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CAL-FED HABITAT CONSERVATION PLAN CONCEPTUAL FRAMEWORKS FOR A PROGRAMMATIC HCP

Prepared by the U.S. Fish and Wildlife Service
April 9, 1997

Introduction:

With the CalFed planning effort gaining momentum and a draft EIS/EIR scheduled for completion by Fall, 1997, affected agency heads have determined that a Habitat Conservation Plan (HCP) and incidental take permit under section 10 of the Endangered Species Act (ESA) is the preferred mechanism for achieving a comprehensive ESA compliance for the CalFed program. This would be in place of addressing ESA issues solely through the section 7 formal consultation process (though even under an HCP individual Federal agencies involved in CalFed would still need to satisfy their section 7 consultation requirements).

A key factor that must be incorporated into any ESA compliance framework for CalFed is the so-called "assurances" issue. CalFed planners want the maximum regulatory certainty that may reasonably be obtained that the agreement ultimately reached through the CalFed process will remain in effect over time, and that the wildlife agencies will not, at some point in the future, require mitigation above and beyond that described in the original CalFed agreement. This objective corresponds with the Department of Interior's "No Surprises" policy for HCPs (indeed, obtaining "No Surprises" was the principal reason for the decision to develop a CalFed HCP). However, to obtain "No Surprises" one must first develop an HCP that meets statutory issuance criteria and obtain an incidental take permit. To do this, an HCP must be relatively clear about the nature of the actions proposed under the plan and their anticipated impacts to federally listed species. However, CalFed planners envision many different program options--including construction of reservoirs and infrastructure--and the final design of the project will not be fully known until some relatively undefined point in the future. Therefore, the central challenge in developing a CalFed HCP is reconciling the desire for regulatory certainty under the "No Surprises" policy, with the inherent uncertainty in the near term about the specific location, size, and impacts of some of the CalFed design proposals.

In addition to the "assurances" issue, there has been much reference to a "programmatic HCP" for CalFed. However, to date no one has defined precisely what is meant by the term or exactly what a "programmatic HCP" would look like or how it would work. With these problems in mind, this paper seeks: (1) to develop a set of conceptual proposals for how a "programmatic HCP" for CalFed might be structured; and (2) to develop such proposals in a manner that allows "No Surprises" assurances to be provided consistently with CalFed objectives and ESA requirements.

It is assumed for purposes of this paper that a programmatic HCP for CalFed would need to be completed concurrently with completion of the final EIS/EIR for the project--Fall of 1998. It is also assumed that the ideas expressed in the paper are preliminary only and do not necessarily represent the full range of HCP approaches that may ultimately be available to the CalFed program. This paper will presumably generate further reflection and discussion of the problems involved with a CalFed HCP and other ideas may surface or grow out of those described below. Furthermore, it may be possible to combine elements of the options described below into new approaches not currently identified.

Option 1--Conditioned Permit Option:

Option 1 would involve issuance by FWS (and NMFS, if necessary) of a single permit for the entire CalFed program, but one that would be conditioned to go into effect in stages and upon the provision of certain vital information.

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Under this option, CalFed agencies would prepare an HCP for the program by Fall, 1998, and would describe in this HCP all specific CalFed actions, facilities, infrastructure, locations, etc., then known or decided upon, together with a list of species to be "covered" by the HCP and a description of impacts to those species anticipated as a result of those known actions and facilities. The HCP would also describe in as much detail as possible the program elements not then known. Furthermore, the CalFed agencies would commit under the terms of this HCP to prepare "supplemental HCPs" that would describe then-unknown program elements as their details were determined.

The Service would then issue a permit for the entire CalFed program, but the permit would be conditioned to go into effect in stages. Stage 1 would authorize only such incidental take as is specifically described in the original HCP and for those species "covered" by that HCP. Subsequent stages would go into effect (i.e., incidental take would be authorized) only when CalFed prepared and submitted to the Service HCP supplements that describe in detail project actions, facilities, and resulting take as they are developed or become known. "No Surprises" assurances under this scenario would also become effective in stages--e.g., as each individual set of CalFed actions is described, "No Surprises" would kick in, but only for that particular set of actions or facilities described at each stage, and only when the conditions for each stage of the permit have been satisfied. There is precedent in the HCP program for permits conditioned upon a future action in this manner, since we routinely issue permits for unlisted species, with the condition that the permit does not become effective for that species except upon the listing of that species as threatened or endangered.

This approach, then, would allow for a single conditioned permit, based upon an original HCP and subsequent HCP supplements.

Advantages:

The main advantage of this approach would be that a single permit would be issued for the CalFed program, instead of multiple permits as described in Option 2. This could minimize the administrative costs of issuing multiple permits.

Disadvantages:

This approach is not without its potential problems. First, some procedural issues would have to be worked out. For example, would we need to make each HCP supplement available for public review? Presumably, yes. And how would the section 7 consultation be handled for such an approach? Would we conduct an initial consultation and prepare a biological opinion for the original HCP, and then prepare amended biological opinions to account for each supplement? The same questions would apply to preparation of the Service's Set of Findings (SOF) for the original HCP--i.e., would supplemental SOFs need to be prepared for HCP supplements? In any case, it is difficult to see how we could satisfy these document requirements for the whole CalFed program concurrently with approval of the original HCP (and on a one-time basis), since many program details would not be available at that time. However, with respect to NEPA requirements, the HCP supplements could presumably be addressed by applicable stages in the programmatic EIS/EIR.

Another potential problem involves the broader issues of indirect effects and overall project effects. That is: (1) can we adequately analyze total project effects, including indirect effects, without knowing the full scope of activities that would ultimately be conducted under the permit (or, to view it another way, can we defer such analysis until we know the full scope of the program?); and (2) if such analysis were to reveal deficiencies in the program with respect to listed species after earlier stages of the program had been initiated and "No Surprises" was in place, would we then find ourselves in the position of having to retract some assurances the permittee had been given for early stage activities to correct deficiencies not revealed until later stages of the program? Perhaps the solution to this conundrum is a set of short-term

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"No Surprises" assurances for early stages of the program that are conditioned upon the availability of information about the effects of full project build-out.

Another potential problem with this option is that since a public comment period would probably need to be observed for each program stage and HCP supplement, and a biological opinion and SOF (or revised opinion and SOF) prepared, there may be little administrative savings compared to Option 2. Ultimately, the only real difference could turn out to be the savings associated with a single document--the permit itself--plus some potential reductions in the lengths of the other documents. However, until a more detailed analysis of the specific document requirements under this option is undertaken, it will not be clear just what the administrative savings might be.

Option 2--Permit Amendment Option:

This option is similar to Option 1, except that instead of a single permit conditioned to become effective in stages, permit amendments would be issued at each stage as the CalFed agencies determined specific project actions and facilities.

Under this option, CalFed agencies would prepare an original HCP for the program by Fall, 1998, just as in Option 1, and would describe in this HCP all specific CalFed actions, facilities, infrastructure, locations, etc., then known, a "covered" species list, and a description of anticipated species impacts. The HCP would also describe in as much detail as possible the program elements not then known. As in Option 1, the CalFed agencies would commit under the terms of this HCP to prepare "supplemental" or "revised" HCPs describing then-unknown program elements as their details were determined.

The Service would then issue a permit authorizing take for only that portion of the program addressed by the original HCP--i.e., for those species and actions as specifically described in this HCP. Permit amendments would then be issued as additional CalFed stages or actions became known and as HCP supplements or amendments for these actions were prepared and submitted for approval. Under this option, "No Surprises" assurances would be provided only for that portion of the overall program as covered by each permit or permit amendment, and as described by the original HCP and each of its supplements.

This approach, then, would allow for an original permit and permit amendments, based, respectively, upon an original HCP and subsequent HCP supplements.

Advantages:

One advantage of this option, compared to Option 1, is that individual CalFed permits would be issued as successive program stages are described and HCPs submitted, instead of a single staged permit being issued. Some might regard this approach as more legally defensible. Another advantage is that document requirements are clearer under this option than under Option 1--i.e., we would definitely have to allow public comment and prepare a biological opinion and SOF for each permit amendment, just as we do for all permit amendments.

Disadvantages:

This approach has some of the same disadvantages as Option 1, especially with respect to the issues of overall project effects, including indirect effects--that is, how can we adequately analyze total project effects without knowing the full scope of activities that would ultimately be conducted under the permit? Also, what implications do project impacts identified later in the process have for "No Surprises" assurances provided early in the process (see discussion under Option 1). Option 2 may also have the disadvantage of being more procedurally cumbersome than Option 1, since individual permit amendments would be issued for each stage of the program; however, this would depend on what procedural requirements are ultimately identified for Option 1.

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Option 3 -- Comprehensive HCP Option:

This scenario would involve preparation of a comprehensive CalFed HCP that would address all reasonable and foreseeable options under consideration for the program--including a discussion of actions, facilities, facility locations, species lists, and species impacts associated with each option. A conditioned permit (as in Option 1) or a series of permits (as in Option 2) would then take effect or be issued, respectively, as each program action or set of actions is decided upon. As in Options 1 and 2, "No Surprises" assurances would be provided contingent upon the CalFed agencies identifying what actions under the HCP would actually be implemented.

Under this scenario, the HCP would identify and analyze a range of options for program actions. The depth, extent, and legal adequacy (for purposes of permit issuance) of these analyses under this HCP document could conceivably vary. That is, the wildlife agencies and CalFed agencies might determine through negotiations that a greater or lesser level of detail in the initial analyses is acceptable or agreed to--with associated agreements, as necessary, that further analyses would be conducted through the various stages of project implementation. Or, they might agree to conduct a full analysis of all options right from the start. In either case the thing that would make this scenario different from Options 1 and 2 is that there would be an initial attempt--through the comprehensive HCP--to analyze and understand the impacts of all serious program options then under consideration (in Options 1 and 2, only those CalFed actions specifically known and decided upon at any time are addressed in the HCP and its supplements). Subsequent analyses and/or project descriptions would then refine such initial analyses, if necessary--presumably through supplemental HCPs. Implementing agreements and a single conditioned permit or a permit with amendments would then be used to codify the program actions and authorize take.

Advantages:

One advantage of this option compared to Options 1 and 2 is that the issue of overall project effects, including indirect effects, could be addressed in an initial HCP rather than being deferred until later HCP supplements. This is because the comprehensive HCP would identify--and analyze, to some extent--the full range of CalFed program actions under consideration.

This option might also force the CalFed agencies to trim their lengthy list of program options to a few serious proposals that could be described in the HCP in at least a preliminary fashion. Even better, they might produce a list of options that are clear and manageable enough to be fully addressed in the comprehensive HCP.

Disadvantages:

There are several potential difficulties with this approach, however. First, because of the current uncertainty about what program actions will ultimately be implemented under CalFed, and the wide array of options being considered, the CalFed agencies may resist having to commit the program to a few carefully described options. There may also be logistical or technical difficulties associated with this task. Second, unless the program can be reduced to a few options, such a comprehensive HCP might bog down in sheer size and complexity as each individual option is analyzed. Unless properly handled, the HCP could become literally unmanageable.

Conclusion:

The three options described above provide some preliminary frameworks for a CalFed programmatic HCP. They do not represent a complete list of possible CalFed HCP options, and the options described may be modified or combined in a variety of ways. Comments and analysis by reviewers of this paper are welcomed and necessary in reaching final agreement on how a workable CalFed HCP can ultimately be structured.