



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

Chris Shutes, Water Rights Advocate

1608 Francisco St., Berkeley, CA 94703

Tel: (510) 421-2405 E-mail: blancapaloma@msn.com

<http://calsport.org/news/>

December 14, 2022

Department of Water Resources
Attention: Delta Conveyance Office
P.O. Box 942836
Sacramento, CA 94236
deltaconveyancecomments@water.ca.gov
Via email

Re: Comments of the California Sportfishing Protection Alliance on the Draft Environmental Impact Report for the proposed Delta Conveyance Project

To whom it may concern:

The California Sportfishing Protection Alliance (CSPA) respectfully comments on the Draft Environmental Impact Report (DEIR) for the proposed Delta Conveyance Project (DCP or Proposed Project). The California Department of Water Resources (DWR) released the DEIR on July 27, 2022.

The DEIR fails to meet the requirements of CEQA and must be revised and recirculated. In broad terms, CSPA has identified the following deficiencies:

- The DEIR violates the Delta Reform Act
- The DEIR fails to analyze flow alternatives to restore the Delta ecosystem
- The DEIR does not present an adequate Project description, including the role, if any, of the federal government in the Proposed Project
- The DEIR fails to adequately characterize existing, No Project, and With-Project conditions (conflates constraints with conditions)
- The DEIR inappropriately substitutes comparative modeling analysis for a substantive Project description
- The DEIR fails to analyze changes to storage in SWP and CVP reservoirs upstream of the Delta, and impacts of these changes, as part of the Proposed Project

CSPA elaborates on these and related issues below.

I. The DEIR Violates the Delta Reform Act.

The Delta Reform Act of 2009 (Water Code §§ 85000-85350) requires the management of the Delta to achieve “coequal goals.” WC § 85054 provided the following definition: “‘Coequal goals’ means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” The DEIR does not treat water supply and restoration of the Delta ecosystem equally. The structure of the DEIR considers the Delta ecosystem as a **constraint** on the primary objective of creating a more reliable water supply by constructing the proposed new Delta conveyance. The DEIR treats protecting, restoring, and enhancing the Delta ecosystem as **subordinate to** water supply reliability. Subordinate is not “coequal.”

The Delta Reform Act also requires at WC § 85086(c)(2): “Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section.” The “analysis” referred to is stated in WC § 85086(c)(1): “For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources.” The DEIR utterly fails in both of these requirements. The DEIR does not propose “appropriate Delta flow criteria.” The DEIR does not explain how the State Water Resources Control Board’s 2010 Report, “*Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*,”¹ informs the “appropriate Delta flow criteria” that the DEIR declines to include.

A. The DEIR treats the Delta as a constraint on the primary goal of water supply reliability, not as the subject of a “coequal goal.”

The statement in Executive Summary Section ES.1.2 of the DEIR (“Project Purpose and Objectives”) is very clear that the “fundamental purpose” of the Proposed Project is to enhance and protect water supply:

DWR’s fundamental purpose in proposing the project is to develop new diversion and conveyance facilities in the Delta that are necessary to restore and protect the reliability of SWP water deliveries, and potentially CVP water deliveries south of the Delta, consistent with the state’s Water Resilience Portfolio (California Natural Resources Agency et al. 2020:7) in a cost-effective manner.²

The Executive Summary continues:

¹ State Water Resources Control Board, “*Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*” (Delta Flow Criteria Report) (August 3, 2010), available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/final_rpt.shtml

² DEIR, p. ES-7.

This fundamental purpose, in turn, gives rise to the following project objectives.

- To help address anticipated rising sea levels and other reasonably foreseeable consequences of climate change and extreme weather events.
- To minimize the potential for public health and safety impacts from reduced quantity and quality of SWP water deliveries, and potentially CVP water deliveries south of the Delta, as a result of a major earthquake that could cause breaching of Delta levees and the inundation with brackish water in the areas where existing SWP and CVP pumping plants operate in the southern Delta.
- To protect the ability of the SWP, and potentially the CVP, to deliver water when hydrologic conditions result in the availability of sufficient amounts, consistent with the requirements of state and federal law, including the California and federal Endangered Species Acts and Delta Reform Act, as well as the terms and conditions of water delivery contracts and other existing applicable agreements.
- To provide operational flexibility to improve aquatic conditions in the Delta and better manage risks of further regulatory constraints on project operations.³

In the Project description above, there is a sole mention of protecting the Delta ecosystem, in the final bullet. Yet even that mention does not propose to protect, enhance, and restore the Delta ecosystem. Rather, it proposes to “provide operational flexibility” for such purpose. The improvements in aquatic conditions are evidently optional, discretionary, or as-needed. Further, as stated, any such improvements would be in order to limit further operational constraints on meeting water supply needs, not because improvements to Delta’s aquatic conditions are needed (and required by law) in their own right. Moreover, the imperative to “improve aquatic conditions” is very different from the statutory mandate (coequal goal) of “protecting, restoring, and enhancing the Delta ecosystem.”

In the third bullet above, the environmental benefits of the state and federal Endangered Species Acts, and the Delta Reform Act, are framed entirely in the context of assuring that their application allows DWR to meet requirements for water supply deliveries. In the second bullet above, the concern with earthquakes is a water-supply concern; there is no mention of ecosystem impacts. And in the first bullet above, climate change and sea-level rise merit concern only in terms of the foregoing “fundamental purpose” of water supply; ecosystem impacts from these processes also do not warrant mention.

³ *Id.*

Review of the DEIR overall confirms this framing. The Delta ecosystem is an afterthought. The approach is one of do no harm, not of improvement, let alone restoration.⁴

B. The DEIR fails to propose or analyze “appropriate Delta flow criteria.”

As cited above, the Delta Reform Act specifically requires the State Water Board to include “appropriate Delta flow criteria” in any order adding a point of diversion in the northern Delta to DWR’s permits for the State Water Project (SWP). However, as was the case in DWR’s previous proposal for new tunnel infrastructure under the Delta (“California WaterFix”),⁵ the DEIR is structured around compliance with the existing Delta flow requirements of Water Rights Decision 1641 (D-1641).

Chapter 5 of the DEIR (“Surface Water”) begins with the following statement:

Existing regulations, operational rules, and water supply allocation procedures governing SWP and CVP system operations would not change because of operation of the project alternatives. However, because of the effect that integration of the proposed north Delta intakes has on the overall system, their operation could lead to changes in river flows and upstream storages.⁶

Any changes to the “overall system” of the SWP and the Central Valley Project (CVP) that the DEIR contemplates would be the result of making system adjustments to comply with existing constraints, plus any new constraints specific to the operation of the proposed north Delta diversion.

The DEIR just does not answer the requirement for “appropriate Delta flow criteria.” By omission, the DEIR assumes that the flows required by D-1641 are appropriate. The only alternative flow regime that the DEIR analyzes is presented in Appendix 4C (“Alternate Regulatory Scenario Sensitivity Analysis”), which presents model output from a vaguely-defined modeling of a potential “Voluntary Agreement.”⁷

Thus, rather than making an effort to model some version of a flow requirement that is “informed by the analysis conducted” by the State Water Board in 2010, the DEIR

⁴ In fact, as we discuss below, the DEIR does not meet this inappropriately weak standard, either. The basis of impact evaluation is a binary CEQA analysis that finds an impact only if that impact crosses the threshold of being “significant” under CEQA. The Proposed Project’s incremental worsening of Delta water quality, for example, skates under this definition.

⁵ See https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/

⁶ DEIR, p. 5-1.

⁷ DEIR, p. 4C-1 (“The description of an Alternate Regulatory Scenario includes some provisions from the recent publicly released March 2022 memorandum of understanding that outlines the terms of the Voluntary Agreements to Update and Implement the Bay-Delta Plan (Natural Resources Agency 2022). The Alternate Regulatory Scenario described in this appendix is not intended to fully represent the March 2022 Voluntary Agreements Memorandum of Understanding (2022 VAs MOU) and is only one example of a potential future condition with an updated Bay-Delta Plan.”)

substitutes sloppy modeling of an approximation of a proposal that is not yet complete, and that is explicitly designed to *supplant* the State Water Board’s 2010 analysis.

In a similar circumstance regarding the pending water rights application for a proposed Sites Reservoir, State Water Board staff in August 2022 explicitly requested the applicant to model a reasonable version of a Bay-Delta Plan update similar in structure to the State Water Board’s 2010 Delta Flow Criteria Report. Board staff requested that the Sites Authority model “a reasonably foreseeable instream flow requirement of 55 percent of unimpaired flow at each point of analysis.”⁸ The Proposed Project (for the DCP) is a petition that DWR has argued does not require a water availability analysis *per se*. However, the fact remains that State Water Board staff has publicly characterized a 55% of unimpaired flow requirement as “reasonably foreseeable” in the context of a different contemporary proposed major water infrastructure project. Such a requirement is equally reasonably foreseeable for the DCP, and as such its analysis is also required as an alternative analysis for the DCP, consistent with the requirements of the Delta Reform Act, as described above.

The absence of *any* alternative that analyzes increased Delta inflow and outflow consistent in any sense with Delta Flow Criteria Report’s percent-of-unimpaired flow approach or with the State Water Board’s more recent “July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan”⁹ renders the DEIR deficient under both the Delta Reform Act and CEQA.

C. The failure of the DEIR to conform with the Delta Reform Act renders the DEIR deficient under CEQA.

The Delta Reform Act requires more of DWR than an analysis that compares an existing degraded baseline with the changes that the proposed Delta Conveyance Project would make from that degraded baseline. The Delta Flow Criteria Report explicitly recognized that the existing flow regime in the Delta is inadequate to protect aquatic species: “Recent Delta flows are insufficient to support native Delta fishes for today’s habitats.”¹⁰ The Delta Reform Act explicitly recognized that “The Sacramento-San Joaquin Delta watershed and California’s water infrastructure are in crisis and existing Delta policies are not sustainable.” (WC § 85001(a)).

⁸ See letter from Erik Ekdahl, Deputy Director, Division of Water Rights, to Alicia Forsythe, Sites Authority, “Application A025517x01 of Sites Project Authority to Appropriate Water from Sacramento River, Funks Creek, and Stone Corral Creek in Tehama, Glenn, and Colusa Counties: Acceptance of Incomplete Application” (August 26, 2022), p. 5. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjDm9bK48_7AhViPH0KHRk8CkMQFnoECAoQAQ&url=https%3A%2F%2Fwww.norcalwater.org%2Fwp-content%2Fuploads%2FSites-Acceptance-Ltr.pdf&usg=AOvVaw2p03EmQI8dDVvMfN6mpcnX.

⁹ See State Water Board, July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan (July 2018). Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf.

¹⁰ Delta Flow Criteria Report, p. 5.

Yet the DEIR contends that by not making conditions worse, the Proposed Project has no impacts.

The CEQA document for the DCP must support the decision making process of the State Water Board, a Responsible Agency under CEQA. *See Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1298-1299 (holding EIR deficient because it failed to provide information about a project’s water supply impacts and alternatives that would reduce them needed to inform the local LAFCO in its review as a responsible agency). *See also Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939-941 (EIR must be comprehensive in addressing related reviews by other agencies, citing *Habitat and Watershed Caretakers*).

The State Water Board is required *by statute* to include “appropriate Delta flow criteria” in any order adding a point of diversion in the northern Delta to DWR’s permits for the SWP. The State Water Board cannot evaluate alternatives for such criteria if the supporting CEQA document does not even mention such criteria.

The DEIR supplants the Legislature’s statutory requirement in the Delta Reform Act with DWR’s view of a general CEQA standard. In failing to analyze compliance of the Proposed Project with statutory requirements, the DEIR is deficient.

II. The DEIR fails to provide an adequate description of the Proposed Project.

A. The DEIR fails to identify the role of the Bureau of Reclamation and the Central Valley Project in the Proposed Project, and associated impacts.

The DEIR is structured so that participation in the Proposed Project by the Bureau of Reclamation and the Central Valley Project is optional. Alternatives 2a and 4 include additional tunnel capacity to accommodate a CVP diversion of up to 1500 cfs, for a total capacity of 7500 cfs. The DEIR says that Alternative 5, the Proposed Project, could accommodate some CVP diversions with a total tunnel capacity of 6000 cfs.¹¹

Should Reclamation or one or more CVP contractors elect to participate (CVP participation), Reclamation’s action in relation to the proposed project or alternatives may include adjustment to CVP operations in the Delta to accommodate new conveyance facility operations, in coordination with SWP operations and within regulatory requirements.¹²

The DEIR brushes aside the notion that CVP participation would change the impacts of the Proposed Project:

The analysis of potential impacts disclosed in the Draft EIR for Alternatives 2A, 4A, or 5 would not be anticipated to change in any appreciable way with

¹¹ DEIR, p. 4-16.

¹² DEIR, p. 4-17.

Reclamation or CVP participation. No appreciable change would be expected in storage or river flows compared to those changes disclosed in the Draft EIR for Alternative 5 (without CVP participation) because water diversions through the new intakes would primarily be export of surplus and not storage releases.¹³

As discussed below, the Proposed Project makes no commitments regarding the amount of stored water DWR and/or Reclamation would divert relative to otherwise uncaptured water. Supposedly, the SWP and CVP were from their inception only supposed to export “surplus” water, but this concept is clearly contested in its meaning, and the current severely depressed status on many Delta fish species does not line up with such characterization.

The DEIR also dismisses potential CVP participation on the grounds that the overall amount of water exported, whether state or federal, would be about the same, so the impacts will not be greater.¹⁴ However, the rise to power of an aggressive radical conservative federal administration has already caused, in the past five years, the creation of a Reclamation policy on water deliveries so aggressive that even a California administration that strongly favors development of new water infrastructure such as the Proposed Project has sued the federal government to peel these deliveries back.¹⁵ If Reclamation is added as a Project participant and beneficiary, it will add an entire layer of policy complexity that is further subject to political winds.

In addition, federal participation would add regulatory complexity, such as potential federal preemption of certain state laws, including those pertaining to the Delta Stewardship Council’s enforcement of the Delta Plan.¹⁶ Further, the addition of Reclamation’s water rights under which diversions through the north Delta facilities could take place would add considerably more annual regulatory capacity. CVP transfers, in some cases outside the regulatory reach of the State Water Board, could also draw down CVP reservoirs by taking advantage of the reduced losses of transferred water to “carriage losses” through the Delta.

In short, the DEIR seeks to include room for the prospective benefits of CVP participation without having to systematically account for the potential impacts. This ‘player to be named later’ approach violates CEQA because it does not provide a stable description of the Proposed Project, does not define the entire Proposed Project, and defers disclosure of the impacts of the Proposed Project under the misleading generality that addition of the CVP to the Proposed Project would not add “appreciable change.”

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Pacific Coast Federation of Fishermen’s Associations, et al. v. Gina Raimondo, et al.; The California Natural Resources Agency, et al. v. Gina Raimondo, et al., Case No. 1:20-cv-00426-DAD-EPG; Case No. 1:20-cv-00431-DAD-EPG.

¹⁶ See Draft Order, Delta Stewardship Council, Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for California WaterFix, (C20185) (October 2018), p. 48 (“federal agencies are not required to be party to any certification of consistency, and the Council has no authority over federal agencies”).

B. The DEIR fails to describe project operations under the Existing, No Project, and With-Project alternatives, because the DEIR substitutes a description of constraints for a description of operations and substitutes comparisons of model output for a description of the decisions and options available and historically chosen by SWP and CVP operators.

Appendix 3C of the DEIR, Section 3C.3.2.2 (“No Project Alternative Assumptions for State Water Project and Central Valley Project”) reports: “The No Project Alternative for this Draft EIR includes continuation of operations of the SWP and CVP as governed by D-1641, the 2019 NMFS BiOp, 2019 USFWS BiOp, and 2020 CDFW ITP.”¹⁷ Yet there is no narrative description of how the SWP and CVP operate today *within these and other constraints*.

Instead, the DEIR refers the reader to descriptions of operations modeling: “Detailed assumptions for the CVP and SWP operations are represented in hydrological and water quality analytical models, as described in Appendix 5A, *Modeling Technical Appendix*.”¹⁸

One turns to the voluminous Modeling Technical Appendices, and one still finds no narrative description of project operations. Instead, one finds a similar perfunctory catch-all description that passes right over a description of project operations:

A.3 Existing Conditions

For modeling purposes, existing conditions are characterized by the following: (1) current regulatory environment; (2) current facilities, programs, and operational criteria; (3) current water demands and water use; (4) runoff from the mountain and foothill watersheds derived from historical streamflow records; and (5) valley floor surface and subsurface hydrology for current land use. Model assumptions and input data are based on conditions that existed in 2020. Details on these assumptions are contained in Appendix 5A, Section B, *Hydrology and Systems Operations Modeling*.

A.4 No Project Alternative (2040)

For modeling purposes, the No Project Alternative (2040) includes the same facilities and programs that are represented under existing conditions, except that the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project is added and there are some changes to assumed FERC regulatory requirements for some hydropower projects located in the Sierra Nevada. Surface hydrology, water demands, and Delta conditions are substantially different from existing conditions. They represent changes in land use and urban growth, climate change

¹⁷ DEIR, p. 3C-9. CDFW is the California Department of Fish and Wildlife; USFWS is the United States Fish and Wildlife Service; NMFS is the National Marine Fisheries Service.

¹⁸ *Id.*

and sea level rise, as projected to occur by year 2040. Details on these assumptions are contained in Appendix 5A, Section B.¹⁹

In short, the DEIR analyzes factors outside the control of SWP and CVP operators that will or that must change. The DEIR does not analyze the discretionary options *within the control* of SWP and CVP operators and/or their managers that exist today or under the No Project Alternative (in the language quoted from Appendix 5A above, these options are apparently embedded within the term “programs” in point (2) of each description). Equally, the DEIR does not analyze what it is reasonably foreseeable that SWP and CVP operators and/or managers will change at their own discretion under the Proposed Project.

Each Project Alternative builds off the Existing Conditions and No Project alternatives. Built on this foundation that lacks essential pieces, each Project Alternative is thus deficient.

1. The absence in the DEIR of a description of existing and future reservoir operations is misleading and unlawful.

The DEIR reminds the reader: “The existing SWP and CVP water infrastructure are operated in a coordinated manner.”²⁰ Yet the DEIR presents the Proposed Project as construction and operation of north Delta diversion infrastructure alone, not as part of the integrated system that the SWP and CVP comprise. If the Proposed Project is constructed and operated, the operators of the SWP (and likely the CVP) are under no obligation at all to operate SWP and CVP reservoirs like they operate them without the tunnel. Those operators are even less obligated to operate their reservoirs like their simulations in an operations model said they would operate them.

Instead, under the Proposed Project, the operators and especially the SWP and CVP contractors will look to optimize the entire SWP and CVP system to best leverage the opportunities for water supply benefits that the Proposed Project affords, within a framework of risk tolerance. Given the scope of the Proposed Project, the level of risk tolerance the SWP and CVP operators and beneficiaries are likely to choose is likely to be, at minimum, variable. The SWP and CVP contractors in particular will seek to receive value in acre-feet for their financial outlay for the tunnel and related infrastructure.

In *County of Amador et al. v. El Dorado County Water Agency et al.* (1999) 76 Cal.App.4th 931 [91 Cal.Rptr.2d 66], a California court of appeals laid out basic requirements for describing reservoir operations in a CEQA document. The court stated at pp. 955-956:

¹⁹ DEIR App. 5A, p. A-4. Nor does review of chapter 5 itself avail. Chapter 5 merely contains a circular reference to Appendix 3C: “A more detailed description of the existing conditions, No Project Alternative, and the assumptions associated with each are included in Appendix 3C, *Defining Existing Conditions, No Project Alternative, and Cumulative Impact Conditions.*” See DEIR, p. 5-11.

²⁰ DEIR, p. 1-7.

We agree that a mere recitation of end-of-month lake levels does not provide an adequate description of the existing environment or how PG&E determined water releases. The hydrologist himself referred to this data as "a presentation of historical observations, rather than an operational analysis."

The month-end water level is only one element of the operation. Just as important to fisheries, river habitation, and recreational users is how those lake levels were determined. When were releases made and at what rate? What were the factors that determined when releases would be made? Are those factors equally applicable for purposes of power generation and inelastic consumptive use? ... Reliance on lake levels alone is insufficient to describe the current release program or to assess the impacts of the proposed project.

Nor does the FERC license describe existing conditions. Minimum stream flow requirements do not describe actual water releases. An EIR must focus on impacts to the existing environment, not hypothetical situations. [*internal citation omitted*] The fact that water flow must be kept at a certain minimum level does not reveal what flows were actually maintained; higher water flows would comport with FERC requirements, but might adversely affect lake levels and/or the downstream environment.

The underlying message of *Amador v. El Dorado* is that it is inadequate to say that reservoir operations will not change with a proposed project and leave it at that. A CEQA document has to *describe and analyze* both the baseline operation and the operation under the proposed project. The DEIS does not meet this basic requirement. Instead, it defaults to model output in Chapter 5 and its appendices, which provide modeled end-of-month storage tables and plots, and similar comparisons of model output. There is simply no narrative explanation of the decision points and choices behind the reservoir operations that are embedded in these model results.

Defining how an existing project operates to meet the constraints that condition a project, or how a project with proposed new facilities would operate to meet constraints, is necessary.²¹ But more is also necessary: an EIR must also provide a description and

²¹ This is as far as the DEIR goes. It models changes in reservoir storage where those changes would be required to meet downstream constraints, primarily in the Delta. "Although the proposed project and alternatives do not include any facilities located in or changes to water operations upstream of the Delta, inclusion of these areas is considered in this Draft EIR to evaluate and, as appropriate, rule out any potential for causing direct or reasonably foreseeable indirect impacts in those areas." (DEIR, p. 1-29, fn. 5). *See also* p. 5-13:

The project alternatives would provide an additional conveyance facility for transporting water from the north Delta for SWP/CVP export without changing the operational rules of other SWP/CVP facilities or the procedures for specifying the overall water supply allocations for their corresponding contractors. However, as part of a dynamic system, the opportunities for using the north Delta intakes for diversion of additional water supplies could result in changes in corresponding simulated river flows and reservoir storage levels even without any change in operational rules and procedures.

analysis of how an existing project, or an existing project under changing conditions (No Project Alternative) operates to meet *all project purposes*. Starting from this point of comparison, an EIR must then describe and analyze how proposed new facilities make changes in such overall operation reasonably foreseeable, and what reasonably foreseeable changes there are likely to be.

In addition to not describing decision points and options, the DEIR's default to model output inappropriately presents the assumption that project operators will not make discretionary operational choices. There is no foundation for this assumption. There are no firm reservoir storage requirements in the water right permits, or in Biological Opinions, for SWP and CVP reservoirs. During the California WaterFix water rights hearings, SWP chief operator John Leahigh confirmed that DWR can change its carryover storage requirements for Oroville Reservoir administratively, without public announcement.²² And indeed, in 2019 DWR did just that. In DWR's [State Water Project Delivery Capability Report for 2019 Technical Addendum](#), DWR explains how it is now operating to an end-of-September carryover storage target of 1.6 million acre-feet in Oroville Reservoir, as opposed to a previous target based on a formula.²³ There was no public announcement or request for public comments in consideration of this change.

As opposed to the more conservative operation that DWR adopted in 2019, the Trump administration in 2019 ordered Reclamation to pursue a policy to "maximize water supply delivery" from the CVP.²⁴ While this policy was embedded in a Biological Opinion (BiOp), a compulsory regulatory document, the change that it embodied was founded on the recognition of operational flexibility within constraints.²⁵ Otherwise stated, there are, or can be, discretionary actions within constraints. In 2020, the first full year that the 2019 Trump BiOps for the operation of the SWP and CVP were in effect, Reclamation recklessly drained CVP reservoirs north of the Delta, precipitating a crisis in 2021 when CVP reservoirs saw very little refill. This is a real-life example of the type of significant adverse environmental effect that is not captured when a DEIR conflates operations with compliance with constraints. To be sure, the 2019 Trump BiOps weakened constraints, and this further enabled reckless CVP reservoir operations. But Reclamation exercised a substantial element of bad judgment independent of the fact that the 2019 Trump BiOps made it easier.

²² See WaterFix hearing transcript from May 9, 2017, pp. 11-21, esp. p. 21. Available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/transcripts/20170509_transcript.pdf.

²³ [State Water Project Delivery Capability Report for 2019 Technical Addendum](#), p. 4: "The current Oroville target is based on a static (flat) 1.6 MAF at the end of September. This methodology using a static 1.6 MAF differs from the previous water supply guidelines methodology, which initially used a 1.0 MAF floor and subsequently increased to a 1.3 MAF floor."

²⁴ See e.g., US Fish and Wildlife Service, Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations of the Coordinated Operations of the Central Valley Project and the State Water Project (Oct. 21, 2019), p. 15: "As stated in the BA, the purpose of this action is '...to continue the coordinated long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreements; and to increase operational flexibility by focusing on nonoperational measures to avoid significant adverse effects.'"

²⁵ *Id.*

It is arbitrary and capricious to assume that operational rules that are embedded in a model but not required by a regulatory requirement accurately reflect future operations. Absent a proposed permit term as part of the Proposed Project that would place requirements on reservoir operations, including enforceable numeric carryover storage requirements, there is no basis to rely on the modeled representations of reservoir operations embedded in the operations modeling that supports the DEIR.

2. The DEIR fails to identify and mitigate impacts of reasonably foreseeable changes to SWP and CVP operations that will deliver more water for water supply under the Proposed Project.

As quoted above, “DWR’s fundamental purpose in proposing the project is to develop new diversion and conveyance facilities in the Delta that are necessary to restore and protect the reliability of SWP water deliveries. . . .”²⁶ In some sense, the DEIR is already reverse engineering the constraints under anticipated climate change conditions to see where there is operational room for savings in water costs.

The SWP and CVP have a long history of studying and engineering reduced water costs to meet environmentally motivated project constraints. The “Port Chicago trigger” is one of the most notorious examples. SWP and CVP operators are able to adjust storage releases and export diversions in order to avoid the outflow requirements at the Port Chicago Compliance location shown in D-1641, Table 4.²⁷

The DEIR discloses that on average flows will decrease in the Sacramento River watershed, including in the Delta downstream of the new intakes at Hood, under the Proposed Project. The DEIR identifies reduced need for carriage water as one source of this decrease:

Use of the proposed north Delta intakes, particularly in July through December, can be used to reduce carriage water requirements—which are necessary to move exports through the south Delta when D-1641 salinity requirements are controlling. The resulting carriage water savings can then be exported or retained in upstream reservoirs, since the water no longer needs to be released. In the CalSim 3 model, increasing exports is always prioritized; however, these savings would remain in storage when sufficient export capacity does not exist.²⁸

However, there is an additional major reason the Proposed Project will cause Delta flow downstream of Hood to decrease. It does not appear that this decrease is reflected in modeling for the DEIR, and it is not discussed in the narrative description.

²⁶ DEIR, p. ES-7.

²⁷ The DEIR refers to this table as the “Roe Island Trigger.” See App. B1, p. 5-3. The DEIR acknowledges that climate change could reduce the frequency that the “Roe Island trigger” is in effect, but says nothing about how added operational flexibility from a North Delta Diversion will allow SWP operators to deliberately reduce the frequency with which the trigger is invoked.

²⁸ DEIR, p. 5-27.

This reason is the addition of a new control point for the SWP at the new north Delta point of diversion where the Sacramento River's enters the Delta.

The addition of an SWP control point at the north Delta intake will allow SWP operators to much more reliably “skate on the edge of compliance” when salinity requirements are controlling in the Delta.²⁹ The effect of leaving less buffer by over-releasing water to avoid a regulatory violation is cumulatively considerable. This element is buried in the catch-all term “real-time operations.” At any given moment, and certainly on a daily basis, SWP operators will be able to turn a dial at the entry to the Delta, whereas under Existing Conditions and in the No Project Alternative the dials are at reservoirs 1-6 days upstream. SWP operators will be able to export or release water to meet Delta salinity requirements real-time, in a single action. Their results will be instantaneous. They will be able to adjust over the course of a day.

The new on-site control point will likely push operators to release more stored water from SWP and CVP reservoirs than under the No Project Alternative, because less water will fail to either meet a regulatory or water supply purpose (an operator would consider such water to be ‘wasted’). On balance, it is reasonably foreseeable that SWP operators will use this capability to export more water.

The DEIR also admits that electrical conductivity (EC, or more simply salinity) will increase under all the alternatives for the Proposed Project.³⁰ But the rationale behind this modeled output is not clear. It does not seem to capture the fact that the new control point will allow SWP operators to more closely calibrate releases to meet salinity requirements.

Starvation of the San Francisco Bay and Sacramento – San Joaquin estuary of freshwater flow is the single greatest impact of the SWP and CVP,³¹ but the DEIR does not consider further reductions of flow into the Delta as an impact under CEQA. Instead, the DEIR considers using less water to meet regulatory requirements a benefit, not an impact.

The DEIR washes away the significance of tighter operator control and the resulting long-term increase in salinity, as well as other sources of salinity increase, by applying “thresholds of significance” for water quality impacts.³² The DEIR applies a threshold by which a value that meets an existing Delta water quality requirement, on a binary yes-or-no basis, is by definition not a significant impact under CEQA. The stated thresholds for significant impacts are founded primarily on existing D-1641 water quality

²⁹ Term used in the 2010 Delta Flow Criteria workshops.

³⁰ DEIR, p. 9-91 (Alternatives 1 and 3), p. 9-94 (all other with-Project alternatives would have about the same effects on salinity as Alternatives 1 and 3).

³¹ See e.g., The Bay Institute, *San Francisco Bay: A Freshwater Starved Estuary* (2016), available at: <https://cawaterlibrary.net/document/san-francisco-bay-a-freshwater-starved-estuary/>

³² For thresholds of significance for salinity and other water quality constituents, see DEIR p. 9-36.

standards and on salinity levels stated in a DWR contract with the North Delta Water Agency at times of year when D-1641 has no stated salinity requirements.³³

Thus, the DEIR uses, as the primary basis for determination of significance of water quality impacts, the D-1641 standards that the legislature in the Delta Reform Act has found inadequate.³⁴

Moreover, the DEIR does not consider that Temporary Urgency Change Petitions (TUCP's) for the SWP and CVP's Delta operations have become business as usual during sequential dry years.³⁵ Under TUCP's for the Delta, D-1641's Delta salinity standards are routinely weakened. Yet the DEIR does not consider failure to meet D-1641 salinity standards when TUCP's are in effect as a violation of standards, and thus does not consider salinity increases, when TUCP's are in effect, as a significant impact.

On top of the binary determination of whether a salinity increase qualifies as a significant impact, the DEIR layers a softball subjective interpretation of anti-degradation. Thus, for example, the DEIR makes a circuitous excuse for why a repeated pattern of salinity increases in September is not significant:

[T]here would be measurable degradation to EC at Threemile Slough, and there would be substantial increases in EC levels in certain years in September (Appendix 9G, Tables 9G-14-1-1 32 through 9G-14-1-2, and 9G-14-2-1 through 9G-14-2-4). The greatest monthly average EC increase in September (154 µmhos/cm) would occur in below normal years, and would be a 24% increase above existing conditions (Appendix 9G, Table 9G-14-2-4).³⁶

Under the DEIR, any degradation from existing levels of a constituent such as salinity must be “long-term” and have “substantially increased risk for adverse effect to one or more beneficial uses” in order to qualify as a significant impact under CEQA.³⁷ In this case, the DEIR selects the beneficial use (agriculture), argues that the impact on this use is not “long-term” and that the frequency of exceeding a contractual benchmark set to avoid impairment of agriculture is the same as without the project, and dismisses the

³³ Since there is not a D-1641 agricultural salinity standard for September, the DEIR arbitrarily chooses one to measure the Proposed Project against on a pass-fail basis, rather than evaluate the significance of the incremental difference between salinity under the No Project Alternative and with-Project alternatives.

³⁴ See Water Code 85001:

“The Legislature finds and declares all of the following:

(a) The Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources.”

³⁵ TUCP's governed the SWP and CVP's Delta operations at times in 2014, 2015, 2016, 2021, and 2022. See https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html.

³⁶ DEIR, p. 9-91.

³⁷ DEIR p. 9-36.

impact as less than significant despite acknowledgement that salinity increases are “substantial” and “measureable.”³⁸

Substantively, Lehman et al. (2020) have shown that incremental increases in salinity, specifically at Threemile Slough, greatly increase the likelihood of harmful algal blooms (HAB’s) in the Delta. “A shift of the X2 index by only 3 km was associated with a factor of 3 increase in the percent abundance of subsurface *Microcystis* cells in the cyanobacterial community between the extreme drought years 2014 and 2015 (Lehman et al., 2018).”³⁹ The DEIR completely obscures this impact and other potential impacts, such as impacts to fisheries, from the acknowledged substantial increases in salinity in the central Delta.

The DEIR dismisses the cumulative water quality effects with similar arguments.⁴⁰

The DEIR says climate change will cause most future increases in Delta salinity, so the increases caused by the Proposed Project are relatively unimportant.⁴¹

The DEIR states: “Nevertheless, compliance with Bay-Delta WQCP EC objectives would continue to occur with the project alternatives, particularly when the operational flexibility allowed by real-time operations is considered.”⁴² Well, compliance would continue except when the project is out of compliance, under the explicit cover of TUCP’s or simply with the same track record of exceedances. Real-time operations would change compliance by consistently allowing operators to skate closer to the edge of compliance.

“EC increases that would occur due the project alternatives would not be of sufficient frequency, magnitude and geographic extent to directly cause impacts on beneficial uses or contribute substantially to anticipated future EC levels in the western Delta.”⁴³ This is another subjective off-ramp in the DEIR’s impacts analysis: the cumulative increases would not “directly” cause impacts. This is a particularly odd construction when discussing cumulative impacts, which by definition are not direct impacts. And there is an encore for the familiar term “substantially.”

³⁸ *Id.*, p, 9-92.

³⁹ Lehman, P., T. Kurobe, and S. Teh. 2020. Impact of extreme wet and dry years on the persistence of *Microcystis* harmful algal blooms in San Francisco Estuary, p. 8. *Quaternary International*. DOI: <https://doi.org/10.1016/j.quaint.2019.12.003>.

⁴⁰ *See id.*, p, 9-200.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

3. It is reasonably foreseeable that DWR and Reclamation, and their contractors, will seek to change, weaken, or limit the Project's constraints on their operations, in order to allow delivery and/or storage of more water for water supply.

As the 2019 Trump BiOps have most clearly demonstrated, it is not speculative that water contractors and a variably sized segment of DWR and Reclamation staff will consistently and relentlessly try to reduce constraints on SWP and CVP operations in order to increase water supply deliveries. There is an entire industry of consultants, attorneys, biologists, hydrologists, and of course engineers that are paid tens of millions of dollars a year to probe for weaknesses in the regulatory framework or for justifications to weaken regulator constraints. Fish don't need as much water, some fish don't matter, some fish aren't worth the expense of a given constraint, warm water fish are more appropriate than cold water fish: the list of rationalizations for weakening constraints goes on and on.

The DEIR does not consider what the impacts of the Proposed Project will be if the operating constraints change. For example, the principle of maximizing water supply for the CVP may well be reinstated by a conservative federal administration. The federal administration may in the future also hold DWR to the letter of the renegotiated terms of the 2018 version of the Coordinated Operations Agreement (COA), compelling DWR to more frequently seek to weaken Delta flow and water quality standards with TUCP's. Under such reasonably foreseeable changes in policy, the DCP facilities would add capacity and/or reduce the water cost for more aggressive exports. Such exports would increase the magnitude and severity of the impacts, as discussed above, of the Proposed Project.

In addition, there numerous constraints on SWP and CVP system operation generally, and on new elements the Proposed Project would add, that the DEIR proposes to revisit under "adaptive management." For instance, the DEIR states:

The instantaneous diversions at the proposed intakes would be subject to fishery agency velocity criteria, currently a maximum approach velocity of 0.2 feet per second (fps) (per U.S. Fish and Wildlife Service [USFWS] criteria for delta smelt) and a minimum sweeping velocity of 0.4 feet per second at the proposed fish screens to help minimize near-field effects of the intake operations.⁴⁴

On the other hand, the DEIR states: "Bypass flow is the 3-day tidally averaged flow remaining in the Sacramento River immediately downstream of the proposed north Delta intakes computed as flow measured at Freeport minus the diversion rate."⁴⁵

One can easily imagine the need to maintain instantaneous sweeping and approach velocity being operationally difficult and having a high water cost. This will be particularly true when inflows to Freeport are relatively low and daily tidal variation is

⁴⁴ DEIR, p. B-55.

⁴⁵ *Id.*

relatively high. An “adaptive management” action could easily be allowing more averaging in the calculation of these velocities and/or making detection of fish “pulses” a precondition to such velocities, rather than additive as stated in the “preliminary proposed operations criteria.”⁴⁶

The DEIR’s entire adaptive management construct relies on the unsupported assumption that state and federal fisheries agencies, along with staff from the State Water Board, will act to protect fisheries and other public trust resources in considering “adaptive management” changes to the operating constraints of the Proposed Project. The DEIR’s adaptive management construct further relies on the objective participation of DWR and Reclamation in considering changes to the operating constraints of the Proposed Project. However, DWR and Reclamation’s TUCP’s for Delta operations and wholly inadequate Sacramento River Temperature Management Plans in 2014, 2015, 2016, 2021, and 2022, and the actions of the regulatory agencies in signing off on them, demonstrate that these agencies cannot be relied on to protect public trust resources affected by the SWP and CVP.⁴⁷

III. Incorporation by reference of the comments of others on the DEIR.

The foregoing comments do not comprehensively exhaust CSPA’s comments on the DEIR. Rather, these comments discuss deficiencies in the DEIR that CSPA believes are not fully addressed in comments of others. Accordingly, CSPA (non-exhaustively) incorporates by reference the comments of others on the DEIR as specified:

- The comments of the Natural Resources Defense Council et al. on:
 - Impacts to fisheries
 - Lack of substantial evidence supporting the effectiveness of proposed habitat restoration as mitigation for the Proposed Project
 - Inadequacy of climate change analysis and assumptions
 - The requirements of CEQA and DEIR’s failure to fulfill those requirements.
- The comments of California Water Research on the inadequacy of climate change analysis

⁴⁶ Term used in the DEIR to describe initial proposed constraints for the Proposed Project, p. 3-149 ff.

⁴⁷ See, e.g., myriad concurrences by CDFW, NMFS, and USFWS with TUCP’s for Delta operations during recent dry year sequences at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/tucp/index.html.

See also concurrences by NMFS with State Water Board’s approval of Sacramento River Temperature Management Plans during such sequences at:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/.

CSPA and others have filed petitions for writ of mandate sued on the 2021 TUCP and 2021 Sacramento River Temperature Management Plan. Available at: https://calsport.org/news/wp-content/uploads/2021_10_28-Verified-Petition-for-Writ.pdf; <https://calsport.org/news/wp-content/uploads/2021-11-09-Petition-for-Writ-of-Mandate-Sac-Temp-CSPA-et-al.pdf>. We incorporate by reference all allegations contained in these petitions.

- The comments of Friends of the River on reasonably foreseeable future new reservoirs and other water development that the Proposed Project, if approved, will incentivize and support, along with associated impacts
- The comments of the San Joaquin Audubon Society on impacts to avian and terrestrial species, and on harmful algal blooms and barge traffic
- The comments of California Water Impact Network (EcoNorthwest) on impacts to recreation
- The comments of Sierra Club California et al. on the requirements of CEQA and the public trust doctrine, and DEIR's failure to fulfill those requirements.

IV. DWR must revise and recirculate the DEIR.

The DEIR violates CEQA and the Delta Reform Act. DWR must revise and recirculate the DEIR in order to correct the deficiencies described above.

Thank you for the opportunity to comment on the Draft Environmental Impact Report for the proposed Delta Conveyance Project.

Respectfully submitted,



Chris Shutes
Acting Executive Director
California Sportfishing Protection Alliance