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## State Water Resources Control Board

September 1, 2020

Mr. James Newcomb  
Program Manager  
Yolo Bypass Habitat Restoration Branch  
Department of Water Resources  
3500 Industrial Boulevard  
West Sacramento, CA 95691

Dear Mr. Newcomb:

### **DETERMINATION OF NEED FOR WATER RIGHT PERMIT FOR YOLO BYPASS SALMONID HABITAT RESTORATION AND FISH PASSAGE PROJECT**

This letter responds to your May 18, 2020 letter requesting a formal determination as to whether the California Department of Water Resources (DWR) requires a water right permit from the State Water Resources Control Board (State Water Board) for the construction, operation, and maintenance of the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Project). For the reasons provided herein, the proposed Project as described does not require a water right permit.

### **BACKGROUND**

The Fremont Weir lies within the Sacramento and San Joaquin Drainage District (SSJDD), which is under the control and management of the Central Valley Flood Protection Board (CVFPB) as the successor to the former Reclamation Board.<sup>1</sup> DWR is responsible for maintaining and operating the Fremont Weir as part of the Sacramento River Flood Control Project.<sup>2</sup> State law defines the Sacramento River Flood Control Project and the federal-state flood control project in the San Joaquin Valley as the State Plan of Flood Control (SPFC).<sup>3</sup> The SPFC comprises more than 1,600 miles of levees along the Sacramento and San Joaquin Rivers, Sutter and Yolo Basins, and Feather, Yuba, Bear, and American Rivers and, among other infrastructure, includes five major weirs and seven relief bypasses (Sutter, Tisdale, Sacramento, Yolo, Chowchilla,

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<sup>1</sup> *In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist.* (1923) 191 Cal. 650, at p. 658; Wat. Code, § 8502.

<sup>2</sup> Wat. Code, § 8361.

<sup>3</sup> Pub. Resources Code, § 5096.805(j) (Proposition 1E).

Eastside, and Mariposa). CVFPB and DWR, both individually and jointly, have various ongoing responsibilities for the SPFC.<sup>4</sup>

The SPFC was constructed piecemeal over the last 100 years and has protected many urban and rural areas against flooding;<sup>5</sup> however, the flood management system has also channelized rivers and prevented them from accessing their historic floodplains, damaged habitat, harmed fish and wildlife, and contributed to the listing of several species under the state and federal endangered species acts. Such diking, leveeing, channelization, and reclamation have contributed to the loss of as much as 91 percent of California's original wetlands, including floodplains.<sup>6</sup>

The propensity of the Sacramento and San Joaquin Rivers, in their natural condition, to seasonally inundate the low-lying lands surrounding their channels is well documented.<sup>7</sup> The Yolo Bypass "today occupies the seasonally flooded edge of the historically perennial wetlands of the Yolo Basin."<sup>8</sup> However, the Fremont Weir is a barrier to fish passage between the Sacramento River and the Yolo Bypass. Fish either cannot access the Yolo Bypass or, if carried into the Yolo Bypass during a high-flow event, may become stranded and unable to return to the Sacramento River.

## PROJECT DESCRIPTION

The Project is designed to address fish passage, stranding, and lack of access to the historic floodplain by allowing increased flow from the Sacramento River to enter the Yolo Bypass during specified periods and river elevations through a gated notch on the weir's east side that will be connected to a new channel and downstream improvements.

The Project headworks would be a reinforced concrete structure with one large bay and two smaller bays in it. The headworks are designed to convey a maximum water flow of 6,000 cubic feet per second (cfs) into the Yolo Bypass when the surface elevation of the river reaches 28' and all gates are fully open. In addition to the new headworks, the Project includes an engineered, trapezoidal channel that connects the new gated notch in Fremont Weir to Tule Pond, improvements to connect isolated pools within the wooded area that extend from Tule Pond to the Tule Canal, and other downstream improvements.<sup>9</sup>

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<sup>44</sup> See generally Wat. Code, §§ 8300-9651; Pub. Resources Code, § 5096.800 et seq.

<sup>5</sup> DWR, State Plan of Flood Control Descriptive Document Update (2017) +p. iii.

<sup>6</sup> United States Geological Survey, Loss of Wetlands in the Southwestern United States (1996) < <https://geochanger.er.usgs.gov/sw/impacts/hydrology/wetlands/> >

<sup>7</sup> *In re Sutter-Butte By-Pass Assessment No. 6*, *supra*, at pp. 655-656.

<sup>8</sup> San Francisco Estuary Institute, Historical Ecological Study (2012) < <https://www.sfei.org/documents/sacramento-san-joaquin-delta-historical-ecology-investigation-exploring-pattern-and-proces> >

<sup>9</sup> Yolo Bypass Salmonid Habitat Restoration & Fish Passage Final Environmental Impact Statement/Environmental Impact Report (May 2019) p. 2-19; Accessible at: <https://www.usbr.gov/mp/bdo/yolo-bypass.html>

## WATER RIGHT PERMITTING ANALYSIS

The California Water Code requires that persons who divert water to beneficial use do so under a valid basis of right. Persons who divert surface streams for direct beneficial use on non-riparian lands, or who divert surface water to storage during times of abundance for beneficial use on riparian or non-riparian lands during times of scarcity, are required to obtain a water right permit. The diversion of natural stream flow for use on riparian lands does not require a water right permit; however, persons who divert in this fashion are required to file statements of diversion and use pursuant to Water Code section 5101.

The State Water Board has reviewed the Project EIS/EIR and determined that the Project, as described, does not require a water right permit. This conclusion is based on two observations about the Project. First, the Project is not a “diversion” as that term is understood under California water rights law. Under California law, an appropriative right involves the physical control of water to apply it to a beneficial use. (*California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820, citing Hutchins, *The Cal. Law of Water Rights* (1956).) This Project, in contrast, effects the opposite of a diversion, partially removing an artificial impediment to natural flows that otherwise would occur (and historically did occur) between the Sacramento River and the Yolo Bypass. (*Cf. Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 603-04 [an appropriative right cannot be initiated or perfected to preserve natural flow within the natural stream channel to protect fish or other instream beneficial uses].) This is distinct from, for example, the dedication of an existing consumptive water right under Water Code section 1707 to instream flow. The purpose of section 1707 is to prevent water that was previously applied to beneficial use and then dedicated to in-stream flow from being considered abandoned and subject to subsequent appropriation. Providing stranded fish an enhanced opportunity to re-enter the Sacramento River does not affect a “use” of the flows from the Yolo Bypass, but rather prevents a harm that would otherwise result from flood control operations. In that context, the Project would not affect a diversion putting water to beneficial use, but instead would partially restore an artificially engineered stream channel.

Second, the State Water Board recognizes that for over a decade funding and implementing projects at the Fremont Weir to address fish passage have been recognized as potential mitigation opportunity for take of salmonids by the Central Valley Project (CVP) operated by the U.S. Dept. of Interior, Bureau of Reclamation and State Water Project (SWP) operated by DWR.<sup>10</sup> However, this is because the “Yolo Bypass and Fremont Weir has been a documented source of migratory delay to, and loss of, adult winter-run, spring-run, [Central Valley] steelhead, and Southern [Distinct

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<sup>10</sup> National Marine Fisheries Service, Biological and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project (2009) (NMFS 2009 BiOp) p. 611; National Marine Fisheries Service, Biological Opinion on the Long-Term Operation of the Central Valley Project and the State Water Project (2019) at p. 815; California Department of Fish and Wildlife, Incidental Take Permit for the Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2081-2019-066-00) (2020) pp. 123-125.

Population Segment] of green sturgeon”<sup>11</sup> and is not related to CVP/SWP operations except during flood management. In this way, the use of the Project for mitigation is similar to paying mitigation credits at a mitigation bank. It does not make the Fremont Weir, which is a unit of the State Plan of Flood Control, a unit of the CVP/SWP. Instead, because the Project implements operating conditions, not involving either off-stream use or use of stored water, that prevent harm to fish that is occurring as a result of the SPFC and flood control operations, the State Water Board views the Project as an integral component of those flood control operations. Flood control is not a “beneficial use” for which an appropriative right can be issued or perfected. (See, e.g., State Water Board Decision 1651 (2012), p. 25.) Therefore, any flows passing between the Sacramento River and the Yolo Bypass as a result of constructing, operating or maintaining the Project would not constitute diversions for a beneficial use, and accordingly do not require a water right permit.

If you have any questions regarding this letter, please contact Craig Williams at [craig.williams@waterboards.ca.gov](mailto:craig.williams@waterboards.ca.gov) or (916) 341-5759.

Sincerely,



Erik Ekdahl, Deputy Director  
Division of Water Rights  
State Water Resources Control Board

Enclosure

cc: Leslie Gallagher, Executive Director, Central Valley Flood Protection Board  
Michael George, Delta Watermaster

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<sup>11</sup> NMFS 2009 BiOP, *supra*, at p. 611.

Mr. Newcomb

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September 1, 2020

bcc: Craig Williams  
Diane Riddle  
Matt Holland  
Tina Cannon Leahy