

DECISION SUPPORT PAPER

DATE: October 11, 2017
SUBJECT: Incorporation of California WaterFix (CWF) into the Reinitiation of Consultation (ROC) on the Coordinated Long-term Operation (LTO) of the Central Valley Project (CVP) and State Water Project (SWP)

This paper describes the possible options to comply with the Endangered Species Act (ESA) for the ROC on LTO and the remaining aspects of the CWF.

KEY TAKEAWAYS

- The USFWS CWF ESA consultation is not complete. Operation of new and existing CVP and SWP water facilities under dual conveyance was addressed programmatically. A project-specific (i.e. not programmatic) USFWS operations ESA consultation is needed before issuance of the 408 permit, which is needed before construction of the CWF.
- The ROC on LTO goal is a durable and sustainable joint BO. Analysis must include a variety of scenarios to account for projects implemented in the short or long-term.
- Some water users:
 - do not want CWF included in the ROC on LTO, as regulatory responsibilities for the CWF should be tied to participation, and they believe the LTO will be reconsulted on again prior to CWF construction.
 - suggested a shorter duration for the ROC on LTO, prior to operations with CWF

BACKGROUND

The final Biological Opinion (BO) from NMFS on the CWF does not require any subsequent consultation on CWF operations. The final USFWS CWF BO includes 7 activities that require future Federal approvals and therefore are addressed programmatically, with no Incidental Take Statement issued as subsequent consultations will be needed. These include “operations of new and existing CVP and SWP water facilities under dual conveyance.” Page 246 of the USFWS CWF BO states: “It is anticipated that as part of the reinitiation of the 2008 Service BiOp, Reclamation and DWR will propose project operations that avoid jeopardizing delta smelt or destroying or adversely modifying its critical habitat. Reclamation has indicated the scope of this reinitiation of consultation is expected to include the operation of existing facilities with CWF facilities (1/19/2017 email from Brooke White, Reclamation).”

Due to the above statement, the Bay-Delta Office (BDO) has assumed that the ROC on LTO will address CWF operations as part of the Proposed Action. BDO has assumed that other consultations by the USACE or others will address the remaining items.

DISCUSSION

Option 1: Inclusion of CWF Operations in the ROC on LTO

CWF may be litigated for many years and could be enjoined. As a goal of the ROC on LTO is to have a durable and sustainable BO, it is necessary to include scenarios both with and without CWF, such that the ROC on LTO can be implemented whether or not the CWF is constructed.

- Environmental Baseline: Per the ESA Handbook, the environmental baseline must include “the anticipated impacts of all proposed Federal projects in the action area that

have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.”

- Thus, as the CWF has a completed NMFS and USFWS consultation for construction, the CWF construction will be included in the environmental baseline for the ESA documentation. Reclamation, USFWS and NMFS agree.
- Proposed Action: As project-specific ESA consultation is needed for CWF operations for USFWS, CWF operations should be part of the Proposed Action. There could be a timeframe component of the Proposed Action to account for pre-CWF operations and post-CWF operations. This would avoid regulatory responsibilities for the CWF if CWF is never constructed -operations would continue indefinitely under the pre-CWF operations Proposed Action.

Advantages:

- Completes project-specific CWF operations consultation for USFWS.
- Allows for a durable BO.

Disadvantages:

- Complex modeling and documents due to pre and post CWF operations considerations in the Proposed Action.
- Imposes/Requires regulatory commitments on non-participants in the CWF.

Option 2: Include CWF Operations in the ROC on LTO, No Measures for Non-Participants

In this option, CWF would be included in the ROC on LTO, but the ROC on LTO documents would be clear that no additional regulatory commitments would be imposed on water districts (i.e. CVP contractors) or agencies that do not participate in the CWF. The environmental baseline and proposed action would be the same as above.

Advantages:

- Completes project-specific CWF operations consultation for USFWS.
- Allows for a durable BO.
- Avoids regulatory commitments to non-participants.

Disadvantages: Complex modeling and documents due to pre and post CWF operations considerations in the Proposed Action.

Option 3: Exclude CWF Operations from the ROC on LTO

As there is the potential for reconsultation to occur before CWF is constructed, and Reclamation and CVP contractors do not want additional regulatory responsibilities associated with CWF assigned to them if they do not participate in CWF, CWF would be excluded from the ROC on LTO under this option.

- Environmental Baseline: As above, per the ESA handbook the environmental baseline must include construction of the CWF as it has completed Section 7 consultation.

- Proposed Action: The proposed action would exclude CWF, and would only address operations without dual conveyance for the next 15-20 years (to extend until likely CWF construction). This would allow for a simpler Proposed Action.

Advantages:

- Simplifies the Proposed Action.
- Avoids appearance of possible regulatory responsibilities associated with CWF from impacting CVP contractors.
- Most contractors support this option.

Disadvantages: If CWF is not constructed, none. If CWF is constructed:

- does not complete project-specific operations consultation for CWF before 408 permit
- would require reinitiation of consultation again to include CWF operations before the 408 permit, which would be largely the same as the ROC on LTO due to interconnected operations, stretching resources thin
 - If each reinitiation of consultation takes 3-5 years, then that process would need to start 3-5 years prior to completion of CWF construction, or CWF operations delayed until the completion of that consultation
- Would not allow the ROC on LTO to support signing long-term water contracts, as consultation would not extend for the 40 years required for M&I service contracts.
 - If separate long-term water contract consultations are pursued, this 1) causes resource issues for Reclamation and USFWS/NMFS, 2) NMFS will likely require a reopen clause to make contracts subject to the ROC on LTO, and 3) could require extensive work to update the 2008 BA environmental baseline to the present, which would be duplicative with ROC on LTO updates.
- Would not meet the goal of a durable BO

POSITION OF INTERESTED PARTIES

USFWS is highly motivated to complete the ROC on LTO to make sure that protections to delta smelt are included as part of the analysis of operations of the project with CWF, particularly because their BO was programmatic for operations.

Reclamation, DWR, USFWS, and NMFS want a durable and sustainable BO in order to avoid new LTO consultations every few years, draining resources and unable to provide a holistic and forward thinking approach. However, USFWS will evaluate whether there is flexibility in the commitments made during the CWF to do a separate consultation on CWF outside of the ROC on LTO.

Westlands does not want the ROC on LTO to include operations of the CWF, as 1) the CWF may not be built, 2) Reclamation and CVP contractors may not participate in CWF, and 3) if CVP contractors or Reclamation do participate in the CWF, the LTO will be reconsulted on by the time CWF is built anyway and therefore CWF should not be included in the ROC on LTO. Westlands believes that changed circumstances warrant evaluation of commitments made during the CWF consultation to consult on CWF during ROC. Westlands also believe that the inclusion of CWF would affect the timeframe of the ROC, which they believe should be 15 to 20 years.

Tehama-Colusa Canal Authority believes regulatory responsibilities for the CWF operation should be tied to participation in the CWF, and therefore believes CWF should be excluded from the ROC on LTO. They are also supportive of the timeframe proposed by Westlands.

Metropolitan Water District agrees with Westlands on not consulting on CWF on the ROC.

Environmental NGOs:

Power Customers: