

July 25, 2018

U.S. MAIL AND ELECTRONIC MAIL

Erik Ekdahl, Deputy Director
State Water Resources Control Board, Division of Water Rights
P.O. Box 100
Sacramento, CA 95812-0100

Re: **DWR and USBR Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project**

Dear Mr. Ekdahl:

I am writing on behalf of the North Delta Water Agency (“NDWA”) regarding the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (“Project”) proposed by the California Department of Water Resources (“DWR”) and the U.S. Department of the Interior, Bureau of Reclamation (“USBR”). After reviewing the Project’s Draft Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”), NDWA, whose mission is to assure a dependable water supply of suitable quality for north Delta water users, has significant concerns regarding the environmental impacts and water rights for the proposed Project.

NDWA has submitted comments regarding the EIS/EIR, but one significant omission from the EIS/EIR is of particular concern to the State Water Resources Control Board (“State Water Board”): the EIS/EIR does not identify a water right change petition pursuant to Water Code sections 1700 *et seq.* as a requirement for the Project. Our analysis of the Project, however, indicates that a change petition would be necessary. DWR and USBR’s apparent decision to forgo a change petition for this Project is an improper attempt to sidestep an important quasi-judicial process for ensuring other legal water users are not injured by projects proposing new diversions.

North Delta Water Agency

Pursuant to the North Delta Water Agency Act, NDWA has a mandate to assure that the lands within the North Delta have a dependable supply of water of suitable quality sufficient to meet present and future beneficial uses.¹ To put this mandate into practice, in 1981, NDWA signed a contract with DWR. The crux of the 1981 Contract is a guarantee by the State of California that,

¹ Attached as Exhibit A is a map of NDWA’s service area and the points of diversion within it.

on an ongoing basis, DWR will ensure – through the operation of the State Water Project (“SWP”) – that suitable water will be available to satisfy all agricultural and other reasonable and beneficial uses in all channels within NDWA’s boundaries. The 1981 Contract prohibits the State from exporting SWP water so as to cause decrease in natural flow, increase in natural flow, reversal of natural flow direction, or alteration of water surface elevations in Delta channels to the detriment of Delta channels or water users within NDWA.

The Fremont Weir and the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project

The Fremont Weir is a State Plan of Flood Control facility that diverts Sacramento River flood flows around the City of Sacramento during times of high flood stage. Flood waters overtop the Fremont Weir and flow into the Yolo Bypass once the Sacramento River exceeds 32 feet North American Vertical Datum 1988.

According to the EIS/EIR,² the Project is intended to implement Reasonable and Prudent Alternative actions I.6.1 and I.7, as described in the 2009 National Oceanic and Atmospheric Administration National Marine Fisheries Service Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project and the 2012 Yolo Bypass Salmonid Habitat Restoration and Fish Passage Implementation Plan. The EIS/EIR for the Project thus addresses methods to improve fish passage and increase floodplain fisheries rearing habitat in the Yolo Bypass to benefit Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and Southern Distinct Population Segment green sturgeon. Attached as Exhibit B is a map of the Project area as included in the EIS/EIR (Figure 1-1 of the EIS/EIR).

All six alternatives analyzed by the EIS/EIR (other than the “No Action Alternative”) describe the Project as requiring the placement of a “gated notch” (or notches) in the Fremont Weir. The notch or notches would be placed approximately 18 feet below the existing flood control weir and the gates would be hydraulically or pneumatically operated, with flush-mounted hinge gates, able to operate under variable river elevations. The gates would be closed when water elevation falls below 14 feet.

The EIS/EIR provides that the various alternative gated notches “would control the diversion of Project flow from the Sacramento River into the Yolo Bypass” at a level of anywhere from 3,000 to 12,000 cfs per day for a 5-7 month period from November 1 through March 7 (and possibly through the end of May to allow fish passage). (See EIS/EIR at ES-6, ES-9-16.) As a result, the Project will alter the flow of water through the Sacramento River and the entire North Delta

² The EIS/EIR is voluminous, and is thus not attached as an exhibit. However, it is available for review at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Environmental-Services/Restoration-Mitigation-Compliance/Yolo-Bypass-Project/Files/Draft-Yolo-Bypass-Salmonid-Habitat-Restoration-and-Fish-Passage-Project-EIS_EIR.pdf.

region. For example, the EIS/EIR admits that the Project “could affect water availability for diversion through the California WaterFix intakes,” which are proposed to be located within NDWA’s service area. (See EIS/EIR at 5-1.) The EIS/EIR goes on to explain, in Chapter 5.3, that the various alternatives analyzed for the Project will change water availability for various water users. (See EIS/EIR at 5-20 – 5-61.) Under each of the project alternatives, it is clear that the Project will be operated to take control of Sacramento River water at the Fremont Weir and put it to beneficial use in the Yolo Bypass. This reveals a need for an analysis of the effect of the Project on the rights of legal water users under the water right change petition process.

DWR and USBR Must File a Change Petition Under Their State Water Project and Central Valley Project Water Rights Permits to Implement the Project

DWR and USBR operate the State Water Project (SWP) and Central Valley Project (CVP) under numerous water rights that appropriate Sacramento River water. (See DWR permits 16478, 16479, 16481, 16482, and 16483; and USBR permits 11315, 11316, 12721, 12722, 12723, 11967, 11968, 11969, 11971, 11973, and 12364.) Generally, those water rights include points of diversion to storage at project reservoirs and at the South of Delta export pumps. None of the water rights for the SWP and CVP include a point of diversion at the Fremont Weir.

Changes to the point of diversion, place of use, or purpose of use for a permitted water right require the permission of the State Water Board. (Wat. Code, § 1701.) Change petitions are critical because they ensure a process that allows various stakeholders (like NDWA) to be heard regarding any potential injuries to any “legal user of the water involved.” (Wat. Code, § 1702; see also Cal. Code Regs., tit. 23, § 791 et seq.)

Here, the EIS/EIR does not indicate that implementation of the Project will require the filing of any change petition by DWR and USBR. Indeed, Table 1-1 of the EIS/EIR, which identifies the necessary permits for the Project, does not contain any reference to the Board’s appropriative water rights permitting authority. (See EIS/EIR at 1-4.) A change petition, however, is required for the Project. At the very least, the Project represents a new point of diversion. Gated notches in the Fremont Weir allowing 3,000 to 12,000 cfs per day to flow out of the Sacramento River and into the Yolo Bypass is a quintessential diversion of water by taking control of the water and putting it to beneficial use for a specific purpose.

Moreover, the diversion constitutes a change in the natural flow of the Sacramento River and a change in the way that water flows throughout NDWA’s service area and at the numerous diversions within that area as depicted on Exhibit A. As explained above, the EIS/EIR acknowledges that the diversion of water at Fremont Weir will impact water availability downstream. Although the water supply impacts have been analyzed in the EIS/EIR, there has been no analysis of those impacts under the Water Code pursuant to the State Water Board’s jurisdiction to regulate water rights. Specifically, DWR’s and USBR’s various permits for the SWP and the CVP do not identify a point of diversion at Fremont Weir. The proposed gated notches are thus a new point of diversion, and the Project may not proceed without permission

from the Board through a change petition filed by DWR and/or USBR.³ Such a change petition will be critical to ensuring that water rights in the North Delta are honored. This Project represents a new diversion of water that could injure legal water users downstream from the Project. Such potential injuries should – and must – be assessed before the Project can proceed.

In addition to representing a new point of diversion, the Project may also represent a change in DWR and USBR's permitted place(s) of use. The Place of Use in DWR's water rights permits relating to the SWP generally describe the Place of Use as "Within the Service Area of the State Water Project as shown on map Nos. 1878-1, 1878-2 and 1878-3, revised December, 1964[,] Oak Flat Water District as shown on map dated January 2009[, and] Diablo Grande Project as shown on map titled 'Western Hills Water District.'" The Places of Use also include various power plants. It is not clear from either the EIS/EIR or the existing permits whether the Yolo Bypass, which the new notched gates will allow water to flow into for the purpose of fish and wildlife preservation and enhancement, is included within the Place of Use defined by DWR's water rights permits. If the Yolo Bypass is not included in the permits, then DWR and/or USBR must also include in a change petition a request to change the Place of Use for their permits.

In sum, the EIS/EIR for the Project demonstrates that a change petition is necessary because, at the very least, the Project proposes to divert water from the Sacramento River at a new point of diversion. It may also represent a new place of use. We appreciate the Board's assistance in this matter and NDWA will cooperate with the Board as necessary to address this issue.

Very truly yours,

DOWNEY BRAND LLP



Meredith E. Nikkel

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cc: Eileen Sobeck, State Water Resources Control Board
Michael Lauffer, State Water Resources Control Board

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³ It is not immediately clear from the EIS/EIR whether DWR, USBR, or some combination of both will operate the Fremont Weir notches. It is also not clear whether the Fremont Weir notches will be considered part of the SWP or the CVP.