

## DECISION SUPPORT PAPER

**DATE:** October 24, 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.

### BACKGROUND

The final biological opinion (BO) from NOAA's National Marine Fisheries Service (NMFS) on the CWF does not require any subsequent consultation on CWF operations. The final U.S. Fish and Wildlife Service (USFWS) CWF BO includes 7 broad categories of activities that require future ESA section 7 consultations and, therefore, are addressed programmatically, with no incidental take exempted from those broad categories of activities within the Incidental Take Statement. These activities are not authorized to commence until these separate project-specific consultations are completed. 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)." Project-specific (i.e. not programmatic) consultation is needed before the new facilities can operate and for construction of the North Delta Diversions (NDDs) and the Head of Old River Gate.

Due to the above statement, Reclamation's 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 will address the remaining items.

Per the ESA regulations, 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."

### DISCUSSION

Current and potential litigation on CWF will likely continue for many years and the project 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 CVP and SWP can operate to new Biological Opinions whether or not the CWF is constructed.

#### Option 1: Inclusion of CWF Operations in the ROC on LTO, Phased Approach

- Environmental Baseline: As the CWF has a completed NMFS and USFWS consultation for construction, and has completed California Environmental Quality Act (CEQA) and a 2081 permit on the state side, the CWF construction will be included in the environmental baseline for the ESA documentation per ESA regulations. The NMFS BO included CWF operations at a project-specific level, and the USFWS BO included CWF

operations programmatically. The environmental baseline will thus need to describe the CWF operations as described in the CWF consultations as well.

- 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 phased approach to the Proposed Action to account for without CWF operations and with CWF operations. This would avoid regulatory responsibilities (restrictions in south delta pumping) for the CWF if CWF is never constructed. Operations would continue under the without CWF operations phase of the Proposed Action.

*Advantages:*

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

*Disadvantages:*

- Complex modeling and documents due to phased CWF operations considerations in the Proposed Action.
- Could impose/require regulatory commitments on non-participants in the CWF if CWF is constructed.

## **Option 2: Multiple environmental baselines and Proposed Actions**

As discussed above, the ESA regulations require the environmental baseline to include completed Section 7 consultations. However, if CWF is not built, the BO characterization of effects and ultimate conclusion would not be the same as if CWF was built and operating. Benefits to delta smelt and its critical habitat from reducing pumping of the South Delta facilities assumed in the BOs would not occur if the CWF is not built, and therefore these benefits should not be included in the environmental baseline. Therefore, one solution could be to have two environmental baselines – one with, and one without CWF, and two proposed actions – one with, one without CWF.

*Advantages:*

- Allows for the CVP and SWP to operate to new BOs regardless of whether WaterFix is constructed or not (allows for a durable BO).
- Avoids appearance of regulatory commitments on non-participants in the CWF.

*Disadvantages:*

- Complex modeling and documents.
- May not have legal precedent.
- May not be allowed under the Endangered Species Act.

## **Option 3: Exclude CWF Operations from the ROC on LTO Proposed Action**

As there is the potential for reinitiation of consultation to occur before CWF is constructed, 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: The environmental baseline would include CWF construction and operations per the ESA regulations.
- Proposed Action: The proposed action would exclude CWF operations, and would only address operations without dual conveyance for the next 15-20 years (to extend until likely CWF operation).

*Advantages:*

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

*Disadvantages:*

- The environmental baseline would have unrealized benefits (benefits to delta smelt from reducing pumping of the South Delta facilities, spring outflow). The proposed action could therefore result in worse conditions than the environmental baseline for smelt.
- If CWF is constructed:
  - would require reinitiation of the CWF consultation to do project-specific consultation on CWF operations before the 408 permit, which would be largely the same as the ROC on LTO due to interconnected operations
    - 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
    - Significant workload issues
  - Would change the subsequent action/consultation identified in the USFWS BO for project-specific CWF operations consultation (ROC on LTO). Could lead to legal risk for USFWS.
  - 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. May not allow for signing long-term water contracts as there would be no updated base operations BO.
  - Would not meet the goal of a durable BO

#### **Option 4: Exclude CWF Construction and Operations from the ROC on LTO Proposed Action and Environmental Baseline**

As there is the potential for reinitiation of consultation to occur before CWF is constructed, 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. It would also be excluded from the environmental baseline.

- Environmental Baseline: The environmental baseline would exclude CWF construction and operations.
- Proposed Action: The proposed action would exclude CWF, and would only address operations without dual conveyance.

*Advantages:*

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

*Disadvantages:*

- Violates Endangered Species Act regulations requiring the inclusion of the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal section 7 consultations in the environmental baseline.
- Would not meet the goal of a durable BO.
- Would require reinitiation of the CWF consultation with the USFWS to do project-specific consultation on CWF operations before the Corps of Engineers can issue a 408 permit, which would be largely the same as the ROC on LTO due to interconnected operations
  - 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
  - Significant workload issues
- Would change the subsequent action/consultation identified in the USFWS BO for project-specific CWF operations.

### **Option 5: Wait to Decide**

Under Option 5, Reclamation would perform analyses with and without the CWF in both the environmental baseline and the proposed action. Prior to submitting a Biological Assessment to the USFWS and NMFS, Reclamation would evaluate the status and likelihood of the CWF project moving forward as consulted on in 2017. If the project is not moving forward, Reclamation would withdraw the Section 7 consultation completed in 2017, and then exclude CWF from both the environmental baseline and proposed action. If the project is moving forward, Reclamation would include CWF in both the environmental baseline and proposed action.

*Advantages:*

- Allows ROC on LTO to move forward while CWF is in flux.

*Disadvantages:*

- Uncertainty regarding the environmental baseline and proposed action for possibly years.
- Need to develop 2 proposed actions and 2 analyses.

*Table 1: Summary of the Options*

Option	CWF in Environmental Baseline?	CWF in Proposed Action?
1	Yes	Yes and No (Phased Approach)
2	Yes and No (two baselines)	Yes and No (two proposed actions)
3	Yes	No

4	No	No
5	Yes and No (two baselines)	Yes and No (two proposed actions)

## POSITION OF INTERESTED PARTIES

USFWS analyzed operations of CWF programmatically. This requires a subsequent consultation on operations. Based on discussions prior to the completion of the CWF BO, it had been assumed the ROC on LTO would include CWF operations in the PA.

Reclamation, DWR, USFWS, DFW and NMFS want a durable and sustainable BO in order to minimize the need for new LTO consultations every few years, draining resources and unable to provide a holistic and forward thinking approach. However, the agencies 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 they believe 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 ROC on LTO will be reinitiated on by the time CWF is built anyway. Westlands believes that changed circumstances (Participation Approach, votes on CWF funding) warrant evaluation of commitments made during the CWF consultation to consult on CWF during ROC. Westlands also believes that the inclusion of CWF would affect the timeframe to complete the ROC, with a non-CWF proposed action taking less time. Westlands believes the duration of the BOs for the ROC on LTO should be 15-20 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 including CWF in the ROC.

Environmental NGOs:

Power Customers: