

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2024-XXXX

In the Matter of the Petition of

United States Bureau of Reclamation

for Reconsideration of State Water Board Order WR 2019-0148,

Amending Permits 11308 and 11310 (Applications 11331 and 11332)

for the Cachuma Project on the Santa Ynez River

SOURCE: Santa Ynez River

COUNTY: Santa Barbara

ORDER DENYING PETITION FOR RECONSIDERATION**1.0 Introduction**

The United States Bureau of Reclamation (Reclamation or Petitioner) petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2019-0148 (Order WR 2019-0148 or Order). The Order, adopted by the Board on September 17, 2019, amends permits 11308 and 11310 (applications 11331 and 11332) (collectively, Permits) for the Cachuma Project on the Santa Ynez River in Santa Barbara County.

Reclamation raises two bases for reconsideration of the Order. First, Reclamation asserts that term 24(a) of the amended Permits (Term 24[a]) is contrary to federal law because Reclamation lacks the authority to conduct a study on options for providing passage around Bradbury Dam for steelhead trout (*Oncorhynchus mykiss*) (steelhead) without specific authorization from Congress. Second, Reclamation asserts that the Order is contrary to California law because it references and relies on a draft 2016 biological opinion (2016 Draft BO) prepared by the

National Marine Fisheries Service (NMFS) that was not admitted into the Order's administrative record for this proceeding.

For the reasons set forth below, the State Water Board has considered the merits of Reclamation's petition for reconsideration and finds that the Order was appropriate and proper. Accordingly, Reclamation's petition is denied.

2.0 Grounds for Reconsideration

Within 30 days of the adoption of a State Water Board order or decision, any interested person may petition the Board for reconsideration of the order or decision pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768 through 770. Such a petition may be brought upon any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the Board may deny the petition if it finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, § 770, subd. (a)(2)(A)–(C).)

Water Code section 1122 directs the Board to act on a petition for reconsideration no later than 90 days from the date on which the Board adopted the decision or order. If the State Water Board fails to act within 90 days, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n, v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-48, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

3.0 LEGAL AND FACTUAL Background

3.1 The Cachuma Project

The Cachuma Project is a water supply project located in Santa Barbara County. Bradbury Dam, formerly Cachuma Dam, impounds water on the Santa Ynez River, forming Cachuma Reservoir. The Santa Ynez River originates in the San Rafael and Santa Ynez Mountains and flows west approximately 90 miles to the Pacific Ocean near Lompoc, California. (Order WR 2019-0148, p. 4, appen. 1, Figure 1.) Bradbury Dam is located approximately 48.7 river miles upstream from the Pacific Ocean. Water from the project is delivered through the Tecolote Tunnel to the south coast region of Santa Barbara County for irrigation, municipal, industrial, and domestic purposes. (United States Department of the Interior (DOI)-1, p. 6.)¹ Reclamation owns all Cachuma Project facilities and operates Bradbury Dam, leaving operation of other project facilities to a joint powers agency formed by the City of Santa Barbara, Goleta Water District, Carpinteria Valley Water District, and the Santa Ynez River Water Conservation District. Reclamation completed construction of the dam in 1953 and the State Water Board's predecessor, the State Water Rights Board, issued water rights permits to Reclamation in 1958.

On August 8, 1983, Reclamation filed a petition for change in place of use and purpose of use to expand the area served with water from the project and add uses under each permit. (DOI-2b.) Reclamation amended the petition in 1995 and 1996. After issuing notice of the amended petition, the State Water Board received six protests in response to the notice. In addition, the California Sportfishing Protection Alliance filed a water right complaint in 1987, which alleged that Reclamation's construction and operation of the Cachuma Project constituted a misuse of water in violation of article X, section 2 of the California Constitution because of the impacts of the project on steelhead trout. Between November 6, 2000, and March 30, 2012, the Board held evidentiary hearings to determine whether to approve Reclamation's change petitions and whether modifications in permit terms and conditions were necessary to protect public trust resources, including steelhead, and water right holders on the Santa Ynez River. The Board adopted its final order on September 17, 2019, conditionally approving Reclamation's change petitions and amending the terms and conditions attached to Reclamation's permits for the Cachuma Project.

¹ Citations to exhibits submitted by parties to the evidentiary hearings are indicated by the name or abbreviation for the party that submitted the exhibit, followed by the exhibit number and the page number or other location of the cited information in the exhibit, if necessary. For example, here United States Department of the Interior Exhibit 1, page 6 is cited as "(United States Department of the Interior (DOI)-1, p. 6.)"

3.2 Cachuma Project Impacts on Steelhead

The Southern California steelhead is a distinct population segment of anadromous trout designated as endangered in 1997 under the federal Endangered Species Act (ESA). (16 U.S.C. §§1531-1544; 62 Fed. Reg. 43937 (Aug. 18, 1997).) Historically, the Santa Ynez River probably supported the largest steelhead run in Southern California, with steelhead evolving to spawn and rear in the upper portions of the river above where Bradbury Dam was later built. (National Oceanic and Atmospheric Administration (NOAA)-13, p.6; R.T., Oct. 23, 2003, pp. 583:19-584:10.)²

The construction, operation, and maintenance of Bradbury Dam has been and continues to be a leading factor in the degraded condition of steelhead and their habitat in the Santa Ynez River. (Final Environmental Impact Report (FEIR), Vol. III, appen. D, p. 29.)³ From 1945 to 1991, the Santa Ynez River steelhead run was reduced from an estimated population between 13,000 and 25,000 adult fish to a population of only 100 adult fish. (NOAA-12, p. 6.) While construction, operation, and maintenance of Bradbury Dam have all contributed to the decline of the fishery, one of the most significant factors is that the dam itself impedes access to a major portion of the steelhead's historic spawning and rearing habitat upstream of the dam. (NOAA-4, p. 3; FEIR, Vol. III, appen. D, p. 29; California Department of Fish and Game-2, p. 17; Member Units⁴-226, p. 32.)

The mainstem Santa Ynez River and its tributaries upstream of Bradbury Dam provide significantly more potential spawning and rearing habitat for steelhead than is available downstream. During the 2003-2004 Phase 2 evidentiary hearing, NMFS presented evidence that 71 percent of the potential steelhead spawning and rearing habitat is upstream of Bradbury Dam and only 29 percent is available downstream. (NOAA-7A, NOAA-7B, NOAA-7C.) As demonstrated by exhibits submitted by NMFS, there are 43 miles of mainstem steelhead habitat

² Citations to the Reporter's Transcripts are indicated by "R.T.", followed by the date of the transcript, then the beginning page and line number and the ending page and line number. A colon separates page and line numbers. For example, here testimony from the October 23, 2003 hearing beginning on line 19 of page 583 and ending at line 10 of page 584 is cited as "(R.T. Oct 23, 2003, pp. 583:19-584:10.)"

³ Citations to the 2011 Final Environmental Impact Report include the volume and page number, and may also include additional location information if necessary. For example, here information from page 29 of Appendix D to Volume III is cited as "(Final Environmental Impact Report (FEIR), Vol. III, appen. D, p. 29.)"

⁴ The Cachuma Project provides water to the Member Units for irrigation, domestic, municipal, and industrial uses. The Member Units consist of the City of Santa Barbara; Goleta Water District; Montecito Water District; Carpinteria Valley Water District; and the Santa Ynez River Water Conservation District, Improvement District No. 1.

upstream of Bradbury Dam and another 205 miles of habitat on tributaries to the Santa Ynez River located upstream of Bradbury Dam. (NOAA-7A, NOAA-7B, NOAA-7C.) Water temperature and oxygen levels in upper portions of Santa Ynez River watershed are consistently more favorable for steelhead spawning and rearing, while the lower areas of river were historically primarily only used for migration to reach these higher, more suitable portions of the watershed. (FEIR, Vol. II, p. 4.7-22; R.T., Oct. 23, 2003, p. 584:8-584:10.)

Since construction of Bradbury Dam, steelhead spawning and rearing has been limited to areas below the dam where conditions are less suitable. (R.T., October 23, 2003, p. 549:4-549:6.) Without access to the upstream areas for spawning and rearing, the steelhead population in the Santa Ynez River is considered to be extremely vulnerable to extinction because of drought or other climatic phenomena. (*Id.* at p. 584:16-584:21.) One of the critical recovery actions NMFS lists in its Draft Steelhead Recovery Plan is unimpeded volitional migration of steelhead to upstream spawning and rearing habitats. (FEIR, Vol. II, p. 2.0-43.) NMFS emphasized that restoring access to the upper reaches of the Santa Ynez River and tributaries upstream of Bradbury Dam is critical to preserve important life history traits that promote steelhead survival and recovery, such as the capacity to migrate long distances. (*Id.* at p. 2.0-42-44.)

In 2000, the Santa Ynez River Technical Advisory Committee (SYRTAC)⁵ prepared initial recommendations related to steelhead passage around Bradbury Dam. (DOI-1f, Vol. II, appen. E, p. E-4-1.) This initial study considered construction of a fish ladder at either Bradbury Dam or Hilton Creek, a bio-engineered fish passage channel, or implementation of trap-and-truck operations to move returning adult steelhead from below the dam into the upper basin and outmigrating smolts from the upper basin to below Bradbury Dam. (*Id.* at pp. E-4-1, E-4-5.) Ultimately, the work group recommended against consideration of a ladder or fish channel, citing cost, technical feasibility, and continuous flow concerns. (*Id.* at pp. E-4-1-E-4-4.) The preliminary study found trap-and-truck operations to be the most feasible method to provide passage for both adults migrating upstream and smolts moving downstream. (*Id.* at pp. E-4-4-E-4-5.) However, the workgroup still anticipated technical and institutional challenges to trap-and-

⁵ SYRTAC was composed of representatives from California Department of Fish and Wildlife; NMFS; Reclamation; U.S. Forest Service; Natural Resource Conservation Service; CalTrout; Santa Barbara Urban Creeks Council; Central Coast Regional Water Quality Control Board; Central Coast Water Authority; Santa Barbara County Fish and Game Commission; California Coastal Commission; U.S. Fish and Wildlife Service; Cachuma Conservation Release Board; Santa Ynez River Water Conservation District; Santa Ynez River Water Conservation District Improvement District No. 1; Santa Barbara County Water Agency; and the City of Lompoc. (FEIR, Vol. II, pp. 2.0-16-2.0-17.)

truck operations, including problems with road access to suitable release sites and potential mixing of an endangered species into established recreational fishing areas. (*Id.* at pp. E-4-5-E-4-6.)

The initial study, conducted as an introductory examination rather than a comprehensive and conclusive study, called for continued investigation of opportunities to provide passage for steelhead. (DOI-1f, Vol. II, appen. E, p. E-4-7; see R.T., Oct. 23, 2003, p. 521:8-521:16.) In each of their Phase 2 closing briefs, NMFS and the California Department of Fish and Wildlife (CDFW) also highlighted the need for further study of options for steelhead passage around Bradbury Dam. (CDFW Closing Brief, p. 22; NMFS Closing Brief, pp. 12-13.) Given the importance of fish passage around Bradbury Dam for the continued survival of the Southern California steelhead, the preliminary nature of previous analysis of the issue, and technological advances made since the 2000 study, the State Water Board's 2019 Order amending Reclamation's permits included a term directing Reclamation to further investigate options for providing passage. (Order WR 2019-0148, pp. 61-62.)

3.3 Permit Term 24(a)

To counteract degradation of the Southern California steelhead population and its habitat, the amended Permits contain a term that requires the study and evaluation of options for steelhead passage around Bradbury Dam. (Order WR 2019-0148, p. 141.)

The State Water Board has broad authority to take measures needed for the protection of fisheries under the public trust doctrine. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426; Cal. Const., art. X, § 2; Wat. Code, §§ 100 & 275.) As discussed in the Order, the Board is obligated to protect public trust resources to the extent feasible and consistent with the public interest. (*National Audubon Society v. Superior Court, supra*, at p. 426.) The public trust doctrine also imposes upon the State Water Board a duty of continuing supervision over the appropriation and use of water even after initial approval of an appropriation. (*Id.* at pp. 446-447.) Thus, in addition to considering the public trust when acting on initial water right applications, the Board has the authority to reconsider the impacts of long-standing diversions on public trust uses when faced with new information or changing needs. (*Ibid.*)

Similarly, the State Water Board has a duty to prevent the wasteful or unreasonable diversion or use of water. A particular use, method of use, or method of diversion may be unreasonable based on its impact on fish, wildlife, or other instream beneficial uses, and what was once found

reasonable may become unreasonable as circumstances change. (See *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District* (1980) 26 Cal.3d 183, 194, 200; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 139-140; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567.)

As explained in Order WR 2019-0148, Fish and Game Code section 5937 is a legislative expression of the public trust and reasonable use doctrines. That section requires dam owners to allow sufficient water to pass through a fishway, or in the absence of a fishway to pass over, around, or through a dam, to keep fish below the dam in good condition. (Order WR 2019-0148, p. 23.) In the exercise of its authorities, the Board is also directed to consider legislative policy with respect to prioritizing the protection of threatened or endangered species, particularly anadromous fisheries. (Fish & G. Code, §§ 6901-6902; Fish & G. Code, §§ 2050-2068.)

In furtherance of these duties under California law, the State Water Board may impose fish passage and related requirements as conditions of permits or licenses issued by the Board. In this instance, the Board found that steelhead below Bradbury Dam were not in good condition, due in large part to the limited quantity and quality of habitat below the dam. Accordingly, the Board directed Reclamation to increase releases from the dam to provide additional steelhead rearing and spawning habitat. The Board also required Reclamation to study and evaluate additional measures that may be necessary to restore steelhead to good condition, including options for providing steelhead passage around Bradbury Dam. (Order WR 2019-0148, pp. 54-58, 126-128.) The relevant portion of Term 24(a), as amended by Order WR 2019-0148, provides as follows:

Right holder shall, at a minimum, conduct the following studies to evaluate measures that may be necessary to keep the steelhead fishery in the Santa Ynez River below Bradbury Dam in good condition at the individual, population, and community level and shall be informed by current scientific information on Southern California steelhead recovery, including NMFS' 2012 Final Southern California Steelhead Recovery Plan:

- a. Study and evaluate options for providing steelhead passage of adults and smolts around Bradbury Dam including: fish ladders, locks, elevators, and trap-and-truck operations, including associated collection facilities. The study shall also include, but shall not be limited to, an evaluation of reservoir outlet works, collectors, transport methods, and upstream and downstream release sites. Unless the Deputy Director provides for a variation, the study shall conform to the Santa Ynez River Fish Passage Feasibility Analysis submitted by NMFS (on February 16, 2004) and CDFW (on February 17, 2004) during this proceeding. Right holder shall complete and submit a report on the results of the study to the Deputy Director, CDFW, and NMFS within 24 months from the date of this Order.

(Order WR 2019-0148, p. 141.)

Reclamation has yet to begin work on this passage study.

3.4 2016 Draft Biological Opinion

As stated above, before adopting Order WR 2019-0148, the Board held an evidentiary hearing on several contested issues, including whether to amend Reclamation's Permits to protect public trust resources. The hearing was conducted in accordance with chapter 4.5 of the Administrative Procedure Act (APA) (Gov. Code, §§ 11400-11475.70). After completing the hearing in 2012, the hearing officer closed the evidentiary portion of the record. In 2016 and again in 2019, the Board released draft orders for public review and comment. In comment letters on the draft orders, NMFS advised the Board of developments in the ongoing consultation process between NMFS and Reclamation under section 7 of the ESA (16 U.S.C. § 1536) concerning the impacts of the Cachuma Project on listed species, including steelhead. Specifically, NMFS advised the Board that Reclamation had prepared a revised Biological Assessment in 2013 (2013 BA), and subsequently NMFS had issued the 2016 Draft BO. In Order WR 2019-0148, the Board summarized the comments submitted by NMFS. (Order WR 2019-0148, pp. 35-36.) In addition, although the Board acknowledged that the 2013 BA and 2016 Draft BO were not part of the evidentiary record, the Board identified both documents as sources of current scientific information concerning steelhead recovery, and directed Reclamation to consider them when conducting the studies and preparing the reports required by the order. (*Id.* at pp. 36, 95.)

4.0 DISCUSSION

On October 16, 2019, Reclamation submitted a petition for reconsideration of Order WR 2019-0148. Reclamation asserts that the State Water Board has made two errors in law. First, Reclamation maintains that Term 24(a) is improper because Reclamation does not have authority to conduct the required fish passage study. Second, Petitioner claims that the Board improperly referenced and relied on the 2016 Draft BO because it was not part of the administrative record. Petitioner requests the Board revise Term 24(a) "to be consistent with federal law" and either strike any mention of the 2016 Draft BO from the final order or hold an evidentiary hearing to consider whether to include the document in the administrative record. (2019-10-16 Reclamation Petition for Reconsideration, p. 4.)

We examine the merits of these contentions below and conclude that the petition for reconsideration should be denied. To the extent that any issue raised in the petition is not addressed in this order, we conclude that the issue is not a substantial issue that merits review. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

4.1 Term 24(a) is a Lawful Exercise of the Board’s Regulatory Powers and Does Not Require Reclamation To Act Outside Its Authority

First, Reclamation contends that it lacks the authority to study and evaluate fish passage above Bradbury Dam absent specific authorization from Congress and, therefore, that Term 24(a) of the amended Permits is contrary to federal law. Reclamation asserts that Congress was fully aware that Bradbury Dam would block fish passage and that its decision to nevertheless authorize construction without including “any fish and wildlife purpose or features” means that Reclamation lacks the discretion to conduct a passage study. (2019-10-16 Reclamation Petition for Reconsideration, p. 4.) We disagree. Term 24(a) is a lawful exercise of this Board’s continuing authority to condition the diversion and use of water of the state and is well within the bounds of the system of cooperative federalism envisioned in the Reclamation Act of 1902. Reclamation has both the authority and duty to operate Bradbury Dam in a manner consistent with Reclamation laws, California law, and the ESA, and, in this case, Term 24(a) is consistent with all three sources of legal authority.

Section 8 of the Reclamation Act of 1902, codified at 43 U.S.C. section 383, requires that all Reclamation projects be operated in compliance with state laws “relating to the control, appropriation, use, or distribution of water used in irrigation.” The United States Supreme Court has confirmed that states may impose conditions on permits issued to the United States for irrigation projects authorized by the Reclamation Act of 1902, going so far as to note that the Act’s legislative history “makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.” (*California v. United States* (1978) 438 U.S. 645, 674-75.) As discussed above, the steelhead passage study required by Term 24(a) is authorized by California’s public trust and reasonable use doctrines, as well as the legislative prioritization of protections for anadromous fish and their habitat. (See *National Audubon Society v. Superior Court*, *supra*, 33 Cal.3d at p. 426; Cal. Const., art. X, § 2; Fish & G. Code, §§ 6901-6902; Fish & G. Code, §§ 2050-2068.) Requiring Reclamation to evaluate steelhead passage options was a valid exercise of the Board’s continuing supervisory control over state waters under state law.

Application of state water law to a project authorized under the Reclamation Act is valid so long as it is not directly inconsistent with a clear congressional directive. An exercise of historic police powers of the state is assumed not to have been superseded by a federal act “unless that was the clear and manifest purpose of Congress.” (*United States v. State Water Resources Control Board* (9th Cir. 1982) 694 F.2d 1171, 1176 [quoting *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 157].) Further, a state-imposed condition on “the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme.” (*Id.* at p. 1177.) There is no such clash here. Reclamation characterizes the situation as one where it is unable to conduct a passage study unless expressly authorized by Congress to do so. This is not the case. Instead, Reclamation must operate Bradbury Dam in compliance with state law, including abiding by a lawful permit term requiring a fish passage study, unless Congress has expressly prohibited it from doing so.

Likewise, there is no clear and manifest congressional intent to prohibit Reclamation from operating Bradbury Dam in compliance with the ESA. Reclamation maintains that Congress did not authorize construction of Bradbury Dam to include “any fish and wildlife purpose or features.” (2019-10-16 Reclamation Petition for Reconsideration, p. 2.) However, the issue is not whether pre-ESA legislation expressly authorized protection of threatened and endangered species, but whether that legislation contains an express requirement that necessarily forecloses Reclamation’s compliance with the ESA. Principles of statutory construction require the authorization of the project to be reconciled with subsequent federal statutes, including the ESA, even if that requires changes to the project to adjust for changes in physical or legal conditions, such as the listing of steelhead as endangered. (See *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District* (9th Cir. 2022) 49 F.4th 1242, 1247-1249 [holding that there was no irreconcilable conflict between federal legislation authorizing Twitchell Dam and operation of the dam in compliance with the ESA].) Congress’s intent in passing the ESA was “to halt and reverse the trend toward species extinction, whatever the cost.” (*Tennessee Valley Auth. v. Hill* (1978) 437 U.S. 153, 184.) The ESA serves to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for [their] conservation.” (16 U.S.C. § 1531(b).) The ESA further defines “conservation” broadly as “the use of all methods and procedures” necessary to allow a species to recover to the point where it is no longer considered endangered. (16 U.S.C. § 1532(3); see *Gifford Pinchot Task Force v. U.S. Fish &*

Wildlife Serv. (9th Cir. 2004) 378 F.3d 1059, 1070.) Here, one such procedure especially important to steelhead recovery is the evaluation of potential methods for providing passage around Bradbury Dam. This conclusion was supported by substantial evidence provided by NMFS and CDFW at the hearing. (See Order WR 2019-0184, p. 96.)

Reclamation suggests that Congress preempted the state's requirement that Reclamation investigate fish passage around Bradbury Dam by authorizing the project to be constructed without a fish ladder or other passage facility. This preemption argument fails, as there is no direct conflict between the congressionally authorized purpose of the project to provide relief for the critical water shortages in Santa Barbara County and the investigation of options for fish passage around the dam. The legislative records submitted by Reclamation evince an understanding that the construction of Bradbury Dam as the project was defined and approved would cut off a significant portion of the spawning grounds available on the Santa Ynez River system. (DOI-1b, p. 44.) No evidence suggests, however, that a fundamental purpose of the project was to prevent the passage of fish to the upper portion of the watershed and, as a result, effectively extirpate the native steelhead population. Instead, the understanding that the dam would block fish passage was based on uncertainty concerning the feasibility of constructing a "functional fishway" over the dam due to its height. (*Id.* at p. 41.) The purpose of the study required by Term 24(a) is to determine whether providing passage is feasible or not. Further, these legislative records, dated November 1947, were written both before the ESA was enacted and before Southern California steelhead were classified as endangered in 1997. (*Id.* at p. 30; 62 Fed. Reg. 43937 (Aug. 18, 1997).) Thus, neither Congress nor the agencies involved in preparing the report submitted to Congress considered the potential need for changes in dam operations to protect steelhead from extinction, let alone concluded that those changes should not even be considered. (See *San Luis Obispo Coastkeeper v. Santa Maria Valley Water*, *supra*, 49 F.4th at p. 1248 [noting that report that evaluated the need for water releases from Twitchell Dam to maintain steelhead did not consider survival of the species, which was listed as endangered decades after dam construction].)

We do not agree with Reclamation that there is an inherent conflict between the operation of Bradbury Dam for purposes of water supply and the investigation of options for fish passage around the dam. A fish passage study would help inform how best to harmonize the water supply benefits of the project with enhancement of habitat for endangered fish species. Such studies are crucial tools that help the Board ensure that California's waters are administered pursuant to the public trust and reasonable use doctrines. Federal permits and licenses

account for approximately 22 percent of surface water rights in California. (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429.)

Concluding that Reclamation has no authority to conduct studies to inform operation of projects and that it thus cannot be bound by State Water Board permit terms requiring such studies would severely impact California's ability to protect its fish, wildlife, and water resources.

Constraining the authority of Reclamation and the State Water Board in that way would undermine both the Reclamation Act of 1902's requirement that projects be operated in a manner consistent with state law and Reclamation's duties under the ESA.

For these reasons, we conclude Term 24(a) is a valid exercise of the State Water Board's permitting authority and does not require Reclamation to act in a manner inconsistent with federal law.

4.2 Term 24(a) Does Not Require Reclamation to Conduct a "Feasibility Report Under Reclamation Law"

As part of its argument that Term 24(a) is contrary to federal law, Petitioner also asserts that it cannot study or evaluate options for providing steelhead passage of adults and smolts around Bradbury Dam because of explicit language found in Section 8 of the Federal Water Project Recreation Act, codified as 16 U.S.C. § 460I-19. Section 460I-19 of title 16, United States Code directs, in pertinent part, that:

Effective on and after July 1, 1966, neither the Secretary of the Interior nor any bureau nor any person acting under his authority shall engage in the preparation of any feasibility report under reclamation law with respect to any water resource project unless the preparation of such feasibility report has been specifically authorized by law, any other provision of law to the contrary notwithstanding.

The relevant code defines the term "feasibility report" to mean "any report of the scope required by the Congress when formally considering authorization of the project of which the report treats." (16 U.S.C. § 460I-21(d).) Prior to approval of a new project or a supplement to a project, the Reclamation Act requires the Secretary of the Interior to submit a report to the President and to Congress that includes specific findings on the engineering feasibility of the construction, its estimated cost, and how the cost might be recouped. (43 U.S.C. § 485h(a).) Production of this feasibility report is a significant step towards final approval of any project. If the feasibility report includes findings by the Secretary that the proposed project meets certain conditions, the project is deemed authorized and may be undertaken by the Secretary without further review or authorization by Congress. (*Ibid.*) Congress retains control over spending

under the federal Reclamation laws by requiring advance approval of feasibility studies to inform final feasibility reports. In some instances, authorization of the preparation of a feasibility report is the last opportunity for Congress to control the funding of a project.

The report to be produced pursuant to Term 24(a) of the Permits does not constitute a “feasibility report under reclamation law.” The report is not required to include the elements, nor would it carry the legal weight, of a “feasibility report” as defined by the Federal Water Project Recreation Act. Reclamation may be required to eventually produce a feasibility report pursuant to section 460I-19 prior to the expenditure of any funds for the construction of a project identified through the fish passage study required by Term 24(a). (But see 16 U.S.C. § 460I-18 [authorizing the Secretary of Interior to investigate, construct, operate, and maintain fish and wildlife enhancement facilities].) Term 24(a) does not itself require the production of any such detailed report, however. The passage study required by Term 24(a) is intended to develop possible options and assess the relative costs and benefits as a precursor to a more detailed and focused investigation of a specific project alternative proposed for final approval. This does not amount to a feasibility report.

Thus, the steelhead passage study does not require Reclamation to violate section 460I-19 by preparing a feasibility report without prior Congressional authorization. Moreover, Term 24(a) is consistent with other provisions of the Federal Water Project Recreation Act. In particular, section 460I-18 of title 16 of the United States Code authorizes the Secretary of the Interior, in conjunction with reservoirs constructed pursuant to federal reclamation laws, “to investigate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation and fish and wildlife enhancement facilities . . . in a manner coordinated with other project purposes.” Further, the study required by Term 24(a) will help inform how best to operate Bradbury Dam pursuant to section 460I-12, which requires, in pertinent part, that full consideration be given to opportunities “for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this part, it shall be constructed, operated, and maintained accordingly.” Therefore, not only does Term 24(a) not violate federal law, but it also helps Reclamation meet Congressional goals for ensuring water reclamation projects are operated with proper consideration for fish enhancement opportunities.

For the reasons discussed above, Term 24(a) is a proper exercise of the Board’s permitting authority and is not outside the limits of Reclamation’s authority.

4.3 The Board Referenced the 2016 Draft Biological Order as an Example of Current Science, Not as a Basis for Findings of Fact

Reclamation's second contention is that the State Water Board committed an error in law by referring to the existence of the 2016 Draft BO and including quotes from one of the comment letters submitted by NMFS. Reclamation also objects to language in the Order that states the 2013 BA and the 2016 Draft BO prepared by NMFS "could be used as sources of information to inform submittals required by this order" and a requirement that it conduct a flow study, "taking into consideration the 2013 Biological Assessment with any amendments and the 2016 Draft Biological Opinion so comparable data will be available to evaluate the changes resulting from the flow regime." (Order WR 2019-0148, pp. 36, 95.) Petitioner also protests the inclusion of a NMFS employee's statement that the 2016 Draft BO relies on the "best scientific and commercial data available." (Order WR 2019-0148, p. 92 n. 61.)

Reclamation asserts that these references violate Government Code section 11425.50, subdivision (c), which requires that final orders issued by the Board be based "exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding." Reclamation also cites Government Code section 11425.10, subdivision (a)(1), which provides for the opportunity to present and rebut evidence in an evidentiary hearing, in support of the argument that the Board must hold a hearing to allow participants to present evidence on whether the 2016 Draft BO should be admitted into evidence or, alternatively, that any references to the 2016 Draft BO must be stricken from the Order and the document should not be considered part of the record.

Petitioner's arguments lack merit because the Board did not rely on the 2013 BA or the 2016 Draft BO to support any findings concerning contested issues of fact. The purpose of an evidentiary hearing under chapter 4.5 of the APA is to determine disputed factual issues material to an agency's decision. (See Gov. Code, § 11410.10; see also *Connecticut Dept. of Public Safety v. Doe* (2003) 538 U.S. 1, 7 [due process does not require a hearing where no material issues of fact exist].) In an adjudicative proceeding required to be conducted pursuant to the APA, the evidentiary record developed through the hearing process is the exclusive basis for any factual determinations that support the agency's decision. In its entirety, the first sentence of subdivision (c) of Government Code section 11425.50 sets forth that "[t]he statement of the *factual basis* for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding." (Italics added.)

Consistent with this limitation, an agency may consider information outside the evidentiary record, provided that the agency does not consider the information as evidence that has a bearing on any of the disputed factual issues material to the agency's decision. (*Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1313-1314, 1319-1320; *Guilbert v. Regents of University of California* (1979) 93 Cal.App.3d 233, 242-243.)

Here, the Board did not rely on the 2013 BA or the 2016 Draft BO to support any findings of fact concerning any of the contested key hearing issues that were the basis for the Board's Order. Rather, the Order mentioned the 2013 BA and the 2016 Draft BO, which was prepared by an agency with undisputed scientific expertise in evaluating the condition of fish species, as examples of the type of "current scientific information on Southern California steelhead" that Reclamation should consider when evaluating measures to keep the steelhead fishery in good condition. (Order WR 2019-0148, p. 95.) For this limited purpose, there was no need to hold a hearing to determine whether the 2016 Draft BO should be admitted into evidence as an exhibit.

It is important to note that comment letters from hearing participants are part of the larger administrative record, even though they do not constitute evidence and are not part of the evidentiary portion of the administrative record. Accordingly, the Board is free to describe parties' statements contained in comment letters. Regarding Petitioner's objection to the reference to the 2016 Draft BO contained in note 61 on page 92 of the Order in particular, that reference clearly indicates that NMFS, not the Board, has stated that "the analyses and conclusions of the most recent 2016 draft biological opinion rely on the best scientific and commercial data available." (Order WR 2019-0148, p. 92, n. 61 [referring to NMFS May 28, 2019 Revised Draft Order comment letter].) This is not a finding concerning the value of the 2016 Draft BO as evidence, or an improper reference drawing from outside the administrative record, and need not be stricken from the Order.

In sum, the Board did not rely on the 2016 Draft BO to support any findings on contested factual issues, and did not make an error in law by referring to the 2016 Draft BO. The Board therefore concludes it is not necessary to remove these references from the Order.

5.0 Conclusion

In its petition for reconsideration, Reclamation claims that Order WR 2019-0148 must be revised to correct two errors in law made by the Board. As discussed above, this is not the case. First, Term 24(a) is a lawful permit term and Reclamation possesses the authority to conduct the

required passage study. The passage study is not a “feasibility report under reclamation law” requiring prior congressional approval. Second, the Board did not rely upon the 2016 Draft BO to support any findings on a contested issue of fact, and thus was not required to hold a hearing to consider whether to add the 2016 draft BO to the evidentiary portion of the administrative record. The Board merely referenced the NMFS document as an example of the type of current scientific information that Reclamation should consider when conducting required studies. The Board therefore finds that the challenged portions of Order WR 2019-0148 are appropriate and proper. Accordingly, Reclamation’s petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED that:

Order WR 2019-0148 is affirmed and the Bureau of Reclamation’s petition for reconsideration is denied and Reclamation is ordered to comply with Term 24(a) without further delay.