

MEMORANDUM

To: EARIP Steering Committee Members and Stakeholders

From: Robert L. Gulley
Program Manager

Date: February 9, 2011

Subject: **Memorandum Regarding Item 2 and the First Bullet of Item 3 of the Agenda for the February 10, 2011 EARIP Meeting**

At the January 28, 2011 EARIP meeting, the EARIP was asked to approve the use of the Phase I Bottom-up Package of flow protection and restoration, minimization and mitigation measures in the development of the draft HCP and for purposes of seeking funding. There were two objections to the motion; thus, the issue was sent to an Issues Team. The Issues Team reached a consensus, with two abstentions, on a restated version of the motion. The EARIP Steering Committee will consider that restated motion on February 10.

I think it is important that the EARIP have a clear understanding of the overall decision process into which this particular decision fits. Accordingly, I suggest that the EARIP decision process relating to these various issues should proceed as follows: (1) take action on the issue team report for Phase I of the Bottom-up Package; (2) consider adoption of long-term biological goals at our February 28th meeting; and (3) consider approval of the implementation process to be used to make adjustments during the term of the HCP (the “Adaptive Decision-Making Process”) at our March 10 meeting.

I suggest the following process with respect to the long-term goals: As we requested previously, Paul Fromer will have his strawman ready in advance of the February 28 meeting. I will circulate it as soon as I receive it so that everyone can have an ample opportunity to review and consider it. I have asked Thom Hardy and Ed Oborny to attend the EARIP meeting on February 28. They will sit on a panel, along with Paul Fromer and one or more biologists from the Science Subcommittee, to discuss and to answer questions from the EARIP regarding the long-term goals. At the close of the panel session, the EARIP can discuss the issue, and the Steering Committee can see if it can reach consensus on the long-term goals.

As you prepare for this process, I urge you to keep several points in mind. First, FWS requires the HCP to contain measurable long-term biological goals and objectives. 65 Fed. Reg. 35,242, 35,250 (June 1, 2000). They typically are defined in terms of such things as the quantity and quality habitat and population numbers. These goals and objectives will be used by FWS, among other things, to evaluate whether the “take” has been adequately mitigated and minimized.

Second, to be defensible, FWS's biological opinion must look at the long-term effects of a continuing action, not just the effects of one phase of such an action.¹ FWS will need these long-term goals and objectives to be able to make this determination. For this determination, the goals and objectives will have to be translated into flow levels or ranges of flows. However, the biological goals and objectives should be the focus of your consideration – not the specific flows.

Third, and perhaps most significantly for your discussions, one of the purposes of the phased approach is to use an Adaptive Decision-Making Process to allow better science to be developed before implementing Phase II and to make the ultimate decision on any revisions to the biological goals based on the best available science at that time. Thus, I urge you to avoid drawing unnecessary lines in the sand regarding flow numbers that may ultimately change. You need to try to come up with realistic, defensible flow numbers and regimes on which consensus can be reached for now.

Finally, to provide FWS a basis for making determinations that attaining the long-term goals and objectives is feasible and that funding for the implementation of the HCP will be available, we will also need to agree on what the Phase II measures may be if there are no changes to the long-term goals. Again, it is important to keep in mind that this decision would be subject to change through the Adaptive Decision-Making Process -- even if the long-term goals remain the same. Thus, again I urge you not to get too invested in that decision in view of the virtual certainty that it will be revisited. I doubt that we will be in a position to reach that decision on February 28 because I believe we may need some input from HDR, but I suggest that we should begin the discussions on this issue on February 28.

After tackling the long-term biological goals and objectives, I suggest that we discuss and try to reach consensus on the process that will be used during the implementation of the HCP to decide whether (1) adjustments are needed in the long-term goals; (2) changes or any additional measures needed for Phase II in order to best achieve those long-term goals; and/or (3) adjustments to the Phase I Bottom-Up Package are warranted (*i.e.*, the Adaptive Decision-Making Process). This decision will perforce take us into the issue of governance.

Then, we can see if there is a consensus of the Steering Committee for moving forward on the entire Package: Phase I Bottom-Up Package, the long-term biological goals and objectives, the “place holder” Phase II measures, and the Adaptive Decision-Making Process.

Therefore, before we consider whether the HCP is acceptable overall, we will have reached interim decisions on many of its individual components to allow us to go forward. Nonetheless, as we agreed over a year ago, we do not have a deal until we have consensus on the entire package.

¹ *Wild Fish Conservancy v. Salazar*, (Slip op. No. 09-35531) (9th Cir. Dec. 7, 2010) at 19,605 (“It was incumbent on the Service to use the best information available to prepare [a] comprehensive biological opinion [] considering all stages of the agency action.”); *Connor v. Burford*, 848 F.2d 1441, 1457-58 (9th Cir. 1988) (“Biological opinions must be coextensive with the action.”); *Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1155 (D.Ariz. 2002) (“An agency may not ignore future aspects of a federal action by segmenting that action into phases”); *American Rivers v. United States Army Corps of Engineers*, 271 F.Supp.2d 230, 255 (D.D.C. 2003) (same).