

CALIFORNIA STATE LANDS COMMISSION
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Our 75th Year



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Russell Stein
Department of Water Resources
3500 Industrial Boulevard
West Sacramento, CA 95691

Subject: 2nd Administrative Draft Environmental Impact Report/Environmental Impact Statement (ADEIR/EIS) for the Bay Delta Conservation Plan

Dear Mr. Stein:

The California State Lands Commission (CSLC) staff has reviewed the subject 2nd ADEIR/EIS for the Bay Delta Conservation Plan (BDCP), which is being jointly prepared by the Department of Water Resources (DWR), U.S. Bureau of Reclamation (USBR), U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries Service (NMFS). DWR, as a public agency proposing to approve and implement a plan, is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The USBR, USFWS, and NMFS, as federal agencies planning actions that may significantly impact the quality of the human environment, are the lead agencies under the National Environmental Policy Act (NEPA) (42 U.S. Code 4321; 40 Code of Federal Regulations §1500 et seq.). The CSLC is a trustee agency because of its trust responsibility for projects that could directly or indirectly affect sovereign lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters. Additionally, since implementation of the BDCP involves work on sovereign lands, the CSLC will act as a responsible agency.

CSLC Jurisdiction and Public Trust Lands

The CSLC has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The CSLC also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6301, 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the Common Law Public Trust.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its

admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes and rivers, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

After reviewing the information contained in the 2nd ADEIR/EIS, CSLC staff has determined portions of the Project will be located on State-owned sovereign land in various waterways under the jurisdiction of the CSLC. Currently, the CSLC is listed in the ADEIR/EIS as a trustee agency; since the CSLC has jurisdiction over portions of implementation of the BDCP, please include the CSLC as a responsible agency as well. CSLC staff requests submittal of additional information such as detailed maps and engineering designs to enable CSLC staff to determine the exact components of the Project that will require a lease. Because a lease from the CSLC may be required for DWR to implement the Project on sovereign lands, please contact Wendy Hall (see contact information below) for further information about the extent of the CSLC's sovereign ownership and leasing requirements.

Please also be advised that the waterways involved in the Project are subject to a public navigational easement. This easement provides that the public has the right to navigate and exercise the incidences of navigation in a lawful manner on State waters that are capable of being physically navigated by oar or motor-propelled small craft. Such uses may include, but are not limited to, boating, rafting, sailing, rowing, fishing, fowling, bathing, skiing, and other water-related public uses.

Project Description

DWR, USBR, USFWS, and NMFS propose to approve and implement the BDCP in order to provide incidental take permits and authorizations to public water agencies¹ for covered activities and species in the Delta. Covered activities include:

- The operation of existing State Water Project (SWP) Delta Facilities;
- The construction and operation of facilities for the movement of water entering the Delta to the SWP or the Central Valley Project (CVP) pumping plants in the southern Delta;
- The implementation of conservation actions that have the potential to result in take of listed species under the Endangered Species Act.

¹ BDCP Public Water Agency proponents are as follows: Alameda County Flood Control and Water Conservation District, Zone 7; Kern County Water Agency; Metropolitan Water District of Southern California; San Luis & Delta Mendota Water Authority; Santa Clara Valley Water District; and Westlands Water District.

Environmental Review

CSLC staff requests that the DWR, USBR, USFWS, and NMFS consider the following comments on the BCDP's ADEIR/EIS:

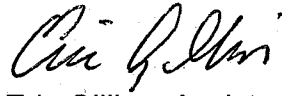
- Public Trust: When discussing the regulatory setting of the terrestrial biological resources, recreation and transportation chapters of the ADEIR/EIS, please add a section discussing the Public Trust Doctrine and its protections for the lands underlying navigable lakes and waterways, tidelands and submerged lands. Lands subject to protections of the Public Trust Doctrine must be water dependent or water related and benefit all the people of California, rather than a local municipality. Over time, the courts have shaped our understanding of the Public Trust Doctrine. The courts have found that uses of these public trust lands include uses connected with commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. When choosing between competing public trust consistent uses the CSLC uses its discretion to determine which use is in the best interest of the State.
- Navigation and Aquatic Invasive Weeds: CSLC staff supports the ADEIR/EIS consideration of the BCDP's aquatic invasive species control, particularly water hyacinth and Brazilian waterweed, as these species may impede navigation on the Delta's waterways.
- Commerce: CSLC staff supports the consideration of the BCDP's impacts to commercial shipping traffic in the Delta. As the ADEIR/EIS mentions, vessels conduct commerce using the Delta's waterways to access the Ports of West Sacramento and Stockton. Continuing to ensure that commerce is feasible on the Delta's waterways provides benefits to the people of California and should remain in the Final EIS/EIR.
- Recreation and Public Access: In addition to the ADEIR/EIS's consideration of impacts to public access of the shoreline of river and lakes, please consider the impacts to public access from the standpoint of boaters traveling on the Delta's waterways.

Thank you for the opportunity to comment on the ADEIR/EIS for the BDCP. As a responsible and trustee agency, the CSLC will need to rely on the EIR/EIS for the issuance of any amended or new lease as specified above and, therefore, we request that you consider our comments in the Draft EIR/EIS.

Please send copies of future Project-related documents, including the Draft EIR/EIS for staff's review and comment during the public review period. In addition, please send electronic copies of the Final EIR/EIS, Mitigation Monitoring and Reporting Program (MMRP), Notice of Determination (NOD), CEQA Findings and, if applicable, Statement of Overriding Considerations when they become available. Please refer questions concerning environmental review to Holly Wyer, Environmental Scientist, at (916) 574-2399 or via e-mail at Holly.Wyer@slc.ca.gov. For questions concerning CSLC leasing

jurisdiction, please contact Wendy Hall, Public Land Management Specialist, at (916) 574-0994, or via email at Wendy.Hall@slc.ca.gov.

Sincerely,



Eric Gillies, Assistant Chief
Division of Environmental Planning
and Management

cc: Wendy Hall, LMD, CSLC
Holly Wyer, DEPM, CSLC
Cy Oggins, DEPM, CSLC