

2 Consultation History

2.1 Consultation History

The Federal Reclamation Central Valley Project (CVP) and California State Water Project (SWP) are two major inter-basin water storage and delivery systems that divert and re-direct water from the southern portion of the Sacramento–San Joaquin Delta (Delta), and have a complex history of consultation under the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.) (Act). Aspects of this consultation history dealing with the management of CVP/SWP facilities located in the Delta are summarized chronologically in Table-2-1. A biological opinion (BiOp) covering the effects of CVP/SWP facilities located in the Delta on listed fish species has been in place continuously since February 14, 1992, but numerous formal and informal consultations have occurred over the years as new species of fish, plants, and wildlife have been listed, new critical habitat has been designated, project operation has changed in response to regulatory requirements, and legal challenges have occurred. Today, CVP/SWP facilities located in the Delta are managed consistent with the 2009 National Marine Fisheries Service (NMFS) and 2008 U.S. Fish and Wildlife Service (USFWS) BiOps. For a detailed history of consultation from 1992–2009 please see the 2009 NMFS¹ and 2008 USFWS² BiOps.

One part of this long and complex consultation history has been for a proposed north Delta diversion facility (i.e., for a dual-water conveyance system), which as now presented in Chapter 3, the Proposed Action (PA) of this biological assessment (BA), has been under various stages of development since January 2006, first as part of a conservation strategy in the Bay-Delta Conservation Plan (BDCP), and now as a stand-alone project referred to as “California WaterFix.” Accordingly, this BA has been prepared by the U.S. Bureau of Reclamation (Reclamation) to initiate an interagency consultation consistent with ESA Section 7. Reclamation is the lead Federal agency for this consultation, and has been designated by the U.S. Army Corps of Engineers to act in their behalf for the purposes of this consultation, as specified in a letter of April 2, 2015 (SPK-2008-00861; Jewell 2015). The past 8 years has been spent in nearly continuous engagement among multiple agencies, including the Bureau of Reclamation (Reclamation), the California Department of Water Resources (DWR), California Department of Fish and Wildlife (CDFW), NMFS, and USFWS (among others) for the “co-equal goals” of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem; this HCP/NCCP process has included numerous productive discussions and the publication of many reports and other documents that address both technical and policy issues. Most of the record of this HCP/NCCP development process is publicly available in the form of documents that have been archived on a DWR-administered website at

¹ The June 4, 2009, NMFS *Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project* can be found at: http://www.westcoast.fisheries.noaa.gov/central_valley/water_operations/ocap.html. All references to this document are intended to include the amendments issued on April 7, 2011, which can be found at: http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/040711_ocap_opinion_2011_amendments.pdf.

² The December 15, 2008, USFWS *Biological Opinion on Formal Endangered Species Act Consultation on the Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP)* can be found at: <http://www.fws.gov/sfbaydelta/cvp-swp/cvp-swp.cfm>.

www.baydeltaconservationplan.com. In December 2013, the draft BDCP was released along with a draft environmental impact statement (DEIS) intended to comply with the Federal requirements under section 10 of the ESA as a habitat conservation plan (HCP), and the associated Federal environmental analysis (NEPA) requirements. The project described in the draft BDCP and DEIS also was intended to comply with applicable state regulations.³ In coordination with Reclamation, DWR, as the applicant, has since added three NEPA alternatives to the range considered to meet the purpose and need of the PA and DWR and Reclamation have identified the PA in this biological assessment as the preferred alternative. Reclamation and DWR, therefore, have now chosen to pursue ESA compliance for operations in the Delta under the Section 7 process (with Reclamation as the Federal action agency), as represented by this biological assessment (BA) and its associated consultation. A Supplemental Draft EIS⁴ was issued on July 9, 2015, updating the 2013 Draft EIS. The new NEPA alternatives in the Supplemental Draft EIS contain fewer conservation measures and changes in tunnel alignment and diversion operations than the previously analyzed alternatives. With the additional alternatives, DWR and Reclamation propose the use of Section 7 consultation to comply with the ESA. DWR considers these additional alternatives within the range of alternatives that meet the purpose and need as described in the EIS and has subsequently identified the PA as the NEPA preferred alternative. Reclamation and DWR, therefore, have now chosen to pursue ESA compliance for operations in the Delta under the Section 7 process (with Reclamation as the Federal action agency), as represented by this BA and its associated consultation.

From March 2015 through November 2015, NMFS, USFWS, CDFW, DWR, and Reclamation participated in collaborative meetings to develop appropriate technical approaches to the evaluation of this PA. These included the following:

- Weekly Section 7 Consultation Team meetings.
- Weekly ESA Technical Team meetings.
- Weekly Terrestrial Technical Team meetings.
- Weekly Aquatics Technical Team meetings.
- Various workshops to discuss specific topics, such as the inclusion of climate change, application of specific modeling tools, modeling assumptions, and other technical topics.

In September, 2014, planning efforts for the ESA Section 7 compliance component of the Bay Delta Conservation Plan (BDCP), a Section 10 permit application, commenced with the formation of the Section 7 Consultation Team (SCT). Attendees included representatives from Reclamation, DWR, USFWS, NMFS, and DFW. The purpose of the SCT was to coordinate the use of the BDCP Section 10 document for purposes of completing the Section 7 consultation. Meetings were held bimonthly through December. In February 2015, Reclamation and DWR decided to pursue a Section 7 consultation in lieu of the Section 10 permit. At that time, the SCT

³ The BDCP was also intended to comply with the California Natural Community Conservation Planning Act and therefore, the EIS was prepared as a joint document with the environmental impact report (EIR) in compliance with the California Environmental Quality Act (CEQA).

⁴ Prepared jointly with DWR's CEQA document, a Partially Recirculated Draft EIR

began meeting weekly and was focused on the development of a new document to support Section 7 consultation. Additionally, technical teams were formed with the same membership as the SCT to allow USFWS and NMFS to provide technical assistance in the development of the BA. Technical teams met regularly to discuss the proposed action, analytical approaches, organization of the BA, and other topics pertinent to the development of the BA. The SCT and technical teams continued to meet regularly through the development of the Final BA. In addition, Principal meetings were held throughout the development of the BA to discuss the Section 7 consultation as well as other topics pertinent to the proposed action.

Additionally, beginning in April 2015, the U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (EPA) also participated in technical discussions pertaining to relevant components of the consultation through the weekly ESA technical team meetings.

Table-2-1. Chronology of ESA Consultation for Coordinated CVP/SWP Operations.

Date	Action
July, 2006	Several state and private parties enter into a memorandum of agreement (MOA) that sets out the financial commitments of the parties to carry out actions to satisfy existing regulatory requirements related to operation of the CVP/SWP and develop a conservation plan for the Delta that would support new regulatory authorizations under state and Federal endangered species laws for current and future activities related to the CVP/SWP. This plan comes to be called the Bay-Delta Conservation Plan (BDCP). DWR unites the MOA parties into a BDCP Steering Committee, which commences regular meetings that continue until November 18, 2010.
December 15, 2008	USFWS issues a BiOp for the <i>Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP)</i> (USFWS 2008), portions of which address operation and management of CVP/SWP facilities in the Delta. Reclamation provisionally accepts and then implements the BiOp including the Reasonable and Prudent Alternative (RPA).
June 4, 2009	NMFS issues a BiOp for the <i>Long-Term Operations of the Central Valley Project and State Water Project</i> (NMFS 2009), portions of which address operation and management of CVP/SWP facilities in the Delta. Reclamation provisionally accepts the BiOp, including RPA, on June 4, 2009, and then implements.
September, 2010	USFWS issues a BiOp, analyzing the effects of the geotechnical studies for the BDCP and preliminary engineering studies for the Delta Habitat Conservation and Conveyance Program.
December, 2010	The BDCP steering committee is dissolved and DWR continues the BDCP planning process as the principal applicant for the BDCP, which is intended to serve as an HCP for the purposes of ESA compliance and as a natural community conservation plan for the purposes of NCCPA compliance. The BDCP at this stage includes, in a preliminary form, the proposed new facilities and water operations subsequently incorporated into the PA for the California WaterFix. DWR and its contractors meet regularly with Reclamation, CDFW, NMFS, and USFWS staff members to discuss issues related to development of the HCP and Natural Community Conservation Plan (NCCP); these meetings continue until release of the draft BDCP in December 2013.
January 7, 2011	FWS issues BiOp on DWR's 2011 Georgiana Slough Non-Physical Barrier Study.
February 22, 2011	NMFS issues BiOp on DWR's 2011 Georgiana Slough Non-Physical Barrier Study.
April 7, 2011	NMFS issues amendments to the RPA of its 2009 BiOp (NMFS 2009). Subsequent references in this biological assessment to NMFS's 2009 CVP/SWP BiOp should be interpreted to include reference to these 2011 amendments, as applicable.

Date	Action
May 4, 2011	The District Court issues a final judgment amending its December 14, 2010, decision in the Delta Smelt Consolidated Cases and orders USFWS to complete a final revised BiOp by December 1, 2013.
September 20, 2011	In the Consolidated Salmonid Cases (a group of six related cases brought against NMFS by various water management entities), the District Court remands portions of the 2009 NMFS BiOp to NMFS for further consideration.
December 12, 2011	Following on its September 2011 remand decision, the District Court orders NMFS to complete a draft BiOp by October 1, 2014, and a final BiOp by February 1, 2016.
December 14, 2011	USFWS issues a draft BiOp on the effects of coordinated CVP/SWP operations on Delta Smelt.
December, 2012	The Departments of the Interior and Commerce and DWR file a joint motion in the District Court for a 3-year extension of the current court-ordered deadlines. The request included delaying completion of the USFWS and NMFS BiOps and the associated NEPA process for 3 years in favor of implementing a Collaborative Science and Adaptive Management Program (CSAMP), which is largely targeted at key Delta actions included in the RPA identified in the BiOps, and as a test run for adaptive management activities included in the BDCP.
April 9, 2013	The District Court grants a staged extension, extending all deadlines related to the remanded BiOps and the NEPA process by 1 year, with the potential for two additional 1-year extensions if satisfactory progress is demonstrated to the court. This extended the deadline for the final USFWS revised BiOp to December 1, 2014, and the final NMFS revised BiOp to February 1, 2017.
October 18, 2013	DWR issues a biological assessment for the 2014 Georgiana Slough Floating Fish Guidance Structure Study.
December 13, 2013	DWR issues draft BDCP, files an application for an incidental take permit under Section 10 of the Act, and together with Reclamation, NMFS, and USFWS, issues a Draft Environmental Impact Report (EIR)/EIS, evaluating the BDCP and 12 other alternatives. Public comment period on the plan and EIR/EIS extends through July 29, 2014.
February 11, 2014	USFWS issues a BiOp on DWR's 2014 Georgiana Slough Floating Fish Guidance System Project.
February 18, 2014	NMFS issues a BiOp on DWRs 2014 Georgiana Slough Floating Fish Guidance Structure Project.
February 21, 2014	USFWS issues a programmatic BiOp on DWR's 2013–2017 Temporary Barriers Project, which supersedes USFWS's previous BiOps and amendments for the Temporary Barriers Project.
March 5, 2014	The District Court extends all deadlines an additional year. This revises the deadline for the final USFWS revised BiOp to December 1, 2015, and the final NMFS revised BiOp to February 1, 2018.
March 13, 2014	The United States Court of Appeals for the Ninth Circuit (Appellate Court) issues an opinion on the Smelt Consolidated Cases, reversing the District Court remand of the 2008 USFWS BiOp.
September 16, 2014	The Appellate Court issues a mandate on the Delta Smelt Consolidated Cases that the judgment of the court, entered March 13, 2014, was in effect.
October 1, 2014	The District Court issues an amended judgment on the Delta Smelt Consolidated Cases, reaffirming the November 13, 2009, judgment that Reclamation's adoption of the December 15, 2008, USFWS BiOp violated NEPA, remanding Reclamation's December 2008 Provisional Acceptance of the USFWS BiOp and requiring that Reclamation comply with its obligations under NEPA and issue a finding of no significant impact or record of decision (ROD) by no later than December 1, 2015.

Date	Action
January 9, 2015	Reclamation reinitiates consultation with USFWS on the 2008 FWS OCAP Biological Opinion and Conveyance of Revised Incidental Take for the 2015 Water Year.
February, 2015	Reclamation and DWR decide to pursue an ESA Section 7 compliance pathway for permitting of water facilities formerly proposed under BDCP.
April 2, 2015	U.S. Army Corps of Engineers, Sacramento District, designates Reclamation as lead Federal agency for the ESA Section 7 consultation on the California WaterFix.
October 1, 2015	Reclamation delivers a draft California WaterFix biological assessment to NMFS and USFWS for review.
October 30, 2015	Reclamation delivers additional components of the draft California WaterFix biological assessment to NMFS and USFWS for review.
November 2015	NMFS and FWS provide comments on the draft California WaterFix biological assessment to Reclamation in the context of a series of meetings and emails.

2.2 References

Jewell, Michael S. 2015. Letter from Michael S. Jewell, Chief, Regulatory Division, U.S. Army Corps of Engineers, Sacramento District, to Michelle Banonis, U.S. Bureau of Reclamation, Sacramento, CA. Dated April 2, 2015. Identification number SPK-2008-00861.

National Marine Fisheries Service. 2009. *Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project*. June 4. Southwest Region. Long Beach, CA. Available: http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf, accessed 2015.09.17.

U.S. Fish and Wildlife Service. 2008. *Formal Endangered Species Act Consultation on the Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP)*. Biological Opinion. December 15. Region 8. Sacramento, CA. Available: http://www.fws.gov/sacramento/delta_update.htm.