute resolution process in Section 5. Venue for such action shall lie in a court with jurisdiction located in Sacramento, California. In such action, a Disputing Party may only seek specific performance of the contractual obligation or other equitable relief. No Party shall be liable for damages for such breach of contractual obligations. By executing this Settlement Agreement, no Party waives any equitable or legal defenses that may be available.

## 6. Withdrawal from Settlement Agreement

6.1 Withdrawal of Party from Settlement

A Party may withdraw from this Settlement Agreement only if (a) it objects to an order issuing a New Project License that is Inconsistent with this Settlement or to a Biological Opinion issued before the New Project License becomes final that is Inconsistent with this Settlement Agreement, (b) it has complied with the required dispute resolution procedures stated in Section 5 to attempt to resolve the objection, and (c) that Party does not file for appeal. If the Party files an appeal to resolve the inconsistency, that Party may not withdraw until its appeal is exhausted. In addition, the Licensee may withdraw as provided in Section 6.2. A Party that withdraws will provide Notice of withdrawal, including its basis for withdrawal.

6.2 Withdrawal of Licensee from Settlement Agreement Prior to Acceptance of the New Project License.

In addition to the provisions of Section 6.1, prior to the acceptance of the New Project License, the Licensee may withdraw from this Settlement Agreement without first complying with the Dispute Resolution process stated in Section 5 if a Party withdraws from this Settlement Agreement and the Licensee reasonably determines at its sole discretion, after providing the other Parties a reasonable opportunity to meet and discuss with Parties, that the withdrawal: (a) may adversely affect the likelihood of NMFS or Interior issuing biological opinions not Inconsistent with this Settlement Agreement, or (b) substantially diminishes the value of this Settlement Agreement. Licensee shall give Notice identifying the reason for withdrawal within 30 days of the Licensee's knowledge of the event creating the right to withdraw. If Licensee withdraws from Settlement Agreement, Licensee agrees to support any Federal or State Regulatory Party's request of FERC for a stay of the licensing process to allow the Federal or State Regulatory Party to comply with FERC's regulatory processes.

6.3 Effective Date of Withdrawal

Withdrawal by a Party shall become effective 10 calendar days after Notice is given by the withdrawing Party.

6.4 Effect of Withdrawal on the Project Supplemental Benefits Fund

6.4.1 Effect of Withdrawal of the Licensee on the Project Supplemental Benefits Fund. If the Licensee elects to withdraw from this Settlement Agreement, it and the State Water Contractors shall thereafter initiate negotiations with the Fund Administrator within 30 days and those three parties shall use their best efforts to reach agreement within 6 months with respect to a reasonable, separate agreement with the Fund Administrator for a revised Supplemental Benefits Fund agreement. The goal of the new Supplemental Benefits Fund agreement would

be to achieve a reasonable new balance of the benefits expected by the parties to the Supplemental Benefits Fund portion of Appendix B, taking into account the increase in costs and burdens and the decrease in value of the license issued by FERC.

6.4.2 Effect of Withdrawal of the State Water Contractors on the Project Supplemental Benefits Fund. If the State Water Contractors elect to withdraw from this Settlement Agreement, it and the Licensee shall thereafter initiate negotiations with the Fund Administrator within 30 days and those three parties shall use their best efforts to reach agreement within 6 months with respect to a reasonable, separate agreement with the Fund Administrator for a revised Supplemental Benefits Fund agreement. The goal of the new Supplemental Benefits Fund agreement would be to achieve a reasonable new balance of the benefits expected by the parties to the Supplemental Benefits Fund portion of Appendix B, taking into account the increase in costs and burdens and the decrease in value of the license issued by FERC.

6.4.3 Effect of Withdrawal of the City of Oroville on the Project Supplemental Benefits Fund. If the City of Oroville withdraws from the Settlement Agreement, if necessary the Licensee shall consult with the other Parties and designate a new Fund Administrator pursuant to Paragraph C (1.0) of the Project Supplemental Benefits Fund portion of Appendix B. Further, the Licensee and the State Water Contractors shall thereafter initiate negotiations with the Steering Committee and those parties shall attempt to reach agreement within 6 months with respect to a reasonable, separate agreement for a revised Supplemental Benefits Fund agreement. The new Supplemental Benefits Fund agreement may be a substantially smaller Supplemental Benefits Fund reflecting a significantly different balance of the benefits expected by the parties to the Supplemental Benefits Fund portion of Appendix B, reflecting a decrease in value to the Licensee and the State Water Contractors due to the withdrawal of the member of the Supplemental Benefits Fund Steering Committee from the Settlement Agreement and the loss of their support for the new license at FERC.

6.5 Continuity After Withdrawal

The withdrawal of a Party, other than the Licensee, does not terminate this Settlement Agreement for the remaining Parties. If a Party withdraws from this Settlement Agreement, the withdrawing Party shall not be bound by any term contained in this Settlement Agreement, except as provided in Section 2.2. The withdrawing Party shall not use any documents and communications related to the development, execution, and submittal of this Settlement Agreement to FERC as evidence, admission, or argument in any forum or proceeding for any purpose to the fullest extent allowed by applicable law, including 18 C.F.R. § 385.606. This provision does not apply to the results of resource studies or other technical information developed for use by the Collaborative. This provision does

not apply to any information that was in the public domain prior to the development of this Settlement Agreement or that became part of the public domain at some later time through no unauthorized act or omission by any Party. This provision does not apply to: (a) any information held by a federal agency that is not protected from disclosure pursuant to the Freedom of Information Act or other applicable law; or (b) any information held by a state or local agency that is not protected from disclosure pursuant to the California Public Records Act or other applicable state or federal law. The withdrawing Party shall continue to maintain the confidentiality of all settlement communications to the extent permitted by applicable law.

6.6 Termination of Settlement Agreement

This Settlement Agreement shall terminate as to all Parties and have no further force or effect upon expiration of the New Project License and any annual licenses issued after expiration thereof or upon withdrawal from this Settlement Agreement by the Licensee. Upon termination, all documents and communications related to its development, execution, and submittal of this Settlement Agreement to FERC shall not be used as evidence, admission, or argument in any forum or proceeding for any purpose to the fullest extent allowed by applicable law, including 18 C.F.R. § 385.606. This provision does not apply to the results of resource studies or other technical information developed for use by the Collaborative. This provision does not apply to any information that was in the public domain prior to the development of this Settlement Agreement or that became part of the public domain at some later time through no unauthorized act or omission by any Party. This provision does not apply to: (a) any information held by a federal agency that is not protected from disclosure pursuant to the Freedom of Information Act or other applicable law; or (b) any information held by a state or local agency that is not protected from disclosure pursuant to the California Public Records Act or other applicable state or federal law. Notwithstanding the termination of this Settlement Agreement, all Parties shall continue to maintain the confidentiality of all settlement communications to the extent permitted by applicable law, and all Parties remain subject to Section 2.2 of this Settlement Agreement.

## 7. General Provisions

7.1 Escalation of Costs

Unless otherwise indicated, costs specified in this Settlement Agreement shall be escalated (starting in December 2005) based upon a Composite Index defined as the arithmetic average of the Producer Price Index for the Materials and Components for Construction (Producer Price Index) published by the U.S. Department of Labor Bureau of Labor Statistics and the Gross Domestic Product Implicit Price Deflator published by the U.S. Department of Commerce Bureau of Economic Analysis. The Composite Index will be computed on January 31 of

each year or the next business day if January 31 is a state holiday or a weekend day. The computation will use the latest version of data available as of January 31 for the annual average values of the Producer Price Index and the Gross Domestic Product Implicit Price Deflator ending December 31 of the prior year. The Composite Index will not be adjusted during the year and its value will remain constant from January 31 of one year to January 30 of the following year.

If during the term of the New Project License either of the two indices are significantly modified or eliminated, then the time value of money shall be based on the remaining index. If both indices are significantly modified or eliminated, the Licensee shall propose a new index or combination of indices and the Parties shall use their best efforts to agree on a substitute index. If the Parties are unable to reach agreement on a substitute index within a reasonable amount of time, or by January 31 if needed sooner, then the Licensee's proposed index shall be used.

This provision does not apply to the Supplemental Benefits Fund set forth in Appendix B.

7.2 Non-Severable Terms of Settlement Agreement

The terms of this Settlement Agreement are not severable one from the other. This Settlement Agreement is made on the understanding that each term is in consideration and support of every other term, and each term is a necessary part of the entire Settlement Agreement. If a court of competent jurisdiction rules that any provision in Sections 1 through 8.2 of this Settlement Agreement is invalid, this Settlement Agreement is deemed modified to conform to such ruling, unless a Party objects. If a Party objects, the other Parties agree to meet and confer regarding the continued viability of this Settlement Agreement.

7.3 Relationship to Water Rights

Nothing in this Settlement Agreement is intended, or shall be construed to, affect any non-Party's existing rights. Nothing in this Settlement Agreement is intended to, or shall be construed to, affect any Party's contract or water rights except as provided by this Settlement Agreement.

7.4 No Third-Party Beneficiaries

This Settlement Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Settlement Agreement. The duties, obligations, and responsibilities of the parties with respect to third parties shall remain as imposed under applicable law.

7.5 Successors and Assigns

This Settlement Agreement shall be binding on and inure to the benefit of the Parties and their successors and approved assigns, unless otherwise specified in this Settlement.

7.5.1 Assignment

Any voluntary assignment by a Party shall not be effective unless approved by the Licensee, which approval shall not be unreasonably withheld. A partial assignment is not permitted. After the Licensee's approval of the assignment, the assignee shall sign the Settlement Agreement and become a Party.

7.5.2 Succession

In the event of succession between public agencies, whether by statute, executive order, or operation of law, the successor agency shall become a Party to and be bound by the terms of this Settlement Agreement, to the extent permitted by law.

7.5.3 Continuation of Certain Obligations

7.5.3.1 Upon completion of a succession or assignment, the initial Party shall no longer be a Party. It shall continue to be bound by Sections 2.2, 6.5, 6 .6, 7.4, and 7.5. Except as provided in Sections 3 and 4, the initial Party shall not take any action adverse to the Settlement Agreement, or the New Project License to the extent it incorporates the Settlement Agreement.

7.5.3.2 No change in ownership of the Project or transfer of the existing or New Project License by the Licensee shall in any way modify or otherwise affect any other Party's rights or obligations under this Settlement Agreement. Unless prohibited by applicable law, the Licensee shall require in any transaction for a change in ownership of the Project or transfer of the existing or New Project License, that such new owner shall be bound by, and shall assume all of the rights and obligations of the Licensee under this Settlement Agreement upon completion of the change of ownership and approval by FERC of the license transfer.

7.5.4 Notice

A Licensee transferring pursuant to Section 7.5.3.2 or an assigning Party shall provide Notice to the other Parties at least 30 days prior to the proposed effective date of such transfer or assignment.

7.6 Extension of Time; Inability to Perform

7.6.1 Obligations under New Project License

7.6.1.1 Extension of Time

If Licensee has good cause, consistent with FERC's standard in 18 C.F.R. § 385.2008, to seek an extension of time to fulfill an obligation under the New Project License, the Licensee may file with FERC such a request. The Parties acknowledge that FERC's standard for any such request shall apply. If any Party provides Notice that it disputes the good cause for extension, the Licensee and the Disputing Party shall follow the dispute resolution process in Section 5 of this Settlement Agreement. If the dispute cannot be timely resolved by such process, the Licensee may proceed with its request, if it has not done so already, and any Disputing Party may oppose the request.

7.6.1.2 Inability of Licensee to Perform

If the Licensee is unable to perform an obligation under the New Project License due to an event or circumstances beyond its reasonable control, the Licensee may file with FERC an appropriate request for relief. The Parties acknowledge that FERC's standard for any such request shall apply. If any Party provides Notice that it disputes the non-performance, the Licensee and the Disputing Party shall follow the dispute resolution process in Section 5 of this Settlement Agreement. If the dispute cannot be timely resolved by such process, the Licensee may proceed with its request to FERC, if it has not done so already, and any Disputing Party may oppose the Licensee's request.

7.6.2 Contractual Obligations

No Party shall be in breach of a contractual obligation under this Settlement Agreement, as established by Sections 1 through 8.2 and Appendix B of this Settlement Agreement, if it is unable to perform or delays performance due to any Uncontrollable Force reasonably beyond its control, unless otherwise provided by this Settlement Agreement. For this purpose, a "Uncontrollable Force" may include, but is not limited to, natural events, labor or civil disruption, action or non-action of a governmental agency (other than DWR), or breakdown or failure of the Project works.

7.6.3 Provisions Applicable to New Project License and Contractual Obligations

7.6.3.1 Delay in Funding

As provided in Section 4.11, the availability of funds may be delayed due to the failure of the California Legislature to pass an annual budget by the State constitutional deadline of June 15. If the Licensee determines that any funds needed to fulfill any of its obligations under the New Project License or Appendix

B, including funding to another state agency, are delayed due to any such failure, then Licensee shall provide the Notice required by Section 7.6.3.2. The Notice also shall include a good faith estimate by the Licensee of the amount of the funds delayed and the Licensee's obligations that were to be funded. Upon passage of the State annual budget, the Licensee shall take prompt action to make the delayed funds available. In the event of such a delay in performance of an obligation under the New Project License, the Licensee shall seek an extension of time as provided in Section 7.6.1.1.

7.6.3.2 Notice of Delay or Inability to Perform

The Party whose performance of an obligation under this Settlement Agreement is affected by any delay or inability to perform under Section 7.6 shall provide Notice as soon as reasonably practicable. This Notice shall include: (1) a description of the event causing the delay or anticipated delay; (2) an estimate of the anticipated length of the delay; (3) a description of the measures taken or to be taken to avoid or minimize the delay; and (4) a proposed timetable for the implementation of the measures or performance of the obligation. The affected Party shall make all reasonable efforts to promptly resume performance of the obligation. It shall provide Notice when it resumes performance of the obligation.

7.7 Governing Law

The New Project License and any other terms of this Settlement Agreement over which a federal agency has statutory or regulatory jurisdiction shall be governed, construed, and enforced in accordance with such authorities. This Settlement Agreement shall otherwise be governed and construed under the laws of the State of California. By executing this Settlement Agreement, no federal agency is consenting to the jurisdiction of a state court unless such jurisdiction otherwise exists. All activities undertaken pursuant to this Settlement Agreement shall be in compliance with all applicable law.

7.8 Elected Officials Not to Benefit

No elected officials shall be entitled to any share or part of this Settlement Agreement or to any benefit that may arise from it.

7.9 No Partnership

Except as otherwise expressly set forth herein, this Settlement Agreement does not and shall not be deemed to make any Party the agent for, partner of, or joint venturer with any other Party.

7.10 Reference to Regulations

Any reference in this Settlement Agreement to any federal or state regulation shall be deemed to be a reference to such regulation, or successor regulation, in existence as of the date of the action at the time in question.

7.11 Notice

Except as otherwise provided in this Section, any Notice required by this Settlement Agreement shall be written. To the extent practicable, Notice shall be sent to all Parties still in existence and to the State Water Resources Control Board by first-class mail or comparable method of distribution, and as applicable, filed with FERC. For the purpose of this Settlement Agreement and unless otherwise specified, a Notice shall be effective upon receipt, but if provided by U.S. Mail, seven (7) days after the date on which it is mailed. The Parties agree that if practicable, e-mail or fax are the preferred methods of providing Notice under this Settlement Agreement. When this Settlement Agreement requires Notice in fewer than seven (7) days, Notice shall be provided by telephone, facsimile, or electronic mail and shall be effective when provided. For the purpose of Notice, the list of authorized representatives of the Parties and State Water Resources Control Board as of the Effective Date is attached as Appendix G. The Licensee shall keep the names and contact information for the Parties to this Settlement Agreement. The Parties and State Water Resources Control Board shall provide Notice of any change in the authorized representatives designated in Appendix G, and the Licensee shall maintain the current distribution list of such representatives. The Parties agree it is their responsibility to keep Licensee informed of their current address, telephone, facsimile and electronic mail information, and that failure to provide Licensee with current contact information will result in a waiver of that Party's right to Notice under this Settlement Agreement.

7.12 Section Titles for Convenience Only

The titles for the Sections of this Settlement Agreement are used only for convenience of reference and organization and shall not be used to modify, explain, or interpret any of the provisions of this Settlement Agreement or the intentions of the Parties. This Settlement Agreement has been jointly drafted by the Parties and therefore shall be construed according to its plain meaning and not for or against any Party.

## 8. Execution of Settlement Agreement

### 8.1 Signatory Authority

Each signatory to this Settlement Agreement certifies that he or she is authorized to execute this Settlement Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

### 8.2 Signing in Counterparts

This Settlement Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same instrument. Any signature page of this Settlement Agreement may be detached from any counterpart of this Settlement Agreement without impairing the legal effect of any signatures thereon, and may be attached to another counterpart of this Settlement Agreement identical in form hereto but having attached to it one or more signature pages.

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**Alameda County Flood Control and Water Conservation District, Zone 7**

_____

Vince Wong, Assistant General Manager

**Alameda County Water District**

_____

Paul Piraino, General Manager

**American Rivers**

_____

Rebecca Wodder, President

**American Whitewater**

_____

Dave Steindorf, California Stewardship Director

**Antelope Valley – East Kern Water Agency**

_____

Andy Rutledge, President, Board of Directors

**Berry Creek Citizens Association**

_____

Loren Gill, President

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**California Department of Boating and Waterways**

_____

Raynor Tsuneyoshi, Director

**California Department of Fish and Game**

_____

Ryan Broddrick, Director

**California Department of Parks and Recreation**

_____

Ruth Coleman, Director

**California Department of Water Resources**

_____

Lester Snow, Director

**California State Horsemen's Association**

_____

Robert C. Adams, President

**California State Horsemen's Association Region II**

_____

Liz Murphy, Trails Chairperson

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**Castaic Lake Water Agency**

_____

Dan Masnada, General Manager

**Central Coast Water Authority**

_____

Leo Trujillo, Chair, Board of Directors

**Chico Paddleheads**

_____

Dave Steindorf, Conservation Chair

**Citizens for Fair and Equitable Recreation**

_____

Larry Grundmann, Representative

**City of Oroville**

_____

Gordon Andoe, Mayor

**Coachella Valley Water District**

_____

Steve Robbins, General Manager/Chief Engineer

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**County of Kings**

_____

Tony Oliveira, Chair, Board of Supervisors

**Crestline – Lake Arrowhead Water Agency**

_____

Roxanne M. Holmes, General Manager

**Desert Water Agency**

_____

David Luker, General Manager

**Empire West Side Irrigation District**

_____

John Howe, Member, Board of Directors

**Feather River Low Flow Alliance**

_____

John Allen

**Feather River Recreation and Parks District**

_____

Vene Thompson, Board of Directors

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**International Mountain Bicycling Association**

_____

Jim Haagen-Smit, State Representative

**Kern County Water Agency**

_____

James Beck, General Manager

**Kon Kow Valley Band of Maidu**

_____

Patsy Seek, Chairwoman

**Lake Oroville Bicyclist Organization**

_____

Lyle Wright, President

**Littlerock Creek Irrigation District**

_____

Brad Bones, General Manager

**Metropolitan Water District of Southern California**

_____

Jeffrey Kightlinger, General Manager

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**Mojave Water Agency**

_____

Kirby Brill, General Manager

**Napa County Flood Control and Water Conservation District**

_____

Don Ridenhour, Assistant District Engineer

**National Marine Fisheries Service**

_____

Rodney McInnis, Regional Administrator

**Oak Flat Water District**

_____

William Harrison, General Manager

**Oroville Area Chamber of Commerce**

_____

Don Reighley

**Oroville Downtown Business Association**

_____

Kristine Armstrong, President

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**Oroville Economic Development Corporation**

_____

Bud Tracy, President

**Oroville Parks Commission**

_____

Carolyn Norton, Chairperson

**Oroville Recreation Advisory Committee**

_____

Kevin Zeitler, Chairman

**Oroville Redevelopment Agency**

_____

Robert Sharkey, Chairperson

**Oroville Rotary Club**

_____

Michael Hutton, President

**Palmdale Water District**

_____

Jon Pernula, Facilities and Operations Manager

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**San Bernardino Valley Municipal Water District**

_____

Robert L. Reiter, General Manager and Chief Engineer

**San Gabriel Valley Municipal Water District**

_____

Darin Kasamoto, General Manager

**San Gorgonio Pass Water Agency**

_____

Jeff Davis, General Manager

**Santa Clara Valley Water District**

_____

Stanley M. Williams, Chief Executive Officer

**Solano County Water Agency**

_____

David Okita, General Manager

**State Water Contractors, Inc.**

_____

Terry Erlewine, General Manager

**SETTLEMENT AGREEMENT FOR LICENSING OF THE OROVILLE FACILITIES**

**Town of Paradise**

_____

Melvin "Sam" Dresser, Mayor

**Tulare Lake Basin Water Storage District**

_____

Brent L. Graham, General Manager

**United States Department of Interior**

_____

Daniel G. Shillito, Regional Solicitor, Pacific Southwest Region

**INDIVIDUAL SIGNATORIES TO THIS SETTLEMENT AGREEMENT**

**Arthur G. Baggett, Jr.***

_____

**DC Jones**

_____

* Mr. Baggett is signing this Settlement Agreement as a recommendation to the California State Water Resources Control Board, and not as a Party to the Settlement Agreement. Mr. Baggett will not be participating in the State Water Resources Control Board's consideration of the Licensee's petition for water quality certification for the Project pursuant to Section 401 of the federal Clean Water Act.

# APPENDIX A

**Protection, Mitigation, and Enhancement Measures Recommended to be Included in New Project License**

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# APPENDIX A
## Protection, Mitigation, and Enhancement Measures Recommended to be Included in New Project License

## ENVIRONMENTAL PROVISIONS

### Ecological Committee

### Article A100. Ecological Committee

Within three months following license issuance, Licensee shall establish and convene an Ecological Committee for the purpose of consultation, review of plans and providing advice to the Licensee as expressly provided in specific license articles pursuant to the procedures stated in the Settlement Agreement Appendix C.

### Fish and Wildlife Improvement Program

### Article A101. Lower Feather River Habitat Improvement Plan

(a) Within three years following license issuance, the Licensee shall develop a comprehensive Lower Feather River Habitat Improvement Plan. The Plan shall provide an overall strategy for managing the various environmental measures developed for implementation within the areas integrated in the Plan, including the implementation schedules, monitoring, and reporting. The Plan shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game, California State Water Resources Control Board, and Central Valley Regional Water Quality Control Board (consultees), and in coordination with the Feather River Technical Team. Upon completion of the development of the Plan, the Licensee shall submit the Plan to the Commission for information.

(b) Each of the programs and components of the Lower Feather River Habitat Improvement Plan shall be individually evaluated to assess the overall effectiveness of each action within the Lower Feather River Habitat Improvement Plan. Each program or component may be updated or modified as appropriate to continue to best meet the Plan goals.

(c) The following programs and plans shall be included in the comprehensive Lower Feather River Habitat Improvement Plan:

(1) Gravel Supplementation and Improvement Program

(2) Channel Improvement Program

(3) Structural Habitat Supplementation and Improvement Program

(4) Fish Weir Program

(5) Riparian and Floodplain Improvement Program including the evaluation of pulse/flood flows

(6) Feather River Fish Hatchery Improvement Program

(7) Comprehensive Water Quality Monitoring Program

(8) Oroville Wildlife Area Management Plan

(9) Instream Flow and Temperature Improvement for Anadromous Fish.

(d) The Plan shall provide for and include:

(1) Coordination of implementation and monitoring activities agreed to in the individual components included in the comprehensive Plan;

(2) Coordination with any Project-specific biological opinions and Operations Criteria and Plan findings or recommendations;

(3) Annual reporting of monitoring results and activities, if appropriate, for the individual components to the Ecological Committee throughout the term of the license;

(4) The integration of the programs and plans listed in subdivision (c) above, including an evaluation of synergistic effects and an evaluation and consideration of predation management; and

(5) Development of a single, comprehensive monitoring and adaptive management summary report by the Licensee as set forth in (e) below.

(e) During the sixth year following license issuance and at five year intervals for the duration of the license, the Licensee shall develop and submit a single, comprehensive monitoring and adaptive management summary report. The Lower Feather River Habitat Improvement Plan report shall be submitted to the consultees listed in (a) above for review and comment at least 60 days prior to filing the report with the Commission. The Licensee shall submit the report to the Commission for information. The comprehensive report shall include the results of each of the various components of each program during the implementation period. The report shall also include information on any proposed changes or updates to the individual plans or programs within the Lower Feather River Habitat Improvement Plan.

**Article A102. Gravel Supplementation and Improvement Program**

(a) Within two years following license issuance, the Licensee shall develop and file for Commission approval, a Gravel Supplementation and Improvement Program Plan to address gravel management for the lower Feather River throughout the term of the license. The Plan shall be developed in consultation with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service, National Marine Fisheries Service, the California Department of Fish and Game, and the State Water Resources Control Board (consultees). The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Licensee, in consultation with the consultees listed in A102(a) above, shall coordinate the gravel supplementation activities with the measures conducted within the Lower Feather River Habitat Improvement Plan.

(c) The Plan shall include a schedule to complete, within five years of license issuance, the supplementation of at least 8,300 cubic yards over the December 31, 2006 baseline of spawning gravels suitable for spring-run Chinook salmon or steelhead which shall be distributed over up to 15 locations in the Low Flow Channel or High Flow Channel of the Feather River.

(d) The Plan shall provide for: (1) a physical assessment of the spawning riffles from River Mile 54.2 up to River Mile 67.2 of the Feather River; (2) a gravel budget for the Low Flow Channel and, if necessary, portions of the High Flow Channel within the Project Boundary; (3) a strategy to augment existing gravel recruitment beyond the 8300 cubic yards referenced in subdivision (c) above in the Low Flow Channel and High Flow Channel with gravel injections, placements, or other methods developed through site-specific investigations; (4) plans to monitor and evaluate the effectiveness of gravel augmentation, particularly the biological response of fish species to the gravel supplementation and enhancement activities; (5) an annual summary account of the activities conducted; and (6) coordination with other components of the license and the Lower Feather River Habitat Improvement Plan to enhance natural reproduction of steelhead and Chinook salmon.

(e) The Gravel Supplementation and Improvement Program Plan shall also include the following measures, criteria and timelines:

(1) All work within the Ordinary High Water mark of the Lower Feather River shall take place during the months of June and July, or at other times as allowed by permit conditions to produce minimal impact to the target species (steelhead and Chinook salmon) and other river attributes (*i.e.* water quality).

(2) Gravel placement or riffle rehabilitation at the treated riffles shall, where feasible, cover the extent of naturally observed spawning areas, be within an area extending between river banks, and extend at least 50 feet upstream and 50 feet downstream of the riffle, and be a depth of at least one foot.

(3) Licensee shall monitor and replenish or rehabilitate gravel at individual sites every five years, as needed, for the term of the License. At five year intervals after the initial supplementation period, the Licensee shall monitor and maintain a minimum of 10 riffle complexes in the Low Flow Channel so that approximately 80% of the spawning gravels randomly sampled in riffle complexes shall be in the median size range preferred by Chinook salmon or steelhead. All work will be done in consultation with the consultees listed in A102(a) above. High flow events shall be defined in the Gravel Supplementation and Improvement Plan.

(4) The Licensee, in consultation with the consultees listed in A102(a) above, shall also determine the need for additional gravel supplementation activities to be conducted in the High Flow Channel of the Feather River (within the Project Boundary). If and when the need arises, but no sooner than ten years after license issuance, the Licensee shall prepare a gravel budget for supplementation activities in the High Flow Channel of the lower Feather River (within the Project Boundary). This budget shall include the staging of spawning gravel stockpiles, of up to 2,000 cubic yards, of a size distribution determined by the Licensee in consultation with the consultees listed in A102(a) above in the immediate vicinity below or near the pool below the Thermalito Afterbay Outlet.

(f) The Licensee shall prepare an annual summary report describing the activities completed pursuant to the Program and submit the report to the consultees listed in A102(a) above. Throughout the term of the license, the Licensee shall compile these annual reports at least once every five years in the Lower Feather River Habitat Improvement Plan Report.

(g) The Licensee, in consultation with the consultees listed in A102(a) above, shall reevaluate the Gravel Supplementation and Improvement Program Plan every five years after initial implementation. Every five years the Licensee shall submit for the Commission's information a Lower Feather River Habitat Improvement Plan report which includes any Plan updates. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Gravel Supplementation and Improvement Program Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Gravel Supplementation and

Improvement Program Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

**Article A103. Channel Improvement Program**

(a) Within one year of license issuance, the Licensee shall develop and file for Commission approval a Moe and Hatchery Ditch Plan to improve two existing side channels at the upstream end of the low flow channel, Moe's Ditch, and Hatchery Ditch, by modifying these channels to provide suitable discharge, velocity, depth, substrate, cover and riparian vegetation to support salmonid spawning and rearing. The Plan shall be developed in consultation with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the California Department of Fish and Game (consultees). The Licensee shall include with the filing of the Moe and Hatchery Ditch Plans copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. The Plan shall include a schedule to complete the improvements to Moe's Ditch and Hatchery Ditch within three years of license issuance. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) Within four years of license issuance, the Licensee shall develop and file for Commission approval a Channel Construction Plan to identify and construct, within ten years of license issuance, five additional side channel riffle/glide complexes of not less than a cumulative total of 2,460 feet in length of new habitat. These side channels shall be located and designed to maximize quantity/quality of suitable salmonid attributes (depth, velocity, substrate, cover, and vegetation) while minimizing the potential for warming, stranding, and predation problems. The Plan shall be developed in consultation with the consultees listed in A103(a) above. The Licensee shall including with the filing of the Channel Construction Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(c) Maintenance activities shall be developed by the Licensee in consultation with the consultees listed in A103(a) above. Maintenance activities shall occur at least every five years, or as often as necessary to maintain channel functions. High flow events shall be defined in the Channel Construction Plan.

(d) Licensee shall annually collect data appropriate for evaluating the effectiveness of the Channel Improvement Program and the achievement of the Channel

Improvement Program objectives. The Licensee shall prepare an annual summary report describing monitoring and implementation activities completed pursuant to the Program and submit the report to the consultees listed in A103(a) above for review on an annual basis. Throughout the term of the License, the Licensee shall compile these annual reports every five years in the Lower Feather River Habitat Improvement Plan Report that is submitted to FERC.

(e) The Licensee, in consultation with the consultees listed in A103(a) above shall reevaluate the Channel Construction Plan every five years after initial implementation. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations made in the course of such consultation, and an explanation as to why any comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

**Article A104. Structural Habitat Supplementation and Improvement Program Plan**

(a) Within two years of license issuance, the Licensee shall develop and file for Commission approval a Structural Habitat Supplementation and Improvement Program Plan to provide additional salmonid rearing habitat in the Lower Feather River by creating additional cover, edge, and channel complexity through the addition of structural habitat, including large woody debris, boulders, and other objects. The Plan shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game (consultees). The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Within two years following Commission approval of the Plan, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall contain the following elements:

(1) Proposed locations for structural placements, including large woody debris, boulders, or other material. Large woody debris for this Program is defined as multi-branched trees at least 12 inches in diameter at chest height, and a minimum of 10 feet in length (with a preference for approximately 20 feet or longer), with approximately 50% of the structures

containing intact rootwads. Large woody debris or other native materials shall be located within the river to maximize the instream benefit at the lowest minimum flow specified in Article A108 with the rootwad (if attached) oriented upstream.

(2) Development and implementation of a strategy to map existing large woody debris, riparian habitat, and sources of riparian and large woody debris recruitment.

(3) Placement of a minimum of 2 pieces of large woody debris, boulders, or other appropriate material per riffle in the Low Flow Channel and High Flow Channel from River Mile 54.2 to River Mile 67.2 of the Feather River for a total of between 50 and 500 pieces in locations that maximize benefits for salmonids. Additional large woody debris, boulders, or other material may be placed in glide, riffle or pool habitat where appropriate.

(4) Completion of a safety analysis, and any resulting necessary modifications to the Plan, prior to program implementation to ensure that issues relating to human safety are adequately addressed.

(5) Monitoring of the structural placements after major high flow events, or at least once every five years in the absence of a high flow event, to collect data appropriate for evaluating the effectiveness of the Program and its objectives. High flow events shall be defined in the Structural Habitat Supplementation Improvement Program Plan.

(6) Inclusion of specific maintenance criteria, including the interval for replacement of large woody debris or other structures. Replacement shall occur at a minimum of every five years.

(c) The Licensee shall annually collect data appropriate for evaluating the effectiveness of the Program and the achievement of the Program objectives. The Licensee shall prepare an annual summary report describing monitoring and implementation activities completed pursuant to the Program and submit the report to the consultees listed in A104(a) above for review on an annual basis. Throughout the term of the license, the Licensee shall compile these annual reports every five years in the Lower Feather River Habitat Improvement Plan Report that is submitted to FERC.

(d) The Licensee, in consultation with the consultees listed in A104(a) above, shall reevaluate the Plan every five years after initial implementation. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why the comment was not adopted. Upon Commission approval, the Licensee shall

implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

**Article A105. Fish Weir Program**

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval a Phase 1 weir construction and operations Plan consistent with the Project biological opinion(s). The Plan shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game (consultees). The Licensee shall include with the filing of the Phase 1 Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Phase 1 Plan shall include a schedule to install and operate a monitoring weir in the vicinity upstream of the Thermalito Afterbay Outlet within three years of license issuance.

(c) The Phase 1 Plan shall be designed to document run timing for spring- and fall-run Chinook salmon and steelhead, and include design and safety analysis including boating compatibility, detailed engineering design, and a permitting process schedule. The Plan may consider using the monitoring weir to provide interim spatial and/or temporal segregation of Chinook salmon runs. The Plan shall be a part of the Lower Feather River Habitat Improvement Plan.

(d) Licensee shall correlate data from the monitoring weir to carcass surveys or other existing population counts. The Licensee, in consultation with the consultees listed in A105(a) above, shall use the data collected in Phase 1 to develop recommendations to the Commission regarding Phase 2 as set forth below.

(e) Within eight years of license issuance, the Licensee shall develop and file for Commission approval a Phase 2 Anadromous Fish Segregation Weir Plan for the purpose of providing spatial separation for the spawning of spring-run and fall-run Chinook salmon. The Plan shall be developed in consultation with the consultees listed in A105(a) above. The Licensee shall include with the filing of the Phase 2 Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(f) The Phase 2 Plan shall include a weir operations protocol, safety analysis including boating compatibility, detailed engineering design, and identification of the required permitting process. The Phase 2 Plan shall also evaluate the installation of an egg-taking station, if appropriate, to collect fall-run Chinook salmon eggs for transport to the Feather River Fish Hatchery.

(g) The Phase 2 Plan shall include a schedule to install and operate a Phase 2 anadromous fish segregation weir in the lower Feather River upstream of the Thermalito Afterbay Outlet within twelve years of license issuance.

(h) The Licensee shall annually collect data appropriate for evaluating the effectiveness of the Fish Weir(s) and Egg-Taking Station, and correlate this data to carcass surveys or other existing population counts. The Licensee shall prepare annual summary reports for Phase 1 and Phase 2 describing the monitoring results and provide these reports to the consultees listed in A105(a) above for review. Every five years the annual reports shall be compiled in the Lower Feather River Habitat Improvement Plan Report.

(i) The Licensee, in consultation with the consultees listed in A105(a) above, shall reevaluate the Program every five years after initial implementation. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

**Article A106. Riparian and Floodplain Improvement Program**

(a) Within six months of license issuance the Licensee shall develop and file for Commission approval a Plan for a phased program to enhance riparian and other floodplain habitats for associated terrestrial and aquatic species. The Plan shall address the connection of portions of the floodplain habitat with the Feather River within the Oroville Wildlife Area and shall include a description of areas in which gravel extraction may take place, in anticipation of improving fish and wildlife benefits. The Plan shall also include a definition of high flow events. The Plan shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, State Water Resources Control Board, and California Department of Fish and Game (consultees). The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the

course of such consultation, and an explanation as to why such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Program set forth in the Plan shall be implemented in the following four phases:

(1) Phase 1 – Within one year of license issuance and in consultation with the consultees listed in A106(a) above, the Licensee shall develop, and submit to the Commission a screening level analysis of proposed riparian/floodplain improvement projects, including how flood/pulse flows may contribute to floodplain values and benefit fish and wildlife species. This phase shall include the identification of a Phase 1 recommended alternative. This phase shall also include an assessment of the gravel value and potential extraction processes in order to provide guidance on the scope, timing, and magnitude of the Program.

(2) Phase 2 – Within four years of license issuance and in consultation with the consultees listed in A106(a) above, the Licensee shall initiate Phase 2 of the Program. Phase 2 shall begin with conducting a full scope and feasibility evaluation and development of an implementation schedule of the Phase 1 recommended alternative. Within six years of license issuance the Licensee shall submit the Phase 1 recommended alternative and implementation schedule to the Commission for approval. Within eight years of license issuance, the Licensee shall complete the final design and commence construction and implementation of the approved alternative. Within fifteen years of license issuance the Licensee shall fully implement this approved alternative.

(3) Phase 3 – Within fifteen years of license issuance and in consultation with the consultees listed in A106(a) above, the Licensee shall complete an evaluation of other potentially feasible projects and the identification of a Phase 3 recommended alternative. This phase shall include a reevaluation of how flood/pulse flows may contribute to floodplain values and benefit fish and wildlife species and shall include an assessment of the gravel value and potential extraction processes similar to the one completed in Phase 1.

(4) Phase 4 – Upon Commission approval, and within twenty-five years of license issuance, the Licensee shall complete construction of the Phase 3 recommended alternative.

(c) The Licensee shall annually collect data appropriate for evaluating the effectiveness of the Program and the achievement of the Program objectives. The Licensee shall prepare an annual summary report describing monitoring and

implementation activities completed pursuant to the Program and submit the report to the consultees listed in A106(a) above, for review on an annual basis. Throughout the term of the license, the Licensee shall compile these annual reports every five years in the Lower Feather River Habitat Improvement Plan Report that is submitted to FERC.

(d) The Licensee, in consultation with the consultees listed in A106(a) above, shall reevaluate the Plan every five years after initial implementation. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

(e) The Licensee's total cost for the Program shall not exceed $5 million, excluding any net profits realized from any sales of gravel.

**Article A107. Feather River Fish Hatchery Improvement Program**

A107.1 Feather River Fish Hatchery Fish Production Program. Upon license issuance, and until the completion and implementation of the Plan set forth in section A107.3 of this article, the Licensee shall ensure the continued operation of the Feather River Fish Hatchery in cooperation with the California Department of Fish and Game for the production of anadromous salmonids such as steelhead, fall-run Chinook salmon, spring-run Chinook salmon, as well as other salmonids that may be stocked as part of the license.

A107.2 Feather River Fish Hatchery Water Temperature

(a) Upon License issuance, the Licensee shall use the temperatures set forth in Table 107A as targets, and shall seek to achieve them through the use of operational measures as set forth below.

Table 107A

| | |
|---|---|
| September 1-September 30 | 56 °F |
| October 1 – May 31 | 55 °F |
| June 1 – August 31 | 60°F |

The temperatures in Table 107A are Maximum Mean Daily Temperatures and shall be calculated by adding the hourly temperatures achieved each day and dividing by 24. Water temperatures shall be measured year-round at the Feather River Fish Hatchery

intake/aeration tower. The licensee shall seek to not exceed these Maximum Mean Daily Temperatures through operational changes including but not limited to (i) curtailing pump-back operation and (ii) removing shutters on Hyatt intake and (iii) after river valve refurbishment, DWR will consider the use of the river valve up to a maximum of 1500 cfs; provided however these flows need not exceed the actual flows in the HFC, but in no event would HFC flows be less than those specified in A108.2. During this interim period, the Licensee shall not be in violation of this article if the Maximum Mean Daily Temperatures are not achieved through operational changes.

Upon completion of Facilities Modification(s) as provided in A108, and no later than the end of year ten following license issuance, Table 107A temperatures shall become requirements, and the Licensee shall not exceed the Maximum Mean Daily Temperatures in Table 107A for the remainder of the License term, except in Conference Years as referenced in A107.2(d).

(b) Licensee shall, in no instance, exceed the temperatures set forth in Table 107B during the term of the license. Temperatures in table 107B shall be measured hourly year-round at the Feather River Fish Hatchery intake/aeration tower. There shall be no minimum temperature requirement except for the period of April 1 through May 31, during which the temperatures shall not fall below 51 degrees Fahrenheit.

Table 107B

| | |
|---|---|
| September 1-September 30 | 56 °F |
| October 1 – November 30 | 55 °F |
| December 1 – March 31 | 55 °F |
| April 1 – May 15 | 55 °F |
| May 16-May 31 | 59°F |
| June 1-June 15 | 60°F |
| June 16- August 15 | 64°F |
| August 16 – August 31 | 62°F |

(c) Upon completion of Facilities Modification(s) as provided in A108, the Licensee may develop a new table for hatchery temperature requirements that is at least as protective as Table 107A. If a new table is developed, it shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game, California State Water Resources Control Board, and Central Valley Regional Water Quality Control Board. The new table shall be submitted to the Commission for approval, and upon approval shall become the temperature requirements for the hatchery for the remainder of the license term.

(d) During Conference Years, as defined in A108.6, the Licensee shall confer with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, California

Department of Fish and Game, and California State Water Resources Control Board to determine proper temperature and disease management goals.

A107.3 Feather River Fish Hatchery Management Program

(a) Within two years of license issuance, the Licensee shall develop and file for Commission approval, a management plan for the Feather River Fish Hatchery. The Plan shall be developed in consultation with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service, National Marine Fisheries Service, the California Department of Fish and Game, California State Water Resources Control Board, and the Central Valley Regional Water Quality Control Board (consultees) and in coordination with the Feather River Technical Team. The Plan shall include a schedule to begin implementation of the Program within three years of license issuance. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The development of this Program will include review and consideration of the recommendations for the Feather River Fish Hatchery put forth in the *Joint Hatchery Review Committee Final Report on Anadromous Salmonid Fish Hatcheries in California* (December 2001).

(c) Components of the Plan shall include:

1) Hatchery and Genetics Management Plans for each anadromous fish species managed by the hatchery.

2) Adaptive management protocols for hatchery production including egg taking, spawning, incubation, hatching, rearing, and stocking of fish.

3) A methodology to implement appropriate form(s) of tagging or marking of the Feather River Fish Hatchery artificial propagation programs, along with recovery of these tags/marks.

4) A methodology to study Feather River Fish Hatchery management effects on salmonids, and the interaction between in-river and hatchery-produced salmonids.

5) A methodology to study the phenotypic or genotypic traits that may be lost due to management actions or the adverse effects of the facilities if existing literature on these subjects is insufficient.

6) Development of a disease management methodology to reduce the incidence of disease outbreaks within the Feather River Fish Hatchery

facilities and a plan to implement the methodology, as well as a requirement that the Licensee monitor and report to the EC on disease and water quality issues. This component of the Plan shall include investigation of the mechanisms to control disease, including water supply disinfection, temperature control devices (e.g., chillers, shade screens, well water), chemical treatments, fish stress reduction methods (fish density manipulation, flow increases, aeration) and standards for acceptable loss.

7) A methodology to work with other Central Valley hatcheries to improve methods of integrating operations, marking and tag recovery, and data management.

8) A methodology to minimize straying of salmonids produced at the Feather River Fish Hatchery.

9) A methodology for the release of fish that evaluates full in-river release for the spring-run production, and in-river fall-run releases starting with 25% of the hatchery fall-run production, or other suitable amount to be determined by Licensee, in consultation with the Ecological Committee, and specifically the California Department of Fish and Game.

10) A methodology to utilize the results of studies, monitoring, and other information, in order to make changes to the operations of the Feather River Fish Hatchery.

(d) Within one year following Plan approval, the Licensee shall annually collect data appropriate for evaluating the effectiveness of the Program and the achievement of the Program objectives. The Licensee shall prepare an annual summary report describing monitoring and implementation activities completed pursuant to the Program and submit the report to the consultees listed in A107.3(a) above for review on an annual basis. Throughout the term of the license, the Licensee shall compile these annual reports every five years in the Lower Feather River Habitat Improvement Plan Report that is submitted to FERC.

(e) The Licensee, in consultation the consultees listed in A107.3(a) above, shall reevaluate the Program/Plan ("Plan") every five years after initial implementation. When possible, the Plan shall be reevaluated concurrently with the renewal of the Hatchery and Genetics Management Plans. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in this article or the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved

revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

(f) The licensee shall consult with the Ecological Committee and the consultees listed in A107.3(a) above regarding new information relating to disease control when it becomes available.

(g) The Licensee shall continue to utilize adaptive management practices for spring run salmonids until the Hatchery Genetics and Management Plans are developed and implemented.

(h) The Licensee shall prepare an annual hatchery report beginning in the year following the calendar year the license is issued. The annual report shall contain, but not be limited to, the following information:

1) The number of each species and/or run of fish taken, along with the number of adults, grilse, steelhead and half-pounders.

2) An estimate of the number of eggs for each species and/or run.

3) The number, size and species and/or run of all fish reared at the hatchery.

4) The number, size, and release location and date of each species stocked and/or transferred.

5) An annual summary of disease management activities, including the diseases detected, the species infected and the number of losses, treatment methods, etc.

6) The egg take and stocking goal used that year.

7) A description of any significant operational changes that may have occurred as a result of the adaptive management process.

A107.4 Feather River Fish Hatchery Water Supply Disinfection System

In the event that anadromous salmonids are passed upstream of the Feather River Fish Hatchery, the Licensee shall install a water disinfection system for the Feather River Fish Hatchery water supply prior to such passage. The system shall be developed in consultation with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game, California State Water Resources Control Board and Central Valley Regional Water Quality Control Board. Prior to installing the system, the Licensee shall develop and file a plan for Commission approval. The Licensee shall include with the filing copies of comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement

the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

A107.5 Feather River Fish Hatchery Annual Operation and Maintenance

Within two years of license issuance, the Licensee, in coordination with the California Department of Fish and Game, shall conduct a comprehensive facility assessment of the Feather River Fish Hatchery, and shall conduct such an assessment at least once every 5 years thereafter. The Licensee shall include all findings of the assessment in the Lower Feather River Habitat Improvement Plan Report filed with the Commission as set forth in Article A101.

## Article A108. Flow/Temperature to Support Anadromous Fish

A108.1 Minimum Flow and other Measures in the Low Flow Channel to Support Anadromous Fish

(a) Upon license issuance, the Licensee shall release a minimum flow of 700 cfs into the Low Flow Channel ("LFC"). The minimum flow shall be 800 cfs from September 9 to March 31 of each year to accommodate spawning of anadromous fish, unless the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and California State Water Resources Control Board provide a written notice that a lower flow (between 700 cfs and 800 cfs) substantially meets the needs of anadromous fish. If the Licensee receives such a notice, it may operate consistent with the revised minimum flow. Within 30 days of receipt, the Licensee shall file such notice with the Commission for information.

(b) Prior to the Facilities Modification(s) described in Article A108.4, if the Licensee does not achieve the applicable Table 1 temperature upon release of the specified minimum flow, the Licensee shall singularly, or in combination (i) curtail pump-back operation, (ii) remove shutters on Hyatt Intake, and (iii) increase flow releases in the LFC up to a maximum of 1500 cfs; provided however these flows need not exceed the actual flows in the HFC, but in no event would HFC flows be less than those specified in A108.2 to meet Table 1 temperatures or minimize exceedances thereof. Prior to the Facilities Modification(s) described in Article A108.4, Table 1 temperatures are targets and if they are not met there is no license violation so long as Licensee is otherwise in compliance with this article. If in any given year the Licensee anticipates that these measures will not achieve the temperatures in Table 1, the Licensee shall consult with the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and California State Water Resources Control Board to discuss potential approaches to best managing the remaining coldwater pool in Lake Oroville, which may result in changes in the way Licensee performs the actions in (i), (ii), and (iii). Licensee shall provide prompt notice to the Commission of any actions taken under this subdivision.

Table 1
LFC
as measured at Robinson Riffle
(all temperatures are in daily mean value (degrees F))

| MONTH | Temperature |
|---|---|
| January | 56 |
| February | 56 |
| March | 56 |
| April | 56 |
| May 1-15 | 56-63* |
| May 16-31 | 63 |
| June 1 – 15 | 63 |
| June 16 – 30 | 63 |
| July | 63 |
| August | 63 |
| September 1-8 | 63-58* |
| September 9 – 30 | 58 |
| October | 56 |
| November | 56 |
| December | 56 |

* Indicates a period of transition from the first temperature to the second temperature.

(c) After completion of the Facilities Modification(s), Licensee shall no longer be required to perform the measures listed in subdivision (b)(2)(i), (ii), and (iii), unless Table 1 temperatures are exceeded.

(d) Upon completion of the Facilities Modification(s), the Licensee shall operate the project to meet temperature requirements in Table 1 in the LFC, unless it is a Conference Year as described in Article 108.6. The Licensee shall monitor the effectiveness of the project facilities to achieve Table 1 temperatures.

A108.2 Minimum Flow and Other Measures in the High Flow Channel to Support Anadromous Fish

(a) Upon license issuance, the Licensee shall, based upon the April through July unimpaired runoff of the Feather River near Oroville of the preceding water year (October 1 through September 30), maintain a minimum flow in the High Flow Channel ("HFC") in accordance with the following schedule, provided that such releases will not cause Oroville Reservoir to be drawn down below elevation 733 feet (approximately 1,500,000 acre-feet).

| Preceding April through July unimpaired runoff, Percent of normal | Minimum Flow in HFC October - February | March | April - September |
|---|---|---|---|
| 55% or greater | 1,700 cfs | 1,700 cfs | 1,000 cfs |
| Less than 55% | 1,200 cfs | 1,000 cfs | 1,000 cfs |

The preceding water year's unimpaired runoff shall be reported in Licensee's Bulletin 120, "Water Conditions in California-Fall Report." The term "normal" is defined as the April through July 1911-1960 mean unimpaired runoff near Oroville of 1,942,000 acre-feet.

(b) If the April 1 runoff forecast in a given water year indicates that, under normal operation of Project 2100, Oroville Reservoir will be drawn to elevation 733 feet (approximately 1,500,000 acre-feet), minimum flows in the HFC may be diminished on a monthly average basis, in the same proportion as the respective monthly deficiencies imposed upon deliveries for agricultural use from the Project; however, in no case shall the minimum flow releases be reduced by more than 25 percent. If, between October 15 and November 30, the highest total 1-hour flow exceeds 2500 cfs, Licensee shall maintain a minimum flow within 500 cfs of that peak flow, unless such flows are caused by flood flows, an inadvertent equipment failure or malfunction.

(c) Upon completion of the Facilities Modification(s), the Licensee shall attempt to meet the temperature targets in Table 2A during the Testing Period. Upon Completion of the Testing period and after the Commission's approval of the Testing Period Report, Table 2A, together with any amendments to it, shall be designated as Table 2B, and the Licensee shall thereafter achieve the temperatures in Table 2B, unless it is a Conference Year as described in Article A108.6

A108.3 Submittal of October 2006 Reconnaissance Study of Potential Facilities Modification(s)

Within sixty days of license issuance, the Licensee shall submit to the Commission for information the October 2006 Reconnaissance Study of Potential Facilities Modification(s) to address temperature habitat needs for anadromous fish in the LFC and HFC.

A108.4 Submittal of Feasibility Study and Implementation Plan for Facilities Modification(s)

(a) Within 3 years following license issuance, the Licensee shall prepare and submit to the Commission for approval, a Feasibility Study and Implementation Plan for Facilities Modification(s) (Plan) to protect and improve temperature conditions for

spawning, egg incubation, rearing, and holding habitat for anadromous fish in the LFC and HFC in the least costly manner (taking into account capital, operational, and maintenance costs, including foregone power generation, third-party impacts, and beneficial uses) over the term of the New License. The Plan shall include a summary of the conclusions of the Reconnaissance Study and shall be prepared in consultation with the Ecological Committee, including specifically National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and the California State Water Resources Control Board.

(b) As part of the Plan, building upon findings of the Reconnaissance Study, the Licensee shall analyze alternatives with consideration of all project purposes, including water supply, flood control, power generation, recreation, fish and wildlife protection and other beneficial uses, and shall evaluate physical and operation effects of considered alternatives. Benefits to temperature and anadromous fishery habitat in the LFC and HFC shall be identified and quantified. The Plan shall recommend a specific alternative for implementation. The recommended alternative shall be designed to meet Table 1 and to meet the objectives for the HFC as stated in A108.4(a), except for those years that are considered severe dry years under the Oroville Temperature Management Index (OTMI). It shall also include Table 2A, which shall state the temperatures that the Licensee shall attempt to achieve in the HFC through implementation of the recommended alternative. The Table 2A temperatures shall be based upon preliminary modeling to determine where lower temperatures can be feasibly achieved in the HFC. Table 2A shall be developed starting from Table 2, below. The Plan will evaluate the OTMI definition and recommend changes based upon hydrology and modeling results on how well the recommended alternative will be able to meet Table 1 and the applicable Table 2.

Table 2
HFC as measured at
Downstream Project Boundary
(all temperatures are in daily mean value (degrees F))

| MONTH | Temperature |
|---|---|
| January | 56 |
| February | 56 |
| March | 56 |
| April | 61 |
| May | 64 |
| June | 64 |
| July | 64 |
| August | 64 |
| September | 61 |
| October | 60 |
| November | 56 |
| December | 56 |

(c) The Plan shall include a proposed implementation schedule and include adaptive management features. The Plan shall also propose a fisheries monitoring program, including a multi-year study of the utilization of the HFC by anadromous fish prior to installation of any Facilities Modification(s) in order to accumulate data on existing conditions. This monitoring program shall be coordinated with and may be integrated into the Lower Feather River Habitat Improvement Plan described in Article A101.

(d) The licensee shall submit a draft Plan to the Ecological Committee, including specifically National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and the California State Water Resources Control Board at least three months before submitting the Plan to the Commission. The recommended alternative is subject to the approval of the Executive Director of the State Water Resources Control Board.

(e) The final Plan shall include the results of such consultation, response to comments, and an explanation as to why any comments were not incorporated. It shall be submitted to the Commission for public notice and approval.

(f) The Licensee's capital cost estimate for the Facilities Modification(s) to meet the purposes described in (c)(2) is not expected to exceed $60 million (2005).

(g) Upon the Commission's approval, the Licensee shall implement one or more Facilities Modification(s) for the benefit of the LFC and the HFC. The Commission reserves the right to make further changes to the Plan.

A108.5 Five-Year Test of Facilities Modification(s) Effects and Report

(a) Upon completion of the Facilities Modification(s), the Licensee shall test the adequacy of the Facilities Modification(s) to achieve Table 2A, and to provide other benefits for fish, for a five-year testing period (Testing Period). In the event that the Licensee considers that the five years do not include a representative sample of year-types for the generation of reliable test results, the Licensee shall confer with the Ecological Committee, including specifically U.S. Fish and Wildlife, National Marine Fisheries Service, and California Department of Fish and Game and the State Water Resources Control Board, and may recommend that the Commission approve a continuation of the Testing Period for such additional time as may be reasonable.

(b) At the conclusion of the Testing Period (as may be extended), the Licensee shall file with the Commission for approval a Testing Period Report which: (i) describes and analyzes monitoring data for temperature, habitat use by anadromous fish, and operations; (ii) describes whether the Facilities Modification(s) has achieved Table 2A during the testing period, and whether the testing results confirm that the Facilities Modification(s) will likely achieve 2A over the remainder of the New License; (iii) analyzes whether the temperatures resulting from the Facilities Modification(s) have increased availability or suitability of HFC habitat for anadromous fish as predicted; (iv)

if appropriate, recommends alterations to the Facilities Modification(s); (v) if appropriate, recommends changes in the definition of OTMI; and (vi) if the Facilities Modification(s) has not achieved Table 2A during the testing period appropriate, recommends alterations to Table 2A. At the end of the testing period, Table 2A becomes table 2B either with or without alterations, consistent with Article A108.4(b). The Licensee shall submit a draft Testing Period Report to the Ecological Committee, including specifically National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and California State Water Resources Control Board for review, comment and consultation three months prior to submitting the report to the Commission. The final Report shall be submitted to the Commission, and shall include the results of such consultation, response to comments, and an explanation as to why any comments were not incorporated. The Licensee shall operate and maintain the Facilities Modification(s), as required by or as may be modified by the Commission's approval of the Testing Period Report, including Table 2B, unless it is a Conference Year.

A108.6 Conference Years Actions

(a) After completion of the Facilities Modification(s), by May 1 of a Conference Year, the Licensee shall consult with the Ecological Committee, including specifically the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, and California State Water Resources Control Board, and prepare a strategic plan that states the specific actions that it will take to manage the coldwater pool to minimize exceedances of Table 1 and the applicable version of Table 2, consistent with its water supply and other legal obligations. After consultation, the Licensee shall submit the strategic plan to the Commission for information and shall implement the strategic plan. As part of any strategic plan, the minimum flows as described in Articles 108.1 and 108.2 shall be maintained.

(b) The Licensee shall inform the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game within ten days of the initial determination of a Conference Year and subsequent updates of that year-type classification.

(c) A Conference Year is defined as any year in which the Oroville Temperature Management Index (OTMI) is equal or less than 1.35 million acre-feet. OTMI is calculated by multiplying the total volume of stored water in Lake Oroville on May 1 by one half and adding to that the projected May-through-September unimpaired Feather River flow at Oroville. The unimpaired Feather River flow at Oroville means the runoff that would be in the Feather River at Oroville if there were no human development on the Feather River. The amount of Feather River unimpaired flows used for calculating the OTMI will be the median value (with an exceedance probability of 50 percent) of May 1 forecast published in DWR Bulletin 120. As the actual amount of unimpaired flow after May 1 becomes available, the OTMI will be recomputed in the beginning of June, July, and August to account for the potential errors of the May 1 prediction. The OTMI will not be updated after the August 1 update.

A108.7 Inability to Meet Temperature Requirements Due to Uncontrollable Forces

If the Licensee is unable to meet the temperature requirements in Articles A107.2, A108.1, A108.2 or A108.5 due to an event or circumstances beyond its reasonable control, the Licensee shall file a notice within ten days of such event or circumstance with the Commission describing the event or circumstances causing the inability to meet those temperature requirements. It shall provide a copy to the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game and the State Water Resources Control Board (consultees) for comment and opportunity for dispute resolution pursuant to A135. Such notice shall include a statement of specific actions that the Licensee will take to address the event or circumstance and how it will manage the coldwater pool to minimize exceedances of Table 1 and the applicable version of Table 2, consistent with its water supply and other legal obligations. If the Commission finds that there is a pattern of exceedances that could result in adverse impacts to fishery resources, it may require the Licensee to file a plan developed in consultation with the consultees identifying any feasible measures that the Licensee may undertake, or modifications to other license requirements, to address the exceedances.

**Article A109. Reservation of Section 18 Authority**

Authority is reserved for the National Marine Fisheries Service and the Department of the Interior to prescribe the construction, operation, and maintenance of fishways at the Oroville Project, No. 2100, including measures to determine, ensure, or improve the effectiveness of such prescribed fishways, pursuant to Section 18 of the Federal Power Act, as amended, during the term of the project license, as provided in the Habitat Expansion Agreement (2006) [note: This agreement in draft form is provided in Appendix F, it will be finalized, signed and submitted to the Commission before the Commission acts on this article.]

**Article A110. Lake Oroville Warm Water Fishery Habitat Improvement Program**

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval a Plan to improve the habitat of the warm water fishery in Lake Oroville, primarily for the benefit of spawning and rearing. The Licensee shall consult with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service, National Marine Fisheries Service, State Water Resources Control Board, and California Department of Fish and Game (consultees) in developing this Plan. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall provide for: (1) construction, operation, and maintenance of projects to improve warm water fishery habitat within the reservoir or fluctuation zone; (2) implementation of the Plan in seven-year intervals, except that the final interval may be adjusted as appropriate to coincide with license expiration; (3) the Licensee to expend an average of $40,000 annually, or $280,000 total, for this purpose during each such interval, with 75% of such funds to be spent on construction, operation, and maintenance and the remainder on monitoring and program oversight; (4) the annual construction of an average of 15 habitat units (defined as projects costing $2,000 each in material and labor); (5) specific habitat units to be constructed in the first interval and that, for each subsequent seven-year interval, the Licensee shall plan further habitat units in consultation with the Ecological Committee, including specifically the consultees; (6) a monitoring program, including angler creel surveys, electrofishing, and springtime snorkel surveys, to evaluate the success of the habitat improvement program; and (7) modification of habitat units based on monitoring results, need, or improvements in technology, within the cost limitations stated above.

(c) After consultation with the Ecological Committee and the consultees listed in A110(a) above the Licensee may modify the implementation measures contained within the Plan without Commission approval to the extent the measures are within the scope of the approved Plan. Any modification to the implementation measures not within the scope of the approved Plan must be filed with the Commission for approval.

(d) The Licensee shall file annually with the Commission a compliance report for information. The Licensee shall first prepare the report in consultation with the Ecological Committee and the consultees listed in A110(a) above. The Licensee shall include with the filing any comments, including recommendations made in the course of such consultation, and an explanation as to why any such comment was not adopted. The annual compliance report shall describe all work performed on such habitat improvements during the previous calendar year. The annual report at the end of each seven-year interval shall describe all such work during that interval, including monitoring results.

**Article A111. Lake Oroville Cold Water Fishery Improvement Program**

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval a Plan to provide a cold water fishery primarily for the purpose of recreational fishing. The Licensee shall consult with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service National Marine Fisheries Service, State Water Resources Control Board, and California Department of Fish and Game (consultees) in developing this Plan. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any

changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall provide for: (1) the stocking of 170,000 yearling salmon or equivalents per year, plus or minus ten percent; (2) the Licensee to expend an amount not to exceed an average of $75,000 annually, with $68,000 for stocking related costs and $7,000 in monitoring costs; (3) identification of a primary source of salmonids for stocking in the lake; (4) addressing disease issues associated with the source or handling of salmonids; (5) identification of alternative sources of salmonids for stocking in the lake; (6) analysis of the feasibility of providing a disinfection system for hatchery water resources; and (7) a monitoring program.

(c) After consultation with the consultees listed in A111(a) above, the Licensee may modify the implementation measures contained within the Plan without Commission approval to the extent the measures are within the scope of the approved Plan. Modifications shall be shared with the Recreation Advisory Committee at the next meeting. Any modification to the implementation measures not within the scope of the approved Plan must be filed with the Commission for approval.

(d) The Plan shall be reviewed and updated by the Licensee every ten years. The Licensee shall consult with the Ecological Committee and the consultees listed in A111(a) above, and then file the updated Plan with the Commission for approval. The Licensee shall include with the filing any comments, including recommendations made in the course of such consultation, and an explanation as to why any such comment was not adopted.

(e) The Licensee shall submit a monitoring report to the consultees listed in A111(a) above for review and recommendations every two years. After review of the report by the Ecological Committee, the Licensee shall file the monitoring report for information with the Commission, and shall include with the filing copies of the comments, including recommendations, made by the Ecological Committee, and an explanation as to why any such comment was not adopted.

**Article A112. Comprehensive Water Quality Monitoring Program**

(a) Within six months following license issuance, Licensee shall begin preparation of a draft initial Comprehensive Water Quality Monitoring Program to track potential changes in water quality associated with the Project, and collect data necessary to develop a water quality trend assessment through the life of the FERC license. This Program shall be developed in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game, California State Water Resources Control Board, the Central Valley Regional Water Quality Control Board, as well as Butte County Health Department (consultees). The Program will include components to sample water chemistry, fish tissue bioaccumulation, recreation site pathogens and petroleum product

concentrations, water temperatures, bioassays, and aquatic macroinvertebrate monitoring.

(b) Within nine months following license issuance, and following the consultation set forth in (a), the draft initial Program shall be submitted to the California State Water Resources Control Board for review and approval. Upon approval by the Chief of the Division of Water Rights, California State Water Resources Control Board, the Licensee shall file the Program with the Commission for approval. The Licensee shall include with the filing of the Program copies of the comments, including recommendations, made in the course of consultation with the consultees, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Program, including any changes required by the Commission. The Commission reserves the right to make further changes to the Program.

(c) In each of the first five years of the initial Program, Licensee shall collect, analyze and compile the water quality data into annual reports. The annual reports shall be provided to the Ecological Committee and the consultees listed in A112(a) above, and any other entity upon request, by May 30th of the following year. Following completion of all data collected for year 5, the Licensee shall compile a summary report of the initial Program, which shall be provided to the Commission, the Ecological Committee and the consultees listed in A112(a) above, and any other entity upon request. A 45-day notice shall accompany the report, inviting all recipients to attend a water quality meeting, scheduled by the Licensee, to discuss the finding of the 5-year data set. After consultation, the Licensee shall submit recommendations for a final Comprehensive Water Quality Monitoring Program to the Chief of the Division of Water Rights, California State Water Resources Control Board, for review and approval prior to the Licensee's filing of the Program with the Commission. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of consultation with the consultees, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Program, including any changes required by the Commission. The Commission reserves the right to make further changes to the Program. Water quality data shall be analyzed and compiled by the Licensee into five-year reports and distributed to the Ecological Committee and the consultees listed in A112(a) above, and any other entity upon request.

(d) Within six months of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall begin implementation of the Water Chemistry Monitoring Plan component of the Program, including the following:

(1) In-situ Physical Parameters. The Licensee shall monitor between 15 and 20 locations four times each year (seasonally) for in-situ physical parameters necessary for determining water quality. In-situ data collected at each sampling location shall include water temperature, dissolved oxygen, pH, specific conductivity, and turbidity. Monitoring at Lake Oroville, the Diversion Pool at Oroville Dam, and one site within the

Thermalito Afterbay shall include vertical profiles for temperature, DO, pH, and specific conductivity collected at one meter intervals from surface to substrate.

(2) Nutrients. The Licensee shall monitor between 15 and 20 locations two times each year (spring and fall), for nutrients necessary for determining water quality. Nutrient data collected at each sampling location shall include nitrate plus nitrite, ammonia, organic nitrogen, dissolved orthophosphate, and total phosphorus.

(3) Metals. The Licensee shall monitor between 18 and 22 locations four times each year (seasonally), for metals necessary for determining water quality. The developed marinas (Bidwell and Lime Saddle) shall be included in the locations, along with sites to be specified in Lake Oroville, the Diversion Pool, Thermalito Forebay, Thermalito Afterbay, the Low Flow Channel, Mile Long Pond, and the Feather River at the southern boundary of the Project. Additional monitoring shall occur at both marinas one time each month during the recreation season (June-September) and one time after the first three significant storm events. Metals shall be analyzed and reported as total concentrations and dissolved fractions for aluminum, arsenic, cadmium, chromium, copper, iron, lead, manganese, nickel, selenium, silver, zinc, and mercury; in addition, total hardness shall be analyzed for each sampling location.

(4) Minerals and Alkalinity. The Licensee shall monitor between 15 and 20 locations two times each year (spring and fall), for minerals and alkalinity necessary for determining water quality. Minerals data collected at each sampling location shall include calcium, sodium, potassium, magnesium, sulfate, chloride, boron, and alkalinity.

(5) Plankton. The Licensee shall monitor 2 locations, two times each year, for phytoplankton and zooplankton as part of the water quality assessment. The monitoring sites are Lake Oroville and Thermalito Afterbay.

(e) Within three years of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall begin implementation of the Fish Tissue Bioaccumulation Monitoring Plan component of the Program. The Licensee shall collect resident fish species from 7 locations within project waters, one time every five years and analyze tissue for metals and organic compounds. Sampling strategy for target species, numbers of individuals, sampling locations, and analytical methods used shall be consistent with the California State Water Resources Control Board's Surface Water Ambient Monitoring Program (or successor program) needs and shall be determined through Licensee consultation with the California State Water Resources Control Board, California Office of Environmental Health Hazard Assessment, Central Valley Regional Water Quality Control Board, U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Game and the Ecological Committee prior to

each sampling year. Constituents to be analyzed include metals (arsenic, cadmium, chromium, copper, iron, lead, nickel, selenium, silver, zinc, and mercury), and organic compounds (chlordane, chlorpyrifos, DDT isomers, dieldrin, hexachlorobenzene, and polychlorinated biphenyls).

(f) Within six months of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall begin implementation of the Recreation Site Water Quality Monitoring Plan component of the Program, including the following:

(1) Pathogens. The Licensee shall conduct bacteriological monitoring at 12 to 16 locations within project waters each summer season. Near-shore water samples shall be collected five times within a 30-day period at each location from June 15 through September 15, consistent with the Basin Plan objectives for protection of the REC-1 beneficial uses. Potential sampling locations shall include developed beach areas, marinas, and boat launch areas along with high-use dispersed beach and shoreline locations in all waters affected by project operations. Prior to April 30th each year, the Licensee, in consultation with the California State Water Resources Control Board, Central Valley Regional Water Quality Control Board, Butte County Health Department and the Ecological Committee shall select the locations to be included in the upcoming seasonal sampling program. The list of bacteriological sampling locations shall always include North Forebay Cove and South Forebay Swim Area, in addition to sampling at 10-14 annually rotating stations. Additionally, at the North Forebay Beach area, individual screening samples shall be collected seasonally, four times throughout the year. Laboratory analyses for pathogens shall include: total coliform, fecal coliform, e-coli, and enterococcus, or other representative bacterial species consistent with any future amendment to the Basin Plan objectives.

(2) Petroleum Products. The Licensee shall monitor 6 locations for petroleum products in project waters (Bidwell Marina, Lime Saddle Marina, Foreman Creek Boat-in Campground, Spillway Boat Ramp/Day Use Area, Oroville Dam, and Monument Hill). Petroleum products shall be sampled one time each month from June through September and once after the first three significant storm events. Field sampling methods shall include both surface and bottom samples at each location. Petroleum products to be analyzed include Total Petroleum Hydrocarbons, MTBE and benzene.

(3) Soil Erosion. The Licensee shall inspect trails between May 1 and May 15 and following summer recreation season to identify soil erosion and potential subsidence into reservoirs or flowing waterways.

(g) Within three months of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall begin implementation of the Water

Temperature Monitoring Plan to provide information that demonstrates compliance with the Feather River Fish Hatchery requirements (Article A107.2), the Operations Criteria and Plan Biological Opinion, and Basin Plan water quality standards. The Licensee shall site 4 permanent continuous temperature monitoring devices, one each at the following locations: (1) Feather River Hatchery aeration tower, (2) Robinson's Riffle, (3) Thermalito Afterbay Outlet, and (4) the Feather River adjacent to the most southern FERC Project 2100 boundary. The permanent temperature gages shall be capable of providing real-time data to the hatchery operators and to the public via an internet-based medium such as the Department of Water Resources' California Data Exchange Center. The four permanent gages shall remain operational throughout the life of the license.

The Water Temperature Monitoring Plan shall be designed and implemented to provide data necessary for additional modeling or study associated with reconnaissance and feasibility studies of the flow and temperature program (Article A108). The Licensee shall install and collect temperature data from temporary continuous recording devices at appropriate locations to provide data necessary for additional modeling or study associated with Article A108, as determined by the needs and results of the Flow/Temperature Reconnaissance (conducted by Licensee pursuant to Settlement Agreement Section B108 and reported pursuant to Article A108[c]).

The Water Temperature Monitoring Plan shall be reviewed after five years, to determine if modifications to the Comprehensive Water Quality Monitoring Program are necessary for consistency with measures that may be implemented following decisions on water temperature management in the Low Flow Channel and High Flow Channel. Continuous temperature monitoring will include both stream stations and reservoir stations, including vertical profile data collection adequate to evaluate changes in cold water pool and stratification in other deep water bodies within the Project boundary.

(h) Within three years of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall implement the Water Quality Bioassay Monitoring Plan component of the Program. The Licensee shall collect water column samples from 2 locations in the Low Flow Channel, 4 times in a single year (seasonally), every 5 years, to conduct bioassay tests on aquatic organisms. Field sampling and laboratory analysis shall be consistent with methods recognized by the California State Water Resources Control Board's Surface Water Ambient Monitoring Program (or successor program). Aquatic organisms to be used in bioassays are: *Ceriodaphnia* and Fathead minnow (*Pimephales promelas*).

(i) Within one year of Commission approval of the final Comprehensive Water Quality Monitoring Program, Licensee shall implement the Aquatic Macroinvertebrate Monitoring Plan component of the Program. The Licensee shall collect benthic macroinvertebrate samples from a minimum of 7 stream locations during the fall index period one time every three years. Field sampling, laboratory identification, and statistical analysis shall be consistent with the California Stream Bioassessment Procedures (California Department of Fish and Game) or subsequent methodologies

acceptable to the California State Water Resources Control Board Surface Water Ambient Monitoring Program (or successor program) and the California Department of Fish and Game. A minimum of four sites shall be located in the Low Flow Channel and one site in the HFC at the southern-most project boundary. Following construction of any side channel habitat created as part of the Lower Feather River Habitat Improvement Program, sampling sites representative of each channel shall be added to the monitoring program.

(j) The Licensee, in consultation with the consultees listed in A112(a) above shall reevaluate the Program every five years after initial implementation. Any recommendations acceptable to the Licensee for changes to the Program shall be submitted to the Chief Division of Water Rights, California State Water Resources Control Board, for review and approval. The Licensee shall provide all Program updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in the Program, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Program, including any changes required by the Commission. The Commission reserves the right to make further changes to the Program. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

**Article A113. Monitoring of Bacteria Levels and Public Education**

(a) The Licensee shall, in coordination with the Butte County Health Department, California Department of Health Services, California Department of Parks and Recreation, State Water Resources Control Board, Central Valley Regional Water Quality Control Board, and any other appropriate public agency, perform monitoring of fecal coliform, enterococcus bacteria or other bacterial indicators as required by the Basin Plan from June 1 through September 30 at developed and popular undeveloped swim areas within the Project boundary, specifically North Forebay recreation area, South Forebay recreation area, Loafer Creek recreation area, Monument Hill recreation area, Lime Saddle recreation area, Foreman Creek boat launch area, Stringtown boat launch area, and Mile Long Pond. Monitoring shall be performed as required in the applicable CVRWQCB Water Quality Control Plan (Basin Plan).

(b) The Licensee shall promptly provide monitoring information to appropriate public agencies and confer with them on additional measures that may be necessary to inform and educate the public about bacteria levels in Project waters. Such information shall be shared with the Recreation Advisory Committee at the next meeting.

(c) Upon direction from an appropriate agency, Licensee shall place notices notifying the public if unsafe levels of bacteria are present in the water.

(d) The Licensee shall place notices educating the public on sanitary measures designed to prevent or minimize contamination of water.

(e) The Licensee, in consultation with the Butte County Health Department, California Department of Health Services, State Water Resources Control Board and Central Valley Regional Water Quality Control Board shall determine if a public education program is needed to inform visitors to the project about water quality and the risks associated with recreating in contaminated waters. If needed, the Licensee shall develop the public education program in consultation with the above agencies.

(f) The Licensee shall reevaluate these measures every five years.

(g) The Licensee shall not be required to expend more than $124,000 on these actions in the first five years following license issuance, and shall not be required to expend more than $23,500 annually thereafter.

(h) The Licensee shall file annually with the Commission a compliance report for information.

**Article A114. Public Education Regarding Risks of Fish Consumption**

(a) The Licensee, in consultation with the Office of Environmental Health Hazard Assessment, State Water Resources Control Board, Central Valley Regional Water Quality Control Board, and Butte County Health Department, shall post notices at all boat ramps and any other locations specified by the Office of Environmental Health Hazard Assessment within the Project boundary notifying the public about health issues associated with consuming fish taken from within Project waters.

(b) The Licensee shall provide funding to the Office of Environmental Health Hazard Assessment to facilitate the publishing of written materials notifying the public about health issues associated with consuming fish taken from within Project waters.

(c) The Licensee shall not be required to spend more than $20,800 in the first five years of the Program and the Licensee's funding obligation shall not exceed $1,800 per year after the first five years.

(d) The Licensee shall file annually with the Commission a compliance report for information.

**Article A115. Oroville Wildlife Area Management Plan**

(a) Within two years of license issuance the Licensee shall develop and file for Commission approval a management Plan for the Oroville Wildlife Area, including the

Thermalito Afterbay. The Plan shall be developed in conjunction with the California Department of Fish and Game and the California Department of Parks and Recreation, and in consultation with the Ecological Committee, including specifically U.S. Fish and Wildlife Service, National Marine Fisheries Service, California State Water Resources Control Board, and Central Valley Regional Water Quality Control Board (consultees). The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, and after obtaining all necessary permits, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall contain the following elements:

(1) Conservation measures required by Final Federal Biological Opinions

(2) Resource actions included in this license that may affect the OWA

(3) Strategies to minimize current and future conflicts between wildlife and recreation

(4) Wildlife management goals and objectives

(5) Recreation management goals and objectives (Consistent with the recreation measures outlined in the Recreation Management Plan, the Recreation Advisory Committee shall have an opportunity to provide input.)

(6) Other best management practices, including fuel load management for the reduction of fire risk to nearby properties and human life

(7) Certain common elements of the Lower Feather River Habitat Improvement Plan

(8) Actions designed to improve conditions for special status species and their habitats

(9) An implementation schedule

(10) Monitoring and reporting requirements

(11) A provision for periodic updates to the Plan as needed

(12) Agency management and funding responsibilities.

(c) The Licensee, in consultation with the California Department of Fish and Game and the consultees listed in A115(a) above, shall reevaluate the Plan every five years after initial implementation. Consistent with the recreation measures outlined in the

Recreation Management Plan, the Recreation Advisory Committee shall have an opportunity to provide input. The Licensee shall provide all Plan updates to the Commission for information. If any changes are recommended beyond the objectives, activities, or schedules identified in the Plan, the Licensee shall submit final recommendations to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan. The Licensee shall include any Commission approved revisions to the Plan into any updates to the Lower Feather River Habitat Improvement Plan set forth in Article A101.

(d) The Licensee shall not be required to expend more than $200,000 to develop the initial Plan.

**Article A116. Oroville Wildlife Area Access**

The Licensee shall allow reasonable access for hunting and fishing in the Oroville Wildlife Area, except where such access poses safety, security, operational risks, or adverse environmental impacts, and subject to applicable State and Federal hunting and fishing regulations and other reasonable conditions.

**Article A117. Protection of Vernal Pools**

(a) The Licensee shall implement conservation measures required by the U.S. Fish and Wildlife Service Final Biological Opinion to protect the vernal pool invertebrate habitat within the Project boundaries.

(b) The Licensee shall evaluate the effectiveness of these conservation measures in accordance with the Biological Opinion. The Licensee, in coordination with U.S. Fish and Wildlife Service, shall evaluate and report to the Commission for information on the effectiveness of the conservation measures annually by June 21 of each year through 2010. The measures shall be reevaluated in the spring every other year thereafter in accordance with the Biological Opinion. If the conservation measures implemented are deemed to be unsuccessful in protecting the vernal pool habitat, the Licensee shall coordinate with U.S. Fish and Wildlife Service to develop and implement additional or alternative conservation measures to protect the vernal pool habitat. Proposed modifications outside the scope of the Biological Opinion shall be filed with the Commission for approval prior to implementation.

**Article A118. Minimization of Disturbances to Nesting Bald Eagles**

(a) The Licensee shall include the conservation measures required by the U.S. Fish and Wildlife Service Final Federal Biological Opinion in any bald eagle management Plan(s). The Licensee shall file any bald eagle nest territory Plan(s) with the Commission for approval. Upon Commission approval, the Licensee shall implement the Plan(s), including any changes required by the Commission. The Commission reserves the right to make changes to the Plan(s). The Licensee shall evaluate the conservation measures in the Plan(s) according to the provisions of the Biological Opinion, and implement modifications deemed necessary accordingly. Proposed modifications outside the scope of the Biological Opinion shall be filed with the Commission for consultation and approval prior to implementation.

(b) The Licensee shall develop additional management Plan(s) or amend the current Plan(s) if new bald eagle nest territories are identified within the Project boundary. The Plan(s) shall be developed or amended in consultation with the U.S. Fish and Wildlife Service. The Plan(s) shall be filed with the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan(s), including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan(s).

**Article A119. Protection of Giant Garter Snake**

(a) The Licensee shall implement conservation measures required by the U.S. Fish and Wildlife Service Final Biological Opinion to protect the giant garter snake within the Project Boundary.

(b) The Licensee shall evaluate the effectiveness of these conservation measures in accordance with the Biological Opinion. The Licensee, in coordination with the U.S. Fish and Wildlife Service, shall annually evaluate and report to the Commission for information on the effectiveness of the conservation measures. If the conservation measures implemented are deemed to be unsuccessful in protecting the giant garter snake, the Licensee shall coordinate with U.S. Fish and Wildlife Service to develop and implement additional or alternative conservation measures to protect the giant garter snake. Proposed modifications outside the scope of the Biological Opinion shall be filed with the Commission for approval prior to implementation.

**Article A120. Protection of Valley Elderberry Longhorn Beetle**

(a) The Licensee shall implement conservation measures required by the U.S. Fish and Wildlife Service Final Biological Opinion to protect the valley elderberry longhorn beetle within the Project Boundary.

(b) The Licensee shall evaluate the effectiveness of these conservation measures in accordance with the Biological Opinion. The Licensee, in coordination with the U.S. Fish and Wildlife Service, shall annually evaluate and report to the Commission for information on the effectiveness of the conservation measures. If the conservation measures implemented are deemed to be unsuccessful in protecting the valley elderberry longhorn beetle, the Licensee shall coordinate with U.S. Fish and Wildlife Service to develop and implement additional or alternative conservation measures to protect the valley elderberry longhorn beetle. Proposed modifications outside the scope of the Biological Opinion shall be filed with the Commission for approval prior to implementation.

**Article A121. Protection of Red-Legged Frog**

(a) The Licensee shall implement conservation measures required by the U.S. Fish and Wildlife Service Final Biological Opinion to protect the red-legged frog within the Project Boundary.

(b) The Licensee shall evaluate the effectiveness of these conservation measures in accordance with the Biological Opinion. The Licensee, in coordination with the U.S. Fish and Wildlife Service, shall annually evaluate and report to the Commission for information on the effectiveness of the conservation measures. If the conservation measures implemented are deemed to be unsuccessful in protecting the red-legged frog, the Licensee shall coordinate with U.S. Fish and Wildlife Service to develop and implement additional or alternative conservation measures to protect the red-legged frog. Proposed modifications outside the scope of the Biological Opinion shall be filed with the Commission for approval prior to implementation.

**Article A122. Construction and Recharge of Brood Ponds**

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval a Plan to construct four waterfowl brood ponds within the Thermalito Afterbay. The Plan shall be developed in conjunction with the California Department of Fish and Game and the Licensee shall consult with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service, in developing the Plan. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall contain the following elements:

(1) Construction of one brood pond every five years over the 20-year period beginning upon issuance of this license. The ponds shall be constructed by creating a small earthen berm across an inlet in the Thermalito Afterbay.

(2) Maintenance of adequate water surface elevations within existing and future waterfowl brood ponds located within the Thermalito Afterbay by sufficiently filling the brood ponds no later than April 15 of each year. Once the brood ponds are filled, Licensee shall ensure that the water surface level of the ponds shall not fluctuate more than one foot throughout the primary waterfowl brooding season of April 15th through July 31st.

(3) Monitoring of the ponds on a weekly basis to ensure that adequate water surface elevations are maintained during the period of April 15th through July 31st.

(4) A requirement that the Licensee shall report to the California Department of Fish and Game's Oroville Wildlife Area Manager within 48 hours of discovering a fluctuation of more than one foot to report what the Licensee has done to remedy the situation or what the Licensee needs to further do to remedy the situation.

(5) Weekly inspection of the ponds from April 15 through July 31 of each year and maintenance as needed to ensure their structural integrity.

(c) The Licensee shall file an annual report with the Commission for information on water elevation monitoring. In addition, the Licensee shall provide a copy of such annual report to California Department of Fish and Game and U.S. Fish and Wildlife Service.

(d) The Licensee shall not be required to expend more than $920,000 to build the four brood ponds.

**Article A123. Provision of Upland Food for Nesting Waterfowl**

(a) The Licensee shall prepare and plant a total of 60 to 70 acres of upland cover/forage crops on an annual basis to support upland game birds and wintering waterfowl within the Thermalito Afterbay portion of the Oroville Wildlife Area on a rotational basis. The Licensee shall implement this measure in coordination with the California Department of Fish and Game.

(b) The Licensee shall not be required to expend more than $9,000 annually to carry out this article.

**Article A124. Provision of Nest Cover for Upland Waterfowl**

(a) The Licensee shall actively manage 240 acres of waterfowl nest cover, including preparing and planting 60 acres and maintaining an additional 180 acres annually within the Thermalito Afterbay portion of the Oroville Wildlife Area on a rotational basis. The Licensee shall implement this measure in coordination with the California Department of Fish and Game.

(b) The Licensee shall not be required to expend more than $15,000 annually to carry out this article.

**Article A125. Installation of Wildlife Nesting Boxes**

The Licensee shall install and thereafter structurally maintain 100 wildlife nesting boxes within the Oroville Wildlife Area within one year of issuance of this license. The Licensee shall also operate the 100 wildlife nesting boxes within the Oroville Wildlife Area consistent with generally accepted practices, including regular servicing of the boxes and any necessary maintenance and supplies needed for the boxes.

**Article A126. Invasive Plant Management**

(a) Within one year of license issuance, the Licensee shall develop and file for Commission approval a Plan to manage and reduce native and non-native invasive plant species populations within the Project boundary. The Plan shall be developed in conjunction with the U.S. Forest Service, Bureau of Land Management, California Department of Fish and Game, and California Department of Parks and Recreation, and in consultation with the Ecological Committee, including specifically the U.S. Fish and Wildlife Service (consultees). Prior to filing the Plan for Commission approval, the Licensee shall: 1) submit the portion of the Plan pertaining to National Forest System lands to the Forest Service for approval, 2) submit the portion of the Plan pertaining to Bureau of Land Management lands to Bureau of Land Management for approval, 3) submit the portion of the Plan pertaining to California Department of Fish and Game lands to California Department of Fish and Game for approval, and 4) submit the portion of the Plan pertaining to California Department of Parks and Recreation lands to California Department of Parks and Recreation for approval. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall specify areas/acreage, treatment/control methods, best management practices, needs for multiple year treatments and monitoring, including an annual inspection. The Plan shall specifically address, but not be limited to, the

following species: purple loosestrife (*Lythrum salicaria)*; giant reed (*Arundo donax*); tree of heaven (*Ailanthus altissima*); scarlet wisteria (*Sesbania punicea*); parrot feather (*Myriophyllum aquaticum* ); Himalyan blackberry (*Rubus discolor*); aquatic primrose (*Ludwigia peploides*); yellow starthistle (*Centaurea solstitialis*); Spanish broom (*Spartium junceum* ); French broom (*Genista monspessulana*); Scotch broom (*Cytisus scoparius*); and skeleton weed (*Chondrilla juncea*).

(c) After coordination with the appropriate land management agency and then consultation with the consultees listed in A126(a) above, the Licensee may modify the implementation measures contained within the Plan without Commission approval to the extent the measures are within the scope of the approved Plan. Any modification to the implementation measures that are not within the scope of the approved Plan must be filed with the Commission for approval.

(d) The Licensee shall coordinate the Plan and ongoing efforts with applicable federal, state and local agencies and shall take into full consideration state and federally listed species.

(e) In consultation with the U.S. Forest Service, Bureau of Land Management, California Department of Fish and Game, and California Department of Parks and Recreation, the Licensee shall reevaluate the Plan five years after initial implementation, and shall consult with the consultees listed in A126(a) above and any other applicable federal, state and local agencies regarding the reevaluation. The reevaluation shall take into consideration the need to treat other invasive plant species, as well as alternative or additional control methods that may be implemented.

(f) The Licensee shall file annually with the Commission a compliance report for information. The Licensee shall first prepare the report in coordination with U.S. Forest Service, Bureau of Land Management, California Department of Fish and Game, and California Department of Parks and Recreation, and in consultation with the consultees listed in A126(a) above .The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted.

(g) The Licensee shall not be required to expend more than $450,000 to develop and implement the Plan during the first five years after issuance of this license, and shall not be required to expend more than $35,000 every year thereafter.

## RECREATION PROVISIONS

### Article A127. Recreation Management Plan

(a) Upon license issuance, the Licensee shall implement the Recreation Management Plan (dated March 2006) as approved by the Commission, including, but not limited to, the following:

(1) The Licensee shall operate and maintain the Project recreation features in accordance with Section 7.2 of the Recreation Management Plan.

(2) The Licensee shall form a Recreation Advisory Committee in accordance with Section 4.4 of the Recreation Management Plan within 6 months of license acceptance.

(3) The Licensee shall implement a recreation monitoring program in accordance with Section 7.3 of the Recreation Management Plan. Every six years after license acceptance, the Licensee shall submit a FERC Form 80 report to the Commission. Prior to submitting the FERC Form 80 report to the Commission, the Licensee shall prepare the FERC Form 80 report in consultation with the Recreation Advisory Committee. The Licensee shall include with the filing copies of the comments, including recommendation, made in the course of such consultation, and an explanation as to why any such comment was not adopted. The FERC Form 80 report shall provide all relevant monitoring information substantially in accordance with Section 7.3 of the approved Recreation Management Plan.

(4) The Licensee shall establish the FERC License Coordination Unit (LCU) in accordance with Section 4.3 of the Recreation Management Plan within 6 months of license acceptance.

(5) Licensee shall conduct community workshops in the City of Oroville/Oroville area twice per year in accordance with Section 4.3.1 of the Recreation Management Plan.

(b) Within one year following the acceptance of the license, and after consultation with the Recreation Advisory Committee, the Licensee shall file a Recreation Implementation Plan, including a schedule for implementation in the first twelve years, to the Commission for approval. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. The Commission reserves the right to make changes to the Recreation Management Plan and the Implementation Plan. The Licensee shall implement the approved Implementation Plan.

## CULTURAL PROVISIONS

### Article A128. Historic Properties Management Plan

(a) The Licensee shall implement the Historic Properties Management Plan (HPMP) as approved by the Commission. The Commission reserves the right to make further changes to the Plan.

### Article A129. Improve and Redirect Recreation Usage to Specific Areas at Foreman Creek

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval a Plan to protect cultural resources at Foreman Creek while continuing to provide recreation at that location. The Licensee shall consult with the four federally recognized Native American Tribes located in Butte County, the Kon Kow Valley Band of Maidu and the Recreation Advisory Committee (consultees) in developing this Plan. The Licensee shall include with the filing of the Plan copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall include measures to restrict the usage of the existing car-top boat ramp and develop facility improvements to encourage recreational use at Foreman Creek in designated areas, including the installation of a restroom and picnic tables.

(c) The Licensee, in consultation with the consultees listed in A129(a) above shall review the Foreman Creek Plan annually over the first five years, and as necessary thereafter to ensure that the Plan is achieving the stated goals.

## FLOOD CONTROL & EARLY WARNING SYSTEM

### Article A130. Flood Control

The Licensee shall operate the project in accordance with the rules and regulations prescribed by the Secretary of the Army pursuant to Section 204 of the Flood Control Act of 1958 and other applicable law.

### Article A131. Early Warning System

(a) Within one year following license issuance, the Licensee shall develop and file for Commission approval, an Early Warning Plan. The Licensee shall consult with the United States Army Corps of Engineers, the Department of Interior Bureau of Reclamation, the California Office of Emergency Services, and the Butte County Office

of Emergency Services (consultees) in developing this Plan. Upon Commission approval, the Licensee shall implement the Plan, including any changes required by the Commission. The Commission reserves the right to make further changes to the Plan.

(b) The Plan shall describe how the Licensee will communicate and coordinate project operations with the United States Army Corps of Engineers, the California Office of Emergency Services, and the Butte County Office of Emergency Services before and during flood emergency events. The Plan shall be consistent with the Standardized Emergency Management System (SEMS). The Plan shall describe measures the licensee shall take before and during greater than normal operational releases and during flood emergency events, including, at a minimum, the consulted agencies; a description of emergency response procedures, including dam operations; and a schedule for implementing and evaluating the Plan.

(c) The Licensee shall provide a minimum of 30 days for the consultees listed in A131(a) above to comment and make recommendations before filing the Plan with the Commission. The Licensee shall include with the filing copies of the comments, including recommendations, made in the course of such consultation, and an explanation as to why any such comment was not adopted.

## LAND USE

### Article A132. Screening of Material Storage Area

Within one year following issuance of the license, the Licensee shall plant appropriate vegetation to screen the storage/staging area located northwest of the emergency spillway from view of Oroville Dam Boulevard, and shall thereafter maintain the vegetation. To the extent practical, native plants shall be used.

## PROJECT BOUNDARY

### Article A133. Project Boundary Modifications

Within two years following license issuance, the Licensee shall file, for Commission approval, a revised Exhibit G and narrative statement as an application to amend its license. The revised Exhibit G shall show all Project works, including environmental and recreation measures, access roads, transmission lines and any other lands necessary for project purposes in the Project Boundary. The narrative statement shall explain any changes to the proposed Project Boundary and the amount of federal land occupied by the Project, and how the proposed Project Boundary includes those lands necessary for Project purposes. For any subsequent changes to the Project Boundary necessary to carry out the measures required by the license, the Licensee shall file an additional revised Exhibit G for Commission approval, which also shall be accompanied by a narrative statement. Prior to making any filing under this article, the Licensee shall

consult with the Recreation Advisory Committee or the Ecological Committee as appropriate.

## COST CAPS

### Article A134. Expenditures

Notwithstanding the limitation on expenditures included in this license, the Commission reserves the right to require the Licensee to undertake such measures as may be appropriate and reasonable to implement approved plans and other requirements in this license.

## PROCEDURAL REQUIREMENTS

### Article A135. Procedural Requirements

The Licensee shall comply with the procedural requirements found in Section 5 (Dispute Resolution), 4.15.1 (Reopener) and 4.15.2 (Amendment of New Project License) of the Settlement Agreement filed with the Commission. The Commission will not consider motions to reopen or amend the license filed by either the Licensee or non-licensee signatories to the Settlement Agreement who have failed to comply with these procedural requirements.

# APPENDIX B

## Measures Agreed to Among the Parties But Not to be Included in New Project License

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# APPENDIX B

**Measures Agreed to Among the Parties But Not to be Included in New Project License**

## Section B100. Project Supplemental Benefits Fund

### A. General Provisions

1.0 The parties agree that their intent in establishing the Project Supplemental Benefits Fund (Fund) is to:

1.1 Allow the benefits of the Oroville Facilities to be extended into the local communities in the vicinity of the FERC boundary in a manner consistent with DWR's authority to provide such benefits through operation of the State Water Project (SWP).

1.2 Create benefits for the parties that are in concert with and do not conflict with the actions taken by DWR pursuant to the new FERC license issued for the Oroville Facilities and the Settlement Agreement.

2.0 If a significant representation from the local community, as determined by DWR, enters into the Settlement Agreement, then DWR shall establish and maintain the Fund, as further provided herein.

### B. Fund Usage and the Oroville Facilities Boundary

1.0 Subject to subsection 2.0 below, the Fund shall be used solely to support projects that are selected in accordance with Section D or as otherwise provided herein and that supplement the benefits provided by the Oroville Facilities, but which are located outside of the Oroville Facilities' boundary.

2.0 At DWR's sole discretion and subject to FERC approval, the Fund may be used to support projects located within the Oroville Facilities' boundary, but which are not within the jurisdiction of FERC, i.e., a non-project use of project lands. Any such use of the Oroville Facilities' lands shall be subject to such terms and conditions as DWR and/or FERC deems appropriate.

### C. Fund Administrator

1.0 Upon the effective date of the Settlement Agreement and subject to its execution of such agreement, the City of Oroville shall be designated as and assume the duties of Fund Administrator. If the City does not execute

the Settlement Agreement or withdraws from the Settlement Agreement, then DWR shall consult with other signatories and designate a different Fund Administrator.

2.0 The Fund Administrator shall use its internal protocols to formally designate a person within its organization to serve as the responsible person for performance of all such administrative duties required to ensure the orderly and efficient operation of the Fund. Such person, or successor thereto, will serve as the principal liaison with DWR during the establishment and operation of the Fund and will be fully authorized by the Fund Administrator to undertake actions on all administrative matters specified in the Fund Implementation Agreement.

3.0 As delineated further herein, the principal duties of the Fund Administrator shall consist of:

3.1 Convening meetings and implementing the decisions of a Fund Steering Committee in accordance with Section D;

3.2 Performing grant funding tasks in accordance with Section F;

3.3 Developing a regional Fund Strategic Plan in accordance with Section G; and

3.4 Entering into a Fund Implementation Agreement with DWR and discharging obligations thereto, in accordance with Section H.

## D. Fund Steering Committee

1.0 Within six months of assumption of duties by the Fund Administrator, a Fund Steering Committee composed of five voting members and three advisory members, selected in accordance with subsection 2.0 below, shall be convened by the Fund Administrator to provide direction regarding proposed projects to be funded through the Fund.

2.0 The voting members of the Steering Committee shall be composed of the following publicly elected officials:

2.1 three members from the Oroville City Council; and

2.2 two members from the Board of Directors of the Feather River Recreation and Parks District.

The members of the Steering Committee will be selected by the appropriate governing body at the beginning of each calendar year and will serve one year terms, except that the initial term will be one year plus

the time from the date the initial member(s) are selected to the beginning of the next calendar year.

3.0 If one or more of the local agencies named in subsection 2.0 above fail to execute the Settlement Agreement, then DWR shall consult with the Fund Administrator and other local governmental agency signatories to determine an appropriate replacement agency(s), if any, for the non-signing agency(s).

4.0 DWR will participate on the Steering Committee in a non-voting advisory role.

5.0 Subject to their execution of the Settlement Agreement, the following stakeholders may, at their discretion, become non-voting advisory members of the Steering Committee:

5.1 the State Water Contractors (SWC),

5.2 the Oroville Area Chamber of Commerce, and

5.3 American Rivers.

6.0 The Steering Committee shall be the sole decision-maker, through majority vote of its members, for purposes of adopting the Fund Strategic Plan, selecting proposed projects eligible for funding, and determining the level of funding appropriate for such projects. If the majority vote on any given measure or action results solely from the votes of a single agency, a majority plus one vote will be required for approval of the measure or action.

7.0 At the first meeting of the Steering Committee, a Chair will be elected to provide for the orderly performance of Steering Committee functions. Thereafter, the Steering Committee will elect a new chair annually. No member agency of the Steering Committee shall serve as Chair for more than two consecutive years.

8.0 At the first meeting of the Steering Committee, the Fund Administrator shall propose written procedures governing committee and membership activities for consideration and adoption by the Steering Committee. In no event shall such procedures conflict with or modify any provision of the Settlement Agreement; provided, however, that members may be added to the Steering Committee upon unanimous vote of the voting members of the Steering Committee, provided they were among the original signatories to the Settlement Agreement and written concurrence of DWR.

9.0 Principal duties of the Steering Committee will consist of:

9.1 facilitating administration of the Fund in a manner consistent with the prudent use of public funds for public purposes;

9.2 adopting the Fund Strategic Plan;

9.3 selecting proposed projects eligible for funding; and

9.4 determining the level of funding appropriate for such projects.

10.0 The Steering Committee will hold public meetings as necessary, but no less than annually, to take action on:

10.1 development and adoption of the regional Fund Strategic Plan pursuant to Section G;

10.2 review and approval of proposed projects to be funded that meet the criteria of the Fund Strategic Plan;

10.3 approval of the level of funding for approved projects; and

10.4 election of a new chair.

## E. DWR Commitment to Establish and Maintain Fund

1.0 Subject to the DWR determination required under Section A(2.0), DWR shall establish the Fund that will provide up to $61,270,000 of unescalated funds, with a combination of initial payments and annual payments as provided below.

2.0 After the executed Settlement Agreement is approved by the Department of Finance, the first $1,935,000 of these funds will be made available in accordance with an annual schedule to be determined by the Fund Administrator in consultation with the Steering Committee. Payments shall be made in arrears upon invoice by the Fund Administrator to DWR of actual expenses up to the total $1,935,000.

3.0 The second $4,135,000 of these funds, as well as any unexpended funds from those made available pursuant to Section E(2.0), will be transferred as a lump sum to the Fund Administrator upon acceptance by DWR of a new license for the Oroville Facilities with terms and conditions that are consistent with and substantially similar to the provisions set forth in the Settlement Agreement.

4.0 DWR shall provide the following unescalated annual payments, as appropriate for the new license term, to the Fund Administrator by June 30

of each year beginning with the first year following DWR acceptance of a new license:

4.1 fifty year term: $1,000,000 per year;

4.2 forty-five year term: $900,000 per year;

4.3 forty year term: $800,000 per year.

4.4 For any license term less than forty years, DWR shall use its discretion to determine the annual payment, if any, which, at a minimum, shall be less than the amount listed in section 4.3 above.

5.0 The Fund also includes $3,000,000 that DWR has already committed to Riverbend Park pursuant to an agreement with Feather River Recreation and Parks District, dated September 26, 2002, and an additional $2,200,000 that was added to this contract via a contract amendment with approval from original signatories of the Interim Settlement Agreement for Riverbend Park Improvements.

6.0 If in any year in which DWR has, during its May determination, approved allocations of 35% or less of the maximum contractual amount SWP contractors can annually request pursuant to their long term water supply contracts, annual payments will be re-scheduled as follows:

6.1 when the approved allocation is 25% or less of the total annual contractual maximum, the next annual payment shall be reduced to $300,000;

6.2 when the approved allocation is between 26% and 35% of the total annual contractual maximum, the next annual payment shall be reduced to $500,000;

6.3 the reduced amounts shall be recovered in full through five equal annual installments beginning with the subsequent first year in which the May approved allocation exceeds 35% of the total annual maximum contractual amount the SWP contractors can request; provided that, the repayment obligation will be made in the years that the allocation exceeds 35% of the total annual maximum contractual amount the SWP contractors can request. The repayment obligation shall survive termination of this agreement and shall be added to the regular annual payments identified in Section 4.

7.0 DWR will use its best efforts to provide a transparent and stable funding stream for the Fund, consistent with its spending authorities.

8.0 If in any year(s) the annual generation (MWH) at the Oroville Facilities is reduced by more than 10% due to a forced physical outage or a regulatory, legislative, or judicial action, the payment(s) to the Fund for the following year(s) will be reduced by the percentage that exceeds 10%. This reduction in payment(s) shall remain in effect only until and to the extent that the reduction in annual generation remains in effect.

9.0 Payments to the Fund will constitute DWR's entire contribution to the funded projects and no contributions from DWR will be solicited by any party for any project that is denied funding by the Steering Committee.

10.0 At DWR's discretion and per its specifications, completed projects may include recognition of DWR funding.

## F. Pursuit of Grant Funds by SWC and Steering Committee

1.0 The State Water Contractors (SWC), and the Steering Committee, agree to form a partnership,[1] the goals of which are to (1) solicit grant funds in addition to those made available under Section E. above, and (2) obtain grant funds to supplement the Fund such that the future purchasing ability of the proposed annual payments will at least keep pace with inflation.

2.0 To accomplish this, the SWC agree to use best efforts to:

2.1 develop a grant assistance program aimed at securing funding in an amount equal to or greater than the amount needed to keep pace with inflation;

2.2 work with the Fund Administrator in exploring various political avenues that may be a productive source of various grants;

2.3 work with the Fund Administrator by making available appropriately qualified in-house staff trained in locating, researching, evaluating, and writing grant proposals for effective fundraising; and

2.4 make available staff resources in an amount not to exceed 50 percent time of one FTE. The staffing for obtaining grant funding will be in effect until five years prior to the expiration of the new license.

[1] Use of the term "partnership" does not connote or create a legal relationship between the SWC and other parties. The parties are not partners, joint venturers or any other legal entity. Rather, use of the term "partnership" is limited to signifying a cooperative endeavor between the SWC and local interests to seek to obtain grant funds, consistent with the concepts set forth herein.

3.0 The Fund Administrator, in coordination with the resources of the Steering Committee voting members, agrees to make available appropriate staff and other resources to complement the grant funding efforts of the SWC without using any Fund allocations.

4.0 Due to the local community's existing desire for recreational and economic development benefits, it is expected that fundraising efforts should be pursued particularly aggressively during the first ten years of the new license term.

5.0 The SWC grant assistance program efforts and the local community grant assistance program efforts will be coordinated. The SWC's efforts will be managed by a SWC representative who shall serve in an advisory capacity to the Steering Committee. The SWC representative also will be responsible for reporting on the SWC grant assistance program activities and performance to the Steering Committee at least once a year. The SWC may designate different personnel to serve on the Steering Committee and to manage the grant funding process. The Fund Administrator shall designate a local representative who will manage the grant program activities on behalf of the Steering Committee.

6.0 The SWC and local community grant assistance program's performance will be evaluated by the Steering Committee during and in accordance with future updates and revisions of the regional Fund Strategic Plan described below. The purpose of the evaluation will be to: review past SWC and local community grant assistance program performance; ensure that "best efforts" by the SWC and local community have been made; and, if necessary, recommend and adjust the program's future fundraising strategy and efforts for greater fundraising effectiveness.

7.0 The parties agree that grant funding cannot be assured due to the competitive process for obtaining such funds. As a result, the SWC are not obligated to guarantee any level of grant funding. The sole SWC commitment is to provide staff resources and political capital to assist and work with the local community to obtain grant funds. It is further agreed that the SWC shall have no obligation to pursue any particular grant if in its judgment to do so would be detrimental to the economic or political interests of the SWC or any of its members. It is further agreed that in those cases where the SWC or any of its members are, or would be, competing with the local community for funds from the same source, there shall be no obligation on the part of the SWC to undertake any actions in pursuit of the grant.

8.0 At the request of either the SWC or the Steering Committee, the grant funding provision of this agreement may be reviewed after the first 10 years of the license term if the grant assistance program has not resulted

in the procurement of any grant funding. If no grant funding has been obtained, the SWC and the Steering Committee will negotiate in good faith to develop additional or alternative jointly- pursued actions or methodologies for obtaining grant funds. This renegotiation shall constitute the sole remedy for failure to obtain grant funds.

9.0 Payments to DWR for the Fund will constitute the SWP contractors' and their member agencies' entire contribution to local projects, and no further contributions from the SWP contractors or their member agencies will be solicited by any local party. Further, at the request of the SWC, completed projects made possible through grant funding will include recognition of SWC efforts.

## G. Regional Fund Strategic Plan

1.0 At the direction of the Steering Committee, the Fund Administrator shall develop a regional Fund Strategic Plan to guide the Steering Committee in selecting and funding proposed projects in a manner that optimizes the overall benefits to the local region consistent with the availability of funds.

2.0 Subject to subsection 3.0 below, only those projects consistent with the goals of the Fund Strategic Plan shall be eligible for funding.

3.0 Prior to adoption of the Fund Strategic Plan, the Steering Committee may direct the Fund Administrator to fund administrative activities and selected projects only from funds obtained through the initial payments as provided in subsections E.2.0 and E.3.0.

4.0 Development of the Fund Strategic Plan shall include a series of public meetings to obtain input about the need for proposed projects. Such meetings shall be open to any person.

5.0 At a minimum, the Fund Strategic Plan shall include the following:

5.1 phasing of projects to complement the implementation of DWR's Recreation Management Plan, including consideration for development of the recreational and economic benefits of the Feather River.

5.2 a statement of goals and policies that provide a basis for optimizing Fund benefits based upon sound business practices consistent with public purposes;

5.3 allocations of the overall Fund for administrative costs, capital expenditures, operation and maintenance costs, feasibility costs,

and environmental permitting and related costs, with the intent of maximizing benefits to the local region;

5.4 a discussion of the consistency of the Fund Strategic Plan with identified goals for economic and recreational development in the greater Oroville region, including the potential for energy and water incentives or programs;

5.5 measurable performance standards to ensure that economic and recreational benefits are distributed in a manner that is consistent with the goals of the Fund Strategic Plan and that benefits are distributed appropriately in the region;

5.6 a list of the Fund Strategic Plan policies that will ensure consistency with the identified goals;

5.7 protocols for ensuring the consistency of the Fund Strategic Plan with the new license for the Oroville Facilities, including the approved Recreation Management Plan;

5.8 adaptive management features to ensure that the Fund Strategic Plan remains effective throughout the term of the Settlement Agreement, or, as determined by the Steering Committee, periodic review and update of the Strategic Plan no less than every 10 years;

5.9 Project selection criteria, which shall include:

5.9.1 priority consideration for funding projects with a documented source of matching funds or other cost-sharing mechanism and priority consideration for projects with an ability to return a portion of generated revenue to the Fund; if matching funds will be made available, the project proponent must provide documentation of such firm commitment before allocations of the Fund can be made;

5.9.2 consistency with existing environmental and recreational projects, and local land use plans;

5.9.3 ability of the proposal to adequately define a project description, with concept level drawings, if applicable; map; estimated cost of project (capital and O&M); amount of funds already allocated (capital and O&M), if any; name of project proponent (party that will implement project); proposed timeframe for implementation; and identification of required permits;

## H. Fund Implementation Agreement

1.0 DWR and the Fund Administrator will use best efforts to develop and execute a Fund Implementation Agreement within four months of the effective date of the Settlement Agreement. The purpose of the Fund Implementation Agreement is to direct future performance of all administrative duties associated with implementation of the Fund. This Fund Implementation Agreement will include, but not be limited to, detailed language addressing the following duties of the Fund Administrator:

1.1 entering into appropriate contracts with developers of selected projects and ensuring compliance with applicable state and federal environmental laws;

1.2 monitoring the progress of selected projects and enforcing any contractual remedies for non-performance;

1.3 documenting all use of the Fund in a manner consistent with auditing requirements associated with the use of public funds;

1.4 working with DWR to resolve in a timely manner any of its issues related to administration of the Fund;

1.5 working with the Steering Committee to implement its decisions;

1.6 developing criteria to be followed during project implementation and inserted into contracts with developers, including:

1.6.1 schedule and benchmark conditions for phased release of Funds, as determined appropriate by the Steering Committee;

1.6.2 identification of responsible parties for securing any necessary permits and for implementing the project in accordance with conditions, timelines, benchmarks;

1.6.3 requirements for periodic status reports to Administrator;

1.6.4 penalties for failure to comply with conditions such as withdrawal of allocation of funds to that project.

## I. Fund Administrative Expenditures

1.0 Portions of the Fund will be allocated for administration of the Fund and Fund Strategic Plan development, as specified below:

1.1 For the first two years beginning with the effective date of this agreement, an annual average amount of $300,000 per year will be allocated to the Fund Administrator for administrative duties associated with establishment and initial administration costs of the Fund, including development of a Fund Strategic Plan in accordance with the applicable provisions herein. Any amount allocated to administrative costs in the first two years that is not expended for administrative duties shall be reallocated to the Fund by the Fund Administrator.

Thereafter, a maximum annual amount to be determined by the Steering Committee will be allocated to the Fund Administrator for administrative duties. Administrative duties include, but are not limited to, activities associated with management of the Fund, including implementation of the Fund Implementation Agreement, disbursement of funds allocated to projects, oversight of projects that receive an allocation of the Fund, coordination of Steering Committee meetings, public notice of Steering Committee meetings, preparation of minutes of Steering Committee meetings, and staff for the Fund Administrator, as appropriate. Any amount allocated to administrative costs that is not expended for administrative duties shall be reallocated to the Fund.

## Section B101. Feather River Whitewater Boating Opportunity Feasibility Study

(a) After filing the signed Settlement Agreement with FERC, Licensee will initiate and fund a whitewater boating opportunity and recreation feasibility study to assist the Fund Steering Committee of the Project Supplemental Benefits Fund in determining whether to fund the construction and operation of such a project, or cost share on such a project somewhere in the region, pursuant to their funding criteria. This feasibility study will be conducted in consultation with signatory Parties of this Settlement Agreement for the Oroville Facilities. Specifically, American Rivers, American Whitewater, and the City of Oroville may actively contribute to the completion of the study and participate in its funding.

(b) This feasibility study will build off of the results of R-16 Whitewater and River Boating Report (DWR 2004). Components of this study will include: 1) a study scoping process; 2) a review of potential whitewater opportunities within this area, including park and non-park options, and constraints (physical, operational, environmental, estimated conceptual costs, and permitting/approvals needed); 3) a review of other existing and

proposed whitewater boating park and non-park opportunities in the region (N. California, N. Nevada, other nearby western states, or other appropriate analogs if possible), including boating experience and opportunities provided, seasonal timeframe availability, typical user distance traveled; visitation census if available; 4) whitewater demand trends, market feasibility, ownership and management (and financing) options, estimates of direct and indirect economic activity potentially generated by such a facility, and potentially competing venues or opportunities; and 5) conclusions regarding the feasibility of constructing and operating a whitewater boating (park and non-park) facility in the project area or region.

(c) Except as provided in the Project Supplemental Benefits Fund, the Licensee's financial obligation under this provision does not extend beyond this feasibility study. Study cost contribution by the Licensee will be a maximum of $250,000. The study scoping process, including any necessary contracting efforts, will commence within 90 days of the execution of this Settlement Agreement. Target study completion will be within 15 months of execution of this Settlement Agreement.

## LAND USE AND ENGINEERING/OPERATIONS

### Section B102. Development of a Fuel Load Management Plan

Within one year of license issuance, the Licensee agrees to develop and file for Commission information a Fuel Load Management Plan for the Project lands. The plan will be developed in coordination with the U.S. Forest Service, Bureau of Land Management, California Department of Forestry and Fire Protection Butte Unit, California Department of Parks and Recreation, California Department of Fish and Game, Licensee, Paradise Fire Department, Butte County Fire Safe Council, Butte County Resource Conservation District, State Water Contractors, Native American Tribes, and other appropriate agencies and associated public processes. The plan will include identification of the issues, prioritization, and recommended actions to address them. The plan will be prepared to be consistent with the plans adopted by the above entities for non-project lands, to the extent permitted by the license and operational constraints of the Project. The plan will be prepared to be consistent with the Oroville Wildlife Area Management Plan. The Parties acknowledge that the Forest Service is submitting a 4(e) condition regarding a Fuel Load Management Plan for Forest Service lands within the FERC boundary, and that FERC will include that condition in the New Project License. The Parties agree that the inclusion of the Forest Service 4(e) condition on fuel load management will not make the New Project License Inconsistent with this Settlement Agreement.

**Section B103. Additional Gaging**

The Licensee agrees to evaluate and potentially implement additional stage and/or precipitation gaging locations in order to improve flood forecasting and monitoring.

## ENVIRONMENTAL PROVISIONS

**Section B104. Feather River Fish Hatchery Funding**

The Licensee shall provide all necessary funding to the California Department of Fish and Game to implement the Feather River Fish Hatchery Program as set forth in Article 107.

**Section B105. Gravel Supplementation**

Upon execution of this Settlement Agreement, the Licensee shall proceed to obtain all necessary permits for the supplementation of at least 8,300 cubic yards over the December 31 2005 baseline of spawning gravels suitable for spring-run Chinook salmon or steelhead which shall be distributed over up to 15 locations in the Low Flow Channel or High Flow Channel of the Feather River as set forth in Article 102. Upon obtaining all necessary permits, the Licensee shall implement this provision.

**Section B106. Oroville Wildlife Management Plan**

The California Department of Fish and Game shall use best efforts to obtain adequate funding to develop the Oroville Wildlife Management Plan as set forth in Article 115.

**Section B107. Revision of Speed Limit Regulation for Thermalito Afterbay**

Upon the execution of this Settlement Agreement, the California Department of Fish and Game shall make a recommendation to the California Fish and Game Commission to rescind the speed limit for the Thermalito Afterbay south of Highway 162.

**Section B108. Flow/Temperature to Support Anadromous Fish**

(a) River Valve. Upon execution and filing of the Settlement Agreement, Licensee shall begin the necessary studies for the refurbishment or replacement of the river valve. Licensee shall refurbish or replace the river valve as necessary in its sole discretion. The river valve will continue to be used primarily for meeting the hatchery temperature requirements (which has the incidental effect of helping to achieve Table 1

temperatures) until a Facilities Modification(s) for providing colder water to the Low Flow Channel and High Flow Channel is constructed. After the refurbishment or replacement of the river valve and prior to the completion of construction of the Facilities Modification(s), the Licensee shall consider using the new valve to meet the hatchery temperatures targets in A107.2(a).

(b) Reconnaissance Study for Potential Facilities Modification(s) for Fish Habitat Temperature Needs.

(1) By October 31, 2006, Licensee shall submit to National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, California State Water Resources Control Board, American Rivers, and the State Water Contractors, a Reconnaissance Study of Potential Facilities Modification(s) to address temperature habitat needs for anadromous fisheries in the Low Flow Channel and High Flow Channel. The study shall clearly: identify resource issues and goals to be addressed; identify and describe an array of alternatives to address the issues and goals; and identify potential issues, benefits, impacts and likely costs of the identified alternatives. The alternatives to be considered include, at a minimum: (i) Palermo Canal improvements; (ii) Hyatt intake extension; (iii) replacement of the river valves with valves specifically designed to incrementally control water releases; (iv) construction of a diversion canal around or through the Thermalito Afterbay; and (v) construction of an alternative Thermalito Afterbay Outlet and channel in the OWA to the Feather River. Alternatives shall be analyzed with consideration of all project purposes, including water supply, flood control, power generation, recreation and fish and wildlife protection. If appropriate, alternatives may be eliminated from further study if: (i) the benefits do not exceed the costs, (ii) there are significant environmental impacts, or (iii) they are otherwise impractical. This study is not expected to determine a preferred alternative, but rather is intended to narrow the range of potential actions. However, the Parties shall rely on a future in-depth Feasibility Study and Implementation Plan for Facilities Modification(s) to eventually select Facilities Modification(s) or other actions to meet Table 1 temperatures and address appropriate temperature resource goals in the High Flow Channel.

(2) Licensee shall provide a draft Reconnaissance Study to the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, California State Water Resources Control Board, American Rivers, and the State Water Contractors by August 31, 2006. It shall attempt to resolve any disputes regarding the study through consultation. The final study shall include the results of such consultation, including response to comments and an explanation why any comments were not incorporated.

(3) Licensee shall provide a copy of the final Reconnaissance Study to the Commission for information purposes by approximately October 31, 2006.

(c) Cost Caps for Facilities Modification(s) for Fish Habitat Temperature Needs. The Parties agree to a cost cap of $5 million for the Reconnaissance Study and subsequent Feasibility Study and Implementation Plan for Facilities Modification(s). The Parties agree to a capital cost for the Facilities Modification(s) not to exceed $60 million (2005). Capital costs include those costs normally associated with large construction projects as estimated using standard procedures. Parties will not request that the Commission order Facilities Modification(s) that cost in excess of this cap, provided the Reconnaissance Study and Feasibility Study and Implementation Plan for Facilities Modification(s) show that a Facilities Modification(s) within the cap will achieve the stated purposes in Article A108. If the total estimated costs exceed a total of $65 million, the Parties agree to seek additional third party funding. If such third party funding cannot be obtained within a reasonable time, the Parties may then request the Commission to order the Facilities Modification(s) notwithstanding that it may exceed the cost cap.

(d) If the Commission does not approve the recommended Plan, the Licensee shall refine the Plan in consultation with the National Marine Fisheries Service, U.S. Fish and Wildlife Service, California Department of Fish and Game, California State Water Resources Control Board, American Rivers, and the State Water Contractors and resubmit the Plan to the Commission for approval.

**Section B109. Riparian/Floodplain Screening Level Analysis**

The Licensee shall develop the screening level analysis for potential riparian/floodplain improvement projects required in Proposed License Article A106(b)(1) consistent with the Oroville Wildlife Area Management Plan currently in effect.

**Section B110. Analysis of Non-Motorized Water Trail Shoreline Access**

(a) Within one year of License issuance, the Licensee shall complete an analysis of non-motorized water trail shoreline access opportunities along the Feather River within and in the vicinity of the Project boundary. Suitable sites will be identified and ranked in consultation with the signatory Parties of this Settlement Agreement.

(b) Licensee shall fund and/or construct or improve a total of two to three river access sites within five years after the New Project License becomes final.

(c) Licensee shall work cooperatively with California Department of Boating and Waterways and other appropriate state or local agencies to expand the boating trail

opportunities downstream in the Feather River to the Sacramento River confluence or beyond where practical.

**Section B111. <u>Oroville Wildlife Area Funding</u>**

Within 120 days of the signing of the Settlement Agreement or by July 1, 2006, whichever is sooner, the Licensee shall complete an Interagency Agreement to provide the annual funding to the California Department of Fish and Game (CDFG) as agreed upon to manage the Oroville Wildlife Area (OWA) and implement those continuing tasks associated with the FERC Project No. 2100. The commitment and resources to be committed in the IA that will be effective on July 1, 2006 are as follows:

The current estimate of the staff resources needed by DFG pursuant to the Settlement Agreement is estimated as the equivalent of 5.5 full-time positions to perform and manage various activities that include public safety, recreational management, facilities management and protection, and the protection of fish and wildlife resources within the OWA. Specifically, these positions would be a combination of: (1) Habitat Supervisor II, (2) Habitat Supervisor I, (3) Environmental Scientist/Biologist, (4) Tractor Operator/Laborer, (5) Fish and Wildlife Technician and (6) Seasonal Aide(s). These positions would be employees of the CDFG. The estimated cost of funding these positions is $350,000 annually (2005). The Licensee shall reimburse CDFG within (45) days of receipt of invoice; CDFG shall give the Licensee an invoice detailing the cost, as often as monthly in arrears. The records of expenditures will be available for Licensee's review.

The Licensee shall provide sufficient funds to CDFG for the purchase of: (1) one air boat and trailer. (2) One 4x4 Back Hoe, (3) two 4x4 ATVs, and (4) five 4WD pick up trucks. The estimated cost of the above is $232,000. The Licensee shall, upon Signing of the Settlement Agreement, pay CDFG $232,000 for the purchase of this equipment. CDFG shall give the Licensee a copy of all invoices or bills of sale and indicate the total cost of the equipment. If the actual cost exceeds $232,000, then the Licensee shall pay the additional actual costs within forty five (45) days of receipt of the invoices or bills of sale by CDFG. The records of expenditures will be available for Licensee's review. The Licensee and CDFG agree that this equipment may need to be replaced during the term of the license. The Licensee and CDFG shall meet every five years as described below to make necessary funding adjustments.

The Licensee shall provide $82,500 annually (2005) to CDFG and thereafter on or about July first of the new fiscal year. This money may be spent by CDFG for expenses including but not limited to utilities, phone service, equipment maintenance, vehicle maintenance, refuse disposal, and general operating and maintenance costs. This amount is for minor administrative expenses only and is not intended to encompass expenses beyond such minor administrative expenses. Any costs associated with mosquito abatement shall be sent directly to the Licensee for payment. Any regulatory or compliance costs, or other third party costs, associated with FERC Project No. 2100

and its effect on the operation of the OWA are the responsibility of the Licensee. The records of CDFG's administrative expenditures will be available for Licensee's review. The Licensee shall provide CDFG $170,000 (2005) annually and thereafter on or about July first of the new fiscal year to assist CDFG with its Wildlife Protection activities within the OWA and Project boundary (FERC Project No. 2100). The records of expenditures will be available for Licensee's review.

Additionally, the Licensee shall provide CDFG their costs, not to exceed $100,000 annually (for the term of the license), for public safety and enforcement overtime within the OWA and FERC Project No. 2100 Boundary. These overtime dollars are to be uses for enforcement of the California Code of Regulation, Fish and Game Code and other state laws. The records of expenditures will be available for Licensee's review.

Upon license issuance and at five year intervals for the remainder of the license, the commitments identified above shall be reviewed by the Licensee and CDFG and funds necessary for the operation of the Oroville Wildlife Area and implementation of tasks associated with the new license (FERC Project No. 2100) provided to CDFG. The Licensee and CDFG shall mutually agree to adjust these commitments and resources as necessary to better reflect then current costs of operating the OWA and implementing the new FERC Project No. 2100 license conditions within the OWA and FERC Project No. 2100 boundary.

# APPENDIX C
## ECOLOGICAL COMMITTEE

### 1.0 PURPOSE AND GOAL OF COMMITTEE

1.1 The purpose of the Ecological Committee (EC) is to advise the licensee, Department of Water Resources (DWR), on ecological issues related to implementation of the New License for Federal Energy Regulatory Commission Project No. 2100. The primary goal of the EC is to achieve consensus on the matters within the scope of the EC's responsibilities under the Settlement Agreement and the New Project License.

### 2.0 COMMITTEE MEMBERSHIP AND MEETING PARTICIPATION

2.1 The EC shall be comprised of DWR and the following members, subject to their signing the Settlement Agreement:

a) State and Federal Members - One representative each from: U.S. Fish and Wildlife Service, Bureau of Land Management, California Department of Fish and Game, California Department of Parks and Recreation, and National Marine Fisheries Services.

b) Other Members (6) – One representative each from: the State Water Contractors; local Native American tribes; Butte County; the City of Oroville; American Rivers; Oroville Area Chamber of Commerce; as selected by each stakeholder category according to their own methods.

2.2 The State Water Resources Control Board and the Central Valley Regional Water Quality Control Board shall also be members of the EC even though they have not signed the Settlement Agreement.

2.3 Each member or category of members may designate a primary representative to the EC within 30 days after the Effective Date, or at any time thereafter with 5 days' notice. Designation shall be by notice to the Parties in accordance with Section 7.11 of the Settlement Agreement. Each member or category of members may name alternate representatives to the EC. Failure to designate a representative shall not prevent the EC from convening or conducting its functions in accordance with the time schedules set forth in this Article or otherwise established in the Settlement Agreement or the New Project License.

2.4 The EC, by unanimous agreement not subject to dispute resolution, may grant any other entity membership status on the EC, provided that the entity seeking membership submits a proposal to the EC that requests membership and demonstrates: (1) reasons why its interests are not adequately represented by present EC membership; and (2) appropriate qualifications of the entity to

participate in the EC. Any new member must agree in writing to be bound by the terms of the Settlement Agreement.

2.5 Each member should select a representative who has relevant training or experience with natural resource management.

2.6 Members with representation on more than one license committee will be expected to coordinate their participation in a consistent and coherent manner across all committees.

2.7 Participation by identified state or federal resource agencies complements their statutory responsibility for resources contained within the license boundary and does not otherwise affect their authority. Issues involving the exercise of specific agency authority can be discussed, but decisions are not delegated to the committee.

## 3.0 MEETING PROVISIONS

3.1 DWR shall establish the EC not later than three months after license issuance.

3.2 DWR will arrange, administer, and chair all meetings. A meeting facilitator may be used if necessary. DWR will provide no fewer than 10 days' prior notice of any meeting, including public notice, unless otherwise agreed to by the EC or required in order to meet a license deadline or other emergency circumstance.

3.3 DWR, or the facilitator, will provide draft meeting summaries for concurrence by the committee prior to final distribution. Meeting summaries will note member concerns.

3.4 The EC will establish protocols for meetings such as agenda development, location and scheduling. Meetings will be fairly distributed between Oroville and Sacramento with teleconferencing provided between sites.

3.5 Meeting agendas will list specific license articles and all other topics for action or discussion.

3.6 Meetings will be scheduled as determined by milestone events contained within specific license provisions, but no less frequently than annually. The EC shall meet jointly with the RAC annually.

3.7 DWR will bear all costs associated with conducting meetings. Each member will bear its own cost of attendance.

3.8 The Licensee will post final meeting summaries and any other written comments on the LCU website and file them with FERC.

3.9 The role of the EC will be evaluated at the end of 5 years after license issuance. The members will review the EC and determine if it should remain the same, be modified or discontinued.

## 4.0 COMMITTEE DELIBERATIONS

4.1 During meetings, prior to committee deliberations, the public may address the committee and provide comments on each agenda topic being discussed.

4.2 Following public comment and committee deliberation, the committee shall seek to reach consensus.

4.2.1 For any decision which the license does not assign to a specific agency for approval, consensus is defined as non-opposition of all committee members present. DWR or the facilitator will poll all EC members present and provide the results of the final poll to all EC members within three working days. Non-opposition means the absence of notice within seven working days that a member will seek dispute resolution pursuant to Section 5 of the Settlement Agreement.

4.2.2 For any decision assigned to a specific agency for approval, consensus is defined as the approval of such agency and the non-opposition of other members present. DWR or the facilitator will poll all EC members present and provide the results of the final poll to all EC members within three working days. Non-opposition means the absence of notice within seven working days that a member will seek dispute resolution pursuant to Section 5 of the Settlement Agreement. As provided in Section 2.8, the opposition of other members does not override the agency's approval. For any such decision, the EC may take public comments, discuss the matter, and provide its view to be documented for the Commission. The agency with such approval authority will convey its determination to the Licensee, the EC, and the Commission.

4.3 DWR will implement consensus on a given matter, subject to the requirements of the license article and any necessary regulatory approval. In the absence of consensus, DWR may proceed in a manner which complies with the license after obtaining any necessary regulatory approval. Thus, where a license article assigns a decision to an agency for approval, DWR will proceed in a manner which is consistent with the approval, subject to the reservations stated in Administrative Provision Section 3 of the Settlement Agreement. DWR will file with the Commission documentation of all consultation with the EC or specific agencies as required by the specific license article; any member's concerns and responses thereto; and any other written comments provided to DWR.

4.4 Any requirement for DWR to consult with a resource agency or other member under a license article that specifically references that agency or other member

shall be deemed satisfied by consultation with that agency or other member through the EC, provided that the EC is in existence and that agency or other member has participated through the EC in consultation on the requisite items. To the extent agency consultation is not provided through committee participation, DWR shall comply with all applicable regulatory consultation requirements including plan submission to appropriate agencies, including agencies specified in the license provision, when filing the plan and/or study with FERC for approval.

4.5 The Licensee will seek to resolve concerns expressed by the federal and state fish and wildlife agencies on matters in which they have expertise prior to seeking consensus of the EC.

## 5.0 SUPPORT FOR COMMITTEE DECISIONS

5.1 Committee members shall first use the dispute resolution process of Settlement Agreement Section 5 to resolve disputes arising from committee deliberations, prior to seeking remedies in any other forum.

5.2 All committee members participating in a consensus decision will support DWR's defense of such decision in any forum where the decision is challenged and the member is participating, to the extent permitted by applicable law. For this purpose, participating means non-opposition and does not include absence or abstention.

5.3 No committee member participating in a consensus decision will seek rehearing or judicial review, unless required by applicable law.

## 6.0 COMMITTEE FUNCTIONS

6.1 (a) The Committee shall meet, discuss, and seek to reach consensus on actions in accordance with the following license provisions;

(i) Lake Oroville Warm Water Fishery Habitat Improvement Program, Article A110

(ii) Lake Oroville Cold Water Fishery Improvement Program, Article A111

(iii) Construction and Recharge of Brood Ponds, Article A122

(iv) Invasive Plant Management, Article A126

(b) The Committee shall meet, discuss, and seek to reach consensus for the purpose of adaptive management in the implementation of the following license provisions:

(i) Lower Feather River Habitat Improvement Plan, Article A101

(ii) Gravel Supplementation and Improvement Program, Article A102

(iii) Channel Improvement Program, Article A103

(iv) Structural Habitat Supplementation and Improvement Program, Article A104

(v) Fish Weir Program, Article A105

(vi) Riparian and Floodplain Improvement Program, Article A106

(vii) Feather River Fish Hatchery Improvement Program, Article A107

(viii) Flow/Temperature to Support Anadromous Fish, Article A108

(ix) Comprehensive Water Quality Monitoring Program, Article A112

(x) Oroville Wildlife Area Management Plan, Article A115

6.2 For each plan and/or study identified in the above license provisions, DWR shall provide the committee with a draft for timely review and comment before filing the plan and/or study with FERC.

# APPENDIX D

## SWRCB Collaborative Process Participation Statement

The State Water Resources Control Board (SWRCB) and the nine Regional Water Quality Control Boards are the principal state agencies responsible for administering the state's water quality control program. (Wat. Code, §§ 13000-14958.) This includes responsibility to grant, waive, or deny water quality certification as provided for under section 401 of the federal Clean Water Act. (Wat. Code, § 13160; see generally 33 U.S.C. § 1341.) The SWRCB issues water quality certification before a license to operate a hydropower project may be issued by the Federal Energy Regulatory Commission (FERC). In addition, the SWRCB is the state agency responsible for administering surface water rights throughout the state. (Wat. Code, §§ 1000-5976.)

Where the SWRCB's regulatory approval is required, the SWRCB has a legal duty, independent of any arguments raised by parties to the proceeding before the SWRCB, to assure that the requirements for that approval are satisfied. In this case, the SWRCB has an independent statutory duty under the Clean Water Act and the applicable regional water quality control plan to ensure that the operation of the Oroville Project will not adversely affect water quality or the beneficial uses of the affected lakes and stream reaches within the Feather River drainage.

The SWRCB agrees to participate in the development of information regarding the Oroville Project that may lead to a settlement among the interested parties. It is the policy of the SWRCB to promote voluntary settlements among the parties to adjudicative proceedings before the SWRCB. It is also the policy of the SWRCB to assist applicants and members of the public by making available information about the requirements of the programs it administers. The SWRCB will participate in the collaborative process with a view towards encouraging settlement among the parties and other persons interested in proceedings before the SWRCB, and providing applicants, protestants and other interested persons with information concerning the requirements applicable to SWRCB approvals.

While the SWRCB can provide information that will help guide the parties towards a settlement that is likely to obtain the necessary regulatory approvals, however, the SWRCB cannot make a prior commitment to the outcome of any regulatory approval that must be issued by the SWRCB. The SWRCB acts in an adjudicative capacity when it acts on a request for water quality certification, water right application, change petition, or other water right approval that may be required for or requested in connection with a proposed project. The SWRCB must be an impartial decision-maker, avoiding bias, prejudice or interest, in any adjudicative proceedings conducted in accordance with the SWRCB's regulatory approvals. Consistent with its adjudicative responsibilities, including its obligation to consider any arguments that may be raised or information provided by parties to a SWRCB proceeding, the SWRCB cannot execute any settlement agreement or make any other commitment that would be binding on the SWRCB as part of its action on a request for water quality certification or other necessary SWRCB permit, license, or other regulatory approval.

# APPENDIX E
## FOREST SERVICE DRAFT 4(e) CONDITIONS

PRELIMINARY LICENSE TERMS AND CONDITIONS
NECESSARY FOR THE PROTECTION AND UTILIZATION
OF THE LASSEN AND PLUMAS NATIONAL FORESTS
IN CONNECTION WITH
THE APPLICATION FOR LICENSE

**Oroville Facilities**
**FERC No. 2100**

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**Enclosure 1**


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**PACIFIC SOUTHWEST REGION, USDA FOREST SERVICE**
**PRELIMINARY 4(E) TERMS AND CONDITIONS**
**NECESSARY FOR THE PROTECTION AND UTILIZATION OF THE**
**LASSEN AND PLUMAS NATIONAL FORESTS**
**OROVILLE FACILITIES**
**FERC PROJECT No. 2100**

# I. Introduction

The Forest Service (FS) provides the following Preliminary Section 4(e) Conditions (Conditions) for the Oroville Facilities project, FERC No. 2100 in accordance with 18 CFR 4.34(b)(1)(i). The Forest Service is also submitting "Recommendations", as allowed under Section 10(a) of the Federal Power Act. The "Recommendations" are applicable to areas where project effects do not directly affect NFS lands, and are optional for consideration by the FERC, as the lead federal agency. The "Recommendations" are shown in Enclosure 1 as italicized text. The rationale for the "Recommendations" is included in Enclosure 2.

Section 4(e) of the Federal Power Act states the Commission may issue a license for a project within a reservation only if it finds that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired. This is an independent threshold determination made by FERC, with the purpose of the reservation defined by the authorizing legislation or proclamation (see Rainsong v. FERC, 106 F.3d 269 (9th Cir. 1977). The FS, for its protection and utilization determination under Section 4(e) of the FPA may rely on broader purposes than those contained in the original authorizing statutes and proclamations in prescribing conditions (see Southern California Edison v. FERC, 116F.3d 507 (D.C. Cir. 1997)).

The following terms and conditions are based on those resource and management requirements enumerated in the Organic Administration Act of 1897 (30 Stat. 11), the Multiple-Use Sustained Yield Act of 1960 (74 Stat. 215), the National Forest Management Act of 1976 (90 Stat. 2949), and any other law specifically establishing a unit of the National Forest System or prescribing the management thereof (such as the Wilderness Act or the Wild and Scenic River Act), as such laws may be amended from time to time, and as implemented by regulations and approved Land and Resource Management Plans prepared in accordance with the National Forest Management Act. Specifically, the 4(e) conditions are based on the Land and Resource Management Plan (as amended) for the Plumas National Forest (and portions of the Lassen National Forest administered by the Plumas), as approved by the Regional Forester of the Pacific Southwest Region.

Pursuant to Section 4(e) of the Federal Power Act, the Secretary of Agriculture, acting by and through the Forest Service, considers the following conditions necessary for the adequate protection and utilization of the land and resources of the Lassen and Plumas National Forests. License articles contained in the Federal Energy Regulatory Commission's (Commission) Standard Form L-1 (revised October 1975) issued by Order No. 540, dated October 31, 1975,

cover general requirements. This document includes both administrative provisions (Section II) and specific resource requirements (Section III) deemed necessary for protection and utilization of National Forest System lands and resources.

## II. Administrative Provisions

### Condition No. 1-Forest Service Reserves the Right to Revise Section 4(e) Conditions

The Forest Service reserves the right to modify final Section 4(e) conditions submitted to FERC for inclusion in the new license for the Oroville Facilities, FERC No.2100, to resolve any conflict between FS 4(e) conditions and: 1) water quality certificate conditions issued by the State of California Department of Water Resources Control Board, 2) Section 18 conditions issued by the National Oceanographic and Atmospheric Administration Fisheries Service, or 3) terms and conditions imposed by existing or revised U.S. Fish and Wildlife Service Biological Opinion issued for the relicensing of the Project.

### Condition No. 2—Approval of Changes After Initial Construction

Notwithstanding any license authorization to make changes to the Project, the Licensee shall obtain written approval from the Forest Service prior to making changes on or affecting National Forest System lands:

- to any constructed project features or facilities,
- in the uses of project lands and waters,
- or any departure from the requirements of any approved exhibits files with the Commission.

Following receipt of such approval from the Forest Service, and a minimum of 60 days prior to initiating any such changes, the Licensee shall file a report with the Commission describing the changes, the reasons for the changes, and showing the approval of the Forest Service for such changes. The Licensee shall file an exact copy of this report with the Forest Service at the same time it is filed with the Commission. This article does not relieve the Licensee from the requirement for license amendment or other requirements of Article 2 or Article 3 of this license. Any changes to the license made for any reason pursuant to Article 2 or Article 3 shall be made subject to any new terms and conditions the Secretary of Agriculture may make pursuant to section 4(e) of the Federal Power Act.

**Condition No. 3—Surrender of License or Transfer of Ownership**

Prior to any surrender of this license, the Licensee shall provide assurance acceptable to the Forest Service that Licensee shall restore National Forest System resources to a condition satisfactory to the Forest Service upon or after surrender of the license, as appropriate. The restoration plan shall identify the measures to be taken to restore National Forest System resources and shall include adequate financial assurances such as a bond or letter of credit, to ensure performance of the restoration measures.

In the event of any transfer of the license or sale of the Project, the Licensee shall guarantee or assure that, in a manner satisfactory to the Forest Service, the Licensee or transferee will provide for the costs of surrender and restoration. If deemed necessary by the Forest Service to assist in evaluating the Licensee's proposal, the Licensee shall conduct an analysis, using experts approved by the Forest Service, to estimate the potential costs associated with surrender and restoration of the Project area directly affecting NFS lands to Forest Service specifications. In addition, the Forest Service may require the Licensee to pay for an independent audit of the transferee to assist the Forest Service in determining whether the transferee has the financial ability to fund the surrender and restoration work on or affecting NFS lands specified in the analysis.

**Condition No. 4—Investigation of Project Related Fires**

The Licensee agrees to fully cooperate with the Forest Service on all fire investigations. The Licensee shall produce upon request all material and witnesses, not subject to attorney client or attorney work product privilege, over which the Licensee has control, related to the fire and its investigation including:

- All investigation reports
- All witness statements
- All photographs
- All drawings
- All analysis of cause and origin
- All other, similar materials and documents regardless of how collected or maintained

The Licensee shall preserve all physical evidence, and give custody to the Forest Service of all physical evidence requested. The Forest Service shall provide the Licensee with reasonable access to the physical evidence and documents the Licensee requires in order to defend any and all claims, which may arise from a fire within the Project boundaries, to the extent such access is not precluded by ongoing criminal or civil litigation.

**Condition No. 5-Area Access**

The United States shall have unrestricted use of any road, over which the Licensee has control, constructed within the project area, for all purposes deemed necessary and desirable in connection with the protection, administration, management, and utilization of NFS lands and resources thereon. The United States shall have the right to extend rights and privileges for use of such right-of-way and road thereon to States and local subdivisions thereof, as well as to other users, including members of the public, except contractors, agents, and employees of the Licensee. The Forest Service shall control such use so as not to unreasonably interfere with safety or security uses, or cause the Licensee to bear a share of the costs of maintenance disproportionate to Licensee's use in comparison to the use of the road by others.

**Condition No. 6—Maintenance of Improvements on or Affecting National Forest System Lands**

The Licensee shall maintain all its improvements and premises on or affecting National Forest System (NFS) lands to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the Forest Service. Disposal will be at an approved existing location. Except as otherwise agreed by the Forest Service.

**Condition No. 7—Pesticide Use Restrictions on National Forest System Lands**

Pesticides may not be used on NFS lands or in areas affecting NFS lands to control undesirable woody and herbaceous vegetation, aquatic plants, insects, rodents, undesirable fish, or other pests without the prior written approval of the Forest Service. If pesticide use is proposed, the Licensee shall submit a request for approval of planned uses of pesticides. The request must cover annual planned use and be updated as required by the Forest Service. The Licensee shall provide information essential for review in the form specified by the Forest Service. Exceptions to this schedule may be allowed only when unexpected outbreaks of pests require control measures that were not anticipated at the time the request was submitted. In such an instance, an emergency request and approval may be made.

The Licensee shall use on National Forest System lands only those materials registered by the U. S. Environmental Protection Agency for the specific purpose planned. The Licensee must strictly follow label instructions in the preparation and application of pesticides and disposal of excess materials and containers.

**Condition No. 8—Valid Claims and Existing Rights**

This license is subject to all valid claims and existing rights of third parties. The United States is not liable to the Licensee for the exercise of any such right or claim.

**Condition No. 9—Compliance with Regulations on National Forest System Lands**

The Licensee shall comply with the regulations of the Department of Agriculture for activities on NFS lands, and all applicable Federal, State, county, and municipal laws, ordinances, or regulations in regard to the area or operations on or affecting NFS lands, to the extent federal law does not preempt ordinances or regulations.

**Condition No. 10—Protection of United States Property**

The Licensee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this license.

**Condition No. 11—Indemnification**

The Licensee shall indemnify, defend, and hold the United States harmless for any violations incurred under any applicable laws and regulations or for judgments, claims, or demands assessed against the United States caused by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. The licensee's indemnification of the United States shall include any loss by personal injury, loss of life or damage to property in connection with the construction, maintenance, or operation of the project works or the works appurtenant or accessory thereto under the license. Indemnification shall include, but is not limited to, the value of resources damaged or destroyed; the costs of restoration, cleanup, or other mitigation; fire suppression or other types of abatement costs; third party claims and judgments; and all administrative, interest, and other legal costs. Upon surrender, transfer, or termination of the license, the Licensee's obligation to indemnify the United States shall survive all valid claims for action that occurred prior to such surrender, transfer or termination.

**Condition No. 12—Surveys, Land Corners**

The Licensee shall protect all public land survey monuments, private property corners, and forest boundary markers located on NFS lands from damage arising from the Licensee's construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. In the event that any such land markers or monuments are destroyed by an act or omission of the Licensee, in connection with the use and/or

occupancy authorized by this license, depending on the type of monument destroyed, the Licensee shall reestablish or reference same in accordance with (1) the procedures outlined in the "Manual of Instructions for the Survey of the Public Land of the United States," (2) the specifications of the County Surveyor, or (3) the specifications of the Forest Service. Further, the Licensee shall ensure that any such official survey records affected are amended as provided by law.

**Condition No. 13—Damage to Land, Property, and Interests of the United States**

The Licensee has an affirmative duty to protect the land, property and interests of the United States from damage arising from the Licensee's construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. The Licensee is liable for and shall pay, after being afforded an opportunity to review Forest Service claimed costs, all damages, costs and expenses associated with damage to the land, property and interests of the United States occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license, including but not limited to damages, costs and expenses resulting from fire. Such damages, costs and expenses shall include, but not be limited to:

1. Fire suppression costs
2. Rehabilitation and restoration costs
3. Value of lost resources
4. Abatement costs
5. Investigative and administrative expenses
6. Attorneys' fees

The Licensee's liability under this condition shall not extend to acts or omissions of third parties outside of the Licensee's control. Licensee's contractors or employees of contractors are not considered third parties. Damages will be determined by the value of the resources lost or impaired, as determined by the Forest Service. The basis for damages will be provided to the Licensee. The Licensee shall accept transaction registers certified by the appropriate Forest Service official as evidence of costs and expenses. The Licensee shall have an opportunity to review the basis for the Forest Service's damages, costs and expenses, and to meet and confer with the Forest Service to resolve any questions or disputes regarding such damages, costs and expenses. After the opportunity for review, the Licensee shall promptly pay to the United States such damages, costs and expenses upon written demand by the United States.

**Condition No. 14—Risks and Hazards**

As part of the occupancy and use of the license area, the Licensee has a continuing responsibility to identify and report all known or observed hazardous conditions on or affecting NFS lands that would affect the improvements, resources, or pose a risk of injury to

individuals. Licensee will abate those conditions, except those caused by third parties not related to the occupancy and use authorized by the License. Any non-emergency actions to abate such hazards on NFS lands shall be performed after consultation with the Forest Service. In emergency situations, the Licensee shall notify the Forest Service of its actions as soon as possible, but not more than 48 hours, after such actions have been taken. Whether or not the Forest Service is notified or provides consultation, the Licensee shall remain solely responsible for all Licensee abatement measures performed. Other hazards should be reported to the appropriate agency as soon as possible.

**Condition No. 15—Consultation**

Each year in March or as otherwise agreed, the Licensee shall consult with the Forest Service with regard to measures needed to ensure protection and utilization of the National Forest resources affected by the Project. Within 60 days following such consultation, the Licensee shall file with the Commission evidence of the consultation with any recommendations made by the Forest Service. The Forest Service reserves the right, after notice and opportunity for comment, to require changes in the Project and its operation through revision of the 4(e) conditions that require measures necessary to accomplish protection and utilization of National Forest resources.

When Forest Service section 4(e) conditions require the Licensee to file a plan with the Commission that is approved by the Forest Service, the Licensee shall provide the Forest Service a minimum of 60 days to review and approve the plan before filing the plan with the Commission. Upon Commission approval, the Licensee shall implement Forest Service required and approved plans.

## III. Resource Protection Conditions

**Condition No. 16-Heritage Resources**

Licensee shall file with the Commission, within one year following license issuance, a Historic Properties Management Plan (HPMP) approved by the Forest Service, for the purpose of protecting and interpreting heritage resources located on National Forest System lands (NFS lands). The Licensee shall consult with the State Historic Preservation Officer, Native American Tribes, Forest Service, and other applicable agencies and communities during the preparation of the Plan. The HPMP shall accurately define the area of potential effects, including effects of implementing Section 4(e) conditions, Native American traditional cultural values, and Project-induced recreational impacts to archaeological properties on or affecting National Forest System lands. The HPMP shall also provide measures to mitigate the identified impacts, including a monitoring program, and management protocols for the ongoing protection of archaeological properties.

If, prior to or during ground-disturbing activities or as a result of project operations, items of potential cultural, historical, archaeological, or paleontological value are reported or discovered, or a known deposit of such items is disturbed on NFS lands, the Licensee shall immediately cease work in the area affected, and implement the provisions in the HPMP.

**Condition No. 17 – Protection of Forest Service Special Status Species**

Before taking actions to construct new project features on NFS lands that may affect Forest Service special status species (i.e. Forest Service sensitive and/or management indicator species) or their critical habitat, the Licensee shall prepare a biological evaluation evaluating the potential impact of the action on the species or its habitat and submit it to the Forest Service for approval. In coordination with the Commission, the Forest Service may require mitigation measures for the protection of the affected species.

The biological evaluation shall

- Include procedures to minimize adverse effects to special status species.
- Ensure project-related activities shall meet restrictions included in site management plans for special status species.
- Develop implementation and effectiveness monitoring of measures taken or employed to reduce effects to special status species.

**Condition No. 18-Invasive Weed Management**

Within one year of license issuance, Licensee shall develop and file for Commission approval a plan to manage and reduce native and non-native invasive plant species populations on or affecting NFS lands. The plan shall be developed in conjunction with the Forest Service (FS), Bureau of Land Management (BLM), California Department of Fish and Game (DFG), and California Department of Parks and Recreation (DPR), and in consultation with the Ecological Committee (EC), including specifically the U.S. Fish and Wildlife Service (USFWS). Prior to filing the plan for Commission approval, the Licensee shall: 1) submit the portion of the plan pertaining to National Forest System lands to the Forest Service for approval, *2) submit the portion of the plan pertaining to BLM lands to BLM for approval, 3) submit the portion of the plan pertaining to DFG lands to DFG for approval, and 4) submit the portion of the plan pertaining to DPR lands to DPR for approval.* Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission. Commission approval to use pesticides for noxious weed control constitutes the approval required by Condition 7.

(b) The plan shall specify areas/acreage, treatment/control methods, best management practices, needs for multiple year treatments and monitoring, including an annual inspection. The plan shall specifically address, but not be limited to, the following species: purple loosestrife (Lythrum salicaria); giant reed (Arundo donax), tree of heaven (Ailanthus altissima); scarlet wisteria (Sesbania punicea); parrot feather

(Myriopyllum aquaticum); Himalayan blackberry (Rubus discolor); aquatic primrose (Ludwigia peploides); yellow starthistle (Centaurea solstitialis); Spanish broom (Spartium junceum); French broom (Genista monspessulana); Scotch broom (Cytisus scoparius); and skeleton weed (Chondrilla juncea).

(c) *After coordination with the appropriate land management agency and then consultation with the EC, including specifically USFWS, the Licensee may modify the implementation measures contained within the plan without Commission approval to the extent the measures are within the scope of the approved plan.* Any modification to the implementation measures that are not within the scope of the approved plan must be filed with the Commission for approval.

(d) The Licensee shall coordinate the plan and ongoing efforts with applicable federal, state and local agencies and shall take into full consideration state and federally listed species including Forest Service Sensitive species located on NFS lands.

(e) In coordination with the FS, BLM, DFG, and DPR, the Licensee shall reevaluate the plan five years after initial implementation, and shall consult with the EC, including specifically USFWS, and any other applicable federal, state and local agencies regarding the reevaluation. The reevaluation shall take into consideration the need to treat other invasive plant species, as well as alternative or additional control methods that may be implemented.

(f) Following license issuance, the Licensee shall file annually with the Commission a compliance report for informational purposes. The Licensee shall first prepare the report in coordination with the FS, BLM, DFG, and DPR, and in consultation with the EC, including specifically USFWS. The report as filed with the Commission shall include any comments of EC members and the Licensee's responses.

(g) The *Licensee shall not be required to expend more than $450,000 to develop and implement the plan during the first five years after issuance of this license, and shall not be required to expend more than ($25,000) every year thereafter.*

**Condition No. 19-Development of a Fuel Management Plan**

Within one year of license issuance, the Licensee shall prepare for Forest Service approval and filing with the Commission, a Fuel Management Plan for National Forest System lands (NFS lands) located within the project area. The plan shall identify fuel management issues, prioritization, and recommended actions to address them. The plan encompassing NFS lands within the project area may be coordinated with the Oroville Relicensing Settlement Agreement, Appendix B, Fuel Load Management plan.

# Appendix F

## Habitat Expansion Agreement For Central Valley Spring-Run Chinook Salmon and Central Valley Steelhead

This Habitat Expansion Agreement for Central Valley Spring-Run Chinook Salmon and Central Valley Steelhead ("Agreement") is entered into this _____ day of _____, 2006 by and among Pacific Gas and Electric Company ("PG&E"), California Department of Water Resources ("DWR") (individually "Licensee" and collectively "Licensees"), Department of Commerce National Marine Fisheries Service ("NMFS"), U. S. Department of Interior Fish and Wildlife Service ("USFWS"), California Department of Fish and Game ("CDFG"), U. S. Department of Agriculture Forest Service ("USFS"), (collectively "Resource Agencies"), Arthur G. Baggett[2], American Rivers, and State Water Contractors, Inc. (all collectively "Signatories").

Definitions:

Consultation: Except as provided in Paragraph 13, consultation refers to the act of conferring and is distinct from the term "Consultation" under the Endangered Species Act.

Fish Passage: Upstream or downstream movement of fish past Feather River hydroelectric project facilities.

Material New Information: Significant and relevant new information which is not in any relevant administrative record as of the date of the execution of this Agreement or otherwise known to the Party who seeks to use the Material New Information, as of that date.

Notice: A written communication sent by U.S. Mail, guaranteed overnight or other delivery, telefacsimile, email or by other reliable means and meeting any additional requirements specified in a paragraph below.

1. Background. FERC relicensing of hydroelectric projects in the Feather River basin has focused attention on the desirability of expanding the amount of spawning, rearing and adult holding habitat available for Central Valley spring-run Chinook salmon *(Oncorhynchus tshawytscha*) ("Spring-Run") and Central Valley steelhead *(O. mykiss)* ("Steelhead"). This

[2] Mr. Baggett is signing this Agreement as a recommendation to the California State Water Resources Control Board, and not as a Party to the Agreement. Mr. Baggett will not be participating in the State Water Resources Control Board's consideration of any petition for water quality certification for any Habitat Expansion Plan pursuant to Section 401 of the federal Clean Water Act.

Agreement establishes an approach for identifying, evaluating, selecting and implementing the most promising action(s) to expand such spawning, rearing and adult holding habitat in the Sacramento River Basin as an alternative to the Resource Agencies or other Signatories seeking project-specific Fish Passage prescriptions or license conditions in the relicensing of the Licensees' Oroville, Poe, Rock Creek-Cresta, and Upper North Fork Feather River hydroelectric projects ("Feather River hydroelectric projects").

2. Habitat Expansion Goal and Threshold. The overall goal of this Agreement is to expand the amount of habitat with physical characteristics necessary to support spawning, rearing and adult holding of Spring-Run and Steelhead in the Sacramento River basin as a contribution to the conservation and recovery of these species. The expansion shall be accomplished through enhancements to existing accessible habitat, improving access to habitat, or other action(s). The specific goal of the Agreement is to expand spawning, rearing and adult holding habitat sufficiently to accommodate an estimated net increase of 2,000 to 3,000 Spring-Run for spawning ("Habitat Expansion Threshold") as compared to the habitat available under any relevant existing requirements or commitments, as defined in Paragraph 3. The Habitat Expansion Threshold is focused on Spring-Run as the priority species, as expansion of habitat for Spring-Run typically accommodates Steelhead as well.

3. Eligible Habitat Expansion Actions.

   A. Scope of Eligible Habitat Expansion Actions. Potential actions to expand Spring-Run and Steelhead spawning, rearing and adult holding habitat will be identified, evaluated, selected and implemented according to Paragraph 4. Actions may include, among other things, dam removals, dam re-operation, creation or enhancement of Fish Passage, water temperature/flow improvements or other physical habitat enhancements, and shall ensure future operation and maintenance if such operation and maintenance is needed after initial implementation. Actions shall also include functional start-up testing, if needed, for technical validation of the action's design (e.g. that a fish ladder operates as designed), but not long-term monitoring of species utilization or benefit. Actions identified in other venues, including unfunded actions, are acceptable for consideration, provided that implementation of this Agreement results in a net expansion of habitat over any existing requirements and commitments, whether by the Licensees or others, as defined below.

   B. Existing Requirements and Commitments. For purposes of this Agreement, the phrase "existing requirements and commitments" is intended to encompass actions expected to occur in a timeframe

comparable to implementation of action(s) under the Agreement. Existing requirements and commitments may include but are not limited to:

(i) legal or regulatory requirements that are the subject of any form of binding order issued by a regulatory agency or court of competent jurisdiction, at the time the habitat expansion action(s) are approved by NMFS under Paragraph 4(B);

(ii) legal or regulatory requirements that are the subject of ongoing or imminent administrative or judicial action by an agency or court of competent jurisdiction at the time the habitat expansion action(s) are approved by NMFS under Paragraph 4(B);

(iii) obligations or commitments set forth in a draft license application, final license application, settlement agreement, or agreement-in-principle in a pending hydroelectric relicensing proceeding at the time the habitat expansion action(s) are approved by NMFS under Paragraph 4(B); and

(iv) reasonable and prudent alternatives, reasonable and prudent measures, and terms and conditions of any final Biological Opinion that has been issued at the time the habitat expansion action(s) are approved by NMFS under Paragraph 4(B).

By recommending, approving, and implementing actions under this Agreement, the Signatories do not intend to encourage non-compliance by third parties with applicable laws and regulations or preclude appropriate enforcement actions.

4. Planning and Implementation of Habitat Expansion Action(s). The Licensees and other Signatories shall follow the planning and implementation phases described below.

   A. Identification, Evaluation and Recommendation of Action(s). Within 2 years of signing the Agreement, the Licensees shall complete identification, evaluation and recommendation of habitat expansion action(s), in consultation with the Signatories and other directly affected and responsive third parties, using the following criteria:

      i. Evaluation Criteria. The Licensees shall use the following non-exclusive and non-prioritized Evaluation Criteria to screen potential habitat expansion actions and develop a preliminary list of viable actions:

(a) favorable feasibility (technically feasible; supported by accepted science; low potential for disease and other risks; proven actions are favored over experimental actions);
(b) adequate scale of expansion of spawning, rearing and adult holding habitat (one or more larger contiguous gains is favored over numerous smaller gains; increased habitat is favored over enhanced habitat);
(c) favorable sustainability of action;
(d) favorable cost-effectiveness and economic feasibility (including consideration of costs necessary to operate and maintain the expansion);
(e) minimal human intervention needed to achieve access to expanded spawning, rearing and adult holding habitat (volitional access is favored over that which requires a high degree of human intervention);
(f) favorable spatial separation from other populations or runs to maintain genetic diversity by minimizing interbreeding;
(g) favorable spatial separation from other spawning streams to minimize population impacts of a stream-specific adverse event (geographic distribution is favored over centralization);
(h) acceptable length of time to implement (earlier gains are favored over later gains);
(i) favorable local/political support;
(j) consistency with NMFS Viable Salmonid Population guidance, Endangered Species Act (ESA) recovery goals and recovery plan (as available), and expected contribution to species recovery (higher consistency and greater contributions are favored);
(k) balance of benefits to Spring-run and Steelhead (actions that provide a balance of benefits to both Spring-run and Steelhead are favored over actions that primarily benefit one species; if multiple actions are undertaken, a combination of actions that provides a balance of benefits to both salmon and steelhead is favored);
(l) consistency with other resource uses such as water supply, public safety, flood control, recreation, and power production;
(m) favorable relative availability of appropriate stocks for reintroduction;
(n) low expectation for the action to be undertaken by the Licensees or others in the near future;
(o) favorable potential to benefit other anadromous, catadromous and resident fisheries affected by the Feather River hydroelectric projects; and
(p) low potential for adverse impact on listed species and destruction or adverse modification of critical habitat under the ESA (actions with low or no impact are favored).

ii. Selection Criteria. After developing a preliminary list of viable action(s) using the Evaluation Criteria above, the Licensees shall use the following Selection Criteria to select recommended action(s) for implementation:
(a) Contribution to achieving the Habitat Expansion Threshold;
(b) Most cost-effective compared to other potential habitat expansion actions;
(c) Feasibility (action(s) can reasonably be accomplished); and
(d) Timing (action(s) can be accomplished in a reasonable period of time).

iii. Draft Habitat Expansion Plan. After selecting recommended action(s) for implementation, the Licensees shall prepare and distribute a Draft Habitat Expansion Plan to the Signatories and other directly affected third parties for a 90-day review and comment period. The Draft Habitat Expansion Plan shall include a description of:
(a) the recommended action(s), including any functional start-up testing and future operation and maintenance;
(b) the rationale for their selection based on the Evaluation Criteria and the Selection Criteria;
(c) a preliminary schedule for each of the remaining phases in this Paragraph 4, including provisions for anticipated schedule uncertainties;
(d) the responsibilities of each Licensee for implementing the action(s);
(e) the estimated contribution of the action(s) to the Habitat Expansion Threshold; and
(f) a pre feasibility-level cost estimate for implementing the action(s).

B. Approval of Final Habitat Expansion Plan. Within 90 days after the close of the review and comment period on the Draft Habitat Expansion Plan, the Licensees shall prepare and submit a Final Habitat Expansion Plan to NMFS for approval of the habitat expansion action(s) recommended in the Plan. For purposes of this Agreement, "approval" of the Plan and recommended action(s) applies only to the elements of the Plan specified in Paragraph 4(A)(iii)(a), (c), (e) above. The Licensees and NMFS may extend the time periods set forth below by mutual agreement to accommodate the approval process.

i. The Final Habitat Expansion Plan shall address all comments received during the 90-day review and comment period, and shall include an explanation why any such comment was not adopted. It shall include all elements required by Paragraph 4(A)(iii) and shall

be distributed to all Signatories and directly affected and responsive third parties.

ii. Prior to taking final action on the Final Habitat Expansion Plan, NMFS shall consult with USFWS, SWRCB, CDFG, USFS, any other Signatories, and other directly affected and responsive third parties, and give due consideration to any comment received during this consultation. NMFS' consultation shall specifically address any comment by a Signatory or other commenter that the action(s) recommended by the Licensees are existing requirements or commitments. In addition, NMFS' consultation with USFWS shall include consideration of recommended action(s)' potential benefits and impacts on resident fish at the location of the action(s).

iii. In determining whether to approve the Final Habitat Expansion Plan, NMFS shall review information submitted by the Licensees, comments by other Signatories as well as any other relevant information and consider the extent to which the action(s) recommended in the Plan meet the following Approval Criteria:
(a) Estimated to meet the Habitat Expansion Threshold;
(b) Assures necessary testing, operation and maintenance;
(c) Supports establishing a geographically separate, self-sustaining population of Spring-Run;
(d) Supports segregating Spring-Run habitat from Central Valley fall-run Chinook salmon;
(e) Meets the requirements for eligible habitat expansion action(s) pursuant to Paragraph 3; and
(f) Expected to be implemented within a reasonable period of time.

iv. NMFS shall not withhold approval for any recommended action(s) determined by NMFS to meet all six Approval Criteria. In addition, NMFS may approve recommended action(s) that meet at least the following four Approval Criteria: (a) as may be modified in Paragraph 4(B)(vi)(a) below, (b), (e), and (f).

v. If the Licensees and NMFS disagree that the action(s) recommended in the final Habitat Expansion Plan are estimated to meet the Habitat Expansion Threshold, the Licensees and NMFS shall select a neutral third party with appropriate expertise to make an independent estimate. The cost of retaining the neutral third party shall be borne by the Licensees. NMFS shall give due consideration to the independent estimate before making its final decision on approval of the recommended action(s) for the purposes of this Agreement.

vi. If NMFS determines that the action(s) recommended in the Final Habitat Expansion Plan are estimated not to meet the Habitat Expansion Threshold, NMFS shall consult with the Licensees to consider the acceptability of the recommended action(s) and, at NMFS' discretion, either:

(a) accept the recommended action(s) as substantially meeting the goal of this Agreement as stated in Paragraph 2, within a reasonable margin of estimating error;
(b) identify other action(s) mutually acceptable to NMFS and the Licensees that may be approved per Paragraph 4(B)(iv), in which case NMFS may approve the Final Habitat Expansion Plan (as modified to incorporate the mutually acceptable actions) after consulting with the Resource Agencies, other Signatories, and other directly affected and responsive third parties as described in Paragraph 4(B)(ii) above; or
(c) deny approval of the Final Habitat Expansion Plan.

vii. After completing its review of the Final Habitat Expansion Plan, NMFS shall provide the Licensees with written Notice of its decision. If NMFS denies approval, the written Notice shall identify the specific reasons the Plan was not approved. The Licensees shall have a reasonable opportunity to assess and cure the deficiencies identified by NMFS and submit a modified Plan for NMFS' review and approval.

viii. Within 90 days after approval by NMFS, the Licensees shall distribute to Signatories and other directly affected and responsive third parties for information an Approved Habitat Expansion Plan reflecting any modifications made during the approval process, and an updated schedule for each of the remaining phases in this Paragraph 4.

ix. ESA permits or approvals related to implementation of any approved action(s) shall be handled separately in accordance with Paragraph 13. By approving action(s) under this Paragraph, NMFS does not represent that it is an action agency or that it has authority to provide any other permits or approvals necessary to implement the approved action(s).

C. Preliminary Design of Action(s). After the Licensees have distributed an Approved Habitat Expansion Plan, they shall begin the Preliminary Design phase. During the Preliminary Design phase the Licensees shall prepare feasibility-level designs and cost estimates of approved action(s). Where plans involve engineered fishway designs, Fish Passage systems, or major engineered components, the Licensees

shall consult with NMFS-Southwest Region Fisheries Engineering Team. The Licensees shall prepare and distribute semi-annual status reports to Signatories and other directly affected and responsive third parties for information purposes. At the completion of this phase, the Licensees shall distribute to Signatories and other directly affected and responsive third parties for information a Preliminary Design Report with preliminary design of the approved action(s), updated cost estimates and schedule for each of the remaining phases in this Paragraph 4. NMFS shall determine whether the Preliminary Design Report is consistent with the Approved Habitat Expansion Plan. After completing its determination, NMFS shall provide the Licensees with written Notice of its determination. If NMFS determines the Preliminary Design Report is inconsistent with the Approved Habitat Expansion Plan, the written Notice shall identify the specific inconsistencies. The Licensees shall have a reasonable opportunity to assess and cure the inconsistencies identified by NMFS and submit a modified Report for NMFS' determination of consistency.

D. Final Design and Permitting of Action(s). During the Final Design and Permitting phase the Licensees shall prepare bid-level designs and cost estimates, and obtain all necessary permits, approvals, and rights. Where plans involve engineered fishway designs, Fish Passage systems, or major engineered components, the Licensees shall consult NMFS-Southwest Region Fisheries Engineering Team. The Licensees shall prepare and distribute semi-annual status reports to Signatories and other directly affected and responsive third parties for information purposes. At the completion of this phase, the Licensees shall distribute to Signatories and other directly affected and responsive third parties for information a Final Design and Permitting Report with final designs and permit status of the approved action(s), updated cost estimates and schedule for each of the remaining phases in this Paragraph 4. NMFS shall determine whether the Final Design and Permitting Report is consistent with the Approved Habitat Expansion Plan. After completing its determination, NMFS shall provide the Licensees with written Notice of its determination. If NMFS determines the Final Design and Permitting Report is inconsistent with the Approved Habitat Expansion Plan, the written Notice shall identify the specific inconsistencies. The Licensees shall have a reasonable opportunity to assess and cure the inconsistencies identified by NMFS and submit a modified Report for NMFS' determination of consistency.

E. Implementation of Action(s). The Licensees shall implement the Approved Habitat Expansion Plan, as may be modified by permitting conditions pursuant to Paragraph 4(D). Implementation may be by DWR and PG&E individually, DWR and PG&E jointly, or through cooperative efforts with others, as provided in the Plan or in

subsequent communications with NMFS. Implementation shall not be required to begin prior to acceptance by the Licensees of the new FERC licenses for the Oroville, Poe, and Upper North Fork Feather River projects ***[add concept of differential schedule for implementation based on the terms of the recent FERC licenses]***. The Licensees shall prepare and distribute semi-annual status reports to Signatories and other directly affected and responsive third parties for information purposes. At the completion of implementation, the Licensees shall distribute to Signatories and other directly affected and responsive third parties for information a Final Report with updated cost information and schedule for each of the remaining phases in this Paragraph 4.

F. Testing of Implemented Action(s). Upon completion of implementation of the habitat expansion action(s) pursuant to the Approved Habitat Expansion Plan, the Licensees shall perform functional start-up testing for technical validation of the specified designs for the action(s). At the completion of this phase, the Licensees shall distribute to Signatories and other directly affected and responsive third parties for information a Final Test Report with test results and conclusions. The Licensees shall take reasonable and necessary actions as approved by NMFS to correct functional deficiencies.

5. Timeframes. The Signatories share a mutual interest in completing implementation of selected and approved action(s) as early as reasonably feasible, consistent with the Licensees obtaining necessary approvals and permits. If it appears that the Licensees will not be able to achieve dates specified or approved pursuant to this Agreement, they may request an extension of time from NMFS, which extension shall be granted if good cause exists. Good cause includes events or circumstances beyond the Licensees' reasonable control.

6. Licensee Obligations. The Licensees shall be responsible for identifying, evaluating, selecting, implementing, and, if included in the Approved Habitat Expansion Plan, testing, operating and maintaining the habitat expansion action(s) to be performed under the Agreement. The Licensees shall separately agree on a distribution of responsibility between them, with each being independently responsible for achieving its portion of the total responsibility. Timely and complete implementation of the Approved Habitat Expansion Plan fulfills the Licensees' obligations under this Agreement. The Licensees are not obligated to guarantee or verify fish production or utilization.

7. Resource Agency Obligations.

A. The Resource Agencies shall be responsible for providing timely information and consultation as requested by the Licensees, and for diligent and timely processing of all permits, approvals, and rights necessary for implementation of this Agreement, subject to available agency resources and agency authority. Any obligation under this Agreement of any Federal agency is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341 et seq. Any obligation under this Agreement for a State agency other than DWR is subject to Article 16, Section 7 of the California Constitution.

B. This Agreement is not intended nor shall it be construed to be a predecisional determination by a Resource Agency as to whether permits, approvals, and rights necessary to implement a habitat expansion action approved by NMFS will be issued. Agency procedures for processing permits or other approvals are not affected by this Agreement. Discretionary decisions related to requests for permits, approvals, and rights necessary to implement the approved action(s) are not subject to the provisions of this Agreement.

8. Uncontrollable Forces.

A. General. No Signatory shall be in breach of its obligations under this Agreement if it is unable to perform or delays required performance due to any Uncontrollable Force reasonably beyond its control, unless otherwise provided by this Agreement. For this purpose, an "Uncontrollable Force" may include, but is not limited to, natural events, labor or civil disruption, action or non-action of a governmental agency (other than DWR), or breakdown or failure of facilities.

B. Notice of Delay or Inability to Perform. The Signatory whose performance of an obligation under this Agreement is affected by a delay in required performance or inability to perform shall provide Notice as soon as reasonably practicable. This Notice shall include: (1) a description of the event causing delay, anticipated delay, or inability to perform; (2) an estimate of the anticipated length of the delay or inability to perform; (3) a description of the measures taken or to be taken to avoid or minimize the delay or inability to perform; and (4) a proposed timetable for the performance of the obligation. The affected Signatory shall make all reasonable efforts to promptly resume performance of the obligation and shall provide Notice when it resumes performance of the obligation.

9. Consultation and Coordination. In implementing their obligations, including selection of habitat expansion action(s), the Licensees shall confer with the Signatories and other directly affected and responsive third parties, and shall diligently seek to obtain all necessary permits,

approvals, and rights from agencies with jurisdiction. All habitat expansion action(s) determined by FERC to be within its jurisdiction are subject to FERC approval. All such submittals to FERC shall include the results of applicable consultation and coordination, including any comments or recommendations received and an explanation why any such comment was not adopted.

10. Cost Effectiveness. The Signatories recognize that cost is a key consideration in the successful implementation of this Agreement, and agree to make a good faith effort to achieve the Habitat Expansion Threshold at the least cost to the Licensees.

11. Withdrawal or Unexcused Failure to Perform by One or Both Licensees.

    A. Licensee Withdrawal Options. If at any point during the Approval of Action(s) (Paragraph 4(B)), Preliminary Design of Action(s) (Paragraph 4(C)), and Final Design and Permitting of Action(s) (Paragraph 4(D)), the Licensees' estimate that the net present value (January 2006 cost basis) of the life-cycle cost of implementing all of the recommended or approved habitat expansion action(s) exceeds $15 million for the two Licensees combined, either or both of the Licensees may withdraw from the Agreement. The Licensees may also decide to proceed with the recommended or approved habitat expansion action(s) with an estimated cost that exceeds $15 million or propose to NMFS an alternative as provided in Paragraph 11(C). The $15 million threshold is for the sole purpose of establishing a Licensee decision point. It is not the Signatories' estimate of the cost of meeting the Habitat Expansion Threshold, and the Signatories recognize that the actual cost to achieve the Habitat Expansion Threshold may exceed this amount. The Licensees are solely responsible for estimating the cost of the habitat expansion action(s) for purposes of this Paragraph.

    B. Withdrawal or Unexcused Failure to Perform by One Licensee.

        i. If one Licensee withdraws from the Agreement or fails to perform, the remaining Licensee shall have the option to:

            (a) proceed with the full scope of the Approved Habitat Expansion Plan, subject to its timely reaching an acceptable cost-sharing arrangement with the non-performing Licensee, or
            (b) propose to NMFS an alternative Habitat Expansion Plan which the remaining Licensee would perform to meet one-half of the Habitat Expansion Threshold.

        ii. If the remaining Licensee chooses to proceed with the full scope of the Approved Habitat Expansion Plan, the remaining Licensee's

compliance with the Approved Habitat Expansion Plan shall satisfy both Licensees' obligations under this Agreement.

iii. If the remaining Licensee proposes to NMFS an alternative Habitat Expansion Plan that meets one-half of the Habitat Expansion Threshold, NMFS shall have the discretion to approve the remaining Licensee's alternative plan after consulting with the other Resource Agencies, other Signatories, and other directly affected and responsive third parties as set forth in Paragraph 4(B).

(a) If NMFS approves the remaining Licensee's alternative Habitat Expansion Plan, then the remaining Licensee shall comply with Paragraphs 4(C) – (F) to the extent the obligations set forth in these Paragraphs have not already been met.
(b) If NMFS does not approve the remaining Licensee's alternative Habitat Expansion Plan, NMFS shall provide the remaining Licensee with Notice of its decision as set forth in Paragraph 4(B)(vii), including a reasonable opportunity to assess and cure any deficiencies identified by NMFS and resubmit a revised alternative Habitat Expansion Plan for NMFS' review and approval. If NMFS does not approve the revised alternative Habitat Expansion Plan and determines that no revisions will result in an acceptable alternative, it shall provide the Licensee with Notice of its final decision.

C. <u>Unexpected Inability to Perform by Both Licensees or Determination of Cost Exceeding $15 Million</u>. If both Licensees determine that they are unable to perform under the Agreement, or determine, as provided in Paragraph 11(A), that the estimated cost of implementing all of the recommended or approved habitat expansion action(s) exceeds $15 million, the Licensees shall have the option of proposing to NMFS an Alternative Habitat Expansion Plan, which NMFS shall have the discretion to approve after consulting with the other Resource Agencies, Signatories, and other directly affected and responsive third parties as set forth in Paragraph 4(B).

i. If NMFS approves the Licensees' Alternative Habitat Expansion Plan, then the Licensees shall comply with Paragraphs 4(C) through 4(F) to the extent the obligations set forth in these Paragraphs have not already been met.

ii. If NMFS does not approve the Licensees' Alternative Habitat Expansion Plan, NMFS shall provide the Licensees with written Notice of its decision as set forth in Paragraph 4(B)(vii). The Licensees shall have a reasonable opportunity to assess and

cure any deficiencies identified by NMFS and resubmit a revised Alternative Habitat Expansion Plan for NMFS' review and approval.

12. Support and Relationship to Relicensing.

A. The Signatories agree that implementation of this Agreement shall fully mitigate for any presently unmitigated impacts due to the blockage of Fish Passage of all fish species caused by the Feather River hydroelectric projects. This Agreement is separate from settlement agreements which have been, or may be, reached for the Licensees' respective Feather River hydroelectric projects, and shall not be incorporated as a condition in those FERC licenses except as specifically provided in such settlement agreements. The Signatories shall support the Agreement in the Feather River hydroelectric project license proceedings. The Signatories understand and acknowledge that PG&E will not sign a settlement agreement for the Oroville Project, and DWR will not sign a settlement agreement for the Poe, Rock Creek-Cresta, or Upper North Fork Feather River projects.

B. Throughout the terms of the new licenses for the Feather River hydroelectric projects the Signatories agree not to directly impose or indirectly seek through other agencies (including through exercise of authority under the state or federal Endangered Species Acts, Sections 18, 4(e) and 10(j) of the Federal Power Act, and Section 401 of the Clean Water Act) conditions for Fish Passage associated with or related to any of the Licensees' Feather River hydroelectric projects in excess of the action(s) contemplated under this Agreement, provided the Licensees are complying with their obligations under this Agreement.

C. A Signatory may exercise any authority to impose or seek conditions for Fish Passage if the Licensee(s) withdraws or otherwise fails to perform, as provided in the Agreement.

D. If NMFS approves an alternative Habitat Expansion Plan that meets one-half of the Habitat Expansion Threshold as proposed by one Licensee after the other Licensee has withdrawn or failed to perform as set forth in Paragraph 11(B)(iii), the Signatories may seek conditions to mitigate for Fish Passage in the withdrawing or non-performing Licensee's Feather River hydroelectric project(s), provided they do so in a manner that does not result in additional operational constraints or mitigation requirements in the performing Licensee's Feather River hydroelectric project(s).

E. Prior to a Signatory imposing or seeking conditions for Fish Passage, the Signatory shall provide written Notice to the affected Licensee(s). The Notice shall include the specific obligations under this Agreement with which the Signatory asserts the Licensee(s) has failed to comply. The affected Licensee(s) shall have 30 days from the date of the Notice to initiate the dispute resolution procedures described in Paragraph 14. If the affected Licensee(s) initiates the dispute resolution procedures, the Signatory shall comply with the procedures set forth in Paragraph 14 before seeking conditions for Fish Passage in the affected Licensee(s) Feather River hydroelectric project. The Notice obligation in this Paragraph 12(D) shall not apply to 1) a Licensee that withdraws from this Agreement pursuant to Paragraph 11; or 2) a final decision by NMFS pursuant to Paragraph 11(B)(iii)(b) not to approve the remaining Licensee's alternative Habitat Expansion Plan or revised alternative Habitat Expansion Plan.

F. This Agreement does not limit the right of the Signatories to seek mitigation for project impacts other than blockage of Fish Passage in any of the Feather River hydroelectric project licenses. This Agreement does not address mitigation for passage of fish through turbines, availability and quality of aquatic habitat above or below such facilities, fish access to tributaries between such facilities, or planting of fish from the Feather River Fish Hatchery in Lake Oroville. Nothing in this Agreement is intended to limit the right of the Signatories to seek appropriate protection, mitigation, or enhancement measures for amphibian species in the licenses for the Feather River hydroelectric projects.

G. Within 30 days of signing this Agreement, each of the Resource Agencies shall modify any existing prescriptions and license conditions relating to Fish Passage they have filed in the relicensing proceedings for the Oroville, Poe and Upper North Fork Feather River projects, if necessary to be consistent with this Agreement.

13. Endangered Species Act. In selecting recommended habitat expansion action(s) the Licensees shall consider the potential of the action(s) to cause incidental take of listed species or the destruction or adverse modification of critical habitat under the ESA and shall favor action(s) with little or no effect on listed species. In the event, however, that a habitat expansion action(s) is recommended and approved that has the potential to affect listed species and/or critical habitat, the Signatories agree that compliance with the ESA shall be achieved as set forth in this Paragraph.

A. With respect to listed species potentially affected by implementation of the approved habitat expansion action(s), the Licensees intend that any necessary measures to address potential impacts would be

identified and incorporated into the approved habitat expansion action(s), and that any necessary authorization for direct or incidental taking of listed species would be obtained from FWS and NMFS through an appropriate ESA mechanism, such as Section 7 or Section 10 of the ESA.

B. The Signatories agree to develop appropriate ESA mechanisms to provide authorization for: (1) any actions taken to implement the approved habitat expansion action(s), and (2) potential impacts to anadromous fish if the habitat expansion action(s) result in the introduction of the species into areas where they may be affected by existing Licensee facilities or operations.

C. The Signatories intend that any costs related to ESA compliance shall be included in the estimated cost of the action(s) subject to Paragraph 11A.

D. NMFS and USFWS represent that they enter into this Agreement believing that the information in the record supports the Agreement. However, NMFS and USFWS are not making a predecisional determination of the outcome of any ESA Consultation or approval and expressly reserve the right to take such future action or to issue such terms and conditions in any Biological Opinions, Incidental Take Statements, or other approvals as necessary to meet their obligations under the ESA. Further, NMFS expressly reserves the right to recommend such EFH conservation measures as necessary to meet its obligations under the Magnuson-Stevens Act.

E. In the event of USFWS and NMFS Section 7 ESA Consultation in response to a newly listed species on river reaches affected by the Feather River hydroelectric projects, USFWS and NMFS shall consider the actions implemented under the Habitat Expansion Plan and potential modifications to such actions in determining whether, and to what degree, new actions on the Feather River are necessary. ***[Need to finalize this section.]***

14. Dispute Resolution and Enforceability.

A. General.

i. This Agreement is enforceable by any Signatory under Federal or California law, as applicable. By executing this Agreement, no federal agency is consenting to the jurisdiction of a state court unless such jurisdiction otherwise exists. To the extent any approved habitat expansion action(s) are within FERC's jurisdiction,

implementation of those action(s) shall be subject to FERC approval and oversight.

ii. Except to the extent that one or more of the Resource Agencies is precluded by law from participating in the dispute resolution procedures set forth below, all disputes among the Signatories regarding any Signatories' performance or compliance with this Agreement, shall be the subject of a non-binding alternative dispute resolution ("ADR") procedure among the Disputing Parties, as described below.

iii. Each Signatory participating in a dispute ("Disputing Party," or collectively, "Disputing Parties") shall cooperate in good faith to promptly schedule, attend and participate in the ADR.

iv. The Disputing Parties agree to devote such time, resources and attention to the ADR as is needed and as can reasonably be provided to attempt to resolve the dispute at the earliest time possible.

v. Each Disputing Party shall implement promptly all final agreements reached, consistent with its applicable statutory and regulatory responsibilities.

vi. The ADR procedures in this Paragraph 14 do not preclude any Signatory from timely filing and pursuing an action for administrative or judicial relief of any FERC order or other regulatory action when the dispute is within FERC's or another regulatory agency's jurisdiction; provided that such Signatory shall pursue the ADR procedures as soon as practicable thereafter.

vii. If the dispute involves a matter within the jurisdiction of FERC or another regulatory agency, the Signatory initiating the dispute under this Paragraph 14 shall notify the regulatory agency when it initiates the ADR procedures.

viii. The initiation of the ADR procedures in this Paragraph 14 shall have no effect on filing deadlines or applicable statutes of limitations before FERC or other regulatory agency of competent jurisdiction.

ix. Nothing in these ADR procedures is intended nor shall be construed to affect or limit the authority of any of the Resource Agencies to resolve a dispute brought before them in accordance with their own procedures and applicable law.

B. ADR Procedures.

i. Notice. A Signatory claiming a dispute shall give Notice of the dispute within 30 days of the Signatory's actual knowledge of the act, event, or omission that gives rise to the dispute, unless this Agreement provides otherwise. Such Notice shall describe:

(a) the matter(s) in dispute;
(b) the identity of any other Signatory who is alleged to have failed to perform or comply with this Agreement; and
(c) the specific relief sought.

ii. Informal Meetings. At a minimum in any dispute subject to these ADR procedures, the Disputing Parties shall hold two informal meetings within 45 days after Notice, to attempt to resolve the disputed issue(s).

iii. Mediation. If the informal meetings fail to resolve the dispute, the Disputing Parties shall decide whether to attempt to resolve the dispute using a neutral mediator. The decision whether to pursue mediation shall be made within 20 days after conclusion of the informal meetings. Mediation shall not occur unless the Disputing Parties agree on the selection of the mediator and an allocation of mediation costs. The Disputing Parties shall select a mediator within 30 days of the decision to pursue mediation. It is anticipated that the mediation process shall be completed within 90 days after selection of the mediator.

iv. Time Periods. Any of the time periods set forth in these ADR procedures may be reasonably extended or shortened by agreement of the Disputing Parties, or as necessary to conform to the procedure of an agency or court with jurisdiction over the dispute.

v. Dispute Resolution Notice. Within 15 days of conclusion of the ADR procedures, the Signatory that initiated the dispute shall provide Notice to all other Signatories participating in the dispute resolution of the outcome achieved under these ADR procedures. The Notice shall:

(a) restate the disputed matter, as initially described in the dispute initiation Notice;
(b) state whether the resolution was achieved, in whole or part; and
(c) state the specific relief agreed to or sought.

C. Rights and Remedies After Dispute Resolution. After exhaustion of dispute resolution, the Signatories shall have the following rights and remedies.

i. 30-Day Waiting Period. Unless otherwise prohibited by law, a Disputing Party shall wait at least 30 days after receipt of the dispute resolution Notice described in Paragraph 14(B)(v) before exercising its rights and remedies under this Paragraph 14(C).

ii. No Damages. No Signatory shall be liable in damages for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement.

iii. Remedy for Material Breach by Licensees. The exclusive remedy for material breach of this Agreement by one or both of the Licensees shall be the ability of a Signatory to impose or seek conditions for Fish Passage in the appropriate Licensee's Feather River hydroelectric project(s), consistent with this Agreement.

iv. Remedy for Material Breach by Signatories Other Than Licensees. The exclusive remedy for material breach of this Agreement by a Signatory other than one of the Licensees shall be specific performance of the Signatory's obligations under this Agreement or other equitable relief from a court or agency of competent jurisdiction. Obligations under this Agreement that are discretionary shall be reviewed under the arbitrary and capricious standard, shall be supported by substantial evidence in the record compiled in the consultation procedures required by this Agreement. Licensees must seek their remedy under this Paragraph within 90 days after the dispute resolution Notice under Paragraph 14(B)(v). Final decisions under Paragraph 11(B)(iii)(b) are not subject to review under this Paragraph. This Agreement does not create jurisdiction (or remedy) to challenge the adequacy of a condition for Fish Passage under applicable statutory or regulatory law.

## Signatories

**California Department of Water Resources**

by _____
(Print) (Title)

**Pacific Gas & Electric Company**

by _____
(Print) (Title)

**National Marine Fisheries Service**

by _____
(Print) (Title)

**United States Department of Interior**

by _____
(Print) (Title)

**United States Forest Service**

by _____
(Print) (Title)

**American Rivers**

by _____
(Print) (Title)

**Arthur G. Baggett**

by _____
(Print) (Title)

**State Water Contractors, Inc.**

by _____
(Print) (Title)

# Appendix G
## List of Authorized Representatives

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