



November 2, 2012

Sue Fry  
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Area Manager, Bay-Delta Office  
801 I Street, Suite 140  
Sacramento, CA 95814

*Sent Via Email to: [RemandSEP@usbr.gov](mailto:RemandSEP@usbr.gov)*

**RE: Comments on Proposed Range of Alternatives for NEPA Remand**

Dear Ms. Fry:

Thank you for the opportunity to comment on the preliminary range of alternatives for the NEPA remand, as part of the Remand Stakeholder Engagement Process. We offer the following comments on the range of alternatives and on specific potential alternatives, which we look forward to discussing at our next RSEP meeting.

First, we agree that the no action alternative must be the existing biological opinions, because the court did not vacate those biological opinions and they are currently being implemented. This is consistent with the requirements of NEPA and the Council on Environmental Quality's NEPA guidance, which states that, "the 'no action' alternative may be thought of in terms of continuing with the present course of action until that action is changed." *See* Forty Most Asked Questions Regarding CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (March 23, 1981) (Question 3). It does not appear that any other no action alternative would be consistent with the requirements of NEPA. We also recommend that Reclamation revise the description of the no action alternative as "2011 Project description with FWS and NMFS biological opinions," which include the reasonable and prudent alternative (RPA) actions, reasonable and prudent measures, and incidental take statements; this more accurately describes what is currently being implemented and the obligation to comply with the incidental take statement.

Second, we remain confused why the proposed project omits elements of the existing biological opinions. The floodplain habitat restoration and other non-operational elements were important components of the RPAs in the two biological opinions, and it is unclear why this alternative omits these components. We recommend that this alternative be revised to include the floodplain habitat restoration requirements of the NMFS biological opinion and other non-operational elements of the biological opinions.

Third, proposed alternative 1 (2011 Project Description without FWS & NMFS RPAs) does not appear to be a reasonable alternative, as it is inconsistent with the stated purpose and need. In the March 28, 2012 federal register notice, Reclamation described the purpose and need of the

action as the continued operation of the SWP and CVP, consistent with federal and state law and in a manner that complies with the Endangered Species Act. *See* 77 Fed. Reg. 18858, 18859 (March 28, 2012). The district court has repeatedly held, including in the most recent litigation, that operation of the CVP and SWP as proposed in the 2009 project description (without any of the FWS and NMFS RPA actions) violated the Endangered Species Act. Indeed, the federal register notice acknowledges that, “coordinated operation of the CVP, as described in the 2008 Biological Assessment was found to likely jeopardize the continued existence of listed species and adversely modify critical habitat.” *Id.* Given Reclamation’s obligation to comply with the ESA, 16 U.S.C. §1536(a)(1)-(2), the prior district court rulings, and Reclamation’s acknowledgment that these operations violate the ESA in this federal register notice, proposed Alternative 1 is not consistent with the stated purpose and need and should be excluded from analysis. Instead, DWR and other stakeholders should develop another alternative that may be consistent with the stated purpose and need.

Fourth, we recommend that all alternatives include the following elements:

- Implementation of the recent Delta Cross Channel Temporary Closure multi-year study ([http://www.usbr.gov/mp/nepa/nepa\\_projdetails.cfm?Project\\_ID=10650](http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=10650)) in October, for which Reclamation signed the FONSI on September 28, 2012;
- Compliance with Reclamation’s obligations under Decision 1641, including Vernalis flow requirements, per the Delta Watermaster July 18, 2012 Notice of Violation sent to Reclamation on behalf of the State Water Resources Control Board and subsequent correspondence;

Fifth, we strongly agree that Alternative 4 should include greater winter/spring outflow and stronger restrictions on South of Delta exports in the winter/spring. Numerous scientific and agency studies have identified the need to increase winter/spring outflow to protect longfin smelt and other species, including the State Water Resources Control Board’s 2010 Flow Criteria Report and analyses conducted by the state and federal wildlife agencies as part of the Bay Delta Conservation Plan (BDCP). We strongly encourage Reclamation to build on the CALSIM modeling work of reservoir operations rules that has been done in BDCP with respect to increased winter/spring outflow alternatives (in Alternative 8 and in later iterations of CS5 operations) in its development of this alternative. We recommend that this alternative consider additional closures of the DCC in the fall months. We also recommend that this alternative (and potentially others) include the interim San Joaquin River inflows required by NMFS RPA Action IV.2.1, since the State Water Resources Control Board has not yet established new water quality objectives that would supplant that requirement. And with respect to the more stringent export restrictions identified in the description of this alternative, we recommend that Reclamation consider including a requirement of positive OMR in the months of April and May, particularly in dry and below normal years.

Finally, although Reclamation has not yet sought comments on NEPA screening criteria, we caution that such screening criteria cannot exclude alternatives based on water supply impacts for at least three reasons. First, the CVPIA defines fish and wildlife protection as a co-equal Project purpose with irrigation deliveries. Rejecting alternatives on the basis of reductions in irrigation water deliveries would conflict with this purpose. Second, the ESA directs Reclamation to give the highest of priorities to protecting threatened and endangered fish

species, whether or not such protections would reduce water deliveries. Third, the courts have held that Reclamation's contracts with water service contractors specify that deliveries under those contracts are "entirely defeasible" if necessary to protect listed species. In addition, to the extent that the analysis identifies potential impacts from reduced surface water deliveries from the SWP and CVP, the analysis should consider water transfers, increased agricultural and urban water use efficiency, and other alternative water supply tools as potential mitigation measures, even if such measures are not within Reclamation's control. *See* 50 C.F.R. §1502.14(f).

Please let us know if you have any questions regarding these comments. We greatly appreciate the opportunity to provide input, and look forward to participating at the next RSEP meeting.

Sincerely,

A handwritten signature in black ink that reads "Doug Obegi". The signature is written in a cursive, flowing style.

Doug Obegi