

## ESA Assurances and the Environmental Water Account

This paper describes the assurances that the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game (together, the Agencies) expect to provide in connection with implementation of an adequately structured environmental water account (EWA) to be managed by the Agencies. The assurances described here address only additional water for fishery needs beyond the water to meet the requirements in the baseline during Stage 1. They will be a component of the broader set of actions and assurances which will be part of the CALFED program.

The assurances are predicated on the creation and implementation of an adequate EWA, the goal of which is to provide the water which will establish a trajectory for the recovery of listed Delta fish in Stage 1. (Some of the actions to create the EWA will also enhance water supply reliability.) As discussed at the March 27 meeting, the EWA when fully implemented would require that an estimated average of 400,000 acre-feet (400 TAF) be provided annually; 300 TAF would be provided by March 1, 2001 for the 2000-2001 water year; 350 TAF would be provided one year later for the 2001-2002 water year; and the full amount of 400 TAF would be provided by March 1, 2003 for that year. The EWA also requires adequate conveyance capacity, and current year and carryover storage capacity. Amounts carried over will be added to the water developed in the following year(s). The size of the EWA has been determined based on the assumption that the baseline includes compliance with the 1995 Water Quality Control Plan, the prescribed actions in the winter-run and delta smelt biological opinions, Interior's b(2) decision, and the Trinity River flow decision. It is also assumed that the CALFED ecosystem restoration program (ERP) will be funded and implemented and that the upstream flow and habitat enhancements that are part of the ERP will be carried out.

Most significantly, the assurances are predicated on the availability of the initially prescribed amount of EWA assets (300 TAF) by March 1, 2001, and of the additional assets which will bring the EWA to the full targeted amount (400 TAF) within three years, i.e., by March 1, 2003.

**Background:** The first serious EWA discussions began immediately after the Agencies informally proposed a new "regulatory" alternative that described the ecological and flow conditions in the Delta they believe are necessary to provide a trajectory toward recovery of fish populations. The Agencies proposed a new set of standards for CVP and SWP operations in order to reach and maintain these conditions. Alternatively, the EWA was proposed as a more flexible and efficient means to the same end (fish recovery in the Delta) that avoided the adverse impacts to other water users resulting from a regulatory approach. After more than a year of modeling and analysis, the Agencies (and other CALFED agencies and stakeholders) have concluded that an EWA can succeed, and that an adequate EWA can be the effective basis of assurances under the Federal and State endangered species acts.

**Nature of Assurances:** EWA-based assurances focus on the operations of the SWP and CVP

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export facilities. Given an adequate EWA, the Agencies will provide assurances as described below to the project operators and indirectly to CVP and SWP water users through Stage 1:

1. *No additional regulatory constraints (to protect fish) on project operations beyond the baseline.* The Agencies will impose no new regulatory constraints beyond those in the baseline that result in reduced water deliveries. The Agencies will use the EWA assets, together with implementation of the ERP, to provide the additional level of protection necessary to achieve fish protection in the Delta and recovery of listed species. The EWA assets may be used directly to benefit fish or, if necessary, to address the impacts of using project water to benefit fish. The EWA is not meant to protect the projects against water costs associated with future regulations not related to fish protection, such as a new water quality standard that protects a consumptive beneficial use. Any water costs associated with new requirements to protect listed fish or fish covered in the Multi-species Conservation Strategy (MSCS) will not result in reduced deliveries, and instead will be addressed through the EWA.

The only exception to the prohibition on new regulatory constraints is in the extremely unlikely event of jeopardy to a listed species. (Jeopardy is extremely unlikely because of the benefits provided by the measures in the baseline and the additional tools provided by the EWA and ERP.) In the event of jeopardy, the Agencies may require the projects to take additional actions. Actions to avoid jeopardy will in the first instance use the assets in the EWA and other sources (e.g., ERP, (b)(2)). If these do not suffice, the Agencies and the projects will use all available means within their authority to address the problem without impacting water deliveries. ~~Only if all of these actions are not sufficient to avoid jeopardy~~ may any regulatory actions be taken which result in reduced deliveries, and any reductions in deliveries will be the minimum consistent with jeopardy avoidance.

2. *Project operations will not be regulated through incidental take levels.* While biological opinions will include incidental take statements, the Agencies will use EWA assets to reduce incidental take without additional water costs to the projects or water users. This assurance will apply to every listed Delta fish species (including listed salmonids) and to other fish species covered in the MSCS, should they be listed, during Stage 1.

The mechanism for providing these assurance will be considered and addressed separately.

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