

**EA BYPASS AGREEMENT**

Dated as of

July 18, 2008

Among

The Central Nebraska Public  
Power & Irrigation District

The Nebraska Public Power District

and

The Platte River Recovery Implementation Program

This EA Bypass Agreement (Agreement) dated as of July 18, 2008 is entered into by and between The Central Nebraska Public Power & Irrigation District (Central), the Nebraska Public Power District (NPPD) (collectively, Districts), and the Nebraska Community Foundation, Inc. (Foundation) of Lincoln, Nebraska, representing all signatories to the Platte River Recovery Implementation Program, hereinafter referred to as "Program." The following persons are authorized to represent the parties through this Agreement: Chief Financial and Administrative Officer of the Foundation; Executive Director of the Program; the Water Resources Manager for the Nebraska Public Power District; and the General Manager for the Central Nebraska Public Power & Irrigation District (collectively referred to as Parties). This agreement sets forth the conditions under which the Parties have agreed that Central and NPPD will assist the Platte River Recovery Implementation Program (Program) and Environmental Account (EA) Manager in carrying out Program Section III.E.1.b and Attachment 5, Section 1, subsection 3, regarding creating or enhancing peak, pulse or other short-duration high flows below the Johnson Power Return to River (J-2 Return) by 1) regulating water in Central's system for return at the J-2 Return; 2) regulating water in NPPD's system for return downstream; and/or 3) intentionally bypassing Environmental Account (EA) or

Other Program Water past one or both of the Districts' diversion dams that the Districts otherwise have a right to divert. In addition, this document sets forth the procedures that the EA Manager, the Program's Executive Director, Central and NPPD will follow in initiating and carrying out these activities, including procedures for payment to the Districts and/or third parties.

#### A. DEFINITIONS

Terminology specific to this agreement is defined as follows:

1. Program Water -- Program Water is water resulting from projects or activities as described in III.E.2.a (Initial Program Projects) and III.E.2.b (Water Conservation/Supply Activities) of the Program. Program Water includes Environmental Account Water and Other Program Water.
2. Environmental Account Water (or "EA Water") -- EA Water is that Program Water stored in the EA in Lake McConaughy or other Approved Storage Facilities, as described in Attachment 5, Section 5, Section I.a.9 of the Program, pursuant to Attachment 5, Section 5, Section II of the Program.
3. Other Program Water – Other Program Water is that Program Water which is not EA Water.
4. Intentional Bypass -- Intentional Bypass is when in accordance with Attachment 5, Section 1, Paragraph 3 of the Program, the EA Manager requests and one or both of the Districts agree to allow water to remain in the Platte River rather than diverting it at one or both of the Districts' diversion dams when they otherwise have a right and available capacity in their system to divert. Intentional bypass does not include Program Water or non-program water remaining in the river because the Districts do not have the capacity to divert it, or bypass for any reason other than to create or enhance a pulse per Attachment 5, Section 1, Paragraph 3.

a. Right to divert -- Each District has the right to divert natural flow and storage water in varying times and quantities under their various appropriations and as allowed by Nebraska water laws and regulations. Additionally, all Program Water may be diverted by the Districts consistent with Attachment 5, Section 5, Section III.A.9 of the Program.

b. Capacity to divert -- Central's Supply Canal Diversion Dam has a diversion capacity of 2,250 cfs. NPPD's Keystone Diversion has a capacity of 2,000 cfs and NPPD's Korty Diversion has a capacity of 1200 cfs.

5. Regulation – Regulation is the limited ability of the Districts to retime the return of diverted water from their respective systems. Only regulation requested by the EA Manager and provided by the Districts pursuant to Attachment 5, Section 1, Paragraph 3 to create or enhance a pulse flow in the river is subject to this agreement; regulation for other purposes is outside the scope of this agreement.

## B. TERMS

The Parties agree as follows:

1. In order to assist in creating or enhancing peak, pulse or short duration high flows below the J-2 Return (e.g., at the Overton stream gage), at the EA Manager's request, Central will regulate up to 12,000 acre-feet annually of water diverted at Central's Supply Canal Diversion Dam (Diversion Dam) under Central's power use appropriations, and retime the return of that water to coincide with releases made from the EA in Lake McConaughy or Other Program Water project. The amount of regulation available may be limited by Central to less than 12,000 acre-feet in some years or some times of the year, depending on anticipated impacts on

project facilities, anticipated impacts on others (e.g., downstream flooding, damage to other river facilities), conflicting operational or licensing requirements such as implementation of the Flow Attenuation Plan, and compliance with other agreements. To reduce risk of damage, the initial use of regulation will be relatively small, and subsequent uses of regulation to create or enhance pulses will gradually increase the quantity to be regulated, if feasible. During the initial use of regulation in creating or enhancing a pulse, Central will regulate approximately 4,000 acre-feet in February, March, or April. During the planning phase for the initial pulse, and prior to October 1, 2008, Central will inform the EA Manager if additional regulation can be made available. Prior to planning for subsequent water years, Central will determine, based on physical and operational impacts, if regulation beyond 4,000 acre-feet will be available to the Program, and, if so, how much. After each subsequent incremental increase in the amount of regulation used to create or enhance a pulse, Central will similarly determine based on physical and operational impacts if and how much additional regulation may be made available.

2. In concert with the regulation of Central's water appropriations for purposes of creating or enhancing peak, pulse or short duration high flows, upon the request of the EA Manager, Central will temporarily waive its right to divert EA Water or Other Program Water, and intentionally bypass some or all of the EA Water or Other Program Water available for diversion at the Central Diversion Dam that Central would otherwise have the capacity to divert. In planning for flow enhancement and requesting regulation and bypass, the EA Manager will seek to

limit the water intentionally bypassed by Central at the Diversion Dam to the minimum amount necessary to achieve the intended flow magnitude and duration downstream of the J-2 return, and will rely to the extent feasible on the regulation of flow in Central's system to enhance flows. Planning and requests for regulation and bypass will also include reasonable ramping rates to attempt to avoid damage to Central's system. Throughout the peak, pulse or other short duration high flow event being enhanced, Central will continue to release water as necessary to meet or exceed the minimum flow requirements at its diversion dam that are set forth in Attachment 5, Section 5, paragraphs III.B through III.F of the Program. In accordance with the compliance measures in Attachment 5, Section 5, paragraph III.G of the Program, such flows are measured for compliance purposes excluding EA releases.

3. To assist in creating or enhancing peak, pulse or short duration high flows, NPPD will coordinate the operation of the Sutherland Project with the EA Manager and Central, and, if requested, will intentionally bypass EA Water or Other Program Water and/or regulate EA Water or Other Program Water in its system, to the extent feasible, without impacting NPPD's ability to meet other downstream demands and to operate the system in a manner that is consistent with safe business practices.
4. As set forth in Attachment 5, Section 1, paragraph 3.b of the Program in the event that the EA Manager calls for regulation with or without intentional bypass to enhance peak, pulse, or other short-duration high flows, the Districts will not unreasonably decline to provide the requested regulation and intentional bypass

flows. Reasonable causes for declining to provide requested regulation with or without intentional bypass include without limitation: (1) prior nonpayment by the Program's Financial Management Entity under subparagraphs 4a through 4d below; (2) the Program not providing EA water for system refill per paragraph 5 below; (3) the Governance Committee determining that insufficient funds are in the budget to cover anticipated or potential costs as described in the paragraph below (4) disagreement by the State of Nebraska's Department of Natural Resources (DNR) with water accounting to implement paragraph 5 below to avoid impacts on either Districts' water supply; and, (5) operational requests to which one or both of the Districts believe will cause undue harm to the Districts facilities or be inconsistent with legal or regulatory limitations as described in paragraph 10 below.

The Districts will be paid through the Program's Financial Management Entity for the use of their systems, facilities and waters as described in paragraphs 1 to 3 above. As set forth in Attachment 5, Section 1, paragraph 3(d) of the Program, prior to implementing the activities described in paragraphs 1 through 3, as part of the annual planning process, the EA Manager and Districts will submit to the ED information regarding the use of regulation and bypass in a planned pulse, the anticipated benefits, and the anticipated costs to the Program. The ED shall provide such information to the Governance Committee along with a description of how much of the budget (initially set at \$3.081 million dollars (2005 dollars) and hereinafter referred to as "the pulse flow account") has been previously spent, and shall similarly provide any updates.

The Governance Committee will determine during its annual budgeting process whether there are sufficient funds in the pulse flow account to cover the anticipated costs, and/or potential costs, associated with the pulse flow activities using District facilities for regulation or intentional bypass. The Governance Committee will not unreasonably decline to make this determination, and the EA Manager will not call for regulation with or without intentional EA bypass resulting in total payments that exceed the \$3,081,000 (2005 dollars) budgeted for the pulse flow account for lost power, increased power acquisition, associated costs (as defined below in paragraph 4.c), and insurance premiums necessary to implement the pulse flow activities, as further described in Attachment 5, Section 1, paragraph 3.c of the Program. If the Governance Committee determines that there are not sufficient funds in the pulse flow account to cover anticipated costs, and/or potential costs, the EA manager will not request a release involving regulation or EA bypass. It is understood that the budgeting process will be based on best estimates of lost power, increased power acquisition, and associated costs, but actual payments required by the Program may differ unavoidably from the estimated costs that the Governance Committee approved. The Program will subsequently provide payment through the Program's Financial Entity to the Districts for the use of Central's and NPPD's systems, facilities and waters, as described in paragraphs 1 to 3 above, and payment will be in an amount based on the Districts' costs, including revenue opportunities that are lost by the Districts while providing regulation and intentional bypass of water at the request of the EA Manager. Any payment shall be set as the sum of the following items:

a. Lost Power Costs: Lost generation opportunity by Central, valued at rates consistent with Central's then-applicable power sales agreement(s), and calculated as described in Exhibit A, attached hereto.

b. Increased Power Acquisition Costs:

i. For so long as Central sells the power it produces at its canal hydros to NPPD, the net additional cost, if any, to NPPD of obtaining replacement power for the generation foregone by Central. The net additional cost of the power, if any, will be based on the increased cost to NPPD based on the delivered market price for power, at the time of intentional bypass, as compared to the contract price for power from Central;

ii. If Central sells the power it produces at its canal hydros to a party other than NPPD, the net additional cost, if any, to the other party of obtaining replacement power for the generation foregone by Central; and,

iii. The net increase in cost to NPPD, if any, for replacing power foregone by NPPD facilities during times of intentional bypass. The cost of the replacement power, if any, will be based on the delivered market price of power.

c. Associated Costs: Consistent with Attachment 5, Section 1, paragraph 3.c(2) of the Program, reimbursement of any costs to one or both of the Districts' facilities associated with operating outside the normal range to accommodate regulation and/or intentional bypass. These costs may include bank sloughing in canals and reservoirs, wind and wave erosion in Johnson Lake,

additional lost hydro generation due to lower head, costs of avoiding recreational impacts, and, with discharges above the normal full canal flow, turbine cavitation damage, tailrace damage, and damage to other components. In addition damage to NPPD's downstream irrigation structures for the Gothenburg, Dawson County and Kearney Canals, including sand dams, is included in these costs. Any impacts to NPPD's irrigation customers will be covered by the third party or self insurance provisions of this agreement.

5. Upon completion of the regulation or intentional bypass activities, sufficient water will be released from the EA to refill the supply canal/reservoir systems to levels existing prior to the initiation of regulation and/or intentional bypass activities, and to avoid refilling the systems using any of the District(s) storage water. Replacement water, including natural flow and any EA water that is part of the replacement water, will be available for use by the affected District(s) for power and/or irrigation. Prior to the peak, pulse or high flow activities, and as part of the Program AOP, timely replacement of water (as determined by the affected District(s)) will be arranged between the affected District or Districts and the EA Manager and coordinated with the Nebraska Department of Natural Resources (DNR) to assure appropriate accounting.
6. Consistent with the Program's good neighbor policy, the Program will also address damages to others impacted by the changed operation (potentially including fisheries, concessionaires, cabin owner's docks, boats, and shore stations, sand dams, private river facilities and equipment) without regard to any liability limitations that the Districts may otherwise have in place under other

agreements. For the purpose of providing some assurance to the Districts that they will be protected against third party claims for damages arising out of operations under this Agreement, the Program shall, prior to implementing operations under this Agreement in any water year, take the following appropriate measures: (1) have in place a liability insurance policy in the amount of at least \$1 million with an A rated carrier which names the Districts as co-insured for documented claims resulting from regulation and/or intentional bypass activities; or (2) provide reasonable evidence to the Districts that the Program has a duly authorized reserve, with at least \$ 1 million remaining available, from which the Program's financial entity is authorized to pay claims for documented damages incurred by entities, other than the Districts, during such operations. If the second option is elected, prior to implementation of peak, pulse or high flow activities, the Program ED will make arrangements acceptable to the Governance Committee and the Districts for appropriate claims investigation, settlement and payment authorization. Payments of damages to third parties and the cost of the insurance policies or alternatives shall be made from the pulse flow account.

7. The Program and the Districts will use the following process, as set forth in the Program Water Plan, regarding presentation of bills and payment:
  - a. Prior to December 31 of each year, the Districts shall each separately invoice the ED based on the foregoing cost factors, providing suitable documentation of the basis for the amount billed, and shall provide a copy to the EA Manager. The amount of intentional bypass passing Central's Diversion Dam

or NPPD's Keystone or Korty Diversion Dams will be determined based on the Nebraska Department of Natural Resources water accounting program.

b. Unless there is a disputed invoice where the process in subparagraph c, below, shall be followed, the Program's Financial Management Entity shall remit payment to the District(s) prior to 60 days following receipt of the invoice(s) from the District(s).

c. In the event that the Program disagrees with the amount of any invoice, it shall nonetheless pay the full amount of the disputed invoice and shall advise the District in question, within 30 days of the receipt of the invoice, of the amount in dispute together with its reasons in writing for disputing that portion of the bill. Under these circumstances, payment is accomplished by the Program's Financial Management Entity remitting payment of the undisputed portion to the District(s) within 60 days following receipt of the invoice(s) from the District(s) and at the same time placing the disputed portion in an interest-bearing account to be released to the appropriate entity, without subsequent Governance Committee action, consistent with the findings in arbitration or other agreement by the parties ending the dispute. In the event the parties are unable to agree upon a resolution of the dispute within 60 days of the date of the invoice (or such later date as the parties may mutually agree), the dispute shall be submitted to an arbitration under the rules and procedures of the American Arbitration Association. For any arbitration, the affected District(s) shall retain one arbitrator at its (their) expense, the ED shall, with the approval of the three states and the Department of the Interior, retain a second arbitrator at the Program's expense. Those two

arbitrators shall select a third arbitrator, whose expenses shall be shared equally by the Program and District(s). The arbitrators selected will be persons having experience with and knowledge of the general subject matter of the disputed issue. With respect to the arbitration: (i) the Program and District(s) shall have the right to any discovery authorized under the Nebraska Discovery Rules for All Civil Cases; (ii) the Program and District(s) shall jointly administer the arbitration process; and (iii) the final decision of the arbitrators shall be entered not later than twelve (12) months after the initial notification of the commencement of the arbitration proceeding described in this paragraph. Subject to the above, the commercial arbitration rules and procedures of the American Arbitration Association shall apply to the arbitration proceedings. The parties agree to abide by the decision of said arbitrator and pay the costs of arbitration as apportioned.

8. In the event of a conflict or ambiguity between the Program documents and this Agreement, this Agreement shall control.
9. To avoid impacts on either Districts' water supply, this Agreement is contingent on the DNR's agreement that the activities described in paragraph 5 are in compliance with state permitting and Nebraska state law.
10. The water service provided pursuant to this Agreement shall be consistent with the terms and provisions of the Districts' respective licenses from the Federal Energy Regulatory Commission, the water appropriations held by the Districts and federal, state and local law. The Districts' performance of the water service described in this Agreement shall be subject and subordinate to any determinations or orders by FERC or the DNR.

11. The term of this Agreement shall coincide with the term of the First Increment of the Program unless terminated by any party upon at least 60 days written notice.

Agreed to by

THE NEBRASKA PUBLIC POWER  
DISTRICT

10-13-08  
(Date)

By Brian L. Baub  
Water Resources Manager

THE CENTRAL NEBRASKA PUBLIC  
POWER & IRRIGATION DISTRICT

10-2-08  
(Date)

By Dan Kraus  
General Manager

NEBRASKA COMMUNITY FOUNDATION

10/15/08  
(Date)

By John M.  
Chief Financial and Administrative Officer

PLATTE RIVER RECOVERY  
IMPLEMENTATION PROGRAM OFFICE OF  
THE EXECUTIVE DIRECTOR

10/17/08  
(Date)

By Jerry F. Kenny  
Executive Director

## Exhibit A

### Fee to Central for lost generation opportunity:

Each day that intentional bypass of EA or other water occurs, the lost generation fee will be based on the volume of water that could have been diverted at the Central District diversion dam. Using DNR data, the volume of intentional bypass will be calculated as the lesser of 1) all the EA water bypassed and 2) the space available to divert additional water. All the EA water bypassed will be equal to the EA water available but not diverted at Centrals diversion dam as determined through DNR's accounting process. The space available will be the difference between canal capacity (2,250 cfs unless otherwise reduced by Central) and the actual diversion for the day converted to acre-feet. The volume of intentional bypass will be multiplied by the following factors. The factors may be revised annually by Central, with notice to the EA Manager and ED, to reflect the then current peak efficiency of each plant.

Jeffrey Factor: 0.104 NMWh/A.F.

Johnson No. 1 Factor: 0.107 NMWh/A.F.

Johnson No. 2 Factor: 0.136 NMWh/A.F.

The total lost generation will be multiplied by the highest energy rate Central could have received if the power was produced or the cost to Central of purchasing replacement energy, if applicable, to meet power delivery obligations. That rate may be fixed by contract or controlled by the market, and may reflect the value (or estimated value) of energy and any associated attributes, any applicable penalties or the value of any applicable credits or subsidies such as renewable energy credits or carbon offsets.

### Example:

Feb 13: Diversion is 1,700 cfs, EA water shown at Maxwell is 200 cfs

Feb 14: Diversion is 1,500 cfs, EA water shown at Maxwell is 1,000 cfs

Fixed rate contract that pays \$32/NMWh in February

Feb 13: EA water bypassed is 200 cfs, diversion space available is 550 cfs. On this day, the calculation would be based on 200 cfs or 397 acre-feet. The net generation loss for the three plants would be 41.288, 42.479, and 53.992 MWh respectively. The total lost generation of 137.759 MWh would be multiplied by the energy rate to determine the fee, \$4,408 for February 13.

Feb 14: EA water bypassed is 1,000 cfs, diversion space available is 750 cfs. On this day, the calculation would be based on 750 cfs or 1,488 acre-feet. The net generation loss for the three plants would be 154.752, 159.216, and 202.368MWh respectively. The total lost generation of 516.336 MWh would be multiplied by the energy rate to determine the fee, \$16,522.75 for February 14.

## PLATTE RIVER RECOVERY IMPLEMENTATION PROGRAM

### Attachment 5

#### Section 1

### Program Water Management Process

August 8, 2006

Described below is the Program's water management process and the relationship of the FWS's Environmental Account (EA) Manager and the Program to that process. The relationship is also shown in Figure 1 of the Organizational Structure Document (Attachment 6).

#### 1. Background

- a. Water projects throughout the Platte River basin are operated by various entities in accordance with each state's water laws. The responsibility for accounting, tracking, regulating, and protecting water rests with each state's water administration.
- b. Pursuant to FERC relicensing requirements, an Environmental Account (EA) was established in Lake McConaughy. A contract between Central Nebraska Public Power and Irrigation District (CNPPID) and the FWS authorized the FWS's representative, the EA Manager, to request releases of EA water pursuant to the terms of the contract. The EA Manager is an employee of the FWS and has the responsibility to manage, request releases from, and coordinate operations of the EA. The EA Manager also develops the EA Annual Operating Plan (AOP), including the demands for the EA water.
- c. Pursuant to FERC relicensing requirements, the document entitled, *An Environmental Account for Storage Reservoirs on the Platte River System in Nebraska* (Attachment 5, Section 5) establishes an Environmental Account Committee (EAC) and Reservoir Coordinating Committee (RCC). The EAC is chaired by the EA Manager and provides guidance/input to the EA Manager for the development of the EA AOP. The RCC provides a forum to coordinate the annual operating plans of other projects and to discuss projected water supply conditions in the basin. The RCC is for coordination purposes only.
- d. The EA Manager, EAC, and RCC, created to meet FERC relicensing requirements, will continue to exist with or without the Program.
- e. Relative to Program water management, Project Sponsors include the states in their tracking, accounting, regulating, and protecting Program water; the federal government and the states in the management of their respective depletions plans; CNPPID for the EA in Lake McConaughy; the State of Colorado for Tamarack I; and the State of Wyoming for the Pathfinder Modification Project. In addition, the Program Water Plan provides opportunity for parties outside the Program to enter into cooperative arrangements with the Signatories for meeting Program water goals.

2. **Program Water Operation Process.** The following proposed Program water operation process builds on the existing structure that is in place for the Lake McConaughy EA and integrates that structure into the Program.

- a. The role of the FWS's EA Manager as the Lake McConaughy EA operator will be expanded. The EA Manager will prepare an annual AOP for the Program water (Program AOP) in the manner described below. The right to request water from individual projects may be accomplished through contracts, letter agreements, or whatever means is acceptable to the Project Sponsor, EA Manager, and Governance Committee. Project Sponsors retain the authority, unless delegated to the Governance Committee or EA Manager, to develop and implement individual operating plans for Program water, provided such operations are consistent with applicable state laws, compacts, decrees, and the Program first increment water objectives.
- b. The responsibility for accounting, tracking, regulating, and protecting Program water rests with each state's water administration. Any changes in state laws or procedures relating to the accounting, tracking, regulating, and protecting water will be reported to the Governance Committee.
- c. In October, the Project Sponsors will report to the EA Manager on the status of the water supply conditions projected in their respective written AOP's. The projected water supply conditions will initially be based on average inflow conditions.
- d. The EA Manager, in consultation with the Executive Director, will use the information provided by the Project Sponsors, EAC, and RCC to develop a draft Program AOP. The Program AOP will match the projected water supply conditions to the EA Manager's stated goals and priorities.
- e. In November, the EA Manager and the Executive Director will meet with the Project Sponsors, EAC, and RCC to discuss and receive input on the draft Program AOP. After consideration of the information received, the EA Manager will make any appropriate revisions in the Program AOP and distribute it to the Executive Director and the Project Sponsors. The Program AOP will include a description of the goals and purposes for which releases of Program water will be requested by the EA Manager.
- f. The Executive Director will report to the Governance Committee on the status of the Program AOP. If needed, the Governance Committee will seek additional review/guidance on the Program AOP from the Water and Technical Advisory Committees. The Governance Committee or its individual members may recommend changes to the Program AOP.
- g. At least once a month, the Project Sponsors may update their projected water supplies conditions and include the estimated snowmelt run off and actual inflow/demand data.
- h. The EA Manager may use the updated water supply information provided by the Project Sponsors to update the Program AOP at least once a month.
- i. The Executive Director will report monthly to the Governance Committee on the status of the Program AOP. If needed, the Governance Committee will seek additional

review/guidance on the updated Program AOP from the Water and Technical Advisory Committees. The Governance Committee or its individual members may recommend changes to the Program AOP at any time.

J. The EA Manager will request the release of Program water in accordance with the Program AOP and the contracts and agreements with the Program Sponsors. However, it is understood that the EA Manager will need to react and adapt to the actual hydrologic events that may impact the planned deliveries to the habitat. To the extent possible, the EA Manager will keep the Executive Director informed of the day-to-day operations for the Program water.

k. At the end of each water year, the EA Manager will prepare a report comparing the actual Program water operations during the water year with the operations outlined in the Program AOP, identifying and explaining any differences in actual operations from the operations proposed in the previous year's Program AOP, and providing other information requested by the Governance Committee. The year-end report will also describe whether the EA releases met the goals and purposes for which the water was used. This year-end report and any Governance Committee comments on that report will be used by the EA Manager as input to the subsequent year's Program AOP.

### **3. Program Water Operations for Enhancing Peak, or Pulse, or Other Flows by Reregulating Water in the CNPPID and/or NPPD Systems and Intentionally Bypassing Program EA Water**

a. Consistent with Program section II.E.I.b, the EA Manager may request CNPPID and/or the Nebraska Public Power District (NPPD) to reregulate flows in their respective systems, downstream of Lake McConaughy, and in conjunction with such reregulation may also request the Districts intentionally to bypass EA water. EA Bypass Flows are created when CNPPID or NPPD (Districts), at the request of the EA Manager, waives the discretion provided by their licenses and the Environmental Account Document (Attachment 5, Section 5) to divert Environmental Account (EA) water that could have been routed through their systems, and instead routes the EA water via the North Platte and/or Platte River. The reregulation of water in District facilities with or without intentional EA bypass will only be requested to enhance peak, pulse or other short-duration high flows.

The EA Manager will consider the following factors when determining whether reregulation with or without intentional EA bypass is necessary, and in developing the annual plan for such operations:

- (1) Feasibility/likelihood of generating satisfactory flows without reregulation and intentional EA bypass.

To the extent that a short-duration high flow or other flows of the desired magnitude and duration can be achieved without reregulation and intentional bypass, or with reregulation but without making an intentional EA bypass, reregulation and bypass may not be needed or requested. This is most likely to occur under wetter-than-normal basin conditions when CNPPID is already making full or nearly-full diversions at the CNPPID Supply Canal headgate.

(2) Anticipated benefits

In cases where reregulation with intentional bypass of EA water would not be expected to provide improvements in the magnitude and duration of the high flows or other flows, nor contribute to the effectiveness of achieving other habitat objectives such as channel sediment mobilization, the FWS is unlikely to call for an intentional bypass or reregulation.

(3) Magnitude, duration, and effectiveness of peak flow events occurring over the previous 12 months.

If a pulse flow of unusually high magnitude (e.g., approaching or exceeding 8,000 cfs) occurred across the habitat reach over the previous year, and these flows were effective at scouring in-channel vegetation, reworking sediment, improving habitat for the target species, or achieving similar Program management objectives, the FWS may determine that it is a low priority to use EA water to generate a short-duration high flow in the current year, and thus may not request a bypass or reregulation for pulse flow purposes.

(4) Other circumstances

Additional considerations may be important. For example, a reregulation and EA bypass request may be needed to test the effectiveness of alternative flow routing strategies, particularly during earlier, experimental EA releases.

b. In the event that the EA Manager calls for reregulation with or without intentional EA bypasses to enhance peak, pulse or other short-duration high flows, the Districts will not unreasonably decline to provide the requested reregulation and intentional EA bypass flows. Reasonable causes for declining to provide requested reregulation with or without intentional bypass include prior nonpayment by the Program under paragraphs c.(1) and (2) below, the Program not providing EA water for system refill per subparagraph c.(3) below, and disagreement by the State of Nebraska's Department of Natural Resources with water accounting to implement subparagraph c.(3) below to avoid impacts on either Districts' water supply. Regulation and intentional bypass will be available as follows:

- (1) To assist in creating or enhancing peak, pulse or short duration high flows below the J-2 Return, at the Environmental Account (EA) Manager's request CNPPID will regulate up to 12,000 acre-feet annually of water diverted at CNPPID's diversion dam under CNPPID's power use appropriations, and retime the return of that water to coincide with releases made from the EA in Lake McConaughy. The amount of regulation available may be limited by CNPPID to less than 12,000 acre-feet in some years or some times of the year depending on anticipated impacts on project facilities, anticipated impacts on others (e.g., downstream flooding, damage to other river facilities), conflicting operational or licensing requirements such as implementation of the Flow Attenuation Plan, and compliance with other agreements. (The initial test will be 4,000 acre-feet in February, March, or April after which, and prior to planning for the subsequent

water year, CNPPID will determine based on physical and operational impacts if regulation beyond 4,000 acre-feet will be available to the Program).

- (2) In planning for flow enhancement and requesting regulation and bypass, the EA Manager will seek to limit the EA water intentionally bypassed at CNPPID's diversion dam to the minimum amount necessary to achieve the intended flow magnitude and duration downstream of the J-2 return and will rely to the extent feasible on the regulation of flow in CNPPID's system to enhance flows. Planning and requests for regulation and bypass will also include reasonable ramping rates to attempt to avoid damage to CNPPID's system. Throughout the peak, pulse or other short duration high flow event being enhanced, CNPPID will continue to release water as necessary to meet or exceed the minimum flow requirements at its diversion dam called for in section III of the EA document, in accordance with the compliance measures in section III.G which measure flows for compliance purposes excluding EA releases. .
- (3) To assist in creating or enhancing peak, pulse or short duration high flows, NPPD will coordinate the operations of the Sutherland Project with the EA Manager and CNPPID, and, if requested, will intentionally bypass EA water and/or reregulate EA water or other water in its system to the extent feasible without impacting NPPD's ability to meet other downstream demands and to operate the system in a manner that is consistent with safe business operations.

c. When reregulation is provided with or without intentional EA bypass, the Program will provide payment to the Districts in an amount equivalent to resultant lost power production, increased power acquisition costs and other associated costs, and will provide water from the EA as needed to refill the Districts' systems ("borrow and payback"). The EA Manager will not call for reregulation with or without intentional EA bypass resulting in total payments that exceed \$ 3,081,000 for the following activities during the first increment of the Program, unless approved by the GC.

- (1) Lost power production and increased power acquisition costs include:
  - a. Power generation forgone by CNPPID, valued at rates consistent with CNPPID's then-applicable power sales agreement(s);
  - b. For so long as CNPPID sells the power it produces at its canal hydropower facilities to NPPD, the net additional cost, if any, to NPPD of obtaining replacement power for the generation foregone by CNPPID. The cost of the increase in power, if any, would be based on the delivered market price of power at the time of by-pass as compared to the contract price from CNPPID;
  - c. If CNPPID sells the power it produces at its canal hydros to another party, the net additional cost, if any, to the other party of obtaining replacement power for the generation foregone by CNPPID; and
  - d. The net increase in cost to NPPD, if any, from replacing power foregone by NPPD facilities during times of EA by-pass. The cost of the replacement power, if any, would be based on the delivered market price of power.
- (2) Other associated costs to be paid for by the Program beyond direct lost power production and increased power acquisition costs may occur if equipment or facilities are operated outside the normal range to accommodate reregulation and/or EA bypass. They may include bank sloughing in canals and reservoirs,

wind and wave erosion in Johnson Lake, additional lost hydro generation due to lower head, costs of avoiding recreational impacts, and, with discharges above the normal full canal flow, turbine cavitation damage, tailrace damage, and damage to other components.

(3) Upon completion of activities to aid the creation or enhancement of peak, pulse or short-duration high flows, sufficient water will be released from the EA to refill the supply canal/reservoir systems to levels existing prior to the initiation of reregulation and/or bypass activities, and to avoid refilling using the Districts' storage water. Replacement water, including any EA water which is part of the replacement water, will be available for use by the affected District or Districts for power and/or irrigation. Timely replacement of water (as determined by the affected District or Districts) will be arranged between the affected District or Districts and the EA Manager.

(4) Similar to the Program's good neighbor policy regarding addressing adverse impacts of the land component of the Program, the Program will address damages to third parties impacted by regulation in the Districts' systems and/or intentional EA bypass, such as fisheries, concessionaires, cabin owner's docks, boats, and shore stations, sand dams, private river facilities and equipment, without regard to any liability limitations that the Districts may otherwise have in place under other agreements. The Program shall, prior to implementing operations under this agreement in any water year, take appropriate measures to have in place a liability insurance policy naming the Districts as co-insured to cover at least \$1 million in documented claims resulting from reregulation and/or EA bypass activities or shall provide other means of addressing third party impacts that hold the Districts harmless and are acceptable to the Districts. Payments of damages to third parties and cost of the insurance policy or alternatives will be counted toward the \$3.081 million budgeted for reregulation and intentional EA bypass.

d. The GC will be kept informed of plans for reregulation with or without intentional EA bypass and estimated costs, and will be provided the opportunity for comment through the annual Program AOP process described in section 2 above as follows:

- (1) As part of the development of the Program AOP described in Attachment 5, Section 1, Subsection 2, the Districts will work cooperatively with the FWS to explore potential water routing and delivery strategies. The EA Manager will annually document the intent to implement reregulation with or without intentional EA bypass in the draft Program AOP, including the estimated amount of EA water to be intentionally bypassed, the Districts facilities/diversion to be used for reregulation or to be bypassed, and flow conditions anticipated when bypasses would be requested.
- (2) The Districts will independently provide estimates of their respective lost power production and increased power acquisition costs and any other anticipated costs associated with the proposed reregulation with or without EA bypass within 30 days of receipt of the draft Program AOP for use by the EA Manager in preparation of any revision to the Program AOP.
- (3) When reporting to the GC on the status of the revised Program AOP per Attachment 5, Section 1, Subsection 2.f, the Executive Director will particularly note any costs associated with reregulation and/or bypass flows. The GC may

seek additional review/guidance or recommend changes relating to reregulation and bypass flows.

- (4) Based on updated water supply estimates provided per Attachment 5, Section 1, Subsection 2.g, the reregulation and bypass cost estimates from the Districts and/or other information, the EA Manager may amend the draft Program AOP proposed reregulation or EA bypasses. The EA Manager and Executive Director will include any such amendment in the monthly status report on implementation of the Program AOP required in Attachment 5, Section 1, Subsection 2.i..
- (5) Prior to December 31 each year, each District will separately invoice the Program's Executive Director with a copy to the EA Manager based on the cost factors in paragraph 3.c above together with suitable documentation of the basis for the amount billed. The amount of EA water by-passing the District's diversion dams will be determined based on the Nebraska Department of Natural Resources water accounting program.
- (6) Prior to 60 days following receipt of the invoices from the Districts, the Executive Director, in consultation with the EA Manager, will review and provide payment through the financial management entity for the bills from the Program budget item specifically established for this purpose.
- (7) In the event that the Program disagrees with the amount of any invoice, it shall nonetheless pay the full amount of the disputed invoice and shall advise the District in question, within 30 days of the receipt of the invoice, of the amount in dispute together with its reasons in writing for disputing that portion of the bill. Such payment shall be placed in escrow pending resolution of the dispute. In the event the parties are unable to agree upon a resolution of the dispute within 60 days of the date of the invoice (or such later date as the parties may mutually agree), the dispute shall be submitted to an arbitration under the rules and procedures of the American Arbitration Association.

e. After the start of Program implementation, a formal agreement will be entered into between the Program and CNPID and NPPD that will implement the provisions outlined in this Attachment 5, Section 1, Subsection 3. There will be no reregulation or EA bypass under the Program until such agreement is in effect.