

February 17, 2009

via Hand Delivery

Arthur G. Baggett, Jr., Hearing Officer
Charles R. Hoppin, Hearing Officer
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, California 95814

Re: Butte Environmental Council Objections/Request for Party Status - In re DWR/USBR
Petition for Temporary Urgency Change (Feb. 10, 2009).

Dear Hearing Officers Baggett and Hoppin,

We are writing on behalf of our client, Butte Environmental Council, to object to the temporary urgency change petition filed by the California Department of Water Resources (“DWR”) and United States Bureau of Reclamation (“USBR”) on February 10, 2009. The Butte Environmental Council, as a non-profit 501(c)(3) organization that is dedicated to preserving and protecting the environment, has taken a long standing interest in DWR and USBR’s operation of the CVP and SWP, due to these projects’ ongoing implications regarding the protection and preservation of sensitive biological resources in Butte County, and throughout the rest of California’s Central Valley. The Butte Environmental Council requests party status in this matter in order to present its evidence and testimony as set forth in this letter, as well as to cross examine witnesses in this proceeding.

I. INADEQUATE NOTICE / REQUEST FOR CONTINUANCE

Butte Environmental Council objects to the unreasonably short public notice (to our understanding, just three business days) given of this proceeding, in light of 1) the scope of the proposed action and 2) the nature of this evidentiary proceeding. The proposed action involves significant and substantive changes to DWR/USBR’s operation of the CVP and SWP, as required under the terms of water rights decision (WD) 1641, in proposing to 1) relax salinity standards, 2) waive delta outflow requirements, and 3) waive the requirement to meet the higher San Joaquin River Flows objectives, as presently mandated under WD 1641. Such changes may adversely or unreasonably impact a wide range of consumptive and instream beneficial uses of water, including sensitive species and their obligate habitats in the delta including, but not limited to, federally listed salmonids and the delta smelt. The Board’s inadequate notice has imposed significant and unduly prejudicial procedural hurdles on interested parties who wish to

present substantive testimony or evidence that cannot reasonably be expected to be marshaled over a three-day holiday weekend.

Butte Environmental Council requests that if the Board does not summarily reject the petition for reasons given in this letter or that may be stated by other objectors who may appear at the hearing, then the Board should continue its hearing on this matter to a later date to allow reasonable time for interested parties to prepare and present their testimony and supporting evidence to the Board.

II. VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (“CEQA”)

Butte Environmental Council objects to approval of the proposed project on the grounds that 1) the proposed Class 1 Categorical Exemption cited in the proposed Notice of Exemption does not apply to the project, and 2) project-specific facts regarding potential direct and cumulative impacts to listed species and their habitats in the delta indicate that the application of a CEQA categorical exemption is not appropriate for this project.

A. INAPPROPRIATE USE OF CLASS 1 CATEGORICAL EXEMPTION FOR “EXISTING FACILITIES.”

The notice and supporting documents for this application published at SWRCB’s website assert that DWR and USBR’s proposed changes to the conditions imposed by WD 1641 are exempt from CEQA review pursuant to CEQA Guidelines section 15301. CEQA Guidelines section 15301 exempts the “operation, repair, maintenance, permitting, leasing, licensing, or minor alterations of existing public or private structures, facilities, mechanical equipment, or topographical features, *involving negligible or no expansion of use* beyond that existing at the time of the lead agency’s determination.” (emphasis added.) As highlighted, the key consideration in applying this exemption is whether the project involves “negligible or no expansion” of an existing use.

DWR and USBR’s currently permitted “use” under WD 1641 includes the right to keep in storage a portion of the water that would otherwise naturally flow through the delta in February. With the current X2 performance standards in effect (the CEQA baseline condition), however, DWR and USBR’s right to withhold such flows is limited where salinity thresholds in the delta are exceeded, or where existing flows through the delta are too low. The petition, if granted, would relax the X2 baseline condition in February, thereby allowing *more* water to be stored above the Delta, and *less* water to flow through the delta to meet the mandatory in-delta maximum salinity and minimum flow levels mandated by WD 1641.

In sum, whether conceived as “expanding” storage, or “expanding” the amount of water withheld from fish and wildlife protection purposes in the delta, this petition represents an “expansion of use.” The fact that DWR and USBR have found it necessary to formally apply for changes to the terms of WD 1641, itself, indicates that the changes involved are more than “negligible.” This fact is further underscored by the fact that the Board in adopting WD 1641, recognized that

controlling delta salinity and maintaining adequate in-delta flows is critically important to listed and other sensitive species in the delta, including, but not limited to, salmonids and the delta smelt. Accordingly, Butte Environmental Council objects to SWRCB's proposal to approve this project based on a Class 1 categorical exemption for "existing facilities."

B. THE PROJECT-SPECIFIC FACTS OF THE PROPOSED ACTION INDICATE THAT A CEQA CATEGORICAL EXEMPTION CANNOT BE PROPERLY RELIED UPON TO APPROVE THE PROJECT.

1. CEQA Guidelines, § 15000.2, subd. (a) - Impacts to Resources of Critical Concern.

The CEQA Guidelines prohibit the use of a CEQA categorical exemption to avoid environmental review where "a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive habitat be significant." (CEQA Guidelines, § 15300.2, subd. (a).) Such circumstances are of particular concern where "the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped and officially adopted pursuant to law by federal, state or local agencies." (*Id.*) As already noted, changing the salinity and flow regimes currently mandated by WD 1641 may have significant, adverse impacts on species of critical concern and their mapped habitats in the delta, including salmonids and the delta smelt. Accordingly, it is not appropriate for SWRCB to invoke any CEQA categorical exemption to approve a project that will 1) increase salinity, and 2) decrease flows through the delta that have been mandated, in part, to help protect these species of critical concern.

2. CEQA Guidelines, § 15000.2, subd. (b) - Cumulative Impacts / Inappropriate Piecemealing of Environmental Review.

The CEQA Guidelines also provide that the use of a categorical exemption is inappropriate where cumulative impacts of successive projects of the same type in the same place, over time, would be significant. (CEQA Guidelines, § 1500.2, subd. (b).)

One very troubling aspect of DWR and USBR's proposal in this regard, is that these agencies claim they are only seeking relief from the X2 salinity and flow requirements of WD 1641 for the month of February 2009. However, their application was belatedly submitted on February 10, and this hearing will not occur until February 17, 2009, with only a total of eleven (11) days left in the month of February. Accordingly, even if the requested relief were to be granted, it would appear to be an inappropriate, *post hoc* attempt by SWRCB to justify DWR and USBR's current and ongoing violations of the mandatory conditions imposed by WD 1641. The unrealistically truncated time frame of the application also indicates that it is foreseeable that serial applications for similar relief from the requirements of WD 1641 will be belatedly filed in March 2009 and subsequent months. The application makes no mention of such ongoing needs, or how repeatedly granting serial relief from WD 1641's mandatory salinity and flow requirements may result in significant, adverse impacts on sensitive species in the delta, including salmonids and the delta smelt, and their obligate habitats. In sum, absent a full and fair *cumulative* assessment of

the actual duration of time in 2009 that DWR and USBR are actually seeking relief from the mandatory requirements of WD 1641, it is inappropriate for them to invoke a CEQA exemption for the month of February 2009 in isolation, especially after seventeen (17) days of the month *have already passed*.

Another troubling aspect of DWR and USBR's proposal is their acknowledgment that the motivation for proposing "urgency" changes to WD 1641 is to address ongoing and known drought water conditions in the state that have persisted for *years*. In fact, the proposed changes are just one of many actions that DWR and USBR are currently proposing to address their longstanding mismanagement of the state's water resources under the SWP and CVP, especially in light of known, prolonged and persistent drought conditions in the state. As just one example, DWR and USBR's most recent proposals includes the proposed adoption of an overarching Drought Water Bank ("DWB") project for 2009 that would result in the transfer of up to 600,000 acre feet of water from the Sacramento Valley through the delta to further facilitate unsustainable consumptive agricultural and urban uses south of the delta. Despite the known existence of this "successive project of the same type in the same place" (i.e., a project intended to radically change flow regimes to and through the delta) no mention is made in the application or supporting materials of the proposed DWB, or how implementing the DWB in conjunction with eliminating the X2 flow and salinity requirements imposed by WD 1641 may result in significant, adverse impacts on sensitive habitats and species in the delta.

In a comment letter submitted to DWR on behalf of Butte Environmental Council on January 16, 2009, this office explained why the proposed DWB cannot lawfully be approved based on a CEQA addendum, because that project may have significant adverse effects on sensitive habitats and species, including salmonids, delta smelt and the giant garter snake. (A copy of BEC's January 16, 2009 comment letter to DWR is attached at Exhibit 1 to this letter. The exhibits to this letter have been also submitted on CD for SWRCB's consideration). Based on the foregoing facts, the use of a Class 1 CEQA categorical exemption for the proposed relaxation of the X2 standards imposed by WD 1641 is barred by CEQA Guidelines, section 15000.2, subd. (b).

In addition, and for the same reasons, DWR and USBR's attempt to implement this one activity in furtherance of their broader 2009 drought relief effort as a separate CEQA project, rather than as an integrated part of the "whole" of their proposed DWB project, also constitutes an unlawful segmenting, or "piecemealing," of environmental review. (CEQA Guidelines, § 15378, subd. (c) [the term "project" *does not* mean each separate governmental approval].)

3. CEQA Guidelines, § 15000.2, subd. (c) - Unusual Circumstances - Endangered Species and Their Habitats in the Delta.

The exceptions to CEQA's categorical exemptions at CEQA Guidelines, section 15000.2, subdivision (c), also prohibit the use of CEQA categorical exemptions to approve a CEQA project "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." In this case, again, the X2 standards currently mandated by WD 1641 serve to guard against 1) excessive salinity levels in, and 2) inadequate

water flows through, the delta. Such protections serve, in part, to mitigate known, documented impacts that CVP and SWP have had on a range of sensitive habitats and species in the delta, including listed salmonids and the delta smelt.

The Court of Appeal has confirmed that proposed agency actions, even when couched in terms of enhancing habitat for sensitive species, cannot be approved based on a CEQA categorical exemption, where the activity in question, if implemented, will foreseeably result in physical changes to the existing environment that may be significant and adverse when compared to the existing baseline condition. (*California Farm Bureau Federation v California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173) Again, the use of a Class 1 categorical exemption to approve DWR and USBR's application is not supported under the project-specific facts, due to the "unusual circumstances" of the existence of listed species in the delta, and how those species and their obligate habitats may be impacted by allowing salinity levels that are higher, and flow levels that are lower, than those presently specified in WD 1641.

This concern is heightened by the fact that DWR and USBR have elected to present a petition, in mid-February, that addresses only the month of February - again suggesting that DWR and USBR have inappropriately piecemealed their consideration of the full scope of their project, or have otherwise failed to properly consider the cumulative effects of their proposal (to the extent that subsequent applications could, somehow, be viewed as separate CEQA projects). *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 ("even assuming sewer expansion was severable from the development project, the FEIR did not comply with CEQA," because such expansion would have to be considered in EIR as a cumulative impact of proposed project.)

III. DWR AND USBR'S APPLICATION IS INCOMPLETE AND MISLEADING.

The notice issued by SWRCB for this proceeding states that applications for changes in permit terms shall follow "as closely as possible" the procedures specified for urgency changes in point of diversion, place of use, or purpose of use, as specified at Water Code section 1435 et seq. In this case, the application that has been filed is incomplete and misleading regarding the beneficial uses of water that may be impacted by the project, and the sensitive habitats and species that may be impacted if the proposed application is granted. Accordingly, the proposed application cannot lawfully be granted, because the application does not provide adequate substantive information from which legally adequate findings can be made by SWRCB, or otherwise comply with the procedural and substantive requirements imposed by Water Code section 1435 and the Board's implementing regulations.

A. FAILURE TO DISCLOSE OR MEANINGFULLY DESCRIBE THE ENVIRONMENT(S) THAT MAY BE IMPACTED IF THE APPLICATION IS GRANTED.

Water Code section 1435 prohibits the granting of any urgency petition for change in point of diversion, place of use, or purpose of use, unless the Board makes an affirmative finding based on substantial evidence, that granting the proposed change will not result in unreasonable

impacts to fish, wildlife or other instream beneficial uses of water. (Water Code, § 1435, subd. (b)(3).) In order to rationally make such a determination, of course, the Board and the interested public must be presented with sufficient information to allow them to understand 1) *what* sensitive species and existing environments may be affected by the proposed activity, and 2) *how* implementing the proposal may or may not impact such resources.

The application filed by DWR and USBR is incomplete, internally inconsistent and misleading regarding how, and to what extent nullifying the X2 requirement in WD 1641 for the month of February 2009 may impact fish, wildlife and other instream beneficial uses of water not only in the delta, but across the entire State of California. The first page of DWR and USBR's application vaguely asserts that the "place of use" affected by the proposed application spans the *entire* "SWP and CVP authorized place of use as shown on maps on file with SWRCB." These maps are not presented anywhere in the application, and the application does not otherwise provide any meaningful information on what specific "place[s] of use" (i.e., the delta) may actually suffer adverse impacts to fish, wildlife or instream beneficial uses if the petition is granted, thus suspending the in-delta salinity and minimum flow requirements imposed by WD 1641. Moreover, the "environmental information document" submitted by DWR and SWRCB inconsistently asserts, at Item #7, that there is *no* environment that may be potentially impacted by approving the application. This assertion cannot be reconciled with the fact that the stated purpose of the petition is to *withhold flows to the delta* in violation of WD 1641's existing salinity and flow requirements.

The application cannot be granted because it does not comply with the requirement of Water Code section 1435, and the Board's corresponding regulations at 23 CCR § 791, subd. (e). In the absence of any meaningful information in the application or supporting documents describing 1) what specific environment(s) may actually be impacted by eliminating the X2 salinity and flow requirements imposed by WD 1641, or 2) how such impacts may result in unreasonable effects on fish, wildlife or instream beneficial uses in the undisclosed environment(s), the Board has no rational basis from which it can make findings satisfying the requirements of Water Code section 1435, subdivision (b)(3).

B. FAILURE TO IDENTIFY OTHER LAWFUL USERS OF WATER THAT MAY BE IMPACTED BY GRANTING THE APPLICATION.

The application is also informationally inadequate and misleading regarding the impact that the project may have on other lawful users of water including, but not limited to, lawful beneficial instream uses that support sensitive species and their obligate habitats. Water Code section 1435, subdivision (b)(2) prohibits the approval of an urgency change petition unless the Board makes an affirmative finding that the proposed change "may be made without injury to any other lawful user of water." As noted above, the purpose of this project is to allow DWR and USBR to operate the CVP and SWP in a manner that is intended to increase DWR and USBR's storage of water, thereby reducing flows to other lawful, downstream uses.

At page 2 of its application form, SWRCB expressly directs that an applicant for an urgency change must provide the name and address of any person(s) known to the applicant who may be affected by the proposed change. DWR and USBR have left this portion of their application blank, providing no information that would allow the Board to identify, let alone consider the impacts to, lawful downstream users of the water (including lawful uses that protect sensitive species and their habitats). The application asserts that DWR and USBR have "consulted" with the California Department of Fish and Game. However, the application goes on to state that CDFG has provided no response - a likely consequence of the unreasonably short notice period provided in this proceeding, combined with DWR and USBR's failure to provide any meaningful information regarding what species or habitats may actually be impacted by their proposal to change the X2 salinity and flow requirements imposed by WD 1641. Absent any disclosure by DWR or USBR of what lawful downstream uses of water exist, and therefore may be impacted by the proposed action, the Board lacks adequate evidence to support the required finding that approval of the application "may be made without injury to any other lawful user of water." (Water Code, § 1435, subd. (b)(2)).

C. MISLEADING AND INACCURATE ASSERTIONS THAT THE PROPOSED CHANGE IS NOT SUBJECT TO WATER CODE SECTION 1707

The application is also misleading and incomplete, because it asserts that the proposed transfer is not subject to Water Code section 1707, which involves "change[s] for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water." However, the conclusion to the environmental information document submitted by DWR and USBR in support of their application inconsistently states that the purpose of the change *is* intended to preserve or enhance such resources:

DWR and Reclamation are seriously concerned that if the extremely dry conditions in the BayDelta watershed continue without the requested modifications to the X2 and Vernalis objectives, it will jeopardize the ability of the Projects to effectively manage the water resources for the protection of fish and wildlife, and critical urban and agricultural beneficial uses. To aid in preserving some flexibility for meeting these competing needs, the Projects are requesting modification of the X2 standards for the entire month of February 2009.

Moreover, at p. 27, WD 1641 (the water rights decision that DWR and USBR seek to modify in their application) states: "This decision approves a change in the water right permits held by OID/SSJID, TID/MID, and Merced ID under sections 1707 and 1735." The application should not be granted, because it is inaccurate and misleading in asserting that the proposed changes are not subject to Water Code section 1707.

IV. CONCLUSION.

For the foregoing reasons, Butte Environmental Council opposes the urgency change petition filed by DWR and USBR in this proceeding. Instead, Butte Environmental Council requests that SWRCB inform DWR and USBR that it cannot lawfully take action on the changes that they have proposed to WD 1641, until such time as DWR and USBR file an amended application that is consistent with the procedural and substantive requirements of CEQA, and that is informationally sufficient to allow the Board to make the substantive findings required by Water Code section 1435.

Sincerely,

A handwritten signature in black ink that reads "Keith G. Wagner". The signature is written in a cursive, flowing style.

Keith G. Wagner.

EXHIBIT 1

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January 16, 2009

Submitted by email to hendrick@water.ca.gov

Mike Hendrick
Senior Environmental Scientist
Department of Water Resources
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Sacramento, CA 95814

Re: Butte Environmental Council Comments on the (1) 2009 Drought Water Bank and CEQA Addendum; and (2) Proposed Extension of the Environmental Water Account and March 2008 Supplemental Final EWA Environmental Impact Statement/Environmental Impact Report to the 2004 Final EWA EIS/EIR

Dear Mr. Hendrick:

This office represents the Butte Environmental Council (“BEC”) with respect to the 2009 Drought Water Bank (“2009 DWB”). I write to object, on BEC’s behalf, to approval of the 2009 DWB on grounds the addendum the Department of Water Resources (“DWR”) circulated for public comment on December 17, 2008 (“Addendum”) does not comply with the requirements of the California Environmental Quality Act (“CEQA”).

BEC also objects to approval of the proposed extension of the Environmental Water Account (“EWA”), and to certification of the March 2008 Supplemental Final EWA Environmental Impact Statement/Environmental Impact Report (“2008 Supplemental EWA EIS/EIR”) to the 2004 Final EWA Environmental Impact Statement/Environmental Impact Report (“2004 Final EWA EIS/EIR”), on grounds the 2008 Supplemental EWA EIS/EIR does not comply with CEQA.

Summary of Comments

The Addendum fails to address a threshold question: is the 2009 DWB a change in the EWA project that was evaluated pursuant to CEQA in the 2004 Final EWA EIS/EIR and 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR, or a separate “project” under CEQA.

Both the 2009 DWB and the EWA are projects that would operate in conjunction with the Central Valley Project (“CVP”) and State Water Project (“SWP”) Operations Criteria and Plan (“OCAP”), also termed the “Coordinated Operations” in the December 2008 U.S. Fish & Wildlife

Service Biological Opinion on the effects of Coordinated Operations on the threatened delta smelt and its designated critical habitat (hereinafter "2008 Delta smelt BO"). Therefore, both must be evaluated in the context of the OCAP.

However, the EWA and 2009 DWB are separate projects. Therefore, the use of an addendum pursuant to CEQA Guideline 15162 is inappropriate. To use the 2004 Final EWA EIS/EIR and 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR as the EIR for the 2009 DWB, DWR must proceed as required by CEQA Guideline 15153, which governs using "an earlier EIR prepared in connection with an earlier project to apply to a later project."

In the alternative, if the 2009 DWB is a change to the EWA project, the use of an addendum to evaluate its environmental impacts is inappropriate because (1) the project deletes previously adopted mitigation measures needed to substantially reduce significant impacts without showing they are infeasible; and (2) changed circumstances and new information demonstrate that operation of the 2009 DWB and EWA as part of the OCAP will result in new significant adverse effects or increase the severity of effects previously identified as significant with respect to several species of fish and wildlife and groundwater resources. Therefore, an addendum is not allowed and, at a minimum, a supplemental or subsequent EIR is required pursuant to Public Resources Code section 21166 and CEQA Guideline 15162.

Finally, the 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR must be recirculated for public comment due to the availability of significant new information generated by the "2008 Delta smelt BO" and the NOAA Fisheries draft Biological Opinion re OCAP and salmonids issued January 15, 2009 (dated December 11, 2008).

1. DWR'S USE OF AN ADDENDUM PURSUANT TO CEQA GUIDELINE 15162 IS UNLAWFUL.

a. DWR Has Not Certified the 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR.

The addendum process authorized by Public Resources Code section 21166 and CEQA Guideline 15162 only applies "[w]hen an EIR has been certified." Since DWR has not certified the 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR, it cannot use an addendum.

b. The 2009 Drought Water Bank Is a Different Project than the EWA.

DWR's use of an addendum pursuant to CEQA Guideline 15162 reflects an assumption that the 2009 DWB is a modification of the EWA, because the Courts have ruled that CEQA's procedures for supplemental or subsequent environmental review (which includes the use of a CEQA addendum) do not apply where later activities constitute a different "project" than activities evaluated in a previous EIR. (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 [applying a "totality of the circumstances" test].) This assumption is incorrect for several reasons.

First, and most important, the purposes of the EWA and DWB are vastly different. The original purpose of the EWA was to protect environmental resources adversely affected by Project operations. The purpose of the DWB is to find and deliver water to water agencies whose supply is adversely affected by drought conditions.

Second, the DWB includes new areas from which water may be purchased for delivery to affected water agencies. The Addendum blithely asserts, without any supporting evidence that:

Those areas that may participate in the DWB, but are not specifically described in the EWA documentation are located adjacent to those areas that are described and include the same ecosystem features, and the same species composition. Thus the analysis and conclusions done as part of the EWA document would be the same as any analysis and conclusions that would be done for those areas that are not specifically described as part of the EWA but may be a part of the DWB.

(Addendum pp. 8-9.) In other words, according to DWR, once you have seen one river system or groundwater basin, you have seen them all! This is absurd on its face.

As BEC's comment letter dated January 16, 2009 demonstrates (attached as Exhibit 6 to this letter), there are a number of groundwater sources located in areas that the Addendum indicates the DWB could access but are not described in the 2004 Final EWA EIR or 2008 Supplemental EWA EIS/EIR. Moreover, the limited data that BEC has been able to obtain to date indicate that these groundwater sources are vulnerable to overdraft. Therefore, any project, including the DWB, that proposes to pump more groundwater from these sources to meet the needs of water users in other locations has the potential to cause significant adverse effects on these resources. At a minimum, DWR must prepare a CEQA document that describes the environmental setting of these new areas and assesses the likely impacts on them from accessing water in these settings.¹

In short, DWR's use of an addendum, especially this Addendum, to evaluate whether the 2009 DWB may have significant effects on the environment is unlawful.

c. DWR Is Attempting to "Use an Earlier EIR Prepared in Connection with an Earlier Project to Apply to a Later Project" under CEQA Guideline 15153.

DWR's Addendum is actually an attempt to "use an earlier EIR prepared in connection with an earlier project to apply to a later project" as described in CEQA Guideline 15153, but without following required procedures. Guideline 15153 requires that DWR follow specific procedures and make specific findings before using an earlier EIR, procedures and findings that are not included in the Addendum that DWR has prepared and circulated for public comment.

¹CEQA Guideline 15124 provides that the project description must include "precise location and boundaries" of project on a map. No such map exists for the DWB,

For example, Guideline 15153 provides: “The Lead Agency shall review the proposed project with an initial study, using incorporation by reference if necessary, to determine whether the EIR would adequately describe: (A) The general environmental setting of the project, (B) The significant environmental impacts of the project, and (C) Alternatives and mitigation measures related to each significant effect.” (CEQA Guideline 15153(b)(1)).

Here, the Addendum neither describes nor incorporates by reference any part of either EWA EIS/EIR that describes the environmental setting of the new areas from which water may be purchased for delivery to affected water supply agencies. Nor does the Addendum describe or incorporate by reference any part of either EWA EIS/EIR that describes the environmental impacts on these new areas from withdrawing water from them for conveyance and sale elsewhere.

Procedurally, even if DWR had made the determinations required by paragraph (1) of subdivision (b) of Guideline 15153, it would have had to open public comment on the EWA EIR as the Draft EIR for the DWB and follow all of the normal procedures for certifying the previous EIR as the EIR for this project. (CEQA Guideline 15153(b)(2).) To date, DWR has not engaged these procedures.

BEC also notes that CEQA Guideline 15153 does not permit the use of an earlier EIR unless “the circumstances of the projects are essentially the same.” Here, the circumstances of the projects are not “essentially the same” for the same reasons they are not the same project described above (i.e., they have different purposes and they affect different geographic areas.) Therefore, DWR must prepare a new EIR for the 2009 DWB.

d. Operation of the 2009 DWB and EWA as Part of the Coordinated Operations of the CVP and SWP in California (“Operations Plan”) Will Result in New Significant Adverse Effects or Increase the Severity of Effects Previously Identified as Significant.

Even if DWR were correct in assuming that the DWB is only a modification of the EWA, a supplemental EIR or subsequent EIR is required because it will result in new significant adverse effects or increase the severity of effects previously identified as significant in a number of resource areas.

(1) Delta Smelt

The 2004 Final EWA EIS/EIR’s determination that impacts on Delta smelt would be less than significant is based in part on assumed EWA compliance with the U.S. Fish & Wildlife Service’s 2004 Biological Opinion (“2004 smelt BO”). (See, e.g., 2003 Draft EWA EIS/EIR, p. 9-

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110;² 2004 Final EWA EIS/EIR, p. 1-1, Appendix B; 2004 EWA Record of Decision, p. 18 (attached as Exhibit 1 to this letter.)

In response to a lawsuit challenging the 2004 smelt BO, USFWS reinitiated consultation under Section 7 of the federal Endangered Species Act (“FESA”) on the Coordinated Operations and issued a new biological opinion in 2005, which was challenged in litigation. On May 25, 2007, the U.S. District Court (Judge Wanger) issued a summary judgment that invalidated the 2005 biological opinion and ordered the USFWS to issue a new biological opinion. On December 14, 2007, Judge Wanger issued an interim order curtailing operations to protect delta smelt until a new biological opinion is completed. (Order dated December 14, 2007, attached as Exhibit 2 to this letter.)

As a result, the 2004 Final EWA EIS/EIR’s conclusion that impacts on Delta smelt would be less than significant, which only applied to operations through the end of 2007, was rendered obsolete, even if it had not expired of its own terms.

Also, the conclusion of the 2008 Supplemental EWA EIS/EIR to the 2004 EWA EIS/EIR, that impacts on Delta smelt would be less than significant, which is intended to apply only to operations from the beginning of 2008 through the end of 2011, is irrelevant, because DWR has not certified that document and the Bureau of Reclamation has not adopted it.³

Perhaps more important, even it had been certified, it would be obsolete now because, in December 2008, in response to the Bureau of Reclamation’s and DWR’s request for consultation under section 7 of FESA, the USFWS issued its Biological Opinion on the effects of the coordinated operations of the CVP and SWP in California (hereinafter “Coordinated Operations”), which includes the EWA, to the threatened Delta smelt and its designated critical habitat (hereinafter “2008 Delta smelt BO,” attached as Exhibit 3 to this letter). The 2008 Delta smelt BO is submitted herewith as an attachment and is incorporated herein by this reference.

The 2008 Delta smelt BO concludes that operation of the EWA has been and will continue to have significant adverse effects on Delta smelt and their habitat. The mechanisms of this effect are: (1) adding more water to Delta flows that are pulled into the CVP and SWP pumps entrains more smelt and their plankton prey; and (2) adding more stored, and thus relatively non-turbid water, to Delta flows in the summer months decreases turbidity of the water in smelt habitat areas, which

²“Delta Smelt The EWA agencies will fully adhere to the terms and conditions in all applicable CESA and FESA biological opinions and permits for CVP and SWP operations”

³ The Bureau of Reclamation has determined that it cannot issue a record of decision or adopt the 2008 Supplemental EWA EIS/EIR because (1) ESA compliance consultation not initiated yet on extension of program and (2) could not make decision until BO on Coordinated Operations on CVP and SWP completed. (Pers. Comm. from Tim Russ of Reclamation to Thomas Lippe on January 14, 2009.)

increase smelt visibility to predators. The 2008 Delta smelt BO observes that:

Typically the EWA replaced water lost due to curtailment of pumping by purchase of surface or groundwater supplies from willing sellers and by taking advantage of regulatory flexibility and certain operational assets. These assets were moved through the Delta during the summer and fall, when entrainment effects to listed fish were minimal. Generally, under past actions, the EWA has reduced water exports out of the Delta during the winter and spring and increased exports during the summer and early winter. These actions reduced entrainment at the facilities, but only by modest amounts (Brown et al. 2008). **The movement of water in the summer and fall may have negatively influenced habitat suitability and prey availability (see effects section).**

(2008 Delta smelt BO, p.166 [emphasis added].)

The 2008 Delta smelt BO also concludes that “[i]mplementation of the proposed action, primarily the volume of diversions at Banks and Jones relative to proposed Delta inflows, will prevent critical habitat from serving its intended conservation role.” (*Id.* at p. 244.)

After finding that the Coordinated Operations will cause jeopardy to the species and harm to its critical habitat, the 2008 Delta smelt BO finds:

To survive and recover, delta smelt need: (d) ... a reduction in entrainment of adult and juvenile delta smelt at CVP/SWP pumping facilities, **over and above reductions achieved under the VAMP and the EWA**, to increase the abundance of the spawning adult population and the potential for recruitment of juveniles into the adult population.

(*Id.* at p. 277 [emphasis added].)

The 2008 Delta smelt BO ultimately finds that the only way to avoid jeopardy to the species and adverse modification of its habitat is to implement a series of “reasonable and prudent alternatives” detailed in the BO. (*Id.* at p. 277.) The BO provides five reasonable and prudent measures:

The following actions are necessary to ensure that implementation of the long term operations of the CVP/SWP does not appreciably reduce the likelihood of both the survival and recovery of the delta smelt and does not preclude the intended conservation role of its critical habitat through: 1) preventing/reducing entrainment of delta smelt at Jones and Banks; 2) providing adequate habitat conditions that will allow the adult delta smelt to successfully migrate and spawn in the Bay-Delta; 3) providing adequate habitat conditions that will allow larvae and juvenile delta smelt to rear; and 4) providing suitable habitat conditions that will allow successful

recruitment of juvenile delta smelt to adulthood. In addition, it is essential to monitor delta smelt abundance and distribution through continued sampling programs through the IEP.

(*Id.* at p. 279.)

Here, the DWB proposal to obtain and deliver replacement water supplies threatens to reinstate the adverse effects on smelt that Judge Wanger's order and the 2008 smelt BO are designed to avoid, because there is no evidence that the EWA/DWB includes the reasonable and prudent alternatives described in the BO. As a result, the operation of the EWA/DWB is likely to have newly identified significant adverse effects on Delta smelt or more severe effects previously identified as significant. Therefore, an addendum is not allowed and a supplemental or subsequent EIR is required.⁴

(2) Listed Salmonids and Other Listed Anadromous Fish

The regulatory history of the EWA's treatment of listed salmonids and other listed anadromous fish parallels that of the Delta smelt. The 2004 Final EWA EIS/EIR's determination that impacts on listed salmonids and other anadromous fish would be less than significant is based in part on assumed EWA compliance with NOAA Fisheries 2004 Programmatic Biological Opinion ("2004 salmonid BO"). (See, e.g., 2003 Draft EWA EIS/EIR, p. 9-110;⁵ 2004 Final EWA EIS/EIR, p. 1-1, Appendix A; 2004 EWA Record of Decision p. 18.)

Judge Wanger invalidated NOAA Fisheries Biological Opinion for the Coordinated Operation regarding salmonids. (Order dated July 18, 2008, attached hereto as Exhibit 4.) NOAA Fisheries recently reissued this Biological Opinion in draft form, on January 15, 2009 (it is dated December 11, 2008):

After reviewing the best scientific and commercial information available, the current

⁴The Addendum uses a false regulatory baseline: the operation of the EWA without regard to Judge Wanger's order. This masks the fact that the EWA has been operating at lower levels of water delivery since the order, because that is what is required to comply with the ESA. To the extent the DWB proposes moving more water at any given time of the year than Judge Wanger's order or implementation the 2008 smelt BO would allow, it threatens to cause significant adverse effects on Delta smelt.

⁵"Salmonids General Conservation Measures - Central Valley Fall-run/Late-fall-run Chinook Salmon (C-FESA; SSC-CDFG); Sacramento River Winter-run Chinook Salmon (E-FESA; E-CESA); Central Valley Spring-run Chinook Salmon (T-FESA; CT-CESA); Central Valley Steelhead (T-FESA). The EWA agencies will fully adhere to the terms and conditions in all applicable CESA and FESA biological opinions and permits for CVP and SWP operations."

status of the species, the environmental baseline for the action area, the effects of the proposed action, and cumulative effects, it is NMFS' draft Opinion that the long-term CVP and SWP OCAP, as proposed, is not likely [to] adversely affect Central California Coast steelhead and their designated critical habitat. In addition, the long-term CVP and SWP OCAP is likely to jeopardize the continued existence of Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and Southern DPS of North American green sturgeon. The long-term CVP and SWP OCAP is likely to destroy or adversely modify critical habitat for Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead, and proposed critical habitat for the Southern DPS of green sturgeon. Finally, the consultation on the effect of the proposed action on Southern Resident killer whales is ongoing. Therefore, NMFS has not reached a conclusion for that species.

(*Id.* at p. 380, attached hereto as Exhibit 5.)⁶

Thus, as with Delta smelt, the operation of the EWA/DWB is likely to have newly identified significant adverse effects on salmonids or more severe effects previously identified as significant. Therefore, an addendum is not allowed and a supplemental or subsequent EIR is required.

(3) Giant Garter Snake: The Project deletes previously adopted mitigation measures needed to substantially reduce significant impacts without showing they are infeasible.

The 2009 DWB proposes to delete or modify mitigation measures previously adopted as a result of the EWA EIR process to substantially reduce significant impacts, but without showing they are infeasible. For example, DWR proposes to delete the 160 acre maximum for "idled block sizes" for rice fields left fallow rather than flooded and to substitute for it a 320 acre maximum. (See 2003 Draft EWA EIS/EIR, p. 10-55; 2004 Final EWA EIS/EIR, Appendix B, p. 18, Conservation Measure # 4.) DWR also proposes to delete the mitigation measure excluding Yolo County east of Highway 113 from the areas where rice fields may be left fallow rather than flooded, except in three specific areas. (See 2004 Final EWA EIS/EIR, Appendix B, p. 18, Conservation Measure # 2.)

Deleting these mitigation measures required by the EWA approval would violate CEQA's requirements that govern whether, when, and how agencies may eliminate mitigation measures previously adopted under CEQA. (See *Napa Citizens for Honest Government v. Napa County Board*

⁶ Again, the conclusion of the 2008 Supplemental EWA EIS/EIR to the 2004 Final EWA EIS/EIR, that impacts on listed salmonids and other listed anadromous fish would be less than significant, which is intended to apply only applied to operations from the beginning of 2008 through the end of 2011, is irrelevant, because DWR has not certified that document and Reclamation has not adopted it.

of Supervisors (2001) 91 Cal.App.4th 342.) In the *Napa Citizens* case, the court announced several rules that agencies must observe when deciding whether to delete a previously adopted mitigation measure.

First, as a general rule governing the court's consideration of a challenge to an agency decision to delete a previously adopted mitigation measure, the court stated that "the deference provided to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration." (*Id.* at 359.)

Second, the court identified two specific requirements that must be followed if an agency is to legally delete a previously adopted mitigation measure, stating that "a governing body must state a *legitimate reason* for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence." (*Id.* [emphasis added].)

Third, in fleshing out what it meant by the term "legitimate reason," the court stated: "The modified EIR also must address the decision to delete a mitigation measure. In other words, the measure cannot be deleted without a showing that it is *infeasible*." (*Id.* [emphasis added].)

Fourth, the court concluded its decision on this issue by stating, "If no legitimate reason for the deletion has been stated, or if the evidence does not support the governing body's finding, the land use plan, as modified by the deletion or deletions, is invalid and cannot be enforced." (*Id.*)

Here, the Addendum does not even contend, much less support a conclusion with facts, that these mitigation measures are no longer feasible. Nor does the Addendum provide a legitimate reason for doing so. But DWR required these mitigation measures as part of the EWA approval specifically to reduce potentially significant effects of the EWA on Giant Garter Snake to less than significant. (2004 EWA Record of Decision, p. 6.) Therefore, deleting the mitigation measures returns the analysis to the stage of the CEQA process where there is substantial evidence supporting a fair argument that the project will have significant adverse effects; and consequently, preparation of an EIR is required.

(4) Groundwater

As noted in section 1.b above, the January 16, 2009 letter from BEC demonstrates that there are a number of groundwater sources located in areas that the Addendum indicates the DWB could access but are not described in the 2004 Final EWA EIS/EIR or 2008 Supplemental EWA EIS/EIR and that are vulnerable to overdraft. Therefore, any project, including the DWB, that proposes to pump more groundwater from these sources to meet the needs of water users in other locations has the potential to cause significant adverse effects on these resources. At a minimum, DWR must prepare a CEQA document that describes the environmental setting of these new areas and assesses the likely impacts on them from accessing water in these settings.

2. THE 2008 SUPPLEMENTAL EWA EIS/EIR MUST BE RECIRCULATED FOR PUBLIC COMMENT.

The 2008 Supplemental EWA EIS/EIR must be recirculated for public comment due to the availability of significant new information generated by the “2008 Delta smelt BO” and the NOAA Fisheries draft Biological Opinion re OCAP and salmonids issued January 15, 2009 (dated December 11, 2008), discussed above.

The 2008 Draft Supplemental EWA EIS/EIR states:

The fisheries and aquatic ecosystems chapter does not include any mitigation measures, but does include conservation measures (conservation measures included in the ASIP (Appendix C) are incorporated into the EWA project). These conservation measures have not changed from the 2004 EIS/EIR and ASIP. However, the updated impacts analysis incorporates one conservation measure at a new time of year: The EWA agencies will avoid acquisition and transfer of water that would reduce flows essential to maintaining populations of native aquatic species in the source river.

(*Id.* p. ES-9, 10.) On this basis, the 2008 Draft Supplemental EWA EIS/EIR concludes that effects on Delta smelt and listed salmonids and other listed anadromous fish will be either beneficial or less than significant. (*Id.*)

The 2008 Draft Supplemental EWA EIS/EIR also states:

The BOs on the long-term operations of the Projects (USFWS 2005, NMFS 2004) were issued after completion of the 2004 EIS/EIR. These BOs established non-discretionary terms and conditions to implement reasonable and prudent measures as part of the Section 7 consultation. The agencies have reinitiated consultation on these BOs, and it is not known how these terms and conditions might change. **For purposes of this analysis it is assumed that the current terms and conditions will be carried forward into the future.**

(*Id.* at pp. 4-5 [emphasis added].) Obviously, the assumption that “current terms and conditions will be carried forward into the future” is no longer valid, as the federal District Court, USFWS and NOAA Fisheries have all found these terms and conditions are not enough to avoid jeopardy or adverse modification of critical habitat to listed species of fish.

Mike Hendrick
2009 Drought Water Bank and CEQA Addendum
January 16, 2009
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Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink that reads "Tom Lippe". The signature is written in a cursive, slightly slanted style.

Thomas N. Lippe

List of Exhibits

1. 2004 Environmental Water Account Record of Decision.
2. Judge Wanger's interim order regarding the U.S. Fish & Wildlife Service's Biological Opinion for OCAP and Delta smelt, dated December 14, 2007.
3. U.S. Fish & Wildlife Service Biological Opinion on the effects of the coordinated operations of the CVP and SWP in California to threatened delta smelt and its designated critical habitat.
4. Judge Wanger's order regarding NOAA Fisheries' Biological Opinion for OCAP and listed salmonids and other species of anadromous fish, dated July 18, 2008.
5. NOAA Fisheries draft Biological Opinion for OCAP and salmonids issued January 15, 2009 (dated December 11, 2008).
6. Butte Environmental Council comment letter dated January 16, 2009.