**California Department of Fish and Wildlife**

**July 13, 2018**

**To: Katrina Harrison, Bureau of Reclamation**

**From: Carl Wilcox**

**Comments on the Draft Near Term Actions Environmental Assessment (Environmental Assessment) for the Reinitiation of Consultation on Coordinated Long-Term Operation of the Central Valley Project (CVP) and State Water Project (SWP) (ROC on LTO).**

Thank you for the opportunity to review and comment. California Department of Fish and Wildlife (CDFW) reviewed Section 2 - Alternatives Including the Proposed Action, Section 5 – References, and Appendix A – Juvenile Chinook Salmon Distribution and Timing. CDFW reviewed the document from the perspective of our responsibility as trustee agency for the fish and wildlife resources of the State. CDFW has issued prior California Endangered Species Act (CESA) authorizations to the California Department of Water Resources (DWR) for its operations of the SWP. The “Memorandum of Understanding for the Reinitiation of Consultation on the Coordinated Long-term Operation of the Central Valley Project and State Water Project,” signed by the U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), CDFW, and DWR included a goal of coordinating ESA and NEPA processes with CESA authorization for the SWP, and CDFW agreed to provide input related to the development of alternatives for NEPA and the proposed action for the BA. CDFW is providing these general comments and the specific comments and line edits in the attached document to support an outcome for the ROC on LTO that facilitates CESA compliance.

In the attached version of the Environmental Assessment we include questions, requests for clarification, comments and suggested line edits. CDFW’s review was limited by the comment period. Staff were unable to read every paper cited or quoted. As such, a lack of comments on a specific citation or quote shouldn’t be interpreted as approval. CDFW encourages Reclamation and DWR to re- convene technical teams to review each of the proposed actions included in this Environmental Assessment and provide additional opportunities to establish a scientific basis for potential changes to the BOs collaboratively.

In addition to the section-specific comments in the attached document we would like to highlight several general comments which apply to multiple subsections of the Environmental Assessment.

Please further describe the purpose and need of the Proposed Action and the list of agencies and persons consulted. Additional explanation is needed here to provide context for the proposed changes to reasonable and prudent alternatives (RPAs) in the 2008 ad 2009 Biological opinions (BOs). How do these proposed changes to RPAs align with the original intent of ROC on LTO as formulated in letters transmitted between Reclamation, DWR, USFWS[[1]](#footnote-2) and NMFS[[2]](#footnote-3) in August 2016?

Because this is a NEPA/ESA process we suggest founding the purpose and need on a balance between *improving* protection for listed species that are in decline under the existing operations and increasing water supply. This Proposed Action only includes operational modifications designed to increase water supply, based on interpretations of portions of scientific studies without considering the high level of uncertainty associated with proposed operational changes. There are no actions in the Proposed Action targeted to improve protections for listed species despite substantial evidence that 1) current BO protections are effective in minimizing impacts to listed species and 2) the abundance of Delta smelt and winter run Chinook salmon has declined substantially in recent years.

Please add a description of the entirety of the engagement process (e.g., workshops, meetings, technical teams, etc.) used to develop the Near Term Actions. Note that in these venues, CDFW, USFWS, and NMFS have repeatedly raised concerns about increased impacts to listed species as a result of proposed changes to RPAs that govern OMR, Fall X2, and I:E. Additionally, all of the previously proposed actions and ideas discussed during the Track 1/Near Term Actions process should be described in reasonable detail. Please note that the details included in the Proposed Action were not discussed as a complete package in inter-agency meetings or workshops and were not developed in collaboration with CDFW.

The approaches to decision making for OMR management described in the Proposed Action qualitatively assess risk and impacts to species based on conceptual models, observations of fish at the salvage facilities, and entrainment and particle tracking modeling. This approach does not address impacts to listed species analyzed in the BOs that are associated with entrainment into less suitable habitat in the central and south Delta and large scale hydrologic impacts on the habitat and overall health of the Sacramento-San Joaquin Delta.

It is our understanding that Reclamation proposed to develop an Environmental Assessment to evaluate changes that would result in no additional adverse effects to listed species beyond the current BOs. However, the changes to RPAs included in the Proposed Action are likely to result in an increase in adverse effects on listed species.

Under ESA, NMFS and USFWS included RPAs in the 2008 and 2009 BOs that were necessary to avoid the likelihood of jeopardizing the continued existence of listed species. The RPAs included in the 2008 and 2009 BOs were crafted to address the many stressors on listed species in the Delta and tributaries and complexities of water operations and hydrology in the Delta and tributaries. Considering this context and basis for the RPAs, CDFW does not think that the scope of modifications proposed to these RPAs can be appropriately analyzed without rigorous quantitative evaluation required by analysis in an Environmental Impact Statement and full ESA consultation with NMFS and USFWS.

* Under the current BOs and take authorizations, certain RPA actions require real-time decision making through which fish agencies retain the authority to make decisions regarding water operations, based on defined ranges and identified risk criteria, to minimize impacts of SWP/CVP operations on listed species. The retention of decision making authority by the fish agencies in the current BOs provides reasonable specificity, and certainty that the RPAs’ measures will be implemented effectively. (See, e.g., *NRDC v. Kempthorne* (E.D.Cal. 2007) 506 F.Supp.2d 322, 355-357.) The Proposed Action describes changes to the water operations decision making structure, including the roles and responsibilities of technical teams (WOMT, DOSS, and SWG) and a shift in decision making authority to Reclamation and DWR. These proposed changes represent a fundamental change in the approach to risk assessment and minimization in the effects analyses that underlie the 2008 and 2009 BOs and the associated consistency determinations (CDs). CDFW is concerned that the Proposed Action would eliminate the decision making structure that has been an important part of CDFW’s past CESA considerations.
* We suggest reviewing the accuracy and context of citations and selected quotes from scientific literature, reports, and unpublished manuscripts used throughout the Environmental Assessment. In the attached document we note many instances where a specific conclusion or statement was copied out of context from a paper to support an argument that was inconsistent with the conclusions of the authors. In addition, we suggest including a discussion of the limitations and uncertainty associated with the scientific literature, reports, and unpublished manuscripts cited in the Environmental Assessment.
* Much of the research relied upon to support proposed water operations decisions is as-yet unpublished (ex. Delta smelt and salmonid entrainment models) or only recently published and not yet peer reviewed (ex. six year steelhead study). CDFW is concerned that results of research and modeling efforts that are unpublished and not peer reviewed do not constitute best available science and do not form a strong foundation for water operations decision making. The combination of an insufficient scientific foundation and the proposed changes to the decision making authorities described in the Environmental Assessment raises serious concerns that protections and minimization measures for listed species will not be preserved over the long term when the reinitiated BOs are implemented.
* In our attached comments we note many places where undefined terms are used to describe key points for decision making regarding impacts to listed species and water operations. Examples of these terms include: “additional adverse effects”, “material changes”, “significant facts”, “significant factors”, “levels of concern”, and “relevant factors”. Please provide clear and consistent definitions of these terms. Without definitions it is not possible to understand how decisions described in the Proposed Action would be made. As a result, CDFW cannot analyze potential effects of the Proposed Action on listed species.
* Consistent with our prior comments regarding WIIN Act implementation, CDFW strongly recommends including a description of decision making processes that will be used by Reclamation, USFWS and NMFS to identify eligible storm events, and using quantitative and clear biological criteria to evaluate whether pre-determined levels of operational flexibility will result in increased effects to listed species from what was analyzed in the 2008 and 2009 BOs. These provisions for operational flexibility should only be authorized through 2021 to encompass the original 5 year time span envisioned in the WIIN Act.
* To properly evaluate whether a Proposed Action results in changes to adverse effects on listed species from what was analyzed in the 2008 and 2009 BOs as required by the WIIN Act, it is necessary to consider the full effects analyses supporting the 2008 and 2009 BOs. The anticipated effects on listed species associated with the Proposed Action should be mapped against that comprehensive baseline.

1. Letter sent to Ren Lohoefener (Regional Director, USFWS) from David Murillo (Regional Director, Reclamation) and Mark Cowin (Director, DWR) on August 2, 2018. Subject: Request for Reinitiation of Section 7 Consultation Addressing Coordinated Long-Term Operation of the Central Valley Project (CVP) and State Water Project (SWP) [↑](#footnote-ref-2)
2. Letter sent to William Stelle (Regional Administrator, NMFS) from David Murillo (Regional Director, Reclamation) and Mark Cowin (Director, DWR) on August 2, 2018. Subject: Request for Reinitiation of Section 7 Consultation Addressing Coordinated Long-Term Operation of the Central Valley Project (CVP) and State Water Project (SWP) [↑](#footnote-ref-3)