

Delta Levees and Habitat Advisory Committee

April 23, 1999

Secretary Mary Nichols
Resources Agency
1416 Ninth Street
Sacramento, CA 95814

Subject: "Work Windows" for Work in the Waterways of the Delta

Dear Secretary Nichols:

Background:

Small projects in the Delta, including driving a few piles for repair of an existing structure or construction of a new dock, maintenance of riprap on levees, dredging for material to be used for levee maintenance, and other similar work, are generally carried out under Nationwide and General Permits issued by the U.S. Army Corps of Engineers. These permits are issued for a set number of years and are reviewed and reissued from time to time. Before permits are issued or implemented, the Corps must consult with National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) to determine what effect the permitted activities would have upon listed endangered species. This consultation occurs under the authority of Section 7 of the federal Endangered Species Act.

Large-scale projects to construct, install, maintain and repair Delta levees and other structures and facilities usually receive individual permits which are also reviewed by NMFS and FWS for effects on listed endangered species. These individual permits include conditions suggested by the oversight agencies to lessen possible impacts to endangered species and, where appropriate, to provide mitigation for loss of individuals or critical habitat.

Work Windows:

Permits issued by the Corps since late 1995 have included restrictions on the time of year when work can take place in the Delta waterways. The "work windows", based on the outcome of Section 7 consultation with FWS and NMFS, seek to protect migrating anadromous fish, return of anadromous smolts to the sea, and the spawning season of the Delta smelt which spawns in the freshwater Delta and migrates a short distance downstream to the brackish Suisun Marsh for the rest of its one year life cycle, as well as designated "critical habitat of delta smelt". The critical habitat includes the physical habitat (water and vegetation), the quality of the water, and the amount and timing of the water flows.

Four different zones were created in the Delta, with different work windows for each zone. Most of the Delta is in one zone where in-water work is allowed only between August 1 and November 30. This is a short construction period that does not allow sufficient time to accomplish all the necessary in-water work in the Delta. In addition, the short construction period is resulting in construction firms losing business, and thus equipment and trained staff, capable of carrying out the specialized Delta work.

Exceptions to the Work Windows:

There is a discretionary procedure which allows the federal fish and wildlife agencies to consider work outside the windows. This occurs when the Corps seeks consultation on a case by case basis for work to be performed outside the window. The concern of the Delta Levees and Habitat Advisory Committee is that this process is unpredictable. This uncertainty is also cause for concern for the CALFED program which proposes extensive work in the Delta including levee work, dredging, creation of shallow water habitat, and enhancement of water covered areas.

Delta engineering firms are reporting that they are unable to obtain timely or favorable consideration of requests for work outside the work windows, thereby precluding or shutting down all in-water work for eight months of the year. This is in spite of assurances during the original consultation with the federal fish and wildlife agencies that there would be potential for modifications taking advantage of real time data to be generated by a CALFED-associated monitoring program. At this time, real time monitoring is not being carried out on a year-round basis.

Delta engineering firms have been requesting variances--for work started within the window, but needing additional time to be completed; for small projects, such as replacing a couple of piles; completing habitat enhancement planting projects in bank areas; construction of new small projects; riprap maintenance projects; and others. These variances are not being approved. There are two problems: first, the federal fish and wildlife agencies are holding and not reviewing the applications in a timely manner, and second, the applications that are reviewed are being turned down with inadequate reasons for the denials. Because it is not clear why the applications are being denied, it is not possible to revise or develop mitigation which might allow work to proceed in an environmentally sensitive manner.

Recommended Action:

There are three problem areas: the timeliness of the applications for window modifications; the lack of specificity in the denial process; and the absence of opportunity or assistance in mitigating concerns that would allow in-water work to proceed in an environmentally sensitive manner.

Concerns over work in the Delta waterways are now heightened due to the publication in the federal register of the proposed critical habitat for Steelhead (February 5, 1999) which includes the Delta waterways. At a recent Delta Levees and Habitat Advisory Committee meeting this matter was discussed and I recommended briefing you and asking for your assistance in addressing these issues. The Committee seeks your assistance with the following:

- Clarification of the criteria being utilized to analyze a request for in-water work outside the designated windows.
- The identification of possible mitigation strategies that might be employed to obtain a clearance to work outside the designated windows.
- Limitation of the role "real-time monitoring" will play in the decision-making process because information is not current, nor site specific.
- A commitment that applications for work outside the windows will be reviewed and processed in a timely manner, for example, 10 working days.

Because staff of three State agencies regularly participate in the Delta Levees and Habitat Advisory Committee (Department of Fish and Game, Department of Water Resources, and Delta Protection Commission) I suggested this policy matter be referred to you for your review and consideration. This letter reflects only the discussion and concerns raised by the members of the Committee and has not been reviewed by upper management or the Directors of any of the participating agencies. The letter has been sent only to you. Members of the Delta Levees and Habitat Advisory Committee would be pleased to meet with you to discuss the issues outlined in this memo. Please feel free to call for additional information.

Sincerely,



Margit Aramburu
Executive Director, Delta Protection Commission