

**YOLO BYPASS WORKING GROUP
MEETING NO. 18**

MEETING MINUTES

MEETING DATE: January 15, 2002

LOCATION: California Department of Fish and Game
Yolo Wildlife Area Headquarters
45211 County Road 32B (Chiles Road)
Davis, CA 95616

IN ATTENDANCE:

Robin Kulakow, Yolo Basin Foundation
Dave Feliz, California Department of Fish & Game (DFG)
Will Wylie, H Pond Ranch
Jack Palmer, H Pond Ranch
Mike Egan, Yolo Flyway
Steve Jennings, Channel Ranch Duck Club
Richard Smith, U.S. Fish and Wildlife Service (USFWS)
Don Stevens, Glide-In Ranch
Chris Fulster, Jr., Glide-In Ranch
Regina Cherovsky, Conaway Ranch
Duncan McCormack, Yolo Ranch
Selby Mohr, Mound Farms
Rick Martinez, Martinez Bros. Farming
William T. Morgan, William T. Morgan Real Estate
Scott Morgan, William T. Morgan Real Estate
Ken Martin, Rising Wings Preserve
Butch Hodgkins, Sacramento Area Flood Control Agency (SAFCA)
Dennis Murphy, Murphy Farms
Ed Towne, Bull Sprig Outing
Tom Harvey, USFWS
Mark Hennelly, California Waterfowl Association
Elizabeth Soderstrom, Natural Heritage Institute
Campbell Ingram, CALFED
Ted Sommer, California Department of Water Resources (DWR)
Steve Gold, DWR
Boone Lek, DWR
Linda Fiack, Yolo County Resource Management

Pat Perkins, DFG
Mark Kearney
Mike Rushton, Jones & Stokes
Selene Jacobs, Jones & Stokes
Jennifer Walker, Jones & Stokes
Paul Cylinder, Jones & Stokes

NEXT MEETING: The next meeting was scheduled for February 21, 2002 from 10:30 a.m. to 1:00 p.m. at the Yolo Wildlife Area Headquarters however, that date was postponed until May 2, 2002.

ACTION ITEMS:

1. Jones & Stokes and Yolo Basin Foundation will refer to past meeting minutes to determine who has volunteered to participate on the Hunting Subcommittee and report back on their findings at the next meeting.
2. Regarding Endangered Species Act compliance responsibilities of a private landowner with an agency easement that allows flow, etc over the land. Jones & Stokes will assess this issue further and will report an opinion at the May 2, 2002 meeting.

Ms. Kulakow called the meeting to order and introduced Mike Rushton, Jones & Stokes' Principal-in-Charge of the Yolo Bypass Management Strategy project. Ms. Kulakow stated that Mr. Rushton is filling in for Dave Ceppos during his family leave. Ms. Kulakow then introduced Mark Hennelly of the California Waterfowl Association, who spoke in the place of Greg Yarris. Mr. Hennelly provided a summary update of the 2001-2002 Waterfowl Season

Mr. Hennelly stated that 2001-2002 was a poor season for waterfowl hunting. There was poor hunter success at federal and state wildlife refuges and areas, particularly in the first half of the hunting season. The average daily duck bag was the lowest in six seasons. The primary reason for poor hunting is fewer young birds are being produced.

One participant commented that the primary reason for poor hunting is not fewer birds but closed zones. He stated that the only time the birds leave these closed zones is when the Yolo Bypass floods, and that increased sanctuary lands reduce hunting opportunities. Mr. Hennelly agreed that the presence of rice habitat plays a role in hunting success, and that CWA is working to reduce flooded rice fields. He suggested the distribution of sanctuary also influences the availability of hunting opportunities. Another participant indicated that there is increasing concern among the hunting community that public acquisition of additional property in the Bypass will further reduce hunting opportunities.

A participant commented that recent radio telemetry efforts miscalculated the duck count because of anti-hunting sentiment, and therefore the bull sprig limit should be increased. Mr. Hennelly responded that the pintail population has increased over the past few years, but that there is concern among resource agencies that allowing increased hunting limits will excessively impact the population. Agencies working with various flyways of the United States cooperatively develop bag limits that cannot be made more liberal by DFG. A participant asked why DFG regulations are liberal for the take of mallards if production of young birds is lower than desired. Mr. Hennelly answered that Federal regulations are based on midcontinental mallard counts. The state does not impose stricter regulations because most mallards in this region are produced by the state. He suggested that regulations should be more specific to local conditions.

One participant asked why there is the high limit of seven birds if current production is low. Mr. Hennelly responded that he expects moderate federal bag limits across the flyways next year. Another participant asked if the CWA has been lobbying decision makers for lower bag limits. Mr. Hennelly answered that CWA has suggested that low limits make sense if production is low. A participant commented that the hunting season should be scheduled for the last Sunday in January and should allow for a bag limit of five large birds. Mr. Hennelly answered that such a change in regulation would require Federal approval, and that all flyways must agree to a change in the hunting season dates.

Another participant asked how interested parties could provide input on bag limits. Mr. Hennelly answered that people can go to Fish and Game Commission meetings in late summer and early fall to provide input.

Another participant asked if we are appropriately benefiting natural resources by protecting one resource (fish) at the expense of another (birds). Mr. Hennelly responded that these are policy decisions guided by the Federal Endangered Species Act. One participant then asked if hunting is really the limiting factor reducing population. Mr. Hennelly answered that CWA believes that breeding habitat, rather than harvest, has the greatest impact on population. Another participant commented that predation is a significant problem with duckling survival. Mr. Hennelly then answered that Delta Waterfowl Association raised nest survival from 10% to 40% by implementing predator control measures. A participant responded that hawks kill ducklings: "Duck club owners raise ducks and resource agencies raise hawks."

Mr. Hennelly stated that there has been high rainfall this year, and that he therefore expects greater mallard production next year. However, Canada and the Dakotas are still experiencing drought, which may counteract production in this region. Canada is attempting to manage grasslands for ducks and reduce farmland to enhance duck populations.

A participant commented that hunters should be allowed to take three sprig to keep license proceeds up. Mr. Hennelly responded that while this is a good suggestion, the Federal framework must approve changes to regulations. Such a change to bag limits would require the cooperation and lobbying efforts of all conservation groups in the Flyway. Mr. Hennelly expressed the opinion that bag limit decisions must be made on the flyway level. A participant

asked if the Working Group had agreed to form a subcommittee on this issue. Mr. Selby Mohr answered that the Working Group did agree to form a subcommittee on hunting in the Bypass, and that it should be established in the near future. This subcommittee would then address and research the bag limit issue. Jones & Stokes agreed to identify who volunteered to participate on the Hunting Subcommittee and report back on the findings at the next meeting.

Reclamation Board Pope Ranch/Giant Garter Snake Habitat project update

Steve Bradley (Reclamation Board) was not present to address this agenda item. The Pope Ranch project will be discussed at the May 2, 2002 meeting.

Sacramento Bypass Habitat and Hydrology Work Update

Mike Rushton (Jones & Stokes) explained that in 1999 the State Reclamation Board and U.S. Army Corps of Engineers (USACE) initiated the Sacramento Bypass project by dredging material from the Bypass and distributing it on the adjacent levees. Currently, a pond of standing water with no outlet is created whenever the Bypass floods. This in turn can trap endangered fish. The Reclamation Board and USACE attempted to remedy this problem by connecting these ponds to a nearby ditch. However, this effort ultimately resulted in the creation of a larger, permanent pond. The agencies are now attempting to connect this large, permanent pond to the Bypass perimeter drainage system (Tule Canal/Toe Drain). Construction was expected to begin October 1, but was suspended because of giant garter snake concerns.

Ted Sommer (DWR) confirmed that the Sacramento Bypass tends to trap fish, and that the conditions that cause this are worse when gates are not opened. A trickle of water coming through the closed gates can carry fish that in turn become trapped in the Sacramento Bypass ponds.

One participant suggested that there is very little additional water available to put into the Bypass. Another participant asked what is the goal of the project, and was told that the agencies want to drain the ponds completely and provide an outlet for the fish.

Another participant indicated that the Bypass has experienced increased flooding due to development, and asked if this will decrease the presence of pheasant and other waterfowl. He suggested that no efforts have been made to require developers to control runoff. A respondent answered that the DWR/USACE Comprehensive Study is attempting to address these issues.

Sacramento Area Flood Control Agency

Butch Hodgkins (SAFCA) asked the participants what are the specific issues they would like to discuss, and that he would like to participate in a focused conversation. The groups generated the following list of topics to be addressed:

1. Local development
2. Management of tributaries
3. Flood control in the Bypass
4. Habitat restoration in the Bypass
5. Flows on other creeks (Putah, Cache)

Mr. Hodgkins stated that the Comprehensive Study could perhaps provide some insight into how decisions relating to these issues are made.

Endangered Species Act, Safe Harbor, and Incidental Take Regulatory Overview

Jennifer Walker and Paul Cylinder (Jones & Stokes) provided a general overview of the Federal and State Endangered Species Acts (ESA). Ms. Walker stated that the Federal ESA (FESA)'s take prohibition is broad, encompassing both direct take and indirect take, such as habitat modification and harassment.

There are two avenues to acquire incidental take authorization under the ESA: Section 7 for projects involving federal funding, permits, or authorizations, and Section 10 for private, local, and state projects not involving federal funding, permits, or authorizations. Under Section 10, there are two compliance options: **Section 10(a)(1)(b) Incidental Take Permits**, for otherwise legal activities that may result in the incidental take of listed species, and **Section 10(a)(1)(A) Authorized Take Permits** for activities that contribute to endangered species enhancement and recovery. The **Section 10(a)(1)(b) Incidental Take Permit** is acquired through the development of a **Habitat Conservation Plan (HCP)** that meets USFWS and National Marine Fisheries Service (NMFS) approval. An optional component of the HCP is the development of a **Neighboring Landowner Agreement**, that is used to provide protection to adjacent landowners who are signatories to the HCP from violations of the ESA if listed species were to come onto their land. Under a **Section 10(a)(1)(A) Authorized Take Permit**, if landowners want to take part in management activities (agricultural, etc) that benefit listed species, the USFWS and NMFS will guarantee that they will not be subject to additional restrictions on their property, nor be held in violation of the ESA, for the life of what is called a **Safe Harbor Agreement**. The landowner can end the Safe Harbor Agreement at any time (return to baseline conditions) with no penalty. *[See attachment: **Endangered Species Issues** for more information about FESA]

Ms. Walker continued with a description of the California ESA (CESA). One important difference between the state and federal ESA is that CESA's prohibition on take does not encompass prohibitions on habitat modification and harassment (a narrower definition). She indicated that the DFG typically allows FESA Section 7 and 10 permits and authorizations to serve as a permit application for incidental take under CESA for all species that are jointly listed under the FESA and CESA. (The Section 2080.1 process). If a species is listed under CESA only, the applicant will need to acquire incidental take authorization under a Section 2081 permit.

*[See attachment: **Endangered Species Issues** for more information about CESA]

Participants were invited to ask questions of Ms. Walker and Mr. Cylinder. Mr. Rushton stated that Yolo Basin Foundation is not under contract to develop a solution for landowners in the Basin. The purpose of this discussion is only to provide information on vehicles for complying with regulations.

The following is a list of the questions asked, answers provided, and comments made.

Why is the endangered species topic included as an agenda item at this meeting? How would Jones & Stokes be involved in choosing a management option?

Endangered species regulation was identified as a topic of concern in the development of the Yolo Bypass Management Strategy. The Working Group requested additional information on endangered species and vehicles for compliance with endangered species regulation. This Strategy was initiated prior to recent land acquisitions (e.g. Glide Ranch). Jones & Stokes is not attempting to make specific recommendations to the Working Group.

If duck clubs continue to function in the same way they always have, is it necessary to go through the endangered species permitting process?

Not necessarily. However, both FESA and CESA prohibit take, and all private, local, state, and federal actions are required to comply with the law. These laws have been in place for almost 30 years, and are applicable to everyone. The USFWS, NMFS, and DFG do not have a history of pursuing incidental take violations associated with ongoing activities in this area, but that does not mean that the risk of prosecution is not there. Conditions in the Bypass are changing, and areas of habitat attractive to listed species are increasing. The duck clubs could be affected by FESA/CESA if new species are listed or if species from adjacent habitat move onto the duck club lands. Going through either a Section 7 consultation or developing a Section 10 Habitat Conservation Plan (HCP) (with a Neighboring Landowners Agreement) or a Safe Harbor Agreement are some methods to solve the potential for enforcement actions.

Wouldn't a Neighboring Landowner Agreement set major new legal precedent?

No. Neighboring Landowner Agreements (NLA) are not new – in fact, there is one in place for the San Joaquin HCP. However, in order to take advantage of a NLA, there needs to be an HCP in place, which there is not in the Yolo Basin. Without an HCP, there is no mechanism (as provided in present ESA law). The NLA is just one way to deal with ESA compliance, but other options (such as a Safe Harbor Agreement) are stand alone agreements not requiring an HCP. What vehicle people use depends on whether they want private, state, and/or federal lands covered; whether their activities will be enhancing habitat for listed species or simply causing incidental take; and other criteria. Currently, FWS and DFG proposed activities in the Yolo Basin would increase habitat and reduce agricultural land. It is therefore important to focus efforts on protecting the present ongoing activities and operations in light of the changing situation. We want to look at ways that could work with existing landowner activities and ESA regulations.

Do landowners have to pay for monitoring programs per Safe Harbor Agreements?

First of all, it is important to note that Safe Harbor Agreement is a voluntary agreement for private landowners – it is not forced upon anyone. As such, the specifics of funding monitoring programs is decided during negotiation of the Safe Harbor Agreement between the signators and the FWS/NMFS/DFG. While the landowner may choose to pay for the monitoring, etc., there are many ways to obtain grant money from various state and federal funding sources. The USFWS refuses to provide final signatures on take applications, dragging them on for years. Mandated timelines often can't be met due to funding and staffing limitations. While Section 7 consultations have timelines associated with the phases of permitting, HCPs and Safe Harbor Agreements have no specified time limits.

If the purpose of activities in question is enhancement of habitat for listed species, then the applicant would be able to use the Section 10(A)(1)(a) Safe Harbors Agreement process. If the purpose of the activities in question is gaining incidental take authorization, the applicant would want to use the 10(A)(1)(b) HCP/NLA option. If there is a federal nexus (i.e., A federal agency is somehow involved with the planning and/or implementation of the project), the applicant would be involved in the Section 7 consultation process with the federal agency. For example, duck clubs would use Section 10(A)(1)(a) if they were managing for endangered species enhancement, and Section 10(A)(1)(b) if managing activities that result in take.

Who gives the government permission to come on my land?

All participants must agree to grant permission in the agreement negotiation. Private landowners are often reluctant to allow government agencies on their property to conduct surveys. Baseline conditions are often the biggest point of contention in Safe Harbor Agreements. (The baseline is the present conditions on the land (number of species, amount of habitat, etc.), and this is the threshold the landowner is allowed to return to with no threat of penalty or prosecution if the Safe Harbor Agreement is ended.)

Have state and federal refuges met to discuss management practices on refuges?

Yes, but nothing concrete has been developed as of yet. Perhaps at future meetings or through other avenues, the Yolo Bypass Management Group can be informed of progress in this area by USFWS/NMFS/DFG staff (e.g. Stone Lakes)

If water flows into the Yolo Bypass, and endangered species die, isn't that considered take?

Not necessarily. The agencies responsible for this flow may need to consult with FWS/NMFS regarding this, but only if this activity is not already covered under an existing Programmatic Section 7 Incidental take authorization. It is likely that the structure and operations involved with this flow are considered as part of an existing environmental baseline that is covered already. On a related note, questions have been raised in the past about the legal

responsibilities of a private landowner with an easement that allows flow, etc over the land. Jones & Stokes will assess this issue further and will report an opinion on May 2.

Is there a time limit for complying with the ESAs?

As stated above, FESA and CESA prohibitions have been in existence for a long time. If activities are occurring unchanged without permits, then the landowner is at risk for prosecution whether it is in knowing violation of the law or not. Historically, these prosecution efforts have been minimal for ongoing activities. However, if a refuge or other entities are developing a plan to authorize take/enable protection from prosecution, then a private landowner may want to tie into that process. This is not required, but it does reduce the risk.

Mr. Rushton adjourned the meeting at the conclusion of this discussion.