



United States Department of the Interior



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Tiffany Vanosdall
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US Army Corps of Engineers
1616 Capitol Ave
Omaha, NE 68102

Dear Ms. Vanosdall:

This letter responds to a question raised by the Corps of Engineers (Corps) during an April 11, 2012 conference call with U.S. Fish and Wildlife Service (Service) Montana Field Office Ecological Services staff regarding Intake Diversion Dam project Endangered Species Act (ESA) section 7 consultation. Specifically, the Corps inquired whether ongoing design and subsequent construction of Intake Diversion Dam project features require further ESA section 7 consultation, given that the Intake project constitutes a Reasonable and Prudent Alternative (RPA) as discussed below. This response is authorized under the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), and the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

Via an October 2009 letter, the Service formally revised portions of the RPA in the Service's 2003 amended Missouri River Biological Opinion to the Corps. A new RPA element at Intake Dam and the irrigation headworks was substituted for one originally identified to be taken at Fort Peck Dam. It was determined that providing passage and reducing entrainment on the Yellowstone River would contribute more to the recovery of pallid sturgeon than flow changes from Fort Peck Dam, and that this RPA substitution would contribute to avoiding the likelihood of jeopardy. Pallid sturgeon passage and entrainment protection at Intake are therefore now Corps requirements under the 2009 revised RPA for the 2003 amended Biological Opinion.

The 2010 overall Bureau of Reclamation (Reclamation) and Corps Intake Diversion Dam project proposal included construction of a new irrigation water intake/headworks containing fish screens, a replacement concrete diversion dam, and a rock-lined ramp around/over the diversion dam to provide fish passage. In April 2010, the Service concurred with the effects determination in Reclamation's and the Corps' *Biological Assessment (BA) for Construction Activities Associated with the Intake Diversion Dam Modification, Lower Yellowstone Project*. The 2010 BA determined that construction of the new headworks and fish screens, a rock-lined fish passage ramp, and a replacement concrete dam was not likely to adversely affect (NLAA) listed species. No incidental take was anticipated. Also in 2010, Reclamation and the Corps completed an environmental assessment (EA) and approved a finding of no significant impact (FONSI) to complete the National Environmental Policy Act (NEPA) compliance process for project construction.

Subsequent to FONSI approval, Reclamation and the Corps determined that additional alternatives to the originally proposed rock ramp passage structure required consideration due to: 1) significant increases in estimated construction costs; and 2) increased concerns regarding potential ice damage to the ramp. An amended EA is currently being prepared by Reclamation and the Corps to analyze and disclose potential effects associated with additional fish passage alternatives. The final amended EA process is tentatively scheduled for completion by April 15, 2013.

Construction of the new headworks and fish screen portions of the Intake project were completed in spring 2012. In March 2012, the Service concurred with Reclamation's NLAA effects determinations in the *Biological Assessment, Lower Yellowstone Irrigation Project, Intake Headworks and Fish Screens Operations and Maintenance*. The 2012 BA pertains to the interim operations and maintenance (O&M) period starting when the new headworks and fish screens are constructed and ending when a fish passage design alternative that provides passage around or over Intake Diversion Dam is constructed and operational.

The Service's Final ESA section 7 Consultation Handbook (Handbook) of March 1998 represents Service policy that steps down legislative and regulatory mandates into pragmatic guidance for use by all Service personnel involved in section 7 consultations. The handbook states on page 4-41 that:

If adopted by the action agency, the reasonable and prudent alternatives do not undergo subsequent consultation to meet the requirements of section 7(a)(2). The action agency's acceptance in writing of the Service's reasonable and prudent alternative concludes the consultation process.

The Corps accepted the Intake project, including fish passage and entrainment minimization (fish screen) components, as an RPA. We therefore consider section 7 consultation pertaining to project design and construction to be concluded, subject to the following discussion regarding incidental take. Anticipated incidental take associated with Intake project construction was not specifically addressed in the 2003 amended Missouri River Biological Opinion or the 2009 Service letter that substituted the RPA element at Intake Dam and its irrigation headworks for that originally identified to be taken at Fort Peck Dam. However, based on the analysis and environmental commitments identified in the 2010 Intake project construction BA, EA, and FONSI, such take was not anticipated.

Provided new information does not emerge during the amended EA analysis indicating that take may occur, and conservation measures and environmental commitments identified in the 2010 BA, EA, and FONSI will remain in place or undergo revision with Service approval, we do not currently anticipate incidental take in conjunction with project construction. Further, per our March 2012 correspondence with Reclamation regarding the 2012 BA, it is our understanding that analysis of fish passage alternatives will continue and means for providing such passage will be proposed and implemented in a timely manner. Implementation of pallid sturgeon passage at Intake Dam is an integral component of the revised RPA for the 2003 amended Biological Opinion and Corps ESA compliance. The Service and our state fish and wildlife management agency partners consider passage at Intake essential for Pallid sturgeon recovery in the upper Missouri River.

This concludes consultation on the proposed design and construction action at Intake Dam pursuant to regulations in 50 CFR 402.13 implementing the Endangered Species Act of 1973, as amended. This action should be re-analyzed if new information reveals effects that may affect threatened, endangered or

proposed species, if the project is modified in a manner that causes an effect not considered in the consultation, if the conservation measures stated in the 2010 BA or environmental commitments applicable to this action stated in the 2010 EA and FONSI will not be implemented (or are revised without Service approval), or if the Intake project post-construction success criteria attached to the October 2009 Service RPA substitution letter are not met.

The Service will continue its ongoing participation with the Intake project at all levels, including the amended EA process. The Service will also continue section 7 consultation with Reclamation on the long term "post-fish passage implementation" operational impacts of the overall Intake / Lower Yellowstone Irrigation Project, as well as coordination regarding post-construction monitoring plans. Please contact Jeff Berglund in this office at (406) 449-5225, ext. 206 if additional information is needed.

Sincerely,



R. Mark Wilson
Field Supervisor

cc: USFWS, Billings, MT (Attn: George Jordan),
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