



February 28, 2019

Mary L. Kendall
Inspector General
U.S. Department of the Interior
Office of the Inspector General
1849 C Street, NW – Mail Stop 4428
Washington, D.C. 20240

Dear Inspector General Kendall:

We write to call your attention to the troubling conduct of Acting Interior Secretary David Bernhardt. Recent reports indicate that Mr. Bernhardt violated the executive branch ethics pledge by participating in matters he lobbied on for a significant former client. Failure to investigate his apparent violations of the law will encourage high-ranking political appointees like Mr. Bernhardt to continue promoting the interests of former clients at the public's expense. The Campaign Legal Center ("CLC") urges you to conduct a full investigation of these matters and refer any adverse findings for appropriate action.

Mr. Bernhardt was sworn in as Deputy Secretary of the Interior Department on August 1, 2017.¹ In this role, Mr. Bernhardt served as the Chief Operating Officer for the Department and second-in-command to the Secretary.² Mr. Bernhardt became Acting Interior Secretary on January 2,

¹ See Jesse Paul, *Colorado's David Bernhardt is sworn into post as deputy Interior secretary after contentious nomination*, DENVER POST (Aug. 1, 2017), <https://dpo.st/2FF6u4C>.

² See Press Release, Dep't of Interior, Secretary Zinke Applauds Nomination of David Bernhardt as Deputy Secretary of the Interior (Apr. 28, 2017), <https://on.doi.gov/2pdDesi>.

2019.³ When he entered government, Mr. Bernhardt signed the executive branch ethics pledge⁴ in a letter dated August 15, 2017.⁵ Pursuant to this pledge, Mr. Bernhardt committed not to participate, for two years, in any particular matter on which he lobbied as a registered lobbyist within the two years preceding his appointment,⁶ and affirmed that the pledge’s ethical obligations “are binding on me and are enforceable under law.”⁷ During his Senate confirmation hearing, he repeatedly stressed that “I believe that public trust is a public responsibility and that maintaining an ethical culture is important. I will fully comply with the ethics agreement that I have signed.”⁸ Separately, under the impartiality regulations that govern all executive branch employees, Mr. Bernhardt was obligated to avoid participation in any matter that may create the appearance of impropriety.⁹

Recent reports indicate that Mr. Bernhardt violated the ethics pledge by participating in particular matters on which he lobbied within the two years preceding his appointment.¹⁰ Before entering government, Mr. Bernhardt was a registered lobbyist for the nation’s largest agricultural water district, Westlands Water District (“Westlands”), which was and is a major stakeholder in water policy affecting agriculture in California’s Central Valley. On Westlands’ behalf, Mr. Bernhardt lobbied on discrete provisions of a law directing Interior to maximize water supplies to his clients, and to minimize Endangered Species Act (“ESA”) protections in that region for the

³ See Nate Hegyi, *The New Acting Interior Secretary Is An Agency Insider and Ex-Oil Lobbyist*, NPR (Jan. 2, 2019), <https://www.npr.org/2019/01/02/677390503/the-new-acting-interior-secretary-is-an-agency-insider-and-ex-oil-lobbyist>.

⁴ Exec. Order No. 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017) (“Ethics Pledge”).

⁵ Letter of Recusal & Ethics Pledge from David Bernhardt, Deputy Secretary, Dep’t of Interior, to Interior Officials (Aug. 15, 2017), <https://bit.ly/2ATE1Eg> (“Bernhardt Ethics Pledge”). In his August 15, 2017 letter, Mr. Bernhardt incorrectly listed Westlands as a client requiring a one-year recusal under the impartiality regulations, yet, as the plain language of the ethics pledge makes clear, Mr. Bernhardt’s relationship with Westlands demanded a two-year recusal.

⁶ See *id.* at 15 (“7. If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.”); see also Ethics Pledge, *supra* note 4, § 1(7).

⁷ Ethics Pledge, *supra* note 4, § 1.

⁸ David Bernhardt, Responses to Questions for the Record from Chairman Lisa Murkowski, U.S. Senate Committee on Energy and Natural Resources, The Nomination of Mr. David Bernhardt to be Deputy Secretary of the Interior (May 18, 2017 Hearing) 7-8, https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=2FA55D32-39A0-4CFF-9ECD-FC8EC432D264 (“Bernhardt Responses to Chair Murkowski Questions”).

⁹ 5 C.F.R. § 2635.502(a)(2) (2019).

¹⁰ Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring his Former Client*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html>.

delta smelt and certain salmon. After joining Interior, he directed or otherwise participated in the same matters that were the focus of his prior lobbying activities, including apparently attempting to codify a specific provision that he had previously lobbied on.

It is difficult to discern where Mr. Bernhardt's private sector lobbying activities end and where his public service begins. Mr. Bernhardt's participation in these particular matters appears to violate his ethics pledge, and at a minimum, violates his obligation to avoid the appearance that he is using his public office for the private gain of his former lobbying client.

I. Mr. Bernhardt's Relationship with Westlands Water District

Before becoming Deputy Secretary, Mr. Bernhardt worked for the Washington, D.C., office of law firm Brownstein Hyatt Farber Schreck ("Brownstein Hyatt"). At Brownstein Hyatt, Mr. Bernhardt led the natural resources group and provided lobbying services and legal representation for oil and gas, mining, and Western water interests.¹¹ Westlands, the nation's largest agricultural water district, was one of his clients.¹²

Westlands comprises more than 1,000 square miles of farmland in California's Fresno and Kings Counties and provides water to 700 farms in this region through federal contracts. The water used by Westlands is extracted from rivers in California's Central Valley, stored in reservoirs maintained by the federal Central Valley Project ("CVP"), and then pumped from those reservoirs through the Central Valley to Westlands and other water districts.¹³ Westlands is CVP's largest contractor.¹⁴ The federal CVP operates jointly with California's State Water Project ("SWP"), a parallel state system of water storage and delivery to agricultural and municipal users across the state.¹⁵

¹¹ See David Longly Bernhardt Public Financial Disclosure Report (OGE Form 278e), <https://bit.ly/2FMIL1G> (last visited Feb. 26, 2019) ("Bernhardt Financial Disclosure"); see also Jesse Prentice-Dunn, *Walking Conflict of Interest*, MEDIUM (Dec. 17, 2018), <https://bit.ly/2R4idPq>.

¹² See Prentice-Dunn, *supra* note 11; see also Bettina Boxall, *Trump's Pick for a Top Interior Post Has Sued the Agency on Behalf of Powerful California Water Interests*, L.A. TIMES (May 17, 2017), <https://lat.ms/2HpFXdy>.

¹³ See *About Westlands*, WESTLANDS WATER DISTRICT, <https://wwd.ca.gov/about-westlands> (last visited Feb. 26, 2019).

¹⁴ CHARLES V. STERN & PERVAZE A. SHEIKH, CONG. RES. SERV., R45342, CENTRAL VALLEY PROJECT: ISSUES AND LEGISLATION 7, 32 (2018), <https://fas.org/sgp/crs/misc/R45342.pdf>.

¹⁵ See *id.*; see also *State Water Project*, CAL. DEPT' OF WATER RESOURCES, <https://water.ca.gov/Programs/State-Water-Project> (last visited Feb. 26, 2019).

Between 2011 and November 2016, Mr. Bernhardt was a registered lobbyist for Westlands.¹⁶ Westlands reportedly paid Brownstein Hyatt nearly \$1.4 million in fees during this time.¹⁷ After Mr. Bernhardt formally deregistered as a lobbyist on November 18, 2016,¹⁸ and during the period that he was leading then-President-Elect Trump's Interior transition team,¹⁹ Mr. Bernhardt continued working as a consultant for Westlands.²⁰ His consulting work included meetings with members of Congress and advocacy on federal legislation and executive orders.²¹ Lobbying disclosures indicate that while he was still a registered lobbyist, Mr. Bernhardt lobbied Congress and the Interior Department on behalf of Westlands on potential legislation "regarding the Bureau of Reclamation and the Endangered Species Act" and "related to energy and water appropriations."²² Mr. Bernhardt also represented Westlands in federal litigation challenging endangered species protections that limited water supplies from the CVP and SWP, including personally arguing an appeal on behalf of Westlands before the U.S. Court of Appeals for the Ninth Circuit in 2014.²³

¹⁶ See David Longly Bernhardt, Statement for Completion by Presidential Nominees, U.S. Senate Committee on Energy & Nat. Res. 6-7 (May 8, 2017), <https://bit.ly/2BPxxXm>.

¹⁷ See Boxall, *supra* note 12 ("Disclosures show that Westlands paid roughly \$1.4 million to Bernhardt's firm for lobbying services from 2011–2017 . . ."); see also *Westlands Water District*, CTR. FOR RESPONSIVE POLITICS, <https://bit.ly/2sH0sry> (last visited Feb. 26, 2019).

¹⁸ Brownstein Hyatt Q4 2016 Lobbying Report (LD-2 Disclosure Form) (Nov. 18, 2016); Brownstein Hyatt Amended Q4 2016 Lobbying Report (LD-2 Disclosure Form) (Jan. 23, 2017) (both reports attached as Exhibit A).

¹⁹ See, e.g., Gregory Wallace & Rene Marsh, *Ryan Zinke's Departure May Not Mean Major Changes for Interior Department*, CNN (Dec. 17, 2018), <https://www.cnn.com/2018/12/17/politics/zinke-resignation-successors/index.html> ("Bernhardt, is a department veteran who crafted the Trump administration's plans for Interior during the 2016 transition."); see also Bernhardt Responses to Chair Murkowski Questions, *supra* note 8, at 10 (Response to D1-4).

²⁰ Lance Williams & Matt Smith, *Trump Nominee Kept Working With Client After Pledge to Stop Lobbying*, REVEAL (July 18, 2017), <https://www.revealnews.org/blog/trump-nominee-kept-working-with-client-after-pledge-to-stop-lobbying>; Michael Doyle, *Deputy Nominee Still Advising Calif. Water District*, E&E NEWS (July 18, 2017), <https://www.eenews.net/stories/1060057527>.

²¹ *Id.*

²² See, e.g., Brownstein Hyatt Q3 2016 Lobbying Report (LD-2 Disclosure Form) (Oct. 19, 2016), <https://bit.ly/2FNUvAZ> (disclosing that Mr. Bernhardt lobbied Congress and the Departments of Justice and Interior on "Potential legislation regarding the Bureau of Reclamation and the Endangered Species Act," "Potential legislation related to energy and water appropriations," and "Potential legislation regarding settlement of litigation"); see also Michael Doyle, *Election over, Westlands Water District may get win with controversial drainage plan*, FRESNO BEE (Nov. 15, 2016), <https://bit.ly/2sMMS6p>; see also Stuart Leavenworth, *Lobbyist who once sued Interior to be named to be department's No. 2 official*, MCCLATCHY (Apr. 28, 2017), <https://bit.ly/2Cyl8GZ>.

²³ See *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 978 (9th Cir. 2014).

II. Mr. Bernhardt's Violations of the Ethics Pledge

Mr. Bernhardt's lobbying activities on behalf of Westlands focused on maximizing water diversion from the CVP and SWP to Westlands, which included efforts to minimize protections for certain endangered species threatened by that increased diversion.²⁴ Fish listed under the ESA—including the delta smelt and certain salmon species—are affected by the operations of the CVP and SWP, and water diversion to Westlands and other users has been limited based on the potential harm that increased water diversion poses to those endangered species.²⁵

When an agency action could adversely impact a protected species, bureaus within the Departments of Interior and Commerce prepare biological opinions that assess the likely impact of the agency action on the species, and set forth reasonable and prudent measures to reduce any potential harm.²⁶ In this case, decisions about whether to increase or decrease the amount of water delivered through the CVP to its different contractors—including Westlands—are impacted by certain biological opinions about fish species in the Central Valley region.²⁷ Specifically, the operations of the CVP are currently governed by a 2008 delta smelt biological opinion issued by Interior's Fish and Wildlife Service,²⁸ and a 2009 salmon biological opinion issued by Commerce's National Marine Fisheries Service.²⁹ These biological

²⁴ See, e.g., Davenport, *supra* note 10.

²⁵ STERN & SHEIKH, *supra* note 14, at 14-17; see also *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 971-988.

²⁶ *Id.*

²⁷ Under the ESA, a "federal agency proposing an action that may have an effect on a listed species consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (i.e., regulatory agencies). The action agency will commonly complete a biological assessment on potential effects to the fish or its habitat and submit it to the regulatory agency. The regulatory agency then renders a biological opinion, or BiOp, to the action agency making the proposal. The intent of a BiOp is to ensure that the proposed action will not reduce the likelihood of survival and recovery of an ESA-listed species. BiOps typically include conservation recommendations intended to further recovery of the ESA-listed species." STERN & SHEIKH, *supra* note 14, at 1 n.3; see also *id.* at 15-16.

²⁸ Memorandum from Regional Director, U.S. Fish & Wildlife Serv. on Transmittal of Formal Endangered Species Act Consultation on the Coordinated Operations of the Central Valley Project and State Water Project to Operation Manager, Bureau of Reclamation, Central Valley Operations Office (Dec. 15, 2008), https://www.fws.gov/sfbaydelta/Documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf.

²⁹ BIOLOGICAL OPINION AND CONFERENCE OPINION ON THE LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT, NAT'L MARINE FISHERIES SERV. SW. REGION (2009), https://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations.%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf.

opinions have entailed reductions to the water supply from the CVP to contractors like Westlands.³⁰ According to the *New York Times*, Westlands has “been fighting for decades against the delta smelt for access to the river water that both need to survive.”³¹

Mr. Bernhardt’s lobbying activities for Westlands within the two years prior to his appointment pertained to at least two particular matters in which he unlawfully participated after joining Interior: (1) specific provisions of the Water Infrastructure Improvements for the Nation (“WIIN”) Act (including sections 4002 and 4012) that maximize water diversion for CVP and SWP which were focused on a discrete and identifiable class of persons (i.e., CVP and SWP contractors, including Westlands), and which were then incorporated into the agency action that he participated in; and (2) seeking to place constraints on the application of ESA biological opinions that govern CVP and SWP in a manner that maximizes water diversion to the discrete and identifiable class of CVP and SWP contractors, like Westlands.

Reports indicate that Mr. Bernhardt’s lobbying efforts for Westlands focused specifically on section 4002 of the WIIN Act, a provision directing the Secretaries of the Interior and Commerce “to maximize water supplies for the Central Valley Project and the State Water Project” in implementing the delta smelt and salmon biological opinions.³² Section 4002 also requires the Interior and Commerce Secretaries to document facts supporting any decision to pump water at rates *lower* than the maximum rates permitted under the applicable biological opinions—including any reasons to believe less-than-maximum rates would have adverse impacts on the protected fish species.³³ Other provisions in the same subtitle of the WIIN Act³⁴ direct Interior and

³⁰ STERN & SHEIKH, *supra* note 14, at 15-16; *see also Locke*, 776 F.3d at 980-89. Specifically, these biological opinions concluded that the long-term operation of the CVP and SWP (as proposed in an earlier biological assessment by the Bureau of Reclamation) was likely to jeopardize the continued existence of listed species. STERN & SHEIKH, *supra* note 14, at 16. Both biological opinions set forth reasonable and prudent measures that the water projects would need to take to reduce the harm to the delta smelt and salmon from their operations so that the water projects would be compliant with the ESA. *Id.* These measures entailed limits on water pumping and diversion to contractors like Westlands. *Id.* The Bureau of Reclamation subsequently began operating the CVP consistent with these measures, and these 2008 and 2009 biological opinions continue to govern the water projects’ operations today. *Id.*

³¹ Davenport, *supra* note 10.

³² Water Infrastructure Improvements for the Nation Act (“WIIN Act”), Pub. L. No. 114-322, § 4002(a) (2016).

³³ *See id.* § 4002(b).

³⁴ *See id.* §§ 4001-4013 (Title II, Subtitle J of the WIIN Act).

Commerce “to provide the maximum quantity of water supplies practicable” to CVP and SWP contractors, which includes Westlands.³⁵

Mr. Bernhardt’s lobbying activities on behalf of Westlands were so focused on entrenching section 4002’s water maximization plan that he continued to lobby the executive branch on the same particular matters on behalf of Westlands even after formally deregistering as a lobbyist for Westlands on November 18, 2016. Emails show that on November 28, 2016, Mr. Bernhardt edited a proposed “draft executive order” for then-President-elect Donald Trump, and sent it to two Westlands officials.³⁶ The draft executive order included some language nearly identical to section 4002 of the WIIN Act.³⁷

Mr. Bernhardt also apparently lobbied on subpart (b) of section 4012 of the statute, “Successor Biological Opinions.” This provision directs the Secretary of the Interior to “apply this Act to any successor biological opinions to the smelt or salmonid biological opinions” to the extent that it is consistent with the ESA and other measures.³⁸ In a December 9, 2016 email to Mr. Bernhardt with the subject line “Successor Biological Opinion Language,” a senior policy advisor to House Majority Leader Kevin McCarthy wrote, “I just wanted to thank you for all of your help with this,” and that “we will see what happens in the senate.”³⁹ Mr. Bernhardt then forwarded the email to a Westlands executive.⁴⁰ (Although the email was sent a few weeks after Mr. Bernhardt had formally deregistered as a lobbyist, it may have pertained to Mr. Bernhardt’s lobbying activities before deregistration.⁴¹) The

³⁵ *Id.* § 4001; *see generally* CONG. RES. SERV., R44986, WATER INFRASTRUCTURE IMPROVEMENTS FOR THE NATION (WIIN) ACT: BUREAU OF RECLAMATION AND CALIFORNIA WATER PROVISIONS (2018), <https://crsreports.congress.gov/product/pdf/R/R44986>.

³⁶ Exhibit B at 1.

³⁷ *Compare* WIIN Act, *supra* note 32, § 4002(a) *with* Exhibit B at 3 (draft Executive Order § (1)(a)).

³⁸ WIIN Act, *supra* note 32, § 4012(b).

³⁹ Exhibit C.

⁴⁰ *Id.*

⁴¹ In a written response to questions from Senate Natural Resources Chair Lisa Murkowski, Mr. Bernhardt apparently sought to give the impression that he did not advise Members of Congress or their staff on legislative language pertaining to the CVP or related biological opinions on behalf of Westlands, after he had deregistered. *See* Bernhardt Responses to Chair Murkowski Questions, *supra* note 8, at 6. In relevant part:

D. Did you lobby or otherwise advise on any legislative language pertaining to the operation of the Central Valley Project or any related Biological Opinions on behalf of the Westlands Water District in 2016?

Response: I was a registered lobbyist for Westlands Water District until November 2016. I was one of many attorneys across the United States who responded to

next day, the WIIN Act passed the Senate; Westlands was described as “among the victors in [the] bill, after spending more than \$1 million on lobbying in the past two years.”⁴²

Mr. Bernhardt subsequently joined the Interior Department as Deputy Secretary, and he signed the ethics pledge on August 10, 2017. Under the ethics pledge, Mr. Bernhardt committed not to participate in any particular matter on which he lobbied as a registered lobbyist within the two years preceding his appointment and not to participate in the specific issue area in which that particular matter falls for two years after his appointment.⁴³ The law defines a “particular matter” broadly to include any deliberation, decision or action that affects a discrete and identifiable class of persons.⁴⁴

The *New York Times* reported that roughly three months after signing the ethics pledge, Mr. Bernhardt directed a senior water resources official for the mid-Pacific region of the Bureau of Reclamation to advance the particular matters he had previously lobbied on.⁴⁵ Specifically, the *Times* reported:

In an interview, Mr. Bernhardt acknowledged that, in late 2017, four months after joining the Interior Department, he directed David Murillo, a senior water-resources official for the mid-Pacific region, to begin the process of weakening protections for the smelt

technical drafting requests made by offices in the U.S. House of Representatives and U.S. Senate from members of both political parties. In that capacity, and upon their request, I provided technical drafting assistance.

E. Did you advise any Members of Congress or their staff on such language after November 18, 2016?

Response: I have not engaged in regulated lobbying on behalf of Westlands Water District after November 18th, 2016.

⁴² Michael Doyle, *After Years of Drama, Farmers Score a Big Win in California Water Battle*, MCCLATCHY (Dec. 8, 2016), <https://www.mcclatchydc.com/news/politics-government/congress/article120131428.html>.

⁴³ Bernhardt Ethics Pledge, *supra* note 5, at 1; Ethics Pledge, *supra* note 4, § 1(7).

⁴⁴ 5 C.F.R. § 2640.103(a)(1); *see also* “Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter,” U.S. OFFICE OF GOV’T ETHICS, DAEOgram DO-06-029, 5-10 (2006), <https://bit.ly/2SvO78f>. A “specific issue area” for purposes of the lobbying provision of the pledge means a “particular matter of general applicability, U.S. OFFICE OF GOV’T ETHICS, LA-17-03, GUIDANCE ON EXECUTIVE ORDER 13770 1 (2017), <https://bit.ly/2FZRhv0>, which in turn means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not necessarily involve specific parties, *see* 5 C.F.R. § 2640.102(m) (2019).

⁴⁵ Davenport, *supra* note 10.

and another fish, the winter-run Chinook salmon, to free up river water for agriculture.⁴⁶

The *Times* reported that Mr. Bernhardt held four phone calls with Murillo in November 2017, and other individuals were also on the calls.⁴⁷ Mr. Bernhardt's request was fulfilled "a month later," according to the *Times*, "when Mr. Murillo's office started the process of weakening the protections" by publishing a notice of intent in December 2017 to prepare an environmental impact statement for analyzing "potential modifications to the continued long-term operation" of the federal CVP and the SWP.⁴⁸ On January 29, 2019, the Bureau of Reclamation "followed up with a more detailed proposal on diverting the water," according to the *Times*, publishing a biological assessment evaluating the impact of maximizing water resources for the CVP and SWP on protected species like the delta smelt and the salmon.⁴⁹ These actions, which reflected Reclamation's intent to revisit the impact of maximizing water diversion to the CVP and SWP on the status of listed threatened and endangered species, "would disproportionately benefit" Mr. Bernhardt's former client, Westlands.⁵⁰

The notice of intent and the January 2019 biological assessment that followed constituted the same particular matter as that which Mr. Bernhardt had previously lobbied on.

The biological assessment that Mr. Bernhardt helped set into motion states that the agency intends the provision of the WIIN Act Mr. Bernhardt previously lobbied on, section 4002, to be incorporated into the resulting biological opinions.⁵¹ If that were to happen, the water maximization principles in section 4002 would "govern operations of the CVP and SWP beyond expiration of the WIIN Act."⁵² The biological assessment states:

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*; see also U.S. Department of Interior Bureau of Reclamation, *Notice of Intent To Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, and Related Facilities*, 82 Fed. Reg. 61789 (Dec. 29, 2017).

⁴⁹ U.S. DEPT OF INTERIOR BUREAU OF RECLAMATION, REINITIATION OF CONSULTATION ON THE COORDINATED LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT: FINAL BIOLOGICAL ASSESSMENT (2019), <https://www.usbr.gov/mp/bdo/docs/ba-final-biological-assessment.pdf> ("Biological Assessment"); see *supra* note 27 (summarizing the process of preparing biological assessments and biological opinions under the ESA).

⁵⁰ See, e.g., Davenport, *supra* note 10.

⁵¹ Biological Assessment, *supra* note 49, at 1-6, 4-51.

⁵² *Id.* at 1-6.

Although the duration of this biological assessment and the biological opinion(s) from this consultation may extend beyond the expiration of the WIIN Act, the congressional direction provided by the WIIN Act governs the preparation of the biological opinion(s) that will result from this ongoing Section 7 consultation. Moreover, the general principles that underlie the direction provided by Congress in section 4001 of the WIIN Act are consistent with the purposes of the proposed action and federal interests. In addition, the science and general principles behind sections 4002 and 4003 warrant incorporation into the proposed action to govern operations of the CVP and SWP beyond expiration of the WIIN Act.⁵³

Although it does not cite the provision explicitly, the biological assessment also appears to incorporate or further the WIIN Act's section 4012(b), which directs Interior and Commerce to apply the WIIN Act "to any successor biological opinions to the smelt or salmonid biological opinions."⁵⁴ Mr. Bernhardt lobbied on section 4012, and appears to have helped draft it on behalf of Westlands.⁵⁵

Mr. Bernhardt engaged in the precise behavior the lobbying provision of the ethics pledge prohibits. He lobbied on particular provisions of the WIIN Act that direct Interior to maximize water resources for the CVP and SWP for the five-year duration of the Act, and then, shortly after joining Interior, Mr. Bernhardt participated in the same particular matter that he had lobbied on by directing the preparation of a biological assessment that sought to institutionalize those provisions, so that they would "govern operations of the CVP and SWP beyond expiration of the WIIN Act."⁵⁶ As a result, Mr. Bernhardt participated in particular matters at Interior that had the effect of reinforcing and potentially extending the reach of Mr. Bernhardt's prior lobbying efforts beyond the expiration date of the law he had lobbied on.

In sum, Mr. Bernhardt lobbied on specific provisions of the WIIN Act, including sections 4002 and 4012, which seek to maximize water diversion for CVP and SWP, and are focused on the discrete and identifiable class of CVP and SWP contractors, of which Westlands is the largest. Mr. Bernhardt violated the ethics pledge by participating in agency action incorporating those provisions that constituted the same particular matter. Mr. Bernhardt's prior lobbying activities sought to place constraints on the application of ESA biological opinions that govern CVP and SWP operations

⁵³ *Id.*

⁵⁴ WIIN Act, *supra* note 32, § 4012(b).

⁵⁵ Exhibit B; *see supra* notes 38-42 and accompanying text.

⁵⁶ Biological Assessment, *supra* note 49, at 1-6.

to maximize water diversion to the discrete and identifiable class of CVP and SWP contractors, like Westlands; he violated the ethics pledge by participating in that same particular matter after joining Interior.

Mr. Bernhardt claims to have received verbal advice from an ethics official, who cleared him to participate in the phone calls and other particular matters on the grounds that Mr. Bernhardt previously lobbied on a “broad” water infrastructure bill.⁵⁷ We request that your office investigate whether any ethics officials who authorized Mr. Bernhardt’s participation were given complete information about the particular matters that he lobbied on while he was working as a registered lobbyist for Westlands and their interaction with the agency matters that he participated in. Your office should also investigate why a written ethics opinion was not issued, given the nature of the alleged request and its close relationship to Mr. Bernhardt’s past lobbying activities.

III. Mr. Bernhardt’s Violations of the Standards of Ethical Conduct

At the very least, Mr. Bernhardt’s conduct has created the appearance of impropriety, raising questions about his impartiality while carrying out his official duties. Taken together, it is exceedingly difficult to discern where Mr. Bernhardt’s private sector lobbying activities end and where his public service begins.

All executive branch employees are subject to ethics rules contained in the Standards of Ethical Conduct, which call on employees to avoid even the appearance that they are violating ethical standards.⁵⁸ The impartiality regulation sets guidelines for how employees can avoid the appearance of favoritism in government decisionmaking, and require employees to consider appearance concerns before participating in a particular matter.⁵⁹ An employee should refrain from participating in matters where a reasonable person with knowledge of the relevant facts would question the employee’s impartiality.⁶⁰

For years, Westlands paid Mr. Bernhardt hundreds of thousands of dollars to lobby and litigate on its behalf, so that the water district could maximize its water supplies from the CVP and minimize protections for endangered fish. As the *New York Times* put it, Westlands has “been fighting

⁵⁷ Davenport, *supra* note 10.

⁵⁸ 5 C.F.R. § 2635.101(b)(14) (2019).

⁵⁹ *Id.*

⁶⁰ 5 C.F.R. § 2635.502(a) (2019).

for decades against the delta smelt for access to the river water that both need to survive.”⁶¹ Following the issuance of two biological opinions that governed CVP and SWP water supplies—the 2008 delta smelt biological opinion⁶² and 2009 salmon biological opinion⁶³—Westlands sued, challenging provisions of those biological opinions, with Mr. Bernhardt personally arguing an appeal on behalf of Westlands before the Ninth Circuit in 2014.⁶⁴ From 2012 until his 2017 confirmation, Mr. Bernhardt served on the board of Center for Environmental Science Accuracy and Reliability (“CESAR”),⁶⁵ an entity led by Westlands’ General Counsel⁶⁶ and characterized in the press as “just fundamentally a Westlands front group”⁶⁷ which promoted Westlands’ interests, including repeatedly “challeng[ing] federal scientific findings on endangered species such as California’s delta smelt.”⁶⁸

Mr. Bernhardt’s lobbying disclosures show that he has long worked on behalf of Westlands to lobby Congress and executive agencies on matters pertaining to the application of those biological opinions and, in turn, on

⁶¹ Davenport, *supra* note 10.

⁶² Memorandum from Regional Director, U.S. Fish & Wildlife Serv. on Transmittal of Formal Endangered Species Act Consultation on the Coordinated Operations of the Central Valley Project and State Water Project to Operation Manager, Bureau of Reclamation, Central Valley Operations Office (Dec. 15, 2008), https://www.fws.gov/sfbaydelta/Documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf.

⁶³ BIOLOGICAL OPINION AND CONFERENCE OPINION ON THE LONG-TERM OPERATIONS OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT, NAT’L MARINE FISHERIES SERV. SW. REGION (2009), https://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations.%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf.

⁶⁴ *See Locke*, 776 F.3d at 978. In this litigation, Westlands, represented by Mr. Bernhardt, sued to invalidate the Fisheries Service’s 2009 Salmonid BiOp. *Id.* at 989-91. The Ninth Circuit rebuffed the water district’s lawsuit, noting its reliance on an earlier case in which Westlands (represented by Brownstein Hyatt) had unsuccessfully challenged the 2008 biological opinion that had concluded that continued water extraction from the Central Valley rivers would jeopardize the delta smelt. *See id.* 981 n.1 (discussing *San Luis & Delta-Mendota Water Auth. v. Jewell (Delta Smelt)*, 747 F.3d 581, 592-94 (9th Cir. 2014)). Brownstein Hyatt has sued the Department of Interior four times on behalf of Westlands. *See Boxall*, *supra* note 12.

⁶⁵ Bernhardt Financial Disclosure, *supra* note 11, at 2; *see also* Bernhardt Ethics Pledge, *supra* note 5, at 2-3.

⁶⁶ *About Us*, CESAR, <http://www.bestscience.org/about-us.html> (last visited Feb. 27, 2019) (disclosing CESAR’s Executive Director, Craig Manson, as General Counsel of Westlands Water District).

⁶⁷ Michael Doyle & Jeremy P. Jacobs, *Did Bernhardt Once Try to Blow up Endangered Species Act?* E&E NEWS (Feb. 22, 2019), <https://www.eenews.net/stories/1060122205>.

⁶⁸ Juliet Eilperin, *Zinke’s #2 Has So Many Potential Conflicts of Interest He Has to Carry a List of Them All*, WASH. POST (Nov. 19, 2018), <https://wapo.st/2FMCO4U>; *see also* *Delta Smelt*, CESAR, <http://www.bestscience.org/delta-smelt.html> (last visited Feb. 27, 2019); *Delta Smelt Research Material*, CESAR, <http://www.bestscience.org/delta-smelt-reference-materials.html> (last visited Feb. 27, 2019).

maximizing water diversion to his lobbying client. Those efforts culminated in the passage of the WIIN Act, legislation that included several provisions on which Mr. Bernhardt had lobbied that were aimed specifically at minimizing the reach of those biological opinions and maximizing water diversion to Mr. Bernhardt's lobbying client, Westlands. Westlands was widely regarded as one of "the victors in [the] bill."⁶⁹ Mr. Bernhardt's lobbying on these issues continued after he joined the presidential transition team, and after he formally deregistered as a lobbyist for Westlands: he continued to communicate about CVP/SWP-focused provisions in the WIIN Act, and even edited a proposed executive order on behalf of Westlands that would incorporate provisions of the WIIN Act aimed at undermining those two biological opinions and maximizing water diversion to Westlands.⁷⁰

There is at least the appearance that Mr. Bernhardt continued lobbying on Westlands' behalf shortly after he entered government. He used his official authority to extend the lifespan of his past lobbying activities and to maximize water resources for his former lobbying client, potentially at the expense of endangered fish species, the exact outcome he lobbied for on behalf of Westlands for years prior to entering government service.⁷¹

Given these facts, a reasonable person would question whether Mr. Bernhardt was acting on behalf of the public or on behalf of his former lobbying client when he participated in these matters.

Mr. Bernhardt was on notice that his longtime lobbying relationship with Westlands raised serious appearance issues. The Republican Chair of the Senate Natural Resources Committee asked a series of pointed questions about Mr. Bernhardt's relationship with Westlands, and specifically asked if he would recuse from matters in which Westlands has an interest, or which pertain to the CVP, or which pertain to "any relevant biological opinions that

⁶⁹ Doyle, *supra* note 42; see also Johnny Amaral, Opinion, *Built to Serve a Variety of Purposes, Water System Struggles to Serve Any*, FRESNO BEE (July 11, 2018), <https://www.fresnobee.com/opinion/opn-columns-blogs/article214709885.html> (op-ed from Westland's deputy general manager of external affairs favorably describing the WIIN Act); Westlands Water District, *Water News* (December 2017), <https://wwd.ca.gov/wp-content/uploads/2017/12/december-2017-newsletter.pdf> (Westlands newsletter applauding the passage of the WIIN Act).

⁷⁰ See Exhibits B-C; see also Williams & Smith, *supra* note 20.

⁷¹ The Office of Government Ethics ("OGE") has said that even informal, preliminary discussions can constitute a particular matter. The term particular matter "cover[s] the crucial step of laying the groundwork for regulatory change focused on an industry, particularly where specific changes have already been discussed within the agency." Letter from Marilyn L. Glynn, Gen. Counsel, OGE, to a Designated Agency Ethics Official (OGE Legal Adv. 06x8) 2 (Aug. 23, 2006), [https://www.oge.gov/web/oge.nsf/Legal%20Advisories/37EC2F518ACCAAAA85257E96005FBE7D/\\$FILE/06x8_.pdf?open](https://www.oge.gov/web/oge.nsf/Legal%20Advisories/37EC2F518ACCAAAA85257E96005FBE7D/$FILE/06x8_.pdf?open).

relate to the operations of” the CVP.⁷² In response to each question, Mr. Bernhardt emphasized that “public trust is a public responsibility” and that he “will fully comply with the ethics agreement.”⁷³

Mr. Bernhardt has betrayed that public trust. Given Mr. Bernhardt’s years of lobbying and litigating on Westlands’ behalf on the *specific* issue of protections for the delta smelt and certain salmon, and the *specific* issue of maximizing Westlands’ water resources from these federal water projects, any reasonable person would question his impartiality in Interior matters that directly pertain to those same specific issues, and which would disproportionately benefit his former lobbying client. The appearance concerns are even more pronounced here, where Mr. Bernhardt lobbied on *specific* provisions of legislation that would be institutionalized by the agency action Mr. Bernhardt participated in. These facts clearly mandated Mr. Bernhardt’s recusal under the impartiality regulation and the Standards of Ethical Conduct.⁷⁴

⁷² Bernhardt Responses to Chair Murkowski Questions, *supra* note 8, at 7-8.

⁷³ *Id.*

⁷⁴ Mr. Bernhardt’s calls involving the declassification of California salmon and delta smelt were not the only conduct that may have violated the ethics pledge. On August 17, 2018, Interior Secretary Ryan Zinke issued a memorandum that directed Mr. Bernhardt to provide a formal recommendation for increasing water delivery from the CVP reservoirs to regions south of the Sacramento-San Joaquin River Delta. *See* Memorandum from Ryan Zinke, Sec’y, Dep’t of Interior, to Interior Officials (Aug. 17, 2018), <https://bit.ly/2sBmD2x>. The memo instructed Interior Department officials to craft a plan with options for “maximizing water supply deliveries” and “streamlining the Endangered Species Act consultation and National Environmental Policy Act processes to more expeditiously modify long-term Central Valley Project operations.” *Id.* The plan that Mr. Bernhardt would have prepared and delivered to Secretary Zinke, pursuant to this directive, would itself have entailed Mr. Bernhardt’s participation in the very matters that were the subject of his lobbying relationship with Westlands until November 2016. *See* Dale Kasler & Ryan Sabalow, ‘Time for action is now.’ *Interior chief demands plan to pump more California water south*, SACRAMENTO BEE (Aug. 20, 2018), <https://bit.ly/2FOMsUC>.

Even before his one-year recusals expired on August 1, 2018, Mr. Bernhardt addressed a meeting of the Association of California Water Agencies, met with officials within his department working on California water issues, and was the featured speaker on a White House call announcing Secretary Zinke’s memorandum, where he reportedly said, “From my perspective, today’s action might be the most significant action taken by a president on Western water issues in my lifetime.” This conduct may also have violated his commitments under the ethics pledge and federal impartiality regulations. *See* Eilperin, *supra* note 68. An analysis by the Center for Western Priorities found that the agency has completed or moved forward with at least 19 policy actions that have been requested or supported by at least 16 of Mr. Bernhardt’s former clients during his tenure as Deputy Secretary of the Interior. *See* Prentice-Dunn, *supra* note 11.

Conclusion

This is the third complaint that CLC has filed with your office alleging ethics violations by high-ranking Interior officials.⁷⁵ Many of these alleged violations occurred in 2017, and suggest a pattern of disregard for ethical norms across the Department of Interior. Nonetheless, Acting Secretary Bernhardt has recently stated his commitment to a “functional and resilient ethics program” and to creating “a culture of ethical compliance.”⁷⁶

To that end, Acting Secretary Bernhardt should be subject to the same high ethical standards required of any other Interior employee. CLC asks that you investigate whether Acting Secretary Bernhardt violated his ethics pledge, and whether he violated his ethical obligation to avoid the appearance of favoritism in government decision-making.

CLC further requests that you report any adverse findings for appropriate action.

Respectfully submitted,

_____/s/_____
Brendan M. Fischer
Director, Federal Reform

_____/s/_____
Delaney N. Marsco
Ethics Counsel

_____/s/_____
Urja Mittal
Legal Fellow

cc: Emory A. Rounds III
Director
U.S. Office of Government Ethics

⁷⁵ *Complaint Against Secretary Ryan Zinke to Inspector General*, CAMPAIGN LEGAL CTR. (Feb. 23, 2018), <https://goo.gl/MH7JiC>; *Complaint Against Doug Domenech, et al. to Inspector General*, CAMPAIGN LEGAL CTR. (Feb. 19, 2019), <https://bit.ly/2GNzoQv>.

⁷⁶ Letter from David L. Bernhardt, Acting Secretary of the Interior, to All Department of Interior Employees, *A Message from Acting Secretary Bernhardt – Ethical Culture* (Feb. 1, 2019), <https://www.doi.gov/sites/doi.gov/files/message-from-acting-secretary-bernhardt-2019-02-01.pdf>.

Exhibit A

Clerk of the House of Representatives Legislative Resource Center 135 Cannon Building Washington, DC 20515 http://lobbyingdisclosure.house.gov	Secretary of the Senate Office of Public Records 232 Hart Building Washington, DC 20510 http://www.senate.gov/lobby
--	---

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - All Filers Are Required to Complete This Page

1. Registrant Name <input checked="" type="checkbox"/> Organization/Lobbying Firm <input type="checkbox"/> Self Employed Individual <u>BROWNSTEIN HYATT FARBER SCHRECK, LLP</u>			
2. Address Address1 <u>1155 F ST. NW</u> Address2 <u>1200</u> City <u>WASHINGTON</u> State <u>DC</u> Zip Code <u>20004</u> Country <u>USA</u>			
3. Principal place of business (if different than line 2) City <u>Denver</u> State <u>CO</u> Zip Code <u>80202</u> Country <u>USA</u>			
4a. Contact Name _____	b. Telephone Number _____	c. E-mail _____	5. Senate ID# 7257-1006397
7. Client Name <input type="checkbox"/> Self <input type="checkbox"/> Check if client is a state or local government or instrumentality Westlands Water District			6. House ID# 318420332

TYPE OF REPORT 8. Year 2016 Q1 (1/1 - 3/31) Q2 (4/1 - 6/30) Q3 (7/1 - 9/30) Q4 (10/1 - 12/31)

9. Check if this filing amends a previously filed version of this report

10. Check if this is a Termination Report Termination Date _____ 11. No Lobbying Issue Activity

INCOME OR EXPENSES - YOU MUST complete either Line 12 or Line 13	
<p style="text-align: center;">12. Lobbying</p> <p>INCOME relating to lobbying activities for this reporting period was:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input checked="" type="checkbox"/> \$ <u>20,000.00</u></p> <p>Provide a good faith estimate, rounded to the nearest \$10,000, of all lobbying related income for the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).</p>	<p style="text-align: center;">13. Organizations</p> <p>EXPENSE relating to lobbying activities for this reporting period were:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input type="checkbox"/> \$ _____</p> <p>14. REPORTING Check box to indicate expense accounting method. See instructions for description of options.</p> <p><input type="checkbox"/> Method A. Reporting amounts using LDA definitions only</p> <p><input type="checkbox"/> Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code</p> <p><input type="checkbox"/> Method C. Reporting amounts under section 162(e) of the Internal Revenue Code</p>

Signature Digitally Signed By: Marc S. Lampkin, Attorney at Law

Date 11/18/2016
8:41:29 AM

LOBBYING ACTIVITY. Select as many codes as necessary to reflect the general issue areas in which the registrant engaged in lobbying on behalf of the client during the reporting period. Using a separate page for each code, provide information as requested. Add additional page(s) as needed.

15. General issue area code NAT

16. Specific lobbying issues

Potential legislation regarding the Bureau of Reclamation and the Endangered Species Act
Potential legislation related to energy and water appropriations
Potential legislation regarding settlement of litigation

17. House(s) of Congress and Federal agencies Check if None

U.S. SENATE, U.S. HOUSE OF REPRESENTATIVES, Interior - Dept of (DOI), Justice - Dept of (DOJ)

18. Name of each individual who acted as a lobbyist in this issue area

First Name	Last Name	Suffix	Covered Official Position (if applicable)	New
David	Bernhardt		Lobbying termination effective as of filing	<input type="checkbox"/>
Ryan	Smith			<input type="checkbox"/>
Luke	Johnson			<input type="checkbox"/>

19. Interest of each foreign entity in the specific issues listed on line 16 above Check if None

Information Update Page - Complete ONLY where registration information has changed.

20. Client new address

Address _____
City _____ State _____ Zip Code _____ Country _____

21. Client new principal place of business (if different than line 20)

City _____ State _____ Zip Code _____ Country _____

22. New General description of client's business or activities

LOBBYIST UPDATE

23. Name of each previously reported individual who is no longer expected to act as a lobbyist for the client

	First Name	Last Name	Suffix		First Name	Last Name	Suffix
1	David	Bernhardt		3			
2				4			

ISSUE UPDATE

24. General lobbying issue that no longer pertains

AFFILIATED ORGANIZATIONS

25. Add the following affiliated organization(s)

Internet Address:

Name	Address				Principal Place of Business (city and state or country)
	Street Address				
	City	State/Province	Zip	Country	
					City State Country

26. Name of each previously reported organization that is no longer affiliated with the registrant or client

1 2 3

FOREIGN ENTITIES

27. Add the following foreign entities:

Name	Address			Principal place of business (city and state or country)	Amount of contribution for lobbying activities	Ownership percentage in client
	Street Address					
	City	State/Province	Country	City State Country		%

28. Name of each previously reported foreign entity that no longer owns, or controls, or is affiliated with the registrant, client or affiliated organization

1 2 3 4 5 6

Clerk of the House of Representatives Legislative Resource Center 135 Cannon Building Washington, DC 20515 http://lobbyingdisclosure.house.gov	Secretary of the Senate Office of Public Records 232 Hart Building Washington, DC 20510 http://www.senate.gov/lobby
--	---

LOBBYING REPORT

Lobbying Disclosure Act of 1995 (Section 5) - All Filers Are Required to Complete This Page

1. Registrant Name <input checked="" type="checkbox"/> Organization/Lobbying Firm <input type="checkbox"/> Self Employed Individual <u>BROWNSTEIN HYATT FARBER SCHRECK, LLP</u>	
2. Address Address1 <u>1155 F ST. NW</u> Address2 <u>1200</u> City <u>WASHINGTON</u> State <u>DC</u> Zip Code <u>20004</u> Country <u>USA</u>	
3. Principal place of business (if different than line 2) City <u>Denver</u> State <u>CO</u> Zip Code <u>80202</u> Country <u>USA</u>	
4a. Contact Name _____	b. Telephone Number _____ c. E-mail _____
5. Senate ID# <u>7257-1006397</u>	
7. Client Name <input type="checkbox"/> Self <input type="checkbox"/> Check if client is a state or local government or instrumentality <u>Westlands Water District</u>	6. House ID# <u>318420332</u>

TYPE OF REPORT 8. Year 2016 Q1 (1/1 - 3/31) Q2 (4/1 - 6/30) Q3 (7/1 - 9/30) Q4 (10/1 - 12/31)

9. Check if this filing amends a previously filed version of this report

10. Check if this is a Termination Report Termination Date _____ 11. No Lobbying Issue Activity

INCOME OR EXPENSES - YOU MUST complete either Line 12 or Line 13	
<p style="text-align: center;">12. Lobbying</p> <p>INCOME relating to lobbying activities for this reporting period was:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input checked="" type="checkbox"/> \$ <u>70,000.00</u></p> <p>Provide a good faith estimate, rounded to the nearest \$10,000, of all lobbying related income for the client (including all payments to the registrant by any other entity for lobbying activities on behalf of the client).</p>	<p style="text-align: center;">13. Organizations</p> <p>EXPENSE relating to lobbying activities for this reporting period were:</p> <p><u>Less than \$5,000</u> <input type="checkbox"/></p> <p><u>\$5,000 or more</u> <input type="checkbox"/> \$ _____</p> <p>14. REPORTING Check box to indicate expense accounting method. See instructions for description of options.</p> <p><input type="checkbox"/> Method A. Reporting amounts using LDA definitions only</p> <p><input type="checkbox"/> Method B. Reporting amounts under section 6033(b)(8) of the Internal Revenue Code</p> <p><input type="checkbox"/> Method C. Reporting amounts under section 162(e) of the Internal Revenue Code</p>

Signature Digitally Signed By: Marc S. Lampkin, Attorney at Law **Date** 1/23/2017 3:15:50 PM

LOBBYING ACTIVITY. Select as many codes as necessary to reflect the general issue areas in which the registrant engaged in lobbying on behalf of the client during the reporting period. Using a separate page for each code, provide information as requested. Add additional page(s) as needed.

15. General issue area code NAT

16. Specific lobbying issues

Potential legislation regarding the Bureau of Reclamation and the Endangered Species Act
Potential legislation related to energy and water appropriations
Potential legislation regarding settlement of litigation

17. House(s) of Congress and Federal agencies Check if None

U.S. SENATE, U.S. HOUSE OF REPRESENTATIVES, Interior - Dept of (DOI), Justice - Dept of (DOJ)

18. Name of each individual who acted as a lobbyist in this issue area

First Name	Last Name	Suffix	Covered Official Position (if applicable)	New
David	Bernhardt		Lobbying termination effective as of filing on 11-18-16	<input type="checkbox"/>
Ryan	Smith			<input type="checkbox"/>
Luke	Johnson			<input type="checkbox"/>

19. Interest of each foreign entity in the specific issues listed on line 16 above Check if None

Information Update Page - Complete ONLY where registration information has changed.

20. Client new address

Address _____
City _____ State _____ Zip Code _____ Country _____

21. Client new principal place of business (if different than line 20)

City _____ State _____ Zip Code _____ Country _____

22. New General description of client's business or activities

LOBBYIST UPDATE

23. Name of each previously reported individual who is no longer expected to act as a lobbyist for the client

	First Name	Last Name	Suffix		First Name	Last Name	Suffix
1	David	Bernhardt		3			
2				4			

ISSUE UPDATE

24. General lobbying issue that no longer pertains

AFFILIATED ORGANIZATIONS

25. Add the following affiliated organization(s)

Internet Address:

Name	Address				Principal Place of Business (city and state or country)
	Street Address				
	City	State/Province	Zip	Country	
					City State Country

26. Name of each previously reported organization that is no longer affiliated with the registrant or client

1 2 3

FOREIGN ENTITIES

27. Add the following foreign entities:

Name	Address			Principal place of business (city and state or country)	Amount of contribution for lobbying activities	Ownership percentage in client
	Street Address					
	City	State/Province	Country	City State Country		%

28. Name of each previously reported foreign entity that no longer owns, or controls, or is affiliated with the registrant, client or affiliated organization

1 2 3 4 5 6

Exhibit B

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](#)

Please call me regarding the attached document on Tuesday morning.

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>
Cc: Johnny Amaral <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> 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>

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.

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

Exhibit C

From: Bernhardt, David L. <DBernhardt@BHFS.com>
Subject: Fwd: Successor Biological Opinion Language
Date: December 9, 2016 at 11:24:43 AM EST
To: Johnny Amaral <jamaral@westlandswater.org>

FYI

David Bernhardt

Begin forwarded message:

From: "Kellogg, Matt" <Matt.Kellogg@mail.house.gov>
Date: December 9, 2016 at 9:44:55 AM EST
To: "Bernhardt, David L." <DBernhardt@BHFS.com>
Subject: RE: Successor Biological Opinion Language

I just wanted to thank you for all of your help with this. We will see what happens in the Senate but I feel pretty good since we posted 360 over here on the bill.

-Matt

STATEMENT OF CONFIDENTIALITY & DISCLAIMER: The information contained in this email message is attorney privileged and confidential, intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this email is strictly prohibited. If you have received this email in error, please notify us immediately by calling (303)-223-1300 and delete the message. Thank you.