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Sharon Gross
CALFED Bay-Delta Program
1416 Ninth Street, Suite 1155
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RE: CALFED HCP

Dear Ms Gross:

Developing "take" permitting linked to the CALFED planning process is both challenging and necessary for CALFED to succeed. How best this is accomplished is a matter of great debate and opinion. From our perspective there is no clear "right way" to do this, but there are a number of wrong ways that if avoided early in the process can greatly reduce the risk of failure. We offer the following points in that spirit.

1) Do not create a separate HCP Process or a separate HCP document

The CALFED process, plans, and scientific basis should be reconsidered and reformulated, if need be, to conform to the standards of an HCP. The CALFED process, plan and implementation agreements should, in aggregate be the functional equivalent to an HCP and declared so by the Secretary, and may, where appropriate, be the basis for the issuance of 10a permits under the ESA and whatever emerges as the CESA equivalent. There should be no document, other than the CALFED plan that is the basis for the HCP. There should be no process, other than the CALFED process, that you need follow or participate in to be fully engaged in the HCP process.

2) Implementation Agreements should be the basis for CESA and FESA "take" authorizations

Implementation Agreements (IA's), which identify the contractual responsibilities of "the parties" to implement appropriate portions of the plan should be the basis for permitting, 10a or otherwise. All obligations of, and assurances to the parties should be specified in the IA's. Likely the IA will take the form of a "master implementing agreement", ("MLA", (pun fully intended)) which is a compilation of IA's that separately address logical subsets of the plan. In aggregate, the individual IA's should add up to full plan implementation. Issues of severability, mitigation beyond what is specified in the plan, assurance terms and conditions, and permits to be issued should be spelled out in the IA's.

3) "The No Surprises Policy" available under 10a should not be the legal or policy basis for most of the assurance packages developed within the Implementing Agreements

"The No Surprises Policy" available under 10a should not be the legal or policy basis for most of the assurance packages developed within the Implementing Agreements for water contracts, state and federal water project operations, or the development of new facilities. It may be part of the assurance packages for private landowners, small private diverters, small private irrigation districts and reclamation districts engaging in "take". The questionable use of 10a permitting for "take" on a clearly "federal" program suggests that, if for no other reason than legal "durability" of the agreement, the use of the 10a "No Surprises Policy" should be considered the exception, not the rule, as the basis for enduring assurances.

4) Section 7 and 4d "take" authorizations/exemptions should play a significant role in the assurance packages and implementation agreements and should be tailored to provide "assurances" sufficient for the legitimate needs of water users.

In many ways, the process, environmental documentation, mitigation and avoidance measures needed for a FESA 10a permit are, at least in theory, more rigorous than what is needed for a section 7 and equal to what has been required for a 4d "take" exemption. Therefore, if we design all of the CALFED planning, documentation and implementation program to the HCP standard one could argue that all and any of the "take" permitting modes should be available, with the selection of one over the other depending on other circumstances, such as listing status of the species, whether or not there is a federal nexus, etc. Currently there is a growing perception on the part of water users that 10a is the only way to go. What colors this equation is the "No Surprises Policy" associated with 10a permitting. They understandably believe that they need the shelter of this policy to get the level of assurances they want. Hence, all the focus is on doing an HCP and getting a 10a permit, as opposed to getting "take" authority from section 7 and 4d. We believe this is a dangerous and, most importantly, unnecessary course of action.

We believe it is dangerous in that it stretches the "No Surprises" policy way beyond its clear intent. The purpose of the policy was to make it attractive to private property owners to resolve ESA conflicts in a meaningful way, providing them some certainty in exchange for conservation action. The intent was not to relieve public agencies of their explicit duty to protect the environment as they provide water and flood control. Second, I believe it is dangerous because the legal durability of this policy has not been subjected to the test of time. Particularly questionable is the issuance of 10a permits and "no surprises" to projects that have an undeniable federal nexus, such as CALFED! Pay special note of the "FED" part. Congress has stressed time and time again that the government should bear the lion's share of the burden of endangered species protection, not the private property owner. Under "no surprises", if the conservation actions of the private property owner doesn't pan out, and the species gets worse, the conservation burden gets kicked up to the feds who act as the ultimate safety net for the species. The logic of this approach is that someone is the backstop -- the feds. Consider what happens if a traditionally section 7 "federal" project is "no surprised", essentially it is the feds that are off the hook if doesn't work, who then is the safety net, who is the backstop, who picks up the tab if the plan doesn't work? The United Nations?

Additionally I think the rush to section 10a is unnecessary, even from the "regulated community" standpoint, because I believe that if the whole CALFED program is brought up to the HCP standard, it is possible to write biological opinions or special rules (4d rules) that provide levels of assurance equal to or even superior to "no surprises". These opinions and rules can be explicit as to the terms and conditions that would initiate further consultation, they can provide flexibility in "take", provide remedies for adverse circumstances and anticipate future needs for change. In short they can be as effective "assuring" as a "No Surprises" provision and they will be on firmer legal and policy ground. It will be extremely challenging for the agencies to rethink the "short leash" mentality manifest in many biological opinions. But the comprehensive nature of the CALFED solution and its aspirations to meet the 10a standard may give sufficient comfort to warrant a longer, and more "assuring" leash.

5) Implementation of the Ecosystem Restoration Program Plan should have some mitigation value and should be considered as a part of the mitigation package for "take" under FESA and CESA.

The Ecosystem Restoration Program Plan (ERPP) draft Vol. I, June 13, 1997, page 2 notes that the ERPP is "not designed as mitigation for projects to improve water supply reliability or to bolster the integrity of Delta levees...". The environmental community agrees that the ERPP should not be considered as mitigation for a massive levee project, changes in operations, or a new dam. On the other hand, most of the ESA listed species are so precarious that without the full implementation of the ERPP it is unlikely that you could do anything that impacts the system without hitting the jeopardy threshold for one species or another. This means that there needs to be a clear and cleverly devised linkage of "take" permits linking project mitigation with the successful implementation of the ERPP. We want to see the ERPP viewed as an essential part of the mitigation package of all CALFED actions, so that failure to implement the ERPP is cause for revocation of "take" authorizations.

A minor but additional twist to this mitigation issue is that, by and large, the actions called for in the ERPP are the same actions that we would want to see done as mitigation for most projects. Perhaps the issue here is not the "what" of mitigation, but the "who pays" for them to be implemented. However this gets worked out, it seems that the ERPP must be included as part of the "HCP" equation or it will be hard to overcome the jeopardy threshold that even a 10a permit must cross.

6) The CALFED process should provide for FESA and CESA "take" authorizations for the implementation of Ecosystem Restoration Plan Projects without the need to mitigate for "take" that occurs as a result of the restoration action.

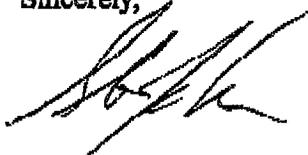
It is not impossible to envision a situation where the implementation of an approved restoration action such as the creation of a freshwater tidal wetland will adversely impact Swainson's hawk habitat, thus requiring mitigation for Swainson's hawk. The planting of new riparian trees for the Swainson's mitigation adversely impacts giant garter snake habitat, thus requiring mitigation for the giant garter snake. The creation of a dirt mound for the giant garter snake habitat impacts vernal pool and fairy shrimp habitat and so we work our way up the watershed, mitigating one impact and creating another. The ERPP is premised on restoration of the ecosystem. To do this, "take" must occur. The goal is to create a more sustainable system that in the end will have more abundant species numbers and be more viable. Getting there will require the destruction of some habitats for some listed species for the long-term gain of them all. The ERPP must be viewed as "self-mitigating" as a whole, and not as a series of projects that each need to be mitigated for. The CALFED program must explicitly deal with this permitting conundrum and create a "take" authorization framework for ERPP implementation that anticipates and authorizes "take" without the impossible financial and administrative burden this daisy-chain of mitigation would create.

7) The USFWS, NMFS and CDFG, should, on approval of the CALFED IA, list all those species that by any biological measure, should have been listed long ago but haven't been -- do to power politics. No party to the CALFED IA should be affected by the listings because they are completely covered under the IA

The regulatory agencies have a pile of listing petition for species that occur in the bay-delta watershed. Many of these species, based on any reasonable understanding of the act simply ought to be listed. The various understandings and agreements have put these listings in limbo, as well-intentioned and useful as they may be to facilitate an agreement, should be irrelevant if the CALFED IA provides the expected degree of protection for all declining native species. The IA should be sufficient to ensure that the listing of these species will have no impact at all on the parties to the IA. This can be achieved through "covered species lists", 4d rules, special rules, "no surprises" and "NCCP-like" state programs. The ongoing subversion of the listing process should not be allowed to carry forward, it is bad for the ESA, conservation, and it makes the process legally vulnerable.

The challenge before you is unprecedented. We offer our assistance in any way we can.

Sincerely,



Steve Johnson, Director of Conservation Science
The Nature Conservancy of California