May 16, 2025

Joaquin Esquivel, Chair
State Water Resources Control Board
Via e-mail: joaquin.esquivel@waterboards.ca.gov

Re: Spring 2025 Endangered Species Act Noncompliance by Voluntary Agreement Parties

Dear Chair Esquivel and State Board Members:

San Francisco Baykeeper, Golden State Salmon Association, Restore the Delta, the Center for Biological Diversity, Friends of the River, California Sportfishing Protection Alliance the Winnemem Wintu Tribe, and Defenders of Wildlife write to inform you of recent actions by the Central Valley Project ("CVP") and State Water Project ("SWP") which are exacerbating conditions for endangered species at high risk of extinction in the San Francisco Bay-Delta estuary in contravention of Endangered Species Act take limits and make clear the impropriety of adopting the Voluntary Agreements as part of an updated Bay-Delta Water Quality Control Plan.

The Bay-Delta estuary is an ecosystem in crisis. In addition to the loss of biodiversity and ecosystem services, this crisis risks destruction of the Delta itself as a cultural place and harms the communities and California Tribes who live in and depend on the Bay-Delta estuary. One of the primary drivers of the crisis is the mismanagement and over-extraction of the fresh water that flows into, through, and from the Delta to San Francisco Bay. Unfortunately, the State's current proposal for the Bay-Delta Plan will exacerbate this crisis by relying on Voluntary Agreements ("VAs"), which put the health of the Delta in the hands of unaccountable actors whose interests are extractive, not restorative. This fundamental problem with the VAs has been demonstrated this spring, making the necessity of enforceable, science-based regulatory updates to the Bay-Delta Plan all the more apparent.

In March, April, and May of this year, the Bureau of Reclamation's ("Reclamation") operation of the CVP was inconsistent with multiple terms of the recently adopted 2024 California Endangered Species Act ("CESA") Incidental Take Permit ("ITP") and the 2024 National Marine Fisheries Service ("NMFS") Biological Opinion ("BiOp") related to take of hatchery winter-run Chinook Salmon and California Central Valley ("CCV") Steelhead. Reclamation also failed to adjust its pumping operations in response to exceedances of incidental take thresholds and the Vernalis flow-to-combined export ratio ("Spring Delta Outflow Action") required by the ITP's early implementation of the VAs.

First, in late March, the State Water Project and Central Valley Project exceeded the annual loss limit for hatchery winter-run Chinook Salmon.[1] The "Salmon Machine Learning Model" projected that improving the Old and Middle River Index ("OMRI") to no more negative than -2,500 cfs would result in "absence" of winter-run near the pumps, triggering a non-discretionary reduction in combined Project exports to achieve that result.[2] Nevertheless, Reclamation continued to export water at above 3,500 cfs, and the 7-day average OMRI actually became increasingly negative, reaching a low of -5,600 cfs on April 10.[3]

This scenario was repeated in early April when additional hatchery winter-run Chinook Salmon loss was reported at Project export facilities and the "Salmon Machine Learning Model" indicated that a reduction in exports to achieve OMRI no more negative than -2,500 cfs was required.[4] Again, Reclamation took no action to achieve the required OMRI, and OMRI subsequently remained well below -2,500 cfs.

Second, on March 2, 2025 the Projects exceeded the three-year rolling average loss of California Central Valley Steelhead anticipated in the Incidental Take Statement of NMFS' 2024 BiOp (which sets a three-year rolling average threshold at 2,319 fish).[5] Neither Reclamation nor California Department of Water Resources ("DWR") adjusted export operations in response to the initial or subsequent exceedances of anticipated loss of CCV Steelhead beyond the amount allowed by the Incidental Take Statement. As of early May, the three-year rolling average of CCV Steelhead loss at the Projects' export facilities exceeds 2,400 fish and take is continuing.[6]

Third, Reclamation chose not to implement the Spring Delta Outflow Action described in the ITP.[7] This ITP condition is explicitly part of the "early implementation" of the VAs. In San Joaquin River Index "below normal" water years, such as the current water year,[8] "the ratio of Vernalis flow to SWP and CVP combined exports shall be 3 to 1."[9] On April 10th, DWR reduced its exports to the minimum required level.[10] However, Reclamation maintained exports inconsistent with attaining the specified San Joaquin River Inflow to Export ratio through at least April 18, and periodically after that date.[11] This inaction resulted in failure to attain conditions Reclamation expects would protect listed species, including minimization of ongoing take at Project export facilities,[12] and which DWR found "minimize impacts to Covered Species as a result of Project operations."[13]

Reclamation's behavior is cause for extreme concern for the health of the Bay-Delta and for the communities and people who care about and depend on this ecosystem. And Reclamation's behavior portends a dark fate for the Bay-Delta if the VAs are adopted as part of the Bay-Delta Plan update. The success of the VAs relies on two core assumptions: first, that the

science supporting its adoption is sound; and second, that VA signatories, including Reclamation, will act in accordance with the VAs' terms in the absence of specific and enforceable regulations requiring them to do so. Both assumptions are fundamentally flawed. As has been exhaustively documented in our previous comments to the Board and in numerous independent and agency analyses, there is no scientific basis to support the assumption that the VAs will reasonably protect fish and wildlife and other beneficial uses or achieve the Bay-Delta Plan's objectives as identified. Reclamation's conduct this spring reinforces previous warnings that the second assumption is also deeply flawed.

Even if we hypothesize that VA proponents' assertions about the potential impacts and alleged benefits were correct (despite the evidence to the contrary), they will not be realized if VA parties choose not to comply with the VAs' terms. Moreover, Reclamation's actions demonstrate the basic unreliability of using its version of "adaptive management" (which is inconsistent with principles of clear, transparent and effective adaptive management as generally understood) to avoid the known consequences of exceeding take limits set by the BiOp and the ITP. Furthermore, we note that adaptive management triggers set in the BiOp and ITP were of little practical value in March and April 2025, or they were ignored. For example, the 50%, 75%, and 100% thresholds for loss of hatchery winter-run Chinook Salmon were exceeded over the course of just a few days; the Projects did not implement, much less complete, the operational responses specified for these interim take thresholds. The Bureau's version of "adaptive management" this spring sidestepped requirements and harmed endangered native fish.

Furthermore, Reclamation's failure to comply with the Spring Delta Outflow Action requirements illustrates the need for specific and clearly understandable regulations. As it pumped far past what was allowed by the 3:1 San Joaquin River Inflow to Export ratio and human health and safety allowances, Reclamation inaccurately and inappropriately relied on a -5,000 cfs OMRI to justify its export rates. Reclamation and other VA signatories cannot be allowed to exploit seeming ambiguities in the Bay-Delta Plan, as the Projects have done with the ITP and BiOp, to disguise self-serving noncompliance. Clear, understandable, and enforceable rules must be established.

To partner with an agency that has flouted the conditions of the brand new 2024 ITP and BiOp is unwise. To rely on that agency and give it authority over the Bay-Delta Plan's implementation, monitoring, and adaptive management would arbitrarily abdicate the Board's basic responsibility to protect public trust resources. This Board cannot tolerate such an outcome.

To avoid further degradation of Bay-Delta water quality, native fish populations and fisheries, and the public trust, this Board must adopt specific and enforceable regulations for all water users in the Bay-Delta's watershed. These regulations must include timely enforcement of the safeguards that the Delta desperately needs. A regulatory Bay-Delta Plan, not the VAs, is the only reliable, credible, and legal way to protect fish and wildlife beneficial uses and the public trust. The Board must abandon the VAs as a pathway for the Bay-Delta Plan and adopt science-based, enforceable water quality objectives and a comprehensive and clear program of implementation applicable to all water users, including Reclamation.

Thank you for your time and attention to this matter.

Signed,



Eric Buescher, Managing Attorney
San Francisco Baykeeper



Jon Rosenfield, Science Director
San Francisco Baykeeper



Scott Artis, Executive Director
Golden State Salmon Association



Barbara Barrigan-Parrilla, Executive Director
Restore the Delta



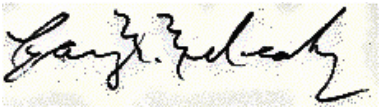
John Buse, Senior Counsel
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Gary Bobker, Program Director
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Chris Shutes, Executive Director
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Gary Mulcahy, Government Liaison
Winnemem Wintu Tribe



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cc:
Chuck Bonham, Director, California Department of Fish and Wildlife
Wade Crowfoot, Secretary of Resources, California Natural Resources Agency
Karla Nemeth, Director, California Department of Water Resources
Adam Nickles, Acting Director, U.S. Bureau of Reclamation
Tomas Torres, Director Water Division, Region 9, U.S. Environmental Protection Agency

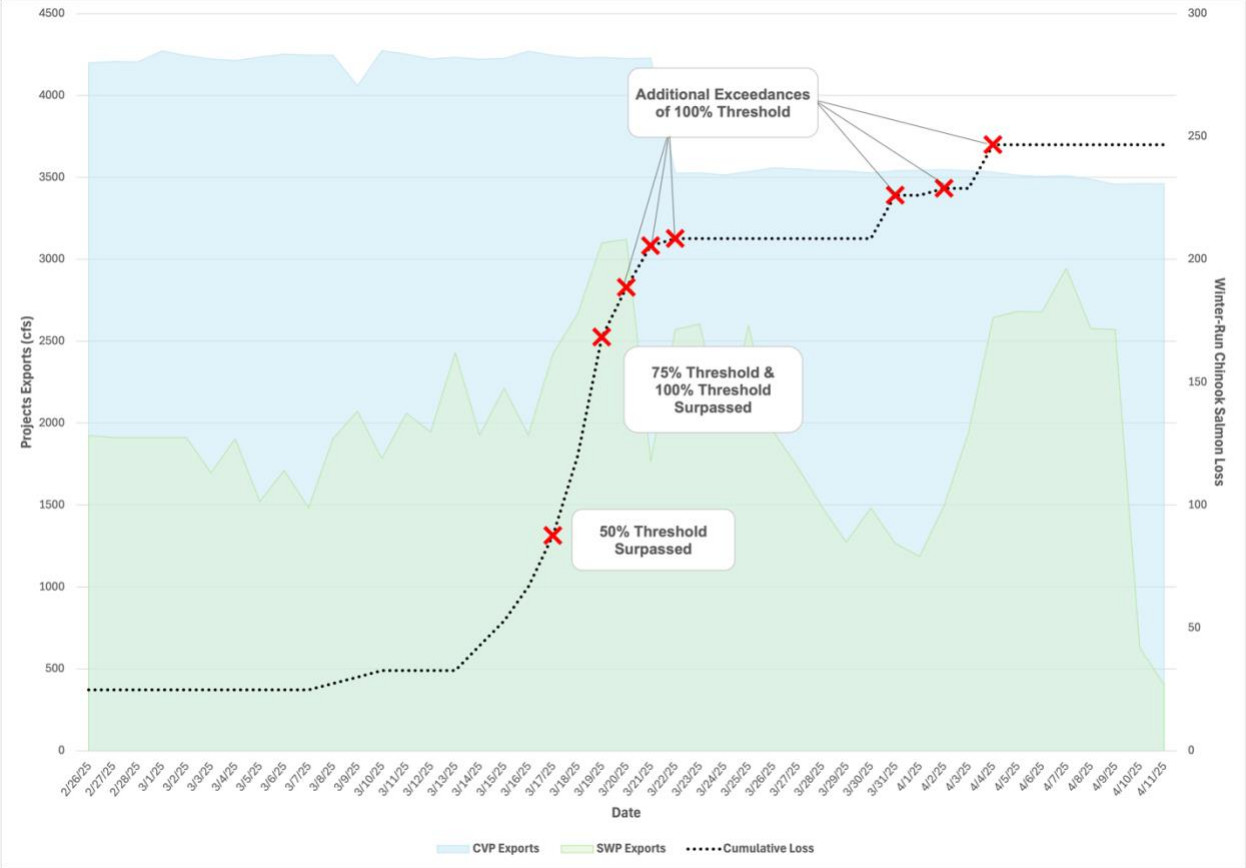


Figure 1: Hatchery winter-run Chinook salmon loss (dotted line, right y-axis) and Central Valley Project and State Water Projects export rates over time (blue and green shaded areas, respectively; left y-axis). Dates when 50%, 75%, and 100% of the annual loss thresholds were exceeded for hatchery winter-run Chinook Salmon are marked with red X's and labeled. Combined Projects exports rates far exceeded those required to achieve an OMRI of no more negative than -2,500 cfs, as required by ITP condition 8.4.3.

Sources: California Data Exchange Center ("CDEC")[1]; California Department of Fish and Wildlife ("CDFW").[2]

[1] DWR, *Harvey O Banks Pumping Plant (HRO)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=HRO; DWR, *Tracy Pumping Plant (TRP)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=TRP; DWR, *Old & Middle Rvrs Tidally Filtered Est (OMR)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=OMR&end=2025-04-23.

[2] CDFW, *Salvage Export Chart: Chinook Salmon – Winter Run, Hatchery or Adipose Clipped at SWP and CVP*, https://apps.wildlife.ca.gov/Salvage/Chart/AcrefeetSalvage?Adipose=1&adiposeDes=Hatchery%20or%20Adipose%20Clipped&SampMethod=Both&orgCode=Winter&orgDes=Chinook%20Salmon%20-%20winter%20run&endDate=04%2F15%2F2025%2000%3A00%3A00&StartDate=10%2F01%2F2024%2000%3A00%3A00&ShowValue=False.

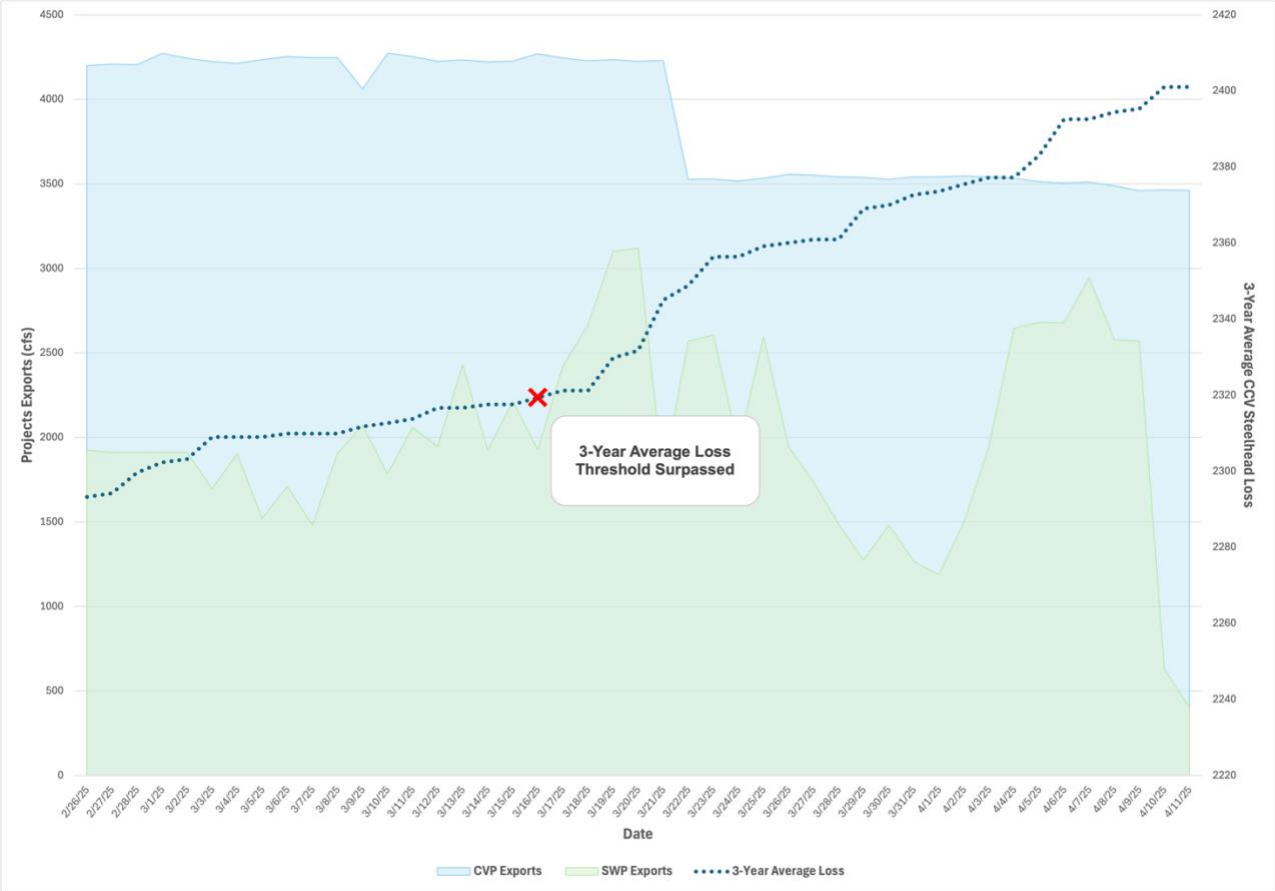


Figure 2: Central California Valley Steelhead (CCV Steelhead) 2023-2025 average loss (dotted line, right y-axis) and Central Valley Project and State Water Projects export rates over time (blue and green shaded areas, respectively). Despite surpassing the BiOp anticipated 3-year running average for CCV Steelhead loss threshold on March 2, 2025, the Projects did not adjust export rates accordingly.

Sources: CDEC[3]; CDFW[4].

[3] DWR, *Harvey O Banks Pumping Plant (HRO)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=HRO; DWR, *Tracy Pumping Plant (TRP)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=TRP.

[4] CDFW, *Salvage Export Chart: Rainbow / Steelhead Trout, Wild of Non-Clipped at SWP and CVP*, https://apps.wildlife.ca.gov/Salvage/Chart/AcrefeetSalvage?Adipose=0&adiposeDes=Wild%20or%20Non-Clipped&SampMethod=Both&orgCode=2&orgDes=Rainbow%20%2F%20Steelhead%20Trout&endDate=04%2F15%2F2025%2000%3A00%3A00&StartDate=10%2F01%2F2024%2000%3A00%3A00&ShowValue=False.

Table 1: Violations of ITP and BiOps through 5/4/25 with associated dates; additional violations have occurred since this date. *Sources*: CDFW; CDEC (as identified in Figures 1 and 2).

Date	Violation
3/16/25	Exceedance of three-year average loss threshold for Central California Valley Steelhead
3/17/25	Exceedance of 50% loss threshold for hatchery winter-run Chinook salmon
3/19/25	Exceedance of 75% loss threshold for hatchery winter-run Chinook salmon
3/19/25	Exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
3/20/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
3/21/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
3/22/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
3/31/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
4/2/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
4/4/25	Additional exceedance of 100% loss threshold for hatchery winter-run Chinook salmon
4/9/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/10/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/11/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/12/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/13/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/14/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/15/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/16/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/17/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/18/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/19/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/20/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/21/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/22/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/23/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/24/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/25/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/26/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/27/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/28/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/29/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
4/30/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
5/1/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
5/2/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
5/3/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio
5/4/25	CVP pumping rates in excess of 3:1 San Joaquin River Inflow to Exports Ratio

Citations

[1] Reclamation, *Salmon Monitoring Team (SaMT) Meeting Notes*, at 4 (Mar. 25, 2025) (enclosed).

[2] DWR, Long-Term Operations of the State Water Project in the Sacramento-San Joaquin Delta ("CESA ITP"), Incidental Take Permit No. 2081-2023-054-00, 74; National Marine Fisheries Service, Endangered Species Act Section 7(a)(2) Programmatic Biological Opinion for the Reinitiation of Consultation of the Long-Term Operation of the Central Valley Project and State Water Project ("NMFS BiOp"), NMFS No. WCRO-2024-02917, 590.

[3] DWR, *Old & Middle Rvrs Tidally Filtered Est (OMR)*, California Data Exchange Center, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=OMR&end=2025-04-23.

[4] Posting to Delta Monitoring Workgroup listserv, *Weekly Fish and Water Operations Outlook: 4/8/2025 – 4/14/2025*, at 1 (April 8, 2025) (enclosed) ("A hatchery-origin Winter-run Chinook Salmon was observed on 4/4/25, the Winter-Run Chinook Salmon Machine Learning Model was ran [*sic*] on 4/7/25, which triggered a –2,500 cfs OMRI for 7 days per COA 8.4.3 of the ITP.").

[5] NMFS BiOp, at 900.

[6] *See, e.g.,* CDFW, *Salvage Export Chart: Rainbow / Steelhead Trout, Wild of Non-Clipped at SWP and CVP*, https://apps.wildlife.ca.gov/Salvage/Chart/AcrefeetSalvage?Adipose=0&adiposeDes=Wild%20or%20Non-Clipped&SampMethod=Both&orgCode=2&orgDes=Rainbow%20%2F%20Steelhead%20Trout&endDate=04%2F15%2F2025%2000%3A00%3A00&StartDate=10%2F01%2F2024%2000%3A00%3A00&ShowValue=False;
University of Washington Columbia Basin Research, *Juvenile Salvage & Loss Detail*, Sacramento Prediction and Assessment of Salmon, https://www.cbr.washington.edu/sacramento/data/query_loss_detail.html.

[7] CESA ITP at 87.

[8] DWR, *2025 Water Year Forecast as of April 1, 2025*, California Data Exchange Center, https://cdec.water.ca.gov/reportapp/javareports?name=WSI.

[9] CESA ITP at 87.

[10] CESA ITP at 88. The Spring Delta Outflow Action was off-ramped from April 2 to April 8 because net Delta outflow (NDOI) exceeded 44,500 cfs.

[11] *See, e.g.*, DWR, *Tracy Pumping Plant (TRP)*, CDEC, https://cdec.water.ca.gov/dynamicapp/QueryDaily?s=TRP. Reclamation maintained exports above 3,400 cfs until April 18, 2025; after a brief reduction in exports to a level approximating its claimed "health and safety" level (~900 cfs), exports have at times increased to 1,800 cfs (i.e., 4/20/2025 and 4/25/2025 when CVP exports alone accounted for most of the San Joaquin River's inflow to the Delta).

[12] NMFS BiOp at 900.

[13] CESA ITP at 87-88.