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VIA E-MAIL AND U.S. MAIL

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Re: Comments on the U.S. Fish and Wildlife Service's December 5, 2013,
*10(a)(1)(A) Enhancement of Species Permit Application to Collect, Transport,
and Release Central Valley Spring-Run Chinook Salmon for the Purpose of
Reintroduction into the San Joaquin River*

Dear Ms. Rea:

We submit these comments on behalf of the San Luis & Delta-Mendota Water Authority ("Water Authority") and Westlands Water District ("Westlands"), regarding the *10(a)(1)(A), Enhancement of Species Permit Application to Collect, Transport, and Release Central Valley Spring-Run Chinook Salmon for the Purpose of Reintroduction into the San Joaquin River* ("Permit Application"). As the National Marine Fisheries Service ("NMFS") is aware, the members of the Water Authority receive their water supply primarily through water conveyed through the Delta and pumped at the Jones Pumping Plant and the Banks Pumping Plant located near Tracy, California. Westlands, a member of the Water Authority, serves an area encompassing some six hundred thousand acres of fertile agricultural lands in the western San Joaquin valley. The Water Authority and Westlands have participated in several public workshops addressing the reintroduction of spring-run Chinook to the San Joaquin River, as part of the San Joaquin River Restoration Program ("SJRRP"). Additionally, the Water Authority and Westlands have commented on multiple components of the SJRRP, including on U.S. Fish and Wildlife Service's ("FWS") September 29, 2010 *10(a)(1)(A) Enhancement of Species Permit Application*.

Our clients appreciate this opportunity to comment on the current Permit Application. The Permit Application is one component in the process of the reintroduction effort for spring-run Chinook salmon ("spring-run Chinook") on the San Joaquin River under the SJRRP as mandated by the stipulated settlement in *NRDC v. Rodgers* ("Stipulated Settlement"), and

approved by Congress through the San Joaquin River Restoration Settlement Act, Pub. L. No. 111-11, Title X, 123 Stat. 1349 (“Settlement Act”).

The Settlement Act includes several provisions that prohibit the SJRRP from having adverse effects on CVP water users, including the Water Authority’s members. The Settlement Act requires NMFS to issue a rule under section 4(d) of the federal Endangered Species Act, to govern “the incidental take of reintroduced California Central Valley Spring Run Chinook salmon.” The 4(d) Rule, which was finalized December 31, 2013, provides that “the reintroduction will not impose more than de minimus water supply reductions, additional storage releases, or bypass flows on unwilling third parties due to such reintroduction.” Settlement Act, § 10011(c)(3). In addition, the Settlement Act provides that “[e]xcept as otherwise provided in this section, the implementation of the Settlement and the reintroduction of California Central Valley Spring Run Chinook salmon pursuant to the Settlement and section 10011, shall not result in the involuntary reduction in contract water allocations to Central Valley Project long-term contractors, other than Friant Division long-term contractors.” Settlement Act, § 10004(f). Accordingly, it is essential that the Permit, as with all components of the SJRRP, be crafted to avoid water supply impacts to the Water Authority members from reintroduction of spring-run Chinook.

The comments presented by the Water Authority and Westlands in this letter are intended to assist the National Marine Fisheries Service (“NMFS”) as it evaluates the Permit Application.

1. The Permit Should Acknowledge The Protections Accorded By The Settlement Act Requiring That The Reintroduction Of Spring-Run Chinook To The San Joaquin River Will Have No Adverse Impacts To CVP Contract Allocations

The Project Description discusses the collection and processing of various life stages of spring-run Chinook from the Feather River Fish Hatchery, the transport and rearing of fish, the reintroduction and experimental stock releases to the San Joaquin River, and the tagging, monitoring, and evaluation measures that will be taken. A provision acknowledging the responsibility to ensure reintroduction does not result in adverse impacts to water allocations to the Water Authority’s member agencies should be added to both the Project Purpose and the Project Description.

2. The Permit Application Should Include Provisions For Genetic Monitoring To Ensure The Introduction Of The Experimental Spring-Run Chinook Population Will Not Result In Adverse Impacts To CVP Operations

Given the requirements of law that reintroduction not result in more than de minimus water supply impacts, NMFS must take all steps to comply with that mandate. Although the

Permit Application identifies “monitoring and evaluation associated with reintroduction efforts” as one of the purposes of the permit, the Permit Application includes the description of only very limited monitoring and evaluation activities that will occur as part of the project. Those monitoring and evaluation activities must include steps to ensure that the progeny of the reintroduced fish do not cause water supply impacts.

The Permit Application’s discussion of these limited monitoring and evaluation activities is very sparse. It appears, however, that the planned specific monitoring and evaluation activities are focused on evaluating fish abundance and the success of the reintroduction program. While fish abundance is an important metric to monitor, monitoring must also be used to ensure the introduction of the experimental spring-run Chinook population does not result in adverse impacts to CVP operations and water supply.

Specifically, genetic monitoring and sampling requirements should be included in the final 10(a)(1)(A) permit to ensure that FWS regularly identifies the run origin of juvenile salmon. Genetic analysis is necessary because there are no phenotypic characteristics to distinguish among the various salmon runs at the juvenile life stage. There are genetic tests available to distinguish salmon runs, using Pedigree genetic analysis. It should be a condition of the permit that genetic monitoring occurs, and the genetic information be used to identify the run origin of sampled fish. However, the Permit Application does not commit to using this type of genetic analysis for this purpose. The Permit Application only notes that “[s]ome adipose fin clips would be used for additional genetic analysis” and that “[g]enetic information may be collected from carcasses through the collection of tissues from fresh carcasses,” but does not explain what this genetic information would be used for. It should be required that genetic sampling occur from all adults contributing to the next generation. It is necessary to obtain genetic information from these fish to be able to determine whether fish four years from now have originated from the reintroduced San Joaquin River population.

Being able to identify whether a fish is a member of the reintroduced spring-run Chinook population or its progeny is a crucial component of avoiding water supply impacts to Water Authority members from reintroduction of spring-run Chinook. At the State Water Project and Central Valley Project salvage facilities, the agencies must be able to identify whether a fish is part of the SJRRP reintroduced population to determine whether and how that fish is counted toward annual “take” limits. Four years from now, the agencies will have to sample the fish and compare the genetic composition of those fish to the genetic data collected from the parent population to determine their run origin and parentage.

Additionally, the collection of genetic data will enable NMFS to assess the accuracy of the Juvenile Production Estimate that is planned to be used to determine the proportion of the experimental spring-run Chinook in the salvage take limits.

The Water Authority and Westlands therefore urge NMFS to require genetic monitoring that assesses the origin of returning fish. This type of genetic analysis is necessary to ensure compliance with the Settlement Act.

Conclusion

The Water Authority and Westlands appreciate the time and effort expended by NMFS and FWS during this process. The terms of the 10(a)(1)(A) Permit should include requirements for genetic sampling to ensure the reintroduction of spring-run Chinook salmon into the San Joaquin River does not result in the reduction in contract water allocations to the Water Authority's member agencies. We and our clients would welcome the opportunity to discuss this with you.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



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Re: **Comments of the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition to the U.S. Fish and Wildlife Service's Final § 10(a)(1)(A) Enhancement of Species Permit Application for the Release of Central Valley Spring-Run Chinook Salmon from the Feather River Fish Hatchery and the Interim/Conservation Facility into the San Joaquin River dated December 2013.**

Dear Sir/Madam:

Thank you for providing the opportunity to comment on the U.S. Fish and Wildlife Service's Final § 10(a)(1)(A) Enhancement of Species Permit Application for the Release of Central Valley Spring-Run Chinook Salmon from the Feather River Fish Hatchery and the Interim/Conservation Facility into the San Joaquin River dated December 2013 ("Permit Application") to the San Joaquin River Exchange Contractors Water Authority ("Exchange Contractors")¹ and the San Joaquin River Resource Management Coalition ("RMC").² The Exchange Contractors and the RMC understand that the Permit Application is one step in the process of the reintroduction effort for spring-run Chinook salmon on the San Joaquin River under the San Joaquin River Restoration Program ("SJRRP") as mandated by the stipulated

¹ The San Joaquin River Exchange Contractors Water Authority is a public entity made up of four separate California water districts: Central California Irrigation District; San Luis Canal Company; Firebaugh Canal Water District; and the Columbia Canal Company.

² The Exchange Contractors and RMC note that the Permit Application circulated for comments was not posted to www.restoresjr.net site and that the former NMFS site for the San Joaquin River Restoration Program, swr.nmfs.noaa.gov/sjrrestorationprogram/salmonreintroduction.htm, has been discontinued.

settlement in *NRDC v. Rodgers*,³ and approved by Congress through the San Joaquin River Restoration Settlement Act, P.L. 111-11 (“SJRRS Act” or “Act”).

Under the Act, Central Valley spring-run Chinook (“SRC”) salmon are to be reintroduced to the San Joaquin River as an experimental population pursuant to section 10(j) of the Endangered Species Act (“ESA”), provided that the Secretary of Commerce (“Secretary”) finds that an ESA section 10(a)(1)(A) permit may be issued allowing the USFWS to collect SRC salmon for the reintroduction program.⁴ The Act requires that the Secretary issue a final rule under ESA section 4(d) governing the incidental take of the reintroduced SRC salmon which shall not impose more than de minimus water supply reductions, additional storage releases, or bypass flows on unwilling third parties.⁵ The final ESA section 4(d) rule becomes effective January 30, 2014. The Act also requires that any adverse impacts to third parties be mitigated⁶ and that no costs be imposed involuntarily on third parties.⁷ Under the terms of the stipulated settlement, salmon were to be reintroduced by December 31, 2012.⁸ T

This 10(a)(1)(A) permit application is for a five-year (1/1/2014 – 1/1/2018) permit for the transport of eggs, juveniles and adult SRC from the Feather River Fish Hatchery (“FRFH”) and the Interim/Conservation Facility to the San Joaquin River for release. Specifically this permit seeks authorization for: 1) the collection of spring-run Chinook salmon and eggs from the Feather River Fish Hatchery (FRFH); 2) the transport of collected chinook salmon to holding pens located in the San Joaquin River; 3) the tagging of FRFH collected spring-run Chinook salmon; 4) the transport of collected spring-run Chinook salmon eggs from the FRFH to nesting boxes or stream side incubators located alongside the San Joaquin River; 5) the release of tagged juvenile spring-run Chinook salmon in years 1-5 of the permit from FRFH, the Interim Facility, the SCARF, or those juveniles that were raised in the stream side incubators; 6) the release of tagged adult salmon in years 4-5 of the permit from the Interim or SCARF facilities; and, finally, 7) monitoring and evaluation.⁹

OVERALL COMMENTS

³ Stipulation of Settlement dated September 13, 2006 in *NRDC v. Rodgers*, Case No. CIV. S-88-1658-LKK/GGH, United States District Court, Eastern District of California (“stipulated settlement”).

⁴ Pub. Law 111-11, § 10011(b)

⁵ *Id.*, § 10011(c)

⁶ *Id.* § 10004(d)

⁷ *Id.* § 10009(a)(3)

⁸ Stipulated Settlement, ¶ 14.

⁹ Permit Application, p. 10.

A number of overarching concerns that call into question the successful implementation of the SJRRP have come to light since the stipulated settlement in 2006 and the passage of the SJRRS Act in 2009. As has been raised in previous comments to NMFS and the U.S. Bureau of Reclamation, these concerns include inadequate habitat in the San Joaquin River and inadequate funding for the implementation of the SJRRP.¹⁰

The Exchange Contractors and RMC continue to believe that these concerns compel the implementing or permitting agencies, such as NMFS, to reevaluate the feasibility of proceeding with the reintroduction of fish into a river that bears little resemblance to the river that will exist if the SJRRP is fully implemented. Such concerns are directly pertinent to NMFS' review of the USFWS' 10(a)(1)(A) Permit Application, because NMFS regulations, regarding the issuance of such permits, require a consideration of, among other things, "whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application."¹¹

Inadequate Habitat

Currently, the program is not being implemented in the sequence or on the schedule¹² that was foreseen in 2006 when the stipulated settlement was crafted. At the time, it was believed that the necessary infrastructure would be in place to reintroduce fish and release full restoration flows down the San Joaquin River by 2014, a schedule that has not been met as acknowledged by the Permit Application.¹³ As a result, the issuance of the 10(a)(1)(A) Permit for the salmon reintroduction program with the goal of SRC salmon reintroduced to the San Joaquin River in 2014 is far in advance of the necessary structural and channel improvements, which are *critical* to providing habitat conditions for the successful reintroduction of SRC salmon to the San Joaquin River. As acknowledged by the USFWS, "[t]o fully achieve the Restoration Goal, a combination of channel and structural improvements along the San Joaquin River below Friant

¹⁰ See e.g., Comments of the Exchange Contractors and RMC to the Draft Environmental Assessment for the 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2011 [sic] dated May 21, 2012 and the Comments of the Exchange Contractors and RMC to the U.S. Fish and Wildlife Service's ("USFWS") 10(a)(1)(A) Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River dated September 29, 2010 ("Permit Application") and the Hatchery and Genetic Management Plan dated December 17, 2010 ("HGMP") dated March 7, 2011.

¹¹ 50 C.F.R. § 222.308(c)(11).

¹² Permit Application, pp. 43-46.

¹³ Permit Application, pp. 27-29.

Dam and releases of additional water from Friant Dam to the confluence of the Merced will be required.”¹⁴

Successful reintroduction of SRC salmon to the San Joaquin River cannot be achieved if the reintroduction occurs *years* in advance of necessary in-river, near-river, and facilities/infrastructural improvements to provide quality fish habitat. Habitat conditions in reaches of the San Joaquin River are severely degraded. To achieve the restoration goal, a combination of channel and structural improvements, described in paragraph 11 of the Stipulated Settlement, along the San Joaquin River below Friant Dam are required. To date, *none* of the in-river improvements required by paragraph 11 of the Stipulated Settlement have been completed.

Reintroduction of SRC salmon to the existing system would be deadly to the fish. Because river restoration projects are not currently estimated to be completed until 2020, the Permit Application acknowledges that the reintroduction of fish in the near-term has some challenges.¹⁵ “Before restoration is completed, the in-stream conditions may limit the growth potential and the survival rates of the introduced eggs and juveniles.”¹⁶ For example, the Permit Application states that “it is likely that in the summer months the stream temperatures may reach lethal limits” in addition to identifying a number of other concerns about habitat conditions.¹⁷ The Permit Application concludes that “prior to the completion of restoration activities, the various habitat components required by different life history stages of salmonids are generally available in the upper mainstem San Joaquin River, although it is not yet clear if the extent and quality of existing habitat is sufficient to support long-term population needs.”

The Permit Application states that “realizing that quality fish habitat must be present to optimize the success of the proposed action, the implementing agencies have also considered the current habitat conditions of the San Joaquin River in light of the Settlement timeline” providing updated estimated dates for completion of Stipulated Settlement paragraph 11 improvements.¹⁸ The Permit Application then rationalizes that “[t]he anticipated short residency time of spring-run during the initial introduction and the several year lag prior to the initial adult returns provide greater flexibility in the completion of the restoration activities, despite delays in implementing channel improvements.” However, many of the projects, such as the Mendota Pool Bypass and Reach 4B, are now “estimated” to be completed well after the expiration of the permit and after the first potential return of adults to the San Joaquin River in 2017. Moreover, there is no

¹⁴ Permit Application, pp. 27, 47-48.

¹⁵ Permit Application, p. 43.

¹⁶ Permit Application, pp. 45, 48.

¹⁷ *Id.*

¹⁸ Permit Application, p.27-29.

indication or evidence that the Paragraph 11 improvement projects will be completed in the current estimates given the lack of funding for the SJRRP.

Inadequate Funding

Most significantly, the current lack of assured and adequate funding for the SJRRP will prevent the achievement of the program's goals. When the SJRRS Act was enacted in 2009, four sources of funds were identified to provide some of the monies needed to carry out the Restoration Program¹⁹ amounting to hundreds of millions of dollars for the necessary channel and structural improvements; to operate the salmon reintroduction program; to prevent damage (via flooding and seepage) to downstream lands and infrastructure (such as those owned by the Exchange Contractors); and to accomplish the goal of "reducing or avoiding an adverse water supply impact" to Friant water users. Currently, there remains a lack of an assured and adequate funding for the for the SJRRP as a whole. However, absent additional appropriations, only \$88 million is currently available until October 1, 2019 from the federal government (due to "PayGo" rules) and much of this has already been spent. In the current economic climate, the funding issue remains highly problematic. As such, the remaining funds, over the next 5 to 6 years, are *grossly inadequate* to carry out the fishery and restoration program that was envisioned at the time of the enactment of the Act.²⁰ It is not valid for NMFS to continue to simply assume that adequate funding to carry out Stipulated Settlement Paragraph 11 improvements will occur.

SPECIFIC COMMENTS TO THE USFWS 10(a)(1)(A) PERMIT APPLICATION

1. Trap and Haul Program

On pages, 30 to 31 and on page 52, the Permit Application anticipates the use of a trap and haul program to move SRC around major passage impediments in the early years of the reintroduction program. The Permit Application, however, does not adequately address the impact on survival from such a trap and haul program.

2. In-stream and stream-side incubators and in-river holding pens

¹⁹ (1) The annual funds already being paid by Friant dam users to the CVPIA fund – approximately \$10 million each year (\$200 million over 20 years);

(2) Funds from the early repayment by Friant users of the capital costs of Friant Dam – approximately \$220 million;

(3) State of California bond initiatives – approximately \$200 million (according to 2008 estimates); and
(4) Federal appropriations capped at \$250 million with a 50% non-federal cost share.

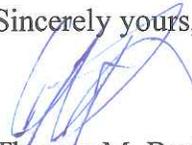
²⁰ There is no certainty that additional money will be more available in 2019.

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The Permit Application proposes the use of in-river and streamside incubators for eggs and the use of in-river holding pens for juveniles, including unmarked juveniles that have not reached a sufficient size for marking, but does not adequately address the risks of releases of eggs or unmarked fish to the San Joaquin River either through accidental release or vandalism²¹. As the Permit Application acknowledges, all fish released to the San Joaquin River under the experimental population must be marked, in part to facilitate recognition of experimental population SRC in the Delta. The use of in-stream or streamside incubators for eggs, and, in particular, the use of in-river holding pens for unmarked juveniles presents an unacceptable risk of an inadvertent release.

The Exchange Contractors and RMC appreciate this opportunity to comment on the 10(a)(1)(A) Permit Application. We look forward to working with NMFS and USFWS to develop a program that meets the goals of the legislation in a manner that does not cause adverse impacts to our customers and landowners.

Sincerely yours,



Thomas M. Berliner

TMB:br

cc: Exchange Contractors, Boards of Directors
RMC, Board of Directors

²¹ Permit Application, pp. 4, 10, 16 and 26.