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Re: Comments on FWS August 26, 2012 Biological Opinion for the Proposed Naval Air Station Disposal and Reuse Project in the City of Alameda, Alameda County, California

Dear Ms. Moore, Mr. Olah and Mr. Solvesky:

Pursuant to Section 7 of the federal Endangered Species Act (ESA), on August 29, 2012 the United State Fish & Wildlife Service (FWS) released its Biological Opinion (Bi-Op) for the project referenced above. This

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project involves the conveyance of federal lands at the former Alameda Naval Station from the United States Department of the Navy (Navy) to the Veterans Administration (VA), and the VA development of a portion of these transferred lands for new facilities. Since 2010, the Golden Gate University Center on Urban Environmental Law (CUEL) has undertaken independent research and analysis of land use and open space issues at Alameda Point (where the former Alameda Naval Air Station was located and where the proposed VA Project would take place.). Below are CUEL's comments on the ESA Bi-Op prepared and issued by the FWS for the VA Project.

Broader Regulatory Context for FWS Bi-Op for VA Project

The Navy and the VA have indicated they intend to complete the transfer of Alameda Point lands by the end of 2012. There are three primary regulatory compliance approvals that need to occur for the conveyance to proceed within this timeframe.

First, pursuant to the ESA, FWS must issue a Bi-Op that finds that the VA Project will not have a significant adverse impact on species protected under the ESA and present at Alameda Point (in this instance two bird species, the California least tern and the Pacific Coast population of the western snowy plover). The August 29, 2012 FWS Bi-Op is therefore not the FWS' assessment of the impact on the VA Project on all wildlife resources (or even all birds). Rather, it is limited to an assessment of the impact of the VA Project on two particular ESA-listed bird species.

Second, the City of Alameda and the Navy will need to renegotiate and approve a new Memorandum of Agreement (MOA) for the conveyance of certain lands (from the Navy to the City of Alameda) in an area of Alameda Point known as the Northwest Territories. The renegotiation of the MOA is needed because under the current MOA the Navy had agreed to transfer to the City of Alameda some of the lands it now proposes to transfer to the VA. The renegotiation and approval of the MOA may trigger the environmental impact assessment requirements of the California Environmental Quality (CEQA) since the lands in question (under the current MOA) were to remain as open space when transferred to the City of Alameda.

Third, in conjunction with the proposed VA facilities, there will need to be compliance with the environmental impact assessment requirements of the National Environmental Policy Act (NEPA). In regard to impacts on birds and wildlife, this NEPA assessment would not be limited to impacts on ESA protected California least tern and western snowy plover (but rather would need to take into account all impacted birds and wildlife, regardless of whether or not protected under the ESA).

The VA has indicated that it is presently preparing an Environmental Assessment (EA) under NEPA, which is used to determine whether an Environmental Impact Statement (EIS) will be prepared or whether the VA adopts a Finding of No Significant Impact (FONSI). Given the expedited timeframe the Navy and the VA have set for the transfer of the Alameda Point lands, it appears likely that the VA will seek to comply with NEPA through the adoption of a FONSI rather than through preparation of an EIS.

The FWS Bi-Op is therefore not the only or the final agency approval for the VA Project. However, the contents and findings of the FWS Bi-Op may be relied upon by the City of Alameda and the VA in the context of their CEQA and NEPA compliance efforts.

The Need for an Accurate and Complete Description of VA Project

Pages 6-7 of the FWS Bi-Op contain a section titled "Description of the Proposed" Action. This section states that the project action includes:

1. Property disposal by the Navy. The disposal action would consist of a **Federal-to-Federal property transfer** of approximately 624 acres of property at the NAS Alameda from the Navy to the VA.
2. The VA's acquisition of the property from the Navy and development of the VA Project on approximately 112.4 acres of the 624-acre Federal transfer parcel and the use of the property as follows:
 - a. Construction and operation of a Veterans Health Administration (VHA) **Outpatient Clinic (OPC)**, which will also include behavioral health services, a Veterans Benefits Administration Outreach office and National Cemetery Administration (NCA) Public Information Center and offices;
 - b. Construction and operation of a NCA **cemetery**, including administrative and maintenance facilities located within the OPC;
 - c. Construction of a **Conservation Management Office (CMO)** to support least tern management, education and interpretive opportunities; and

Per the description in the FWS Bio-Op, it is therefore proposed that a series of new VA facilities be constructed that will serve as Outpatient Clinic, Cemetery, and Conservation Management Office. In later portions of the FWS Bi-Op (see page 38) the VA indicates that there will be approximately **250 employees** at the new facilities, and that approximately **543 patients per day** will visit the Outpatient Clinic

The VA facilities are to be located in an area of Alameda Point that is non-contiguous with existing buildings and structures, and presumably the majority of the 250 employees and 543 daily patients will arrive and depart from these facilities in automobiles or other motorized vehicles. Although the means by which employees and patients will reach the new VA facilities is clearly an essential and integral part of the proposed project (or action) the anticipated vehicular usage of the access road that will lead to and from the VA facilities was not included in the FWS Bi-Op's description of the proposed action.

At present, there is little vehicular usage in the areas where the access road leading to the VA facilities would be located. Using standard traffic engineering methodologies, with 250 anticipated employees and 543 anticipated patients per day, on an average day it is reasonable to anticipate that there will be approximately **1500 vehicular trips per day** along this access road. Spread out over an average 9 hour work day, that would translate into about **160 vehicles each hour** on this access road (where there are currently almost none). This is a considerable increase in vehicular traffic over existing baseline conditions.

In early July 2012, while the FWS was in the final stages of preparing its Bi-Op for the VA Project, CUEL contacted FWS staff to confirm that the access road vehicular usage was a part of the project description and that analysis of the impacts of this vehicular usage would be included in the Bi-Op. At that time, CUEL was told by FWS staff that access road vehicular usage was not part of the project description in the current draft of the Bi-Op, and that the current draft of the of the Bi-Op did not include any analysis of this vehicular usage. At that time, CUEL was also told that even if the Bi-Op was revised to include access road vehicular usage, the Bi-Op would still likely reach the conclusion that there were no significant impacts on the two ESA protected bird species.

This background provides the context for evaluating the manner in which the FWS has revised the Bi-Op to address the question of access road vehicular usage. That is, it appears that the FWS may have been under pressure from the Navy and the VA to issue its final Bi-Op, and that a more thorough assessment of the access road vehicular traffic impacts on the ESA listed species (the California least tern in particular) may have required FWS to delay the issuance of the final Bi-Op.

Analysis of Access Road Vehicular Traffic on California Least Tern

Pages 38-39 of the FWS Bi-Op state:

Traffic from employee commuters (approximately 250), VA patients (approximately 543 per day) and recreationist traveling to the regional park will increase traffic noise. The effects of traffic noise on the least tern may result in behavioral changes, such as avoiding flying over trafficked areas, impairing the ability of least terns to effectively hear and detect predators and conspecifics, and/or increasing stress and alter reproductive and other hormone levels. However, according to a literature review on the effects of highway noise on birds (**Dooling and Popper, 2007**), there are not studies identifying traffic noise as having behavioral or physiological effects on birds and high noise below a masked bird's auditory threshold has no effect on the bird. Thus, the most probable effect of noise from road traffic to least terns would be a reduction in their ability to hear conspecifics and potential predators. The potential effects of increased traffic noise, from several cars per minute (significantly less than highway traffic levels), on the ability of least terns to hear conspecifics or predators will be minimized by maintaining the large buffer zone. The large buffer zone will attenuate noise from road traffic more than 0.4 miles away, significantly minimizing the effects on least terns at the nesting colony.

This paragraph represents, in its entirety, the FWS Bi-Op's assessment of the impacts of access road vehicular usage on the California least tern. This assessment is inadequate in several respects.

Perhaps most fundamentally, the findings in this paragraph rely not on specific actual data regarding either traffic, noise or the California least tern, but rather the generalized findings of a single paper (Robert J. Dooling and Arthur N. Popper, *The Effects of Highway Noise on Birds*, 2007). The Dooling and Popper paper was not a peer reviewed work, but rather was a report commissioned and paid for by the California Department of Transportation (Caltrans), a state agency that builds and maintains highways.

Moreover, the FWS Bi-Op's characterization of the substance of the Dooling and Popper paper is inaccurate. Throughout their paper, Dooling and Popper repeatedly emphasize that there can be significant variations among different bird species in terms of how they respond to vehicular

noise and their respective auditory thresholds, and they therefore make clear that the auditory physiology and behavioral patterns of the particular bird species under consideration needs to be taken into account. The Dooling and Popper paper also suggests that there are levels of vehicular/highway noise above which birds often are adversely impacted. For example:

- On page 30 of their Caltrans report, Dooling and Popper explain: "[T]he **variation between birds of different species is considerable**... This raises, again, the issue of accounting for species variation and suggests caution in trying to apply a model based on one species. Such an approach would prove woefully inadequate in the case of masking of important biological signals by noise."
- On page 53 of their Caltrans report, Dooling and Popper explain: "[M]asking studies led to an overall noise level guideline of around 60 dB(a) for continuous noise. Since this 60 dB(a) criterion was developed, however, highly controlled laboratory and field studies have extended the range of species differences into signal-to-noise ratios as well as the gain in signal-to-ratio that occurs with various short-term adaptive behavioral responses that birds might use in natural environments. **Critical rations vary across species** as much as 10dB, strongly suggesting that acoustic communication in **some species might be affected by an overall highway noise level even less than 60dB(a), while others would not.**"

The Dooling and Popper Caltrans paper therefore does not stand for the general premises (as the FWS Bi-Op claims) that highway noise does not affect birds. Rather, the Dooling and Popper Caltrans paper suggests that before one can determine whether particular highway noise adversely affects a particular species one must first quantify in dB(A)s the noise and then take into account the particular auditory physiology and behavioral responses of particular species. In contrast to the impact assessment methodology actually recommended in the Dooling and Popper Caltrans paper, the FWS Bi-Op improperly relied upon the Dooling and Popper Caltrans paper as an rationale to not actually undertake any assessment of the impacts of noise from the access road vehicular usage on the nearby California least tern colony. That is, in regard to the VA Project, the FWS Bi-Op contains no assessment of the number of access road vehicle trips generated, no assessment of the noise levels or noise ranges generated by these access road vehicle trips, and no assessment of the particular masking/auditory physiology/thresholds of the California least tern to evaluate the species' susceptibility to adverse effects from such noise.

Conclusion

For the reasons noted above, the FWS Bi-Op's analysis of the impacts of the access road vehicular usage is a disappointment. As also discussed above, however, the FWS Bi-Op is not the only opportunity that FWS will have to provide input on the VA Project.

In the coming months, the FWS will be provided with an opportunity to comment on the NEPA EA for the VA Project that will be issued, which is most likely to propose adoption of a FONSI rather than the preparation of an EIS. FWS may also be provided with an opportunity to comment on the City of Alameda's CEQA documents. There are extensive wetlands along the proposed access road and near other of the proposed VA project facilities. While these wetlands may not provide habitat to California least tern, they serve as habitat for many other waterfowl and migratory birds.

The comments that the FWS provides on the NEPA/CEQA documents may well determine whether the VA Project will proceed without the analysis of alternatives and mitigation measures that a full environmental impact assessment would ensure. Through the NEPA/CEQA processes that lies ahead, there will therefore be chances for FWS to weigh in constructively and independently on the bird/wildlife impacts of the proposed VA project.

Yours,



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