

Remand Stakeholder Engagement Process

Remanded Biological Opinions on the Coordinated, Long-Term Operation of the Central Valley Project and State Water Project

Bay-Delta Office
Mid-Pacific Region, Bureau of Reclamation
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Introduction

The Bureau of Reclamation began formal consultation in 2008 with the U.S. Fish and Wildlife Service (Service) and the National Marine Fisheries Service (NMFS) on the coordinated, long-term operation of the Central Valley Project (CVP) and the State Water Project (SWP) pursuant to Section 7 of the Endangered Species Act (ESA). The biological opinions (BOs) issued by the Service and NMFS (collectively, the Services) were remanded by the U.S. District Court for the Eastern District of California and both agencies were ordered to issue new BOs. In addition, Reclamation was ordered by the court to comply with the National Environmental Policy Act (NEPA) prior to accepting and implementing the action described in the new BOs to be issued by the Services. Because the BOs will address the operation of the SWP, it is expected that the remand process will support development of a Consistency Determination under the California ESA for the operation of the SWP in coordination with the CVP.

Reclamation has determined that the California Department of Water Resources (DWR) qualifies as an “applicant” within the meaning of Section 7 of the ESA. Accordingly, Reclamation will work in partnership with DWR to successfully complete the remand process. DWR will also be a cooperating agency in the NEPA process.

In addition to working closely with and seeking information from DWR throughout the remand and NEPA processes, Reclamation will also undertake the Remand Stakeholder Engagement (RSE) process described in this paper. DWR, as the applicant, will participate in the RSE process.

The impetus for the RSE process was the discussions held in the fall of 2011 between certain parties in the *Consolidated Salmonid Cases* and *Consolidated Delta Smelt Cases*. These discussions attempted to reach a stipulated agreement regarding a schedule and process for the participation of non-Federal parties in the remand and NEPA processes. While an agreement was not reached, the commitments made by Reclamation during those discussions, which are within its purview, will be voluntarily effected through the RSE process.

Reclamation, Service, and NMFS must meet the deadlines ordered by the court.¹ Accordingly, there will be limits on the time available for the RSE process. Furthermore, final decisions regarding the environmental impact statement (EIS), the content of information to be submitted by Reclamation to supplement its 2008 biological assessment and the additional information which it provided to the Service in 2011 (collectively, the 2008 supplemented BA), the action to be consulted upon, and the acceptance of reasonable and prudent alternatives (RPAs), if any, proposed by the Services in their new BOs are legally committed to Reclamation's discretion and necessarily rest with it.

General Approach to the Remand and NEPA Processes

As required by the court's order, an EIS will be completed by December 2013. The preferred alternative identified in the final EIS will be the action consulted upon in the remand. Given that the court has ordered the Service's new BO to be completed more than two years before the deadline for the NMFS's new BO, the EIS will have to proceed concurrently with the remand of the Service BO.

If the NMFS's final BO, which is not due for more than another two years, calls for an RPA which differs significantly from the preferred alternative selected in the 2013 EIS and the accompanying Record of Decision (ROD), then the 2013 EIS may have to be supplemented or otherwise revised before Reclamation can proceed with the implementation of the action (or RPA) which is the subject of NMFS's final BO.

Reclamation and DWR anticipate providing information to the Services which updates the 2008 supplemented BA. This information may be presented as a supplement to the 2008 supplemented BA, an entirely new BA, or in some other format. A decision in this regard will be made at a later date.

In order to coordinate the remand of the Service BO with the NEPA process, Reclamation will provide updated information to the Service by July 2013. NMFS has stated that to meet the court deadline of October 2014 for a draft of its new BO, Reclamation must provide supplemental information by August 2013, with minimal changes to the action to be consulted upon as compared to the 2008 project description and RPA in the 2009 BO. If more than minimal changes are proposed, then NMFS may require that updated information be provided before August 2013.

The action to be consulted upon in the remand, whether consisting of the RPAs in the remanded BOs or revisions to them, will address all Federally-listed species that could be affected. The action will consist of the coordinated, long-term operation of the CVP and SWP, and structural modifications to project facilities. Collectively, these were referred to as the "project description" in the 2008 supplemented BA. The action may also include measures, such as habitat restoration, to minimize or offset the adverse effects of the coordinated, long-term

¹ December 2013 for the Service Final BO, Reclamation decision on that BO and any RPA, and completed NEPA review. October 2014 for the NMFS draft BO; and February 2016 for the final BO, Reclamation decision on that BO and any RPA, and EIS, with the ROD due by April 2016.

operation of the CVP and SWP on listed species if Reclamation judges such to be necessary in order to meet the requirements of Section 7 of the ESA.

Overview of the RSE Process

Typically, Section 7 consultations between an “action agency” such as Reclamation and one or both Services involve only the Federal agencies; an applicant if there is one; and one or more non-Federal representatives if the action agency, under its discretion, designates any. However, for the remand, the RSE process will provide non-Federal parties an opportunity to engage with Reclamation and DWR, as well as with each other, for the purpose of understanding key issues and perspectives and providing and evaluating information to inform Reclamation’s decision making.

Reclamation recognizes that there are many entities in addition to DWR which have an interest in the remand process even though they do not qualify as applicants under Section 7. Accordingly, Reclamation will invite water agencies which are representative of the range of CVP and SWP contractors and non-governmental entities which are representative of commercial fishing and environmental organizations interested in the Bay-Delta (collectively, invited stakeholders) to participate in structured, facilitated discussions and exchanges of information regarding certain aspects of the remand and NEPA processes, as detailed below. In light of their interests and responsibilities, Reclamation will also invite the California Department of Fish and Game (DFG), Service, and NMFS (collectively, the resource agencies) to participate in its discussions with invited stakeholders, particularly regarding core scientific issues.

While the RSE process will focus on receiving information and input from the invited stakeholders, Reclamation may also invite input from other interested parties on matters germane to the coordinated, long-term operation of the CVP and SWP. This will be done on an ad hoc basis as time permits.

With regard to invited stakeholders, Reclamation has also designated, or will offer to designate, each invited water agency as a non-Federal representative pursuant to 50 CFR 402.08. This is being done in recognition of “the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species” (sec. 2(c)(2) of the ESA) and their role as governmental entities which have a unique, and contractually defined, relationship with Reclamation and/or DWR. For the remand, Reclamation will be responsible for updating the 2008 supplemented BA.

Facilitated Engagement with the Invited Stakeholders

Reclamation is committed to an RSE process that is objective, balanced, open, understandable, and appropriately transparent, that contributes to the development of required information, and that assists in informing Reclamation’s decision making and, potentially, that of the resource agencies. Through structured, professionally facilitated processes, all invited stakeholders will be afforded the opportunity to provide input to, and to engage with, Reclamation and DWR, as will the resource agencies if they choose to participate in the RSE process. This will be done

through requests for information from the invited stakeholders and through discussions and exchanges with Reclamation and DWR about the information provided to it and about the conduct and status of the remand and NEPA processes.

The invited stakeholders will not constitute a Federal advisory committee tasked with providing advice to Reclamation. Rather, the invited stakeholders will provide individual input to Reclamation and DWR. Reclamation will consider points of agreement as well as disagreement among invited stakeholders, but will not seek a consensus.

Furthermore, the RSE process is not intended to be a single “meeting table” or discussion forum, but rather a flexible process that uses a combination of formats. Thus, Reclamation may meet with DWR and invited stakeholders individually, in different combinations, and collectively, and will invite the resource agencies to participate as appropriate. Meetings likely will be a combination of face-to-face gatherings, web-based events, and conference calls. They will be conducted in formats most conducive to the purpose to be served (e.g., general discussion meetings, technical workshops, panel presentations, information only meetings, etc.) and in compliance with all applicable Federal and state laws regarding open meetings. All meetings will be subject to guidelines. All RSE process representatives will be expected to honor these guidelines as a condition of their participation.

The RSE process will engage invited stakeholders at both the management and technical levels. Some interactions will be heavily oriented to information and data exchange and scientific issues and will, therefore, involve an invited stakeholder’s technical staff and consultants. Other interactions will be focused on parties’ key interests and questions regarding the conduct of the remand and NEPA processes and will, therefore, involve management-level participation.

Throughout the RSE process, Reclamation will hold regularly scheduled meetings with management-level representatives of the invited stakeholders (singly, in various combinations, or collectively) to discuss the conduct and progress of the remand and NEPA processes and to address major issues. Meetings with technical staff and consultants will be scheduled on an ad hoc basis to address scientific and technical tasks and issues. The resource agencies will be invited to participate.

Reclamation will keep a running list of meetings which it holds as part of the RSE process with subsets of DWR and the invited stakeholders. Brief summaries of such meetings indicating the participants and their affiliations, the meeting date, and the general topics discussed will be made available to all participants in the RSE process as well as via a link on Reclamation’s public website. Written information (either paper or in electronic format) prepared and provided by Reclamation, or received by Reclamation from DWR, invited stakeholders, and the resource agencies, in the course of the RSE process will also be made available to all participants and via Reclamation’s public website.

Invited Stakeholder Input to Reclamation in the Remand Process

To the extent permitted by the court ordered schedules, the RSE process will afford the invited stakeholders the opportunity to provide input to Reclamation at the following junctures in the remand process, with the resource agencies also being invited to participate as appropriate:

- The invited stakeholders, as well as DWR as the applicant, will be afforded the opportunity to provide new information and analyses to Reclamation, to include new data and scientific studies on the effects of project operations and other factors on the listed species, and on the status of the listed species and of their designated critical habitats. A science review process will be organized and supported by Reclamation for this purpose and for the purpose of gathering input from DWR and the invited stakeholders on a defined set of core scientific issues. The design of this science review process, and the identification of core scientific issues, will be among the first items on which Reclamation will seek input. A separate paper describing this science review process will be developed by Reclamation.
- Before supplemental information (in whatever format) is formally submitted by Reclamation to Service and/or NMFS, Reclamation and DWR will provide the invited stakeholders with the opportunity to review and comment on it.
- Reclamation and DWR will seek input from the invited stakeholders regarding the description of the action to be addressed in the remand process.
- Reclamation and DWR will regularly update the invited stakeholders on the discussions and communications it is having with the Services, including questions or requests for information received by Reclamation from the Services.
- When draft BOs are received from the Services, Reclamation and DWR will provide them to the invited stakeholders for their review and comment, subject to such schedules as the Services may require. Reclamation will consider any comments it receives when formulating its responses to the draft BOs.
- If it appears that the BOs will be jeopardy opinion(s), DWR, as the applicant, and the invited stakeholders will be afforded the opportunity to provide input to Reclamation on the development of a BO's RPA and on suggested alternatives to a proposed RPA. Such input will be considered by Reclamation in formulating its responses to the Service and NMFS.

Invited Stakeholder Input to Reclamation in the NEPA Process

In addition to what is required by the NEPA regulations (i.e., public scoping meetings, a scoping report, and public review of a draft EIS), the RSE process will provide the invited stakeholders the opportunity to provide input to Reclamation at the following junctures in the NEPA process to the extent the court ordered schedules permits, with the resource agencies being invited to participate as appropriate:

- Reclamation has invited DWR, DFG, water agencies (invited stakeholders and otherwise), and other governmental entities, as appropriate, to become cooperating agencies for the EIS.

- The cooperating agencies will be able to provide input during the development of the EIS as provided by the NEPA regulations. In addition, invited stakeholders who are not cooperating agencies will, as part of the RSE process, be afforded the opportunity to provide input. Consistent with the requirements and limitations of the NEPA regulations, input from invited stakeholders (both those who are cooperating agencies and those who are not) will be sought with regard to the development of alternatives, the development of information on the affected environment, and the analysis of the impacts of the proposed action, the no action alternative, and other alternatives.
- As provided by the NEPA regulations, the cooperating agencies will be allowed to review and comment on the administrative draft of the EIS. In addition, invited stakeholders who are not cooperating agencies will, as part of the RSE process, be afforded the opportunity to review and comment on the administrative draft EIS.
- In addition to providing the draft EIS for public review and holding public meetings to take comment on it, Reclamation will meet with the invited stakeholders to discuss their comments if requested to do so and if time permits.

Reclamation’s Management of the Remand, NEPA, and RSE Processes

The Mid-Pacific Region’s Bay-Delta Office has the lead responsibility for the remand and NEPA processes, and for the RSE process. This office will be assisted by other offices in the Mid-Pacific Region. In addition, Reclamation has already procured, and/or will be procuring, the services of consulting firms to assist in the preparation of the EIS and of the supplemental information for the remands.

As it committed it would do, Reclamation has retained Bill McDonald (Staff Tech, Inc.), the recently retired Regional Director of Reclamation’s Pacific Northwest Region, who is experienced in managing complex NEPA processes and Section 7 ESA consultations. He will assist Reclamation with the integration of the remand and NEPA processes and with the RSE process, to include interfacing regularly with DWR, the invited stakeholders, and the resource agencies.

Reclamation has also obtained an experienced professional facilitator, J. Michael Harty (Kearns & West), to assist with RSE process design and implementation. His team’s responsibilities will include developing meeting or discussion formats and ground rules for participation, facilitating meetings and workshops, promoting constructive communication and the sharing of information, and tracking action items that result from meetings, workshops, or discussions.

Messrs. Harty and McDonald will work together closely in effecting the RSE process under the direction of the Bay-Delta Office.