Committee on Natural Resources
Subcommittee on Water and Power
Subcommittee Hearing July 2, 2007
"Extinction is not a Sustainable Water Policy: The Bay-Delta Crisis and the Implications for California Water Management"
Testimony of David Nawi

Madame Chair, Members of the Subcommittee. Thank you very much for providing me this opportunity to appear before you today.

As you have recognized [and heard from previous witnesses today] the issues you are dealing with regarding the Bay-Delta are of vital importance and are at a critical stage. Federal and state court judges have found of violations of both the federal and California Endangered Species Acts, and current information indicates that the federal and state listed Delta smelt may be on the verge of extinction. Depending on the outcome of appeals and further rulings, the courts may be in the position of determining how the Central Valley Project (CVP) and the State Water Project (SWP) will be operated.

I will briefly describe relevant legal provisions at issue in current litigation and regulatory proceedings and then offer some thoughts on the possible future course of events.

The Federal Endangered Species Act

I will begin with the federal Endangered Species Act (ESA). 15 U.S.C. §§ 1531 et seq. Section 9 of the ESA prohibits any person from "taking" a species listed as threatened or endangered. 15 U.S.C. § 1538. The statute defines "take" to mean, among other things, to harass, harm, wound or kill a species. Section 3(18), 15 U.S.C. § 1532(18). Section 10 of the Act provides that take of a species may be permitted if it is incidental to an otherwise lawful activity and is authorized pursuant to an approved conservation plan, known as a habitat conservation plan, or HCP. Of relevance to the CVP and SWP, take may also be authorized by an incidental take statement included in a biological opinion issued pursuant to section 7 of the Act.

Section 7(a)(1) directs all federal agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. 15 U.S.C. § 1536(a)(1). Section 7(a)(2) directs any federal agency proposing to carry out an action authorized, funded or carried out by the agency to insure that that the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 15 U.S.C. § 1536(a)(2).

The directive in Section 7(a)(2) to avoid jeopardizing the continued existence of a species was the basis of the seminal Supreme Court case of *TVA v. Hill* (1978)

437 U.S. 153, a 1978 decision that enjoined a federal agency from constructing a dam that would have eradicated a tiny fish, the snail darter. Referring to the statutory directive in Section 7(a)(2), the court wrote, "This language admits of no exception." 437 U.S. 153, 173. (Shortly after the decision in *TVA v. Hill,* supra, Congress amended the ESA to allow the so called "God Squad" to exempt federal actions from Section 7(a)(2). Section 7(h), 15 U.S.C. § 1536(h). This exemption process has rarely been used.)

Section 7 also specifies the procedure pursuant to which federal agencies must consult with either the Fish and Wildlife Service (FWS), in the Department of the Interior, or the National Marine Fisheries Service (NMFS), in the Department of Commerce, to assure that covered actions comply with Section 7(a)(2). (Administration of the ESA is the responsibility of the Secretary of Commerce and the Secretary of the Interior, depending on the species. Section 3(14), 15 U.S.C. § 1532(14).) The statute provides for a biological opinion to be issued on a finding that the agency action will not violate section 7(a)(2), i.e., not result in jeopardy or adverse modification of critical habitat, and that sets forth the impacts of the taking, reasonable and prudent measures to minimize the impacts, and mandatory terms and conditions that must be complied with by the federal agency.

Section 7(d) prohibits a federal agency, after the initiation of consultation, from making any irreversible or irretrievable commitment of resources with respect to the action that would foreclose the formulation or implementation of reasonable and prudent alternative measures that would not violate section 7(a)(2). 15 U.S.C. § 1536(d). Section 7(o) exempts from the take prohibition of Section 9 take that is in compliance with the terms and conditions of a biological opinion. 15 U.S.C. § 1536(o). Pursuant to his provision, biological opinions generally contain an incidental take statement that has the effect of authorizing take.

In addition to provisions for civil and criminal penalties, the ESA contains a provision allowing suits by citizens to enjoin violations of the Act or implementing regulations. Section 11(g), 15 U.S.C. § 1540. Courts have held that a biological opinion may be challenged under the Administrative Procedure Act (APA) on the grounds, among others, that it is arbitrary, capricious or an abuse of discretion. 5 U.S.C. § 706(2)(A). *Bennett v. Spear* (1997) 520 U.S. 154.

The Fish and Wildlife Service and NMFS issued separate biological opinions under ESA Section 7 regarding the Bureau of Reclamation's 2004 Operating Criteria and Plan (OCAP), a document that describes the coordinated operations of the CVP and SWP. Both biological opinions have been challenged in court. In *Natural Resources Defense Council v. Kempthorne,* E. D, Cal. No. 1:05-CV01207 OWW (TAG), Judge Oliver Wanger issued an order on May 25 finding the 2005 FWS OCAP biological opinion to be in violation of the APA and unlawful. The court has requested that the parties submit briefs on the question of remedy and has scheduled a hearing on the issue in late August. Presumably the court will

consider and rule on the manner in which the projects may operate pending the completion of a new biological opinion, expected some time in 2008.

A second case before Judge Wanger challenges the NMFS biological opinion. *Pacific Coast Federation of Fishermen's Associations v. Gutierrez,* E.D. Cal. No C-06-0245. While the court in this case issued a ruling in June dismissing claims under the National Environmental Policy Act, the ESA claims have yet to be briefed or considered by the court.

The California Endangered Species Act

I will briefly turn next to the California Endangered Species Act, or CESA. CESA prohibits the taking of state-listed threatened or endangered species. Cal. Fish and Game Code ("FGC") § 2080. CESA contains provisions that allow the take of listed species through various mechanisms.

Take is allowed if a person has obtained an incidental take permit or incidental take statement allowing take of the species under the federal ESA, and the incidental take permit or statement is determined by the Director of the Department of Fish and Game to be consistent with the relevant provisions of the Fish and Game Code. FGC § 2080.1. The Department may issue an incidental take permit if certain criteria are met, including minimization and full mitigation of the impacts of the authorized take. FGC § 2081. Take is also allowed if it was authorized through a plan or agreement entered into by the Department of Fish and Game in a specified time period, a so-called "grandfather" provision. FGC § 2181.1

A lawsuit recently decided at the trial level claimed that pumping by the SWP was taking state-listed species (Winter Run Chinook Salmon, Spring Run Chinook Salon and Delta smelt) without incidental take authorization from the Department of Fish and Game and therefore in violation of CESA. *Watershed Enforcers v. Department of Water Resources,* Alameda County Superior Court No. RG06292124. In ruling for the petitioners, the trial court rejected the claim by the DWR that a series of five documents served to bring DWR's take of the species within the coverage of the grandfathering provisions of section 2181.1 The court issued a judgment on April 17 of this year ordering that DWR cease pumping within sixty days unless DWR had received authorization from the Department of Fish and Game for the incidental take of the three species. DWR has appealed the ruling, and it is currently stayed pending appeal.

California Water Law

In addition to the federal and state ESAs, both projects are subject to the regulatory authority of the Sate Water Resources Control Board (State Board). Under the state's Porter-Cologne Water Quality Act (Water Code §§ 13000 et seq.), the State Board is charged with adopting water quality control plans, including a plan for the Bay-Delta, to meet the requirements of section 303 of the

federal Clean Water Act. (Federal Water Pollution Control Act, 33 U.S. C. § 1313). Section 303 provides the water quality control plan must meet specified requirements and is subject to approval by the federal Environmental Protection Agency. Water quality control plans are not self-implementing and do not contain regulatory requirements applicable to water rights holders, whose diversions are subject to water rights permits issued by the State Board.

Both the state and federal projects are required to obtain and comply with the water right permit requirements of state law. The applicability of these requirements to the CVP was the subject of the 1978 decision of the U.S. Supreme Court in *California v. U.S.*, 438 U.S. 645, which held that under section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, a federal project must comply with state requirements that are not inconsistent with clear congressional directives regarding the project.

The State Board has broad authority and responsibility in administering water rights permits. If the Board finds a violation or threatened violation of any term or condition of a permit, it may issue a cease and desist order. Water Code § 1831. The Board also has the authority, and in fact is directed, to take action to prevent waste, unreasonable use, or unreasonable method of use of water. Water Code § 275; Cal. Constitution Article X, section 2. Water rights permits are also subject to review and modification pursuant to the public trust doctrine. *National Audubon Society v. Superior Court,* (1983) 33 Cal.3d 419.

The State Board held a workshop on June 19 to receive recommendations on short term actions it should consider to improve fishery resources, including actions to slow or stop the decline of Delta smelt, improve water quality conditions, and reduce impacts resulting from water diversion and use in the Bay-Delta. The workshop notice stated that the Board sought formation on, among other things, reducing diversions, for export or in-Delta use, from Delta channels; requiring releases from upstream storage; requiring waste dischargers to provide monitoring reports; and requiring measures to ease potential dry year conditions to ensure reasonable protection of water quality and beneficial uses in the Delta. Following the workshop, the State Board has not indicated what actions it is considering.

Looking to the Future

What can we say about the future? For the long term, it is apparent that solutions must be developed that comprehensively address the numerous and complex factors that affect the Bay-Delta and the totality of the state's water supply and delivery system. Among other things, a comprehensive approach must assure compliance with the statutory regimes discussed above – the federal ESA, the California ESA, and state water law, including provisions to comply with the federal Clean Water Act. In recognition of the need for a comprehensive long-term approach, California's Delta Vision has been established to address the full array of issues to achieve a sustainable Delta.

However, any long-term solutions will take time to develop, fund, and implement, and at least until there is a long-term solution, litigation almost certainly will continue to be a way of life for water issues in California and especially the Bay-Delta. The Bay-Delta is a uniquely valuable ecological resource that at the same time serves as the heart of the state's water supply and delivery infrastructure. These two functions seem inevitably to lead to conflict.

In the early 1990s we were faced with a situation that had many features in common with what we are facing today. Fish species were in sharp decline, and Endangered Species Act requirements caused unpredicted shut-downs of the project pumps and consequent uncertainty and cut-backs in water supply for agricultural and municipal and industrial water users south of the Delta. Actions of state and federal agencies were not coordinated and often in conflict.

To remedy this situation, the leadership of state and federal governments became actively engaged and took a series of actions to create a sound, coordinated and collaborative approach to moving forward. From Club FED (the Federal Ecosystem Directorate), through the July 1994 Framework Agreement, and the December 1994 Bay-Delta Accord ("Principles for Agreement on Bay- Delta Standards between the State of California and the Federal Government"), to the August 2000 Record of Decision (ROD) on the CALFED Bay-Delta Program, substantial and tangible progress was made toward a less adversarial and more collaborative science based approach that fully involved stakeholders. The enactment in 1992 of the Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV (CVPIA), was also intended to help assure the health of the Delta and the species dependent on it.

Unfortunately, despite implementation of the CVPIA, the benefits of the collaborative process CALFED created, and the Environmental Water Account other substantive achievements of CALFED, an indicator species is in grave peril, and once again conflict and litigation have come to dominate Bay-Delta issues. In the absence of a sound, collaborative, scientifically based process for operating the projects in a manner that provides needed water supply and at the same time maintains clear compliance with unforgiving statutory mandates, litigation and an increased role of the courts is likely if not inevitable.

Courts have not been created with the intent that they operate water projects, and they are not well-equipped to make the scientific and biological judgments involved in assuring consistency between project operations and the requirements of the state and federal ESAs. But if they find that environmental statutes have not been complied with, they will have little choice but to order such compliance, and there is no small potential that courts will have to make their own determinations of the actions needed for compliance.

No one wants the Delta smelt or other species dependent on the Delta to go extinct. Avoidance of species extinction is the most essential goal of the state and

federal ESAs, the primary purpose for which they were enacted. And no one wants to see the massive disruptions that drastic reductions in water supply would cause. Critical decisions regarding these goals are now being made by the courts in the context of adversarial litigation. The only alternative to the current situation will be coordinated and effective agency action to comply with statutory mandates based on collaboration, balance, and transparent and scientifically based decision-making. And this will occur only as a result of strong, positive and far-sighted political leadership of both California and the federal government.

Thank you again for this to opportunity to appear before you. I would be glad to answer any questions you may have.