

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrights.ca.gov>

REVISED

PROTEST - APPLICATION

Based on Prior Filed Application or Injury to Prior Rights
(Protests based on Environmental Considerations, Public Interest, Public Trust, and Other Issues should be completed on other side of form)

APPLICATION 234, 1465 and 5638

1. I, (We) San Luis & Delta-Mendota Water Authority
Name of Protestant(s)
of See Attachment _____, _____ have read carefully a copy
Mailing address and zip code of protestant(S) Telephone Number
of, or a notice relative to, Application 234, 1465 and 5638 of Bureau of Reclamation
Name of applicant
_____ to appropriate from the San Joaquin River
Name of source
at a point from the confluence of the San Joaquin River and Merced River, to near Vernalis, and to the Delta channels from the
San Joaquin River near Vernalis to the Jones and Banks Pumping Plant.
2. I, (We) desire to protest against the approval thereof because to the best of our information and belief the proposed appropriation
My or our
will result in injury to us as follows: See Attachment
Me or us State the injury which will result

3. Protestant claims an interest in the use of water from the source from which applicant proposes to divert which is based upon: _____
See Attachment
Prior application: appropriative permit or license; notice posted or use begun prior to December 19, 1914; riparian claim; etc.
Please provide application, permit, license, or statement of water diversion and use numbers which cover your use of water, or state "none".
See Attachment
4. Where is your diversion point located? Attached ¼ of _____ ¼ of Section _____, T. _____, R. _____, _____ B&M
Is your point of diversion downstream from applicant point of diversion? See Attachment
Yes, No, or at same point
5. The extent of present and past use of water by protestant or his predecessors in interest from this source is as follows (leave blank if protest based on prior filed application):
a. approximate date first use made _____
b. amount used _____
c. time of year when diversion is made _____
d. purpose(s) of use _____
6. Under what conditions may this protest be disregarded and dismissed? See Attachment
(Conditions should be of a nature that the applicant can address, such as minimum by-pass flows, measuring devices required, acknowledgement of prior rights, etc.)

7. A true copy of this protest has been served upon the applicant by mail.
_____ Personally or by mail

Date: August 17, 2010

Notes: Attach supplemental sheets as necessary.
Protests must be filed within the time specified
in the notice of application.

Protestant(s) or authorized representative sign here

Jon D. Rubin

Type or print name and title of representative, if applicable

400 Capitol Mall, Suite 1800

Street Address

Sacramento, California 95814

City and State

(916) 492-5000

Telephone Number

REVISED

BACKGROUND

The San Luis & Delta-Mendota Water Authority (Authority) on behalf of its member agencies,¹ protests the petition filed by the United States Bureau of Reclamation (Reclamation) for temporary change to Permits 11885, 11886, and 11887 (Application 234, 1465 and 5638). After carefully reading the petition, the Authority files this protest based on public interest considerations and injury to their rights.

The Authority is located at P.O. Box 2157, Los Banos, CA 93635. Its phone number is (209) 826-9696.

The Authority files this protest because the changes requested by the petition are contrary to the protections afforded the Authority's member agencies under the Water Code and are not in the public interest. The proposed changes could result in a reduction in the amount of water supply available to the Authority's member agencies, thereby causing harm to legal users of water; harm that is not in the public interest because it could substantially jeopardize the benefits realized from the use of water within the area served by Authority's member agencies.

I. Petition

On or about June 30, 2010, Reclamation submitted the petition to the State Water Board. The petition, if granted, would (1) add to the places of use authorized under Permits 11885, 11886, and 11887 the San Joaquin River from its confluence with the Merced River, to near Vernalis, and to the Delta channels from the San Joaquin River near Vernalis to the Jones and Banks Pumping Plants; and (2) authorize redirection of water appropriated and/or stored under Permits 11885, 11886, and 11887 at Jones and Banks Pumping Plants and at the San Luis Dam.

¹ The Authority's member agencies are: Banta-Carbona Irrigation District, Broadview Water District, Byron Bethany Irrigation District (CVPSA), Central California Irrigation District, City of Tracy, Del Puerto Water District, Eagle Field Water District, Firebaugh Canal Water District, Fresno Slough Water District, Grassland Water District, Henry Miller Reclamation District #2131, James Irrigation District, Laguna Water District, Mercy Springs Water District, Oro Loma Water District, Pacheco Water District, Pajaro Valley Water Management Agency, Panoche Water District, Patterson Irrigation District, Pleasant Valley Water District, Reclamation District 1606, San Benito County Water District, San Luis Water District, Santa Clara Valley Water District, Tranquillity Irrigation District, Turner Island Water District, West Side Irrigation District, West Stanislaus Irrigation District, Westlands Water District.

II. Protest

A. Protestants

The Authority is a joint powers authority, established under California's Joint Exercise of Powers Act (Gov. Code § 6500 *et seq.*). The Authority is comprised of 29 member agencies, which have historically received deliveries of Central Valley Project (CVP) water up to 3,100,000 acre-feet annually for the irrigation of more than 1,000,000 acres of highly productive farm land primarily along the San Joaquin Valley's Westside, and approximately 100,000 acres of publically and privately managed wetlands situated in the Pacific Flyway. The areas served by the Authority's member agencies span portions of seven counties encompassing about 3,300 square mile, an area roughly the size of Rhode Island and Delaware combined. The Authority has the right to protest, because, if granted, the petition would (1) injure the rights of the Authority's member agencies to use the water involved, and (2) be contrary to the public interest.

B. Bases of Protest

The Authority protests the petition because, as filed, the petition will likely result in harm to its member agencies, as well as other "third parties"; harm that is contrary to the protections afforded legal uses of water under the Water Code and harm that is contrary to the public interest.

The changes proposed by the petition are intended to serve the purposes of the San Joaquin River Restoration Program ("SJRRP"), as authorized by the San Joaquin River Restoration Settlement Act, Public Law 14-359 and the underlying Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Rogers* (Settlement). The Authority supports actions to implement the Act and Settlement. That support, however, is based, in part, upon Reclamation implementing the SJRRP consistent with the fundamental principle that the SJRRP it will not harm third parties, including the Authority and its member agencies. Although Reclamation and others may intend to implement the SJRRP to avoid adverse impacts to third parties, they have not yet fully developed the SJRRP and consequently the SJRRP provides inadequate assurance that adverse impacts to third parties will be avoided. Indeed, implementation of the SJRRP in 2010 verified that point. As explained in further detail below, implementation of the 2010 SJRRP harmed third parties and highlighted elements of the SJRRP that threaten to harm third parties this year and subsequent years during which the SJRRP is implemented.

Actual and Threatened Harm to the Authority's Member Agencies

The petition asserts the Authority's member agencies "will not be affected by the proposed transfer." (Supplement to Petitions, pp. 8, 11, 12.) The assertion, while likely well-intended, is not supported by the facts.

The petition's analysis of adverse impacts relies heavily on the Draft Supplemental Environmental Assessment Interim Flows Project Water Year 2011. (SEA WY 2011) On July 23, 2010, the Authority submitted comments on the SEA WY 2011, however, that identified multiple deficiencies in the SEA WY 2011 analysis.² The petition's reliance on the deficient SEA WY 2011 raises the same concerns expressed in the comment letter. The comment letter provided several specific examples of actual and threatened harm resulting from the implementation of the SJRRP in Water Year 2010 – actual and threatened harm that persists today. The Authority briefly reiterates four examples:

1. Inadequate Monitoring To Assess Harm: In 2010, implementation of the SJRRP demonstrated that there are inadequate flow measurements in the system (1) to accurately account for the flows under the SJRRP entering into the Mendota Pool and (2) 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 data but no flow data. Other stations require on-going correction factors. To properly account for the flow under the SJRRP and determine the effects of water released and recaptured under the SJRRP, Reclamation must be required to install and maintain continuous monitors at Gravelly Ford, below the 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.
2. Harm Resulting From Water Quality Impairment: During 2010 operations, the SJRRP impaired water quality in the Delta-Mendota Canal and Mendota Pool. Although Reclamation was eventually able to adjust the manner in which it was implementing the SJRRP to prevent the water quality conditions from continuing, certain water users 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, Reclamation should be required to develop, with direct involvement by the Authority, a water quality response plan for the Delta-Mendota Canal and Mendota Pool.
3. Threatened Harm From Treatment Of Flood Flows: Implementation of the SJRRP in 2010 demonstrated harm may occur if the SJRRP flows take precedence over historical and permitted flood flow routing or if channel capacity below the Mendota Pool is dedicated to the SJRRP instead of meeting the demands of the San Joaquin River Exchange Contractor Water Authority. If the SJRRP flows take priority and/or the SJRRP uses channel capacity for releases past Mendota Dam during flood flow operations, many of the Authority's member agencies will be deprived of water they would otherwise have received, water that would have been conveyed to the Mendota Pool and beneficially used. To avoid that potential harm, Reclamation must be required to develop an

² The Authority hereby incorporate the July 23, 2010 comment letter by reference, a copy of which is attached hereto.

accounting methodology and description of how the channel capacity will be prioritized.

4. Threatened Harm From Displacement of CVP/SWP Capacity: Given the limited capacity of the CVP and SWP to pump water from the Delta, implementation of the SJRRP could displace capacity need to meet existing needs. Thus, Reclamation must be required to ensure that recapture of flow under the SJRRP by the CVP and SWP pumping facilities is pumped after all water available to the Authority's member agencies is pumped (including Project and non-Project water available to the Authority's member agencies through transfer or exchanges).

At this point, the SJRRP does not include provisions that avoid the above described harm.

C. Disregard or Dismiss Protest

The Authority is willing to dismiss this protest provided that certain conditions are included in the State Water Board's approval.³ The Authority asks the State Water Board to include the conditions set forth in Order WR 2009-0058-DWR, except as amended or supplemented, as follows:

Condition 2: Delete existing text and replace with: "No water in, stored, or routed through the San Luis Reservoir as a result of this Order, including San Joaquin River water recaptured in the Delta or water available as a result of supplemental deliveries to the Mendota Pool that are used for deliveries to the Exchange Contractors, shall be delivered within the Friant Division of the Central Valley Project unless and until Reclamation demonstrates compliance with Condition [2nd New Condition below]. To the extent an action by Reclamation to implement the SJRRP adversely impacts any water user entitled to CVP or SWP water from Delta Facilities⁴ absent this Order (does not include Friant Division Contractors), within 30 days of the impact occurring, Reclamation shall make available to the injured water user(s) to fully mitigate for the harm the water in, stored or routed through San Luis Reservoir as a result of this Order."

New Condition: Add: "Prior to October 1, 2010, Reclamation shall develop and implement a Recapture and Recirculation Plan. No later than September 15, 2010, Reclamation shall provide a copy of a

³ The Authority reviewed the protest filed by the San Joaquin River Exchange Contractors Water Authority and supports the protest and the conditions it proposes.

⁴ As used in these conditions, Delta Facilities are 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, the O'Neill Forebay, the O'Neill Pumping/Generating Plant, the San Luis Reservoir, Clifton Court Forebay, Harvey O. Banks Pumping Plant and the California Aqueduct.

draft of the Plan to the San Luis & Delta-Mendota Water Authority and State Water Contractors. No less than every 30 days during the time this Order is in effect, Reclamation shall prepare and submit a status report to the Deputy Director and serve a copy of each report on the San Luis & Delta-Mendota Water Authority. Reclamation shall include in the report a description of the actions it has taken to implement the Plan and to ensure the changes authorized by this Order do not violate Condition _ [2nd New Condition below].”

Condition 15: Delete existing text and replace with: “Rediversion and conveyance of water under Permits 11885, 11886 and 11887 by or through Central Valley Project (CVP) or State Water Project (SWP) facilities is limited to 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 or other Delta Facilities, after satisfying all legal, statutory and contractual obligations to make deliveries through Delta Facilities that existing at the time this Order issued or that arise while this Order is in effect (other than obligations under the SJRRP), including but not limited to: (1) obligations related to Level 2 and Level 4 refuge water supplies; (2) obligations under water service, repayment, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities; (3) obligations under transfer, exchange or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served water through Delta Facilities, including, for example, transfers made for purposes of the Environmental Water Account, Yuba Accord, or similar programs, existing at the time this Order issued or that arise while this Order is in effect (other than obligations under the SJRRP); (4) obligations under long-term water supply contracts involving State Water Project contractors served State Water Project water through Delta Division facilities; and (5) 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.”

New Condition: Add: “No action authorized by this Order shall adversely impact water users entitled to CVP or SWP water from Delta Facilities (other than Friant Division Contractors). Reclamation shall assess impacts by comparing the conditions that exist during the 2011 Water Year (and beyond if potential impacts may result in subsequent years) with and without this Order in effect.

San Luis & Delta-Mendota Water Authority



P O Box 2157
Los Banos, CA 93635

State Water Contractors, Inc.

1121 L Street, Suite 1050
Sacramento, CA 95814



July 23, 2010

Via e-mail: InterimFlows@restoresjr.net
And U.S. Mail

Michelle Banonis
Natural Resources Specialist
U. S. Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, California 95825

*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.

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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

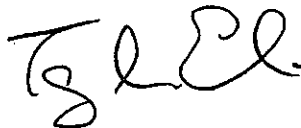
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action" or a Proposed Project that satisfies the "purpose and need."⁴ And, the SJRRP could harm third parties, including the Water Agencies member – harm not identified or other considered in the draft SEA/FONNSI. To comport with the Settlement, the 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



Terry L. Erlewine
General Manager
State Water Contractors

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



JOHN V. "JACK" DIEPENBROCK
BAREN L. DIEPENBROCK
KEITH W. MORRIS
BRADLEY J. ELZM
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R. JAMES DIEPENBROCK
(1929-2002)

July 16, 2010

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

Michelle Banonis
Natural Resources Specialist
U.S. Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, CA 95825-1898

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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Michelle Banonis
Natural Resources Specialist
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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."

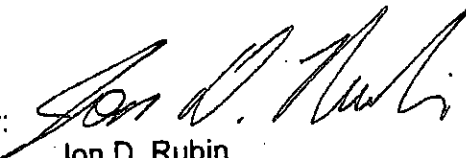
DIEPENBROCK HARRISON

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Thank you for your consideration of the comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By: 
Jon D. Rubin

Attorneys for the San Luis & Delta-Mendota
Water Authority

cc: Daniel Nelson, Executive Director
San Luis & Delta Mendota Water Authority

San Luis & Delta-Mendota Water Authority



P O Box 2157
Los Banos, CA 93635

State Water Contractors, Inc.



1121 L Street, Suite 1050
Sacramento, CA 95814

July 20, 2009

Via: E-mail: InterimFlows@RestoreSJR.Net

Mr. Jason Phillips
SJRRP Program Manager
U.S. Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, CA 95825-1898

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

Mr. Kevin Faulkenberry
SJRRP Program Manager
Cal. Department of Water Resources
3374 Shields Avenue
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

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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.

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

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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

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.

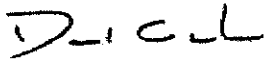
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Water Project water through Delta Division facilities, and (5) all water delivery obligations established by the State Water Project Water Supply Contracts, including, but not limited to, the categories of deliveries set forth in Article 12(f) of such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

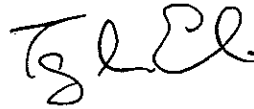
And, the Final EA/FONSI/IS/MND should state clearly the modeling results that show adverse changes to CVP/SWP pumping and storage (whether quantity or timing) are not reflective of how the Proposed Project will be implemented. That because of the Settlement and the Act, implementation of the Proposed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



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



Terry L. Erlewine
General Manager
State Water Contractors

PROOF OF SERVICE

1 I, Jolanthe V. Onishi, declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

4 On August 17, 2010, I served a copy of the foregoing document entitled:

5 **REVISED PROTEST – APPLICATION**
6 **(Based on Prior Filed Application or Injury to Prior Rights)**

7 on the following interested parties in the above-referenced case number to the following:

8 U. S. Bureau of Reclamation
9 Attn.: Bob Colella
2800 Cottage Way
Sacramento, CA 95825-1898


10 **BY MAIL**
11 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope,
12 for collection and mailing with the United States Postal Service where it would be deposited for
13 first class delivery, postage fully prepaid, in the United States Postal Service that same day in the
ordinary course of business as indicated above.

14 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above.
15 The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was
16 reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the
17 machine to print a transmission record of the transmission, a copy of which is attached to this
18 declaration.
 A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business
practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United
States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United
States Postal Service that same day in the ordinary course of business.

19 **BY OVERNIGHT DELIVERY**
20 Federal Express Golden State Overnight
21 Depositing copies of the above documents in a box or other facility regularly maintained by
22 Federal Express, or Golden State Overnight, in an envelope or package designated by Federal
Express or Golden State Overnight with delivery fees paid or provided for.

23 **PERSONAL SERVICE**
24 via process server

25 I certify under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and that this declaration was executed on August 17, 2010 at Sacramento,
27 California.

28 
Jolanthe V. Onishi

REVISED

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterrights.ca.gov>

PROTEST – APPLICATION

Based on Environmental Considerations, Public Interest, Public Trust, and Other Issues.
(Protests based on INJURY TO PRIOR RIGHTS should be completed on other side of form)

APPLICATION 234, 1465 and 5638

1. I, (We) San Luis & Delta-Mendota Water Authority
Name of Protestant(s)
of See Attachment () have read carefully a copy
Mailing address and zip code of protestant(S) Telephone Number
of, or a notice relative to, Application 234, 1465 and 5638 of Bureau of Reclamation
Name of applicant
to appropriate from the San Joaquin River
Name of source
at a point from the confluence of the San Joaquin River and Merced River, to near Vernalis, and to the Delta channels from
San Joaquin River near Vernalis to the Jones and Banks Pumping Plant.

2. I, (We) protest the above application on:
 ENVIRONMENTAL ISSUES, ETC.:
The appropriation will not best conserve the public interest, will have an adverse environmental impact and/or will adversely affect a public trust use of a navigable waterway. *
a. Public interest protests should clearly indicate how the appropriation will affect the public.
b. Environmental protest should identify specific impacts and provide supporting recitals on issues such as: plants, animals or fish affected, erosion, pollution, aesthetics, etc.
c. Public trust protests must identify the navigable waters to be affected and how the project will impact public trust values.
Protests of a general nature (not project specific) or opposed to constitutional or legislated state policy will not be accepted. A request for information or for studies to be conducted is not a protest.

OTHER ISSUES, ETC.:
The appropriation will be contrary to law, will require access rights, will not be in the State Water Resources Control Board's jurisdiction, or concerns other issues.

Facts and, if applicable, points of law which support the foregoing allegations are as follows: See Attachment

3. Under what conditions may this protest be disregarded and dismissed? See Attachment
(Conditions should be a nature that the applicant can address and either accept or submit mitigating measures.)

4. A true copy of this protest has been served upon the applicant by mail.

* For the purpose of filing a protest, navigable waters include streams and lakes that may be seasonally navigable in small recreational watercraft.

Date: August 17, 2010

Notes: Attach supplemental sheets as necessary. Protests must be filed within the time specified in the notice of application

Personally or by mail
Protestant(s) or authorized representative sign here
Jon D. Rubin
Type or print name and title of representative, if applicable
400 Capitol Mall, Suite 1800
Street address
Sacramento, California 95814
City and State
(916) 482-5000
Telephone number

REVISED

BACKGROUND

The San Luis & Delta-Mendota Water Authority (Authority) on behalf of its member agencies,¹ protests the petition filed by the United States Bureau of Reclamation (Reclamation) for temporary change to Permits 11885, 11886, and 11887 (Application 234, 1465 and 5638). After carefully reading the petition, the Authority files this protest based on public interest considerations and injury to their rights.

The Authority is located at P.O. Box 2157, Los Banos, CA 93635. Its phone number is (209) 826-9696.

The Authority files this protest because the changes requested by the petition are contrary to the protections afforded the Authority's member agencies under the Water Code and are not in the public interest. The proposed changes could result in a reduction in the amount of water supply available to the Authority's member agencies, thereby causing harm to legal users of water; harm that is not in the public interest because it could substantially jeopardize the benefits realized from the use of water within the area served by Authority's member agencies.

I. Petition

On or about June 30, 2010, Reclamation submitted the petition to the State Water Board. The petition, if granted, would (1) add to the places of use authorized under Permits 11885, 11886, and 11887 the San Joaquin River from its confluence with the Merced River, to near Vernalis, and to the Delta channels from the San Joaquin River near Vernalis to the Jones and Banks Pumping Plants; and (2) authorize redirection of water appropriated and/or stored under Permits 11885, 11886, and 11887 at Jones and Banks Pumping Plants and at the San Luis Dam.

¹ The Authority's member agencies are: Banta-Carbona Irrigation District, Broadview Water District, Byron Bethany Irrigation District (CVPSA), Central California Irrigation District, City of Tracy, Del Puerto Water District, Eagle Field Water District, Firebaugh Canal Water District, Fresno Slough Water District, Grassland Water District, Henry Miller Reclamation District #2131, James Irrigation District, Laguna Water District, Mercy Springs Water District, Oro Loma Water District, Pacheco Water District, Pajaro Valley Water Management Agency, Panoche Water District, Patterson Irrigation District, Pleasant Valley Water District, Reclamation District 1606, San Benito County Water District, San Luis Water District, Santa Clara Valley Water District, Tranquillity Irrigation District, Turner Island Water District, West Side Irrigation District, West Stanislaus Irrigation District, Westlands Water District.

II. Protest

A. Protestants

The Authority is a joint powers authority, established under California's Joint Exercise of Powers Act (Gov. Code § 6500 *et seq.*). The Authority is comprised of 29 member agencies, which have historically received deliveries of Central Valley Project (CVP) water up to 3,100,000 acre-feet annually for the irrigation of more than 1,000,000 acres of highly productive farm land primarily along the San Joaquin Valley's Westside, and approximately 100,000 acres of publically and privately managed wetlands situated in the Pacific Flyway. The areas served by the Authority's member agencies span portions of seven counties encompassing about 3,300 square mile, an area roughly the size of Rhode Island and Delaware combined. The Authority has the right to protest, because, if granted, the petition would (1) injure the rights of the Authority's member agencies to use the water involved, and (2) be contrary to the public interest.

B. Bases of Protest

The Authority protests the petition because, as filed, the petition will likely result in harm to its member agencies, as well as other "third parties"; harm that is contrary to the protections afforded legal uses of water under the Water Code and harm that is contrary to the public interest.

The changes proposed by the petition are intended to serve the purposes of the San Joaquin River Restoration Program ("SJRRP"), as authorized by the San Joaquin River Restoration Settlement Act, Public Law 14-359 and the underlying Stipulation of Settlement in *Natural Resources Defense Council, et al. v. Rogers* (Settlement). The Authority supports actions to implement the Act and Settlement. That support, however, is based, in part, upon Reclamation implementing the SJRRP consistent with the fundamental principle that the SJRRP it will not harm third parties, including the Authority and its member agencies. Although Reclamation and others may intend to implement the SJRRP to avoid adverse impacts to third parties, they have not yet fully developed the SJRRP and consequently the SJRRP provides inadequate assurance that adverse impacts to third parties will be avoided. Indeed, implementation of the SJRRP in 2010 verified that point. As explained in further detail below, implementation of the 2010 SJRRP harmed third parties and highlighted elements of the SJRRP that threaten to harm third parties this year and subsequent years during which the SJRRP is implemented.

Actual and Threatened Harm to the Authority's Member Agencies

The petition asserts the Authority's member agencies "will not be affected by the proposed transfer." (Supplement to Petitions, pp. 8, 11, 12.) The assertion, while likely well-intended, is not supported by the facts.

The petition's analysis of adverse impacts relies heavily on the Draft Supplemental Environmental Assessment Interim Flows Project Water Year 2011. (SEA WY 2011) On July 23, 2010, the Authority submitted comments on the SEA WY 2011, however, that identified multiple deficiencies in the SEA WY 2011 analysis.² The petition's reliance on the deficient SEA WY 2011 raises the same concerns expressed in the comment letter. The comment letter provided several specific examples of actual and threatened harm resulting from the implementation of the SJRRP in Water Year 2010 – actual and threatened harm that persists today. The Authority briefly reiterates four examples:

1. Inadequate Monitoring To Assess Harm: In 2010, implementation of the SJRRP demonstrated that there are inadequate flow measurements in the system (1) to accurately account for the flows under the SJRRP entering into the Mendota Pool and (2) 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 data but no flow data. Other stations require on-going correction factors. To properly account for the flow under the SJRRP and determine the effects of water released and recaptured under the SJRRP, Reclamation must be required to install and maintain continuous monitors at Gravelly Ford, below the 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.
2. Harm Resulting From Water Quality Impairment: During 2010 operations, the SJRRP impaired water quality in the Delta-Mendota Canal and Mendota Pool. Although Reclamation was eventually able to adjust the manner in which it was implementing the SJRRP to prevent the water quality conditions from continuing, certain water users 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, Reclamation should be required to develop, with direct involvement by the Authority, a water quality response plan for the Delta-Mendota Canal and Mendota Pool.
3. Threatened Harm From Treatment Of Flood Flows: Implementation of the SJRRP in 2010 demonstrated harm may occur if the SJRRP flows take precedence over historical and permitted flood flow routing or if channel capacity below the Mendota Pool is dedicated to the SJRRP instead of meeting the demands of the San Joaquin River Exchange Contractor Water Authority. If the SJRRP flows take priority and/or the SJRRP uses channel capacity for releases past Mendota Dam during flood flow operations, many of the Authority's member agencies will be deprived of water they would otherwise have received, water that would have been conveyed to the Mendota Pool and beneficially used. To avoid that potential harm, Reclamation must be required to develop an

² The Authority hereby incorporate the July 23, 2010 comment letter by reference, a copy of which is attached hereto.

accounting methodology and description of how the channel capacity will be prioritized.

4. Threatened Harm From Displacement of CVP/SWP Capacity: Given the limited capacity of the CVP and SWP to pump water from the Delta, implementation of the SJRRP could displace capacity need to meet existing needs. Thus, Reclamation must be required to ensure that recapture of flow under the SJRRP by the CVP and SWP pumping facilities is pumped after all water available to the Authority's member agencies is pumped (including Project and non-Project water available to the Authority's member agencies through transfer or exchanges).

At this point, the SJRRP does not include provisions that avoid the above described harm.

C. Disregard or Dismiss Protest

The Authority is willing to dismiss this protest provided that certain conditions are included in the State Water Board's approval.³ The Authority asks the State Water Board to include the conditions set forth in Order WR 2009-0058-DWR, except as amended or supplemented, as follows:

Condition 2: Delete existing text and replace with: "No water in, stored, or routed through the San Luis Reservoir as a result of this Order, including San Joaquin River water recaptured in the Delta or water available as a result of supplemental deliveries to the Mendota Pool that are used for deliveries to the Exchange Contractors, shall be delivered within the Friant Division of the Central Valley Project unless and until Reclamation demonstrates compliance with Condition _ [2nd New Condition below]. To the extent an action by Reclamation to implement the SJRRP adversely impacts any water user entitled to CVP or SWP water from Delta Facilities⁴ absent this Order (does not include Friant Division Contractors), within 30 days of the impact occurring, Reclamation shall make available to the injured water user(s) to fully mitigate for the harm the water in, stored or routed through San Luis Reservoir as a result of this Order."

New Condition: Add: "Prior to October 1, 2010, Reclamation shall develop and implement a Recapture and Recirculation Plan. No later than September 15, 2010, Reclamation shall provide a copy of a

³ The Authority reviewed the protest filed by the San Joaquin River Exchange Contractors Water Authority and supports the protest and the conditions it proposes.

⁴ As used in these conditions, Delta Facilities are 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, the O'Neill Forebay, the O'Neill Pumping/Generating Plant, the San Luis Reservoir, Clifton Court Forebay, Harvey O. Banks Pumping Plant and the California Aqueduct.

draft of the Plan to the San Luis & Delta-Mendota Water Authority and State Water Contractors. No less than every 30 days during the time this Order is in effect, Reclamation shall prepare and submit a status report to the Deputy Director and serve a copy of each report on the San Luis & Delta-Mendota Water Authority. Reclamation shall include in the report a description of the actions it has taken to implement the Plan and to ensure the changes authorized by this Order do not violate Condition _ [2nd New Condition below].”

Condition 15: Delete existing text and replace with: “Rediversion and conveyance of water under Permits 11885, 11886 and 11887 by or through Central Valley Project (CVP) or State Water Project (SWP) facilities is limited to 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 or other Delta Facilities, after satisfying all legal, statutory and contractual obligations to make deliveries through Delta Facilities that existing at the time this Order issued or that arise while this Order is in effect (other than obligations under the SJRRP), including but not limited to: (1) obligations related to Level 2 and Level 4 refuge water supplies; (2) obligations under water service, repayment, exchange, and other settlement contracts to Central Valley Project contractors entitled to Central Valley Project water through Delta Division facilities; (3) obligations under transfer, exchange or other agreements involving or intended to benefit Central Valley Project and/or State Water Project contractors served water through Delta Facilities, including, for example, transfers made for purposes of the Environmental Water Account, Yuba Accord, or similar programs, existing at the time this Order issued or that arise while this Order is in effect (other than obligations under the SJRRP); (4) obligations under long-term water supply contracts involving State Water Project contractors served State Water Project water through Delta Division facilities; and (5) 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.”

New Condition: Add: “No action authorized by this Order shall adversely impact water users entitled to CVP or SWP water from Delta Facilities (other than Friant Division Contractors). Reclamation shall assess impacts by comparing the conditions that exist during the 2011 Water Year (and beyond if potential impacts may result in subsequent years) with and without this Order in effect.

San Luis & Delta-Mendota Water Authority



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July 23, 2010

Via e-mail: InterimFlows@restoresjr.net
And U.S. Mail

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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

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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



Terry L. Erlewine
General Manager
State Water Contractors

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

**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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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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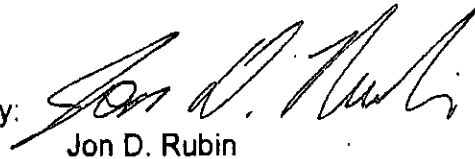
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Thank you for your consideration of the comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By:



Jon D. Rubin

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

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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.

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

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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

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.

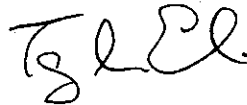
And, the Final EA/FONSI/IS/MND should state clearly the modeling results that show adverse changes to CVP/SWP pumping and storage (whether quantity or timing) are not reflective of how the Proposed Project will be implemented. That because of the Settlement and the Act, implementation of the Proposed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



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



Terry L. Erlewine
General Manager
State Water Contractors

PROOF OF SERVICE

1 I, Jolanthe V. Onishi, declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

4 On August 17, 2010, I served a copy of the foregoing document entitled:

5 **REVISED PROTEST – APPLICATION**
6 **(Based on Environmental Considerations, Public Interest, Public Trust and Other Considerations)**

7 on the following interested parties in the above-referenced case number to the following:

8 U. S. Bureau of Reclamation
9 Attn.: Bob Colella
10 2800 Cottage Way
11 Sacramento, CA 95825-1898

11 **BY MAIL**

12 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope,
13 for collection and mailing with the United States Postal Service where it would be deposited for
14 first class delivery, postage fully prepaid, in the United States Postal Service that same day in the
15 ordinary course of business as indicated above.

14 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above.

15 The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was
16 reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the
17 machine to print a transmission record of the transmission, a copy of which is attached to this
18 declaration.

17 A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business
18 practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United
19 States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United
20 States Postal Service that same day in the ordinary course of business.

19 **BY OVERNIGHT DELIVERY**

20 Federal Express Golden State Overnight
21 Depositing copies of the above documents in a box or other facility regularly maintained by
22 Federal Express, or Golden State Overnight, in an envelope or package designated by Federal
23 Express or Golden State Overnight with delivery fees paid or provided for.

23 **PERSONAL SERVICE**

24 via process server

25 I certify under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and that this declaration was executed on August 17, 2010 at Sacramento,
27 California.

28 
Jolanthe V. Onishi