

California Sportfishing Protection Alliance  
 Clean Water Action  
 Friends of the River  
 League of Women Voters of California  
 Natural Resources Defense Council  
 Mt. Diablo Audubon Society  
 Pacific Coast Federation of Fishermen's Associations  
 Save San Francisco Bay Association  
 The Bay Institute  
 United Anglers of California

October 20, 1997

*By Facsimile and First Class Mail*

Sharon Gross  
 CALFED Bay-Delta Program  
 1416 Ninth Street  
 Suite 1155  
 Sacramento, CA 95814

**RE: Supplemental Notice of Intent to Prepare an EIS/EIR (62 Fed. Reg. 45683)**

Dear Ms. Gross:

These comments on the above referenced Federal Register Notice (NOI) are submitted on behalf of the undersigned members of the Environmental Water Caucus (EWC). We are concerned that the CALFED agencies are moving forward with the process for the issuance of an incidental take permit well before the endangered species issues, or even the basic proposal for action, have been defined. The NOI emphasizes the primary purpose of the proposed HCP as providing regulatory assurances to plan participants that will limit their responsibility for measures necessary to protect and preserve animal and plant species. We note at the outset that the primary purpose of federal (and state) endangered species statutes is to protect depleted species from extinction when management measures have failed.

These comments set forth our concerns, first, with the timing and the breadth of the proposed incidental take permit and accompanying "no surprises" assurance, and second, propose some parameters for any such permit and underlying habitat conservation plan. Individual members of the EWC are submitting supplemental comments as well.

**1. The Proposed Scope of the Incidental Take Permit is Too Broad.**

The NOI states that the State agencies involved in CALFED intend to apply for an

incidental take permit for the CALFED Bay Delta Program ("Program"). The NOI states further that if such an incidental take permit is issued, the State agencies "would receive assurances pursuant to the Department of Interior's No Surprises Policy." The NOI also indicates that the CALFED agencies will develop a habitat conservation plan to serve as the basis for such an incidental take permit. The purpose of habitat conservation plans generally is to mitigate the effects of activities that could result in harm to listed species and serve as the justification allowing for the issuance of incidental take permits under ESA.

The CALFED Bay-Delta Program consists of four major elements (water supply reliability measures, water quality, systems vulnerability and an ecosystem restoration plan) and is currently being developed in a programmatic EIS/EIR. No preferred alternative has been identified to date. This Program will be massive, with literally thousands of moving parts many of which will have impacts on different endangered, threatened and otherwise depleted animal and plant species. The planning area at issue is similarly massive spanning many watersheds and hundreds of miles. Numerous species of plants and animals will necessarily be affected by various program elements.

While incidental take permits may be appropriate to ensure the implementation of the CALFED long-term solution in these four problem areas, the NOI provides no legal or scientific rationale for the issuance of a take permit covering so large an area and so many different species and habitat types and so many different types of actions that could potentially harm such species. CALFED should provide the public with a clear analysis of the benefits, and disadvantages, of issuing an incidental take permit for a program of this magnitude and range, as well as relevant precedents, before proceeding further with this process. This analysis should include consideration of several alternative approaches, such as for example, the examination on species taking and mitigation issues by geographic zones within the CALFED study area.

## **2. Scoping for an Incidental Take Permit is Premature.**

While we support early planning for recovery of endangered or otherwise jeopardized species, we are gravely concerned that moving forward with the process to issue an incidental take permit is premature. Specifically, early issuance of a "no surprises" guarantee with the programmatic EIS/EIR in any form, could seriously undermine ecosystem recovery and put implementation of the CALFED program at risk.

At the programmatic EIS/EIR stage it cannot be expected that we will know which specific actions will go forward, which species will be affected by such actions, and which specific mitigation measures will be necessary. These details are expressly anticipated to be further refined in project level environmental review documents tiered to the programmatic EIS/EIR. We cannot support the issuance of an incidental take permit that authorizes ongoing harm to (or take of) a vast array of depleted and jeopardized species based on broad programmatic review of environmental impacts. Even more troubling would be the issuance of assurances that "no additional land, funds or restrictions on covered program actions will be required," as indicated in the NOI, prior to project-level impact analysis.

We strongly support the notion that Bay-Delta Program impacts to endangered, threatened and depleted (but not listed) species should receive special attention in the programmatic EIS/EIR. This should include full and thorough consideration of mitigation measures for anticipated adverse impacts stemming from proposed Program elements. It may also be appropriate to use the programmatic EIS/EIR and a sufficiently specific Ecosystem Restoration Recovery Program Plan (ERPP) to serve as the NEPA/CEQA documentation from which future habitat conservation plans, and accompanying environmental review, could be tiered. Our concern is with the issuance, at the programmatic stage, of an incidental take permit that enshrines "rights" -- or perceived rights-- of permit holders, and limits the capacity of either the government or the public to take action necessary to protect endangered and other jeopardized species as necessary in the future.

### **3. The Goal of Providing Regulatory Certainty Appears To Be Incompatible with the Current Programmatic Level of Environmental Impact Review.**

The NOI provides that "no surprises" assurances provided to the non-federal agencies will be "commensurate with" (1) the specific actions covered by the HCP; (2) the level of detail and specificity in the HCP; (3) the unique circumstances of each species. The preferred alternative for the long-term solution will be addressed programmatically in the draft EIS/EIR expected in early 1998. Environmental impact analysis will be necessarily preliminary and detailed documentation of impacts will be deferred to later project specific stages. Thus, we anticipate that the environmental impacts of the preferred alternative (as well as the common program elements) will be broad and lacking significant detail. Given the extremely expedited schedule for the draft EIS/EIR no other outcome seems probable. However, it is difficult to ascertain what a "programmatic" incidental take permit would look like, or what would constitute an "unspecific" regulatory assurance.

The NOI makes clear that providing "permit applicants" with regulatory certainty regarding their future commitments for ensuring the survival of listed species is a federal priority. However, the NOI fails to provide the public or decision makers with a clear picture of how CALFED expects to provide such certainty in the face of the myriad of unknowns about the environmental impacts of the vast ecological systems at issue and the potential impacts of the many components of the Bay-Delta long-term solution.

### **4. The Proposed Incidental Take Permit and Related Assurances Undermine the CALFED Assurances Package.**

Closely related to our concern about timing overall, is the problem that by embarking on a HCP at this time, CALFED is moving forward with only one out of many potential assurance mechanisms. A fundamental tenet of the CALFED planning process is that a package of "assurances" across the board will be developed to provide that all program elements will be implemented and that no constituency or resource will be treated unfairly. A contractual guarantee such as DOI's No Surprises Policy is only one of many assurance tools now under

consideration by CALFED. The NOI begins the process of issuing an incidental take permit, expressly including no surprises assurances to the state implementing agencies. However, no comparable action is being taken to put into place other assurance tools with equally, if not longer, lead times necessary to secure their implementation. (Examples of such other measures include but are not limited to, crafting legislation to establish a new environmental trust entity, or a regulatory proposal to merge various dedicated funding schemes.)

The NOI provides no basis for bumping "no surprises" guarantees ahead of the queue. We support a balanced approach to the development and implementation of the assurances package.

### **5. The Proposed Regulatory Assurances Could Undermine the Role of Adaptive Management in the CALFED Program.**

Another basic tenet of the CALFED process is that the ecosystem restoration element will be guided by an adaptive management approach, meaning that the program will change and adapt as more information is developed and the ecological systems at issue are better understood. Thus, "surprises" are expressly anticipated. While the NOI states that the HCP will include an adaptive management plan, it is not clear how such a plan would be reconciled with the representations in the NOI that the permit holder will be provided with assurances under the no surprises policy. At the very least, the NOI suggests that any such adaptive management plan may be circumscribed with regard to the permit holder's future contributions to further ecosystem recovery.

Once again, this contradiction argues against the issuance of any type of incidental take permit prior to project level environmental impact review.

### **6. The Role of the State as the Holder of the "No Surprises" Assurance is Unclear.**

The NOI indicates that the State of California will apply for and be the holder of the anticipated incidental take permit pursuant to the provisions of section 10(a)(1)(B) of the federal ESA. However, the NOI fails to identify the actions that the State will undertake that require an incidental take permit. In addition, the NOI states that: "The purpose of this HCP" is to provide sufficient long-term conservation of listed species such that "plan participants" can be assured that no additional financial commitments or other restrictions will be required. It is not clear from the NOI whether entities other than the State are expected to be plan participants or how the incidental take permit and "no surprises" assurances will affect non-State entities with a stake in the Program. This is a critical issue since CALFED has indicated in other forums that the Bay-Delta Program (the subject of the proposed take permit) will be implemented by a broad array of federal, state, local and private entities.

We recommend that CALFED clarify its proposal in this regard, and how assurances would (or would not) affect non-State entities participating in implementation of the long-term solution.

## **7. A HCP for the CALFED Bay-Delta Program Must Contain Balanced Protections for Depleted Species.**

As indicated above, the NOI is particularly troubling in its focus on providing regulatory assurance to permit holders that once they comply with the proposed HCP for the Bay-Delta long-term solution, no further commitments of resources will be required regardless of species impacts. *Such assurances are appropriate only if the full recovery and long-term sustainability of the affected species are guaranteed.*

However, the NOI contains little or no indication of the type of commensurate assurances that will be provided to guarantee species recovery and long-term sustainability. Indeed, the failure of ecological guarantees in other HCPs has been the subject of considerable criticism of the HCP and NCCP processes. Habitat conservation planning to mitigate harmful human activities is inherently risky given the complexity of natural ecosystems. DOI's no surprises policy for the most part places the burden of the risk that HCP measures will not work on the depleted species. Moreover, there is generally little recourse if the plan fails to meet expectations in terms of species recovery or even if commitments under the HCP are not met.

At a minimum, the following elements must be included in a habitat conservation plan applicable to the long-term Bay-Delta Program. This list is preliminary and by no means intended to be exhaustive:

- (1) The HCP and ERPP must contain measurable performance standards for species recovery and long-term sustainability;
- (2) Full and sustained implementation and funding of the ERPP and HCP measures must be a continuing condition of any regulatory assurance under the "no surprises" policy. Thus, whenever funding drops and program implementation is limited or suspended, any take allowances and/or assurances under "no surprises" must be limited or suspended as well.
- (3) The burden of demonstrating that such standards are being met must be carried by the permit applicants prior to the issuance of any "no surprises" assurance.
- (4) Fast track legal remedies should be established for violations of commitments to implement and fund the ecosystem recovery and mitigation program.

## **8. Independent Scientific Oversight and Review is Critical to the Development of a Credible HCP.**

The debate over "good science" often has been rancorous in the Bay-Delta context. It is vital that the ecological protections underlying any incidental take permits associated with the long-term solution are credible. Thus, the analysis of potential impacts to species as well as

proposed mitigation and recovery measures should be subjected to independent scientific review, meaning experts unaffiliated with affected agencies and stakeholder interests.

In addition, a distinction must be made between appropriate scientific standards and conclusions on the one hand, and the unwarranted standard of "scientific certainty" on the other. Scientific conclusions are not flawed or invalid merely because they are not "certain," particularly in the public policy context. Independent scientific review of the analysis and conclusions of the HCP should be based on the best evidence that is available, which may be limited due to the severely depleted status of many of the relevant species. Data limitations should not be construed against providing species protections.

#### **9. Any HCP for the CALFED Program Should be Part and Parcel of the ERPP.**

There are two fundamental challenges facing CALFED with regard to ecosystem restoration: (1) how to structure an affirmative program that restores species populations, natural processes and habitats after decades of degradation and establishes a sustainable future for such resources; and (2) how to ensure that any new adverse impacts attributable to the Bay-Delta Program itself are fully mitigated.<sup>1</sup>

Boiled down, the purpose of habitat conservation planning under ESA is to address primarily this second category -- mitigation of impacts to endangered species associated with proposed actions. In our view, planning to mitigate potential adverse species impacts of the CALFED Bay-Delta Program should be part and parcel of the affirmative species and habitat recovery effort -- the ERPP. It is essential that planning for species restoration and recovery be conducted in a comprehensive and systematic manner. This means that the broad restoration plan must encompass anticipated adverse impacts on listed or jeopardized species associated with the CALFED Bay-Delta long-term solution. Put differently, any habitat conservation plan intended to serve as the basis for an incidental take permit for the long-term solution must be fully integrated with a sufficient ERPP in a single document. We would object to two parallel processes with different focuses -- one on affirmative restoration and the other on Program mitigation.

The NOI makes no reference to the ERPP or otherwise indicate how CALFED anticipates that it will integrate the mitigation focus of habitat conservation planning for ESA purposes with the affirmative recovery mission of the broader CALFED program. We recommend that CALFED re-scope the proposed HCP to clarify this critical issue.

#### **10. Recommendations**

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<sup>1</sup> This second category will be largely concerned with potentially adverse impacts associated with water supply facilities and operations, but CALFED will need to address as well impacts associated with the other three Program elements including the affirmative ecosystem restoration element.

In addition to the recommendations identified above, we make the following specific recommendations regarding the HCP options listed in the NOI:

(1) All three options assume a single HCP and incidental take permit covering the entire CALFED Bay-Delta long-term solution. Given the vastness of the long-term program (in terms of actions covered, number and types of species affected, the huge geographic region involved, etc.) a single HCP and take permit is inappropriate. To the extent that there are valid policy reasons for beginning the habitat conservation planning process at the same time as programmatic level environmental impact review for the entire Bay-Delta Program, such planning should be limited to the development of a "programmatic HCP" and should not include the issuance of any incidental take permits until the project specific phase when other permitting will take place.

(2) A "standard HCP" addressing "all reasonable and foreseeable activities and associated impacts" (option 1) is infeasible, unworkable and likely to undermine ecosystem recovery.

(3) Phasing of the incidental take permit, either through a "conditioned permit" or permit amendments still fails to address the concerns set forth above. The species and habitat impacts of even "known" actions (whatever those might be) are only going to be analyzed at a programmatic level and, as indicated above, it is inappropriate to attempt to provide assurances that limit future responsibility for species and habitat recovery at this phase.

(4) A potentially constructive way of addressing the need for early planning on Bay-Delta Program mitigation is to incorporate mitigation measures for anticipated species and habitat impacts into the ERPP. The draft assurances package should specifically address the mechanisms available for providing guarantees both to potential applicants for incidental take permits and to depleted natural systems and affected species. Such a package should analyze the viability of a series of incidental take permits on a variety of analytical bases; for example, by geographic zones, natural communities, individual species, etc.

## CONCLUSION

The essence of our concerns is captured by CALFED's informational material regarding the proposed incidental take permit and habitat conservation plan. To the rhetorical question "Why is an HCP needed for the CALFED Program?" CALFED responds that state agencies:

"could receive assurances from an HCP under the ESA and the Department of Interior's 'No Surprises Policy' that no additional mitigation will be required except under extraordinary circumstances."

While CALFED further states that an HCP "will allow for the development of a regional

conservation plan for listed and unlisted species," it is simply not the case that an incidental take permit process is required for such a plan to be developed; indeed the ERPP is supposed to be precisely this type of plan. Thus, the primary rationale for the HCP NOI at this time appears to be providing early assurances regarding the resources that will be required to restore depleted species. We urge the CALFED to reconsider the focus of this effort as outlined above.

Thank you for your consideration of our views. The Environmental Water Caucus looks forward to working with you further on this important matter.

Sincerely,

  
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