



**COUNTY OF SAN LUIS OBISPO
DEPARTMENT OF PUBLIC WORKS**

Date: January 31, 2025
Contact: Shelly Cone, Public Information Officer (805) 781-5299

County Appeals Court Decision that Would Have Catastrophic Impact on South County Water Supply

The County has appealed a court decision that requires increased water releases from Lopez Lake that could potentially cause harm to sensitive species and is already having adverse effects on water supply for drinking and fighting fires. On, November 27, 2024, a Federal Judge in Los Angeles determined that the operation of the lake, a water supply reservoir for the communities of Pismo Beach, Arroyo Grande, Grover Beach, Oceano and Avila, threatens steelhead trout under the Endangered Species Act. The Court subsequently ordered the County of San Luis Obispo – as the operator of the dam – to, among other things, immediately release significantly more water from Lopez Lake.

The County appealed the Court’s decision because the Court-ordered releases are predicted to result in Lopez Lake completely running out of water during droughts, which will have a catastrophic impact on the communities’ water supply, fire suppression and environmental habitat downstream of Lopez Lake. For example, if the Court-ordered releases were in effect during the last drought in 2021, the communities that rely on Lopez Reservoir would have had no access to this supply for more than one year, with extended periods of poor water quality. (See attached graph)

Lopez Lake was constructed before Congress enacted the Endangered Species Act. To comply with the Act, the County is implementing the Interim Downstream Release Schedule designed to avoid impacts to protected species. In addition, the County has been working with National Marine Fisheries Service (NMFS) and US Fish and Wildlife Service (FWS) to develop a Habitat Conservation Plan. The Habitat Conservation Plan is intended to authorize a variety of County activities in Arroyo Grande Creek, including continued operation of Lopez Dam for the benefit of local wildlife and County residents.

The lawsuit interrupts this process and is forcing water releases that are not science-based and collectively do more harm than benefit. The County received letters from NMFS and FWS stating they would not participate in the lawsuit and would only work on a Habitat Conservation Plan under their guidelines. (See attached letters)

The appeal is seeking an end to the problematic water releases, and to ensure that the ‘big picture’ of drinking water supply, fire suppression, and environmental habitat are balanced. It is important that the County return to working on a final Habitat Conservation Plan with the federal agencies who have approval authority.

Other statewide organizations have joined in supporting the County and communities that rely on Lopez Lake, including the California State Association of Counties, Association of California Water Agencies, California Farm Bureau, San Luis Obispo Farm Bureau, and Pacific Legal Foundation.

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Attachments: 1) Supporting Statements 2) Graph 3) Letters from NMFS and USFWS

County of San Luis Obispo Department of Public Works

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Statement List

A number of public officials and leading citizens in the Zone 3 community, who rely heavily if not exclusively on Lopez Lake for their water supply, have weighed in on this lawsuit:

Scott Jalbert, Director for the County Office of Emergency Services: "The Lopez Lake water supply is a vital resource for public safety in the South County Area. It is used daily through the hydrant systems providing firefighting water for building and wildland fires. Firefighting helicopters also use the lake as a source for dropping water on fast moving wildland fires. The high potential of going back into a drought condition combined with this increase of water release, places our communities in a high-risk situation where this vital water supply may be limited or not available when we need it for public safety."

Five Cities Fire Authority Chief **Scott Hallett**: "The Five Cities Fire Authority is responsible for keeping 38,000 residents safe in the communities we protect. Knowing there could be months without water in Lopez Lake is unsettling to think about and will create unprecedented challenges for my firefighters to protect life and property. With the frequency of drought in California, we cannot risk jeopardizing our water supply."

SLO County Supervisor for District 4, **Jimmy Paulding**: "Ideally, we can work out a settlement with the litigants and agree on a compromise that is mutually beneficial for both the community's water supply and environmental needs. I am hopeful the environmental groups who have brought this lawsuit are willing to recognize this balance. It is the Board of Supervisors' responsibility to protect this important resource for our community and the environment and the filing of this appeal assures we have time to work collaboratively toward a reasonable solution."

SLO County Supervisor for District 2, **Bruce Gibson**: "As past president of the California State Association of Counties, I am pleased to see that our organization has joined forces with the Association of California Water Agencies, the California Farm Bureau, San Luis Obispo Farm Bureau, and other stakeholders to support the County's appeal in this case. The complaint filed here is unreasonable on its face and, if sustained, would in fact negatively impact the environment of Arroyo Grande Creek. The environmental groups that filed this litigation should realize that the habitat and species that they are trying to protect will fare much better under protections developed collaboratively in the regulatory process currently underway with agencies like the National Marine Fisheries and the Fish and Wildlife Service. Unfortunately, we have seen litigation like this being misused up and down the State."

Brian Talley, third generation farmer and President of Talley Farms: "This order has put us on the path to draining Lopez Lake, the South County's main source of water. It threatens our water supply and more than 60 years of productive collaboration between Lopez water contractors (cities of Arroyo Grande, Grover Beach, Pismo Beach, Oceano and Avila Community Services Districts), SLO County, and the Agricultural community since the conception and construction of the Lopez dam in the 1960s. During that time, we have protected our water supply and protected threatened species with thoughtful and pragmatic management practices. If the plaintiffs prevail, we'll be subject to outside agencies and groups dictating how we manage our water supply."

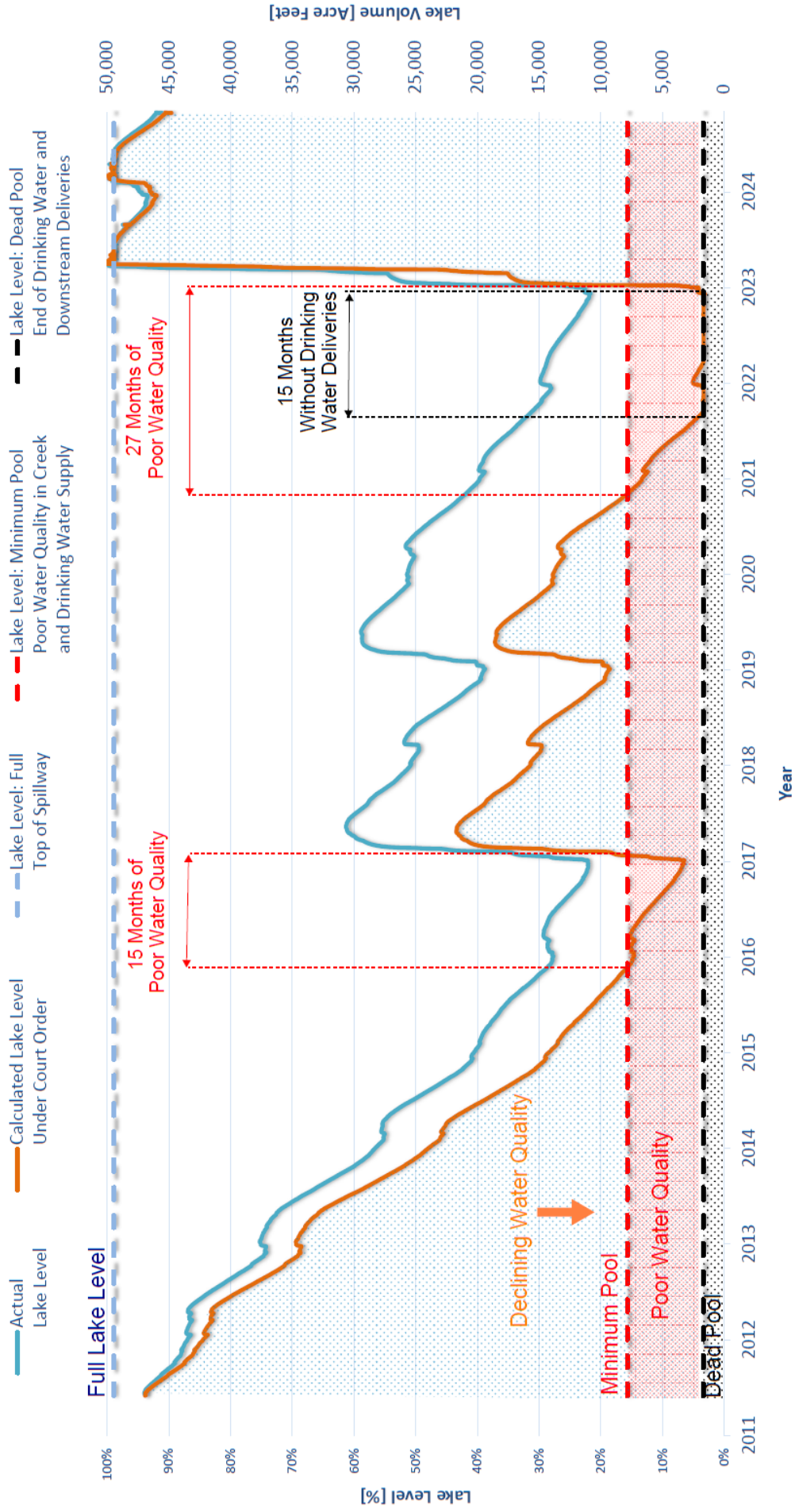
Joint statement by the South County communities: "The cities of **Arroyo Grande, Grover Beach, Pismo Beach**, and the **Oceano Community Services District** have contracted with the County of San Luis Obispo to receive water from Lopez Lake for over 50 years. We are deeply concerned and support the County's appeal as a result of the potentially significant long-term impact to the water supply and storage that our residents, businesses, and ecosystems rely upon."

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Lopez Lake Levels: Actual vs Calculated Under Court Order





UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404-4731

January 10, 2025

Paul Weiland
Nossaman, LLP
18101 Von Karman Avenue, Suite 1800
Irvine, California 92612
Via email: pweiland@nossaman.com

Dear Mr. Weiland:

NOAA's National Marine Fisheries Service (NMFS) received San Luis Obispo County's (County) request for comments and recommendations regarding its attached *Proposed Lopez Dam Flow Release Plan* via email on December 23, 2024.

Should the County submit to NMFS a draft habitat conservation plan (HCP) and application for an Endangered Species Act (ESA) Section 10(a)(1)(B) incidental take permit (Permit), NMFS will review the application at that time and will work with the County within that statutory process. However, for the reasons below, NMFS does not intend to provide review and comments outside of avenues provided by the ESA, such as the Section 10 Permit process.

NMFS is charged with administering the provisions of the ESA. For example, Section 4 of the ESA requires NMFS to determine if particular species should be listed as "endangered" or "threatened," decide whether to designate critical habitat for listed species, and develop and implement recovery plans for those listed species. Section 7 of the ESA mandates that federal agencies consult with NMFS regarding agency actions to ensure that those actions are not likely to jeopardize ESA-listed species or destroy or adversely modify their designated critical habitat. And Section 10 allows NMFS to issue permits to non-federal entities or individuals that allow for take of listed species, including permits for take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (also known as an incidental take permit). These are just some of the responsibilities that Congress has charged NMFS with carrying out under the ESA, and this list does not include the numerous other mandates that NMFS must execute under other statutes using its limited resources.

When Congress passed the ESA, it recognized that NMFS would have competing priorities and finite resources with which to implement them. For that reason, a citizen suit provision was added to allow members of the public to enforce the ESA under certain circumstances. The citizen suit provision allows a person to file a civil suit to enjoin another person alleged to be in violation of the ESA or its regulations. 16 U.S.C. § 1540(g)(1)(A). Before a person can bring such an action, they must provide a 60-day notice to the relevant wildlife agency, NMFS or the U.S. Fish and Wildlife Service (collectively, the Services). *Id.* § 1540(g)(2)(A). This notice gives the Services the opportunity to review the claims and use their discretion to decide whether to bring their own criminal or civil enforcement action in lieu of the citizen suit. *See id.* If the citizen suit is filed and the United States is not already a party, the Services have another avenue



through which they can opt to become involved in the litigation: they can request that the U.S. Department of Justice intervene in the lawsuit on behalf of the United States. *Id.* § 1540(g)(3)(B). With regard to *San Luis Obispo Coastkeeper v. San Luis Obispo County*, No. 2:24-cv-6854 (C.D. Cal.), NMFS received Plaintiffs' 60-day notice of intent to sue, but did not pursue a criminal or civil action. NMFS also has not requested that the Department of Justice intervene in the lawsuit.

Instead, given its competing priorities, NMFS believes participation in the administrative Permit process provided in Section 10 of the ESA is the appropriate path forward for the agency at this time. We note that San Luis Obispo County has already been engaging in the Permit process with regard to the Lopez Dam, and NMFS looks forward to working with the County within that process. However, we will not be providing review and comment on interim flow plans (and other plans) as specified by the Court as those interim plans fall outside the statutory processes described above. We urge the County to submit a new draft HCP and Permit application as quickly as possible. The HCP should contain all information required by ESA statute and regulation.

Please contact Matt McGoogan via email at matthew.mcgoogan@noaa.gov if you have a question regarding this letter or if you require additional information.

Sincerely,



Alecia Van Atta
Assistant Regional Administrator
California Coastal Office

cc: Kirby M. Bartlett, U.S. Fish & Wildlife Service, Ventura Field Office



United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE

Ecological Services
Ventura Fish and Wildlife Office
2493 Portola Road, Suite B
Ventura, California 93003



IN REPLY REFER TO:
2025-0037779

January 7, 2025

Paul Weiland
Assistant Managing Partner
Nossaman LLP
18101 Von Karman Avenue, Suite 1800
Irvine, California 92612
pweiland@nossaman.com

Subject: Response to Requested Comments on the County of San Luis Obispo's Proposed Lopez Dam Flow Release Plan

Dear Paul Weiland:

This letter acknowledges our receipt of the County of San Luis Obispo's (County) request that the U.S. Fish and Wildlife Service (FWS) review and provide comments to the proposed Lopez Dam Flow Release Plan. The Plan was provided pursuant to the Preliminary Injunction Order issued in Case No. 2:24-cv-06854-SPG-AS (*San Luis Obispo Coastkeeper, et al., v. County of San Luis Obispo*). The requested review concerns the potential effects of the County's proposed activities related to the Lopez Dam Flow Release Plan on species under the FWS's Endangered Species Act of 1973 (ESA) purview, including the federally threatened California red-legged frog (*Rana draytonii*) and the federally endangered tidewater goby (*Eucyclogobius newberryi*), as well as the federally proposed threatened southwestern pond turtle (*Actinemys pallida*). The FWS defers all South-Central California Coast steelhead (*Oncorhynchus mykiss*) considerations to the National Marine Fisheries Service (NMFS) or appropriate species experts.

The FWS does not intend to provide comments on the various interim measures specified by the Preliminary Injunction Order. Should the County submit to the FWS a draft habitat conservation plan (HCP) and application for an ESA Section 10(a)(1)(B) incidental take permit (ITP), the FWS will work with the County within that statutory process. However, for the reasons below, the FWS does not find it appropriate at this time to provide review and comments outside of avenues provided by the ESA, such as the Section 10 ITP process.

The FWS is charged with administering many different provisions of the ESA. Among those many different responsibilities, Section 10 allows the FWS to issue permits to members of the public that allow for take of listed species, including permits for take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (also known as an ITP). When Congress passed the ESA, it recognized that the FWS would have competing priorities and finite resources with which to implement them. For that reason, a citizen suit provision was added to

allow members of the public to enforce the ESA under certain circumstances. The citizen suit provision allows a person to file a civil suit to enjoin another person alleged to be in violation of the ESA or its regulations. 16 U.S.C. § 1540(g)(1)(A). Before a person can bring such an action, they must provide a 60-day notice to the relevant wildlife agency, the FWS or NMFS (collectively, Services). *Id.* § 1540(g)(2)(A). This notice gives the Services the opportunity to review the claims and use their discretion to decide whether to bring their own criminal or civil enforcement action in lieu of the citizen suit. *See id.* If the citizen suit is filed and the United States is not already a party, the Services have another avenue through which they can opt to become involved in the litigation: they can request that the U.S. Department of Justice intervene in the lawsuit on behalf of the United States. *Id.* § 1540(g)(3)(B). With regard to *San Luis Obispo Coastkeeper v. San Luis Obispo County*, No. 2:24-cv-6854 (C.D. Cal.), the FWS received Plaintiffs' 60-day notice of intent to sue, but did not pursue a criminal or civil action. The FWS also has not requested that the Department of Justice intervene in the lawsuit.

Instead, the FWS believes participation in the administrative ITP process provided in Section 10 of the ESA is the appropriate path forward for the agency at this time. We note that the County has already been engaging with NMFS in the ITP process with regard to the Lopez Dam, and the FWS looks forward to working with the County within the ITP process. However, FWS will not be providing review and comment on the interim flow plan (and other plans) discussed in the Court's Order.

The Service recommends the County coordinate with us through the ITP process to develop an HCP to avoid, minimize, and mitigate potential impacts to California red-legged frog, tidewater goby, and southwestern pond turtle from Lopez Dam management activities to ensure compliance with the ESA. To discuss development of an HCP or if you have any questions, please contact Kirby Bartlett at 805-677-3307, or by electronic mail at kirby_bartlett@fws.gov.

Sincerely,

Catherine Darst
Acting Field Supervisor

cc: Kate Ballantyne, SLO County
Ben Rubin, Nossaman, LLP

References

- Kupferberg, S.J., Palen, W.J., Lind, A.J., Bobzien, S., Catenazzi, A., Drennan, J., Power, M.E. 2012. Effects of Flow Regimes Altered by Dams on Survival, Population Declines, and Range-Wide Losses of California River-Breeding Frogs. *Conservation Biology* 26(3): 513–524.
- Reese, D.A., and H.H. Welsh, Jr. 1998a. Comparative demography of *Clemmys marmorata* populations in the Trinity River of California in the context of dam-induced alterations. *Journal of Herpetology* 32:505-515.

Ruhi, A., Catford, J.A., Cross, W.F., Escoriza, D., Olden, J.D. 2019. Multiple Stressors in River Ecosystem, Chapter 3 Understanding the Nexus Between Hydrological Alteration and Biological Invasions. Elsevier. pp. 45-64.

[Service] U.S. Fish and Wildlife Service. 2005. Recovery Plan for the Tidewater Goby (*Eucyclogobius newberryi*). U.S. Fish and Wildlife Service, Portland, Oregon. vi + 199 pp.