

COMMENT LETTER

RESPONSES

- 31 (3.16-24)
- similar to above, status of recovery actions for the Yuma clapper rail should reflect any changes since 1994;

31: The analysis includes an update for the Yuma clapper rail.

- 32 (3.8-17)
- the yellow billed cuckoo has been petitioned for listing under the ESA and the FWS has published a 90 day finding that listing may be warranted.

32: This information on the yellow-billed cuckoo is included.

Cumulative Impacts

- 33
- The DEIS states that current circumstances and expected future actions have been "included in system modeling" and thus cumulative impacts have been "incorporated into modeling." (4-1.) Impacts from actions such as the California 4.4 Plan (canal linings, intrastate transfers, groundwater banking, etc.), interstate transfers through off-stream banking, the uses of surplus water and day-to-day operations and maintenance activities along the lower Colorado River are not included in the modeling. Environmental variables – fish and wildlife, endangered species, native vegetation – are not included in the modeling and must be described in the cumulative impacts section of the DEIS.

33: As discussed in the EIS, the potential effects on system conditions (including reservoir elevations and river flows) were determined by modeling potential future conditions under baseline conditions and each of the alternatives. To the extent possible, expected future actions that would affect system conditions were included in system conditions modeling, and the impacts of these actions are therefore accounted for in the resource analyses in Chapter 3 of the EIS. In addition, implementation of the LCRMSCP is expected to prevent adverse cumulative effects to the biological resources of the lower Colorado River. The LCRMSCP is being developed to mitigate the adverse effects on resources from current and future water diversions and power production with the cooperation of federal, state, Tribal and other public and private stakeholders. The LCRMSCP will include the creation and enhancement of habitat and augmentation of native fish species populations from Lake Mead to the SIB. The LCRMSCP is evaluating the appropriate amount of acreage for restoration. Currently, acreage estimates range from a low of 3,000 acres to a high of 80,000 acres of riparian woodland, marsh, open water and mesquite habitat.

- 34
- Cumulative impact is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions . . ." 40 C.F.R. § 1508.7. See also Considering Cumulative Effects Under the National Environmental Policy Act (CEQ 1997). Reclamation has found that current operations along the LCR may affect the endangered totoaba, citing the lack of freshwater flows to the delta as a factor. See Description and Assessment of the Operations, Maintenance and Sensitive Species of the Lower Colorado River (Reclamation 1996). Offstream banking, as well as the interim criteria, will reduce the amount of and probability of freshwater flows to the delta. See Biological Assessment for Proposed Rule for Offstream Storage of Colorado River Water and Delivery of Intentionally Created Unused Apportionment in the Lower Division States (Reclamation 1998) at Table IV-3. There is no attempt to accumulate these environmental effects in the DEIS. Environmental values are not factors in Reclamation's hydrological models, thus this lack of cumulative impacts analysis is pervasive in the DEIS.

Section 4.2 has been modified and Reclamation believes that it has appropriately addressed potential cumulative effects of the proposed action.

34: See response to Comment 10-9.

- 35
- Mitigation*
- The direct, indirect and cumulative impacts to sensitive species, to native habitat, to water quality, and to the Lower Colorado River ecosystem as a whole is significant. According to CEQ guidance, a proposed action with significant effects must consider all of its effects on the environment, whether or not significant, and mitigation measures covering the range of impacts must be developed. See 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.14. Furthermore, all relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would

35: No significant impacts have been identified that require specific mitigation. However, Section 3.17 has been added to the FEIS to discuss environmental commitments that Reclamation would undertake upon adoption of interim surplus criteria through the Secretary's Record of Decision.

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not be committed as part of the RODs of these agencies. 40 C.F.R. §§ 1502.16(h), 1505.2(c). There is no discussion of mitigation in the Draft EIS; mitigation measures must be included in the Final EIS.

Compliance with the Endangered Species Act

36

The scope of the ESA Section 7 consultation on the Interim Surplus Criteria is of enormous importance yet contains several flaws. First, section 5.3.3 must be amended to read that the action area "will be within the 100-year floodplain and Lakes Mead, Mohave and Havasu to full pool elevations of the Colorado River *and downstream to the Gulf of California*" (5-2) (emphasized text added). In this DEIS Reclamation identifies the potential for impacts to the vaquita, totoaba, southwestern willow flycatcher and Yuma clapper rail from the decrease in frequency and amount of freshwater flows to the delta. Therefore, in an ESA consultation where the 'action area' includes "all areas to be affected directly or indirectly by the Federal action and not merely in the immediate area involved in the action." 50 C.F.R. § 402.02 (emphasis added), and the Colorado River delta is clearly affected by the proposed action, the scope of analysis must include the reach of the river and its floodplain downstream to the Gulf.

37

In addition, section 5.3.3 on ESA compliance refers *only* to the U.S. Fish and Wildlife Service in caption and text, implying that the National Marine Fisheries Service, the agency with jurisdiction over the vaquita and totoaba, have not been contacted regarding this consultation. Communications with NMFS confirm this. See Letter from Rodney R. McInnis, Acting Regional Administrator, NMFS to David Hogan, Center for Biological Diversity, of July 13, 2000 ("the Bureau of Reclamation has not contacted NMFS regarding informal or formal ESA consultation on the Department of Interior's Colorado River Interim Surplus Criteria") (Attached). This is in violation of the ESA and contrary to a memo indicated that this consultation has occurred and should continue. See Memorandum from John Lesly, Solicitor to Eluid Martinez, Commissioner, of August 14, 2000. We hope that the August 14 memo is more indicative of the consultation that is occurring on the proposed action and that consultation with both FWS and NMFS continues.

38

In conclusion, section 3.16.6.1, POTENTIAL EFFECTS TO HABITAT IN MEXICO, is an argument against, rather than for, the implementation of surplus criteria. The second and fourth full paragraphs at 3.16-13 claim that "the potential magnitude of these excess flows is not affected by interim surplus criteria" because "all alternatives plus baseline indicate a decrease in frequency of flood control releases and flow amounts." However, two paragraphs later the analysis concludes "[s]pecial status species that utilize the riparian habitat along the Mexican reach of the Colorado River could be affected by the decrease in frequency of flood control releases and amounts of flow past Morelos Dam." Since declaration of a surplus is discretionary with the Secretary, he must ensure that the adverse impacts to endangered species from any type of surplus declaration are avoided. When read in conjunction with graphs showing the higher probabilities under the baseline and flood control alternative, this also suggests that the environmental harms of the other alternatives are significant and outweigh the benefits of any

36: The action area extends to the Sea of Cortez. Reclamation is consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for the delta area of Mexico and effects of the interim surplus criteria on species that occur in both the U. S. and Mexico or only in Mexico are discussed in Section 3.16, Transboundary Impacts.

37: Reclamation is informally consulting with NMFS, as described in Section 5.3.5 of the FEIS. Reclamation's assessment of effects on the vaquita and totoaba in Mexico is also included in Section 3.16.6 of the FEIS. The August 14 memo is included in Attachment S.

38: As indicated by response to Comment 11-36 above, the analysis of effects to special status species in Section 3.16 has been revised. Reclamation has concluded that implementation of interim surplus criteria may affect, but is unlikely to adversely, some species and is consulting with the U.S. Fish and Wildlife Service and NMFS, as required by Section 7 of the ESA.