

**CALIFORNIA DEPARTMENT OF FISH AND GAME**  
**CONSISTENCY DETERMINATION**  
**Fish and Game Code Section 2080.1**  
**Tracking Number 2080-2009-007-00**

**PROJECT:** Ongoing Operation of California State Water Project Delta Facilities

**LOCATION:** In and Around the California Delta and Central Valley

**NOTIFIER:** California Department of Water Resources

**BACKGROUND**

The proposed project (Project) by the Department of Water Resources (DWR) is the continued operation of the State Water Project (SWP) and other water diversion, storage, and transport related actions that are described in and covered by the current State water operations Operating Criteria and Plan (OCAP), and addressed in the federal Biological Opinion (BO) issued by the U.S. Fish and Wildlife Service (USFWS) as a result of the OCAP Biological Assessment (BA) consultation for the protection of delta smelt (*Hypomesus transpacificus*).

Existing facilities in the Delta include Clifton Court Forebay, John E. Skinner Fish facility, Harvey O. Banks Pumping Plant (collectively referred to as the Banks Pumping Plant Complex), and the North Bay Aqueduct at Barker Slough (NBA). Facilities which run in coordination with the federal Central Valley Project (CVP) are the Suisun Marsh Salinity Control Gates, Roaring River Distribution System, Morrow Island Distribution System, Goodyear Slough Outfall, and the South Delta Temporary Barriers Project (TBP). The TBP has four rock barriers across south Delta channels (at Middle River near Victoria Canal, Old River near Tracy, Grant Line Canal near Tracy Boulevard Bridge, and the head of Old River near the confluence of Old River and San Joaquin River) which can be installed and removed during the spring and fall. Other facilities of the SWP include Oroville Dam which is operated for flood control and water supply.

The SWP is operated to provide flood control and water for agricultural, municipal, industrial, recreational, and environmental purposes. Water from Oroville facilities and Sacramento-San Joaquin River flows are captured in the Delta and conveyed to SWP contractors. Water is conserved in Oroville Reservoir and released to serve three Feather River area contractors and two NBA contractors, and water is delivered to the remaining 24 contractors in the SWP service areas south of the Delta from the Harvey O. Banks Pumping Plant.

Facilities of the SWP are permitted by the California State Water Resources Control Board (SWRCB) to divert water in the Delta and to re-divert water that is stored in upstream reservoirs. The U.S. Bureau of Reclamation (USBR) and DWR coordinate the operations of the SWP and CVP to meet water quality, quantity, and operational criteria in the Delta set by the SWRCB and to meet federal Endangered Species Act (ESA) (16

U.S.C. § 1531 et seq.) requirements for delta smelt, winter and spring-run Chinook salmon, steelhead, and green sturgeon.

The Central Valley and California Delta system, where the above-described SWP and CVP facilities are located, supports populations of delta smelt, which is distinguished as a threatened species under both the federal ESA and the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.). Flow disruption, loss of habitat, and entrainment caused by Project related water export and management activities result in incidental take of delta smelt.

Because the Project has the potential to take a species listed under ESA, the USBR, on behalf of DWR, consulted with the USFWS under Section 7 of the ESA. On December 15, 2008, USFWS issued a Biological Opinion (Ref. No. 81420-2008-F-1481-5), which includes an incidental take statement (hereafter, the BO). The BO describes the Project, including conservation measures developed to minimize impacts to delta smelt, and sets forth measures to mitigate any remaining impacts to delta smelt and its habitat. The measures in the BO include one "Reasonable and Prudent Alternative" with five components (RPAs) which must be implemented and adhered to. The RPA actions are to be implemented using an adaptive approach with specific defined constraints. The BO includes a detailed description of the adaptive process, its framework, and the rationale for each of the RPA components. On June 17, 2009, the Director of the Department of Fish and Game (DFG) received correspondence from Lester A. Snow, Director of DWR, requesting a determination from DFG that the BO and its incidental take statement are consistent with CESA pursuant to Fish and Game Code Section 2080.1.

## **DETERMINATION**

DFG has determined that the BO, including all RPA requirements and the related incidental take statement, is consistent with CESA because the mitigation measures therein meet the conditions set forth in Fish and Game Code section 2081, subdivisions (b) and (c), for DFG to authorize incidental take of CESA listed species. This determination is limited to only those actions specifically identified and analyzed in the December 15, 2008 BO. Specifically, DFG finds that take of delta smelt will be incidental to an otherwise lawful activity (i.e., SWP operations); the measures and RPAs identified in the BO to modify flow requirements and restore habitat will minimize and fully mitigate the impacts of the taking of delta smelt; and the Project, with the prescribed measures and RPAs in place, will not jeopardize the continued existence of the species. The avoidance, minimization, and mitigation measures in the BO include, but are not limited to, the following:

### **Minimization and Mitigation Measures**

**Avoidance and Minimization Actions:** The BO requires SWP operational actions which are expected to provide flow conditions that reduce entrainment of delta smelt and retain necessary outflow and habitat to support all its life stages. Specific flow modification requirements are presented in RPA Components 1 and 2, including the information necessary to determine delta smelt risk. The requirements include a

defined real time scientific evaluation process to develop timely flow augmentations to avoid situations that increase delta smelt risk.

**Mitigation Measures:** The BO includes two actions to increase the area of suitable delta smelt habitat in the estuary: 1) Delta outflow augmentation in the fall following wet and above normal water years and, 2) restoration of at least 8,000 acres of intertidal and associated subtidal habitat in the Delta and Suisun Marsh.

**Reporting and Monitoring Actions:** Conditions of the BO and respective RPAs require DWR to develop and follow specific monitoring programs to adaptively evaluate specific flow requirements and action triggers to achieve the RPA objectives. Participation in (including DFG among others), review of, and reporting requirements for these processes are all a condition of and detailed within the BO and RPAs. The BO outlines a monitoring and reporting process to determine specific operational actions set forth in RPA Components 1 and 2. RPA Components 3 and 4 include similar requirements for the design, monitoring, and adaptive management of fall flow actions to improve delta smelt habitat, as well as the implementation of required habitat restoration actions. RPA Component 5 ensures that information is gathered and reported appropriately.

**Ensured Funding:** All SWP operational actions are a conditional requirement of the BO RPAs. RPA Component 4 lays out specific conditions for DWR to create or restore the required 8,000 acres of intertidal and associated subtidal habitat in the Delta and Suisun Marsh. Included in these conditions is the requirement that an endowment or other secure financial assurance and easement be held in place by a third-party or DFG, and approved by the USFWS. This also includes secure financial assurances to fund the monitoring effort and operation and maintenance of the restoration site. To fund these mitigation actions, DWR has the statutory authority to require reimbursement in the SWP contracts for water and power for any costs DWR incurs for SWP-related fish and wildlife preservation. (See Wat. Code, §§12937, 12938.)

Based on this consistency determination, DWR does not need to obtain authorization from DFG under CESA for incidental take of delta smelt that occurs in connection with the Project, provided DWR implements the Project as described in the BO, and complies with the measures, RPAs and other conditions described in the BO. However, if the Project as described in the BO, including the mitigation measures therein, changes after the date of the BO, or if the USFWS amends or replaces the BO, including any of the RPAs, DWR will need to obtain from DFG a new consistency determination (in accordance with Fish and Game Code section 2080.1) or a separate incidental take permit (in accordance with Fish and Game Code section 2081).

By:   
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Date: 7/16/09