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*GAVIN NEWSOM, Governor*  
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May 22, 2019

Mitchell Moody  
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**Subject: Comments on the Notice of Petitions to Revise Declaration of Kings River Fully Appropriate Stream Systems**

Dear Mr. Moody:

The California Department of Fish and Wildlife (CDFW) is providing comments on the Notice of Petitions to request revision of the declaration of the Kings River fully appropriated stream (FAS) status (Notice). The State Water Resource Control Board (SWRCB) provided the Notice on August 1, 2018, pursuant to California Code of Regulations, title 23, Section 871, subdivision (c), for two petitions filed with SWRCB requesting revision of the FAS status of the Kings River stream system. The two petitioners are listed as: 1) Semitropic Water Storage District (Semitropic); and 2) Consolidated Irrigation District, Fresno Irrigation District, and Alta Irrigation District (Consolidated).

The Consolidated application requests to divert and use up to 1,000,000 acre-feet per year (afy) of Kings River water characterized as excess flood flows, for purposes of compliance with the Sustainable Groundwater Management Act (SGMA) and for uses within Fresno, Kings, and Tulare Counties. The Semitropic application requests to divert and use up to 1,600,000 afy of Kings River flows for the purposes of irrigation and groundwater replenishment in the support of its proposed Tulare Lake Storage and Floodwater Protection Project, and in furtherance of the goals of SGMA. Related to the petitions, Semitropic has also filed a water rights complaint against the Kings River Water Association (KRWA), which acts as water master, asserting that there is more water available for appropriation from the Kings River than that identified in the 1949 settlement schedule that determines current allocations. Specifically, the complaint to SWRCB documents that under water right License Nos. 11517 and 11521, the KRWA users including has not used or stored available water for beneficial use.

CDFW supports the existing FAS status of the Kings River. It is not apparent from the petitions that the additional water requested for appropriation is available. Also, CDFW has concerns regarding effects on fish and wildlife and their habitats, particularly because existing water licenses appear to lack any legal requirement to provide necessary water as bypass flows. CDFW strongly recommends that the current petitions be rejected. Additional comments follow.

### **CDFW Regulatory Authority Regarding Water Rights**

California Water Code (CWC) Sections 1205 through 1207 establish a procedure for the SWRCB to adopt a declaration designating stream systems that are determined to be fully appropriated either year-round or during specified months. SWRCB may act on its own motion or on petition of any interested person. Any declaration that a stream system is fully appropriated encompasses all upstream sources that contribute to the stream system if, and to the extent that, such upstream sources are hydraulically continuous to the stream system.

If SWRCB determines that unallocated stream flows exist in the Kings River system, then use of these flows are subject to appropriation and approval by SWRCB pursuant to CWC Sections 1225 *et seq.* CDFW, as Trustee Agency, is consulted by SWRCB during the water rights process to provide terms and conditions designed to protect fish and wildlife prior to appropriation of the State's water resources (CWC Section 1243(b)). In determining the amount of water available for appropriation for other beneficial uses, the SWRCB must consider, especially regarding navigable waters such as these, the amount of water required for the preservation and enhancement of fish and wildlife resources (CWC Section 1243(a)).

Transfers, such as the proposed Tulare Lake Storage and Floodwater Protection Project, that require the use of State, regional, or a local public agency's conveyance facilities, require the owner of the conveyance facilities to comply with CWC Section 1810(d) by determining that transfers will not unreasonably affect fish, wildlife, or other instream beneficial uses.

### **Downstream Flow and Water Availability**

The Fresno Slough historically conveyed Kings River surface flow to the San Joaquin River, but flood flow patterns have since been modified such that up to 4,750 cubic feet per second (cfs) of flood flow releases are capable of being conveyed through Fresno Slough and James Bypass to the San Joaquin River via the Mendota Pool. Flood flow releases have occurred in 19 years since construction of the Pine Flat Dam was completed in 1954.

Each of these streams in whole or in part has a FAS status. Fresno Slough is Fully Appropriated all year from the confluence with the San Joaquin River upstream to the Kings River and including the upstream watershed of the Kings River, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems. The Kings River in Kings, Fresno, and Tulare Counties is Fully Appropriated all year from the Tulare Lake Basin upstream, including all tributaries where hydraulic continuity exists, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems. The San Joaquin River in Fresno County is Fully Appropriated all year from the confluence with Mendota Pool upstream, including all tributaries where hydraulic continuity exists, per SWRCB Water Right Order 98-08 Declaration of Fully Appropriated Stream Systems.

Diversion of Kings River surface flows away from the Fresno Slough is anticipated to also impact the Fresno Slough and San Joaquin River, and it is not clear how the water rights or FAS statuses of those streams depend on the flow that is currently delivered. Consolidated and Semitropic included a Water Availability Analysis with their respective petitions; each included different data in their analyses but neither included the entire system that would be affected by a reduction in current downstream flow.

Fresno Slough is the only riparian corridor that conveys flows from the Kings River northward into the San Joaquin River, and thence to the San Francisco Bay Delta. The addition of cool freshwater flood flows from the Kings River into the San Joaquin River system during the winter and spring months benefit both returning adult and outmigrating juvenile chinook salmon. The petitions and associated documents submitted by Consolidated and Semitropic did not include an analysis of Kings River flood flows to the aquatic ecosystems and fisheries of the Fresno Slough, San Joaquin River, and the Delta.

### **Public Trust Resources and Lack of Adequate Instream Flows**

The Kings River is a navigable river to which the Public Trust Doctrine applies (*People v. Gold Run Ditch & Mining Co.* (1884), 66 Cal. 138; *Marks v. Whitney* (1971), 6 Cal. 3d 251). CDFW is designated as trustee for California's fish and wildlife resources (Fish & G. Code Section 711.7; 14 California Code of Regulations (CCR) Section 15386) and has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations (Fish & G. Code Section 1802).

The valley floor reach of the Kings River, Tulare Lake basin, and Fresno Slough / James Bypass and surrounding areas are known to support species that are threatened or endangered under the California Endangered Species Act and/or federal Endangered Species Act in addition to other special status species, including but not limited to the

State threatened and federally endangered San Joaquin kit fox (*Vulpes macrotis mutica*), State and federally threatened giant garter snake (*Thamnophis gigas*), the State threatened Swainson's hawk (*Buteo swainsoni*), the State candidate tricolored blackbird (*Agelaius tricolor*), and the State species of special concern burrowing owl (*Athene cunicularia*) and western pond turtle (*Emys marmorata*). The San Joaquin River additionally supports habitat for the Federal threatened Central Valley steelhead (*Oncorhynchus mykiss irideus*) and the State species of special concern fall/late fall-run Central Valley Chinook salmon (*Oncorhynchus tshawytscha*), in addition to the nonessential experimental population of spring run Central Valley Chinook salmon, for which the San Joaquin River Restoration Program goal is to restore a self-sustaining fishery. Other species of birds, amphibians, reptiles, mammals, fish, and plants also compose the local ecosystem.

The lower Kings River aquatic, riparian, and wetland habitats, in their present state, represent approximately 5 percent of the historical coverage. Riparian and wetland areas along portions of the lower Kings River, its distributary sloughs, and streams currently receiving flood flows are valuable for their ecosystem processes such as protecting water quality by filtering pollutants and transforming nutrients; stabilizing stream banks to prevent erosion and sedimentation/siltation; and dissipating flow energy during flood conditions, thereby spreading the volume of surface water, reducing peak flows downstream, and increasing the duration of low flows by slowly releasing stored water into the channel through subsurface flow. Recent water years have consisted of drought and higher than average temperatures. Given the current regional weather patterns, years with insufficient rainfall and above average ambient temperatures could occur more frequently. The recent severe drought reduced surface and subsurface flow, additionally stressing the existing riparian habitat and resulting in documented losses of mature vegetation in the lower Kings River. Habitat along the Kings River downstream of Peoples Weir has also been incrementally degraded over several decades due to a combination of habitat conversion plus surface, subsurface, and groundwater diversions. Continued water diversions and drought are anticipated to result in further degradation to the remaining riparian and wetland habitat.

The remaining riparian vegetation in the lower King River and Fresno Slough provides crucial habitat for many species, including those with special status such as Swainson's hawk (SWHA). SWHA was listed as threatened in 1983 based on loss of habitat and decreased numbers across the state. SWHAs often nest in riparian vegetation located near high quality foraging habitat such as grasslands, pasture, and suitable agriculture crops such as alfalfa. Degradation and loss of riparian habitat due to insufficient instream flows pose a threat to the recovery of SWHAs that occupy the lower Kings River and Fresno Slough during the nesting season.

The Kings River, Fresno Slough, and San Joaquin River have beneficial uses designated for fish and wildlife and their habitats. The Water Quality Control Plan for the Tulare Lake Basin designates preservation or enhancement of aquatic, terrestrial, and wetland habitats and associated vegetation, fish, and wildlife; preservation or enhancement of water and food sources for wildlife; and warm water ecosystem uses and support for warm water fish as beneficial uses for the lower Kings River. The Tulare Lake Basin Plan also designates wildlife habitat uses of water that support warm water ecosystems, including but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates, as beneficial uses for Fresno Slough within the Delta-Mendota Basin Unit. The Sacramento-San Joaquin River Basin Plan designates warm and cold freshwater habitat, migration habitat for salmonids and warm water fisheries, and wildlife habitat as beneficial uses for the San Joaquin River from Friant Dam to Mendota Pool. This portion of the San Joaquin River is designated potential spawning habitat for salmon and steelhead (i.e., salmonids), and existing spawning habitat for warm water fisheries.

There is currently no flow in the Kings River dedicated to fish and wildlife, including the preservation or enhancement of aquatic or riparian habitats. It is therefore not clear that fish and wildlife in the Kings River are currently being protected or necessarily could be protected if additional water appropriations from the Kings River are authorized. Similarly, a reduction in flow to Fresno Slough and the San Joaquin River could affect the respective beneficial uses to fish and wildlife. The scheduled spring restoration flow releases to the San Joaquin River, as specified by Exhibit B of the Stipulation of Settlement (Settlement) in *NRDC et al. v. Kirk Rodgers et al.*, varies between 500 and 4000-cfs during normal to wet water years. The Kings River flood flows in combination with San Joaquin River Settlement flows would benefit both outmigrating juvenile and returning adult Chinook salmon, as well as the aquatic ecosystem in general.

Prior to construction of Pine Flat Dam in 1954, typical fall-winter stream flows below the dam at Piedra ranged between 240 and 500 cfs while stream flows during the April to June snowmelt season ranged from 3,500 to 6,500 cfs (Trihey and Associates 1992). Currently, minimum flows vary from between 35 cfs and 45 cfs below Piedra at the Fresno , and as such are insufficient to sustain Kings River flows much beyond the Fresno Weir (CDFG 1964, CDFG 1999).

Given that pre-1954 Kings River flows were many times that of the current minimum flows, CDFW recommends that SWRCB make a determination whether the above beneficial uses for fish and wildlife and public trust resources in Fresno Slough, Kings River and the San Joaquin River are adequately protected before any decision to appropriate additional water from the Kings River is made.

### **Kings River and Fresno Slough 303(d) Listing Impairments**

Section 303(d) of the Clean Water Act requires the identification of impaired waterbodies that do not meet, or are not expected to meet, water quality standards. The current list approved by the United States Environmental Protection Agency (USEPA) is the 2014-2016 303(d) list.

In 2002 and 2014, the USEPA added the Lower Kings River from Pine Flat Reservoir to Island Weir (2002), and Island Weir to Stinson and Empire Weirs (2014) to the 303(d) list of water quality limited segments due to impairment for pollutant toxicity including molybdenum, toxaphene, electrical conductivity, and alkalinity. In 2010, the USEPA added the Fresno Slough from Graham Road to James Bypass in Fresno County to the 303(d) list due to impairment for pollutant toxicity and chlorpyrifos. Between 2002 and 2014, the San Joaquin River, from Friant Dam to Mendota Pool and from Mendota Pool to Bear Creek, has been 303(d) listed for various pollutants and toxicity including boron, chlorpyrifos, diazinon, Group A Pesticides, DDT (Dichlorodiphenyltichloroethane), pH, and invasive species.

CDFW recommends that SWRCB consider the potentially cumulative impacts to water quality and fisheries resources from diverting additional water from the Kings River. Continued impaired conditions, particularly if water quality objectives of respective Basin Plans are not met, will threaten the designated beneficial uses for the Kings River, Fresno Slough, and San Joaquin River.

### **Lake and Streambed Alteration**

CDFW has regulatory authority over certain activities occurring in rivers, streams, and lakes, pursuant to Fish and Game Code Section 1600 *et seq.* If any project would substantially divert or obstruct the natural flow of any river, stream or lake; substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake; or deposit or dispose of debris, waste, sediment, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, notification to CDFW is required. Regarding the diversion of flow, notification is required for the act of diverting flow that is determined to be substantial (*Siskiyou County Farm Bureau v. CDFW* (2015), 237 Cal. App. 4th 411), as well as for construction and related maintenance activities for diversion structures and facilities substantially affecting the stream bed, bank, and channel, including the floodplain, if present.

As a result of the petitions and the associated information provided, CDFW will evaluate the lower Kings River system and the status of existing diversions with regard to compliance with Fish and Game Code Section 1600 *et seq.* In this process, CDFW anticipates that coordination with SWRCB will help determine where points of diversion

are located, what water rights exist for diversions, and how those rights have been exercised. CDFW is also interested in understanding diversions operating without permitting or appropriation from SWRCB. For diversions and related activities that are subject to the notification requirement of Fish and Game Code 1602, CDFW will pursue compliance options with operators as warranted; and may initiate enforcement actions for those that have failed to notify or are otherwise not operating according to the provisions of an executed Lake and Streambed Alteration (LSA) Agreement.

In notifying CDFW, an applicant for water diversion must include the details of the diversion of water, including use in past years and stream flow information, plus documentation of the water right and any other information that is needed for CDFW to evaluate the potential impacts to fish and wildlife. This could include biological or hydrological studies, water availability analysis, instream flow study, and water quality analysis. When CDFW drafts an LSA Agreement, it is required to include measures to protect fish and wildlife (Fish & G. Code Section 1603). Based on the analysis for a diversion project, bypass flows are determined, to provide adequate water for fish and wildlife and the habitats they rely on. It is a priority for CDFW to determine adequate bypass flows for the jurisdictional diversions on the lower Kings River, for those diversions that warrant permitting. Also, it is important to note that CDFW must comply with CEQA in issuance of LSA Agreements, and additional project-specific and cumulative impacts analyses would be conducted in support of any environmental document such as a Mitigated Negative Declaration or Environmental Impact Report.

### **Sustainable Groundwater Management Act**

Each petition cites compliance with the goals of the Sustainable Groundwater Management Act (SGMA) in describing their proposed use of additionally appropriated water. CDFW supports efforts for better local and regional management of groundwater use and does not wish to subvert the need for groundwater recharge. As feasible, CDFW will review Groundwater Sustainability Plans (GSP) developed by Groundwater Sustainable Agencies (GSA). It is not clear if the proposed Tulare Lake Storage and Floodwater Protection Project is incorporated into a GSP, though a project to enhance open water and other habitats in the Tulare Lake would have value to fish and wildlife that have historical connections to Kings River flood flows; the potential concern in diverting flow for this purpose is trading one resource for another with detrimental effects. As SGMA is implemented, CDFW therefore has an interest in the careful consideration of new and changed water appropriations. In particular, it is important that if additional flow from the Kings River is ultimately appropriated for recharge and storage, it is not allowed to be subsequently diverted out of the Kings River / Tulare Lake watershed.

## **Summary**

CWC Section 1255 provides that the SWRCB shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest. CDFW urges the SWRCB to reject the FAS revision applications that would allow additional diversion from the Kings River, affecting flows to the lower Kings River, Fresno Slough, San Joaquin River, and San Francisco Delta. As discussed above, the lower Kings River and other waters that receive Kings River flood flow support many public trust resources, including fisheries, threatened and endangered species, riparian and wetland ecosystems.

It is estimated that 95 percent of pre-European settlement riparian habitat has been lost to human activities. The remaining riparian habitat in the lower Kings River watershed could be adversely affected if the groundwater table is depleted below the rooting depth of vegetation, due to flood flow diversion combined with conjunctive groundwater pumping. This could also affect the ability to implement riparian restoration projects in the lower Kings River and Fresno Slough. Existing flows appear insufficient to support current instream beneficial uses, including riparian habitat, and more reliable water, not less, is needed to maintain and enhance those habitats and the fish and wildlife that rely on them.

If SWRCB does not reject the FAS petitions at the outset, CDFW recommends that diverters along the Kings River, Fresno Slough, and San Joaquin River be required to provide a water availability analysis with sufficient information demonstrating a reasonable likelihood that water is available for the proposed appropriation by the petitioners (CWC Section 1260(k) and to meet needed instream flow requirements for public trust resource protection.

CDFW appreciates the opportunity to comment on the Notice. CDFW requests notification of any further hearings or proceedings regarding the Notice, and that such communication be sent to Annette Tenneboe, Senior Environmental Scientist (Specialist), at (559) 243-4014 extension 231 or by email at [annette.tenneboe@wildlife.ca.gov](mailto:annette.tenneboe@wildlife.ca.gov).

Sincerely,



Julie A. Vance  
Regional Manager

cc: See Page Nine



Mitchell Moody  
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## REFERENCES

California Department of Fish and Game (CDFG). 1964. CDFG, Kings River Water Association, 1964 Fish and Game Agreement, September 11, 1964.

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