



STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0119
(916) 319-2096
FAX (916) 319-2196

Assembly California Legislature

ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE

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G. DIANE COLBORN
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PRINCIPAL ASSISTANT
KATHY MATSUMOTO

February 10, 2010

Mark Cowin, Director
California Department of Water Resources
1416 Ninth Street, Room 1155-A
Sacramento, CA 95814

Dear Director Cowin:

As chair of the Assembly committee charged with oversight of California's water and wildlife policies, I am writing to express my deep concern about recent actions taken by the Department of Water Resources (DWR) that would appear to flout the California Endangered Species Act (CESA) and further imperil the beleaguered Sacramento-San Joaquin Delta, one of our most important natural resources.

Over four years ago, when state water exports had reached near-historic heights and populations of delta fish were crashing precipitously, Senator Darrell Steinberg, Chair of the Senate Natural Resources and Water Committee, and Senator Mike Machado, Chair of the Select Committee on Delta Resources and Development, convened a hearing to investigate. At that hearing, DWR was asked to produce proof that the State Water Project (SWP) was authorized to take state-listed threatened and endangered fish. DWR was unable. Instead it argued that a "patchwork" of agreements with the Department of Fish and Game (DFG) had become, over the years, the functional equivalent of take authority. Subsequently, an Alameda Superior Court found DWR to be violating CESA and enjoined the SWP Delta pumps from operating until DWR obtained CESA permits. DWR's former Director then wrote to Senator Steinberg, advising him that DWR would comply with CESA by submitting the Bush Administration's federal biological opinions for delta smelt, winter-run and spring-run Chinook salmon to DFG for "consistency determinations."

Shortly thereafter, however, a federal court invalidated those biological opinions due to their inadequate protection and dubious scientific foundation. The court ordered the Bush administration to develop new biological opinions that complied with the federal Endangered Species Act. At that point, even though DWR was continuing to operate the SWP pumps with no CESA coverage, it chose not to seek a CESA permit from DFG. Rather, DWR sought and obtained a stay of the state court litigation by promising to seek consistency determinations from DFG when the new biological opinions were finished.

Those new biological opinions, issued in December, 2008 and June, 2009 by the US Fish and Wildlife Service and the National Marine Fisheries Service, respectively, found that high levels of Delta pumping by the federal Central Valley Project (CVP) and SWP were jeopardizing the continued existence of delta smelt and salmonids. To protect these fish from extinction, the agencies crafted "reasonable and prudent alternatives" for project operations, including limitations on the rate at which SWP/CVP pumping could force Old and Middle Rivers in the Delta to flow backward and draw fish towards areas of high predation, such as Clifton Court Forebay, or entrain them in the pumps.



In June, 2009, DWR requested a consistency determination from DFG on the smelt biological opinion issued six months earlier. It received that determination in mid-July. On Friday, July 31, 2009, DWR requested that DFG also issue a consistency determination based on the salmon biological opinion.

What follows are a series of actions by DWR that reflect at best an implausible view of CESA, and at worst a callous disregard for the protection of endangered species under California law. Less than three weeks after securing CESA coverage for delta smelt based on the new biological opinion, DWR started attacking the biological opinion in court. On August 3, 2009, DWR filed legal papers in support of a motion by its water contractors seeking to invalidate the biological opinion – even though the effect would be to invalidate DWR's own CESA coverage for the SWP pumps.

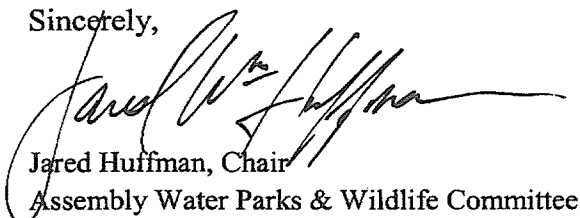
Meanwhile, on September 3, 2009 DWR received a consistency determination from DFG based on the salmon biological opinion. Five days later, citing the two consistency determinations by DFG (and ignoring its contradictory efforts in federal court to invalidate the smelt biological opinion), DWR filed a motion in state court requesting dismissal of the action challenging its lack of CESA coverage for the SWP pumps.

Then DWR took aim at the salmon biological opinion. Last week, detection of salmon triggered an obligation under the salmon biological opinion for the SWP/CVP pumps to reduce reverse flows in Middle and Old Rivers. State and federal water contractors went to court seeking to overturn the heavily peer-reviewed salmon biological opinion and replace it with a previously-invalidated Bush-era opinion. Incredibly, DWR filed a brief declaring its "non-opposition" to a Temporary Restraining Order (TRO) in that case. Last Friday, February 5th, Judge Oliver Wanger granted the TRO enjoining salmon protections in order to increase water deliveries, noting in his opinion, "It is significant that DWR, the co-operator of the Projects, does not oppose this relief." Now, detection of smelt has triggered protections under the delta smelt biological opinion. As you know, a limitation on reverse flow to protect delta smelt would also meet your requirements to protect salmon and longfin smelt. Monday, CVP contractors filed for a TRO on the delta smelt protections. And DWR, fully informed as to the deference the court gave its last letter, filed another "non-opposition" letter yesterday.

These actions taken by DWR to eliminate protections for salmon and smelt increase the likelihood of extinction for endangered fish populations. Moreover, although DWR has winked at CESA for years, it is now all but inviting a challenge to its lack of CESA coverage for the SWP pumps. The limitations on reverse flow enjoined by the TRO granted last Friday form the basis for DFG's finding of consistency with the salmon biological opinion. These flow limitations had also enabled DWR to meet the requirements of its CESA incidental take permit for longfin smelt, a species uniquely protected by California law. Consequently, DWR appears to be operating the SWP pumps without any semblance of CESA coverage for salmon and and with a serious cloud over its coverage for delta smelt and longfin smelt.

Having actively worked to create these problems, please explain how DWR intends to fix them. Specifically, how does DWR intend to secure CESA coverage for the operation of the SWP pumps, and exactly when will that happen? Given the great urgency of these matters, we look forward to your immediate response.

Sincerely,



Jared Huffman, Chair
Assembly Water Parks & Wildlife Committee