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Re: *PCFFA v. Coggins*, E.D. Case No. 1:20-cv-00431-DAD

Counsel:

We are writing to request information about the Bureau of Reclamation's ("Reclamation") intended operations of the Central Valley Project this year. Specifically, we seek information about Reclamation's intended operations with respect to the San Joaquin Inflow: Export ("I:E") ratio, Old and Middle River ("OMR") storm flexibility provisions, Stanislaus River flows, and protective measures for juvenile Delta Smelt, as discussed in more

detail below, so that we may assess the need to file for emergency injunctive relief and give the Court and the parties as much advance notice as possible if it appears judicial intervention is necessary. Of course, we urge Reclamation to operate the Central Valley Project (“CVP”) in a manner consistent with its obligations under the Endangered Species Act such that Court intervention is not necessary.

San Joaquin Inflow to Export Ratio. As you know, in 2020 the Court ordered Reclamation to comply with the San Joaquin I:E ratio that was previously required in the months of April and May by Reasonable and Prudent Alternative Action IV.2.1 of the 2009 National Marine Fisheries Service (“NMFS”) Biological Opinion. *PCFFA* Dkt. 173 at 35; *see also* 2009 NMFS BiOp at 643–45.

In support of its conclusion that it was appropriate and necessary to require Reclamation to comply with the I:E ratio, the Court relied on NMFS’s own acknowledgment that the performance objectives imposed by the 2019 NMFS Biological Opinion purportedly in place of the I:E ratio were less protective for San Joaquin-origin CCV steelhead. Dkt. 173 at 18 (quoting 2019 NMFS BiOp at 777: stating only that performance objectives “might *partially offset* the effects to San Joaquin basin steelhead related to not having [an] I:E ratio or Head of Old River Barrier in plan”). In addition, the Court raised concerns that the 2019 NMFS Biological Opinion anticipated that its performance objectives would only limit species loss overall to levels similar to those of the last ten years, noting that “the evidence of record suggest[s] that the species cannot withstand those ongoing, ‘similar’ impacts.” Dkt. 173 at 20 (citing 2019 NMFS BiOp at 774); *see also id.* at 22.

Furthermore, it was clear that failure to adhere to the I:E ratio would result in irreparable harm to protected species. *See id.* at 31. As the Court found, the peak emigration of CCV steelhead from the San Joaquin River basin occurs in April and May—the same months that the I:E ratio requirement was previously in effect. *Id.* at 28 (quoting 2019 NMFS BiOp at 102). The Court also observed that, during a short period in April 2020 when Reclamation increased export pumping over Plaintiffs’ objection, the result was increased CCV steelhead salvage. *Id.* at 29 (further noting that salvage decreased when exports were reduced). The Court found that the cumulative losses of steelhead associated with the increased pumping that would be permitted in the absence of the I:E ratio constituted irreparable harm, particularly in light of the “extremely precarious situation faced by the San Joaquin-origin CCV steelhead.” *Id.* at 31.

The need for the I:E ratio is just as clear this year; all of the reasons on which the Court based its preliminary injunction in 2020 are just as applicable this year. In fact, since the preliminary injunction briefing last year, additional evidence has come to light showing that NMFS staff repeatedly emphasized the importance of the I:E ratio for avoiding jeopardy and that there was significant political interference in the NMFS consultation, leading to scientific integrity concerns and ultimately a politically-motivated rewrite of the July 1 jeopardy opinion that had found that eliminating the I:E ratio would jeopardize the listed species.

In light of the Court’s conclusion last year that there were serious questions as to whether NMFS justified its changed position as to elimination of the I:E ratio and that the I:E ratio provides important protection against harm to listed species, and in the interests of avoiding a motion for injunctive relief if one is not necessary and of providing the Court as much advance notice as possible if such a motion becomes necessary, we request that Reclamation provide the following information: (1) anticipated CVP operations for the months of April and May,

including the anticipated San Joaquin River I:E ratio for each of these months, anticipated scheduling of the export limits under D-1641, and anticipated San Joaquin River flows at Vernalis (both base and pulse flows required under D-1641)¹; (2) whether Reclamation will provide Plaintiffs advance notice of any planned coordinated operations of the CVP and SWP that would exceed the I:E ratio required by the 2009 NMFS Biological Opinion; and (3) how much advance notice Reclamation expects it will be able to provide. We request that Reclamation provide as much advance notice as possible.

OMR Storm Flexibility. Last year, the Court also expressed concerns about the OMR storm flexibility provisions that Plaintiffs challenged as an arbitrary and capricious weakening of the prior regime of OMR restrictions. Although the Court ultimately found it “unnecessary” to rule on Plaintiffs’ arguments regarding the storm flexibility provisions because the Court granted preliminary injunctive relief requiring adherence to the I:E ratio, which would also control OMR, the Court noted that the storm flexibility provisions created a “potentially large exception” to the -5000 cfs OMR limit during ill-defined “storm events,” and that it was “unclear on the present record” exactly when the provision could be invoked.² Dkt. 173 at 16 n.7.

Moreover, as referenced above, the Court found in the context of the I:E ratio that salmonid loss thresholds were insufficient to prevent irreparable harm or explain the 2019 NMFS Biological Opinion’s “no jeopardy” finding given that those thresholds simply planned to limit loss to prior levels despite continued species decline. *See id.* 173 at 20, 22, 30. Significantly, Federal Defendants relied on these same loss thresholds when defending the OMR storm flexibility provisions. *See, e.g.,* Dkt. 119 at 21.

In light of the Court’s prior comments, and in the interests of avoiding a motion for injunctive relief if one is not necessary and of giving the Court as much advance notice as possible if such a motion becomes necessary, we request that Reclamation provide the following information: (1) how Reclamation has defined a “storm-related event” that would permit invocation of the storm flexibility provisions;³ (2) whether Reclamation intends to utilize the

¹ We recognize that the dry hydrology and Reclamation’s obligations under its water rights (D-1641) may result in pumping operations that are consistent with a 1:1 ratio of San Joaquin River inflow to exports for the months of April and May, which is the I:E ratio we anticipate would have been required this year by the 2009 NMFS Biological Opinion’s RPA Action IV.2.1. A similar requirement will likely apply to the State Water Project under its incidental take permit.

² The Biological Assessment and 2019 FWS Biological Opinion purport to provide a vague definition of a “storm event” that would permit invocation of the storm flexibility provisions (“A storm related event occurs when precipitation falls in the Central Valley and Delta watersheds and Reclamation and DWR determine that the Delta outflow index indicates a higher level of flow available for diversion”), but then state that an actual definition will be developed at a later date (“Reclamation and DWR will define storm-related events in the first year of implementation of this proposed action”). 2019 FWS BiOp at 48; BA at 4-71. There is no limit on the duration, magnitude, or frequency of these storm events—and corresponding unlimited pumping—during the year. *See, e.g.,* 2019 FWS BiOp at 141.

³ As noted above, the Proposed Action as described in the Biological Assessment stated that, “Reclamation and DWR will define storm-related events in the first year of implementation of this proposed action.” BA at 4-71; *see also* 2019 FWS BiOp at 48.

storm flexibility provisions to pump at OMR more negative than -5000 cfs if a storm event occurs, as permitted by the 2019 Biological Opinions;⁴ (3) if so, whether Reclamation will give Plaintiffs advance notice of any planned increase in pumping that would result in OMR more negative than -5000; and (4) how much advance notice Reclamation expects it will be able to provide. We request that Reclamation provide as much advance notice as possible.

Notably, Reclamation has discretion over whether to utilize the OMR storm flexibility provisions, because the new operations plan and the Biological Opinions authorize—but do not require⁵—Reclamation to increase pumping during storm events. We hope that the Biden Administration will choose to exercise this discretion not to increase pumping that would result in OMR more negative than -5,000 cfs, particularly in light of the agencies’ prior repeated findings that OMR more negative than -5,000 cfs is not protective of migrating fish species and results in a significant increase in fish loss. *See, e.g.*, Dkt. 85-21; 2009 NMFS BiOp at 361–62, 652; 2008 FWS BiOp at 281, 286, 347–50.

Stanislaus River Flows. Third, the Court last year denied as moot Plaintiffs’ preliminary injunction motion with respect to Plaintiffs’ challenge to the weakening of minimum instream flow requirements on the Stanislaus River, because Federal Defendants made a commitment at the hearing “to meet or exceed instream flows that would have been provided under the 2009 NMFS BiOp” during the relevant months in 2020. Dkt. 173 at 13–14. The Court, however, invited Plaintiffs to file future motions for injunctive relief concerning Stanislaus flows upon “a renewed showing of likely harm.” *Id.* at 14.

In the interests of avoiding a renewed motion for injunctive relief regarding Stanislaus River flows if one is not necessary given planned operations this year, and of giving the Court as much advance notice as possible if such a motion becomes necessary, we request that Reclamation provide the following information: (1) anticipated CVP operations and flows on the Stanislaus River for March through June 2021, including information about any intended shaping of flows; (2) the anticipated water year type for determining Stanislaus minimum flow requirements under the 2019 NMFS Biological Opinion; (3) the water year type that would have been applicable for purposes of determining Stanislaus minimum flow requirements under the

⁴ Plaintiffs understand that there may be other limiting factors, such as the loss thresholds, that could theoretically prevent invocation of the storm flexibility provisions in certain circumstances. *See, e.g.*, BA at 4-67; White Decl. (Dkt. 119-1) ¶47. What we are asking is, assuming that conditions exist that *would* permit increased pumping pursuant to the storm flexibility provision under the 2019 Biological Opinions, does Reclamation intend to take advantage of that provision?

⁵ The Biological Assessment states that “Reclamation and DWR **may** operate to a more negative OMR up to a maximum (otherwise permitted) export rate at Banks and Jones Pumping Plants of 14,900 cfs (which could result in a range of OMR values) to capture peak flows during storm-related events.” BA at 4-71 (emphasis added). Similarly, the 2019 Biological Opinions confirm that “Reclamation and DWR **may** operate to a more negative Old and Middle River up to a maximum (otherwise-permitted) export rate at Banks and Jones Pumping Plants of 14,900 cfs (which could result in a range of Old and Middle River values) to capture peak flows during storm-related events.” 2019 NMFS BiOp at 479 (emphasis added); *see also* 2019 FWS BiOp at 47–48.

2009 NMFS Biological Opinion⁶; (4) whether Reclamation expects to meet or exceed the Stanislaus minimum flow requirements that would have been applicable under the 2009 NMFS Biological Opinion from March through June 2021; (5) if not, whether Reclamation will give Plaintiffs advance notice of when Stanislaus flows are expected to fall below the flows that would have been required under the 2009 NMFS Biological Opinion; and (6) how much advance notice Reclamation expects it will be able to provide. We request that Reclamation provide as much advance notice as possible.

Juvenile Delta Smelt Protections. Finally, Plaintiffs remain concerned, particularly in light of continued record low abundance levels, that there is no sufficiently protective take limit in place for south Delta entrainment of larval/juvenile Delta Smelt.

Last year, Federal Defendants submitted to the Court a March 2020 letter from Reclamation to FWS recognizing that “[t]he October 2019 Proposed Action for the LTO calls for Reclamation and DWR to manage exports to limit entrainment to be protective of larval and juvenile delta smelt” and that “[t]he 2019 Fish and Wildlife Service Biological Opinion permits incidental take through entrainment during March-June, under the ecological conditions of OMR flows managed at no more negative than -5000 cfs on a 14-day moving average or at the flow determined through use of Service-approved life cycle models *to limit recruitment to stable levels*.”⁷ Dkt. 119-1 at ECF p. 39 (emphasis added).

In its March 2020 letter, Reclamation proposed to operationalize the results of the newly-completed Life Cycle Model entrainment module by managing OMR reverse flows as follows: “When the secchi depth in the south Delta is less than 1 meter . . . Reclamation will operate to OMR no more negative than -3,500 cfs. When the secchi depth in the south Delta is greater than 1 meter, Reclamation and DWR will operate to OMR no more negative than -5,000 cfs.” Dkt. 119-1 at ECF p. 39. Yet the scientific analysis attached to that letter concluded that there is *no* sustainable level of entrainment mortality given current Delta Smelt population dynamics. *See id.* at ECF p. 42. In addition, Reclamation’s letter and the attached analysis are based on a target of entraining 10 percent of the juvenile Delta Smelt population under the 2019 Biological Opinion, and proposed operations would result in a significant increase in entrainment of Delta Smelt compared to entrainment observed from 2004 to 2015 (which ranged from 0.3 to 3 percent per year). *See id.* at ECF pp. 41–42, 44–45.

⁶ As discussed in prior filings, the methodology for calculating the applicable water year type—which determines minimum required flows—was altered under Reclamation’s new operations plan, making it possible that this water year would have been classified differently under the 2009 NMFS Biological Opinion compared to the 2019 NMFS Biological Opinion. *See* White Decl. (Dkt. 119-1) ¶¶ 37, 39; Dkt. 153 at 14 n.15.

⁷ The 2019 FWS Biological Opinion had deferred until later the establishment of any numerical limits on the number of juvenile Delta Smelt that can be killed at the pumps, explaining that Reclamation was proposing to manage annual entrainment levels of larval/juvenile Delta Smelt using the results of Service-approved life cycle models that would be peer reviewed by March 2020. *See* 2019 FWS BiOp at 151. The 2019 FWS Biological Opinion’s incidental take statement thus directed that negative OMR flows be managed “at the flow determined through use of Service-approved life cycle models to limit recruitment to stable levels.” 2019 FWS BiOp at 394–95.

In light of these concerns, please explain: (1) how Reclamation intends to operate this year to provide sufficient protections to larval and juvenile Delta Smelt, including (a) how life cycle models have been operationalized, (b) any limits on OMR that Reclamation will follow based on such models (as suggested by the March 2020 letter from Reclamation to FWS discussed above), (c) any target level of maximum entrainment that has been set, and (d) any additional protective measures not already discussed in the 2019 FWS Biological Opinion that will be put in place, in light of the finding that there is no sustainable level of Delta Smelt entrainment mortality.⁸

We would appreciate receiving all of the requested information as soon as possible, but no later than March 12, 2021, given the urgency of these issues. In addition, please provide notice as far in advance as possible—including prior to March 12—if Reclamation expects to utilize the OMR storm flexibility provisions, to not follow the I:E ratio starting in the beginning of April, or to fall below the Stanislaus River flows that would be required under the 2009 NMFS Biological Opinion. If Reclamation is unable to provide any of this requested information, please explain why. We are available to discuss our requests, should you have questions. Thank you.

Sincerely,



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⁸ The 2019 FWS Biological Opinion also stated that, "[i]n the event the life cycle results cannot be operationalized in a manner that can be used to inform real-time operations, Reclamation and DWR will work with the Service to develop an alternative plan to provide operational actions protective of this life stage." 2019 FWS BiOp at 151.