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Environmental Law Foundation
Natural Resources Defense Council
The Bay Institute
California Sportfishing Protection Alliance

July 1, 1998

Mr. Rick Breitenbach
CALFED Bay/Delta Program
1416 Ninth Street, Suite 1155
Sacramento, CA 95814

Re: Comments on "California and Federal Endangered Species Act Compliance" Technical Appendix of the CALFED Draft Programmatic EIS/EIR

Dear Mr. Breitenbach:

On behalf of the undersigned groups, we submit the following comments on the document entitled "California and Federal Endangered Species Act Compliance" (hereafter referred to the "ESA Appendix"). This document was belatedly made available to the public as a new technical appendix attached to an errata to the CALFED draft EIS/EIR.

I. OVERVIEW, BACKGROUND AND REGULATORY MECHANISMS SECTIONS

The ESA Appendix contains several erroneous statements of the law which must be corrected.

A. Federal Endangered Species Act (FESA).

The ESA Appendix contains an incomplete and misleading summary of the so-called "no surprises" regulation. The Appendix states that the regulation provides that "no additional conservation or mitigation measures will be required of non-federal landowners should there be changed, or unforeseen, circumstances." (App., p. 10.) In fact, the regulation is not quite so absolute. Instead, it provides that the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) may not impose additional conservation or mitigation measures[1/] on an incidental take permittee in the event of changed or unforeseen circumstances not covered by the

[1/] "Additional conservation and mitigation measures" are those which require: (1) the payment of additional money; (2) dedication of additional land or water; or (3) further restrictions on the *use* of land, water or other natural resources "otherwise available for development or use" under the original terms of the habitat conservation plan (HCP).

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original habitat conservation plan (HCP), without the permittee's consent. These assurances only apply to HCPs that are being "properly implemented" and species that are "adequately covered." (50 C.F.R. §§ 17.3, 17.22(b)(5), 17.32(b)(5), 222.3, 222.22(g).)

The ESA Appendix also states that, once consultation is completed on the strategy as a whole, consultation will not be reinitiated until "all adaptive management measures have been exhausted or a significant change is made to the project description." (App., p. 21.) This is inconsistent with the criteria for reinitiation of consultation in the ESA regulations, which *require* reinitiation of consultation if: (1) the amount or extent of authorized taking is exceeded; (2) new information reveals that the action may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. (50 C.F.R. § 402.16.)

B. California Endangered Species Act (CESA).

The ESA Appendix states that the Department "may permit the take of state listed species . . . provided the impacts of the authorized take are minimized and fully mitigated." (App., pp. 14, 26.) This is an incomplete statement of the law. Take may not be authorized under section 2081 of CESA if it would cause jeopardy to state-listed species. (Cal. Fish & Game Code § 2081(c).) In addition, section 2081 requires that adequate funding be provided to implement the permit mitigation measures, and that the permit require both compliance and effectiveness monitoring. (Cal. Fish & Game Code § 2081(b)(4).)

The Appendix also notes that state agencies must consult with the Department of Fish & Game (the Department) under CESA if a state agency project would jeopardize the continued existence of a listed species. However, the Appendix fails to mention that consultation is also required if the state agency project would adversely modify or destroy the essential habitat of state-listed species. (Cal. Fish & Game Code §§ 2090(b), 2091.)

C. Natural Communities Conservation Planning Act (NCCP Act).

The ESA Appendix states that section 2835 of the NCCP Act may be used to authorize take of state listed species pursuant to the CALFED program. However, section 2835 *does not* provide independent authority for the Department to authorize take of listed species. Instead, this section only allows the Department to authorize take consistent with the requirements of CESA. (*See* Cal. Fish & Game Code § 2835 (allowing take "as provided in this [Fish & Game] code"); *see also* § 2825(c) (providing that NCCPs shall be implemented pursuant to section 2081 of the Fish & Game Code, which is part of CESA).) In San Bernadino Valley Audubon Society v. Metropolitan Water District, Riverside Sup. Ct. Case No. 274844, the Riverside Superior Court held that "the NCCP Act does not provide independent authorization for incidental `take' for development purposes, but instead refers back to CESA and to section 2081 [of the Fish & Game Code]." (Decision on Pet. for Writ of Mandate, at 4.)

II. CONSERVATION STRATEGY (CS)

A. The ESA Appendix Lacks Critical Detail Regarding the CS

The ESA Appendix fails to describe the CS in sufficient detail to allow for adequate public review and comment. It is impossible to determine, based on the information provided in the Appendix, precisely is being proposed and how the CALFED program will achieve ESA compliance. For example, the Appendix does not state which legal mechanisms will be used to permit what types of actions, to which entities take permits would be issued, or even what species and activities will be covered. It is also unclear how the CS relates to the broader CALFED program, the Ecosystem Restoration Program Plan (ERPP), and any potential HCP/NCCP for the program.

Furthermore, the legal assurances that will be provided to take permittees are insufficiently explained. It is entirely unclear what assurances will be given, to whom, and for how long, and for which species and activities assurances will be granted. In addition, how do the ESA assurances relate to the overall CALFED assurances package? How will commensurate assurances be granted to ensure protection of species covered by the CS? What types of circumstances will be labeled "changed" vs. "unforeseen"? How will the CS adaptive management program address these circumstances in the context of virtually ironclad regulatory assurances being provided pursuant to the no surprises regulation?

These details must be provided so that the public can evaluate the legal and biological sufficiency of the ESA compliance strategy.

B. It Is Unclear What Legal Standard the CS Will Be Designed to Meet

The ESA Appendix states that the CS will "provide the basis for any and all of the above regulatory mechanisms and will remain constant regardless of which mechanism is used to authorize take." (App., p. 1.) Yet, the Appendix contains inconsistent statements regarding the legal standard that the CS will be designed to meet. For example, on pages 1 and 16, the CS states that it will "*allow for* the recovery" of listed species and the "conservation of" unlisted species. Later, the CS states that it will constitute a "refinement" of the ERPP, which aims to *achieve* or *contribute to* recovery for listed species. (App. p. 16.)

If the CS is to remain unchanged regardless of what legal mechanism is used to authorize take, the CS must be designed to meet the highest applicable legal standard. Under sections 7 and 10(a), federally listed species may be taken if such take is minimized and mitigated "to the maximum extent practicable" and the take will not "appreciably reduce the likelihood of" the species' survival and recovery in the wild. (16 U.S.C. §§ 1536(a)(2), 1539(a)(2)(B)(iv); 50 C.F.R. § 402.02.) Section 4(d) of the ESA, however, only authorizes take of threatened species if "necessary and advisable" to provide for the *conservation* of the species. Conservation is broadly defined in

the act to mean recovery.[2] (16 U.S.C. § 1533(d); *see also* § 1536(a)(1) (requiring all federal agencies to conserve listed species).) Thus, the CS must meet a *recovery*, not a jeopardy, standard.

Likewise, under CESA, section 2081 authorizes take of state-listed species if the take is "minimized and fully mitigated," and the take will not cause jeopardy to the species. (Cal. Fish & Game Code § 2081(b)(2), (c).) Section 2081 does not expressly reference species' habitat. CESA's consultation provisions, on the other hand, only authorize take if such take will not jeopardize the continued existence of the species *and* will not adversely modify or destroy its "essential habitat." (Cal. Fish & Game Code § 2090(b), 2091.) Moreover, under CESA, as under the federal ESA, all state agencies have a mandatory duty to conserve (e.g., recover) listed species.[3] (Cal. Fish & Game Code §§ 2052, 2052.1, 2055.) Thus, the CS must be designed to fully mitigate impacts to listed species, to conserve to listed species, and to protect such species' essential habitat.

In addition, if section 10(a) is used as a legal mechanism to authorize incidental take, unlisted species must be treated *as if they were listed.* (HCP Handbook; 63 Fed. Reg. 8859, 8867 (Feb. 23, 1998).) Finally, the CS must meet all other applicable requirements of each statute (*e.g.* sections 4(d), 7 and 10 of FESA and sections 2081 and 2091 of CESA), such as adequate funding, monitoring, reporting, and implementing agreements.

C. Because the CS Has Not Yet Been Developed, Future Environmental Review and Consultation, Both at the Program and Site Specific Level, Is Required

Because the CS has not been developed, subsequent environmental review and section 7 consultation will be necessary, both for the CS as a whole, and site-specific actions to implement the CS. The CS and accompanying environmental documentation must contain site and species specific analysis, mitigation measures and management actions.

While the Appendix states that the CS will "provide the foundation for" subsequent compliance with the federal and state ESAs, this cannot excuse the legal requirement for independent environmental review and consultation on the CS itself.

Under section 7(a)(2) of the ESA, each federal agency must ensure that any agency action it

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[2] 16 U.S.C. § 1532(3), defining "conservation" as:

the use of all methods and procedures which are necessary to bring any . . . threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management . . . and, *in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.* (Emphasis added.)

[3] As under the federal ESA, the term "conserve" under CESA is broadly defined as the use of all methods and procedures necessary to bring listed species to the point of recovery. (Cal. Fish & Game Code § 2061.)

proposes to fund, authorize or carry out will not jeopardize the continued existence of a species listed as endangered or threatened or adversely modify or destroy designated critical habitat.[4] (16 U.S.C. § 1536(a)(2).) "Agency actions" are defined broadly as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies." (50 C.F.R. § 402.02.) These include, but are not limited to: (1) actions intended to conserve listed or their habitat; (2) promulgation of regulations; (3) granting of licenses, contracts, leases, easements, and permits (including incidental take permits); and (4) actions that will directly or indirectly modify land, air or water. (*Id.*)

In order to ensure compliance with the mandatory duty to ensure no jeopardy and no adverse modification of critical habitat section 7 requires each federal agency that proposes to authorize, fund or carry out an action to consult with NMFS and/or the USFWS regarding the impact of this action on listed species. (16 U.S.C. § 1536(b)-(c).) After completion of formal consultation, USFWS and NMFS must issue a biological opinion based on the best available scientific information as to whether the federal agency action will jeopardize listed species or adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(b)(3)(A).) In addition, NEPA requires preparation of an Environmental Impact Statement (EIS) for every major federal action that may significantly affect the quality of the environment. (42 U.S.C. § 4332(C).)

CESA also requires a state lead agency to consult with the Department whenever it proposes to authorize, fund or carry out a "project" that may jeopardize the continued existence of a state listed species.[5] (Cal. Fish and Game Code § 2090(a); Cal. Pub. Res. Code § 21104.2.) CEQA compliance is also required for such a project.

Because the CS and many actions implementing the CS qualify as federal agency actions and state agency projects, each of these activities are subject to formal consultation under the federal and state ESAs and environmental review under NEPA and CEQA.

D. The CALFED Program and CS Cannot Be Implemented Prior to Completion of Adequate Site Specific Environmental Review and Formal Consultation

The Appendix states that some CALFED program actions may be implemented during

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[4] To "jeopardize the continued existence of" is defined as to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." (50 C.F.R. § 402.02.)

[5] A state agency "project" includes: (1) any activity directly undertaken by a state agency; (2) any activity undertaken by a private party supported by a state agency (i.e. through grants, contracts, loans, subsidies or other forms of assistance); or (3) issuance of a lease, permit, license, certificate or other entitlement to a private party by a state agency. Cal. Fish and Game Code § 2064. The same definition of project applies under CEQA. *See* Cal. Pub. Res. Code § 21065.

Phase II, prior to completion of site-specific environmental review and analysis on such actions. However, program actions cannot be implemented until adequate site-specific environmental review and section 7 compliance has been completed.

As mentioned above, formal consultation is required for all major federal actions that may adversely affect a listed species or critical habitat. (16 U.S.C. § 1536(a)(2).) Similarly, an EIS must be prepared for all major federal actions that may significantly affect the environment. (42 U.S.C. § 4332(C).) The CALFED program, the CS, and certain actions taken to implement the CALFED program and CS all qualify as major federal actions for which formal consultation and NEPA review are required.

Section 7(d) of the ESA prohibits a federal action agency *and* any federal permit or license applicant from making "irreversible and irretrievable commitments of resources" that would foreclose the federal agency's ability to implement "reasonable and prudent alternatives," until formal consultation is completed.[6] (16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.)

The purpose of section 7(d) is to ensure that the existing environmental *status quo* is maintained during the consultation process so as not to foreclose consideration and adoption of alternatives to the proposed federal agency action. (Connor v. Burford, 848 F.2d 1441, 1445 n.34 (9th Cir. 1988); Lane County Audubon Society v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992).) This prohibition on making irreversible and irretrievable commitments of resources applies throughout consultation and continues until the requirements of ESA section 7(a)(2) have been satisfied, *e.g.* the federal action agency has *ensured* that its actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. (51 Fed. Reg. 19926, 19935 (June 3, 1986).)

NEPA contains a similar prohibition on implementation of federal agency actions pending completion of the environmental review process and issuance of the record of decision. (40 C.F.R. § 1506.1.) A federal agency may not undertake any major federal action covered by a program EIS which would significantly affect the quality of the environment unless the action: 1) is justified independently of the program; 2) is itself covered by an adequate EIS; and 3) will not prejudice the ultimate decision on the program by determining subsequent development or limiting the choice of alternatives. (*Id.*, 1506.1(c).)

Thus, individual CALFED program actions may not be implemented section 7 consultation and NEPA review have been completed for such actions, and implementation of these actions will not foreclose reasonable alternatives to all or some aspect of the CALFED program.

Thank you for considering these comments.

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[6] Reasonable and prudent alternatives are those that: (1) can be implemented in a manner consistent with the purposes of the proposed agency action; (2) are within the agency's legal authority and jurisdiction to implement; (3) are economically and technologically feasible; and (4) would not jeopardize listed species or adversely modify or destroy designated critical habitat. (50 C.F.R. § 402.02.)

Sincerely,

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