



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Allegations of Ethics Violations by Former U.S. Department of the Interior Secretary Were Not Substantiated

This is a revised version of the report prepared for public release.



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REPORT OF INVESTIGATION

I. EXECUTIVE SUMMARY

We investigated allegations that former U.S. Department of the Interior (DOI) Secretary David Bernhardt violated the Ethics Pledge¹ and Federal conflict of interest rules through his participation in matters involving the California Central Valley Project (CVP). The CVP is a large Federal water project under the jurisdiction of the Bureau of Reclamation (BOR).² In particular, we examined allegations that: (1) DOI ethics officials failed to provide Mr. Bernhardt with appropriate ethics advice concerning potential conflicts of interest with respect to Mr. Bernhardt's former client, the Westlands Water District (WWD), a public agency of the State of California; (2) Mr. Bernhardt withheld material information regarding his potential conflicts of interest from ethics officials and sought to improperly influence or intimidate them to provide him with specific advice that allowed him to participate in CVP water issues; (3) Mr. Bernhardt violated paragraphs 6 and 7 of the Ethics Pledge and the Standards of Ethical Conduct or engaged in conduct that was otherwise unlawful or improper through his participation in CVP water issues; (4) Mr. Bernhardt improperly took steps to help ensure that the WWD was awarded a favorable, permanent BOR contract to receive CVP water; and (5) the contract awarded to the WWD lacked appropriate Federal oversight provisions.

We did not substantiate the allegations. The evidence did not support the complainants' first two allegations regarding the DOI ethics officials' review of Mr. Bernhardt's potential conflicts of interest or Mr. Bernhardt's participation in that review. We also found that Mr. Bernhardt's participation in CVP water issues did not violate the Ethics Pledge or the Standards of Ethical Conduct because the matters in which he participated were not "particular matters" as that term is defined under the ethics rules, and, thus, these rules were not implicated. We also identified no evidence showing that Mr. Bernhardt's actions were otherwise unlawful or improper. Rather, we found that, to the extent Mr. Bernhardt gave directions, guidance, or advice affecting CVP matters, his actions involved policy decisions that were within Mr. Bernhardt's official discretion to make. Finally, we found no evidence that Mr. Bernhardt had any involvement in the WWD's efforts to obtain a favorable, permanent BOR contract to receive CVP water or that the WWD's contract lacked appropriate Federal oversight provisions.

Mr. Bernhardt left the DOI in January 2021. Mr. Bernhardt declined to participate in a voluntary interview with our office without special conditions that were inconsistent with our interviewing policies and practices.

¹ All references in this report to the Ethics Pledge refer to the prior Administration's Ethics Pledge, Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Feb. 3, 2017).

² Appendix 1 provides a list of abbreviations used in this report.

We are providing this report to the current Secretary of the Interior for any action deemed appropriate.

II. BACKGROUND

A. The CVP and the WWD

The BOR operates the CVP, which runs for approximately 400 miles through central California (see Figure 1). The CVP is made up of 20 dams and reservoirs, hundreds of miles of canals, and numerous other storage and distribution facilities.³ The CVP delivers water to farms, homes, businesses, and wildlife refuges; produces electric power; and provides flood protection, navigation, recreation, and other water quality benefits. It is the primary source of water for much of California's wetlands.⁴

The BOR supplies CVP water to users through contracts it established with over 250 contractors in half of California's counties. Each contract specifies how much CVP water it will deliver. The BOR operates the CVP in coordination with the California State Water Project (SWP), which is managed by the California Department of Water Resources (CDWR). The SWP provides water to 29 urban and agricultural water suppliers throughout California, including in the San Francisco Bay Area, the San Joaquin Valley, and Southern California.

The WWD is a public agency of the State of California that supplies water to, and receives payment from, approximately 700 farms within its territory.⁵ The WWD is the largest CVP contractor, both geographically and in terms of the amount of CVP water it has contracts to receive.⁶ Nevertheless, due to various factors including its historical water rights under California's State water rights system, the WWD often receives very little CVP water relative to other CVP contractors in times of water scarcity.

³ Cong. Rsch. Serv., R45342, Central Valley Project: Issues and Legislation 3 (Mar. 8, 2022), <https://crsreports.congress.gov/product/pdf/R/R45342/30>.

⁴ *Id.* at 1.

⁵ California Water Code § 37823.

⁶ Cong. Rsch. Serv., R45342, Central Valley Project: Issues and Legislation 7, 34 (Mar. 8, 2022), <https://crsreports.congress.gov/product/pdf/R/R45342/30>.

Figure 1: Map of the California Central Valley and State Water Projects



Source: Bureau of Reclamation, Central Valley Project history.

B. The Endangered Species Act Consultation and National Environmental Policy Act Processes

The CVP and SWP operate in areas containing the habitats of species protected under the Endangered Species Act (ESA), including Delta smelt (smelt) and Chinook salmon (salmon).⁷ Accordingly, any significant modifications to their operations must be reviewed under the procedures set forth in the ESA.⁸ Specifically, the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), a component of the U.S. Department of Commerce, whenever that agency's proposed action could jeopardize the continued existence or might destroy or adversely modify the critical habitat of species listed as endangered or threatened under the ESA.⁹

This consultation process generally begins when the agency wishing to take the action makes a request for its initiation (or reinitiation in the case of proposed modifications to previously reviewed actions) (see Figure 2).¹⁰ The agency then provides to the FWS or NMFS a "biological assessment" containing the agency's assessment of the impact of its proposed action on the listed species.¹¹ The process concludes when the FWS or NMFS issue their own "biological opinions" about the effects of the proposed action on the species. If the FWS or NMFS determine that a proposed action could jeopardize an ESA-protected species or its habitat, they will issue a "jeopardy opinion" that may also set forth "reasonable and prudent alternatives" (RPAs) to the agency's proposed action.¹² An agency can also modify its proposed action in response to feedback from the FWS or NMFS throughout the consultation process and thereby avoid the implementation of RPAs.¹³

⁷ In addition to Chinook salmon, other salmonid species are listed under the ESA in the area and are potentially affected by the actions at issue in this report. We refer to them collectively as "salmon" for ease of reference.

⁸ 16 U.S.C. §§ 1531–44.

⁹ 16 U.S.C. § 1536; 50 C.F.R. §§ 402.10–402.17, 402.02. The FWS and NMFS both administer the ESA: the FWS is responsible for terrestrial and freshwater species, and the NMFS is generally responsible for marine wildlife such as whales and fish that live primarily in saltwater, including salmon. U.S. Fish & Wildlife Serv., ESA Basics: 40 Years of Conserving Endangered Species (Feb. 2017), <https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics.pdf>.

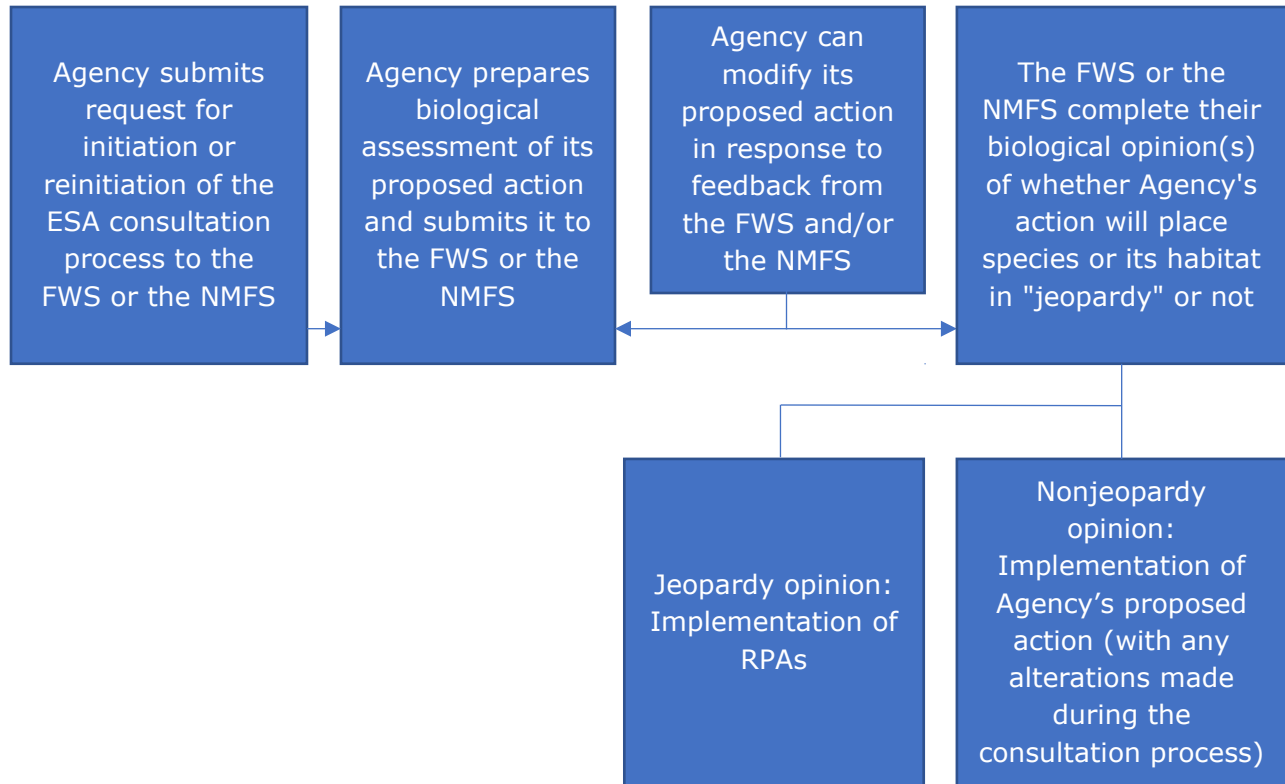
¹⁰ The ESA consultation process can vary depending on a range of factors, including the species at issue and the nature of the proposed action. The process described in this report is referred to as a "formal consultation."

¹¹ 16 U.S.C. § 1536(a)(2), (b)(3), (c); 50 C.F.R. §§ 402.14, 402.02.

¹² 16 U.S.C. § 1536(a)(4), (b)(3)(A).

¹³ RPAs are alternatives to the agency's proposed action "that can be implemented in a manner consistent with the intended purpose of the action" and that are "economically and technologically feasible" but that the FWS or NMFS "believes would avoid the likelihood of jeopardizing the continued existence of listed species" or "the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02.

Figure 2: Formal ESA Consultation Process



In addition, where an agency's action may affect the "human environment," the action may be subject to the notice and comment review provisions of the National Environmental Policy Act (NEPA).¹⁴ In carrying out these provisions, the agency first issues a notice of intent to draft an environmental impact statement in the *Federal Register*.¹⁵ The agency then prepares both a draft and final environmental impact statement, both of which must be available for public review.¹⁶ At the end of the process, the agency issues a record of decision, which describes the alternative courses of action the agency considered and explains why the agency chose a particular alternative.¹⁷ Figure 3 contains a summary of the NEPA process as it relates to this report.

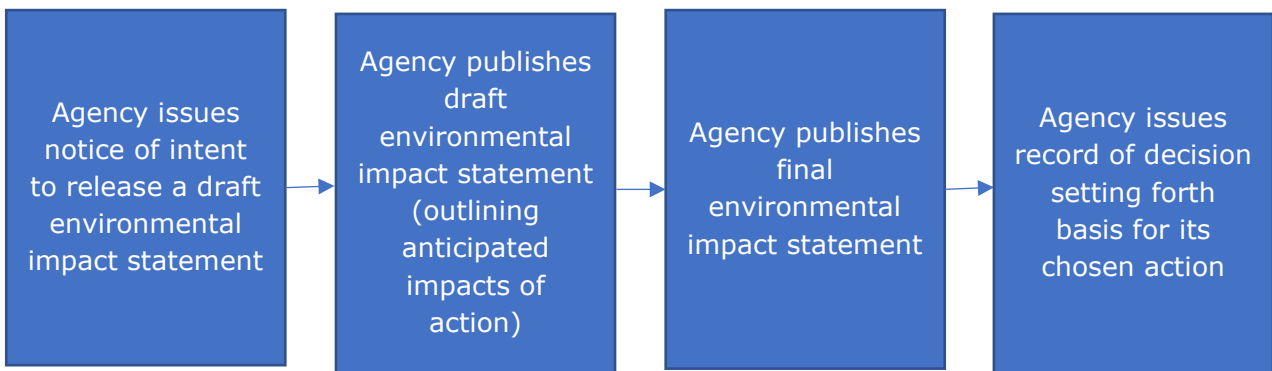
¹⁴ See 42 U.S.C. § 4332(2)(C).

¹⁵ U.S. Env't Prot. Agency, National Environmental Policy Act Review Process, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Nov. 25, 2022). In general, an environmental impact statement contains a discussion of the agency's proposed action, the action's potential impacts on the environment, and a "reasonable range of alternatives that could accomplish the same purpose and need as that of the agency's original proposed action." *Id.*

¹⁶ *Id.*; see also 40 C.F.R. § 1506.6(b).

¹⁷ U.S. Env't Prot. Agency, National Environmental Policy Act Review Process, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Nov. 25, 2022).

Figure 3: NEPA Process



The NEPA process is distinct from the consultation process under the ESA, but the two sometimes overlap when the same action could potentially affect both the listed species and the human environment.

C. The U.S. Government’s Efforts to Increase CVP and SWP Water Supplies Before Mr. Bernhardt Became DOI Deputy Secretary

Before Mr. Bernhardt’s confirmation as DOI Deputy Secretary in August 2017, the BOR, the CDWR, and Congress took steps to increase water supplies to CVP and SWP water users, including CVP contractors like the WWD.¹⁸

1. The BOR’s and CDWR’s Initiation of Proposed Modifications to CVP and SWP Operations in August 2016

In August 2016, following multiple years of drought in the region, the BOR and CDWR sought to modify the long-term operations plan for the CVP and the SWP. Before this time, the CVP and SWP were under an operations plan that had been modified by RPAs resulting from 2008 and 2009 biological opinions. Many CVP water users argued that these RPAs were overly restrictive and unnecessarily limited CVP water supplies in favor of the smelt and salmon.

On August 2, 2016, the BOR and CDWR began the process of modifying the operations plan for the CVP and SWP and obtaining new biological opinions regarding that plan by sending a request for reinitiation of the ESA consultation process to the FWS and NMFS (“2016 request for consultation”).

A BOR official involved in the decision to issue the 2016 request for consultation stated that the discussions regarding and decision to reinitiate the ESA consultation process and obtain new biological opinions began before Mr. Bernhardt became Deputy Secretary. The BOR Regional Official at the time, whose office oversaw the overall ESA consultation process for the CVP and SWP, confirmed those statements.

¹⁸ Appendix 2 includes a timeline of the events discussed in this report.

2. *Congress Enacted the Water Infrastructure Improvements for the Nation (WIIN) Act in December 2016*

The WIIN Act, signed into law on December 16, 2016, was enacted to, among other goals, “provide for improvements to the rivers and harbors of the United States, [and] to provide for the conservation and development of water and related resources.”¹⁹ The WIIN Act contained provisions aimed at increasing the amount of water delivered to CVP and SWP water users. Section 4001, for example, directed that the Secretaries of Interior and Commerce supply CVP and SWP water users with the “maximum quantity of water supplies practicable . . . by approving . . . operations or temporary projects to provide additional water supplies as quickly as possible” and “use all available scientific tools to identify any changes to the real-time operations of Bureau of Reclamation, State, and local water projects that could result in the availability of additional water supplies.”²⁰ In addition, Section 4002 specifically directed the Secretaries of Interior and Commerce to maximize the water flows for the CVP and SWP at the highest level allowed by the applicable biological opinion at two significant geographical points.²¹

The WIIN Act also contained provisions that benefited CVP and SWP water contractors in other ways. For example, Section 4004 provided public water agencies that had CVP or SWP water contracts with the opportunity to receive information about and provide input on CVP and SWP ESA consultations.²² Section 4011, meanwhile, directed the BOR, at the contractor’s request, to convert water service contracts held by some CVP contractors, including the WWD, into repayment contracts that could, among other things, allow the contractor to avoid the acreage limitations in the Reclamation Reform Act of 1982.²³ It also provided for accelerated repayment/prepayment under terms favorable to repayment contractors.²⁴

III. RESULTS OF INVESTIGATION

We investigated allegations that Mr. Bernhardt violated the Ethics Pledge and Federal conflict of interest rules through his participation in issues involving the CVP. We also investigated allegations that the Departmental Ethics Office failed to provide Mr. Bernhardt with appropriate ethics advice regarding his participation in issues related to the CVP. We did not substantiate the allegations, either because the conduct at issue was not improper under applicable authority or because the evidence did not support the allegations.

¹⁹ Pub. L. No. 114–322, 130 Stat. 1628, 1628 (2016).

²⁰ *Id.* § 4001, 130 Stat. at 1851, 1854.

²¹ *Id.* § 4002, 130 Stat. at 1855–56.

²² *Id.* § 4004, 130 Stat. at 1858–59.

²³ *See id.* § 4011, 130 Stat. at 1878–82.

²⁴ *Id.*; *see also* Cong. Rsch. Serv., R44986, Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions 23 (Dec. 14, 2018), <https://crsreports.congress.gov/product/pdf/R/R44986> (citing 43 U.S.C. § 390mm).

A. Facts

1. *Mr. Bernhardt's Work Representing the WWD as Its Attorney and Lobbyist*

Before his confirmation as DOI Deputy Secretary in July 2017, Mr. Bernhardt was a shareholder of a law firm in Washington, D.C. As part of his practice, Mr. Bernhardt represented the WWD in both litigation and lobbying Congress and the Federal Government on various water issues.

Specifically, Mr. Bernhardt represented the WWD in connection with its litigation challenging the validity of the 2009 NMFS jeopardy biological opinion and resulting RPAs.²⁵ In the litigation, the WWD claimed that the RPAs improperly and unnecessarily restricted the flow of CVP and SWP water.²⁶ Mr. Bernhardt argued on behalf of the WWD in the NMFS challenge before the Ninth Circuit Court of Appeals in September 2014.²⁷ During this argument, Mr. Bernhardt argued that the NMFS's biological opinion overstated the effect of the operation of the CVP and SWP on the salmon because it used the wrong environmental "baseline" to measure the effects.²⁸

In addition, Mr. Bernhardt lobbied members of Congress on the WWD's behalf concerning Section 4002 of the WIIN Act. As described previously, Section 4002 sought to maximize the water available to CVP and SWP contractors by limiting the BOR's discretion to pump water below the highest rate allowed by the applicable biological opinion, which critics contended could harm the species.²⁹

2. *Ethics Determinations Related to Mr. Bernhardt's Nomination as DOI Deputy Secretary*

In early January 2017, several months before the public announcement of his nomination as Deputy Secretary, Mr. Bernhardt contacted the DOI's then-Alternate Designated Agency Ethics Official (ADAEO) to discuss various ethics issues. The ADAEO told us in an interview that the ADAEO could not specifically recall this particular discussion with Mr. Bernhardt. However, the ADAEO's handwritten notes reflect that the ADAEO and Mr. Bernhardt discussed whether Mr. Bernhardt's prior work for the WWD would require his recusal from official matters related directly to the WWD or would require a broader recusal from all official matters involving the CVP. The ADAEO reported to us that, in other conversations and correspondence prior to Mr. Bernhardt's formal nomination, Mr. Bernhardt said that he had provided legal and lobbying services to the WWD. The ADAEO recalled that Mr. Bernhardt said his lobbying efforts for the

²⁵ *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 978 (9th Cir. 2014).

²⁶ *Id.* The WWD also challenged the 2008 FWS jeopardy biological opinion on similar grounds. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014). Other CVP water contractors, SWP water contractors, and the CDWR were also parties to the litigation and made claims similar to those of the WWD.

²⁷ Transcript of Oral Argument of David Longly Bernhardt, *San Luis & Delta-Mendota Water Auth. v. Locke* (9th Cir. Sept. 15, 2014) (No. 12–15144), 2014 WL 10500986.

²⁸ *Id.*

²⁹ See Cong. Rsch. Serv., R44986, Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions 11 (Dec. 14, 2018), <https://crsreports.congress.gov/product/pdf/R/R44986>. The BOR monitors these pumping levels closely because higher pumping rates can lead to more fish being drawn into the pumps and injured. *Id.*

WWD had been limited to Section 4002 of the WIIN Act, which, as described previously, related to the pumping rates along the CVP.

On March 6, 2017, Mr. Bernhardt filed his Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) with the U.S. Office of Government Ethics (OGE) in connection with his forthcoming nomination as DOI Deputy Secretary. Mr. Bernhardt listed the WWD as an entity to which he had provided “Legal Services.”³⁰ In considering Mr. Bernhardt’s potential conflicts of interest with respect to the WWD, the ADAEO, in consultation with the OGE, made several determinations:

- First, the ADAEO determined that paragraph 6 of the Ethics Pledge, which restricts a political appointee’s ability to participate in particular matters directly and substantially related to the political appointee’s former employer or client, did not apply to Mr. Bernhardt’s work for the WWD. The ADAEO made this determination because the WWD was a State agency and thus, not a “former client” for purposes of the Ethics Pledge.
- Second, the ADAEO determined that paragraph 7 of the Ethics Pledge, which restricts a political appointee’s ability to participate in particular matters on which the political appointee lobbied or in the specific issue area in which the particular matter fell, did not apply to Mr. Bernhardt’s lobbying activities on behalf of the WWD. The ADAEO explained that the ADAEO drew this conclusion because the matter on which Mr. Bernhardt lobbied was not a “particular matter” as that term is defined under the Ethics Pledge. The ADAEO memorialized this determination in a memorandum sent to Mr. Bernhardt and the Designated Agency Ethics Official (DAEO) on March 31, 2017. The ADAEO also sent this memorandum to the OGE and the Office of White House Counsel on April 3 and April 5, 2017, respectively.
- Third and finally, the ADAEO concluded that, under the Standards of Ethical Conduct, specifically 5 C.F.R. § 2635.502, Mr. Bernhardt was required to recuse himself from participating in particular matters in which the WWD was, or represented, a party.³¹ Under this provision, Mr. Bernhardt was not barred from participating in “particular matters of general applicability” in which the WWD might have an interest.

On April 25, 2017, after reviewing Mr. Bernhardt’s ethics materials, including his OGE Form 278e and his preconfirmation ethics agreement setting forth Mr. Bernhardt’s ethics commitments should he be confirmed, the OGE informed the administration and the DOI that it had

³⁰ U.S. Off. of Gov’t Ethics, Public Financial Disclosure Report (OGE Form 278e), Bernhardt, David Longly.

³¹ Federal employees are generally required to disqualify themselves from participation in “particular matters involving specific parties” when: 1) the employee has a specified “covered relationship” with one of the parties to the matter, and 2) the employee determines that the circumstances would “cause a reasonable person with knowledge of the relevant facts to question [the employee’s] impartiality in the matter.” 5 C.F.R. § 2635.502(a). These “covered relationships” include having worked as an attorney for a specific party within the past year. *Id.* § 2635.502(b)(1)(iv). Agencies are permitted to make an independent determination as to whether a reasonable person would question the employee’s impartiality and to independently require recusal. *Id.* § 2635.502(c).

determined that no unresolved conflicts of interest existed or remained, and that the administration could move forward with Mr. Bernhardt's nomination.³²

On April 28, 2017, the President formally nominated Mr. Bernhardt to be the DOI Deputy Secretary. On May 1, 2017, Mr. Bernhardt signed his preconfirmation ethics agreement. On May 8, 2017, the DAEO sent a letter transmitting Mr. Bernhardt's preconfirmation ethics materials to the Chairman of the Senate committee that was reviewing Mr. Bernhardt's nomination. In the letter, the DAEO expressed the opinion that, "based upon [the DAEO's] review of Mr. Bernhardt's OGE Form 278e and the specific commitments made by him in his ethics agreement that he will be in compliance with the conflicts of interest laws and regulations that will apply to him as Deputy Secretary of the Department of the Interior."

On July 24, 2017, the Senate confirmed Mr. Bernhardt as DOI Deputy Secretary. Two weeks later, Mr. Bernhardt submitted a memorandum to senior DOI officials regarding his ethics recusals, which referenced and attached his May 1, 2017 preconfirmation ethics agreement. In the recusal memorandum, Mr. Bernhardt wrote that, in order to comply with 5 C.F.R. § 2635.502, he would not participate in particular matters involving the WWD for 1 year (until August 1, 2018) unless he was first authorized to participate by the DAEO. The recusal memorandum did not identify the WWD as a party implicated by any of the restrictions set forth in the Ethics Pledge.

3. Mr. Bernhardt's Involvement in CVP Water Issues During His Tenure as DOI Deputy Secretary and Secretary

a. Mr. Bernhardt's Involvement in the BOR's 2017 Notice of Intent to Prepare a Draft Environmental Impact Statement

In addition to its 2016 request for consultation, the BOR determined that its proposed modifications to the CVP and SWP operations plan required review under the process set forth in the NEPA.³³ To that end, in late 2017, BOR employees worked to complete the first step of this process, the Notice of Intent to Prepare a Draft Environmental Impact Statement (NOI).

The evidence showed that, on at least four occasions in late 2017, Mr. Bernhardt called or invited a BOR Regional Official to attend meetings to discuss the NOI. For example, the agenda for the first of these meetings included discussions about the NOI, aspects of the ESA consultation, and the NEPA processes related to the CVP and SWP operations plan. Mr. Bernhardt, the BOR Regional Official, and other senior DOI and BOR officials attended this meeting. Emails sent

³² Pursuant to the procedures set forth in 5 C.F.R. § 2634.605(c), the Director of the OGE is required to review a presidential nominee's ethics materials, and, if "satisfied that no unresolved conflicts of interest exist," submit those materials to the appropriate Senate committee, along with a letter stating that the Director is satisfied, based on the information provided by the nominee, that "the nominee has complied with all applicable conflict laws and regulations." In the case of political appointees, the OGE typically reviews these materials prior to an individual's nomination and then informs the administration and the relevant agency whether it believes the nominee can satisfy the ethics commitments. This process is referred to colloquially as "preclearance," and the email that the OGE sent to the administration and the DOI stated, "David Bernhardt is precleared."

³³ This process was described previously in the Background section.

during this time reflect that Mr. Bernhardt provided the BOR Regional Official with guidance on the contents of the NOI and that Mr. Bernhardt wanted a “quick turnaround” on its finalization.³⁴

Contrary to some allegations we received, the BOR Regional Official denied having received direction from Mr. Bernhardt to “weaken” the ESA protections for the smelt or salmon. The BOR Regional Official acknowledged that Mr. Bernhardt had “some ideas” of what should be included in the NOI, but the BOR Regional Official did not view Mr. Bernhardt’s input as “uncommon.” Rather, the BOR Regional Official said that if they had received similar input from a prior deputy secretary, they probably would have taken the same actions—debated the issue before finalizing the NOI.

One BOR employee who worked on the NOI recounted having to “fight” for language concerning species protection to be included in the NOI and that the BOR employee had been concerned because the BOR employee believed the BOR Regional Official was “getting pressure from above” to not include this kind of language. Although language regarding species protection was ultimately included in the NOI, the BOR employee reported remaining concerned that protections for smelt and salmon had taken a “back seat” to maximizing water supplies in the published NOI. The BOR employee also stated, however, that the BOR employee was aware attorneys in the DOI Office of the Solicitor (SOL) had reviewed the NOI, and they believed it satisfied all legal and regulatory requirements. Further, the BOR employee did not personally believe the published NOI was “illegal.”

On December 29, 2017, the BOR published the NOI in the *Federal Register* for public notice and comment.³⁵

b. Mr. Bernhardt’s October 4, 2018 Meeting with the Biological Assessment Team in California and the October 19, 2018 Presidential Memorandum

Following the publication of the NOI, the BOR began working on the biological assessment of its proposed changes to the operations plan for the CVP and SWP. This biological assessment contained its view of the likely effects of these changes on smelt and salmon.

In October 2018, Mr. Bernhardt met with the employees working on the biological assessment at their offices in California. The meeting attendees included BOR employees and several SOL attorneys who had been assigned to assist with the biological assessment.

Meeting attendees stated that the meeting lasted for several hours, and that Mr. Bernhardt questioned them about several aspects of their plans for the biological assessment. Specifically, the attendees stated that Mr. Bernhardt appeared to prefer the team use a “without action” baseline against which to measure the effects of the proposed modifications to the CVP and SWP operations on the species. One of the meeting attendees explained that, while using this baseline would increase the amount of CVP water, it would also mean that even minimal species

³⁴ The WWD was not discussed in these emails.

³⁵ 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. 61,789 (Dec. 29, 2017).

protections measures could be deemed acceptable. One BOR employee recounted an awareness that Mr. Bernhardt had unsuccessfully advanced this theory on behalf of the WWD in court prior to joining the DOI as Deputy Secretary. The BOR employee expressed the belief that it was inappropriate for him to try to have the BOR use a methodology the court had already stated was unnecessary.

The meeting attendees also said that Mr. Bernhardt expressed concerns about unexpected delays that could result from the team's plan to include salmon life cycle modeling in its biological assessment.³⁶

Notwithstanding the questions Mr. Bernhardt raised during the meeting, all the attendees we interviewed denied that Mr. Bernhardt gave them explicit instructions about what to include in or exclude from the biological assessment. One of the SOL attorneys who attended the meeting described the process of completing the biological assessment as similar to other processes in which the attorney had been involved during prior administrations. The attorney also said that all administrations have a strong policy interest in California water issues. The attorney opined that, because it was legitimate for the Deputy Secretary of the Interior to discuss the analytical approach with his teams, the attorney did not have any concerns. Likewise, the other attendees we interviewed told us that, to the extent they objected to Mr. Bernhardt's questions or opinions, these objections were based on policy disagreements and not on ethical, misconduct, or other similar concerns.

Shortly after this meeting, on October 19, 2018, the President issued a memorandum that established deadlines for completion of biological assessments and biological opinions.³⁷ Pursuant to this memorandum, the BOR was required to complete the final biological assessment by January 31, 2019, and the FWS and NMFS were required to issue their final biological opinions within 135 days of that final biological assessment.³⁸

c. The BOR's Completion and Transmission of its Biological Assessment to the FWS and NMFS on January 31, 2019

On January 31, 2019, the BOR transmitted its completed biological assessment to the FWS and NMFS.³⁹ The BOR's biological assessment contained an analysis measuring the effects of the proposed modifications using the "without action" baseline that Mr. Bernhardt discussed during his October 4, 2018 meeting with the biological assessment team. It also contained an analysis using the CVP and SWP's current operations as the baseline, which was the same approach as

³⁶ One BOR employee expressed the belief that excluding life cycle modeling could make the agency vulnerable to legal challenges, but advised their supervisor that the BOR should not include it. The BOR employee recounted relying on SOL attorneys to ensure that the biological assessment was legally sufficient. The evidence showed that SOL attorneys reviewed the biological assessment prior to its publication.

³⁷ 83 Fed. Reg. 53,961 (Oct. 25, 2018).

³⁸ *Id.* at 53,962.

³⁹ U.S. Bureau of Reclamation, Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, Final Biological Assessment (Jan. 2019), <https://www.usbr.gov/mp/bdo/docs/ba-final-biological-assessment.pdf>.

that previously used by the BOR.⁴⁰

The biological assessment did not include salmon life cycle modeling as part of its analysis of the effects of the proposed actions on the species. However, the NMFS subsequently requested, and the BOR submitted, supplemental life cycle modeling data that addressed this issue.⁴¹

4. The Departmental Ethics Office's Conclusion that Mr. Bernhardt's Involvement in the NOI and Biological Assessment Was Not Restricted by Paragraph 7 of the Ethics Pledge

In early 2019, a national news organization published an article that referenced the NOI and the biological assessment and stated that Mr. Bernhardt acknowledged that he directed the BOR Regional Official to start the process of weakening the ESA protections for smelt and salmon to increase CVP water supplies. The article quoted sources described as outside ethics experts who questioned whether Mr. Bernhardt's participation in CVP water issues that could affect the WWD violated the Ethics Pledge and whether he participated in CVP water issues to benefit the WWD. The same ethics experts also questioned the validity of the "verbal approval" Mr. Bernhardt purportedly received from DOI ethics officials to participate in the NOI and biological assessment. A subsequent article by the same news organization reported that Mr. Bernhardt improperly pressured the ADAEO to render ethics advice based on Mr. Bernhardt's personal preferences.

Shortly after the article was published, the new Director of the DOI Departmental Ethics Office (DEO), who was also the DAEO,⁴² sent Mr. Bernhardt a memorandum at Mr. Bernhardt's request. The DAEO's memorandum "examine[d] prior ethics advice and counsel" the DEO had provided to Mr. Bernhardt regarding "issues, decisions, and/or actions pending" at the DOI involving the CVP or SWP. In this memorandum, the DAEO concluded that paragraph 7 of the Ethics Pledge did not apply to Mr. Bernhardt's involvement in either the NOI or the biological assessment because neither were "particular matters" as that term is defined for purposes of the Ethics Pledge. Rather, according to the DAEO's memorandum, both were "broad matters" that were "outside the scope of paragraph 7 of the Ethics Pledge."⁴³ Specifically, the memorandum stated that the NOI was "focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta [i.e., south of the Sacramento and San Joaquin Rivers' confluence with the San Francisco Bay] . . . while augmenting operational flexibility by addressing the status of listed species." Similarly, the DAEO's memorandum stated that the proposed modifications described in the biological assessment were for the continued operation of the CVP and SWP, which it described as Federal and State projects "that are enormous in geographical extent and impact."

⁴⁰ *Id.* at 3–1, 4–1.

⁴¹ Nat'l Marine Fisheries Serv., Biological Opinion on Long Term Operation of the Central Valley Project and the State Water Project 690–91 (Oct. 21, 2019), <https://repository.library.noaa.gov/view/noaa/22046> [hereinafter NMFS Biological Opinion].

⁴² This individual was not the DAEO at the time of Mr. Bernhardt's appointment and confirmation.

⁴³ In the DAEO's email transmitting the memorandum to Mr. Bernhardt, the DAEO wrote that the WIIN Act was also not a "particular matter" for purposes of the Federal ethics rules and the Ethics Pledge. The memorandum itself, however, did not directly address this issue.

5. *The NMFS' and FWS' Respective Biological Opinions, and the BOR's Final Environmental Impact Statement and Record of Decision*

The FWS and NMFS released their respective biological opinions on October 21, 2019.⁴⁴ Unlike their 2008 and 2009 predecessors, these two biological opinions found that the BOR's final proposed modifications to CVP and SWP operations would not jeopardize the listed species or adversely modify their critical habitat. Both the FWS and NMFS wrote, however, that unlike the CVP and SWP operations plan that had resulted in the 2008 and 2009 "jeopardy" opinions, the 2019 modifications were "more protective" of the species and included changes that had objectives similar to the 2008 and 2009 RPAs.⁴⁵

On December 19, 2019, the BOR issued the final environmental impact statement.⁴⁶ On February 19, 2020, the BOR officially adopted the biological opinions through a Record of Decision,⁴⁷ thereby concluding the consultation process.

6. *The BOR's Negotiated Contract with the WWD for the Permanent Supply of CVP Water*

As stated above, the complainants alleged that, around the same time that the NOI and biological assessment were being prepared, Mr. Bernhardt helped ensure that the WWD received a favorable long-term BOR contract to receive CVP water. They also alleged that this contract lacked appropriate provisions for Federal oversight.

As noted previously, Section 4011 of the WIIN Act directed the BOR, at the contractor's request, to convert CVP water service contracts, including those held by the WWD, into repayment contracts.⁴⁸ It further provided for accelerated repayment/prepayment under terms favorable to repayment contractors, including the newly converted water service contractors, which allowed them to more easily obtain a permanent right to receive CVP water.⁴⁹ In addition, Section 4011 emphasized that contractors who had satisfied their repayment obligations were not subject to the

⁴⁴ U.S. Fish & Wildlife Serv., Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the Central Valley Project and the State Water Project 1 (Oct. 21, 2019), [hereinafter FWS Biological Opinion]; NMFS Biological Opinion at 1.

⁴⁵ NMFS Biological Opinion at 14, 797; FWS Biological Opinion at 62, 220.

⁴⁶ U.S. Bureau of Reclamation, Final Environmental Impact Statement Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project (Dec. 19, 2019), https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41664.

⁴⁷ U.S. Bureau of Reclamation, Record of Decision Statement Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project (Feb. 19, 2020), https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42324.

⁴⁸ In general, water users within the CVP receive CVP water through one of two types of contracts with the BOR: "repayment" or "service" contracts. Repayment contracts are structured to allow the contractor to pay down its debt to the BOR for the costs of constructing the CVP that can be allocated to that contractor. These payments for construction costs are fixed in amount and duration, and repayment contractors also make payments for operations and maintenance costs. Service contractors, meanwhile, make payments toward their share of CVP construction costs and operations and maintenance costs based on the amount of water they actually receive (i.e., water service). Service contracts are term-limited, albeit renewable, at the contractor's request. *See* Reclamation Project Act of 1939 §§ 9(d)–(e), 43 U.S.C. § 485h(d)–(e).

⁴⁹ Once a contractor repays its allocable construction costs, it is considered to have a permanent right to the use of the water developed by it. *See* 43 U.S.C. § 485h-1(4).

Reclamation Reform Act of 1982's pricing requirements and acreage limitations.⁵⁰ This had the effect of lifting the limitations on the number of acres an individual landowner could irrigate and allowed contractors to obtain water at a generally lower rate.⁵¹

On April 23, 2018, the WWD requested the conversion of its seven water service contracts to repayment contracts pursuant to Section 4011. The contracting official in the BOR's Water Office told us that 74 other water contractors made the same conversion request as the WWD. The WIIN Act project manager stated that the BOR held contract negotiation sessions with the WWD and the other water contractors in 2018 and 2019 and that the BOR followed the same negotiation process with the WWD as it did with the other contractors.

When we asked BOR employees involved in the contract negotiations about Mr. Bernhardt's role, the BOR employees stated that they did not receive any instructions or directions from Mr. Bernhardt regarding specific contract negotiations with the WWD. They also said that they were unaware of any direction Mr. Bernhardt provided to their supervisors regarding contract negotiations for the WWD or any other water contractor. In addition, the BOR employees said that the WWD was not treated any differently from other similarly situated contractors.

On February 28, 2020, the BOR and the WWD entered into a contract that set forth the terms and conditions for the BOR to permanently provide water to the WWD in exchange for the WWD's accelerated repayment of its allocated portion of CVP construction costs and other obligations.⁵² The contract between the BOR and WWD contained numerous provisions providing for contracting officer oversight of WWD operations.

B. Analysis

We did not substantiate any of the allegations, whether under the Ethics Pledge or otherwise. In brief, we did not find evidence supporting the complainants' allegations regarding the DEO's review of Mr. Bernhardt's potential conflicts of interest or Mr. Bernhardt's participation in that review. We also found that Mr. Bernhardt's participation in the development of the NOI and biological assessment did not violate paragraphs 6 or 7 of the Ethics Pledge or 5 C.F.R. § 2635.502, and we found no evidence that Mr. Bernhardt's actions were otherwise unlawful or improper. Finally, we found no evidence that Mr. Bernhardt had any involvement in the WWD's efforts to receive a favorable, permanent contract with the BOR and that the allegation that the WWD's contract lacked Federal oversight was unfounded. Each of these allegations is addressed below.

⁵⁰ Cong. Rsch. Serv., R44986, Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions 23 (Dec. 14, 2018), <https://crsreports.congress.gov/product/pdf/R/R44986> (citing Reclamation Reform Act of 1982, P.L. 97-293, 96 Stat. 1261).

⁵¹ *See id.*

⁵² As of August 11, 2022, the WWD's contract, along with 13 other CVP renewal contracts, are the subject of ongoing litigation not relevant to this report. *See Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, No. 20-0706 (E.D. Cal. filed May 20, 2020).

1. The Evidence Did Not Support the Complainants' Allegations Regarding the DEO's Review of Mr. Bernhardt's Potential Conflicts of Interest or Mr. Bernhardt's Participation in that Review

The complainants raised various allegations regarding the sufficiency of the DEO's review of Mr. Bernhardt's potential conflicts of interest with respect to the WWD and issues related to the CVP. They also questioned whether Mr. Bernhardt withheld material information related to his potential conflicts of interest from the DEO. In addition, the complainants alleged that Mr. Bernhardt sought to intimidate or otherwise improperly sway ethics officials' views. For the reasons stated below, we found the evidence did not support these allegations.

First, we found that the DEO's review of Mr. Bernhardt's potential conflicts of interest related to the WWD and the CVP before his confirmation as DOI Deputy Secretary was not deficient and was consistent with standard review practices.⁵³ As stated above, the evidence showed that Mr. Bernhardt submitted his OGE Form 278e before his nomination as DOI Deputy Secretary. On this form, Mr. Bernhardt disclosed the WWD as an entity to which he had provided "Legal Services" in the past. He also told the ADAEO that he had lobbied on Section 4002 of the WIIN Act on behalf of the WWD, and the evidence showed that Mr. Bernhardt engaged extensively with the ADAEO on this topic.

Based on the information the ADAEO received, and in consultation with the OGE, the ADAEO concluded that 5 C.F.R. § 2635.502 required Mr. Bernhardt to recuse himself from participating in particular matters in which the WWD was, or represented, a party for a period of 1 year from the date his representation of the WWD ended. However, the ADAEO also concluded that paragraphs 6 and 7 of the Ethics Pledge did not apply to Mr. Bernhardt's former representation of or lobbying work for the WWD, either because the WWD was not considered a "former client" under paragraph 6 of the Ethics Pledge or because Section 4002 of the WIIN Act was not a "particular matter" under paragraph 7 of the Ethics Pledge.⁵⁴

The ADAEO memorialized these conclusions in a memorandum shared with other ethics officials, including the ADAEO's supervisor, members of the OGE, and the Office of White House Counsel. We found no evidence that any of these officials raised any objections or concerns with respect to the ADAEO's conclusions. Moreover, after the OGE reviewed Mr. Bernhardt's OGE Form 278e and his preconfirmation ethics agreement, it informed the White House and the DOI that, should they decide to proceed with Mr. Bernhardt's nomination, the OGE would certify to the Senate Committee that Mr. Bernhardt's financial disclosure materials were complete and that the steps Mr. Bernhardt had agreed to take in his ethics agreement would sufficiently address any conflicts of interest.

We also did not substantiate the allegation that Mr. Bernhardt withheld material information related to his potential conflicts of interest from the DEO. As discussed above, Mr. Bernhardt disclosed his prior representation of the WWD in his OGE Form 278e and described the scope of

⁵³ See 5 C.F.R. § 2634.605(c).

⁵⁴ As discussed below, we independently analyzed whether Mr. Bernhardt's conduct violated the Ethics Pledge and the Standards of Ethical Conduct and found that it did not.

his lobbying work in his communications with the ADAEO.

Finally, we found no evidence to support the claim that Mr. Bernhardt sought to coerce or intimidate the ADAEO. The ADAEO denied that Mr. Bernhardt had tried to persuade the ADAEO to change the ADAEO's legal advice. The ADAEO stated that Mr. Bernhardt had opinions on various ethical and legal topics, but the ADAEO said this was not unusual given that Mr. Bernhardt was a practicing attorney. The ADAEO also reported appreciating the direct engagement with Mr. Bernhardt. According to the ADAEO, Mr. Bernhardt was not coercive or intimidating. Moreover, as stated above, the ADAEO shared the ADAEO's legal conclusions regarding Mr. Bernhardt's preconfirmation disclosures with a number of individuals, including OGE officials and the ADAEO's supervisor (the DAEO), and none of them objected, disagreed, or otherwise expressed concerns. There was no suggestion that Mr. Bernhardt sought to improperly intimidate or coerce the views of the OGE officials or the DAEO.

2. Mr. Bernhardt's Participation in the Development of the NOI and Biological Assessment Did Not Violate Paragraphs 6 or 7 of the Ethics Pledge

a. Paragraph 6 of the Ethics Pledge

We determined that Mr. Bernhardt did not violate paragraph 6 of the Ethics Pledge, which prohibits political appointees from participating in particular matters involving specific parties directly and substantially related to the political appointee's former employer or client for 2 years from the date of their appointment. Although the WWD was Mr. Bernhardt's former client because Mr. Bernhardt represented the WWD as an attorney, the WWD is a State agency, and—as such—is excluded from the definition of “former client” under the Ethics Pledge.

Paragraph 6 of the Ethics Pledge states, “I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.” For purposes of the Ethics Pledge, a “former client” is defined as “any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment.”⁵⁵ However, the Ethics Pledge excludes from its definition of “former employer” any “executive agency or other entity of the Federal Government, State or local government.”⁵⁶ Furthermore, in interpreting this provision, the OGE has stated that the “definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer.”⁵⁷ Thus, as an agency of the State of California, the WWD is not a “former client” for purposes of the Ethics Pledge, and Mr. Bernhardt was not required to recuse himself from matters involving the WWD under paragraph 6 of the Ethics Pledge.

⁵⁵ Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Feb. 3, 2017).

⁵⁶ *Id.* at 9334.

⁵⁷ U.S. Off. of Gov't Ethics, DO-09-011, Ethics Pledge: Revolving Door Ban—All Appointees Entering Government 4 (Mar. 26, 2009). Although initially issued in 2009 under the prior administration's Ethics Pledge, the OGE subsequently updated this guidance to reflect that the exclusion of governmental entities from the definition of former clients also applied to the Ethics Pledge discussed in this Report. *Id.* at 1.

b. Paragraph 7 of the Ethics Pledge

We also determined that Mr. Bernhardt did not violate paragraph 7 of the Ethics Pledge. Paragraph 7 restricts a political appointee who was a registered lobbyist from participating in any particular matter on which the political appointee lobbied within the 2 years before the date of his or her appointment or participate in the specific issue area in which the particular matter falls for 2 years after the date of the appointment. While Mr. Bernhardt's lobbying for the WWD did involve Section 4002 of the WIIN Act, we determined that neither the NOI nor the biological assessment were "particular matters" as that term is defined under the Ethics Pledge. Thus, Mr. Bernhardt was not required to recuse himself from participating in the NOI or biological assessment under paragraph 7.

Paragraph 7 of the Ethics Pledge states, "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."⁵⁸ For purposes of paragraph 7, a "particular matter" includes "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding"⁵⁹ and "encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons."⁶⁰ The term "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons."⁶¹ "Particular matters" include matters that focus on the interests of specific parties and also include particular matters of general applicability.⁶² Moreover, the term "specific issue area" is defined as a "particular matter of general applicability."⁶³ A particular matter of general applicability is defined as "a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties."⁶⁴

As an initial point, before Mr. Bernhardt's nomination, the ADAEO, in consultation with the OGE, concluded that "Mr. Bernhardt's prior lobbying on Section 4002 of [the WIIN Act] does not subject him to the restrictions of paragraph 7." The ADAEO explained that "when viewed in its entirety, [the WIIN Act] is not a particular matter" and thus, "Mr. Bernhardt's prior lobbying on Section 4002 of [the WIIN Act] does not subject him to the restrictions of paragraph 7 of the administration ethics pledge."

⁵⁸ Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Feb. 3, 2017). Unlike paragraph 6, which does not apply when the former client is a State or Federal agency, paragraph 7 applies regardless of the type of client to whom lobbying services were provided.

⁵⁹ 18 U.S.C. § 207(i)(3).

⁶⁰ 5 C.F.R. § 2635.402(b)(3).

⁶¹ *Id.*

⁶² U.S. Off. of Gov't Ethics, DO-06-029, Particular Matter Involving Specific Parties, Particular Matter, and Matter, 8 (Oct. 4, 2006).

⁶³ U.S. Off. of Gov't Ethics, LA-17-03, Guidance on Executive Order 13770, 1-2 (Mar. 20, 2017).

⁶⁴ 5 C.F.R. § 2640.102(m).

We do not need to independently resolve this question because, regardless of whether the matter on which Mr. Bernhardt lobbied for the WWD *was* a particular matter, the matters in which Mr. Bernhardt participated in his official capacity—namely, the NOI and the biological assessment—were not “particular matters.” Moreover, they did not fall “in the specific issue area” (i.e., “particular matter of general applicability”) on which Mr. Bernhardt lobbied. Thus, the restrictions of paragraph 7 were not implicated, and Mr. Bernhardt was not required to recuse himself from participating in either the NOI or the biological assessment.

We concluded that neither the NOI nor the biological assessment was a particular matter because neither was focused on the interests of “specific parties” or a “discrete and identifiable class of persons.” The NOI was intended to solicit input from a broad range of stakeholders in the CVP and SWP, including the public and other agencies beyond the WWD, regarding the continued operation of the CVP and SWP in a manner that maximized water supplies, optimized power generation, and supplemented flexibility by addressing the status of the listed species.⁶⁵ Both the CVP and SWP are large Government projects that affect the water supplied throughout the entire State of California.⁶⁶ Indeed, the CVP is one of the world’s largest water supply projects and delivers water for use throughout California including to farms, homes, businesses, wildlife refuges, and wetlands.⁶⁷ Likewise, the SWP provides water to a wide array of water users in California including homes, businesses, and farms. Given the diversity of interests implicated by the NOI, we concluded that it was not a “particular matter,” and paragraph 7 of the Ethics Pledge did not apply.

For similar reasons, we also found that the biological assessment was not a “particular matter.” The biological assessment discussed numerous and varied proposed actions intended to provide additional operational flexibility and maximize water deliveries to the full range of CVP and SWP water users, not just the WWD. As discussed above, these water users included both commercial and residential entities and spanned a variety of industries and economic sectors. Therefore, as with the NOI, we concluded that, because of the diversity of interests implicated by the biological assessment, it was not a “particular matter,” and paragraph 7 of the Ethics Pledge did not apply.

In sum, because we found that neither the NOI nor the biological assessment was a “particular matter” or a “specific issue area,” we concluded that Mr. Bernhardt was not restricted from involvement in either by paragraph 7 of the Ethics Pledge.

3. Mr. Bernhardt’s Participation in the NOI and Biological Assessment Did Not Implicate 5 C.F.R. § 2635.502

Mr. Bernhardt’s participation in the NOI and the biological assessment did not implicate 5 C.F.R. § 2635.502 because they were not particular matters involving specific parties.

⁶⁵ 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. 61,789, 61,790 (Dec. 29, 2017).

⁶⁶ Cong. Rsch. Serv., R45342, Central Valley Project: Issues and Legislation 3 (Mar. 8, 2022), <https://crsreports.congress.gov/product/pdf/R/R45342/30>.

⁶⁷ *Id.* at 1.

Pursuant to 5 C.F.R. § 2635.502, Federal employees are required to consider the appearance of their participation in “particular matters involving specific parties” when the employee has a “covered relationship” with one of the parties, such as a former attorney-client relationship. Where either the employee or the agency designee determines that the circumstances “would cause a reasonable person with knowledge of the relevant facts to question [the employee’s] impartiality in the matter,” the employee “should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee” to participate.⁶⁸

A “particular matter involving specific parties” is one that “typically involves a specific proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties.”⁶⁹ The OGE has explained that “[w]hen this language is used, it reflects ‘a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate.’”⁷⁰

As discussed above, we determined that the NOI and the biological assessment did not fall within the broader category of particular matters of general applicability, let alone the narrower category of particular matters “involving specific parties.” Here, the NOI and the biological assessment were not particular matters involving specific parties because neither involved a “specific proceeding” or “isolatable transaction or related set of transactions” between identifiable parties. Rather, as explained above, both implicated a broad array of water users from various industries and sectors. Therefore, Mr. Bernhardt’s participation in the NOI and the biological assessment did not implicate 5 C.F.R. § 2635.502, and he was not required to consider whether his participation in those matters raised an appearance issue.

4. The Evidence Did Not Show That Mr. Bernhardt’s Involvement in the NOI or Biological Assessment Was Otherwise Unlawful or Improper

The evidence did not substantiate the allegation that Mr. Bernhardt’s involvement in the NOI and biological assessment was otherwise unlawful or improper and undertaken to specifically benefit the WWD, irrespective of the Ethics Pledge and Federal ethics regulations discussed above. More specifically, we found that, to the extent Mr. Bernhardt gave directions related to the NOI and biological assessment, these were policy decisions that were squarely within the agency’s purview.

Although agencies such as the BOR are required to use the “the best scientific and commercial data available” in completing biological assessments,⁷¹ they have broad discretion concerning the contents of NOIs and biological assessments. NEPA regulations pertaining to the NOI require only that the NOI “briefly” describe the action the agency proposed to take and its

⁶⁸ 5 C.F.R. § 2635.502.

⁶⁹ 5 C.F.R. § 2640.102(1).

⁷⁰ U.S. Off. of Gov’t Ethics, DO–06–029, Particular Matter Involving Specific Parties, Particular Matter, and Matter, 3 (Oct. 4, 2006) (quoting Bayless Manning, Federal Conflict of Interest Law 204 (1964)).

⁷¹ 50 C.F.R. § 402.14(d).

planned “scoping process.”⁷² Likewise, ESA regulations give Federal agencies “wide discretion” regarding the contents of a biological assessment.⁷³

We found no evidence that Mr. Bernhardt’s directions were outside the scope of this discretion or were otherwise given to specifically benefit the WWD. As noted previously, with respect to the NOI, one of the BOR employees who worked on the NOI reported feeling that the species’ protections had become less important than water maximization. The BOR employee did not specify the source of this belief, but recounted believing that the BOR Regional Official was being pressured from “above” to prioritize water maximization over species protection. However, this employee did not believe the NOI was legally deficient and acknowledged that species protection language was included in the NOI and that SOL attorneys had reviewed and approved the NOI. We found no basis to disagree with this assessment.

Similarly, several participants in the October 2018 meeting told us that Mr. Bernhardt questioned the biological assessment team’s plan for setting the “baseline” against which to measure the effects of the proposed changes on smelt and salmon and expressed concerns about delays that could result from the team’s plan to use life cycle modeling. However, notwithstanding Mr. Bernhardt’s apparent preference to use the “without action” scenario as the “baseline” for the biological assessment, the BOR team included the CVP and SWP’s current operations scenario in the final biological assessment. We received no evidence that there were any negative consequences from Mr. Bernhardt or anyone else as a result of this decision. In addition, although one BOR employee expressed concerns about the biological assessment’s legal sufficiency if it did not include life cycle modeling, the BOR employee acknowledged that the biological assessment had been reviewed and approved by SOL attorneys.

In support of the allegation that Mr. Bernhardt sought to increase CVP water supplies irrespective of the impact on the species and regulatory requirements, the complainants cited Mr. Bernhardt’s alleged instruction to the BOR Regional Official to “begin the process of weakening [the ESA] protections” for smelt and salmon. The complainants alleged this purported instruction evidenced Mr. Bernhardt’s intent to deliberately avoid the ESA and NEPA requirements to provide more CVP water to the WWD. However, the BOR Regional Official to whom Mr. Bernhardt allegedly made this statement denied that Mr. Bernhardt had done so. Likewise, all the individuals we interviewed, including employees from the BOR, SOL, and FWS who worked on the ESA consultation and NEPA processes, denied that Mr. Bernhardt ever directed them to weaken ESA protections for smelt or salmon.

We also did not find evidence that Mr. Bernhardt sought to specifically benefit the WWD. While some BOR employees may have disagreed with Mr. Bernhardt’s views on what to include in relevant documents, none of the BOR and DOI employees we interviewed reported that Mr. Bernhardt attempted to influence these processes to benefit the WWD. In addition, two of

⁷² 40 C.F.R. § 1508.22 (amended Sept. 13, 2020). The current version reads, “*Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement.” 40 C.F.R. § 1508.1(u). The prior version contained the same text but included the additional context guidelines described above.

⁷³ 50 C.F.R. § 402.12(f). The rules regarding biological assessments indicate that their contents will “depend on the nature of the Federal action” and list several items that “may be considered for inclusion,” such as results of site inspections, the views of experts on the species, and analyses of potential alternate actions. *Id.*

the employees described their interactions with Mr. Bernhardt as consistent with those of political appointees from prior administrations and stated that they had responded to his inquiries, requests, and directives in the same manner as they would have done previously. Similarly, some BOR employees told us that the focus of the ESA consultation and NEPA processes changed from protection of smelt and salmon to increased water deliveries following the change in administrations. These employees attributed this change to the directives contained in the WIIN Act (which was passed immediately prior to the change in administrations) and to the different policy views of the two administrations. We found no evidence to the contrary. Moreover, the evidence showed that the effort to modify the CVP and SWP operations plan and obtain new biological opinions began before Mr. Bernhardt's tenure as DOI Deputy Secretary. The BOR and CDWR began this process in August 2016, approximately 1 year before Mr. Bernhardt was confirmed as DOI Deputy Secretary in late July 2017. Even assuming the WWD would have had a proportionally larger increase in water supplies relative to other CVP water contractors, Congress' passage of the WIIN Act in December 2016 highlighted that many water users, not just the WWD, would benefit from increased water supplies.⁷⁴ The broad range of potential beneficiaries of increased water supplies was further highlighted by the October 2018 Presidential Memorandum, which established deadlines for and attempted to streamline the ESA consultation process. Taken together, the BOR and CDWR's effort to obtain new biological opinions before Mr. Bernhardt's tenure and the legislative and presidential support for the water supply maximization provisions contained in the WIIN Act, weigh against the suggestion that Mr. Bernhardt's subsequent efforts to achieve the same goal were predicated on an improper desire to specifically benefit the WWD.

In light of the above, we concluded that Mr. Bernhardt's involvement in the NOI and biological assessment was neither unlawful nor otherwise improper.

5. Mr. Bernhardt Did Not Have Any Involvement in the WWD's Efforts to Receive a Favorable, Permanent Contract With the BOR, and the Allegation that the WWD's Contract Lacked Federal Oversight Was Unfounded

We found no evidence to support the allegation that Mr. Bernhardt helped ensure that the WWD receive a favorable, permanent BOR contract to receive CVP water or that its contract lacked provisions for Federal oversight.

Section 4011 of the WIIN Act allowed all water service contractors such as the WWD to request conversion to long-term contracts similar to the one the WWD sought. The BOR employees involved in negotiating these contracts denied that Mr. Bernhardt was involved in these negotiations or that they received any instructions from him either directly or indirectly. They also confirmed that over 70 other water contractors made the same conversion request as the WWD and that the BOR followed the same process for the WWD as it did for these other contractors. Moreover, the WWD's contract contained numerous provisions that provided for Federal oversight. Thus, we concluded that the allegations made by the complainant regarding

⁷⁴ Section 4001 of the WIIN Act, for example, directed that the CVP and SWP water users be supplied the "maximum quantity of water supplies" possible. Similarly, Section 4010 directed the BOR to "use all available scientific tools to identify any changes . . . that could result in the availability of additional water supplies."

the WWD's CVP water contract were unsubstantiated.

IV. CONCLUSION

We did not substantiate any of the allegations regarding improper conduct by Mr. Bernhardt. We also concluded that the evidence did not support the complainants' allegations regarding the DEO's review of Mr. Bernhardt's potential conflicts of interest.

V. SUBJECT

David L. Bernhardt, Former Secretary, U.S. Department of the Interior

VI. DISPOSITION

We are providing this report to the current Secretary of the Interior for any action deemed appropriate.

Appendix 1: List of Abbreviations

Abbreviations	Full Name
ADAEO	Alternate Designated Agency Ethics Official
BOR	U.S. Bureau of Reclamation
CDWR	California Department of Water Resources
CVP	Central Valley Project
DAEO	Designated Agency Ethics Official
DEO	Departmental Ethics Office
DOI	U.S. Department of the Interior
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOI	Notice of Intent to Prepare a Draft Environmental Impact Statement
RPA	Reasonable and Prudent Alternative
SWP	California State Water Project
WWD	Westlands Water District
WIIN	Water Infrastructure Improvements for the Nation Act

Appendix 2: Timeline of Events

2008 and 2009	
The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) issue biological opinions regarding the operations plan for the California Central Valley Project (CVP) and the California State Water Project (SWP). Both opinions are “jeopardy opinions” and require the Bureau of Reclamation (BOR) to implement Reasonable and Prudent Alternatives (RPAs).	
2014	
September	Mr. Bernhardt argues on behalf of his client, the Westlands Water District (WWD), in its appeal regarding the 2009 biological opinion before the Ninth Circuit Court of Appeals.
2016	
August 2	The BOR and California Department of Water Resources (CDWR) submit their request for consultation to the FWS and NMFS seeking to modify the operations plan for the CVP and the SWP and obtain new biological opinions regarding that plan.
December 16	The Water Infrastructure Improvements for the Nation (WIIN) Act is signed into law by President Obama.
2017	
January–April	Mr. Bernhardt contacts the U.S. Department of the Interior (DOI) Alternate Designated Agency Ethics Official (ADAEO) to discuss various ethics issues prior to his nomination as the DOI Deputy Secretary.
March 6	Mr. Bernhardt files his Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) with the Office of Government Ethics (OGE).
April 3 and 5	The ADAEO provides the OGE and the Office of White House Counsel with a written determination that paragraph 7 of the Ethics Pledge does not apply to Mr. Bernhardt’s lobbying activities on behalf of the WWD because the matter on which Mr. Bernhardt lobbied was not a “particular matter” under the Ethics Pledge.
April 25	The OGE informs the Office of White House Counsel and the DOI that if the administration decides to move forward with Mr. Bernhardt’s nomination, the OGE would certify to the Senate Committee that Mr. Bernhardt’s financial disclosures were complete and that any conflicts of interest had been sufficiently addressed.
April 28	Mr. Bernhardt is nominated as the DOI Deputy Secretary.

July 24	The Senate confirms Mr. Bernhardt as DOI Deputy Secretary.
Fourth Quarter	On at least four occasions, Mr. Bernhardt meets with or calls the former BOR Regional Director to discuss the CVP and SWP operations plan and the Notice of Intent to Prepare a Draft Environmental Impact Statement (NOI).
December 29	The BOR publishes the NOI in the <i>Federal Register</i> .
2018	
October 4	Mr. Bernhardt travels to California to meet with the BOR employees working on the biological assessment regarding the BOR's proposed changes to the operations of the CVP and SWP and the likely effect those changes would have on endangered species, including smelt and salmon.
October 19	The President issues a memorandum requiring the BOR to complete its final biological assessment by January 31, 2019, and the FWS and NMFS to issue their final biological opinions about the effects of the proposed actions on endangered species, including smelt and salmon, 135 days thereafter.
2019	
January 31	The BOR transmits its final biological assessment to the FWS and NMFS.
First Quarter	A national news organization publishes an article referencing the NOI and the biological assessment.
First Quarter	The Director of the DOI Departmental Ethics Office and Designated Agency Ethics Official sends Mr. Bernhardt a memorandum concluding that paragraph 7 of the Ethics Pledge does not apply to Mr. Bernhardt's involvement in either the NOI or the biological assessment because neither were "particular matters" as that term is defined for purposes of the Ethics Pledge.
October 21	The FWS and NMFS release their respective biological opinions finding that the BOR's final proposed modifications to CVP and SWP operations would not jeopardize the listed species or their habitats and that the proposed modifications were "more protective" of the species and included changes that had objectives similar to the 2008 and 2009 RPAs.
December 19	The BOR issues the final environmental impact statement.
2020	
February 19	The BOR accepts the FWS and NMFS biological opinions through a record of decision.



REPORT FRAUD, WASTE, ABUSE, AND MISMANAGEMENT

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