



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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For immediate release:

20 May 2007

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Schwarzenegger Administration Opposes Compliance With Endangered Species Act As Delta Smelt Tumble To The Brink Of Extinction

(Stockton, CA) The California Department of Fish and Game (DFG) and Department of Water Resources (DWR) continue to strenuously oppose efforts by the California Sportfishing Protection Alliance (CSPA) to compel them to comply with fundamental requirements of California's Endangered Species Act (CESA), even as new data reveals that populations of endangered Delta smelt have tumbled to the very brink of extinction. On 18 April 2007, Alameda Superior Court Judge Roesch gave DWR 60 days to either comply with CESA or shut down the State Project export pumps. DWR appealed, temporarily staying the Order. CSPA, through its Watershed Enforcers project, then filed suit against DFG asking the court for an order directing DFG to determine whether or not the federal biological opinions (BOs), issued pursuant to the federal Endangered Species Act (ESA), are consistent with the requirements of CESA. A hearing is scheduled for 8:45 am, Monday, 23 May 2007 in Dept. 31 of the Alameda Superior Court.

CESA requires full mitigation, assured funding and monitoring requirements that go far beyond those mandated by ESA. These additional measures are not included in existing federal BOs that are being rewritten because they are seriously inadequate, were developed under political pressure and have failed to protect listed Delta species. The federal BOs are being litigated by a coalition of environmental groups and a decision is expected shortly. CSPA believes DFG cannot legally find the flawed federal BOs to be consistent with CESA. Consequently, DFG would be required to issue DWR a CESA permit requiring additional protective measures to be implemented that are likely to be necessary for Delta smelt survival.

The latest court hearing follows the release of information revealing that the Delta smelt population has crashed another 93% from the historic low of last year. The Delta Smelt Working Group (DSWG), comprised of agency biologists, has warned that the "species has become critically imperiled and an emergency response is warranted" and recommended that reverse flows in the Southern Delta caused by excessive water export pumping be eliminated "as soon as possible." See <http://www.sacbee.com/static/weblogs/water/> for the report of the DSWG and http://www.delta.dfg.ca.gov/data/20mm/CPUE_map.asp for the results of the latest survey (striped bass & splittail are also crashing). Such action would likely necessitate substantial reductions in Delta exports. Unfortunately, DWR has already rejected such measures.

"DWR and DFG's dance of denial and conspiracy to evade CESA, while Delta smelt rapidly approach the point of no return, is surely one of the most wretched and despicable spectacles I have ever witnessed" said CSPA Executive Director Bill Jennings. "Delta smelt are the canary in the mine and as the smelt goes, so will a number of other species whose populations are also crashing," he said, adding that "this disaster would not now be occurring if state agencies had obeyed the law. They need to immediately implement emergency measures to save this sentinel species."

“Our intent is to put this case on the fast track “ said Michael Lozeau, counsel for CSPA/Watershed Enforcers. All three of these species face the risk of extinction and the Delta smelt, in particular, is hanging on by a thread. DFG, as well as the DWR, must immediately begin to implement the state’s endangered species law to protect these fish. Instead, they continue their backroom deals - now apparently joined by the Governor’s office - and plot how to avoid their mandatory duties under CESA.”

Background:

On 4 October 2006, CSPA filed suit, in Alameda Superior Court against DWR for violating CESA by capturing and killing threatened spring-run Chinook salmon, endangered winter-run Chinook salmon and threatened Delta smelt at its South Delta pumping facilities without securing the legally required authorization from the DFG. Under CESA, the killing or harming (“taking”) of listed species may occur only if DFG finds that the “taking” is consistent with an incidental take statement issued pursuant to the federal Endangered Species Act (ESA) or an incident “take” permit issued by the Director. Following two hearings, Judge Roesch issued a decision finding DWR in violation of CESA and giving the Department 60 days to comply or shut down the State Water Project’s export pumps. DWR applied to DFG for a consistency determination (i.e., that the federal biological opinions are consistent with CESA). Under CESA, DFG has 30 days to make a consistency determination. CSPA is reliably informed that DFG told DWR that additional requirements would be necessary for them to be able find consistency with the federal biological opinions. These additional requirements included some 800,000-1,000,000 AF of additional water, \$30 million/yr and final decision authority over the Water Operations Management Team. DWR emphatically rejected DFG’s additional requirements. The matter was elevated to the governor’s office. The matter was decided in favor of DWR. DWR then rescinded its application for a consistency determination, appealed Judge Roesch’s decision and DWR and DFG signed a Memorandum of Understanding that they would essentially continue business as usual over the next year.

As these events were unfolding, DFG and DWR were acutely aware that incoming results from DFG’s Delta surveys were showing a precipitous drop in the population of Delta smelt. On 15 May 2007, CSPA filed a lawsuit against DFG (and DWR as real party in interest) over its failure to make a determination of whether the federal BOs noticed by DWR are or are not consistent with CESA. Under CESA, once the Director of DFG is notified that a party has obtained authorization to take listed species pursuant to the federal BOs, the Director must immediately publish that information in the California Regulatory Notice Register and the Director is mandated by statute to make and publish a consistency determination within a 30-day period, regardless of whether or not the applying party withdraws the request. This is a mandated nondiscretionary requirement pursuant to CESA. Once the genie is out of the bottle, it cannot be returned unless the take activity (i.e., pumping water) ceases and the federal opinions are vacated. A hearing in this matter is scheduled for 8:45 am, Monday, 21 May 2007 before Judge Roesch, Dept. 31, Alameda Superior Court. CSPA is asking the Court to issue an alternative writ of mandate ordering DFG to immediately comply with their mandatory duty to make and publish a determination whether or not the 2004 Salmon BO and 2005 Delta Smelt BO are consistent or not with CESA in regard to DWR’s operation of the Clifton Court Forebay, the Skinner Fish Protective Facility, the Harvey O. Banks Pumping Plant, the North Bay Aqueduct Intake at Barker Slough and the Suisun Marsh facilities and DWR’s ongoing take of spring run Chinook salmon, winter run Chinook salmon and Delta smelt or, in the alternative to show cause why such determination is not mandated by CESA.

CSPA is a public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state’s water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California’s water quality and fisheries.