

**Natural Resources Defense Council
The Bay Institute**

July 11, 2003

**By Federal Express and
Electronic Mail to alubaswilliams@mp.usbr.gov
Ms. Ann Lubas-Williams
U.S. Bureau of Reclamation
3310 El Camino Avenue, Suite 300
Sacramento, CA 95821**

Re: Comments on Draft OCAP and Draft OCAP Biological Assessment

Dear Ms. Lubas-Williams:

On behalf of the more than one hundred thousand California members of the Natural Resources Defense Council and of The Bay Institute, we appreciate this opportunity to comment on the "Preliminary Working Draft Long-Term Central Valley Project Operations Criteria and Plan CVP-OCAP" (June 2003) ("Draft OCAP") and "Draft - Preliminary Working Draft Long-Term Central Valley Project OCAP BA CVP-OCAP" (2003) ("Draft OCAP BA").

I. The Planned OCAP Schedule Is Not Sustainable

Before addressing the merits of the Draft OCAP and BA, we would like to urge the Bureau to take the time necessary for sound decision making. The Bureau's announced schedule for revision of the CVP OCAP and completion of associated Endangered Species Act consultations with the National Marine Fisheries Service ("NMFS") and Fish and Wildlife Service ("FWS") appears designed principally to revise the CVP OCAP before the Bureau renews numerous CVP long-term water contracts in early 2004. This rush is perplexing. On the one hand, CVP contractors have survived with interim contracts for many years. On the other hand, many of the most critical decisions facing the federal and state projects - including the expansion of Banks' pumping capacity and the future of the Environmental Water Account ("EWA") - will not be made in sufficient time to include in the OCAP revision process. Nor will NMFS and the FWS have time to conduct careful and honest consultations on both the OCAP revisions and the

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numerous long-term contract renewals under the Bureau's present, rushed timetable.

Particularly for such long-term commitments, such rushed and piecemeal decision making undermines the environmental review process and is likely to produce consultations that are unstable at best. Indeed, the likely result of rushing the OCAP revision here is that the federal and state agencies involved will devote enormous resources on a process that they will have to revisit just months later – an extraordinary waste of agency and taxpayer resources at a time when those resources are urgently needed to protect California's environment and the purity and reliability of the public's drinking water supplies. We urge the Bureau and its partner agencies to take a more deliberate and careful approach.

II. The Draft OCAP Fails to Ensure Compliance with All Obligations Under Federal and State Law

Section 3406(b) of the Central Valley Project Improvement Act ("CVPIA") requires the Bureau of Reclamation to "operate the Central Valley Project to meet all obligations under state and federal law." Among those obligations are those established by the State Water Resources Control Board, the Endangered Species Act, the Clean Water Act, and the CVPIA itself. We are concerned that the measures described in the Draft OCAP are insufficient to fulfill the Bureau of Reclamation's obligations under these laws.

A. The Draft OCAP Fails to Meet the CVPIA's Anadromous Fish Doubling Requirements

Section 3406(b)(1) of the Central Valley Project Improvement Act directs the Secretary to:

develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991.

The Draft OCAP BA demonstrates that the Secretary has failed adequately to implement this statutory mandate. Total Chinook salmon production for all CAMP streams for the period 1995 to 1999 failed to meet the Bureau's "rebuilding schedule" target for each of the three Chinook salmon races reported. Just 5 of 18 stream runs being monitored had met their target. Across all streams,

spring-run rebuilding reached just 22% of its target, and winter-run rebuilding barely attained 5% of its target. Draft BA at 4-27 to 4-28. Moreover, the Bureau's failure to achieve the congressionally mandated anadromous fish doubling goal has also resulted in a failure to achieve California's state objective to double natural production of Chinook salmon. *Cf.* Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (1995) at 30 (“[P]rompt and efficient actions taken to implement CVPIA [anadromous fish doubling] goal, in concert with other recommended actions in this plan, are important to achieving the [Bay-Delta Plan's] narrative salmon protection objective.”).

The Draft OCAP's lack of attention to this lapse is inexplicable. In 1992, Congress directed the Bureau to operate the CVP in such a manner as to give “mitigation, protection, and *restoration* of fish and wildlife” equal priority with delivery of water for irrigation. CVPIA § 3406(a)(1). The Bureau has not implemented Congress' direction. If finalized as proposed, the Draft OCAP would contravene Congress' intent and be unlawful.

B. Bay/Delta Plan – Vernalis Flow Objectives

The Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay/Delta Plan”) establishes a number of water quality objectives for the San Joaquin River that are critical to protecting the Bay-Delta estuary and the salmon and other wildlife it supports, the purity of drinking water supplies for tens of millions of Californians, and the quality of the water relied on by downstream farmers to grow their crops. *See, e.g., Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002).

The Draft OCAP assumes that the Bureau will meet the Bay/Delta Plan's Vernalis flow objectives in the manner set out in Revised Decision 1641. Recently, however, the Sacramento Superior Court held this aspect of D-1641 invalid, since implementation of the VAMP is not sufficient to ensure compliance with the relevant Bay/Delta Plan standards. The Draft OCAP should not, and lawfully cannot, be premised on an assumed compliance plan that has been struck down. We urge the Bureau, as the operator of the most significant diversion facilities on the San Joaquin River, to revise the OCAP to ensure full compliance with the Bay/Delta Plan flow standards – including releases from Friant Dam that contribute to meeting flow requirements at Vernalis.

C. Bay/Delta Plan – Vernalis Salinity Objective

Another of the Bay/Delta Plan's water quality objectives is that which establishes maximum salinity levels for the San Joaquin River near Vernalis. In Revised Decision 1641, the State Board reaffirmed that the Bureau of Reclamation is required to ensure this salinity objective is met "using any measures available." *See also* CVPIA § 3406(b) (requiring the Bureau to operate the CVP in compliance with obligations imposed by state law, including State Board orders). Historically, the Bureau has partially addressed this requirement by releasing water from New Melones pursuant to the Bureau's "New Melones Operations Plan." The Bureau has candidly acknowledged, however, that under that plan the Bureau will violate the Vernalis salinity objectives. *See* Revised Decision 1641, § 10.1; *Central Delta Water Agency*, 306 F.3d 938, 948-49. Such violations are unlawful.

The State Water Resources Control Board has concluded that the CVP's operations in the San Joaquin Basin are the "principal cause" of violations of the Vernalis salinity objective. *See* Revised Decision 1641, § 10.2.1. Specifically, the Bureau's diversion of high quality upper San Joaquin River flows at Friant Dam has devastated the River's assimilative capacity, and what little assimilative capacity remains is then rapidly overwhelmed by drainage from areas for which the CVP provides the primary water supply. *See id.* Indeed, such drainage is responsible for more than 70 percent of the salinity discharged to the San Joaquin River. *See id.* As the Ninth Circuit has held, "the salinity level of Project waters is under the control of the Bureau" and "any violation of the Vernalis standard . . . would be 'fairly traceable' to the Bureau's decision to release waters" from CVP facilities, or not. *See Central Delta Water Agency*, 306 F.3d at 947.

Although the Bureau has a clear legal obligation to comply with the Vernalis salinity objective, the Bureau's current operations plan is apparently calculated to ensure a perpetual state of intermittent noncompliance. Two obvious solutions exist: First, reduce irrigation water deliveries to the west side lands that are a source of the saline drainage. Second, release high quality San Joaquin River water from behind Friant Dam. The State Board has made clear that the Bureau's Friant permit authorizes the release of water for salinity control. *Id.* at 10.4. And, by happy coincidences, restoring flows to the San Joaquin River below Friant is also required by California Fish & Game Code § 5937, among other laws.

The Draft OCAP's failure to provide for compliance with the Vernalis salinity objective cannot be reconciled with either the CVPIA or the Clean Water Act and Porter-Cologne Act requirements established by the State Board. The Bureau

must meet the salinity objective either by releasing water from Friant Dam, or through other means (such as reduced deliveries to the west side areas that discharge saline drainage to the River), or by some combination of approaches. A perpetual state of intermittent noncompliance simply is not lawful.

III. The Draft OCAP Does Not Reflect the Ninth Circuit's "B2" Decision

The draft OCAP and OCAP BA are premised on the Department of the Interior's May 9, 2003 "Decision on Implementation of Section 3406(b)(2) of the Central Valley Project Improvement Act." That May 9, 2003 decision was, in turn, premised on the district court's final partial judgment in *San Luis & Delta Mendota Water Auth. v. United States*, Civ. Nos. 97-6140, 98-5261 (E.D. Cal. 2002). On June 3, 2003, however, the U.S. Court of Appeals for the Ninth Circuit reversed a portion of the District Court's partial judgment regarding the Secretary's implementation of CVPIA § 3406(b)(2). *Bay Institute v. United States*, No. 02-16041 (9th Cir. June 3, 2003) (mem. op.). The Ninth Circuit's decision reverses a portion of the District Court's ruling related to the accounting for water that is "used for water quality and Endangered Species Act purposes," and requires the Secretary to "give[] effect to the hierarchy of purposes established in Section 3406(b)(2)" of the CVPIA. *Id.* Any OCAP revision must take into account the Ninth Circuit's decision.

IV. The Draft OCAP and BA Assume Continuation of the Environmental Water Account

The Draft OCAP and BA rest on the assumption that the EWA will continue for two more decades in essentially the same form described in the CALFED Record of Decision. This assumption is flawed for several reasons. First, actual assets and resources secured to implement the EWA have differed substantially from the ROD, calling into question whether the level of protection and recovery of endangered species mandated by the ROD is actually being achieved. Second, even were the actual EWA identical to the one described in the ROD, the assumption is arbitrary and unwise given that the EWA described in the ROD is a four-year program, and the future existence and size of the EWA have not been determined. Does the Bureau really believe that it makes sense to finalize the CVP OCAP revisions and accompanying BA based on unsupported assumptions regarding an unsettled EWA?

V. The Draft OCAP BA Inadequately Addresses Impacts to Protected Species Even While Acknowledging Unacceptable Impacts

The Draft OCAP BA acknowledges a number of unacceptable adverse impacts of future CVP operations, including elevated temperatures on most streams during the critical adult migration, egg incubation, and early rearing periods for spring-run Chinook salmon and Central Valley steelhead, as well as fall/late fall-run Chinook salmon. *See* Draft OCAP BA, Chapter 9. For some streams, the analyses indicate that, in addition to the presently unsuitable stream conditions resulting from project operations in many dry and critical years, future operations will similarly adversely affect normal years. In addition to these adverse impacts in upstream habitats, future operations are predicted to further degrade Delta environmental conditions, increasing the E/I ratio during the Delta smelt spawning season and shifting X2 upstream. *See* Draft OCAP BA, Chapter 10. Direct take of federally listed adult Delta smelt and splittail is also predicted to increase.

We are deeply concerned by these conclusions. In 1992, Congress amended the CVP authorizing act to make clear that protection and mitigation of fish and wildlife impacts is as important a purpose of the Project as providing irrigation deliveries. CVPIA § 3406(a). Particularly in view of the Bureau's palpable failure to meet the CVPIA's anadromous fish doubling objective, the Bureau's proposal to operate the CVP in a manner that is more, not less, harmful to these protected species is both disturbing and contrary to law.

Perhaps more troubling yet, the Draft OCAP BA assumes the continuation of the current adverse impacts on the environment as an acceptable baseline. Yet overwhelming evidence demonstrates that operations of the CVP have caused sharp declines in numerous species, including winter- and spring-run Chinook salmon, Central Valley steelhead, Delta smelt, and Sacramento splittail. These adverse impacts result directly from CVP water diversions and the pollutants introduced into the Bay-Delta system by contaminated return flows and, for a number of operational factors (e.g., export rates), the magnitude of the adverse impact (e.g., reduced survival) is directly related to the intensity of project operations.

No substantial evidence exists that these long-term downward trends have been halted, let alone reversed. To the extent that short-term improvements have occurred in certain populations, those improvements may simply reflect generally favorable hydrologic and ocean conditions that will not continue forever. What is clear is that CVPIA fish doubling goals – and specific stream flow targets – are not being met. In this context, and without any meaningful analysis of the recent

effect of those favorable hydrologic and ocean conditions, or of the effect of future extended drier year cycle conditions on the estuary's resources – the Bureau's conclusion that *increases* in Delta exports (particularly in view of decreased inter-basin imports) will not jeopardize these protected species or adversely modify critical habitat cannot be sustained.

Two particular deficiencies in the Draft OCAP BA's analysis are its failure to report ranges of impacts (rather than just average impacts) and failure to analyze the reduction in the flexibility of the system. On the first point, reporting an "average" impact of, for example, a two percent increase in egg mortality may hide widely variable impacts that could, in some years, reach far higher levels. It is these occasional (and predictable) high magnitude impacts that can jeopardize species already made vulnerable by consistently sub-optimal environmental conditions in most other years. Reporting average impacts, rather than ranges, minimizes these potential impacts. Similarly, given that fish inhabit the affected streams on a daily basis, evaluating the magnitude of future operations using, for example, predicted increases in monthly mean temperatures, is extremely coarse and almost certainly underestimates the true impacts. On the second point, absent an analysis of remaining flexibility, there is no ability to evaluate how the Draft OCAP would reduce the Bureau's existing flexibility to respond to unforeseen developments. Reductions in that flexibility will, predictably, lead to adverse impacts on protected species that the Bureau will be ill-positioned to address.

VI. The Draft OCAP Improperly Treats Freeport Diversions as "In Basin"

The Draft OCAP and its supporting studies, including the CALSIM studies used as the basis for the Draft OCAP BA, rest on an assumption that Freeport Regional Water Project diversions to the East Bay Municipal Utility District are put to "in basin" use. Draft OCAP at 2-9. This assumption is not tenable, since EBMUD's service area is not within the relevant basin. While it is unclear how this assumption affected the results of the CALSIM studies reported in the BA, it is clear that those studies must be rerun.

We respectfully request that the Bureau provide the public with an opportunity to comment on the results of these revised studies and resulting changes to the draft BA.

VII. Water Needs Assessments

The Draft OCAP inaccurately reports that "[w]ater needs assessments have been performed for each CVP water contractor eligible to participate in the CVP long-

term contract renewal process” and that “[t]hese water needs assessment [*sic*] serve to confirm a contractor’s past beneficial use and to determine future CVP water supplies needed to meet the contractor’s anticipated future demands.” We have previously explained that the Bureau’s water needs assessment process, as carried out with respect to the so-called “Sacramento River settlement contractors,” suffered from misplaced and inconsistent assumptions and flawed and irrational analysis. Many of those same errors are common to the Bureau’s CVP-wide needs assessment methodology. We incorporate by reference NRDC’s August 11, 2002 and November 27, 2002, comment letters on this issue.

Of particular note, and as we observed in the incorporated letters, the Bureau’s needs assessments fail to ensure that CVP water is put to reasonable and beneficial use, as required by state and federal law. There is a remarkable and unexplained contrast between the Department of the Interior’s recent approach to this issue in non-CVP water allocation decisions and its handling of the reasonable and beneficial use inquiry in its CVP OCAP and contract renewal processes. Regardless, one thing is clear: The Bureau must comply with state reasonable and beneficial use requirements in operating the CVP. *See* CVPIA § 3406(b). The Draft OCAP’s minimal discussion of this issue, taken in combination with the Bureau’s plainly inadequate needs analyses, suggest that the Bureau has abdicated its legal duty to ensure reasonable and beneficial use.

VIII. Friant Division

The Draft OCAP states that the Friant Division “is operated separately from the rest of the CVP and is not integrated into the CVP Operations Criteria and Plan.” Draft OCAP at 3-40. Elsewhere, the Draft OCAP states that “the Friant Division is covered by the CVP-OCAP.” Draft OCAP at 1-12. The Bureau’s inconsistency on this issue makes it difficult to evaluate what, exactly, the Bureau is proposing to do through the OCAP and on what suite of actions it intends to consult. That inconsistency also reflects what is in fact reality: While the Bureau claims that the Friant Division is “operated separately from the rest of the CVP,” that is plainly not so.

Operational and contracting decision made within the Friant Division and the Hidden and Buchanan Units have a direct and immediate impact on the health of the lower San Joaquin River and the entire Bay-Delta system. Water deliveries to Friant Division contractors divert virtually the entire flow of the San Joaquin River at Friant Dam – degrading downstream water quality and requiring increased Delta exports to the “Exchange Contractors.” And it is only because the Bureau is proposing to continue Delta exports as a means of satisfying its obligations to the

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Exchange Contractors that the extent of the Bureau's ongoing deliveries to the Friant Division contractors remains possible. These interrelated effects must, of course, be considered together. 50 C.F.R. § 402.02. See generally *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n.12 (9th Cir. 1994); *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1144 (W.D. Wash. 2000). The Draft OCAP BA does not do so.

VIII. Essential Fish Habitat

The Draft OCAP BA's discussion of essential fish habitat is quite peculiar for failing to consider the essential fish habitat of a number of species, including Chinook salmon and steelhead. The consideration of project impacts on designated essential fish habitat for these species is not entirely congruent with the requirements of Endangered Species Act consultation. Among other things, essential fish habitat exists in areas from which salmon and steelhead runs have been essentially extirpated. Accordingly, the Bureau's Draft OCAP BA does not constitute an adequate analysis of essential fish habitat for these species.

IX. The Draft OCAP and BA Fail to Consider the Effects of Global Climate Change

At a recent public meeting regarding the Draft OCAP, Bureau staff were asked why the Draft OCAP and Biological Opinion did not account for global climate change. The Bureau's response was that, at present, global climate change is too uncertain to address.

This explanation is not credible. That global climate change *is* occurring, and *will* affect western hydrology, are by now beyond any reasonable dispute. It is not simply one model that is predicting warming, but at least a half a dozen - and all of these indicate warming in the western United States of several degrees Celsius over the next 100 years (Redmond, 2003). Yet the Draft OCAP and OCAP BA ignore this phenomenon, thereby implicitly assuming that neither climate nor hydrology will change. These implicit assumptions are unsupported and indefensible.

In California, a significant percentage of the annual precipitation falls as snow in the high Sierra Nevada mountains. Snowpack acts as a form of water storage by melting to release water later in the spring and early summer months (Minton, 2001). The effects of global climate change are expected to have a profound effect on this dynamic. Among other things, less water will be slowly released from this snowpack "storage" to streams and existing reservoirs during spring and

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summer months (Wilkinson, 2002; Dettinger, 2003). This in turn will make it more difficult to fill the large reservoirs in most years, with corresponding reductions in yield and possible concerns for downstream fisheries (Roos, 2001). These developments will also dramatically increase the relative costs of surface storage to other water supply options such as conservation.

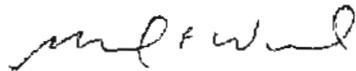
The precise magnitude of these changes might be uncertain, but judgments about the likely range of impacts have been made. See, e.g., *U.S. Global Climate Action Report – 2002: Third National Communication of the United States of America Under the United Nations Framework Convention on Climate Change*, at 82, 101 (2002).¹ The Bureau can and must evaluate how that range of likely impacts would affect CVP operations and the Bureau's ability to provide water to contractors while complying with environmental standards. The Bureau's failure to conduct such an analysis would be indefensible.

X. Conclusion

We appreciate this opportunity to de comment on the preliminary Draft OCAP and BA. For the reasons set forth above, we urge the Bureau to take the time necessary to fully address these concerns before moving forward with its OCAP revisions.

Sincerely,

Michael E. Wall, Attorney
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¹ Available at [yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/\\$File/ch6.pdf](http://yosemite.epa.gov/OAR/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/$File/ch6.pdf).

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