

**California Department of Water Resources
Katherine F. Kelly's Testimony Regarding the
Potential Modification of Part A of Order WR 2006-0006**

Introduction

My name is Katherine F. Kelly and I am Chief of the Bay-Delta Office for the California Department of Water Resources (DWR). I am testifying in regard to DWR and the U.S. Bureau of Reclamation's (USBR) joint request to modify Part A of the State Water Resources Control Board (SWRCB) Order WR 2006-006. I will provide a brief overview of the South Delta Improvements Program (SDIP), which includes the permanent operable gates; a description of the Endangered Species Act (ESA) consultation process and its effect on the SDIP implementation schedule; and the status of the SDIP and the future next steps.

DWR's Suggested Modification of Part A of Order WR 2006-0006

DWR is requesting that Part A.1 of the Order, which states that DWR and the USBR must implement measures to obviate the threat of non-compliance of the 0.7 EC objective by July 1, 2009, be stayed. As will be demonstrated by my testimony, there have been significant delays in the schedule to install the permanent operable gates, which is the measure by which DWR and the USBR will implement the 0.7 EC objective. The delays have been primarily due to issues related to the ESA consultation process and, recently, DWR has been directed not to install the permanent operable gates.

In addition, there are two major processes, the Bay-Delta Conservation Plan (BDCP) and the periodic review of the 2006 San Francisco Bay – Sacramento/San Joaquin Delta Water Quality Control Plan (2006 Bay-Delta Plan), which are moving forward and may significantly affect the feasibility and/or necessity of installing the permanent operable gates. Thus, given the current inability of DWR to install the operable gates and the uncertainty of how the current processes may affect the south Delta, DWR is requesting a stay of Part A.1 until the above processes have identified clear direction on whether the gates are appropriate and DWR has obtained the necessary permits to install them.

In addition, if the above stay is granted, DWR is requesting that Part A.3 be modified to reflect that a final plan that will reasonably protect the southern Delta agriculture is not required until DWR either has authority to install the gates or the BDCP and/or the periodic review has been completed.

Overview of the SDIP

The South Delta Improvements Program (SDIP) developed from earlier programs undertaken by DWR to address the water levels and circulation in the south Delta. The USBR is our partner

in this program. The South Delta Water Management Program began in the late 1980s and proposed permanent gated structures in locations in the south Delta. Also during this time, the Temporary Barriers Project was initiated. It was designed to test the effectiveness of the barriers to improve water levels and circulation. The Temporary Barriers Project has evolved into an annual action and is permitted through 2010. The SDIP is the current program proposing to install permanent operable gates at four locations in the south Delta.

In 2000, the SDIP was included as an action within the CalFed Program. The CalFed Program Record of Decision (August 2000) states the SDIP would be implemented in two stages. The first stage would increase the export limit for the State Water Project (SWP) to 8500 cfs by 2003. The second stage would be accomplished by 2007 and include screening the intake to Clifton Court Forebay, increasing the export limit to 10,300 cfs, and installing permanent operable gates at four locations in the south Delta. Due to the tremendous costs and technical complexity associated with screening the forebay, the scope of the SDIP was reduced to installing the permanent operable gates and increasing the export limit to 8500 cfs. A draft EIR/S was issued in October 2005 for the program and finalized in November 2006 (final EIR/S). On December 15, DWR announced that it certified the final EIR/S, although it did so without approving any specific action to be taken. On Dec. 8, the USBR issued a notice in the Federal Register of the availability of the final EIR/S, but did not make a decision on the proposed action. [Federal Register: December 8, 2006 (Volume 71, Number 236)].

The draft EIR/S, as well as the final EIR/S, described the decision process for implementing the project. The first decision would be whether to construct and operate the gates; and, once the reasons for the decline in the population of delta smelt were understood, a second decision would be made on whether to increase the export limit of the SWP to 8500 cfs. Therefore during the period 2000 to 2005, the Department had reduced the scope of the SDIP to simply one component, the installation and operation of the permanent operable gates. This was done with the intent of easing the permitting for the gates and meeting our target date for the operable gates of April 2009.

ESA Consultation

Consultation for the federal Endangered Species Act (ESA) was requested of the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) by the USBR in June 2006. In July 2006, NMFS responded saying the information was sufficient and a biological opinion would be provided by November, 2006. (Exhibit DWR-07.) USFWS responded to the USBR in October 2006 identifying additional required information and recommending incorporating ESA consultation for the operable gates into the ESA consultation for the Delta Operations Criteria And Plan (OCAP) for the SWP and Central Valley Project (CVP). (Exhibit DWR-08.) We were very concerned about incorporating the SDIP consultation into the OCAP consultation because the OCAP consultation was scheduled to be completed by April 2008 and had the potential to extend well beyond that date. This, in turn, would significantly delay the permitting for the operable gates.

In January 2007, NMFS sent another response to the USBR which expressed their intent to suspend formal consultation on the SDIP due to identified areas of concern, and recommended the ESA consultation be included in the OCAP consultation. (Exhibit DWR-09.) The USBR responded in their letter of March 9, 2007 by addressing each of the four areas of concern and continued to request the ESA consultation for the SDIP gates be conducted separate from the OCAP ESA consultation. As the culmination of intense discussions between DWR, the USBR, NMFS and USFWS, which had begun in the late summer of 2006, an approach was agreed to in late March 2007. This approach would incorporate the ESA consultation on the operation of the gates into the OCAP consultation and separate consultations would be conducted on the construction and near-field structural effects of the gates. That approach is described in the attached letter from NMFS to the USBR dated May 8, 2007. This letter includes copies of the correspondence exchange described in this paragraph. (Exhibit DWR-10.)

The OCAP consultation continued for months. The biological opinion from the USFWS was completed December 15, 2008. The operation of the SDIP gates is approved in the USFWS' BO. The final NMFS' biological opinion was released on June 4, 2009. It directs that the operable gates not be installed (See NMFS 2009 Bio Op, p. 631, RPA Action IV.6). It states that DWR may pursue ESA permitting after an analysis of monitoring required by the permit for the Temporary Barriers Project is completed. This permit runs through 2010. The monitoring is to assess the potential for predation at the barriers. Recent discussion between DWR staff and NMFS' staff indicates that three years of predation studies rather than two are needed.

The effect of the ESA consultation on the schedule for the implementation of the SDIP operable gates is documented in our quarterly status reports to the SWRCB. We have provided the quarterly reports as required by the CDO. We first notified the SWRCB in the May 2007 quarterly status report that, due to delays associated with ESA consultation, we could not meet the July 1, 2009 date. In that report, we requested that the date for installation of the gates be extended to July 2011. Our latest quarterly report (06/01/09) states:

“Given the required predation studies, the schedule to begin operation of the permanent operable gates requires an extension of four years. This estimate includes the time required for the analysis of the monitoring data and modification of the associated environmental documentation as necessary. A complete milestone schedule is not included herein, but based on the estimated extension, the permanent operable gates could be in operation for the 2016 agricultural season.”

In spite of the significant delay in the schedule, DWR staff is currently working with NMFS to refine gate designs. Three-dimensional hydraulic modeling is being conducted to help modify the designs of permanent gates to minimize flow disturbances and potential areas for predation.

Conclusion

Given the difficulty we have experienced with the ESA consultation on the SDIP gates, I am not confident that we will be able to obtain ESA permits for them that would allow their operation by

2016. The primary reason for my uncertainty is the link of the SDIP ESA consultation with ESA consultation for the SWP and CVP. I have been told during meetings with staff from the federal Department of Justice that consulting on the SDIP gates will require re-consulting on the OCAP biological opinions. Therefore, we can expect the entire OCAP consultation process would be reopened as a result of the SDIP ESA consultation. OCAP consultation has proved to be a multi-year process. There is also the chance that consultation on the SDIP gates would be deferred because re-consultation on the OCAP biological opinions was already underway and the parties would choose to not delay the OCAP schedule by incorporating the SDIP gates. Although we would do our best to implement a consultation process that avoids pitfalls, key elements associated with the consultation are beyond our control.

Other factors contribute to my uncertainty. The BDCP is under development and will be a comprehensive plan for habitat and water conveyance for the Delta. In addition, the SWRCB is conducting an update of the San Francisco Bay – Sacramento/San Joaquin Delta Water Quality Control Plan. Each of these efforts has the potential to affect the SDIP. It is not yet clear how SDIP would be affected.

DWR staff will continue to analyze and refine the design and operation of the gates for SDIP. Information gathered for the "non-physical" fish barrier installed at the Head of Old River this spring will be evaluated to determine if the design of the gate should be changed or if its objective can be achieved effectively with a non-physical barrier. We will also incorporate the analysis of the temporary barrier monitoring information to help evaluate the potential for increased predation and delay in fish passage. In addition, we will analyze the SDIP gates under the operations proposed by the BDCP. The environmental documentation under CEQA and NEPA will be updated as necessary, as well as the biological assessment needed to support ESA consultation.