



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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San Francisco, CA 94105-3901

Joe Karkoski
Deputy Director
Division of Financial Assistance
State Water Resources Control Board
1001 I Street
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SUBJECT: Clarifying Roles and Responsibilities regarding Designation of Non-Federal Representative for Consultations under Section 7 of the Endangered Species Act and Section 305(b) of the Magnuson-Stevens Act

Dear Mr. Karkoski:

I am writing to affirm the U.S. Environmental Protection Agency, Region 9 (EPA)'s designation of the California State Water Resources Control Board (SWRCB) as our non-federal representative for purposes of conducting informal consultation and preparing a Biological Assessment or Biological Evaluation under Section 7 of the Endangered Species Act (ESA) and conducting Essential Fish Habitat consultation under Section 305(b) of the Magnuson-Stevens Act (MSA). This designation applies to all projects in the state of California receiving assistance through the Clean Water State Revolving Fund (CWSRF) program, Drinking Water State Revolving Fund (DWSRF) program, Emerging Contaminants in Small or Disadvantaged Communities Grant (EC-SDC) program and Small, Underserved and Disadvantaged Communities Grant (SUDC) program, unless EPA notifies SWRCB that this designation does not apply for a particular project. In some cases, the SWRCB may be supported in its role as EPA's designated non-federal representative by the CWSRF, DWSRF, EC-SUDC or SUDC assistance recipient or a professional environmental consultant.

The purpose of this letter is to lay out respective roles and responsibilities for EPA and SWRCB as our agencies work together to assure efficient and effective compliance with the ESA and MSA for projects receiving federal assistance in California through the DWSRF, the CWSRF, the EC-SDC, and the SUDC programs.

Federally-Assisted DWSRF, CWSRF, EC-SDC, and SUDC Projects

EPA provides capitalization grants to state agencies under the CWSRF program and the DWSRF program, and provides grants to state agencies under the EC-SDC and SUDC grant programs. SWRCB administers California's CWSRF and DWSRF programs, which are capitalized by federal grants, state match funds, loan repayments, and other earnings of the fund, and the EC-SDC and SUDC programs,

which receive federal grants. These programs provide loans, including principal forgiveness loans, and subgrants to eligible entities for eligible planning and construction projects. Projects supported with funds made available by federal CWSRF and DWSRF capitalization grants, and projects supported by EC-SDC and SUDC grant funds, referred to as federally-assisted projects, must comply with Section 7 of the ESA and Section 305(b) of the MSA and implementing regulations.

Designation of Non-Federal Representative

ESA regulations at 50 CFR Section 402.08 allow a federal agency to designate a non-federal representative to conduct informal consultation with the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service or prepare a Biological Assessment pursuant to ESA Section 7. Similarly, 50 CFR Section 600.920(c) allows a federal agency to designate a non-federal representative for purposes of conducting Essential Fish Habitat consultation with the National Marine Fisheries Service (NMFS) under Section 305(b)(2) of the MSA. In accordance with 50 CFR Section 402.08 for the ESA and 50 CFR Section 600.920(c) for the MSA, EPA has designated SWRCB as its non-federal representative for the referenced programs. As the designated non-federal representative, SWRCB must follow the applicable procedures, listed below, for each action.

Roles and Responsibilities for Compliance with the ESA

Because environmental review is often undertaken before the SWRCB has determined whether to provide funding for a particular project or before the SWRCB has determined the source for any such funding, SWRCB will apply the following procedures for certain projects for which applications have been submitted for financial assistance from the programs. Where ESA is applicable, compliance with the ESA must be achieved prior to SWRCB executing final assistance agreements for the programs to which this designation applies.

SWRCB must identify the action area for each action; obtain from the USFWS and NMFS (Service(s)) a list of listed and proposed species and designated and proposed critical habitat that may be present in the action area; and assess the potential effects of the action on those species and habitats in accordance with 50 CFR Section 402.12.

No Effect Determinations

SWRCB may make a "no effect" determination for threatened or endangered species or designated critical habitat if SWRCB determines any of the following:

- The Service(s) did not identify any listed species or designated critical habitat within the project's action area.
- The Service(s) may have identified listed species or designated critical habitat in the project area, but the project's field surveys and/or existing information demonstrate that there are no species found and no suitable habitat within the project's action area.

- Suitable habitat may be identified, however, there is no reasonable evidence of the presence of listed species in the project's action area.
- The type and scope of the project is such that it would have no effect on listed species or their critical habitat.

SWRCB must document all "no effect" determinations in writing. EPA encourages SWRCB to request technical assistance from the Service(s) if SWRCB determines that additional information, relevant to the project's effect on listed species or habitat within the project area, is needed prior to reaching a "no effect" determination. If SWRCB determines that the action will not affect any listed species or designated critical habitat, SWRCB will submit a copy of each "no effect" determination, along with supporting documentation, to the EPA SRF Project Officer, the EPA EC-SDC Project Officer, or the EPA SUDC Project Officer, as applicable, by email at the time of the "no effect" final determination.

Informal Consultation

Informal consultation is required when the action, as proposed or modified, may affect but is not likely to adversely affect any listed species or designated critical habitat. When SWRCB determines that an action may affect but is not likely to adversely affect any listed species or designated critical habitat, SWRCB, as EPA's designated non-federal representative, will prepare a Biological Assessment or Biological Evaluation and will conduct informal consultation and request written concurrence from the Service(s) with the determination. SWRCB will provide the EPA Project Officer(s) with a copy of the Biological Assessment or Biological Evaluation and will copy the EPA Project Officer(s) on all written communications with the Service(s) regarding ESA consultations. SWRCB will forward correspondence from the Service(s), including responses, findings, and concurrences, and non-concurrences to the EPA Project Officer(s). In the event that the Service(s) do not concur with the determination that the action is not likely to adversely affect any listed species or designated critical habitat or that SWRCB cannot resolve an issue as part of an informal consultation, SWRCB will ask EPA to assist as needed. Such instances may result in EPA initiating formal consultation.

Formal Consultation

Formal consultation with the Service(s) is required when an action is likely to adversely affect one or more listed species or designated critical habitat. 50 CFR Section 402 does not provide for designation of formal consultation to a non-federal representative. When SWRCB determines that formal consultation is required, SWRCB will notify the EPA Project Officer(s). SWRCB will provide a Biological Assessment or Biological Evaluation for the action, along with supporting documentation, to EPA with the notification that formal consultation is required. EPA will conduct formal consultation, when required.

Conference on Proposed Species or Proposed Critical Habitat

A federal agency is required to confer with the Service(s) on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of

proposed critical habitat. 50 CFR Section 402 does not provide for designation of conference to a non-federal representative. When SWRCB determines that conference is required, SWRCB will notify the EPA Project Officer(s). SWRCB will provide a Biological Assessment or Biological Evaluation for the action, along with supporting documentation, to EPA with the notification that conference is required. EPA will conduct the conference, when required.

Roles and Responsibilities for Compliance with the MSA

Consistent with 50 CFR Section 600.920(f)(1), EPA and SWRCB anticipate that the requirements of consultation under the MSA will be consolidated with ESA or similar environmental review procedures to the extent practicable. If SWRCB determines that the action will not adversely affect any Essential Fish Habitat, SWRCB will submit a copy of each "no adverse effect" determination, along with supporting documentation, to the EPA Project Officer(s).

For any action that may adversely affect Essential Fish Habitat, SWRCB will prepare a written Essential Fish Habitat Assessment that meets the requirements of 50 CFR Section 600.920(d) and (e) and will conduct consultation with NMFS, in accordance with 50 CFR Section 600.920. SWRCB will provide the EPA Project Officer(s) with a copy of the assessment along with supporting documentation and will copy the EPA Project Officer(s) on all written communications with NMFS regarding MSA consultations. SWRCB will forward correspondence from NMFS, including responses, findings, concurrences, and non-concurrences to the EPA Project Officer(s). EPA may, at its own discretion or upon request from SWRCB, engage in an MSA consultation.

Consultation and Conference Requirements in SWRCB Assistance Agreements

SWRCB may require, through assistance agreement provisions, that assistance recipients implement avoidance measures or other steps identified in the consultation process as necessary to comply with the ESA or MSA. For example, SWRCB may require implementation of best management practices, protective measures during project construction, and/or activities that restore and enhance habitat that is disturbed as a result of project construction, or other reasonable and prudent measures identified during consultation.

SWRCB may ensure implementation of such measures through curtailment of financing, interest penalties or other enforcement actions. Should SWRCB fail to properly ensure the implementation of measures required by the loan or grant agreement for federally-assisted projects, EPA may take appropriate measures to address the deficiency, including corrective action authorized by federal regulations, which may involve the withholding of disbursements.

EPA looks forward to its continued partnership with SWRCB in implementing this designation as described above. If you have any questions regarding this designation, please contact Elizabeth Borowiec, State and Municipal Infrastructure Section Manager at (415) 972-3419 or Luis Garcia-Bakarich, Drinking Water Section Manager at (415) 972-3237.

Sincerely,

/s/ May 12, 2025

Hector Aguirre, acting on behalf of
Tomás Torres, Director, Water Division

Enclosures

cc: Michael Downey, SWRCB
Ahmad Kashkoli, SWRCB
Brian Cary, SWRCB
Bridget Binning, SWRCB
Jean Fung, SWRCB