



**Consideration of Action on Resolutions of Necessity for the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Big Notch Project) – Batch B, Step 2 (Action Item)**

**Introduction**

The Department of Water Resources (DWR) submitted a notice to the Commission, on February 10, 2022, of DWR's intent to request Resolutions of Necessity (RONs) for the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Big Notch Project or Project). Pursuant to the Commission's Procedures for Resolutions of Necessity and Eminent Domain (Procedures), Revised February 20, 2013, No. 2, DWR is providing this Staff Report to the Commission that includes the information and documentation necessary in order to ensure that all applicable requirements for a RON have been met. Pursuant to Procedures, DWR presented an informational briefing on this property at the April 20, 2022 Commission meeting.

DWR will present evidence in accordance with Procedure No. 2, at a public meeting for the Commission to consider in support of the specific findings required for a resolution of necessity pursuant to Code of Civil Procedure § 1245.230.

This agenda item is consistent with Goal Three of the Commission's Strategic Plan, to carry out its "statutory authorities associated with the Department ... to ensure that the Department's decisions on key programs and activities are based on sound information and advance climate resiliency." Goal Three specifically includes the Commission's eminent domain obligations within its objectives.

The Commission is being asked to consider adopting the proposed resolution of necessity at this meeting.

**Elements of the Resolution of Necessity**

The elements of the Resolution of Necessity are set forth in Code of Civil Procedure § 1245.230:

- (a) A general statement of the public use for which the property is to be taken and a reference to the statute that authorizes the public entity to acquire the property by eminent domain.
- (b) A description of the general location and extent of the property to be taken, with sufficient detail for reasonable identification.
- (c) A declaration that the governing body of the public entity has found and determined each of the following:
  - (1) The public interest and necessity require the proposed project.

- (2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (3) The property described in the resolution is necessary for the proposed project.
- (4) That either the offer required by Section 7267.2 of the Government Code has been made to the owner or owners of record, or the offer has not been made because the owner cannot be located with reasonable diligence.

The amount of compensation that is required to be paid to the owner(s) to acquire the property interest is not at issue in a RON proceeding. The amount of compensation will be either be reached by agreement through settlement negotiations or may be determined in a court trial following adoption of the Resolution of Necessity. (Cal. Const., art I, § 19.)

### **Project Description**

The Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Big Notch Project or Project) was designed by the Department of Water Resources (DWR) and the United States Bureau of Reclamation (Reclamation) to achieve compliance with Reasonable and Prudent action (RPA) I.6.1 and partial compliance with RPA action I.7 of the National Marine Fisheries Service's (NMFS's) *2009 Biological Opinion and Conference Opinion on the Long-term Operations of the Central Valley Project and the State Water Project* (NMFS 2009 LTO BO). RPA action I.6.1 states the need to increase the availability of floodplain fisheries rearing habitat for juvenile Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead and RPA action I.7 states the need to reduce migratory delays and mortalities of federally listed fish species within the Yolo Bypass. RPA actions I.6.1 and I.7 were subsequently included in the baseline conditions for the superseding NMFS's 2019 LTO BO, issued on October 21, 2019. The Project is also required under Section 9.2.2 of the *Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta* (2081-2019-066-00) (LTO ITP), issued March 31, 2020, by the California Department of Fish and Wildlife. The Project is required by the NMFS 2009 LTO BO and the LTO ITP and is necessary and in the public interest for the continued long-term operations of the Central Valley Project and the State Water Project. (CCP § 1245.230(c)(1).) The Project is being funded between DWR and Reclamation.

The NMFS 2009 LTO BO identified activities in RPA actions I.7 and I.6.1 to improve fish passage and habitat restoration actions in the lower Sacramento River basin, including the Yolo Bypass. The Yolo Bypass, which currently experiences at least some flooding in approximately 70 percent of years, retains many characteristics of the historical floodplain habitat that are favorable to various fish species. Implementation of the RPA actions would enhance existing floodplain benefits in the lower Sacramento River basin and improve fish passage in the Yolo Bypass. The primary function of the Yolo Bypass is flood control, with much of it also managed as agricultural land or wetland waterfowl habitat. Major California restoration planning efforts (e.g., CALFED Bay-Delta Program, the Bay Delta Conservation Plan, and California EcoRestore) have identified the Yolo Bypass, as well as other areas, as a prime area of the Sacramento Valley for enhancement of seasonal floodplain fisheries rearing habitat. The Yolo Bypass was

identified as the preferred location to implement the Project due to its function as a historic and current floodplain, and as the land uses within the Yolo Bypass accommodate existing flooding. Implementing the Project elsewhere would have had substantially larger impacts.

Through the CEQA/NEPA process, Alternative 1, East Side Gated Notch, was selected. Alternative 1 would allow flows up to 6,000 cubic feet per second (cfs), depending on Sacramento River elevation, through the gated notch, on the east side of Fremont Weir, to enter the Yolo Bypass. The Project entails constructing a gated notch on the east side of Fremont Weir, connecting the new gated notch to Tule Pond with a channel that parallels the existing east levee of the Yolo Bypass. 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. The Project would allow flows up to 6,000 cfs in a portion of the Yolo Bypass when water surface elevations in the Sacramento River are high enough for fish passage. The Project, when operating, would be able to flow water through the notch from November 1 through March 15. There are no pumps associated with the project; it is gravity-driven. This will allow juvenile salmon to move from the Sacramento River onto the floodplain and adult salmon and sturgeon access into the Sacramento River from the Yolo Bypass. The same flow entering the Yolo Bypass provides a means for the adults to return into the Sacramento River.

The Yolo Bypass is a historical floodplain and is part of the State's Adopted Plan of Flood Control (Cal. Code Regs., tit. 23, § 4) and the Sacramento River Flood Control Project (Water Code § 8361), both part of the State-federal flood management system in the Sacramento River and San Joaquin River watersheds. This Project will enhance the connection to the Sacramento River and increase the duration of flooding by about two weeks during years when water surface elevations in the Sacramento River are amenable to fish passage. Not all the land in the Yolo Bypass will experience this increase due to the Project. DWR used modeling and historical data to identify the impacted properties.

In making this decision, DWR and Reclamation reviewed the alternatives evaluated in the Environmental Impact Statement/Environmental Impact Report (EIS/EIR), the results of the physical, environmental, economic, and human resources impact analyses, and comments submitted by federal, state, and local agencies, interested parties, and the public. Alternative 1 was found to:

- Improve access to seasonal habitat through volitional entry
- Increase access to and acreage of seasonal floodplain fisheries rearing habitat
- Reduce stranding and presence of migration barriers
- Increase aquatic primary and secondary biotic production to provide food through an ecosystem approach
- Improve connectivity within the Yolo Bypass for passage of salmonids and green sturgeon

- Improve connectivity between the Sacramento River and the Yolo Bypass to provide safe and timely passage for:
  - Adult Sacramento River winter-run Chinook salmon between mid-November and May when water surface elevations in the Sacramento River are amenable to fish passage
  - Adult Central Valley spring-run Chinook salmon between January and May when elevations in the Sacramento River are amenable to fish passage
  - Adult California Central Valley steelhead in the event their presence overlaps with the defined seasonal window for other target species when elevations in the Sacramento River are amenable to fish passage
  - Adult Southern DPS of North American green sturgeon between February and May when elevations in the Sacramento River are amenable to fish passage

### **Public Engagement**

DWR and Reclamation conducted public and stakeholder outreach activities to engage and inform all interested parties of Project activities. Reclamation initiated the NEPA process by issuing a Notice of Intent on March 4, 2013, to prepare an EIS and hold public scoping meetings. DWR initiated the CEQA process by issuing a Notice of Preparation (State Clearinghouse # 2013032004) on the same date to prepare an EIR and hold public scoping meetings. Reclamation and DWR accepted scoping comments throughout the public scoping period of March 4 through May 6, 2013.

Public scoping meetings were held on March 14, 2013, in the cities of West Sacramento and Woodland, California. During the scoping meetings and throughout the public scoping comment period, Reclamation and DWR accepted comments to help determine the range of alternatives, the environmental effects, and the mitigation measures to be considered in this EIS/EIR. Comments and suggestions regarding alternatives were documented in the Public Scoping Report published in July 2013.

Public involvement and outreach activities have continued since 2013 and enabled the DWR and Reclamation to successfully involve stakeholders and incorporate public and stakeholder input into the development of this Project. DWR worked with the Department of Fish & Wildlife, Yolo County, the Bureau of Reclamation, National Oceanic and Atmospheric Administration - Fisheries, NMFS, the Army Corps of Engineers, landowners, and Non-Governmental Organizations (NGOs) to conduct public scoping meetings, workshops, and value planning exercises. There were also cooperating agency review periods, public draft comments, and an extensive amount of landowner meetings.

Three of the six alternatives considered in the environmental documents were developed by stakeholders and NGOs. The preferred alternative ultimately chosen reduced impacts on landowners while maintaining the Project's benefits. The alternative chosen sets the peak flow for the Project at 6000 cfs, and project operations for floodplain rearing habitat expire on

March 15 (rather than April 30 in other alternatives). After March 15, the flow rate would be reduced to a range between 1000 cfs to 300 cfs to accommodate the landowner's interest.

These activities sought to create an open and transparent process through which the public, stakeholders, and other interested parties can track and participate in Project activities, including the formulation of alternatives for the EIS/EIR. This coordination enabled the Project to be planned and located in the manner that will be most compatible with the greatest public good and the least private injury. (CCP § 1245.230(c)(2).)

Reclamation published a Notice of Availability for the Draft EIS/EIR in the Federal Register (Vol. 82, No. 248, 61584-61585 [FR DOC # 2017-28059]) on December 28, 2017. Public meetings were held January 17, 2018 and January 18, 2018 in the cities of Woodland and West Sacramento, California, respectively. The public comment period concluded February 15, 2018. On July 19, 2019, DWR certified the Project EIS/EIR and filed a Notice of Determination (SCH# 2013032004). Reclamation issued the Record of Decision on September 19, 2019.

#### **Public Use and Eminent Domain Authorization**

DWR is seeking flowage easements for the purpose of fish passage as required mitigation for the long-term operations of the State Water Project. DWR has authority under Water Code §§ 250, 253, 258, 11575 and 11580 to acquire property rights required and necessary for the operation of the State Water Project. Legislature has found that the operations of the State Water Project and the providing for fish and wildlife are both public uses.

California Code of Civil Procedure §§ 1245.210 and 1245.220 requires DWR to obtain a Resolution of Necessity from the Commission, as the appropriate governing body.

#### **Future Rights**

Under the Delta Reform Act (Water Code § 85308(f)) and as required under the 2019 NMFS LTO BO and 2020 LTO ITP, DWR has adopted a Project Adaptive Management and Monitoring Plan (AMMP). "Adaptive management" means a framework and flexible decision-making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvements in management planning and implementation of a project to achieve specified objectives. (Water Code § 85052.)

Under the AMMP, several potential management responses are possible if specific intervention thresholds are met during monitoring, one of which is consideration of modifying the Project operations. There is a reasonable probability that adaptive management of the Project may be required after Project operations commence to meet the Project objectives. The adaptive management flowage easements would allow for Project operations to increase flows up to 12,000 cfs from November 1 through March 15 annually and up to 1,000 cfs through May 1. If future Project operations utilize such easements, between approximately 3,000 – 5,000 acres of the areas identified in the preferred alternative in the Project EIS/EIR would continue to be inundated post-March 15 in the Yolo Bypass. The inundation charts with depths, duration and

last day wet have been modeled for the individual parcels. 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.

In determining the reasonable probability of when the date of use of these future rights would be (CCP § 1240.220) and following best available science, it is estimated DWR would need to collect approximately 7-10 years of data before determining if operations should be extended. However, based on historical data and current drought conditions, the Project would likely not be operating for consecutive years because in some years the levels of the Sacramento River would be too low for fish passage purposes. In order to gather sufficient data, it is reasonable to assume the Project would operate for 10-15 years before a determination to extend operations would be made by the regulatory agencies.

Public Resources Code § 21080.28 provides a CEQA exemption to allow acquisition of properties for restoration purposes, prior to completion of any required environmental review. The Notice of Exemption was filed with the Office of Planning and Research on March 7, 2022 (SCH Number 2013032004) and filed with the County of Yolo on March 11, 2022. Water Code § 258 and Code of Civil Procedure § 1240.220 allow DWR to acquire property rights for future needs.

### **Status of Acquisitions**

Total Number of Easements Grouped by Landowner to Be Acquired by DWR: 43

Total Number of First Written Offers Made: 22

Total Number of Easements/Approvals Acquired: 1

This information is provided at a point in time prior to the Commission Meeting and is subject to change. At this time, DWR is diligently working to reach an agreement with the landowners and cannot speculate in advance which properties will move forward with a Resolution of Necessity.

### **Property Description**

The Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Project) is seeking a flowage easement for fish purposes over the Property identified below and in the Attachments:

APN: 042-270-013

DWR Parcel Number: YBSH-136

Owner of Record: John Whitcombe and Judy Whitcombe; Kenneth O'Brien and Stacy O'Brien; and James W. Hirschmann II and Laura Ann Hirschmann

Approximate Acres: 338.21± acres

The property is currently used for duck hunting.

The property was identified through hydrodynamic modeling. To meet the demands of the EIS/EIR analyses, a 1D/2D hydrodynamic model was created using TUFLOW Classic. Comments received on suggested improvements to previous Bypass modeling efforts were incorporated into the new model as appropriate. The TUFLOW Classic model was used to perform hydrodynamic simulations of a sixteen-year period from 1997-2012. The two-dimensional capabilities of the engine allow for the comparison of the spatial distribution of flow, velocity, and depth under existing conditions and with imposed project conditions. The hydrodynamic modeling report is included in the EIS/EIR Appendices.

Pursuant to Government Code § 7267.2, a written offer of just compensation was sent to the landowner of record on January 24, 2022, a copy of which is attached to this staff report. The amount was based on an approved appraisal of the fair market value of the property and an Appraisal Summary provided to indicate clearly the basis for the offer, including, but not limited to, all of the following information: (1) The date of valuation, highest and best use, and applicable zoning of property; and (2) The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the determination of value. As DWR is acquiring an easement, existing encumbrances on the Property were also considered by the appraiser. Also included with the offer was a complete legal description of the property to be acquired, a right of way contract for the purchase of the easement, and an informational pamphlet detailing the process of eminent domain and the property owner's rights under the Eminent Domain Law.

### **Status of Negotiations**

Negotiations are still in a preliminary stage and ongoing. DWR's Real Estate Branch is working directly with the landowners to address their questions. At the time of this report, an agreement has not been reached as to compensation.

Proposed design refinements were addressed through the extensive outreach process during the design phase and environmental analysis of the Project.

### **Notice of this Commission Meeting**

Pursuant to the Commission's Procedures, written notice of this meeting was mailed via first class to the property owner(s) listed with Yolo County's Recorder on April 25, 2022. A copy of that letter is attached. Notice of the information hearing was also provided to the landowner of record on March 24, 2022. A copy of that letter is also attached.

### **Compatible Public Use**

The Property is encumbered by an existing a conservation easement, held by United States Fish and Wildlife Service. Pursuant to Code of Civil Procedure § 1240.055(c), written notice was

mailed to the conservation easement holder on January 24, 2022. A copy of that notice is attached.

DWR has determined that the Project is a compatible use with the existing conservation easement, which allows for the Property to be flooded. Operation of this Project would not unreasonably interfere with or impair the continuance of the conservation easement's public use as it exists or may reasonably be expected to exist in the future (CCP § 1240.510). DWR is working directly with the conservation easement holders impacted within the Yolo Bypass to address any questions and concerns. Conservation easement holders were sent a notice of this hearing on the resolution of necessity on April 25, 2022, pursuant to Code of Civil Procedure § 1245.235, sent by first-class mail, and have the right to appear and be heard on this matter. A copy of that notice is attached.

### **DWR Contact For This Property**

Nathan Myhre  
Associate Right of Way Agent  
715 P Street, #5  
Sacramento, CA 95814  
Nathan.myhre@water.ca.gov

### **Attachments**

- Notice of Determination (July 19, 2019)
- Notice of Exemption (March 7, 2022)
- First Written Offer Package
- Real Estate Agent Diary (Communications)
- Property Map – Location of Subject Property
- Letter to Conservation Easement Holder
- Notice of to Landowner of Informational Hearing (Informational)
- Notice to Landowner of Hearing to Consider Adopting a Resolution of Necessity
- Notice to Conservation Easement Holder of Hearing to Consider Adopting a Resolution of Necessity
- Resolution of Necessity (Draft)