

**San Luis & Delta-Mendota Water Authority**



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**BY EMAIL TO REMANDSEP@USBR.GOV**

Susan Fry  
Bay-Delta Office Manager  
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Re: Comments on Initial Range of Alternatives Proposed by Bureau of Reclamation in October 19, 2012 Meeting on National Environmental Policy Act Analysis on Remanded Biological Opinions on the Coordinated Long-term Operation of the Central Valley Project and State Water Project

Dear Ms. Fry:

The State Water Contractors and San Luis & Delta-Mendota Water Authority (collectively, Public Water Agencies) appreciate the opportunity to comment in response to the Bureau of Reclamation's (Bureau) October 19, 2012 request for comments during the Remand Stakeholder Engagement meeting.

Previously, Public Water Agencies provided substantial comments on the Notice of Intent and Scoping under the National Environmental Policy Act (NEPA) on Remanded Biological Opinions on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project (Scoping Comments). The comments below are meant to supplement those prior comments. Additionally, under NEPA, a federal agency proposing a major action "significantly affecting the quality of the human environment" must prepare an Environmental Impact Statement (EIS) that includes a "detailed" account of the "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). The comments below address this requirement in light of the Bureau's recent presentation on the proposed EIS purpose and need statement and initial range of alternatives.

**1. The Bureau Must Prepare A New Biological Assessment.**

Before the Bureau can reconsider whether and how the continued operations of the CVP and SWP should be modified to ensure compliance with the federal Endangered Species Act (ESA), the Bureau must complete a new consultation under section 7 of the ESA regarding each listed species affected by Project operations. As the Public Water Agencies previously explained in their Scoping Comments, this requires the Bureau and the California Department of Water

Resources (DWR) to prepare a new biological assessment describing the proposed CVP and SWP operations. The Public Water Agencies should also be permitted to directly and actively participate in the preparation of the biological assessment.

The Bureau has not indicated that it has prepared a new biological assessment as part of the remand process, or that it will be doing so. Yet, future Project operations will be substantially different from the operations described in the 2008 Biological Assessment. (*See* Scoping Comments at pp. 1-2, 6.) Moreover, Project operations will be substantially different from the operations described in the “2011 Project Description.”<sup>1</sup> Although the Bureau acknowledged, in the October 19 meeting, that the proposed “2011 Project Description” requires updating (e.g. to include the completion of Red Bluff and Freeport RWA Facilities), it has not identified the full host of changes to the description of operations that are necessary, and has not acknowledged that the substantial changes to Project operations since 2008 warrant the preparation of a new biological assessment.

A new biological assessment is also necessary because significant new scientific data and studies have become available since 2008. The Public Water Agencies’ Scoping Comments previously recited some of the new science that has developed since 2008, including life-cycle models, analyses of ammonium impacts on the food web, and analyses addressing the appropriateness of use of X2 as an indicator of delta smelt habitat and the need for a “fall X2” measure. (Scoping Comments at 6; Exhibit B to Scoping Comments.)

A new biological assessment would include new information bearing on whether and to what extent the proposed action is likely to adversely affect the listed species at issue. The new information would shape the Bureau’s formal section 7 consultation with FWS and NMFS, and ultimately, the agencies’ compliance with NEPA. If, for instance, after consultation the Bureau concludes that project operations are not likely to jeopardize the listed species or adversely modify their critical habitat, then no changes to the regime governing project operations would be required, and there would be no significant effects on the existing human environment triggering the need for an EIS. In sum, preparation of a new biological assessment is necessary for the remand process to be lawful.

## **2. The Bureau Should Alter Its Description Of The Purpose And Need Of The Action.**

The Public Water Agencies’ Scoping Comments previously alerted the Bureau to problems with the draft statement of purpose and need in the NOI. (Scoping Comments at 10-12.) The Public Water Agencies noted that in this case, the purpose of the action and the need for the action are distinct. The purpose of the action should be to continue long-term operation of the CVP and SWP in a manner that will enable the Bureau and DWR to satisfy their contractual and other obligations to the fullest extent possible. Conversely, providing water supply as fully as possible while still complying with the ESA gives rise to the need for the action. The purpose and need statement identified in the NOI is not properly formulated, and in its current form, it is overly narrow. *See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1069 (9th Cir. 2012) (“Because they

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<sup>1</sup> The Public Water Agencies previously provided detailed comments regarding the problems with the 2011 Project Description on September 21, 2012 and July 12, 2011. *See* [http://www.usbr.gov/mp/BayDeltaOffice/docs/SLWA\\_DMWA%20\\_SWC\\_Prj\\_Description\\_2011\\_RemandLTO\\_9-21-12.pdf](http://www.usbr.gov/mp/BayDeltaOffice/docs/SLWA_DMWA%20_SWC_Prj_Description_2011_RemandLTO_9-21-12.pdf).

determine the range of reasonable alternatives, an agency cannot define the purpose and need of a project in unreasonably narrow terms.”).

In the October 19 meeting, the Bureau did not indicate how, if at all, it intends to revise its description of purpose and need in response to Scoping Comments, and did not present a revised statement of purpose and need. A purpose and need statement must be finalized before the Bureau decides upon the range of alternatives selected for analysis in the EIS, as the underlying purpose of and need for the action provide the basis for the selection of alternatives. 43 C.F.R. § 46.415; *League of Wilderness Defenders*, 689 F.3d at 1069. Without first establishing a purpose and need statement, the Bureau cannot explicitly define and logically support the criteria used to identify a reasonable range of alternatives, as it is required to do. (NEPA Handbook at 8-9.)

The purpose and need statement will inform not only the range of alternatives to be analyzed but the ultimate selection of a preferred alternative. Given the true purpose and need for the action, an action alternative under which operations will comply with the ESA with minimal water supply impacts should be deemed superior to an action alternative under which operations will comply with the ESA but cause substantial water supply impacts. The purpose and need statement suggested by the Public Water Agencies supports this conclusion, and should be adopted to help the Bureau focus the proposed action and range of alternatives to be considered in the NEPA analysis.

### **3. The Bureau Should Alter Its Description Of The Range Of Alternatives To Eliminate References To The 2011 Project Description.**

The range of alternatives identified in the October 19 meeting is inadequate. First, a defensible range of alternatives can only be developed after the Bureau has prepared a new biological assessment and revised its statement of purpose and need, and there is no indication that the Bureau has taken those steps.

Second, the range of alternatives is deficient because the initial proposed action, no action alternative, and alternative 1 incorporate the 2011 Project Description. The Public Water Agencies’ previous comments on the 2011 Project Description highlighted the flaws in that description, noting problems with the period timeframe, transfer window, status of completed facilities, San Joaquin River Restoration Program, Yuba Accord, summer additional export capacity, FERC relicensing processes, State Water Resources Control Board (SWRCB) South Delta Water Quality Standards, and SWRCB San Joaquin River flow requirements.<sup>2</sup> Although the Bureau has indicated that it intends to update the 2011 Project Description, until the 2011 Project Description is actually updated or replaced with a new project description, i.e., a new project description in a new biological assessment, it should not have any part in the range of alternatives for the Bureau’s NEPA analysis.

### **4. The Bureau Cannot Proceed with the No Action Alternative it Initially Proposed.**

The Bureau must include a no action alternative among those analyzed. 40 C.F.R. § 1502.14(d). The Bureau initially proposed as the no action alternative its 2011 project

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<sup>2</sup> See Sept. 21, 2012 and July 12, 2011 Public Water Agency comments at [http://www.usbr.gov/mp/BayDeltaOffice/docs/SLWA\\_DMWA%20\\_SWC\\_Prj\\_Description\\_2011\\_RemandLTO\\_9-21-12.pdf](http://www.usbr.gov/mp/BayDeltaOffice/docs/SLWA_DMWA%20_SWC_Prj_Description_2011_RemandLTO_9-21-12.pdf).

description with implementation of the 2008 U.S. Fish and Wildlife Service (FWS) Reasonable and Prudent Alternative and the 2009 National Marine Fisheries Service (NMFS) Reasonable and Prudent Alternative (collectively, the RPAs).

The United States District Court for the Eastern District of California held that FWS RPA Actions 1, 2, 3, and 4 were unlawful, leaving only Action 5 intact. *Delta Smelt Consol. Cases*, 760 F. Supp. 2d 855 (E.D. Cal. 2010). The United States District Court for the Eastern District of California also held that NMFS RPA Actions IV.2.1, IV.2.3, and IV.3 were unlawful. *Consolidated Salmonid Cases*, 791 F. Supp. 2d 802 (E.D. Cal. 2011). These actions that the court invalidated have significant water supply implications. The court also held that other components of the RPA are unlawful.

In light of these prior court decisions, as a matter of law the Bureau cannot proceed with the no action alternative it initially proposed. This is the case for two reasons. First, the Bureau's no action alternative assumes as the baseline the continued implementation of RPAs previously found invalid. Second, the no action alternative assumes implementation of the action being proposed. In *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008), the Ninth Circuit rejected a no action alternative proposed by the National Park Service precisely for these two reasons.

The district court correctly ruled that the SEIS did not set forth a true “no-action” alternative because the SEIS assumes, as the baseline, the existence of the 2000 [Management Plan], which we previously found invalid. Such an assumption is logically untenable. The baseline alternative should not have “assume[d] the existence of the very plan being proposed.” *Friends of Yosemite Valley*, 439 F. Supp. 2d at 1105. This is so even given the deference owed to the agency's choice of a “no-action” alternative and the ongoing nature of agency management.

520 F.3d at 1037-38. Accordingly, an EIS that assumes the existence of the 2008 FWS and 2009 NMFS BiOps and RPAs in the no action alternative would be illegal. If the Bureau chooses to analyze elements of the RPAs in its current NEPA analysis, it can only do so in the context of proposed alternatives, not in a no action alternative.

Additionally, including the invalidated RPAs in the no action alternative would prevent the Bureau from evaluating the effects of operating the CVP and SWP to comply with those RPA actions. A no action alternative is required to be the basis against which all other alternatives are compared. See 40 C.F.R. § 1502.14. If the invalidated RPA actions are included in the no action alternative, then the comparisons that the Bureau performs—between the no action alternative and various action alternatives—will not measure the effects of operating the CVP to comply with the invalidated RPAs. That evaluation is precisely what the district court directed the agencies to evaluate on remand. See *Consolidated Salmonid Cases*, 688 F. Supp. 2d 1013, 1026-27 (E.D. Cal. 2010); *Consolidated Smelt Cases*, 686 F. Supp. 2d 1026, 1049-50 (E.D. Cal. 2009).

In the October 19 meeting, a representative for the Bureau indicated that any problems with the no action alternative would be cured by the fact that the Bureau plans to compare each of the alternatives against each other, as well as against the no action alternative. This is not the case. Each of the alternatives considered—whether they include implementation of some or all of the invalidated RPAs, other operational restrictions, measures to reduce stressors, etc.—must

be compared against a lawful, accurate no action alternative. That is the only way of determining the effects of each alternative.

The appropriate no action alternative was described in the Public Water Agencies' Scoping Comments. There, we stated that the "no action" alternative should be defined to include operations consistent with the Bureau's and DWR's obligations and all legal requirements except the requirements of the ESA. Under this definition of 'no action,' Project operations would continue in compliance with other regulatory requirements (e.g., D-1641 as modified by applicable laws, including Wilkins Slough requirements, FERC license requirements, American River in-river flow requirements, etc.). (Scoping Comments at 14.)

## **5. The Bureau Must Analyze a Broader Range of Alternatives than it Initially Proposed.**

The Council on Environmental Quality's NEPA regulations specify that an EIS must "[r]igorously explore and objectively evaluate *all* reasonable alternatives . . ." 40 C.F.R. § 1502.14(a) (emphasis added); *see also* 46 Fed. Reg. 18,026 (March 23, 1981) (Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations). Therefore, the Bureau must rigorously explore and objectively evaluate a wide range of "reasonable alternatives." 40 C.F.R. § 1502.14. The breadth of the range of reasonable alternatives should be commensurate with the breadth of the action's underlying purpose and need. *E.g.*, *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (the range of reasonable alternatives is "dictated by the nature and scope of the proposed action"); *Illio 'ulaokaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1097-98 (9th Cir. 2006).

As the Ninth Circuit explained in *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995):

The goal of the statute is to ensure that federal agencies infuse in project planning a thorough consideration of environmental values. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers have before them and take into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance . . . . Informed and meaningful consideration of alternatives—including the no action alternative—is . . . an integral part of the statutory scheme.

*Id.* at 729 (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (internal citations, quotations and alterations omitted)).

Thus, failure to consider a reasonable range of feasible alternatives is a violation of law. *Southeast Alaska Conserv. Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011) (finding violation of NEPA where EIS failed to examine a viable and reasonable alternative to the proposed project and did not provide adequate justification for its omission). "A 'viable but unexamined alternative renders [the] environmental impact statement inadequate.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)).

Moreover, NEPA regulations state that agencies shall also “include reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. § 1502.14(c); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d at 814; 46 Fed. Reg. 18,026 (March 23, 1981). In *Muckleshoot Indian Tribe*, the U.S. Forest Service failed to consider an alternative that would have involved obtaining funds from another agency that could be used to purchase land from a lumber company because the Forest Service deemed the funds, and therefore the alternative, to be “remote and speculative.” *Id.* at 814. The Ninth Circuit rejected this rationale, holding that the alternative was feasible, and should have been considered in the EIS, even if the funding was not within the jurisdiction of the U.S. Forest Service itself. *Id.*

**6. The Bureau Must Consider Alternatives that Include Multiple Combinations of Management Responses to Ensure the Bureau and DWR Continue to Operate the CVP and SWP in a Manner Consistent with the ESA**

The Bureau must consider alternatives that include multiple combinations of measures to ensure continued operation of the CVP and SWP, consistent with legal mandates of the ESA. It is well established that there are myriad stressors on the listed species that are the subject of consultations (USFWS 2008, NMFS 2009, NRC 2012, Mount et al. 2012). Table 1 sets forth a broad range of stressor categories and constituent stressor types.

<b>Table 1.</b> Stressor categories and constituent stressor types	
Loss of habitat	
	Insufficient tidal marsh habitat
	Insufficient freshwater marsh habitat
	Insufficient floodplain habitat
	Insufficient riparian habitat
	Insufficient spawning/rearing habitat
Reduced habitat quality	
	Reduced capacity of habitat to produce food
	Reduced turbidity
	Reduced dissolved oxygen
	Heightened or diminished salinity
	Heightened water temperature
	Non-natural flow direction
	Impaired fish passage
Contaminant impacts	
	Pesticide loading from direct sources and storm-water inputs
	Legacy contaminants (including heavy metals)
Predation	
Invasive species impacts (other than from predation)	
Entrainment	
	CVP and SWP export entrainment
	In-Delta entrainment
	Power plant entrainment
Ocean conditions	
Ocean harvest	

The extent to which these various stressor categories and constituent stressor types can be addressed via implementation of management response varies. Table 2 sets forth a number of management responses that can be analyzed by the Bureau to assess the extent to which they address one or more stressor categories and constituent stressor types. Each management

response identified can be varied on one or more scales, so that each management response encompasses a range of potential actions that could be taken.

<b>Table 2. Potential Management Actions</b>	
<u>Stressor</u>	<u>Management Response</u>
<b>Loss of habitat</b>	
- Insufficient tidal marsh habitat	▪ Tidal marsh habitat restoration
- Insufficient freshwater marsh habitat	▪ Freshwater habitat restoration
- Insufficient floodplain habitat	▪ Floodplain habitat restoration
- Insufficient riparian habitat	▪ Riparian habitat restoration
- Insufficient spawning/rearing habitat	▪ Improve passage ▪ Implement trap and haul program
<b>Reduced habitat quality</b>	
- Reduced capacity of habitat to produce food	▪ Implement water quality improvements
- Reduced turbidity	
- Reduced dissolved oxygen	
- Heightened or diminished salinity	▪ Impose requirement to manage water projects to control the average location of the X2 salinity gradient
- Heightened water temperature	
- Non-natural flow direction	▪ Impose export restrictions ▪ Install head of Old River barrier
- Impaired fish passage	▪ Improve passage ▪ Implement trap and haul program
<b>Contaminant impacts</b>	
- Pesticide loading	▪ Implement water quality improvements
- Legacy contaminants	
<b>Predation</b>	▪ Alter sport-fishing regulations ▪ Establish sport-fish reward programs
<b>Invasive species impacts</b>	▪ Develop and implement a plan to prevent the introduction of invasive species into the Delta ▪ Develop and implement a plan to eradicate or control invasive species in the Delta that are harmful to the listed species
<b>Entrainment</b>	
- CVP and SWP export entrainment	▪ Impose export restrictions ▪ Improve survival rate of salvaged fish
- In-Delta entrainment	▪ Strengthen enforcement ▪ Implementing screening program
- Power plant entrainment	▪ Impose operating restrictions
<b>Ocean conditions</b>	
<b>Ocean harvest</b>	▪ Impose additional harvest restrictions ▪ Establish mark-select fishery

For example, the habitat restoration actions can vary in extent (that is, number of acres) and location. Likewise, the export restrictions can vary by trigger (e.g., fish salvage or turbidity level), duration, and volume. Further, alteration of sport-fishing regulations can vary spatially, temporally, by species, and by imposing or easing size, catch, and gear limitations.

The range of potential actions should be determined by the results of the effects analysis conducted during formal consultation. If, for instance, after consultation the Bureau concludes that project operations are not likely to jeopardize the listed species or adversely modify their

critical habitat, then no actions or only those that result in minor changes would be appropriate. 40 C.F.R. § 402.14(h); 40 C.F.R. § 402.02 (defining reasonable and prudent alternatives and reasonable and prudent measures). Alternatively, if the effects analysis results in a likely to jeopardize or adversely modify conclusion, a broader range of actions would be appropriate.

The initial range of alternatives identified by the Bureau is defective in a number of respects. First, where a specific management response can be adjusted on one or more scales, in a number of instances, the Bureau appears intent on analyzing only a predetermined action rather than a reasonable range of actions. For example, the only export restrictions that the Bureau has included are those restrictions included in the invalid biological opinions. As mentioned above, export restrictions can vary by trigger, duration, and volume. Stakeholders have previously recommended alternative bases for establishing export restrictions (Coalition for a Sustainable Delta 2012, State Water Contractors, San Luis & Delta-Mendota Water Authority, and Westlands Water District 2012). The Bureau is obliged to analyze a range of potential export restrictions, including a no restriction alternative, to protect listed fish. This same shortcoming apparently applies with respect to other management responses described in the initial range of alternatives, namely, the fall X2 action, San Joaquin River inflow/export ratio, and head of Old River barrier.

Second, the Bureau has indicated that it will consider analyzing multiple, unspecified measures to reduce stressors on the listed species in two of the alternatives it initially proposed (i.e., Alternatives 3 and 4). In light of the number of stressors identified in Table 1 and the potentially responsive management responses identified in Table 2, the Bureau is obliged to analyze a greater range of alternatives that encompass varying suites of management responses and adjustments to those actions on multiple scales in order to fulfill its legal mandate to analyze all reasonable alternatives. For example, consistent with one of the alternatives proposed by the Coalition for a Sustainable Delta, the Bureau should analyze multiple alternatives that include management responses other than export restrictions to provide sufficient protection for the listed species. The initial range of alternatives contains only one alternative that excludes export restrictions, and it proposes no affirmative measures to provide sufficient protection for the listed species at all.

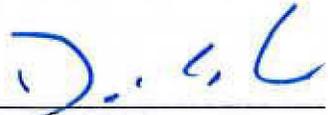
As it stands, the Bureau can analyze the effects of adjusting well over a dozen management knobs (see Table 2), but it is poised to ignore many of those. Furthermore, in most cases where the Bureau does intend to conduct analysis, the Bureau appears ready to pretend that the knobs are binary switches that can only be turned on or off (e.g., a single set of export limits, a single fall X2 action, and a single inflow/export ratio). This is not the case, and the Bureau has a legal obligation to analyze a full range of differing management responses. These differing management responses have materially different effects on the human environment so that it is not sufficient for the Bureau to analyze a cabined subset of alternatives. For example, ocean harvest restrictions, water quality improvements, and floodplain habitat restoration all are appropriate management responses for the Bureau to consider, and each would have distinct effects on the environment.

## **Conclusion**

The Public Water Agencies thank the Bureau for providing the opportunity to submit comments for consideration in the Remand Stakeholder Engagement Process. The Public Water

Agencies reserve the right to submit additional comments as the NEPA process proceeds. The Public Water Agencies look forward to working with the Bureau in a cooperative manner in developing the environmental review for the OCAP.

Sincerely,

  
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Executive Director  
San Luis & Delta-Mendota Water Authority

  
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