

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CALIFORNIA DEPARTMENT OF WATER RESOURCES, ET AL.,
Appellants,

v.

WATERSHED ENFORCERS, a project of the CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE,
Respondent.

On Appeal from the
Superior Court of California, County of Alameda
Case No. RG06292124
The Honorable Hon. Frank Roesch

**DECLARATION OF CATHY CROTHERS IN SUPPORT
OF JOINT MOTION TO STAY CONSOLIDATED
APPEALS THROUGH
DECEMBER 31, 2008**

Consolidated Case No. A117750 and Case No.
A117715 and Cross-Appeal

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I, Cathy Crothers, declare as follows:

1. I am Assistant Chief Counsel for the California Department of Water Resources (“DWR”), one of the appellants in these consolidated appeals. I make this declaration in support of the parties’ joint motion to stay the consolidated appeals through December 31, 2008. I have personal knowledge of the facts stated in this declaration and, if called to do so, could and would testify competently thereto.

2. DWR operates the State Water Project (“SWP”). The SWP delivers water throughout California for municipal, industrial, agricultural, and environmental purposes. The water provided by the SWP, in combination with the federal Central Valley Project (“CVP”), is critically important to California’s citizens, cities, and the economy as a whole. The Harvey O. Banks Pumping Plant and related facilities (the “Banks Facility”) is the key pumping component of the SWP.

3. In the action below, the trial court ruled that DWR lacked necessary take authority under CESA for Delta smelt and winter and spring-run Chinook salmon in connection with the operation of the Banks Facility. The trial court ordered DWR to obtain from DFG incidental take authority under CESA or stop operation of the Banks Facility. The trial court stayed enforcement of the judgment for 60 days.

4. Incidental take authority under the California Endangered Species Act (“CESA”) must be obtained from the California Department of Fish and Game (“DFG”). CESA provides four methods by

which a party can obtain DFG take authority with respect to a protected species. Pursuant to Fish & Game Code Section 2081.1, a party can possess “grandfathered” take authority based on agreements or plans entered into with DFG prior to April 10, 1997, that authorized take. DWR asserted unsuccessfully in the trial court that it had take authority for the Banks Facility pursuant to Section 2081.1.

5. Second, under Fish and Game Code Section 2081, a party can obtain CESA take authority from DFG through the incidental take permit application process. This process generally requires, among other things, completion of an Environmental Impact Report (“EIR”) under the California Environmental Quality Act (“CEQA”). For that and other reasons, the incidental take permit process under Section 2081 usually takes a long time to complete.

6. Third, CESA take authority can be obtained through the completion of a Natural Communities Conservation Plan (“NCCP”) pursuant to Fish and Game Code Section 2800 *et seq.* An NCCP is a comprehensive environmental management plan that is intended to address the effects of covered activities on multiple species and habitats in a large region and, like the incidental take permit process, requires completion of an EIR under CEQA. Given the broader purpose and function, completion and approval of an NCCP takes more time to complete than the incidental take permit application process. In 2007, DWR, other state and federal agencies, companies, and non-governmental organizations began to

develop a conservation plan for the San Francisco Bay and Delta intended to meet the requirements of an NCCP, which would address, among numerous other species and issues, the impacts of SWP operations on Delta smelt and Chinook salmon. DWR expects that the Bay-Delta conservation plan will be completed and approved in 2010, well after the new federal biological opinions are issued.

7. The fourth method by which a party can obtain CESA take authorization is through a consistency determination under Fish and Game Code Section 2080.1. This is the method DWR intends to pursue when the new Delta smelt and Chinook salmon biological opinions are issued. Pursuant to Section 2080.1, a party that has received from a federal agency an “incidental take statement or an incidental take permit” under the Federal Endangered Species Act (“FESA”) can seek from DFG a consistency determination, which, if granted, provides CESA take authority.

8. The specifics for obtaining a CESA consistency determination are as follows. The United States Fish and Wildlife Service (“USFWS”) or the National Oceanic and Atmospheric Administration National Marine Fisheries Service (“NOAA Fisheries”) develops and issues a biological opinion that comprehensively addresses the impact of a federal action on a protected species. While DWR is not a federal agency, DWR operates the SWP in coordination with the federal Bureau of Reclamation’s operation of the CVP, and hence the FESA consultation includes the effects

of DWR's operation of the SWP. When issued, a biological opinion contains an incidental take statement authorizing the take of the particular species under FESA, subject to the reasonable and prudent alternatives or measures detailed in the biological opinion and the incidental take statement. The party requesting CESA take authority submits to DFG the biological opinion containing the incidental take statement and requests that DFG determine whether the biological opinion is consistent with CESA. Following submission of the request for the consistency determination, DFG has 30 days to determine whether the incidental take statement or incidental take permit is not consistent with CESA.

9. In 2004 and 2005, the responsible federal fishery agencies issued biological opinions with incidental take statements addressing the SWP's and the CVP's impact on Delta smelt and Chinook salmon (winter and spring-run). Environmental groups subsequently challenged these biological opinions in federal court alleging, among other things, that the biological opinions and incidental take statements did not provide sufficient protection for the species at issue.

10. Because of the uncertainty created by these lawsuits regarding the continuing validity of the existing Delta smelt and Chinook salmon biological opinions, obtaining a CESA consistency determination based on these biological opinions in response to the trial court's order was not in DWR's view a realistic or long-term solution.

11. In 2006, the Bureau of Reclamation, which operates the CVP, reinitiated consultation under FESA with USFWS and NOAA Fisheries regarding the long-term effects of CVP and SWP operations on Delta smelt and Chinook salmon, respectively. In brief, the consultation process is the method under FESA by which new biological opinions are developed and issued. During the consultation process, the agencies involved undertake a comprehensive scientific study and evaluation of the effects the activity at issue may have on the species and its habitat, and develop measures to minimize incidental take. New biological opinions are intended, in part, to provide an up-to-date scientific evaluation of the species' status and the measures to be taken for the effective protection of the species.

12. The consultation process addressing the impacts of the SWP (including the Banks Facility) on Delta smelt and Chinook salmon is proceeding. At the end of that process, DWR expects that new biological opinions will be issued that contain incidental take statements authorizing under FESA DWR's incidental take of Delta smelt and Chinook salmon, as well as other species, for the operation of the SWP, including the Banks Facility. Immediately after the new biological opinions are issued, DWR intends to request from DFG a consistency determination pursuant to Fish and Game Code Section 2080.1 which, if granted, will provide DWR with the ordered take authorization under CESA.

13. Importantly, DFG is centrally involved in the consultation process and the development of the new biological opinions. In fact, pursuant to a written memorandum of understanding, DWR and DFG mutually committed to dedicate substantial resources to the consultation process. Attached as Exhibit A to this declaration is a true and correct copy of that document, dated May 7, 2007 and entitled, Memorandum of Understanding Between the Department of Fish and Game and the Department of Water Resources During Reinitiated Consultation of Federal Biological Opinions on the Coordinated Operations of the State Water Project and Central Valley Project.

14. Development of a new biological opinion involves a thorough, complex biological assessment of the status of the species at issue and drafting of a lengthy, detailed written product analyzing the results of that evaluation. The two new biological opinions involved in the on-going consultations are intended to address the impacts of the SWP and the CVP in their entirety, as well as their coordinated operations, with respect to Delta smelt and Chinook salmon (as well as other species). The sheer magnitude of the SWP and CVP operations, in addition to the complexities of the environmental and scientific variables at work, makes completing these new biological opinions a time-consuming process.

15. On December 14, 2007, in the federal lawsuit challenging the existing Delta smelt biological opinion, Judge Oliver Wanger issued an injunction mandating that the consultation process

addressing Delta smelt be completed and a new biological opinion issued no later than September 15, 2008. In addition, Judge Wanger ordered, among other things, that specific protective measures be implemented in the operation of the SWP (and the CVP) until the new biological opinion for Delta smelt is issued. Attached to this declaration as Exhibit B is a true and correct copy of Judge Wanger's "Interim Remedial Order Following Summary Judgment and Evidentiary Hearing," dated December 14, 2007.

16. The parties to this appeal have jointly requested that the Court issue a stay effective through December 31, 2008. The parties requested this date based on the anticipated issuance of the new biological opinions by September 15, 2008, plus a short additional period of time for DWR to submit its request and receive a response from DFG with respect to the consistency determination under CESA.

17. With the successful conclusion of this process, DWR will possess take authority under CESA (and FESA) for its operation of the SWP, the primary issue involved in DWR's appeal will be resolved without the need for further litigation, and the remaining issues in these consolidated appeals may be mooted as well. Even more importantly, a stay allowing that process to be completed will save substantial judicial and party resources while furthering the purposes of CESA and the interests of the parties and the public.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ____ day of January 2008 at Sacramento, California.

Cathy Crothers