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VIA EMAIL & REGISTERED MAIL

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SUBJECT: Comments in response to the U.S Bureau of Reclamation (Bureau) Federal Register notice of March 28, 2012, requesting suggestions and information on the alternatives and topics to be addressed and any other important issues related to the Environmental Impact Statement (EIS) on the continued long-term operation of the Central Valley Project (CVP), in a coordinated manner with the State Water Project (SWP)

Dear Ms. Pinero,

The Center for Environmental Science Accuracy and Reliability (CESAR) is a California 501(c) (3) corporation whose mission is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes and to ensure consistent application of these statutes throughout all industries and all sectors. Our members include Californians as well as residents throughout the United States.

Bureau Failed to Exercise Appropriate Oversight

To date the Bureau has failed to comply with the law and exercise appropriate oversight with respect to the biological opinions (BiOps) issued for the continued long-term operation of the CVP, in a coordinated manner with the SWP. The Bureau has been operating the Central Valley Project in coordination with the State Water Project for decades. However, since 1992, the Bureau's operation has continued under court injunction without a valid biological opinion. This is in part due to the apparent inability of the Fish and Wildlife Service and the National Marine Fisheries Service (the

Services) to complete biological opinions on this coordinated operation that withstand legal scrutiny. However, the responsibility lies primarily with the Bureau for uncritically accepting flawed biological opinions.

There have been several biological opinions prepared since the last valid biological opinion, each accepted by the Bureau, and each found to be legally invalid. This has led to an untenable situation whereby the water supply essential to cities and farms throughout California is at risk from year to year due to the perpetual threat of litigation. Arguably, this situation could have been avoided, had the Bureau exercised its independent authority nearly two decades ago, and refused to accept biological opinions inconsistent with the requirements of the ESA.

The current situation is a direct result of two policy choices:

1. The Bureau's decision to simply adopt the conditions of each of the inadequate biological opinions, notwithstanding the fact that they failed to comply with the requirements of the ESA and its implementing regulations and guidance, and;
2. The failure of the Bureau to undertake a NEPA analysis when the decision to accept the biological opinions resulted in major changes to the agency action and consequently to the human environment.

For nearly 20 years cataclysmic changes in the water supply allocations for farms and cities throughout California have been made with no public oversight, but have instead been controlled by a select group of academics, consultants, and federal employees.

CESAR notes that the Bureaus' proposed action, was to continue operating the projects in a coordinated manner and that in fact, the far-reaching and cataclysmic changes were the result, not of the Bureau's continued operation, but from the provisions of the various biological opinions issued as a result of the required agency consultation under the ESA. For this reason, many of our scoping comments address issues related to the information the Bureau must provide to the public and consulting wildlife agencies to ensure a legally sufficient biological opinion is produced.

This NEPA process is the first time that the government will allow the public to examine and comment on its proposed coordinated operation of the CVP and SWP and the basis for that operation including the requirements imposed by the biological opinions. It is the first opportunity for the public to review and comment on the government's examination and characterization of the NEPA and ESA effects of the project.

- This EIS provides an opportunity for the Bureau to provide information that accurately characterizes its proposed action;
- This EIS provides an opportunity for the government to more fully and accurately identify alternative project operations and assess the various alternative project operations effect on the environment as required by NEPA;
- This EIS provides for a 'hard look' at the entire agency action, including actions taken to comply with a biological opinion and incidental take permit and their environmental consequences;
- This EIS provides for a 'hard look' at the effects¹ if the Bureau's proposed action on listed species under the Section 7 consultation requirements of the ESA, to ensure that the resulting biological opinion and any reasonable and prudent alternatives (RPAs) comply with the requirements of the ESA and its implementing regulations **before** the Bureau adopts those provisions.

This EIS, if properly prepared, will identify the suite of alternatives available to the agency and the environmental effects of the preferred alternative. The practical consequences of the action and preferred alternatives will be accurately identified in order for policy makers and the public to understand the consequences of different policy choices. **A properly constructed EIS, which provides for a 'hard look' at each of the components of the agency's action including the actions required by the biological opinions, will provide heretofore unavailable information on impacts to the human environment which are the consequence of policy preferences of the government.**

CESAR has a history of identifying the government's errors with respect to the characterization of the effects of the coordinated operation of the CVP and SWP as well as the characterization of the status of listed species. In 2008, CESAR provided the Bureau a comment letter identifying significant errors in the Bureau's 2008 Biological Assessment of the OCAP². Recognizing the failure of the government to properly consider *all* the scientific data related to the decline of the delta smelt, CESAR sued the FWS to make a determination on the petition to list the delta smelt as endangered. Finally, in response to the assumption in the 2008 Fish and Wildlife Service BiOp (FWS 2008) that all adverse effects to delta smelt were attributable to the operation of the CVP and SWP pumps, CESAR arranged an independent and public peer review of the key issues surrounding the science related to the delta smelt, the effect of project pumping, and other possible causes of the decline of the delta smelt. The accuracy of CESAR's observations and comments were in large part confirmed by the federal court

¹ The 'effect of the action' as defined by the ESA differs from that of NEPA. The distinction is important and has significant implications for the content of the biological opinion and eventually the final agency action. In our comments, we will specifically identify the 'effects' by their governing statute, i.e.: the ESA 'effects' of the action.

² Attachment 1 http://www.bestscience.org/#!__projects/vstc4=delta-smelt

in its decision finding the government was 'arbitrary and capricious' in its preparation of the 2008 OCAP Biological Opinion.

CESAR supports preparation of a complete, clear, unbiased, and accurate assessment of the effects of the OCAP under NEPA. Compliance with the process prescribed by NEPA will result in transparency with respect to policy choices made by the Bureau and a rigorous application of the statutory and regulatory requirements of the ESA in determining effects of the project generally and specifically with respect to listed species. As envisioned by the drafters of NEPA, such an EIS is the most effective tool for arriving at a preferred alternative that meets the goal of NEPA which is to:

"...use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations."³

Following are our comments to Bureau on the scope of the information, alternatives and other important information that must be included in the OCAP (continued long-term operation of the CVP, in a coordinated manner with the SWP) Environmental Impact Statement (EIS).

COMMENT 1

The EIS must provide information acknowledging that California's water system is virtually wholly managed, that there is no longer a 'natural' flow regime, and that any preferred alternative is simply the result of a series of policy choices based on implicit water allocation priorities. This information must include:

- *A description of the physical changes over the past 150 years that have resulted in the existing managed water system which supplies farms and cities throughout the state with fresh clean water.*

This information is necessary for the public to understand the consequences of these water allocation choices on the human environment.

³ 42 USC § 4331(a)

California's water supplies are almost wholly managed using a series of dams, canals and levees. The managed system evens out naturally occurring extremes of flow and salinity and replaces the extremes with flows and salinities which fluctuate within legally prescribed limits designed to ensure adequate, fresh, and sweet water for cities and farms and the environment.

Prior to European settlement the Delta was subject to very high winter and early springtime flows (depending on the particular water year) with salinity varying depending on daily tides and the particular weather pattern of the year. The high spring and summer flows followed longer patterns of drought and flooding. The state's waters were concentrated in the north and the southern and central portions of the state were starved for water. In addition to being unequally distributed through the state, water supplies were subject to extreme swings in flows. In the Delta the extremes in flow were accompanied by extremes in salinity as tidal action forced saltwater inland during the dry summer months.

Construction of the state's water system began in 1861 with the state legislature authorizing the drainage of delta lands. Development and management of California's water supply continued when in 1933 the federal government authorized construction of the CVP to address flooding, limit salt water intrusion, and provide fresh water to farms and cities. Construction of the State Water Project followed.

As a result of 150 years of building the reservoirs, canals, and pumping plants that make up the state's water system, practically every measure of water supply has been moderated through human management. The extremes that existed prior to European settlement have been damped and the historic low-low and high-high flow incidence has been eliminated. They have been replaced with flows and salinities which fluctuate, but within prescribed limits, and within boundaries designed to limit flooding and ensure fresh sweet water for cities and farms. This managed system is characterized by higher year round flows and the very high salinity peaks have been replaced by more constant and much lower salinity year-round.

The EIS must provide information on the historical changes in California's water systems in order for the public to assess and comment on significant changes in OCAP and the appropriateness of the 'environmental baseline' chosen for the Section 7 consultation required by the ESA. This baseline is important as it forms the basis for evaluating the consequences of the 'agency action' for the purposes of the biological opinion which is the result of an ESA consultation. The biological opinion in large part defines the extent to which OCAP 'continued' operations are altered and water supplies reallocated.

- *An enumeration of the legal requirements that govern operation of the OCAP, from water delivery to flood control.*

In assessing the effects of the Bureau's proposed operation on listed species for the purposes of the ESA Section 7 consultation, only discretionary actions are considered. The Bureau must identify those actions which over which they have no discretion in order to ensure that they are properly included in the environmental 'baseline' for the purposes of a Section 7 consultation under the ESA. The NEPA document must provide this information so that the public and the consulting wildlife agencies have the benefit of the Bureau's interpretation of their own authorities in identifying which agency actions generate 'effects' for the purposes of the ESA.

Some examples of requirements imposed on the Bureau which are not discretionary:

- Wildlife refuge contracts and exchange contracts;
- California's State Water Resources Control Board ("SCWRB") orders which impose multiple constraints on the operations of the CVP and SWP;
- Water Rights Decisions; such as Decision 1641 which implements the objectives identified in the SWRCB 1995 Bay-Delta Water Quality Control Plan and protects beneficial uses in the Delta through the use of flow and water quality objectives.

The distinctions between discretionary and non-discretionary actions are important because only those effects that are the result of the Bureau's discretionary actions generate any ESA 'effects' to listed species. All other actions are part of the ESA's 'environmental baseline' and are not considered 'effects of the action' under the ESA.

The conditions for water allocation in the past invalidated OCAP biological opinions have had a more significant effect on the human environment than the agency's proposed continued operations. The water allocation conditions are a direct result of the ESA Section 7 biological opinion 'effects' of the Bureau's continued operation. However, in large part, the 2008 Biological Opinion made no distinction between effects due to discretionary and non-discretionary actions and did not identify the baseline conditions whose effects are not the subject of the biological opinion. The Bureau must provide information on those individual actions within the operation of the OCAP which they have distinguished as discretionary, as those actions create the 'effects' which concern the Section 7 consultation. Further, the Bureau must provide the public with the rationale for each determination that an action is discretionary, since the determination itself can result in significant NEPA environmental effects as a result of conditions in the biological opinion which are the result of identified discretionary actions.

- *An explanation of the discretion available to the Bureau in operating the projects in the context of the legal requirements.*

It is plausible that flexibility exists within a non-discretionary action. If the Bureau identifies such circumstance, the NEPA document must provide a clear explanation of whether and how such flexibility renders the entire action discretionary.

COMMENT 2

The EIS must provide an explanation of the requirements of an ESA Section 7 consultation and the resulting biological opinion, in the context of the OCAP.

This information is important as it enables the public to understand whether and how the FWS has met the legal and policy requirements for the requirements generated by the biological opinion that results from a Section 7 consultation.

- *The purpose of Section 7 must be explained.*

Section 7(a) (2) of the ESA requires each federal agency to consult with the FWS and/or NMFS (Services) to ensure that their actions do not 'jeopardize the continued existence' of a listed species or 'destroy or adversely modify' its critical habitat. This is typically referred to as a 'section 7 consultation' and the jeopardy determination and any regulatory requirements are contained in the biological opinion that results from such a consultation. The ESA regulations describe a detailed and specific process for identifying the 'effects of the action'. In addition to the specific requirements for identifying the effects of the action, the Services have published Guidance and policy that explain how they implement their regulations.

The Section 7 consultation informs the federal agency whether their proposed action will in fact 'jeopardize the continued existence of the species'. This determination is contained in the biological opinion that results from the consultation. If the action is found to jeopardize the continued existence of the species, it may not go forward. However, when a jeopardy determination is made, the biological opinion includes 'reasonable and prudent alternatives' (RPAs) to the proposed agency action. **In the case of the OCAP, the RPAs in the 2008 BiOp, adopted uncritically by the Bureau, not the proposed continued operation, caused significant adverse changes to the human environment in the form of rampant unemployment, increased poverty and hunger, and damage to prime agricultural land, wells, and facilities.**

In order to ensure the public has sufficient information to understand the basis for either or both a jeopardy opinion and RPAs which result in considerable alteration of the environment:

- *The Bureau must provide information on the process and requirements for identifying 'effects of the action' under Section 7 as required by regulation.*

When the Services conduct a Section 7 consultation, they must determine the effects of the federal action. In conducting this 'effects analysis' for a biological opinion, the Services must first properly define the 'environmental baseline'. The environmental baseline includes the current status of the species, the effects of all non-discretionary actions of federal agencies, and the environmental impacts to the species that would exist even if the agency's action was not taken.⁴ The results of this evaluation "serve as the baseline for determining the effects of agency [discretionary] actions on the species or critical habitat." When making this initial determination, the Services must, distinguish between the discretionary and nondiscretionary elements of the proposed action because the Section 7(a) (2) consultation requirement applies only to "actions in which there is discretionary Federal involvement or control."⁵ **Failure to distinguish between effects which are included in the environmental baseline and the 'effects of the action' results in an effects analysis which is inconsistent with law and thus cannot be used to justify departures from the Bureau's obligations under the law.**

The regulatory instructions to the Services for analyzing the 'effects' of a federal discretionary action are clear and detailed as follows:

Step 1. Identify the effects on the species and habitat of the existing conditions, including past and present impacts of all federal, state or private actions in the action area⁶. This includes the impacts of the existence of dams that are part of a federal water project⁷. Further, identify and assess the anticipated impacts of proposed federal actions that have already undergone consultation, and of state and private actions that are ongoing. This forms the environmental baseline⁸.

Step 2. Identify the projected effects on the species and habitat of the proposed discretionary federal agency action⁹.

Step 3. Determine the aggregated effects of the existing conditions and the proposed federal action on the species and habitat—i.e., add the effects of discretionary federal action to the baseline effects¹⁰.

Step 4. Compare the projected aggregated effects scenario created at Step 3 with the baseline effects scenario determined at Step 1, that is, assess whether

⁴ 50 C.F.R. §402.02

⁵ 50 C.F.R. §402.03

⁶ 50 C.F.R. § 402.02; see also Final Rule, 51 Fed. Reg. 19,926, 19,932 (June 3, 1986).

⁷ NWF v. NMFS, 524 F.3d at 930-31

⁸ 50 C.F.R. § 402.02; CONSULTATION HANDBOOK at 4-29.

⁹ 50 C.F.R. § 402.03

¹⁰ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008)

the proposed discretionary federal action will appreciably worsen the species' condition or habitat from what it will be under baseline conditions.¹¹

This analysis must take place within the same time frame for the entire biological opinion¹²; there is no authority to vary timeframes based on the effect being analyzed. There are two reasons that a single time frame is essential, first, because it is the Agencies' own requirement for an analysis that complies with the requirements of the Act, and second, failure to use a single timeframe for the baseline could, as a practical matter, lead to conflicting or inconsistent requirements for environmental conditions that would be practically impossible to achieve (i.e.: flow prohibitions required at the same time as minimum flow requirements are also required).

Failure to properly allocate the effects of the action render the analysis required under 402 meaningless. The regulations and the Act contemplate an analysis whereby incremental change is identified and analyzed, any other interpretation results in biological opinions which are retroactive and result in agencies being required to compensate for conditions for which they have no responsibility. The Supreme Court in *TVA v. Hill* was clear that their interpretation of the ESA found it in no way retroactive¹³.

- *The Bureau must provide information on how the Bureau intends to ensure the 'hard look' required by NEPA prior to accepting the conditions in a biological opinion. Specifically, the Bureau must address:*
 1. How it intends to ensure that the ESA's requirement that Section 7 consultations be based on the 'best scientific and commercial data available' and whether the standards included in the Information Quality Act Guidance adopted by the Department of the Interior, the Bureau of Reclamation, the FWS, and NMFS will be applied, or some other standard, and if so, which standard will be applied.

The ESA explicitly requires that biological opinion be based on data. The Supreme Court has interpreted that language in this manner:

¹¹ Before formulating its ultimate conclusions, FWS must in addition consider "cumulative effects." "Cumulative effects" are the effects of future (i.e., not currently existing) state or private activities within the action area. 50 C.F.R. §402.02; see CONSULTATION HANDBOOK at 4-30 to 4-31. FWS must determine whether the effects of the action, "taken together with cumulative effects," will likely jeopardize a species or adversely modify its critical habitat. 50 C.F.R. §402.14(g)(3), (4); CONSULTATION HANDBOOK at 4-

¹² *The environmental baseline is a "snapshot" of a species' health at a specified point in time.* CONSULTATION HANDBOOK at 4-22

¹³ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)

"...The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise...¹⁴"

While it is explicit that speculation or surmise may not form the basis of Biological Opinion it is less clear what *does* constitute a legally sufficient basis for implementation. As a practical matter, it is clear that lists of data points are insufficient information from which to draw conclusions. A logical extension of the requirement that data form the basis of biological opinions is to presume that the Secretary's opinion is a scientific analysis whose ultimate foundation is in data¹⁵.

The ESA does not define 'best scientific and commercial data available' and neither do its regulations or guidance. However, in 2001 the Congress passed the Information Quality Act (IQA), in order to,

"Provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.¹⁶"

In the IQA, Congress directed the Office of Management and Budget (OMB) to issue government-wide guidelines that:

"Provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.¹⁷"

The OMB issued guidelines in 2002 and by 2004 the Services had adopted the OMB Guidelines. These Guidelines, emanating from the Office of the President and authorized by Congress, which have been subject to two rounds of public review and

¹⁴ *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)

¹⁵ Data must form the basis for the analysis, as opposed to surmise or speculation. The Court's language would also exclude untested hypothesis from serving as a basis for ESA regulatory pronouncements. Hypothesis testing is a fundamental tenet of the scientific process whereby hypotheses are tested to determine whether they can be disproved. This testing is akin to the 'hard look' that is expected in NEPA, questioning whether the hypothesis is truly an accurate explanation of an effect which explains *all* the data. Hypothesis testing is fundamentally distinct from an exercise which merely recites supporting data and suppresses conflicting data. A case in point is the Wildlife Agencies' assumption that the pumps are causing the decline in delta smelt. Great care is used to outline the data supporting a theoretical mechanism whereby pumping could affect delta smelt long term abundance, and the lack of any supporting data for linking the outcome or demonstrating its actual operation is simply ignored or assumed to be available.

¹⁶ Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658).

¹⁷ *Ibid*;

comment and subsequently adopted by the Services, the Bureau, and the Department of the Interior, are clearly the definition of 'best available science' which is so often cited by the agencies as the standard for their biological opinions. **Taken together , the language of the ESA and the agencies own IQA requirements clearly set the standard for what best available data and best available science must be, and failure to meet those standards is a failure to meet the ESA requirement for a rigorous basis for regulation.** Therefore the Bureau must either comply with the existing published Guidelines or provide information to the public on how they determine what is 'best scientific and commercial data available' in assessing the validity of the OCAP BiOp.

There is ample evidence that the 2008 biological assessment and the 2008 biological opinion did not comply with the requirements of the OMB Guidelines for Information Quality¹⁸. In addition to the direct objections to the contents of the FWS effects analysis for the 2008 biological opinion, additional information and information that either contradicted or expanded on what was included in the biological opinion was provided to the Services and ignored¹⁹. The Bureau may only accept those conservation conditions included in the Biological Opinion which are based on data and consistent with the transparency and peer review requirements of the OMB's IQA Guidelines which have been adopted by the Services. Those recommendations that do not meet the requirements of the Guidelines are not based on either the best scientific data available or the best science available.

Unequivocally, the ESA requires that Biological Opinions must be based on data. Often, in the absence of data, the Services substitute 'best professional judgment'. There is absolutely no provision for substitution of judgment for data anywhere in the ESA or the its implementing regulations. **If data does not exist to support an action and only judgment²⁰, supports the action that action may not be required under the ESA and until such data exists there is no legal authority for its imposition:**

2. How it intends to determine the effectiveness of the RPAs or other conservation requirements in the biological opinion; in order to inform the public how the Bureau will determine whether or not to apply recommendations included in the biological opinion.

The Delta Smelt was listed as threatened in the early 1990s. Since being listed and under the management of the Services its population has declined substantially.

¹⁸ CESAR's comments on the Bureau's Biological Assessment, Family Farm Alliance 2009 request for correction on the OCAP effects analysis; <http://www.fws.gov/informationquality/>

¹⁹ CESAR comments on the 90-day finding to list the Delta Smelt as Endangered http://www.bestscience.org/#!_projects/vstc4=delta-smelt; the findings of an expert panel on the analysis justifying the effects analysis' finding that project pumping was the cause of the decline of the delta smelt; http://www.bestscience.org/#!_projects/vstc4=ds-seminar-reference-material

²⁰ Judgment is simply opinion based on surmise or speculation.

Despite increasing regulatory burdens on water users and more and more onerous conservation actions, the status of the smelt has not improved. A closer look at the basis for the conservation actions explains their lack of success. First, they are little more than guesses in the dark. There is no life cycle model for the smelt, despite its 15 years of peril, little is known about its life history, regulators don't even know where it spawns, and very few eggs have ever been found in the wild. Just recently large numbers of smelt were found where agency scientists did not expect them to be found. The agency scientists had missed them simply because those scientists had believed, with no factual basis that the smelt were not there.

The 'science' surrounding the conservation of delta smelt has been largely the opinion, characterized as 'best professional judgment', of a few key agency scientists, contractors, and academics that fund, write, and review one another's papers. The 2005 independent peer review of the Pelagic Organism Decline noted that:

'The program relies too heavily on local perspectives and resources for problem analysis, research and solutions. This can give rise to a culture of common assumptions that impedes exploration of alternative possibilities...'

What was true in 2005, was still true in 2008 when the authors of the papers which provided the basis for the FWS assumption in the BiOp that project pumping was the cause of the decline of the smelt were the 'independent' peer reviewers of the OCAP BiOp. **As we have noted earlier, the Bureau's NEPA examination must provide information demonstrating that:**

- a. The conservation actions required by the OCAP biological opinion are based on data, and**
- b. that the science and analysis used to support the BiOp conclusions data is consistent with the requirements of the OMB IQA guidelines.**

There is a third requirement, based on common sense; and that is that the Bureau require the conservation actions required by the OCAP BiOp be effective. While the agencies do not have guidance on evaluating the effectiveness of conservation actions related to biological opinions, the FWS does have a Policy for Evaluating the Conservation Effectiveness (PECE) of actions generally, in the context of listing determinations. CESAR believes that this policy can be useful in guiding the evaluation of the conservation actions included in the OCAP BiOp. The conservation actions evaluated by the policy are those undertaken by other agencies, and the question is how to evaluate their contribution to the species conservation generally.

Given the costs and consequences of the conservation actions required in the 2008 OCAP BiOp, the public and the Bureau must provide the public information on how the BiOp conservation actions and RPAs are effective under PECE so that the public has access to the evaluations of the effectiveness of the RPAs and other conservation actions which will enable them to determine whether these actions are likely to be effective.

COMMENT 3

The NEPA document must provide explicit information to the public on how the uncertainties in application of the ESA and NEPA which are the result of nearly two decades of serial litigation and operation under injunction are resolved.

In the normal course of events, an action agency proposes its action at a point in time, and the Services analyze the environmental baseline and effects of the action within that time frame. In the case of the OCAP, the project has been operating under invalid biological opinions and under injunction for nearly two decades. The conditions existing today are the effect of the imposition of regulatory controls that were not legal, but left in place in the absence of any alternative. This creates a practical problem whereby litigants have achieved *de facto* imposition of illegal conditions which has resulted in the significant reallocation of water supplies and catastrophic losses for the public.

The EIS must provide information on:

1. How the Bureau intends to identify the environmental baseline for the EIS, will it be the environment as it existed at the time of the first consultation in 1995, or some other baseline, and if so what, and how will the Bureau account for changes to the environment which are the result of invalid biological opinions.
2. How the Bureau intends to define the environmental baseline for the purposes of the ESA Section 7 biological opinion. Does the Bureau intend to use the environmental baseline as it existed at the time of the first consultation, or some other baseline later in time, which is the result of the operation of an invalid biological opinion?

Whatever baselines are chosen by the Bureau, sufficient information must be provided to the public in the EIS to allow informed comment on the baseline itself and the rationale for the choice.

COMMENT 4

The EIS must provide the public with full information on what is known and unknown regarding the listed species.

It is clear from the legal proceedings regarding the OCAP delta smelt BiOp that at least some of the information provided by the agencies in the BiOp was inaccurate and misleading, so much so that the district court found the agencies had acted in 'bad faith'. In order to ensure that the public has full, accurate information, and that they have the opportunity to augment the information available to the Bureau, the EIS must at a minimum:

1. For each listed species, provide citations to the data supporting statements as to the status of the species;
2. For each listed species clearly distinguish which information on the species is supported directly by data, which information is based on hypothesis, and the supporting data, and which information is based on the 'best professional judgment' of wildlife agency staff or consultants
3. Provide information to the public regarding the concern that food supply, affected by ammonia deposition, is depressing delta smelt populations
4. Provide information to the public regarding the fact that no data supports an assumption that OCAP pumping is adversely affecting Delta Smelt long term abundance;
5. Provide information to the public regarding the fact that year-round flows are resulting in year-round salmon runs, and that distinct salmon runs are hybridizing;
6. The Bureau must provide information to the public regarding;
 - a. New delta smelt populations discoveries;
 - b. Knowledge of delta smelt spawning in the wild;
 - c. The effect of spring inflows on delta smelt populations
 - d. The effect of spring outflows on delta smelt populations
 - e. Existing delta smelt life-cycle models.

COMMENT 5

The EIS must develop a new biological assessment and may not rely on the 2008 Biological Assessment (BA) prepared by the Bureau as the 2008 BA fails to

include new scientific data and analysis and contains many errors some of which the court found illegal in its decision.

On June 17, 2008, CESAR sent the Bureau a letter detailing the inadequacies of its biological assessment. The letter identified 4 broad categories of deficiency. Specifically, the assessment contained numerous statements of effects unsupported by data or analysis relying instead on speculation or surmise, relied on models incapable of producing accurate predictions, and failed to consider or even acknowledge significant scientific data and instead used only selected data.

The criticisms identified by CESAR in 2008 are just as true today and have been confirmed by the District Court. Consequently, the Bureau's proposed use of the 2008 assessment for the EIS is inexcusable given the tremendous increase in scientific data and analysis in the ensuing 4 years, including but not limited to, availability of delta smelt life cycle models, new published research demonstrating the detrimental effects of ammonia deposition on delta smelt food supply, evidence that salmon runs are now almost constant, rather than seasonal, and the federal court's findings regarding the arbitrary and capricious nature of the science used by the government in the 2008 and 2009 Delta Smelt and Salmon BiOps.

COMMENT 6

The EIS must at least consider the following alternatives:

- a. The 'no action' alternative which must be continued operations pursuant to the last valid biological opinion.
- b. An alternative which consists of complete cessation of all CVP operations and water management.

The request for comments states that the action to be analyzed is the Bureau's continued operation of the CVP, in coordination with the SWP. In fact, the Bureau is now embarking on a third attempt at a valid biological opinion and associated incidental take permit, and that the two previous biological opinions were both costly and inadequate, and that the current remands ordered by the District Court as well as virtually every pronouncement on the validity of the biological opinions are on appeal before the 9th Circuit. In this context, CESAR believes that two additional alternatives must be considered in this EIS.

First the Bureau must consider a true 'no action' alternative, that is: operate to the conditions of the last valid biological opinion and its associated incidental take permit. Second, CESAR believes that the Bureau must consider an alternative that

assumes no managed or coordinated operation of the dams in any form, this alternative would have the Bureau open the flood gates of the dams and allow the river to flow unimpeded. This alternative would most closely resemble 'natural flow' patterns.

An explanation of our rationale for each of these approaches is included in the following paragraphs.

The 'no action' alternative -- continued operations pursuant to the last valid biological opinion.

If the OCAP is operated consistent with the provisions in the last valid biological opinion, there can be no 'incremental change' as identified in the ESA Section 7 regulations. Operation consistent with the management regimes consistent with any of the invalidated biological opinions is a change from the legal operation. Thus, the 'no action' alternative, to continue operation with no change from the last valid biological opinion should result in no jeopardy or significant constraints in the biological opinion. As discussed earlier, biological opinions assess the effects of the proposed action based on incremental changes in operation. In this case, there would be no change from the last valid biological opinion, therefore, there can be no effect flowing from that operation as it has been identified, and accounted for in the last valid biological opinion. The EIS must explicitly identify the 'no action' alternative, which as there is no action, there can be no 'effect' and thus no jeopardy under Section 7 of the ESA.

Complete cessation of all CVP operations and water management.

A federal agency action triggers the need for consultation. If the requirements of an ESA Section 7 biological opinion are so draconian as to make the project operation infeasible, then operation of the project and the associated water management activities must be abandoned. The requirements of the 2008 Biological Opinion were indisputably onerous and in fact obviated much of the purpose of the CVP with respect to provision of water supplies to farms and cities, instead sending the fresh water into the ocean. The extent to which the 2008 BiOp was actually implemented and the resulting catastrophic consequences, leads CESAR to believe that abandoning the CVP and the associated water management activities, the costs and consequences, must be considered and disclosed to the public.

CESAR believes that it may not be possible to harmonize the requirements for the identified endangered species and continue to operate the federal CVP. The fact that twice the Services have failed to produce a document that neither harmonizes actions to conserve species nor withstands legal scrutiny argues that it may not be possible to meet the requirements of the ESA and to continue operation of the projects. This is particularly true if a court determines that the projects are responsible for more than just the incremental effects identified in C.F.R. 402 *et seq.*

If that is the case, it will not be possible to operate the projects in a manner consistent with their legal authorization, it will not be possible to generate sufficient revenue to maintain the projects and to continue operations, and in the case of biological opinions with competing demands, it may not be possible for Bureau of Reclamation employees to operate the projects in a manner and avoid personal liability for take under the ESA. In such a case, it may be that the gates at the dams must be left open and flows be allowed to pass through unimpeded.

The public must be provided an opportunity to review and comment on the consequences of either of these two alternatives to the human environment as well as the flora and fauna affected by their operation.

COMMENT 7

The EIS must provide information to the public demonstrating how the requirements of the Biological Opinion on the OCAP preferred alternative:

- a. Are supported by a Section 7 effects analyses using the best available data;
- b. Are the result of discretionary actions as defined by the Bureau;
- c. Are supported by an effects analysis consistent with the requirements of CFR 50 Section 402 *et seq.*;
- d. Are effective.

The Bureau may only execute the OCAP within the constraints of their authorities as defined in contract, law, and regulation. The ESA has the authority to override those constraints. However, the ESA imposes the substantive requirements on the contents of the BiOp and RPAs and conservation actions that do not meet the ESA requirements do not have the authority of law. This has been demonstrated time and again as inadequate biological opinions have been rejected by the courts. **Unless the conservation actions identified in the biological opinion, including any reasonable and prudent alternatives to avoid jeopardy, meet the substantive requirements of the ESA²¹ the Bureau may not unilaterally incorporate them into their NEPA alternatives and cite them as a basis to override other legally binding limitations on their operational authority.**

The EIS must provide information to the public explaining how the provisions of any biological opinion adopted as part of the preferred alternative meets the substantive requirements of the ESA, it's implementing regulations and the agency's guidance.

²¹ These have been enumerated and explained elsewhere in this letter.

COMMENT 8

In assessing the effects of Alternatives under NEPA the EIS must include any requirements which are the result of a biological opinion.

In submitting these comments, we are mindful that most importantly this EIS is a document designed to help guide decisions whose practical effect has been and could again be catastrophic on those who rely on the OCAP water deliveries.

When the EIS identifies the effects of alternative agency actions related to the OCAP it must include the effects of the requirements of any related biological opinion. In doing **the Bureau must be mindful of the direction of Congress in Section 2 of the ESA that requires agencies to:**

'...cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.'

The requirements contained in the biological opinion resulting from Section 7 consultation under the ESA will likely generate the most significant NEPA effects. The EIS must provide information that the contents of the biological opinion are consistent with the requirements of law and identify the effects on the biological opinions on the human environment. CESAR believes this is necessary based on the Services' (Fish and Wildlife Service (FWS) and National Marine Fishery Service (NMFS)) continuing failure to develop Biological Opinions on this issue which are not arbitrary and capricious and which are not based on the specific requirements of the regulations and the statute.

Water delivery to communities and farms are controlled by contractual agreements with some delivery flexibility. The Bureau of Reclamation has little authority to go outside those contractual boundaries and substitute other priorities. In fact, the actual action described in the request for comment states that the agency action is the merely 'continue the operations of the CVP, in coordination with the SWP...' The real 'change in the environment' of this agency action to, 'continue to operate', are the conditions imposed by Biological Opinions to allow that continued operation.

Typically, under NEPA, when an action agency proposes alternatives, the Services only analyze the effects of the preferred alternative. In the case of the OCAP, the proposed agency action is for the Bureau to continue to operate the project consistent with its contractual obligations. The actual effect of the project on the human environment flows not from the agency action, but from the consequence of changes to the contractual deliveries of water which result from the conditions contained in the Biological Opinions designed to conserve listed species.

The public cannot be informed and the agency cannot make meaningful decisions or formulate alternatives until the effects of the entire agency action, including the actions flowing from the Biological Opinion are identified, analyzed, and made available for public review and comment.

The consequences to the human environment of the 2008 biological opinions related to the OCAP were catastrophic. Subsequent litigation confirmed they were unjustified and may have been avoidable. A full analysis and proper review of those effects under NEPA would provide an opportunity to avoid the errors made by the Services, provide the public an opportunity to review and comment on assumptions, data and analysis used in the ESA effects analysis, and assist the action agency, the state and other affected parties to identify potential alternatives to the recommendations of the biological opinion.

COMMENT 9

If the Bureau chooses an alternative that cedes operational control of the CVP to the wildlife agencies as was the case with the 2008 biological opinion, the EIS must identify the legal authority for such delegation to another federal agency.

The Bureau has the statutory authority and responsibility for operating the federal water projects. The Services may only impose those conditions on operation of the projects that address their discretionary activities and which are supported by the best available scientific and commercial data. Hypothesis, surmise and speculation have no place in the conditions that can be imposed. In the 2008 OCAP BiOp the Services took *de facto* operational control of the projects with no clear authority for doing so, the ESA provides that the Services consult with the action agency, it does not contemplate that the Services may substitute their judgement for that of the action agency.

If the conditions imposed by the OCAP BiOp are supported by data and analysis, they can be articulated as a series of decision rules developed by the Services for implementation by the biologists and engineers of the Bureau. There is no reason for the Services to have any ongoing participation in the operation of the project. The Bureau will have identified their action, accepted the decision rule related to operation of the project articulated by the biological opinion and can move forward based on that rule until the Bureau makes a discretionary decision to change that action. **However, if it is the Wildlife Agency position that only they and their biologists are able to discern the necessary actions based on their 'best professional judgment' and thus must be active participants in the operation of the projects, that is not a conservation action based on the best available data and thus does not meet the requirements of the ESA.**

Sincerely,



Leah Zabel
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Center for Environmental Science, Accuracy &
Reliability