Congress of the United States
Washington, DC 20510

May 19, 2016

Chuck Tracy
Acting Executive Director
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220-1384

Dear Mr. Tracy:

We write to express our concern that the Pacific Fishery Management Council reached its conclusions regarding S. 2533, "California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act" with no input from the congressional offices responsible for drafting the bill or from the federal agencies with whom we have worked for over two years. As a result, we believe the Council's letter lacks the rigorous analysis that we would ordinarily expect from this public body. We'd like to set the record straight.

Disagreements are inevitable in the world of drought and water. That's why we worked for over two years with fishery experts from NOAA Fisheries, not to mention the U.S. Fish and Wildlife Service, the Bureau of Reclamation, and the State of California: to achieve a balanced bill that could provide for additional water supplies in a manner that is entirely consistent with the Endangered Species Act and biological opinions. A public discussion draft of S. 2533 was also circulated for the purpose ofsoliciting input from a variety of environmental groups, including fishermen.

Your letter that expresses concern with S. 2533 is particularly troubling for a number of reasons. The first problem as we see it is the Council's complete failure to solicit input from the bill sponsor—the sponsor of the very bill that is the subject of your critique. Disagreements are inevitable, yes. But those disagreements should be based on a fair, robust, and transparent dialogue—an approach that should be particularly relevant for public bodies such as this Council. Yet this Council based its entire opinion on two letters from groups with a clear bias against this bill.

That these fishermen groups have an opposing view is not the point. Rather, the Council failed to solicit *any* input from the offices responsible for this legislation. Indeed, a simple inquiry would have revealed that this bill has been thoroughly vetted by the Council on Environmental Quality, NOAA Fisheries, and throughout the federal government.

Equally problematic is the Council's failure to conduct an independent analysis. Relying upon, *and repeating word for word in many cases*, two letters is a poor replacement for the rigorous and independent analysis the public expects from this Council.

The Council's myopic approach is now manifest in its assertion that the bill is inconsistent with the Endangered Species Act and the biological opinions—an assertion squarely at odds with the Obama Administration's recent testimony that "[the Administration] believe[s] that **we are able to implement these directives in a manner that is consistent with the ESA and the biological opinions**." We have attached for your review both the Administration's Senate testimony, as well as a point-by-point rebuttal of the letter upon which you based your position.

Putting aside our procedural concerns with how the Council went about this letter, we would also like to set the record straight on the substance. As an initial matter, you are simply incorrect that this bill violates the biological opinions or weakens protections for salmon. Again, the Administration, responsible for the implementation and enforcement of the ESA, certainly disagrees. And we have made clear all along that nothing in this Act can violate the Endangered Species Act or the biological opinions. To remove any doubt, we included a clear, concise savings clause that says nothing in the Act "overrides, modifies, or amends the applicability of the Endangered Species Act . . . or the application of the smelt and salmonid biological opinions" (Sec. 701(a)(3)).

Your letter also misconstrues another fundamental aspect of this bill: The bill will not, as you contend, cause irreparable harm to salmon. The bill focuses on improved data to operate pumps at higher levels when fish are not present and reducing pumping levels when fish are nearby. As the Administration observed, "provisions intended to build upon the agencies' current actions to improve data gathering, monitoring, and scientific methodologies can greatly benefit operations with respect to water supply and species protection."

The argument that increased water diversions at the pumps caused high mortality among salmon also misses the broader point about the main driver behind high salmon mortality rates: An insufficient amount of cold water at Shasta Dam. As NOAA Fisheries observed, it wasn't excessive pumping that resulted in high mortality rates in 2014 and 2015 as your letter suggests, but instead a failure to store enough cold water at Shasta Dam the past two years.[1]

These failures are unacceptable and resulted in 95% and 97.9% mortality rates in 2014 and 2015. In 2014, a malfunctioning side gate meant the agencies could not access all the cold water in Shasta. As a result, temperatures in the Sacramento River rose to 62 degrees—fatal for salmon eggs. The following year, a malfunctioning temperature probe meant that the agencies again had less cold water available than predicted, and temperatures again climbed to levels that were fatal for salmon. This drought bill tries to fix the problem, by giving the agencies the necessary funds to act as prudent stewards of the vital cold water reserves behind Shasta.

This drought has highlighted that we must take a holistic look at how we manage the entire ecosystem, not just looking to reductions in pumping. To this point, NOAA Fisheries acknowledged that there are many reasons for the species' decline, not just water pumping: the construction of Shasta and Keswick dams that eliminated access to vital cold water rivers and tributaries, a subsequent lack of cold water behind Shasta, predation by non-native species, and a reduction in suitable spawning habitat, not to mention water quality concerns,[2] have all contributed to a species on the brink of extinction.

---

[1] NOAA Fisheries concedes that agency mistakes in managing cold water at Shasta led to high salmon mortality rates:

> . . . **Last year, due to imperfect estimates of its volume, the cold-water pool was unexpectedly drained by mid-September, and stream temperatures soon shot up to 62 degrees**. Scientists estimate that only 5 percent of winter-run Chinook eggs survived as fry in the upper Sacramento River, compared to 25 percent survival in an average year.

NOAA Fisheries, "For Endangered Salmon in California, a Very Measured Sip of Cold Water, available at http://www.nmfs.noaa.gov/stories/2015/09/endangeredsalmon_sip_of_water.html (last accessed Mar. 14, 2016).

[2] For example, there are seven tertiary and six secondary waste water treatment plants operating around the delta that discharge around 261 million gallons of treated waste water *per day*. It is also well-established that pesticides, chemicals, and legacy pollutants, like DDT and

This bill therefore looks at a variety of ways to protect the Chinook salmon during *all* life stages, including $45 million for: increasing gravel rearing and spawning habitat; improving the agencies' management of cold water at Shasta; improving the way in which salmon are salvaged at the pumps; and studying different methods for protecting salmon during their outward migration; and reducing predation, which could provide "near- and long-term benefits for the environment," the Administration observed.

By focusing on ways in which the federal government can increase supplies in the short-term, increase our drought resilience in the long-term, and invest in activities to restore the species, the bill moves the federal government closer to achieving the laudable co-equal goals of increasing water supply reliability and environmental restoration as set forth in the Delta Reform Act of 2009.

We appreciate your consideration of our views going forward and stand ready to answer any other questions that you may have about S. 2533.

Sincerely,

Dianne Feinstein
United States Senator

John Garamendi
Member of Congress

DF/kr

---

mercury, have had significant effects on the health of salmon and the surrounding ecosystem. *See* NOAA Fisheries, *Recovery Plan for Sacramento River Winter-Run Chinook Salmon, Central Valley Spring-Run Chinook Salmon, and California Central Valley Steelhead*, Executive Summary, 2 (July 2015); *see also* U.S. Geological Survey, *Mercury Contamination from Historic Gold Mining in California*, 1 (May 2000).

Response to Specific Points in Golden Gate Salmon Association's Factsheet "Initial Analysis of S. 2533 – Senator Feinstein's Drought Bill"

1. *"On balance, S. 2533 likely would result in significant harm to salmon and the commercial and recreational salmon industry along the West Coast."*

Response: This statement is not supported by any factual data, and this sweeping conclusion rests on a faulty assessment of the provisions in S. 2533.

- **If anything, this bill attempts to fix one of the key drivers behind the species' decline**: Management of cold water at Shasta.
    - As NOAA Fisheries has explained, winter-run are dependent on sufficient cold water in Shasta Reservoir, "and it has long been recognized that a prolonged drought could have devastating impacts, possibly leading to the species' extinction."[1]
    - Further compounding matters is two successive failures in 2014 and 2015 to manage this cold water. Last year, this failure meant that temperatures in the Sacramento River rose to 62 degrees—fatal for eggs and fry.
    - *It is therefore not coincidental that high mortality rates of 95 percent and 97 percent over the past 2 years followed closely on the heels of increased temperatures on the Sacramento.*
    - This bill therefore authorizes $4 million to go towards upgrading the infrastructure and enhancing the technology so that the agencies can act as prudent stewards of this vital cold water.
- **And there are also many other reasons for the decline in salmon populations, which your letter fails to acknowledges**. As NOAA Fisheries has explained:
    - Shasta and Keswick dams block winter-run from their historical spawning habitat, which means that the spawning habitat that is

[1] NOAA Fisheries, Species in the Spotlight, Priority Actions: 2016-2020 (Sacramento Winter-Run Chinook Salmon), page 3, *available at*: http://www.nmfs.noaa.gov/stories/2016/02/docs/sacramento_winter_run_chinook_salmon_spotlight_species_5_year_action_plan_final_web.pdf

accessible is subject to high water temperatures that can be fatal to salmon eggs and fry.

- In addition to a lack of quality spawning habitat, 98 percent of riparian and floodplain habitat along the Sacramento River is no longer available to support juvenile rearing.

- Predation from non-native species (like striped bass) is another well-established threat to salmon.

- Lastly, NOAA Fisheries has also pointed to commercial and recreational fisheries as another reason for the decline.

- **In short, your critique relies heavily on high mortality rates in the fall and winter-run salmon, yet fails to draw a credible connection between those mortality rates and specific provisions in this bill.**

- Additionally, the agency tasked with the protection and management of salmon—NOAA Fisheries—participated extensively in the drafting of this legislation.

2. *"Weakening current federal protections for salmon under the ESA and other laws, such as:"*

Response: Your letter is wrong on this fundamental point.

- The savings clause in Section 701 explicitly states that the bill cannot be implemented in a manner that "overrides, modifies, or amends the applicability of the Endangered Species Act . . . or the application of the smelt and salmonid biological opinions.

- In addition, the bill explicitly requires consistency with state law and the Central Valley Project Improvement Act. Section 701(a)(1)-(2).

Below, we address in more detail how #'s 3 – 10 provided in your analysis, do not weaken current federal protections for salmon:

3. *"Allowing worse flow conditions in the Delta and increased exports. (301(e)(4))."*

Response: We are puzzled by this comment, because section 301(e)(4) has *zero effect* on management of the salmon or the salmon biological opinion. Instead, it is entirely concerned with the Delta smelt. The detailed measures to protect the salmon set forth in the salmon biological opinion are completely unaffected by this provision.

- In addition, section 301(e) begins with the Environmental Protection Mandate, which maintains current protections for listed fish species, including salmonids.

- Moreover, another part of the legislation provides a new tool to *increase* environmental flows. It equips the agencies with authority to purchase water supplies for the benefit of environmental flows—something the agencies can only do in limited circumstances at present. Section 201(g).

4. *"Locking in a 1:1 export to inflow ratio on the lower San Joaquin River for water transfers, which is less protective of salmon that current requirements. (302)(b)(6))."*

Response: Again, this is inaccurate. The bill requires this provision to be consistent with the NOAA biological opinion, something NOAA Fisheries' participation ensured.

- Like every other part of the bill, this provision must be implemented consistently with the biological opinions. Section 701.

- The salmon biological opinion has a strong adaptive management provision, which contemplates a flexible management regime—within the parameters of the ESA and influenced by new information in the seven years since the NOAA biological opinion was adopted in 2009.

- **Far from "locking in" the 1:1 ratio for water transfers, the bill only allows the agencies to use this ratio if it meets NOAA Fisheries' adaptive management standards** by not increasing adverse effects on the salmon beyond those contemplated by the biological opinion. Section 302(b)(6).

- Moreover, the transfers can only proceed if their environmental effects are consistent with all applicable environmental laws. Section 302(b)(6)(A).

- In addition, **we included language in this provision at NRDC's request requiring** that transfers must result in river flow that is in addition to the flow that would otherwise occur in the absence of the transfer. This means that the additional water will benefit both the communities that most need the water and the environment. Section 302(b)(6)(C).

- Finally, nothing in the NOAA biological opinion explicitly applies the 1:1 ratio to water transfers.

    - There is good reason for transfers to be treated separately to promote such voluntary water sales that bring needed inflow into the Delta.

    - Otherwise the transfers would not occur if a higher ratio were required and the purchasers of the transfer water couldn't get to use most of the water they purchased because they had to leave it behind in the Delta.

5. *"Mandating that the Delta cross-channel gates be kept open "to the maximum extent practicable," increasing the loss of juvenile salmon to the Delta pumps. (302(b)(1)(A)"*

Response: **Here again, your letter cherry-picks an isolated clause without any regard for what the provision says in its entirety. Context matters.**

- Section 302 (b)(1)(a) does **not**, as your letter misleadingly suggests, mandate that the agencies maximize the time that the Delta Cross Channel gates are open to the detriment of the salmon.

- To the contrary, this provision establishes a pilot project to test out ways to open the gates yet "**protect[s] out-migrating salmonids**" among other purposes.

- NOAA Fisheries drafted this provision to require extensive monitoring and data collection to ensure that the pilot study only would proceed in a way that protects salmon.

- Again, the savings clause in Section 701 explicitly states that the bill cannot be implemented in a manner that "overrides, modifies, or amends the applicability of the Endangered Species Act . . . or the application of the smelt and salmonid biological opinions." Thus if the Secretary determines that implementing the pilot project would override these protections, its implementation would be prohibited.

6. *"Allowing higher levels of pumping during peak winter storm runoff, which is critical to moving juvenile salmon through the Delta to areas where they can survive. (303(c))"*

   - Response: Nothing in the bill requires any specific pumping levels. Instead agencies must make decisions based on real-time monitoring, including the distribution of fish, turbidity, salinity, and other relevant factors.

   - The agencies can take no action under the bill if it would violate the Environmental Protection Mandate by causing any additional adverse effects on the threatened or endangered fish beyond those anticipated to occur by the biological opinions.

   - Thus, the environmental protections of the Endangered Species Act clearly have priority.

   - For example, Section 303 as revised eliminates any mandatory triggers for increased pumping and simply directs the agencies to evaluate when they can capture peak flows from El Nino storms without causing additional adverse effects on the fish.

7. *"Mandating averaging requirements that could harm salmon. (302(b)(12)) The above approach to regulating impacts on salmon is not supported by science and would be subject to interpretation by an unknown future administration."*

   Response: This argument is flawed for a number of reasons:

   - First, regardless of fears about future administrations, the agencies have been implementing these averaging requirements under the current administration.

Second, the provision expressly requires consistency with state water quality standards, which prohibit averaging requirements that would harm fish or water quality and would constrain any administration.

- **Third, all this rests against the backdrop of the ESA and the biological opinions**, meaning that the protections of this bedrock environmental law will place confine the actions of any administration, whether Democrat or Republican.

8. *"A new mandate to "maximize water supplies", which conflicts with existing federal law, the "coequal goals" under state law, and existing protections for salmon. (301, 302)"*

Response: **The bill is entirely consistent with both state and federal law.**

- The bill explicitly requires consistency with state law and the Central Valley Project Improvement Act. Section 701(a)(1)-(2).

- **The bill actually *contributes* to the co-equal goals of a reliable water supply and environmental restoration**: The bill attempts to move Delta management toward the co-equal goals of increasing water supply reliability when possible within the biological opinions' overriding mandate of environmental protection.

- The bill has an "Environmental Protection Mandate" that faithfully reflects the priorities and precautions of the Endangered Species Act by forbidding *any action* that would increase the adverse effects on threatened or endangered species beyond those anticipated to occur under the biological opinions. Sections 301(e)(2), 303(a).

- The bill does so by improving real-time management and efforts to increase water supplies solely when it is consistent with the biological opinions and environmental laws.

9. *"Provisions to facilitate authorization, permitting and funding of new dam projects that could harm salmon. The bill conflicts with state law, which prohibits the expansion of Shasta Dam. A review by the USFWS concluded that*

raising Shasta Dam would harm salmon. (Title 1, Subtitle B, Sec. 506 and 602)"

Response: This is another case where we changed the bill precisely to address the comments and concerns of the environmental community.

- At NRDC's request, the introduced bill clearly states that a storage project must comply with applicable state laws in order to be eligible for funding. Section 112(j).

- **The federal government therefore cannot fund a Shasta raise under this bill if it would be inconsistent with State law.**

10. *"A permanent guarantee of water deliveries for junior Sacramento Valley water users. (404)"*

Response: This comment is wrong on three points based on the explicit language of the bill:

- **First, Section 404 is not permanent**, but expires at the end of the Governor's drought declaration, or within two years of enactment, whichever is later (Section 702).

- Second, nothing in Section 404 "shall adversely affect *any* protections for the environment." Section 404(b)(1).

- Third, Section 404(b)(1)(C)(ii) requires that the Secretary adhere to "applicable State or Federal law (including regulations)" thereby ensuring compliance with protections for delta outflow and state water quality standards.

11. *"Excluding any consideration of impacts to fall run salmon from decision-making regarding the water operations requirements of the bill. (Multiple sections.)"*

Response: Two responses:

1) Similar to a failure to link this bill to purported harms to winter-run, **this letter likewise fails to provide any explanation for how this bill will have any greater impact on the Sacramento and American River.**

- **To the contrary, this legislation attempts to address the reasons for the fall-run decline**: a lack of cold water at Shasta; predation; and inadequate spawning habitat.

2) **Consideration of fall run salmon are not excluded from the legislation.** There are any number of statutes that extend a variety of protections to the fall run, as your letter points out. And this legislation does nothing to modify or undermine those statutes.

- While fall run salmon are not protected by the Endangered Species Act, the bill nevertheless makes explicit that any provisions must comply with the CVPIA, as well as any applicable state and federal environmental laws or biological opinions.

12. *"Requiring federal agencies to "use," not just consider, recommendations regarding water operations developed by water districts. (301(b)(2)(C) and 305(1))"*

Response: Here again, your characterization of section 301(b)(2)(C) ignores the entire provision.

- **The universe of participants is not limited to water agencies, as you incorrectly suggest.**

- **In fact, your organization would be eligible to participate:**

    - Section 301(b)(2)(C) references section 301(d)(2), which lists multiple entities for consultation, not just water districts as your analysis states. The bill text lists Central Valley Project and State Water Project water contractors and public water agencies, other public water agencies, the California Department of Fish and Wildlife and the California Department of Water Resources, and nongovernmental organizations.

The bill text also directs the Secretary to use the most up to date science to inform real-time operations, an approach that everyone should agree with.

- The bill text of 301(b)(2)(C) states: "science-based recommendations developed by any of the persons or entities described in (d)(2) to inform the agencies' real-time decisions."

- These provisions require agencies to utilize the most updated an accurate science to inform agency decisions. Deference remains with the agencies to make the final decisions.

- Section 305(1) states the level of detail required for agency analysis, requiring agencies to address "both supporting and countervailing evidence using such quantity of written supporting detail as is reasonable within the timeframe permitted for timely decisionmaking in response to changing conditions in the Delta." It is unclear how this connects to the assertion in your analysis.

13. *"Increased litigation risk regarding salmon protections and existing law. (Multiple sections.)"*

Response: **Litigation will occur with or without this legislation**. And litigation is a concern with *any* statute—the Affordable Care Act is the most recent example, but NEPA and the ESA are also examples of statutes that have spawned extensive litigation.

- In addition, this legislation requires the agencies not to take actions that would cause additional adverse effects beyond those anticipated to occur through implementation of the biological opinions.

- This standard gives the agencies a strong defense against lawsuits seeking to require them to increase water supplies.

14. *"Reduced environmental review of water transfers, including for impacts to salmon. (302(b)(9)(B)(i))"*

Response: Section 302(b)(9)(B)(i)(I) and (II) do not reduce environmental reviews of water transfers, but instead, requires compliance with both NEPA and the ESA.

- If a final permit decision cannot be made 30 days after deeming the application complete, it will be completed at "such later date as the Director or the Commissioner determines to be necessary."

15. *"New restrictions on environmental review for undefined "emergency" water projects. (304)"*

Response: Section 304 was revised based on concerns raised by the environmental community to make clear that the emergency provisions apply only to Title III—not long-term projects.

- **This provision also reflects existing law**: Council on Environmental Quality procedures, section 1506.11 of title 40, Code of Federal Regulations already allow for emergency alternative arrangement NEPA.

- **This simply means that agencies must give the amount of environmental consideration that is commensurate with the time allowed.**

16. *"A predator removal program that is not supported by science and that scientists believe could result in unintended environmental harm. (203) GGSA has developed and is working to implement alternative science-based predation management projects."*

Response: This section requires NOAA Fisheries, along with the California Department of Fish and Wildlife and water districts, to establish and conduct a nonnative predator research and pilot fish removal program based on the best available science.

- NOAA Fisheries has reviewed and is supportive of the need for additional research and programs to address salmonid predators.

- Section 203 (c) requires any program under this section to be "scientifically based" with research questions "determined jointly" by NOAA and technical experts of the districts.

- It's also unclear how you can characterize a program as lacking in scientific foundation despite a provision that requires it to be scientifically based and in the absence of an actual proposal.

17. *"Limiting environmental review for predation projects, including the review of potential harm to salmon. (204(c))"*

Response: As stated above, the emergency environmental reviews in S. 2533 fully comply with the existing Council on Environmental Quality procedures in section 1506.11 of title 40, Code of Federal Regulations. This section requires the Secretaries of the Interior and Commerce to consult with Council on Environmental Quality to develop alternative arrangements to comply with NEPA.

18. *"The conversion of Central Valley Project water contracts to permanent contracts, with potential impacts on salmon. (602(c)(1))"*

Response: **Your letter entirely fails to explain how conversion to a permanent contract can have potential impacts to salmon.**

- In fact, conversion to a permanent contract was a critical component of efforts to restore the San Joaquin for the benefit of the salmon: the San Joaquin River Restoration.

- The bill language states that nothing in this section alters any requirements under Reclamation Law, including the continuation of CVPIA Restoration Fund payments. Section 602(g)(3).

- Thus, contractual shortage provisions to satisfy endangered species needs and other environmental requirements would remain in effect under this section.

19. *"A pilot program to allow California and other states to assume the lead for NEPA review, without limiting eligible projects or eliminating projects that could harm salmon. (139)"*

Response: **This program does not weaken environmental considerations.** The idea for NEPA delegation to states is based on similar already enacted legislation in the transportation context that was largely drafted by the Senate Environment and Public Works Committee under last Congress's Democratic majority.

- This provision requires each eligible State to demonstrate that it has the regulatory capacity to adequately undertake the environmental considerations required by NEPA.

- In the transportation context, California DOT has made tremendous progress in both satisfying NEPA's requirements and streamlining the process.

- This program does not modify the Endangered Species Act, meaning that NOAA Fisheries would still consult on impacts to endangered species, like winter-run salmon.

20. *"An open ended sunset provision, as there is no definition in state law for the end of a state drought declaration. Some damaging provisions are exempt from the sunset provision. (702)"*

Response: **The sunset is not "open-ended."** The official start of the drought began with a declaration, so it makes sense that this bill would be tied to an official gubernatorial declaration to the end of the drought.

- While the sunset does exempt certain provisions, those sections pertain to the agencies using the best-available science. Requiring the agencies to employ the best available technology and make decisions on the most up to date information makes just plain common sense.