

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service**

RIN 0648-XE30

Notice of Intent to Conduct Public Scoping and Prepare an Environmental Impact Report/Environmental Impact Statement (EIR/EIS) Regarding the Bay Delta Conservation Plan (BDCP) for the Sacramento-San Joaquin Delta, California

AGENCIES: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce; Fish and Wildlife Service (FWS), Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), and the California Environmental Policy Act (CEQA) we, NMFS and FWS (Services), advise the public of our intent to collaborate with the State of California in gathering information necessary to prepare a joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on the anticipated Bay Delta Conservation Plan (BDCP). The BDCP is being prepared through a unique collaboration of state, Federal and local agencies, of the Federal Endangered Species Act of 1973, as amended (Act). The California Department of Water Resources (DWR) intends to apply for Incidental Take Permits (ITP) from the Services based upon the BDCP in 2009 according to the planning schedule. At the same time, the Services would provide Biological Opinions and Incidental Take Statements (ITS) to the Bureau of Reclamation (Reclamation) for their participation and implementation of the BDCP. A goal of the BDCP is to meet the requirements of the California Natural Community Conservation Planning Act (NCCPA), California Fish and Game (CDFG), and provide the basis for DWR to apply for an ITP pursuant to CDFG Code. However, in the event that the BDCP does not meet the requirements of the NCCPA, DWR may alternatively seek an ITP under Section 2081 of the California Endangered Species Act, California Fish and Game Code 2050 *et seq.* These incidental take authorizations would allow the incidental take of threatened and endangered species resulting from certain covered activities that will be identified through the planning process, including those associated with water

operations of the California State Water Project, as operated by DWR, and the Central Valley Project, as operated by Reclamation.

ADDRESSES: Comments and requests for information related to the preparation of the EIR/EIS should be sent to National Marine Fisheries Service, Attn: Rosalie del Rosario, 650 Capitol Mall, Suite 8-300, Sacramento, California 95819; or Fish and Wildlife Service, Attn: Lori Rinek, Chief, Conservation Planning and Recovery Division, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, California 95825. Comments may also be submitted electronically to *BDCP-NEPA.SWR@noaa.gov*. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Rosalie del Rosario of NMFS at 916-930-3600 or Lori Rinek of FWS at 916-414-6600.

SUPPLEMENTARY INFORMATION:**Proposed Action**

The California Department of Water Resources (DWR) intends to apply for Incidental Take Permits (ITP) from the Services based upon the BDCP in 2009 according to the planning schedule. Other applicants, co-applicants, or beneficiaries of an ITP, referred to as Potentially Regulated Entities, will be identified during this planning process. At the same time, the Services would issue Biological Opinions and Incidental Take Statements (ITS) to Reclamation for its participation and implementation of the BDCP. These Incidental Take Statements would allow for the incidental take of threatened and endangered species resulting from certain covered activities that will be identified through the planning process and are associated with water operations of the California State Water Project, as operated by DWR, and the Central Valley Project, as operated by Reclamation.

The Services provide this notice to (1) briefly describe the anticipated proposed action and the BDCP planning activities now underway to help develop that proposed action; (2) advise other Federal and State agencies, affected Tribes, and the public of our intention to continue to gather information to support the preparation of an EIR/EIS; (3) announce the initiation of early public scoping; and (4) obtain suggestions and information on the scope of issues to be included in the EIR/EIS. Written comments should be received on or before March 24, 2008.

The applicants have identified four potential water conveyance options that are being considered for the habitat conservation planning process: (1) the existing conveyance and system without physical change to conveyance facilities, (2) changes to conveyance in San Joaquin Old and Middle River channels plus separation of San Joaquin corridor from through-delta conveyance, (3) a dual conveyance in which existing conveyance would still be operational plus an isolated facility (not yet constructed) from the Sacramento River to the south Delta, and (4) an isolated conveyance facility (not yet constructed) from the Sacramento River to the south Delta. These four options are undergoing evaluations through the BDCP Steering Committee to assess the relative ability of each to contribute to the goals and objectives of the planning effort. Although the applicant has not yet decided which option(s) will be submitted for consideration under section 10 of the Endangered Species Act, the intent is to narrow the project focus to one or two of the four options or a mixture thereof by fall 2007.

Additional to the conveyance elements of the State Water Project (SWP) and Central Valley Project (CVP) options given above, covered activities may include, but are not necessarily limited to, existing or new activities related to:

1. Operational activities, including emergency preparedness, of the SWP and CVP
2. Operational activities related to water transfers involving Water Contractors or to serve environmental programs
3. Maintenance of the SWP, CVP and other Potentially Regulated Entities' facilities
4. Facility improvements of the SWP and CVP
5. Ongoing operation of and recurrent and future projects related to other Delta Water Users
6. Projects designed to improve salinity conditions
7. Conservation measures included in the BDCP, including, but not limited to adaptive habitat management, restoration, enhancement and monitoring activities.

Please refer to the Planning Agreement, para. 7.5, available at <http://resources.ca.gov/bdcp/>. The BDCP Planning Agreement was reached in October 2006 and was amended April 2007, to guide the BDCP process.

Planning Process
DWR and Reclamation, along with the Metropolitan Water District of Southern California, Kern County Water Agency, Santa Clara Valley Water District, Zone

7 Water Agency, San Luis & Delta-Mendota Water Authority, Westlands Water District, Contra Costa Water District, and Mirant Delta (known collectively as the "Potentially Regulated Entities" or PREs) are preparing the BDCP for their covered activities within the Geographic Scope described below. It is the goal of the PREs that the BDCP will (1) satisfy the requirements of Section 10(a)(1)(B) of the Act for non-Federal PREs and result in the issuance of ITPs from the Services to certain of the PREs, (2) be used in a concurrent consultation with other Federal agencies pursuant to Section 7 of the Act, resulting in the issuance of Biological Opinions, including ITSs, from the Services to certain of the PREs, (3) satisfy the requirements for an ITP under the California fish and wildlife protection laws, either pursuant to the Natural Community Conservation Plan Act (NCCPA), Section 2835 of the Fish and Game Code or Section 2081 of the Fish and Game Code.

The planning efforts for the BDCP are in its preliminary stages. Formal preparation of a draft EIR/EIS will commence when the planning efforts described below progress further in the coming months. The BDCP is being prepared with the cooperation of the Services, the California Resources Agency, CDFG, the California Bay Delta Authority, the PRE's as listed above, and key Non-Government Organizations including The Nature Conservancy, Environmental Defense, Defenders of Wildlife, Natural Heritage Institute, The Bay Institute, American Rivers, and the California Farm Bureau Federation. All of these agencies and organizations are members of a Steering Committee that will guide the preparation of the BDCP. The Services are participating in the Steering Committee's efforts on an ex officio basis, providing technical input and guidance in support of the Steering Committee's efforts. The participants are undertaking these planning efforts pursuant to the Planning Agreement.

A document from the BDCP Steering Committee titled "The Bay Delta Conservation Plan: Points of Agreement for Continuing into the Planning Process," dated November 16, 2007, provides a summary of the planning process to date along with future direction and procedures. Through this document, the Steering Committee points to agreement on an approach to be evaluated for achieving the conservation and water supply goals. The primary new structural features of the water conveyance system to be evaluated are a new diversion point (or points) for water from the Sacramento River in the north Delta and an isolated

water conveyance facility around the Delta. Modifications to existing south Delta facilities to reduce entrainment and otherwise improve the State Water Project's (SWP) and Central Valley Project's (CVP) ability to convey water through the Delta while contributing to near- and long-term conservation and water supply goals will also be evaluated.

Members of the public interested in participating in the BDCP process directly or interested in having access to information associated with the effort are encouraged to visit the Bay Delta Conservation Plan component of the California Resources Agency's website: <http://resources.ca.gov/bdcp/>. This website provides open access to comprehensive documentation of the planning process, and a detailed schedule of past and future planning activities. The following describes preliminary information identified by the Steering Committee for consideration in the BDCP development.

Geographic Scope

The planning area for the BDCP will consist of the aquatic ecosystems and natural communities, and potentially adjacent riparian and floodplain natural communities, within the Statutory Delta (California Water Code Section 12220), which includes parts of Yolo, Solano, Contra Costa, San Joaquin, and Sacramento Counties. However, it may be necessary for the BDCP to include conservation actions outside the Statutory Delta that advance the goals and objectives of the BDCP, including as appropriate, conservation actions in the Suisun Marsh, Suisun Bay, and areas upstream of the Delta. Any conservation actions taken outside the Statutory Delta would be implemented pursuant to cooperative agreements or similar mechanisms with local agencies, interested non-governmental organizations, landowners, and others. See Planning Agreement, para. 5.

Covered Species

Species that are intended to be the initial focus of the BDCP include aquatic species such as: Central Valley steelhead (*Oncorhynchus mykiss*), Central Valley Chinook salmon (*Oncorhynchus tshawytscha*) (spring run and fall/late-fall runs), Sacramento River Chinook salmon (winter run), Delta smelt (*Hypomesus transpacificus*), green sturgeon (*Acipenser medirostris*), white sturgeon (*Acipenser transmontanus*), splittail (*Pogonichthys macrolepidotus*), longfin smelt (*Spirinchus thaleichthys*). Other species that will be considered for inclusion in

the BDCP include Swainson's hawk (*Buteo swainsoni*), bank swallow (*Riparia riparia*), giant garter snake (*Thamnophis gigas*), and valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*). See Planning Agreement, para. 6.1.1. This list identifies the species that will be evaluated for inclusion in the BDCP as proposed covered species, but the list may vary or change as the planning process progresses. The participants anticipate that species may be added or removed from the list once more is learned about the nature of the covered activities and the impact of covered activities on native species within the planning area.

Planning Goals

The BDCP will include goals and objectives for the management of Covered Activities and conservation of Covered Species. As proposed in the Planning Agreement (para.3), the planning goals include:

1. Provide for the conservation and management of covered species within the planning area;
2. Preserve, restore and enhance aquatic, riparian and associated terrestrial natural communities and ecosystems that support covered species within the planning area through conservation partnerships;
3. Allow for projects that restore and protect water supply, water quality, ecosystem, and ecosystem health to proceed within a stable regulatory framework;
4. Provide a means to implement covered activities in a manner that complies with applicable State and federal fish and wildlife protection laws, including the Natural Communities Conservation Planning Act or the California Endangered Species Act, the Federal Endangered Species Act, and other environmental laws, including CEQA and NEPA;
5. Provide a basis for permits necessary to lawfully take covered species;
6. Provide a comprehensive means to coordinate and standardize mitigation and compensation requirements for covered activities within the planning area;
7. Provide a less costly, more efficient project review process which results in greater conservation values than project-by-project, species-by-species review; and
8. Provide clear expectations and regulatory assurances regarding covered activities occurring within the planning area.

Statutory Authority

Section 9 of the Act (16 U.S.C. 1538) and implementing regulations (50 CFR 17.21, and 17.31(a)) prohibit the “taking or animal species listed as endangered or threatened. The term “take” is defined under the Act to mean harass, harm, pursue, hunt, shoot, wound kill, trap, capture or collect, or attempt to engage in any such conduct (16 U.S.C. 1532 (10)). “Harm” is defined by FWS regulation to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering (50 CFR 17.3). NMFS’ definition of harm includes significant habitat modification of degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, spawning, migrating, rearing and sheltering (64 FR 60727, November 8, 1999).

Section 7 of the Act outlines the procedures for federal interagency cooperation to conserve federally listed species and designated critical habitats (U.S.C. 1531 *et seq.*) Section 7(a)(1) of the Act directs the Secretaries of Interior and Commerce (Secretaries) to review other programs administered by them and utilize such programs to further the purposes of the Act. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act. Section 7(a)(2) states that each Federal agency shall, in consultation with the Secretaries, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Sections 7(b)(4) and 7(o)(2) of the Act allow for taking of listed species that is incidental and not an intended part of a Federal action if such taking is in compliance with the terms and conditions of an incidental take statement provided by the Services.

Section 10 of the Act and implementing regulations provide for the issuance of incidental take permits (ITPs) to non-federal applicants to authorize incidental take of endangered and threatened species (16 U.S.C. 1539(a); 50 CFR 17.22, and 17.32(b)). Any proposed take must be incidental to an otherwise lawful activity, must not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and must be minimized and mitigated to the maximum extent

practicable. In addition, an applicant must prepare a Habitat Conservation Plan (HCP) describing the impact that will likely result from such taking, a plan for minimizing and mitigating the impacts of such incidental take, the funding available to implement the plan, alternatives to such taking, and the reasons such alternatives are not being implemented.

NEPA (42 U.S.C. 4321 *et seq.*) requires that Federal agencies conduct an environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment. Under NEPA and its implementing regulations (40 CFR 1500 *et seq.*; NOAA Administrative Order 216–6; 40 CFR parts 1500–1508), a reasonable range of alternatives to the proposed action are developed and considered in the Services’ EIR/EIS. Alternatives considered for analysis in an EIR/EIS may include: variations in the scope or types of covered activities; variations in the location, amount and types of conservation measures, timing of project activities; variations in permit duration; or a combination of these or other elements. In addition, an EIR/EIS will identify potentially significant direct, indirect, and cumulative effects, and possible mitigation for those significant effects, on biological resources, land use, air quality, water quality, water resources, socioeconomics, environmental justice, cultural resources, and other environmental issues that could occur with the implementation of the proposed action and alternatives.

Schedule

The schedule for this EIR/EIS depends upon the development of the draft BDCP, which is expected to occur by early 2009. We will publish additional notices about the proposed action and public participation once the elements of the comprehensive plan are developed.

Request for Comments

Environmental review of the EIR/EIS will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4321 *et seq.*), its implementing regulations (40 CFR parts 1500–1508), other applicable regulations, and the Services’ procedures for compliance with those regulations; and according to the requirements of CEQA (California Public Resources Code Section 21000 *et seq.*) and the State CEQA Guidelines (14 California Code of Regulations 15000 *et seq.*). This notice is being furnished in accordance with 40 CFR 1501.7, and 1508.22 to obtain suggestions and information from other agencies and the

public on the scope of issues and alternatives that will be addressed in the EIR/EIS. The primary purpose of the scoping process is to identify important issues raised by the public related to the issuance of ITPs for the BDCP. Written comments from interested parties are invited to ensure that the full range of issues related to the development of the BDCP and issuance of the ITPs are identified. Comments during this stage of the scoping process will only be accepted in written form. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

Our practice is to make comments, including names, home addresses, home phone numbers, and email addresses of respondents, available for public review. Individual respondents may request that we withhold their names and /or homes addresses, etc., but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present a rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety.

Reasonable Accommodation

Information regarding this proposed action is available in alternative formats upon request.

Dated: January 15, 2008.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

Dated: January 15, 2008.

Dale Morris,

Acting Deputy Regional Director, U.S. Fish and Wildlife Service, Region 8, Sacramento, CA.

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