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Submitted Via Email: bcnelson@usbr.gov

Mr. Ben Nelson
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SUBJECT: Comments on Draft EIR/EIS for Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (RPA I.6.1 and I.7)

Dear Mr. Nelson:

The following comments on the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Draft EIR/EIS are submitted on behalf of the North Delta Water Agency (NDWA/Agency).

Background of Agency and 1981 Contract

NDWA has a statutory mandate under California law 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 In accordance with its statutory responsibilities, in 1981 the NDWA and the Department of Water Resources (DWR/Department) executed the *Contract for the Assurance of a Dependable Water Supply of Suitable Quality* (1981 Contract).

The crux of the 1981 Contract, which remains in full force and effect, is a guarantee by the State of California that, on an ongoing basis, DWR will ensure through the operation of the State Water Project 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 contains specific minimum water quality criteria to be maintained year-round and obligates DWR to avoid or repair damages from hydrodynamic changes resulting from conveyance of SWP water. The 1981 Contract also provides that, if necessary, DWR will provide alternative water supplies of suitable quality and quantity or to limit the operations of the SWP pumps and reservoirs in order to maintain compliance with the minimum water quality criteria contained in the contract.

¹ North Delta Water Agency Act, Chapter 283, California Statutes of 1973.

Subsequently, during “Phase IV” of the water right hearings that led up to Water Right Decision No. 1641 revised, DWR acknowledged its responsibilities to NDWA by means of a Memorandum of Understanding dated May 26, 1998. Taken together, the 1981 Contract and the 1998 Memorandum of Understanding constitute a broad commitment by DWR to provide a water supply of suitable quality and quantity within the jurisdictional boundaries of NDWA.

DWR’s compliance with the binding terms of the 1981 Contract is not discretionary. Moreover, the legal standards that govern DWR’s discharge of its obligations under the 1981 Contract are quite different from those that govern DWR’s compliance with NEPA, CEQA and other applicable law. For example, while CEQA requires DWR to implement feasible mitigation measures to reduce significant impacts of projects to less-than-significant levels, DWR may not, as a matter of contract law, choose not to comply with the specific requirements of the 1981 Contract based on a determination of infeasibility, or otherwise.

Under the 1981 Contract, the State is prohibited from conveying 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 the Agency. So the Final EIR/EIS should analyze where any of these impacts occur in any of the channels and tributaries throughout the 300,000 acres of the Agency boundaries as a result of this project design and operation.

The State (SWP) is also required to either the repair or alleviate damage, improve the channels as necessary, or provide diversion facility modifications required for any seepage or erosion damage to lands, levees, embankments, or revetments adjacent to Delta channels within Agency associated with conveyance of SWP, which includes this habitat project. So the Final EIR/EIS should carefully analyze these potential impacts and design fixes where necessary.

The CVP and SWP are operated in accordance with the Coordinated Operation Agreement between the federal government and the State of California.² Therefore, the Project Proponents must ensure that the diversion through new Fremont Weir operable gates into the Yolo Bypass of any CVP and SWP water released from upstream storage does not impede DWR’s ability to fully comply with the water quality and availability terms and conditions of the 1981 Contract. The following comments on the Draft EIR/EIS are intended to ensure continued compliance with the 1981 Contract and the requirements of the National Environmental Policy Act (NEPA).

Project Purpose

On June 4, 2009 the National Marine Fisheries Service (NMFS) issued its Biological Opinion

² Authorized by Public Law 99-546.

and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project (BiOp) that concluded if left unchanged, the SWP and CVP operations were likely to jeopardize the continued existence of four federally-listed anadromous fish species. Subsequently, the Department of Water Resources (DWR) and the Bureau of Reclamation (USBR) have issued their Fish Restoration Program Agreement Implementation Strategy (FRPA) to create aquatic habitat and fish passage improvements in the Delta as part of their requirement to maintain ESA incidental take permits for the operation of the SWP and CVP pumping facilities in the South Delta.

In order to comply with RPA I.6.1 and I.7 in the BiOps and FRPA, this Yolo Bypass fish restoration project (Project) was initially included in the Bay Delta Conservation Plan (BDCP) as Conservation Measure 2 and is now one of the projects in the California EcoRestore Program.

Deficiencies of Analysis in Draft EIR/EIS

The assumptions used for the analysis and impact conclusions in Chapter 5 *Water Supply* and Chapter 6 *Water Quality* are inadequate, failing to identify or analyze the full scope of water supply and quality impacts to water users located in the Yolo Bypass and downstream in the Delta. Diverting water from the Sacramento River during normal, dry or critically dry years through a notched weir may have significant effects on Sacramento River water quality and quantity effecting downstream areas and water users.

Reduced water quality conditions created by operation of new operable Fremont Weir gates could constitute a “taking” of water rights due to the water supplies in and downstream of the Plan Area essentially being degraded to the point of significant impairment of existing beneficial uses, requiring compensation under the law and under the 1981 Contract. The Final EIR/EIS must be revised to acknowledge and mitigate these adverse impacts in the Water Supply Chapter and consider whether the damage to water users is a violation of California’s “No Injury Rule” statutes governing “Priority of Water Rights,” or standards in CEQA and NEPA governing disclosure, weighting of impacts, and cumulative effects on environmental and human resources.

Both chapters analyze impacts to CVP and SWP contractors, but limit analysis of impacts to non-CVP/SWP water users with junior water rights and that are related to implementation of Term 91. Currently, the Draft EIR/EIS only acknowledges water availability impacts to the proposed new North Delta Diversions in the WaterFix project from the alternatives in this Project because of reduced flows in the Sacramento River between Fremont Weir and Delta.

Section 5.1.3 *Non-CVP and SWP Water Users* acknowledges there are hundreds of diverters with water rights junior to CVP/SWP that divert from Sacramento River and tributaries and within the Yolo Bypass, but fails to mention there are a total of approximately 2,500 individual water diversion intakes in the Delta, many of which have more senior water rights than

CVP/SWP and are gravity siphons that could be negatively impacted by lowered water surface elevations or increases in salinity regardless if Term 91 is implemented or not. The absence of describing the context in which local water supplies are accessed and used, results in the Draft EIR/EIS *Water Supply Chapter 5* failing to properly disclose the level of significant impacts imposed on agricultural and municipal water users in the Plan Area.

Section 5.3.1.4 analyzes how non-CVP/SWP water users with water rights *junior* to the CVP and SWP could be affected by changes in the application of Term 91, but does not disclose, analyze or mitigate impacts to water users with more senior water rights or water users within NDWA's boundaries. Sec 5.1.2 *State Water Project* also fails to mention NDWA Contract obligations that DWR must meet.

Chapter 5 *Water Supply* also fails to disclose that the water to be diverted from the Sacramento River is from CVP/SWP stored water supplies or that such diversion requires submission of a Change of Diversion Petition to the State Water Resources Control Board so that hearings can be held to ensure that no other legal water users are injured from the diversion of 6,000-12,000 cfs from the Sacramento River into the Yolo Bypass.

This Project was analyzed in the BDCP EIR/EIS as Conservation Measure 2, however no mention of the impacts identified in the Effects Analysis is included in the Yolo Bypass Draft EIR/EIS. The Final Yolo Bypass EIR/EIS should disclose and describe the many cumulative water surface elevation and water quality impacts identified in the BDCP Effects Analysis and EIR/EIS that would occur with implementation of both Conservation Measure 1 (WaterFix Project) and Conservation Measure 2 such as:

- In the North Delta, flow patters will be altered by the increased diversions to the Yolo Bypass (CM2) and operations of the new north Delta intake facilities (CM1). *Chap 5, page, 5.3-2.*
- The average modeled annual inflow at Freeport for the evaluated starting operations was reduced by about 650,000 af compared to existing conditions, primarily as a result of the increased Fremont Weir Spills (CM2). *Chap 5, 5.3-3.*
- The Freeport median flows in January, February, and March for the evaluated starting ops cases were about 3,000 cfs less than existing conditions flows, reflecting the increased spills at the Fremont Weir into the Yolo Bypass (CM2). *Chap 5, page 5.3-4.*
- Overall, proposed operation of Fremont notch extended the duration of spills from 78 days under the EBC2_LL1 to 117 days under the ESO_LL1, and the duration of floodplain inundation from 85 to 124 days, respectively. *Chap 5, page 5C.5.4-28.*

- A decrease of 6,000 cfs in the Sacramento River could result in as much as a 3-foot reduction in river stage, although understanding of how notch flows would affect river stage is incomplete. *Chap 5, page 5C.5.4-6.*
- In addition to flows from new north Delta intakes, BDCP habitat restoration may modify hydrodynamics in the Delta. These hydrodynamic changes in turn can change salinities, DO, turbidity, and flows. *Chap 5, page 5C.1-1.*
- The median diversions into Sutter and Steamboat Sloughs are lower under the evaluated starting ops because of the Fremont Weir notch increases the diversions to the Yolo Bypass and because north Delta intakes reduce the Sacramento River flow at these two sloughs. In addition, tidal restoration in the Cache Slough Complex was simulated to shift the tidal elevations and reduce the Sutter/Steamboat diversion fractions. The BDCP median diversion flows were reduced by about 1,000 cfs in January, about 5,000 cfs in February, and about 3,500 cfs in March compared to the existing conditions. The reductions in the Sutter/Steamboat Slough diversions were about 40% of the simulated north Delta intake diversions. *Chap 5, page 5.3-10.*
- Predicted reduced monthly median diversion flows to DCC and Georgiana Slough for evaluated starting ops because the north Delta intakes reduced the Sacramento River flow. The average annual diversions into the DCC and Georgiana Slough were about 3,750 TAF (24% of the Sacramento River flow at Freeport) for the existing conditions and were reduced to about 3,50 TAF (21% of Sac River flow) for the BDCP ops. *Chap 5, page 5.3-10.*
- North Delta intakes combined with diversion of water into Yolo Bypass (CM2) inevitably would result in less Sacramento River flow below intakes with potential for greater incidences of Sac River flow reversals in the vicinity of Georgiana Slough and the DCC. *Chap 5, page 5C.4-78.*
- Removal of road crossings and agricultural impoundments, earthwork and construction of structures to reduce Tule Canal/Toe Drain channel capacities. *Chap 4, page 4-16.*
- Modification of existing configuration of the discontinuous channels along the western edge of the Yolo Bypass to reduce diversion of Delta water for Yolo Bypass irrigation. *Chap 4, page 4-16.*
- Operations result in changes in flow and potentially changes in water quality, habitat, and predation. Operational impacts on fish may include changes in spawning, migration, and rearing habitat associated with changes in reservoir operations, diversion of water, and

the consequent changes in flow in the Sacramento River and water circulation and quality through the Delta. Placement and operation of intakes may also result in changes in the potential for predation. *Chap 4, page 4-20.*

Unmitigated Water Quality and Availability Impacts

The Draft EIR/EIS fails to properly analyze and disclose several potential significant impacts to water users or analyze impacts to DWR's ability to comply with the water supply availability and quality terms and conditions contained in the 1981 Contract.

The Project Proponents need to broaden the analysis in the Final EIR/EIS to include disclosure of following impacts associated with diverting between 6,000-12,000 cfs from the Sacramento River more frequently and for longer duration, and provide mitigation measures if the following impacts are significant:

- Affects to water surface elevations in Delta waterways and the salinity criteria at seven monitoring locations identified in the 1981 Contract from implementation of RPA I.6.1 and I.7.
- If implementation of RPA I.6.1 and I.7 are successful in increasing the abundance of special status or endangered species in the Yolo Bypass, then ESA restrictions could become problems for existing water diversion intakes that currently do not have impacts on listed species.
- Diverting 6,000-12,000 cfs into the Yolo Bypass will lower water surface elevations in the Sacramento River and downstream tributaries, including Sutter and Steamboat Sloughs, reducing water availability for existing intakes.

The Final EIR/EIS should be revised to include:

1. A comprehensive description of the 1981 Contract and the Final EIR/EIS should focus on alternatives that are feasible in light of the requirements of the 1981 Contract.
2. Perform hydrologic and hydraulic modeling that assumes the terms and conditions of the 1981 Contract as the "baseline" condition (Existing Conditions), including but not limited to its water quality requirements, will remain in full force and effect at all seven monitoring locations.
3. Modeling should analyze not only the potential impacts to water quality, water surface elevations, flows and flow direction, increased seepage and erosion resulting from

various alternatives, but also the mitigations associated with the repair, modification, or replacement of existing landowner diversion facilities and levees as required under Article 6 of the 1981 Contract due to the modification of the Fremont Weir.

4. NEPA imposes an obligation to analyze and mitigate the significant effects (direct and indirect) associated with “human environment” (42 U.S.C. § 4332) and “economic, social or health” effects (40 C.F.R. § 1508.8). The Final EIS must analyze the extent that any of the project alternatives cause agricultural land within NDWA to be taken out of agricultural production.

Thank you for considering our comments and recommendations for revising the Final Draft EIR/EIS for the Yolo Bypass Fish Restoration Project.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda Terry". The signature is fluid and cursive, with the first name "Melinda" written in a larger, more prominent script than the last name "Terry".

Melinda Terry,
Manager

