ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
LUND DOCK
SACRAMENTO COUNTY, CALIFORNIA
SACRAMENTO DISTRICT
FILE NUMBER SPK-2013-00533

DATE: APR 1 9 2016

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Philicia and Mary Lund (Appellants)

District Representative: Mary Pakenham-Walsh, U.S. Army Corps of Engineers, Sacramento District (District)

Authority: Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: February, 9, 2015

Appeal Meeting and Site Visit Date: August 26, 2015

Summary of Decision: The reason for appeal of this permit does not have merit. The District's decision is upheld and no further action is required of the District.

Background Information: The Lund Property (Property) is an approximately 0.09-acre site is located along the northern bank of the Sacramento River, in Section33, Township 5 North, Range 4 East, Mount Diablo Meridian, Latitude 38.16949°, Longitude - 121.59682°, adjacent to property address 17781 Grand Island Road, Assessor's Parcel Number 142- 0120-042 and 142-0120-043, Walnut Grove, Sacramento County, California.

On May 28, 2013, the Appellants submitted an application for their proposed dock. The District published a public notice of the project on July 2, 2013.

On July 13, 2013, the District initiated consultation under Section 7 of the Endangered Species Act with the U.S. Fish and Wildlife Service, based on its determination that the action may affect, and is likely to adversely affect, the Federally listed delta smelt (Hypomesus transpacificus) and/or its critical habitat. The District, in its letter initiating consultation, proposed to offset the effects (loss

of shallow water habitat, and a potential increase in predator habitat) of the proposed project on delta smelt as guided by the December 1, 2004, "Formal Programmatic Consultation on the Issuance of Section 10 and 404 Permits for Projects with Relatively Small Effects on the Delta Smelt (Hypomesus transpacificus) and its Critical Habitat within the Jurisdiction of the Sacramento Fish and Wildlife Office of the U.S. Fish and Wildlife Service, California" (Service File No. 1-1- 04-F-0345) (Programmatic).

The Programmatic be appended to include boat dock construction projects with relatively small effects on delta smelt. The District proposed to ensure that all in-water construction activities related to the proposed project would occur between August 1 and November 30th and that compensation for shallow water habitat loss due to shading effects would be required at a ratio of 3:1(0.27 acre). The District stated that the applicant would be required to purchase shallow water habitat conservation credits from a Service-approved conservation bank.

The Service responded, on August 29, 2013, appending the project to the Programmatic, as requested by the District. The Service concurred with the District's determination that the proposed project may affect and is likely to adversely affect the delta smelt and 0.09 acre of designated critical habitat. The Service concluded that, since the proposed project meets the conditions of the Programmatic, the project is not likely to jeopardize the continued existence of the delta smelt, or result in destruction or adverse modification of designated critical habitat. The Service based their determination on the nature of the effects; restriction of in-water work to times when delta smelt are less likely to be present; and the compensation of shallow water habitat lost or shaded at a 3:1 ratio. The Service required the District to ensure that the applicant provided the Service with proof that 0.27-acre conservation bank credits are purchased from the Liberty Island Conservation Bank.

The District proffered the letter of permission (LOP) to the Appellant on June 6, 2014. The Appellant initially submitted a Request for Appeal (RFA) on December 16, 2014. That RFA was referred to the District for reconsideration, as required by the appeal regulations at 332 CFR 331.6(b). Following required reconsideration by the District, the Appellant submitted a new RFA. Following clarification of the Appellant's reasons for appeal, the appeal was determined to be complete on June 9, 2015.

The Appellant's reason for appeal, which was accepted for review, is:

The Sacramento District made an incorrect judgment when it determined that the project was within the critical habitat of the delta smelt and did not have a basis for the initiation of Section 7 consultation with the U.S. Fish and Wildlife Service.

An appeal conference and site visit were conducted on August 26, 2015.

Appeal Evaluation, Findings and Instructions to the District Engineer (DE):

REASON FOR APPEAL: The Sacramento District made an incorrect judgment when it determined that the project was within the critical habitat of the delta smelt and did not have a basis for the initiation of Section 7 consultation with the U.S. Fish and Wildlife Service.

FINDING: This reason for appeal does not have merit.

ACTION: No further action is required.

DISCUSSION: The requirements of Section 7 of the Endangered Species Act, with which a Federal agency must comply when one of its actions has the potential to affect a listed species, are found in 50 CFR 402.02. Once the Federal agency submits to the Service a request for formal consultation, the Service and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the Service will prepare a biological opinion.

In this case, the District's action was the proposed issuance of a permit. The District reviewed the Appellant's proposal to install a private recreational boat dock and boat shed on fourteen 12-inch steel pilings that had been installed in 1994 under a previous authorization. The Appellants were unable to complete the work at that time. The District, in its July 13, 2013, initiation letter, described the project, its potential effects, and the affected environment. The District, in that letter, stated that the project area is assumed to provide suitable habitat for delta smelt and that the project area is within the area designated as delta smelt critical habitat. The District made it clear in its letter initiating consultation that, as a result of the previously authorized work, constructing the proposed project would not require any new or replacement piles to be installed and that the Appellant did not propose to discharge dredged or fill material (e.g. rip-rap) in association with the proposed dock and boat shed. The District's letter described the proposed project, including dimensions, materials, and a proposed work window.

The District requested that, should the Service concur with its determination of may affect, likely to adversely affect, it would propose to offset the effects (loss of shallow water habitat, and a potential increase in predator habitat) of the proposed project on delta smelt as guided by the Programmatic, including ensuring that all in-water construction activities related to the proposed project would occur between August 1 and November 30th and that compensation for shallow water habitat loss due to shading effects would be required at a ratio of 3:1, for a total compensatory credit acre amount of 0.27 acre. The Programmatic, which is part of the administrative record as an attachment to the proffered

permit, on page 17, includes the Sacramento River, in the Delta, in its description of the geographic extent of Delta smelt critical habitat.

The Service concurred with the District's determination that the proposed project may affect and is likely to adversely affect the delta smelt and 0.09 acre of designated critical habitat and, on August 29, 2013, the Service appended the project to the Programmatic.

Under Section 7 of the Endangered Species Act, Federal agencies must consult with the U.S. Fish and Wildlife Service when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. 50 CFR § 402.14(a) requires each Federal agency to at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required. In this case the December 1, 2004, Programmatic included the project area within its description of the limits of critical habitat and the District determined that the project area consisted of suitable habitat for the delta smelt. Given the District's review of its action and the conclusion that the project area was suitable habitat for delta smelt, located within designated critical habitat, the District was obligated to initiate consultation.

INFORMATION RECEIVED AND ITS DISPOSAL DURING THE APPEAL REVIEW: The administrative appeal was evaluated based on the District's AR, the Appellant's Request for Appeal, and discussions at the appeal meeting with the Appellant and the District.

CONCLUSION: I, therefore, conclude that the reason for appeal does not have merit. The District's determination was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law or policy. This concludes the Administrative Appeal Process. The District's decision is upheld and no further action is required.

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- For
R. Mark Toy
Brigadier General, U.S. Army
Commanding