

**From:** [Tom Birmingham](#)  
**To:** ["Johnny Amaral \(Westlands\)"](#)  
**Cc:** ["David L. Bernhardt"](#)  
**Subject:** FW: Executive Order  
**Date:** Monday, November 28, 2016 8:45:12 PM  
**Attachments:** [Executive Ordertyposfixed.docx](#)

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Please call me regarding the attached document on Tuesday morning.

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**From:** Bernhardt, David L. [mailto:DBernhardt@BHFS.com]  
**Sent:** Monday, November 28, 2016 6:37 PM  
**To:** Thomas W. (Tom) Birmingham Esq. <[tbirmingham@westlandswater.org](mailto:tbirmingham@westlandswater.org)>  
**Cc:** Johnny Amaral <[jamaral@westlandswater.org](mailto:jamaral@westlandswater.org)>  
**Subject:** Re: Executive Order

Tom: Given our discussion, I have fixed the typos and shortened a sentence, but other than that it is as drafted.

On Nov 27, 2016, at 10:54 PM, Tom Birmingham  
<[tbirmingham@westlandswater.org](mailto:tbirmingham@westlandswater.org)> wrote:

Johnny and David,

Attached is a draft executive order. Please review it and let me know your thoughts.  
David, I am particularly interested in your reaction.

Tom  
<Executive Order.docx>

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## EXECUTIVE ORDER

### ADVANCING THE GOALS OF PROVIDING WATER FOR HUMAN NEEDS AND EFFECTIVELY PROTECTING LISTED SPECIES IN CALIFORNIA

A growing body of evidence demonstrates that the Bureau of Reclamation's operations of the Central Valley Project and the California State Water Project have been unreasonably constrained by implementation of the biological opinion issued by the United States Fish and Wildlife Service, dated December 15, 2008, regarding the coordinated operation of the Central Valley Project and the State Water Project and the biological opinion issued by the United States National Marine Fisheries Service, dated June 4, 2009, regarding the long-term operation of the Central Valley Project and the State Water Project, without any apparent benefit for the species sought to be protected by these biological opinions. There is also a growing body of evidence that demonstrates the implementation of these biological opinions have had profound negative impacts on the human environment, including groundwater overdraft, degraded air quality, and loss of habitat of other listed species, and profound negative impacts on the economy of the State of California and of the San Joaquin Valley, in particular.

To achieve a more reasonable balance between efforts to supply water for human needs and to more fully realize the benefits of actions to protect listed fish species dependent on the Sacramento-San Joaquin Rivers Delta, the Federal Government should design its policies and programs to reflect the best understanding of how operations of the Central Valley Project and the California State Water Project affect listed species. The Federal Government should impose actions intended to protect species from the threat of extinction or adverse modification of their critical habitat only when there is a clear relationship between the operations of the Projects and threatened jeopardy or adverse modification of critical habitat. By improving the effectiveness and efficiency of the Endangered Species Act's application to the Central Valley Project and the California State Water Project, listed fish species will be better protected from the risk of extinction and water supplies for human needs will be limited

only in those circumstances where science demonstrates the need to limit those supplies is necessary.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States, I hereby direct the following:

Section 1. Management of Pumping to Achieve Maximum Reverse Flow in Old and Middle Rivers.

(a) In implementing the provisions of the December 15, 2008, Delta smelt biological opinion and the June 4, 2009, salmonid biological opinion, the Secretary of the Interior and the Secretary of Commerce shall not restrict pumping at the W.C. "Bill" Jones Pumping Plant or the Harvey O. Banks Pumping Plant to achieve reverse flow in Old and Middle Rivers at a rate less negative than the most negative reverse flow rate allowed under the applicable biological opinion, unless a less negative reverse flow is required to avoid a population level effect on the relevant species that would jeopardize the continued existence of that species.

(b) In implementing the directives in section (a), the Secretary of the Interior and the Secretary of Commerce shall base their decisions on the best scientific and commercial data available and shall only restrict pumping at the W.C. "Bill" Jones Pumping Plant or the Harvey O. Banks Pumping Plant to achieve reverse flow in Old and Middle Rivers less negative than the most negative reverse flow rate allowed under the applicable biological opinion when those data establish a statistically significant relationship between operations of the pumping plants at the most negative reverse flow rate allowed under the applicable biological opinion and a population level effect that would jeopardize the continued existence of the species. If the Secretary of the Interior or Secretary of Commerce determines to manage rates of pumping at the pumping plants to achieve a reverse flow rate less negative than the most negative reverse flow rate allowed under the applicable biological opinion, the Secretary shall explain in writing why the decision to manage reverse flow at a rate less negative than the most negative reverse flow rate allowed under the biological opinion is necessary to avoid a population level effect that would jeopardize the continued existence of the species.

(c) Pursuant to the adaptive management protocols described in the December 15, 2008, Delta smelt biological opinion and the June 4, 2009, salmonid biological opinion, the Secretary of the Interior and the Secretary of Commerce, shall evaluate and shall authorize the W.C.

“Bill” Jones Pumping Plant and the Harvey O. Banks Pumping Plant to operate at levels that result in Old and Middle River flow rates more negative than the most negative reverse flow rate prescribed by the applicable biological opinion to capture peak flows during storm-related events if such operations would not result in a population level effect that would jeopardize the continued existence of the species.

## Section 2. Subsequent Consultations.

(a) To enable a thorough evaluation of reasonable and prudent alternatives imposed by the December 15, 2008, Delta smelt biological opinion and the June 4, 2009, salmonid biological opinion, any consultation or reconsultation conducted pursuant to Section 7 of the Endangered Species Act concerning operations of the Central Valley Project and the California State Water Project shall be based on a biological assessment that describes as the proposed action project operations that are consistent with California State Water Resources Control Board Order D-1641.

(b) Any assessment of proposed reasonable and prudent alternatives shall be based on the best scientific and commercial data available, and a decision to offer a reasonable and prudent alternative shall be based on a showing that the reasonable and prudent alternative is designed to avoid a population level effect resulting from the proposed action that would jeopardize the continued existence of the species or cause adverse modification of critical habitat of the species. The decision to offer a reasonable and prudent alternative shall be based on a scientific methodology for which: (1) the theory or technique in question can be and has been tested; (2) the theory or technique has been subjected to peer review and publication; (3) the potential error rate is known; (4) standards controlling its operation exist and are maintained; and (5) there is widespread acceptance within a relevant scientific community.

(c) In furtherance of the policy established by Section 2(c)(2) of the Endangered Species Act (16 U.S.C. 1531 (c)(2)), that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species, in any consultation or reconsultation on the operations of the Central Valley Project and the State Water Project, the Secretary of the Interior and the Secretary of Commerce shall ensure that any public water agency that contracts for the delivery of water from the Central Valley Project or the State Water Project that so requests shall:

1. Have routine and continuing opportunities to discuss and submit information to the action agency for consideration during the development of any biological assessment;
2. Are informed by the action agency of the schedule for preparation of a biological assessment;
3. Are informed by the consulting agency, the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, of the schedule for preparation of the biological opinion at such time as the biological assessment is submitted to the consulting agency by the action agency;
4. Receive a copy of any draft biological opinion and have the opportunity to review that document and provide comment to the consulting agency through the action agency, which comments will be afforded due consideration during the consultation;
5. Have the opportunity to confer with the action agency and applicant, if any, to identify one or more reasonable and prudent alternatives for consideration by the consulting agency; and
6. Where the consulting agency adopts a reasonable and prudent alternative be informed of:
  - (A) how each component of the alternative is essential to avoid jeopardy or adverse modification of critical habitat and the scientific data or information that supports each component of the alternative
  - (B) why other proposed alternative actions that would have fewer adverse water supply and economic impacts are inadequate to avoid jeopardy or adverse modification of critical habitat.

### Sec. 3. General Provisions.

(a) To execute the policy directives set forth in sections 1 and 2 of this order, the Secretary of the Interior and the Secretary of Commerce shall, within 30 days of the date of this order and thereafter as necessary, issue guidance to assist agencies in implementing this order.

(c) This order may be enforced at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents to the extent permitted by law.

DONALD J. TRUMP

THE WHITE HOUSE