

EXTENSIONS OF REMARKS

IN SUPPORT OF SCIENTIFIC INTEGRITY AT THE DEPARTMENT OF THE INTERIOR

HON. JARED HUFFMAN

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, November 24, 2020

Mr. HUFFMAN. Madam Speaker, I rise today with great concern. Even on their way out the door, the Trump administration's "favor factory" at the Interior Department continues to try to deliver for well-connected interests. We have been conducting oversight over these efforts throughout this Congress, and I want to share with my colleagues just one of the documents we have been provided, which clearly outlines a political agenda overriding science, the law, and the public interest. I am hopeful that the courts and the incoming administration will be able to reinstate scientific integrity to the policymaking process.

UNITED STATES DEPARTMENT OF
COMMERCE, NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION,
NATIONAL MARINE FISHERIES
SERVICE,

Sacramento, CA.

Date: July 1, 2019

Memorandum for: ROC LTO Consultation,
ARN# 151422-WCR2016-SA00300

From: Howard Brown

Subject: Long-term Operation of the Central Valley Project and State Water Project: Consultation Process

I am the Policy Advisor for the Reinitiation of Consultation on the Long-term Operation of the Central Valley Project and State Water Project. This memo is intended to capture, from my own professional perspective, elements of the consultation that were unusual in nature and that may have denigrated the scientific integrity of the Endangered Species Act (ESA) Section 7 process. I have over 18 years working for NOAA Fisheries (NMFS) and have extensive experience writing and reviewing BOs, many of which were complicated and controversial. This consultation was not like any other that I have been involved. From the beginning of this consultation it was clear to me that the pendulum was always going to swing in the favor of political decisions being made by the Department of Interior (DOI) at the expense of the ESA Section 7 process and scientific integrity.

General

The timeline for the consultation was directed by an October 19, 2018, Memorandum from the White House. The Memorandum directed Reclamation to issue a final Biological Assessment (BA) by January 31, 2018 and for NMFS to issue a final Biological Opinion "BO" within 135 day of receiving this date. The timeline for completing this consultation was completely unrealistic, given the complexity of the action. From my perspective, the aggressive schedule was established to set us up for failure, or at the very least to make it difficult to incorporate the best available scientific information into the NMFS BO or for us to complete a credible, repeatable, defensible analysis.

The lead Federal representative assigned to oversee the project seemed biased in the

execution of his role and routinely favored the positions of the Bureau of Reclamation (Reclamation). This seemed unusual to me and I would have expected this representative to serve the role more independently. The representative repeatedly referred to Reclamation as "we" or "our", which indicated to me that he was essentially serving as an extension of the agency.

Development of the Biological Assessment

NMFS was very engaged in the development of the BA. Almost immediately after the October 19, 2018 Memorandum, we provided Reclamation with a proposed outline that would allow for ease-of-integration into the NMFS Biological Opinion BO, and we provided an annotated list of the recent science and biological models that we felt should be considered. We also participated in almost every "Tiger Team" meeting up until the lapse of Federal appropriations triggered a month long Federal furlough. Our mindset was to be cooperative and solution oriented and to provide technical and scientific support to Reclamation to help them develop and analyze a proposed action for the BA with the final objective of supporting a "no-jeopardy" BO.

Soon after we shared the outline and list of science and models we were directed to stop sharing electric documents with Reclamation. This made it very difficult to provide useful information in a timely manner, made it difficult to provide meaningful comments to Reclamation, made it difficult to share best available science to Reclamation.

Reclamation used Google Drive as used as a platform for developing the BA. The U.S. Fish and Wildlife Service (USFWS) had access to the drive but not NMFS. We made multiple requests to be granted access and were told that it was a DOI technical issue that could not be resolved. We offered to help resolve the matter and our IT specialist contacted Reclamation's IT staff with emails and phone calls, but Reclamation never responded. The lack of access made it very difficult to keep up with the latest version of the BA.

NMFS provided high-level comments on the first draft of the BA that we were able to review. We provided our comments verbally and left hard copies with Reclamation. Despite several requests for Reclamation to follow-up on how they addressed our comments, we never received a response.

We did begin providing comments to Reclamation that we passed onto their staff using portable thumb drives.

One of the comments that we made most often, was that the description of the proposed action was ambiguous and would be difficult to analyze. This applied to their description of Core Water Operations, but also to their suite of conservation actions, that later became known as Collaborative Actions. We informed Reclamation that without more details about how actions would be implemented, NMFS would have to apply conservative assumptions that would benefit the conservation of the species. I recall that we made this kind of statement multiple times but did not get much traction in terms of developing more specificity.

NMFS made recommendations to use established, peer reviewed biological models to support the analysis of the BA because we felt that the use of these models represented the application of best available science. DOI

solicitors at the meeting questioned the use of a model represented best available science and Reclamation staff said told us that although they did not disagree, they had been directed to not use biological modeling to support the analysis of the BA. From my view, this was one of the first attempts to influence the scientific integrity of the consultation process.

Reclamation developed a "without action" scenario for the Environmental Baseline of the BA, arguing that that in a consultation on an ongoing action, a without-action scenario must be applied in order to isolate the effects of the action. The without-action scenario entailed no future operations of the Central Valley Project and State Water Project: in other words, no discretionary regulation of flows through the system, including, for example, storing and releasing water from reservoirs and delivering water otherwise required by contract. We had significant concerns with this approach. The first was that this application is not consistent with the regulatory definition of Environmental Baseline; we argued that the analysis in the Environmental Baseline should be consistent with the regulatory definition. The second is that this scenario has no basis in reality and that it should not be applied because it only serves to confuse the analysis. Our third concern was that we were not consulting on an ongoing operation; although many of the operational elements were similar, the action was fundamentally different in that exports were proposed to increase significantly and many of the actions from the previous consultation, most notably the Reasonable and Prudent Alternative (RPA) from the NMFS BO were excluded from the action.

Reclamation then carried this without action scenario forward into their effects analysis as a "without action analysis" (WOA) and completed a wholly comparative analysis where the proposed action was compared against the WOA. This set up a fundamental flaw in the consultation because it made it appear that the effects of the action were better in comparison to the WOA. This flaw was not isolated only to the BA because Reclamation and DOI spent much time and effort seeking to apply this approach to the NMFS BO.

In contrast to the development of the NMFS BO, the process of developing the BA seemed to have very little oversight from the lead Federal representative even though the NMFS team was routinely briefing and elevating areas of serious concern. Although we routinely elevated areas of concern there did not seem to be much effort to address our concerns. In fact, we were routinely told that although our elevated concerns were legitimate, there was simply not enough time to address them in the BA and that we would have to work through them during the drafting of the BO. This created another fundamental flaw in the process because rather than cooperating to make adjustments to the proposed action, we were forced to analyze ambiguous action descriptions that had very little detail or analyze actions that had seemingly significant effects. This placed unreasonable burden on NMFS during the drafting of the BO.

Development of the Biological Opinion

NMFS received the first "Final" BA on January 21, 2018. We immediately started our

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

review. Within hours we were told by Reclamation to stop our review until they had a chance to make some changes.

On February 5, 2019, Reclamation submitted a second "Final" BA and NMFS continued to review the document. We spent the next several weeks carefully reviewing the proposed action and analysis and quickly determined that we did not have sufficient information to initiate ESA Section 7 consultation. Under any other circumstance, we would have notified the lead Federal action agency that the BA did not meet the minimum standards for initiating consultation and we would not have initiated the consultation. Most significantly, the BA did not have a clear description of the action to be covered.

After completing our review of the BA, NMFS spent approximately two weeks in focus-group meetings with Reclamation trying to get a better understanding of the proposed action. My sense is that the meetings were helpful but that staff still felt that they were managing a lot of ambiguity.

NMFS also began to take on the biological modeling that we had recommended for the BA. Reclamation was supportive of this effort and made their consulting teams available to help with modeling runs. We also had to find funds to support the NMFS Southwest Fisheries Science Center to conduct a run of the Winter-run Life Cycle Model. We felt that the results of these modeling efforts were critical to our mandate to apply the best available scientific information to the BO. Taking on these modeling commitments was a significant task and took away staff time from actually drafting the BO.

In April, Reclamation issued a third "Final" BA and our staff spent a considerable amount of time understanding the changes and incorporating them into the BO.

In late April, DOI started to insist that we share the draft BO much sooner than we had planned. Our original plan had a joint Reclamation, WIIN Act Public Water Agency and Independent Peer Review scheduled for late May. We were directed by the lead Federal representative to start sharing the drafts sections of the BO, while the sections were very much in the early drafting stage. This initiated a sequence of events and meetings that consumed much of our available time and were almost impossible for our drafting team to recover from.

During the first wave of reviews we received over 500 comments on the Shasta section, nearly 190 comments on the Delta and hundreds of comments on other sections. We were directed into all-day Tiger Team meetings and Director meetings to clarify the characterization of the proposed action and to scrutinize our effects analysis. The lead Federal representative routinely made statements that our effects analysis was "an extreme worse-case scenario" and that it was hard to understand how we were having trouble with the 4-tiered Shasta Cold Water Temperature Management Plan when "at the end of the day we have a much bigger cold water pool and that should only help us". These statements were not helpful and only added to the confusion and emerging divide between NMFS and Reclamation.

Although the staff-level Tiger Team meetings were costly in terms of time and staff resources they were important because once we were able to focus on the priority comments, we took the time to get into details of the proposed action and effects at a level that we were not able to during the focus group sessions. These working sessions improved the quality of the BO. During these meetings, I reflected that this is exactly how the Section 7 consultation process should work, but unfortunately, the time constraints did not allow for this deliberation

between agencies to run a more natural course.

These meetings were followed by a series of Director-level elevations to resolve matters related to the NMFS analysis of effects on Shasta temperature management and juvenile fish loss at the export facilities. We agreed to a general course of action to develop management objectives for Shasta temperatures and loss at the export facilities. Accomplishing this task would take time and a two week extension was granted to the consultation period to allow us to work through this and to "clean up the analysis". The final BO would now be due on July 1, 2019.

As we moved toward WIIN Act Public Water Agency and Independent Scientific Peer Review, DOI's concern with our analysis began to breach the scientific integrity of the process. Most significant was, what I believe was a political decision to extract our "Integration and Synthesis" section from the Effects Analysis for the review. The Integration and Synthesis section is, perhaps, the most important part of any BO, because it is in this section that our "jeopardy analysis" occurs; where we actually complete the aggregate analysis that supports our conclusion. The direction to extract this section from review, particularly Independent Scientific Peer Review, seemed completely contradictory to the NOAA policy on scientific integrity from NOAA Administrative Order 202-735D: Scientific Integrity. This order was issued to promote a culture of scientific integrity and excellence and establishes an understanding that there must be a commitment between scientists, managers and those who set policy to follow a code of scientific conduct and ethics. I feel that in being directed to extract this section was in direct conflict with the goals of the policy.

On June 14, 2019, Reclamation issued a revision to the proposed action. NMFS had to review the revision and incorporate the changes into the analysis of the BO. Due to time constraints, we accomplished this through supplemental analyses that were essentially tagged on to the end of the Shasta and Delta analyses. This was not ideal, and from my perspective, did not meet Reclamation's satisfaction, but it was the best we could do given time constraints.

Although we spent quite a bit of time working directly with Reclamation to accurately characterize the proposed action and we spent more time independently working on the effects analysis. A second review of the draft BO signaled to DOI that they were still not pleased with the way or effects analysis was reading. Based on this a second extension to the consultation is currently being considered.

Ultimately, the NMFS Central Valley Office completed a draft BO that we sent to Barry Thom, the WCR Regional Administrator, on July 1, 2019. I believe that, considering the time constraints and the complexities of this consultation, that this BO does a good job of analyzing the effects of Reclamation's proposed action and that the draft conclusion of the BO is sound and supported by the best available science.

PERSONAL EXPLANATION

HON. BLAINE LUETKEMEYER

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Tuesday, November 24, 2020

Mr. LUETKEMEYER. Madam Speaker, I was unable to be present for recorded votes on November 20, 2020, for a recorded vote on

Amendment No. 9 and Amendment No. 15 to H.R. 8294 and final passage of H.R. 8294, the National Apprenticeship Act. Had I been present, I would have voted NAY on Roll Call No. 225, YEA on Roll Call No. 226, and NAY on Roll Call No. 227.

REMEMBERING PEGGY FULTON HORA

HON. ERIC SWALWELL

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, November 24, 2020

Mr. SWALWELL of California. Madam Speaker, I rise to recognize the life of retired California Superior Court Judge, Peggy Fulton Hora, who passed away on October 31, 2020.

Born in Oakland and educated in Castro Valley, Hayward, and San Francisco, Peggy was a true Bay Area native. She understood our community and would devote her life to helping others within it. Right from the beginning of her legal career, she committed herself to service by joining the Legal Aid Society of Alameda County, much of which, I represent in Congress.

In a spirit I certainly understand, Peggy, in 1984, decided to make a long-shot run for a judgeship. Her opponents underestimated her, then found themselves referring to her by her new title, Judge Hora.

Judge Hora could have gone to work each morning, completed the criminal dockets in front of her, then returned home in the evening and been a successful member of the bench. But, as you might imagine, this was not how Judge Hora operated. She saw the same defendants in her courtroom repeatedly and thought that there must be a better way. She sought a way to disrupt the criminal justice cycle that she found herself participating in. She turned to a deep and personal love of hers for the solution, reading and studying. She studied brain science, chemical dependence, and addiction. She took this new understanding and helped innovate our justice system by helping to establish a new drug treatment court movement with the intention of being therapeutic and rehabilitating instead of having a primary focus on punishment.

Judge Hora served on the trial bench in Alameda County for over 20 years. She would go on to share her knowledge as the dean of the B.E. Witkin Judicial College of California, and a 15-year faculty member of the National Judicial College. Judge Hora was the 2004 recipient of the Bernard S. Jefferson Judicial Education Award from the California Judge's Association and a 2008 inductee to the Alameda County Women's Hall of Fame. In 2015, Judge Hora, with two colleagues, founded the Justice Speakers Institute and became even more widely recognized as an authority on justice systems and their administration worldwide.

In her personal life, Judge Hora was a voracious reader and traveler. She also enjoyed the symphony, ballets, and both preparing and enjoying fine dining. Her passing was unexpected, and she will be dearly missed by the loving family she left behind. She was predeceased by her son Tim Spangler; but her son Erik and his wife Linda, her son Paul and his wife Jamie; and her eight grandchildren, Dillon, Kyle, Madison, Nathan, Kevin, Emily,