



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

July 20, 2015

In response refer to: WCR-2014-1599

Lieutenant Colonel John C. Morrow
U.S. Army Corps of Engineers
San Francisco District
1455 Market Street
San Francisco, California 94103-1398

Michael Montgomery
Acting Director, Water Division
Environmental Protection Agency
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Colonel Morrow and Mr. Montgomery:

NOAA's National Marine Fisheries Service (NMFS) has received the Corps of Engineers' (Corps) letter dated July 16, 2015, regarding the recently completed reinitiation of consultation pursuant to section 7 of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), for the Long Term Management Strategy for the Placement of Dredged Material in the San Francisco Bay Region (LTMS). This letter provides clarification regarding the July 9, 2015 biological opinion and the requirements of the incidental take statement (ITS).

Based on the Corps' letter and information provided during telephone conversations between our staff on July 17, 2015, the Corps has indicated to NMFS that they are not requesting reinitiation of the section 7 consultation for the LTMS Program. However, the Corps has pointed out that the ITS does not clearly address the requirements for maintenance dredging projects conducted or funded by the Corps in San Francisco Bay. NMFS clarifies here that the analysis contained in the opinion is based on the Corps' adherence to the appropriate LTMS Program measures and best management practices presented in October 2014 LTMS Program update. In the existing ITS (Section 2.8) attached to the July 9, 2015 biological opinion, an oversight by NMFS resulted in term and condition 1(a) only applying to dredging projects "permitted" by the Corps. For the purpose of clarifying the requirements of the biological opinion and ITS, the terms and conditions to implement reasonable and prudent measure #1 contained in Section 2.8 have been revised to include projects "conducted or funded" by the Corps.



The revised ITS is enclosed and replaces the original ITS. Only Section 2.8, *Incidental Take Statement*, of the original opinion has been changed. The Corps and EPA must substitute the revised ITS for the original ITS, and the original ITS is no longer in effect. This change to the ITS is fully consistent with the analysis in the biological opinion, and thus reinitiation of consultation is not warranted. No change has been made to the body of the biological opinion and the opinion remains in effect. We believe this resolves the issues raised in your July 16, 2015 letter to NMFS.

Please contact Sara Azat at 707-575-6067 or Sara.Azat@noaa.gov if you have any questions, or if you require additional information regarding this biological opinion or the revised ITS.

Sincerely,



William W. Stelle, Jr.
Regional Administrator

Enclosure

cc: Cynthia Jo Fowler, Corps San Francisco District
Brian Ross, EPA, San Francisco
Larry Goldzband, BCDC, San Francisco
Bruce Wolfe, SFB Reg. Water Board, Oakland
Scott Wilson, CDFW, Napa
Becky Ota, CDFW, Belmont
Ryan Olah, USFWS, Sacramento
Copy to ARN File #151422WCR2014SR0025
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Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion

Long Term Management Strategy For the Placement of Dredged Material in the San Francisco Bay Region Revised Incidental Take Statement

NMFS Consultation Number: WCR-2014-1599

Action Agency: U.S. Army Corps of Engineers, San Francisco District and
U.S. Environmental Protection Agency, Region IX

2.8 Incidental Take Statement

Section 9 of ESA and Federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without a special exemption. "Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. "Harm" is further defined by regulation to include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). "Incidental take" is defined by regulation as takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant (50 CFR 402.02). Section 7(b)(4) and section 7(o)(2) provide that taking that is incidental to an otherwise lawful agency action is not considered to be prohibited taking under the ESA if that action is performed in compliance with the terms and conditions of this incidental take statement.

2.8.1 Amount or Extent of Take

In the biological opinion, NMFS determined that incidental take would occur in association with LTMS Program dredging and in-bay disposal activities. Incidental take in the form of injury and/or mortality of threatened CCC steelhead, threatened CCV steelhead, threatened CV spring-run Chinook salmon, endangered Sacramento River winter-run Chinook salmon, and threatened southern DPS green sturgeon is anticipated. Sediment plumes associated with operation of dredges and disposal events are expected to result in incidental take ranging from injury and mortality of adult and smolt listed anadromous salmonids and threatened green sturgeon. Entrainment at hydraulic dredges is expected to result in the mortality of juvenile listed salmonids and green sturgeon.

NMFS was not able to estimate the specific number of CCC steelhead, CCV steelhead, CV spring-run Chinook salmon, winter-run Chinook salmon, and green sturgeon that may be incidentally taken by the proposed action. Monitoring or measuring the number of listed fish actually injured and/or killed by high concentrations of suspended sediment and entrainment during dredging and disposal activities is not feasible. Entrained fish will be carried away in a slurry of dredged sediments and placed at a disposal site which renders their losses as undetectable. Therefore, the number of affected listed fish is difficult to quantify. Due to the difficulty in quantifying the number of listed fish that could be affected by the LTMS Program, a

surrogate measure of take is necessary to establish a limit to the take exempted by this incidental take statement. For this action, compliance with the expected in-bay dredged material disposal volume limit is the best surrogate measure for incidental take associated with implementation of the LTMS Program. The amount of dredged material disposed in-bay provides a measure of the extent of dredging performed and sediment plumes at disposal sites. Since both these activities are sources of incidental take, annual in-bay disposal volumes will provide a meaningful measure to assess the incidental take of listed anadromous salmonids and green sturgeon. Therefore, NMFS will consider the extent of take exceeded if LTMS Program in-bay disposal of dredged material exceeds a volume limit of 1.5 million cubic yards per year.¹

2.8.2 Effect of the Take

In the biological opinion, NMFS determined that the amount or extent of anticipated take, coupled with other effects of the proposed action, is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat.

2.8.3 Reasonable and Prudent Measures

“Reasonable and prudent measures” are nondiscretionary measures that are necessary or appropriate to minimize the impact of the amount or extent of incidental take (50 CFR 402.02). NMFS believes the following reasonable and prudent measures are necessary and appropriate to minimize take of CCC steelhead, CCV steelhead, CV spring-run Chinook salmon, Sacramento River winter-run Chinook salmon, and the southern DPS of green sturgeon:

1. Ensure LTMS Program measures and dredging best management practices are properly implemented.
2. Prepare and submit annual reports regarding dredging and disposal activities performed under LTMS.

2.8.4 Terms and Conditions

The terms and conditions described below are non-discretionary, and the Corps and EPA must comply with them in order to implement the reasonable and prudent measures (50 CFR 402.14). The Corps and EPA has a continuing duty to monitor the impacts of incidental take and must report the progress of the action and its impact on the species as specified in this incidental take statement (50 CFR 402.14). If the entity to whom a term and condition is directed does not comply with the following terms and conditions, protective coverage for the proposed action would likely lapse.

The following terms and conditions implement reasonable and prudent measure 1:

- a. The Corps and/or EPA must include as permit conditions in authorizations for dredging all appropriate LTMS Program measures and best management practices, including the

¹ The in-bay disposal target volume is 1.25 million cubic yards; however a contingency volume of 250,000 cubic yards has been established for emergencies when sedimentation or other factors result in unanticipated material volumes.

following:

- i. The work window for dredging and disposal is June 1 through November 30.
 - ii. No dredging will be permitted from December 1 through May 31 upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.
 - iii. Projects may plan work for the period outside the work window (December 1 through May 31) provided the project mitigates for its impacts by placing dredged material at a beneficial re-use site that will provide aquatic habitat benefits, such as a tidal wetlands restoration site. If a project is unable to place all material dredged outside the work window at a beneficial re-use site, the LTMS Program measures allow for an equivalent volume of dredged material to be placed at a beneficial re-use site from a project conducted within the work windows during the following season. This exemption does not apply to dredge sites upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.
 - iv. Projects that incur an unplanned and unavoidable need to complete a portion of an ongoing dredging operation outside of the work window, the LTMS agencies may approve up to 50,000 cubic yards of dredging and disposal per year for this purpose. This exemption may apply to dredge sites upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.
- b. Dredging and disposal of dredged materials conducted or funded (in whole or in part) by the Corps must adhere to all appropriate LTMS Program measures and best management practices, including the following:
- i. The work window for dredging and disposal is June 1 through November 30.
 - ii. No dredging will be permitted from December 1 through May 31 upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.
 - iii. Projects may plan work for the period outside the work window (December 1 through May 31) provided the project mitigates for its impacts by placing dredged material at a beneficial re-use site that will provide aquatic habitat benefits, such as a tidal wetlands restoration site. If a project is unable to place all material dredged outside the work window at a beneficial re-use site, the LTMS Program measures allow for an equivalent volume of dredged material to be placed at a beneficial re-use site from a project conducted within the work windows during the following season. This exemption does not apply to dredge sites upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.

- iv. Projects that incur an unplanned and unavoidable need to complete a portion of an ongoing dredging operation outside of the work window, the LTMS agencies may approve up to 50,000 cubic yards of dredging and disposal per year for this purpose. This exemption may apply to dredge sites upstream or within 1,000 feet bayward of the mouths of Larkspur/Corte Madera Creek, Napa River Channel/Mare Island Strait, Petaluma River, and Novato Creek.

The following terms and conditions implements reasonable and prudent measure 2:

- a. The Corps and/or EPA must provide the following information as an annual report to NMFS by June 15 of the following year. The reports shall be submitted to NMFS North Central Coast Office, Attention: NCCO Supervisor, 777 Sonoma Avenue, Room 325, Santa Rosa, California, 95404-6528. The report must contain, at a minimum, the following information:
 - i. **Dredging Episode Data.** For each dredging episode conducted during the previous year: project location, start and end date of dredging, amount of material dredged, and disposal location(s).