

DECISION SUPPORT PAPER

DATE: November 15, 2017
SUBJECT: Consideration of California WaterFix (CWF) in 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 exempts incidental take associated with CWF operations. The final U.S. Fish and Wildlife Service (USFWS) CWF BO includes 7 broad categories of activities that require future project-specific 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 project-specific consultations are completed. These include "operations of new and existing CVP and SWP water facilities under dual conveyance." Identification of the subsequent project-specific consultation is required in **XXX** in order to use a programmatic approach. Page 246 of the USFWS CWF BO identifies the subsequent consultation on CWF operations as the ROC on LTO. 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, 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 (50 CFR 402.02), 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. A goal of the ROC on LTO is to have a durable and sustainable BO, which means legally defensible, flexible, and lasting more than a decade (ideally several decades). The following are various options for considering the inclusion of CWF in the ROC on LTO, in addition to the advantages and disadvantages of each option.

Option 1: Include CWF Operations in the ROC on LTO, Phased Approach

- Environmental Baseline: As NMFS and USFWS have exempted incidental take for construction of Phase 1 in their respective CWF BOs, and the California Department of Water Resources has completed California Environmental Quality Act (CEQA) and a California Department of Fish and Wildlife 2081 permit on the state side, the CWF construction will be included in the environmental baseline for the ESA documentation per ESA regulations. Under this option, the environmental baseline for ROC on LTO will include the CWF operations 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:

- Fulfills Reclamation's stated intent to complete project-specific CWF operations consultation.
- Consistent with statements in the USFWS CWF BO that assume ROC on LTO is the subsequent consultation on CWF.
- Allows for a durable BO.

Disadvantages:

- Complex modeling and documentation 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.
- May be inconsistent with the ESA Handbook, which states that the baseline "should not include the effects of the action under review in the consultation." (FWS & NMFS, Consultation Handbook at 4-22). Unless Reclamation proposes a different CWF Operation in ROC on LTO, the baseline would assume the presence of part of the proposed action.
- To be consistent with Federal regulations (50 CFR 402.02), CWF operations should be part of the baseline, unless Reclamation proposes a CWF operation that differs than what was included in the CWF BOs.
- May result in litigation on the ROC on LTO.

Option 2: Multiple Environmental Baselines and Proposed Actions

As discussed above, the ESA regulations (50 CFR 402.02) 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 CWF is constructed or not (allows for a durable BO).

- Avoids appearance of regulatory commitments on the CVP that could apply to non-participants in the CWF.

Disadvantages:

- Complex modeling and documentation, increased agency workload and confusion.
- USFWS and NMFS are not aware of any precedent for multiple environmental baselines, and there is no clear guidance.
- NMFS has a policy that they do not do consultation on multiple proposed actions.
- Excluding CWF operations from the environmental baseline when Biological Opinions have been completed would be inconsistent with Federal regulations implementing the Endangered Species Act (50 CFR 402.02).
- Would prolong the consultation process.

Option 3: Limit the Temporal Scope of ROC on LTO and Exclude CWF Operations from the ROC on LTO Proposed Action

CWF would be excluded from the ROC on LTO under this option.

- Environmental Baseline: The environmental baseline would include CWF construction and operations.
- 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.
- CWF is very uncertain – would avoid this uncertainty in the proposed action.
- Responds to changed conditions in the CWF process.

Disadvantages:

- The environmental baseline may characterize benefits that will not be realized in reality (benefits to delta smelt from reducing pumping of the South Delta facilities, spring outflow), if the baseline characterizes benefits after CWF is constructed and operational. The effects of the proposed action could therefore result in worse conditions than the environmental baseline for smelt.
- The FWS CWF BO identifies the ROC on LTO as the subsequent consultation to complete the project-specific analyses. Not including CWF operations in the ROC on LTO would be inconsistent with the language and intent in the FWS CWF BO.
- If CWF is constructed, would require a subsequent consultation for the CWF consultation to do project-specific consultation on CWF operations before the Corps can issue their

Section 408 permit, which would be largely the same as the ROC on LTO due to interconnected operations.

- If each subsequent 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.
- Corps and Reclamation would need to decide which agency is the lead federal agency for the subsequent consultation.
- Would not provide the analysis needed to support signing long-term water service contracts for a term that exceeds the scope of analysis. Reclamation would need to undertake stand-alone consultations on the pending long-term water service contracts.
- Would not meet the goal of a durable BO.
- Extends the BA and BO timelines.

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 operations would be excluded from the ROC on LTO under this option. CWF operations would also be excluded from the environmental baseline.

- Environmental Baseline: The environmental baseline would exclude CWF construction and operations; or, would exclude CWF operations but include CWF construction.
- 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.
- Responds to changed conditions in the CWF process.

Disadvantages:

- The FWS CWF BO identifies the ROC on LTO as the subsequent consultation. Not including CWF operations in the ROC on LTO would be inconsistent with the FWS CWF Biological Opinion.
- Inconsistent with the ESA regulations (50 CFR 402.02) 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. CWF construction and operations should be in the ROC on LTO baseline.
- The only way to exclude CWF from the environmental baseline may be to rescind the CWF ESA Section 7 consultation, which would also rescind the construction related ESA coverage and, therefore, not allow for construction of the CWF.

- Would not meet the goal of a durable BO if CWF is then constructed and reinitiation is required on the LTO.
- Would require a subsequent 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
 - Corps and Reclamation would need to decide which agency is the lead federal agency for the subsequent consultation.

Option 5: Wait to Decide

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 CWF is not moving forward, Reclamation would withdraw the 2017 Section 7 consultation, 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.

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	?	?

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, and the ROC on LTO was identified as the subsequent consultation in the USFWS CWF BO as required by the ESA.

Staff from 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. A wait and see approach may be considered the most reasonable at this time.

Water users prefer Option 4.

Environmental NGOs:

Power Customers: