May 27, 2008

South Feather River Power and Water Agency
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Re: *Letter of Intent for 2008 Water Transfer*

Dear Messrs. Glaze, Chapman, and Wilson:

Butte Environmental Council (BEC), a public benefit corporation representing 850 members, and the California Sportfishing Protection Alliance (CSPA) are submitting the following comments and questions for the *Letter of Intent for 2008 Water Transfer* (LOI). The proposed project (Project) is to transfer Feather River Water, up to 10,000 AF between May and June 30, 2008 to the State Water Project Contractors Authority. Possible buyers include Dudley Ridge Water District, the Kern County Water Agency, the Napa County Flood Control and Water Conservation District, the Metropolitan Water District of Southern California, the San Bernardino Valley Municipal Water District, the Antelope Valley East Kern Water Agency, the Palmdale Water District, and the Tulare Lake Basin Water Storage District

Environmental Review

BEC and CSPA suggest that the South Feather River Power and Water Agency (seller) should not be exempt from environmental review and should include the following topics in their environmental review:

- How is the seller able to obtain this much water for a transfer?
- Will land be fallowed in the seller's district? If so, how much?
- How many total acres of fallowed land are occurring due to water transfers in 2008? What are the cumulative impacts? This is only one of seven projects that are proposed in 2008 in Butte and Glenn counties. The proposed project, along with other 2008 projects both within and without Butte County, will create significant fallowing and, moreover, the projects, in their entirety, have the potential to cause dramatic changes to the northern Sacramento Valley.
- Multi-season biological surveys for the aquatic and terrestrial species within the seller's jurisdiction must occur. Habitat values are essential to many special status species that utilize this area including, but not limited to, Swainson's hawk, giant garter snake, bank

swallow, greater sandhill crane, salmon, bald eagles, etc. Because this portion of the county is part of a Habitat Conservation Plan/Natural Community Conservation Plan, surveys must be completed for all the species that will be in the HCP/NCCP before the seller considers adopting any project approvals.

- Multi-season biological surveys or umbrella environmental review for the Sacramento River and the Bay Delta must occur. Please provide details in the California Environmental Quality Act (CEQA) document. Habitat values are crucial to many special status species that utilize this area including, but not limited to, Swainson's hawk, giant garter snake, bank swallow, greater sandhill crane, bald eagle, salmon, Sacramento splittail, delta smelt, green sturgeon, etc. Additionally, since the Feather River flows into the Sacramento River, the federal CVP, will the seller complete NEPA review of the proposed Project? This must be done and circulated for public review.
- The Project is part of a much larger project(s) that has/have not been analyzed under CEQA and NEPA. The seller, under its former name, Oroville-Wyandotte Irrigation District, has closely collaborated with the Department of Water Resources (DWR) in the development of the Sacramento Valley Integrated Regional Water Management Plan (SVIRWMP). To date there hasn't been any programmatic or tiered environmental review that would create a scientific basis upon which the seller can arrive at a justifiable conclusion that the proposed Project has no adverse environmental effect. The public is owed full disclosure under CEQA and NEPA and the opportunity to comment on the myriad impacts that have not been divulged either at a programmatic or project level.
- How will increased flows in the main stem rivers impact species, habitat, and existing conditions during the months transfers are allowed through the delta? When this project is combined with the other transfer and fallowing projects (see Cumulative Impacts), the alteration of flows will be highly significant.
- How will the proposed project mitigate for probable third party impacts in the area of origin and the area(s) of delivery? Even DWR acknowledges that all transfers have the potential to impact third parties (Unresolved Issues http://www.swpao.water.ca.gov/transfers/index.cfm#Unresolved%20Issues). CEQA requires analysis and mitigation for impacts, yet the IS/ND does not address any of the probable impacts to the environment or other water users in the region of origin or the area of delivery.

Species Impacts

In answer to the potential impacts to species (Water Code Section 1727 (b)(2)), the seller states in the Petition for Temporary Transfer of Water/Water Rights that, "The beneficial uses of the stream include cold water habitat. Releases will be ramped up and down to prevent impacts to amphibians." How will this be monitored? What oversight of the monitoring and reports will occur? In addition, we believe the following impacts have not been considered.

Terrestrial Species

Flooded rice fields and irrigation canals in the Sacramento Valley can be used by the giant garter snake for foraging, cover and dispersal purposes. The IS/ND fails to comprehensively analyze the movements and habitat requirements for the federal and state-threatened giant garter snake. The snake gives birth from July to September, months that the Project would be implemented. If this Project proceeds without alteration or without the necessary environmental review in an

EIR/EIS, additional surveys must be conducted for the GGS prior to any alteration in water regime or landscape. Consultation with the U.S. Fish and Wildlife Service must also occur.

Avian Species
Bank swallows breed in California from April to August. With the Project planned to operate during the months allowed by the federal court (July through October), how will the river flows from the Project alone and when combined with the other projects (see Cumulative Impacts) impact this species? Since the transfers would require conveyance on the Sacramento River, this is a potentially significant impact.

The greater sandhill crane is a state threatened species that forages in the Project area. and the applicant has not only failed to disclose this fact, but there is no mention of the additional projects occurring in the region during 2008 (see Cumulative Impacts). This is a serious omission that must be corrected.

Aquatic Species
The pelagic organism declines have reached catastrophic levels in the Sacramento San Joaquin River Delta. The pumps that would move the transferred water operate in the southern portion of the Delta and create reverse flows in the San Joaquin river as noted in the Delta Vision Committee summary, "Water project operations… create a reverse flow on the Old and Middle rivers that bring the Delta smelt down to the pumps, rather than pushing them away from the pumps" (July 31, 2007). The reverse flows have caused direct and indirect impacts to listed Delta fish species through direct mortality (sucking fish into the pumps), disruption of the food chain (by pumping out the food chain organisms) and by disruption of regeneration migration navigation.

Numerous proposals to sell water entitlements claimed by Sacramento Valley Water contractors will require increased export of river water through the pumps located in the Sacramento San Joaquin Delta. The increased demand for pumping operations coincides with recognition that Delta Smelt in the Sacramento San Joaquin Delta are being negatively impacted by reductions in outflow from the Estuary and entrainment to water diversions. [http://www.delta.dfg.ca.gov/gallery/dsmelt.asp] Delta Smelt is just one of several fishes of the delta watershed listed as threatened, endangered or "of concern."

FISH OF THE DELTA WATERSHEDS LISTED AS THREATENED, ENDANGERED OR "OF CONCERN"

Fish Species	Date Listed	Listing Entity	Status
Chinook salmon_Winter-run	09-22-89	State (DFG)	Endangered
Sacramento River Winter-run Chinook salmon	02-03-94 08-29-05	Federal (NMFS)	Endangered
Chinook salmon_Spring-run	02-05-99	State (DFG)	Threatened
Chinook salmon_Spring-run Central Valley Spring-Run ESU	11-15-99 08-29-05	Federal (NMFS)	Threatened
Delta Smelt	12-09-93	State (DFG)	Threatened
Delta Smelt	03-05-93	Federal (FWS)	Threatened
Steelhead-Central Valley ESU	05-18-98 02-06-06	Federal (NMFS)	Threatened

Green sturgeon_southern DPS	07-06-06	Federal (NMFS)	Threatened
Sacramento splittail	02-08-99	Federal (FWS)	Species of concern
Longfin smelt	1995	State (DFG)	Species of concern
Sacramento perch	1995	State (DFG)	Species of concern
River lamprey	1995	State (DFG)	Species of concern

[Source: California Department of Fish and Game list of State and Federally Listed Endangered and Threatened Animals of California, October 2007, available at: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/TEAnimals.pdf.

Delta Smelt

The Delta smelt is a small fish listed under the ESA in 1993 as threatened. [58 Fed. Reg. 12,863] The Delta was designated under the ESA in 1994 as "critical habitat" for the fish. [Figure 1; 59 Fed. Reg. 65,256] As a result, federal actions that are likely to impact the species adversely must undergo consultation with the FWS on the effects of the actions. Under the ESA, these consultations result in the issuance of biological opinions (BiOp) by the FWS.

The Natural Resources Defense Council (NRDC) and other environmental groups filed a lawsuit in 2005 challenging the BiOp for the long-term coordinated operations of the SWP and the CVP; *Natural Resources Defense Council v. Kempthorne.* The BiOp found that pumping from the Delta into the SWP and CVP systems did not jeopardize the continued existence of the Delta smelt, and did not adversely modify the fish's designated critical habitat. The BiOp allowed the "incidental take" of smelt at the water pumps, by water-year type, based upon historical smelt collection data, modeling, and estimated fish per volume of water diverted. The FWS's "no-jeopardy" determination was based on the premise that anticipated take would be "at or below historic take levels."

In May 2007, however, federal District Court Judge Oliver W. Wanger ruled on a summary judgment motion in the *Natural Resources Defense Council v. Kempthorne* case that the Delta smelt "is undisputedly in jeopardy as to survival and recovery." The court found in its subsequent December 14, 2007 ruling that "there is no firm and reliable total population estimate for the Delta smelt and there never has been." [December 14 Findings of Fact] In light of recent data suggesting that smelt populations have declined significantly to their lowest reported numbers, the court found the existing (and unquantified) take limits at the pumps inadequate, "unrealistically high," and potentially "approach[ing] the current population numbers of the species as a whole." The court also found that the BiOp impermissibly relied on uncertain and unenforceable mitigation measures, and failed to consider the possible effects that climate change might have on the smelt's habitat.

In the December 14, 2008 order, the court issued an injunction to address the "imminent peril to the survival of the Delta smelt and adverse effects on its critical habitat," conditioning operations of the SWP and CVP on various requirements. Most importantly, the order specifies "Flow Restrictions," based on ensuring that the Old and Middle Rivers (the OMR), which are part of the Delta complex, do not flow towards the pumps over prescribed levels established to prevent the Delta smelt from becoming entrained at the SWP and CVP pumps. Pumping can induce flows in the OMR to flow towards the pumps, which is the reverse of their typical direction.

All parties agreed that OMR flows towards the pumps of 6,000 cubic feet per second (cfs) or greater put the smelt at great risk. NRDC advocated for zero flow in the OMR towards the pumps, a condition that would have sharply curtailed the pumps' hours of operation. The Court directed the SWP and CVP operators to maintain OMR flows towards the pumps within a range of 750 to 5,000 cfs during the prescribed periods, as summarized in Table 1, below:

Table 1

Stage	Applicable Time Period	Delta Smelt Being Protected	OMR Flow Restrictions
1	Up to 10 days within the period December 25 through Jan. 15; high turbidity as trigger; operative for "winter pulse flows"	Migration from Suisin Bay upstream in the Delta	< 2,000 cfs
2	From no later than Jan. 15 until the onset of spawning	Pre-spawning adults	< 5,000 cfs
3	From the onset of spawning until as late as June 20	Larvae and juveniles	750-5,000 cfs, set weekly by FWS
4	From no later than May 1; for 31 days thereafter	Larvae and juveniles	Per Vernalis Adaptive Management Plan; replaces Stage 3 while occurring

Splittail

The IS/ND fails to disclose or analyze potential impacts to the Sacramento splittail, a federal species of concern. This is a serious omission that must be corrected. Peter Moyle, PhD. et al. found that significant take occurs at the SWP and CVP fish salvage operations in the southern part of the Delta from May through mid-July (17). The number of salvaged splittail seem to increase as outflows to the bay decrease and exports escalate (17). He concludes that, "Splittail larvae and juveniles are entrained not only by the CVP and SWP pumps but probably by the Antioch and Pittsburgh Power Plants and other diversions in the Delta. There is still a need to understand what impact these diversions have, if any, on splittail populations. Impacts are most likely to be significant in dry years when a higher percentage of the water is diverted and splittail populations are depleted" (40). Exporting the proposed Project water between May and November could have significant impacts on the splittail. Analysis of the seller's 10,000 AF and the cumulative impacts of the 178,447 AF from this region (see below) must occur.

Lonfin Smelt

The IS/ND fails to disclose or analyze potential impacts to the longfin smelt, a species that is undergoing review for federal listing. This is a serious omission that must be corrected. Restrictions on pumping from the Delta will expand under the California Department of Fish and Game's recommended spring and summer measures to immediately protect Longfin smelt.

> **The Department's Recommendation – Spring and Summer Measures to Immediately Protect Longfin Smelt Using a Longfin Smelt Risk Assessment Matrix**. This option requires the SWP and the CVP to make potential operational curtailments during the next 180 days if requested by the Department based on a "Longfin Smelt Risk Assessment Matrix" (LSRAM) incorporating scientific data

collected in real-time showing the potential for longfin smelt which are at specified locations in the Delta to be drawn to the pumps or "entrained." This option makes clear that if the emergency regulation is extended beyond the standard 180-day period (under the Administrative Procedures Act it may be extended for two 90-day periods) additional measures need to be included at that time to protect longfin smelt during the 2008-2009 winter (McCamman 2008).

All of the fish species in the delta watershed listed as threatened, endangered, or "of concern" and the habitat they require are being impacted by the operation of the south delta pumps as well as the artificial flow regime required to facilitate pumping operations. With the Project plan to operate during the months allowed by the federal court (July through October), how will the river flows from the Project alone and when combined with the other projects (see Cumulative Impacts) impact the fish species? Since the transfers would require conveyance on the Sacramento River and through the delta, this is a potentially significant impact.

Overview
Water code 1727 requires that the temporary transfer not result in injury to any other legal user or unreasonably affect fish, wildlife, or other in-stream beneficial users. What is missing from the LOI and Petition is a list of possible impacted species and an explanation regarding how species impacts will be monitored and reported to the wildlife agencies and the public. This must be part of a management plan for species. Moreover, the seller has failed to provide any depiction of not only the impacts to their lands, but has also impacts from the other 2008 projects, so that the public has a sense of the possible impacts from the fallowing. Added to this deficiency is the failure to analyze that other districts in the area are planning their own water transfer and fallowing projects (see Cumulative Impacts), which could easily exacerbate negative conditions for special status species.

In addition to an EIR/EIS for the project, a management plan must be prepared for special status species prior to the proposed Project's commencement.

Alternatives

"Compliance with CEQA is not optional." (*Stanislaus Audubon Society, supra*, 33 Cal.App.4th at 159, fn. 7.) Preparation of an EIR is not excused by claims that "an EIR costs a hell of a lot of money," or "is an exercise in futility." (*Id.*) Even if the seller or its experts are of the "opinion that preparation of an EIR is just another big added expense, without commensurate benefits, compliance with CEQA is not optional." (*Id.*). An EIR, as opposed to a negative declaration, would contain analysis of project alternatives, including a "no project" alternative. (Pub. Resources Code § 21100(b)(4); and CEQA Guidelines § 15126(d).)[1] An EIR would consider different water options and mechanisms for obtaining it, which could significantly reduce the Project's impacts while still meeting the goals of the Project. In addition, an EIR would necessarily contain further analysis on biological, air quality, hydrological, land use, noise, cumulative, and growth-inducing impacts.

[1] An EIR must describe a reasonable range of alternatives to the project, or its location, that could feasibly obtain the Project's objectives. The EIR must evaluate the merits of each alternative and must include a no-project alternative.

The Council on Environmental Quality regulations (40 CFR 1502.14) require a rigorous and objective alternatives analysis that explore and evaluate all reasonable options under NEPA. As noted above, there are no alternatives presented for consideration.

An EIR/EIS must be required for the Project.

Growth Inducing Impacts

Extracting water from areas of origin for SWP and CVP agricultural and urban contractors is not encouraging the CVP and the SWP to begin working within the limited means of California's water supplies. The current efforts to correct years of mismanagement of California's water and the impacts on countless aquatic species, have forced the state to confront the maelstrom from competing interests vying for an ever, smaller piece of the water pie.

This project has the potential to cause numerous growth-inducing impacts. Section 21100(b)(5) of CEQA requires that an EIR discuss the growth-inducing impacts of a proposed project. A project could have a growth inducing impact if it could:

- Foster economic or population growth, or construction of additional housing;
- Remove obstacles to population growth, for example, developing service areas in previously unserved areas, extending transportation routes into previously undeveloped areas, and establishing major new employment opportunities;
- Encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.

Removing water from currently healthy watersheds and basins to continue supplying water to agricultural interests in desert portions of the state and depleted urban areas is an act of folly at best and of immorality and corruption at worst. This type of transfer will alter the economic and environmental viability in the areas of origin and will not encourage the receiving areas to practice holistic management of the resources found in their own region, nor will it prepare them for periods of drought. The State of California must learn to limit the growth inducing measures encouraged by programs of this nature. The competing water interests in this state must learn to conserve water, and like any good manager, the state must require water users to live and work in a manner conducive to economic and environmental integrity in each region.

Cumulative Impacts

The LOI and Petition fails to disclose that the water transfer is one of several transfers likely to occur in 2008. This is a glaring omission. Additionally, the assertions and conclusions reached in the Mandatory Findings of Significance section are ludicrous in light of the collapse of the pelagic fish and salmon populations (see Fish section above).

There is the potential to fallow up to 47,449 acres and sell 178,447 AF of water, including the sellers water, in Butte and Glenn counties. How will the cumulative impacts be analyzed and who will conduct the analysis? How many other districts in California, the Sacramento Valley, or even the region surrounding Butte County are contemplating water transfers? Who is analyzing the cumulative impacts from all the transfers in the areas of origin and the areas of delivery?

BEC is aware of the following districts (below) that are also planning surface water sales and fallowing in 2008, but it appears from the IS/ND that was used for the Biggs West Gridley

project documents, that 360,000 AF may actually be transferred from the Sacramento Valley in 2008

Agency	Water Sold (AF)	Land Fallowed (acres)
Biggs West Gridley	14,642	4,437
Browns Valley Irrigation District	3,100	?
Butte Water District	18,455	3,121
Glenn Colusa Irrigation District	85,000	25,000
Richvale	17,250	5,800
Western Canal	30,000	9,091
Total	168,447	47,450

A programmatic EIR/EIS is required to analyze the cumulative impacts from the 2008 water sales. The sellers have participated in numerous planning efforts with the DWR to augment the state water supply. Unfortunately neither DWR nor any other collaborating agency has undertaken a partial, much less a comprehensive, environmental review of these plans. Consequently, there is no "tiering" of environmental studies upon which the seller may reference their analysis. The absence of prior environmental analysis thwarts the explicit purpose of CEQA/NEPA - to allow public agencies and elected officials to make informed choices with regards to the possible adverse impact of their decisions on the environment.

BEC and CSPA request notification of any meeting that addresses this Project or any other project by the seller that requires any consideration of NEPA and/or CEQA. In addition, please send any additional documents that pertain to this project.

Sincerely,

B. Vlamis

Barbara Vlamis, Executive Director
Butte Environmental Council

Cc: Michael Jackson, Esq.

References

Delta Vision Committee, 2007. Summary. http://deltavision.ca.gov/DV_Committee/July2007/DVC_Meeting_Summary_073107.pdf]

McCamman, John 2008. *Longfin smelt Agenda Item 8(B) for the February 7, 2008 Fish and Game Commission Meeting – Department of Fish and Game Recommendation on a Proposed Emergency Regulation Pursuant to Fish and Game Code § 2084*. State of California Memorandum, February 4, 2008. http://www.dfg.ca.gov/news/pubnotice/docs/08smelt/Smelt-Memo.pdf

Moyle, Peter et.al. 2004. *Biology and Population Dynamics of Sacramento Splittail (Pogonichthys macrolepidotus) in the San Francisco Estuary: A Review***.** San Francisco Esturay and Watershed Science.

Attachment A

Butte County HCP/NCCP Initial Covered Species
(Selected by the Stakeholder Committee.. A more exhaustive list may be available as of March 14, 2008.)

Amphibians
California Red-legged Frog
California Tiger Salamander
Foothill Yellow-legged Frog
Western Spadefoot Toad

Reptiles
California Horned Lizard
Giant Garter Snake
Northwest Pond Turtle

Birds
American Peregrine Falcon
Bald Eagle
Bank Swallow
California Black Rail
Greater Sandhill Crane
Swainson's Hawk
Tri-colored Blackbird
Western Burrowing Owl
Western Yellow-billed Cuckoo
White-Tailed Kite
Yellow-breasted Chat

Fish
Central Valley Steelhead
Chinook Salmon Spring Run
Chinook Salmon Winter Run
Chinook Salmon Fall Run
Green Sturgeon
River Lamprey
Sacramento Splittail