



MEMORANDUM

TO: SLDMWA Water Resources Committee Members and Alternates

FROM: Scott Petersen, Water Policy Director

DATE: March 2, 2020

RE: Update on Water Policy/Resources Activities

BACKGROUND

This memorandum is provided to briefly summarize the current status of various agency processes regarding water policy activities, including but not limited to the (1) Reinitiation of Consultation on Long-Term Operations (“ROC on LTO”), (2) State Water Resources Control Board Action, including the Bay-Delta Water Quality Control Plan update, (3) San Joaquin River Restoration Program, (4) Revised Delta Conveyance, (5) Delta Stewardship Council, and (6) San Joaquin Valley Water Blueprint.

POLICY ITEMS

Reinitiation of Consultation on Long-Term Operations (ROC on LTO)

On August 2, 2016, the U.S. Bureau of Reclamation, the lead federal agency, and the California Department of Water Resources (DWR), the applicant, jointly requested the reinitiation of Endangered Species Act consultation on the coordinated long-term operation of the Central Valley Project (CVP) and State Water Project (SWP). The U.S. Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) accepted the reinitiation request on August 3, 2016.

On January 31, 2019, Reclamation transmitted their Biological Assessment. As stated in the BA, the purpose of this action is “...to continue the coordinated long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreements; and to increase operational flexibility by focusing on nonoperational measures to avoid significant adverse effects.”

The two biological opinions¹² on the coordinated operations of the CVP/SWP were finalized on October 21, 2019. FWS and NOAA Fisheries evaluated the impact of CVP/SWP water operations on imperiled species including Delta smelt, salmonid, green sturgeon, northern resident killer whale and 15 terrestrial species that could be impacted. The proposal includes habitat

¹ https://www.fws.gov/sfbaydelta/cvp-swp/documents/10182019_ROC_BO_final.pdf

² <https://www.fisheries.noaa.gov/webdam/download/98198559>

management measures in the Delta and entrainment management related to water exports in the South Delta.

FWS and NOAA Fisheries documented impacts from the proposed operations and worked with Reclamation to modify their proposed operations to minimize and offset those impacts, in conjunction with DWR. The FWS and NOAA Fisheries have concluded that Reclamation's proposed operations will not jeopardize threatened or endangered species or adversely modify their designated critical habitat. However, on November 21, 2019, the California Department of Natural Resources and the California Environmental Protection Agency announced their intent to litigate the federal biological opinions, asserting that the state performed an assessment that the operating rules proposed by federal agencies are not scientifically adequate and fall short of protecting species pursuant to the requirements of the Endangered Species Act and California's interests.

On December 19, 2019, Reclamation continued the environmental compliance process under the National Environmental Policy Act by releasing the final Environmental Impact Statement (EIS)³. Subsequent to this, the Record of Decision was signed on February 18, 2020, implementing the new biological opinions.

Relatedly, the State Water Project (SWP) is undergoing a process to provide legal permitting of its long-term operations consistent with the requirements of the California Endangered Species Act (CESA) in conjunction with the update of the CVP biological opinions. As part of this process, the state released a draft Environmental Impact Report⁴ on November 21, 2019, pursuant to the California Environmental Quality Act, that identifies potential operational changes to protect species and manage the SWP based on real-time conditions in the Delta ecosystem, rather than calendar-based requirements.

The draft EIR assesses impacts of proposed project operations, a "no project" alternative that reflects current operating rules, three alternatives that provide fresh water flows in the spring and summer, and an alternative that uses physical barriers and other deterrents to keep fish away from the SWP pumps.

Concurrent with the environmental review under CEQA, DWR is developing an application for a permit from the California Department of Fish and Wildlife (CDFW) for long-term SWP operations under CESA. CDFW will determine requirements for the permit in the coming months, with a specific focus on mitigating impacts of SWP operations on longfin smelt, Delta smelt, winter-run and spring-run Chinook salmon.

Historically, DWR had relied on federal Biological Opinions to cover the SWP under the federal ESA, with a consistency determination provided by CDFW. Securing a separate permit under

³ https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=39181

⁴ https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Files/Deliv-42DEIRv1-112119-Volume-I_ay_19.pdf?la=en&hash=FA4DB4BDFE72DFE791F187AE5D796B0BB89177AC

CESA provides flexibility for CDFW to consider amendments to the permit based on better scientific understanding as part of the adaptive management program, without relying on changes to be made to the federal Biological Opinions. It also provides CESA authorization for SWP regardless of any potential changes in federal law.

DWR's draft proposal differs from the federal Biological Opinions in some ways:

- It vests authority in CDFW to stop operational changes if it determines they will violate CESA standards.
- It includes alternatives that provide a block of environmental water that can be used to offset pumping impacts in the Delta, with adjustments made over time as new information is learned.
- It provides additional direction on when Delta pumping can be increased during storm events and caps the amount that exports can be increased in those events.
- It includes specific protections for longfin smelt, a protected species under CESA, though not under the ESA, and a commitment to implementing a longfin smelt science plan.

DWR's draft EIR was available for public comment through January 6, 2020. The Authority submitted a comment letter highlighting concerns with the document. DWR anticipates completing a final document in early 2020, with a permit from CDFW expected to follow.

Reclamation Directives and Standards

Documents out for Comment

Draft Directives and Standards

- [Review of Operation and Maintenance Program Examination of Associated Facilities \(Facilities Other Than High- and Significant-Hazard Potential Dams\) \(comments due 3/23/2020\)](#)
- [Transportation Program \(comments due 3/23/2020\)](#)

United States Environmental Protection Agency

Navigable Waters Protection Rule

On February 28, 2017, President Trump signed the "[Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.](#)" The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final 2015 Rule and "publish for notice and comment a proposed rule rescinding or revising the rule...." The E.O. directs that the EPA and the Department of Army "shall consider interpreting the term 'navigable waters'" in a manner "consistent with Justice Scalia's opinion" in [Rapanos v. United States \(2006\)](#).

On October 22, 2019, the agencies published a final rule to repeal the 2015 Rule and recodify the regulation that was in place prior to issuance of the 2015 Rule. This final rule became effective on December 23, 2019.

On January 23, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) finalized the Navigable Waters Protection Rule to define “waters of the United States” (WOTUS). Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.” The Navigable Waters Protection Rule regulates these waters and the core tributary systems that provide perennial or intermittent flow into them. The final rule fulfills [Executive Order 13788](#) and reflects legal precedent set by key Supreme Court cases as well as robust public outreach and engagement, including pre-proposal input and comments received on the proposed rule. The final rule will become effective 60 days after publication in the *Federal Register*. Once effective, it replaces the rule published on October 22, 2019.

Under the final “Step 2” rule, four clear categories of waters are federally regulated:

- The territorial seas and traditional navigable waters,
- Perennial and intermittent tributaries to those waters,
- Certain lakes, ponds, and impoundments, and
- Wetlands adjacent to jurisdictional waters

The final rule also details 12 categories of exclusions, features that are not “waters of the United States,” such as features that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; many ditches; prior converted cropland; and waste treatment systems.

The final rule clarifies key elements related to the scope of federal Clean Water Act jurisdiction, including:

- Providing clarity and consistency by removing the proposed separate categories for jurisdictional ditches and impoundments.
- Refining the proposed definition of “typical year,” which provides important regional and temporal flexibility and ensures jurisdiction is being accurately determined in times that are not too wet and not too dry.
- Defining “adjacent wetlands” as wetlands that are meaningfully connected to other jurisdictional waters, for example, by directly abutting or having regular surface water communication with jurisdictional waters.

The Navigable Waters Protection Rule is the second step in a two-step process to review and revise the definition of “waters of the United States” consistent with the February 2017 Presidential Executive Order entitled “[Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States.’](#)” This final rule will become effective 60 days after publication in the *Federal Register* and will replace the [Step One Rule](#) published in October, 2019.

Council on Environmental Quality

National Environmental Policy Act Proposed Rule

CEQ is considering updating its NEPA implementing regulations and has issued a Notice of Proposed Rulemaking to modernize and clarify the regulations to facilitate a more efficient,

effective, and timely NEPA review process. CEQ's proposed rule would incorporate elements of the One Federal Decision policy, codify certain case law and CEQ guidance, revise the regulations to reflect current technologies and agency practices, eliminate obsolete provisions, and improve the format and readability of the regulations.

Overview of Key Elements of the Proposed Rule:

- Modernize, Simplify and Accelerate the NEPA Process
 - Establish presumptive time limits of two years for completion of environmental impact statements (EISs) and one year for completion of environmental assessments (EAs)
 - Specify presumptive page limits
 - Require joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple agencies
 - Strengthen the role of the lead agency and require senior agency officials to timely resolve disputes to avoid delays
 - Promote use of modern technologies for information sharing and public outreach

- Clarify Terms, Application and Scope of NEPA Review
 - Provide direction regarding the threshold consideration of whether NEPA applies to a particular action
 - Require earlier solicitation of input from the public to ensure informed decision-making by Federal agencies
 - Require comments to be specific and timely to ensure appropriate consideration
 - Require agencies to summarize alternatives, analyses, and information submitted by commenters and to certify consideration of submitted information in the ROD
 - Simplify the definition of environmental “effects” and clarify that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action
 - State that analysis of cumulative effects is not required under NEPA
 - Clarify that “major Federal action” does not include non-discretionary decisions and non-Federal projects (those with minimal Federal funding or involvement)
 - Clarify that “reasonable alternatives” requiring consideration must be technically and economically feasible

- Enhance Coordination with States, Tribes, and Localities
 - Reduce duplication by facilitating use of documents required by other statutes or prepared by State, Tribal, and local agencies to comply with NEPA
 - Ensure appropriate consultation with affected Tribal governments and agencies
 - Eliminate the provisions in the current regulations that limit Tribal interest to reservations

- Reduce Unnecessary Burdens, Delays
 - Facilitate use of efficient reviews (categorical exclusions (CEs), environmental assessments)
 - Allow agencies to establish procedures for adopting other agencies' CEs
 - Allow applicants/contractors to assume a greater role in preparing EISs under the supervision of an agency

CEQ requests public comment on the NPRM. Comments should be submitted on or before March 10, 2020.

Comments may be submitted via any of the following methods:

Go to <https://www.regulations.gov/> and follow the online instructions for submitting comments to Docket ID No. CEQ-2019-0003.

By Fax: 202-456-6546.

By mail:

Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503
Attn: Docket No. CEQ-2019-0003

[State Water Resources Control Board Activity](#)

[Documents out for Comment](#)

The State Water Resources Control Board (State Water Board) is seeking written public comments on an initial draft Comprehensive Operations Plan submitted by the California Department of Water Resources (DWR) and United States Bureau of Reclamation (USBR).

BACKGROUND

The San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan (Bay-Delta Plan) establishes water quality objectives for the protection of beneficial uses in the Bay-Delta watershed. In December 2018, the State Water Board approved modifications to the southern Delta salinity objective and program of implementation in the Bay-Delta Plan for the reasonable protection of agricultural beneficial uses. The program of implementation requires USBR and DWR to submit a Comprehensive Operations Plan that describes actions to fully address impacts of State Water Project and Central Valley Project export operations on southern Delta water levels and salinity conditions to the State Water Board for approval. In pertinent part, the Bay-Delta Plan requires the State Water Board Executive Director to act on the Comprehensive Operations Plan after providing notice and opportunity for comment.

DOCUMENT AVAILABILITY

As required by the 2018 Bay-Delta Plan, DWR and USBR consulted with the South Delta Water Agency and Contra Costa Water District regarding the initial draft Comprehensive Operations

Plan. DWR and USBR are revising the initial draft Comprehensive Operations Plan in response to the consultation process. Public comments received in response to this Notice will be reviewed by DWR and USBR and may result in additional revisions to the initial draft Comprehensive Operations Plan. A revised draft Comprehensive Operations Plan will be made available to parties who submit timely comments consistent with Notice requirements for submission of written comments.

SUBMISSION OF WRITTEN COMMENTS

Written comment letters on the initial draft Comprehensive Operations Plan must be received by Tuesday, March 30, 2020. The State Water Board requests that comment letters on the Comprehensive Operations Plan be submitted via email to Bay-Delta@waterboards.ca.gov (please note that the email capacity is less than 50 megabytes total). Please title the subject line: “Comment Letter – Bay-Delta Plan Comprehensive Operations Plan.” Electronic submission by email in pdf text format is preferred. The State Water Board appreciates submissions that conform to Universal Accessibility and Web Content Accessibility Guidelines 2.0 standards, located at: <http://www.w3.org/TR/WCAG21/>.

Bay Delta Water Quality Control Plan Update

The State Water Resources Control Board (“Water Board”) is currently considering updates to its 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay Delta Plan”) in two phases (Plan amendments). The first Plan amendment is focused on San Joaquin River flows and southern Delta salinity (“Phase I” or “San Joaquin River Flows and Southern Delta Salinity Plan Amendment”). The second Plan amendment is focused on the Sacramento River and its tributaries, Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne rivers), Delta outflows, and interior Delta flows (“Phase II” or “Sacramento/Delta Plan Amendment”).

During the December 12, 2018 Water Board Meeting, the Department of Water Resources (“DWR”) and Department of Fish and Wildlife presented proposed “Voluntary Settlement Agreements” (“VSAs”) on behalf of Reclamation, DWR, and the public water agencies they serve to resolve conflicts over proposed amendments to the Bay-Delta Plan update.⁵ The Water Board did not adopt the proposed VSAs in lieu of the proposed Phase 1 amendments, but as explained below, directed staff to consider the proposals as part of a future Delta-wide proposal.

Phase 1 Status: The Water Board adopted a resolution⁶ to adopt amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and adopt the Final Substitute Environmental Document during its December 12, 2018 public meeting.

⁵ Available at <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Blogs/Voluntary-Settlement-Agreement-Meeting-Materials-Dec-12-2018-DWR-CDFW-CNRA.pdf>.

⁶Available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0059.pdf.

Phase 2 Status: In the Water Board’s resolution adopting the Phase 1 amendments, the Water Board directed staff to assist the Natural Resources Agency in completing a Delta watershed-wide agreement, including potential flow and non-flow measures for the Tuolumne River, and associated analyses no later than March 1, 2019. Staff were directed to incorporate the Delta watershed-wide agreement as an alternative for a future, comprehensive Bay-Delta Plan update that addresses the reasonable protection of beneficial uses across the Delta watershed, with the goal that comprehensive amendments may be presented to the State Water Board for consideration as early as possible after December 1, 2019. As the Water Board further refines this update, there will be opportunity for public comment.

The effort has made significant progress since an initial framework was presented to the State Water Board on December 12, 2018.

On March 1, 2019, the California Department of Water Resources and the Department of Fish and Wildlife submitted documents⁷ to the Water Board that reflect progress since December to flesh-out the previously submitted framework to improve conditions for fish through targeted river flows and a suite of habitat-enhancing projects including floodplain inundation and physical improvement of spawning and rearing areas.

Since the March 1 submittal, significant work has taken place to develop the package into a form that is able to be analyzed by State Board staff for legal and technical adequacy. On June 30, 2019, a status update with additional details was submitted to the Board for review. Additionally, on February 4, 2020, the State team released a framework for the Voluntary Agreements to reach “adequacy”, as defined by the State team.

Further work and analysis is needed to determine whether the agreements can meet environmental objectives required by law and identified in the State Water Board’s update to the Bay-Delta Water Quality Control Plan. Key remaining issues/dates are identified below:

- Over the past months, the State Team and the VA Parties have worked on a set of documents outlining implementation criteria and biological and environmental targets (collectively, “BETs”) for the VA. These include a BET framework document, a template for tributary BETs, individual BET documents for each tributary, a Delta BET document, and a Systemwide BET document. Development of these documents continues and a report on their development is anticipated in advance of the next plenary meeting on December 17.
- *The Legal Work Group* has drafted and continues to revise a VA Master Agreement and a Government Code Agreement.

⁷ Available at http://resources.ca.gov/docs/voluntary-agreements/2019/Complete_March_1_VA_Submission_to_SWRCB.pdf

Delta Conveyance

On May 2, 2019, the California Department of Water Resources announced that it has withdrawn the project approval of WaterFix and rescinded the accompanying NOD filed pursuant to CEQA. DWR will begin a renewed environmental review and planning process for a smaller, single tunnel project. In addition, DWR and Reclamation submitted the attached letter to the State Water Board notifying the Board that they were withdrawing both the change petition and the application for Section 401 certification for WaterFix.

On January 15, 2020, The Department of Water Resources (DWR) released a [Notice of Preparation \(NOP\)](#) for a proposal to modernize water infrastructure in the Sacramento-San Joaquin Delta, initiating environmental review in compliance with the California Environmental Quality Act (CEQA). The NOP, announcing the preparation of an environmental impact report (EIR) for the proposed Delta Conveyance Project, marks the first step under the CEQA process. The proposed project described in the NOP is a single underground tunnel with two intakes that together have a total diversion capacity of 6,000 cubic feet-per-second (cfs). The NOP notes that there will likely be alternatives identified that evaluate a range of capacities from 3,000 cfs to 7,500 cfs. The NOP signals the start of the scoping process for the EIR and provides an opportunity for members of the public and agencies to provide input on the scope and content of the EIR, including information needs, potential project effects and mitigation measures, and possible alternatives to the proposed project.

The purpose in proposing this project is to develop diversion and conveyance facilities in the Delta necessary to restore and protect the reliability of California's water deliveries south of the Delta in a cost-effective manner, and consistent with the recently released [draft Water Resilience Portfolio](#).

Public comments on the NOP are due on March 20, 2020 by 5 p.m. and may be submitted via email at DeltaConveyanceScoping@water.ca.gov or mail at Delta Conveyance Scoping Comments, Attn: Renee Rodriguez, Department of Water Resources, P.O. Box 942836, Sacramento, CA 94236. Seven public scoping meetings are scheduled to receive written and verbal comments.

Independent from the CEQA process, DWR also intends to seek a court ruling this spring to affirm its authority to issue revenue bonds for a future conveyance facility.

What happens next with regard to Delta conveyance remains to be seen, but this development certainly has implications for (1) pending litigation challenging the WaterFix BiOps, DWR's financing of WaterFix, and the "No Harm" or "Hold Harmless" agreement, and (2) financial contributions to the planning of WaterFix.