

1.7 San Joaquin River Resource Management Coalition and San Joaquin River Exchange Contractors Water Authority

RMC-SJREC – 1: The WY 2010 Final Interim Flows EA/IS and the Draft and Final Supplemental WY 2011 Interim Flows EAs have been incorporated as part of this Final Supplemental WY 2012 Interim Flows EA. Therefore, comments received and responses to comments on these documents are incorporated.

RMC-SJREC – 2: The terms and conditions associated with water rights orders issued by the State Water Resources Control Board (SWRCB) were obtained and have been executed for WY 2010 and WY 2011 Interim Flows. Reclamation is pursuing an additional water rights order from the SWRCB for WY 2012. SWRCB has a separate authority and obligation under state law for the issuance of the water rights order. However, impact associated with release of flows from Friant Dam to collect relevant data on flows, temperatures, fish needs, seepage losses, recirculation, recapture, and reuse have been addressed in the Draft Supplemental WY 2012 Interim Flows EA.

RMC-SJREC – 3: The Settlement requires the implementation of hydrographs based on the specific water year type. The Draft Supplemental WY 2012 Interim Flows EA analyzes the largest potential range of impacts of the Exhibit B hydrographs for a wet year type. The hydrographs are not distinct alternatives and all hydrographs combined are an alternative under the NEPA review for this project. The Restoration Goal in the Settlement includes the reintroduction of fish. However, the purpose of Interim Flows is outlined in Paragraph 15, which states that the Secretary implement “*a program of Interim Flows in order to collect relevant data concerning flows, temperatures, fish needs, seepage losses, recirculation, recapture, and reuse. Such program shall include releasing the flows identified in Exhibit B for the appropriate year type to the extent that such flows would not impede or delay completion of the measures specified in Paragraph 11(a), or exceed existing downstream channel capacities.*”

RMC-SJREC – 4: The commentor states that “Reclamation has irretrievably committed resources prior to meaningful environmental review.” It should be noted that for NEPA documents (typically for Environmental Impact Statements), an irreversible or irretrievable commitment of resources is the permanent loss of resources for future or alternative purposes and that those resources cannot be recovered or recycled; or those resources that are consumed or reduced to unrecoverable forms. This typically refers to physical resources or materials and real property. In relation to the meaning under NEPA, Reclamation has not irreversibly or irretrievably committed resources. It is outside of the scope of this NEPA document to consider funding availability or financial resources for future SJRRP actions.

RMC-SJREC – 5: The Proposed Action constitutes a complete project under NEPA because it is a project that has independent utility and provides useful information on flows, temperatures, fish needs, seepage losses, shallow groundwater conditions, recirculation, recapture and reuse conditions, channel capacity (high and low flows), and levee stability regardless of the future implementation of the Settlement. These data are useful independent of the future actions that may be implemented as part of the SJRRP, particularly with respect to understanding the flood management system and seepage. While the Proposed Action is one of the first of several steps

in implementing the SJRRP, the Proposed Action can be implemented successfully in meeting its purpose and need without any prior (e.g., WY 2010 or WY 2011 Interim Flows) or subsequent SJRRP activities.

Reclamation will prepare a separate document to address the recirculation of water that would potentially be recaptured as part of the WY 2012 Interim Flows Project. It is currently unknown where and how much water would be recaptured, although potential locations and a range of volumes are identified and covered in the Draft and Final Supplemental WY 2012 Interim Flows EAs. Because the specific plans for recirculation are not known at this time, it is too speculative to evaluate in the Supplemental EA. The recirculation of Interim Flows would be subject to subsequent environmental review and will be evaluated under NEPA and the California Environmental Quality Act (CEQA), if applicable, prior to implementation of those actions.

RMC-SJREC – 6: The Settlement and the San Joaquin River Restoration Settlement Act (Act) are separate and distinct requirements from those requirements for disclosure of impacts as required by NEPA and CEQA.

Nothing in the Act requires that the Proposed Project not harm third parties. Section 10004(d) of the Act states the following:

- (d) MITIGATION OF IMPACTS. – Prior to the implementation of decisions or agreements to construct, improve, operate, or maintain facilities that the Secretary determines are needed to implement the Settlement, the Secretary shall identify –
- (1) the impacts associated with such actions; and
 - (2) the measure which shall be implemented to mitigate impacts on adjacent and downstream water users and landowners.

The completion of the NEPA process for the WY 2012 Interim Flows Project will fulfill Reclamation’s obligations under this section of the Act.

Section 10004(h)(3) of the Act states:

- (3) SEEPAGE IMPACTS.—The Secretary shall reduce Interim Flows to the extent necessary to address any material adverse impacts to third parties from groundwater seepage caused by such flows that the Secretary identifies based on the monitoring program of the Secretary.

Implementation of the Seepage Monitoring and Management Plan, and specifically, the short-term response action to reduce Interim Flows to the extent necessary to address any material adverse impacts to third parties will fulfill Reclamation’s obligations under this section of the Act.

RMC–SJREC – 7: Reclamation will continue to coordinate with landowners to implement the measures identified in the Seepage Monitoring and Management Plan. Groundwater elevation thresholds have been developed in this plan in consideration of nearby land uses, known groundwater and subsurface conditions, and other information available or provided by

landowners. The Proposed Action for WY 2012 Interim Flows includes flow reductions in response to groundwater levels observed in the buffer or threat zones as part of the implementation of the Seepage Monitoring and Management Plan. The commitment to operating within these thresholds was shown when, during fall WY 2011 Interim Flows, flow releases were constrained at 50 cfs past Sack Dam to address downstream seepage concerns from a neighboring landowner. In addition, flood flows released from Friant Dam for public safety are not considered part of the San Joaquin River Restoration Program and potential seepage associated with those flows are beyond the scope of the analysis presented in the Draft and Final Supplemental WY 2012 Interim Flows EA.

At the time of the preparation of these responses to comments, Reclamation has received one claim for impacts under the Federal Tort Claims Act that a landowner felt occurred during WY 2010 Interim Flows. We continue to evaluate that claim.

RMC-SJREC – 8: See response to comment RMC-SJREC – 7. Lands designated as Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland) are lands that must have been used for irrigated agricultural production at some time during the four years before being mapped by the State of California Farmland Mapping and Monitoring Program. The reoperation of Friant Dam for the release of a temporary, one-year action for WY 2012 Interim Flows would not result in a long-term modification that would require a change to lands with Farmland designations.

RMC-SJREC – 9: The anecdotal knowledge presented by the commentor of bass population increases and the correlation between Interim Flows and bass populations is not supported by data or specific references. Further, Interim Flows for WY 2011 were held at 50 cfs past Sack Dam from February 1, 2011 to March 20, 2011 to address downstream seepage concerns from neighboring landowners. Because of these low flows, a connection through the San Joaquin River system to the Merced River confluence was never established. On March 21, 2011 flood flows commenced and Interim Flows ceased. Because WY 2011 Interim Flows did not create a connection to the lower San Joaquin River, it is unlikely that any perceived increases in bass population are a direct result of the Interim Flows Project.

RMC-SJREC – 10: See response to comments RMC-SJREC – 8 and RMC-SJREC – 9.

RMC-SJREC – 11: Permits and approvals are a normal part of the process for moving forward with any federal project, and these are required for Reclamation to implement its actions. In this case, the water rights order issued by the SWRCB is an approval for the temporary one-year action associated with WY 2012 Interim Flows. Unlike the San Joaquin River Restoration Settlement Act which authorizes and directs the Secretary to implement the terms and conditions of the Settlement through the Act, the water rights order is an approval for which Reclamation applies for a temporary transfer and change. In the context used in the document, the term “authorization” is used to refer to the Federal law or statute which gives Reclamation the authority to implement the WY 2012 Interim Flows Project. Because there is a difference between authorization as stated in the sense of the Settlement and Act, and regulatory permission such as that granted by the SWRCB, no changes are proposed to the text of the document.

RMC-SJREC – 12: The text cited by the commentor is correct as written. Paragraph 2 of the Settlement outlines the two goals of the Settlement. The Act provides the authority and conditions under which Reclamation will implement the Settlement. However, these conditions are not goals of the Settlement.

RMC-SJREC – 13: Reclamation is working to quantify the extent to which the river influences local groundwater elevations. This includes ongoing seepage management tasks such as identifying hydraulic conductivities, groundwater gradients, and groundwater modeling to determine the lateral extent of the river's influence on groundwater levels. Implementation of the Seepage Monitoring and Management Plan allows Reclamation to continue to expand understanding of these regional and localized conditions, allowing Reclamation to better anticipate groundwater changes before they happen and continue to avoid impacts. Reclamation will continue to work with stakeholder and landowners through the Seepage Conveyance and Technical Feedback group and as identified in the response RMC-SJREC – 7 and RMC-SJREC-8.

RMC – SJREC – 14: See response to comment RMC – SJREC – 9. Additionally, an assessment of predation on Chinook salmon is being performed associated with the Juvenile Salmonid Survival and Migration Study that is identified in Section 2.2.8 – WY 2011 Interim Flows Monitoring, 2011 Interim Flows Monitoring Activities and Studies. This data is currently being analyzed and with preliminary results posted at <http://www.restoresjr.net/flows/Fisheries.html>. Also, new studies assessing the abundance and diversity of fish in the Restoration Area and Chinook salmon predators in the Reach 1A gravel pits will be included in the Public Draft 2012 Monitoring and Analysis Plan, which is scheduled for review during October 2011.

RMC – SJREC – 15: See response to comments RMC-SJREC – 7, 8, 13, and 15. Flows past Sack Dam were reduced to avoid seepage impacts based on groundwater monitoring data that indicated that thresholds were being approached. As a result, Reclamation reduced flows to avoid impacts and to address concerns by the neighboring landowners.

RMC – SJREC – 16: The Seepage Monitoring and Management Plan of March 28, 2011, page 2, first full paragraph states, “The Plan provides a means to reduce or avoid risk of seepage impacts through a combination of monitoring and analyses to better understand and predict system response to Restoration activities, and development of thresholds and response actions designed to reduce or avoid undesirable outcomes.” The language provided in the Draft Supplemental WY 2012 Interim Flows EA is consistent with the language provided in the Seepage Management Plan and as developed in cooperation with landowners and stakeholders.

RMC-SJREC – 17: See response to comment RMC-SJREC-5.

RMC-SJREC- 18: The commentor is asking several questions regarding several different topics in one paragraph. The questions asked do not significantly add to the alternatives evaluated or add substantial information to the analysis as is required for meaningful consideration of comments under NEPA. However, answers to the questions are provided below:

- *Channel capacities:* In section 2.2.5 – Additional Implementation Considerations, of the Draft Supplemental WY 2011 Interim Flows EA, Reclamation provided an analysis and discussion of the Draft San Joaquin River Underseepage Limiting Capacity Analysis. This analysis is intended for further refinement, but clearly outlines the maximum flow capacities in each reach in relation to underseepage and saturation adjacent to levees. Reclamation has committed to keeping within these flow constraints until such time as additional information is gathered and additional modeling is performed to increase flows based on site conditions. Additionally, Reclamation is working with landowners to implement to the Seepage Monitoring and Management Plan and manage Interim Flows such that groundwater elevations do not exceed the identified thresholds as identified in responses to comments RMC-SJREC-7 and RMC-SJREC-8 and in Section 2.2.6 – Environmental Commitments, Draft Seepage Monitoring and Management Plan in the Draft Supplemental WY 2012 Interim Flows EA.
- *Fish Reintroduction:* See response to comment LSJLD – 8. The release of fall-run Chinook salmon was experimental in nature and was utilized to monitor the habits of outmigrating salmon in the San Joaquin River. There is no specified “fishery plan” for WY 2012, however, there are studies associated with the implementation of studies related to determination of fish habitat suitability, gravel studies, and water quality monitoring that will substantially inform future fisheries actions outside WY 2012 actions. These activities are discussed in the document and are a main purpose and intent of the release of WY 2012 Interim Flows, which is to enable the collection of relevant data on flows, temperatures, fish needs, seepage losses, and water recirculation, recapture, and reuse. The final fishery study actions that will be implemented in WY 2012 will be provided in the Monitoring and Assessment Plan, a draft of which will be available for public review in October 2011. These study actions are experimental in nature and are not intended to meet the Settlement’s fish reintroduction requirements. Fisheries actions associated with the long-term implementation of the SJRRP, including reintroduction actions, are beyond the scope of the analysis of the environmental impacts associated with this temporary one-year action related to WY 2012 Interim Flows.

RMC-SJREC – 19: See response to comments RMC-SJREC – 3 and RMC-SJREC – 4.

RMC-SJREC – 20: Prior to an increase in flows recommended by the Restoration Administrator, Reclamation conducts a Flow Bench Evaluation. Part of the Flow Bench Evaluation includes determining whether flows have stabilized from the last flow change at downstream locations. Reclamation determines this based on the variation in recent flow rates as reported by stream gaging stations. The ramping or stabilization time may change based on the losses, initial wetting, volume of flow change, or other factors.

RMC-SJREC – 21: The requirements of the water rights order for the WY 2011 Interim Flows Project and how Reclamation has met those requirements is outside of the scope of the Draft and Final Supplemental WY 2011 EAs. However, Reclamation requested an extension with the SWRCB to finalize these agreements. The San Luis Canal Company (SLCC) financial assistance agreement for operations and maintenance activities from February 1 through December 31, 2010 was executed on August 18, 2010. Additionally, Reclamation and SLCC executed a financial assistance agreement for the purchase and installation of four remotely

operated gates on Sack Dam to improve flow control capabilities and allow for more accurate flow control capabilities. This agreement was executed on May 31, 2011. The executed agreements for both the operations and maintenance and the installation of the gates at Sack Dam are attached as Attachment A1 and A2 to these comment responses.

Coordination with the Central California Irrigation District is on-going. Reclamation will continue to coordinate with CCID in order to execute a financial assistance agreement for operations and maintenance associated with WY 2012 Interim Flows. Correspondence related to the formation of this agreement is included as Attachment B to these comment responses.

RMC – SJREC – 22: Reclamation will continue to make deliveries consistent with the Second Amended Contract for Exchange of Waters, Contract Ilr-1144, February 14, 1968. The contract outlines the delivery of substitute water to the Central California Irrigation District, the Columbia Canal Company, the San Luis Canal Company, and the Firebaugh Canal Company (Contracting Entities). The substitute water is all water delivered at the points of delivery stipulated in the contract to the Contracting Entities, regardless of source. Reclamation will continue to make water available at the points of delivery and turnouts as stated in the contract and may utilize the San Joaquin River, the Delta-Mendota Canal (Canal) or other sources as appropriate.

Additionally, Reclamation developed an operations plan and holds weekly conference calls to discuss upcoming flows and potential limitations on release and recapture. This operations plan and weekly calls will continue throughout WY 2012 Interim Flow releases.

RMC – SJREC – 23: See response to comment RMC-SJREC – 46.

RMC – SJREC – 24: See responses to comments RMC-SJREC – 27 and RMC-SJREC – 28.

RMC-SJREC – 25: The Draft Supplemental WY 2012 Interim Flows EA is not intended to be utilized for the reintroduction of Chinook salmon to the San Joaquin River. It is not anticipated that any reintroduction activities would occur prior to the conclusion of WY 2012 Interim Flows on September 30, 2012. However, in the event that salmon were to be reintroduced prior to the December 31, 2012 deadline stipulated in the Settlement and prior to the conclusion of WY 2012 Interim Flows, additional environmental compliance would be required, including additional NEPA documentation and subsequent public disclosure by NMFS. Reintroduction of Chinook as specified in the Settlement is outside of the scope of this temporary one-year action for WY 2012 Interim Flows. Additionally, long-term actions associated with salmon reintroduction will be addressed at a program-level in future environmental documentation.

RMC-SJREC – 26: The Draft Supplemental WY 2012 Interim Flows EA addresses the flow constraints due to channel capacities and seepage concerns. The intent of the NEPA document is to analyze the maximum possible flows that could be released associated with the proposed action. Further, the document outlines constraints to the implementation of the release of WY 2012 Interim Flows in Section 2.2.5 – Additional Implementation Considerations. While a 350 cfs base flow is part of the project description, it is anticipated that seepage constraints, channel capacities constraints, and Mendota Pool maintenance activities could reduce the flows released from Friant Dam. Flows released at a lesser amount from Millerton Lake would have a lesser

environmental impact than what is analyzed in the Draft Supplemental WY 2012 Interim Flows EA, and would be included in the range of the alternatives assessed.

RMC – SJREC – 27: See response to comment RMC – SJREC – 15.

RMC – SJREC – 28: See response to comments RMC – SJREC - 7, 8, 13, 15, and 26.

RMC – SJREC – 29: The only agreement contemplated at this time is an agreement with the LSJLD for increase in maintenance activities that are directly related to Interim Flows. In the event that Reclamation were to enter into such an agreement, Reclamation would complete the necessary environmental compliance and permitting activities.

RMC – SJREC – 30: See response to comment RMC – SJREC – 46.

RMC – SJREC – 31: The commentor states that “significant impacts were disclosed in the ATR that were denied to exist in the WY 2010 EA.” It is unclear what these “impacts” were as no specific references have been made and Reclamation is unaware of any impacts that have been discovered or disclosed as a result of studies performed with the Annual Technical Report. No revisions are proposed or can be made as the specific concern is not stated in order for a revision to be provided or a substantive response to be made.

RMC – SJREC – 32: The Implementing Agencies were prepared to take advantage of data collection opportunities during flood flows, and studies proceeded as planned except limited instances when monitoring conditions were unsafe. The referenced sediment monitoring continued during flood flows as monitoring equipment was in place, and regular surveys continued to assess the sediment mobility during flood flows.

RMC – SJREC – 33: The intent of the inclusion into the Draft Supplemental WY 2012 Interim Flows EA was to present new facts and information received since the implementation of WY 2011 Interim Flows. Commitments to providing a letter to the Exchange Contractors is outside of the scope of this environmental review and would not result in any new or significant impacts from the implementation of the WY 2012 Interim Flows Project.

RMC – SJREC – 34: This statement does not provide new substantive additional information or include factual corrections. Riparian recruitment flows are part of the Wet Year flow hydrographs included in Exhibit B and includes the ramping of flows over a 60-90 period. Reclamation will continue to adhere to the Settlement requirements, including recruitment flows, if recommendations made by the Restoration Administrator are adopted by the Secretary.

RMC – SJREC – 35: As per the Act, Section 10004(h)(4), the effectiveness of Hills Ferry Barrier is being and will be evaluated as part of the implementation of the SJRRP. The last sentence in Section 2.3 – Relationship to Related Projects, Hills Ferry Barrier has been removed as this study is previously mentioned in the first paragraph of the section, lines 8 through 11 of the Draft Supplemental WY 2012 Interim Flows EA. The Act does not make the Hills Ferry Barrier an “essential component” of the SJRRP and does not commit DFG to operate the Hills Ferry Barrier. Section 10004(h)(4) of the Act states:

(4) TEMPORARY FISH BARRIER PROGRAM.—The Secretary, in consultation with the California Department of Fish and Game, shall evaluate the effectiveness of the Hills Ferry barrier in preventing the unintended upstream migration of anadromous fish in the San Joaquin River and any false migratory pathways. If that evaluation determines that any such migration past the barrier is caused by the introduction of the Interim Flows and that the presence of such fish will result in the imposition of additional regulatory actions against third parties, the Secretary is authorized to assist the Department of Fish and Game in making improvements to the barrier. From funding made available in accordance with section 10009, if third parties along the San Joaquin River south of its confluence with the Merced River are required to install fish screens or fish bypass facilities due to the release of Interim Flows in order to comply with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), the Secretary shall bear the costs of the installation of such screens or facilities if such costs would be borne by the Federal Government under section 10009(a)(3), except to the extent that such costs are already or are further willingly borne by the State of California or by the third parties.

RMC – SJREC – 36: See responses to comments RMC-SJREC – 7, 8, 13, and 15. Reclamation will implement the Seepage Monitoring and Management Plan to avoid impacts. The Proposed Action for WY 2012 Interim Flows includes flow reductions in response to groundwater levels observed in the buffer or threat zones as part of the implementation of the Seepage Monitoring and Management Plan. Groundwater monitoring efforts are on-going. Reclamation is currently monitoring approximately 125 groundwater monitoring wells and will continue to install and monitoring groundwater elevations as appropriate. This monitoring is providing useful data for WY 2012 and will continue to be collected throughout the water year.

The commenter appears to be referring to an event that was reported on a property in Reach 4A of the San Joaquin River. The property owner has subsequently submitted a claim under the Federal Tort Claims Act for damages that the party feels resulted from the release of WY 2010 Interim Flows. Reclamation and the U.S. Office of the Solicitor General are evaluating this claim and anticipate a completed evaluation by November 2011. We recognize that the San Joaquin River's interaction with the groundwater table is complex and if WY 2010 Interim Flow releases are found to be the cause of reported crop productivity losses, this will be addressed accordingly by Reclamation.

The significance criteria presented in the Final WY 2010 Interim Flows EA/IS found that potential impacts due to the implementation of Interim Flows during WY 2010 would be less than significant for hydrology and for agricultural resources, of which, both analyses were incorporated by reference in their entirety into the Draft Supplemental WY 2012 Interim Flows EA. As stated in the Draft Supplemental WY 2012 Interim Flows WA, the Seepage Monitoring and Management Plan would be implemented with the release of Interim Flows. Because the Seepage Monitoring and Management Plan will continue to be implemented and adapted to new information in order to keep groundwater elevations within thresholds stated in the plan, the release of WY 2012 Interim Flows continues to be less than significant.

RMC – SJREC – 37: See response to comment RMC – SJREC – 36.

RMC – SJREC – 38: See response to comment RMC – SJREC – 36. Further, land use is not anticipated to change within the context of the temporary one-year action of WY 2012 Interim Flows.

RMC – SJREC – 39: See response to comment RMC – SJREC – 7, 8, 13, and 15. Reclamation is committed to implementing the Seepage Monitoring and Management Plan as well as avoiding or minimizing impacts associated with potential levee underseepage concerns in order to avoid or minimize impacts. Table 2-8 of the Draft Supplemental WY 2012 Interim Flows EA provides the flow releases that Reclamation would adhere to until such time as additional data and monitoring is performed to provide evidence that flows should be increased or decreased accordingly. Additionally, Interim Flows changes would continue to be evaluated utilizing data from Daily Seepage Evaluations and Flow Bench Evaluations and will be made publicly available on www.restoresjr.net.

RMC – SJREC – 40: See response to comments RMC – SJREC – 39.

RMC – SJREC – 41: The Draft Seepage Monitoring and Management Plan identifies groundwater threshold constraints and identifies measures to keep groundwater levels at non-damaging levels. This plan is part of the WY 2012 Interim Flows Project and will be implemented, subject to landowner coordination through the Seepage Conveyance and Technical Feedback Group. The actions identified in these forums and plans will continue to be implemented. At this time, the precise method of controlling groundwater levels for the long-term SJRRP is not fully identified and these technical issues are being discussed among the landowners and stakeholders at the Seepage Conveyance and Technical Feedback Group meetings.

RMC – SJREC – 42: The Restoration Administrator recommendations are included as an Appendix to the Draft Supplemental WY 2012 Interim Flows EA for illustrative purposes only. The Restoration Administrator provides recommendations as specified in Paragraph 15 and 18 of the Settlement. Paragraph 15 stated that the Restoration Administrator make recommendations to the Secretary on the implementation of Interim Flows for the collection of data. Paragraph 18 specified that the Restoration Administrator makes recommendations to the Secretary on the manner in which the hydrographs will be implemented and when Buffer Flows are needed. The Restoration Administrator does not have the authority to recommend changes that may change the total volume of water to be released under the hydrographs presented in Exhibit B of the Settlement. The Secretary has the discretion to consider and implement the recommendations made by the Restoration Administrator. For responses to the commentor's concerns regarding the reintroduction of Chinook salmon, see response to comment RMC – SJREC – 25.

RMC – SJREC – 43: See response to comment RMC – SJREC – 42. Recommendations provided by the Restoration Administrator would be taken under consideration by the Secretary and implement the recommendations to the extent consistent with applicable law, operational

criteria (including flood control, safety of dams, and operations and maintenance), and the terms of the Settlement. The WY 2012 recommendations, when they are received, must be consistent with the Proposed Action addressed in this environmental assessment and with any permits or approvals obtained for the WY 2012 Interim Flows Project.

RMC – SJREC – 44: See responses to comments RMC – SJREC – 42 and 43.

RMC – SJREC – 45: The Annual Technical Report (ATR) is a document that compiles information from study and analysis performed by the SJRRP. The ATR is a useful tool in compiling information collected by the Program. The purpose of the ATR is not to provide or propose mitigation actions of any kind, nor is it intended to serve as resolution to any perceived outstanding issues. Reclamation will continue to implement actions identified in the Draft Seepage Monitoring and Management Plan. See responses to comments RMC – SJREC – 7, 8, 13, and 15.

RMC – SJREC – 46: This comment relies solely on proposing modifications to the Draft Seepage Monitoring and Management Plan. The plan is intended to function as a working document and is intended to be revised as needed to reflect most recent and best available information. Revisions to the Seepage Monitoring and Management Plan itself are outside of the scope of analysis performed in the Draft Supplemental WY 2012 Interim Flows EA. However, if changes are requested to this plan, it would be suggested that the commentor provide feedback via the Seepage Conveyance and Technical Feedback Group process.

1.8 San Luis & Delta-Mendota Water Authority

Via Hand-Delivery

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RE: *Draft Supplemental EA and Proposed FONNSI for the San Joaquin River Restoration Program's Water Year 2012 Interim Flows Project*

Dear Ms. Banonis:

SLDMWA- 1

The San Luis & Delta-Mendota Water Authority (Authority) submits the following comments on the draft supplemental environmental assessment and draft finding of no new significant impact (Draft SEA and Draft FONNSI, respectively) for the San Joaquin River Restoration Program's Water Year 2012 Interim Flows Project (Proposed Project). The Authority continues to support the San Joaquin River Restoration Program (Restoration Program), as it is described by the settlement in the litigation entitled *Natural Resources Defense Council, et al. v. Kirk Rodgers, et al.*, United States District Court, Eastern District of California, No. CIV. S-88-1658-LKK/GGH (Settlement) and authorized by the San Joaquin River Restoration Act, Pub. L. No. 111-11, tit. X, subtit. A, Part I, §§ 10004-10011 (Act). Yet the Authority's concern with how the United States Bureau of Reclamation (Reclamation) is implementing the Restoration Program continues to grow.¹ This growing concern exists because, like other environmental-review documents that Reclamation has previously prepared for the Restoration Program, the Draft SEA and Draft FONNSI:

- fail to explicitly acknowledge that an important part of the Proposed Project is to avoid or fully mitigate harm to third parties;
- do not include the no-harm requirement in the project description or the statement of purpose and need;

¹ Because Reclamation rests the Draft SEA and Draft FONNSI squarely on the environmental-review documents that it prepared for the WY 2010 and WY 2011 Interim Flow Programs, the Authority's prior comments on those documents remain relevant. Those and other comment letters the Authority previously submitted on environmental documents for elements of the Restoration Program are attached hereto and incorporated herein by this reference.

SLDMWA- 1

- do not include a detailed plan for the recapture and recirculation of interim flows;
- improperly segment the environmental review of the Proposed Project by separating it from Reclamation's review of the long-term program; separating it from review of the interim recapture and recirculation effort; and separating it from review of prior or future Interim Flows programs;
- ignore or only provides a superficial analysis of impacts of the Proposed Project and so fails to ensure that the Proposed Project has been developed and will be implemented without causing harm (or unmitigated harm) to third parties; and
- fail to identify the measures needed to fully mitigate harms, to the extent that harm will result from the Proposed Project.

In the end, these flaws render the Draft SEA and Draft FONNSI legally deficient.

SLDMWA- 2

1. The Draft SEA Must Not Only Comply With NEPA, But With The Act, Which Imposes On Reclamation Additional, Rigorous Requirements.

Last year, in response to the Authority's comments on the EA for WY 2011 Interim Flows, Reclamation responded that "NEPA does not make a claim to have a 'no-harm principle' associated with its implementation..."² At that time, Reclamation misunderstood the Authority's comment. Reclamation should not misunderstand the similar comment the Authority makes now. Reclamation must comply *both* with NEPA *and* the Act, and the Act *does* impose a "no-harm to third parties principle" on Reclamation and its implementation of the Proposed Project. In other words, the Proposed Project, its statement of purpose and need, and its impact analyses must adhere to and reflect the no-harm principle. Congress' no-harm requirement is an important aspect of the Proposed Project.

A. The Act Defines The Proposed Project And Requires That Reclamation Develop And Implement The Proposed Project Without Unmitigated Harm To Third Parties.

Under the Act, implementation of the Proposed Project must "not result in the involuntary reduction in contract water allocations to Central Valley Project long-term contractors."³ Nor may the Proposed Project "modify or amend the rights and obligations of the parties to any existing water service, repayment, purchase, or

² Final SEA for WY 2011 Interim Flows at 95, response to comment SLDMWA & SWC-1.

³ Act, § 10004(f).

SLDMWA- 2

exchange contract.”⁴ Reclamation was required to prepare a plan for the recapture, recirculation, exchange, and transfer of interim flows that leaves south-of-the-Delta Central Valley Project (CVP) contractors unharmed by the Restoration Program, including its interim flows.⁵ Reclamation may not argue now that these parts of the Act only require Reclamation to avoid narrowly defined impacts, not after Reclamation and the other settlement parties conceded — indeed, agreed in writing after meetings hosted by members of Congress — that the Proposed Project must leave third parties like the Authority unharmed.

SLDMWA- 3

B. The Act Adds A Full-Mitigation Requirement To NEPA Review Of The Proposed Project.

Beyond NEPA’s normal requirements, the Act requires mitigation — full mitigation — of any adverse impact on third parties caused by the Proposed Project.⁶ Hence, review here is really “NEPA-plus.” Congress increased the level of review when it enacted the Act. The Act gave NEPA more teeth for the whole Restoration Program by requiring Reclamation to do no material harm at all to third parties.⁷ Section 10004(d) of the Act does not qualify “impacts” that Reclamation must identify and mitigate. Instead, the Act requires Reclamation to ensure that third parties like the Authority and its member agencies are not adversely affected at all — something that Reclamation and the other settlement parties have already acknowledged and committed to do. Reclamation must initially seek to avoid causing third party impacts, and, if they result, Reclamation must fully mitigate for those impacts. Thus, Reclamation must ensure the Draft SEA accurately identifies all the impacts, describing the corresponding mitigation in detail, and fully explaining how the mitigation will eliminate the harmful effects on third parties. The Draft SEA and Draft FONSI do not do that. Until they do, they violate federal law.

Indeed, accurate analysis depends on full consideration of the no-harm requirement and mitigation, where needed, not just peripheral treatment. For example, the Draft SEA says that “[f]or WY 2012 Interim Flows, all flows will be limited such that adverse impacts to lands from seepage will be avoided *or reduced*.”⁸ But *reduced* is not the standard or requirement imposed by the Act — the Act requires Reclamation to completely avoid or totally mitigate material impacts. “The Secretary shall reduce Interim Flows to the extent necessary to address any material adverse impacts to third parties”⁹ To afford third parties any less protection than full mitigation of all harm violates Reclamation’s public commitments; and to ignore those impacts or to treat partially-but-not-totally-reduced impacts as insignificant violates the

⁴ Act, § 10004(g).

⁵ Act, § 10004(a)(4)(B); Settlement, ¶ 16.

⁶ Act, §§ 10004(d), (h)(1)(C)(ii).

⁷ *Id.*

⁸ Draft SEA at 1-6:17–19, emphasis added.

⁹ Act, § 10004(h)(3).

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Act and therefore the NEPA-plus review that the Act imposes on Reclamation and its implantation of the Proposed Project.

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2. The Draft SEA Violates The NEPA-Plus Review That Congress Requires Because (A) It Omits An Important Part Of The Proposed Project, (B) It Unlawfully Segments The Interim Flow Program From The Remainder Of The Restoration Program, And (C) It Fails To Explain How Specific Harms To Third Parties Will Be Avoided Or Fully Mitigated.

A. Reclamation Has Not Included Congress' No Third Party Harm Principle In The Draft SEA's Project Description Or Statement Of Purpose And Need.

i. The No Harm To Third Parties Principle Should Be Included In The Project Description Because It Is A Significant Limitation On Reclamation's Proposed Action.

Under NEPA, an agency must provide an accurate description of the proposed action. An accurate description is necessary to ensure the proposed action's environmental impacts are accurately disclosed and analyzed, and to define the range of alternatives to the proposed action.¹⁰ As interpreted by the Ninth Circuit, NEPA requires a full evaluation of site-specific impacts "when a critical decision has been made to act ..., i.e., when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to [a] project at a particular site."¹¹ The determination of whether a 'critical decision' has been made begins with an accurate description of the [agency's] proposed action."¹² An agency's decision to proceed with an action will be set aside as arbitrary and capricious if it entirely fails to consider an important aspect.¹³

The project description in the Draft SEA is fatally deficient because it omits the critical no-harm component of the Proposed Project. The Draft SEA approaches the no-harm requirement only obliquely and indirectly with general statements that the interim flows will be released "according to the Settlement and the Act ... consistent with ... laws, and any agreements with downstream ... entities."¹⁴ It never expressly

¹⁰ See 40 C.F.R., §§ 1502.13 (requiring statement of purpose and need), 1502.14 (requiring an EIS to "rigorously explore and evaluate" alternatives to the proposed action and the environmental consequences of the action), 1502.16 (requiring disclosure of the proposal's environmental consequences).

¹¹ *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 at 801-802 (9th Cir. 2003).

¹² *Aberdeen & R. R. Co. v. Students Challenging Regulatory Agency Procedures et al.*, 422 U.S. 289, 322 (1975).

¹³ *Friends of Wild Swan v. US Fish & Wildlife Serv.*, 12 F.Supp.2d 1121, 1131 (D. Ore. 1997).

¹⁴ Draft SEA at 2-2:8-11.

describes the no-harm requirement of the Proposed Project, much less discusses it as a critical component of the Proposed Project or as an important consideration in evaluating impacts. The project description is also inadequate because it does not include important elements of the Proposed Project that Reclamation has yet to define through the mandated recapture and recirculation plan.¹⁵ See discussion under heading 2(C) *infra*.

The Authority raised similar concerns about last year's *Draft Environmental Assessment for Recirculation of Recaptured Water Year 2011 San Joaquin River Restoration Interim Flows*, and Reclamation responded merely by referring to section 10004(f) of the Act, which is accurate but incomplete. Quoting section 10004(f) is no substitute for a direct acknowledgement of Reclamation's responsibility to avoid or fully mitigate all material harm; it is no substitute for a detailed explanation of how each aspect of the Proposed Project will comply with that important requirement; and it is no substitute for a similar analysis when it comes to alternatives.

ii. The No-Harm To Third Parties Principle Should Be Included In The Statement Of Purpose And Need Because It Will Directly Affect The Selection Of Alternatives, Impact Analyses, And Mitigation Measures That Reclamation Must Develop And Implement.

The Draft SEA's statement of purpose and need is defective, too, for the same reason discussed above — it fails to include Congress's no-harm requirement. The Draft SEA merely says that the "intent of the Interim Flows release is to allow data to be collected on flows, temperatures, fish needs, seepage losses, and water recirculation, recapture, and reuse"¹⁶; that the stated purpose is to "implement the provisions of Paragraph 15 of the Settlement"¹⁷; and that the need "is to support collection of relevant data to guide future releases of Interim flows and Restoration Flows."¹⁸ Like the project description, this statement of purpose and need is much too general, and could not and has not been used to ensure alternatives are developed and/or screened consistent with the no-harm to third parties principle. Because the statement of purpose and need omits the key project element of avoiding adverse impacts to third parties, alternatives might be considered that seem to satisfy the purpose and need as they are written in the current draft but that do harm to third parties and so violate the Act and creates a fatal flaw in the Draft SEA.

¹⁵ Act, § 10004(a)(4); Settlement, ¶ 16.

¹⁶ Draft SEA at 1-1:27–28, 1-3:34–36.

¹⁷ Draft SEA at 1-5:6–10; see also lines 12–17 and 1-7:7–10.

¹⁸ *Id.*

iii. Reclamation Must Define "Harm" With More Specificity To Satisfy The Act And Reclamation's No-Harm Commitment To The Authority.

To ensure it adheres to the no-harm commitment, Reclamation must include in the Draft SEA a definition "harm" and use that definition as a critical component of all "thresholds of significance". The Authority proposes the following language:

The Act requires that the Proposed Project not harm third parties. "Harm" here means

- (1) any impact that deprives third parties, including south-of-the-Delta CVP contractors, of water that would otherwise be available to them in the absence of the Proposed Project,
- (2) any impact that adversely affects the reliability and water quality of their water supply,
- (3) any impact that increases the financial costs of their water supply (such as cost to water purchase, operation and maintenance costs, etc.), or
- (4) any adverse impact to or obligation incurred by a downstream water user, landowner, water agency, or levee district that occurs as a result of, arises from or is caused by implementation of the San Joaquin River Restoration Program.

Reclamation will assess project impacts by comparing conditions with and without the Proposed Project, using the definition provided above as a component of all "thresholds of significance". Reclamation will not implement the Proposed Project in a manner that harms third parties. The Proposed Project will either avoid impacts that cause harm or fully mitigate for them.

To further protect third parties from harm, the Authority requests that Reclamation clarify the definition of available capacity it included in the Draft SEA. Section 10004(a)(4)(b) of the Act subordinates Reclamation's use of CVP facilities for the Restoration Program, including the Proposed Project, to its use of CVP facilities to move existing or future acquired water for south-of-the-Delta contractors. The Draft SEA may not adequately address the potential harm to the Authority and other third parties. In the Draft SEA, Reclamation defined "available capacity" as:

capacity that is available after satisfaction of all statutory and contractual obligations to existing water service or supply contracts, exchange contracts, settlement contracts, transfers, or other agreements involving

or intended to benefit CVP/SWP contractors served water through CVP/SWP facilities.”¹⁹

The definition is unclear whether "existing" modifies "water service or supply contracts," or whether it modifies all of the agreements listed. The law precludes "existing" to modify all of the listed agreements. Thus, to avoid the ambiguity and ensure the definition is consistent with the Act, as well as other sections of the Draft SEA,²⁰ Reclamation must make plain that it is committed to implement the Proposed Project in a manner that does not impair present and future obligations assumed for the benefit south-of-the-Delta contractors. The Authority suggests the following language:

Available capacity is the capacity that is available after satisfaction of all statutory and contractual obligations to make deliveries through Delta facilities, including but not limited to:

- (1) obligations related to Level 2 and Level 4 refuge water supplies,
- (2) obligations under existing or future water service, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities,
- (3) all obligations under existing or future transfer, exchange, or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served through the Delta Division facilities, including the Environmental Water Account, Yuba Accord, or similar programs,
- (4) obligations under existing or future long-term water supply contracts involving State Water Project contractors served through Delta Division facilities, and
- (5) all water delivery obligations established by the State Water Project Water Supply Contracts, including, but not limited to, the categories of deliveries set forth in Article 12(f) of such contracts.

B. Reclamation Is Illegally Segmenting Environmental Review For The Restoration Program.

Agencies may not segment a major federal action into smaller components to avoid either the application of NEPA or the preparation of a more detailed assessment of the environmental effects of the overall federal action. "Segmentation is to be avoided in order to ensure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions."

¹⁹ Draft SEA at 2-8:1–4, emphasis added.

²⁰ Draft SEA at 2-20:23–24.

Indeed, to minimize the threat of segmentation, the Council of Environmental Quality's NEPA Regulations contain detailed requirements pertaining to the scope of actions that must be considered. An environmental document must consider "connected actions," "cumulative actions," and "similar actions." Actions are "connected" and must be considered in a single environmental document if they:

- (1) automatically trigger other actions that might require environmental impact statements;
- (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or
- (3) are interdependent parts of a larger action and depend on the larger action for their justification.

The Ninth Circuit applies an "independent utility" test to determine whether multiple actions are so connected as to mandate consideration in a single environmental document. The crux of the test is whether each of the actions would have taken place with or without the other and thus had "independent utility."

i. The Draft SEA Separates Review Of The 2012 Interim Flows Program From The Restoration Program.

The Draft SEA illegally segments environmental review of the Restoration Program. Because of the manner in which Reclamation has developed the Restoration Program, released interim flows, and implemented other elements of the Restoration Program, each Interim Flows Program is closely related to and bound up with the overall Restoration Program. Therefore, Reclamation was required, but failed to, undertake programmatic environmental review of the Restoration Program before implementing its elements (i.e., the Interim Flow Program). Indeed, the Draft SEA concedes the 2012 Interim Flow Program has no independent utility. The Draft SEA provides, besides extending the 2011 "Interim Flows Project for one additional year", it "generally does not change other aspects of this project."²¹

ii. The Draft SEA Illegally Separates Review Of Reclamation's Release Of Interim Flows From Reclamation's Recapture And Recirculation Of Those Interim Flows.

In the Draft SEA, Reclamation has also illegally segmented the review of Reclamation's release of interim flows from Reclamation's recapture and recirculation of the interim flows. That the Proposed Project and the recapture and recirculation of interim flows are intertwined is apparent, even from the Draft SEA's discussion. In the Draft SEA, Reclamation wrote: "Interim Flows and their associated actions are directly related to the availability of water for recirculation back to the Friant Division long term contractors." It also provided:

²¹ Draft SEA at 1-2:22.

Under the WY 2012 Interim Flows, recirculation of recaptured water to the Friant Division could require mutual agreements between Reclamation, DWR, Friant Division long-term contractors, and other south-of-Delta CVP/SWP contractors.²²

Yet, Reclamation admits that it is reviewing the recapture and recirculation of the interim flows outside of the Draft SEA:

Reclamation is working with the Friant Division long-term water contractors to prepare a *separate* Environmental Assessment to determine possible mechanisms to either exchange or deliver to the Friant Division long-term contractors recaptured water stored in San Luis Reservoir.²³

Indeed, in this case, there can be no reasonable dispute that, in 2012, provision of interim flows and the recapture and recirculation of those flows are connected. There is no water to recapture and recirculate without the interim flows.²⁴ Those two elements result from a *single* settlement agreement and a *single* act of Congress.²⁵ Consistent with that, in 2010, Reclamation filed a single petition with the State Water Resources Control Board to modify Reclamation's water rights to allow it to implement both components.²⁶ For all of these reasons, Reclamation has unlawfully segmented two elements of the same action. Accordingly, the Draft SEA here does not meet minimum standards set by NEPA.

C. The Draft SEA Does Not Consider The Congressionally Mandated Recapture And Recirculation Plan.

The Authority has already noted above NEPA demands an accurate description of the Proposed Project. The description of the Proposed Project, however, is materially lacking. It does not include the congressionally mandated plan for recirculation, recapture, reuse, exchange, or transfer of interim flows. That plan is expected to define, among other things, the criteria to determine the volume of interim flows available for recapture, the pumping facilities where the water will be recaptured, and the priority of use for those facilities. It is also expected to determine priority of use for facilities in which Reclamation might store the recaptured interim flows. And,

²² Draft SEA at 3-19:7-10.

²³ Draft SEA at 3-19:10-13 (emphasis added).

²⁴ Draft EA/FONSI for Recirculation of Recaptured Water Year 2011, San Joaquin River Restoration Program Interim Flows (2011 Recirculation Draft EA) at 8 (explaining that the Draft EA considers "water stored in [San Luis Reservoir] or Millerton Lake as a *result of WY 2011 Interim Flows*"(emphasis added)).

²⁵ See 2011 Recirculation Draft EA at 1.

²⁶ See State Water Board Order WR 2010-0029-DWR, Order 2011-0001-EXEC. Copies of Order WR 2010-0029 DWR and Order 2011-0001-EXEC are attached to our comments on the 2011 Recirculation Draft EA and are hereby incorporated herein by this reference.

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the plan will need to be consistent with the legal requirements imposed by the Act and discussed above. Without that plan, Reclamation cannot adequately describe the Proposed Project and has not done so in the Draft SEA. As a result, Reclamation does not and cannot accurately discuss or analyze impacts of the Proposed Project. It does not and cannot determine if the Draft SEA presents a reasonable range of alternatives. And it does not and cannot adequately support conclusions and findings made in the Draft SEA and draft FONSI.

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D. The Draft SEA Does Not Consider The Impacts Of The Reintroduction Of Chinook Salmon.

In the Draft SEA, Reclamation states clearly that "Chinook salmon will not be reintroduced to the river during WY 2012."²⁷ In a footnote on that same page, Reclamation explains: "The Settlement schedule identifies the reintroduction of Chinook salmon by December 31, 2012. WY 2012 Interim Flows would be between October 1, 2011 and September 30, 2012, which is outside of the timing of this release target date."²⁸ However, in that same footnote, Reclamation equivocates. Reclamation writes: "If Chinook salmon are scheduled to be released prior to the conclusion of WY 2012, Reclamation will coordinate with NMFS."²⁹ That equivocation is unnecessary. Reintroduction of Chinook salmon cannot occur in Water Year 2012, at a minimum, because infrastructure required under the Settlement is lacking,³⁰ and necessary authorization and rules associated with the reintroduction have not been respectively obtained and issued.

Of great importance to the Authority and to the reintroduction of Chinook Salmon is an application filed by the United States Fish and Wildlife Service on September 29, 2010. That application, titled: "*10(a)(1)(A), Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River*", however, is legally inadequate. Prior to Chinook salmon being reintroduced, the United States Fish and Wildlife Service would have to amend its application and the National Marine Fisheries would have to act on that application. The Authority previously provided comments to the National Marine Fisheries Service on that application, explaining its inadequacies. Those comments are attached hereto and incorporated herein by this reference.

E. The Draft SEA Fails To Adequately Analyze At Least Six Specific Potential Harms To Third Parties.

The Authority previously raised to Reclamation during comment period for environmental documents for elements of the Restoration Program the same concerns raised in this letter. Those concerns were not adequately addressed in prior

²⁷ Draft SEA at 2-16:5-6.

²⁸ Draft SEA at 2-16, fn.4.

²⁹ *Id.*

³⁰ Settlement, ¶ 11.

Reclamation responses to comments, and they have not been adequately addressed in the Draft SEA. The Authority repeats its concerns, with the expectation that Reclamation will address them in a revised Draft SEA and in the final SEA.

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i. Water-Quality Degradation In The Delta-Mendota Canal And Mendota Pool.

During 2010 and 2011 operations, water-quality impacts on the Delta-Mendota Canal and Mendota Pool resulted from releases of interim flows, and the Authority, other stakeholders and Reclamation have developed a water-quality response plan for the Delta-Mendota Canal and Mendota Pool that would prevent this kind of harm to third parties in the future. Nonetheless, in the Draft SEA, the impacts to Delta-Mendota Canal and Mendota Pool water quality caused by the Proposed Project must be identified and Reclamation must discuss how the response plan will avoid those impacts.

Further, Reclamation's prior responses regarding water quality on the Delta-Mendota Canal and Mendota Pool were inadequate. Reclamation discounted the water-quality on the Delta-Mendota Canal and Mendota Pool by asserting water-quality degradation has occurred in the on the Delta-Mendota Canal and Mendota Pool before Reclamation began implementing the Restoration Program. Reclamation suggested that the water-quality impacts identified by the Authority were therefore not unique to the Proposed Project and thus not Reclamation's responsibility. Such a response completely sidesteps the concern that the Authority raised then and which it reiterates now, namely that the Proposed Project causes impacts by creating water-quality issues at times when or to a degree they would not occur without implementation of the Proposed Project.

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ii. Reduced Access To Flood Flows.

Reclamation needs to ensure that the water supply of the south-of-the-Delta CVP water-service contractors will not be adversely impacted when the Proposed Project reduces flood flows below Friant Dam. Historically, flood flows below Friant Dam that reached the Mendota Pool have been delivered to the members of the San Joaquin River Exchange Contractor Water Authority, and a like amount of water has been "backed up" into San Luis Reservoir. That backed-up water has been made available to south-of-the-Delta CVP water-service contractors. The flood flows historically accounted for as much as 25 percent of the annual water supply available to them. Depending upon how Reclamation develops and implements the Restoration Project, Reclamation could reduce the occurrence of flood flows and consequently the water supply of the south-of-the-Delta CVP water-service contractors. To ensure that those adverse impacts do not occur, or, if they do, that Reclamation fully mitigates for them, Reclamation must evaluate Friant Dam operation consistent with the "threshold of significant" and definition of "harm" presented above. Reclamation must consider conditions (hydrologic, regulatory, etc.) with and without the Proposed Project.

The Authority raised this concern last year as well. Reclamation's response was that "[b]ecause of the short-term and temporary nature of the Proposed Action,

impacts to water supply would be less than significant” — without any further explanation or analysis whatsoever. Such a superficial and cursory approach again this year would be grossly inadequate. Reclamation must consider the impacts of the Proposed Project under a range of hydrology. And, regardless of the duration or permanence of the Proposed Project, if it causes unmitigated harm to third parties, it violates both the Act and Reclamation’s express commitments.

Likewise, it is insufficient to do as Reclamation did last year and simply quote section 10004(f) of the Act and state that the Proposed Project will “be implemented consistent with the Act” — without saying how or including an express, detailed definition of what constitutes harm (see discussion in part 2(A)(iii) above) — and merely concluding that it will “not involuntarily reduce non-Friant Division contract water allocations.”³¹ The Act and Reclamation’s express commitments require Reclamation to avoid *all* unmitigated harm to third parties.

Finally, even if the Proposed Project will not run afoul of section 10004(f) or any other part of the Act or Reclamation’s commitment to do no harm, the Draft SEA still does not give a detailed explanation of how Reclamation will implement the Restoration Project without harm to third parties. Cursory conclusions are legally insufficient under NEPA and must be supported by detailed analysis and explanation to show a rational connection between the evidence and the action chosen.³²

iii. Reduced Access To Facilities.

Reclamation must also ensure that flows under the Proposed Project do not take precedent over historical and permitted flood-flow routing. And Reclamation must ensure that during flood operations, the channel capacity to the Mendota Pool provides for the delivery of water to meet demands of the San Joaquin River Exchange Contractor Water Authority members. If the interim flows are given priority and use of the channel capacity for releases past the Mendota Dam during flood-flow operations, south-of-the-Delta contractors will be deprived of water that they would otherwise have received, water that would have been conveyed at the Mendota Pool and beneficially used. An accounting methodology and description of how the channel capacity will be prioritized must be included in the Draft SEA’s description of the Proposed Project.

Similarly, given the limited capacity of the CVP and SWP to pump water from the Delta, Reclamation must ensure that recapture of flow under the Proposed Project through CVP and SWP pumping facilities is pumped only after all water that is available to the Authority and other affected third parties is pumped (including water available through transfer or exchanges). The pumping prioritization regime needs to be added to the Draft SEA’s project description. When the Authority raised similar concerns last year, Reclamation responded simply by referring to its answer to the

³¹ Final EA for WY 2011 Interim Flows at 96, response to SLDMWA & SWC-5.

³² *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983); *accord Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010).

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concerns about reduced flood flows. For all the same reasons that are detailed in the last two paragraphs in part 2(E)(ii) immediately above, this response would be wholly inadequate to this comment as well.

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iv. Adverse Changes In New Melones Dam Operations.

The Draft SEA addresses New Melones Dam releases by stating that “[w]ater to be released from New Melones Reservoir to meet Delta water quality objectives is not part of the Proposed Action and would not be considered part of the recaptured flows.”³³ But that does little to address the concern. The Authority recognizes that New Melones water is not a facility Reclamation will use to provide interim flows. Nonetheless, the Restoration Project, and specifically the interim flows, could result in changes in New Melones operations that adversely affect third parties including the Authority’s member agencies.

Current CVP operations intended to achieve Reclamation’s responsibility for water-quality objective often require New Melones Dam releases. During certain periods, release of that water results in water being available to be pumped from the Delta by the CVP and SWP. The Proposed Project might result in reductions in New Melones Dam releases; the interim flows might provide the water needed to meet water-quality objectives otherwise met with releases from New Melones. If that happens, depending on how Reclamation accounts for interim flows and recapture and recirculates interim flows, Reclamation could harm third parties by depriving them of water they otherwise would have in the absence of the Restoration Program.

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v. Increased Regulatory Burden At CVP Facilities.

The Authority and other interested third parties bear numerous regulatory burdens imposed on the CVP, SWP, and other Delta water facilities. The Proposed Project could change the hydrograph of the San Joaquin River, hydrodynamics in the San Joaquin River and the Delta, and operation of the CVP, SWP and other Delta water facilities. These changes might impact regulatory agencies’ analyses and lead them to augment or shift more regulatory burden onto the water supply otherwise available to the Authority’s member agencies, as well as others. Reclamation must consider the possibility that the Proposed Project might result in increased regulatory burdens, identify those potential impacts, analyze them fully, and explain how Reclamation will completely mitigate for impacts that may be caused to third parties, as the Act and Reclamation’s agreements require.

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vi. To The Degree That The Proposed Project Might Reduce The Supply Of Water To The Authority’s Member Agencies, Impacts To The Human Environment Are Likely.

For all of the reasons the Authority previously explained, by law the Proposed Project cannot reduce the Authority’s water supply. However, if it does the Proposed

³³ Draft SEA at 2-12:10–12.

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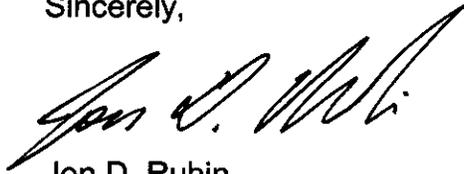
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Project will likely adversely affect the human environment by, among other things, resulting in land subsidence, deteriorating air quality, or exacerbating environmental justice issues. Thus, the Draft SEA would need to consider those affects, if the

Proposed Project is not developed inconsistent with the law and does not protect the Authority's member agencies from harm.

The Authority looks forward to reviewing a revised and recirculated Draft SEA and Draft FONNSI, which are consistent with the Authority's comments.

Sincerely,



Jon D. Rubin

Enclosures

cc: Daniel Nelson

3.12 San Luis & Delta-Mendota Water Authority and State Water Contractors

San Luis & Delta-Mendota Water Authority



P.O. Box 2137
Los Banos, CA 93635

State Water Contractors, Inc.



1221 L Street, Suite 1050
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July 20, 2009

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Re: Environmental Assessment, Proposed Finding of No Significant Impact, Initial Study, and Draft Mitigated Negative Declaration for the San Joaquin River Restoration Program's Water Year 2010 Interim Flows Project

Dear Mr. Phillips and Mr. Faulkenberry:

The San Luis & Delta-Mendota Water Authority and the State Water Contractors (collectively, "Water Agencies") submit the following comments on the draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration ("Draft EA/FONSI/IS/MND") for the San Joaquin River Restoration Program's ("SJRRP") Water Year 2010 ("WY 2010") Interim Flows Project ("Proposed Project"). The Water Agencies present their comments with the hope they will be addressed, the Draft EA/FONSI/IS/MND will be revised, and the final EA/FONSI/IS/MND will thereby comply with the mandates of the National Environmental Policy Act and the California Environmental Quality Act.

The Water Agencies support the Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Kirk Rogers, et al.* ("Settlement") and actions taken consistent with the legal mandates and authorities provided under the San Joaquin River Restoration Settlement Act, Public Law 148-359 ("Act"). However, as more fully explained below, the Water Agencies are concerned the description of the Proposed Project is not consistent, and the Proposed Project may not satisfy the Purpose and Need, as sections of the Draft EA/FONSI/IS/MND indicate the Proposed Project, if implemented, would violate the Settlement and the Act. They are also concerned that

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the Proposed Project is not placed into proper context, as the Draft EA/FONSI/IS/MND fails to discuss the effects of the Proposed Project in relation to all potentially relevant statutes, laws, programs, and agreements.

SLDMNA&SWC- 1. The Draft EA/FONSI/IS/MND Does Not Provide A Consistent Description Of The Proposed Project Or A Project Description That Is Consistent With The Purpose And Need
1

The purpose and need for the Proposed Project is to implement the San Joaquin River Restoration Program ("SJRRP"), as established by the 2008 Stipulation of Settlement in *Natural Resources Defense Counsel, et al. v. Kirk Rodgers, et al.*, and authorized by the San Joaquin River Restoration Settlement Act, Public Law 146-359. (Draft EA, pp. 1-1). As such, the Proposed Project is explained as "the release of WY 2010 Interim Flows according to the Settlement and the Act." (Draft EA, pp. 2-5). The Proposed Project, as does the Settlement and Act, contemplates the potential recirculation or recapture of the releases. In all cases, however, it should be beyond reasonable dispute that the intent of the Settlement and the Act are, and the Proposed Project should be, limited to recirculating or recapturing of releases in a manner that does not adversely affect the Water Agencies' members. (See, e.g., Act, Public Law 146-359, § 10004(a)(4)). The Proposed Project does not reflect that intent and limitation consistently. The intent and limitation are also not properly reflected in the purpose and need.

The Draft EA/FONSI/IS/MND does explain the Proposed Project would include the recapture of water, "subject to *available capacity* within CVP/SWP storage and conveyance facilities, including the Jones and Banks pumping plants, the California Aqueduct, the DMC, San Luis Reservoir and related pumping facilities, and other facilities of CVP/SWP contractors." (Draft EA, pp. 2-9, 2-12, 2-26)(emphasis added)). The Draft EA/FONSI/IS/MND includes other limitations on the recirculation or recapture of water. (Draft EA, p. 2-9). However, nowhere does the Draft EA/FONSI/IS/MND provide a clear and direct statement that the recirculation or recapture of water will not cause any adverse impact to the Water Agencies' members. In fact, language and modeling results presented in the Draft EA/FONSI/IS/MND suggest such impacts are acceptable.

SLDMNA&SWC- 1a. A. The Project Description And Direct Impacts Analyses Are Inconsistent With The Settlement And The Act.

Although in places the Draft EA/FONSI/IS/MND could be read to provide the protections to third parties intended and/or required by the Settlement and Act, other

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sections of the Draft EA/FONSI/IS/MND, including the modeling, undermine such an interpretation. For example, the description of the Proposed Project provides that the "maximum quantity of WY 2010 Interim Flows that could be diverted from the Restoration Area [recirculated] is limited by the combined diversion capacity at all identified diversion points." (Draft EA, p. 2-27.) The Draft EA/FONSI/IS/MND provides similar statements elsewhere. None of those statements are limited. There is no clear constraint that limits the Proposed Project's use of capacity to capacity available only after the obligations to/needs of the Water Agencies' members are met.¹

SLDMNA&SWC- Further, the Draft EA/FONSI/IS/MND presents the results of modeling, which
1b indicate the Proposed Project could adversely impact the quantity and/or timing of water conveyed at the Harvey O. Banks (Banks pumping plant) and C.W. Jones Pumping Plants (Jones pumping plant) or stored in San Luis Reservoir. Attachment 1 to the Draft EA/FONSI/IS/MND presents a number of tables, depicting modeling results. Some of those tables (Tables 70-75) present the monthly averages of simulated pumping by the CVP and SWP at the Jones and Banks pumping plants, respectively. The tables show at least one month in each water year type in which the Proposed Project will negatively impact CVP/SWP pumping rates – some of which the significance should be beyond reasonable dispute. For example, Table 75 shows a 5 percent adverse impact to CVP/SWP pumping during August of critically dry years. Tables 121-128, which show changes to San Luis Reservoir, provide similar data. The modeling of Proposed Project impacts suggests the Proposed Project may, at times, reduce San Luis Reservoir storage. Again, there are no statements in the Draft EA/FONSI/IS/MND that the Proposed Project will avoid the impacts identified in the modeling, that the Proposed Project will be implemented in a manner consistent with the Settlement and the Act.

SLDMNA&SWC- B. Potentially Significant Indirect Impacts Of The Project Are Not Disclosed.

1c The CVP and SWP are significantly regulated pursuant to the federal Endangered Species Act. The Draft EA/FONSI/IS/MND does not take into account the significant effect the Proposed Project may have on the ability of the CVP/SWP to comply with those regulations. It fails to analyze potential indirect impacts from any potential increased regulatory burdens, for example, resulting from the increased take of

¹ To provide necessary protection to the Water Agencies' members, the Proposed Project should include accounting measures that ensure the quantity of recirculated or recaptured water made available to the Friant contractors is limited to water resulting from Proposed Project and available at the point of re-diversion (i.e., measures that account for potential losses from depletions, diversions by others, reoperation of facilities on tributaries to the San Joaquin River, etc.). The existence of and the manner in which such an accounting would be carried out is not apparent in the Draft EA/FONSI/IS/MND.

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listed species that could occur when implementing the Proposed Project.² For instance, if the Proposed Project results in additional pumping at the Jones and/or Banks pumping plant and that additional pumping causes the incidental take of fish authorized under a biological opinion (i.e., Delta smelt, winter run salmon, etc.), the take could contribute to the CVP and/or SWP reaching or exceeding take limitations imposed in a biological opinion. Under those circumstances, the Proposed Project could foreclose the ability of the CVP and/or SWP to deliver water to the Water Agencies members that would otherwise be delivered in the absence of the Proposed Project. There are no statements in the Draft EA/FONSI/ISMND that suggest the Proposed Project will be implemented in a manner to avoid those types of impacts.

SLDMRA&SWC- 2. Effects of the Proposed Project in Relation To All Potentially Relevant Statutes,
2 Laws, Programs, and Agreements.

Section 6.0 of the Draft EA/FONSI/ISMND describes a number of statutes, laws, programs, and agreements. However, nowhere in that section or elsewhere does the Draft EA/FONSI/ISMND discuss the authority of the State Water Resources Control Board ("State Water Board") and California Regional Water Quality Control Board in relation to water quality. As an example and at a minimum, the Final EA/FONSI/ISMND should discuss the State Water Board's periodic review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan"). In particular, the Final EA/FONSI/ISMND should explain that the State Water Board will review water quality objectives (i.e., the San Joaquin River flow objective), which could result in the State Water Board assigning to the United States Bureau of Reclamation responsibility for meeting objectives, responsibility that could burden operation of the Friant Division of the CVP.

SLDMRA&SWC- 3. Other Errors Or Inconsistencies

3a

A. The Draft EA/FONSI/ISMND does not consider the potential effects of the Proposed Project, with the constraints imposed on the CVP and SWP by the 2008 biological opinion issued by the United States Fish and Wildlife Service for CVP and SWP operations ("Smelt BIOp") or the June 2009 biological opinion issued by the National Marine Fisheries Service for CVP and SWP operations. Sections of the Draft EA/FONSI/ISMND are inconsistent with those BIOps. For example, Old River and Middle River ("OMR") flows listed in Appendix G, Tables 76 to 81, exceed the allowable

² In addition, the SWP may be subject to regulation under the State Endangered Species Act. Such regulation, if valid, could increase the burdens on the SWP. Therefore, Final EA/FONSI/ISMND should consider the Proposed Project in context with State ESA regulation.

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reverse flow limits under the Smelt BiOp for most months under both the No Action and Proposed Action scenarios.

SLDMNA&SWC- 3b B. The values listed in Table 4-40 do not match the October-February values listed in Appendix A, Tables 70-75.

SLDMNA&SWC- 4. Conclusion

4

For the reasons stated above, the Water Agencies respectfully request that the Draft EA/FONSI/IS/MND be revised to address the above-stated concerns. In addition to correcting the "other errors" noted above and discussing the authority of the State Water Board and California Regional Water Quality Control Board, the descriptions of the Purpose and Need and the Proposed Project should be revised to state clearly that implementation of Proposed Project shall not have adverse impacts to the Water Agencies' members (no adverse change in quantity or timing of water deliveries, no increased financial burdens).

SLDMNA&SWC- 5 The following definition should be included and used to define "available capacity".

Pumping and conveyance that is available at the C.W. Jones Pumping Plant, at the Harvey O. Banks Pumping Plant, in the Delta-Mendota Canal or in the California Aqueduct, after satisfying all statutory and contractual obligations to make deliveries through Delta facilities,³ including but not limited to: (1) obligations related to Level 2 and Level 4 refuge water supplies, (2) obligations under existing or future water service, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities, (3) all obligations under existing or future transfer, exchange or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served water through Delta Division facilities, including the Environmental Water Account, Yuba Accord, or similar programs, (4) obligations under existing or future long-term water supply contracts involving State Water Project contractors served State

³ For purposes of this definition, "Delta facilities" should mean those existing and future Central Valley Project and State Water Project facilities in and south of the Sacramento-San Joaquin Rivers Delta, including, but not limited to, the C. W. Jones Pumping Plant, Delta Mendota Canal, O'Neill Forebay, O'Neill Pumping/Generating Plant, San Luis Reservoir, Clifton Court Forebay, Harvey O. Banks Pumping Plant and the California Aqueduct.

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Water Project water through Delta Division facilities, and (5) all water delivery obligations established by the State Water Project Water Supply Contracts, including, but not limited to, the categories of deliveries set forth in Article 12(f) of such Contracts.

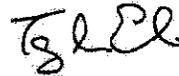
SLDMWA&SWC- 6 And, the Final EA/FONS/IS/MND should state clearly the modeling results that show adverse changes to CVP/SWP pumping and storage (whether quantity or timing) are not reflective of how the Proposed Project will be implemented. That because of the Settlement and the Act, implementation of the Proposed Project will not cause any adverse effect to the CVP/SWP (except the contemplated impacts within the Friant Division).

Thank you for your consideration of the comments.

Very truly yours,



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Executive Director
San Luis & Delta-Mendota Water Authority



Terry L. Erlwine
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July 16, 2010

**Via Electronic Mail (InterimFlows@restoresjr.net)
And U.S. Mail**

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**Re: Draft Environmental Assessment and Draft Finding of No Significant
Impact for the Recirculation of Recaptured 2010 San Joaquin River
Restoration Program Interim Flows**

Dear Ms. Banonis:

The San Luis & Delta-Mendota Water Authority ("Authority") submits the following comments on the Draft Environmental Assessment and Draft Finding of No Significant Impact ("Draft EA/Draft FONSI") for the Recirculation of Recaptured 2010 San Joaquin River Restoration Program Interim Flows ("Proposed Project").

As indicated in our comment letter dated July 20, 2009, regarding the draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration for the San Joaquin River Restoration Program's Water Year 2010 Interim Flows Project, which we incorporate by reference, the Authority supports the Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Kirk Rogers, et al.* ("Settlement") and actions taken consistent with the legal mandates and authorities provided under the San Joaquin River Restoration Settlement Act, Public Law 146-359 ("Act"). The Authority's support extends to the Proposed Project.

The Draft EA/Draft FONSI explains the purpose and need for the Proposed Project are to (1) implement the provisions of the Settlement pertaining to the Water

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July 16, 2010
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Management Goal for the WY 2010 Interim Flows", and (2) "reduce or avoid water supply impacts to Friant Division long-term contractors by providing mechanisms to ensure that recirculation, recapture, reuse, or transfer of Interim Flows occurs." WY 2010 Draft EA/FONSI/IS/MND, p. 1. The statement of purpose and need must be read in the context of the larger terms and conditions of the Settlement and the Act, which require Reclamation, and other parties to the Settlement, to avoid harm the Authority's member agencies, as well as other third parties for which protection is intended under the Settlement and the Act. (See, e.g., Act, Public Law 146-359, § 10004).

The Draft EA/Draft FONSI implicitly acknowledge implementation of the Settlement, and specifically the Proposed Project, cannot cause harm. It does so by appropriately identifying no impact to the Authority's member agencies. Given its importance to the success of the Settlement, the final EA/FONSI should state clearly and explicitly that implementation of the Settlement or any part thereof will not harm to the Authority's member agencies and other third parties.

Further, the Authority and its members recognize Reclamation has not yet developed all of the monitoring programs or analytical tools needed to protect the Authority's member agencies, as well as others, from harm caused by implementation of the Settlement. Until those programs and tools have been developed, there remains significant risk regarding implementation of the Settlement. It is therefore critical that the approach to the effects analysis that Reclamation has taken in the Draft EA/Draft FONSI guides monitoring and analyses. In other words, Reclamation must develop programs and tools that allow for a comparison of the "no settlement conditions" with conditions when the Settlement (or an element thereof) is implemented. Only that type of comparison will ensure implementation of the Settlement does not adversely affect the Authority's member agencies.

For the reasons stated above, the Authority requests that Reclamation insert into the final EA/FONSI the following language: "Reclamation will not implement the Proposed Project in a manner that will adversely affect third parties. Reclamation will assess effect based upon a comparison of conditions with and without implementation of the Proposed Project."

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Page 3

Thank you for your consideration of the comments.

Very truly yours,

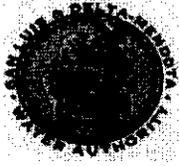
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By: 
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July 23, 2010

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***Re: Draft Supplemental EA/Proposed FONNSI for the San Joaquin River
Restoration Program's Water Year 2011 Interim Flows Project***

Dear Ms. Banonis:

The San Luis & Delta-Mendota Water Authority and the State Water Contractors (collectively, "Water Agencies") submit the following comments on the draft supplemental environmental assessment and finding of no new significant impact ("Draft SEA/FONNSI") for the San Joaquin River Restoration Program's ("SJRRP") Water Year 2011 Interim Flows Project ("Proposed Project"). As the Water Agencies have expressed previously, they support the Proposed Project. That support, however, is based, in part, upon the United States Bureau of Reclamation implementing the SJRRP, including the Proposed Project, consistent with the underlying principle that it will not harm third parties, including the member agencies of the Water Agencies.¹ Implementation of the SJRRP in Water Year 2010 highlighted risks that future actions to implement the SJRRP, including the Proposed Project, might not adhere to the no-harm principle; risks that are simply unacceptable to the Water Agencies. They include:

¹ The Water Agencies define harm as any impact that deprives the members of the Water Agencies of water that would otherwise be available in the absence of the Proposed Project, any impact that affects the reliability of the Water Agencies members' water supply, and any impact that increases the financial costs associated with the Water Agencies members' water supply (cost to water purchase, operation and maintenance costs, etc.).

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Within the Delta – The risk of harm: (1) if recirculation relies upon capacity not in excess of that needed to move water for the benefit of the Water Agencies' members, or (2) if recirculation causes the incidental take of species protected under the federal Endangered Species Act, and, for the State Water Project, state Endangered Species Act.

Upstream – The risk of harm as a result of Reclamation re-operating Friant Dam or New Melones Dam.

In River – The risk of harm to lands within the areas served by the Water Agencies members if restoration flows cause seepage.

The Water Agencies hope Reclamation eliminates those risks by adopting the changes proposed in this letter.²

The Settlement And The Law Protect The Water Agencies From Harm

The Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Kirk Rogers, et al.* ("Settlement") and the San Joaquin River Restoration Settlement Act, Public Law 146-359 ("Act") require the United States Bureau of Reclamation ("Reclamation") to implement the San Joaquin River Restoration Program without harming third parties, including the Water Agencies' member agencies. (Act, §10004(f), (g).) Reclamation and the California Department of Water Resources ("DWR") have acknowledged the protections the Settlement and the Act afford the Water Agencies.

On July 20, 2009, the Water Agencies submitted to Reclamation and DWR comments on the SJRRP WY 2010 draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration. The Water Agencies' comments identified deficiencies in the draft environmental assessment. Specifically, the Water Agencies explained: "[N]owhere does the Draft EA/FONSI/IS/MND provide a clear and direct statement that the recirculation or recapture of water will not cause any adverse impact to the Water Agencies' members. In fact, language and modeling results presented in the Draft EA/FONSI/IS/MND

² The Water Agencies attach to this comment letter and hereby incorporate herein by this reference the comments submitted on the draft environmental assessment and draft finding of no significant impact for the recirculation of recaptured 2010 San Joaquin River Restoration Program Interim Flows and the draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration for the San Joaquin River Restoration Program's Water Year 2010 Interim Flows Project.

The Water Agencies also support the comments submitted by the San Joaquin River Exchange Contractor Water Authority and the San Joaquin River Resource Management Coalition on the Proposed Project.

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suggest such impacts are acceptable." We appreciated Reclamation and DWR attempt to address the comment by including additional language in the final EA/FONSI/IS/MND.³

We also appreciate that Reclamation and DWR have employed the appropriate framework for their impact analyses. In the environmental assessment for the SJRRP in Water Year 2010, Reclamation and DWR compared the then existing conditions without and with implementation of the Interim Flow Project to determine if adverse impacts would result. Reclamation employed the same comparison in its Draft Environmental Assessment and Draft Finding of No Significant Impact for the Recirculation of Recaptured 2010 San Joaquin River Restoration Program Interim Flows. A comparison of then-existing conditions "without" versus "with" the SJRRP is the type of comparison needed annually to ensure the Water Agencies are not injured by the Projected Project.

Information Developed In Water Year 2010 Demonstrates Additional Protections Are Needed To Avoid The SJRRP Harming The Water Agencies

The Water Agencies provide 5 examples of potential harm the SJRRP can cause to it members.

1. In 2010, implementation of the SJRRP has demonstrated that there are inadequate flow measurements in the system to accurately account for the flows under the SJRRP entering into the Mendota Pool and to determine the amount of those flows available to be recaptured and recirculated. Reclamation has yet to finalize a Recapture and Recirculation Plan. Certain measurement stations provide only stage

³ Reclamation and DWR incorporated into the final EA/FONSI for WY 2010 language it believed addressed the comment of the Water Agencies. Implementation of the SJRRP in WY 2010, however, demonstrated the language had ambiguity. The Water Agencies request the following language replace the definition of Available Capacity that appear on page 2-6 of the Draft EA/FONSI:

Available capacity is the capacity that is available after satisfaction of all statutory and contractual obligations to make deliveries through Delta facilities, including but not limited to: (1) obligations related to Level 2 and Level 4 refuge water supplies, (2) obligations under existing or future water service, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities, (3) all obligations under existing or future transfer, exchange or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served water through Delta Division facilities, including the Environmental Water Account, Yuba Accord, or similar programs, (4) obligations under existing or future long-term water supply contracts involving State Water Project contractors served State Water Project water through Delta Division facilities, and (5) all water delivery obligations established by the State Water Project Water Supply Contracts, including, but not limited to, the categories of deliveries set forth in Article 12(f) of such Contracts.

data but no flow data. Other stations require on-going correction factors. Without adequate real-time continuous flow measurement data at strategic locations, the accounting of flows and credits to Friant are only estimates. To properly account for the flow under the SJRRP and determine the effects of water released and recaptured under the SJRRP, Reclamation must install and maintain continuous monitors at Gravelly Ford, below Bifurcation Structure, Sack Dam and Washington Road, and, publish on its website or the website for the SJRRP, no less than daily, data produced by the monitoring equipment. This upgraded monitoring needs to be included as part of the Project Description.

2. During 2010 operations, water quality impacts in the Delta-Mendota Canal and Mendota Pool resulted from the SJRRP. Although Reclamation was eventually able to adjust the manner in which it was implementing the SJRRP to prevent the water quality conditions from continuing, the Warren Act and Mendota Pool well pumpers had to curtail pumping during the intervening period of quality impacts. In 2011 and beyond, Reclamation must ensure the SJRRP is implemented in a way that accounts for changes in water quality and avoids adverse water quality conditions. Accordingly, the Water Agencies propose Reclamation develop, with direct involvement by the Water Agencies, a water quality response plan for the Delta-Mendota Canal and Mendota Pool, and include a description of that plan in the Project Description.

3. Reclamation must ensure the water supply of the south of the Delta Central Valley Project water service contractors, included many members of the Authority, is not adversely impacted when implementation of the SJRRP reduces flood flows that would have been realized below Friant Dam absent the SJRRP. Historically, flood flows below Friant Dam reaching the Mendota Pool have been delivered to the members of the San Joaquin River Exchange Contractor Water Authority and a like amount of water has been backed up in San Luis Reservoir. That backed up water has been made available to south of the Delta CVP water service contractors. The flood flows historically accounted for as much as 25 percent of the water supply available to south of the Delta CVP water service contractors. The SJRRP could reduce the occurrence of flood flows, and therefore the water supply of the south of the Delta Central Valley Project water service contractors. To ensure those adverse impacts do not occur, Reclamation must evaluate Friant Dam operation under the then-existing conditions (hydrologic, regulatory, etc.) with and without the SJRRP and develop actions to avoid, or at least fully mitigate for all impacts. The evaluation must be based upon a determination of how Friant conveyance and delivery operations would have occurred absent SJRRP (again, under the then-existing conditions, including hydrologic and regulatory) rather than strictly theoretical operations. The accounting must be made a part of the Project Description to assure that the Project will not trigger additional environmental impacts within the service areas of the Water Agencies.

4. Reclamation must ensure flows under the SJRRP do not take precedent over historical and permitted flood flow routing. Reclamation must also ensure that during flood operations, the channel capacity to the Mendota Pool provides for the delivery of water to meet the demands of the San Joaquin River Exchange Contractor Water Authority members prior to delivery of flows under the SJRRP. If the SJRRP flows take priority and use the channel capacity for releases past Mendota Dam during a flood flow operations, south of the Delta CVP water service contractors will be deprived of water they would otherwise have received, water that would have been conveyed to the Mendota Pool and beneficially used. An accounting methodology and description of how the channel capacity will be prioritized must be included in the Project Description.

5. Current operations for water quality require New Melones Dam releases to meet water quality objectives measured at Vernalis, California. During certain periods, release of that water results in additional water available to be pumped from the Delta by the CVP and State Water Project. As a result of flows under the SJRRP, New Melones Dam releases could be reduced by a like amount of flows under the SJRRP to meet the water quality objectives. The flow under the SJRRP could then be eligible to be recaptured at the CVP and SWP pumping facilities for return back to water users with the CVP Friant Division. If that were the case, the SJRRP would result in a water supply impact to third parties, as absent the SJRRP flows, the New Melones Dam releases would allow additional water to be pumped by the CVP and SWP. An accounting methodology that ensures this potential impact is avoided must be added to the Project Description.

6. Given the limited capacity of the CVP and SWP to pump water from the Delta, Reclamation must ensure that recapture of flow under the SJRRP by the CVP and SWP pumping facilities is pumped after all water available to the Water Agencies members is pumped (including water available through transfer or exchanges). (See footnote 3.) The pumping prioritization regime needs to be added to the Project Description.

The Risk of Harm Outlined Above, If Not Addressed Will Result In A Final SEA/FONNSI That Violates NEPA

The Draft SEA/FONNSI violates the National Environmental Policy Act ("NEPA"). As outlined above, the Settlement and Act requires Reclamation to develop the Proposed Project in a manner that ensures no harm to third parties. The Proposed Project as described in the Draft SEA/FONNSI has not done that. The consequence is the Draft SEA/FONNSI does not include an adequate description of the "proposed

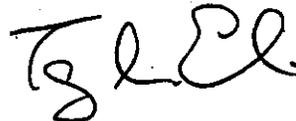
Michelle Banonis, Natural Resources Specialist
U.S. Bureau of Reclamation
July 23, 2010
Page 6

action" or a Proposed Project that satisfies the "purpose and need."⁴ And, the SJRRP could harm third parties, including the Water Agencies member – harm not identified or other considered in the draft SEA/FONNSI. To comport with the Settlement, the Act, and NEPA, the Draft SEA/FONNSI must be revised to describe the Proposed Project and the Purpose and Need consistent with these comments.⁵

Very truly yours,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

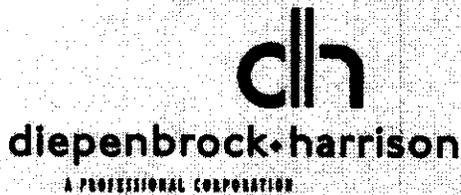


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⁴ The Draft SEA/FONNSI suffers from another legal defect. NEPA prohibits "segmentation" of large federal project into segments to avoid full disclosure of adverse environmental and/or socioeconomic impacts. The Draft SEA/FONNSI creates a segmentation problem by characterizing the Proposed Project as mere "continuation" of "temporary" activities. (Draft FONNSI, p. 1; Draft SEA, pp. 1-1 – 1-5, 2-1 – 2-2.) The Draft SEA/FONNSI further defers preparation of the environmental impact statement ("EIS") for the project and instead continues to divide it into segments. By deferring meaningful analysis of the Proposed Project's impacts as a whole, the actual consequences of this series of actions may be overlooked or understated. In this manner, the Draft SEA/FONNSI understates impacts to agricultural resources, hydrology and water quality, as well as socioeconomic impacts, among others, particularly on a cumulative basis. Comprehensive NEPA review is necessary where, as here, Reclamation is undertaking several proposed actions that may have significant cumulative and synergistic environmental impacts on the region.

⁵ The Draft SEA/FONNSI states that it "will be used to support Reclamation's petition to the SWRCB" to allow the release and redirection of WY2011 Interim Flows, and that in evaluating the petition, the SWRCB "must consider potential impacts to other legal users of water." (Draft SEA, p. 1-2.) The information provided in the Draft SEA/FONNSI is inadequate for this purpose because it fails to ensure the Proposed Project will avoid adversely impacts (injury) to the Water Agencies' members.

ATTACHMENTS



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July 16, 2010

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Re: Draft Environmental Assessment and Draft Finding of No Significant Impact for the Recirculation of Recaptured 2010 San Joaquin River Restoration Program Interim Flows

Dear Ms. Banonis:

The San Luis & Delta-Mendota Water Authority ("Authority") submits the following comments on the Draft Environmental Assessment and Draft Finding of No Significant Impact ("Draft EA/Draft FONSI") for the Recirculation of Recaptured 2010 San Joaquin River Restoration Program Interim Flows ("Proposed Project").

As indicated in our comment letter dated July 20, 2009, regarding the draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration for the San Joaquin River Restoration Program's Water Year 2010 Interim Flows Project, which we incorporate by reference, the Authority supports the Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Kirk Rogers, et al.* ("Settlement") and actions taken consistent with the legal mandates and authorities provided under the San Joaquin River Restoration Settlement Act, Public Law 146-359 ("Act"). The Authority's support extends to the Proposed Project.

The Draft EA/Draft FONSI explains the purpose and need for the Proposed Project are to (1) implement the provisions of the Settlement pertaining to the Water

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Management Goal for the WY 2010 Interim Flows", and (2) "reduce or avoid water supply impacts to Friant Division long-term contractors by providing mechanisms to ensure that recirculation, recapture, reuse, or transfer of Interim Flows occurs." WY 2010 Draft EA/FONSI/IS/MND, p. 1. The statement of purpose and need must be read in the context of the larger terms and conditions of the Settlement and the Act, which require Reclamation, and other parties to the Settlement, to avoid harm the Authority's member agencies, as well as other third parties for which protection is intended under the Settlement and the Act. (See, e.g., Act, Public Law 146-359, § 10004).

The Draft EA/Draft FONSI implicitly acknowledge implementation of the Settlement, and specifically the Proposed Project, cannot cause harm. It does so by appropriately identifying no impact to the Authority's member agencies. Given its importance to the success of the Settlement, the final EA/FONSI should state clearly and explicitly that implementation of the Settlement or any part thereof will not harm to the Authority's member agencies and other third parties.

Further, the Authority and its members recognize Reclamation has not yet developed all of the monitoring programs or analytical tools needed to protect the Authority's member agencies, as well as others, from harm caused by implementation of the Settlement. Until those programs and tools have been developed, there remains significant risk regarding implementation of the Settlement. It is therefore critical that the approach to the effects analysis that Reclamation has taken in the Draft EA/Draft FONSI guides monitoring and analyses. In other words, Reclamation must develop programs and tools that allow for a comparison of the "no settlement conditions" with conditions when the Settlement (or an element thereof) is implemented. Only that type of comparison will ensure implementation of the Settlement does not adversely affect the Authority's member agencies.

For the reasons stated above, the Authority requests that Reclamation insert into the final EA/FONSI the following language: "Reclamation will not implement the Proposed Project in a manner that will adversely affect third parties. Reclamation will assess effect based upon a comparison of conditions with and without implementation of the Proposed Project."

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Thank you for your consideration of the comments.

Very truly yours,

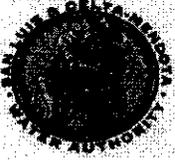
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By: 
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Attorneys for the San Luis & Delta-Mendota
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cc: Daniel Nelson, Executive Director
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July 20, 2009

Via: E-mail: InterimFlows@RestoreSJR.Net

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Via E-mail: Faulkenb@Water.Ca.Gov

Mr. Kevin Faulkenberry
SJRRP Program Manager
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Fresno, CA 93726

Re: *Environmental Assessment, Proposed Finding of No Significant Impact, Initial Study, and Draft Mitigated Negative Declaration for the San Joaquin River Restoration Program's Water Year 2010 Interim Flows Project*

Dear Mr. Phillips and Mr. Faulkenberry:

The San Luis & Delta-Mendota Water Authority and the State Water Contractors (collectively, "Water Agencies") submit the following comments on the draft environmental assessment, proposed finding of no significant impact, initial study, and draft mitigated negative declaration ("Draft EA/FONSI/IS/MND") for the San Joaquin River Restoration Program's ("SJRRP") Water Year 2010 ("WY 2010") Interim Flows Project ("Proposed Project"). The Water Agencies present their comments with the hope they will be addressed, the Draft EA/FONSI/IS/MND will be revised, and the final EA/FONSI/IS/MND will thereby comply with the mandates of the National Environmental Policy Act and the California Environmental Quality Act.

The Water Agencies support the Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Kirk Rogers, et al.* ("Settlement") and actions taken consistent with the legal mandates and authorities provided under the San Joaquin River Restoration Settlement Act, Public Law 146-359 ("Act"). However, as more fully explained below, the Water Agencies are concerned the description of the Proposed Project is not consistent, and the Proposed Project may not satisfy the Purpose and Need, as sections of the Draft EA/FONSI/IS/MND indicate the Proposed Project, if implemented, would violate the Settlement and the Act. They are also concerned that

the Proposed Project is not placed into proper context, as the Draft EA/FONSI/IS/MND fails to discuss the effects of the Proposed Project in relation to all potentially relevant statutes, laws, programs, and agreements.

1. The Draft EA/FONSI/IS/MND Does Not Provide A Consistent Description Of The Proposed Project Or A Project Description That Is Consistent With The Purpose And Need

The purpose and need for the Proposed Project is to implement the San Joaquin River Restoration Program ("SJRRP"), as established by the 2006 Stipulation of Settlement in *Natural Resources Defense Counsel, et al. v. Kirk Rodgers, et al.*, and authorized by the San Joaquin River Restoration Settlement Act, Public Law 146-359. (Draft EA, pp. 1-1). As such, the Proposed Project is explained as "the release of WY 2010 Interim Flows according to the Settlement and the Act." (Draft EA, pp. 2-5). The Proposed Project, as does the Settlement and Act, contemplates the potential recirculation or recapture of the releases. In all cases, however, it should be beyond reasonable dispute that the intent of the Settlement and the Act are, and the Proposed Project should be, limited to recirculating or recapturing of releases in a manner that does not adversely affect the Water Agencies' members. (See, e.g., Act, Public Law 146-359, § 10004(a)(4)). The Proposed Project does not reflect that intent and limitation consistently. The intent and limitation are also not properly reflected in the purpose and need.

The Draft EA/FONSI/IS/MND does explain the Proposed Project would include the recapture of water, "subject to *available capacity* within CVP/SWP storage and conveyance facilities, including the Jones and Banks pumping plants, the California Aqueduct, the DMC, San Luis Reservoir and related pumping facilities, and other facilities of CVP/SWP contractors." (Draft EA, pp. 2-9, 2-12, 2-26)(emphasis added)). The Draft EA/FONSI/IS/MND includes other limitations on the recirculation or recapture of water. (Draft EA, p. 2-9). However, nowhere does the Draft EA/FONSI/IS/MND provide a clear and direct statement that the recirculation or recapture of water will not cause any adverse impact to the Water Agencies' members. In fact, language and modeling results presented in the Draft EA/FONSI/IS/MND suggest such impacts are acceptable.

A. The Project Description And Direct Impacts Analyses Are Inconsistent With The Settlement And The Act.

Although in places the Draft EA/FONSI/IS/MND could be read to provide the protections to third parties intended and/or required by the Settlement and Act, other

sections of the Draft EA/FONSI/IS/MND, including the modeling, undermine such an interpretation. For example, the description of the Proposed Project provides that the "maximum quantity of WY 2010 Interim Flows that could be diverted from the Restoration Area ["recirculated"] is limited by the combined diversion capacity at all identified diversion points." (Draft EA, p. 2-27.) The Draft EA/FONSI/IS/MND provides similar statements elsewhere. None of those statements are limited. There is no clear constraint that limits the Proposed Project's use of capacity to capacity available only after the obligations to/needs of the Water Agencies' members are met.¹

Further, the Draft EA/FONSI/IS/MND presents the results of modeling, which indicate the Proposed Project could adversely impact the quantity and/or timing of water conveyed at the Harvey O. Banks (Banks pumping plant) and C.W. Jones Pumping Plants (Jones pumping plant) or stored in San Luis Reservoir. Attachment 1 to the Draft EA/FONSI/IS/MND presents a number of tables, depicting modeling results. Some of those tables (Tables 70-75) present the monthly averages of simulated pumping by the CVP and SWP at the Jones and Banks pumping plants, respectively. The tables show at least one month in each water year type in which the Proposed Project will negatively impact CVP/SWP pumping rates – some of which the significance should be beyond reasonable dispute. For example, Table 75 shows a 5 percent adverse impact to CVP/SWP pumping during August of critically dry years. Tables 121-126, which show changes to San Luis Reservoir, provide similar data. The modeling of Proposed Project impacts suggests the Proposed Project may, at times, reduce San Luis Reservoir storage. Again, there are no statements in the Draft EA/FONSI/IS/MND that the Proposed Project will avoid the impacts identified in the modeling, that the Proposed Project will be implemented in a manner consistent with the Settlement and the Act.

B. Potentially Significant Indirect Impacts Of The Project Are Not Disclosed.

The CVP and SWP are significantly regulated pursuant to the federal Endangered Species Act. The Draft EA/FONSI/IS/MND does not take into account the significant effect the Proposed Project may have on the ability of the CVP/SWP to comply with those regulations. It fails to analyze potential indirect impacts from any potential increased regulatory burdens, for example, resulting from the increased take of

¹ To provide necessary protection to the Water Agencies' members, the Proposed Project should include accounting measures that ensure the quantity of recirculated or recaptured water made available to the Friant contractors is limited to water resulting from Proposed Project and available at the point of re-diversion (i.e., measures that account for potential losses from depletions, diversions by others, reoperation of facilities on tributaries to the San Joaquin River, etc.). The existence of and the manner in which such an accounting would be carried out is not apparent in the Draft EA/FONSI/IS/MND.

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listed species that could occur when implementing the Proposed Project.² For instance, if the Proposed Project results in additional pumping at the Jones and/or Banks pumping plant and that additional pumping causes the incidental take of fish authorized under a biological opinion (i.e., Delta smelt, winter run salmon, etc.), the take could contribute to the CVP and/or SWP reaching or exceeding take limitations imposed in a biological opinion. Under those circumstances, the Proposed Project could foreclose the ability of the CVP and/or SWP to deliver water to the Water Agencies members that would otherwise be delivered in the absence of the Proposed Project. There are no statements in the Draft EA/FONSI/IS/MND that suggest the Proposed Project will be implemented in a manner to avoid those types of impacts.

2. Effects of the Proposed Project In Relation To All Potentially Relevant Statutes, Laws, Programs, and Agreements.

Section 6.0 of the Draft EA/FONSI/IS/MND describes a number of statutes, laws, programs, and agreements. However, nowhere in that section or elsewhere does the Draft EA/FONSI/IS/MND discuss the authority of the State Water Resources Control Board ("State Water Board") and California Regional Water Quality Control Board in relation to water quality. As an example and at a minimum, the Final EA/FONSI/IS/MND should discuss the State Water Board's periodic review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan"). In particular, the Final EA/FONSI/IS/MND should explain that the State Water Board will review water quality objectives (i.e., the San Joaquin River flow objective), which could result in the State Water Board assigning to the United States Bureau of Reclamation responsibility for meeting objectives, responsibility that could burden operation of the Friant Division of the CVP.

3. Other Errors Or Inconsistencies

A. The Draft EA/FONSI/IS/MND does not consider the potential effects of the Proposed Project, with the constraints imposed on the CVP and SWP by the 2008 biological opinion issued by the United States Fish and Wildlife Service for CVP and SWP operations ("Smelt BiOp") or the June 2009 biological opinion issued by the National Marine Fisheries Service for CVP and SWP operations. Sections of the Draft EA/FONSI/IS/MND are inconsistent with those BiOps. For example, Old River and Middle River ("OMR") flows listed in Appendix G, Tables 76 to 81, exceed the allowable

² In addition, the SWP may be subject to regulation under the State Endangered Species Act. Such regulation, if valid, could increase the burdens on the SWP. Therefore, Final EA/FONSI/IS/MND should consider the Proposed Project in context with State ESA regulation.

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reverse flow limits under the Smelt BiOp for most months under both the No Action and Proposed Action scenarios.

B. The values listed in Table 4-40 do not match the October–February values listed in Appendix A, Tables 70-75.

4. Conclusion

For the reasons stated above, the Water Agencies respectfully request that the Draft EA/FONSI/IS/MND be revised to address the above-stated concerns. In addition to correcting the “other errors” noted above and discussing the authority of the State Water Board and California Regional Water Quality Control Board, the descriptions of the Purpose and Need and the Proposed Project should be revised to state clearly that implementation of Proposed Project shall not have adverse impacts to the Water Agencies’ members (no adverse change in quantity or timing of water deliveries, no increased financial burdens).

The following definition should be included and used to define “available capacity”.

Pumping and conveyance that is available at the C.W. Jones Pumping Plant, at the Harvey O. Banks Pumping Plant, in the Delta-Mendota Canal or in the California Aqueduct, after satisfying all statutory and contractual obligations to make deliveries through Delta facilities,³ including but not limited to: (1) obligations related to Level 2 and Level 4 refuge water supplies, (2) obligations under existing or future water service, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities, (3) all obligations under existing or future transfer, exchange or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served water through Delta Division facilities, including the Environmental Water Account, Yuba Accord, or similar programs, (4) obligations under existing or future long-term water supply contracts involving State Water Project contractors served State

³ For purposes of this definition, “Delta facilities” should mean those existing and future Central Valley Project and State Water Project facilities in and south of the Sacramento-San Joaquin Rivers Delta, including, but not limited to, the C. W. Jones Pumping Plant, Delta Mendota Canal, O’Neill Forebay, O’Neill Pumping/Generating Plant, San Luis Reservoir, Clifton Court Forebay, Harvey O. Banks Pumping Plant and the California Aqueduct.

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Water Project water through Delta Division facilities, and (5) all water delivery obligations established by the State Water Project Water Supply Contracts, including, but not limited to, the categories of deliveries set forth in Article 12(f) of such Contracts.

And, the Final EA/FONSI/IS/MND should state clearly the modeling results that show adverse changes to CVP/SWP pumping and storage (whether quantity or timing) are not reflective of how the Proposed Project will be implemented. That because of the Settlement and the Act, implementation of the Proposed Project will not cause any adverse effect to the CVP/SWP (except the contemplated impacts within the Friant Division).

Thank you for your consideration of the comments.

Very truly yours,



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Terry L. Erlewine
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March 7, 2011

SENT VIA EMAIL AND U.S. MAIL

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Re: Comments on the United States Fish and Wildlife Service's September 29, 2010, *10(a)(1)(A)*, *Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River*

Dear Ms. Reed:

We submit these comments on behalf of Westlands Water District ("Westlands") and the San Luis & Delta-Mendota Water Authority ("Authority"), regarding the *10(a)(1)(A)*, *Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River* ("Permit Application").

The Permit Application describes the processes that the U.S. Fish and Wildlife Service ("FWS") will follow during implementation of the proposed reintroduction of Central Valley spring-run Chinook salmon into the San Joaquin River. Specifically, the Permit Application describes how FWS will collect spring-run Chinook from existing populations (donor stock), raise a conservation stock (cultured fish), and reintroduce an "experimental stock" population to the San Joaquin River. Apparently, only those activities described in the Permit Application would receive incidental take authorization. The comments presented by the Authority in this letter are intended to assist the National Marine Fisheries Service ("NMFS") as it evaluates the Permit Application.

The Authority is a joint powers authority formed in 1992 and consists of 29 public agencies, 27 of which contract with the United States Department of the Interior, Bureau of Reclamation ("Reclamation"), for water from the Central Valley Project ("CVP"). The Authority's members, including Westlands, hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water annually. Of that amount, approximately 2.1

Exhibit
4

million acre-feet are contracted for delivery to water service contractors, approximately 840,000 acre-feet for exchange contractors, and approximately 300,000-350,000 acre-feet to publicly and privately managed wetlands situated in the Pacific Flyway. The CVP water supplies are used within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, California. In addition, the Authority is responsible for operating Delta Division facilities of the Central Valley Project pursuant to a transfer agreement between the Authority and the United States. The Authority has participated in several public workshops addressing the reintroduction of spring-run Chinook to the San Joaquin River, part of the San Joaquin River Restoration Program ("SJRRP").

In its present form, the Permit Application is inadequate. Section 10004 of Title X of the Omnibus Public Land Management Act of 2009 states: "implementation of the Settlement and the reintroduction of California Central Valley Spring Run Chinook salmon pursuant to the Settlement and section 10011, *shall not result in the involuntary reduction in contract water allocations to Central Valley Project long-term contractors, other than Friant Division long-term contractors.*" (Omnibus Public Land Management Act of 2009 ("Omnibus Act"), Title X, § 10004(f) [emphasis added].) Under this provision, FWS and NMFS must ensure that the reintroduction of spring-run Chinook does not cause a reduction in contract water allocations to the Authority's member agencies. The Permit Application, however, does not address how FWS and NMFS will provide that assurance. In particular, the section 10(a)(1)(A) permit contemplated by the Permit Application apparently would not authorize incidental take of reintroduced fish at CVP facilities used to appropriate water for the benefit of the Authority's member agencies.

In addition, section 10011(c)(2) of Title X of the Omnibus Act requires NMFS to issue a rule under section 4(d) of the federal Endangered Species Act, to govern "the incidental take of reintroduced California Central Valley Spring Run Chinook salmon." The 4(d) Rule must provide that "the reintroduction will not impose more than de minimus water supply reductions, additional storage releases, or bypass flows on unwilling third parties due to such reintroduction." (Omnibus Act, Title X, § 10011(c)(3).) As is described further below, however, NMFS has suggested that the 4(d) Rule will not authorize take of reintroduced fish once they leave the San Joaquin River and move into the Delta.

The Omnibus Act is clear – the reintroduction of spring-run Chinook can neither cause a reduction in CVP contract water allocations to Authority member agencies, nor more than a de minimus reduction in water supply or other measures on third parties. Hence, any implementation of the SJRRP must, but currently fails to, include as an essential element the protections for water supply afforded to the Authority's member agencies. Without provisions to protect water supplies, any program for reintroduction of Central Valley spring-run Chinook salmon is unlawfully incomplete.

1. The Permit Application Fails To Include A Provision That Ensures The Reintroduction Of Spring-Run Chinook Salmon To The San Joaquin River Will Have No Adverse Impacts To CVP Contract Allocations

The Project Description in the Permit Application does not address, let alone include as an essential element, the requirement that the reintroduction not adversely impact allocation of CVP water to the Authority's member agencies. The Project Description discusses only the collection of donor stock, rearing of conservation stock, and the release of these spring-run Chinook to the San Joaquin River. It refers to the fish released as the "experimental population." The Permit Application does not address incidental take of the experimental population. A provision to ensure the reintroduction of spring-run Chinook does not result in adverse impacts to water allocations to the Authority's member agencies must be added to the Project Description.

The Permit Application acknowledges that "[t]he proposed action [reintroduction of spring-run Chinook] would result in both direct and incidental take to the donor stock populations and losses to the conservation stock." (Permit Application, p. 79.) However, it does not address incidental take of fish after they have been released, the so-called experimental population. The Permit Application should include analysis and a request for authorization of incidental take of the experimental population where necessary to protect water allocations to the Authority's member agencies. If take occurs in the Sacramento-San Joaquin River Delta that is not anticipated or accounted for in the Permit Application, that take might be used to justify the imposition of water export and flow restrictions. The take of experimental stock thus has the potential to result in water supply impacts to the Authority's member agencies. This type of take must be considered and included in the Permit Application, to ensure that it is authorized in a manner that results in no adverse impacts to water allocations to the Authority's member agencies.

Another component of the reintroduction process, the development of a 4(d) Rule, is supposed to address incidental take of the experimental stock, but so far, NMFS has taken the position that the 4(d) Rule will not address take of the reintroduced salmon once they enter the Delta. During the February 8, 2011 workshop on Permitting for the Reintroduction of Spring-Run Salmon to the San Joaquin River, co-presented by FWS and NMFS, the NMFS Program Manager stated that 4(d) Rule now being developed would apply to the reintroduced fish only while they are within the "geographic scope" of the San Joaquin River, and possibly, three tributaries of the San Joaquin River. The Program Manager expressly stated that take authorization of the planned 4(d) Rule would *not* apply to the reintroduced fish once they have migrated into the Delta. However, the mandate that the reintroduced species shall be designated an experimental population is not limited in its geographic scope. Congress did not say that the population would be experimental only while in the San Joaquin River. Rather, Congress said the population shall be reintroduced pursuant to ESA section 10(j), which provides for