APPENDIX A

Family Farm ALLIANCE™ P.O. Box 216 Klamath Falls, OR 97601 www.familyfarmalliance.org

VIA FACSIMILE AND MESSENGER DELIVERY AND CERTIFIED MAIL

December 14, 2008

Correspondence Control Unit
Attention: Information Quality Complaint Processing
U.S. Fish and Wildlife Service
1849 C Street, NW, Mail Stop 3238-MIB
Washington, D.C. 20240

H. Dale Hall, Director
U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street NW, Room 3012
Washington, DC 20240

U.S. Department of Justice
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 4390
Ben Franklin Station
Washington, DC 20044-4390

RE: Request for Correction of Information in the Draft Effects Analysis of the Biological Opinion on the Continued Long-Term Operations of the Central Valley Project and the State Water Project

Dear Mr. Hall:

This Request for Correction of Information (Request) is hereby submitted under the Information Quality Act (IQA)[1] Guidelines issued by the United States Fish and Wildlife Service (FWS)[2], the Department of the Interior (DOI)[3], the Department of Justice (DOJ)[4], and the Office of Management and Budget (OMB)[5], as well as the Final Information Quality Bulletin for Peer Review (Final Bulletin) issued by OMB[6]. The OMB Guidelines provide the blueprint for the agencies subject to the IQA mandates, and these agencies have adopted administrative measures that are primarily procedural in nature, but incorporate OMB's substantive requirements as well. Since the various agencies have each adopted Guidelines of their own, but follow OMB's, all references will be made to OMB Guidelines in the discussion below for the sake of clarity.

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[1] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554; H.R. 5658) provides in full the following:
(a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 20, 2001, AND WITH PUBLIC AND Federal agency involvement issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
(b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and (2) require that each Federal agency to which the Guidelines apply (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish administrative mechanisms allowing affected persons to see and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and (C) report periodically to the Director (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and (ii) how such complaints were handled.

[2] *Available at* www.fws.gov/informationquality.

[3] 67 Fed. Reg. 36642(May 24, 2002).

[4] *Available at* www.justice.gov/jmpr/doj/informationqualityguidelines.htm

[5] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies. 67 Fed. Reg. 8452(republished Feb. 22, 2002).

[6] 70 Fed. Reg. 2664(Jan. 14, 2005).

The Family Farm Alliance (Alliance) is an affected organization and our members are affected persons within the meaning of the OMB Guidelines. We are a coalition of water agencies, water users and affiliated businesses who depend upon and work to ensure the availability of reliable, affordable irrigation water supplies to farmers and ranchers in seventeen Western states, including water provided by and through the Sacramento and San Joaquin Rivers and the San Francisco Bay/Delta area in the State of California (herein referred to as the Bay-Delta or the Delta). The Alliance is a non-profit organization that seeks to facilitate the delivery of accurate and timely information to Congress, regulatory agencies and our members on issues that impact Western irrigators.

This letter and the attached Summary of the Request and Detailed Request List constitute our request that the FWS correct information included in the Draft Effects Analysis (Effects Analysis) of the Biological Opinion (BO) on the Continued Long-Term Operations of the Central Valley Project (CVP) and State Water Project (SWP) (herein referred to as the OCAP). The IQA provides that agencies should not disseminate substantive information that does not meet a basic level of quality. The more important the information, the higher the quality standards to which it should be held.

The Effects Analysis contains highly influential information and is a highly influential scientific document as it was written in response to requirements of the federal Endangered Species Act (ESA)[7] and involves "influential scientific, financial, or statistical information" as defined in the OMB Guidelines. The ESA requires the use of the best scientific and commercial data available and the standards and procedures used by the FWS must ensure that the FWS's administrative mechanisms for information resources management and administrative practices satisfy the standards and procedural requirements of the OMB Guidelines. The Effects Analysis fails to meet the requirements of both the ESA and the OMB Guidelines and requires correction accordingly.

Strict adherence to the IQA will ensure consideration of and decision-making based solely on the best available scientific and commercial data, as required by the ESA. Further, the rigor imposed will enhance the quality and credibility of the FWS's development of a scientific assessment where, as here, that information when disseminated will have a clear and substantial impact on important public policies and private sector decisions, as defined in the Final Bulletin.[8]

A. BACKGROUND

The Effects Analysis functions as a part of the BO, the context of which is important because, as stated in *Bennett v. Spear*, 520 U.S. 154, 157 (1997:

> "The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and [*158] to designate their "critical habitat." 16 U.S.C. § 1533. The ESA further requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." § 1536(a)(2). If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, as delegate of the Secretary, ibid.; 50 CFR § 402.14 (1995), after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat, 16 U.S.C. § 1536(b)(3)(A). If the Service concludes that the proposed action will "jeopardize the continued existence [***293] of any [listed] species or result in the destruction or adverse modification of [critical habitat]," § 1536(a)(2), the Biological Opinion must outline any "reasonable and prudent alternatives" that the Service believes will avoid that consequence, § 1536(b)(3)(A). Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the "Incidental Take Statement") specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures]." § 1536(b)(4)."

[7] Specifically 16 U.S.C. §1536(a).
[8] 70 Fed. Reg. *supra*, at p. 2675.

In July 2007, U.S. District Court Judge Oliver Wanger issued Findings of Fact and Conclusions of Law concerning a lawsuit filed by environmental litigants challenging the 2005 Biological Opinion issued by the FWS on Operating Criteria and Procedures for coordinated operation of the SWP and CVP. The court's findings highlight the glaring scientific uncertainties and the agencies' ongoing and inexcusable failure to ascertain the true needs of listed species in the Bay-Delta and the water users who depend upon the Delta as a hub for water supplies. Uncertainties pinpointed by the court included unresolved conflicts in evidence regarding: (i) whether a group of agency fishery biologists' recommendations to reduce pumping would be **necessary and effective to protect the delta smelt from extinction;** and (ii) whether other causes of delta smelt decline, including but not limited to, other water diversions, effects of ocean tides, presence of toxics, absence of delta smelt prey, and existence of non-native predators are **materially causing a decline in the species.** (*See NRDC v. Kempthorne, 1:05-CV-1207 (E.D. Cal. July 3, 2007).*

On December 14, 2007, Judge Wanger remanded the BO on the effects of the OCAP to the FWS for further consideration and directed the FWS to complete that remand by September 12, 2008. Judge Wanger later extended that date to the current due date of December 15, 2008. When evaluating what is at stake in trying to resolve the Bay-Delta conflicts and the jeopardy status of the species, the court considered such things as: (i) the potential catastrophic loss of water supplies to urban water users, including but not limited to, cities, fire protection agencies, hospitals and health providers, schools, laboratories, and potable water supplies for human consumption; (ii) potential catastrophic loss of water supplies to contractors dependent on SWP and CVP water supplies; (iii) potential physical damage to the San Luis Reservoir due to gross reduction of its water supplies and being removed from service for over one year; and (iv) economic damage to crops in the range of $23 million to $1 billion. (*See NRDC v. Kempthorne, 1:05-CV-1207 (E.D. Cal December 14, 2007).*

Judge Wanger's ruling that the projects' water supply operations must be subordinated to the needs of the delta smelt was based upon the scientific evidence provided by the resources agencies that was admitted into the record before the court, which is now incorporated into the Effects Analysis. As noted above, other evidence submitted to the court contradicted the evidence provided by the resources agencies. The corrections we are requesting are critical because, as stated by the court:

> "B. Judicial Non-Intervention
>
> 7. The Court will not substitute its judgment for that of any administrative agency. The Court lacks the expertise or background in fish biology, hydrology, hydraulic engineering, water project operations, and related scientific and technical disciplines that are essential to determining how the State and Federal Water Projects should be operated to protect and benefit the public and the species."(*Id.)*

Judge Wanger further found in deference to the FWS and other administrative agencies as follows:

> **"61. The Court recognizes its own limitations in approaching the scientific and technical issues presented, some of which are fraught with uncertainty. The Court lacks the expertise and authority to take over operation of the Projects, or to supervise or second-guess the decisions of the biological, and other expert staff of the USFWS and DWR and the hydrologists and engineers of the Bureau of Reclamation. It is appropriate for the Court to defer to the expertise of the Projects' operators and Federal Defendants in highly technical operational issues as they concern protection of human health and safety and the environment. The court's role is limited to see that compliance with the requirements of law is achieved."**(*Id.).*

On October 29, 2008, James Maysonett, legal counsel for the DOJ, disseminated the Effects Analysis for the BO to counsel of record in the OCAP litigation as requested by the FWS. A number of affected persons and organizations responded with comments that were highly critical of the scientific assumptions and conclusions contained in the analysis. In addition, a number of the scientific assumptions, analyses and conclusions have been questioned on the record in other fora[9]. This Request first discusses the context in which the Effects Analysis should be evaluated as a

[9] For example, see November 19, 2008 letter from the San Luis & Delta-Mendota Water Authority and the State Water Contractors to the FWS commenting on the Effects Analysis; September 8, 2008 letter from the Council for Endangered Species Act Reliability (CESAR) to the FWS commenting on 90-Day Finding on a Petition to Reclassify the Delta Smelt From Threatened to Endangered; June 17, 2008 letters from CESAR to the U.S. Bureau of Reclamation (BOR) and the FWS commenting on the biological assessment disseminated by BOR that formed the basis of the current draft BO on OCAP; *see also* the December 29, 2005 Review Panel Report: San Francisco Estuary Sacramento-San Joaquin Delta Interagency Ecological Program on Pelagic Organism Decline (herein 2005 Independent Science Board Peer Review).

highly influential scientific assessment and its component parts as highly influential information, then reviews the IQA requirements in a general context, and finally provides specific responses to questions posed by the FWS pursuant to OMB Guidelines.

The ESA already mandates that each federal agency use the "best scientific and commercial data available" when consulting with DOI regarding agency action under section 7 of the ESA[10] and does not allow the FWS or any other agency to pick and choose when such data is used. The OMB Guidelines and the Final Bulletin set forth standards for enhancing the quality and credibility of the government's scientific information. The Effects Analysis violates the ESA mandate in several ways that are illuminated by its failure to meet basic IQA standards for information disseminated by a government agency.

As refinements of the IQA, which had little detailed information, OMB's implementing bulletins contain the necessary definitions to determine what is required of the FWS to comply with the law. If the Effects Analysis is not corrected now, it will become part of a final rulemaking on the BO for the delta smelt and perpetuate the use of information which is inaccurate, biased, incomplete, and unclear. That, in turn, will further exacerbate the devastating consequences of an ongoing severe curtailment of the water supply available to affected members of the Alliance.

1. **The Highly Influential Nature of the Effects Analysis for the OCAP BO is Evident When Considered in the Context of Persons Affected and the Economic Implications of Severe Pumping Curtailments**

The Bay-Delta is of great importance to California's health and prosperity and specifically to that of the affected members of the Alliance. The delta smelt are endemic to the Bay-Delta, much of which is currently designated as critical habitat for the delta smelt. The Delta is widely known to be a hub for distribution of water emptying into the Bay-Delta estuary to other regions of California, including the Central Valley and Southern California. The Bay-Delta estuary includes California's two largest rivers: the Sacramento, which flows into the Delta from the north, and the San Joaquin, which flows into the Delta from the south. Water that accumulates in these rivers flows through the Delta and is either diverted elsewhere or goes into Suisun Bay and, from there, continues to the San Francisco Bay and then the Pacific Ocean. (*See generally: In re Bay-Delta Envtl. Impact Report Coordinated Proceedings*, 133 Cal.App.4th 154, 170 (3rd DCA, 2005) (Reversed by *In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 2008 Cal. LEXIS 6737 (2008)* (cited here for factual background only).

The Delta consists of major transportation networks, towns, homes, and businesses and a maze of tributaries, sloughs and islands covering over 738,000 acres in five counties. Around 641,000 acres in the Delta area have been classified as some of the highest quality soils for agricultural production in California. In the San Joaquin River region, 1996 figures show over 3.7 million acres of important farmland; in the Sacramento River region over 2.4 million acres; in the Bay region, including the counties of Contra Costa, Solano, Napa, and Sonoma, approximately 493,000 acres.

Areas influenced by the Delta hub include the Central Valley, which stretches nearly 500 miles from Redding in the north to Bakersfield in the south and more than 100 miles from the Sierra Nevada in the east to the coastal ranges in the west, and Southern California, home to two-thirds of the state's population and approximately 2.1 million acres of important farmland. Delta water deliveries help to sustain a $36.6 billion farming industry and a significant contribution to California's $1.6 trillion gross state product by a combination of Silicon Valley companies in the Bay region and energy, tourism and entertainment industries south of the Delta. (*See* Legislative Analyst's Office Cal Facts 2006, California's Economy and Budget in Perspective, *available at* http://www.lao.ca.gov/2006/cal_facts/2006_calfacts_econ.htm.)

Average annual precipitation in the state is a meager 24 inches, ranging from as little as zero in the southern desert regions to as much as 100 inches in the mountainous north coast regions. The overall runoff in the state varies from year to year, with a low of 15 million acre-feet in 1977 and a high of 135 million acre-feet in 1983. Sixty percent of the state's precipitation is transpired by trees and other vegetation. Half of the approximately 71 million acre-feet of water left ends up as runoff that gathers in streams and other watercourses and flows through the Delta.

[10] 16 U.S.C. §1536(a)(2).

Due to the need to prevent seasonal flooding that caused serious damage to farms and cities along the Sacramento and San Joaquin Rivers and to ensure a reliable water supply for various water users, the federal CVP was built beginning in 1937, with the first water deliveries in 1940. Later, in order to address the need to redistribute water supply from areas of surplus to areas of deficiency, the SWP was built beginning in 1967, with first water deliveries in 1971.

The ecology of the Bay-Delta is continually evolving and changing as it has been since its discovery[11]. There are a number of factors affecting the wildlife and fishery habitat and the quality of drinking water and other water supply needs for consumption by residential, farming and municipal and industrial users. These factors are broadly acknowledged and include both natural phenomena, e.g., organic carbon, saltwater intrusion, disease, and predation; and human activities, e.g., waste discharges, introduction of invasive species, unscreened diversions, overfishing of some species, fish barriers, and channel alterations, among other things. Government agencies have convened a number of fora and attempted various efforts to address the current conditions in the ecology of the Delta with the consequent ESA listing of the delta smelt, among other species (*e.g.*, salt marsh harvest mouse, valley elderberry longhorn beetle, and various salmonid species.) Unfortunately, all of those efforts have been ineffective.

In December 1994, CALFED, a consortium of 18 federal and state agencies, signed a document known as the Bay-Delta Accord that set interim water quality standards and constrained operation of the water projects for a three year period, later extended to 2000. The Bay-Delta Accord committed additional fresh water flows to the Delta and was intended to protect the supplies to water users in the event additional water commitments were required by further species listings under the ESA. During that same month, the State Water Resources Control Board issued a draft water quality plan for the Delta, later finalized in 1995. As a result of the Framework Agreement and the Bay-Delta Accord, the CALFED agencies launched the ambitious CALFED Program with the stated objective of coordinating management of California's most precious resource, water. CALFED has to date spent billions of dollars in state bond money, federal appropriations and contributions by water users with the net result of overseeing catastrophic declines in delta smelt abundance indices.[12]

It seems clear that the primary reason for CALFED'S failure to address the challenges presented by water quality and water supply conditions in the Bay-Delta is the lack of early investment in rigorous scientific study of the area. CALFED ignored every opportunity to examine all potential causes of the changing conditions in the estuary in favor of blaming the SWP and CVP export pumps and single-mindedly looking for support for the assumptions that would lead to that single culprit. A 2005 Independent Science Review Board, convened by CALFED itself, found that CALFED's energy and focus was erroneously devoted to trying to prove those assumptions were accurate[13].

Clearly, given the above facts, anything the FWS considers or decides with respect to issuing a final biological opinion on the delta smelt must involve a highly influential scientific assessment under the IQA because it has a potential impact of more than $500 million in any year and it is novel, controversial, precedent setting, or has significant interagency interest.[14]

2. The OMB Guidelines and Final Bulletin Refine and Add Definition of Terms to Which the FWS Must Adhere

As refinements of the IQA, which had little detailed information, OMB's implementing bulletins contain the necessary definitions to determine what is required of the FWS to comply with the law. Further, the IQA standards are in harmony with the ESA's requirement that the best available scientific data be used for decisions. Case law supports the interpretation of the ESA requirement for rigor, with courts finding that data need not be conclusive but must support the findings, and that determinations may not be based on mere supposition.[15] If the Effects Analysis is not corrected now, its inaccurate, incomplete, biased and unclear information will become part of a final rulemaking on the BO for the delta smelt and further exacerbate the devastating consequences of an ongoing severe curtailment of the water supply available to Alliance members as well as others in California dependent on the Delta for their water needs.

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[11] September 8, 2008 CESAR detailed comments at pp. 1-3.
[12] *Id. at pp.1-40.*
[13] 2005 Independent Science Review Board Peer Review.
[14] Final Bulletin, *supra*, at p. 2675.
[15] See discussion and references in attached Detailed Request List.

The administrative record pertaining to Bay-Delta issues is voluminous and is derived from numerous court actions, biological opinions, biological assessments, CALFED activities, independent studies, and public comments on agency actions, among other things. The FWS has ignored a large part of the scientific data available on the causes of fishery conditions in the Bay-Delta, failed to pursue easily identifiable potential causes, and stubbornly asserted that export pumping is the cause of the decline in abundance indices, thereby supporting implementation of draconian measures requiring severe curtailments in export water supplies in the face of overwhelming statistical and empirical evidence that such cutbacks will not solve the problems with the species. This approach violates the requirements of the IQA as specifically detailed in two documents: the February 22, 2002 OMB Guidelines and the January 14, 2005 Final Bulletin. Pertinent requirements of each document are highlighted as follows:

a. **OMB Guidelines[16]:**

> **SUMMARY:** These final guidelines implement section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106–554; H.R. 5658). Section 515 directs the Office of Management and Budget (OMB) to issue government-wide guidelines that ''provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.'' By October 1, 2002, agencies must issue their own implementing guidelines that include ''administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency'' that does not comply with the OMB guidelines.

These guidelines apply to federal agencies subject to the Paperwork Reduction Act (44 U.S.C. §3502(1)). Federal agencies must develop information resources management procedures for reviewing and substantiating the quality (including the objectivity, utility, and integrity) of information before it is disseminated. In addition, agencies must establish administrative mechanisms allowing correction of information disseminated by the agency that does not comply with the OMB or agency guidelines. The guidelines stress the importance of agencies implementing the standards in a common sense and workable manner. Agencies are required to apply the guidelines in a manner appropriate to the nature and timeliness of the information to be disseminated, and incorporate them into existing agency information resources management and administrative practices.

The IQA denotes four substantive terms regarding information disseminated by Federal agencies: quality, utility, objectivity, and integrity. The OMB Guidelines provide definitions that are designed to establish a clear meaning so that both the agency and the public can readily judge whether a particular type of information to be disseminated does or does not meet these attributes.

In the guidelines, OMB defines ''quality'' as the encompassing term, of which ''utility,'' ''objectivity,'' and ''integrity'' are the constituents. ''Utility'' refers to the usefulness of the information to the intended users. ''Objectivity'' focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. ''Integrity'' refers to security—the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification. OMB modeled the definitions on the longstanding definitions in OMB Circular A–130, but tailored them to fit into the context of the guidelines.

This Request addresses specific failures of the FWS to meet the quality requirements of the OMB Guidelines with respect to the accuracy, completeness, clarity, and biased representation of the data.

b. **Final Bulletin:**

In addition to the Guidelines for the IQA, OMB issued peer review guidance[17] which federal agencies must use in conjunction with any highly influential scientific assessment. This guidance is designed to realize the benefits of meaningful peer review of the most important science disseminated by the federal

[16] Copy attached.
[17] Copy attached.

government and is part of the ongoing effort to improve the quality, objectivity, utility, and integrity of information[18] disseminated by the federal government to the public.

The Peer Review Bulletin is designed to be implemented in tandem with the OMB Guidelines. It establishes minimum standards for when peer review is required for scientific information and the types of peer review that should be considered by agencies in different circumstances. The Final Bulletin also addresses peer review of scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government. The FWS has adopted the OMB peer review guidelines in full.[19]

The Effects Analysis is a highly influential scientific assessment as defined in the Final Bulletin. Its dissemination in draft form by the DOI gave no indication that its release was solely for the purpose of pre-dissemination peer review, therefore, the affected persons and organizations, such as the Alliance and its affected members, are entitled to regard it as an official dissemination under the OMB Guidelines.

The statements presented below and the two attached documents entitled Summary of Request and Detailed Request List present the Alliance's additional specific comments in this matter.

B. SPECIFIC RESPONSES TO REQUEST FOR CORRECTION PROCEDURES

The FWS's version of the OMB Guidelines requires that specific information be provided as part of the request for correction. The following is a list of the specific information requirements and our responses.

1. *Statement that the Request for Correction of Information is submitted under FWS Information Quality Guidelines.*

   This Request is submitted under the FWS Information Quality Guidelines.

2. *Requester Contact Information. The name, mailing address, telephone number, fax number, email address, and organizational affiliation (if any). Organizations submitting a request must identify an individual to serve as a contact.*

   Dan Keppen, Executive Director, Family Farm Alliance, PO Box 216, Klamath Falls, Oregon 97603, ph. (541)850-9007, fax (541)850-9244, dankeppen@clearwire.net, with a copy to The Brenda Davis Law Group, 1990 3rd Street, Suite 400, Sacramento, California 95811.

3. *Description of Information to Correct. The name of the FWS publication, report, or data product; the date of issuance or other identifying information, such as the URL of the web page, and a detailed description that clearly identifies the specific information contained in that publication, report, or data production for which a correction is being sought.*

   The Alliance seeks correction of the influential information included in the Effects Analysis publicly released by James Maysonett on behalf of the Department of Justice on October 29, 2008.

   Specifically, the Alliance seeks correction of all the assertions in the Effects Analysis that state, infer, or imply that export pumping by the SWP and CVP has important effects on abundance of delta smelt. These assertions violate the objectivity requirement of the OMB Guidelines promulgated by OMB, DOI, DOJ, and the FWS. Specific requests are attached.

[18] A requirement of the IQA.

[19] *See* http://www.fws.gov/informationquality/peer_review/index.html: "While we have always consulted experts to ensure that our science is sound, through this peer review process we will follow the guidelines for Federal agencies spelled out in the Office of Management and Budget (OMB) "Final Information Quality Bulletin for Peer Review." (PDF, 363 KB) released December 16, 2004."

4. Effect of the Alleged Error. Provide an explanation that describes how the requester specifically uses the information, how the alleged error affects the requester in a material way and how a correction would resolve the error.

The Secretary's final biological opinion is a highly influential scientific assessment, as its contents and conclusions will govern the operations of the Central Valley Project and the State Water Project and will be used to make determinations as to the water deliveries to millions of acres of farms in California. The information used in the Effects Analysis of the final biological opinion regarding the effect of project operations on delta smelt abundance indices is highly influential information. The biological opinion Effects Analysis is being disseminated by the government through emails from the Department of Justice to interested parties, among them, the Family Farm Alliance and its members.

The Alliance represents numerous family farmers and ranchers in California's Central Valley. Its members also include hundreds of other farm-related organizations, including irrigation districts, commodity associations, private water companies, consulting firms, law firms, and farm implement dealers. Four of our 10 directors are from the Central Valley. Eight members of our Advisory Committee are from California. As such, the Alliance and its members are vitally interested in the availability of reliable and affordable irrigation water supplies in the Central Valley.

If the information in the Effects Analysis is not corrected, water supplies to water agencies and farmers in the Central Valley, many of whom are members of and/or represented by the Alliance, will be significantly reduced. Water users will face drastic and potentially permanent reductions in the water they need to live, grow their crops, and run their businesses, and water agencies will have insufficient supplies to satisfy demand. The economic and social consequences could be immediate and devastating if land is fallowed due to lack of water. In some cases, farmers could even lose entire permanent crops, such as orchards and vineyards, causing irretrievable losses of their investments in those crops. Alliance members in allied industries will also be damaged, as their livelihoods are dependent on the agricultural economy at risk if the information in the Effects Analysis is not corrected. Lenders could become less likely to lend to agriculture because of the doubts about water supplies created by the errors in the Effects Analysis, magnifying the economic effects. Farm workers will be displaced and without work. The Alliance itself could be at risk, as it depends on the financial contributions of its members. The impacts visited upon the rural communities reliant on these water supplies will multiply as the economies of these communities are destroyed.

By correcting the errors in the Effects Analysis, the injuries to the Alliance, its members and their communities caused by those errors can be avoided because irrigation water deliveries would not be unnecessarily restricted by erroneous information. The information currently in the draft Effects Analysis misleads the public and any other user of the biological opinion with respect to the effects of the water project operations.

A correction entails:

- The draft effects analysis acknowledging that the best available scientific and commercial data demonstrates that operation of the water project pumps does not have important effects on abundance of delta smelt, and/or that numerous other factors do have important effects on the abundance of delta smelt;
- The draft effects analysis acknowledging that the statistical predicate to any conclusion that project operations (namely operation of export pumps) requires correlation and that correlation is not present between abundance of delta smelt and project export pumping activities; therefore it cannot be said that project operations are responsible for declines in delta smelt abundance;
- Removal of all assertions which are either (a) unsupported by data, and/or (b) contradicted by data and analysis;

- Removal of all statements, assumptions, and assertions which are not supported by the best available scientific or commercial data;
- Removal of all statements which are predicated on speculation, hypothesis, or supposition;
- Full disclosure of the degree of uncertainty regarding the cause of the decline of delta smelt;
- Full disclosure of the degree of uncertainty regarding the effects of other stressors on delta smelt abundance and the effects of project operations on those other stressors;
- Acknowledgement of data which demonstrate that water project pumping operations, including entrainment, have no important effects on abundance of delta smelt; and
- Acknowledgement of the importance of weather and tidal action on the hydrodynamics of the entire Delta.

The data support the requested correction, and the ESA and IQA require their acknowledgement and prompt revision. The ESA does not allow for hypothesis, speculation or opinion to form the basis of the biological opinion, it requires data; and the best available data demonstrate water project pumping has no important effects on abundance of delta smelt.

4. *A specific description of how the information does not comply with OMB, DOI, and/or FWS Information Quality Act Guidelines. The petitioner should cite the specific locations in the text of the document where the alleged error occurs and should state specifically how the information should be corrected and why the corrections should be made.*

The IQA requires that federal agencies ensure the quality, objectivity, utility and integrity of information (including statistical information) disseminated by the agency. The guidelines promulgated as a result of the IQA by OMB, DOI, DOJ, and the FWS all define 'quality' as being a combination of utility, objectivity, and integrity. The FWS definition of objectivity[20] states:

> *III-8 Objectivity means ensuring information is unbiased. Objective information is presented accurately, clearly, and completely, and any limitations are stated explicitly. Objectivity involves two distinct elements: presentation and substance.*
>
> *(a) Information disseminated by the FWS will be presented accurately, clearly, and completely.*
>
> *(b) Information disseminated by the FWS will be treated in an unbiased fashion. In a scientific, financial, or statistical context, we will analyze the original and supporting data and develop our results using sound statistical and research methods to ensure, to a reasonable extent, that our results are not subject to bias. Where a potential for bias is identified, the FWS will address it.*

The information presented in the Effects Analysis is biased, inaccurate, and incomplete. The conclusions and statements included in the BO also fail to meet the ESA requirement that biological opinions be based on the best scientific and commercial *data* available.

Instead of relying on, or even acknowledging, multiple statistical analyses demonstrating no important effects of CVP and SWP export pumping, the Effects Analysis assumes that federal and state water project operations are the sole cause of delta smelt decline. There is no mention of the repeated analyses of data over the past 15 years which contradict this assumption and demonstrate that water project pumping has no important effects on abundance of delta smelt.

The Effects Analysis is:

- Inaccurate as it makes the statement that CVP and SWP operations are the cause of declines in delta smelt abundance indices;

[20] http://www.fws.gov/informationquality/topics/IQAguidelines-final82307.pdf

- Incomplete as it fails to acknowledge the complete lack of support for any important effects of pumping on abundance of delta smelt;
- Incomplete as it fails to recognize that no other factors have been subject to any significant review or research by the agencies;
- Incomplete in that it fails to recognize the enormous changes in the Delta environment that took place in the first 100 years after European settlement, and the ongoing changes that continue to this day;
- Incomplete in that it fails to recognize that export pumping has been occurring in the Delta for over 70 years and that delta smelt populations were not affected for most of those years;
- Biased in that it ignores data based statistical information in favor of speculation, hypothesis, and opinion;
- Biased in that it fails to recognize that there has been virtually no examination of other potential factors affecting abundance of delta smelt in the 15 years since the delta smelt was listed under the ESA;
- Biased in that it implies all the changes in the Delta are the result of project operations, when in fact, the most extensive changes were the result of activities which occurred long before completion of the projects, and the declines in delta smelt populations occurred roughly 40-50 years after operation of project pumping commenced;
- Biased in that it fails to acknowledge that tides and weather are the two most important effects on the hydrodynamics of the Delta, instead stating that the pumps have the most effects; and
- Incomplete in that it analyzes selected areas of the Delta, makes speculative statements as though they are fact, and fails to acknowledge that the data does not support statements that pumps have important effects on abundance of delta smelt.

In addition, the Independent Peer Review commissioned by the FWS and released with the Effects Analysis does not comply with the Final Bulletin, which was adopted by the FWS. The Final Bulletin specifically requires certain conflict of interest standards be met in peer review of highly influential scientific assessments[21]. Those standards were not met by the peer review document disseminated with the Effects Analysis. Two of the reviewers were either authors of papers upon which the BO is based and/or receive funding or commissions from the government agencies which authored the Effects Analysis.

5. *Supporting Documentary Evidence. Provide any supporting documentary evidence, such as comparable data or research results on the same topic. Wherever possible, the petitioner should link this supporting evidence to specific locations in the text of the document being challenged so that it is clear how the supporting documentation relates to the challenged information.*

Attached to this Request are detailed and specific line-by-line comments on the Effects Analysis with supporting documentation.

6. *Identification of any other public proceeding, including public comments, legal proceedings, or communications in which the requester has previously or is simultaneously requesting consideration of the same or similar corrections. Failure to provide such information will be considered an indication of a bad faith submission.*

The Alliance and its members have commented for 15 years or more on many of the specific issues related to the effects of export pumping in the Delta addressed in this Effects Analysis.

The Alliance's members, staff and scientists have commented in CALFED workshops, science meetings and in staff technical meetings on these issues.

The Alliance requests this information be corrected so that courts, the public, Congress and the water users and others this organization represents and serves have accurate, unbiased, complete, and clear information based on data as required by the ESA, rather than hypothesis, speculation or opinion.

[21] Final Bulletin, *supra* at p. 2671.

The Alliance notes that the final BO is due on December 15, 2008 by court order. The timeframes in the FWS's version of the OMB Guidelines will not allow for a response prior to publication of the final rule. We note that formal comments on exactly the same issues were provided to the Bureau of Reclamation and the FWS on the biological assessment for the OCAP. Failure to address the issues regarding the data requirements, and the lack of analytical support for the FWS's oft-stated assertions that export pumping is the cause of the decline in abundance of delta smelt is repeated and ongoing and continues despite multiple analyses demonstrating no important effects. To date, the FWS has relied on the judicial deference under the Chevron Rule[22] to protect itself from the consequences of grossly and repeatedly ignoring the statutory requirements of the ESA.

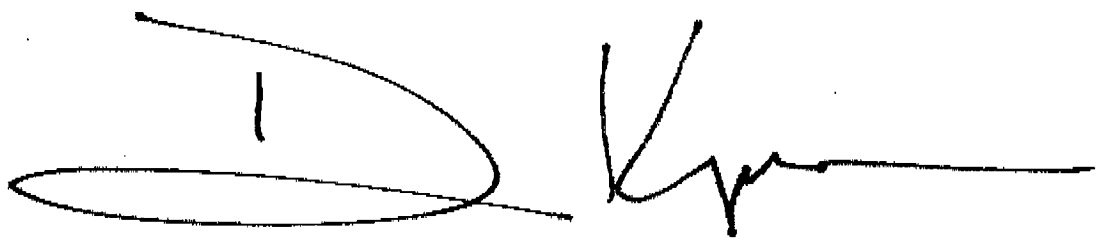
This request for correction of information under the IQA is yet another attempt to illustrate what the data show clearly: there is no basis for statements that operation of the water projects is the sole cause of declines in delta smelt abundance indices.

Conclusions

For the reasons stated above and in the attachments, the Alliance strongly urges the FWS to adhere to the legal requirements of the ESA and the IQA in evaluating this Request for Correction of Information. As required specifically in the DOI Guidelines, please notify us within 10 business days of your receipt of this letter.

Thank you for your attention.

Sincerely,



Dan Keppen
Executive Director
Family Farm Alliance

Enclosures
cc: Jim Connaughton, Council on Environmental Quality
Dirk Kempthorne, Secretary of the Interior
Secretary of Commerce
Department of Justice
Affected Members of Congress
OIRA

[22] The Chevron Rule applies to the agency interpreting a statute it administers. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).