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MICHAEL SELLING
DEPUTY DIRECTOR OF PUBLIC WORKS

ADVISORY WATER COMMISSION

September 16, 2015, 1:00 p.m.

Public Health Conference Room, 1601 E. Hazelton Avenue, Stockton, California

AGENDA

Roll Call

Approve Minutes for the Meeting of July 15, 2015

SCHEDULED ITEMS

I. Action Items:

A. No Action Items

II. Discussion Items:

A. Discussion on Local Drought Emergency (See Attached) – Mike Cockrell

B. Discussion on Valadao and Feinstein Drought Bills (See Attached) – Brandon Nakagawa

C. Presentation on Upper Mormon Slough Erosion Repair Project – Matthew Ward

D. Update on Federal Rule Making Process Defining Waters of the US (See Attached) – Brandon Nakagawa

E. Update on Sustainable Groundwater Management Act Workgroup Formation by the GBA (See Attached) – Brandon Nakagawa

III. Communications (See Attached):

A. July 21, 2015, San Joaquin County Request to Extend Comment Period for BDCP Recirculated Draft EIR/EIS.

B. July 29, 2015, Delta Counties Coalition Request to Extend Comment Period for BDCP Recirculated Draft EIR/EIS.

C. September 9, 2015 Friends of the River et al Comment Letter – BDCP Recirculated Draft EIR/EIS

Next Regular Meeting: **October 21, 2015, 1:00 p.m.**
Public Health Conference Room

Commission may make recommendations to the Board of Supervisors on any listed item.

If you need disability-related modification or accommodation in order to participate in this meeting, please contact the Water Resource Staff at (209) 468-3089 at least 48 hours prior to the start of the meeting.Any materials related to items on this agenda distributed to the Commissioners less than 72 hours before the public meeting are available for public inspection at Public Works Dept. Offices located at the following address: 1810 East Hazelton Ave., Stockton, CA 95205. These materials are also available at http://www.sjwater.org. Upon request these materials may be made available in an alternative format to persons with disabilities.

REPORT FOR THE MEETING OF
THE ADVISORY WATER COMMISSION OF THE SAN JOAQUIN COUNTY
FLOOD CONTROL AND WATER CONSERVATION DISTRICT
July 15, 2015

The regular meeting of the Advisory Water Commission of the San Joaquin County Flood Control and Water Conservation District was held on Wednesday, July 15, 2015, beginning at 1:00 p.m., at Public Health Services, 1601 E. Hazelton Avenue, Stockton, California.

Roll Call

Present were Commissioners Nomellini, Roberts, Uecker, Holman, Jr., Flinn, Elliott, Herrick, Kuil, Weisenberger, Heberle, Salazar, Jr., Hartmann, Neudeck, Secretary Nakagawa, Vice Chair Price, and Chairman McGurk. Others present are listed on the attendance sheet. The Commission had a quorum.

Approval of Minutes for the Meeting of May 20, 2015.

Motion and second to approve the minutes of May 20, 2015 (Nomellini/Flinn). Unanimously approved.

SCHEDULED ITEMS

Tom McGurk, Chairman of the Advisory Water Committee, led the agenda.

I. Action Items:

A. No Action Items

Commission

II. Discussion Items:

Note: At the Chairman's discretion, Discussion Item 2B (Discussion on Drought Activities) was moved up on the agenda during the meeting and discussed prior to Item 2A.

A. Presentation on Spring 2015 Groundwater Levels – Brandon Nakagawa

Mr. Nakagawa presented the Groundwater Report for spring 2015, which is prepared by County Public Works staff. An introduction of the report was provided, explaining that groundwater levels have been monitored since 1971. Data is shared on over 400 wells, of which 250 are monitored by County Staff. We are in the 4th year of the drought, with 11 inches of rain last year versus an average of 17 inches. The contour maps indicate groundwater elevation. They show declines in the deepest area just west of Linden. Comparing 2010 to 2015, cumulative groundwater has declined. Another dry year will cause concerns over water quality. Commissioner Nomellini asked how this data relates to 1992 levels in the County. Mr. Nakagawa answered that the pumping levels are nearing 1992 levels. Commissioner Flinn asked about the result of groundwater pumping. Mr. Nakagawa answered he believes it is lower. There is an uptick in drilling, but it is the older, shallower wells that have been reported as problematic. Specific data to reflect such activity is neither collected nor requested at this time.

Following is a summary of groundwater elevations reported:

*Note: Not all wells monitored were available for comparison due to limited access or active pumping at the time of monitoring.

Central San Joaquin Water Conservation District (CSJWCD) – Sixty-two (62) wells are monitored in CSJWCD. Thirty-seven (37) wells were able to be compared. Thirty-six (36) show decreases in groundwater levels. No change was observed in one (1) well.

North San Joaquin Water Conservation District (NSJWCD) – One-hundred thirty-eight (138) wells are monitored in NSJWCD. One-hundred five (105) wells were able to be compared. Eighty (80) wells decreased in groundwater levels. Twenty-five (25) wells increased in groundwater levels.

Oakdale Irrigation District (OID) – Five (5) wells are monitored in the OID area. No wells were able to be compared.

Stockton East Water District (SEWD) – One-hundred twenty-eight (128) wells are monitored in SEWD. Sixty-nine (69) wells were able to be compared. Fifty-six (56) wells decreased in groundwater levels. Nine (9) wells show increases in groundwater levels. Four (4) wells had no change in groundwater elevations.

South San Joaquin Irrigation District (SSJID) – Forty-one (41) wells are monitored in the SSJID area. Twenty-nine (29) wells were able to be compared. Twenty-three (23) wells show decreases in groundwater levels. Four (4) wells show increases in groundwater levels. No change was observed in two (2) wells.

Southwest County Areas – Thirty-six (36) wells are monitored across the Southwest Area of the County. Thirty (30) wells were able to be compared. Twenty-one (21) wells decreased in groundwater levels. Eight (8) wells increased in groundwater levels.

Woodbridge Irrigation District (WID) – Thirty-four (34) wells are monitored in the WID. Twenty-one (21) wells were able to be compared. Seventeen (17) wells decreased in groundwater levels. Four (4) wells show increases in groundwater levels.

B. Update on Drought Activities – Brandon Nakagawa

Mr. Nakagawa provided background on the legislation, explaining that there are a number of attempts by House of Representatives members to push this bill throughout the current drought. HR 2898 is going to the House as soon as today and there will be an opportunity to work on the language if passed and sent to the Senate. When analyzed compared to the adopted County Legislative Platform regarding the Delta, the Bill is inconsistent in several areas, but also has a number of provisions that on face value, might be supportable. Focusing on inconsistencies, the bill prescribes how the CVP should be operated to increase water exports to the detriment of endangered species and Delta water users. This would in essence favor one part of the State over the other and the mitigation of the incremental impacts would again fall to others on the system including many in San Joaquin County.

Commissioner Weisenberger expressed he does not see the Bill as “taking” from the County. He encouraged the Commission to remain neutral on the issue. Mr. Jeff Shields, South San Joaquin Irrigation District General Manager, provided public comment to encourage a neutral position, pointing out the importance of maintaining relationships with all involved and that this issue had not really been vetted by this group yet.

Supervisor Elliott highlighted that at this point a letter had been issued by Supervisor Katherine Miller, however the letter was not sent on behalf of the County Board of Supervisors. She sent the letter on behalf of the Delta Counties Coalition. He thinks the approach the Commission should take is to

discuss the matter and state any concerning issues but keep the lines of communication open with the author for future negotiations.

Commissioner Herrick expressed his concern about the Bill, stating that it is a serious threat and that he has written letters to express his concerns to the Board of Supervisors. He believes the state needs to enforce standards and not transfer the burden to his clients. Furthermore, he stated the Bill is unfair and worthy of a no vote.

Commissioner Hartmann expressed concern of the affects this will have on water quality and gave an illustration from the "Tragedy of the Commons" and summarized it by saying that the best way to manage resources is for people who share the resource to come together and work together to figure out how to best make it work—it's not best for government to manage it.

Commissioner Flynn suggested we discuss this as a group to reach consensus and bring a collective opinion to the Board of Supervisors. He added, "Let's sort out the good from the bad, with wise minds".

It was determined that further discussion over the matter was needed. Chairman McGurk asked Mr. Nakagawa to coordinate a follow-up meeting and bring the item back to the Commission for further discussion.

During public comment, Ms. Jackie Lauchland Shaw, a Lodi Zin grower, expressed concern of drought to growers and has expressed concerns to congress. She expressed the need to stop the tunnels given it would cause destruction, and instead continue dredging and develop cost effective suggestions.

Drought Discussion

Drought discussion was led by Mr. Mike Cockrell, Director of the Office of Emergency Services (OES), who provided a status on drought conditions to the Commission. He stated that precipitation at this time are just trailing 1923 and this is the 3rd worst drought in history. El Niño is a potential concern. This time last year it was also a potential concern, however as winter approached it lessened. A three month outlook indicates warmer temperatures than normal. While an equal chance of precipitation was predicted last year, El Niño was not as likely. El Niño is predicted 90% likely it will occur this year.

County OES is monitoring legal challenges to the State Water Board's curtailment notices.

The Human Services Agency received an allotment of boxes as part of the Drought Food Assistance Program specified for counties suffering high levels of unemployment from the drought.

The estimated cost incurred by San Joaquin County in response to 2014 Drought Proclamation is approximately $600,000. Upcoming events and activities include Cease & Desist orders, billboards, Master Gardner programs, going to Board of Supervisors regarding continued proclamation of drought situation, and continued outreach efforts pertaining to assistance as well as education on conservation.

C. Update on State Budget Trailer Bills – Brandon Nakagawa

Mr. Brandon Nakagawa provided an update to Senate Bill No. 88 (SB 88), explaining that once its budget is approved, the trailer bills are up for negotiation in a Conference Committee rather than debated publically in a standing Committee. This is the Bill which Assembly-member Eggman helped negotiate. Potential CEQA exemption was discussed for big projects, such as tunnels, professional sports stadiums, and high-speed rail. The final negotiated language kept the exemption narrow. SB 88 also includes mandated metering of Delta farming diversions.

Mr. Nomellini stated that for years the Delta was exempt from these measures. The Delta acts like a pool because when you pump out water it goes right back into the Delta. In the past there was a comprehensive model that guided operations. He explained there are efforts underway to promote the

use of remote satellite systems. The Board is considering this option and we are making some headway in that regard. The State did not like the idea of us not having a measuring device. The law now says we have to use a measuring device unless the Board determines it to be financially unreasonable. It is discretionary not mandatory. He stated that we are still going to work with the State for use of a satellite to measure water usage. Others are using it. You get real time information. You can even measure groundwater with the tool.

D. Update on Smith Canal Gate Project Draft Environmental Impact Report – Roger Churchwell
Mr. Roger Churchwell gave an update on the Smith Canal Gate Project. The Draft Environmental Impact Report (EIR) is available for public review and comments are due by August 10. It is available online. There was a public meeting and 50 people attended. Three alternatives were presented. Based on an informal polling of those that considered the three alternatives, one choice was greatly supported over the others. If this alternative is selected, it will not need to go back through the election approval process again because it is within the financial limits allowed. The project will be selected at Board meeting November 19.

III. Communications (See Attached):

A. July 9, 2015, Announcement of Public Review Period for BDCP Recirculated Draft EIR/EIS

B. July 9, 2015, Delta Counties Coalition Press Release on Governor's Latest Tunnel Proposal

C. June 4, 2015, Joint Press Release Contra Costa and San Joaquin Counties, funding to Combat Invasive Aquatic Weeds

Jackie Lauchland Shaw concluded by reiterating her thoughts on the need for solving delta problems, dealing with the heart, not just putting down sand bags, and control by dredging. She suggested working with Army Corp of Engineers to do dredging. Mr. Hartmann encouraged her to meet with them and that she had good ideas to share with them.

Next Regular Meeting: August 19, 2015, 1:00 p.m.
Public Health Conference Room

Adjourned 2:55

SAN JOAQUIN COUNTY
FLOOD CONTROL & WATER
CONSERVATION DISTRICT

ADVISORY WATER COMMISSION

MEETING OF JULY 15, 2015

ATTENDANCE SHEET

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Michael Colleri			
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Will Price	At-Large	Same	
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Dale Kuil	SSJID		670-5829
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Dante John Nomellini	CCWA		
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SAN JOAQUIN COUNTY
FLOOD CONTROL & WATER
CONSERVATION DISTRICT

ADVISORY WATER COMMISSION

MEETING OF JULY 15, 2015

ATTENDANCE SHEET

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ATTACHMENT
II.A.

By **MICHAEL CASEY** / **CBS NEWS** / *September 10, 2015, 3:05 PM*

Get ready for one of the strongest El Ninos ever

A rescue worker rescues a mock flood victim during a training drill in Lima's district of Surco, Peru, September 1, 2015. Peru conducted a national drill on Monday to prepare the South American country for predicted natural disasters from a strengthening El Nino weather phenomena that officials have predicted to be "extraordinary." / **REUTERS**

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Forecaster can say with 95 percent confidence that this El Nino will last through the winter and is shaping up to be one of the strongest ever.

The weather experts from National Oceanographic and Atmospheric Administration's Climate Prediction Center said that weekly sea surface temperatures in the eastern half of the tropical Pacific had warmed in August and were 3.6 degrees higher than average -- one of the key indicators that this El Nino could be one for the record books.

Trade winds have also been weaker than average over much of the equatorial central and eastern Pacific, another indicator of a stronger event. The latest offer increased certainty that we could be in for what one forecaster described as a "Godzilla" El Nino.

An El Niño -- meaning in Spanish "the little boy, or Christ child" -- is created when the equatorial waters of the Pacific Ocean warm significantly.

Play **VIDEO**

Mike Halpert, deputy director, NOAA's Climate Prediction Center, said this one -- which is expected to weaken by the Spring -- could be the third strongest behind the 1986-88 El Nino. The biggest on record, the 1997-98 El Nino, sparked widespread storms and flooding that caused more than $4 billion in damage and killed 189 people nationwide.

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Drought-plagued West faces "Godzilla" El Nino

"At this point, it could be one of the three strongest we have seen," Halpert told reporters, adding that this could be second if you look at El Ninos that peak in winter.

"1997 by any measure ... is still stronger than 2015," he said, noting that a key then was winds reducing much further and even reversing and blowing from West to East. "Even just looking the oceans in the eastern part of the basin, 97 was almost as twice as warm as what we are seeing right now. "

Workers dry cocoa beans in the village of Goin Debe, Blolequin department, western Ivory Coast. Ivory Coast, the world's top cocoa grower, will see a significant fall in its 2015/16 main crop due to dry weather that has hampered crop development and could worsen with the onset of El Nino. / **LUC GNAGO, REUTERS**

Around the world, nations are girding for the expected flooding, storms, crop failures and shifts in commercial fishing that would be expected from a strong El Nino. But in the United States, the effects so far have been minimal, although Halpert said the weak Atlantic Hurricane season was partly due to this El Nino.

In August, NOAA said there was a 90 percent chance that this Atlantic hurricane season that runs through Nov. 30 would be relatively quiet, blaming atmospheric conditions associated with El Nino.

"What we can attribute to El Nino is that have seen increased shear," Halpert said "Basically, the winds aloft have been quite strong. We have seen seven or eight storms but none of them have had the opportunity to develop because of this shear. As the storm gets going, the tops get sheared off and that is not a favorable environment for tropical systems."

But in the coming months, parts of the country especially on the West Coast are expected to see more frequent and intense storms and heavy rains. Tropical cyclones are expected to increase in other parts of the world.

play **VIDEO**

Ballroom dancing breaks out on the streets of Manhattan

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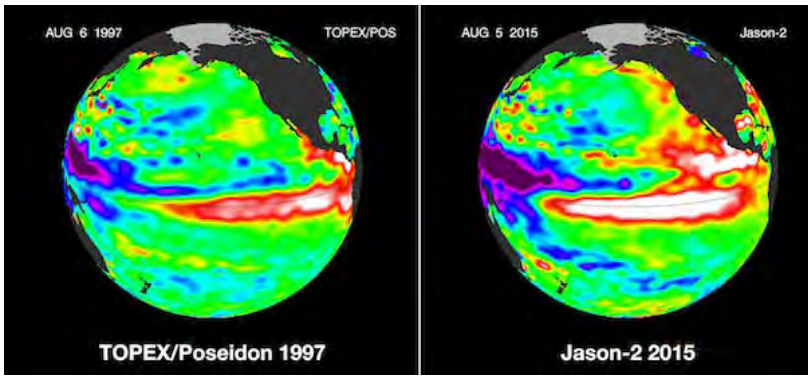
13 **PHOTOS**

"Almost human" - Homo naledi



This is a side by side comparison of Pacific Ocean sea surface height (SSH) anomalies of what is presently happening in 2015 with the Pacific Ocean signal during the famous 1997 El Niño. These 1997 and 2015 El Niño animations were made from data collected by the TOPEX/Poseidon (1997) and the OSTM/Jason-2 (2015) satellites. / **NASA**

"The most reliable El Nino signal over the U.S. is a wet signal in the Gulf Coast and Florida. At this point, we have fairly high probability for that," Halpert said.

"El Nino is actually good for some parts of the country. It generally favors a warm Northern Plains and Northern Rockies," he said. "The United States is one of the big winners economically regarding El Nino. The increase to GDP can be in the billions of dollars. Often, that is just savings on your heating bill if you live in North Dakota."

But the forecasters warned that even heavier rains out West wouldn't be enough to alleviate the four years of record breaking drought in California and other parts of the Pacific Northwest that have left reservoirs far below capacity and groundwater systems significantly stressed.

"El Nino events do have a tendency to produce wetter than average winters in southern California but a single El Nino event is unlikely to erase four years of drought even there," Kevin Werner, NOAA's director of western region climate services, said. "Most of the important water resources originate from places in the Sierra Nevada and the Rocky Mountain range and those places have little or no correlation to El Nino."

Werner said the Pacific Northwest could actually suffer even more, since El Nino is projected to bring drier than average conditions to places like Washington.

"It's entirely possible that we could see continued drought across many areas of the West at the same time that we see a strong El Nino event and even flash flooding in the southwest," he said.

Michael Casey
Michael Casey covers the environment, science and technology for CBSNews.com

Featured in SciTech

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New Android App

ATTACHMENT
II.B.

Congressional Research Service
Informing the legislative debate since 1914

Drought Legislation: Comparison of Selected Provisions in H.R. 2898 and S. 1894

Charles V. Stern
Specialist in Natural Resources Policy

Pervaze A. Sheikh
Specialist in Natural Resources Policy

Betsy A. Cody
Specialist in Natural Resources Policy

Nicole T. Carter
Specialist in Natural Resources Policy

Claudia Copeland
Specialist in Resources and Environmental Policy

September 4, 2015

Congressional Research Service
7-5700
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CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Several western states are experiencing extreme, and in some cases exceptional, drought conditions. The persistence and intensity of the current drought has received considerable attention from Congress. To date, federal legislative proposals to address drought have focused on the federal role in managing water supplies, supporting drought-related projects and programs, and conserving fish species and their habitat.

A number of bills in the 114th Congress include proposals to address drought, including S. 176, S. 1837, S. 1894, H.R. 2898, and H.R. 3045, among others. Two of these bills have received significant attention as potential legislative vehicles for drought proposals and are compared in this report: H.R. 2898 and S. 1894. H.R. 2898, the Western Water and American Food Security Act, was passed by the House on July 17, 2015. The House bill has 11 titles. S. 1894, the California Emergency Drought Relief Act of 2015, was introduced in the Senate on July 29, 2015. The Senate bill includes 4 titles. Both bills address a wide range of drought issues, including those that are specific to the state of California and those that are regional or national in scope.

This report provides a high-level comparison of S. 1894 (as introduced) and H.R. 2898 (as passed by the House). It identifies comparable issue areas addressed in both bills and discusses selected commonalities and differences between those provisions. It also summarizes selected provisions in each bill that are not addressed in the other bill.

Certain issues are addressed in both pieces of legislation. For example, both bills contain multiple sections that focus on water infrastructure and water conveyance in California. These sections include provisions that would address operations of the federal Central Valley Project (CVP) and the California State Water Project (SWP) as they relate to managing water flows and conserving endangered and threatened fish populations (i.e., the Delta smelt and certain salmon species) listed under the Endangered Species Act (ESA; 16 U.S.C. §§1531-1543). Some of these provisions would be triggered by drought conditions, whereas others would be permanent changes. Other sections address common goals throughout the West, such as the facilitation of new surface water storage projects.

Although the bills address some common issue areas and include some similar provisions, their approaches often differ in important ways. For instance, S. 1894 provides broad guidance for the Secretaries of the Interior and Commerce to maximize water deliveries in accordance with applicable laws; H.R. 2898 has a similar directive but also includes a number of specific requirements that could alter the current implementation of biological opinions (BiOps) under the ESA.

Outside of common issue areas addressed in both bills, each would also authorize a number of changes that have no obvious corollary in the other bill. For example, H.R. 2898 includes provisions that would alter implementation of the Central Valley Project Improvement Act (CVPIA; P.L. 102-575), which is not addressed in S. 1894. Similarly, S. 1894 contains new authorities related to water reuse and recycling, which are not addressed in H.R. 2898.

Key issues raised by these bills include how to address the management of federal water supply projects in times of drought and how to handle the overall increasing demands for water supplies despite scarce water resources. Congress may also consider whether federal law and its implementation adequately address the balance between competing demands (e.g., fishery conservation and agricultural use) for limited supplies and whether changes are warranted during drought and/or under other circumstances.

Contents

Figures

Contacts

Introduction

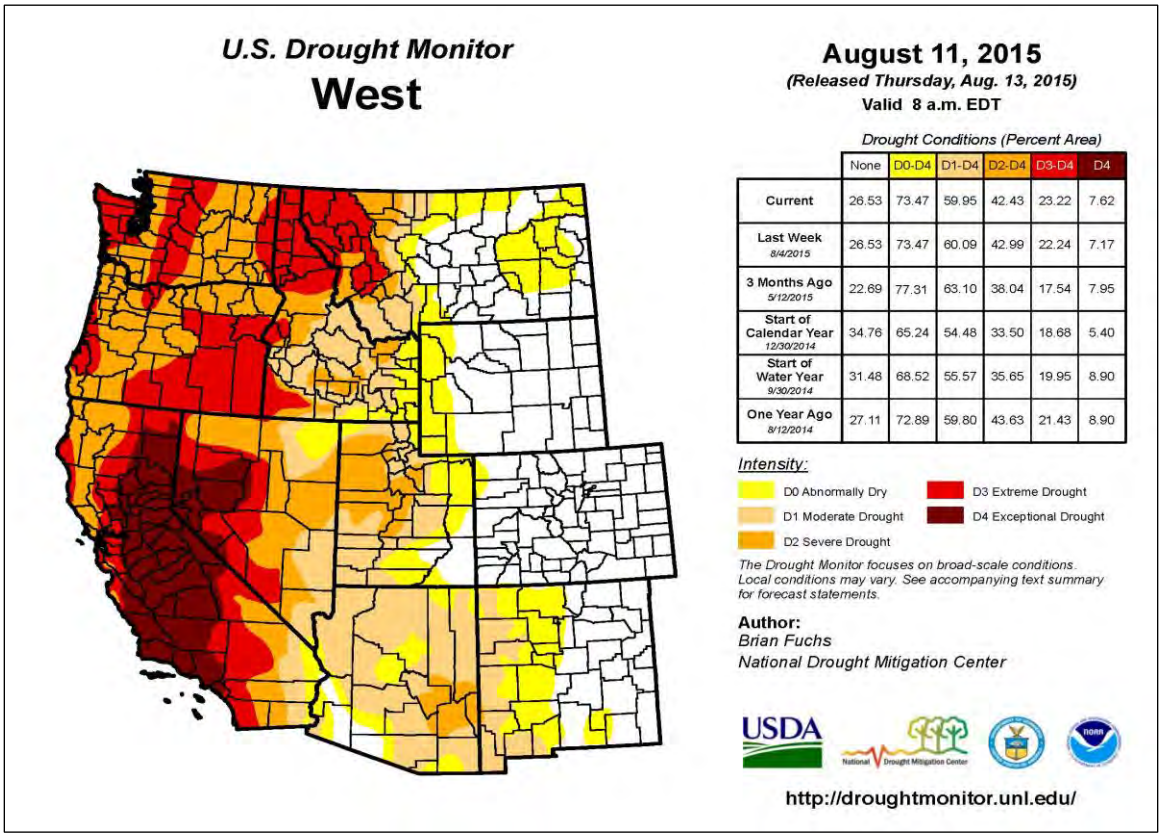
Several western states, including California, Oregon, Nevada, Washington, and portions of Montana and Idaho, are experiencing extreme—and in some cases exceptional—drought conditions. To date, federal legislative proposals to address drought have focused on the persistence and intensity of the drought in the western states and the federal role in managing water supplies, supporting drought-related projects and programs, and conserving fish species and their habitat.

A number of bills have been introduced in the 114th Congress that would address drought. These bills include S. 176, S. 1837, S. 1894, H.R. 2898, H.R. 2983, and H.R. 3045, among others.

Two of these bills in particular, H.R. 2898 and S. 1894, have received congressional and broad public attention and are the focus of this report. On July 17, 2015, H.R. 2898, the Western Water and American Food Security Act, was passed by the House. The House bill has 11 titles, which address a wide range of issues. On July 29, 2015, S. 1894, the California Emergency Drought Relief Act of 2015, was introduced in the Senate. The Senate bill includes four titles, many of which address elements that were not included in H.R. 2898.

As California experiences its fourth year of drought and the Southwest endures more than a decade of drought conditions, western water management will likely remain an issue before Congress. Elements from one or both of these bills (as well as from other bills) will likely receive continued attention from Congress.

Figure 1. U.S. Drought Monitor in Some Western States as of August 11, 2015



Source: U.S. Drought Monitor, at http://droughtmonitor.unl.edu/Home/RegionalDroughtMonitor.aspx?west.

This report summarizes the provisions of S. 1894, as introduced, and H.R. 2898, as passed by the House. It identifies comparable provisions between the two bills and discusses some of the ways in which those provisions overlap or differ.[1] It also summarizes selected other major provisions in each bill.

Overall, both bills contain provisions that focus on infrastructure and water conveyance in California. Some of these provisions would be triggered by drought conditions or declarations, and others would result in permanent changes in water management. Some provisions in the bills are associated with specified states (typically the 17 western states,[2] Hawaii, and Alaska), whereas other provisions may have national application.[3] Many provisions of H.R. 2898 have no specified authorization of appropriations; S. 1894, by contrast, contains provisions that authorize either funding subject to appropriations or mandatory funding for certain activities. Many provisions in both bills are specific to the projects and programs of the Bureau of Reclamation (Reclamation), but others are associated with other federal agencies (e.g., U.S. Army Corps of Engineers [Corps], U.S. Environmental Protection Agency [EPA]). Some provisions would amend existing programs and activities, whereas others would authorize new programs and activities.[4]

Issues Addressed in Both Bills

Several drought-related issues are addressed in both H.R. 2898 and S. 1894. For example, both bills contain multiple sections that focus on infrastructure and water conveyance in California, often specifically pertaining to management of the federal Central Valley Project (CVP). Some of the California-specific common issue areas include management of fish populations and water flows; the CALFED invasive species program; operational flexibility and drought relief; operation of the Delta Cross Channel gates; emergency environmental reviews; water transfers; water rights protections; and completion of CALFED storage studies. Other sections discuss common goals to address drought on a broader scale, the most notable of which are construction of new surface water storage projects and amendments to Bureau of Reclamation (Reclamation) authority under the SECURE Water Act (Title IV of P.L. 111-11).

Management of Fish Populations and Water Flows

Water projects and water diversions can affect fish habitat and fish populations. In California, the coordinated operations of the CVP and the State Water Project (SWP) serve millions of people and thousands of acres of farmland throughout much of the state. Both projects collect and store water in reservoirs in northern California. They also divert water from the San Joaquin and Sacramento Rivers' Delta confluence with the San Francisco Bay (Bay-Delta) and pump it south

[1] A congressional distribution memorandum providing a side-by-side comparison of legislative text in issue areas common to both bills is available from the authors upon request.

[2] These states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[3] U.S. territories are not specifically mentioned in either bill. Evaluating the application of the bills' provisions to the U.S. territories is beyond the scope of this report.

[4] For more information on drought in general, see CRS Report R43407, *Drought in the United States: Causes and Current Understanding*, by Peter Folger and Betsy A. Cody. For background on the drought in California, see CRS Report R40979, *California Drought: Hydrological and Regulatory Water Supply Issues*, by Betsy A. Cody, Peter Folger, and Cynthia Brown.

to water users in Central and Southern California.[5] CVP and SWP pumping from the Bay-Delta has been reduced and other project operations have been altered due to drought conditions, as well as to protect threatened and endangered species and to preserve in-Delta water quality. Operational changes associated with compliance with the Endangered Species Act (ESA; 16 U.S.C. §§1531-1543) aim to protect and recover threatened and endangered species. State water quality requirements aim to stabilize salinity levels in the Bay-Delta, protect water quality for in-Delta farmers and nearby communities, and provide adequate flows for aquatic species and their habitat.

Both H.R. 2898 and S. 1894 include provisions that would address water conveyance and flows in relation to fish populations listed under ESA. Specifically, both bills would address certain operations of the CVP and SWP in relation to biological opinions (BiOps) associated with the threatened Delta smelt[6] and with threatened and endangered salmon species[7] under ESA. A BiOp is the formal response of either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS)[8] to a federal agency stating whether or not a proposed action is likely to jeopardize the continued existence of a species listed under ESA or result in the destruction or adverse modification of the species' critical habitat. A BiOp can have an incidental take statement (an allowance of how many individuals of a listed species can be taken) and reasonable and prudent alternatives (RPAs) to proposed activities.[9]

The next few sections summarize how both bills address the management of water flows in relation to fish populations.

Definitions in H.R. 2898 and S. 1894

Both bills present a set of definitions to complement their provisions, including definitions of the salmonid BiOp and the smelt BiOp. Both bills would define the term *Salmonid Biological Opinion*[10] as the opinion issued under the federal ESA by the National Marine Fisheries Service on June 4, 2009. Both bills also would define the term *Smelt Biological Opinion*[11] as the biological opinion on the Long-Term Operational Criteria and Plan for coordination of the CVP and SWP issued by FWS on December 15, 2008. Both BiOp definitions appear to codify the specified BiOp (based on its original date) and therefore would not allow for new scientific information beyond what is directed in other provisions of the bill to be used.

In relation to identifying the condition of species, H.R. 2898 would define "negative impact on the long-term survival" as follows:

> The term "negative impact on the long-term survival" means to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

[5] Whereas the Central Valley Project (CVP) serves mostly agricultural water contractors, the State Water Project (SWP) serves largely urban or municipal and industrial contractors; however, both projects serve some contractors of both varieties.

[6] This species was listed as threatened under the Endangered Species Act (16 U.S.C. §§1531-1543) in 1993.

[7] The Salmonid Biological Opinion issued by the National Marine Fisheries Service on June 4, 2009, covers Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead.

[8] NMFS is also sometimes referred to as NOAA Fisheries.

[9] In the case of pumping in the Bay-Delta, both of these elements are important to consider.

[10] Hereinafter referred to as the salmon BiOp.

[11] Hereinafter referred to as the Delta smelt BiOp.

This phrase is used several times in H.R. 2898 in regard to how the effects to a species of a water project or water diversion would be measured. While similar terminology is not formally defined under ESA, federal regulations implementing ESA provide a definition for the phrase "jeopardize the continued existence of" that is comparable to that provided above (with a few notable differences):

> *Jeopardize the continued existence of* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.[12]

S. 1894 does not define *jeopardy* or any other term that involves effects on species; thus, some may argue that it appears to defer to existing laws and regulations when conditioning changes to operations criteria. For example, Section 121 of S. 1894 generally would provide that nothing under S. 1894 authorizes any federal official to take an action that is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their habitat beyond the effects listed in the BiOps.

Delta Smelt

Both bills aim to increase water supplies for users by authorizing changes in how pumps and flow rates are managed in the Delta. H.R. 2898 calls for maximizing water supplies to users[13] but has several earlier provisions that would specify water flows and the conditions to keep these flows at certain levels. For example, H.R. 2898 would address water flow requirements for Delta smelt by setting fixed flow rates in the Old and Middle Rivers[14] unless the Secretary determines there is an imminent negative impact on the long-term survival of the Delta smelt. In contrast, S. 1894 would not set specific pumping rates in relation to Delta smelt populations. However, Section 101(a)(1) of S. 1894 would direct water managers to maximize water supplies while staying consistent with applicable laws and regulations. In relation to Delta smelt, this provision means that under S. 1894, pumping flows would be maximized while aiming to be consistent with the parameters of the Delta smelt BiOp.

Both bills call for greater data collection on the Delta smelt population through a Delta smelt distribution study. Both also would authorize greater real-time monitoring of Delta smelt to advise water conveyance management. However, the bills would take different approaches to monitoring and implementing changes to operations. Section 103(a) of H.R. 2898 is a broad provision that would require the director of FWS to use the best scientific and commercial data to evaluate, refine, or amend the RPAs[15] in the Delta smelt BiOp. It would direct the Secretary of the Interior, however, to make all "significant decisions" under the Delta smelt BiOp and document those decisions. S. 1894 does not have this broad directive to potentially change parts of the Delta smelt BiOp; however, under Section 101(a)(8), S. 1894 would direct the Secretaries of Commerce and the Interior (the Secretaries) to use all scientific tools to identify changes to the real-time

[12] 50 C.F.R. §402.02.

[13] §302(a) of H.R. 2898.

[14] The Old and Middle River flow rate is often expressed as a reverse flow rate. When pumps south of the Bay-Delta are turned on to provide water supplies to the CVP and SWP, the Old and Middle Rivers reverse their flow. The rate at which water flows through the pumps is expressed as a negative flow in cubic feet per second because of the reversal of the Old and Middle River.

[15] *Reasonable and prudent alternatives* are alternate ways of an implementing a project presented in a BiOp that, if implemented, would avoid jeopardizing a species and adversely modifying its habitat.

operations of Reclamation and of state and local water projects that could increase water supplies.[16] It also would require such actions to be consistent with applicable laws and regulations, including existing BiOps.

Section 103(b) and (c) in H.R. 2898 would direct the Secretaries to increase and review monitoring practices for Delta smelt throughout the year and under different conditions (e.g., during periods of high turbidity) to minimize salvage of Delta smelt[17] and maximize pumping rates. This approach is broader than the one prescribed under Section 203(b) of S. 1894, which would require additional monitoring of Delta smelt when sediment loads could cause increased turbidity.

Both bills address negative flows on the Old and Middle Rivers (OMR flows) as they pertain to listed species.[18] Under Section 103(e) of H.R. 2898, OMR flows would be set at -5,000 cubic feet per second unless information allows the Secretaries to conclude that a lower flow rate is justified. If a lower flow rate is implemented, H.R. 2898 has a series of conditions that would be required to be met to make the change. Some of these conditions would be centered on obtaining supporting data that justifies the lower rate. This analysis would be done for current as well as future BiOps addressing Delta smelt. In addition, under Section 103(g) of H.R. 2898, the reverse flows in the implementation of the BiOps would be calculated within 90 days of enactment and every 5 years. Section 101(c)(3)(B) of S. 1894 would also address flow rates in the Old and Middle River. It would direct the management of flows to be done within the parameters listed in the BiOp to minimize water supply reductions.

Salmon

Both bills would address salmon management in the Delta, but they would do so in different ways. H.R. 2898 contains specific directions for implementing new science and data into the management of salmon stocks, whereas S. 1894 would authorize the implementation of the National Oceanic and Atmospheric Association's Salmon Restoration Plan.[19]

Under Section 202 of H.R. 2898, the RPAs in the salmon BiOp would be adjusted to reflect new science and data in accordance with existing adaptive management provisions in the BiOp.[20] Section 202(b) outlines a process for examining new science and data on salmon and providing recommendations to alter the RPAs to reduce the water supply impacts of the salmon BiOp. The recommendations would be implemented if they would have a net effect that is similar to the operational parameters in the BiOp on the listed species.

By contrast, S. 1894 does not specifically direct that RPAs in the salmon BiOp be adjusted to reflect new information. However, S. 1894 would require that the Secretaries report any changes to the BiOp. These changes could occur from adaptive management processes that exist under the salmon BiOp.

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[16] This provision directs the Secretaries of the Interior and Commerce to identify projects, not implement them.

[17] The salvage of fish is capturing fish and releasing them elsewhere.

[18] See footnote 14.

[19] See National Oceanic and Atmospheric Association, "West Coast Salmon Recovery Planning & Implementation," at http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/recovery_planning_and_implementation/.

[20] Adaptive management is the process of incorporating new scientific and programmatic information into the implementation of a project or plan to ensure that the goals of the activity are being reached efficiently. It promotes flexible decisionmaking to modify existing activities or to create new activities if new circumstances arise (e.g., new scientific information) or projects are not meeting their goals.

Section 202(d) and (e) of H.R. 2898 discuss the evaluation of activities related to factors that affect species (e.g., physical habitat improvement and predation control) to see how these activities could be used to offset the effects that operational changes to pumping rates have on species. A framework for identifying offsetting actions and estimating how each action would affect the survival of salmonid species is provided in Section 202(e) of H.R. 2898. After the framework is established, Section 202(g) provides that there would be an evaluation of alternative management measures based on the recommended actions and their potential effect on salmonid survival. Under the bill, the alternative management measures would be compared with existing restrictions on export pumping rates to see if the measures would offset the effects of increased pumping if the restrictions were eased. If the evaluation determines that an alternative measure would offset the existing effects of restricting water supplies—and the implementing the alternative measure is feasible—then the alternative measure would be implemented to increase pumping rates to the maximum extent possible while maintaining equivalent through-Delta survival rates for listed salmon species. Section 202(h) of H.R. 2898 discusses oversight responsibilities for adaptive management under the BiOp and would direct that operational criteria be developed to coordinate the management of smelt and salmon under the BiOps.

S. 1894 would not direct managers to create management regimes that offset the effects of pumping. However, Section 201 of S. 1894 would authorize several actions that aim to help threatened and endangered fish populations. These actions might resemble the potential offsetting actions listed under Section 202(g) of H.R. 2898. Examples would include implementing nonstructural barriers at Delta Cross Channel (DCC) gates (see "Operation of the Delta Cross Channel Gates," below), alternative hatchery salmon release strategies, and a trap and barge pilot project to increase fish survival in the Delta.

Invasive Species and Protection of Native Anadromous Fish

Both bills would authorize pilot projects to implement an invasive species control program authorized in the Water Supply, Reliability, and Environmental Improvement Act (P.L. 108-361). The program would seek to reduce and remove invasive species in the Delta and would sunset after seven years.

In addition, both bills would authorize programs to protect native anadromous fish[21] in the Stanislaus River. H.R. 2898 would establish a nonnative fish removal program under Section 203, whereas Section 202 of S. 1894 would establish a pilot program to remove nonnative fish that would sunset seven years after the final applicable permit was issued. Both bills would direct participating water districts to pay for 100% of the program.

Operational Flexibility and Drought Relief

Both H.R. 2898 (Section 302) and S. 1894 (Section 101) would direct the Secretaries to maximize water supplies to CVP users and SWP contractors by approving, consistent with applicable laws, projects and operations that provide additional water supplies. Both bills would provide broad authority to the Secretaries to approve any project or operational change to address emergency provisions, although both also contain limitations on this authority. Both H.R. 2898 and S. 1894 would streamline permit decisions and authorize expedited procedures to make final decisions on operations and projects that address their respective sections on maximizing water supplies. Both bills also would provide the Secretaries with new authority to approve projects that normally

[21] Anadromous fish migrate from saltwater to spawn in fresh water. Salmon are anadromous fish.

would not require congressional authorization. In addition, Section 302(f) of H.R. 2898 would require the Secretaries to develop a drought operations plan that is consistent with provisions under the bill. S. 1894 contains no comparable provision.

Operation of the Delta Cross Channel Gates

The DCC is a feature of the CVP. It is a controlled diversion channel downstream of Sacramento that diverts water from the Sacramento River into the Mokelumne River. The DCC is significant because of its role in maintaining water quality in the Delta, its effect on listed fish, and its redirection of flows to the Delta-Mendota and Contra Costa canals and their pumping facilities.

Both bills would direct the Secretaries to keep the DCC open to the maximum extent possible to maintain water flows to the pumping plants. Further, both bills would state that the opening of the gates should be consistent with operating and monitoring criteria developed by the State Water Resources Control Board and any Temporary Urgency Change order affecting the gates. Both bills also call for data to be collected on how opening the gates would affect listed species of fish (e.g., Delta smelt and salmon).

H.R. 2898 also contains unique provisions related to the DCC. Section 303 of H.R. 2898 contains a broader mandate for data collection near the DCC and would require that data on water quality, water supply, and listed species be collected. Further, H.R. 2898 would require an evaluation of salmonid survival when gates are open and a report to congressional committees on the extent to which the gates will remain open. Section 303(b) of H.R. 2898 also would direct the Secretary of the Interior to recommend revisions to the operations of the DCC so that water supplies can be maximized without causing a significant negative impact on the long-term survival of the listed species or water quality. S. 1894 does not address these specific considerations.

Emergency Environmental Reviews

Both bills would address compliance under the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.) by directing the Secretaries to consult with the Council on Environmental Quality to make alternative arrangements to comply with NEPA. Section 305 of H.R. 2898 would further state that the Secretaries may deem a project to be in compliance with all necessary environmental regulations and reviews. However, such a determination could only be made if the Secretaries determine that the immediate implementation of the project is necessary for addressing human health and safety or if there is an imminent loss of agricultural production that contributes to 25% (or greater) of an identifiable region's tax revenue.

Water Transfers

Both bills attempt to expand opportunities for water transfers in the CVP service area by expediting review of these actions. Section 101(c)(4)(a) of S. 1894 would require that any proposal to increase flows in the San Joaquin River through a voluntary sale, transfer, or exchange be evaluated by the Secretary of the Interior in a "timely manner" and consistent with "applicable law." Section 308 of H.R. 2898 would amend the Central Valley Project Improvement Act (CVPIA; P.L. 102-575) to require that the Secretary take "all necessary actions to facilitate and expedite transfers of Central Valley Project water" in accordance with (1) the bill; (2) NEPA, and (3) reclamation laws. It would require the appropriate entity (i.e., the contracting district from which the water is coming, the agency, or the Secretary) to determine if a transfer proposal is complete within 45 days. The House bill also provides that the Secretaries should "allow and

facilitate" water transfers through the two primary federal and state pumping plants from April 1 to November 30, provided transfers comply with state law.

In addition, both bills address San Joaquin River inflow-to-export ratios as they pertain to pumping. Section 101(c)(4)(b) of S. 1894 would require the adoption of a 1:1 inflow-to-export ratio on the San Joaquin River from April 1 through May 31 for increased flows resulting from voluntary water transfers, sales, and exchanges during the period that the bill is in effect (i.e., during the drought designation). Under the bill, this ratio would be allowed unless the Secretaries determine that implementing the requirement would impact species listed as threatened or endangered under ESA more than currently anticipated through the implementation of the current salmonid BiOp. Section 302(b)(3) of H.R. 2898 similarly provides that this inflow-to-export ratio would be allowed, but it would only allow for a more restrictive ratio if the Secretaries make a determination that such a ratio would be required "to avoid a significant negative impact on the long-term survival of a listed salmonid species" under ESA. Thus, while S. 1894 uses existing ESA documents as the standard for of its determination, H.R. 2898 uses the "negative impact on long-term survival" standard that appears in other places throughout that bill. S. 1894 also includes other conditions for the new ratios to apply.

Water Rights Protections

Title V of H.R. 2898 and Title I of S. 1894 both outline protections of existing water rights but do so to different extents. A brief summary and high-level comparison of sections with similar provisions is provided below:

- Section 501 of H.R. 2898 and Section 111 of S. 1894 would stipulate that any changes required under the bills that reduce water supplies to the SWP and increase supplies to the CVP must be offset and that reduced water supplies must be made available to the state. However, the notification requirements in both bills related to environmental protections differ. Whereas H.R. 2898 would require the Secretary of the Interior to notify the state of California if implementation of the salmon and smelt BiOps under the act reduces environmental protections, S. 1894 would require notification of changes in implementation of the BiOps and confirmation that they are authorized under the respective documents.
- Section 502 of H.R. 2898 and Section 112 of S. 1894 include language that would aim to protect certain state water rights. However, H.R. 2898 also specifies that any actions by the Secretary of the Interior under the bill and under Section 7 of the ESA shall not alter water rights priorities under California state law. S. 1894 includes no such statement.
- Section 503 of H.R. 2898 and Section 113 of S. 1894 include language providing that "involuntary reductions" to contractor water supplies would not be allowed to result from the bill. However, while the water rights protections in the Senate bill appear to apply to all valid water rights holders and to bar the Secretaries from carrying out actions that would "directly" result in an involuntary reduction of water supply, H.R. 2898 would apply only to CVP and SWP contractors. H.R. 2898 further states that actions under the bill shall not "directly or indirectly" result in reductions or adverse impacts to water supply or fiscal impacts. Additionally, S. 1894 also includes language allowing for certain "substitute actions" under existing law that would not be subject to the requirements of the title.

- Both Section 505 of H.R. 2898 and Section 121 of S. 1894 include similar clarifying language as to the scope of the bill. Both bills note that nothing in the act modifies existing obligations to operate the CVP in conformance with state law. However, while Section 121 of S. 1894 also states that the act does not authorize adverse effects on species listed under ESA or the modification of obligations under CVPIA, H.R. 2898 includes no such language.

Completion of CALFED Water Storage Studies

Section 312 of S. 1894 and Section 401 of H.R. 2898 both would direct Reclamation to complete certain ongoing feasibility studies for new or augmented surface water storage in California that were originally authorized under P.L. 108-361.[22] Both bills would set the same deadlines for these feasibility studies to be completed. However, H.R. 2898 would impose financial penalties on Reclamation for failing to meet the deadlines. Both bills also would authorize construction of these projects pending a positive feasibility report finding, although Section 404 of H.R. 2898 only provides for such an authorization pending 100% nonfederal financing for the project. S. 1894.

New Water Storage Projects

Both H.R. 2898 and S. 1894 would encourage federal involvement in new water storage projects. Section 312 of S. 1894 would provide general authority for federal involvement in the construction or expansion of federal storage projects, as well as federal participation in nonfederal water storage construction, subject to certain conditions. S. 1894 would authorize $600 million in discretionary funding for new water storage projects under this section, with a maximum federal cost share of 50% for new federal projects and 25% for new nonfederal projects.[23]

Under H.R. 2898, new storage projects could potentially be authorized for construction by Congress under a new process proposed under Title VII of the bill (see below section, "H.R. 2898: Other Issues Addressed"). Both federal and nonfederal storage projects also would be authorized to receive funding from a proposed new Reclamation Surface Storage Account (authorized under Title IX); however, all funds provided through this account would have to be fully reimbursed consistent with reclamation laws. Whereas the authorization of appropriations under S. 1894 is not drawn from a specified source, the new storage account that would be established in H.R. 2898 would be funded out of the proceeds from accelerated repayment by users, of which 50% would be available for new surface water storage (see bullet below on Title IX of the House bill under "H.R. 2898: Other Issues Addressed"). The expected level of authorized funding under this title was estimated by the Congressional Budget Office at approximately $360 million over the FY2016-FY2020 period and would be available for expenditure subject to appropriations (i.e., discretionary funding).[24]

[22] These studies are commonly referred to as "CALFED studies," a reference to the authorizing legislation title.

[23] Under current reclamation laws, the construction costs of traditional storage projects are repaid by water users based on the amount of costs attributed to water supply purposes. Generally, unless users have been found to lack the ability to pay, 100% of the allocated construction costs for water supply purposes are to be repaid to the federal government and are known as reimbursable costs. Costs for flood protection and certain fish and wildlife features are typically considered non-reimbursable.

[24] Congressional Budget Office, *Estimate of* H.R. 2898*, Western Water and American Food Security Act of 2015,* July 14, 2015, at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr2898-2_0.pdf.

Both bills also include provisions that would authorize additional reservoir storage to be developed at Reclamation Safety of Dams[25] projects if this storage is paid for by local project sponsors.[26] This increased reservoir storage would be authorized under Section 314 of S. 1894 and Section 1001 of H.R. 2898.

Amendments to the SECURE Water Act

Both bills would authorize changes to the SECURE Water Act (Title IV of P.L. 111-11), one of the principal authorities for Reclamation's WaterSMART Program. Section 421 of S. 1894 would amend the SECURE Water Act by authorizing federal assistance for planning, design, and construction of a new class of nonfederal water storage and conveyance; reclamation and reuse; and other water management projects. The federal share of the projects would be limited to the lessor of 25% of total costs or $20 million (adjusted for inflation). Eligibility for this assistance is limited to the 17 western states, Alaska, and Hawaii. The bill would also authorize an additional $100 million for these and other WaterSMART activities. Section 607 of H.R. 2898 would amend a different SECURE Water Act authority, the Basin Studies Program. It would allow for the Secretary of the Interior to accept nonfederal funds and require that nonfederal funds be used to carry out the special studies.

H.R. 2898: Other Issues Addressed

H.R. 2898 includes a number of sections that are not included in S. 1894. While addressing many issues, its provisions may be grouped into two categories, those affecting California or the CVP and those addressing other Reclamation provisions and funding or financing of water projects. Each of these categories is discussed below.

California/Central Valley Project

Several sections in H.R. 2898 include provisions that focus specifically on elements of the CVP, or the related CVPIA.[27] Examples of some of these provisions are as follows:[28]

- H.R. 2898 specifies how parts of the BiOps would be implemented and in some cases would direct the agencies to implement them in a certain way that is not reflected in S. 1894. For example, Section 102 of H.R. 2898 would authorize the

[25] P.L. 95-578, (November 2, 1978), as amended by P.L. 98-404 (August 28, 1984), P.L. 106-377 (October 27, 2000), P.L. 107-117 (January 10, 2002), and P.L. 108-439 (December 3, 2004).

[26] In accordance with reclamation laws, local sponsors would not be required to contribute to the cost of those projects prior to constructing them, but some of these construction costs would be required to be paid within 50 years after the project is substantially complete.

[27] When enacted, the Central Valley Project Improvement Act (CVPIA, P.L. 102-575) made broad changes to the operations of the CVP. The act set protection, restoration, and enhancement of fish and wildlife on par with other project purposes (such as delivering water to irrigation and to municipal and industrial contractors); dedicated a certain amount of water for fish and wildlife purposes (e.g., 800,000 acre-feet of §3406(b)(2) water and certain levels for valley refuges); established fish restoration goals; and established a restoration fund (the Central Valley Project Restoration Fund) to pay for fish and wildlife restoration, enhancement, and mitigation projects and programs. It also made contracting changes and operational changes. The CVPIA was controversial when enacted and has remained so, particularly for junior water users whose water allocations were ultimately limited due to implementation of the act and other subsequent factors, such as revised BiOps protecting certain threatened and endangered species.

[28] This list of other issues addressed in H.R. 2898 is not exhaustive.

director of FWS to revise the incidental take level[29] for Delta smelt in the BiOp. It would require updated salvage information and new scientific and commercial data to be used in a new simulation model to create a modified incidental take level for Delta smelt. Further, Section 103(g) of H.R. 2898 would direct the Secretary of the Interior to revise the method to calculate the reverse flow in the Old and Middle River in the BiOps at least every five years to achieve maximum pumping levels.[30]

- H.R. 2898 would require that "alternative" measures for salmon management be determined, implemented, and monitored. This issue is not specifically addressed in S. 1894.
- Section 304 of H.R. 2898 would require Reclamation to operate facilities to achieve a 35% Delta export-to-inflow ratio (i.e., diversions for Delta exports would be limited to 35% of Delta inflow). Under the bill, these limits would be in place "in any year that the Sacramento Valley index[31] is 6.5 or lower, or at the request of the State of California and until two succeeding years following either of those events has been completed where the final Sacramento Valley Index is 7.8 or greater." Currently, these exports are limited to a maximum of 35% under most circumstances.
- Section 310 of H.R. 2898 would direct the Secretary of the Interior to determine the amount of new water storage that would be made available through the Draft Plan of Operations for New Melones Reservoir (DRPO)[32] and would direct that the plan's activities be implemented. It also would direct the commissioner of Reclamation to report to Congress on the amount of storage projected to be made available under the DRPO within 18 months of enactment.
- Section 313 would declare that the terms of the San Joaquin River Restoration Settlement Act (Title X of P.L. 111-11), enacted in 2009, and a related settlement agreement[33] would be satisfied by a "warm water fishery" at certain points below Friant Dam and upstream of Gravelly Ford. (Such a fishery is defined in the bill as being suitable for species other than salmon and trout.) It would also direct the Secretary of the Interior to "cease any action" to implement the settlement as authorized. Thus, it would effectively repeal that act.
- Section 504 of H.R. 2898 includes specific water supply allocations for Sacramento Valley contractors under certain water year types.

[29] The *incidental take level* in the BiOp is the number of individual fish likely to be taken or the extent of critical habitat likely to be adversely modified. *Take* under ESA is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The term is used in conjunction with listed species (e.g., to take an elephant).

[30] As noted above, S. 1894 would direct that water supplies be maximized under the BiOps by approving projects and activities in a manner consistent with current laws and regulations.

[31] The Sacramento Valley Index is a calculation of current year unimpaired runoff and the previous year's index used to determine the type of water year for actions under the State Water Resources Control Board Water Rights Decision 1641. A classification of 6.5 or lower is considered a dry year, and 5.4 or lower is considered a critically dry year.

[32] The Revised Plan of Operations for New Melones Dam is an ongoing project to develop a "Flow Prescription" for fisheries in the lower Stanislaus River that reduces the dependency on New Melones Project water for water quality and fisheries objectives.

[33] *Natural Resources Defense Council, et al.* v. *Kirk Rodgers, et al.*, Eastern District of California, No. Civ. S–88–1658– LKK/GGH.

- Section 601 would expand the authorized service area of the CVP to include Kettleman City, CA. It would direct the Secretary of the Interior to enter into a long-term contract with the Kettleman City Community Services District for up to 900 acre-feet of CVP water; however, similar to other areas, actual deliveries would depend on annual allocations by Reclamation.
- Section 602 would establish an oversight board to evaluate annually the planned expenditures of the Central Valley Project Restoration Fund. The board would be composed of 11 members appointed by the Secretary of the Interior, including 4 representatives of CVP agricultural contractors, 2 CVP municipal and industrial contractors, 2 CVP power contractors, 1 representative of a federal wildlife refuge receiving CVP water, 1 expert on the economic impacts of the changes of water operations, and 1 member of a waterfowl-related "wildlife entity."
- Section 603 would alter water supply accounting under CVPIA so that any restrictions on CVP water (except for certain releases to the Trinity River) to benefit fisheries imposed since enactment of CVPIA would count toward the quantity of water that CVPIA requires the Secretary of the Interior to dedicate to environmental purposes (known as b(2) water).[34] Current law requires that only water for salmon "doubling" is counted toward these purposes.
- Section 604 would require that the Secretary of the Interior implement a "water replacement plan" that was originally required under CVPIA. It would also require a least-cost plan by the end of FY2015 to increase CVP water supplies by the amount of water dedicated and managed for fish and wildlife purposes under CVPIA, as well as to otherwise meet all purposes of the CVP, including contractual obligations.[35] If changes under the water replacement plan have not increased CVP yield by 800,000 acre-feet within five years of the bill's enactment, then in any year in which water service and repayment contractor allocations are less than 50% of the contract amount the provision of b(2) water made available for fish and wildlife purposes is to be reduced by 25%.
- Section 605 would mandate that hatchery fish be included in making determinations regarding anadromous fish in the Sacramento-San Joaquin Delta that are covered by ESA. Currently, hatchery fish are not included in population estimates of protected species, due largely to their different genetic makeup from wild fish. The inclusion of these fish could increase the population size and potentially decrease some pumping restrictions, thus allowing for increased pumping compared with current levels.
- Section 606 would direct the Secretary of the Interior to enter into negotiations for the transfer of the New Melones Unit of the CVP to water users. This provision could potentially result in the removal of the New Melones Unit from the federal CVP.
- Section 608 would limit releases from Lewiston Dam during operation of the Trinity River Division of the CVP to those amounts allowed for in a December

[34] Section 3406(b)(2) of the CVPIA directs the Secretary of the Interior to dedicate and manage annually 800,000 acre-feet of CVP water for fish and habitat restoration. This amount of water is referred to as b(2) water because of the subsection number under CVPIA.

[35] Contractual obligations are currently approximately 9.3 million acre-feet (maf). Actual deliveries ranged from 4.9 maf in 2009 (a drought year) to 6.2 maf over the last five years. They are closer to 7 maf in normal hydrologic years. Thus, a gap exists between CVP contractual obligations and average or normal deliveries.

2000 environmental impact statement for the Trinity River Restoration Program. This limit would effectively bar additional releases for Trinity River fisheries. Such additional releases have been allowed in recent years to prevent fish kills, among other things.

- Sections 609-611 would make other changes to CVPIA, including amending the act's purposes to include replacement water and expedited water transfers. Section 610 would amend the act's definition of anadromous fish to limit coverage to those found in the Sacramento and San Joaquin Rivers as of October 30, 1992.[36] This amendment would effectively change the baseline for fish protection and restoration to set restoration goals at population levels after some species were already listed as endangered. Section 611 would require an annual report on the purpose, authority, and environmental benefit of instream flow releases from the CVP and the SWP.

Financing and Reclamation-Wide Provisions

Several other titles of H.R. 2898 do not focus on the specific geographic areas of the CVP and/or California and, similar to the above sections, are not covered in S. 1894. Most of these provisions relate to Bureau of Reclamation policies and project management, including alterations to bureau and other agency processes for reporting on new projects and efforts to expedite environmental studies and recommendations to Congress. One of these provisions would direct new budget authority to surface storage projects. Some of them are similar to provisions in other proposed legislation in the 114th Congress. Examples of these titles include the following:

- Title VII, Sections 701-706, the Water Supply Permitting Coordination Act, would establish a one-stop permitting office within Reclamation for nonfederal storage projects on lands administered by the Department of the Interior and the Department of Agriculture. The bill would establish Reclamation as the lead agency for all reviews, analyses, permits, and other requirements necessary for construction. This title is similar to S. 1533 and to legislation introduced in the 113th Congress (H.R. 3980).
- Title VIII, Sections 801-806, the Bureau of Reclamation Project Streamlining Act, would set up an annual reporting process to authorize Reclamation projects (including storage, recycling, desalination, and rural water supply projects) similar to that authorized for the Corps of Engineers in the Water Resources Reform and Development Act of 2014 (P.L. 113-121). Under this process, Reclamation would report annually to Congress on requested and recommended water resource projects for potential congressional approval.[37]
- Title IX, Sections 901-902 would authorize accelerated repayment (or prepayment) by nonfederal Reclamation project users for certain project construction costs that are currently paid over 40-year or 50-year terms. It would allow for the conversion of water service contracts to repayment contracts and for subsequent accelerated repayment (in the form of a lump-sum payment or annual

[36] Some stocks were already absent or in severe decline by 1992, including winter run Chinook salmon, which were listed as endangered under ESA in 1990. Some (such as San Joaquin River salmon runs) had become extinct by the 1950s.

[37] For more information on the Army Corps of Engineers reporting system, see CRS Report R43298, *Water Resources Reform and Development Act of 2014: Comparison of Select Provisions*, by Nicole T. Carter et al.

installments) of allocable construction costs for any repayment contract. This provision would allow contractors to forgo certain requirements (e.g., acreage and full-cost pricing limitations) under reclamation laws (including the Reclamation Reform Act of 1982, or RRA; P.L. 97-293) sooner than would otherwise be the case.[38]

S. 1894: Other Issues Addressed

S. 1894 contains several titles and individual provisions that are not in H.R. 2898. Among these are modification of and/or explicit authority for existing programs and authorities and creation of new programs that were not previously authorized. Selected examples of these changes are highlighted below.[39]

Alternative Water Supplies

Many of the provisions in S. 1894 would strengthen or add to authorities for "alternative" water supplies; that is, efforts to make available additional water supplies outside of traditional federal support for new or augmented surface water storage. Examples include the following:

- Section 301 would authorize the Secretary of the Interior to competitively award federal funds for qualifying water recycling projects (§301(b)), desalination projects (§301(c)), and innovative water supply projects (§301(d)). The innovative water supply projects would include groundwater recharge, stormwater capture, agricultural and urban water conservation and efficiency, and other projects to reduce reliance on surface and groundwater supplies. The authority appears to be limited to the 17 western states, Alaska, and Hawaii. Section 301 would authorize the Secretary of the Interior to review requests for projects that are eligible and compliant with Reclamation standards, but the section also explicitly mentions review of recycling requests by 105 specified water authorities, districts, and communities in California and review of 26 specific desalination projects in California. No specific authorization of appropriations amount or federal contribution limitation is specified in Section 301. The Section 301(b) recycling projects may be eligible for assistance under Section 431 (see bullet below under "Financing and Other Provisions") as part of the expansion of the long-standing Reclamation Title XVI recycling program and the funds provided for that program in Section 432, which would start in FY2026. The desalination projects under Section 301(c) also would be eligible for the funds made available through Title IV, at a maximum federal cost share of 25%. No per project amount is specified; establishment of an account to fund these projects and provision of funds starting in FY2026 appears in Section 442 and Section 443 of the bill, respectively. No new account would be created for recycling activities under Section 301(b). No new account and no funds would be created specifically for the innovative water supply activities in Section 301(d); some of the Section 301(d) activities may be eligible for federal assistance under

[38] Under current law, once a repayment contract is paid out, the contractor is no longer subject to the 960-acre limit or other provisions of the Reclamation Reform Act of 1982 (P.L. 97-293) (e.g., full-cost pricing for water).

[39] Similar to the above list for H.R. 2898, the list of issues addressed in S. 1894 but not in H.R. 2898 is not exhaustive.

the innovative supply and conservation technologies authority that would be provided to EPA by Section 327.

- Section 302 would create a new desalination grant program at EPA. It would support federal grants covering up to 50% of the cost of a feasibility study for a nonfederal desalination facility and 25% of the project design costs. The program would be authorized at $10 million annually through 2020. Section 302 also would amend the Water Desalination Act of 1996 (P.L. 104-298) to extend and augment the authorization of appropriations and to establish priorities for both research ($5 million annually through 2020) and demonstration activities ($3 million annually through 2020).
- Section 322 would authorize the Secretary of the Interior to enter into voluntary agreements with public water agencies that receive water from Reclamation projects to implement water conservation programs. It also would direct the portions of water conserved from these activities to individual entities (e.g., 25% to the water agency, 75% retained by the Secretary for marketing and allocation to wildlife refuges). In addition, Section 322 would give Reclamation contractors the authority to contribute funding to these efforts. If a contractor contributed more than 50 percent of funding, Section 322 would allow the Secretary to provide water to that contractor for groundwater recharge and conservation.
- Section 323 would establish a program within the U.S. Department of Agriculture's Rural Water and Waste Disposal Program to provide up to 100% grants for projects such as point-of-use treatment and point-of-entry systems in homes and the construction of wells or other new water-source facilities in drought-stricken communities. Eligible communities would generally be those with a population of less than 10,000 but could include larger communities in some circumstances. Section 323 would authorize $15 million for up to 15 pilot projects.
- Section 431 would amend an existing federal grant funding for water recycling and reuse projects (i.e., Reclamation's Title XVI program[40]) to authorize these projects for construction if they have a completed feasibility study and meet certain other guidelines.[41] The new "programmatic" authority would be available to projects in the western states, Alaska, and Hawaii. The bill would afford priority to projects in areas that have experienced severe, extreme, or exceptional drought within the past 10 years or have been designated as disaster areas by a state, and it would authorize $200 million in competitive grant funding for these projects through FY2020.[42] The programmatic authority for Reclamation's Title XVI program contained under this section of the bill is similar to that proposed in H.R. 2993.

Financing and Other Provisions

S. 1894 would also authorize a number of new financing provisions, as well as amendments to existing authorities in various areas and pilot programs that would attempt to address drought.

[40] 43 U.S.C. §390(h).

[41] Under current law, these projects are individually authorized.

[42] Title IV, Subtitle D of S. 1894 would also authorize $40 million per year in mandatory funding for these projects, beginning in FY2026.

Some of the new financing mechanisms could fund "alternative" water supply programs noted above, among others. Selected examples include the following:

- Section 103 would address the use of State Revolving Fund (SRF) programs that assist wastewater and drinking water infrastructure projects, pursuant to the Clean Water Act (P.L. 92-500) and the Safe Drinking Water Act (P.L. 93-523), respectively. SRF programs provide loans and other financial assistance for local water infrastructure projects. Section 103 would direct EPA, when allocating funds under these programs in a state with a declared emergency drought, to require the state to review and give priority to projects that would assist communities at risk of inadequate water supply for public health or safety or that would improve resiliency to drought.
- Section 315 would authorize the Corps to study and implement a pilot program for "forecast-based" operations to enhance water supply benefits and flood control operations. The operational changes would be based on weather and climate science, watershed data (e.g., watershed-specific runoff data), and other factors. Potential projects would be limited to states with a gubernatorial drought declaration during 2015; however, eligibility would not be limited to the western states. For qualifying states, the Corps would report on the status of water control manuals, water supply storage allocation requests, and opportunities for forecast-based operations at existing Corps reservoirs and select nonfederal reservoirs at which the Corps is responsible for flood control operations; the Corps has authority for these projects under Section 7 of the Flood Control Act of 1944. Section 315 also would authorize a pilot program for five projects to implement forecast-based revisions to water operations manuals.[43] No authorization of appropriations and no cost-sharing requirements are specified. In addition, Section 315 would require the Secretary of the Army to report to Congress within 180 days on the forecast-based reservoir operations components of modifications to all Corps reservoir operations manuals and flood control curves.
- Section 321 would authorize WaterSense, which EPA established administratively in 2006. WaterSense is a voluntary labeling and recognition program that seeks to help consumers and businesses easily identify products, homes, and buildings that are highly water efficient. Section 321 would authorize $5.0 million per year for the program through FY2019, plus additional increases in subsequent years based on inflation.
- Section 328 would explicitly authorize an existing program within the U.S. Geological Survey, the Open Water Data Initiative, to advance the availability of water data and information and to promote use of this information. It would authorize $4 million to carry out these efforts through FY2020.
- Title IV, Subtitle A (§§401-412) the Reclamation Infrastructure Finance and Innovation Act (RIFIA), would authorize a new financing mechanism for certain water supply projects. It would authorize $200 million for secured loans or loan guarantees under RIFIA for up to half of the costs of certain Reclamation projects (with a minimum cost of $20 million). Projects would be limited to the 17 western states, Alaska, Hawaii, and other states where Reclamation is authorized to provide assistance. Priority would be given to areas facing water resource

[43] According to §315 of S. 1894, a revision of a manual shall not interfere with the authorized purposes of a project.

challenges. The RIFIA provisions of S. 1894 are similar, but not identical, to the Water Infrastructure Finance and Innovation Act (WIFIA) enacted in Title V of P.L. 113-121, which created a five-year pilot program for EPA and the Corps.[44] Similar authority for Reclamation has been proposed in other legislation in the 114th Congress (e.g., S. 176, H.R. 291, S. 1837, and H.R. 2983).

- Title IV, Subtitle D (§§441-447) would create a new fund that is not subject to annual appropriations, the Federal Support for State and Local Drought Solutions Fund. The new fund would receive surplus receipts in the Reclamation Fund beginning in FY2026 and would be authorized at a level of $150 million per year for 25 years, without further appropriation (i.e., mandatory funding). It would fund authorizations under other parts of the bill, including $75 million per year for desalination projects under Section 301(c); $40 million per year for Title XVI projects (which are proposed to receive programmatic authority under Section 431); and $35 million per year for innovative finance projects under the new RIFIA authority (Title IV, subtitle A).

Issues for Congress

Among the key issues for Congress is how to address water supply shortages in general and management of federal water supply projects in particular during times of drought and increasing demand. Myriad laws, regulations, contracts, and other obligations affect federal water project management. Balancing these obligations while meeting growing demands for water for multiple purposes poses challenges for western water managers at all levels: federal, state, tribal, and local.

H.R. 2898 and S. 1894 propose to address some of these challenges by providing guidance for Reclamation's management of the CVP, which would result in changes to CVP operations under certain circumstances. Both bills call for maximizing water supplies to users, with certain limitations. H.R. 2898 also contains specific guidance on the implementation of BiOps. These conditions under both bills raise questions of how much discretion federal agencies would have in implementing the CVP's operations and how the management provisions in each bill would be implemented. Some may also question whether aspects of one or both bills contain conflicting operational directives within the bill or among other regulations. For example, how would CVP directives in either bill be implemented in relation to state water quality regulations?

Both bills call for measuring the effects of water operations on listed species under ESA. S. 1894 states that operations are to be consistent with applicable laws and regulations (including ESA); H.R. 2898 conditions several actions on the "negative effect on the long term survival of the species." Some might question if H.R. 2898 would set a new standard for measuring effects on species under ESA or if maximizing water supplies in the short term could have long-term effects on the viability of species populations.

Each bill contains certain provisions that would direct greater data collection and monitoring. H.R. 2898 includes provisions that would specify how certain aspects of the Delta smelt and salmon BiOps would be implemented. These provisions may raise questions about how better data collection and more accurate accounting of species populations could result in higher pumping rates and water exports. Further, these proposed changes might raise the question of

[44] For information on the Water Infrastructure Finance and Innovation Act, see CRS Report R43315, *Water Infrastructure Financing: The Water Infrastructure Finance and Innovation Act (WIFIA) Program*, by Claudia Copeland.

whether the effects of operational changes could be better detected and acted upon in a manner that will protect the species. In a broader sense, some might also question how each bill would address ESA implementation and whether the legislation might set precedents for other BiOps addressing federal activities involving listed species.

Limited commonalities exist in other areas of the bills. Both bills would attempt to encourage new water storage in the form of expedited completion of CALFED and storage studies, as well as by facilitating the potential authorization of new or augmented surface water storage projects. Both bills would also attempt to facilitate nonfederal completion of water storage projects, to various extents. However, although H.R. 2898 would focus on streamlining or reforming current Reclamation processes to facilitate water storage activities (e.g., alterations to bureau and other agency processes for reporting on new projects, including environmental studies and recommendations to Congress), S. 1894 would expand the scope of Reclamation's authorized activities. For instance, under the Senate bill, Reclamation would gain new authorities for desalination, water reuse and recycling projects, groundwater recharge, and stormwater capture, as well as authority for a credit financing mechanism (i.e., RIFIA) that differs from traditional Reclamation project financing.

Some of the questions related to both bills may include what quantity of water supplies would be generated by new authorities and programs and at what federal and nonfederal cost. In addition, some may ask how new authorities and processes that would be established in the bills would be prioritized relative to ongoing agency activities and how (or whether) spending provisions might be offset.

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ATTACHMENT
II.D.

News Releases By Date

Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy

Release Date: 05/27/2015
Contact Information: Robert Daguillard, (202) 564-6618, (202) 360-0476, daguillard.robert@epa.gov; En español: Lina Younes, younes.lina@epa.gov, (202) 564-9924

Does not create any new permitting requirements and maintains all previous exemptions and exclusions

Washington – In an historic step for the protection of clean water, the U.S. Environmental Protection Agency and the U.S. Army finalized the Clean Water Rule today to clearly protect from pollution and degradation the streams and wetlands that form the foundation of the nation's water resources.

The rule ensures that waters protected under the Clean Water Act are more precisely defined and predictably determined, making permitting less costly, easier, and faster for businesses and industry. The rule is grounded in law and the latest science, and is shaped by public input. The rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions.

"For the water in the rivers and lakes in our communities that flow to our drinking water to be clean, the streams and wetlands that feed them need to be clean too," said EPA Administrator Gina McCarthy. "Protecting our water sources is a critical component of adapting to climate change impacts like drought, sea level rise, stronger storms, and warmer temperatures – which is why EPA and the Army have finalized the Clean Water Rule to protect these important waters, so we can strengthen our economy and provide certainty to American businesses."

"Today's rule marks the beginning of a new era in the history of the Clean Water Act," said Assistant Secretary for the Army (Civil Works) Jo-Ellen Darcy. "This is a generational rule and completes another chapter in history of the Clean Water Act. This rule responds to the public's demand for greater clarity, consistency, and predictability when making jurisdictional determinations. The result will be better public service nationwide."

People need clean water for their health: About 117 million Americans – one in three people – get drinking water from streams that lacked clear protection before the Clean Water Rule. America's cherished way of life depends on clean water, as healthy ecosystems provide wildlife habitat and places to fish, paddle, surf, and swim. Clean and reliable water is an economic driver, including for manufacturing, farming, tourism, recreation, and energy production. The health of our rivers, lakes, bays, and coastal waters are impacted by the streams and wetlands where they begin.

Protection for many of the nation's streams and wetlands has been confusing, complex, and time-consuming as the result of Supreme Court decisions in 2001 and 2006. EPA and the Army are taking this action today to provide clarity on protections under the Clean Water Act after receiving requests for over a decade from members of Congress, state and local officials, industry, agriculture, environmental groups, scientists, and the public for a rulemaking.

In developing the rule, the agencies held more than 400 meetings with stakeholders across the country, reviewed over one million public comments, and listened carefully to perspectives from all sides. EPA and the Army also utilized the latest science, including a report summarizing more than 1,200 peer-reviewed, published scientific studies which showed that small streams and wetlands play an integral role in the health of larger downstream water bodies.

Climate change makes protection of water resources even more essential. Streams and wetlands provide many benefits to communities by trapping floodwaters, recharging groundwater supplies, filtering pollution, and providing habitat for fish and wildlife. Impacts from climate change like drought, sea level rise, stronger storms, and warmer temperatures threaten the quantity and quality of America's water. Protecting streams and wetlands will improve our nation's resilience to climate change.

Specifically, the Clean Water Rule:

- **Clearly defines and protects tributaries that impact the health of downstream waters**. The Clean Water Act protects navigable waterways and their tributaries. The rule says that a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection. The rule provides protection for headwaters that have these features and science shows can have a significant connection to downstream waters.
- **Provides certainty in how far safeguards extend to nearby waters.** The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.
- **Protects the nation's regional water treasures.** Science shows that specific water features can function like a system and impact the health of downstream waters. The rule protects prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.
- **Focuses on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or

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Multimedia

Speaker: Ken Kopocis, Deputy Assistant Administrator, Office of Water

Soundbite 1

00:10

Download soundbite (MP3, 0:09, 114KB)
Transcript: Rather than creating any new permitting requirements, particluarly for farmers, the Clean Water Rule will provide greater clarity and certainty and does not add any economic burdens.

Soundbite 2

00:07

Download soundbite (MP3, 0:06, 83KB)
Transcript: Automatic jurisdiction does not extend to waters subject to normal farming, ranching, or forestry.

Soundbite 3

00:11

Download soundbite (MP3, 0:10, 127KB)
Transcript: The agencies limited the waters subject to a case-specific "significant nexus" analysis to waters within four thousand feet of a jurisdictional water or within the 100-year flood plain.

Soundbite 4

00:08

Download soundbite (MP3, 0:07, 94KB)
Transcript: No longer is every water, everywhere, subject to the kind of case-specific analysis that is the situation today.

Soundbite 5

00:06

Download soundbite (MP3, 0:05, 73KB)
Transcript: Finally, we're focusing on streams and not ditches. This was critically important to the agricultural community.

Soundbite 6

00:11

Download soundbite (MP3, 0:10, 127KB)
Transcript: We like to say: if you can plow, plant, and harvest today without a Clean

For media actualities (short sound clips), please go to http://www.epa.gov/adminweb/multimedia/newscc 5-27-ow/

Recent additions

09/10/2015 EPA Awards Green Infrastructure Grant of $20,000 to Kansas State University for Projects on Campus in Manhattan, Kan.
09/10/2015 Duke Energy Corp. to Reduce Emissions from Power Plants in North

function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.

· **Maintains the status of waters within Municipal Separate Storm Sewer Systems.** The rule does not change how those waters are treated and encourages the use of green infrastructure.

· **Reduces the use of case-specific analysis of waters.** Previously, almost any water could be put through a lengthy case-specific analysis, even if it would not be subject to the Clean Water Act. The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.

A Clean Water Act permit is only needed if a water is going to be polluted or destroyed. The Clean Water Rule only protects the types of waters that have historically been covered under the Clean Water Act. It does not regulate most ditches and does not regulate groundwater, shallow subsurface flows, or tile drains. It does not make changes to current policies on irrigation or water transfers or apply to erosion in a field. The Clean Water Rule addresses the pollution and destruction of waterways – not land use or private property rights.

The rule protects clean water necessary for farming, ranching, and forestry and provides greater clarity and certainty to farmers about coverage of the Clean Water Act. Farms across America depend on clean and reliable water for livestock, crops, and irrigation. The final rule specifically recognizes the vital role that U.S. agriculture serves in providing food, fuel, and fiber at home and around the world. The rule does not create any new permitting requirements for America's farmers. Activities like planting, harvesting, and moving livestock have long been exempt from Clean Water Act regulation, and the Clean Water Rule preserves those exemptions.

The Clean Water Rule will be effective 60 days after publication in the Federal Register.

More information: www.epa.gov/cleanwaterrule and http://www.army.mil/asacw

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Carolina, Fund Environmental Projects
09/10/2015 EPA Awards Green Infrastructure Grant of $20,000 to Mississippi State University
09/10/2015 EPA Cleanup Plan Issued for the Peterson/Puritan, Inc. Superfund Site in Rhode Island
09/10/2015 EPA Awards Green Infrastructure Grants of $20,000 to Kansas State University and Mississippi State University

BOARD OF SUPERVISORS

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August 25, 2015

The Honorable James Inhofe, Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Building
Washington, District of Columbia 20510

SUBJECT: LETTER OF CONCERN – PROPOSED FINAL RULE DEFINING WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

Dear Chairman Inhofe:

The County of San Joaquin (County) is concerned that the proposed Final Rule to define "Waters of the United States" (WOTUS) under the Clean Water Act (CWA) (Clean Water Rule) is an expansion of Federal jurisdiction beyond what the CWA originally intended, relative to regulating activities on private and public property. Furthermore, the County remains concerned that the definitions and exemptions provided for in the Clean Water Rule are still subject to interpretation by staff at the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Army Corps), and as currently written, the proposed Clean Water Rule at times contradicts itself. As with previous iterations of the Clean Water Rule, disputes over the regulatory interpretation of the definition of WOTUS have been costly for both public and private project proponents that have required the Courts and ultimately, the Supreme Court of the United States to rule on the intended reach of the CWA.

During the public comment period, the County submitted detailed comments on the proposed draft Clean Water Rule. In addition, the County has had a long record of concerns on the definition of WOTUS. The final Clean Water Rule fails to adequately address the County's concerns. EPA and the Army Corps have incorrectly stated in their press release announcing their Clean Water Rule that the definition of WOTUS will lead to certainty in determining Federal jurisdiction for public and private lands. The County joins a multitude of other State and local governments and agencies, as well as numerous private property interests, in voicing opposition to the Clean Water Rule as currently written.

The County supports the enactment of S. 1140, the Federal Water Quality Protection Act, passed by your Committee and respectfully urges Congress to ensure that any Clean Water Rule resolve jurisdictional issues decided in relevant Supreme Court of the United States decisions without expanding the Federal jurisdiction into new categories of water, and without imposing unneeded new mandates on water already subject to CWA permits. The Clean Water Rule does not adequately address concerns regarding the regulation of stormwater, water delivery systems, ditches, and vernal pools. Prominent terms in the rule such as "dry land,"

"perennial," "ordinary high water mark," "tributary" and "adjacent" are either not defined at all, vague, overly broad, or still under development, ensuring prolonged decision-making, costly study and review, subjective regulatory interpretations in the field, and inviting litigation from third parties.

The County believes the Clean Water Rule as written is certainly a broadening of the definition of WOTUS and an expansion of Federal jurisdiction under the CWA. As such, implementation by the EPA and the Army Corps will continue to cause uncertainty across the United States with the additional burdens borne by both public and private entities through increased costs and time delays for projects and routine maintenance of ditches and other drainage facilities or topographic features. The County urges Congress to take the necessary actions to address these ongoing concerns by passing S. 1140.

Sincerely,

KATHERINE M. MILLER
Chair Board of Supervisors
San Joaquin County

KMM:KV:me
WR-15H065-ME1

c: Senator Diane Feinstein
San Joaquin County House Delegation
San Joaquin County Board of Supervisors

ATTACHMENT
II.E.

EASTERN SAN JOAQUIN COUNTY GROUNDWATER BASIN AUTHORITY

1810 EAST HAZELTON AVENUE
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(209) 468-3531
(209) 468-2999/FAX
www.GBAwater.org

August 27, 2015

Supervisor Cliff Edson
Calaveras County Board of Supervisors
891 Mountain Ranch Road
San Andreas, California 95249-9709

SUBJECT: SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA) WORKGROUP

Dear ~~Supervisor~~ CLIFF Edson:

The Sustainable Groundwater Management Act of 2014 (SGMA) legislatively mandates management of California's groundwater basins at a level of sustainability. SGMA requires that groundwater be managed locally by Groundwater Sustainability Agencies (GSAs) or management will be deferred to the State.

As a public agency that has water supply, water management, or land use responsibilities within the groundwater basin, your agency is invited to participate in the SGMA Workgroup for the Eastern San Joaquin Groundwater Sub-basin. The initial meeting will be held on **Wednesday, September 9, 2015, from 9:30 a.m. to 12:00 p.m. at the California Water Service Company located at 1602 East Lafayette Street in Stockton.**

The purpose of the SGMA Workgroup process is to provide a forum where local agencies can work collectively to determine the best path to take in complying with SGMA requirements. Additional SGMA Workgroup details are enclosed.

The Eastern San Joaquin County Groundwater Basin Authority hopes your agency will send a representative to this very important initial meeting. On behalf of the Eastern San Joaquin County Groundwater Basin Authority, I look forward to your agency's participation. Should you have any questions, please contact me at (209) 468-3113 or by email at cwinn@sjgov.org, or Brandon Nakagawa, Water Resources Coordinator, at (209) 953-7460 or by email at bnakagawa@sjgov.org.

Sincerely,

CHUCK WINN
Chairman
Eastern San Joaquin County
Groundwater Basin Authority

CW:KV:me
WR-15H041-ME18

Enclosures

c: Jason Boetzer, Director, Calaveras County Department of Environmental Health
Brandon W. Nakagawa, Water Resources Coordinator

PARTICIPATION IN THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT (SGMA) WORKGROUP FOR THE EASTERN SAN JOAQUIN GROUNDWATER SUB-BASIN

The Sustainable Groundwater Management Act of 2014 (SGMA) legislatively mandates management of California's groundwater basins at a level of sustainability. SGMA provides that groundwater management is ideally conducted at the local level through one or more Groundwater Sustainability Agencies (GSAs), but requires local agencies to meet an aggressive timeline for GSA formation, entering into associated coordination agreements, and development of a Groundwater Sustainability Plan. Failure to comply with the timeline will result in State-imposed management of groundwater.

The Eastern San Joaquin County Groundwater Basin Authority (GBA) has established a SGMA Workgroup for the Eastern San Joaquin Groundwater Sub-basin to provide a forum where local agencies can work collectively to determine the best path to take in complying with SGMA requirements. Initial funding for technical assistance to the SGMA Workgroup is also being provided by the GBA.

As a public agency that has water supply, water management, or land use responsibilities within the groundwater basin, your agency could elect to be a GSA. Accordingly, the GBA invites you to participate in the SGMA Workgroup for the Eastern San Joaquin Groundwater Sub-basin. The initial SGMA Workgroup meeting will be held on **Wednesday, September 9th, from 9:30 to noon at the California Water Service Company located at 1602 East Lafayette Street in Stockton**.

The GBA hopes your agency will send a representative to this very important initial meeting. At this meeting, in addition to learning about SGMA, GSA responsibilities, and SGMA Workgroup milestones and decision points, you will also be given a membership form through which your agency can select your official SGMA Workgroup representative and alternates. The SGMA Workgroup process supports local agencies in self-determining the best course of action in complying with SGMA and working with one another to achieve basin coordination.

The GBA realizes that at this point there are more questions than answers as to what implementation of SGMA will look like. As part of the SGMA Workgroup process, the GBA has enlisted the help of an experienced facilitator, Carolyn Lott, who has been with the GBA from its inception in 2001. The GBA will also enlist technical experts and consultants to help inform agencies' decisions through the support of the SGMA Workgroup. The GBA believes through a transparent and open process, local agencies can work together to provide the best outcome for their customers and constituents and for the Eastern San Joaquin Sub-basin as a whole. For additional information regarding SGMA, the following link will direct you to the Department of Water Resources SGMA webpage at www.water.ca.gov/groundwater/sgm/. Several maps and a chart of SGMA Workgroup key dates are also attached.

Should you have any questions, please contact GBA Chairman, Chuck Winn at (209) 468-3113 or by email at cwinn@sjgov.org, or Brandon Nakagawa, Water Resources Coordinator, at (209) 953-7460 or by email at bnakagawa@sjgov.org.

Figure 2-4 - DWR Groundwater Basins in San Joaquin River Hydrologic Region

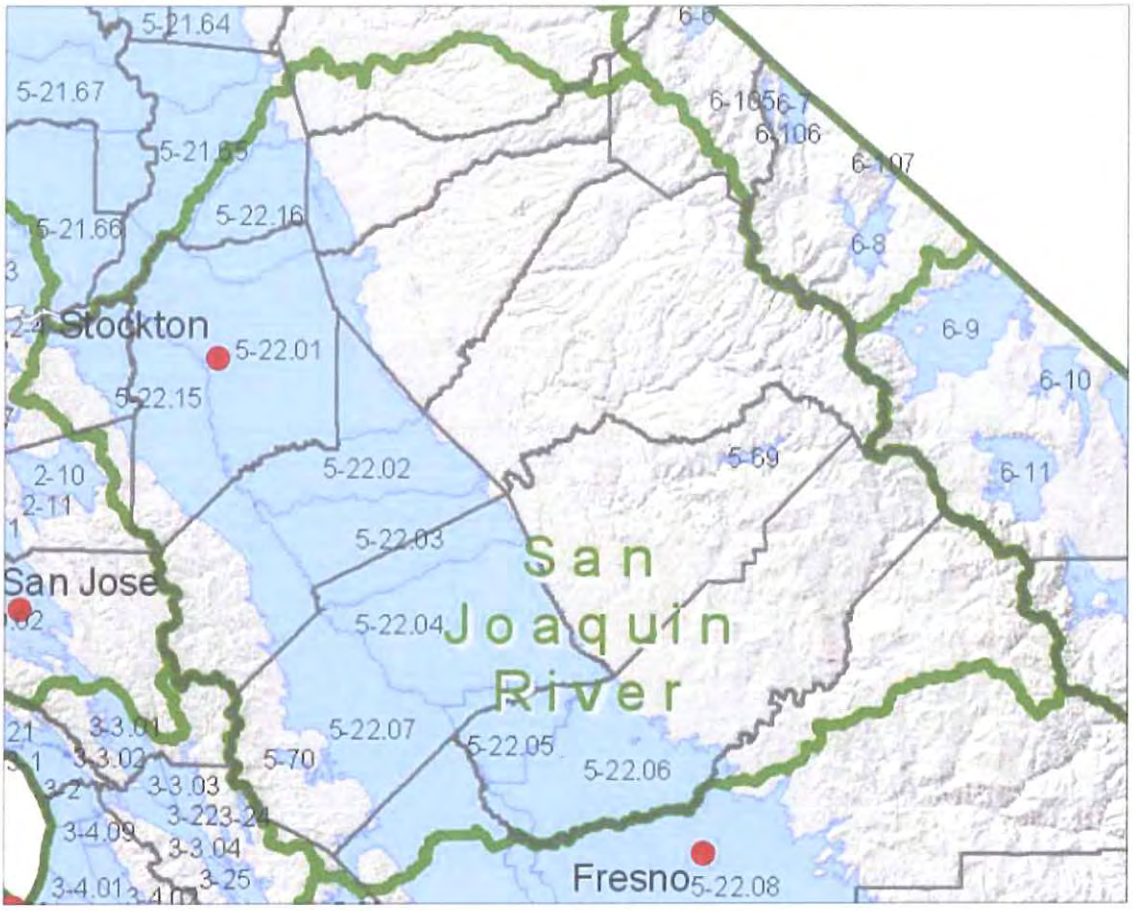
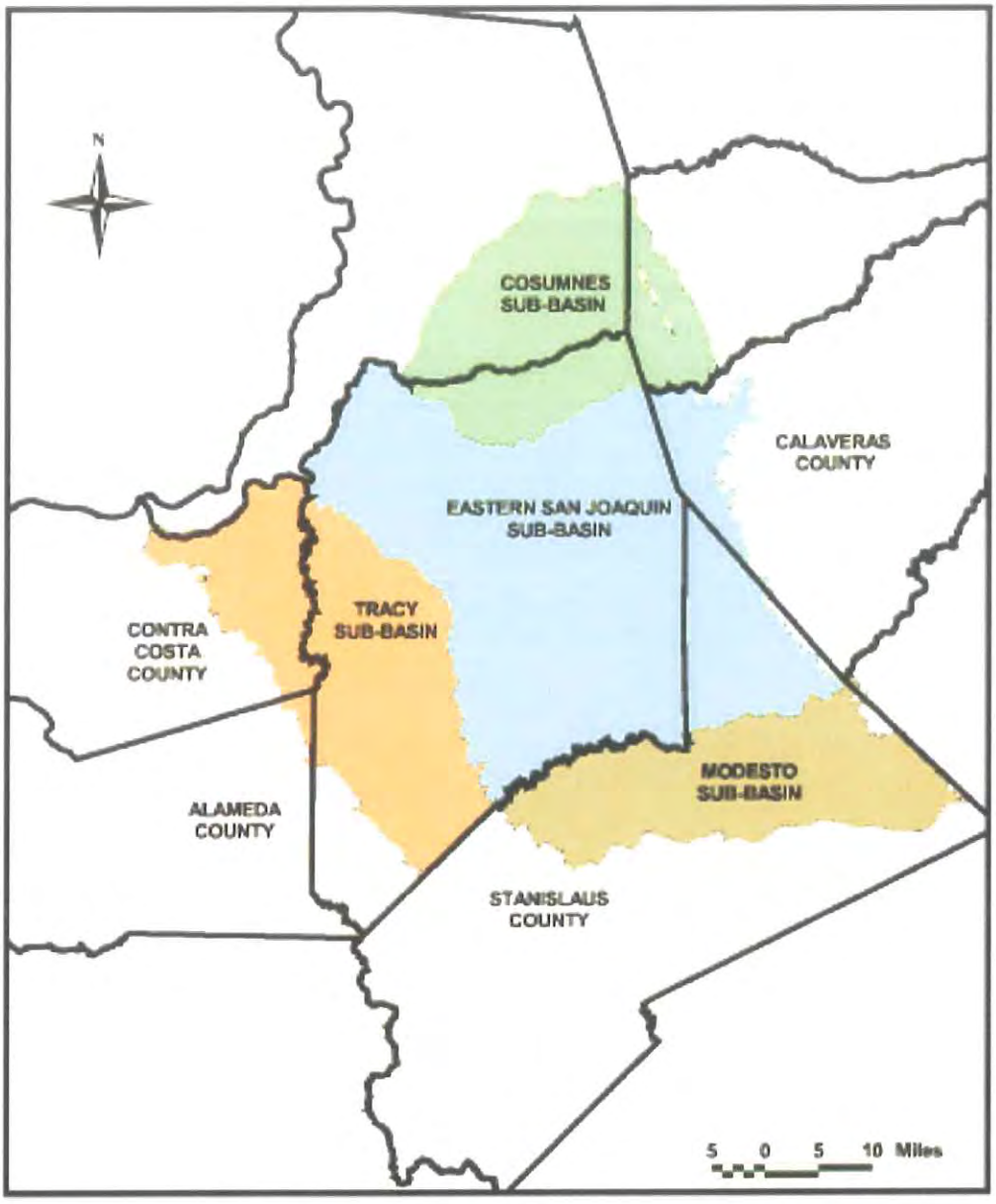
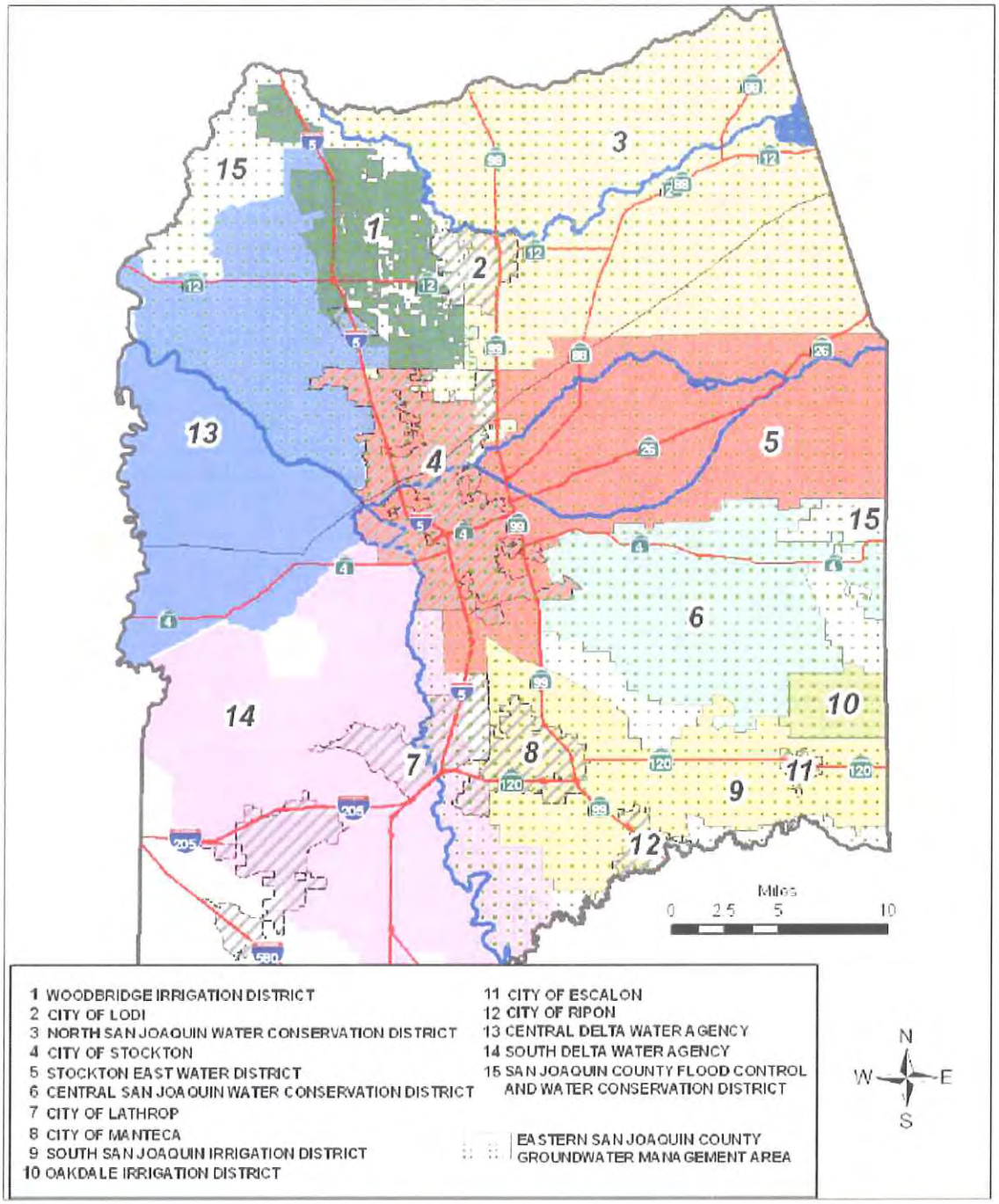


Figure 4-7 Groundwater Sub-Basins of San Joaquin County

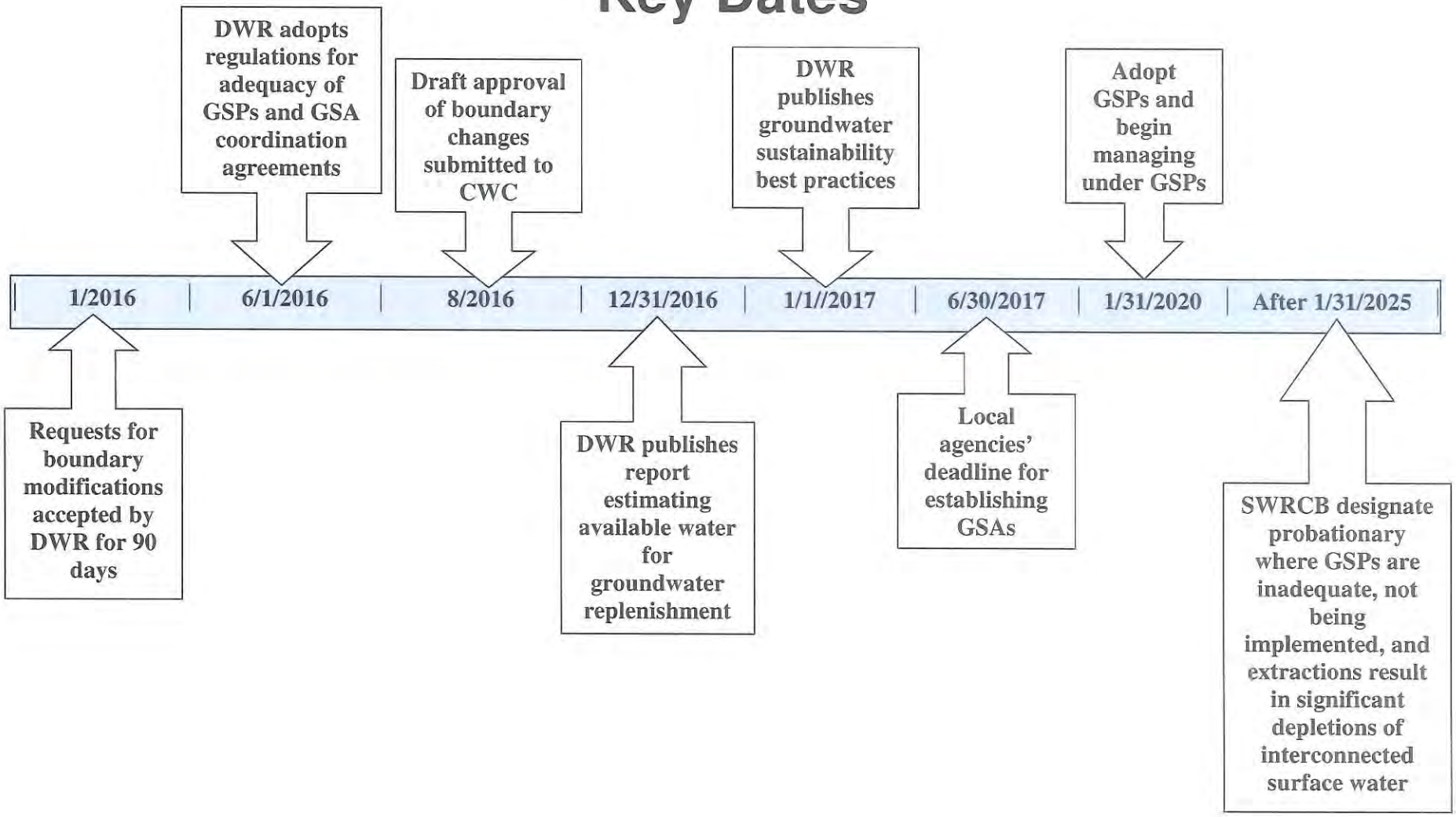


Source: California Spatial Information Library at http://www.gis.ca.gov/

Figure 4-12 Overlying Agencies within the Regional Planning Area



Sustainable Groundwater Management Act Key Dates



Draft Eastern San Joaquin GBA SGMA Process Highlights

Decision Points	Workgoup Focus
GBA Authorizes SGMA Workgroup	Present plan to GBA
Initial Invitation List Developed	Identify potential intra-basin members, associate members, interested parties, and inter-basin stakeholders
	Invitations sent out
WG Meetings Begin	WG Meeting - Hold organizational meeting (Why-overview of SGMA and responsibilities of GSAs, overview of process and decision points)
	Distribute draft WG charter and WG member ID forms
	WG Meeting - Develop charter to include decision-making process, submission of WG member ID forms, discussion "Who's missing?"
Adopt Charter Authorize Boundary Revision Application	WG Meeting – Discussion boundary/ies revision request
Submission of Revision Request	WG Meeting – GSA roles and responsibilities, GSA early interest survey (Who's considering being a GSA?)
GSA Early Interest Survey Results	WG Meeting – Analysis & discussion of sub-basin coverage based on GSA early interest survey
	WG Meeting – Readiness to self-identify GSAs, discussion of what's needed to help with decision. Role of GSA sub-basin integrating body if multiple GSAs
	WG Meeting – Provision of information needed to support GSA decisions
Deadline for GSA Self-Identification Set	WG Meeting – Readiness to self-identify GSAs, discuss deadline for self-identification
	WG Meeting - Revisit sub-basin coverage. Introduce GSA sub-basin integration governance model
Approval of GSA/s	WG Meeting – Discuss how to complete sub-basin coverage (if needed)
	WG Meeting – Sample GSA resolution, by-laws, & other required information for filing with state
	WG Meeting - Discuss GSA sub-basin integration governance models (JPA, MOU, etc.), policy board, advisory group, financing. Relationship and coordination with existing policy boards (GBA, AWC, BOS, Water Districts, etc.)and inter-basin stakeholders/GSAs
Submission of GSA/s Information to State	WG Meeting – Continued discussion on integration governance, legal review of draft document, discussions draft workplan and budget
	WG Meeting – GSA coordination agreement requirements
Adoption of GSA Integration Documents	WG Meeting - Agreement on GSA integration governance & formation documents

Note: This provides for the option of multiple GSAs and assumes boundary revision granted if sought. Additional meetings may be required based on level of agreement. Target formation date is 12/2016

Invitees to the GBA SGMA Workgroup

1. Calaveras County
2. Calaveras County Water District
3. California Water Service Company - Stockton
4. Central Delta Water Agency
5. Central San Joaquin Water Conservation District
6. City of Escalon
7. City of Lathrop
8. City of Lodi
9. City of Manteca
10. City of Ripon
11. City of Stockton
12. North San Joaquin Water Conservation District
13. Oakdale Irrigation District
14. Sacramento County Water Agency
15. San Joaquin County
16. South Delta Water Agency
17. South San Joaquin Irrigation District
18. Southeast Sacramento Agricultural Water Authority
19. Stanislaus County
20. Stockton East Water District
21. Woodbridge Irrigation District

Overview of SGMA - Groundwater Sustainability Agencies

September 9, 2015

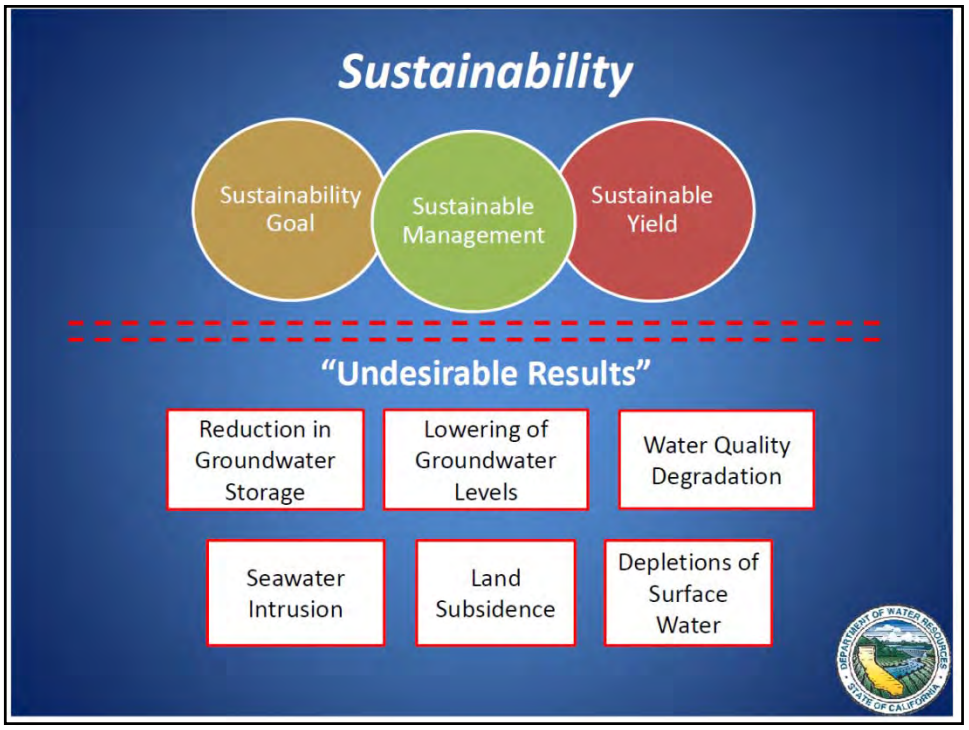
SGMA Workgroup

Sustainable Groundwater Management Act (SGMA)

- Requires formation of Groundwater Sustainability Agency (GSA)
- Requires completion of Groundwater Sustainability Plan (GSP)
- Requires GSAs to manage groundwater basins through implementation of GSPs
- Provides GSAs with authority to collect fees and conduct enforcement actions

SGMA cont.

- Multiple GSAs and GSPs allowed within a basin with a "Coordination Agreement"
- Coordination with adjoining basin GSA is required
- GSA is formed from one or more local agencies with water supply, water management or land use responsibility
- GSA can be formed under a joint powers agreement or a memorandum of agreement
- Failure to form GSA by June 30, 2017 will result in State intervention



SGM

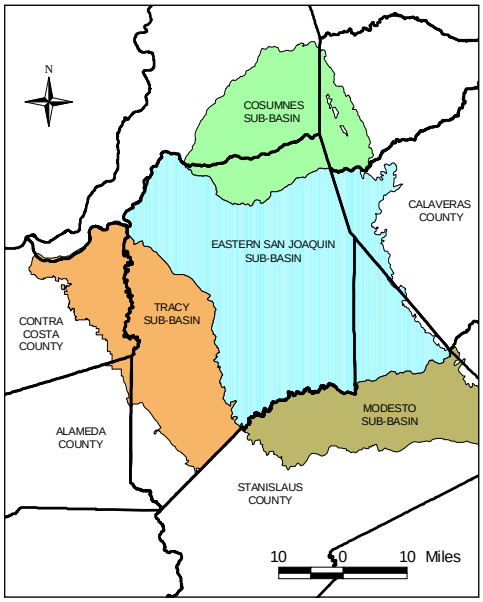
- Required for High- and Medium Priority Basins
- Empowers GSAs:
  - Register groundwater wells
  - Measure extractions
  - Manage extractions
  - Require reports
  - Assess fees
- Creates State "Backstop"
- Establishes "sustainability goal"

Steps to Forming a GSA

1. Identify basins and their boundaries
2. Identify local agencies and parties of interest
3. Understand the basin conditions and issues
4. Engage parties of interest
5. Discuss assignment of authorities
6. Evaluate and propose governance model

Identify Basins and Their Boundaries

- Basin boundaries defined by State Bulletin 118-03
- "Critically overdrafted" per Bulletin 118-80
- State regulations for adjusting basin boundaries are due January 1, 2016
- Boundary adjustment requests accepted January 1, 2016 – March 31, 2016

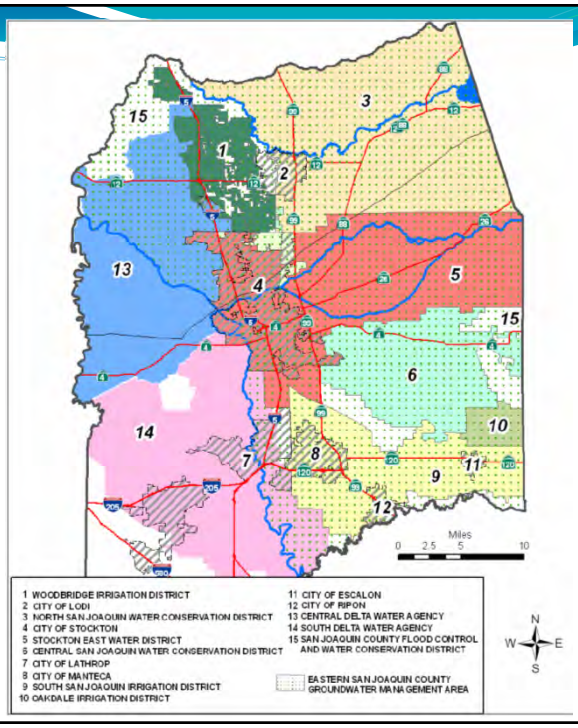


Current GBA Members

- WID
- NSJWCD
- City of Lodi
- City of Stockton
- Calwater
- SEWD
- CSJWCD
- CDWA
- SDWA
- San Joaquin County
- SSJID
- SJ Farm Bureau

And Perhaps…

- Manteca
- Ripon
- Escalon
- Lathrop



Identify Local Agencies and Parties of Interest

- Water supply and water management agencies
- Municipalities including land use planning entities
- Agricultural and domestic groundwater users
- Small public water systems
- Surface water users
- Federal agencies holding land in the basin
- Environmental users of groundwater
- California Native American Tribes
- Disadvantaged communities

Engage Parties of Interest

- Prior to State acceptance of a GSA, a noticed public hearing must be held
- How will interested parties participate in the process?
- Will existing advisory groups be used?
- Will new structures or processes be needed?
- How will input be received on GSA formation, GSP development and GSP implementation?

Discuss Assignment of GSA Authorities

- Range of authorities and tasks
  - Coordination
  - Planning
  - Monitoring and Reporting
  - Implementation
  - Financing
  - Enforcement
- Will any existing local agencies assume any of the authorities and tasks?

Understand the Basin Conditions and Issues

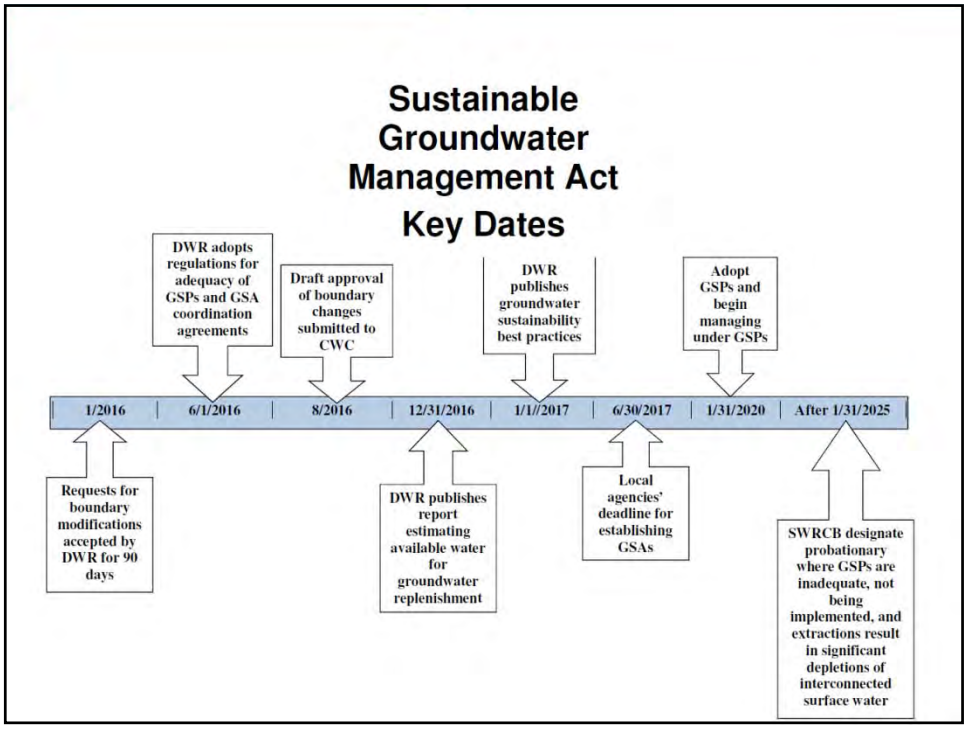
- Condition of the basin
- Existing Groundwater Management Plans
- Groundwater basin models
- Groundwater monitoring data
- Identify key issues such as declining elevations, degrading water quality, subsidence, impacts to the ecosystem, impacts to surface water systems, need for additional water supply
- Develop a Groundwater Sustainability Plan

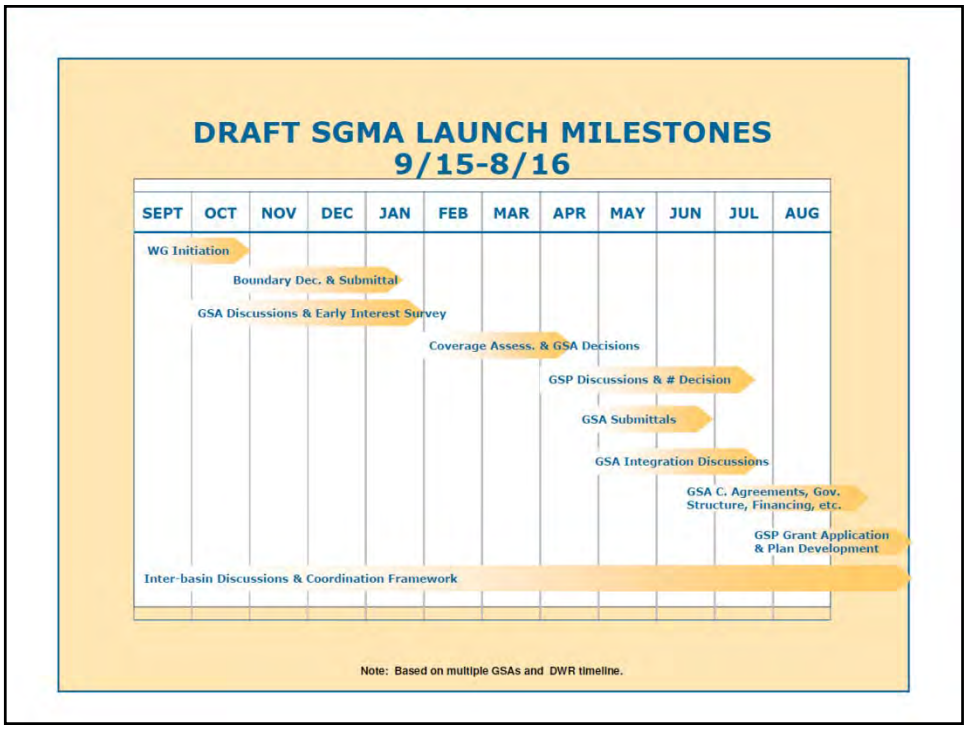
GBA Recent Actions

- GBA's Amended and Restated JPA
  - Expanded Membership
  - SGMA Implementation Planning
- 2015-16 GBA Budget
  - $120,000 Professional Services
  - $150,000 Special Studies and Reports
  - $150,000 County Staff
- DWR Facilitation Application
  - Facilitator Selected and Working
  - Facilitation Scope of Work - Approval Pending

STAFF RECOMMENDATIONS

- Convene the SGMA Workgroup
- Develop Invitation List
- First Meeting September 9, 2015
- Possible 2nd Meeting on the 4th Wednesday of the Month if Needed
- Possible Move to Ag Commissioner's Assembly Room to Accommodate Group
- Develop Formal Charter for the SGMA Workgroup


Sustainable Groundwater Management Act
Key Dates
DWR adopts regulations for adequacy of GSPs and GSA coordination agreements
Draft approval of boundary changes submitted to CWC
DWR publishes groundwater sustainability best practices
Adopt GSPs and begin managing under GSPs
1/2016
6/1/2016
8/2016
12/31/2016
1/1//2017
6/30/2017
1/31/2020
After 1/31/2025
Requests for boundary modifications accepted by DWR for 90 days
DWR publishes report estimating available water for groundwater replenishment
Local agencies' deadline for establishing GSAs
SWRCB designate probationary where GSPs are inadequate, not being implemented, and extractions result in significant depletions of interconnected surface water


DRAFT SGMA LAUNCH MILESTONES
9/15-8/16
SEPT
OCT
NOV
DEC
JAN
FEB
MAR
APR
MAY
JUN
JUL
AUG
WG Initiation
Boundary Dec. & Submittal
GSA Discussions & Early Interest Survey
Coverage Assess. & GSA Decisions
GSP Discussions & # Decision
GSA Submittals
GSA Integration Discussions
GSA C. Agreements, Gov. Structure, Financing, etc.
GSP Grant Application & Plan Development
Inter-basin Discussions & Coordination Framework
Note: Based on multiple GSAs and DWR timeline.

Questions?

www.GBAWater.org

www.SJWater.org

www.SJCleanWater.org

www.MOREWATER.org

www.SJCSavewater.org

Working Draft
Eastern San Joaquin GBA SGMA Process Highlights

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	WG Meeting – GSA coordination agreement requirements
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ATTACHMENT
III. Communications

BOARD OF SUPERVISORS

44 N. SAN JOAQUIN STREET, SUITE 627
STOCKTON, CALIFORNIA 95202
TELEPHONE: 209/468-3113
FAX: 209/468-3694

KATHERINE M. MILLER
Chair
Second District

STEVE J. BESTOLARIDES
Third District

CARLOS VILLAPUDUA
First District

CHUCK WINN
Vice Chair
Fourth District

BOB ELLIOTT
Fifth District

Mimi Duzenski
Clerk of the Board

July 21, 2015

The Honorable Governor Jerry Brown
State Capitol, Suite 1173
Sacramento, CA 95814

The Honorable Sarah "Sally" Jewell, Secretary
United States Department of the Interior
1849 C Street, NW
Room 6156
Washington, DC 20240

The Honorable Penny S. Pritzker, Secretary
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

John Laird, Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

The Honorable Regina A. "Gina" McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Room 3000
Washington, DC 20460

Mr. Ryan Wulff
National Marine Fisheries Service
650 Capitol Mall, Suite 5-100
Sacramento, CA 95814

Request to Extend the Comment Period for the Bay Delta Conservation Plan/WaterFix Revised Draft Environmental Impact Report and Revised Draft Environmental Impact Statement

Dear Governor Brown, Secretaries Jewell, Pritzker and Laird, Administrator McCarthy and Mr. Wulff:

The Bay Delta Conservation Plan (BDCP)/WaterFix Revised Draft Environmental Impact Report and Revised Draft Environmental Impact Statement (RDEIR/RDEIS) was released July 9, 2015. Prior to the release representatives of the California Natural Resources Agency represented to the Delta Counties Coalition that they would have more than forty-five days to respond to the document. While it is true that fifty-three days is longer than forty-five, it is also true that fifty-three days is an insufficient amount of time to thoughtfully review and analyze the changes, contrast the differences with the original plan, and craft thoughtful responses intended to further the lead agencies' analysis of the project.

The California Environmental Quality Act and the National Environmental Policy Act are grounded in fully disclosing the impacts of projects so that we as a society can make informed decisions -- knowing full well the consequences to our communities, our livelihoods, and our environment of

those actions. Given the importance of the project, and the complexity of the document, the 53-day public comment period is woefully inadequate.

San Joaquin County is one of the communities most affected by the WaterFix, and we believe more time is needed to thoroughly review and comment on the project. San Joaquin County respectfully requests that the public comment period for the BDCP/WaterFix RDEIR/RDEIS be extended by a minimum of 120 additional days beyond the current 53-day comment period. If you have any questions regarding this matter, please contact Mike Selling, Public Works Director at (209) 468-3100, or me at (209) 468-3113.

Thank you for your favorable consideration of this request.

Sincerely,

Katherine M. Miller, Chairman
San Joaquin County Board of Supervisors

c: San Joaquin County's State Legislative Delegation
San Joaquin County's Federal Legislative Delegation
The Honorable Michael L. "Mike" Connor, Commissioner
United States Bureau of Reclamation
Mr. Gary D. Frazer, Assistant Director
Endangered Species Program
United States Fish and Wildlife Service
Mr. Samuel D. Rauch, III, Assistant Administrator
National Marine Fisheries Service
United States Department of Commerce
Delta Stewardship Council
Delta Protection Commission
Delta Conservancy
Delta Counties Coalition
Delta Coalition
Paul Yoder, State Advocate, Shaw/Yoder/Antwih
Karen Lange, State Advocate, Shaw/Yoder/Antwih
Roger Gwinn, Federal Advocate, The Ferguson Group
Mark Limbaugh, Federal Advocate, The Ferguson Group

BOS07-01

Delta Counties Coalition

Contra Costa County · Sacramento County · San Joaquin County · Solano County · Yolo County

"Working together on water and Delta issues"

July 29, 2015

The Honorable Governor Jerry Brown
State Capitol, Suite 1173
Sacramento, CA 95814

John Laird, Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

The Honorable Sarah "Sally" Jewell, Secretary
United States Department of the Interior
1849 C Street, NW, Room 6156
Washington, D.C. 20240

The Honorable Penny S. Pritzker, Secretary
United States Department of Commerce
1401 Constitution Avenue, NW
Washington, D.C. 20230

The Honorable Regina A. McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3000
Washington, D.C. 20460

Dear Governor Brown, Secretaries Laird, Jewell and Pritzker, and Administrator McCarthy:

The recently released and rebranded Bay-Delta Conservation Plan (BDCP)/California "WaterFix" and the partially Recirculated Draft Environmental Impact Report and Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) contain substantial changes from the initial public draft. We hope that this latest iteration of the BDCP will provide a complete and detailed description of the revised project, an accurate assessment and characterization of the potential impacts, and the specific elements of a comprehensive mitigation strategy to compensate for the impacts of this massive project as an extensive and detailed analysis is required in order to make that determination.

The spirit of both the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) is grounded in fully disclosing the impacts of project actions so that we, as a society, can make decisions with respect to our communities, livelihood, and environment. The RDEIR/SDEIS amount to nearly 8,000 pages of additional documentation. Given the size and complexity of the document and the need to refer back to the initial 40,000

pages, the current public comment period is distressingly inadequate. The recent extension of the comment period, while helpful, remains inadequate for meaningful review and comment of the revised documents, which must be reviewed in the context of the original BDCP and without the benefit of response to our earlier comments. Both CEQA and NEPA require, at a minimum, a summarized and clearly defined project and impact report. Given the lengthy environmental documents, more time is necessary.

The Delta counties, cities and towns are among the communities most affected by the proposed actions of the BDCP/California "WaterFix," and more time is needed to thoroughly review and comment on the recently released documents. On behalf of the Delta Counties Coalition and the Delta community, we respectfully request that the public comment period for the RDEIR/SDEIS be extended by, at least, another 60-days (deadline of December 29) in addition to the recently granted 60-day extension (deadline of October 30).

Thank you for your consideration.

Sincerely,

Mary Nejedly Piepho
Supervisor, Contra Costa County

Supervisor John M. Vasquez,
Supervisor, Solano County

Don Nottoli
Supervisor, Sacramento County

Jim Provenza
Supervisor, Yolo County

Katherine M. Miller
Supervisor, San Joaquin County

c: Delta Counties State Legislative Delegation
Delta Counties Federal Legislative Delegation
The Honorable Estevan Lopez, Commissioner of United States Bureau of Reclamation
Mr. Mike Fris, Assistant Director of Endangered Species, Region 8
United States Fish and Wildlife Service

Mr. Will Stelle, Regional Administrator of National Marine Fisheries Service
Mr. Michael Tucker, National Marine Fisheries Service
Delta Stewardship Council
Delta Protection Commission
Delta Conservancy

FRIENDS OF THE RIVER
1418 20TH STREET, SUITE 100
SACRAMENTO, CA 95811

September 9, 2015

Via Email and U.S. Mail

The Honorable Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
exsec@ios.doi.gov

John Laird, Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Kimberly.goncalves@resources.ca.gov

The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230
thesec@doc.gov

Mark W. Cowin, Director,
California Department of Water Resources
P.O. Box 942836, Room 1115-1
Sacramento, CA 94236-0001
Mark.cowin@water.ca.gov

The Honorable Gina McCarthy, Administrator
U.S. Environmental Protection Agency
WJC North, Room 3,000 1101A
Washington, D.C. 20460
McCarthy.Gina@epa.gov

David Murillo, Regional Director
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825
dmurillo@usbr.gov

BDCPComments@icfi.com

RE: RDEIR/SDEIS Comments and Request for BDCP Agencies to Comply with NEPA and the ESA by Preparing a Biological Assessment and Carrying out Consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service and then Issuing a New Draft EIR/EIS Concurrently with and Integrated with the Biological Assessment(s) and resulting Biological Opinion(s) and Including Reasonable and Prudent Alternatives

Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Secretary Laird, Director Cowin, Regional Director Murillo, and Federal and California Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/California Water Fix:

Summary

Friends of the River (FOR), Restore the Delta, the Center for Biological Diversity, the California Water Impact Network, the California Sportfishing Protection Alliance, and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes) object to the adverse modification of critical habitat for five threatened and endangered fish species, which would occur under the Bay Delta Conservation Plan (BDCP)/California Water Fix/Water Tunnels project.[1] Under the BDCP, three large new intakes would divert vast amounts of water from the Sacramento River between Clarksburg and Courtland through two tunnels roughly 35 miles south for export from the Central Valley and State Water Projects' pumping plants. As a result of this massive new diversion ("Water Tunnels project"), enormous quantities of freshwater which now flow through the Sacramento-San Joaquin Delta before being diverted would never even reach the Delta.

The BDCP Delta Water Tunnels project is not a permissible project under the Endangered Species Act (ESA) because it would adversely modify critical habitat for at least five endangered and threatened fish species. We previously addressed the failure of the BDCP agencies to develop and consider a range of reasonable alternatives increasing Delta flows by reducing exports in our July 22, 2015 letter to you. This letter expands on the ESA substantive and procedural violations to the National Environmental Policy Act (NEPA) alternatives analysis violations set forth in our earlier letter.

To summarize, ***first,*** the Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. Likewise, the Central Valley Spring-Run Chinook Salmon, Central Valley Steelhead, Southern Distinct Population Segment of North American Green Sturgeon, and Delta Smelt, are listed as threatened species under the ESA.[2] ***Second***, the reaches of the Sacramento River, sloughs, and

[1] The lead agencies for the project are the federal Bureau of Reclamation and the California Department of Water Resources.

[2] Each of these species is listed under the California Endangered Species Act as well, with most of them considered threatened. Bay Delta Conservation Plan, Section 1.4.3, *Covered Species*, Table 1-3, p. 1-24. This table shows that under the California Endangered Species Act, Delta smelt is listed as threatened; however, the BDCP species account for Delta Smelt states that the California Fish and Game Commission elevated delta smelt to the status of endangered on March 4, 2009. (BDCP, Appendix 2A, section 2A.1.2, p. 2A.1-2, lines 21-24.) Longfin smelt is considered threatened, winter-run Chinook salmon is considered endangered, spring-run Chinook salmon

the Delta that would lose significant quantities of freshwater flows through operation of the proposed Water Tunnels are designated critical habitats for each of these five listed endangered and threatened fish species. ***Third***, no Biological Assessment has been prepared and transmitted to the U.S. Fish and Service (USFWS) or National Marine Fisheries Service (NMFS) by Reclamation with respect to the Water Tunnels project. ***Fourth***, ESA Section 7 consultations have not occurred and no Biological Opinion has been prepared by the USFWS or NMFS with respect to the effects of the operation of the Water Tunnels on the five federally listed species of fish or their designated critical habitats. ***Fifth,*** because of Reclamation's failure to prepare Biological Assessments and failure to initiate ESA consultation, no "reasonable and prudent alternatives" (RPAs) have been developed or suggested by the USFWS or NMFS to avoid species jeopardy or adverse modification of designated critical habitat.

Approval of the Water Tunnels project in the form of preferred Alternative 4A or otherwise would violate the substantive prohibitions of Section 7 of the ESA by adversely modifying designated critical habitat as well as by jeopardizing the continued existence of the endangered and threatened fish species.

Approval of the Water Tunnels project would violate the procedural requirements of the ESA because Reclamation has not evaluated its proposed action "at the earliest possible time" to determine whether its action may affect listed species or critical habitat and has not entered into formal consultation with USFWS and NMFS.

Approval of the Water Tunnels project would violate the procedural requirements of NEPA because the BDCP Draft EIR/EIS and Water Fix RDEIR/SDEIS have not been prepared "concurrently with and integrated with" Biological Assessments and Biological Opinions required by the ESA. Again, the Biological Assessments and Biological Opinions, though required, do not exist.

These are not deficiencies that can be "fixed" by responses to comments in a Final EIR/EIS. Instead, Reclamation and the Department of Water Resources (DWR) must prepare a new Draft EIR/EIS to be circulated for public review and comment. The new public Draft EIR/EIS document must include the range of reasonable alternatives including alternatives increasing flows by reducing exports as set forth in our July 22, 2015 letter. The new public Draft NEPA document must also be prepared concurrently with and integrated with the ESA required Biological Assessments, Biological Opinions, and include reasonable and prudent alternatives, developed by the USFWS and NMFS. The required reasonable and prudent alternatives would include alternatives increasing flows through the Delta to San Francisco Bay by reducing exports.

The Water Tunnels Threaten Jeopardy and Adverse Modification of Designated Critical Habitat of Endangered and Threatened Fish Species in Violation of the Substantive Prohibitions of the ESA

The Sacramento River Winter-Run Chinook Salmon is listed as an endangered species under the ESA. 50 C.F.R. § 17.11. Critical habitat for the species was designated to include the Sacramento River extending from River Mile 0 near the Delta to River Mile 302, which is far

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threatened, fall- and late fall-run Chinook salmon are considered species of special concern; and green sturgeon (southern DPS) is also considered a species of special concern. Longfin smelt is at this time a candidate species for listing under the federal Endangered Species Act.

north of the proposed BDCP diversion near Clarksburg. 50 C.F.R. § 226.204.The Water Tunnels project would divert enormous quantities of freshwater from the Winter-Run Chinook Salmon's designated critical habitat. The four threatened fish species mentioned above would likewise lose enormous quantities of freshwater from their designated critical habitats because of diversion of water resulting from the project.[3]

"The ESA provides 'both substantive and procedural provisions designed to protect endangered species and their habitat.'" *San Luis & Delta-Mendota Water Auth. v. Jewell (Jewell),* 747 F.3d 581, 596 (9th Cir. 2014), *cert. denied,* 135 S.Ct. 948 and 950 (2015). Pursuant to the commands of Section 7 of the ESA, each Federal agency "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." 16 U.S.C. § 1536(a)(2). "Actions" include "actions directly or indirectly causing modification to the land, *water*, or air." 50 C.F.R. § 402.02 (Emphasis added). "ESA section 7 prohibits a federal agency from taking any action that is 'likely to jeopardize the continued existence' of any listed or threatened species or 'result in the destruction or adverse modification' of those species' critical habitat." *San Luis & Delta-Mendota Water Auth. v. Locke* (*Locke*)*,* 776 F.3d 971, 987 (9th Cir. 2015).

The BDCP itself identifies stressors and threats to each of the five species. Common threats and stressors to the five species include habitat loss due to the operation of water conveyance systems, increasing water temperatures and predation hotspots. By installing gigantic diversion intakes in at least three locations between Clarksburg and Courtland, and by diverting massive amounts of water from the Sacramento River, the Water Tunnels project will literally reduce the amount of aquatic habitat available to these five species in their critical habitats. Additionally, the massive diversion will reduce flow in the critical habitat and contribute to a further increase in water temperature. The Effects Analysis chapter (Chapter 5) of the Draft BDCP Plan (November 2013) admits that significant adverse effects could result from

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[3] The Central Valley Spring-Run Chinook Salmon is listed as a threatened species under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0612, Long -121.7948, near Mile 0, upstream to Elk Slough (38.4140, -121.5212) in Clarksburg, California. 50 C.F.R. § 226.211(k)(5)(i).

The Central Valley Steelhead is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include the Sacramento River from Lat 38.0653, Long -121.8418, near Mile 0, upstream to Elk Slough in Clarksburg. 50 CFR § 226.211(l)(5).

The Southern Distinct Population Segment of North American Green Sturgeon is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for this species is designated to include the Sacramento–San Joaquin Delta including all waterways up to the elevation of mean higher high water within the area defined in California Water Code Section 12220. 50 CFR § 226.219(a)(3). The National Marine Fisheries Service's website provides a map displaying Green Sturgeon critical habitat: <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/greensturgeon.pdf>. The map indicates that the critical habitat includes the Sacramento River from Mile 0 near the Delta to upstream beyond the proposed intake site near Clarksburg.

The Delta Smelt is listed as threatened under the ESA. 50 CFR § 17.11. Critical habitat for the species was designated to include "all contiguous waters of the legal Delta." 50 CFR § 17.95–e–Fishes–Part 2. The US Fish and Wildlife Service's website provided a map displaying some of the Delta Smelt's critical habitat: <http://www.fws.gov/sfbaydelta/maps/delta_smelt_critical_habitat_map.pdf>. The map indicates that the Delta Smelt's critical habitat includes the Sacramento River near Mile 0 upstream to the proposed BDCP intake site near Clarksburg.

the Water Tunnels on the covered fish and their habitat including: "Change in entrainment of fish in water diversions. Change in predation as a result of new structures. Modification of river flow. Change in habitat. Change in food and foraging. Permanent indirect and other indirect losses. Disturbances related to construction and maintenance." (Plan, ch. 5, 2-13).

The BDCP identifies key hydrologic and hydrodynamic changes that reduce or adversely modify habitat of these listed fish species. (See below) These changes will exacerbate threats and stressors already known to affect these fish. BDCP modeling in the RDEIR/SDEIS finds that through-Delta survival rates of winter-run, spring-run, and fall-run Chinook salmon all decrease relative to the No Action Alternative from Water Tunnels operation. (RDEIR/SDEIS Tables 11-4A-23, 51, and 74).

Specifically, the BDCP identifies reduced habitat due to water storage and water conveyance systems as a stressor and threat to Winter- Run Chinook Salmon. BDCP EIR-EIS Administrative Draft, 11A-47 (March 2013). There will be adverse effects on juvenile winter-run Chinook salmon including near-field (contact with screens and aggregation of predators) and far-field (reduced downstream flows (Plan, ch. 5, 5.3-23; RDEIR/SDEIS p. 4.3.7-48), reduced Sacramento River attraction flows for migrating adult winter-run Chinook salmon (Plan, ch. 5, 5.3-29), possible reduction of survival of juvenile winter-run Chinook salmon during downstream migration and possible negative effect on upstream migration of adult winter-run Chinook salmon by changing attraction flows/olfactory cues. (Plan, ch. 5, 5.3-32). The BDCP also admits that "A potential adverse effect of the BDCP on adult winter-run Chinook salmon will be the reduction in flow downstream of the north Delta diversions on the Sacramento River, reducing river flow below the north Delta intakes." (Plan, ch. 5, 5. 3-45; BDCP Appendix 5C, Tables C.A-41 and C.A-42; RDEIR/SDEIS Figures 4.3.2-7 and 4.3.2-8.) The reduced outflow along with the possible change in olfactory signals due to change in the flow mixture "could affect upstream migration." (*Id*.). The RDEIR/SDEIS states: "when compared to the CEQA baseline, [Alternative 4A, the Water Tunnels], including climate change, would substantially reduce the quantity and quality of spawning and egg incubation habitat for winter-run Chinook salmon relative to existing conditions." (RDEIR/SDEIS, 4.3.7-58.) The BDCP likewise identifies similar threats and stressors to the Spring-Run Chinook Salmon, Steelhead, Green Sturgeon, and Delta Smelt that would result from the Water Tunnels.[4]

In 2013, NMFS reiterated its previous "Red Flag" comment that the Water Tunnels project threatens the "potential extirpation of mainstem Sacramento River Populations of winter-run and spring-run Chinook salmon over the term of the permit . . . ." (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, Section 1.17, 12, April 4, 2013). As we pointed out in our July 22, 2015 letter, the U.S. Environmental Protection Agency (EPA) has called for alternatives addressing "the need for water availability and greater freshwater flow through the Delta." (EPA Letter, August 26, 2014, p. 2). Likewise, the Army Corps of Engineers, State Water Resources Control Board, and USFWS scientists also raised concerns regarding the BDCP's impacts on water quality and impacts to endangered and threatened species.[5]

[4] See references to threats and stressors for the four other fish species in Attachment 1 of this letter.
[5] We briefly summarized some of these agencies comments in our July 22, 2015 letter (at pp. 8-10) to you.

However, comments from other federal agencies were ignored. In April 2015, the claimed habitat conservation elements of the BDCP have been dropped or drastically pared back in the switch from the BDCP to the "California Water Fix." As just one example, the plan to provide "*65,000 acres* of tidal wetland restoration" has been eviscerated to merely "*59 acres* of tidal wetland restoration." (RDEIR/SDEIS ES–17 (emphasis added)). Consequently, the current Water Tunnels project is *even more of a threat* to fish species and their habitat compared to the previous version that resulted in the concerns raised then by the EPA, Army Corps of Engineers, State Water Resources Control Board, and NMFS and USFWS scientists.

"The goal of the ESA is not just to ensure survival but to ensure that the species recover to the point it can be delisted." *Alaska v. Lubchenko,* 723 F.3d 1043, 1054 (9th Cir. 2013), citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1070 (9th Cir. 2004). Pursuant to the commands of the ESA, each Federal agency "shall. . . insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered or threatened species *or result in the destruction or adverse modification of [critical] habitat of such species* . . . ." 16 U.S.C. § 1536(a)(2) (emphasis added). "[T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary to the species' survival but also essential for the species' recovery." *Gifford Pinchot,* 378 F.3d 1059, 1070. Also, "existing or potential conservation measures outside of the critical habitat cannot properly be a substitute for the maintenance of critical habitat that is required by Section 7 [of the ESA, 16 U.S.C § 1536]." *Gifford Pinchot,* 378 F.3d 1059, 1076.

Taking the fresh water flows and safe refuge away from the endangered and threatened fish species would neither insure their survival nor insure their recovery and delisting. On-the-ground habitat restoration is not a lawful substitute under the ESA for maintaining the critical habitat of and in the waters of the Sacramento River, sloughs, and Delta. The reduction of water and flows, increased residence times of water, and increased water temperature are adverse modifications of their critical habitat. Approval of the BDCP would violate the ESA. The Water Tunnels project is thus not permissible under the ESA.[6]

Reclamation is Presently Violating both NEPA and ESA Procedure by Failing to Issue a Draft EIR/EIS Concurrently with and Integrated with ESA Required Biological Assessments and Biological Opinions

Extinction is forever. Fortunately, the ESA obligates federal agencies "to afford first priority to the declared national policy of saving endangered species," *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 185 (1978). Despite that, Reclamation has failed to prepare a Biological Assessment pertaining to its action and has failed to initiate consultation with USFWS and NMFS even though Biological Assessment preparation and initiation of consultation are required by the ESA. (See RDEIR/SDEIS 1-15 (under "Section 7 of the Endangered Species

[6] We have brought the impermissibility of the Water Tunnels project given the substantive prohibitions of the ESA and the related procedural ESA and NEPA violations to the attention of Reclamation and DWR on numerous occasions for more than two years now. These prior communications include the FOR letters of June 4, September 25 and November 18, 2013, January 14, March 6, May 21, and July 29 (including pp. 10-11), 2014, EWC letter of June 11, 2014 (including pp. 29-30) and our recent joint letters of July 16 (requesting an extension of time to comment), and July 22 (alternatives), 2015. We also addressed these issues in our meeting with federal agency representatives in Sacramento on November 7, 2013.

Act")). The RDEIR/SDEIS concedes that "formal consultation under ESA Section 7" will be necessary. (*Id.*).

Section 7 of the ESA (16 U.S.C. § 1536(a)(4) requires that "Should the agency find that its proposed action *may* affect a listed species or critical habitat, it must formally or informally consult with the Secretary of the Interior, or his or her delegee [USFWS and/or NMFS]." *Jewell,* 747 F.3d 581, 596 (emphasis in decision). "Formal consultation is required when the acting agency or consulting agency determines that the proposed action is *likely* to adversely affect a listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14. Formal consultation requires the consulting agency . . , to issue a biological opinion stating whether the proposed action is likely to jeopardize such species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14." *Jewell,* 747 F.3d at 596 (emphasis in decision).

ESA Regulations (50 C.F.R. § 402.14(a)) require that "Each Federal agency shall review its actions *at the earliest possible time* to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. . . ." *Karuk Tribe of California v. U.S. Forest Service,* 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc)(emphasis added), *cert. denied,* 133 S.Ct. 1579 (2013). The Ninth Circuit Court of Appeals has repeatedly held that: "Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement." *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1210 (9th Cir. 2010). *Accord, Karuk Tribe,* 681 F.3d 1006, 1027; *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,* 575 F.3d 999, 1018 (9th Cir. 2009).

Even the ardent advocates for the Water Tunnels project who prepared the 48,000 pages of BDCP advocacy documents do not contend that taking large quantities of water away from the Sacramento River, sloughs, and Delta will not have "any possible effect, whether beneficial, benign, adverse or of an undetermined character" on the endangered and threatened fish species or their habitat. Not surprisingly, no preposterous claim of "no possible effect" is made in the Draft EIR/EIS or RDEIR/SDEIS. But instead of reviewing the proposed Water Tunnels at the earliest possible time, Reclamation is delaying ESA review until some unspecified and unacknowledged future time.

The NEPA regulations require that "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the. . . Endangered Species Act. . . ." 40 C.F.R. § 1502.25(a). "The [ESA] regulations also acknowledge that the agencies are expected to concurrently comply with both Section 7 of the ESA and NEPA. *See* 50 C.F.R. § 402.06 ('Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA).')." *Jewell*, 747 F.3d 581, 648. "ESA compliance is not optional," and "an agency may not take actions that will tip a species from a state of precarious survival into a state of likely extinction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 929-30 (9th Cir. 2008). Consequently, against this threat of extinction, conducting the draft EIS public review and comment stage without Biological Assessments or Biological Opinions leaves the public in the dark and violates both the ESA and

NEPA. In the absence of the ESA required analyses, the draft EIS/EIR is "so inadequate as to preclude meaningful analysis" in violation of NEPA. 40 C.F.R. § 1502.9(a).[7]

Reclamation has violated the "at the earliest possible time" ESA mandate and the "concurrently with and integrated with" NEPA mandate by prematurely issuing the Draft EIR/EIS and now the REDIR/SDEIS attempting to hide from the reviewing public the critical pertinent information and analyses that would be supplied by the missing Biological Assessments and Biological Opinions. New upstream diversions of large quantities of water from the Sacramento River will undeniably "affect" the listed fish species and their critical habitats.

The public now has what it does not need: unsupported advocacy from the consultants speculating that the adverse effects will be offset or that the effects will not really be all that adverse. *The public does not have what it does need*: the federal agency Biological Assessments and Biological Opinions required by the ESA and NEPA.[8]

The evasion of ESA obligations by Reclamation is both extreme and deliberate. Reclamation has on August 26, 2015 joined with DWR in submitting a petition to the State Water Resources Control Board for a change in the point of diversion necessary for the Water Tunnels. The petition recites that "The proposed project reflects the culmination of a multiyear planning process that began in 2006 . . "(Petition cover letter, p. 1). The passage of nine years makes a mockery of the ESA requirement to commence ESA review "at the earliest possible time." Because of the absence of the ESA-Required Biological Assessments and Biological Opinions, Reclamation feels free to make the demonstrably false representation in the petition that "The California WaterFix would result in substantially improved conditions in the Delta for endangered and threatened species and afford greater water supply reliability for the state." (Petition cover letter, p. 2).

Red flag comments and the Record so far have made it clear that there is at minimum significant uncertainty about whether the Water Tunnels project is even permissible under the ESA. This critical issue cannot be resolved until the Biological Assessments and Opinions have been prepared. Reclamation has not obtained the determination pursuant to ESA-required consultation whether the "preferred alternative"— the Water Tunnels— is even lawful or feasible.

Against this threat of extinction from known stressors and negative effects on the critical habitat, conducting the NEPA environmental draft process prior to and in a vacuum from the ESA consultation process violates the ESA command to carry out the ESA process "at the earliest possible time" and violates the NEPA command to conduct the NEPA and ESA processes "concurrently" and in an "integrated" manner. This also constitutes unlawful piecemealing or segmenting of the NEPA process from the ESA required analyses of the jeopardy and habitat threats posed by the proposed Water Tunnels.

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[7] The CEQA rule is the same. Recirculation is required where feasible project alternatives were not included in the Draft EIR. CEQA Guidelines, 14 Cal. Code Regs., § 15088.5(a), or when "The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." CEQA Guidelines, § 15088.5(a)(4).

[8] "The ESA requires an agency to use 'the best scientific and commercial data available' when formulating a BiOp." *Locke,* 776 F.3d 971, 995. "The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise." *Locke*, 776 F.3d at 995.

Reclamation is Proceeding in the Absence of the "Reasonable and Prudent Alternatives" that Must be Developed and Identified pursuant to the ESA

Our July 22, 2015 letter to you set forth the NEPA violations resulting from the failure of the BDCP documents including the Draft EIR/EIS and the new RDEIR/SDEIS to include a range of reasonable alternatives increasing freshwater flows through the Delta by reducing exports and not including new upstream conveyance. We pointed out how Reclamation and DWR have ignored repeated warnings and suggestions made to them over the years by public agencies including the EPA, U.S. Army Corps of Engineers, and State Water Resources Control Board, by the National Academy of Sciences and by the Environmental Water Caucus (EWC).

Beyond ignoring the NEPA alternatives mandate, expert government agencies, the Academy and the EWC, Reclamation is also ignoring the crystal clear prohibitions and mandates of the ESA and NEPA. The previous section set forth the procedural ESA requirements for consultation "at the earliest possible time" and the procedural NEPA requirements for the NEPA Draft EIS to be prepared "concurrently with and integrated with" the analyses required by the ESA.

There is more. Under Section 7 of the ESA, 16 U.S.C. § 1536(b)(3)(A), after consultation "If it appears that an action may affect an endangered or threatened species, the consulting agency must provide a biological opinion to the action agency explaining how the action 'affects the species or its critical habitat.' *Id.* § 1536(b)(3)(A). When a biological opinion concludes that the action is likely to jeopardize an endangered or threatened species, or adversely modify its habitat, then the consulting agency must suggest 'reasonable and prudent alternatives [RPA].' *Id.*" *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1085 (9th Cir. 2015). *Accord, Jewell*, 747 F.3d 581, 596; *Locke*, 776 F.3d 971, 988. The consulting agency "in the course of proposing an RPA, must insure that the RPA does not jeopardize the species or its habitat." *Jewell,* 747 F.3d 581, 636.

We pointed out in our July 22, 2015 letter (at p. 10) that Reclamation and DWR had to drop the attempt to sell the Water Tunnels as part of a habitat conservation plan. The USFWS and NMFS scientists were unwilling to find falsely that the Water Tunnels would not be harmful to endangered species of fish and their habitat. The RDEIR/SDEIS calls this "difficulties in assessing species status and issuing assurances over a 50 year period . . ." (RDEIR/SDEIS, 1-2). In fact, for more than three years, the federal scientists have been issuing "Red Flag" warnings that the Water Tunnels threaten the "potential extirpation of mainstem Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit," contrary to publicity claims made for the project.

The Draft EIR/EIS and RDEIR/SDEIS alternatives and alternatives analyses are of no value whatsoever to either decision-makers or the public. This appears to be a deliberate effort on the part of Reclamation and DWR to unlawfully evade the obligation to develop in a Draft EIR/EIS for public review and comment a range of reasonable alternatives including alternatives that would increase freshwater flows through the Delta by reducing exports and that would not include new upstream conveyance. A central feature of this intentional violation of the procedural requirements of both NEPA and the ESA is premature issuance by Reclamation of the Draft EIR/EIS and RDEIR/SDEIS on the one hand, while with the other hand, Reclamation has deliberately failed to prepare a Biological Assessment and initiate formal ESA consultation with USFWS and NMFS.

As a result of these violations, *reasonable and prudent alternatives* have not been prepared by USFWS and NMFS and are not available to the public during the BDCP and Water Fix public review and comment periods. Reclamation and DWR wish to approve the Water Tunnels *in spite of* their adverse impacts on Delta water quality and quantity and on endangered and threatened fish species. In contrast, the ESA requires that the project *must not* jeopardize endangered species or their habitat. In essence, the current Water Tunnels project/Water Fix is an unlawful attempt by Reclamation and DWR to approve the Water Tunnels in a vacuum, in the absence of reasonable and prudent alternatives that they wish to avoid but which are required by the ESA. Reasonable and prudent alternatives are also necessary to provide the NEPA required analysis of a range of reasonable alternatives. The range of *reasonable alternatives* required by NEPA will necessarily include the *reasonable and prudent alternatives* required by the ESA. We are pleased to offer EWC's *A Sustainable Water Plan for California*, discussed in our July 22, 2015 letter, as one example of a reasonable and prudent alternative to the Water Tunnels.[9]

One remedy for this unlawful process is for Reclamation to proceed to prepare a Biological Assessment and request consultation with USFWS and NMFS, and then issue a new Draft EIR/EIS for public review and comment concurrently with and integrated with the resulting Biological Opinions prepared under the ESA. The only other lawful remedy open to Reclamation and DWR is also eminently sensible: drop the Water Tunnels proposed action and focus on intelligent 21st century water solutions such as recycling, drip-irrigation, conservation, and retirement of drainage impaired lands in the San Joaquin Valley from production.

Conclusion

In the absence of answers to basic questions including ESA questions about jeopardy of listed fish species and adverse modifications of designated critical habitats, the Draft BDCP EIR/EIS and RDEIR/SDEIS are not sufficient for informed review by the public and the decision-makers. It will be necessary at minimum under the ESA, NEPA and CEQA for the federal and state agencies to prepare, issue, and circulate for public review a *new Draft* EIR/EIS concurrently with and integrated with Biological Assessments and Biological Opinions. 40 C.F.R. §§ 1502.9(a); 1502.25(a) (NEPA); 14 Cal. Code Regs., §§ 15065(a)(1); 15088.5(a)(CEQA). Then, and only then, would the public and the decision-makers have the opportunity to engage in meaningful analysis of a preferred project alternative and informed comparison with other alternatives, including the reasonable and prudent alternatives required by the ESA.

Should you have any questions, please contact Conner Everts, Co-Facilitator, Environmental Water Caucus at (310) 394-6162 ext. 111 or Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext. 207 or bwright@friendsoftheriver.org.

Sincerely,

[9] http://ewccalifornia.org/reports/ewcwaterplan9-1-2015.pdf.

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Attachment 1

ATTACHMENT 1

The BDCP identifies several threats and stressors to the Central Valley Spring-Run Chinook Salmon, which include flow reductions causing increased water temperature and habitat elimination or degradation due to water conveyance systems. (BDCP EIR-EIS Administrative Draft, 11A-83, 11A-76 (March 2013)). The BDCP Plan admits that adverse effects of the proposed north Delta diversions on juvenile Spring-Run Chinook Salmon include near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows). (Plan, ch. 5, 5. 4-16; see also RDEIR/SDEIS, p. 4.3.7-79, lines 15-17). "Plan Area flows have considerable importance for downstream migrating juvenile salmonids and will be affected by the proposed north Delta diversions . . . Because of the north Delta diversions, salmonids migrating down the Sacramento River generally will experience lower migration flows compared to existing conditions. . . As with winter-run Chinook salmon, it was assumed with high certainty that Plan Area flows have critical importance for migrating juvenile spring-run Chinook salmon." (Plan, ch. 5, 5. 4-17; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). Other admitted adverse effects caused by operations of the north Delta diversions include reduced attraction flows in the Sacramento River for migrating adult spring-run Chinook salmon. (Plan, ch. 5, 5. 4-19). "Lower river flow downstream of the north Delta intakes under the BDCP may reduce survival of juvenile spring-run Chinook salmon during downstream migration along the Sacramento River and also could negatively affect upstream migration of adult spring-run Chinook salmon by changing attraction flows/olfactory cues." (Plan, ch. 5, 5. 4-20). The RDEIR/SDEIS again delivers bleak prospects for the survival of this federally-protected species: "Under Alternative 4A (including climate change effects), there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality rates and overall reduced habitat conditions for spawning spring-run and egg incubation." (RDEIR/SDEIS, 4.3.7-98).

The BDCP states that threats and stressors to the Steelhead include water storage and conveyance systems as well as flow reductions contributing to increased water temperatures. (BDCP EIR-EIS Administrative Draft, 11A-129, 11A-133 (March 2013)). The Plan admits near-field (physical contact with the screens and aggregation of predators) and far-field (reduced downstream flows leading to greater probability of predation) effects of the north Delta diversions on juvenile Sacramento River Region Steelhead. (Plan, ch. 5, 5. 6-11; see also RDEIR/SDEIS, p. 4.3.7-199, lines 1-6). The plan also admits that "Sacramento River attraction flows for migrating adult Sacramento River region steelhead will be lower from operations of the north Delta diversions under the BDCP." (Plan, ch. 5, 5. 6-13; BDCP Appendix 5C, Tables C.A-41 and C.A-42; see also RDEIR/SDEIS, Figures 4.3.2-7 and 4.3.2-8). The Plan admits that respect to the Feather River, "the reduction in flows in the high-flow channel due to BDCP would reduce conditions in an already unsuitable habitat." (Plan, ch. 5. 6-16). The RDEIR/SDEIS states: "In general, Alternative 4A would degrade the quantity and quality of rearing habitat for steelhead relative to Existing Conditions." (RDEIR/SDEIS, 4.3.7-22).

The BDCP identifies increased water temperatures and habitat loss as threats and stressors to the Green Sturgeon. BDCP EIR-EIS Administrative Draft, 11A-162 – 65 (March 2013). With respect to admitted adverse effects, the Plan admits that flow changes will reduce transport and migration flows in the Feather River and Plan area. (Plan, ch. 5. 8-17 through 8-24). "As such [reduction in early fall releases], average in stream flows during some months of the three periods identified above (June-September, August-October, August-June) are expected

to substantially decline in the Feather River at Thermalito and moderately decline in the Sacramento River at Verona under the BDCP, especially for the LOS [low-outflow scenario] (Appendix 5.C, flow, passage, salinity, and turbidity, section 5.C.5.3.3, High Outflow and Low Outflow Scenarios)." (Plan, ch. 5. 5. 8-18). Also, the plan admits that "there is [on the Feather River] the potential for appreciable change in the Feather River as a result of operational differences between the BDCP scenarios and future conditions without the BDCP (EBC2_LLT)." (Plan, ch. 5, 5. 8-24). The RDEIR/SDEIS states: "In general, Alternative 4A would reduce the quantity and quality of rearing habitat for larval and juvenile green sturgeon relative to Existing Conditions." (RDEIR/SDEIS, 4.3.7-296).

The BDCP identifies several threats and stressors to the Delta Smelt, including water exports and increased water temperature. (BDCP EIR-EIS Administrative Draft, 11A-8–11 (March 2013)). Admitted adverse effects caused by the BDCP north Delta intakes include reducing the quantity of sediment entering the Plan Area thus increasing water clarity and negatively affecting delta smelt. (Plan, ch. 5, 5. 1-30; see also RDEIR/SDEIS, p. 4.3.7-26, 4.3.7-29). Greater water residence time from changes in water operations will likely increase the toxic blue-green alga Microcystis having both direct and indirect effects on the smelt. (Plan, Chapter 5, 5. 1-32; BDCP, Appendix 5C, p. 5.4-14; RDEIR/SDEIS, Chapter 8, Table 8-60a). North Delta intakes' operations will introduce and increase entrainment and impingement of Delta smelt as well as introduce and increase predation hotspots in and around the new intakes (RDEIR/SDEIS, p. 4.3.7-24, lines 4-7).