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11 *Exempt from Filing Fees Under Gov. Code § 6103*

12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF YOLO**

14 COUNTY OF YOLO;

15 Petitioner,

16 v.

17 CALIFORNIA DEPARTMENT OF WATER
18 RESOURCES and DOES 1-50, inclusive

19 Respondents;

20 UNITED STATES BUREAU OF
21 RECLAMATION and ROES 51-100,

22 Real Parties in Interest.

Case No.:

PETITION FOR WRIT OF MANDATE

(Code of Civ. Proc., §§ 1085, 1094.5; Pub.
Resources Code §§ 21168, 21168.5)

1 The County of Yolo (“County”) petitions this Court for a writ of mandate directed to the
2 California Department of Water Resources (“DWR”) under Code of Civil Procedure §§ 1085 and/or
3 1094.5, and further requests injunctive relief, and alleges as follows:

4 INTRODUCTION

5 1. The County brings this petition for a writ of mandate to challenge actions taken by
6 DWR to implement the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (the
7 “Project”) in violation of the California Environmental Quality Act (“CEQA”), Public Resources
8 Code § 21000 *et seq.* The Project’s objectives include modifying the Fremont Weir, located
9 approximately seven miles northeast of Woodland, by constructing operable gates to inundate the
10 Yolo Bypass more frequently and for longer durations to create floodplain habitat for juvenile fish
11 diverted from the Sacramento River. The Project serves as mitigation for impacts of the State Water
12 Project (“SWP”) and Central Valley Project (“CVP”) on various protected fish species.

13 2. This action challenges DWR’s construction of Project gates with a conveyance
14 capacity that is double what DWR disclosed during the environmental review process and in
15 publicly available Project approval documents. The gates are part of a “headworks” facility at the
16 Fremont Weir that will allow the Project to flood the farmland and wetlands of the Yolo Bypass with
17 diverted Sacramento River flows at up to 12,000 cubic feet per second (“cfs”)—an amount
18 equivalent to the entire Sacramento River on a typical summer day—rather than the “maximum
19 design capacity” of 6,000 cfs previously disclosed by DWR and analyzed in the environmental
20 review process. Additionally, this action challenges DWR’s post-approval decision to eliminate
21 certain other Project features intended to protect nearby levees and farmland without prior
22 environmental review or notice to affected agencies and landowners. In each of these respects,
23 DWR’s failure to inform the public and study related environmental effects violates CEQA.

24 3. These actions compel the County to bring this action and hold DWR accountable for
25 its failure to comply with the fundamental disclosure requirements of CEQA before permanently
26 altering the Yolo Bypass and its rich mosaic of farmland, wetlands, and riparian habitat. The CEQA
27 process is founded on a principle that a lead agency will be honest and truthful with the public.
28 DWR has repeatedly flouted this principle in planning, approving, and implementing the Project.

1 bird watching and other recreational uses. The County is the local government agency with
2 principal responsibility for, among other things, land use planning, management and preservation of
3 agricultural lands, stewardship of biological resources, and emergency response in the event of
4 natural disasters such as floods. For these and other reasons, the County's interests and the interests
5 of its constituents have been, are being, and will continue to be adversely affected by DWR's failure
6 to comply with applicable law in connection with Project environmental review, approval, and
7 implementation. The County would be directly, adversely, and irreparably harmed as described
8 herein until and unless this Court provides the relief prayed for in this petition. The County has no
9 other adequate remedy at law, and it brings this action to protect its legal and policy interests and on
10 behalf of its adversely affected constituents.

11 7. The County also brings this action as a private attorney general pursuant to Code of
12 Civil Procedure section 1021.5 and any other applicable legal theory to enforce important public
13 rights affecting the public interest.

14 8. Respondent DWR is a department of the State of California headquartered in
15 Sacramento, California. Along with the California Department of Fish and Wildlife and several
16 other departments, boards, and commissions, DWR is part of the California Natural Resources
17 Agency, one of eight cabinet-level agencies of the California state government. DWR is the
18 Project's lead agency under CEQA. DWR was established in 1956 for the purpose of building and
19 operating the SWP. In addition to operating the SWP, DWR's major responsibilities include
20 overseeing the statewide process of developing and updating the California Water Plan, protecting
21 and restoring the Sacramento-San Joaquin Delta, regulating dams, providing flood protection, and
22 assisting in emergency management. DWR is also the state agency with principal responsibility for
23 administration and implementation of the Sustainable Groundwater Management Act, including the
24 evaluation of local groundwater sustainability plans prepared in accordance with the Act to achieve
25 basin-specific sustainability goals.

26 9. Real Party in Interest United States Bureau of Reclamation ("Reclamation") is a
27 federal agency that operates the CVP and is the designated lead federal agency related to the
28 proposed Project. Reclamation is a signatory to the federal component of the Project, the

1 Environmental Impact Statement (“EIS”), pursuant to the National Environmental Policy Act
2 (“NEPA”). Reclamation adopted a Record of Decision related to the EIS and the Project on or about
3 September 19, 2019.

4 10. The true names and capacities, whether individual, corporate, associate,
5 governmental, coconspirator, partner or alter-ego of those respondents sued herein under the
6 fictitious names of DOES 1 through 50, inclusive, are not known to Plaintiffs, who therefore sue
7 those respondents by such fictitious names. Plaintiffs will ask leave of court to amend this
8 Complaint and insert the true names and capacities of these respondents when the same have been
9 ascertained. Plaintiffs are informed and believe, and on that basis, allege, that respondents
10 designated herein as DOE respondents are legally responsible in some manner for the events and
11 happenings alleged in this Complaint, and that Plaintiffs alleged injuries were proximately caused
12 by said respondents’ conduct.

13 11. The true names and capacities, whether individual, corporate, associate,
14 governmental, coconspirator, partner or alter-ego of those Real Parties in Interest sued herein under
15 the fictitious names of ROES 51 through 100, inclusive, are not known to Plaintiffs, who therefore
16 sue those by such fictitious names. Plaintiffs will ask leave of Court to amend this Complaint and
17 insert the true names and capacities of these Real Parties in Interest when the same have been
18 ascertained. Plaintiffs are informed and believe, and on that basis, allege, that Real Parties in
19 Interest designated herein as ROE real parties in interest are legally responsible in some manner for
20 the events and happenings alleged in this Complaint, and that Plaintiffs alleged injuries were
21 proximately caused by said Real Parties in Interests conduct.

22 **NOTICE OF CEQA SUIT AND NOTICE TO THE ATTORNEY GENERAL**

23 12. On July 17, 2023, the County served a notice of intent to file this action on DWR
24 pursuant to Public Resources Code § 21167.5. This notice and the accompanying proof of service
25 are attached hereto as **Exhibit C**. Pursuant to Code of Civil Procedure § 388 and Public Resources
26 Code § 21167.7, the County will provide the California Attorney General a copy of this Petition.

27 13. The County has also named Reclamation as a Real Party in Interest and is timely
28 serving this Petition on Reclamation.

1 **JURISDICTION AND VENUE**

2 14. This Court has jurisdiction over the matters raised in this Petition pursuant to Code
3 of Civil Procedure §§ 526, 527, 1085, and 1094.5, and Public Resources Code § 21000 *et seq.*,
4 including Public Resources Code §§ 21167, 21168, and 21168.5.

5 15. Venue is proper in Yolo County Superior Court in accordance with Code of Civil
6 Procedure §§ 392 and 393(b) because the Project is located in Yolo County and its impacts will
7 occur primarily within the County’s geographic boundaries.

8 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

9 16. The County participated extensively over nearly a decade in the administrative
10 process for the Project, including prior iterations first set forth in Conservation Measure 2 of the
11 Bay Delta Conservation Plan. The County attended dozens of meetings, provided written and verbal
12 comments on dozens of occasions, and otherwise engaged with DWR and other agencies, including
13 Reclamation, on all significant aspects of the Project. The County’s formal engagement in the
14 Project’s environmental review process is detailed in Section E of the Background discussion,
15 below. In addition, the County and DWR met and conferred regarding the principal issues raised
16 herein prior to the filing of this action on several occasions, including on March 8, April 10, and
17 May 9, 2023.

18 17. The County has performed all conditions precedent to filing this action and has fully
19 exhausted its administrative remedies, to the extent such remedies exist and to the extent that
20 exhaustion of administrative remedies is legally necessary. The County has no plain, speedy or
21 adequate remedy unless this Court grants the requested writ of mandate and injunctive relief. In the
22 absence of such relief, the Project will continue to proceed in violation of state law.

23 **STATUTE OF LIMITATIONS**

24 18. The County filed this Petition prior to the expiration of any applicable statute of
25 limitations.

26 19. The County’s claim relating to the Project’s concealed 12,000 cfs conveyance
27 capacity arose no earlier than January 26, 2023. On that date, as explained below, DWR first
28 disclosed the Project’s true conveyance capacity to the County after years of obfuscation. The

1 County had no prior actual or constructive notice that the facility under construction had double the
2 approximately 6,000 cfs conveyance capacity stated in the joint Environmental Impact Statement
3 and Environmental Impact Report² (the “EIS/EIR”) and Project approval documents. The true
4 conveyance capacity of the Project was thus unpublicized, unknown, and unknowable until DWR’s
5 disclosure. Under the “discovery rule” and doctrine of equitable estoppel, this Petition is timely
6 because it was filed within 180 days of the County’s discovery of the 12,000 cfs conveyance
7 capacity. *Committee to Relocate Marilyn v. City of Palm Springs*, 88 Cal. App. 5th 607 (2023);
8 *Ventura Foothill Neighbors v. County of Ventura*, 232 Cal. App. 4th 429 (2014); *County of Inyo v.*
9 *City of Los Angeles*, 71 Cal.App.3d 185 (1977).

10 20. Similarly, the County’s claim relating to DWR’s decision to change the Project by
11 eliminating cutoff walls in the east levee of the Yolo Bypass—features that protect levee integrity
12 and adjacent farmland—is timely. Published judicial decisions arising from similar post-approval
13 project changes, including the authorities cited in the preceding paragraph, apply a 180-day
14 limitation period that begins upon the petitioner’s discovery of the change. Here, the County first
15 learned of the Project change on February 28, 2023. This Petition is therefore timely.

16 **REQUEST TO PREPARE ADMINISTRATIVE RECORD**

17 21. Pursuant to Public Resources Code § 21167.6(b)(2), the County elects to prepare the
18 administrative record in this action.

19 **BACKGROUND**

20 **A. Project Location and Setting.**

21 22. The Project area includes the lower Sacramento River Basin, including the Yolo
22 Bypass and portions of Sacramento, Solano, Sutter, and Yolo Counties. While the EIS/EIR describes
23 the Project area expansively (*e.g.*, Section 1.5 of the EIS/EIR), the Project’s infrastructure and
24 physical impacts are mostly confined to Yolo County and affect the Fremont Weir at the north end
25 of the Yolo Bypass, over one-third of the nearly 60,000 acres within the Bypass, and existing
26 features such as the east levee of the Yolo Bypass, the Tule Pond, certain agricultural crossings, and

27 _____
28 ² Unless otherwise noted, all references herein to the EIS/EIR are to the Final EIS/EIR rather than
the draft version of the EIS/EIR circulated for public review.

1 two channel features that traverse the length of the Bypass along its eastern side, the Tule Canal
2 and the Toe Drain.

3 23. The Yolo Bypass is a historical floodplain and a crucial part of the State's Adopted
4 Plan of Flood Control (Cal. Code Regs., tit. 23, § 4) and the Sacramento River Flood Control
5 Project (Water Code § 8361). The Yolo Bypass moderates the flooding of farmlands and
6 communities in the Sacramento region by diverting floodwaters from the Sacramento River at the
7 Fremont Weir (described below) and routing them to the terminus of the Bypass about 41 miles
8 south, near Rio Vista. The Bypass includes nearly 60,000 acres of land, two-thirds of which is
9 privately owned and farmed or managed as waterfowl habitat. The Yolo Bypass is also home to the
10 Fremont Weir Wildlife Area and the much larger Yolo Bypass Wildlife Area, located south of
11 Interstate 80 and consisting of over 16,000 acres of public lands used for recreation, environmental
12 education, and other public uses.

13 24. The Fremont Weir, at the northern end of the Yolo Bypass, is a 1.8-mile-long
14 concrete structure designed to allow water to flow into the Yolo Bypass during high-flow events
15 when the Sacramento River overtops the crest of the weir. The weir has a concrete stilling basin just
16 downstream of the crest and along its full length to minimize scouring during overtopping events.

17 25. Other important physical features of the Yolo Bypass impacted by the Project include
18 the Tule Canal and Toe Drain. The Tule Canal and Toe Drain are essentially a single channel with
19 different names north (Tule Canal) and south (Toe Drain) of Interstate 80. Each feature is readily
20 visible to passing vehicles on Interstates 5 and 80 as they approach the eastern levee of the Yolo
21 Bypass. They function primarily to convey agricultural drainage water and, seasonally, runoff from
22 the westside tributaries that discharge into the Yolo Bypass (Knights Landing Ridge Cut and Cache
23 Creek) after major storm events. In addition, the Toe Drain is tidally influenced due to its proximity
24 to the Delta. Each feature contains certain agricultural crossings that impede fish adult fish passage;
25 the Project will address these crossings and this work is not at issue in this action.

26 **B. The Decline of Delta Fisheries and the 2009 Biological Opinion.**

27 26. The Central Valley used to be a vast system of wetlands, tidal marsh, and
28 floodplains, which allowed juvenile fish to move through the Sacramento River and other rivers and

1 streams in the Delta watershed to food-rich floodplains. Over time, these ecosystem features have
2 been substantially modified throughout California’s Central Valley for flood prevention and water
3 supply purposes. As floodplain habitats diminished, fish were disconnected from food sources and
4 areas essential to their growth and survival. The resulting losses of rearing habitat, migration
5 corridors, and food web production have adversely affected many native fish species that rely on
6 floodplain habitat for part or all of their lifecycle.

7 27. California’s water distribution systems, including the SWP and CVP, are a leading
8 contributor to the decline of the Delta ecosystem. California’s water distribution has historically
9 been accomplished through a series of aqueducts, canals, and other conveyance systems bringing
10 water from the north of the state where it is more plentiful, to farms, homes, and other users in the
11 south of the state. DWR is responsible for operating and maintaining the SWP, while Reclamation is
12 responsible for managing the CVP. The SWP and CVP are operated in a coordinated manner to
13 deliver water to agricultural, municipal, and industrial contractors throughout California. Water
14 project operations, however, drastically alter natural conditions in the Delta ecosystem and cause
15 direct and indirect mortality and harm to a wide range of aquatic species, including the juvenile
16 Chinook salmonids that are the primary intended beneficiary of the Project.

17 28. For this reason, SWP and CVP operations are tightly restricted by protections
18 afforded to anadromous fish (i.e., fish that migrate from rivers to the ocean) by the federal
19 Endangered Species Act (“ESA”) (16 U.S.C. § 1531 et seq.) and state Endangered Species Act,
20 among other laws. When the National Marine Fisheries Service (“NMFS”) studied the potential
21 impacts on protected species of the proposed long-term operations of the SWP and CVP, it
22 concluded in its June 4, 2009, Biological Opinion (“2009 BiOp”) that such long-term operations are
23 “likely to jeopardize the continued existence” of several species, including the endangered
24 Sacramento River winter-run Chinook salmon, threatened Central Valley spring-run Chinook
25 salmon, threatened Central Valley steelhead, and the threatened Southern Distinct Population
26 Segment of North American green sturgeon. NMFS also found that the proposed operations of the
27 CVP/SWP are likely to “destroy or adversely modify” the designated and proposed critical habitats
28 of the same salmon, steelhead, and sturgeon species.

1 29. As required by the federal ESA, the 2009 BiOp included a suite of Reasonable and
2 Prudent Alternative (“RPA”) actions to address potential SWP/CVP operational impacts on the
3 protected species and their habitat. Two of these actions are relevant here:

4 **RPA Action I.6.1:** Restoration of Floodplain Rearing Habitat, through the increase of
5 seasonal inundation within the lower Sacramento River Basin.

6 **RPA Action I.7:** Reduce Migratory Delays and Loss of Salmon, Steelhead, and Sturgeon at
7 Fremont Weir and Other Structures in the Yolo Bypass.

8 30. The Project is designed to comply with RPA Actions I.6.1 and I.7 of the 2009 BiOp
9 by modifying the Fremont Weir to enhance adult fish passage and—of direct relevance to this
10 action—to install operable gates enabling more frequent and longer periods of inundation of the
11 Yolo Bypass to provide floodplain habitat for juvenile fish. The fish passage improvements
12 addressing RPA Action I.7 have already been constructed and are not at issue herein.

13 31. Regarding RPA Action I.6.1, a 2019 NMFS biological opinion addressing changes to
14 SWP and CVP operations assumes implementation of the Project in describing the “environmental
15 baseline” for evaluating the anticipated impacts of changes in SWP/CVP operations then under
16 consideration. The Project is also required under Section 9.2.2 of the Incidental Take Permit for
17 Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2081-2019-
18 066-00), issued March 31, 2020, by the California Department of Fish and Wildlife.

19 **C. The State and Federal Response to RPA I.6.1 and I.7—Initial Planning Through
20 Project Approval.**

21 32. The Project was conceived, analyzed, and approved over the course of more than a
22 decade, starting in about 2010 as part of so-called “Conservation Measure 2” in DWR and
23 Reclamation’s Bay Delta Conservation Plan effort. A separate, parallel planning effort by
24 Reclamation described strategies for responding to RPA I.6.1 and I.7 in the “Yolo Bypass Salmonid
25 Habitat Restoration and Fish Passage Implementation Plan,” adopted in September 2012. These
26 strategies were later refined and, starting in March 2013, DWR and Reclamation commenced
27 environmental review pursuant to CEQA and NEPA of various alternatives for satisfying elements
28 of RPA I.6.1 and I.7.

33. Following the State’s abandonment of the Bay Delta Conservation Plan, DWR rebranded its SWP mitigation program in 2015 as “California EcoRestore” and integrated the Project. The environmental review process and related Project planning efforts consumed the next six years. The County participated intensively throughout this period, as detailed in Section E, below. Significant DWR and Reclamation activities in this time period included the following:

- **March 4, 2013:** Release of a Notice of Preparation of an EIS/EIR by DWR on March 4, 2013, with public scoping meetings on March 14, 2013, in the cities of West Sacramento and Woodland.
- **July 2013:** Publication of a Public Scoping Report in July 2013.
- **December 22, 2017:** Release of a Draft EIS/EIR on December 22, 2017 for a 55-day comment period.
- **January 17-18, 2018:** Public meetings convened by DWR and Reclamation to receive and respond to comments on the Draft EIS/EIR.
- **June 7, 2019:** Release of the Final EIS/EIR, along with a notice of availability.
- **July 19, 2019:** DWR Director Karla Nemeth (a) certified the EIS/EIR; (b) adopted the CEQA Findings, Statement of Overriding Considerations, and Mitigation Monitoring and Reporting Plan; and (c) approved the Project. DWR also filed a Notice of Determination (NOD) with the State Clearinghouse.

Relevant portions of the EIS/EIR are addressed in the following Section.

D. The Project EIS/EIR.

34. The Project EIS/EIR is over 10,000 pages in length, with extensive appendices that cover a wide range of topics. Chapter 2 of the EIS/EIR describes the Project (Alternative 1) and various other alternatives with features summarized in Table 2-4 (p. 2-8) of the document:

Table 2-4. Summary of Alternatives Retained for Detailed Evaluation in this EIS/EIR

Components	Alternative 1	Alternative 2	Alternative 3	Alternative 4	Alternative 5	Alternative 6
Maximum design flow (cfs)	6,000	6,000	6,000	3,000	3,400	12,000
Gated notch and channel location	East	Central	West	West	Central (Multiple)	West
Supplemental fish passage	West	West	East	East	West	East
Downstream channel improvements	X	X	X	X		X
Agricultural road crossing 1	X	X	X	X	X	X
Tule Canal water control structures				X		
Tule Canal floodplain improvements (program-level)					X	
Closure date for inundation flows	March 15	March 15	March 15	March 15 or March 7	March 15	March 15

Key: cfs = cubic feet per second

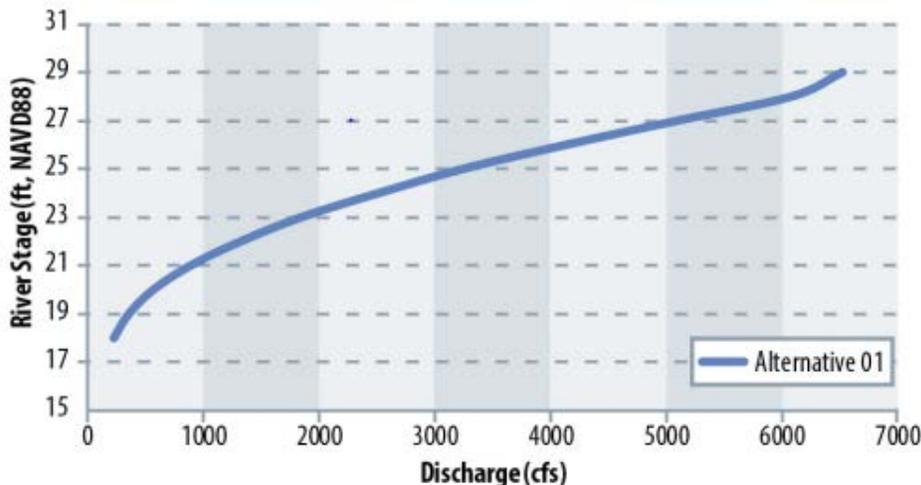
1 35. Notably, the “[m]aximum design flow” information in the second row of the table
2 expressly indicates that Alternative 1 (which eventually became the approved Project) would not
3 exceed 6,000 cfs. Only Alternative 6 included a greater conveyance capacity at 12,000 cfs. Also, all
4 alternatives included a March 15 or earlier gate closure date for inundation flows, a measure
5 essential to preserving agriculture in the Yolo Bypass.

6 **The Alternative 1 Headworks**

7 36. Consistent with Table 2-4 in the EIS/EIR, the headworks structure for Alternative 1
8 is described in pertinent part as follows:

9 The headworks structure would be a three-bay, pile-supported, reinforced concrete structure
10 that would bisect the existing Fremont Weir at an eastern location. It was designed **to**
11 **convey 6,000 cfs** at a river elevation of 28 feet (14 feet of water depth in the headworks
12 structure) with all gates fully open to meet the applicable requirements for fish passage and
13 flood control.... The gates would open **to allow a maximum flow of 6,000 cfs** when the
14 water surface elevation in the river reaches 28 feet. Each gate would be capable of
15 independent operation via submersible hydraulic cylinders or inflatable reinforced bladders
16 located beneath the gate. (EIS/EIR at p. 2-17, emphasis added.)

17 37. Substantially the same language referring to a maximum design flow of 6,000 cfs
18 appears on pages 2-19, 2-29, 2-30, and 2-31 of the EIR/EIS. Also, the EIS/EIR includes Figure 2-
19 10, which “shows a curve that represents the amount of water that would flow through the gated
20 [Alternative 1] notch at different Sacramento River elevations” and tops out at 6,500 cfs:



21 38. Similarly, all Project alternatives included channels associated with the headworks—
22 a so-called “intake channel” located between the Sacramento River and the headworks, and a
23 “transport channel” to the south of the headworks. The intake channel included with each
24
25
26
27
28

1 alternative is described only generally, without any mention of capacity, but each transport channel
2 is described in more detail. For Alternative 1, the transport channel is described as follows:

3 The main channel within the trapezoidal channel would have a bottom width of 30 feet. The
4 bench would be on the east side of the channel and elevated four feet above the main
5 channel. The bench width would vary between 30 and 65 feet. The trapezoidal channel
6 would have 3:1 side slopes (horizontal to vertical). The top of the channel would be
7 approximately 150 feet wide. The channel would be about 2,650 feet long with a gradual
8 downward slope toward Tule Pond (a slope of 0.00075). The entire channel would be lined
9 with rounded rock revetment on the channel bottom and angular rock on the bank slopes. **It**
would be designed to convey up to 6,000 cfs at a river elevation of 28 feet while
maintaining velocities that permit fish passage. At the top of each side of the channel, an
eight-foot-wide area with rock (a “rock key”) would be added to reduce the potential for the
channel to head cut the channel banks. The facility also would have a 12-foot-wide
maintenance corridor at the top of each side of the channel. (EIS/EIR at p. 2-25 (emphasis
added).)

10 39. Although it is over 10,000 pages long, the Project EIS/EIR does not once mention
11 that the Project’s maximum design flow is 12,000 cfs or even explain that it could significantly
12 exceed 6,000 cfs. Nor does it analyze how a doubling of flows in operating Alternative 1 could
13 impact environmental resources.

14 **Project Operations: Flow and Duration**

15 40. Chapter 2 describes Project operations in a brief and straightforward manner:

16 Once Fremont Weir begins to overtop, the smaller gates would remain in their last position
17 prior to the weir overtopping (generally both would be closed at this point). After the
18 overtopping event is over, the smaller gates would open and close as needed to keep the flow
19 through the gate as close as possible to 6,000 cfs. All gates would close when the river
20 elevation falls below 14 feet. Gate operations to increase inundation could continue through
21 March 15 of each year, based on hydrologic conditions. The gates may remain partially open
after March 15 to provide adult fish passage. However, flows through the gates after March
15 could not exceed the available capacity of Tule Canal (typically about 300 cfs) so that
these flows do not inundate areas outside of the canal and affect landowners. (EIS/EIR at p.
2-31.)

22 41. The discussion of adaptive management later in the EIS/EIR contains no hint of a
23 possible ability to expand operations beyond 6,000 cfs. In fact, the possibility of greatly increasing
24 flow through the Alternative 1 headworks beyond 6,000 cfs appears foreclosed by the following text
25 discussing adaptive management and potential benefits of Alternatives 5 and 6:

26 Given the uncertainties associated with estimating entrainment of size-specific juvenile
27 Chinook salmon into the Yolo Bypass, multiple gates at the intake facilities under
28 Alternative 5 would potentially allow for optimizing levels of juvenile Chinook salmon
entrainment into the Yolo Bypass under various hydraulic conditions. Similarly, the wider
notch (and associated **higher flow capacity** (of up to 12,000 cfs)) under Alternative 6 could

1 be adaptively managed to better optimize juvenile Chinook salmon entrainment into the
2 Yolo Bypass relative to other Alternatives. Therefore, Alternatives 5 and 6 would have better
3 potential for future adaptive management to meet project objectives relative to the other
4 alternatives. (EIS/EIR at p. 8-330 (emphasis added).)

4 42. As noted, DWR did not select Alternative 5 or 6 as the Project, instead opting for
5 Alternative 1. If Alternative 1 offered the same potential to increase flow capacity significantly
6 beyond 6,000 cfs, a reader would expect that disclosure to appear in this discussion of adaptively
7 managing (increasing) flow. Its omission tends to confirm that, just as discussed extensively in
8 Chapter 2, the maximum design capacity of the Alternative 1 headworks is around 6,000 cfs.

9 43. Finally, as indicated in the quoted language from page 2-31 in the EIS/EIR, above,
10 Project operations beyond 300 cfs would end no later than March 15 annually. The March 15 end
11 date is essential for ensuring the sustainability of agriculture in the Yolo Bypass. As the EIS/EIR
12 recounts:

13 The gated notch structures were originally planned to stay open through April to allow
14 juveniles to enter the Yolo Bypass, but discussions with stakeholders indicated that an earlier
15 inundation end date (originally suggested as March 15) would reduce impacts to agricultural
16 users and wetlands. **The Lead Agencies analyzed whether this change would result in a
17 substantive decrease in benefits to the focus fish species and found little change in
18 benefits, so the end date was changed for all alternatives to March 15.** Subsequent
19 discussion with landowners identified potential benefits from an earlier closure date of
20 March 7, and this date was incorporated as a variation of Alternative 4. (EIS/EIR at p. 2-13
21 (emphasis added))

18 44. The scale of the Project highlights its potential to drastically alter agriculture in the
19 Yolo Bypass. As the EIS/EIR recognized, Project operations “could temporarily affect up to seven
20 percent of Yolo County’s Prime Farmland, Unique Farmland, and Farmland of Statewide
21 importance,” and even with a March 15 end date, “it is possible that farms might shift to alternative
22 crops or experience changes in agricultural yield.” (Final EIS/EIR at p. 11-20.) Similarly, Chapter
23 16 and Appendix K of the EIS/EIR extensively reviewed the economic significance of a March 7 or
24 15 end date, noting that several weeks of post-operation drainage, drying time, and field preparation
25 would be necessary before crops could be planted annually. Other chapters of the EIS/EIR also
26 discussed the significance of a March 7 or 15 end date in the context of analyzing impacts wildlife
27 resources (Chapter 9 of the EIS/EIR) and recreational resources (Chapter 13). DWR ultimately
28 selected the March 15 end date in approving the Project.

Levee Underseepage and Cutoff Walls

45. In addition to starting to build the Project with twice the conveyance capacity disclosed in the EIS/EIR and Project approval documents, DWR has eliminated so-called “cutoff walls” that were originally included in the approved Project to address levee seepage and stability concerns. The EIS/EIR describes the cutoff walls as protection against potential levee underseepage (water movement beneath the levee embankment through foundation layers):

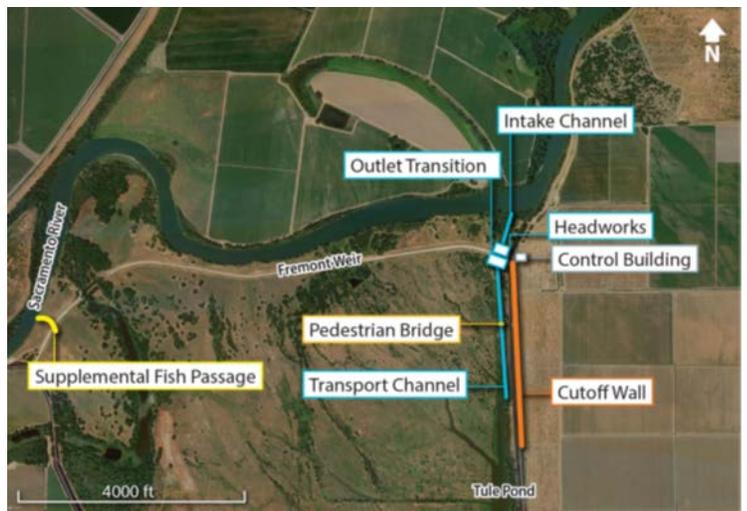
The transport channel for the new gated notch would be immediately adjacent to the east levee of the Yolo Bypass and would cut through the clay blanket layer at the toe of the levee, which raises concerns about increased levee underseepage. Levee underseepage could cause levee stability concerns. To reduce seepage, a cutoff wall would be constructed at the levee toe from Fremont Weir to the central part of Tule Pond. The cutoff wall would be approximately 2,850 feet long and 30 feet deep, and the wall would be completely underground. (EIS/EIR at p. 2-25.)

46. The location of the southern cutoff wall (3,150’ in length) included in Alternative 1 is shown in Figure 2-3 of the EIS/EIR and the northern cutoff wall (2,850’ in length) and its close proximity to the Project headworks is depicted in Figure 2-4:

Figure 2-3



Figure 2-4



47. As stated in the EIS/EIR, a cutoff wall “is a structure that uses a slurry or cement mix to create a ‘wall’ along a levee to prevent seepage under the levee or address other levee stability and seepage concerns.” (EIS/EIR at p. 2-12.) Later in the EIS/EIR, the cutoff walls and underseepage are explained in more detail:

1 Under Alternative 1, two cutoff walls would be constructed along the eastern side of the
2 bypass: one from Fremont Weir to the central part of Tule Pond and another just south of
3 Tule Pond. These cutoff walls would be included because the channel construction in these
4 areas would cut through an existing clay blanket layer that currently prevents levee
5 underseepage. Both cutoff walls would be approximately 30 feet deep and approximately
6 2,850 and 3,150 feet long, respectively. Construction of the cutoff walls along the eastern
7 levee would act as a barrier to levee underseepage from the bypass to the Elkhorn area.
8 Where there are higher water levels in the Tule Canal that would cause water to flow from
9 the bypass to groundwater (“losing” conditions), the cutoff wall would prevent groundwater
10 movement from the Yolo Bypass into the aquifer to the east.... [T]he eastern side of the Yolo
11 Bypass is typically in a losing condition, with higher surface water levels in the bypass than
12 in the surrounding groundwater (well locations shown on Figure 7-4). (EIS/EIR at p. 7-25.)

13
14 48. Cutoff walls were included in almost every Project alternative studied in the EIS/EIR
15 “to prevent seepage under the levee or address other levee stability and seepage concerns.”
16 Consequently, as explained on p. 7-25 of the EIS/EIR eliminating the cutoff walls would allow
17 groundwater movement from the Yolo Bypass to the east due to disturbance of the existing clay
18 layer that currently limits such movement. The EIS/EIR does not analyze the potential elimination
19 of the cutoff walls.

20
21 **E. The County’s Engagement in State and Federal Planning Activities and**
22 **CEQA/NEPA Compliance.**

23 49. The County participated extensively in Project planning and environmental review
24 for nearly a decade. Beginning in 2010, the County consistently advocated for a modestly-sized
25 Project with operations ending in February, or early March at the latest, to avoid impacts to
26 agriculture and minimize impacts to waterfowl habitat and recreation. Over the following decade,
27 the County retained experts to complete studies on a host of Project-related topics, including:

- 28 • Waterfowl impacts of the Proposed Conservation Measure 2 for the Yolo Bypass (July 2012)
- Yolo Bypass MIKE-21 Model Review: Strengths, Limitations and Recommendations for Refinement (September 2012)
- Agricultural and Economic Impacts of Yolo Bypass Fish Habitat Proposals (April 2013)
- Yolo Bypass Drainage and Water Infrastructure Improvement Study (April 2014; updated in December 2020)
- Yolo Bypass Salmonid Habitat Restoration and Fish Passage Hydrodynamic Modeling Report (February 2015)
- Potential Fish Benefits Associated with Yolo Bypass Salmonid Habitat Restoration and Fish Passage Proposals (April 2017)
- Public Domain HEC-RAS Model with 2-D Floodplain of the Yolo Bypass and its Connection and Effects on the Sacramento River (May 2017)
- Yolo Bypass Westside Tributaries Flow Monitoring Report (March 2020)

1 All of the foregoing studies were provided to DWR and Reclamation in an effort to influence
2 Project design and prospective operations.³

3 50. In addition, the County participated in the Project design and environmental review
4 as part of the public comment process. The County authored at least 10 extensive letters between
5 May 2009 and June 2019 concerning iterations of the Project and related environmental review
6 documents, including the Draft and Final EIS/EIR for the Project. County supervisors and staff also
7 met frequently with leadership in the California Natural Resources Agency, DWR, and Reclamation
8 to advocate for an early (late February or early March) end date to inundation and a small
9 inundation footprint. Additionally, the County engaged in significant outreach to stakeholders like
10 the Yolo Basin Foundation, Yolo Farm Bureau, and individual landowners and growers in the Yolo
11 Bypass.

12 51. The County's efforts made a difference. Over time, DWR agreed to abandon earlier
13 proposals to inundate the Yolo Bypass through April and even May, selecting March 7 and 15 end
14 dates for evaluation in the EIS/EIR. DWR's leadership assured the County that its studies and
15 advocacy relating to agricultural impacts were pivotal in its decision, in consultation with other state
16 and federal agencies, to ultimately adopt a March 15 end date as part of Alternative 1. While the
17 County had also advocated for a smaller project, it ultimately concluded that the 6,000 cfs capacity
18 headworks included in Alternative 1 was an acceptable compromise when coupled with the
19 March 15 end date.

20 52. Certain other County concerns, however, remained unresolved. Addressing the Draft
21 EIS/EIR, the County commented in detail regarding the lack of seepage analysis and the potential
22 for elevated groundwater levels resulting from Project operations to impair agriculture east of the
23 Yolo Bypass, even with the cutoff walls:

24 The discussion in the second paragraph on page 16-17 states that an increase in shallow
25 groundwater levels could increase saturation near the crop root zone, thereby reducing crop
26 yields. The discussion then states that this reduction in yields would not result in permanent
cropland conversions due to crop shifting. However, no evidence is provided to justify the
conclusion that other crops could survive in saturated soil conditions. The discussion then

27 ³ The studies are available at: [https://www.yolocounty.org/government/general-government-](https://www.yolocounty.org/government/general-government-departments/county-administrator/county-administrator-divisions/intergovernmental-affairs/delta-library)
28 [departments/county-administrator/county-administrator-divisions/intergovernmental-affairs/delta-](https://www.yolocounty.org/government/general-government-departments/county-administrator/county-administrator-divisions/intergovernmental-affairs/delta-library)
[library](https://www.yolocounty.org/government/general-government-departments/county-administrator/county-administrator-divisions/intergovernmental-affairs/delta-library).

1 states that the Elkhorn area and the west side of the Bypass only account for 1.5 to 3 percent
2 of the total agriculture of Yolo County, presumably indicating that the loss of agricultural
3 production in this area would be insignificant. As summarized in Table 11-3, in the Land
4 Use Chapter, Yolo County lost nearly 3,000 acres of important farmland between 2012 and
5 2014; therefore, any additional losses would be considered by the County to be significant.
6 (Comment 16-3, EIS/EIR.)

7 53. After DWR responded that such impacts would be purely economic and did not
8 require analysis (Response to Comment 16-3, EIS/EIR), the County sent a further letter to DWR
9 and Reclamation to express its final concerns with the Project, including seepage. That letter
10 specifically questioned “[w]hether lands outside the Yolo Bypass, including thousands of acres of
11 productive farmland in Reclamation District 1600 (east of the Bypass) will be impacted by Project
12 operations and experience reduced agricultural productivity and other environmental and economic
13 impacts due to elevated groundwater.” The County continued to express these and other concerns
14 following Project approval, ultimately entering into a series of tolling agreements with DWR to
15 preserve its right to litigate the approval.

16 **F. Approval of the Project.**

17 54. As indicated above, on July 19, 2019, DWR Director Karla Nemeth: (a) certified the
18 EIS/EIR; (b) adopted the CEQA Findings, Statement of Overriding Considerations, and Mitigation
19 Monitoring and Reporting Plan; and (c) approved the project described as Alternative 1 in the
20 EIS/EIR. DWR also filed a Notice of Determination (NOD) with the State Clearinghouse.
21 Separately, Reclamation issued the Record of Decision on September 19, 2019, in compliance with
22 NEPA.

23 55. The DWR approval package signed by Director Nemeth and the corresponding NOD
24 filed with the State Clearinghouse on July 19, 2019, contain text that mirrors the EIS/EIR language
25 describing the Alternative 1 as having a 6,000 cfs maximum design capacity. The approval package
26 also includes graphics depicting the two cutoff walls in the east levee of the Yolo Bypass as part of
27 the approved Project. Finally, the approval package also references a March 15 end date for Project
28 operations, consistent with the EIS/EIR.

56. Both before and after its approval of the Project, DWR sought federal and state
permits and approvals for its construction and operation. DWR has consistently described the

1 headworks as a 6,000 cfs (or at times, “approximately 6,000 cfs”) facility. For example, in
2 certifying the Project’s consistency with the Delta Protection Act to the Delta Stewardship Council,
3 DWR stated “[t]he Project will allow flows of approximately 6,000 cfs, depending on Sacramento
4 River elevation, through the gated notch....” (Delta Plan Consistency Determination, p. 5 (DWR
5 11/2020).) In California Water Commission proceedings regarding Project-related condemnation
6 actions, DWR described the Project design flow as “~6,000 cfs is the floodplain inundation flow
7 rate.” (Att. 1, Item 11, 1/19/2022 Meeting, California Water Commission.) Indeed, other public
8 agencies such as the Army Corps of Engineers, United States Fish and Wildlife Service, and
9 California Department of Fish and Wildlife have all expressly relied on and mirrored DWR’s
10 description of the Project’s 6,000 cfs conveyance capacity in issuing their own permits for the
11 Project. The California Attorney General also relied on and repeated DWR’s description of the
12 6,000 cfs headworks capacity in its briefs submitted in Project-related CEQA challenges filed in
13 Yolo Superior Court by private landowners in 2019. (Yolo Sup. Ct. Case Nos. PT-2019-1719-1 and
14 PT-2019-1724.)

15 **G. The County/DWR Memorandum of Understanding.**

16 57. Following Project approval, DWR and the County entered into a series of tolling
17 agreements to preserve the County’s rights to litigate DWR’s approval of the Project, certification of
18 the EIS/EIR, and related actions. The County and DWR eventually entered into an agreement
19 resolving various disputes on January 4, 2022. The agreement includes four main elements:

20 **Project funding:** Building on the successful implementation of initial phases of the Yolo
21 Bypass Drainage and Water Supply Project, the agreement provides \$2.5 million to the
22 County for completion of the final phases of the project. This funding complemented other
23 funding of nearly \$5 million provided by the Delta Conservancy and California Wildlife
24 Conservation Board to support earlier phases of the project.

25 **Staff funding:** The agreement provides \$4 million (in 2021 dollars) to fund a County
26 position for 20 years focused broadly on the Yolo Bypass and certain objectives recited in
27 the agreement, including agricultural sustainability, flood conveyance, and wetland resource
28 management.

Economic impacts: The agreement obligates DWR to perform studies at least twice during
the first 20 years of Project implementation to analyze the Project’s economic impacts within
the Yolo Bypass, including the Yolo Bypass Wildlife Area, and additional studies in other
circumstances described in the agreement. In the event unanticipated economic impacts are
identified, subject to certain limitations, DWR is obligated to collaborate with the County to
identify mitigation strategies and to pay for their implementation.

1 **Governance:** Finally, the agreement obligates DWR to engage in regular Project-related
2 information sharing, notify the County well in advance of the approval of operational or
3 other changes, and commit to ongoing engagement with County staff and leadership.

4 58. The agreement also includes customary waiver and release language. This language
5 does not limit the County’s rights to maintain this action or any of the claims asserted herein, all of
6 which arise from post-agreement disclosures and other actions by DWR that are outside the scope
7 of the agreement.

8 **H. DWR’s Easement Acquisition Efforts.**

9 59. The Yolo Bypass includes about 40 distinct landowners (and landowner groups)
10 affected by the Project and DWR’s easement acquisition efforts. Using legal authority to acquire
11 land for the purpose of operating the SWP (Water Code § 11575), DWR is currently acquiring
12 easement rights for Project operations across most of the Yolo Bypass from affected private
13 landowners as well as from the United States Fish and Wildlife Service and other federal agencies
14 holding conservation easements that may conflict with the Project. The easements sought by DWR
15 are broadly scoped and contain no references to the Project or any operating criteria, such as the
16 March 15 end date or the conveyance capacity of the headworks. The following text is typical of the
17 draft easements presented by DWR in California Water Commission proceedings:

18 For good and valuable consideration, the receipt and sufficiency of which is hereby
19 acknowledged, and pursuant to the laws of the State of California, Grantor grants and
20 conveys to Grantee the perpetual right-of way and easement in the real property (“Property”)
21 situated in the County of Yolo, State of California, more specifically described in Exhibit A,
22 attached and incorporated by this reference, for the purposes of seasonal floodplain fisheries
23 rearing habitat and fish passage in the Yolo Bypass. Grantee has the right for the flowage of
24 water over and upon the Property **as may be required for the present and future
25 permitted construction and operation of fish passage and floodplain restoration
26 projects**, including the right of access by authorized representatives of the Grantee. The
27 flowage right includes the right to flow water and materials and by said flow erode; or place
28 or deposit earth, debris, sediment, or other material.

29 60. Virtually without exception, DWR has been unsuccessful in negotiating voluntary
30 easement acquisitions. DWR has thus resorted to eminent domain under Water Code § 11580 and
31 related authorities to acquire the easement rights necessary for Project operations. Under California
32 law, DWR lacks authority to adopt a resolution of necessity and commence an eminent domain
33 action. It must instead request that the California Water Commission, deemed the “governing body”

1 of DWR in Code of Civil Procedure § 1245.210(h), adopt a resolution of necessity for each
2 acquisition DWR intends to pursue through condemnation.

3 61. This process is well underway. At nearly every monthly meeting since early 2022,
4 the Water Commission has adopted all resolutions of necessity requested by DWR, often over the
5 objection of Yolo Bypass landowners and their attorneys. Water Commission staff have essentially
6 no role in the proceedings; instead, DWR authors the Commission staff reports (using Commission
7 letterhead), resolutions of necessity, and other documents essential to the Commission’s
8 consideration of DWR’s requests. In describing the Project in these documents, DWR consistently
9 explains that it “would allow flows up to 6,000 cubic feet per second (cfs), depending on
10 Sacramento River elevation, through the gated notch.... The Project, when operating, would be able
11 to flow water through the notch from November 1 through March 15.”

12 62. Despite these statements, however, DWR has asserted a need for sweeping easement
13 rights allowing expanded Project operations—rather than rights that correspond to Project operating
14 criteria, the EIR, and existing permits—in its interactions with the Water Commission. As DWR has
15 regularly represented to the Water Commission:

16 There is a **reasonable probability** that adaptive management of the Project may be required
17 after Project operations commence to meet the Project objectives. The adaptive management
18 flowage easements would **allow for Project operations to increase flows up to 12,000 cfs**
19 **from November 1 through March 15 annually and up to 1,000 cfs through May 1. If**
20 **future Project operations utilize such easements, between approximately 3,000 – 5,000**
21 **acres of the areas identified in the preferred alternative in the Project EIS/EIR would**
22 **continue to be inundated post-March 15 in the Yolo Bypass....**To ensure the regulatory
and project objectives can be met, DWR is acquiring adaptive management flowage
easement rights for potential future Project operations over the properties. However, it
should be noted that the Project is not authorized at this time to operate under those
conditions. Prior to a change in Project operations to utilize adaptive management flowage
easement rights, DWR will complete any environmental review that would otherwise be
required by law.

23 63. To support its acquisition of broad easement rights, DWR cannot rely on the EIS/EIR
24 due to the much more limited scope of its analysis. It therefore adopted a Notice of Exemption
25 (“NOE”) pursuant to CEQA on March 7, 2022, citing Public Resources Code § 21080.28, relating
26 to acquisitions for habitat restoration and related purposes. The NOE describes the scope of the
27 easements as including potential expanded Project operations, largely mirroring language in the
28 Water Commission staff reports:

1 ...up to 12,000 cfs from November 1 through March 15 and 1,000 cfs through May 1. If
2 future Project operations utilize such easements, between approximately 3,000-5,000 acres
3 of the areas inundated under the Project EIS/EIR would be inundated post-March 15 in the
4 Yolo Bypass, with depths, duration, and last day wet differing for individual parcels and
5 dependent upon the Sacramento River hydrology each year. (NOE, Att. B.)

6 64. DWR’s proposed easement language, however, is even broader than the description
7 of scope included in the NOE. As mentioned above, the easements contain no references to the
8 Project, any rate of flow, or date ranges to constrain the exercise of easement rights. The rights
9 sought by DWR are effectively unlimited except by the reference to “fish passage and floodplain
10 restoration projects.” In other words, DWR analyzed a limited project in the EIR/EIS but it is now
11 openly taking steps toward a larger project.

12 **I. The County’s Recent Discovery of the True Conveyance Capacity, Elimination
13 of the Cutoff Walls, and DWR’s Efforts to Fast-Track Project Operational
14 Changes.**

15 **Headworks Facility Capacity**

16 65. On January 26, 2023, DWR staff mentioned in casual conversation with a County
17 natural resources planner that the headworks facility would have a maximum conveyance capacity
18 of 12,000 cfs. Shortly thereafter, DWR reaffirmed the 12,000 cfs capacity in more formal meetings
19 held at the County’s request to discuss the discrepancy between the January 26, 2023 disclosure by
20 DWR and the plain language of the EIS/EIR and project approvals, which refer exclusively (and
21 extensively) to a gated facility of about 6,000 cfs. In effect, DWR concealed the facility’s design
22 capacity in the EIS/EIR, Project approval documents, and subsequent permitting (and similar)
23 proceedings. To date, DWR has offered no explanation for its concealment of the true capacity of
24 the headworks facility in the EIS/EIR.

25 66. The County alleges, aside from its conversations with the County, DWR has not
26 publicly disclosed the true capacity of the headworks facility to affected Yolo Bypass landowners
27 and other stakeholders.

28 67. The 12,000 cfs facility, nonetheless, is currently under construction. The County
29 contends that DWR could not, and did not, properly approve this facility due to the vast difference
30 in its functional capabilities from the facility described in the EIS/EIR. The EIS/EIR and all DWR
31 approval documents expressly say that the facility would have a “maximum design capacity” of

1 about 6,000 cfs. And yet, DWR worked concurrently to design a much larger facility without any
2 public notice, opportunity for comment, or analysis of the environmental effects that a larger
3 capacity facility could have on agriculture, hydrology, biological species, and other environmental
4 resources. The EIS/EIR and approvals relying thereon are thus inadequate to support construction
5 of a 12,000 cfs facility. Put simply, DWR cannot build what it did not properly disclose, study, or
6 approve.

7 **Elimination of Cutoff Walls**

8 68. Shortly after disclosing the 12,000 cfs capacity of the Project headworks, DWR
9 disclosed to the County that it also changed the Project after its approval to eliminate the cutoff
10 walls in the east levee of the Yolo Bypass. The County has not been able to obtain any documents
11 reflecting this decision or analyzing its potential impacts pursuant to CEQA other than a short
12 technical study prepared by DWR staff dated January 27, 2022. The study focused narrowly on
13 whether the Project channels would increase through-seepage (water movement through a levee
14 embankment) or underseepage when the Fremont Weir is overtopping and the Yolo Bypass is at
15 capacity. The study concluded the effect of the Project channels would be negligible without the
16 cutoff walls in this very limited operational scenario and did not address the need for CEQA
17 analysis in connecting with changing the Project to eliminate the cutoff walls.

18 69. Based on this limited study and without any other consideration of seepage
19 attributable to Project operations in the absence of the cutoff walls or potential impacts, DWR
20 eliminated the cutoff walls. The extent to which elevated groundwater levels will impact lands east
21 of the Bypass during Project operations—one of the concerns DWR itself identified in the
22 EIS/EIR—remains unknown and of substantial concern to the County.

23 70. The County submits that based on language in the EIS/EIR regarding the “losing
24 condition” of lands to the east, it is reasonable to expect impacts will occur. The proximity of the
25 Project to the east levee of the Bypass makes clear why DWR included cutoff walls in the Project
26 (see the graphic included as **Exhibit D**). Indeed, further south and immediately east of the Yolo
27 Bypass, DWR has agreed to purchase “seepage easements” on farmland in connection with the
28 Project. This amounts to a concession by DWR—the leading state agency on water, groundwater,

1 and flood infrastructure matters—of the potential for such impacts, and particularly in the vicinity
2 of the omitted cutoff walls due to the unique soil and groundwater conditions noted in the EIS/EIR.
3 The environmental impacts associated with those changes have not been analyzed, and appropriate
4 mitigation measures have not yet been considered.

5 **Changes to Project Operations**

6 71. The County’s concern with the 12,000 cfs capacity of the headworks facility is
7 heightened by DWR’s ongoing efforts to lay the groundwork for rolling back its commitments to
8 the 6,000 cfs operational limit and March 15 inundation end date. DWR has acknowledged that the
9 Project entrainment rate objective (i.e., the degree to which juvenile fish are diverted onto the
10 floodplain) expressed in the EIS/EIR is unrealistic:

11 The Action Area will provide approximately a 0.9:1.0 ratio [90%] between juvenile
12 entrainment rates and flow entrainment rates. Reclamation and DWR anticipate lower
entrainment by [sic] want to strive for this entrainment rate. (App. C to EIS/EIR, p. C-7).

13 72. At the time of Project approval, however, DWR’s position in the Adaptive
14 Management Plan included in Appendix C to the EIS/EIR was that the “potential management
15 response” to any failure to achieve the (unrealistic) entrainment rate would be limited to:

16 Additional monitoring and study of obstacles to entrainment. Develop model for behavioral
17 guidance structures to improve entrainment and implement if likely to provide desired
objective. Improve upstream bank channel. (*Id.*).

18 Actions to increase the rate of flow beyond 6,000 cfs or extend the inundation end date past March
19 15 were **not** part of the Adaptive Management Plan at the time of initial Project approval in 2019.

20 73. Just over a year later, however, DWR changed course in an updated Adaptive
21 Management Plan prepared in November 2020 (the “2020 AMP”) but not circulated for public
22 review or comment. In the 2020 AMP, DWR retained the same unrealistic 90% entrainment goal but
23 added that it will “[c]onsider **modifying gate operations** or project hydrodynamics (i.e., improve
24 upstream bank channel) to improve entrainment rate” if the goal is not met. (2020 AMP, p. 23.) Nor
25 is the March 15 date—a hard fought compromise over the course of several years—off limits.
26 Adjusting “inundation duration” is specifically identified as a “potential management response” if
27 the entrainment rate is not met or if juvenile Chinook salmon are not larger than in years when the
28 Project does not operate. (2020 AMP, pp. 24-25.)

1 (3) Prevent significant, avoidable damage to the environment by requiring changes in
2 projects through the use of alternatives or mitigation measures when the governmental
agency finds the changes to be feasible.

3 (4) Disclose to the public the reasons why a governmental agency approved the project in
4 the manner the agency chose if significant environmental effects are involved. (*Bottini v.*
City of San Diego, 27 Cal.App.5th 281, 291 (2018).)

5 78. To effectuate these purposes, an EIR must represent “a good-faith effort at full
6 disclosure.” (CEQA Guidelines § 15003(i).) The California Supreme Court has emphasized that an
7 EIR “is a document of accountability” and that “[t]he EIR process protects not only the environment
8 but also informed self-government,” reinforcing the fundamental CEQA precept that a lead agency
9 must be fully transparent in the EIR and CEQA process. (*Laurel Heights Improvement Ass’n v.*
10 *Regents of the University of California*, 47 Cal.3d 376, 392 (1987).)

11 79. Consistent with these precepts, an accurate project description is essential to the legal
12 adequacy of an EIR. To pass legal muster under CEQA, an EIR must contain an “accurate, stable,
13 and finite project description.” Further, “[i]f a final environmental impact report (EIR) does not
14 ‘adequately apprise all interested parties of the true scope of the project for intelligent weighing of
15 the environmental consequences of the project,’ informed decisionmaking cannot occur under
16 CEQA and the final EIR is inadequate as a matter of law.” (*RiverWatch v. Olivenhain Municipal*
17 *Water Dist.*, 170 Cal. App. 4th 1186, 1201 (2009) (internal citations omitted).) “The ultimate
18 decision of whether to approve a project...is a nullity if based upon an EIR that does not provide the
19 decisionmakers, and the public, with the information about the project that is required by CEQA.”
20 (*Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829 (1981).)

21 80. The EIS/EIR unambiguously describes the headworks proposed in Alternative 1 as a
22 facility that, in DWR’s words, “would allow flows up to 6,000 cubic feet per second (cfs),
23 depending on Sacramento River Elevation, through the gated notch to provide open channel flow
24 for adult fish passage, juvenile emigration, and floodplain inundation.” Nothing in the 10,000+
25 pages of the EIS/EIR indicates that the design capacity of the headworks would significantly exceed
26 6,000 cfs. DWR’s own approval documentation and the corresponding NOD filed with the State
27 Clearinghouse on July 19, 2019 all mirror the EIS/EIR language describing Alternative 1 as having
28 a 6,000 cfs design capacity. Additionally, in permitting (and similar) proceedings with other state

1 and federal agencies after approving the Project, DWR continued to describe the headworks as an
2 approximately 6,000 cfs facility. Consequently, the Project under construction is not the “project”
3 described in the EIR and, as a matter of law, DWR could not properly approve the Project with a
4 12,000 cfs capacity headworks due to deficiencies in the EIR.

5 81. DWR committed a prejudicial abuse of discretion, failed to proceed in the manner
6 required by law, and acted without substantial evidence in violation of CEQA by concealing the
7 12,000 cfs capacity of the Project headworks and misleading the public in the EIS/EIR and in its
8 Project approvals. All work in furtherance of the Project must now cease pending CEQA
9 compliance. The Court should issue a writ of mandate directing DWR to set aside its certification of
10 the EIR, invalidate all Project approvals and associated Project permits, and enjoin all Project-
11 related construction activities.

12 **SECOND CAUSE OF ACTION**

13 **(Violation of CEQA--Elimination of Project Cutoff Walls)**

14 82. The County incorporates herein by reference the allegations contained in the
15 foregoing paragraphs.

16 83. Public notification of agency decisions is central to CEQA's protection of
17 environmental resources. “Public notification serves the public's right to be informed in such a way
18 that it can intelligently weigh the environmental consequences of any contemplated action and have
19 an appropriate voice in the formulation of any decision.” (*Concerned Citizens of Costa Mesa, Inc. v.*
20 *32nd Dist. Agricultural Ass’n*, 42 Cal.3d 929, 938 (1986).)

21 84. Hidden actions to change existing projects, such as the one challenged here,
22 undermine the basic purpose of CEQA. “Public participation is an essential part of the CEQA
23 process.” (Guidelines, § 15201.) “[T]he privileged position that members of the public hold in the
24 CEQA process...is based on a belief that citizens can make important contributions to environmental
25 protection and on notions of democratic decision-making...” (*Id.* at 935 (quoting Selmi, *The*
26 *Judicial Development of the California Environmental Quality Act*, 18 U.C. Davis L. Rev. 197,
27 215-16 (1984).)

1 3. Refrain from granting any further approvals for the Project unless and until it
2 has fully complied with the requirements of CEQA; and

3 4. Cease and desist from any other significant efforts to plan, design, permit,
4 build, operate, or otherwise implement the Project in a manner inconsistent with the initial
5 project approvals, including but not limited to compliance with the approved maximum
6 design flow of approximately 6,000 cfs and the March 15 end date for Project operations
7 exceeding the capacity (approximately 300 cfs) of the Tule Canal, without first fully
8 complying with the requirements of CEQA.

9 B. For a temporary stay and the entry of preliminary and permanent injunctive relief
10 prohibiting DWR from constructing and operating the Project until it has fully complied with the
11 requirements of CEQA by taking the actions set forth in the preceding paragraph and conducting
12 further environmental review in compliance with the CEQA requirements set forth herein;

13 C. Award the County its fees and costs in this action, including reasonable attorneys'
14 fees pursuant to Code of Civil Procedure § 1021.5 and any other applicable provisions of law; and

15 D. Grant such other relief as the Court deems just and proper.

16
17 Dated: July 18, 2023

PHILIP J. POGLEDICH
COUNTY COUNSEL

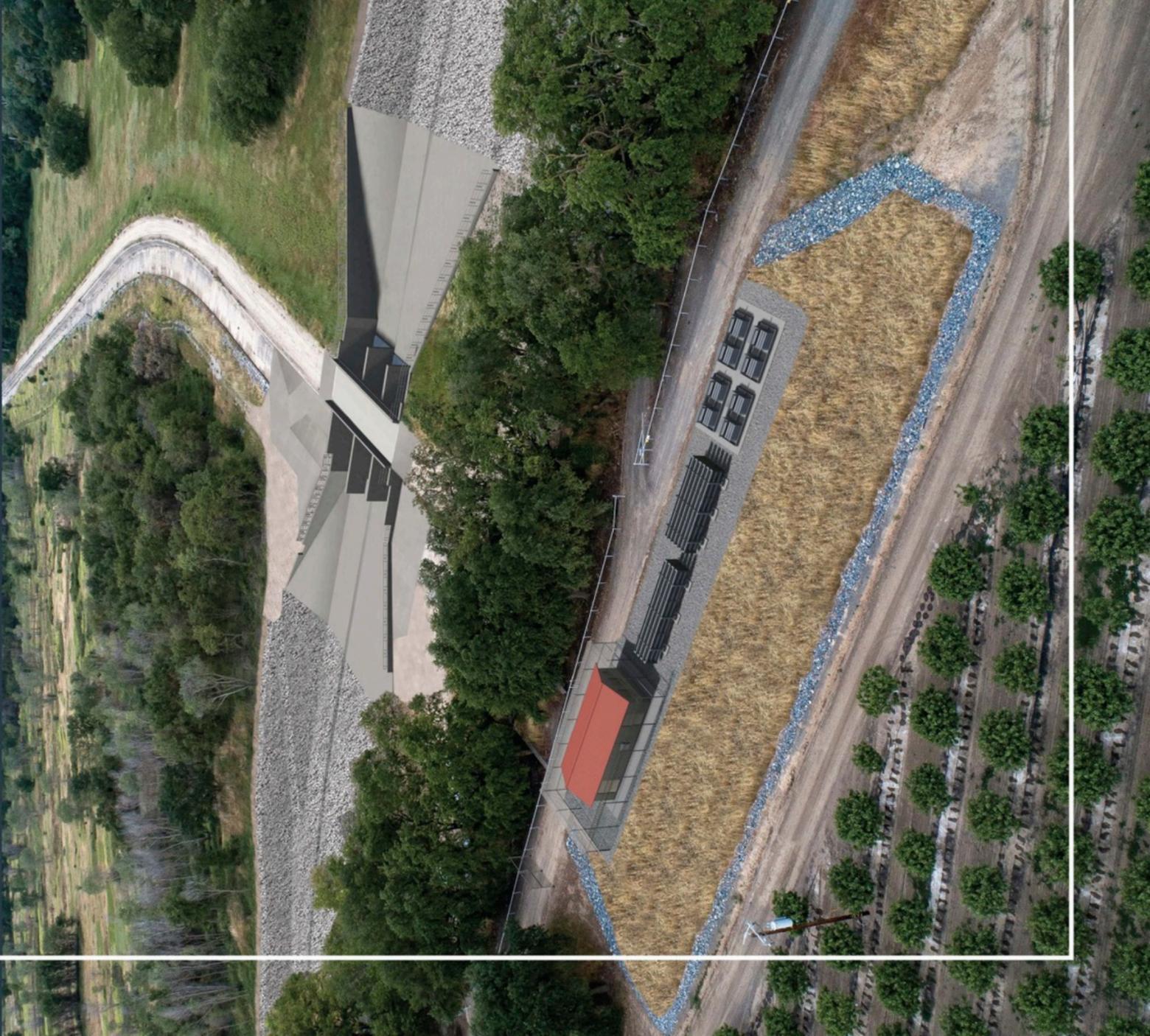
18
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20 By: 
PHILIP J. POGLEDICH
Attorneys for COUNTY OF YOLO

EXHIBIT A



BUREAU OF
RECLAMATION

CONTROL BUILDING & HEADWORKS STRUCTURE



HEADWORKS STRUCTURE



Gate 1: 18ft tall x 34ft wide
Gate 2: 14ft tall x 27ft wide
Gate 3: 14ft tall x 27ft wide

EXHIBIT B

Notice of Determination

Appendix D

To:

Office of Planning and Research
U.S. Mail: _____ Street Address: _____
P.O. Box 3044 1400 Tenth St., Rm 113
Sacramento, CA 95812-3044 Sacramento, CA 95814

County Clerk
County of: _____
Address: _____

From:

Public Agency: Department of Water Resources
Address: 3500 Industrial Blvd., 2nd Floor
West Sacramento, CA 95691
Contact: Catherine McCalvin
Phone: 916-376-9705

Lead Agency (if different from above): _____
Address: _____
Contact: _____
Phone: _____

SUBJECT: Filing of Notice of Determination in compliance with Section 21108 or 21152 of the Public Resources Code.

State Clearinghouse Number (if submitted to State Clearinghouse): 2013032004

Project Title: Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project

Project Applicant: California Department of Water Resources

Project Location (include county): Sacramento, Solano, Sutter, Yolo (See Attachment 1, Project Location)

Project Description:
See Attachment 1, Project Description

This is to advise that the California Department of Water Resources has approved the above
(Lead Agency or Responsible Agency)

described project on 7-19-19 and has made the following determinations regarding the above
(date)
described project.

1. The project [will will not] have a significant effect on the environment.
2. An Environmental Impact Report was prepared for this project pursuant to the provisions of CEQA.
 A Negative Declaration was prepared for this project pursuant to the provisions of CEQA.
3. Mitigation measures [were were not] made a condition of the approval of the project.
4. A mitigation reporting or monitoring plan [was was not] adopted for this project.
5. A statement of Overriding Considerations [was was not] adopted for this project.
6. Findings [were were not] made pursuant to the provisions of CEQA.

This is to certify that the final EIR with comments and responses and record of project approval, or the negative Declaration, is available to the General Public at:

3500 Industrial Blvd., 2nd Floor, West Sacramento, CA 95691

Signature (Public Agency): Karl Nemo Title: Director, Depart. of Water Resources
Governor's Office of Planning & Research

Date: 7-19-19 Date Received for filing at OPR: JUL 19 2019

STATE CLEARINGHOUSE

**YOLO BYPASS SALMONID HABITAT RESTORATION AND FISH PASSAGE
PROJECT (SCH# 2013032004)**

NOTICE OF DETERMINATION ATTACHMENT 1

PROJECT AREA

The Project area includes the lower Sacramento River basin, including the Yolo Bypass, in Sacramento, Solano, Sutter, and Yolo counties, California. The neighboring local jurisdictions include the cities of Davis, Sacramento, West Sacramento, and Woodland. Major water bodies and infrastructure located within the Project area include the Sacramento River; Fremont, Sacramento, and Lisbon weirs; Knights Landing Ridge Cut and Wallace Weir; Cache and Putah creeks; Willow Slough Bypass; Tule Canal; and the Toe Drain. Project actions are primarily located along Fremont Weir and within the Fremont Weir Wildlife Area south to Agricultural Road Crossing 1.

The below figure shows the Project (Alternative 1 in the Final EIS/EIR) area.

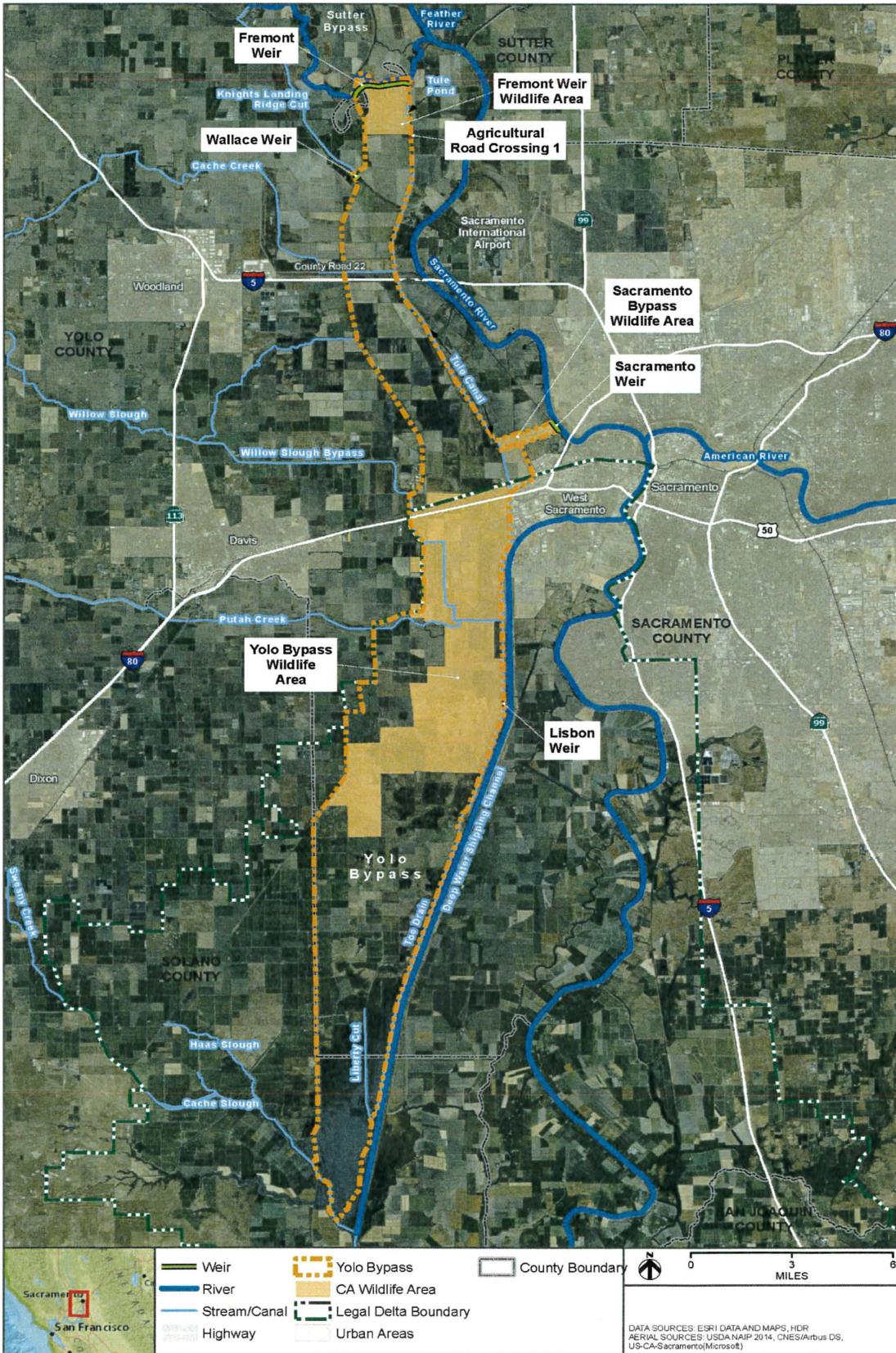


Figure 1. Project Area

Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (SCH#2013032004)

PROJECT DESCRIPTION

The goal of the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project is to improve fish passage and increase juvenile fisheries rearing habitat in the Yolo Bypass and lower Sacramento River basin. The Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project is intended to comply with Reasonable and Prudent Alternative (RPA) action I.6.1 and, in part, I.7 of the 2009 National Marine Fisheries Service Biological Opinion (NMFS BiOp) on the long-term operations of the State Water Project and Central Valley Project. The Final EIS/EIR analyzed six alternatives and the No Project Alternative. Alternative 1 was DWR's Preferred Alternative during the Draft EIS/EIR process where it was identified as the environmentally superior alternative. After reviewing public comments and considering the impacts and benefits of the Alternatives, DWR is proposing to proceed with the construction of Alternative 1. Under Alternative 1 described in the Final EIS/EIR (see Figures 2-4), increased flow from the Sacramento River would enter the Yolo Bypass through a gated notch on the east side of Fremont Weir. The gated notch would create an opening in Fremont Weir that is deeper than Fremont Weir, with gates to control water going through the facility into the Yolo Bypass. The invert of the new notch would be at an elevation of 14 feet, which is approximately 18 feet below the existing Fremont Weir crest. Water would be able to flow through the notch during some periods when the river elevations are not high enough to go over the crest of Fremont Weir (at an elevation of 32 feet). Alternative 1 would connect the new gated notch to Tule Pond with a channel that parallels the existing east levee of the Yolo Bypass. Alternative 1 would have the shortest and most direct access to the Tule Canal for migrating fish. Alternative 1 would allow flows up to 6,000 cubic feet per second (cfs), depending on Sacramento River elevation, through the gated notch to provide open channel flow for adult fish passage, juvenile emigration, and floodplain inundation. This alternative would include a supplemental fish passage facility on the west side of Fremont Weir and improvements to allow fish to pass through Agricultural Road Crossing 1 and the channel north of Agricultural Road Crossing 1.

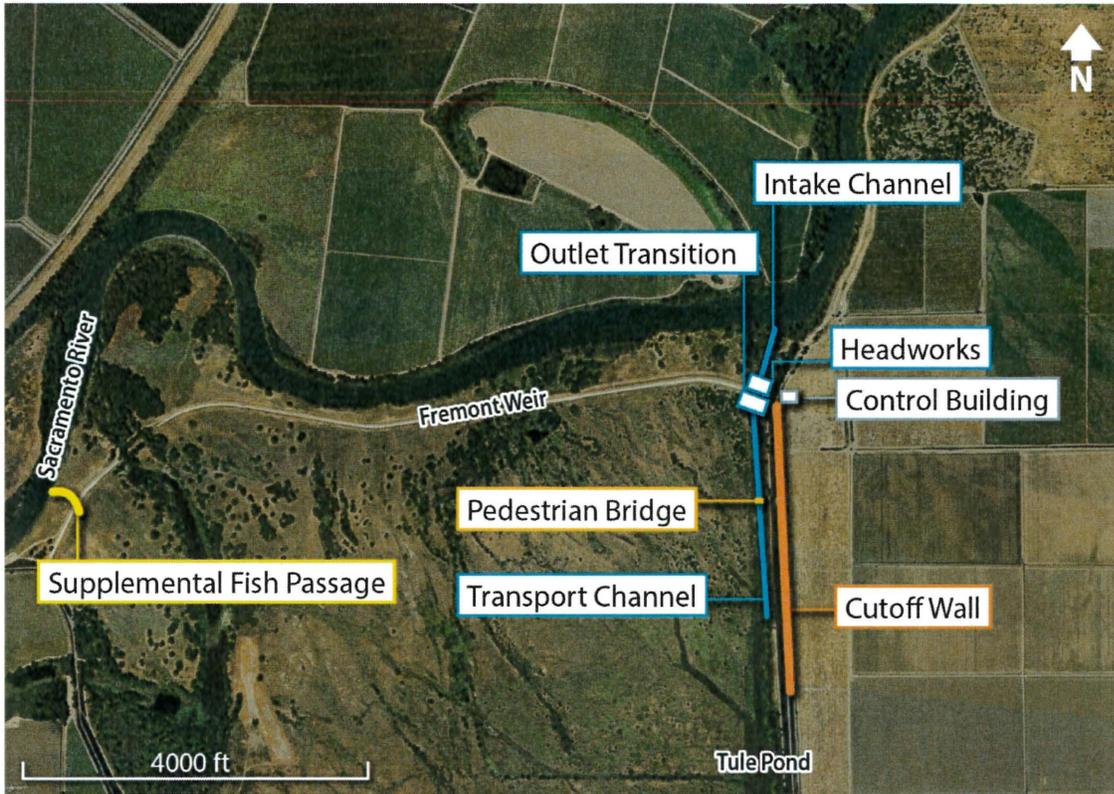


Figure 2. Alternative 1 components near the Fremont Weir

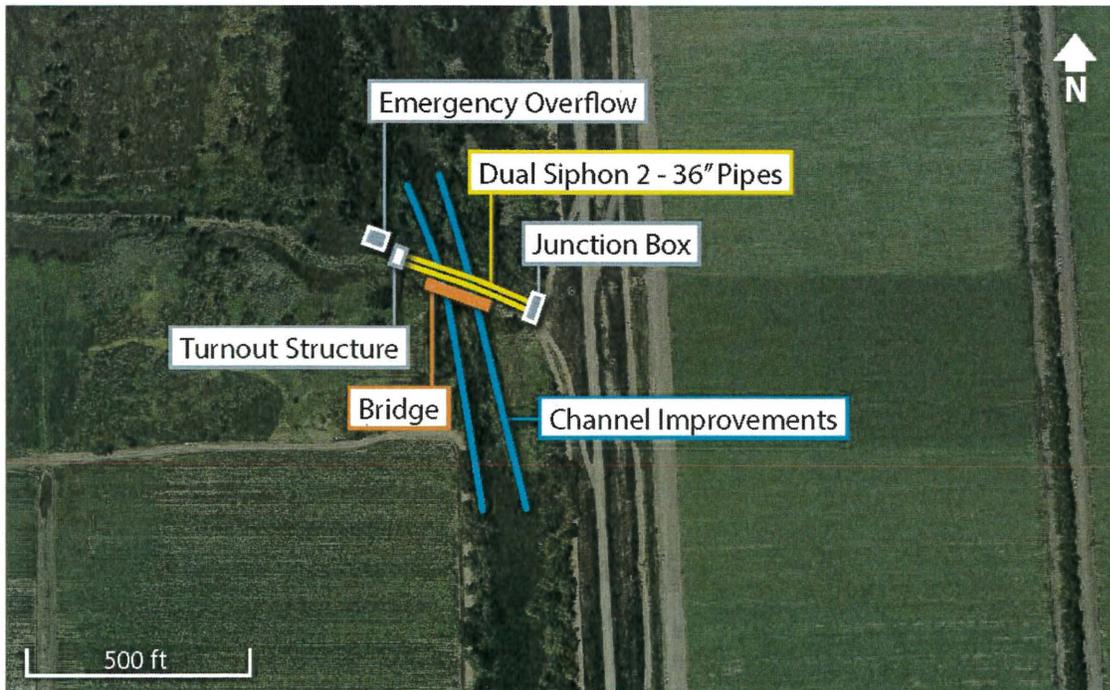


Figure 3. Improvements at Agricultural Road Crossing 1

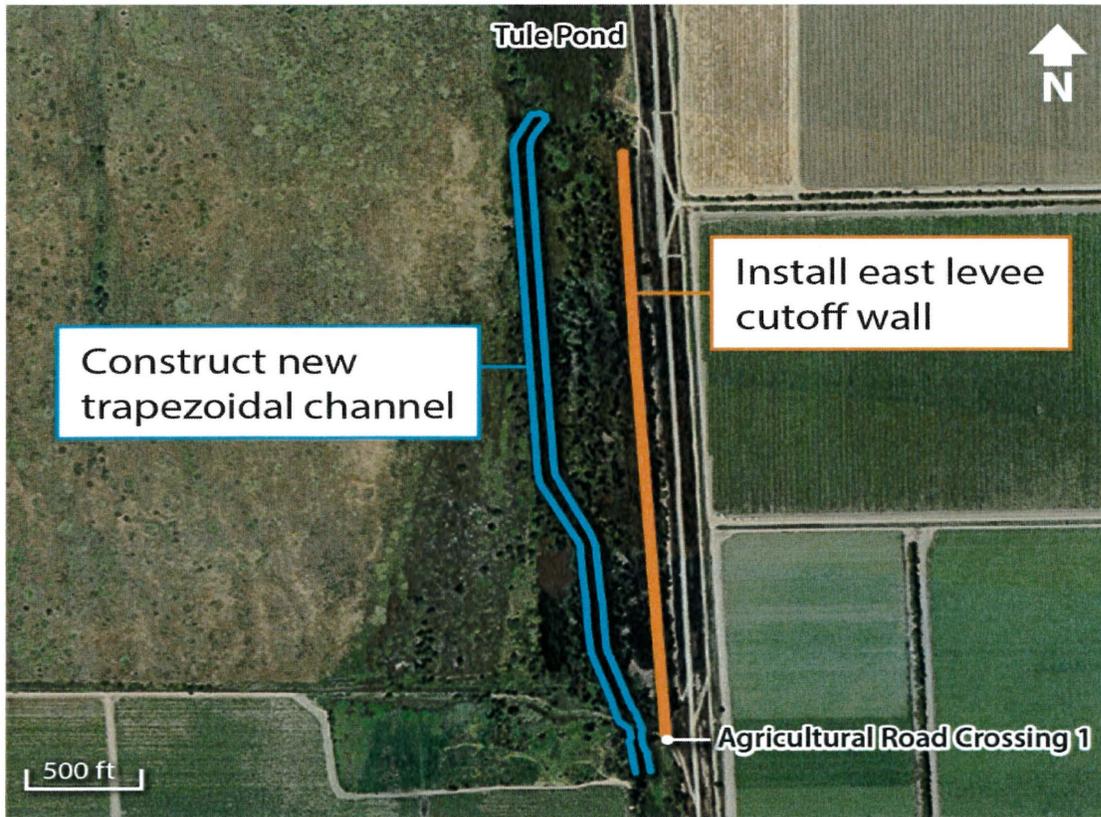


Figure 4. Downstream improvements near Agricultural Road Crossing 1

EXHIBIT C

1 PHILIP J. POGLEDICH, COUNTY COUNSEL (State Bar No. 197110)
2 philip.pogledich@yolocounty.org
3 ERIC MAY, SENIOR DEPUTY (State Bar No. 245770)
4 eric.may@yolocounty.org
5 OFFICE OF THE COUNTY COUNSEL
6 625 Court Street, Room 201
7 Woodland, CA 95695
8 Telephone: (530) 666-8172
9 Facsimile: (530) 666-8279

10 Attorneys for Petitioner COUNTY OF YOLO

11 *Exempt from Filing Fees Under Gov. Code § 6103*

12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF YOLO**

14 COUNTY OF YOLO;

15 Petitioner,

16 v.

17 CALIFORNIA DEPARTMENT OF WATER
18 RESOURCES and DOES 1-50, inclusive

19 Respondents;

20 UNITED STATES BUREAU OF
21 RECLAMATION and ROES 51-100,

22 Real Parties in Interest.

Case No.:

**NOTICE TO INTENT TO FILE
PETITION UNDER CALIFORNIA
ENVIRONMENTAL QUALITY ACT
(Public Resources Code § 21167.5)**

1 PLEASE TAKE NOTICE, under Public Resources Code section 21167.5 and Code of Civil
2 Procedure section 388, that on or about July 18, 2023, the County of Yolo will file a petition for writ
3 of mandate against the California Department of Water Resources (DWR) in Yolo Superior Court.
4 The petition will present causes of action arising in connection with the Yolo Bypass Salmonid
5 Habitat Restoration and Fish Passage Project. The causes of action included in the Petition address
6 the following matters:

7 (1) DWR's failure to disclose, analyze, or properly approve the 12,000 cubic foot per
8 second (cfs) capacity of the headworks facility under construction, which was described as having a
9 design capacity of 6,000 cfs in Alternative 1 in the Environmental Impact Statement/Environmental
10 Impact Report (EIS/EIR) and in approvals signed by Director Nemeth on July 19, 2019; and

11 (2) DWR's failure to disclose or analyze the post-approval elimination of cutoff walls in
12 the east levee of the Yolo Bypass that were expressly included as a component of Alternative 1 in
13 the EIS/EIR and the July 19, 2019 approval documents.

14 The County contends that DWR violated CEQA in each of the foregoing ways. The petition
15 will seek various forms of relief for these violations, including preliminary and permanent
16 injunctive relief to halt ongoing work in furtherance of the project unless and until DWR fully
17 complies with CEQA.

18 A copy of the petition is attached to this notice.

19
20 Dated: July 17, 2023

PHILIP J. POGLEDICH
COUNTY COUNSEL

21
22
23 By: 
PHILIP J. POGLEDICH
24 Attorneys for COUNTY OF YOLO
25
26
27
28

1 (PROOF OF SERVICE BY FEDERAL EXPRESS AND E-MAIL)

2 STATE OF CALIFORNIA }
3 COUNTY OF YOLO }

4 I am a citizen of the United States and an employee of the aforesaid county; I am over the age of
5 eighteen years and not a party to the within entitled action; my business address is: 625 Court
Street, Room 201, and Woodland, California 95695.

6 On July 17, 2023 I served a copy of the **NOTICE OF INTENT TO FILE PETITION UNDER**
7 **CALIFORNIA ENVIRONMENTAL QUALITY ACT (Public Resources Code 21167.5)** on the
interested parties named below, as follows:

8 Karla Nemeth, Director
9 Thomas Gibson, General Counsel
10 California Department of Water Resources
11 715 P Street
12 Sacramento, CA 95814
karla.nemeth@water.ca.gov
thomas.gibson@water.ca.gov

13 **BY EMAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be
14 sent from my e-mail address to the persons at the email addresses listed above. I did not receive,
within a reasonable time after the transmission, any electronic message or other indication that the
transmission was unsuccessful.

15 **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and
16 addressed as indicated above. I placed the envelope or package for collection and overnight delivery
17 at an office or regularly utilized drop box of FedEx or delivered such document(s) to a courier or
driver authorized by FedEx to receive such documents

18 I, Natalia Olivares, declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct. Executed on July 17, 2023 at Woodland, California.

20
21 
22 _____
Natalia Olivares

EXHIBIT D

