

July 15, 2014

Via United States Mail and Electronic Mail

BDCP Comments
Ryan Wulff, National Marine Fisheries Service
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Sacramento, California 95814

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Re: CUEL Comments on *December 2013 Draft EIR/EIS* for Proposed Bay Delta Conservation Program (BDCP)

Dear Mr. Wulff:

The following comments are submitted by the Center on Urban Environmental Law (CUEL) at Golden Gate University School of Law. The focus of CUEL's comments is on Chapter 11 (Fish and Aquatic Resources) of the December 2013 Draft Environmental Impact Report/Environmental Impact Statement for the proposed Bay Delta Conservation Program (*December 2013 Draft EIR/EIS*). The *December 2013 Draft EIR/EIS* was prepared and circulated for public review pursuant to the California Environmental Quality (CEQA) and the National Environmental Policy Act (NEPA). CUEL's comments address the relationship between the proposed BDCP and the authority of the State Water Resources Control Board (State Water Board), the relationship between the proposed BDCP and the Ninth Circuit Court of Appeal's April 2014 decision on federal Endangered Species Act (ESA) compliance in *San Luis v. Jewell*, and CEQA/NEPA

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compliance issues pertaining to information on baseline conditions in the *December 2013 Draft EIR/EIS*.

I. Approach to Fisheries in Current BDCP and *December 2013 Draft EIR/EIS*

There are several fisheries listed under the federal ESA present in the waters of the San Francisco Bay-Sacramento River-San Joaquin River Delta (Bay Delta), including species of smelt and salmon and steelhead trout. In connection with proposed activities that may adversely impact species protected species, the ESA contains provisions that allow parties who would conduct such activities to propose “habitat conservation plans/habitat conservation programs” (HCPs) to the federal wildlife agencies, the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Services (NMFS). Pursuant to Section 10 of the ESA, the federal wildlife agencies may only approve an HCP if the plan/program and underlying project activities “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.”

There are two large water infrastructure projects that operate diversion facilities in the Bay Delta specifically and water diversion/storage facilities in the Sacramento River-San Joaquin River watershed more generally – the federal Central Valley Project (CVP) and California’s State Water Project (SWP). The CVP is operated by the United States Bureau of Reclamation (Bureau of Reclamation) and the SWP is operated by the California Department of Water Resources (DWR). In addition to the CVP and the SWP, there are also many other non-CVP/non-SWP diverters of water and operators of water storage facilities in the Sacramento River-San Joaquin River watershed.

The BDCP process has been underway for many years and to date has focused on the relationship between the impacts of the water diversion/storage operations of the CVP and SWP on fish species listed under the ESA. More specifically, the Bureau of Reclamation and DWR have initiated development of the BDCP as a multi-species HCP pursuant to Section 10 of the ESA, with the goal of creating a plan/program that would enable the CVP/SWP to operate

going forward in a manner that would “not appreciably reduce the likelihood of the survival and recovery” of the endangered smelt, salmon and steelhead fisheries in the Bay Delta watershed.

There are several stressors that have contributed and are contributing to the decline of the smelt, salmon and steelhead fisheries that pass through the Bay Delta, but three in particular that are pertinent to evaluating the BDCP. The first stressor on these fisheries is the significant reduction in fresh water flows moving through the Bay Delta which has resulted in seawater intrusion and elevated salinity levels in the Sacramento River-San Joaquin River Delta. The second stressor on these fisheries is the problem of entrainment of fish in the CVP/SWP diversion pumps that pull water from the south Delta. The third stressor on these fisheries is the reduction in the amount and quality of habitat (particularly spawning habitat) due to changes in land uses (levees, development, fill) along waterways.

Of these three noted stressors, the multi-species HCP proposed as the BDCP has so far paid little attention to the first stressor (inadequate fresh water flows into and through the Delta) and in fact anticipates increased fresh water diversions (meaning a further reduction in fresh water flows). Instead of focusing on this first stressor, to date the BDCP has instead focused on the second stressor (entrainment in the south Delta CVP/SWP pumps) and the third stressor (reduced fishery habitat). To address the second stressor (entrainment of endangered fisheries in the south Delta CVP/SWP pumps) the BDCP has proposed shifting the main point of CVP/SWP diversion upstream from the south Delta to the north Delta, and then transporting this diverted water south in two tunnels. To address the third stressor (reduced fishery habitat) the BDCP has proposed a set of projects in the watershed to increase and improve spawning habitat.

The current BDCP approach to fisheries restoration and recovery aligns with the water supply interests of recipients of CVP water (mostly Central Valley farms) and SWP water (mostly cities) in that this approach does not call for curtailing CVP/SWP diversions of water. Equally important to recipients of CVP and SWP water, moving the point of diversion to the north Delta will place the CVP/SWP pumps in a location further upstream from the intruding seawater and rising salinity levels. Water with high salinity levels is not suitable for either irrigation or drinking water supplies. If the CVP and SWP are able to divert water further upstream as the

BDCP now proposes, then CVP and SWP water is not likely to be affected by the rising salinity levels/seawater intrusion further downstream in the Delta. The BDCP's proposed north Delta point of diversion would therefore help insulate the CVP and SWP (and the recipients of CVP/SWP water) from the adverse water quality impacts of their own diversions – impacts which are getting ever closer to the existing CVP/SWP diversion pumps in the south Delta.

The *December 2013 Draft EIR/EIS* contains analysis presented in support of the BDCP's approach to fisheries, which in essence is the proposition that the endangered smelt, salmon and steelhead in the Bay Delta will be able survive and recover even if additional fresh water is diverted for the CVP and SWP because the benefits of BDCP-proposals for reduced entrainment and improved fishery habitat will outweigh the adverse impacts of reduced fresh water flows.

II. Relationship Between Proposed BDCP and State Water Board Authority

A. State Water Board 2010 Public Trust Delta Flow Proceedings and Criteria

California's 2009 Delta Reform Act was enacted after preparation of the BDCP had already begun. Among other things, the 2009 Delta Reform Act required the State Water Board (by September 2010) to establish quantitative criteria for what instream fresh water flow was needed to protect public trust resources in the Delta. The purpose of requiring the State Water Board to develop these flow criteria was to establish a solid scientific foundation for the levels of fresh water flow needed to sustain the Delta's fisheries.

Section 85086 of the 2009 Delta Reform Act explained the relationship between the State Water Board and the BDCP, noting that the State Water Board public trust flow criteria adopted for the Delta were "for the purpose of informing the planning decisions for the Bay Delta Conservation Plan." That is, the public trust Delta flow criteria established by the State Water Board were intended to serve as a reliable objective benchmark to help evaluate the extent to which a proposed BDCP would effectively achieve fishery restoration.

In terms of the State Water Board public trust Delta flow criteria process set forth in the 2009 Delta Reform Act, California public trust law provides that the State of California has a continuing trustee obligation to preserve instream uses of water (e.g. fisheries) for the public's

benefit whenever feasible. Pursuant to previous decisions by the California Supreme Court and the State Water Board, the starting point for public trust determinations is to first identify the level of protection required to fully protect the public trust resources at issue, and to then evaluate whether such levels of full protection are economically and technically feasible.¹ Section 85086 of the Delta Reform Act directed the State Water Board to only make the initial public trust determination, that is to identify what level of instream flow was needed to fully protect Delta fisheries.²

After nine months of public comments and hearings, the State Water Board issued its public trust *Delta Flow Criteria Report* in August 2010. In this report, the State Water Board adopted the following criteria: 75% of the unimpaired Delta outflow from January through June; 75% of the unimpaired Sacramento River inflow from November through June; 60% of unimpaired San Joaquin River inflow from February through June. The August 2010 *Delta Flow Criteria Report* also compared its public trust flow criteria with historic flows over the past two decades, noting that during this period Delta outflows were 30% of unimpaired flow in drier years, Sacramento River inflows were 50% of unimpaired flow from April to June, and that San Joaquin River inflows were 20% of unimpaired flows in driers years and 50% of unimpaired flows in wetter years. This comparison made clear the State Water Board's scientific finding that, to fully protect the public trust fisheries in the Delta, there would need to be significant reductions in the amount of water diverted upstream of and from the Delta to increase the amount of instream flow going through the Delta.

The 2010 *Delta Flow Criteria Report* issued by the State Water Board was endorsed by NMFS (the lead federal agency responsible for salmon and steelhead fisheries listed under the Endangered Species Act). As noted above, along with the USFWS, NMFS is one of the federal wildlife agencies with responsibility for approving the proposed BDCP to ensure compliance with the ESA. In its July 2010 comment letter to the State Water Board, NMFS stated:

¹ See *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (1983) and *Mono Lake Basin Water Right Decision No. 1631* of State Water Board.

² Paul Stanton Kibel, *The Public Trust Navigates California's Bay Delta*, 51 *Natural Resource Journal* 35 (2011).

The purpose of the flow criteria is to inform both the Bay Delta Conservation Plan process and the Delta Stewardship Council in their development of a comprehensive long-term Delta management plan. The State Water Board was successful in fulfilling this purpose by developing flow criteria through a public process, applying the best available science, and considering the broad goals of the planning efforts the criteria are intended to inform...The Delta flow criteria provide a solid foundation for considering how to manage Delta flows in a manner that is more beneficial to native aquatic species."³

The State Water Board's public trust Delta flow criteria were also praised in a July 2010 comment letter submitted jointly by the Bay Institute, the California Coastkeeper Alliance, California Sportfishing Alliance, California Water Impact Network, Defenders of Wildlife, Environmental Defense Fund, Natural Resources Defense Council, Planning and Conservation League, and Sierra Club California. This letter to the State Water Board stated:

Our organizations collectively represent hundreds of thousands of Californians concerned about keeping the Bay Delta Estuary alive and healthy and restoring our dwindling salmon and other aquatic species. We applaud the draft [of the public trust Delta flow criteria] that you have prepared identifying the flow needs of the Estuary's public trust resources, and particularly commend your careful analysis of the overwhelming scientific support that has demonstrated for many years that we are, and have been, extracting too much water from the Estuary and its watershed to support those trust resources sustainably."⁴

While acknowledging that there are other non-flow stressors (such as entrainment in the south Delta pumps and reduced spawning habitat) that may also be contributing to the decline of the smelt, salmon and steelhead that pass through the Delta, the State Water Board's conclusion was that significant additional fresh water flows are an essential prerequisite to restore and sustain these fisheries.

B. State Water Board Review of BDCP Proposal to Change Delta Point of Diversion for CVP and SWP

As discussed above, to address the problem of fish entrainment, a central component of the proposed BDCP is to change to main point of diversion for the CVP and SWP from the south Delta to the north Delta (and to then convey this water south in two new proposed tunnels).

³ NMFS July 29, 2010 Comment Letter to State Water Board.

⁴ Joint July 29, 2010 Comment Letter to State Water Board.

The entitlement of the CVP and the SWP to divert water from their current south Delta pumps is set forth in the terms in a series of appropriate water licenses issued to the Bureau of Reclamation and DWR by the State Water Board. These appropriative water licenses specify the “point of diversion” so to implement the BDCP (or at least the components of the BDCP involving the proposed new north Delta point diversion which would then deliver water into the proposed new tunnels) the Bureau of Reclamation and DWR would first need to petition the State Water Board to approve the proposed new north Delta point of diversion. In its review of a petition to modify the appropriative water licenses of the Bureau of Reclamation and DWR to change the point of diversion, California Water Code § 1257 provides that the State Water Board must determine the benefit of the proposed change to the “preservation and enhancement of fish and wildlife.” If the State Water Board determines that the BDCP proposed north Delta diversion will not benefit the fisheries that pass through the Delta (because this change is expected to reduce rather than increase fresh water flows) then the State Water Board would have discretionary authority to deny the petition.

With this context in mind, in July 2013 the State Water Board submitted comments on the draft of the BDCP EIR/EIS. In its comments, the State Water Board criticized the draft BDCP and the draft BDCP EIR/EIS for failing to propose or evaluate an alternative for CVP/SWP operations that would reduce diversions and increase fresh water flow into the Delta, for overestimating the likely effectiveness of proposed fishery habitat projects, and highlighted that the proposed north Delta point of diversion constitutes a change in water rights subject to the review of the State Water Board.

In terms of the lack of BDCP proposals to increase fresh water flow into the Delta, the July 2013 State Water Board comments on the BDCP Draft EIR/EIS stated:

“The decision tree for the Delta outflow include four operational scenarios. Compared to the no project alternative (which appears to be the appropriate comparison point for long-term effects) it appears that all of these operational scenarios decrease Delta outflow scenarios in the late long-term. The justification for this limited range of Delta outflow scenarios is not clear given that there is strong information on the possible need for more Delta outflow for

the protection of aquatic resources and the uncertainty that other conservation measures will be effective in reducing the need for flow.”⁵

The “strong information” referenced in the State Water Board’s July 2013 comments on the BDCP Draft EIR/EIS would include the comprehensive body of scientific data and analysis submitted to the State Water Board in 2010 in conjunction with the proceedings that culminated in the August 2010 *Delta Flow Criteria Report*.

In terms of overestimating the likely effectiveness of the BDCP’s proposed habitat conservation project, the July 2013 State Water Board comments on the BDCP Draft EIR/EIS stated:

“The fishery and aquatic resource impact analysis does not appear to analyze scenarios in which conservation measures are not 100% successful...the EIR/EIS appears to assume that all of the conservation measures will be successful in meeting biological goals and objectives. The lack of certainty regarding the success of the conservation measures should be a consideration in the impact analysis and significance determinations reported in the EIR/EIS.”⁶

Here and other places in the document, aquatic natural community restoration appears to assume 100% success. Is there an assumption of success for any of the restoration projects? If so, it would be helpful to disclose that assumption and detail support for it.”⁷

In terms of State Water Board role in reviewing and approving the BDCP’s proposed change of diversion (to the north Delta) in CVP and SWP appropriative water licenses, the July 2013 State Water Board comments on the BDCP Draft EIR/EIS noted:

“Before the State Water Board may approve a change in a water right permit or license needed to implement the BDCP, including a change to the point of diversion specified in the permit or licenses, the Board must find that the change will not injure any legal user of water (Wat. Code §1702). Information concerning the extent, if any, to which fish and wildlife would be affected by the change shall also be considered. (Wat. Code §1701.2). The State Water Board has an independent obligation to consider the effect of the BDCP on public trust resources and to protect those resources when feasible.”⁸

...

⁵ July 2013 State Water Board Comment Letter on BDCP, page 4.

⁶ July 2013 State Water Board Comment Letter on BDCP, pages 32-33.

⁷ July 2013 State Water Board Comment Letter on BDCP, page 35.

⁸ July 2013 State Water Board Comment Letter on BDCP, page 2.

The Executive Summary (in the draft EIR/EIS) indicates the project proponents anticipate approval from the State Water Board for new SWP points of diversion in the Delta...It further states that such changes 'would not include changes in water rights; however, there are concerns that the BDCP could result in the potential for increased exports of water.' This statement is incorrect. Implementation of the BDCP will require changes to water rights and water rights requirements.⁹

...

Similar to the executive summary, the EIR/EIS states that the project proponents anticipate approval from the State Water Board for new points of diversion in the Delta for the proposed project. The EIR/EIS further states that such changes would not include changes in water rights, but there are concerns that the BDCP could result in the potential for increased exports of water. These statements are unclear and contradictory and should be clarified. The proposed project would result in changes to water rights and could potentially affect other legal uses of water. As explained above, these issues should be fully described and analyzed in the EIR/EIS."¹⁰

From a legal standpoint, the viability of the BDCP's current approach appears contingent on the State Water Board's discretionary approval of modifications to CVP/SWP appropriate water licenses to authorize the new proposed north Delta point of diversion. Yet, in its comments on the Draft BDCP and Draft BDCP EIR/EIS, the State Water Board has indicated its view that the current BDCP approach takes insufficient account of the need for additional fresh water flows into the Delta and that the current BDCP approach places unwarranted reliance on the anticipated effectiveness of the proposed habitat conservation projects. Moreover, the current BDCP approach does not take into account the findings and recommendations in the State Water Board's 201 *Delta Flow Criteria Report*.

Under these circumstances, it is unclear why the Bureau of Reclamation and DWR are confident and assume that the State Water Board will approve the water rights changes that are a prerequisite for the current BDCP to move forward.

⁹ July 2013 State Water Board Comment Letter on BDCP, page 8.

¹⁰ July 2013 State Water Board Comment Letter on BDCP, page 9.

III. Relationship Between Proposed BDCP and April 2014 Ninth Circuit Court of Appeal's Decision on ESA in *San Luis v. Jewell*

As noted above, the BDCP is being proposed as a multi-species HCP pursuant to Section 10 of the ESA, and the USFWS and NMFS may only approve the BDCP if these federal wildlife agencies determine that the plan and underlying project activities “will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” With this standard in mind, it is pertinent to examine the previous ESA- compliance approach taken by the USFWS in regard to endangered smelt fisheries in the Delta (which was upheld in April 2014 by the Ninth Circuit Court of Appeals in *San Luis v. Jewell*).¹¹

The *San Luis v. Jewell* litigation involved a challenge by recipients of CVP/SWP water to the terms of an “incidental take permit” issued by the USFWS to the Bureau of Reclamation and DWR pursuant to the ESA. The basis for the inclusion of these USFWS terms in the incidental take permit was the analysis in the 2008 USFWS Biological Opinion (2008 BiOp) concerning the anticipated impacts of CVP/SWP south Delta pumping on the delta smelt. The purpose of the terms the USFWS included in this incidental take permit was to prevent CVP/SWP operations from resulting in a “take” of the endangered delta smelt. Under ESA regulations, a “take” is defined as “an act which kills or injures wildlife...Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding and sheltering.”¹² Section 9 of the ESA prohibits the “take” of a species listed under the ESA unless the party undertaking the proposed action first obtains a lawful incidental take permit from the appropriate federal wildlife agency.

In the *San Luis v. Jewell* litigation, recipients of CVP/SWP water took aim at analysis in the 2008 BiOp and subsequent incidental take permit in which USFWS determined that, to protect and restore endangered delta smelt, CVP/SWP operations would need to be managed to ensure enhanced fresh water outflow to prevent rising salinity levels due to seawater intrusion. In its April 2014 ruling, the Ninth Circuit Court of Appeal rejected this challenge and upheld the

¹¹ No. 11-15871 (issued in April 2014).

¹² 50 CFR § 17.3.

USFWS determination that additional fresh water flow was needed to protect and restore delta smelt, explaining:

“The FWS found that Reclamation and DWR’s proposed operation ‘are likely to negatively affect the abundance of delta smelt’ by ‘substantially decreasing the amount of suitable abiotic habitat for delta smelt.” BiOp at 236-37. To address the loss of habitat, the FWS proposed...that Reclamation and the DWR must provide sufficient Delta outflow to maintain a monthly average X2 no more eastward than 74 km from the Golden Gate in wet years and 81 km in ‘above normal’ immediate water years. BiOp at 272, 369. The FWS has previously found that the amount and quality of spawning habitat available to delta smelt is linked to the location of X2. BiOp at 239,240. As we previously discussed, X2 is the point in the Bay-Delta estuary where the salinity is two parts per thousand...which is considered suitable spawning habitat for the smelt. X2 in turn, depends on Delta outflow, which is largely determined by the difference between the total inflow from the Sacramento and San Joaquin River and the total amount of water exported through the pumping station. BiOp at 236....As the BiOp found, ‘CVP/SWP operations control the position of X2 and therefore are a primary driver of delta smelt habitat suitability.’ BiOp at 234.”¹³

...

“The BiOp, in analyzing the predicted location of X2, estimated that median X2 would move 10 to 15 percent farther upstream under the proposed action relative to the historic median X2 baseline. BiOp at 265.”¹⁴

...

“As we have previously explained, as the combined pumping operations of the SWP/CVP removed hundreds of gallons of fresh water from the Bay-Delta , X2 – the salinity-defined location of the smelt’s primary spawning habitat – shifts eastward towards the delta. BiOp at 373...The BiOp determined that the ‘long-term upstream shift in X2 during fall has caused a long-term decrease in habitat area availability for delta smelt,’ and it set forth an adaptive management program to minimize the effect of Project pumping on X2.”¹⁵

In the *San Luis v. Jewell* litigation, the Ninth Circuit upheld the determination by the USFWS (in its 2008 BiOp) that additional fresh water flows into the Delta were necessary under the ESA to protect and restore delta smelt. In the currently proposed BDCP and *December 2013 Draft EIR/EIS*, however, the Bureau of Reclamation and DWR have presented a HCP that does not

¹³ No. 11-15871 at pp. 74-75 (issued in April 2014).

¹⁴ No. 11-15871 at p. 76 (issued in April 2014).

¹⁵ No. 11-15871 at p. 86 (issued in April 2014).

provide additional fresh water flows and actually anticipates reduced fresh water flows. Yet, it is the USFWS (and its sister federal wildlife agency NMFS, which is responsible for endangered salmon and steelhead fisheries) that will ultimately determine whether the BDCP complies with the standards for HCP issuance pursuant to Section 10 of the ESA. If the 2008 USFWS BiOp found that increased fresh water flows into the Delta was needed (was a “primary driver”) to protect delta smelt, it would follow that the USFWS would also be inclined to reject a BDCP (which is a multi-species HCP that covers the delta smelt) that disregarded the need for additional fresh water flows into the Delta and proposed to further reduce such flows.

Beyond the 2008 USFWS BiOp and the Ninth Circuit’s April 2014 ruling in *San Luis v. Jewell*, there are additional reasons why the USFWS (and NMFS) may not be receptive to the current BDCP approach to fisheries restoration.

First, in March 2012, the USFWS prepared a draft “red flag” memo on the BDCP which found that that the BDCP’s approach to fisheries “continues to downplay Bay Delta hydrodynamics as system-wide drivers of ecosystem services to the San Francisco Estuary...It is critical that the BDCP effects analysis forthrightly address the many important aspects of the dependency and its constituent species on flow...Until the roles of flows and flow alteration are properly developed in the effects analysis, the analysis will remain inadequate and potentially misleading.”

Second, in November 2010 the California Department of Fish and Game (CDFG, a state wildlife agency) released a report titled *Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta (2010 CDFG Flow Report)*. The *2010 CDFG Flow Report* (whose preparation was mandated under California’s 2009 Delta Reform Act) began by explaining the agency’s particular regulatory responsibilities in the arena of water resources: “As a trustee agency for the fishery resources in the State, the Department of Fish and Game has an interest in assuring that water flow into and out of the Delta is maintained at levels which are adequate for long-term viability of native fish and the aquatic resources they depend on.”

The background section of the *2010 CDFG Flow Report* then noted:

Fish declines coupled with hydrological and physical changes in the Delta suggest that the current water flow available for environmental resources is not adequate to maintain, recover, or restore the functions and processes that support native Delta fishes. Salmon in the Central Valley are also in decline. Two of the four runs of Chinook salmon are listed under the State and federal Endangered Species Act and fall-run Chinook salmon is at historic low abundance. Delta smelt is both State and federally listed as threatened and longfin smelt is listed under the California Endangered Species Act, reflecting their precipitous declines in abundance.

Water flow through the Delta is one of the primary drivers of ecosystem function. The timing, magnitude, and quality of flows all influence habitat features such as temperature, turbidity, transport, residence time, nutrient loadings, pollutant dispersal and other factors.

The *2010 CDFG Flow Report* acknowledged that although the direct entrainment of fish in the Delta pumps has contributed in the declines of Delta fisheries, a "more important" effect may be the indirect effects caused by reduced instream flow caused by water diversion operations. The *2010 CDFG Flow Report* concluded: "[r]ecent Delta flows are insufficient to support native Delta fishes in habitats that now exist in the Delta and that "[f]low is the critical factor in maintaining suitable habitat conditions that support all or some of the life stages (spawning, rearing, and adult) of native fish species that depend on the Delta and its tributaries." Table 15 of the *2010 CDFG Flow Report* then went on to recommend specific numerical Delta outflow criteria, San Joaquin River base and pulse flows, and Sacramento base and pulse flows that were significantly higher than current flows.

Much like the State Water Board's *2010 Delta Flow Criteria Report*, the *2010 CDFG Flow Report* found that the best available science established that significant increases in fresh water flow through the Delta and its two main contributing rivers were a prerequisite to restoring the Delta's fisheries. Although CDFG (renamed the California Department of Fish and Wildlife in 2013) does not have direct authority to approve HCPs under the ESA, it is foreseeable and likely that the USFWS and NMFS will take into account the finding of the *2010 CDFG Flow Report* in terms of evaluating whether the BDCP proposed by the Bureau of Reclamation and DWR complies with ESA requirements.

Third, in February 2014 the California Advisory Committee on Salmon and Steelhead Trout submitted comments on the BDCP.¹⁶ The California Advisory Committee on Salmon and Steelhead Trout was established pursuant § 6920 of the California Fish and Game Code to advise CDFG on the protection of these fisheries. In its February 2014 comment letter to the Director of CDFG, this Committee stated:

“BDCP promotes the unproven scientific hypothesis that habitat restoration can substitute for flow. However, the State Water Resources Control Board has already indicated that Delta inflows and outflows are presently insufficient to help listed species recover their former abundance. BDCP would reduce Delta outflow, which contributed to the decrease to salmon smolt survival rates modeled by the BDCP.

The concept of improving riparian and subtidal habitat to create an aquatic food supply for the Delta to make up for too water diverted is an unproven theory that has been criticized extensively by federal agencies in their ‘red flag’ comments on the BDCP/

...

None of the alternatives considered in the BDCP Draft Environmental Impact Statement and report would lead to the recovery of Sacramento River Winter Run and Spring Run Chinook salmon. None of the alternatives analyzed reduces the amount of water diverted upstream of or within the Delta. None of the alternatives analyzed considers meeting or moving towards meeting the State Water Resource Control Board’s Delta Outflow Criteria of 2010 that was specifically required by the legislature in 2009 to ‘inform planning decisions for the...BDCP.’”

Fourth, in 2009, pursuant to the ESA the NMFS issued a BiOp for CVP/SWP operation impacts on endangered salmon/steelhead. Much like the 2008 USFWS BiOp for CVP/SWP operation impacts on delta smelt, the 2009 NMFS Bi-Op found that CVP/SWP operations would destroy or adversely modify the critical habitat of these fisheries, and therefore proposed increased flow requirements and curtailment of CVP/SWP diversions on the San Joaquin River.

¹⁶ February 26, 2104 Letter from California Advisory Committee on Salmon and Steelhead Trout to Charlton Bonham, Director of California Department of Fish and Wildlife.

Under these circumstances, again it is difficult to understand why the Bureau of Reclamation and DWR believe that the USFWS and NMFS are likely to determine that the current BDCP approach satisfies the HCP requirements of Section 10 of the ESA. To make this determination, the USFWS would need to disavow the findings of its 2008 USFWS BiOp for smelt, NFMS would need to disavow the findings of its 2009 BiOp for salmon and steelhead, and USFWS and NMFS would both need to disregard the findings and recommendations in the *2010 CDFG Flow Report* and the State Water Board's *2010 Delta Flow Criteria Report*.

IV. CEQA/NEPA Compliance and Information on Baseline Conditions in *December 2013 Draft EIR/EIS*

A starting point for environmental impact analysis under both CEQA and NEPA is the information provided regarding "baseline conditions" (sometime also referred to as the environmental and regulatory "setting"). If the baseline conditions of the project are not accurately described, then the analysis in an EIR/EIS of a proposed project's impacts and effects on such baseline conditions will necessarily be flawed.

A leading case on CEQA baseline conditions is the California Court of Appeal's 2003 decision in *Friends of the Eel River v. Sonoma County Water Agency (Friends of the Eel River)*.¹⁷ This case involved a water agency project that would increase diversions of water from the Eel River, in which the petitioner alleged that the CEQA EIR section pertaining to impacts on Eel River salmon and steelhead species did not adequately describe baseline conditions. More specifically, the petitioner in *Friends of the Eel River* maintained that the EIR in question failed to disclose the previously documented impacts of diversions on salmon/steelhead fisheries and failed to disclose proposals from other agencies to curtail such diversions to protect these fisheries. In its decision, the California Court of Appeal agreed with the petitioner, finding that EIR's inadequate discussion of baseline conditions failed to properly set the stage for the project impact analysis that followed.

In terms of CEQA compliance, the facts and holding in *Friends of the Eel River* are particularly on point with respect to the BDCP's fisheries analysis. In both instances, the proposed projects

¹⁷ 108 Cal.App.4th 859 (2003).

involved additional out of stream diversions that would reduce instream fresh water flow. In both instances, the waterways where the additional diversions were to take place involved declining salmon and steelhead fisheries where there had been detailed findings by other agencies that additional instream flow was needed to protect these fisheries. In *Friends of the Eel River* the California Court of Appeal ruled that the EIR's disregard and non-disclosure of the previous regulatory findings linking reduced fresh water flow to fisheries decline was inconsistent with CEQA's requirements concerning baseline conditions.

With these CEQA/NEPA standards in mind, and for reasons detailed earlier in this letter, the following portions of Chapter 11 of the *December 2013 Draft EIR/EIS* on baseline conditions appear vulnerable to challenge along the lines in *Friends of the Eel River*. Collectively, these portions of Chapter 11 of the *December 2013 Draft EIR/EIS* misrepresent the baseline conditions for fisheries through disregard and non-recognition of the critical role that reduced fresh water flows and rising salinity levels have played and are playing in the decline of smelt, salmon and steelhead in the Delta.

A. 11.1.5.1

This section is titled "Water Development and Conveyance" and contains a 4-page subsection under the heading "Water Diversions." In the subsection on "Water Diversions" there are 3 pages of discussion regarding the problem of entrainment of fish in the CVP/SWP south Delta pumps but no disclosure or discussion about well-established body of scientific evidence regarding the effects of CVP/SWP diversions on reduced fresh water flow, seawater intrusion and salinity (and how this salinity impacts smelt, salmon and steelhead).

B. 11.1.5.2

This section is titled "Hydrograph and Hydrodynamics Alterations" and contains an 8-page section on "Water Quality." In the subsection on "Water Quality" there is discussion of water quality impacts (on fisheries) related to nutrient input, ammonia, sediments, mercury, selenium, agricultural runoff, herbicides and pesticides. In the subsection on "Water Quality" there is no disclosure or discussion of water quality impacts (on fisheries) of salt/salinity resulting from seawater intrusion.

C. 11.2.1.2

Section 11.2.1.2 is titled “Long-Term Central Valley 2008 and 2009 USFWS and NMFS Biological Opinions.” In Section 12.1.1.2, the *December 2013 Draft EIR/EIS* stated that the USFWS 2008 BiOp and incidental take permit included actions to “provide suitable habitat conditions” for delta smelt but made no mention of and did not disclose that these actions were specifically related to seawater/intrusion and salinity concerns and called for reduced CVP/SWP diversions to allow additional instream flow.

In Section 12.1.1.2, the *December 2013 Draft EIR/EIS* reported that a 2011 federal district court decision (issued by now retired Judge Oliver Wanger) had found the 2008 USFWS BiOp flawed and that the USFWS had been ordered issue a revised BiOp (suggesting that the conditions in the 2008 BiOp were no longer binding). As discussed above in this comment letter, in April 2014 the Ninth Circuit Court of Appeals (in *San Luis v. Jewell*) overturned and reversed the 2011 federal district court decision, and upheld the 2008 USFWS BiOp.

D. 11.2.1.8

Section 11.2.1.8 is titled “Clean Water Act” and notes that (pursuant to Section 401 of the Clean Water Act) the California State Water Board must certify that any activity subject to a permit issued by a federal agency meets all state water quality standards. This section does not disclose that that the issuance of an ESA incidental take permit for the proposed BDCP would be subject to State Water Board water quality certification, and that such was quality certification would address salinity levels (affected by seawater intrusions and CVP/SWP fresh water diversions). It should be noted that in its July 2013 comments on the BDCP, the State Water Board highlighted that the BDCP project proponents “should note that there are no waivers for Clean Water Act Section 401 Water Quality Certifications in the state of California.”¹⁸

¹⁸ July 2013 State Water Board Comment Letter on BDCP, page 30.

E. 11.2.2.4

Section 11.2.2.4 is titled “The Salmon, Steelhead Trout and Anadromous Fisheries Program Act” and explains that in 1988 this legislation was enacted in response to reports that the natural production of salmon and steelhead in California had declined dramatically. Section 11.2.2.4 did not disclose that this 1998 legislation created the California Advisory Committee on Salmon and Steelhead Trout, and that (as discussed above in this letter) the California Advisory Committee on Salmon and Steelhead Trout submitted a letter to the director of the California Department of Fish and Wildlife that criticized the proposed BDCP for failing to address the need for additional fresh water flows into the Delta to restore salmon and steelhead fisheries.

F. Section 11.2 and Section 11.2.2.9

Section 11.2 is titled “Regulatory Setting” and its introduction states that “This section provides the regulatory setting for aquatic resources, including potentially relevant federal, state and local requirements applicable to the BDCP.” Section 11.2.2.9 is titled “Sacramento-San Joaquin Delta Reform Act of 2009.” Although the proceedings leading to the State Water Board’s 2010 *Delta Flow Criteria Report* and the 2010 *CDFG Flow Report* were explicitly required pursuant to the 2009 Delta Reform Act, there is no mention or disclosure of these proceedings or (or the findings/recommendations that resulted from these proceedings) in this section of the *December 2013 Draft EIR/EIS*. In Section 11.2.2.9 there is also no disclosure of provisions in the 2009 Delta Reform Act providing that the State Water Board’s 2010 *Delta Flow Criteria Report* shall inform the planning decisions for the BDCP.

G. Section 11.4.1

This section is titled “Printed References” and lists all of the reports/written materials referenced and relied upon in the *December 2013 Draft EIR/EIS*. The State Water Board’s 2010 *Delta Flow Criteria Report* and the 2010 *CDFG Flow Report* are not listed in this section (nor are they mentioned or discussed anywhere in the text of the *December 2013 Draft EIR/EIS*).

V. Current BDCP Approach to Fisheries – Watching a Train Wreck in Slow Motion

There are politically and economically practical reasons that explain why the BDCP process has so far tried to avoid the issues of fresh water flow, seawater intrusion and salinity. CVP/SWP diversions in the Delta account for less than half of the total diversion in the Sacramento River-San Joaquin River watershed, with the majority of diversions occurring upstream of the Delta CVP/SWP pumps. Given this circumstance, the Bureau of Reclamation and DWR (and recipients of water from the CVP/SWP) have been understandably reluctant to assume the role of “sole guarantor” for ensuring fresh water flows in the Delta because from their perspective it seems that, equitably, upstream diversions should be curtailed as well.

These upstream diverters, however, are not formally a part of the BDCP (which focuses on CVP/SWP operations), and efforts to press for curtailment of upstream diversion are complicated by California’s appropriative water rights system which generally provides that in times of water shortage/reduced supply “senior” appropriative water rights holders can take their full share before “junior” appropriators. Since most of the upstream diverters in the Sacramento River-San Joaquin River watershed hold appropriative water rights senior to appropriative water rights held by the Bureau of Reclamation and DWR for the CVP/SWP, under traditional California appropriative water rights principles these upstream diverters are likely to resist efforts to “equitably” share in the curtailment of diversions.

To be sure, the issues of fairness, equity and California appropriative water rights noted above are complex when it comes to allocating responsibility between the CVP/SWP and upstream diverters for ensuring there is adequate fresh water flow into the Delta. However, instead of acknowledging these complex issues head-on and trying to craft a feasible solution to navigate through them, with the BDCP process the Bureau of Reclamation and DWR have instead unfortunately attempted to dodge these issues altogether by adopting a fisheries restoration approach that simply ignores altogether the critical role of fresh water flow.

While one can appreciate why this approach was tempting to the Bureau of Reclamation and DWR (and the recipients of CVP/SWP water), it is an approach that is likely to fail because it

lacks scientific credibility. As explained above, the current BDCP approach is contingent on the State Water Board approving the proposal to change the CVP/SWP point of diversion to the north Delta and on the State Water Board issuing a Clean Water Act Section 401 water quality certification for the ESA incidental take permit, and on USFWS and NMFS approving the BDCP as an HCP that complies with Section 10 of the ESA. In light of the previous and repeated scientific determinations by the State Water Board, USFWS and NMFS regarding the need for additional fresh water flows to restore declining fisheries, however, it is questionable whether such agency approvals will be forthcoming. As also noted above, it is also questionable whether the non-disclosure of the well-documented scientific link between reduced fresh water flows and declining fisheries in the *December 2013 Draft EIR/EIS* is consistent with CEQA/NEPA requirements concerning disclosure of baseline conditions. Without these agency approvals, and without CEQA/NEPA compliance, the BDCP cannot move forward.

At this point, watching the BDCP process unfold is much like watching a train wreck in slow motion. Although many initially hoped the BDCP process would be grounded in credible science and would serve as a mechanism to address the hard political, legal and economic questions of how to reduce fresh water diversions in a manner that is fair and takes proper account of appropriate water rights principles, the BDCP has fallen short in both respects by opting to disregard entirely the question of fresh water flow. In doing so, the BDCP is likely to be rejected by the State Water Board, USFWS and NMFS, and has little chance of satisfying CEQA/NEPA requirements for disclosure of baseline conditions. The question (to strain the railroad metaphor) is whether the BDCP is too far down the track to halt its current course.

Yours,

A handwritten signature in blue ink, appearing to read "Paul Stanton Kibel". The signature is fluid and cursive, with the first name "Paul" being the most prominent.

Paul Stanton Kibel
Professor of Water Law and CUEL Co-Director