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March 9, 2017

Via E-mail – Hard Copy to Follow

Sonoma County Water Agency
Attn: Fish Flow DEIR
404 Aviation Boulevard
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fishflow-eir@scwa.ca.gov

Re: Comments on Behalf of Russian River Watershed Protection Committee

Dear Sonoma County Water Agency Board of Directors and staff,

Thank you for this opportunity to comment on the Draft Environmental Impact Report (“Draft EIR”) for the Fish Habitat Flows and Water Rights Project (“Fish Flow Project”). These comments are submitted on behalf of the Russian River Watershed Protection Committee (“RRWPC”). RRWPC and Lozeau Drury LLP appreciate the Sonoma County Water Agency’s (“SCWA”) willingness to facilitate the public’s review of this critical environmental document by extending the comment period.

RRWPC has participated in several of the workshops conducted during this process. Although RRWPC agrees that the SCWA must do everything in its power to ensure its operations of the Warm Springs Dam and Coyote Valley Dam do not jeopardize the embattled steelhead and salmon dependent upon the Russian River watershed, RRWPC is concerned that some of the recommendations involving flows in the lower Russian River and management of the Estuary during the spring and summer months are not well-supported by existing facts and have proven unsuccessful over the last decade to improving estuarine habitat for juvenile steelhead. RRWPC is concerned that providing for lower flows than D1610 currently allows in the lower river will only serve to exacerbate the ever-growing water quality problems in this stretch of the river without realizing any benefit at all to steelhead. The now constant worry about elevated levels of toxic algae along the lower river’s shoreline and the DEIR’s acknowledgement that biostimulatory conditions in the river will be exacerbated by the proposed flow reductions further heighten RRWPC’s concerns that Russian River beaches and swimmers health will be compromised by habitat modification efforts that neither modify the target estuarine habitat nor result in any benefits to steelhead.

The DEIR process is an opportunity to evaluate alternatives to those portions of the NMFS’ Biological Opinion that are not working and ensure that other critical

recreational uses are not impaired or sacrificed for no reason. RRWPC asks that SCWA consider these comments and the separate comments submitted by RRWPC and amend or supplement the DEIR to include additional review and alternatives as discussed below.

A. SCWA Should Not Propose and the State Board May Not Grant a Change Petition That Will Violate or Threaten to Violate Water Quality Standards.

SCWA's Draft Environmental Impact Report ("DEIR") for the Fish Flow Project acknowledges that the project's lower flows "could result in a violation of water quality standards or waste discharge requirements or otherwise degrade water quality relating to biostimulatory substances in the Russian River." (DEIR, p. 4.2-49.) The DEIR then goes on to claim that no mitigation is available to address these anticipated water quality standard violations. (*Id.*, p. 60.) The Basin Plan establishes a narrative standard for biostimulatory substances which states: "Waters shall not contain biostimulatory substances in concentrations that promote aquatic growths to the extent that such growths cause nuisance or adversely affect beneficial uses." On November 15, 2010, the North Coast Regional Water Quality Control Board submitted comments to SCWA identifying not only the biostimulatory substances standard, but also the Basin Plan standards for temperature, dissolved oxygen, bacteria and toxicity as water quality objectives that could be violated by implementation of the Fish Flows Project. (Letter from NCRWQCB to SCWA, "Comments on the Notice of Preparation of an Environmental Impact Report for the Fish Habitat Flows and Water Rights Project, SCH No. 2010092087" (Nov. 15, 2010).)

The State Board cannot grant a water rights petition that will violate the North Coast Regional Water Quality Control Plan and other provisions of the Water Code. CEQA itself precludes such an outcome. Pub. Res. Code § 21002.1(c) states that:

If economic, social, or other conditions make it infeasible to mitigate one or more significant effects on the environment of a project, the project may nonetheless be carried out or approved at the discretion of a public agency ***if the project is otherwise permissible under applicable laws and regulations.***

(Pub. Res. Code § 21002.1(c) (emphasis added).) The Water Code precludes the State Board from approving the reduced flows if they will cause violations of the Basin Plan's numeric or narrative water quality standards. (Water Code §§ 13247, 13146, 1258; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 730.) Given the acknowledged likelihood that SCWA's proposals to reduce flows in the lower Russian River will violate one or more applicable water quality standards, the State Board cannot grant the petitions as proposed. In order for the State Board to proceed, SCWA must include changes or conditions that would ensure SCWA's operations comply with the Basin Plan.

As noted below, SCWA's objective for proposing lower in-stream flows in the lower Russian River is to reduce the amount of water flowing into the estuary in hopes of encouraging and prolonging the closing of the river mouth and lagoon (*i.e.* non-tidal) conditions in the estuary in order to provide improved habitat for juvenile steelhead completing their migration to the ocean. (See Biological Opinion, pp. 242, 244.) However, it does not appear that the in-stream flow reductions proposed by SCWA for the spring and summer months in the lower river will provide any habitat benefits to listed fish given that the river is generally flowing at much higher levels in the spring and the mouth of the river seldom closes during July (and then only briefly) and has not closed in August in the last decade.

The DEIR also does not describe or attempt to apply California's antidegradation policy. That policy requires SCWA and the State Board to determine whether the project may degrade water quality from the level of water quality present in 1968 when the policy was adopted. Notably, the policy does not allow water quality to decline below applicable standards. To the extent the estuary or other stretches of the Russian River already are violating standards, no further degradation at all is allowed. The policy applies to **any activity which produces or may produce increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters....**" (Resolution No. 68-16, § 2.)

The DEIR admits that the proposed SCWA activity may produce increased concentration of waste in the Russian River. The activity includes discharges to existing high quality waters, *i.e.* discharges from SCWA's two dams. (See *Lake Madrone Water Dist. v. State Water Resources Control Bd.* (1989) 209 Cal.App.3d 163, 174 ("discharge" means: "to relieve of a charge, load or burden; . . . to give outlet to: pour forth: EMIT" (Webster's New Internat. Dict. (3d ed. 1961) p. 644).) "Discharge" is defined broadly consistent "with the Legislature's directive that "water quality control" means "the regulation of any activity or factor which may affect the quality of the waters of the state" (*Id.*, citing Water Code § 13050(i).) The Policy further requires the State Board to maintain existing high quality water, *i.e.*, the conditions existing in 1968, and ensure that any activity "will not result in water quality less than that prescribed in the [Basin Plan] policies." (Resolution No. 68-16, § 1.)

Because the DEIR admits that SCWA's proposed activity may produce increased concentrations of biostimulatory substances in the Russian River and the activity involves discharges from the Coyote Valley and Warm Springs Dams, an antidegradation analysis is required. The State Board cannot grant the petitions to lower in-stream flows if they will result in a violation of any Basin Plan standard.

It is becoming common place over the last several summers – consistent with the issuance of TUCOs approving minimum of flows as low as 35 cfs during the summer – for water testing by the Sonoma County Department of Health Services ("DHS") to detect blue-green algae toxins at Russian River beaches. See, *e.g.*

<http://sonomacounty.ca.gov/Health/Press-Releases/2016/Blue-Green-Algae-Toxins-Detected-in-Russian-River/>. In August 2015, a golden retriever died from exposure to anotoxin-a after ingesting Russian River water.
<http://www.pressdemocrat.com/news/4442976-181/russian-river-visitors-heed-toxic?artslide=0>. Reductions in flows in the lower river during the summer months will exacerbate nutrient concentrations in the lower river and the occurrence of toxic algae blooms. There appears to be no reasonable or legal basis for SCWA or the State Board to approve low in-stream flow proposals for the summer months (as well as future TUCPs for those months) based on unproven benefits to fish habitat and assure that flows in the lower river are sufficient to minimize algae blooms. Rather than unnecessarily compromising water quality and increasing risks to human health and pets during the critical summer months of July and August, SCWA should present the alternative discussed below of maintaining the current flow requirements of D1610 in the lower Russian River during summer months and seeking an amendment to the Biological Opinion consistent with maintaining those summer flow requirements.

B. The DEIR's Baseline for Summer Months is Improper.

In evaluating impacts to fisheries, the DEIR applies a baseline consisting of "minimum instream flow requirements included in the Water Agency's water right permits as established by the State Water Resources Control Board's Decision 1610 and the Russian River Estuary Management Project with a target water elevation in the Estuary of 7 feet (range 4.5 to 9 feet) from May 15 to October 15." (DEIR, p. 4.3-29.) This baseline is not supported by substantial evidence for the main summer months of July and August. During the baseline period from 2009 through 2015, as well as in 2016, no closures have occurred during August. See Russian River Estuary Outlet Channel Adaptive Management Plan 2015 ("2015 AMP"), Attachment F (2011), Attachment I (2014); SCWA Spreadsheet, "Russian River Estuary Management Events, 1996-2009"; Misc. communications betw. A. Dubay and B. Adelman (2016). In four of those eight years, no closures occurred in July. *Id.* In July of the other four years (2010, 2012, 2013, 2016), closures of one week (2010), a muted closure of a week or so (2012), two days (2013), and 11 days (2016), respectively, occurred in the first part of July. See 2015 AMP, Attachment E (2010), Attachment G (2012), & Attachment H (2013); Misc. communications betw. A. Dubay and B. Adelman (2016). It does not appear accurate to claim that actual environmental conditions included estuary levels in the range of 4.5 to 9 feet during these summer months. Instead, the Estuary is fully tidal during these two summer months. The DEIR's use of an inaccurate baseline obscures the simple fact that, even with the many TUCP's permitted during the baseline period, lowering the river flows during these two critical recreational months provides no benefit to the listed fish in the estuary area.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. (*Communities for a Better Environment v. So Coast Air Qual.*

Mgmt. Dist. (2010) 48 Cal.4th 310, 321.) Section 15125(a) of the CEQA Guidelines states in pertinent part that a lead agency's environmental review under CEQA:

“...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.”

(14 Cal. Code Regs. § 15125(a); See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125 (“*Save Our Peninsula.*”) As the Court of Appeal has explained, “the impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. (*Save Our Peninsula*, 87 Cal.App.4th at 121-123.) Using such a skewed baseline “mislead(s) the public” and “draws a red herring across the path of public input.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711.) In this case, the estuary closure conditions wished for by SCWA and the Biological Opinion do not exist. The EIR's evaluation should be based on an accurate description of the river mouth as open during the months of July and August.

Likewise, the DEIR's description of the environmental setting is inaccurate. (See p. 4.1-92.) The DEIR states that “[t]he Russian River Estuary may close throughout the year as a result of a barrier beach forming across the mouth of the Russian River. Although closures may occur at any time of the year, the mouth usually closes during the spring and fall.” (*Id.*) For the baseline period identified by SCWA, it is not true that the Russian River Estuary “may close throughout the year” because it has not closed in August for the last decade and rarely closes in July and then only briefly in early July. Likewise, Appendix F of the DEIR is misleading and inaccurate for the two summer months when it asserts that “[t]he historical artificial breaching practices create a tidal marine environment with shallow depths and high salinity.” (DEIR, App. F, p. 4.) During those months, the mouth is open and tidal even when in-stream flows are reduced and no breaching has occurred. July and August are, of course, the critical recreation months for the river during which period it is essential that water quality standards be met. Because SCWA applies hypothetical water elevations and conditions to the estuary to its analysis in the DEIR, the DEIR is deficient and fails to properly consider the impacts of reduced flows into the estuary.

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C. SCWA Must Include Alternatives That Do Not Change the Current Spring and/or Summer Flow Requirements in the Lower River Because Those Alternatives Would Mitigate Water Quality Impacts and Not Undermine Any Actual Improvements to Fish Habitat.

In order to satisfy CEQA, the EIR must be amended to evaluate an alternative of maintaining the current D1610 flow requirements in the lower river but implementing the other flow reductions improving habitat upstream. RRWPC believes this additional alternative would be the environmentally superior alternative because it likely would address the unmitigated water quality impacts identified for the proposed project and would not impact steelhead or other sensitive fish species.

The only reason NMFS' Biological Opinion identifies lowering in-stream flows in the lower Russian River to 70 cfs from May 1 through October 15 is to promote a longer lasting barrier beach at the mouth of the river cutting off tidal interaction in the estuary. (BO, p. 245.) The DEIR acknowledges when describing the Project's objective that "[t]he new minimum instream flow requirements proposed by the Fish Flow Project were developed to meet the requirements of the Russian River Biological Opinion to improve habitat for threatened and endangered salmonid species." (DEIR, p. 3-23. *See also* DEIR, App. F, p. 5 ("[r]educed minimum flows in the Russian River, and the resultant possible reduced flows into the Estuary, if approved by the SWRCB, may make it easier for the Water Agency to maintain the water levels identified in the Russian River Biological Opinion as beneficial in some years").) The BO bases the reduced in-stream flow recommendation on NMFS' conclusion that a closed estuarine environment in the lower river would provide freshwater habitat for 1+ year old trout preparing to return to the ocean. (BO, p. 245.) However, there is a serious disconnect between the habitat benefits envisioned by the BO and the actual tidal conditions present at the mouth of the river with or without reduced in-stream flows during the critical recreational use months of July and August.

As noted above, the river mouth has not closed in August for the last 8 years. It has only closed briefly in early July four times in that 8 year period. In other words, the estuary is open to the tides almost all summer long, with or without any reduction in in-stream flows. During July and August, lower in-stream flows have had no effect on the tidal nature of the river. As a result, lower in-stream flows in the lower river during July and August have done nothing to improve conditions for juvenile steelhead or made it easier for SCWA to maintain any desired water levels. Given the tidal, estuarine condition of the river mouth, very few, if any, steelhead are found in the estuary during the summer. (See DEIR, p. 4.3-8 – 4.3-9; BO, pp. 186-187, 193-194, 196.) To the extent the proposed lower flows succeed in briefly extending the few closures that may occur in July and enticing more juvenile steelhead into that area, it would seem the inevitable reopening of the estuary in mid-July and August would place those juveniles in more serious risk than they would have been had they remained further upstream. SCWA's petition to make NMFS' recommended flow reductions in the lower river

permanent and, for some water years even reduce flows further, has not and will not benefit the fish species of concern. Although the change petition to reduce in-stream flows in the lower river would provide no benefit to the fish, it would threaten to violate water quality standards and create health risks to people swimming and recreating on the river during those summer months. For this reason, SCWA should alter that aspect of the proposed project and the change petitions.

A different disconnect with reality also infects SCWA's petitions to lower the required in-stream flows from the levels currently allowed in the lower river from May 15 through June 30. During these months, the flows in the river are generally higher than the minimum flows of 125 cfs in normal years and 85 cfs in dry years. (See, e.g. DEIR, Appendix F, p. 5 ("Although the Water Agency is required by the SWRCB to maintain minimum instream flows in the Russian River, flows often greatly exceed the prescribed minimums due to natural flow from unmanaged tributaries on the River".)) RRWPC's review of lower river flow data indicates that in 17 of the last 22 years, the in-stream flows measured at Hacienda did not go below 125 cfs until the end of June. The required minimum instream flows in the Lower Russian River from Dry Creek to the Pacific Ocean currently in place pursuant to D1610 are 125 cfs during *Normal* water supply conditions and 85 cfs during *Dry* conditions. (DEIR, p. 3-13.) Thus, for this spring period, setting an in-flow stream requirement of 70 cfs when natural flow from unmanaged tributaries on the River generally maintains flows at 125 cfs or higher will again do nothing to improve fish habitat in the estuary and lower river beyond what is already required by D1610.

An EIR must describe a range of reasonable alternatives to the Project, or to the location of the Project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. "An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404.) An EIR must also include "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id.* at 405.)

One of CEQA's fundamental requirements is that the DEIR must identify the "environmentally superior alternative," and require implementation of that alternative unless it is infeasible. (14 Cal. Code Regs. §1526.6(e)(2); Kostka & Zischke, *Practice Under the California Environmental Quality Act* §15.37 (Cont. Educ. of the Bar.)) An alternative of no change to D1610 in the lower river, while at the same time implementing the other flow reductions improving habitat upstream would appear to have a good chance of being environmentally superior to any of the alternatives currently being considered. For this reason, it is arbitrary for SCWA not to consider this option.

The only alternatives to SCWA's flow proposals considered in the DEIR are the no project alternative or the flows recommended in NMFS' Biological Opinion. Similarly, the variations considered during the screening process do not include an option of maintaining the existing summer flows in the lower river while lowering flows in Dry Creek. (Appendix 7, pp. 7-7 – 7-9.) SCWA cannot hide behind NMFS' Biological Opinion to claim the above "hybrid" alternative is infeasible. The Project Objective currently attempts to constrain its review by incorporating NMFS's Biological Opinion: "The new minimum instream flow requirements proposed by the Fish Flow Project were developed to meet the requirements of the Russian River Biological Opinion to improve habitat for threatened and endangered salmonid species." (DEIR, p. 3-23. See Chapter 7.) The true objective of the Project is identified before that reference to the Biological Opinion: "to provide instream flows that will improve habitat for threatened and endangered fish species, and to update the Water Agency's existing water rights to reflect current conditions." (*Id.*) To narrowly define the primary "objective" of the proposed project itself constitutes a violation of CEQA since such a restrictive formulation would improperly foreclose consideration of alternatives. (See, *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, holding that when project objectives are defined too narrowly an EIR's treatment of analysis may also be inadequate.) "The case law makes clear that...overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives." (Remy, Thomas, Moose & Manley, *Guide to CEQA* (Solano Books, 2007), p. 589.) The objective is not simply to do whatever NMFS' 9-year old Biological Opinion states. If it turns out SCWA's CEQA review confirms that there are no benefits to changing the lower river flows in the summer and, instead, creates serious water quality concerns, there is nothing precluding SCWA from seeking an adjustment to the NMFS Opinion to reflect the futility of attempting to manage closures in July and August that do not occur or to reevaluate the effectiveness of the early spring flow reductions in the lower river. Nor are the Project's two objectives furthered by refusing to consider a no flow change option for the spring and summer in the lower river. The reduced flows to an open estuary do not improve any habitat for steelhead or salmon. Nor does that proposed change "reflect current conditions."

In *North Coast Rivers Alliance*, the agency refused to consider *control* of an invasive species as an alternative to *eradication* on the basis that the purpose of the project was eradication of the pest. (*North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 657.) The "alternatives" analysis merely considered different tools for eradication that could be used in combination to eradicate the pest. (p. 656-57). The Court of Appeals found that the EIR violated CEQA by creating an artificially narrow definition by mislabeling eradication as the "purpose" instead of the "objective" that resulted in the failure to conduct a proper alternatives analysis (p. 668-70) "The objective of the program was to protect California's native plants and agricultural crops from damage." (*Id.*) "A control program should have been studied as an alternative to eradication, particularly given the EIR's acknowledgement that eradication could become unattainable at any time." (*Id.*) Likewise, if the Russian River's mouth does not

close sufficiently in July or August despite reductions in flow levels, and the Biological Opinion is attempting to maintain partial closures that do not exist, an alternative recognizing that futile requirement must be included in the EIR.

Because the portion of the Project requesting reduced flows in the lower River for July and August does nothing to further the basic objective of the Project to improve conditions for juvenile steelhead in the estuary, an alternative maintaining lower river flows that would help address the significant and unavoidable water quality impacts of the proposed flow reductions coupled with reducing upper river and Dry Creek flows to benefit fish habitat must be evaluated.

D. The Project is Inconsistent With Its Objective to Meet the Requirements of the Russian River Biological Opinion to Improve Habitat for Threatened and Endangered Salmonid Species.

Although citing the Biological Opinion as the main reason for the in-stream flow reduction proposals, SCWA's proposed flow reductions go well beyond what is recommended by NMFS. For two of the minimum in-stream flow schedules representing the driest years, SCWA proposes new flow minimums for the lower river of 50 cfs from May through October 15 and 35 cfs year-round. (DEIR, p. 3-31.) The 50 cfs in-stream flow minimum appears to be a reduction from the current 85 cfs requirement as well as the 70 cfs flow identified in the Biological Opinion. There is no corresponding recommendation in the BO for another reduction of flow to 50 cfs or 35 cfs. (See DEIR, p. 3-27.) The EIR does not explain why this change is proposed nor identify substantial evidence upon which it is based. SCWA should either remove this proposal or supplement and recirculate the DEIR with analysis and citations to evidence explaining the basis for these lower flows.

E. The EIR Must be Amended to Include Alternatives to the Proposed Extension of Time to Divert 75,000 Acre-Feet as Well as to the Proposed Hydrologic Index.

Both the extension of time to divert 75,000 acre-feet and the proposed hydrologic index are presented as a *fait accompli*. With the exception of the No Project Alternatives, the only option considered by the DEIR is the proposed extension until 2040 of the 75,000 acre-feet diversion limit and the proposed new hydrologic index. No variations on either of these critical components is provided.

The DEIR contains a general discussion of the process by which SCWA screened various alternatives for the fish flow proposal and the hydrologic index. However, there is no discussion of any process to consider any alternatives to extending the 75,000 acre-feet demand until 2040. An alternative reflecting recent water conservation efforts and considering a lower diversion limitation should be considered as an alternative to maintaining and extending the water diversion demand level.

As for the hydrologic index, a few variations were apparently screened, but only the proposed hydrologic index was considered as an alternative in the DEIR. One alternative that was apparently screened was a proposal for separate hydrologic indices; an Upper Russian River index based on Lake Mendocino cumulative inflow and a Lower Russian River based on Lake Sonoma storage. The DEIR and Appendix 7 do not discuss why this alternative was rejected for any further discussion or consideration. RRWPC believes this type of index would more naturally fit the actual hydrology of the Russian River watershed. SCWA needs to explore a range of alternatives and present them in the EIR. At least this alternative should be discussed and compared to the existing index and the proposed index. There also does not appear to be any reason different flows could not be considered for the five flow levels through a reasonable range of index alternatives.

F. The DEIR Finding That Flood Risks During July and August are Significant and Unavoidable is not Supported by Substantial Evidence

The DEIR concludes that the Project will result in unavoidable flood risks because lower flows in summer would result in longer mouth closures and accompanying flood risk. (See DEIR, p. 4.1-93.) However, as discussed above, there is no substantial evidence to indicate this actually occurs during the summer months or would be affected by the project during the spring. Hence, despite the proposed lowering of flows, there are no flood impacts because the river mouth does not generally close during these months. Hence, during the spring and summer, the proposed project results in no benefit to fish over current baseline. For the rare occasions when a temporary closure could occur in July or August, SCWA could avoid flood risks by allowing breaches consistent with the baseline.

Relatedly, “[a]n agency may not issue a statement of overriding considerations unless it has imposed all feasible mitigation measures and alternatives. (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal. 4th 341, 368-369.) Because the proposed project objective could be met by not reducing flows in summer, adverse impacts on water quality during those months resulting from the project’s reduced flow requirements would be avoided in those months.

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Sonoma County Water Agency
Attn: Fish Flow DEIR
March 9, 2017
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Thank you for your consideration of these comments. RRWPC reserves its right to supplement these comments up to and including the date of SCWA's final approval of the Project.

Sincerely,



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