



February 24, 2017

Paul Souza
Regional Director
U.S. Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825

RE: WaterFix draft biological opinion

Dear Mr. Souza:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute, we are writing to request a meeting with you to discuss the U.S. Fish and Wildlife Service's ("FWS") draft biological opinion ("Draft Biop") and section 7 consultation for the California WaterFix project. We are extremely concerned that FWS' approach in this consultation defers the development of specific mitigation measures necessary to avoid jeopardy to Delta Smelt to future consultations and other regulatory proceedings. As discussed below, such an approach clearly violates the Endangered Species Act and constitutes poor public policy, and it would likely cause extended delays of the State Water Resources Control Board's water rights hearing for WaterFix. We urge FWS to ensure that the final biological opinion provides the specific measures that are necessary, based on the best scientific information available today, to ensure that the construction and operation of the California WaterFix would not jeopardize the continued existence of the species or adversely modify its critical habitat.¹

The excerpts of the Draft Biop, which was posted online for the Delta Science Program's independent peer review, demonstrate that the WaterFix project as proposed would cause significant adverse effects on Delta Smelt. For instance, the Draft Biop concludes that:

- the construction and operation of WaterFix will cause "substantial adverse effects" on Delta Smelt through constricting habitat as a result of construction of the NDD facilities, worsened water quality as a result of increased Delta salinity from proposed operations in some months and years, and "small reductions in available food supply; increased predation rates associated

¹ This letter follows up on our letter dated July 26, 2016 regarding the consultation on WaterFix. We also note that the Draft Biop fails to consider new scientific information developed by FWS and other agencies regarding the effects of Delta outflow on the survival and abundance of Delta Smelt, including effects during the spring and summer months, which was identified in that letter and the enclosures thereto.

with structures, increased water clarity, residence times, reduced flows, and creation of suitable predator habitat; increased favorable conditions for predators and competitors; slightly modified flow regimes; increased exposure to low levels of contaminants (likely not reaching lethal levels in most cases); reductions in suitable spawning substrates; and the potential for increase in macrophytes and exposure to harmful cyanobacteria blooms.” See Draft Biop at 251-252;

- WaterFix is likely to “[d]ecrease the abundance of delta smelt,” “[d]ecrease the quality and quantity of suitable and available migratory, spawning, and rearing habitat,” and that with the proposed project, “overall baseline habitat conditions are maintained or worsened.” *Id.* at 256-257;
- “[T]he continued loss and constriction of habitat proposed under the PA significantly threatens the ability of a self sustaining delta smelt population to recover and persist in the Delta ecosystem at abundance levels higher than the current record-lows.” *Id.* at 259;
- “In the aggregate, the current status of delta smelt critical habitat and its PCEs necessary to support all life stages, the effects of the PA on critical habitat, and the current and future cumulative effects, will prevent the ability of delta smelt designated critical habitat to serve its intended conservation role for the species and will preclude the species’ recovery.” *Id.* at 282.

In its initial findings, the Delta Science Program’s independent scientific peer review panel of the Draft Biop and the National Marine Fisheries Service’s concluded that “The services have provided good evidence from best available science of significant adverse impacts to species and critical habitat.” Panel Presentation at 3;² see *id.* at 33. Although the Draft Biop does not include a formal conclusion whether the project would jeopardize the continued existence and recovery of Delta Smelt or adversely modify its designated critical habitat, see Draft Biop at 3, the available scientific evidence documented in the Draft Biop indicates that as currently proposed, California WaterFix would result in jeopardy to the survival and recovery³ Delta Smelt and adversely modify its critical habitat.

However, during the public meeting of the peer review panel on January 23, 2017, FWS staff explained that FWS has delivered a draft no jeopardy biological opinion to the action agency. Based on statements at the meeting and text in the Draft Biop, this conclusion appears to be based on vague assurances that the project would be revised in the future in unknown ways to avoid jeopardy. For instance, the Draft Biop asserts that,

In the CWF BA, Reclamation and DWR have described and analyzed one operational scenario under a dual conveyance system. This BiOp analyzes this scenario at a programmatic-level. However, the consultation on the near-term operations of the south Delta water facility has been reinitiated and the State Water Resources Control

² The peer review panel’s initial findings and conclusions are available online at: http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/CAWaterFix/Peer%20Review%20B/phase_2b_panel_presentation_25jan2017a_actual_presentation_edited.pdf and are hereby incorporated by reference.

³ The section 7 analysis must consider the effects on recovery of the species, not merely the species’ continued existence. See, e.g., *NWF v. NMFS*, 524 F.3d 917, 931-33 (9th Cir. 2007).

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Board's Water Quality Control Plan process will influence operational standards that the PA will be required to adhere to for the current existing facilities (near-term) and future operations under a dual conveyance system (long-term). Both of these processes will likely result in changes to near-term and long-term operations, and these changes are not reflected in the PA at this time because the operational standards are not yet known. Therefore, the operational scenario that is described in the CWF BA will almost certainly change between now and when the dual conveyance system goes online. Adverse effects associated with operations described within the effects analysis of this consultation may occur under the real-time operations of a future dual conveyance system; however, Reclamation and DWR have committed to propose future actions that will avoid jeopardizing the continued existence of delta smelt and destroying or adversely modifying their designated critical habitat (Reclamation 2016b). Those future actions could include: new or modified operational criteria, minimizing project footprints during the final design phase, conservation efforts to maintain or increase trends in delta smelt abundance, efforts to restore and/or improve habitat conditions that support delta smelt, and other actions to be defined in the future.

Draft Biop at 11; *id.* at 179. The Draft Biop also admits that, "The Operations section may describe in some instances significant adverse effects to delta smelt and its critical habitat that will or may potentially occur in the future from the PA operations; however, Reclamation and DWR have committed to proposing future actions that will not jeopardize delta smelt or destroy or adversely modify their designated critical habitat." *Id.* at 179. The Draft Biop identifies some potential actions that could be undertaken, including changes to operational criteria, but as with the quote above, admits that these actions are "to be defined in the future." *Id.* at 252. Not surprisingly, the independent scientific peer review panel also concluded, in its initial findings, that "details regarding how they will avoid, minimize, and mitigate [the significant adverse effects to species and critical habitat] is not complete." Panel Presentation at 3.

However, a biological opinion that relies on uncertain and undefined future mitigation measures in order to avoid jeopardy and adverse modification of critical habitat would clearly violate the ESA. *See, e.g., NWF v. NMFS*, 524 F.3d at 935-36; *Rock Creek Alliance v. U.S. Fish and Wildlife Service*, 663 F.3d 439, 444 (9th Cir. 2011); *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 353-357 (E.D. Cal. 2007); *NWF v. NMFS*, 254 F.Supp.2d 1196, 1214-1215 (D. Or. 2003) (holding that a biological opinion that relies on mitigation measures that have not undergone section 7 consultation and are not reasonably certain to occur, in order to reach a no jeopardy conclusion, violates the ESA); *NWF v. NMFS*, 839 F.Supp.2d 1117, 1125-26 (D. Or 2011); *Center for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101, 1117 (9th Cir. 2012) (conservation measures to mitigate adverse impacts of a project must be enforceable under the ESA in order to be included in a biological opinion's jeopardy analysis).

For instance, in *NWF v. NMFS*, the Court of Appeal held that NMFS could not rely on the future installation of structural improvements in reaching a no jeopardy conclusion, because the agencies

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lacked “specific and binding plans” for such structural improvements, failed to provide a “clear, definite commitment of resources for future improvements,” and could not be included without “more solid guarantees that they will actually occur.” 524 F.3d at 935-36. On remand, the district court again invalidated the biological opinion, holding that “Mitigation measures supporting a biological opinion's no jeopardy conclusion must be ‘reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.’” *NWF v. NMFS*, 839 F.Supp.2d 1117, 1125-26 (D. Or 2011) (citing *Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D. Az 2002)). There, the district court concluded that NMFS improperly relied on future mitigation measures that were not specifically identified, and that a commitment to achieve a particular level of survival improvement is inadequate without committing to specific measures that are likely to achieve that level of improvement:

Federal Defendants argue that these future actions are, in fact, certain to occur because they have “committed” to achieving specific, numerical improvements in habitat quality and survival. Federal Defendants acknowledge, however, that they are unable to identify any specific projects that will occur between 2013 and 2018, and it is unclear whether they will be able to identify feasible and effective mitigation measures during that period.... In other words, Federal Defendants do not know what exactly will be needed to avoid jeopardy beyond 2013, or whether those unknown actions are feasible and effective, but they promise to identify and implement something. This is neither a reasonable, nor a prudent, course of action.... Federal Defendants simply cannot substitute their “commitment” to survival improvement for specific actions they have evaluated and determined will provide the necessary biological response. It is one thing to identify a list of actions, or combination of potential actions, to produce an expected survival improvement and then modify those actions through adaptive management to reflect changed circumstances. **It is another to simply promise to figure it all out in the future.**

Id. at 1126-28 (emphasis added).

Similarly, in *Rock Creek Alliance*, the Ninth Circuit concluded that, “[b]efore approving a proposed project, an agency must have “specific and binding plans,” “solid guarantees,” and a “clear, definite commitment of resources.” 663 F.3d at 444 (quoting *NWF v. NMFS*, 524 F.3d at 935-36). The Ninth Circuit upheld the biological opinion because it included “an extensive package of mitigation measures” that were detailed and reasonably certain to occur. In contrast, the district court in *Kemphorne* struck down the 2005 Delta Smelt biological opinion, finding that the operational provisions were not reasonably certain to occur, and holding that, “Mitigation measures must be ‘reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.’” 506 F.Supp.2d at 350 (citations omitted).

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As these cases indicate, FWS' Draft Biop cannot rely on promises that the agencies will in the future identify and implement operational changes, construction and design changes, or other measures to mitigate and avoid the adverse effects identified in the Draft Biop. Instead, the final biological opinion must include measures, based on the best available science, which would ensure that the project as proposed would not jeopardize the continued existence and recovery of the species or adversely modify its critical habitat.

Nothing in the 2015 final regulation regarding framework programmatic ESA consultations changes this conclusion. First, framework programmatic consultations "address the subset of Federal actions that are designed to provide a framework for the development of future, site-specific actions that are authorized, funded, or carried out and subject to the requirements of section 7 at a later time." 80 Fed. Reg. 26832, 26833 (May 11, 2015). More specifically, the federal register notice for final rule explains that framework programmatic consultations do not authorize *any* future action and do not result in any take. *Id.* (emphasis added); *see id.* at 26835. The federal register notice explains that agency programs are framework programmatic actions, although it allows for "mixed programmatic actions" that include authorization of some specific actions that would result in take under the program. *Id.* at 26835-36; 50 C.F.R. § 402.02. The federal register notice identifies three examples of framework programmatic actions: the land management plans prepared by the Bureau of Land Management or Forest Service, or the Army Corps of Engineers Nationwide Permit Program. 80 Fed. Reg. at 26835.

However, WaterFix is not an agency program, nor a framework for future site-specific actions, and is not at all similar to the examples provided in the federal register notice. WaterFix is thus neither a framework programmatic action nor a mixed programmatic action. Instead, it is a specific proposal for construction and operation of a massive new facility in the Bay-Delta estuary, for which FWS has identified significant, adverse, site-specific impacts on listed species resulting from construction and operation. Moreover, it appears that the consultation does authorize future action, including construction of the facilities.

Second, while the final rule authorizes FWS to not include an incidental take statement in a framework programmatic consultation, the rule does not modify FWS' obligation under section 7(a)(2) of the ESA to ensure that any action would not jeopardize the continued existence or recovery of the species and/or avoids adverse modification of critical habitat under section 7(a)(2). *See* 80 Fed. Reg. at 26833, 26835, 26840, 26841; 50 C.F.R. § 402.14(i)(6). In an explanatory document regarding the final rule, FWS states that, "These changes do not alter the obligation of federal agencies to ensure their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat in accordance with the requirements of Section 7(a)(2) of the ESA." *See* ESA Regulatory Reform: Final Rule Governing Incidental Take Statements, Questions and Answers, available online at: https://www.fws.gov/endangered/improving_ESA/pdf/ITS%20Final%20Rule%20FAQs%20Final%205-1-15.pdf.

Thus, even assuming for the sake of argument that California WaterFix could qualify as a mixed programmatic consultation, nothing in the final rule allows FWS to issue a final biological opinion

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approving the California WaterFix project, which defers until a later time and consultation the identification of specific mitigation measures necessary to avoid jeopardy and/or adverse modification. This is particularly true where, as here, the specific action being authorized (construction and initial operation of the facility) will result in take, and as currently designed and proposed, is likely to jeopardize the continued existence and recovery of the species and adversely modify its critical habitat.

Identifying the necessary mitigation measures to avoid jeopardy and adverse modification is critical not only to ensure that the project protects the Bay-Delta ecosystem, but they are also critically important for the water agencies that have to decide whether to invest billions of dollars in the WaterFix project. Because some of the significant impacts to Delta Smelt result from the construction and design of the project, it is critical to identify sufficient mitigation measures and ensure that they are implemented before design is complete and construction begins, in order to ensure that these impacts will effectively be mitigated. Moreover, to the extent that operational changes may reduce the water supply yield of the project or the value of the new north delta diversion facilities, water users and their ratepayers deserve to know this now. For too many years, the agencies have attempted to push off these kinds of hard decisions in the BDCP process, and it is likely that operational and other changes to WaterFix will only become more difficult after water users have made sizeable investments in this project. Indeed, deferring the identification of these measures in the final biological opinion should substantially delay the State Water Resources Control Board's initiation of Part 2 of the water rights hearing for WaterFix, until such time that adequate measures to avoid jeopardy and adverse modification of critical habitat are identified in a final biological opinion. *See* SWRCB, California WaterFix Project Pre-Hearing Conference Ruling, February 11, 2016 at 3; SWRCB, Revised Hearing Schedule, Revised Notices of Intent to Appear, Electronic Service and Submissions, and other Procedural Issues Concerning the California WaterFix Water Right Change Petition Hearing, March 4, 2016 at 2 (ruling that ESA regulatory processes must be complete before Part 2 of the hearing begins). Ultimately, identifying the necessary measures to avoid jeopardy and adverse modification of habitat in the final biological opinion is required under the ESA, and is necessary in order for water agencies to make a sound investment decision.

For these reasons, we urge you to reverse course and ensure that the final FWS biological opinion for WaterFix includes a Reasonable and Prudent Alternative that identifies the necessary changes in the design and operation of the project to avoid jeopardizing the continued existence and recovery of Delta Smelt and adversely modifying its critical habitat. While those operational and other measures may ultimately change in future consultations, the agency cannot simply "promise to figure it all out in the future."

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Thank you for consideration of our views.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Rachel Zwillinger
Defenders of Wildlife



Gary Bobker
The Bay Institute

cc: Chuck Bonham, California Department of Fish and Wildlife
Tom Gibson, California Natural Resources Agency
Barry Thom, National Marine Fisheries Service