

Memorandum

Date: July 31, 2009

To: Donald Koch
Director
Department of Fish and Game
1416 Ninth Street
Sacramento, California 95814

From: Department of Water Resources

Subject: California Endangered Species Act Consistency Determination Request

Pursuant to Fish and Game Code Section 2080.1, the Department of Water Resources (DWR) requests your determination that the enclosed Biological Opinion (BiOp) and Conference Opinion from the National Marine Fisheries Service (NMFS), Biological Opinion and Conference Opinion on the Long-term Operations of the Central Valley Project (CVP) and State Water Project (SWP), June 4, 2009, for the State listed Sacramento River winter-run Chinook salmon and Central Valley spring-run Chinook salmon covering the SWP Delta operation are consistent with the California Endangered Species Act (CESA).

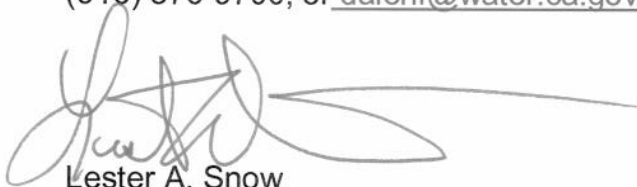
The Bureau of Reclamation (Reclamation), in a June 4, 2009 letter from Regional Director Donald Glaser, informed NMFS that Reclamation provisionally accepted the Reasonable and Prudent Alternatives (RPA's) in the BiOp, conditioned upon the further evaluation and development of the longer-term actions and the components included in those actions. Reclamation has acknowledged, and DWR agrees, that further evaluation of these actions are necessary because the actions require future appropriations unlikely to be obtained, involve outside party agreements, and are beyond the Reclamation and DWR's legal authority.

DWR is fully committed to protecting salmon and has consistently supported reasonable measures to restore salmon populations. However, DWR is concerned that the RPA lacks sufficient scientific support and unnecessarily impacts the State's water supply. For SWP, annual average impact of the extended range of impacts allowed for in the RPA's is estimated to range from 70,000 acre-feet to 420,000 acre-feet. Even more troubling is that we see very little, if any, fishery benefit from the actions that directly affect the SWP due to lack of sound scientific support for these actions. The BiOp does not provide estimated population level benefit for these actions; so it is difficult to ascertain how NMFS believes each of these actions will translate into fishery population improvements. Although they have significant impacts on water supply reliability, there is not sufficient science to support the conclusion that April and May exports restrictions are related to San Joaquin River salmonid survival. Furthermore, the particle tracking model used to develop Old and Middle River flows to provide salmon protection appears to have been used in a technically inappropriate manner.

Many of the RPA actions call for joint action by DWR and Reclamation at CVP facilities. This requires DWR to take actions to remedy impacts the salmon from CVP facilities, over which the SWP has no authority or control. In addition, the actions called for at the Skinner Fish Protection Facility may be infeasible, their costs significantly exceed any potential benefits, and the penalties for non-compliance are unreasonable. Based on these and other concerns, DWR intends to ask NMFS to reinstate consultation on the BiOp operations and seek modification to the BiOp.

At this time, the BiOp is being challenged in two separate lawsuits. Currently, DWR has not been named as a party in these actions. Regardless, the BiOp is in force and DWR intends to act in full compliance. If the BiOp is subsequently invalidated, revised, or modified as a result of reconsultation, litigation, or some other cause, DWR will apply to the Department of Fish and Game (DFG) for a revised or subsequent Consistency Determination or other CESA compliance mechanism as appropriate.

In summary, pursuant to Fish and Game Code Section 2080.1, DWR requests that DFG determine that the BiOp and the Incidental Take Statement therein is consistent with the requirements of CESA. If you have any questions, please contact Dale Hoffman-Floerke, Chief of DWR's Division of Environmental Services, at (916) 376-9700, or dalehf@water.ca.gov.

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

Lester A. Snow
Director
(916) 653-7007

cc: (See attached list.)

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