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California Department of Fish and Game  
1416 Ninth Street,  
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April 8, 2003

John Davis  
Deputy Regional Director  
U.S. Bureau of Reclamation  
Mid Pacific Region  
2800 Cottage Way  
Sacramento, California 95825

Tom Glover  
Deputy Director  
California Department of Water Resources  
1416 Ninth Street, P.O. Box 942836  
Sacramento, California 94236

Dear Messrs Davis and Glover:

This responds to your letter dated April 8, 2003 requesting concurrence that 1) the three tiers of assets, including the Environmental Water Account (EWA), are in place and operable for the 2003 water year and 2) these are sufficient to maintain regulatory commitments under the Endangered Species Act (ESA commitments) as described in the CALFED Record of Decision (ROD). We would like to acknowledge all those who have done an excellent job in acquiring the assets described in your letter.

The CALFED ROD describes the items, in addition to the Tier 1 baseline level of protection, necessary for the CALFED Agencies to provide ESA commitments to south of Delta water users that fish protection measures beyond the Tier 1 regulatory baseline will not reduce their water supply. These include:

- 1) *Ecosystem Restoration Program (ERP) Plan Funding.* As part of Tier 2, the CALFED ERP must be funded to a level of at least \$150,000,000. It is our understanding that the current CALFED budget and plan provides this level of funding for the ERP;
- 2) *A Fully Functioning EWA Over and Above the Tier 1 Level of Protection.* To complete Tier 2, there must be a fully functioning EWA providing fish protection capability over and above the Tier 1 level of protection. The current year funding levels and the anticipated purchases of EWA assets are commensurate with the ROD. The capability of the State Water Project (SWP) to "backstop" up to

100,000 acre-feet (AF) of EWA actions this year serves as a functional equivalent of the south of Delta storage component. Because some EWA assets were carried over from last year and to date we have used fewer EWA assets to protect fish than anticipated, EWA assets can be used to partially compensate for the reduced level of baseline fish protection provided by Tier 1 and the accrual of fewer variable assets than anticipated in the ROD. EWA assets will be sufficient to enable commitments to continue if it remains relatively dry, and project operations are similar to predictions in the forecast using the 90% exceedance hydrology.

- 3) *A Tier 3 Strategy to be Developed and Implemented When Necessary.* There is \$6.25 million budgeted for Tier 3 water purchases and protocols have been established defining how it would be used. We believe that actions using Tier 3 are not dependent on the amount of purchased water and that Tier 3 water will be made available by the Project Agencies if necessary. Consistent with the Tier 3 protocol, there is no guarantee that water supply losses resulting from actions to avoid jeopardy can be fully mitigated. It is our view that the Tier 3 strategy, as described in the protocol paper attached to your letter, is sufficient.

The Project Agencies and Management Agencies agree to the interim set of EWA Operating Protocols attached to your letter. These protocols will guide us through the third year of EWA operation. The Project and Management Agencies will update the protocols as necessary and address any problems that arise in a coordinated fashion. The Project Agencies, and DWR staff in particular, have worked diligently to help us develop the EWA Acquisition Strategy attached to your letter. This strategy attempts to adjust EWA implementation in light of various circumstances that were not anticipated in the ROD. We think the flexible purchase strategy is a good step towards increasing the cost effectiveness of the EWA and helping us respond to the practical realities we have encountered in obtaining and managing EWA assets. It also seeks to respond to baseline conditions which differ from the ROD assumptions. In order to better prepare for future EWA operation we must continue to acquire the necessary EWA assets, develop a funding mechanism and long-term agreements for EWA asset acquisition and refine the long-term EWA operating protocols as needed.

Again this year, changes to the (b)(2) accounting have impacted the way the Management Agencies manage (b)(2) and EWA assets, and have resulted in less fish and aquatic habitat protection in Tier 1 as compared to that assumed in the CALFED ROD and programmatic biological opinions. However, based on real time fish monitoring data in the Delta, fewer than anticipated (b)(2) and EWA actions have been required to protect fish in the Delta during the late winter and early spring period. Since we have not needed to use EWA assets in February and March this year, more environmental water assets are now available for use in future months than might have been expected. Consequently, our ability to maintain ESA commitments this year is based on a determination that there are adequate EWA assets available now to effectively implement planned fish protection actions in the Delta during the rest of the water year.

The EWA was designed with the flexibility to address a range of hydrologic conditions and fish protection measures. Analysis of the March 2003 forecast based on the 90% exceedance

hydrology indicates that the EWA assets as described in your letter will be adequate to provide for Delta actions to protect fish that are essentially equivalent to those actions which would have previously been implemented by a combination of (b)(2) fish actions and EWA fish actions. These Delta fish actions include (1) export reductions at the CVP and SWP to a combined 1,500 cubic feet per second (cfs) to benefit chinook salmon and delta smelt and to meet the Vernalis Adaptive Management Program (VAMP) export objective from April 15 through May 15; (2) export reductions to a combined 1,500 cfs from May 16 through 31 to benefit chinook salmon and delta smelt; and (3) a placeholder of approximately 60,000 AF for potential export reductions in June to protect delta smelt.

In the March, 2003 forecast using the 50% exceedance hydrology, EWA assets are adequate to meet actions (1) and (2) described above. Because forecasted pumping rates are higher in the wetter circumstances of the 50% exceedance hydrology, the April and May actions will use more EWA and (b)(2) and, with the current asset portfolio, there would be approximately 33,000 AF of EWA for potential export reductions in June to protect delta smelt. Consequently we are not able to assure the same level of protection in June in a 50% exceedance hydrology as in a 90% exceedance hydrology and stay within the parameters of the EWA. We are also concerned that in the 50% exceedance hydrology the EWA will likely carry a significant water and financial debt into next year. Thus, providing June fish protection in this hydrological scenario would place an increased risk on 2004 operations and on the ability to provide ESA commitments next year.

In summary, based on our review of the March 2003 forecast using the 90% exceedance hydrology, it is our assessment that all of the necessary elements (or their functional equivalent) identified in the CALFED ROD for ESA commitments are in place and functional for the remainder of this water year. Therefore, assuming a 90% exceedance hydrology, the Management Agencies by this letter agree that there are sufficient EWA assets in place to maintain ESA commitments for the remainder of water year 2003. We would like to stress again that we must continue working diligently with the Project Agencies in the event that hydrologic conditions turn wetter, i.e., similar to the 50% exceedance hydrology. Should a wetter hydrology require a closer look at this year's commitments, the Management Agencies will follow the process described in the Conservation Agreement Regarding Multi Species Conservation Strategy (MSCS Conservation Agreement, CALFED ROD Attachment 5).

The Management Agencies will use available EWA resources, either the fixed acquired assets or the variable asset tools, to minimize or avoid any impacts to the south of Delta water contractors from implementing fish protection measures this year. We intend to use the available EWA assets for the primary purpose of protecting fish species listed pursuant to the State or Federal Endangered Species Acts. We will manage the EWA assets essentially on a first need basis until the assets are expended. We intend to use EWA assets for the purposes of protection and enhancement of these species as the EWA was intended to do and not solely as an incidental take management tool. We are committed to evaluating the realtime information and anticipated future conditions and, if appropriate, shifting the use of EWA assets to later in this water year and for other listed species to minimize the potential for effects of any fish protection measures on south of Delta water users. This includes following the protocols set forth in the Conditions for

Program Level Regulatory Commitments in the MSCS Conservation Agreement. That agreement outlines steps for communications, coordination and species protection actions among and between the Management Agencies and Project Agencies.

In closing, we remain concerned about our capability to continue to ensure regulatory commitments pursuant to the ESA in Water Year 2004 and beyond. The ability to acquire EWA variable assets was limited this year due to hydrologic conditions and changes to the October 1999 (b)(2) Decision. We continue to be concerned about the need to develop the capability to carryover or store EWA assets. Furthermore, the uncertainty of long-term funding and multi-year purchase agreements for EWA assets present a significant challenge that must be addressed. We emphasize that we will all need to use the remainder of the year to fully develop assets and resources for next year, undertake an evaluation of the long-term impacts to Tier 1, assess what the EWA may look like beyond year four, and decide whether to continue the EWA program through the remainder of stage 1 and beyond to meet the CALFED agencies' needs for the long-term. Finally, the issues outlined in this letter all need to be addressed in the context of the many new milestones unfolding in the coming months, including the revision of the Operations Criteria and Plan, the EWA and South Delta Improvement Project environmental analyses and documentation, and other related efforts.

The Management Agencies are committed to working collaboratively with the Project Agencies to ensure that the CALFED ROD continues to be implemented in a biologically appropriate manner, consistent with the CALFED goals of restoration and recovery.

If you have any questions regarding this letter, please contact David Harlow at the Service (916) 414-6600, Diana Jacobs at the Department of Fish and Game (916) 654-9937, or Michael Aceituno, at the National Marine Fisheries Service (916) 930-3600.

Sincerely,



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California Dept. of Fish and Game



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