



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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Ms. Angela Somma
Ms. Monica Gutierrez
NMFS California Central Valley Office
Attn: Calaveras River Habitat Conservation Plan,
650 Capitol Mall, Suite 5-100,
Sacramento, CA 95814.
Calaveras.DRAFT HCP@noaa.gov
Via e-mail

Re: Comments of California Sportfishing Protection Alliance on the Draft Environmental Assessment and Initial Study for the Habitat Conservation Plan for the Calaveras River

Dear Ms. Somma and Ms. Gutierrez:

The California Sportfishing Protection Alliance (CSPA) respectfully submits these comments on the Draft Environmental Assessment and Initial Study (draft EA/IS) for the Habitat Conservation Plan for the Calaveras River (HCP). Notice of the draft EA/IS was published in the Federal Register on September 30, 2019 (RIN 0648–XR041).

In general, the draft EA/IS is deficient because it fails to disclose potentially significant impacts of the Proposed Action/Proposed Project. These potentially significant impacts require production and circulation of an Environmental Impact Statement/Environmental Impact Report (EIS/EIR). In addition, the draft EA/IS is deficient as an informational document in its failure to disclose the regulatory setting and other key facts about the Proposed Action/Proposed Project. The draft EA/IS improperly compares the Proposed Action/Proposed Project against a degraded baseline, without analyzing ongoing operations as part of the Proposed Action/Proposed Project. The draft EA/IS does not analyze socioeconomic or environmental justice impacts, does not analyze reasonably foreseeable operational changes and their impacts, and does not acknowledge the public trust and include a public trust analysis.

We discuss these and other deficiencies of the draft EA/IS below. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects these deficiencies.

I. The draft EA/IS fails to disclose significant necessary information and thus fails to provide the reader and decision makers with sufficient information to reach an informed conclusion.

The draft EA/IS incorrectly assumes that, since the Bureau of Reclamation (Bureau), Stockton East Water District (SEWD) and Calaveras County Water District (CCWD) entered into a water supply contract for the entire yield of New Hogan Reservoir, SEWD is not required to provide flows to support fisheries and public trust resources downstream of Bellota, other than to manage the timing of flood control releases. The failure to reveal, discuss and analyze requirements in the California Water Code, Clean Water Act, California Fish & Game Code and public trust doctrine to provide sufficient flows to protect fisheries and the aquatic ecosystem renders the draft EA/IS deficient. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects this deficiency.

For example, the May 18, 2018 *Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region, Sacramento River Basin and San Joaquin River Basin* identifies the existing identified beneficial uses of the Calaveras River from New Hogan Reservoir to the Delta as warm and cold freshwater habitat, warm and cold migration, warm and cold spawning and wildlife habitat.¹ Yet the draft EA/IS ignores these federally protected identified beneficial uses and fails to discuss and analyze how the HCP will ensure these uses will be protected below Bellota. This is compounded by the fact that the HCP proposes to exclude salmonids from the Old Calaveras River and fails to include any flow requirements below Bellota other than the management of the timing of flood control releases.

Water rights in California are subject to the California Water Code and authority of the State Water Resources Control Board (State Water Board). California Water Code § 85023 state, “The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy...” However, the words “reasonable use” and “public trust” do not appear in either the draft EA/IS or the HCP.

Pursuant to California Water Code § 85086(c)(1), the State Water Board conducted a proceeding and issued a report titled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* on August 3, 2010. The report states: “The Cosumnes and Mokelumne rivers, and smaller streams such as the Calaveras River, Bear Creek, Dry Creek, Stockton Diversion Channel, French Camp Slough, Marsh Creek, and Morrison Creek are all tributary to the Delta. Flows should generally be provided from tributaries in proportion to their contribution to unimpaired flow.”²

¹ *Water Quality Control Plan (Basin Plan) for the California Regional Water Quality Control Board, Central Valley Region, Sacramento River Basin and San Joaquin River Basin, Fifth Edition with Amendments*, May 18, 2018, p. 29. https://www.waterboards.ca.gov/centralvalley/water_issues/basin_plans/sacsjr_201805.pdf

² State Water Resources Control Board, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*, August 3, 2010, p. 126. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf

Pursuant to California Water Code § 85084.5, the California Department of Fish and Wildlife (CDFW), in consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (NMFS), conducted a peer-reviewed proceeding and issued a report titled *Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta* on November 23, 2010. The report states: “Juvenile salmonids emigrate downstream on the San Joaquin River during the winter and spring. Salmonids from the Calaveras River basin and the Mokelumne River basin also use the lower San Joaquin River as a migration corridor. It is therefore necessary to provide adequate flows in these eastside streams (e.g., the flows suggested in Fleenor et al., 2010).”³

On December 12, 2018, the State Water Board approved Phase 1 of an updated *Water Quality Control Plan for the San Francisco Bay–Sacramento San Joaquin Delta Estuary*.⁴ Phase 1 addressed flows upstream of Vernalis on the San Joaquin River. Phase 2 will address eastside tributary and Sacramento River flows and Delta outflow. The adopted Phase 1 amendments established a target of 40% of unimpaired flow, with an allowed adaptive range between 30% and 50% from each of the Stanislaus, Tuolumne and Merced Rivers from February through June.

The draft EA/IS is deficient in failing to acknowledge, analyze and discuss reasonable use, public trust doctrine, California Water Code requirements, and multiple relevant proceedings on required instream flows. It is also deficient in failing to acknowledge that SEWD, as operator of New Hogan Dam, will be required to provide flows protective of fisheries and other public trust resources from New Hogan Dam to the Delta. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects these deficiencies.

California Fish & Game Code § 5937 states:

The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impractical to detrimental to the owner to pass the water through the fishway.

California Fish & Game Code § 5900(a) states: “Dam” includes any “artificial obstruction.” This definition applies to New Hogan Dam as well as the myriad flashboard dams, diversion dams and low flow crossings in the lower Calaveras River watershed. The draft EA/IS fails to disclose, analyze and discuss the requirements of these Fish & Game Code sections and their

³ California Department of Fish and Game, *Quantifiable Biological Objectives and Flow Criteria for Aquatic and Terrestrial Species of Concern Dependent on the Delta*, November 23, 2010, p. 56. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi-NTgpunlAhVBnq0KHW_7DNgQFjAAegQIABAC&url=https%3A%2F%2Fnrm.dfg.ca.gov%2FFileHandler.ashx%3FDocumentID%3D25987&usg=AOvVaw0a5hNXaUZF-IJcWKKifsUC

⁴ State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*. Available at: https://www.waterboards.ca.gov/plans_policies/docs/2018wqcp.pdf.

applicability to structures in Calaveras River, including those in the mainstem between Bellota and New Hogan Dam, Old Calaveras River, Mosher Slough/Creek, Mormon Slough, the Stockton Diverting Canal and Potter Creek. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects this deficiency.

The HCP acknowledges that the Central Valley steelhead DPS is listed as threatened pursuant to the federal Endangered Species Act. The HCP states:

The lower Calaveras River downstream of New Hogan Dam is within the Central Valley steelhead DPS and designated critical habitat for this species. Designated critical habitat for Central Valley steelhead includes the Calaveras River from New Hogan Dam downstream to Bellota, Mormon Slough from Bellota to the mouth, the SDC, the Old Calaveras River channel downstream of Bellota to the SDC, and the Calaveras River from the SDC to the mouth (70 FR 52488).⁵

The HCP also acknowledges that nine years after the critical habitat designation, NMFS issued its July 2014 *Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-Run Chinook Salmon and Central Valley Spring-Run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead*.⁶ For the Calaveras River, the Recovery Plan recommends: “Develop and implement longterm [sic] year-round instream flow schedules and water temperature requirements that are protective of all steelhead life stages, including providing flows for upstream and downstream fish passage.”⁷ However, the draft EA/IS fails to analyze or discuss how designated critical habitat downstream of Bellota is protected. Specifically the EA/IS fails to analyze or discuss how upstream and downstream fish passage is provided given the absence of any flow requirements below Bellota in the draft HCP other than the management of the timing of flood control releases. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects this deficiency.

The HCP acknowledges that Central Valley fall-run and late-fall-run Chinook salmon are classified as Species of Concern and states: “

The proposed draft HCP area is within Essential Fish Habitat (EFH) for Pacific salmon pursuant to provisions of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). This designation includes Central Valley fall-/late- fall-run Chinook salmon. Though the historical presence of this race of salmon in the Calaveras River is unknown, the Calaveras River downstream of New Hogan Dam frequently maintains a connection with the Delta and ocean environment and is categorized as EFH.⁸

⁵ HCP, p. 38.

⁶ National Marine Fisheries Service, West Coast Region, *Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-Run Chinook Salmon and Central Valley Spring-Run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead*, Sacramento, California July 2014, p. 331.

⁷ *Id.*, pp. 20 and 161.

⁸ HCP, pp. 38-39.

However, the draft EA/IS fails to analyze or discuss how this Essential Fish Habitat downstream of Bellota can be protected given the absence of any flow requirements other than the timing of flood releases. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that corrects this deficiency.

The degraded state of the Calaveras River has been highly controversial. In December of 2005, CSPA, Watershed Enforcers, San Joaquin Audubon Society and Committee to Save the Mokelumne filed a *Public Trust, Waste and Unreasonable Use and Method of Diversion Complaint* with the State Water Board.⁹ The State Water Board conducted a site inspection in October 2006 and placed the complaint in abeyance pending completion of an HCP. Given the failure of the draft EA/IS to acknowledge or discuss the issues raised in the complaint and degree of controversy surrounding the degraded condition of the Calaveras River, SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR.

II. The draft EA/IS does not evaluate sufficient alternatives.

Both NEPA and CEQA require the analysis of reasonable alternatives to the Proposed Action (NEPA) or the Proposed Project (CEQA). The draft EA/IS evaluates only two alternatives: the No Action Alternative and the Proposed Action/Proposed Project.

The HCP explains that NMFS and SEWD considered several alternatives to covered actions under the HCP, explaining: “The HCP Handbook suggests that alternatives to the proposed activities be explored to assure agencies and the public that all reasonable choices were considered. Several alternatives were considered but dismissed.”¹⁰

The alternatives that the HCP discusses include a No Action Alternative; an alternative under which flashboard dams would be installed later than April 15; an alternative that would include “artificial” adult *O. mykiss* and Chinook migration flows; an alternative that would include “artificial” juvenile *O. mykiss* and Chinook migration pulse flows; and an alternative that would which would move the SEWD intake from Bellota to a location closer to the Dr. Joe Waidhofer Water Treatment Plant.¹¹

The HCP proposes to partly mitigate for the blockage of downstream passage at flashboard dams by notching them. The HCP dismisses post-April 15 annual flashboard installation because it would interfere with the irrigation uses that the Calaveras River serves. It is arguable that an alternative would not rise to the level of a reasonable alternative under NEPA or CEQA.

Moving the SEWD intake downstream from the existing intake at Bellota, thus increasing the length of the permanently waterer stream channel, would not solve the greater problem of lack of connectivity between the San Joaquin River and the Calaveras River upstream of Bellota Weir. The limited benefit of such an alternative makes it unreasonable.

⁹ This complaint is attached to CSPA’s comments on the HCP, which CSPA is submitting simultaneous to these comments on the EA/IS.

¹⁰ *Id.*, p. 146.

¹¹ HCP, pp. 146-155.

Upstream and downstream migration flows released from storage are feasible alternatives that are reasonable. It would likely to make sense to analyze upstream and downstream migration flows under a single NEPA/CEQA alternative. It is not reasonable to devote zero stored water to a fisheries HCP, particularly in a watershed where storage is about double average annual runoff,¹² and where additional future diversions for groundwater recharge are explicitly planned. (*See* Section VI below). The arguments in the HCP against the pejoratively labelled “artificial” migration flows are unpersuasive, particularly because the analysis that purports to support these arguments limits evaluation to limited arbitrarily selected flow volumes. SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR with an alternative (or alternatives) that includes both upstream and downstream migration flows, and that evaluates a range of options for such flows.

Finally, an alternative that the HCP does not discuss is use of the Old Calaveras River channel as rearing habitat and as a means to convey a year-round flow from New Hogan Dam to the confluence of the San Joaquin River. The Old Calaveras River channel has the potential to provide rearing habitat, particularly for juvenile salmon, that Mormon Slough and the Stockton Diverting Channel do not provide. Neither the EA nor the HCP contemplate such a use, writing off the Old Calaveras River solely as a means to convey water for irrigation and groundwater recharge. A new NEPA/CEQA document should evaluate an alternative that would restore and use the Old Calaveras River channel as salmonid habitat. In addition, the HCP and the draft EA/IS do not even consider, let alone analyze, a year-round flow in the length of the Calaveras River. The city of Stockton is deprived of a living river for most of the year in most years.¹³ SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that analyzes the use of the Old Calaveras River channel as restored salmonid habitat. As part of this alternative, the EIS/EIR should evaluate use the Old Calaveras River channel as a means to convey a year-round flow into and through the city of Stockton.

III. The draft EA/IS unlawfully accepts degraded conditions as a baseline and finds effects less than significant because it compares the Proposed Action/Proposed Project only to the degraded baseline.

The draft EA/IS finds that there are no significant impacts of the Proposed Action/ Proposed Project because the draft EA/IS limits the evaluation of the Proposed Action/Proposed Project to the incremental changes from the No Action Alternative. This incremental analysis ignores the degraded baseline condition, whose details both the HCP and the draft EA/IS document extensively. Thus, the draft EA/IS finds that there are likely no significant impacts of the Proposed Action/ Proposed Project, and justifies the selection of an EA/IS as the appropriate level of environmental review rather than the more rigorous review of an EIS/EIR.

The HCP describes as many as 194 unscreened diversions in the lower Calaveras River watershed that the HCP does not propose any specific measures to screen.¹⁴ In addition to its large facilities at the head of Old Calaveras River Channel and Bellota Weir, SEWD owns and/or

¹² HCP, p. 22; HCP Appendix B, p. 2.

¹³ See further discussion below.

¹⁴ HCP, p. 114.

operates forty-three smaller diversion structures in the Calaveras River watershed between New Hogan Dam and the San Joaquin River.¹⁵ The HCP specifically promises that SEWD will make fish passage improvements at five of them. The ongoing operation of the remaining thirty-eight structures that SEWD proposes to continue under protection of an 50-year Incidental Take Permit issued in response to the HCP is in itself a significant impact that requires an EIS/EIR.¹⁶

Attributing ongoing project impacts to the “baseline” and excluding those impacts from evaluation as to their significance is arbitrary in failing to account for the impact of continued operations of the existing dams and operations. The same is true for the analysis under the ESA. The evaluation of take cannot simply consider whether the Proposed Action will make the existing situation better or worse. It must consider the cumulative effects of past, present and future actions, and account for ongoing actions in the analysis. *See American Rivers v. Federal Energy Regulatory Commission*, 895, F.3d 32, (2018) at 47 and 55.

IV. In addition to physical obstruction of fish passage by SEWD facilities, there are additional significant impacts of the Proposed Action/Proposed Project for which an ITP will be issued and that thus require issuance of an EIS/EIR.

A. SEWD’s operations will continue to block fish passage by diverting water for storage, for irrigation and for municipal and industrial use, thus leaving inadequate flow for salmon and steelhead to migrate.

The draft EA/IS and HCP acknowledge that migration of salmonids into and out of the Calaveras River is limited to flood releases and spills. However, the draft EA/IS and HCP don’t show regulated flow downstream of Bellota in terms of its frequency. This would show decision makers just how much SEWD’s operations limit salmonid migration, both under current conditions and as envisioned under operations covered by the HCP. As stated, the draft EA/IS does not provide essential data, and decision makers must struggle to evaluate the impacts.

An indicator of the ongoing impact of SEWD’s operations on salmonids in the Calaveras River is the limited number of years salmon spawn in the river. The HCP notes:

Chinook salmon are only present in years when there are early flow events (i.e., November-December) that provide access into the spawning reach upstream of Bellota. Since monitoring began in 2002, there have only been three such years (2005, 2006, and 2011) and juvenile monitoring from 2012 is not yet complete so estimates are not available.¹⁷

Table 15 in the HCP provides some sense of impacts to juvenile Chinook salmon. Substantial numbers migrated downstream in May and June.¹⁸ Because of lack of flood flows in

¹⁵ See HCP, Table 7, pp. 53-54.

¹⁶ NEPA requires only the potential for significant impacts as the threshold for requiring an EIS. (40 C.F.R. § 1508.18). A CEQA lead agency must prepare an EIR if there is “substantial evidence” that a project “may have a significant effect on the environment.” (CEQA Guidelines at § 21082.2, subs. (a) & (d)).

¹⁷ HCP, p. 154, fn. 23.

¹⁸ *Id.*, p. 123.

the very dry spring of 2007, these late downstream migrant were likely entrained into a diversion or stranded in Mormon Slough or the Stockton Diversion Channel. Similar numbers of downstream salmon migrants show up in May and June of the dry year 2012.

The HCP will provide no additional flows to reduce take or to mitigate the loss of these fish. Rather, as discussed below, the frequency of flows that would aid migration into and out of the spawning and rearing reaches of the lower Calaveras River will likely be reduced by additional development for groundwater recharge and other consumptive uses over the 50-year period of the HCP.

SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that analyzes the significant present and long-term future impact of limiting migration flows for salmonids into and out of the Calaveras River. The draft EIS/EIR must also present the necessary information to support this analysis.

B. The Proposed Action/Proposed Project will permanently block access for salmon and steelhead to the Old Calaveras River channel, eliminating nineteen miles of habitat.

One of the main conservation measures of the HCP is the construction of new headworks from the Calaveras River to the Old Calaveras River channel. These headworks will block “entrainment” of salmonids into the Old Calaveras River channel.¹⁹ The HCP and draft EA/IS describe the exclusion of salmonids from the Old Calaveras River channel solely as a benefit. The draft EA/IS does not disclose that constructing the headworks is a substantial choice to permanently eliminate salmonid rearing habitat. This habitat is superior to Mormon Slough and the Stockton Diverting Channel, into which the Calaveras River has been routed for solely for flood-control and water supply. The impact of permanently eliminating this habitat is not disclosed in the draft EA/IS. The impact is likely significant, and thus warrants analysis in an EIS/EIR.

C. The Proposed Action/Proposed Project will exacerbate the effects/impacts of identified impairing pollutants and other constituents by depriving the Lower Calaveras River of critical dilution flows.

The draft EA/IS states that water quality parameters in the lower Calaveras River have been tested and compared to Basin Plan Water Quality Objectives and the California Toxics Rule to assess potential impairment to the designated beneficial uses of the watershed. It further states that Tetra Tech found that several water quality parameters could be less than optimal (i.e., coliform bacteria, nutrient concentrations and subsequent eutrophication, dissolved oxygen and temperature). All other water quality parameters were within acceptable limits.²⁰

The draft EA/IS fails to disclose or address the fact that the Calaveras River is identified as legally impaired, pursuant to the federal Clean Water Act, and incapable of meeting identified beneficial uses because of a number of pollutants. The October 3, 2017 California 303(d) list

¹⁹ *Id.*, p. 97.

²⁰ Draft EA/IS, pp. 93-94.

identifies the Calaveras River from Bellota Weir to Stockton Diverting Canal is impaired because of toxicity (source unknown) and the reach from the Stockton Diverting Canal to the San Joaquin River is impaired because of chlorpyrifos (agriculture), diazinon (agriculture), indicator bacteria (urban runoff/storm sewers), mercury (numerous sources) and organic enrichment/low dissolved oxygen (source unknown).²¹

Water quantity and water quality are flip sides of the same coin. Increased flow serves to dilute constituent concentration and decreases in flow increase constituent concentration. The absence of a reasonable flow regime below Bellota (other than timing of flood control releases) likely exacerbates water quality and the bioavailability of pollutants.

The only water quality mitigation that the draft EA/IS only proposes is mitigation for water quality impacts from construction.²² SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that includes an analysis of the Project's impacts to the array of pollutants identified as impairing the beneficial uses of the Calaveras River.

V. The draft EA/IS does not analyze socioeconomic and environmental justice impacts.

The draft EA/IS states that the CHCP plan area encompasses the Lower Calaveras River from New Hogan Dam (RM 42) to the confluence where it enters the San Joaquin Delta (RM 0) via both the old Calaveras River channel and Mormon Slough/Stockton Diverting Canal routes.²³ The draft EA/IS dismissed a number of environmental issues from detailed analysis on the grounds that they would not be affected by the Proposed Action/Proposed Project.²⁴ The draft EA/IS states that it does not analyze socioeconomic impacts because “[t]here are no low-income, minority, or subsistence populations in the Project Area. Therefore, there would be no impact to socioeconomics and a detailed socioeconomic analysis for the Proposed Action is not warranted.”²⁵ Likewise, draft EA/IS states that it does not analyze environmental justice impacts because “[t]here are no low-income, minority, or subsistence populations in the Project Area. Therefore, there would be no impact to environmental justice.”²⁶

Contrary to draft EA/IS claims, Stockton and adjacent areas of San Joaquin County have significant disadvantaged populations. For example, Stockton has a 50% non-white population, 30-40% that speaks languages other than English, significantly exceeds the national poverty rate and has the sixth highest EIG Distressed Community Index score in the nation.²⁷ There is a large

²¹ Final 2014 and 2016 Integrated Report (CWA Section 303(d) List/305(b) Report), Category 5, Available at: https://www.waterboards.ca.gov/water_issues/programs/tmdl/2014_16state_ir_reports/category5_report.shtml

²² Draft EA/IS, p. 78.

²³ *Id.*, pp. 1-2.

²⁴ *Id.*, pp. 101-104.

²⁵ *Id.*, p. 109.

²⁶ *Id.*, p. 110.

²⁷ Information derived from <http://worldpopulationreview.com/us-cities/stockton-population/>, and from *The 2016 Distressed Communities Index*, available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/ResouretheDelta/RTD_211.pdf

homeless and subsistence fishing population. CSPA's Stockton office is on the banks of the Calaveras River. We frequently witness homeless individuals and families sheltering within the riparian corridor and under bridges from the confluence to the Highway 99 crossings of the Stockton Diverting Canal and Old Calaveras River channel. As these individuals frequently use the Calaveras to wash, bath or even consume water, they are disproportionately impacted by poor water quality and waterborne infections. We routinely see subsistence fishermen along these reaches. Over the years, we have also seen homeless individuals and families and subsistence fishermen along Pixley Slough/Bear Creek and in the Mormon Slough area. Moreover, these waterways attract disadvantaged populations for recreation, especially during hot summer days.

In failing to acknowledge socioeconomic and environmental justice impacts, the draft EA/IS is deficient. SEWD and NMFS should withdraw the draft EA and should prepare and circulate a draft EIS/EIR that includes an analysis of the socioeconomic and environmental justice impacts of the Proposed Action/Proposed Project to these low-income, minority, subsistence and homeless populations.

VI. The draft EA/IS fails to disclose reasonably foreseeable increases in future diversions, and proposes no mitigation for even further reduction in magnitude, timing and duration of flood releases.

The HCP describes how SEWD has implemented pilot conjunctive use projects and how it is implementing a “conjunctive use program”:

San Joaquin County is in a period of rapid growth, and the rate of growth is projected to continue to increase. The imperative to engage in regional planning and water use projects is accordingly increasing in importance. Potential conjunctive use operations have been identified as a viable opportunity to increase water supply reliability within SEWD boundaries, which is identified as part of the eastern San Joaquin groundwater basin. SEWD has implemented several pilot recharge projects, which confirm the viability of a conjunctive use program. SEWD is implementing a conjunctive use program that will optimize the efficiency and reliability of SEWD's surface water resources, including New Hogan supplies, and of local groundwater resources, and would help to mitigate the lowering of the groundwater table as a result of continuing overdraft in San Joaquin County.²⁸

It is unlikely the SEWD would increase groundwater recharge by reducing water deliveries to agricultural or municipal and industrial customers. Instead, it is reasonable to anticipate that the effort to “optimize the efficiency and reliability of SEWD's surface water resources” will involve SEWD's increased use of water currently released as flood flows or its use for recharge of water that it would otherwise store in New Hogan Reservoir. Either of these latter options will reduce the frequency, duration and/or magnitude of flood releases from New Hogan Reservoir. These flood releases are currently the only source of migration opportunities for salmonids into and out of the Calaveras River watershed. As proposed, the HCP intends to perpetuate the condition in which flood releases are the only source of migration opportunities

²⁸ HCP, p. 18.

for salmonids into and out of the Calaveras River watershed. Thus, the future reduction of flood releases will directly reduce migration opportunities for salmonids into and out of the watershed.

The EA/IS fails to disclose this impact to the migration opportunities of salmonids. It is likely that this impact will be significant. However, it is not possible to evaluate significance of this impact using the information presented in the EA/IS. This is because, as discussed above, the EA/IS does not present the current frequency, duration and magnitude of flood releases from New Hogan Reservoir.

SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that includes an analysis of the current and planned future frequency, duration and magnitude of flood releases from New Hogan Reservoir. The draft EIS/EIR should then evaluate the significance of the reasonably foreseeable reduction in flood flows from New Hogan Reservoir.

VII. The draft EA/IS does not acknowledge or discuss the public trust and fails to include a public trust analysis.

The draft HCP notes that the Bureau holds the water rights from the State Water Board and entered into a water supply contract with SEWD and CCWD for the entire yield of the project for the authorized purposes of use. The storage capacity behind New Hogan Dam is more than twice the unimpaired runoff of the Calaveras River Basin. Other than timing of flood control releases, the draft HCP provides no flows below Bellota to protect public trust resources. The words “public trust,” “reasonable use” or “unreasonable use” do not appear in either the draft EA/IS or the HCP. Indeed, the draft EA/IS and HCP would perpetuate an illegal status quo in violation of the California Constitution, California Water Code and the public trust doctrine.

The origins of public trust lie in Roman law conveyed forward in English common law and Spanish civil law and encoded in America through state and federal Supreme Court decisions. The public trust is the people’s property right in healthy rivers and aquatic ecosystems. In other words, the public trust is the common property right in healthy riverine ecosystems of all Californians that must be balanced against the consumptive rights of private interests.

As previously noted, California water rights are subject to the California Water Code and authority of the State Water Board. California Water Code § 85023 states, “the longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy...” The State Water Board has authority to amend an existing water right permit or license under various authorities, including by invoking: its reserved jurisdiction over permits under California Water Code § 1394; its continuing authority to prevent the waste, unreasonable use, or unreasonable method of use of water under the California Constitution, Article X, Section 2; or its continuing authority to protect public trust uses of water.

The State Water Board has the authority *and* affirmative duty to consider the public trust when making water allocation decisions, and to preserve and protect public trust resources that are affected by its decisions, so far as consistent with the public interest. (*Nat. Audubon Society*

v. Super. Ct. (1983) 33 Cal.3d 419, 426, 446-47.) “Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state’s public interest in the matter.” (*San Francisco Baykeeper, Inc. v California State Lands Comm.* (2015) 242 Cal.App.4th 202, 234.) Traditional public trust uses include fisheries, navigation, and waterborne commerce, including wildlife and water levels that are adequate to maintain wildlife habitat. (*Nat. Audubon, supra*, 33 Cal.3d at 426; see also *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) Consumption of water resources for other private and public uses, including agriculture and municipal supply, are not recognized public trust uses. (See *Nat. Audubon, supra*, 33 Cal.3d at 446-447; *San Francisco Baykeeper, supra*, 242 Cal.App.4th at 237-238.)

While there is no set “procedural matrix” for agency compliance with the public trust doctrine (*Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 576), “such actions should not be taken in some fragmentary and publicly invisible way,” and mere mitigation of trust impacts, without an accompanying public trust doctrine analysis, is insufficient. (*Baykeeper, supra*, at 234.) Thus, courts have found a cause of action to lie where “defendants have violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction” (*Juliana v. United States* (D. Or. 2016) 217 F.Supp.3d 1224, 1254) and “[t]o the extent the Board has failed to implement all of the flow objectives of the 1995 Bay-Delta Plan . . .” (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778-779).

The HCP envisions business as usual. Water diverters will continue to take water, leaving nothing to support fisheries below Bellota other than the management of the timing of flood control releases. If grants become available, SEWD is willing to undertake a number of improvements to flashboard dams and other impediments.

SEWD and NMFS should withdraw the draft EA/IS and should prepare and circulate a draft EIS/EIR that includes a public trust analysis. A public trust analysis would require a reasonable balancing of competing beneficial uses. Balancing is not simply a moment-to-moment decision on what constitutes the public trust or public interest and what a reasonable balance of competing beneficial uses might be. It requires an analytical framework, including the scientific method or basis employed to secure the necessary information to arrive at an informed decision. Balancing the public trust cannot be a black box. A credible and defensible benefit/cost analysis of a project would consider all of the environmental consequences, social effects and costs and benefits of water management alternatives, including both market and non-market effects, uncertainty and risk.

A public trust analysis must follow rigorous professional standards and methods of analysis. It must consider benefits and costs to both agricultural and urban uses, as well as commercial fishing and recreational uses. It must analyze benefits and costs to ecosystem services and contingent valuation or the value Californians place on a healthy ecosystem. It must analyze benefits and costs of alternatives to current water use like conservation, reuse and reclamation. It must also consider the constitutional mandate to put water to the fullest beneficial use and prevent the waste and unreasonable use of water.

VIII. Conclusion

For the reasons describe above, SEWD and NMFS should withdraw the EA/IS and should prepare and circulate a draft EIS/EIR. As recommended in CSPA's comments on the HCP, SEWD and NMFS should use the EIS/EIR to evaluate and implement revisions to the HCP.

Respectfully submitted,



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