



May 8, 2009

Mr. Ren Lohofener
Regional Director
U.S. Fish and Wildlife Service
2800 Cottage Way
Sacramento, CA 95825-1846

Mr. Donald Glaser
Regional Director
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825-1846

Dear Mr. Lohofener and Mr. Glaser:

On behalf of the Natural Resources Defense Council and The Bay Institute, we are writing to express our strong support for your agencies' continued implementation of the December 15, 2008 delta smelt biological opinion ("BO") on the proposed Coordinated Operations of the Central Valley Project and State Water Project. Our organizations have recently moved to intervene on behalf of your agencies in the four lawsuits challenging the BO, and we look forward to working with you in defending the BO in this litigation.

We were disappointed to learn that the Department of Water Resources is likely to request reinitiation of consultation on this BO. For the reasons that follow, we oppose granting such a request.

First, the current BO is based on the best available science. The BO underwent three separate peer reviews, which generally found that the effects analysis and proposed actions were based on the best available science, and the Service modified the BO in response to those reviews. In addition, most of the components of the RPA are substantially similar to the federal district court's 2007 interim remedy order, which the Court concluded was based on the best available science. We understand that much of the opposition to the BO focuses on the so-called "Fall Action," (Component 4 of the RPA), which would require increased Delta outflows in the Fall months of wet and above normal years. This component is based on published, peer reviewed science, was peer reviewed, and is implemented within the adaptive management framework of the BO. The Fall Action also implements a key recommendation of the State's *Delta Vision Strategic Plan*, which explicitly called for increased fall Delta outflows to benefit fish.

Second, all of the RPA components in effect this year are substantially similar to the Court's 2007 interim remedy order. The 2007 court order limited Old and Middle River (OMR) flows to prevent and reduce entrainment of delta smelt in the massive export pumps in the South Delta. The RPA components in effect through June 30 potentially permit *greater* pumping levels than under the court's order. In addition, the Fall Action will not be triggered this year, given the current water year classification, and most likely will not be triggered next year either. Thus, there is no pressing need to reinitiate now.

Finally, NRDC and others in the environmental community view the attempt to reinstate consultation now as an attempt to politicize science and undermine existing environmental protections for delta smelt and other species. Doing so also could lead to additional water supply impacts and/or additional litigation, as many other projects to benefit water supply this summer (including the Drought Water Bank and increased pumping rates from July-September) are dependent on the validity of the delta smelt BO. Moreover, the State has the authority and duty to impose substantially similar flow restrictions to protect longfin smelt under the Incidental Take Permit issued to the State Water Project under the California Endangered Species Act, and the California Department of Fish and Game has not done so this year, based on the advice of the Smelt Working Group, which has repeatedly relied on delta smelt protections under the BO in not recommending additional restrictions to protect longfin smelt.

To the extent that there are disputes over the science underlying the BO, the existing litigation over the BO provides a forum for the resolution of these disputes. Reinitiating consultation appears to be an attempt to get a “second bite at the apple,” and would substantially weaken existing environmental protections (and the environmental baseline) going into the BDCP.

Ultimately, both the Bureau of Reclamation and the Director of the Department of Water Resources have acknowledged that it is the drought, not the Endangered Species Act, which is driving low water allocations, particularly for South of Delta agricultural contractors. Both agencies have acknowledged that eliminating ESA protections might increase allocations by 5%. There is no question that Central Valley agricultural communities have been hit hard by the drought, foreclosure crisis, recession, drop in dairy and other commodity prices, and other causes, and we encourage the State and Federal government to provide economic assistance, particularly for economically disadvantaged communities. But the delta smelt BO is not the primary cause of this crisis and the pumps have not been turned off as a result of the BO. Even with three consecutive dry years and implementation of the delta smelt BO, the CVP will deliver nearly 4 million acre feet of water to irrigated agriculture in the Sacramento and Central Valley this year, more than 50% of total agricultural allocations, although some districts get 100% of their supplies, and others only get 10-15%.

We know of no valid reason for reinitiating consultation now. Reinitiation would require extensive duplication of staff time and scarce budgetary resources, which could be better used implementing the BO and addressing other stressors on the system, like water pollution. In light of all of these concerns, we strongly urge the Department to reject any requests to reinstate consultation and continue implementing the adaptive management framework of the December 15, 2008 delta smelt biological opinion.

Thank you for consideration of our view.

Sincerely,



Doug Obegi
Natural Resources Defense Council



Gary Bobker
The Bay Institute