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John Davis
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2800 Cottage Way
Sacramento, California 95825

MAY 26 2004

Tom Glover
Deputy Director
California Department of Water Resources
1416 Ninth Street P.O. Box 942836
Sacramento, California 94236

Dear Messrs Davis and Glover:

This responds to your letter dated May 4, 2004, requesting concurrence that 1) the three tiers of assets, including the Environmental Water Account (EWA), are in place and operable for the 2004 water year and 2) these are sufficient to maintain regulatory commitments under the Endangered Species Act (ESA commitments) as described in the CALFED Record of Decision (ROD). We would like to acknowledge all those who have done an excellent job in acquiring the assets described in your letter.

The CALFED ROD describes the items, in addition to the Tier 1 baseline level of protection, necessary for the CALFED Agencies to provide ESA commitments to south of Delta water users that fish protection measures beyond the Tier 1 regulatory baseline will not reduce their water supply. These include:

- 1) *Ecosystem Restoration Program (ERP) Plan Funding.* Tier 2 consists of the EWA assets combined with the benefits of the CALFED ERP. The CALFED ROD identified a funding threshold as the measure of successful implementation for the ERP during Stage 1 of the CALFED program. It is our understanding that the ERP funding available this year met the threshold and ERP is functioning successfully.
- 2) *A Fully Functioning EWA Over and Above the Tier 1 Level of Protection.* To complete Tier 2, there must be a fully functioning EWA providing fish protection capability over and above the Tier 1 level of protection. The current year funding levels are adequate to achieve purchases of EWA assets commensurate with the

ROD. The capability of the State Water Project (SWP) to carry over up to 100,000 acre-feet (AF) of EWA debt this year serves as a functional equivalent of the south of Delta storage component. Prior to the start of the Vernalis Adaptive Management Plan evaluation we have used no EWA assets to protect fish. Consequently, EWA assets can be used to partially compensate for the reduced level of baseline fish protection provided by Tier 1 and the accrual of fewer assets from operational tools than anticipated in the ROD. EWA assets will be sufficient to implement planned fish actions and enable commitments to continue if it remains relatively dry.

- 3) *A Tier 3 Strategy to be Developed and Implemented When Necessary.* There is \$6.25M budgeted for Tier 3 water purchases and a separate protocol has been established defining how it would be used. Actions using Tier 3 are not dependent on the amount of purchased water and Tier 3 water will be made available by the Project Agencies if necessary. Consistent with the Tier 3 protocol, there is no guarantee that water supply losses resulting from actions to avoid jeopardy can be fully mitigated. It is our view that the Tier 3 strategy, as described in the protocol paper attached to your letter, is sufficient.

The Project Agencies and Management Agencies agree to the interim set of EWA Operating Protocols attached to your letter. The Project and Management Agencies will update the protocols as necessary and address any problems that arise in a coordinated fashion. The Project Agencies and DWR staff have worked diligently to help us develop the EWA Acquisition Strategy attached to your letter. The Management Agencies have reviewed the EWA Acquisition Strategy and note that the flexible purchase strategy is a good step towards increasing the cost effectiveness of the EWA and represents an appropriate response to the practical realities we have encountered in obtaining and managing EWA assets. In order to better prepare for future EWA operation we must continue to acquire the necessary EWA assets, develop a funding mechanism, secure long-term agreements for EWA asset acquisition and refine the long-term operating protocols as needed.

The EWA was designed with the flexibility to address a range of hydrologic conditions and fish protection measures. Analysis of the April 2004 forecasts based on the 90% and 50% exceedance hydrologies indicates that the EWA assets as described in your letter will be adequate to provide for Delta actions to protect fish that are essentially equivalent to those actions which would have previously been implemented by a combination of (b)(2) fish actions and EWA fish actions. These Delta fish actions include: (1) export reductions at the CVP and SWP to a combined 1,500 cubic feet per second (cfs) to benefit chinook salmon and delta smelt and to meet the Vernalis Adaptive Management Program (VAMP) export objective from April 15 through May 15; and (2) export reductions to a combined 1,500 cfs from May 16 through 31 to benefit chinook salmon and protect delta smelt. Based on this year's current conditions, it is unlikely that we will need the placeholder of approximately 50,000 AF for potential export reductions in June to protect delta smelt.

Consequently, based on our review of the April 2004 90% and 50% exceedance hydrology forecasts, it is our assessment that all of the necessary elements (or their functional equivalent) identified in the CALFED ROD for ESA commitments are in place and functional for the remainder of this water year. Therefore, the Management Agencies by this letter agree that there are sufficient EWA assets to effectively implement planned fish protection actions in the Delta during the rest of the water year and maintain ESA commitments for the remainder of water year 2004. This commitment assumes: (1) implementation of upstream primary purpose (b)(2) fish actions during VAMP and post-VAMP Delta fish actions; (2) implementation of the Delta fish actions described previously; and (3) a SWP and CVP allocation south of the Delta at 65%. We would like to stress again that we must continue working diligently with the Project Agencies in the unlikely event that hydrologic conditions turn wetter than the 50% exceedance hydrology. Should a wetter hydrology require a closer look at this year's commitments, the Management Agencies will follow the process described in the Conservation Agreement Regarding Multi Species Conservation Strategy (MSCS Conservation Agreement, CALFED ROD Attachment 5).

In closing, we remain concerned about our capability to continue to ensure regulatory commitments pursuant to the ESA in Water Year 2005 and beyond. The ability to acquire EWA operational assets was limited again this year due to hydrologic conditions and changes to the October 1999 (b)(2) Decision. We remain concerned about the need to develop the capability to carry over or store EWA assets. It is important that we continue the EWA program through the remainder of stage 1 and beyond to meet the CALFED agencies' needs for the long-term. The uncertainty of long-term funding and multi-year purchase agreements for EWA assets present a significant challenge that must be addressed. Finally, the issues outlined in this letter all need to be addressed in the context of the many new milestones unfolding in the coming months, including the revision of the Operations Criteria and Plan, the proposed long-term EWA, the South Delta Improvement Project environmental analyses and documentation, and other related efforts.

The Management Agencies are committed to working collaboratively with the Project Agencies to ensure that the CALFED ROD continues to be implemented in a biologically appropriate manner, consistent with the CALFED goals of restoration and recovery. If you have any questions regarding this letter, please contact David Harlow at the Service (916) 414-6600, Diana Jacobs at the Department of Fish and Game (916) 654-9937, or Michael Aceituno, at NOAA Fisheries (916) 930-3601.

Sincerely,

		
Diana Jacobs Deputy Director Science Advisor California Dept. of Fish and Game	Wayne S. White Field Supervisor Fish and Wildlife Service	Michael Aceituno Area Supervisor, Sacramento NOAA Fisheries