



August 11, 2017

Felicia Marcus, Chair
State Water Resource Control Board
California WaterFix Project Co-Hearing Officer

Tam M. Doduc, Member
State Water Resources Control Board
California WaterFix Project Co-Hearing Officer

Re: August 8, 2017 Notice re Part 2 Scheduling

Dear Hearing Officers:

We are writing on behalf of the Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife to object to DWR's request to commence Part 2 of the hearing. When the SWRCB noticed the WaterFix hearing on October 30, 2015, it recognized that several critical environmental analyses of the proposed project were not yet complete and affirmed that the Board would not "begin the second part of the hearing or act on the Petition until the ESA, CESA and CEQA processes are complete." Oct. 30, 2015 Hrg. Not. at 11. On August 3, 2017, DWR noticed the availability of certain ESA, CESA, and CEQA documents, and urged the Board to schedule the start of Part 2, claiming that it "believes that the substantive information necessary to notice Part 2 of the hearing is publicly available." Letter from Tripp Mizell, DWR, to SWRCB Hearing Officers (Aug. 3, 2017). However, DWR did not, nor could it, claim that the ESA, CESA and CEQA processes for WaterFix are complete – the SWRCB's prerequisite for commencing Part 2. Most notably, the ESA process for WaterFix is not complete because the biological opinions for WaterFix do not address, permit, or authorize incidental take associated with operation of the Project. Because that information is critical for the "petitioners [to] demonstrate that the project complies with the federal ESA" and for the SWRCB to "make independent findings concerning significant environmental effects within the State Water Board's jurisdiction," the information necessary to commence Part 2 is not yet available and the Board should reject DWR's request unless and until all necessary environmental reviews of WaterFix are complete. Oct. 30, 2015 Hrg. Not. at 10-11.

The Board need look no further than the U.S. Fish & Wildlife Service's "Questions and Answers on the WaterFix Biological Opinion" to confirm that the ESA process for WaterFix is not complete. As FWS explains, "[s]ome of the [WaterFix] project elements are still in development and will require additional consultation with the Service in the future. **Those elements that will require a subsequent Biological Opinion include construction of the diversion structures in**

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the North Delta and operations of those new diversion structures and existing Central Valley Project and State Water Project pumping plans under dual conveyance.”

Attachment A at 1. The FWS biological opinion elaborates that:

The following activities requiring future Federal approvals and therefore addressed programmatically are: (1) construction of the NDD and associated structures; (2) construction of the HORG; (3) construction of the CCWD settlement agreement facilities; (4) operations of new and existing CVP and SWP water facilities under dual conveyance; (5) future maintenance; (5) future monitoring; (6) compensatory mitigation associated with construction of the NDD, HORG, and CCWD settlement agreement facilities; and (7) the CWF Adaptive Management Program. ...One or more subsequent consultations will be needed to address activities associated with future approvals. No Incidental Take Statement is included for activities addressed programmatically because those subsequent consultations will address incidental take associated with those activities.

Memorandum to Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, from California Regional Director, U.S. Fish and Wildlife Service, Pacific Southwest Region, re California Biological Opinion for the California WaterFix, at 2 (June 23, 2017) (excerpts included as Attachment B).

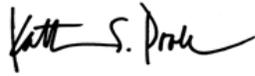
Clearly, the ESA process and permits for the WaterFix Project are not complete. Of greatest concern, the fish and wildlife agencies have not fully analyzed or permitted the impacts of operating the Project. Until that process is complete, Petitioners simply cannot “demonstrate that the project complies with the federal ESA.” Oct. 30, 2015 Hrg. Not. at 11.

In addition, it will be very difficult and time-consuming for the SWRCB to “make independent findings concerning significant environmental effects” of WaterFix, *id.*, and to devise appropriate terms and conditions to meet the Board’s public trust and other obligations, without the benefit of the fish and wildlife agencies’ opinions on those impacts. Protestants will similarly be at a distinct disadvantage and prejudiced during Part 2 of the hearing by the lack of the fish and wildlife agencies’ complete biological opinions. Indeed, the Board runs the risk of developing and imposing terms and conditions that conflict with the ultimate conditions developed by the fish and wildlife agencies to ensure that WaterFix is operated to avoid jeopardizing the continued existence and adversely modifying the critical habitat of numerous listed species.

In sum, the information necessary to commence Part 2 is not yet available and the Board should reject DWR’s request unless and until all necessary environmental reviews of WaterFix are complete.

Sincerely,

*Re: August 8, 2017 Notice re Part 2 Scheduling
August 11, 2017*



Katherine S. Poole
Natural Resources Defense Council



Gary Bobker
The Bay Institute



Rachel Zwillinger
Defenders of Wildlife

Attachment A

Questions and Answers on California WaterFix Biological Opinion

Q: What is the California WaterFix project?

A: California WaterFix is an infrastructure project that would include constructing two tunnels to convey water from the north to the south Delta. The purpose of WaterFix is to modernize water infrastructure and provide a secure and reliable source of water to meet the needs of farmers and communities, while including measures to address the needs of fish and wildlife.

Q: Why was the Biological Opinion prepared?

A: The Endangered Species Act (ESA) requires federal agencies to consult with the U.S. Fish and Wildlife Service to ensure that its actions are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The biological opinion provides the opinion of the Service, based on the best available science, as to whether or not a proposal is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The Service analyzed the effects of the California WaterFix on 16 listed species.

Q: What does the biological opinion cover?

A: The Biological Opinion provides broad-scale evaluation of the California WaterFix program to ensure that the basic goals and approaches of the program do not jeopardize the survival or recovery of listed species or adversely modify critical habitat. Some of the project elements are still in development and will require additional consultation with the Service in the future. Those elements that will require a subsequent Biological Opinion include construction of the diversion structures in the North Delta and operations of those new diversion structures and existing Central Valley Project and State Water Project pumping plans under dual conveyance. Elements that do not require a subsequent Biological Opinion include construction of the tunnels, expansions and modifications of Clifton Court Forebay and certain mitigation actions.

Q: Does the California WaterFix Biological Opinion conclude that the project would jeopardize any listed species?

A: We concluded that the project is not likely to result in jeopardizing listed species under our jurisdiction in the Biological Opinion.

Q: What is Jeopardy?

A: The Service's analysis of the effects of the project is measured against the definition of jeopardy. Under the ESA, jeopardy occurs when an action is reasonably expected, directly or indirectly, to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced.

Q: Why didn't you find that the WaterFix project would jeopardize any listed species?

A: The conclusions in the Biological Opinion were reached after an extensive review the current status of our listed species, anticipated effects of the activities being proposed, and the cumulative effects, we concluded that the project is not likely result in jeopardizing listed species under our jurisdiction in the Biological Opinion.

Q: What is critical habitat?

A: When a species listed under the Endangered Species Act, we often identify areas of habitat believed to be essential to the species' conservation. Those areas may be officially designated as critical habitat and afforded some protections under the Endangered Species Act.

Q: What does it mean to destroy or adversely modify critical habitat?

A: Destruction or adverse modification of critical habitat is defined as direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.

Q: Does the WaterFix Biological Opinion conclude that the project would destroy or adversely modify critical habitat?

A: We concluded that the project is not likely to result in the destruction or adverse modification of designated critical habitat for species under our jurisdiction in the Biological Opinion.

Q: Is the Biological Opinion from the U.S. Fish and Wildlife Service our final involvement in the construction and operation of the California WaterFix project?

The issuance of the Biological Opinion is not the end point of our involvement. There will be a number of additional opportunities and requirements where listed species protections will be addressed. Some elements of the proposal that will be subject to future more specific consultations because they require additional federal approvals later in time. Other elements of the project are fully evaluated for implementation with no additional consultation required. U.S. Bureau of Reclamation and the California Department of Water Resources have committed to further address species effects from California WaterFix operations in tandem with the existing pumping facilities in the South Delta in a future consultation.

In addition, requirements to further consult with us in the event the project is going to change from what we evaluated or additional impacts are identified additional consultation may be required.

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Last updated June 22, 2017

Attachment B



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Room W-2606
Sacramento, California 95825-1846

In Reply Refer To:
08FBDT00-2016-F-0247

JUN 23 2017

Memorandum

To: Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, California

From: Regional Director, U.S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California 

Subject: Biological Opinion for the California WaterFix

This memorandum is in response to the U.S. Bureau of Reclamation's (Reclamation) July 29, 2016 letter requesting consultation with the U.S. Fish and Wildlife Service (Service) on the effects of the California WaterFix (CWF) on species listed and critical habitat designated under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*; [Act]). Reclamation was designated as lead action agency and the U.S. Army Corps of Engineers is an additional Federal action agency for this consultation.

A *Biological Assessment for the California WaterFix* (BA), dated July 2016, accompanied the request. In a memorandum dated September 15, 2016 to Reclamation, the Service agreed that formal consultation could be initiated. An Administrative Draft Biological Opinion (BiOp) was provided to the action agencies and applicant on January 19, 2017. The attached Final BiOp incorporates relevant information provided by the action agencies and applicant, including comments, changes, and additions to the CWF provided since consultation was initiated.

The Service has prepared a mixed programmatic BiOp on the CWF. This BiOp represents the culmination of consultation on a mix of standard-level and programmatic-level project elements. An analysis and conclusion of whether or not the entire CWF action is likely to jeopardize each listed species or destroy or adversely modify designated critical habitat is included in this BiOp. All activities addressed programmatically will be subject to a subsequent consultation on future Federal actions in order to proceed.

The following activities analyzed as a standard consultation are: (1) construction of the tunnels; (2) expansions and other modifications of Clifton Court Forebay; (3) associated infrastructure; (4) geotechnical explorations, (5) compensatory mitigation associated with construction except the North Delta Diversions (NDD), Head of Old River Gate (HORG), and Contra Costa Water District (CCWD) settlement agreement facilities; and (6) specific construction-related conservation measures including preconstruction surveys for listed terrestrial species.

Where incidental take of threatened or endangered species is reasonably certain to occur, an Incidental Take Statement for these activities is included with this BiOp.

The following activities requiring future Federal approvals and therefore addressed programmatically are: (1) construction of the NDD and associated structures; (2) construction of the HORG; (3) construction of the CCWD settlement agreement facilities; (4) operations of new and existing CVP and SWP water facilities under dual conveyance; (5) future maintenance; (5) future monitoring; (6) compensatory mitigation associated with construction of the NDD, HORG, and CCWD settlement agreement facilities; and (7) the CWF Adaptive Management Program. In order to ensure that future actions developed for the CWF are consistent with this analysis, Reclamation and DWR have proposed a framework consisting of Guiding Principles that are analyzed as part of this BiOp. One or more subsequent consultations will be needed to address activities associated with future approvals. No Incidental Take Statement is included for activities addressed programmatically because those subsequent consultations will address incidental take associated with those activities.

The Service has analyzed the operational scenario for CWF included in the BA. The agencies recognize this operational scenario will change between now and the time that the CWF facilities are operational. Changes to the operational scenario will be analyzed in subsequent consultation.

The attached BiOp addresses effects of the CWF to 16 federally-listed species and designated critical habitat. Appendix A of the BiOp includes justifications for the species and critical habitat that were determined not likely to be adversely affected. Effects to the remainder of the species and critical habitat are addressed in the BiOp. The Service has determined that the CWF is not likely to jeopardize the continued existence of any of these species, and is not likely to destroy or adversely modify designated critical habitat.

The Service appreciates Reclamation's efforts to complete this consultation. We look forward to further coordination on the CWF. If you have any questions on this consultation, please contact Kaylee Allen, Field Supervisor, San Francisco Bay-Delta Fish and Wildlife Office at kaylee.allen@fws.gov or (916) 930-5603.

Attachment

cc: Barry Thom, National Marine Fisheries Service, Portland, OR
Maria Rea, National Marine Fisheries Service, Sacramento, CA
Michael Jewell, U.S. Army Corps of Engineers, Sacramento, CA
Charlton Bonham, California Department of Fish and Wildlife, Sacramento, CA
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