STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, *Governor*

DEPARTMENT OF WATER RESOURCES
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Mr. Rod McInnis, Regional Administrator
National Marine Fisheries Service
501 West Ocean Blvd, Suite 4200
Long Beach, California 90802-4213

Dear Mr. McInnis:

The Department of Water Resources (Department) formally requests that the National Marine Fisheries Service (NMFS) reinitiate consultation with the US Bureau of Reclamation (Bureau) on the June 4, 2009 Biological Opinion (NMFS BO) for the long-term operations of the State Water Project (SWP) and the Central Valley Project (CVP). It is our goal in asking for reconsultation to allow a review of the NMFS BO in coordination with the December 2008 Delta smelt Biological Opinion issued by U.S. Fish and Wildlife Service (USFWS) and to examine the NMFS BO in light of the long-term protections being developed for multiple species in the Bay-Delta Conservation Plan (BDCP). The Department also has an outstanding request to the USFWS to reinitiate consultation for the Delta smelt Biological Opinion (see enclosed letter). These Biological Opinions regulate the same SWP and CVP facilities and operations, yet they conflict in many areas which the Department believes is best reconciled with coordinated action by NMFS, USFWS, Bureau, and the Department through reconsultation. These Biological Opinions have mandated unprecedented changes to SWP and CVP operations based on science that does not have a high level of confidence and that has not fully considered other stressors to the Bay-Delta ecosystem. The combined effects of these Biological Opinions have significantly reduced the reliability of California's water supply at a time when the state can ill afford it, while providing uncertain levels of protection for targeted species.

The Department believes it is proper for NMFS to recognize this request for the same reasons set forth in its request to the USFWS: (1) NMFS has the authority to reinitiate consultation on its own motion; and (2) the Department has a unique status in the consultation process conferred by the Congressionally recognized interdependency of the CVP and the SWP in legislation authorizing the Coordinated Operating Agreement, the San Luis Act, and CVP Improvement Act. Most importantly, it is impossible to effectively address many of the questions regarding federal operations in the Delta without involving participation and cooperation of the Department on behalf of the SWP. It is therefore appropriate for NMFS to recognize the Department's standing and to grant its request for reconsultation.

As stated in the request to the USFWS, the Department is asking for reconsultation principally so NMFS and the Bureau can incorporate information and provisions that address other stressors to the ecosystem besides project operations, such as toxics, radical changes in food chain and species composition, climate change and ocean conditions. Furthermore, the Department believes that reconsultation would permit the opportunity to better integrate protections for multiple species that are now being addressed in individual Biological Opinions and other NMFS actions regulating ocean harvest and to integrate long-term protections currently being developed through the BDCP process.

The lack of consideration of other stressors in the formulation of regulatory measures is one important aspect of the serious concern the Department has with the way the Biological Opinions have been approached. This may stem from the fact that the Bay-Delta watershed ecosystem is not sufficiently well understood. Because other factors affecting at-risk species are not well understood and are not being addressed, there is a disproportionate and scientifically unjustifiable tendency to look to the regulation of the water projects to remedy the problems facing species survival and success actually caused by other factors.

It is important to repeat and reaffirm what we stated in our letter to the USFWS:

> "The Department has never questioned whether the adverse impacts of SWP operations on the estuary should be fully addressed. But it is in the 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. . . . 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 in the Delta system."

The need to understand these other factors and their role in species decline in order to determine not only their proper responsibility but the proportionate impact of the water projects has reached a critical level. The at-risk fisheries continue to be highly stressed and in even steeper decline notwithstanding years of increasing levels of water project regulation; and the disproportionate impacts of the two Biological Opinions on SWP and CVP operations now seriously threaten the economic well-being of the state. It is essential that other factors be addressed with the same scrutiny, focus, and commitment of resources that has been applied to the water projects. The factors which are controllable must be assigned appropriate and proportionate regulatory responsibility for their impacts, and the non-controllable factors must be fully accounted for in determining what benefit the regulation of each controllable factor is likely to produce.

In addition to these fundamental concerns, reconsultation on the current NMFS BO is called for to address specific issues and concerns that include the following:

1. The need to coordinate conflicting calls upon storage releases and the cold water reservoir pools for anadromous species set forth in the NMFS BO with the fall flow requirements incorporated in the Delta smelt Biological Opinion.

2. The need to revisit the questionable provisions in Action IV.2.1 of the NMFS BO regarding San Joaquin River Inflow to Export ratio. This RPA does not have sufficient scientific justification. Far from simply failing to quantify the expected outcome and benefit of the new restrictive measures on salmon survival and population levels, the NMFS BO fails to use the best available science—which actually indicates that exports in fact do not cause any significant adverse impact on salmonid survival on the San Joaquin River.

3. Action IV.2.3 of the NMFS BO for Old and Middle River Flow Management appears to adopt a measure from the Delta smelt Biological Opinion, based upon certain assumptions applicable to that species and inserts them into the salmonid BO with little or no scientific justification. Even on the face of it, it is highly improbable that the needs and responses of these two different species happen to require precisely the same protective measure. In fact, NMFS clearly relied upon relationships derived for and applicable to Delta smelt to justify the Old and Middle River regulation for juvenile salmon migration. There is similarly no scientific justification for using the Particle Tracking Model which replicates the movement of neutrally buoyant particles as surrogates for planktonic or weak-swimming organisms to predict the impact of Old and Middle River flow on actively swimming out-migrating salmon and even larger steelhead.

4. The requirement that the Department and the Bureau restore a minimum of 20,000 acres in the lower Sacramento River basin for floodplain rearing habitat is poorly defined and requires funding and permissions over which they have no authority or control. Moreover, there is insufficient nexus between SWP and CVP operations and conditions in the Central Valley's flood system to justify this regulatory burden being placed upon the water projects. While the Bay-Delta Conservation Plan process is actively considering similar actions as a management option, engaging appropriate agencies through a cooperative effort to develop floodplain habitat is very different than imposing these requirements through the Endangered Species Act Section 7 process.

The Department understands that these concerns with the NMFS BO are due in part to the fact the Delta watershed is a highly complex biological and hydrodynamic system, which makes it difficult to formulate regulatory solutions through a Section 7 process. It is this same difficultly that led to the creation of CalFED. The purpose of the BDCP is to pick up the comprehensive, management-oriented approach to species and ecosystem planning and protection begun in 1994 with the CalFED process, but to do so in closer connection with the regulatory requirements of the Endangered Species Act and the California Endangered Species Act. It is the Department view that reconsultation would give us the best opportunity to reconcile as closely as possible the Section 7 process with this larger, long-term BDCP effort with the promise it holds for multi-species protection and multi-stressor analysis and solutions.

The Department is fully committed to protecting salmon and other anadromous species, just as it is to protecting Delta smelt and the entire estuarine ecosystem. But certain RPAs in the NMFS BO lack sufficient scientific support, create conflicts with Delta smelt protections, 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. Furthermore, we appreciate NMFS' continued involvement in the ongoing BDCP. The success of the BDCP is critical to the realization of a sustainable and reliable Delta.

We look forward to your response to this request, as well as to working closely with the NMFS, the Bureau, and the USFWS on this urgent matter.

Sincerely,

Lester A. Snow
Director

cc: (See attached list.)

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