

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



May 7, 2009

Mr. Ren Lohofener
US Fish & Wildlife Service
2800 Cottage Way, #W2606
Sacramento, CA 95815

Dear Mr. Lohofener:

By this letter, the California Department of Water Resources (Department) formally requests that the U.S. Fish and Wildlife Service (Service) reinitiate consultation with the U.S. Bureau of Reclamation (Bureau) on the December 15, 2008 Delta smelt biological opinion (BO) for the coordinated operations of the State Water Project (SWP) and Central Valley Project (CVP). It is our intent in asking for reconsultation at this time that the Service and the Bureau will now be better able to integrate protections for multiple species in other pending BOs, as well as long-term protections currently being developed through the Bay Delta Conservation Plan (BDCP) process. There is new information that shows there are better ways to protect Delta smelt that also better protect water supply. The current BO contains conditions which have a high degree of scientific uncertainty for the level of protection they provide, but these conditions have significant water supply impacts for California.

The Department has demonstrated a long history and continuing commitment to finding effective and efficient strategies to protect at-risk species in a manner that protects the Sacramento-San Joaquin Delta (Delta) ecosystem and ensures a reliable water supply for California. Beginning with the Department's joint sponsorship and funding of the Interagency Ecological Studies Program (IEP), the Department has been an active participant in and sponsor of multi-agency processes to understand and address the environmental problems of the estuary. These include the Water Operations Management Team (WOMT) and the BDCP. In June 2007 the Department proactively curtailed Delta exports in an effort to protect Delta smelt. Also, the Department worked closely with the Bureau and the Service to jointly develop protective measures for Delta smelt that were adopted by the federal court in its interim remedy order in 2007.

The Department has never questioned whether the adverse impacts of SWP operations on the estuary should be fully addressed. But it is in best interest of both the ecosystem and the Department that the SWP's role be fully understood and accurately characterized. In this regard, the impact of the SWP as one factor influencing the Delta cannot be assessed without assessing the relative impact of the other stressors: radical changes in species composition and food chain relationships, urban wastewater discharges, pesticide discharges and harvest practices. The risk in not understanding

the combined impacts of these stressors results in the SWP bearing a disproportionate regulatory burden through water supply impacts, and, more importantly, failing to address the other stressors affecting the Delta ecosystem.

It is therefore our intent in seeking reconsultation to incorporate new scientific information about the species and stressors to the ecosystem and to better integrate protections for multiple species with water operations for the interim period until the more comprehensive and long-term BDCP is in place. The goal of the BDCP is to allow for recovery of key species by creating improved habitat and water quality. Accordingly, the final BDCP will allow water project operations to continue in a way that ensures optimal compatibility with recovery of multiple fish species.

While it is customary that the federal action agency request reconsultation, the Service is authorized, and has the responsibility, to reinitiate consultation on its own initiative where a triggering event has occurred. In the alternative, the Department also requests that the Service initiate reconsultation based upon the Department's status in the consultation process and its close connection with the Bureau for the purposes of SWP and CVP operations, including compliance with federal law. For purposes of consultations under the Endangered Species Act (ESA), the operations of the SWP and CVP are intentionally and inextricably connected, as exemplified by the various mandates of Section 8 of the Reclamation Act of 1902, the San Luis Act (integrating SWP and CVP operations), Public Law 99-546 (authorizing the Coordinated Operating Agreement), and the joint state-federal actions under the CVP Improvement Act of 1992 and the CALFED process (including the 2000 Record of Decision and agreements entered into in connection therewith). Like the joint and several responsibility imposed upon the Department and the Bureau by the State Water Resources Control Board (SWRCB) to meet Delta protective water quality objectives, ESA protection of Delta species under the BO is impossible without the participation and cooperation of the Department. Because of this unique relationship between the Department, the Bureau, and the Service, which has been created and controlled by federal law, it is appropriate and necessary for the Service to grant the Department's reconsultation request.

The Service should reinitiate reconsultation because "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 CFR § 402.16(b). Further, failure to coordinate the Reasonable and Prudent Alternative (RPA) components in the Delta smelt BO with the protective requirements of winter-and spring-run Chinook salmon (and steelhead and green sturgeon) will result in impacts to a listed species that were not adequately considered prior to the issuance of the BO, which impacts come within the spirit and policy of the reconsultation regulations. 50 CFR § 402.16(d). While the Department addresses certain specific RPA components in this letter, the Department desires to address with FWS all relevant aspects of the Delta smelt BO that may warrant reconsultation.

RPA component 3, and specifically, the "Fall Measure X2 Provision," significantly limits SWP operations and the Department's ability to store water in Oroville Dam, which is critical to the Department's ability to provide sufficient water supplies. This RPA and the limitations it imposes are not scientifically justified or necessary. In particular, the propriety of the Fall Measure X2 Provision should be reevaluated in light of the recent Liberty Island research, which revealed the existence of a Delta smelt population that is separate from the population addressed in the BO and which is unaffected by SWP and CVP operations. This population suggests that Delta smelt are less susceptible to a catastrophic event than previously thought and that increasing Delta smelt habitat south of Collinsville through the Fall Measure X2 Provision is not necessary, as contemplated in the BO. The Department also believes that the Service should consider the information contained in the October 20, 2008 letter from the State Water Contractors and the San Luis Mendota Water Authority regarding the X2 relationship and the use of X2 as a protective parameter.

Moreover, reconsultation on RPA component 3 is warranted to evaluate unconsidered negative effects on spring-run Chinook salmon and green sturgeon. These negative effects will be seen in the reduction of the cold water reservoir pools that the Department can maintain in the Oroville Reservoir, which will in turn reduce the Department's ability to enhance spring-run Chinook salmon and green sturgeon survival with cold water releases. Negative impacts may also result from unintended regulatory conflicts that will occur if the instant BO is not better coordinated with the BO addressing winter and spring-run Chinook salmon, steelhead and green sturgeon, which is due to be issued by the National Marine Fisheries Services (NMFS) in June 2009, and the NMFS BO on the FERC Relicensing of the Oroville Facilities P-2100. The protective measures in the Delta smelt BO and the pending BOs may be most effective and better reconciled with a reconsultation focused on a unified protective construct, or at least an analysis of the negatively synergistic effects of the various BOs.

The flow restrictions of negative 1,250 to 2,000 imposed under RPA components 1 and 2 are more conservative than necessary and not biologically warranted for the protection of Delta smelt, even if they could be statistically justified. The Department's analysis establishes that flow restrictions of negative 3,500 to 5,000 adequately protect Delta smelt from the risk of entrainment and are sufficient to meet ESA's protective mandate. Moreover, as noted, recent research conducted at Liberty Island has shown the existence of a resident Delta smelt population that is outside of the zone of influence of the SWP and CVP. The negative 1,250 to 2,000 flow restrictions imposed under the BO should be reevaluated in light of this new and unaffected Delta smelt population, which demonstrates a wider Delta smelt distribution than previously considered.

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The Department is fully committed to protecting the Delta smelt, but based on its biological analysis, the RPAs lack strong conclusive scientific support and unnecessarily create significant adverse impacts on the State's water supply and economy. We strongly believe that consultation should be reinitiated to address the concerns raised in this letter. We look forward to your response to this request, as well as to working closely with the Service, the Bureau and NMFS on this urgent matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lester Snow", with a long horizontal flourish extending to the right.

Lester Snow
Director

cc: Donald R. Glaser, Regional Director
United States Bureau of Reclamation
Mid Pacific Regional Office
Federal Office Building
2800 Cottage Way
Sacramento CA 95825-1898

Don Koch, Director
California Department of Fish and Game
1416 9th Street, 12th floor #1205
Sacramento, CA

Rod McGinness, Regional Director
National Marine Fisheries Service
SW Region
501 West Ocean Blvd, Suite 4200
Long Beach, CA 90802-4213