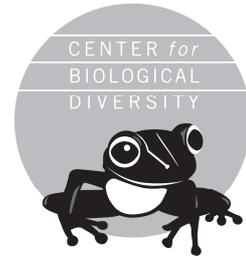


SIERRA CLUB



KERN-KAWEAH CHAPTER



Because life is good.

21 May 2012

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U.S. Army Corps of Engineers

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Sacramento District

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**RE: Isabella Lake Dam Safety Modification Project Draft EIS,
Kern County, California**

Dear Colonel Leady:

The Kern-Kaweah Chapter of the Sierra Club and the Center for Biological Diversity (“Center”) (collectively “conservation groups”) thank you for this opportunity to submit comments on the Isabella Lake Dam Safety Modification Project Draft EIS.

As you are aware, the conservation groups have been working to protect the resources of the Lake Isabella area for decades and in particular have raised significant concerns regarding the impacts of dam operations on species and habitats.¹ The tributaries to and shoreline of Lake Isabella includes the Kern River Preserve, the South Fork Kern important bird area (“IBA”), California’s Department of Fish and Game’s Canebrake Ecological Reserve Units, and designated critical habitat for the endangered Southwestern willow flycatcher. This area is of great importance to migratory and resident birds.

Moreover, the South Fork of the Kern River includes 9.6 miles of designated critical habitat for the Southwestern willow flycatcher. 70 Fed. Reg. 60886, 60920 (October 19, 2005) Now, the U.S. Fish and Wildlife Service (“FWS”) is proposing to expand the designated critical habitat in this unit to include part of Canebrake Creek as well as FWS, Designation of Revised Critical Habitat for Southwestern Willow Flycatcher; Proposed Rule, 76 Fed. Reg. 50542, 50567 (Aug. 15, 2011) (proposing critical habitat for a 14.8-

¹ See, e.g., *Southwest Center for Biological Diversity et al., v. Klasse*, Case No. CIV S-97-1969 GEB JF, 1999 WL 34689321 (E.D. Cal. April 1, 1999) (the Center (under our former name, Southwest Center for Biological Diversity) previously challenged the Corps’ operations of the Lake Isabella Dam regarding impacts to the endangered southwestern willow flycatcher and its critical habitat).

mile portion of the South Fork Kern River (including the upper 0.6-mile of Lake Isabella) and a 1.0-mile segment of Canebrake Creek). As much as ninety percent of riparian habitat used by southwestern willow flycatchers for breeding territories has been lost or modified throughout the species' range. *See* FWS, Southwestern Willow Flycatcher Recovery Plan, at 30, 53 (Aug. 2002); FWS, Designation of Revised Critical Habitat for Southwestern Willow Flycatcher; Proposed Rule, 76 Fed. Reg. 50542, 50567 (Aug. 15, 2011). The South Fork Kern IBA is one of the few places within the species' range where riparian habitat has increased substantially in recent decades, and the area hosts one of the largest breeding populations of southwestern willow flycatchers in California. This population peaked in 1997 at thirty-eight breeding territories but was at just twenty-three territories in 1999. *See* 76 Fed. Reg. at 50567. FWS has recognized that the habitat for the southwestern willow flycatcher along the South Fork of the Kern River is essential to the conservation of the species.

Moreover, unfortunately, we recently learned that the Corps' has failed to complete promised mitigation to support the survival and recovery of the endangered Southwestern willow flycatcher due to the ongoing impacts of dam operations and other projects associated with the dam.

Given this background, the conservation groups are concerned the DEIS fails to properly identify and analyze the significant impacts of the action alternatives on rare, listed, and sensitive species and habitats including designated and proposed critical habitat essential to the survival and recovery of the endangered southwestern willow flycatcher. In addition, the DEIS fails to include a comprehensive identification and analysis of other projects that will have significant cumulative impacts to these same species including, for example, wind power projects in the vicinity and in the flyway corridor for the birds that utilize the Lake Isabella and the Kern River area as critical stops on their migration routes.

The DEIS says:

“INTRODUCTION

This Draft Environmental Impact Statement (Draft EIS) has been prepared by the US Army Corps of Engineers (Corps), Sacramento District in cooperation with US Forest Service, Sequoia National Forest, Kern River Ranger District (USFS). The Draft EIS evaluates the environmental, cultural, and socioeconomic impacts of implementing the proposed Isabella Lake Dam Safety Modification Project (Isabella DSM Project) to remediate existing seismic, seepage, and hydrologic deficiencies in the Main Dam, Spillway, and Auxiliary Dam. The Corps is the Federal lead agency and the USFS is the cooperating agency for the Isabella DSM Project. This analysis was carried out to meet requirements of the National Environmental Policy Act of 1969 (NEPA). Following public and agency review and comment of this Draft EIS, a Final EIS will be prepared and considered before a decision is made whether to approve the project for construction.

PROJECT PURPOSE

The Corps is proposing risk reduction measures to minimize the potential for and consequences of a catastrophic downstream flooding event by remediating the significant seismic, hydrologic, and seepage deficiencies at the Isabella Main and Auxiliary Dams and spillway for safe and effective functioning at authorized capacity, while reducing the risk to the downstream public to tolerable levels. This would support the ultimate goal of having a safe facility that meets Corps risk reduction guidelines for existing dams and allows the project to provide the benefits for which it was authorized. Risk is defined as a measure of the probability and severity of undesirable consequences or outcome.”

Problems with the Isabella Lake Dam Safety Modification Project DEIS

1) The DEIS is unclear and confusing, using multiple terms to describe elevation of the reservoir water, fails to make clear which term is being used at all times and fails to describe each proposed alternative with the same water elevation term, contrary to the requirements of NEPA. The unclear DEIS leaves the reader to try to figure out what the reservoir elevation condition is for each proposed Alternative.

The DEIS violates NEPA and its implementing regulations 40 CFR. § 1500.1(b) which requires the agency to “insure that environmental information is available to public officials and citizens before decisions are made and actions are taken. The information must be of high quality.

The DEIS violates NEPA and its implementing regulations 40 CFR 1502.22 (a) “An EIS must “set forth sufficient information for the general public to make an informed valuation, ... and for the decisionmaker to ‘consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action.’” (Sierra Club v. Corps of Engineers (1983) 701 F.2d 1011.)

The Corps has admitted that it does not yet have critical information needed to evaluate the impacts of the proposed action and alternatives but is attempting to elide this requirement of NEPA by an improper use of “tiering”. Tiering cannot be used to segment an action or enable the action agency to make a premature decision before environmental review is conducted. Impacts to resources must be identified and analyzed at the earliest possible time, not after the decision is made.

The Corps’ statement that it may include additional critical information in the Final EIS does not cure the lack of needed information in the Draft EIS and undermines public participation. For example, the DEIS states:

“a separate analysis in cooperation with the US Fish and Wildlife Service is currently being conducted to evaluate potential habitat impacts and mitigation requirements resulting from implementation of the proposed Action Alternatives,

and to prepare a cost-effective Fish and Wildlife Mitigation Plan. This Plan would likely be completed in time to be included with the final EIS for the Isabella DSM Project, anticipated by the end of September 2012.” DEIS at ES-12.

A separate analysis of impacts to fish and wildlife is not appropriate—these impacts must be included in a revised and recirculated DEIS.

Similarly, providing needed surveys and jurisdictional delineations only after the decisions are made, as a so-called mitigation measure, is unlawful. See DEIS at Page 3-237 (3.10.4 Environmental Commitments and Mitigation Measures, Protective Actions: “Immediately preceding the borrow excavation activities in the South Fork Delta area, bird surveys would be conducted by the Corps or its designated contractors, focusing on southwestern willow flycatcher and least Bell’s vireo.”); DEIS at ES-21 (Recommended Mitigation Measures/Best Management Practices for impacts to biological resources includes: “Conduct bird surveys preceding any borrow excavation activities in the South Fork Delta area, focusing on southwestern willow flycatcher and least Bell’s vireo” and “When final boundaries of Staging Areas south of Auxiliary Dam are established, conduct a detailed wetland delineation of the emergent wetlands to specifically identify the potential area(s) and quantify the extent of potential impact.”)

Shockingly, the Corps is even proposing to defer preparation of the required LEDPA analysis until after the decision has been made. DEIS at ES-21 (“Prepare a Wetland Mitigation Plan to identify the least environmentally damaging practicable alternative (LEDPA) and appropriate on- or off-site areas for any required compensatory mitigation and the appropriate ratio.”) This is nonsensical. It is the DEIS that must contain information about the alternatives, whether they are practicable, appropriate minimization and mitigation measures and what ratios would be appropriate for any compensatory mitigation. These are not decisions that can be made by the agency after the fact, without public review and comment.

Similarly, waiting until after the decision is made to analyze the impacts from the relocation of Ponderosa Drive along with relocation of the existing USFS offices is an unlawful segmenting of the project.

2) The DEIS does not describe, analyze, and discuss a Preferred Alternative. We are told that they are developing a Preferred Alternative, but the public is not provided with that information in the analysis of the DEIS, so the DEIS must analyze each alternative equally, but it does not. The DEIS is inadequate as a NEPA document and a Revised DEIS must be generated with a new comment period for the public to consider and comment on the alternatives.

The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including

the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided, but rather, prescribes a level of treatment, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives." (<http://ceq.hss.doe.gov/nepa/regs/40/40P1.HTM>)

3) The DEIS fails to adequately describe and analyze all of the Alternatives presented in the DEIS, contrary to the requirements of NEPA. The DEIS says, "As a result of the above-described formulation process, the following eight alternative RMPs were derived by the Corps for consideration in this Draft EIS," actually nine were listed on page ES-6, including the No Action Alternative. But not all of these proposed alternatives were discussed and analyzed. We are told that the schedule and details of the five alternatives or mitigation plans are deferred in the draft EIS and could be completed in August 2012, after the comment deadline. Any alteration of the current status of the dam must consider the cumulative impacts of each alternative and or mitigation, so there must be a Revised DEIS to consider all of the proposed Alternatives, mitigations, and plans.

For example, raising the dam level as proposed in Alternative 4 makes no sense, and its need is not supported by any data in the DEIS. Alternative Plan 4 at Page 3-236 states:

"While this alternative includes a 16-foot increase in dam crest height, the existing spillway crest will remain at its current elevation. This would allow the dam to return to normal operating conditions following construction without experiencing changes in gross pool elevation under all but the most infrequent (1 in 4,720 occurrence probability and less) of flood events. This means that inundation of habitat surrounding the lake would be to the same depth and frequency under this alternative as is experienced under current conditions."

There are multiple problems with the description and analysis of Alternative 4. For example, if the Corps believes that the likelihood of the "super-flood" condition is close enough to zero to state the inundation of habitat would be to the "same depth and frequency as under current conditions", then there is no reason to incur the additional expense and risk to the habitat of constructing Alternative 4. If there is any likelihood at all the 16 feet could be needed, then the impact of that occurrence must be addressed. How much additional land would be flooded? What habitat would that impact? Is it possible it could affect the entire South Fork wildlife area? The Kern River Preserve? At minimum, the supplemental DEIS should provide this information and mapping.

In addition, although the DEIS states that Alternative 4 would not in and of itself change the gross pool elevation, it appears to "set up" a future scenario where the Corps would later raise the spill way levels but the DEIS does not fully evaluate that eventuality. In

other words, construction of the additional 16 feet would make it possible for a future proposed project to simply raise the spillway the same amount and we are concerned that in the future the Corps would then claim that raising the spillways alone could be implemented as a “minor” project or even as a “repair” without a new EIS and thereby circumvent full and fair public review.

In addition, raising the dam crest 16 feet would require maximum material "borrow." The conservation groups recommend minimizing borrow to lessen impact on the borrow area near the South Fork wildlife area. If possible, dredging silt deposits already under water would be preferable.

The DEIS should also consider an alternative that would include improvements to Sierra Way Road as it crosses the South Fork Kern River as suggested by the Audubon Kern River Preserve manager, which could reduce flood impacts on that road, result in better public safety, and improve habitat connectivity for wildlife populations.

The Kern River Valley is rich in traditional cultural resources and sites, including but not limited to grinding holes, pictographs, and Native American burial sites. Because the reservoir level is undefined for three of the action alternatives listed in the DEIS, an unknown number of cultural sites or resources below the high water mark could be inundated because of the unspecified conditions of these undefined alternatives.

Section 106 of the National Historic Preservation Act (NHPA) of 1966 does not require historic properties to be preserved but does ensure that the decisions of Federal agencies concerning the treatment of these places result from meaningful consideration of cultural and historic values and the options available to protect the properties.

The DEIS states, “As the final alternatives are defined and cultural resources are identified, evaluated and the effects are assessed, the Section 106 process would be completed in accordance with the executed PA. The Corps may determine that adverse effects on historic properties would be expected. In some cases, these adverse effects may be resolved through mitigation; in other cases, mitigation measures may not be adequate to avoid adverse effects. High adverse and significant impacts under NEPA would result if there remained an adverse effect under the NHPA that could not be resolved through consultation or mitigation on NRHP-eligible resources or areas of importance to Native American or other traditional communities.”

A Revised DEIS must be created that corrects these significant deficiencies.

4) A Revised DEIS should be issued that considers an Alternative that proposes to dredge the reservoir bottom to remove sediments that have accumulated over the years since construction because of logging, road building, and wildfires in Sequoia National Forest and up-stream of the dam. The gross pool storage is currently stated as being 568,075 acre feet of water while the past figure for gross pool storage was approximately

578,000 acre feet, which indicates that approximately 10,000 acre feet of accumulated sediment needs to be removed to restore reservoir capacity.

An Alternative that specifies dredging 10,000 acre feet of sediment from the bed of the reservoir could conceivably reduce the cost of the project and increase public safety without the complication of interference with existing roads that surround the reservoir, commercial and recreational activities that take place on and around the reservoir, and businesses that rely on the existence of the reservoir.

One example of an impact to a business because of just the promise or threat of the proposed dam modification is the loss of renters at the mobile home park just south of the dam. A similar situation occurred when the “Lake Success dam” was proposed for modification and then the dam modification was never implemented. The renters vacated upon hearing of the dam modification and the business owner lost his income.

- 5) The DEIS fails to adequately describe, analyze, and discuss the cumulative impacts of each proposed alternative relative to real estate values in the Kern River Valley.
- 6) The DEIS fails to adequately describe, analyze, and discuss the cumulative impacts of each proposed alternative relative to fish in the reservoir.
- 7) The DEIS fails to adequately describe, analyze, and discuss the cumulative impacts, including the health impact to local residents, of each proposed alternative relative to the creation of dust from the modification proposed with each alternative.
- 8) The DEIS fails to adequately describe, analyze, and discuss the reasons for needing a modification of the dam. The dam has existed under the same seismic and seepage conditions since the dam was first constructed. Do we really need to modify the dam to continue to operate the dam as it has been operated since it was constructed? Is there more danger now than when the dam was constructed?
- 9) The DEIS fails to adequately describe, analyze, and discuss an alternative that would only provide a larger spillway to handle a 500-year flood event, since the capacity to handle a 500-year flood event may be a critical missing ingredient.
- 10) The DEIS fails to adequately describe, analyze, and discuss cleaning up the water quality of the reservoir.
- 11) The DEIS fails to adequately describe, analyze, and discuss the potential toxicity of the bottom mud in the reservoir.
- 12) The DEIS fails to adequately describe, analyze, and discuss where the water that is leaking through the dam originates. Has the leaking water been tested to determine if it

is water coming from the reservoir or if it is actually ground water from a spring that was under the dam when it was first constructed?

13) The DEIS fails to adequately address inconsistency with the Kern River Valley Specific Plan and overstates the likelihood that restoration efforts will be effective. The DEIS at Page 4-36 states that:

“Under all proposed Isabella DSM Project alternatives, two fairly large staging areas are proposed below the Auxiliary Dam. There are USFWS National Wetland Inventory mapped wetlands below the Auxiliary Dam. Two objectives of the KRVSP are to protect the natural environment and maintain and enhance the health of the valley’s natural systems and resources. Similarly, borrow sites proposed in the South Fork Delta area and the Auxiliary Dam Recreation Area could conflict with the above-mentioned objectives of the KRVSP [Kern River Valley Specific Plan]. Efforts to restore borrow sites to preconstruction conditions or better and to mitigate for wetland impacts (on- or off-site) may reduce potential conflicts between the Isabella DSM Project and the KRVSP. With this mitigation, potential cumulative impacts from implementing any of the proposed Action Alternatives would be considered low.”

However, as the Corps is well aware, when the borrow site is a wetland it is often impossible to restore borrow sites to preconstruction conditions. The remaining pit will always be under water and will not achieve the same wetland function as before disturbance even with restoration efforts. The DEIS should include alternative borrow sites such as removing the needed sand from areas exposed from the lakebed during construction, when the water level is low. If feasible, removing sand from these areas could also help reduce the airborne dust and particulates created by proliferation of ORV trails on the drying lakebed when the lakebed is exposed in times of low water.

14) The DEIS also contains inconsistent and confusing statements. For example,

- Table 3-66, page 3-228 has no bullet point under Alternative Plan 4 for Borrow Areas in the South Fork delta. If there's an impact for the other plans, there is likely also for Plan 4. Indeed, impacts to burrow areas should even be greater for this alternative, since the amount of material would be greater for the material to raise the dam.
- Page 3-272 correctly states that: "A population of southwestern pond turtles lives in the ponds of the wildlife area, east of the lake." But this is inconsistent with the discussion regarding the absence of western pond turtles at Page 3-222.

Given all of these significant inadequacies of the Isabella Lake Dam Safety Modification Project Draft EIS, the conservation groups recommend that a Revised DEIS be created that takes into account these significant deficiencies and a new public comment period be provided for the interested public to submit comments on the proposed alternatives.

Respectfully submitted,

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