

DECISION SUPPORT PAPER

DATE: December 7, 2017
SUBJECT: Consideration of California WaterFix (CWF) in the Reinitiation of Consultation (ROC) on the Coordinated Long-term Operation (LTO) of the Central Valley Project (CVP) and State Water Project (SWP)

This paper describes options for Reclamation when considering CWF in the context of the ROC on LTO.

BACKGROUND

The final biological opinion (BO) from NOAA's National Marine Fisheries Service (NMFS) on the CWF exempts incidental take associated with CWF operations. The final U.S. Fish and Wildlife Service (USFWS) CWF BO includes seven broad categories of activities that require future project-specific ESA section 7 consultations and, therefore, are addressed programmatically, with no incidental take coverage for those categories of activities. Reclamation completed an Environmental Impact Statement for the CWF but has not accepted either the NMFS BO or the USFWS BO. Certain CWF activities are not authorized to commence until these project-specific consultations are completed, including "operations of new and existing CVP and SWP water facilities under dual conveyance." Project-specific (i.e. not programmatic) consultation is needed before the new facilities can operate and for construction of the North Delta Diversions (NDDs) and the Head of Old River Gate. Further, per the ESA regulations (50 CFR 402.02), for all future consultations, the environmental baseline must include "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process."

DISCUSSION

The following are various options for considering the inclusion of CWF in the ROC on LTO, in addition to the advantages and disadvantages of each option.

Option 1: Inclusion of CWF Operations in the ROC on LTO, Phased Approach

As NMFS and USFWS have exempted incidental take for construction of Phase 1 in their respective CWF BOs, and per Federal regulations (50 CFR 402.02) the CWF construction will be included in the environmental baseline for the ESA documentation. Under this option, the environmental baseline for ROC on LTO will include the CWF operations as well as NMFS has exempted incidental take for operations.

As project-specific ESA consultation is needed for CWF operations for USFWS, more detailed or modified CWF operations would be part of the Proposed Action, such that the proposed action includes new or modified actions beyond the baseline (required per USFWS & NMFS Consultation Handbook, page 4-22). There could be a phased approach to the Proposed Action to account for without CWF operations and with CWF operations. This would avoid regulatory responsibilities (restrictions in south delta pumping) for the CWF if CWF is never constructed. Operations would continue under the without CWF operations phase of the Proposed Action if CWF is not constructed.

Assumes a 40 year duration for the ROC on LTO.

Advantages:

- Consistent with the text of the NMFS BO or USFWS BO, which indicated that the ROC on LTO would include project-specific CWF operations.
- Allows for a BO that is more than 15 years in duration and avoids an additional CWF consultation.
- Would complete project-specific CWF operations consultation, allowing CWF to proceed with permits (408 permit) needed for construction.

Disadvantages:

- Because the USFWS BO would be prepared for project-specific CWF operations a decade before the CWF would become operational, could result in regulatory constraints that are based on a high degree of scientific uncertainty and for which the efficacy is highly questionable. This will occur in the project-specific CWF operations consultation regardless of whether it is stand-alone or not, as project-specific CWF operations consultation must be done prior to issuance of the 408 permit, which is needed prior to CWF construction.
- Forecloses the ability of USFWS and NMFS to consult regarding CWF Operations after planned studies are completed that are intended to inform the consultation.
- Complex modeling and documentation required due to phased CWF operations considerations in the Proposed Action.
- Could impose/require regulatory commitments on non-participants in the CWF if CWF is constructed.
- Increased timeline to complete consultation.

Option 2: Multiple Environmental Baselines and Proposed Actions

If CWF is not built or if it proceeds differently from what was described in DWR's Notice of Determination, the BOs characterization of effects and ultimate conclusion would not be the same as if CWF was built and operating, as contemplated by the CWF BOs. Effects to delta smelt and on its designated critical habitat identified in the BOs would not occur if the CWF is not built or proceeds differently, and therefore the effects identified in the CWF BOs should not be included in the environmental baseline.

There would be three environmental baselines: one with, one without CWF as described in the NOD, and one CWF constructed or operated differently from what was described in the NOD. There would also be three proposed actions: one with, one without CWF as described in the NOD, and one CWF constructed or operated different from what was described in the NOD.

Assumes a 40 year duration for the ROC on LTO.

Advantages:

- Allows for the CVP and SWP to operate to new BOs with the alternatives being if CWF is constructed, CWF is not constructed, or CWF is constructed and operates different from what was described in the NOD.

Disadvantages:

- Because the BO would be prepared for project-specific CWF operations a decade before the CWF would become operations, could result in regulatory constraints that are based on a high degree of scientific uncertainty and for which the efficacy is highly questionable. This will occur in the project-specific CWF operations consultation regardless of whether it is stand-alone or not, as project-specific CWF operations consultation must be done prior to issuance of the 408 permit, which is needed prior to CWF construction.
- Complex modeling and documentation, increased agency workload and confusion.
- There is limited precedent for multiple environmental baselines. [Insert Missouri reference here]
- NMFS has a policy that they do not do consultation on multiple proposed actions.
- Would prolong the consultation process.

Option 3: Exclude CWF Operations from the ROC on LTO Proposed Action

The environmental baseline would include CWF construction and operations. The proposed action would not include CWF operations, and would only address operations without dual conveyance for the next 15-20 years (to extend until likely CWF operation).

Advantages:

- Simplifies the Proposed Action.
- Could allow Reclamation to better respond to changed conditions in the CWF process.

Disadvantages:

- The environmental baseline may characterize benefits that will not be realized in reality, if the baseline characterizes benefits after CWF is constructed and operational. The effects of the proposed action could therefore result in worse conditions than the environmental baseline for some species.
- The USFWS CWF Biological Opinion identifies the ROC on LTO as the subsequent consultation to complete the project-specific analyses. Not including CWF operations in the ROC on LTO would require documentation of the subsequent federal action that will complete the project specific CWF operations consultation.
- If CWF is constructed, it would necessitate a subsequent project-specific consultation on CWF operations before the Corps can issue its Section 408 permit.
 - If each subsequent consultation takes 3-5 years, then that process would need to start 3-5 years prior to completion of CWF construction, or CWF operations delayed until the completion of that consultation.
- Would not allow for a BO that is more than 15 years in duration, making it unclear whether the ROC on LTO of this duration would support signing long-term water contracts.

Option 4: Exclude CWF Construction and Operations from the ROC on LTO Proposed Action and Environmental Baseline

As there is the potential the LTO BO would be issued before CWF is constructed and CVP contractors do not want additional regulatory responsibilities associated with CWF assigned to

them if they do not participate in CWF, CWF operations would not be included in the ROC on LTO proposed action under this option.

The environmental baseline would include CWF construction and operations, but the operations would not be reflected in the modeling because this option assumes a consultation period that would end before CWF is completed. The proposed action would not include CWF, and would only address operations without dual conveyance.

Assumes a 15 year duration.

Advantages:

- Simplifies the Proposed Action.
- Avoids the potential of regulatory responsibilities associated with CWF from impacting CVP contractors.
- Could allow for Reclamation to better respond to changed conditions in the CWF process.

Disadvantages:

- USFWS CWF BO identifies the ROC on LTO as the subsequent consultation. Not including CWF operations in the ROC on LTO would require documentation of the subsequent federal action that will complete the project specific CWF operations consultation.
- Would not allow for a BO that is more than 15 years in duration, making it unclear whether the ROC on LTO of this duration would support signing long-term water contracts.
- Would require a subsequent CWF consultation with the USFWS to do project-specific consultation on CWF operations before the Corps of Engineers can issue a 408 permit.
 - If each reinitiation of consultation takes 3-5 years, then that process would need to start 3-5 years prior to completion of CWF construction, or CWF operations delayed until the completion of that consultation

Option 5: Wait to Decide

Prior to submitting a Biological Assessment to the USFWS and NMFS, Reclamation would evaluate the status and likelihood of the CWF moving forward as described in the NOD and assessed in the CWF BOs. If the CWF does not move forward as described in the NOD, if Reclamation cannot identify a Reclamation interest in the CWF, and/or Reclamation does not accept the NMFS BO or USFWS BO, Reclamation would then withdraw the Section 7 consultation and exclude CWF from both the environmental baseline and proposed action. If the project is moving forward as described in the NOD, Reclamation identifies a Reclamation interest in the CWF, and Reclamation accepts the NMFS BO or USFWS BO, Reclamation would include CWF in both the environmental baseline and proposed action.

Advantages:

- Allows ROC on LTO to move forward while CWF is in flux.

Disadvantages:

- Uncertainty regarding the environmental baseline and proposed action for possibly years.

Option 6: Proceed with ROC to cover period until consultation is completed on subsequent CWF activities and include CWF in environmental baseline

The construction of CWF will be included in the environmental baseline for the ROC on LTO. Construction activities, not CWF operations nor changes to the system due to CWF operations, will be modeled as part of the baseline as CWF operations will not commence until after the biological opinions have expired. If CWF proceeds, it is expected that, whenever the facilities become operational, in approximately 12-15 years, it will be necessary to reinitiate consultation to include operations of those CWF facilities as a part of the coordinated operations of the CVP and SWP. Further, a commitment has been made to undertake significant research in the intervening period, which can be expected to inform the effects of the action and therefore provide grounds for undertaking consultation at that time.

Advantages:

- Simplifies the Proposed Action.
- Avoids appearance of possible regulatory responsibilities associated with CWF from impacting CVP contractors.
- Provides take authorization until subsequent CWF consultations are completed.
- Assures subsequent CWF consultations are informed by directed scientific research conducted in the intervening period.
- Incorporates CWF into the environmental baseline.
- Recognizes that both the status of the listed species and the state of scientific research are changing at a rate that provides grounds for consultations that do not extend far into the future.

Disadvantages:

- Would not allow for a BO that is more than 15 years in duration, making it unclear whether the ROC on LTO of this duration would support signing long-term water contracts.
- The environmental baseline may characterize benefits that will not be realized in reality, if the baseline characterizes benefits after CWF is constructed and operational. The proposed action could therefore result in worse conditions than the environmental baseline for some species.
- CWF Biological Opinion identifies the ROC on LTO as the subsequent consultation. Not including CWF operations in the ROC on LTO would require documentation of the subsequent federal action that will complete the project specific CWF operations consultation.
- Would require a subsequent CWF consultation with the USFWS to do project-specific consultation on CWF operations before the Corps of Engineers can issue a 408 permit.
 - If each reinitiation of consultation takes 3-5 years, then that process would need to start 3-5 years prior to completion of CWF construction, or CWF operations delayed until the completion of that consultation

- Corps and Reclamation would need to decide which agency is the lead federal agency for the subsequent consultation.

Table 1: Summary of the Options

Option	CWF in Environmental Baseline?	CWF in Proposed Action?
1	Yes	Yes and No (Phased Approach)
2	Yes and No (three baselines)	Yes and No (three proposed actions)
3	Yes (construction and operations)	No
4	Yes (but not modeled)	No
5	?	?
6	Yes (construction only)	No

POSITION OF INTERESTED PARTIES

Water users prefer Option 4 or 6. Some water users want an approach that supports signing long term water service contracts.

Staff from Reclamation, DWR, USFWS, DFW and NMFS want a durable and sustainable BO in order to minimize the need for new LTO consultations every few years, draining resources and unable to provide a holistic and forward thinking approach. However, the agencies will evaluate whether there is flexibility in the commitments made during the CWF to do a separate consultation on CWF outside of the ROC on LTO. A wait and see approach may be considered the most reasonable at this time.

Environmental NGOs:

Power Customers: