

DEPARTMENT OF WATER RESOURCES

1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 653-5791



April 9, 2007

Honorable Darrell Steinberg, Chairperson
Senate Natural Resources and Water Committee
Member of the Senate
State Capitol, Room 4035
Sacramento, California 95814

Dear Senator Steinberg:

Today, the Department of Water Resources (DWR) submitted a request to the Department of Fish and Game (DFG) for a determination that the federal biological opinions and incidental take statements for State listed salmon and Delta smelt are consistent with the California Endangered Species Act (CESA). DWR submitted this request in response to the proposed Alameda County Superior Court decision finding that DWR does not have authority for incidental take of these species through existing plans and agreements pursuant to the provisions of CESA (Fish and Game Code Section 2081.1).

Although DWR believes that the plans and agreements developed with DFG over the past 20 years to protect Delta species from the impacts of pumping satisfy the statutory requirements, DWR decided to seek this alternative form of authorization under CESA to avoid potentially severe consequences of ceasing operations at the DWR south Delta pumping facilities.

DWR and DFG will also continue to collaborate on the development of a Bay-Delta Conservation Plan (BDCP) to provide the broadest and most comprehensive protection for the Delta ecosystem. Fish species in the Delta face a host of stressors that include not only water project operations, but competition and predation from invasive species, as well as a shortage of food sources. The BDCP will address multiple stressors, conserve natural communities at the ecosystem scale, and provide a stable approach to species recovery.

We cannot expect to recover Delta species by adjusting SWP pumping alone, but instead must continue to address issues related to habitat, invasive species, and all other stressors. Once the BDCP process is completed and appropriate environmental documentation is prepared, DWR intends to rely upon this more protective process and seek appropriate authorization for its Delta activities using the BDCP.

The collaborative process to develop a Bay-Delta Conservation Plan began in 2005 and was formalized in a planning agreement in October 2006. The DWR goal for the BDCP process is to secure an approved habitat conservation plan and natural community conservation plan by 2010.

Meanwhile, the draft decision of the court would impose a 60-day timeline requiring DWR to comply with the order or cease SWP Delta pumping, leaving DWR few options. If the State cannot obtain coverage under CESA in the time frame proposed by the court, the resulting Delta export curtailment would cause significant statewide impacts. SWP agricultural customers in the San Joaquin Valley would rely on groundwater which would further overdraft these aquifers and increase energy use. At the same time, California energy managers would not be able to rely on the peak-period generating capacity of the SWP and the flexibility that this generation provides. By September, all south-of-Delta storage would likely be drawn down far below normal operating levels. This would leave south-of-Delta water users vulnerable to any subsequent supply interruption caused by earthquake, levee failure, or drought.

In order to avoid these consequences, DWR is expeditiously seeking a consistency determination as an alternative method to obtain CESA authorization. A consistency determination is the only method of complying with the court's order and 60-day timeline. This effort is part of a three-part strategy to ensure protection and recovery of listed fish species in the Delta. This strategy includes (1) a request for consistency determination by DFG with the current federal biological opinions that control water project operations to confirm incidental take authority in the short term; (2) active engagement in the current reconsultation process regarding the existing federal biological opinions to provide updated species protection from water project operations and operational coverage for these activities; this is particularly important since the current smelt biological opinion is under legal challenge; and (3) expedited completion of the BDCP to contribute to species recovery over the long term.

Any determination by DFG regarding consistency of CESA with the existing federal biological opinions will have a limited term, since the U.S. Bureau of Reclamation, in coordination with DWR, has renewed consultation with the federal fish agencies on the 2004 salmon biological opinion and the 2005 Delta smelt biological opinion. We anticipate that these opinions will be amended or replaced with new opinions sometime next year. DWR and DFG staff should be actively engaged in the consultation to help develop effective measures that will best protect the listed species under both State and federal law. Toward this end, I have requested "applicant status" under the federal ESA from Reclamation for DWR in the consultation process. This will help ensure that the requirements of both the State and federal endangered species acts are considered during consultation and the new opinions are consistent with the provisions of CESA. Upon issuance of new biological opinions, DWR may request a new consistency determination based on these opinions.

DWR and DFG share a long collaborative history of processes and agreements designed to protect the species covered by the federal biological opinions. Five of these agreements were specifically described in our filings with the court, but the cited agreements are just a subset of a much longer list that includes:

- Delta Pumping Plant Fish Protection Agreement (“Four Pumps Agreement”), December 1986. Under this agreement with DFG, DWR pays for direct losses of striped bass, steelhead and Chinook salmon based on measured losses at Banks Pumping Plant. The payments are used for various habitat measures, with an account maintained of the estimated quantity of fisheries mitigation. Under this agreement DWR is exceeding its annual mitigation requirements for some salmonid species about five-fold.
- CALFED Framework Agreement and Bay-Delta Accord, 1994. These agreements committed state and federal agencies to improved coordination of water supply operations with endangered species protection, and provided the foundation for development of the CALFED long-term plan for Delta ecosystem restoration.
- Vernalis Adaptive Management Plan, 1998. This plan provides for adaptive fishery management on the lower San Joaquin River including a San Joaquin River pulse flow and reduced Delta exports in April and May, fall attraction flows, and other measures.
- Water Right Decision 1641 issued by the SWRCB, March 2000. The SWP and CVP are jointly responsible for meeting conditions contained in this water right decision. The conditions include a delta outflow standard (the X-2 standard), export-inflow ratio limitations and other restrictions. Combined SWP-CVP export reductions above those of the former water right decision 1485 are estimated at about 300,000 acre-feet in an average water year and dry-year impacts are estimated at 895,000 acre-feet.
- CALFED Record of Decision, August 2000. The Environmental Water Account is discussed in the CALFED Record of Decision and has as its goal the resolution of fishery/water diversion conflicts in the Delta. The Environmental Water Account supplements the baseline fisheries protection measures with a combination of fixed water supply assets and variable water supply from operational tools such as defined conveyance capacity. It provides an adaptive management approach to the protection of at-risk fish species in an atmosphere of evolving science in the Bay-Delta Estuary. In total, the EWA real water budget in the CALFED Record of Decision was estimated to be 330,000 acre-feet annually, with year-to-year variations based on the amount of water generated by variable assets. Over the last six years of EWA operation the typical amount of water used by the EWA has been about 320,000 AF.
- Anadromous Fisheries Biological Opinion (NMFS), October 2004 (supersedes earlier 1995 Biological Opinion.). This provides Federal Endangered Species Act incidental take coverage for Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead trout. Includes various measures for restricting operations of upstream reservoirs and Delta operations, such as closure of the Delta Cross Channel.

- Delta Smelt Biological Opinion (USFWS), February 2005 (supersedes earlier 1995 Biological Opinion). This provides Federal Endangered Species Act incidental take coverage for Delta smelt for the SWP and CVP. Includes restrictions on operation of SWP and CVP facilities, including export restrictions in the spring. Also establishes the Delta Smelt Working Group for determining an adaptive management approach to Delta smelt fishery protection measures among resources agencies.
- Delta Smelt Action Plan, 2005. This plan jointly prepared by DWR and DFG described current and future work needed to provide more answers and guide efforts to restore and protect Delta smelt.
- Statement of Principles to Provide Further Protection to At-risk Species in the Delta, December 19, 2005. During the fall of 2005 discussions were held among State and federal water and fishery agencies, water interests and environmental interests at the University of Pacific. This culminated in the Statement of Principles signed in December 2005 which began the Bay Delta Conservation Plan process. A Memorandum of Agreement to provide \$30 Million to the BDCP effort and related activities from water and power interests was signed in July 2006. SWP and certain CVP water users plus Mirant Power committed to voluntary contributions of \$30 million in new money over two years. These contributions include \$6 million for development of the Bay-Delta Conservation Plan, \$12 million for projects through a Species Recovery Capital Fund, \$4 million for Delta Vision studies, and \$8 million for pelagic organism decline studies.
- Bay Delta Conservation Plan (BDCP) Planning Agreement, October 2006. This formal Planning Agreement was signed under the provisions of the Natural Community Conservation Planning Act (NCCP) under State law and under the federal Endangered Species Act under Section 10 for a Habitat Conservation Plan (HCP). The Planning Agreement is the formal initiation of this collaborative process to go beyond mitigation of water project impacts and to achieve conservation and contribute to recovery of at-risk fish species in the Delta. A diverse 18-member Steering Committee meets almost every 2 weeks to guide this process. The goal is to achieve conceptual agreement on the BDCP by December 2007 with detailed actions defined shortly thereafter. Before the BDCP can be executed and submitted to the State and federal fishery agencies for approval, an EIS/R will have to be developed and certified. This may take an additional year or more.
- Pelagic Fish Action Plan, 2007. This plan jointly prepared by DWR and DFG under the direction of the Resources Agency built upon the foundation of the 2005 plan and incorporated emerging science. Some protective actions described in the 2007 plan related to water project operations were implemented even before publication of the final plan.

All of these agreements and efforts attest to DWR's continuing efforts to protect Delta species. Judge Roesch, in his proposed decision, acknowledged that "...the documents certainly demonstrate the fact that DWR was and has been attentive to the issue of the incidental take caused by the pumping plant operation..."

A significant action in the Delta smelt and salmon biological opinions is the Adaptive Management Process which requires DWR and Reclamation, as the Project agencies, to work closely with DFG, U.S. Fish and Wildlife Service, and the National Marine Fisheries Service to coordinate Project operations with fishery needs. Within the Adaptive Management Process, there are several forums that meet regularly to review the real-time monitoring data on each fish species and the Project operations affecting these species. These forums, including the Data Assessment Team, the Salmon Decision Process, the Delta Smelt Working Group, and the Water Operations Management Team, enable SWP and Central Valley Project (CVP) operations to be modified as appropriate to avoid impacts to the listed fish and protect critical habitat.

The on-going consultation created by the Adaptive Management Process has resulted in SWP operational changes that incorporate the latest scientific information to provide fish protection beyond regulatory requirements. One example is the recent reduction in SWP exports designed to modify flows in Old River and Middle River to protect adult Delta smelt. The rationale for this action was described at the CALFED Science Conference in October 2006. DWR and DFG worked to refine the potential action and describe it in the jointly-published *Pelagic Fish Action Plan, March 2007*. Even before final publication of the plan, we applied this science to better protect smelt in the Delta. The SWP has not experienced any observable direct take of smelt this season, and the CVP has taken 36 smelt. During other years with similar smelt indices, salvage of Delta Smelt has been about 2000 fish. The rapid application of evolving science appears to be helping us protect the species.

The existing biological opinions rely heavily upon adaptive management of the Environmental Water Account (EWA). The EWA is a flexible program: assets including money or water can be added to the EWA portfolio according to need, and the assets can be used in ways that are informed by the best available science. The EWA is most effective when the fish agencies know they can depend upon the assets of the EWA as they manage these assets to protect fish. Within the flexibility of the biological opinions, DWR can provide additional certainty with EWA assets. The EWA is allowed to carry water "debt" from one water year to the next to help it function effectively. In order to address an emerging issue related to interruptible water and effects on the EWA, DWR will add flexibility by reducing the allocation of interruptible water deliveries to repay this EWA carryover debt. Also, the EWA has "fixed assets" of purchased water, but funds for the purchase of this water will likely run short in 2008. In order meet the program needs under the current federal opinions, if purchased assets are insufficient to meet the recent purchased asset targets (210-250 thousand acre-feet), the SWP will provide water to the purchased water account for EWA to meet these targets.

Adaptive management relies upon good scientific information and real-time monitoring to guide decision making. DWR and DFG, along with several other State and federal agencies, have collaborated in the Interagency Ecological Program (IEP) since before 1970. The IEP monitoring program informs many of our actions. Elevated turbidity, which refers to the cloudiness of water caused by particles in the water, has recently been identified as a factor that may help explain smelt movement and distribution. To ensure that the IEP and its member agencies have the necessary data about turbidity to help predict smelt distribution, DWR plans to invest in additional turbidity monitoring stations at key points in the Delta this year. Of course, DWR will also continue its investment in the intensive pelagic organism decline studies started in 2005.

In summary, DWR and DFG share a long and collaborative history of protecting resources and integrating our management activities. We have incorporated new science into our real-time decision-making to adaptively manage resources. DWR's request for a consistency determination is a step to further validate the current efforts to protect fish in the Delta. And now, we have opportunities before us to make additional improvements in our resource management through active participation in the federal reconsultation process and the completion of the BDCP.

We look forward to continuing to work with you and other members of the Legislature as we address the important challenge of managing our Delta resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Lester A. Snow", with a long horizontal flourish extending to the right.

Lester A. Snow
Director

cc: Honorable Bob Margett, Vice-Chairperson
Senate Natural Resources and Water Committee
Member of the Senate
State Capitol, Room 3082
Sacramento, California 95814