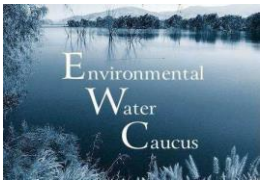

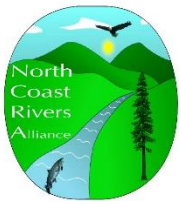

September 9, 2024

U.S. Bureau of Reclamation California Great Basin Region
Attention Bay-Delta-Office
801 I Street, Suite 140,
Sacramento, CA 95814

Via email: sha-mpr-bdo@usbr.gov

Re: Comments on Bureau of Reclamation DEIS (EIS No. 20240131) on Long-Term Operations of the CVP and SWP

Dear U.S. Bureau of Reclamation:

Please accept these public interest organizations' comments pursuant to the National Environmental Policy Act (NEPA), on the U.S. Bureau of Reclamation Draft Environmental Impact Statement (Draft EIS) on Long-Term Operations of the Central Valley Project (CVP) and State Water Project (SWP.) The Draft EIS was issued for public review on July 26, 2024. These supplemental comments are submitted by the following non-profit organizations: the Planning and Conservation League, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, North Coast Rivers Alliance, Save the American River Association Northern California Council Fly Fishers International, Southern California Watershed Alliance, Sierra Club California, AquAlliance, Center for Biological Diversity, California Water Impact Network, and the Environmental Water Caucus.

I. Discussion.

September 2021, the U.S. Bureau of Reclamation (USBR) requested to reinitiate the Endangered

Species Act consultation for the Long-Term Operations Plan (LTOP) for the Central Valley Project (CVP) and State Water Project (SWP). The stated goals were to support species viability, protect life history diversity, support operational flexibility, provide regulatory certainty, support science and monitoring, and create a single, adaptable, coordinated operation for the CVP and SWP. The proposed plan includes five alternatives that reflect a range of alternatives for the long-term operation of the Central Valley Project and Delta facilities of the State Water Project. As described below, all alternatives except alternative 3 are unacceptable.

A. The Selection of the 2019 Biological Opinion as the No Action Alternative Does Not Comply with NEPA.

Under the National Environmental Policy Act (NEPA), establishing an appropriate baseline or no action alternative is crucial for accurately assessing the environmental impacts of proposed federal actions. The no action alternative describes what would happen if the proposed federal action is not implemented. It serves as a benchmark for comparing the impacts of other alternatives. The current baseline in the DEIS does not meet this test. The DEIS baseline is not a 'benchmark' for current operations for a number of reasons:

1. The proposed no action alternative[1], the "2019 BiOps" is not a viable operations plan[2] and currently is not consistent and in compliance with the California Endangered Species Act.[3]
2. As DWR has stated the *"2019 BiOp" scenario is an artificial regulatory construct on which the SWP could not operate to because by itself the 2019 BiOps do not include necessary coverage under CESA. The SWP received a consistency determination (CD) from CDFW on the 2008-2009 BiOps for its CESA coverage, so those items in the aggregate represent a valid regulatory construct on which the SWP did indeed operate to. The 2019 BiOps can only be coupled with the 2020 ITP to form a valid and complete operating structure providing coverage under both ESA and CESA".*[4]
3. The 2019 BiOps No Action alternative benchmark relies upon stale data that is decades old. The 2019 BiOps operations modeling used the Delta Simulation Model II Version 8.0.6

[1] See "No Action Alternative" that would continue implementation of the 2020 Record of Decision on the Reinitiation of Consultation on the Coordinated Long-Term Operation of the CVP and SWP. "*No Action Alternative: continued operation of the CVP and SWP as described in the 2020 Record of Decision and subject to the 2019 Biological Opinions. DWR would also operate the SWP consistent with the California Department of Fish and Wildlife's 2020 Incidental Take Permit for the SWP*." Pg 0-2 to 0-3
https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=54803

[2] See 1:20-cv-00431 JLT EPG 1:20-cv-00426 JLT EPG
PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, et al., Plaintiffs, v. GINA RAIMONDO, et al., Defendants. THE CALIFORNIA NATURAL RESOURCES AGENCY, et al., Plaintiffs, v. GINA RAIMONDO, et al., Defendants. Civ. No. This litigation is currently stayed through December 20, 2024. Dkt. #511, 512. An interim operations plan (IOP) is in effect to govern CVP/SWP operations through that date.

[3] The SWP sought and obtained an Incidental Take Permit for SWP operations under the California Endangered Species Act. That permit was issued in March of 2020. USBR does not have a CSEA take permit in accordance with State law and there is a lack of consistency with the federal 2019 BiOp, which creates operational problems. The CVP/SWP are currently operating under an interim plan under the court's jurisdiction.

[4] DWR statement see Pg 6:
https://www.mwdh2o.com/media/18577/dwr-delivery-capability-report-2019.pdf

(2010),[5] which used a model simulation period from 1922-2003,[6] thus creating a biased overestimate of predicted flows under a number of operations in the Delta Estuary, including water available for Trinity River exports and flows in the Sacramento River along with meeting required temperatures.[7]

4. The 2019 BiOps is not a current operations plan and yet is used throughout the document as a basis of comparison to determine impacts and to analyze operations and determine by comparison impacts from the proposed action. This failure to provide an accurate baseline and no action alternative creates bias throughout all the alternatives being considered because they are judged in comparison with this "*artificial regulatory construct'* non-operative plan. This calls into question the degree to which the action may adversely affect an endangered or threatened species or its habitat. And further, how or whether the proposed action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

B. A More Accurate Baseline and No Action Alternative Can be Found in Long-Term Operation – Biological Assessment Appendix AB, Chapter 2 – Environmental Baseline: EXP3 More Accurately Reflects the 'No Action Alternative.'[8]

In the DEIS Appendix AB, Chapter 2 the EXP3 modeled alternative would more accurately reflect a "no action alternative"

"EXP3 identifies those ongoing operations that are not within the agencies' discretion to modify. In EXP3, Reclamation and DWR not only store and release inflow, but release stored water in the absence of other intervening factors (e.g., Congressional Directive, Temporary Urgency Change Petitions, Voluntary Programs, Board Order, Shortage Provisions) to meet regulatory requirements and senior water rights demands."[9]

"EXP3 attempts to model how much water is needed to meet "ongoing agency activities . . . that are not within the agency's discretion to modify," consistent with the definition of environmental baseline, 50 CFR 402.02. It includes some reasonable assumptions for how the projects would operate to meet certain requirements and obligations."[10]

The EXP3 model does have some assumptions that potentially could conflict with State Water

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[5] The Delta Simulation Model II (DSM2) Version 8.0.6 was released on November 17, 2010. https://water.ca.gov/Library/Modeling-and-Analysis/Bay-Delta-Region-models-and-tools/Delta-Simulation-Model-II

[6] See the USGS publication: https://pubs.usgs.gov/of/2018/1028/ofr20181028.pdf
"The 2019 Biological Opinion for the long-term operations of the Central Valley Project and State Water Project used the CalSim II simulation period of 1922-2003. Specifically, the Final State Water Project Delivery Capability Report 2019 states that it uses "CalSim II and a simulation period of 1922 – 2003" for its analysis."

[7] See this USGS study which notes the biased flow predictions from the use of DSM2 model Version 8.0.6., Version 8.0.6 does not accurately predict tidal phasing and routinely overestimated the magnitude of flow at specific locations according to USGS publication in 2018. https://pubs.usgs.gov/of/2018/1028/ofr20181028.pdf

[8] See the July 2024 Long-Term Operation – Biological Assessment Appendix AB, Chapter 2 – Environmental Baseline. Chapter 2 pgs 2-5 to 2-6

[9] Ibid.

[10] Ibid.

Resources Control Board Order 90-5. While there is some discretion, the requirement to meet specified temperature controls for the Sacramento River is not discretionary when it comes to the survival of endangered salmon and other species. Temperature requirements are routinely waived, which has had devastating impact to the survival of salmon and has significantly altered critical habitat both for listed salmon, steelhead and sturgeon species and for terrestrial wildlife and the giant garter snake habitat.

The EXP3 model, if used as the baseline and 'no action' alternative, would provide the public and decision makers with a more accurate basis to evaluate the analytical approach taken by USBR to assess how the long-term operations (LTO) of the CVP and SWP affect the exposure, response, and risk to select ESA-listed species (individuals and populations). The EXP3 model also enables improved assessment of whether quantitative and qualitative methods and risk assessment tools are used appropriately.

Without an extensive reanalysis using the EXP3 model, the draft analyses in the DEIS fails to accurately explain the exposure, response, and risk from project operations (alternatives) for individuals, populations, and habitats for ESA species by biasing the major effects from the alternatives and critical mitigation.

Updated modeling must be used for the No Action alternative along with an accurate depiction of the project without the proposed action. The impact analysis would thus include the discretionary actions that have consequences for endangered species and modification of critical habitat. The impact analysis across all alternatives[11] must be redone to accurately disclose the impact to endangered species and critical habitat from these alternatives for the Central Valley Project and State Water Projects entire geographical boundaries without arbitrary limits.

C. The Arbitrary DEIS Geographical Limit Placed on CVP Operations Results in a Failure to Analyze and Disclose Significant Environmental Impacts to the Federal and State Wild and Scenic Trinity River and the San Joaquin River.

1. Trinity River: The Trinity River Division (TRD) is part of the Central Valley Project and its operations, but the DEIS did not include impacts from CVP operations on the Trinity River resources nor did the DEIS analyze impacts from the various operational components associated with the Trinity River portion of the TRD.

The failure to analyze and disclose impacts to the Tribal fishery resources, endangered and threatened species, and impacts to the Federal Wild and Scenic values creates an overestimate of the water available for export to the CVP.

Furthermore, not only are the water supplies available for export artificially inflated, but failure to include required consultations for endangered species on the Trinity River jeopardizes the accuracy and integrity of the DEIS. Reclamation's failure to determine ESA, Humboldt County and tribal

[11] See Delta Simulation Model II (DSM2) Methods and Results for State Water Resources Control Board the Proposed Voluntary Agreements Draft Staff Report: Sacramento/Delta Update; September 2023 to the Bay-Delta Plan pgs G3b-1 & G3b-2 https://water.ca.gov/Library/Modeling-and-Analysis/Bay-Delta-Region-models-and-tools/Delta-Simulation-Model-II

requirements for TRD water prior to allocating TRD water for diversion to the Central Valley, and the failure to integrate that determination into the comprehensive LTOP, will result in uncertainty and the potential for additional litigation.

The arbitrary piecemeal approach currently being undertaken by USBR will lead to uncertainty and likely undermine the finality that all parties seek in the operations of the CVP/SWP. The DEIS impacts analysis did not consider any impacts of the proposed action on the Trinity and Klamath rivers, or their associated listed species (i.e., Pacific eulachon, Southern Oregon/Northern California Coast coho salmon) and designated critical habitats. Neither was production of currently unlisted Upper Klamath-Trinity River Chinook salmon evaluated as it pertains to Chinook salmon availability as prey for Southern Resident killer whales (SRKW).

Downstream water management and operations of the CVP are of critical significance and importance to the Trinity River, its resources, and the Hoopa Valley Tribe. It appears USBR is attempting to finalize the long-term operations plan for the CVP/SWP prior to completing their ongoing ESA consultation[12] relating to the Trinity River Division (TRD) and without determining the amount of water that must be retained in the Trinity River Basin for restoration and long-term protection of Trinity fish and water resources and for compliance with their endangered species obligations and protection of the federal Trinity River Wild and Scenic values.

Because the TRD is an integrated component of the CVP, and due to the statutory priorities found in the 1955 Act (Public Law 84-386, 69 Stat. 719 (1955)), 1984 Act (Public Law No. 98-541, 98 Stat. 2721), 1992 CVPIA (Pub. L. 102-575 Title XXXIV (CVPIA)), 1996 Act (Public Law No. 104-143, 110 Stat. 1338 (1996)), and the 2000 Trinity River Record of Decision (2000 ROD), the amounts of water necessary for full restoration and lasting protection of Trinity resources needs to be determined prior to making any determinations about downstream water available for export to the CVP/SWP. Segregating ESA compliance for the TRD from the long-term operations plan for the CVP/SWP, even temporarily, makes it difficult and likely impossible to protect TRD priorities and volumes required to meet the obligations of priority contained in the TRD 1955 Act and to meet the 1984, 1992, and 1996 fish statutory preservation, propagation and natural restoration and hatchery improvement mandates for the Trinity River.

2. San Joaquin River (SJR): The DEIS arbitrarily limits the CVP geographical operations analysis on the SJR to the Stanislaus River and thus fails to disclose impacts to San Joaquin River and Friant Dam from CVP LTOP.

The San Joaquin Exchange Contractors, under certain drought conditions, are allowed to take water from Friant Dam to be delivered via the San Joaquin River and CVP canals to their service area. The impacts of these diversions are not analyzed or disclosed in the DEIS.

The impacts the DEIS also fails to analyze water quality, supply, and fish and wildlife impacts to

[12] USBR re-initiated consultation on September 30, 2021, that re-initiation of consultation included the TRD component of the CVP. However, the consultation relating to the TRD has proceeded on a separate track and is not expected to be completed by December 20, 2024; rather, it is expected to be completed approximately one year later – by the end of 2025. Also see https://www.noaa.gov/sites/default/files/legacy/document/2020/Oct/0.7.115.14918-000001.pdf See also the September 12, 2023 USBR WIIN Act meeting agenda at https://www.sldmwa.org/OHTDocs/pdf_documents/Meetings/Committees/WR%20Committee/Prepackets/AgendaItem7_20231002%20WRC7.MEMO.WaterPolicyUpdate.pdf

the San Joaquin River and the Delta Estuary as the result of CVP/SWP operations upstream of the Stanislaus River. In 2013, NMFS designated a non-essential experimental population of CVP spring-run Chinook salmon for reintroduction to the San Joaquin River. The designation allows for the release of listed CV spring-run Chinook salmon outside their current range as an experimental population; given that, the non-essential population is geographically separate from the threatened population of the same species and, if lost, will not significantly impact the status of that species. In addition, ESA section 4(d) provides protective regulations (including ESA section 9 take exceptions) for activities performed during otherwise lawful activities within the experimental population area. Any activities that result in direct intentional take, harm, or activities that are illegal in nature are still subject to ESA section 9 provisions.

The San Joaquin River Restoration Plan (SJRRP) Settlement Act states in section 10011(c)(3) that the reintroduction of CVP spring-run Chinook by the SJRRP will not impose more than de minimus water supply reductions, additional water storage releases, or bypass flows on unwilling third parties due to the reintroduction. Outside of the reintroduction area, CV spring-run Chinook salmon in the San Joaquin River or its tributaries downstream to Mossdale County Park in San Joaquin County will continue to be covered by the same take prohibitions and exceptions applicable to nonexperimental populations, except when potential regulatory measures to address take would affect the de minimus conditions of the Settlement Act. Section 10011 (c) of the Settlement Act includes the Central Valley Project contractors outside of the Friant Unit and State Water Project in the definition of "third parties," and NMFS develops an annual technical memorandum to describe the accounting of any experimental non-essential CVP spring-run Chinook salmon during the operations of these facilities. That report can be found on the NMFS San Joaquin River Restoration website.

Any impacts to the SJR fishery, flows, and water quality from CVP operations must be included and analyzed in the DEIS for the long-term operations of the CVP. Further impacts to designated critical habitat along the river corridor along with wetland areas that support the federally threatened giant garter snake (1993) need to be analyzed and disclosed.

Finally, discharge of agricultural drainage from the federal San Luis Drain to the SJR and slough tributaries, including contaminant inputs such as Selenium that bioaccumulate in fish, shore birds, waterfowl and migratory birds needs to be analyzed and disclosed.[13]

II. Conclusion

Thank you for the opportunity to comment. Absent withdrawing the DEIS to more accurately provide the public and decision-makers with a valid baseline, USBR should complete a Supplemental EIS. Using the EXP3 Environmental Baseline found in Appendix AB, Chapter 2 of the Biological Assessment would more accurately reflect the impacts from the various alternatives. This fundamental change across the analysis of all the alternatives would further highlight how the selection of Alternative 3 would significantly improve river conditions and

[13] Selenium water quality data at Vernalis shows that since 2011 (when splittail deformities were reported by federal scientists) dissolved selenium concentrations were below 0.5 µg/L. Further, water quality trends since 2011 have not appreciably changed at the Vernalis regulatory point. Given the data regarding deformities and the lack of protection from the dissolved selenium concentrations at 0.5 µg/L, the immediate and cumulative impacts from CVP operations sanctioned discharges to San Joaquin River and the Sacramento-San Joaquin Delta Estuary need to be analyzed and disclosed.

restore fish populations at risk of extinction. The updated modeling in the baseline would be more reflective of current conditions. The current baseline, resulting from excluding the 2013-2016 and 2020-2022 drought conditions, likely inflates the amount of water available for export by 20% or more.

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