Re: Stanford Habitat Conservation Plan – Final Environmental Impact Statement

Beyond Searsville Dam, American Rivers, and California Trout comment on the Final Environmental Impact Statement for Authorization for Incidental Take and Implementation of the Stanford University Habitat Conservation Plan (FEIS), as noticed on November 14, 2012. In light of Stanford’s December 6, 2012 letter (Attachment 1) modifying its permit applications and other developments, we request that the Services:

(1) issue a revised notice clarifying which Covered Activities remain in the pending permit applications, explaining whether Incidental Take Permits (ITPs) for such activities may issue under Endangered Species Act section 10(a)(1)(B) at this time, and providing an additional 60 days for public comment;

(2) supplement the FEIS once Stanford has decided how to proceed with Searsville Dam and the Lake Water System as a whole; and

(3) reinitiate consultation related to the April 2008 Biological Opinion for the Steelhead Habitat Enhancement Project (SHEP BiOp).

Background

Stanford has applied to the Services for ITPs to take Covered Species incident to its Covered Activities (including Conservation Program) described in the FEIS Vol. I p. 3-1. Its applications covered four terrestrial species (California tiger salamander, California red-legged...
frog, San Francisco garter snake, and the Western pond turtle) and one aquatic (Central California Coast steelhead). Stanford submitted a Habitat Conservation Plan (HCP) (FEIS Appendix B) to describe the Conservation Program. The Services issued the FEIS for the proposed ITPs. After that, Stanford submitted a December 6 letter modifying its permit applications.

In that letter (p. 1), Stanford suspended its permit application for steelhead in the San Francisquito/Los Trancos Basin, pending the completion of the Searsville Alternatives Study. Stanford also stated (p. 2) that it will continue to process its permit application to FWS for Covered Species on its lands outside of the San Francisquito/Los Trancos Basin.

Specifically, Stanford acknowledged (p. 1) that the conservation easement which the HCP proposed for lands in the San Francisquito/Los Trancos Basin may preclude desirable future actions related to Searsville. It suspended its permit applications (p. 1) “…until such time as the Searsville Alternatives Study is complete or sufficiently advanced to a point where we better understand the best future for Searsville Dam and Reservoir and how future structure or operational changes to address Searsville may affect the basin.” On December 10, Stanford issued a press release indicating that it will implement the HCP in two phases. See http://news.stanford.edu/news/2012/december/habitat-conservation-plan-121012.html. As reflected in this press release and the December 6 letter, Stanford reserves its discretion to modify conservation measures which the HCP otherwise had proposed, following the completion of the Searsville Alternatives Study. It is not possible to predict at this time whether Stanford will in fact pursue the same or different conservation measures for steelhead, this basin, or these facilities, in the future.

Extension of Public Comment Period

Permit applications under ESA section 10(a)(1)(B) are voluntary. See FEIS Vol. II p. 3-50. Under 16 U.S.C. §1539 (a)(2)(A)(i), an HCP must provide a “…complete description” of the activities sought to be permitted. As a result of the December 6 letter, the HCP describes Covered Activities which are no longer included in the permit applications pending for decision. Specifically, we believe that Stanford does not seek ITPs at this time for steelhead, any lands in the San Francisquito/Los Trancos Basin, or any facilities and activities associated with the Lake Water System in that basin.

The purpose of this FEIS and the associated record (including public comments) is to support a federal decision on the proposed action. The proposed action described in the FEIS Vol. 1 p. 2-2 has now been substantially modified at Stanford’s initiative. Among other things, the proposed action now excludes most of Stanford’s lands. See FEIS Vol. 1 p. 4-6. The Services must respond to this letter to determine the proposed action which is pending for decision. While we offer our view above, the Services plainly must make that determination.

NEPA requires an EIS for a major federal action that may significantly affect the human environment. See 42 U.S.C. § 4332. Under 40 C.F.R. § 1508.18(b)(4), a major federal action
includes “…[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” (Emphasis added.) The Services have rightly concluded that issuance of ITPs on this HCP would be a major federal action. See FEIS Vol. 1 p. 2-4. The Services cannot complete NEPA analysis or issue the ITPs, until they have determined what proposed federal action is pending for decision.

We request that the Services revise their November 14 notice once they have determined what proposed federal action is pending for decision. Specifically, the revised notice should describe the changes in the proposed action as a result of Stanford’s December 6 letter, and it should state how this change affects the analysis in the FEIS. The revised notice should also explain the Services’ conclusion whether ITPs may issue for still-included Covered Activities, in light of any interconnections with activities which are now excluded.

As stated in our December 17, 2012 letter (Attachment 2), we respectfully request that the revised notice should provide that comments are not due on the Alternatives (Section 3), or Environmental Consequences (Section 5) of Alternatives, related to steelhead, lands in the San Francisquito/Los Trancos Basin, or the facilities of the Lake Water System in that basin. It is inefficient and improper to require public comments on the NEPA analysis of a proposed action which is no longer pending for decision and will likely change in the future.

We further request that the revised notice provide an additional 60 days for public comments on any parts of the FEIS that are ripe. The scoping for this document began in September 2006, more than 6 years ago. See FEIS Vol. 1 p. 2-6. By email dated December 18, NMFS rejected our December 17 request to continue the December 24 deadline, without responding specifically to the grounds for that request. We again submit that it is unnecessary and unfair to require stakeholders to submit comments during the holiday season, given that Stanford substantially modified its permit applications after the November 14 notice and the Services have not yet responded to that modification.

We submit that the FEIS contains errors in its analysis of Searsville Dam and the Lake Water System. For example, it finds that dredging has never been performed in Searsville Reservoir. See FEIS Vol. I, p. 2-15. Our prior comments on the DEIS and thereafter addressed such dredging activities. We attach a 1997 Fish and Game Code section 1602 Agreement that authorized dredging in the reservoir beginning at the causeway (Attachment 3). We will address the FEIS’ analysis of these facilities, once the Services are actually considering a decision whether to issue ITPs for these facilities.

Supplement to the FEIS

As stated above, the Services will not issue ITPs to Stanford at this time that include conservation measures for steelhead, any lands in the San Francisquito/Los Trancos Basin, or any facilities and activities associated with the Lake Water System in that basin. Before seeking
such authorizations in the future, Stanford may change the HCP’s proposed measures as a result of the Searsville Alternatives Study.

We respectfully request that the Services supplement the FEIS once Stanford has resubmitted its applications, and there is a federal action pending for decision, that includes steelhead, lands in the San Francisquito/Los Trancos Basin, or the facilities and activities associated with the Lake Water System in that basin. This is consistent with 40 C.F.R. § 1502.9(c), which provides for such a supplement if “…(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

Beyond Searsville Dam has submitted significant new information not analyzed in the FEIS, related to the impacts of the Lake Water System on steelhead and other Covered Species. We incorporate by reference its letters dated October 22 (Attachment 4), October 25 (Attachment 5), and November 5 (Attachment 6), as well as its comments submitted under separate cover today. Further, we have been informed that, following publication of the FEIS, NMFS opened an enforcement investigation regarding Searsville Dam’s impacts on steelhead. If that is correct, we request that NMFS revise the FEIS’ analysis of such impacts to incorporate the results of that investigation.

We support the result that the Services will consider the Lake Water System, or at least those facilities and operations within this basin, as a system. In our prior comments on the DEIS and thereafter, we demonstrated the functional interconnections between these facilities, as graphically depicted in Stanford’s diagram (Attachment 7). Although we rebutted the HCP’s claim that the facilities have segregable operations, the FEIS unfortunately adopts a similar finding. See FEIS Vol. II p. 3-100. We note that this finding is inconsistent with the evidence we previously submitted, the reasoning in Stanford’s December 6 letter, and its report to the State Water Resources Control Board that it “…operates an integrated water diversion, storage, and conveyance system, and water use cannot accurately be allocated as use from any single diversion or water use facility.” See Attachment 8, Note *D, p. 3. We will address the FEIS’ analysis of these facilities, once the Services are actually considering a decision whether to issue ITPs for these facilities.

**Reinitiation of Consultation on the SHEP Biological Opinion**

The HCP incorporates the measures which the 2008 SHEP BiOp required for protection of steelhead affected by the Los Trancos Creek Diversion Facility and San Francisquito Creek Pump Station. The FEIS analyzes the sufficiency of these measures. See FEIS Vol. 1 p. 3-6. We request that NMFS and the Army Corps reinitiate consultation on such measures. As shown in Beyond Searsville Dam’s separate comments filed today, there is new information that the ongoing operations exceed the take permitted in the 2008 BiOp’s Incidental Take Statement and also affect steelhead in a manner not considered in the SHEP BiOp, and further that these facilities have been modified to impact listed species in a manner not considered in the BiOp.
C.F.R. § 402.16 provides for reinitiation of consultation in these circumstances. Such reconsultation may take into account the results of the enforcement investigation and the Searsville Alternatives Study, assuming that it is timely completed.

Thank you for considering these comments.

Respectfully submitted,

WATER AND POWER LAW GROUP PC

______________________________
Richard Roos-Collins
Julie Gantenbein

Attorneys for
BEYOND SEARSVILLE DAM, AMERICAN RIVERS, and CALIFORNIA TROUT

Cc: Scott Wilson and Tom Gibson, California Department of Fish and Game
Rob Donlan, Ellison Schneider & Harris