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Certified Mail – Return Receipt Requested

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Re: Notice of Violation of the Endangered Species Act and of Intent to Sue for
Exceedance of Incidental Take Limits for Sacramento River Winter-Run Chinook
Salmon and Delta Smelt, and Other Violations

Dear Sirs and Madam:

I am writing on behalf of a coalition of environmental protection and commercial and sport fishing organizations¹ to notify you of ongoing and recurring violations of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1538, in the operation of the Central Valley Project and the State Water Project (collectively, the “Projects”) by the United States Bureau of Reclamation (“Bureau”) and the California Department of Water Resources (“Department”),

¹ The coalition includes: The Bay Institute, California Sportfishing Protection Alliance, Center for Biological Diversity, Natural Resources Defense Council, Pacific Coast Federation of Fishermen’s Associations, and Save San Francisco Bay Association.

respectively, and of Section 7 of the ESA, 16 U.S.C. § 1536, by the Bureau. This constitutes the notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

Summary

As set forth in detail below, in multiple years since the endangered Sacramento River winter-run chinook salmon (“winter-run salmon”) and the threatened Delta smelt were listed under the ESA, the Bureau and the Department have operated the Projects in such a way that the ESA-mandated incidental take limits for both species have been exceeded. These recurring take limit exceedances constitute unlawful takings in violation of Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B). Moreover, despite such exceedances, the National Marine Fisheries Service (“NMFS”), the U.S. Fish and Wildlife Service (“FWS”), and the Bureau have failed in many instances to reinstate consultation concerning the Projects’ adverse impacts on these species, in violation of Section 7 of the ESA, 16 U.S.C. § 1536; on those occasions when NMFS or FWS and the Bureau have purported to do so, the supposed consultation has been legally inadequate, intended, apparently, merely to authorize the exceedances, rather than to eliminate or minimize them. Finally, the Bureau is also in violation of Section 7 for failing to comply with its duty to avoid jeopardy to these species.

Background

1. The Projects.

By their operation of the Projects, the Bureau and the Department² largely control the flow of water in the Sacramento and San Joaquin Rivers into and out of the Sacramento-San Joaquin River Delta. At times, the Projects’ water export facilities capture more than half the total inflow of all the tributaries that flow into the Delta. This water is then exported primarily to agricultural and urban users in the Central Valley and Southern California. Operation of the Projects attenuates the natural variability of the river systems, and often changes the complex pattern of currents in the Delta’s many channels. At times, the net flow of the San Joaquin River and its tributary channels is reversed upstream under the influence of the Projects’ powerful export pumps.

This replumbing of the Sacramento-San Joaquin river system has had devastating consequences for the Delta ecosystem and its fishery resources. The construction of Shasta and Keswick dams on the Sacramento River as part of the CVP blocked access to all of the winter-run chinook salmon’s historic spawning grounds. The displaced and decimated population has since been restricted to a narrow reach of spawning grounds below the dams, from which winter-run juveniles make the perilous downstream journey through the Delta enroute to the ocean.

² The Bureau and the Department cooperate in operating the Projects pursuant to a 1986 “Agreement Between the United States of America and the State of California For Coordinated Operation of the Central Valley Project and the State Water Project.”

When rates of export are high, and reverse flow conditions created, many migrant juvenile salmon are diverted from the Sacramento River into the central and south Delta, where they become entrained in the system of channels and forebays leading to the pumping facilities. Most of the entrained juvenile salmon here are trapped and killed by predators; many others perish at the fish “salvage” facilities.

For the resident Delta smelt, the problems are unrelenting. After hatching in the upper Delta, or the lower reaches of the tributary rivers, juvenile smelt make their way downstream through the Delta to the head of the estuary, where the rivers meet the saline waters of the Bay. In this “mixing zone,” the vertical circulation of fresh and salt waters concentrates nutrients near the surface, stimulating biological productivity and rendering this area an ideal nursery and larder for juvenile smelt. When water exports from the Delta are high, however, out-migrating smelt are drawn into the South Delta by the reversed currents. Nearly all Delta smelt that become entrained in the Projects’ intake channels perish. Many are preyed upon by striped bass and other predators. Even those smelt that are “salvaged” at the fish facilities perish because of stress during screening, handling, and transport to release sites. A more insidious effect of high export rates and reduced freshwater outflow is to shift the position of the mixing zone upstream, out of Suisun Bay and into the narrow channels of the Delta. As a result, the base of productivity supporting the entire Delta ecosystem, including the Delta smelt, is constricted and reduced.

2. The Winter-Run Salmon.

After declining to as few as 191 adults returning to spawn, the winter-run salmon were listed as threatened on November 5, 1990, and as endangered on January 4, 1994. *See* 55 Fed. Reg. 46515 (1990); 59 Fed. Reg. 440 (1994). The winter-run’s critical habitat was designated on June 16, 1993. 58 Fed. Reg. 33212 (1993).

On February 12, 1993, following formal consultation with the Bureau, NMFS issued a Biological Opinion (“1993 Winter-Run BO”) on the Projects’ impacts on winter-run salmon, in which it concluded that, unless modified, operation of the Projects was likely to jeopardize the continued existence of the winter-run salmon. 1993 Winter-Run BO at 49. NMFS therefore recommended a reasonable and prudent alternative that, in its opinion, would not jeopardize the winter-run, *id.* at 51-62. NMFS further concluded, however, that even with implementation of the reasonable and prudent alternative, taking of the species would continue. *Id.* at 65. Accordingly, NMFS included with the biological opinion an incidental take statement providing, among other things, that “[t]he total level of anticipated take at the Delta pumping facilities must not exceed 1 percent of the estimated number of winter-run chinook salmon entering the Delta for a given year.” *Id.* at 66. By amendment of May 17, 1995, the take limit was increased to 2 percent of estimated juvenile production.³

³ NMFS provided no justification whatsoever for its decision to double the winter-run salmon take limit, and consequently this action was arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

As set forth in boldface in Table 1 below,⁴ the applicable take limits for the winter-run salmon at the Delta export pumps have been exceeded in four out of the past seven years, including the last two years. Last season's exceedance, in which the take limit was surpassed by 170 percent, was particularly egregious.

Table 1: Incidental Take of WR Chinook Salmon, 1993-2001 (exceedances in bold)			
Water-Year	Incidental Take Limit (Wild Fish)*	Incidental Take of Winter-Run Chinook (Estimated Loss at Combined Fish Facilities)**	Percent Exceedance of Take Limit
1993	2731	1909	--
1994	905	863	--
1995 ⁵	745	1034	39 %
1996	6762	7296	8 %
1997	3301	630	--
1998	2766	1542	--
1999	9095	3720	--
2000	5794	5835	1 %
2001	7404	20099***	170 %

* Incidental Take Limits determined annually by NMFS from juvenile production estimates.

** Source: California Department of Water Resources weekly summaries of daily salvage and hydrologic data for winter chinook incidental take; winter-run chinook incidental take and monitoring program annual data reports, where available. Data provided to Earthjustice by National Marine Fisheries Service.

*** Source: U.S. Bureau of Reclamation Central Valley Operations Office Fish Report, September 2001

3. Delta Smelt.

The Delta smelt, a species endemic to the Delta, was listed as threatened on March 5, 1993. 58 Fed. Reg. 12854 (1993). Critical habitat for the Delta smelt was designated on December 19, 1994. 59 Fed. Reg. 65256 (1994). On March 6, 1995, following formal consultation with the Bureau, FWS issued a Biological Opinion on the Projects' impacts to the Delta smelt ("1995 Delta Smelt BO"). FWS concluded that the Projects would not result in jeopardy to the Delta smelt, in part because the Projects were now supposedly being run in accordance with the 1993 Winter-Run BO's reasonable and prudent alternative. *See* 1995 Delta Smelt BO at 26, 39-40. Notwithstanding its no jeopardy conclusion, the 1995 Delta Smelt BO

⁴ See Appendix for list of documents and data sources upon which Table 1 is based; these documents and data sources are hereby incorporated in this letter by reference.

⁵ As noted above, by amendment of May 17, 1995, NMFS raised the incidental take limit from 1 percent to 2 percent of juvenile production estimate. This altered limit became effective, however, only *after* the original 1 percent take limit for the 1995 season had been exceeded. At the time of the 1995 taking, therefore, the applicable take limit was 745 fish, not 1490.

nevertheless concluded that operation of the Projects would result in the taking of Delta smelt. *Id.* at 40-41. Accordingly, the 1995 Delta Smelt BO contains an incidental take statement specifying the number of Delta smelt that may be lawfully taken in connection with the operation of the Projects. *Id.* at 40-46.

Compliance with incidental take limits for the Delta smelt is measured on a monthly basis in terms of fish “salvaged” at the Federal and State facilities. *Id.* at 42. The applicable monthly take limits are determined based on water-year type forecasts, updated monthly.⁶ Different take limits are applied in months determined to be of “above normal” water-year type versus months determined to be of “below normal” water-year type. *Id.* at 43. The numerical limits were “developed using the highest 25 percent of historical salvage from 1980 through 1982,” and at the time the 1995 Delta Smelt BO was issued, FWS thought that “these numbers are not likely to be salvaged at the Federal and State facilities.” *Id.* at 42.

As set forth in Table 2 below, the take limits for the Delta smelt have been exceeded seven times since the issuance of the 1995 Delta Smelt BO, six times in the last three years alone.

Year	Month	Estimated Water-Year Type * AN=above normal BN=below normal	Applicable Take Limit	Take of Delta Smelt** (salvage at combined pumps)	Percent Exceedance of Take Limit
1996	May	AN	9,769	30,399	211 %
1999	May	AN	9,769	58,928	503 %
1999	June	AN	10,709	73,368	585 %
1999	July	AN	9,617	19,821	106 %
2000	February	AN	7,188	7,819	9 %
2000	May	AN	9,769	49,401	406 %
2000	June	BN	47,245	49,123	4 %

* Water-Year Type estimation based on the Eight River Index, the Sacramento and San Joaquin Valley Water Year Hydrologic Classification Indices, and Full Natural Flow data summaries for the Sacramento and San Joaquin basins, all maintained by the California Department of Water Resources' California Data Exchange Center (http://cdec.water.ca.gov/water_supply.html).

** Sources: California Department of Fish and Game salvage data for Federal and State facilities on the Bay-Delta Server, <http://www.delta.dfg.ca.gov/data/salvage/>, hereby incorporated in this letter by reference; Ken Sanchez, U.S. Fish and Wildlife Service, pers. comm.

⁶ Ken Sanchez, U.S. Fish and Wildlife Service, pers. comm.; Mike Thabault, U.S. Fish and Wildlife Service, pers. comm.

Endangered Species Act Violations⁷

1. Section 9 of the ESA — Prohibited Take of Winter-Run Salmon and Delta Smelt.

Section 9(a)(1)(B) of the ESA provides that it is unlawful for any person — including federal and state entities — to “take” any endangered species, such as the winter-run salmon. 16 U.S.C. § 1538(a)(1)(B). By regulation, FWS has extended the take prohibition to threatened species, such as the Delta smelt, as well. *See* 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31.

Section 7(o)(2) provides an exemption from Section 9 liability for taking that is incidental to, and not the purpose of, the agency action, provided that such taking “*is in compliance with* the terms and conditions specified in [an incidental take statement]. . . .” 16 U.S.C. § 1536(o)(2) (emphasis added). The requirements for an incidental take statement are set forth in Section 7(b)(4), 16 U.S.C. § 1536(b)(4). Such a statement must specify the impact of the taking on the species, reasonable and prudent measures necessary to minimize such impact, and terms and conditions required to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4)(i), -(ii), -(iii). *See generally Arizona Cattle Growers v. U.S. Fish and Wildlife Serv.*, ___ F.3d ___, 2001 U.S. App. LEXIS 26821 at *21-32 (9th Cir. Dec. 17, 2001) (discussing requirements for incidental take statement). An incidental take statement is the equivalent of a permit allowing incidental take, *see Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996), and any taking “that is in compliance with” the incidental take statement “shall not be considered to be a taking of the species concerned.” 16 U.S.C. § 1536(o)(2).⁸

It is clear from the text of Section 7(o)(2) that compliance with the incidental take limits contained in the 1993 Winter-run BO and 1995 Delta Smelt BO is a condition precedent to exemption from the take prohibitions of Section 9; consequently, any exceedance of those take limits constitutes a prohibited take and gives rise to Section 9 liability. NMFS and FWS both agreed with this interpretation in the final rulemaking establishing the procedural regulations governing Section 7. *See* 51 Fed. Reg. 19926, 19954 (1986) (“[T]he Service will enforce the taking prohibitions of Section 4(d) or 9 if the continuation of an action, after the anticipated level of incidental take has been reached, results in the additional takings of listed species.”). *See also* 1995 Delta Smelt BO at 47 (“In instances where the amount or extent of incidental take is exceeded, any operations causing such take *ceases to have the protective coverage* of section 7(o)(2) [exempting takings from section 9 liability]”) (emphasis added); *Arizona Cattle*

⁷ In addition to the violations of the ESA discussed in the text, FWS and NMFS are also in violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* The incidental take statement in each biological opinion constitutes a “major Federal action significantly affecting the quality of the human environment,” requiring preparation of an environmental impact statement (“EIS”). 42 U.S.C. § 4332(2)(C). *See Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (incidental take statement in biological opinion for Columbia River fish management plan is major federal action for NEPA purposes). To our knowledge, neither NMFS nor FWS prepared an EIS before issuing the incidental take statements in question.

⁸ FWS or NMFS may only issue an incidental take statement if the incidental taking “will not violate [Section 7(a)(2)]” — that is, will not jeopardize the species or adversely modify or destroy its critical habitat. 16 U.S.C. § 1536(b)(4)(A).

Growers' Ass'n v. U.S. Fish & Wildlife Serv., 63 F. Supp.2d 1034, 1044-45 (D. Ariz. 1998), *aff'd* ___ F.3d ___, 2001 U.S. App. LEXIS 26821 (9th Cir. Dec. 17, 2001) (rejecting argument that exceedance of incidental take limit does not constitute unlawful taking).

As documented above, the Bureau and the Department have exceeded the winter-run salmon take limit in four out of the past seven years, and in the most recent season exceeded the limit by 170 percent. Similarly, the Bureau and the Department have exceeded the incidental take limits for the Delta smelt seven times since the issuance of the 1995 Biological Opinion, including six times in the last three years alone, often by stunning margins. To our knowledge, neither the Bureau nor the Department have implemented new measures to protect adequately the winter-run salmon or the Delta smelt, nor have conditions changed such that the take limits will not continue to be exceeded.⁹

2. Section 7 of the ESA.

a. Duty to Reinitiate Consultation.

As a procedural mechanism for insuring that federal agency actions do not jeopardize listed species, Section 7(a)(2) of the ESA requires all federal agencies to consult with either FWS or NMFS on the impacts of “any action authorized, funded, or carried out by such agency” on any listed species. 16 U.S.C. § 1536(a)(2). Normally, as was the case here, such consultation results in the preparation by FWS or NMFS of a written biological opinion “detailing how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). If FWS or NMFS concludes in the biological opinion that the agency action will not jeopardize the listed species or offers reasonable and prudent alternatives that will not do so, but that the action will nevertheless result in the taking of the species, then FWS or NMFS must, as they each did here, include with the biological opinion a written incidental take statement. 16 U.S.C. § 1536(b)(4). *See* discussion above.

The ESA’s implementing regulations provide that consultation must be reinitiated if, among other reasons, “the amount or extent of taking specified in the incidental take statement is exceeded.” 50 C.F.R. § 402.16(a). The duty to reinitiate consultation lies with both the action agency and the consultation agency. *See id.* Moreover, “[r]einitiation of consultation requires either the FWS or the NMFS to issue a new Biological Opinion before the agency action may continue.” *Environmental Protection Information Ctr. v. Simpson Timber Co.*, 255 F.3d 1073,

⁹ In August, 2000, federal and state agencies adopted the CALFED Bay-Delta Program to restore the Bay-Delta’s ecological health while helping the state meet its water needs. As part of the CALFED program, in October 2000, the Environmental Water Account (“EWA”) was created to assist in the implementation of ESA requirements and to contribute to additional ecosystem restoration needs. However, as discussed in a report issued by The Bay Institute entitled *The First Annual State of the Environmental Water Account Report* (September 2001), implementation of the EWA during 2001 failed to meet the requirements of either CALFED or the ESA; more specifically, as documented in this letter, it failed to prevent the taking of record numbers of winter-run salmon in excess of the take limit.

1076 (9th Cir. 2001); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992).

To our knowledge, based on the documents provided to us by NMFS and FWS pursuant to Freedom of Information Act requests, it appears that for many of the above-documented exceedances the Bureau and NMFS have failed to reinitiate consultation on the Projects' impacts on winter-run salmon as required by law.¹⁰ Although on several occasions the Bureau and FWS have purported to reinitiate consultation concerning exceedances of the Delta smelt take limits, none of these "consultations" resulted in the production of any document that could legitimately be described as a new biological opinion or amendment to the existing Delta smelt biological opinion. In each such instance the primary result of the supposed consultation was simply to adjust — or even eliminate — the taking limits, so as to authorize retroactively the excessive takings. Simply providing the Bureau and the Department with a blank check to exceed the take limits by whatever amount of taking actually occurs, without any meaningful analysis of the impacts to the Delta smelt, defeats the purpose of the ESA and violates the spirit and letter of the Section 7.¹¹

b. Duty to Avoid Jeopardy and Adverse Modification of Critical Habitat.

Section 7(a)(2) of the ESA imposes on federal agencies the substantive duty to ensure that any action carried out by such agencies "is not likely to jeopardize the continued existence" of any listed species, or "result in the destruction or adverse modification of" the critical habitat of such species. 16 U.S.C. § 1536(a)(2). "An action would 'jeopardize' a species if it 'reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery' of the species by reducing its reproduction, numbers or distribution." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (quoting 50 C.F.R. § 402.02).

As set forth above, last season the Bureau and the Department exceeded the winter-run salmon take limit by 170% and in several instances over the past five years exceeded the Delta smelt take limit by more than 500%. These ongoing and recurring exceedances of incidental take limits for the winter-run salmon and Delta smelt are jeopardizing the continued existence of these species, in violation of Section 7(a)(2). Moreover, Project operations that create the conditions causing the excessive takes are also adversely modifying and destroying designated critical habitat for both species, in further violation of Section 7(a)(2).

¹⁰ By letter dated March 8, 2001 the Bureau requested reinitiation of consultation with NMFS concerning the Bureau's on-going exceedance of the winter run take limit at that time. (Letter from Chester Bowlings, Bureau of Reclamation, to Rebecca Lent, NMFS (3/8/01)). However, to our knowledge NMFS has issued no document to reflect either that such consultation in fact occurred or, if it did, the results of that consultation. Moreover, take of winter-run salmon continued at record levels for weeks after the Bureau's March 8, 2001 letter.

¹¹ FWS's failure in any instance to offer any biological explanation for the additional takings authorized is also arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

Conclusion

The Bureau and the Department are currently operating the Projects in violation of sections 7 and 9 of the ESA. Unless these violations are cured within 60 days hereof by the reinitiation of consultation between the Bureau and NMFS and FWS concerning the Projects' effects on winter-run salmon and Delta smelt and their critical habitat, and by the Bureau's and Department's modification of Project operations as necessary both to comply with incidental take limits and to avoid jeopardy to these species, we intend to take appropriate legal action.

If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to call us.

Sincerely yours,

MICHAEL R. SHERWOOD

Staff Attorney

SUSAN BRITTON

Attorney

Appendix to January 10, 2002 letter to Donald Evans, et al.

Documents upon which Table 1 is based (Incidental Take Limits):

- Memo, February 9, 1993 to WR CVP Section 7 File from Gary Stern (NMFS) (1993 winter-run juvenile production estimate);
- Letter, October 1, 1993, from Gary Matlock (NMFS) to David Kennedy (DWR) (authorizing incidental take for WY 1994);
- Letter, February 21, 1995, from Hilda Diaz-Soltero (NMFS) to Roger Patterson (USBR) (authorizing incidental take for WY 1995);
- Letter, October 30, 1995, from Hilda Diaz-Soltero (NMFS) to Roger Patterson (USBR) (authorizing incidental take for WY 1996);
- Letter, February 10, 1997, from Hilda Diaz-Soltero (NMFS) to Roger Patterson (USBR) (authorizing incidental take for WY 1997);
- Letter, April 27, 1998, from James Lecky (NMFS) to Lowell Ploss (USBR) and Robert Potter (DWR) (authorizing incidental take for WY 1998);
- Letter, February 26, 1999, from James Lecky (NMFS) to Lowell Ploss (USBR) and Stephen Kashiwada (DWR) (authorizing incidental take for WY 1999);
- Letter, February 18, 2000, from James Lecky (NMFS) to Lowell Ploss (USBR) and Steve Macaulay (DWR) (authorizing incidental take for WY 2000);
- Letter, January 29, 2001, from Michael Aceituno (for Rebecca Lent) (NMFS) to Chester Bowling (USBR) and Steve Macaulay (DWR) (authorizing incidental take for WY 2001).

Estimated Loss/Incidental Take Data upon which Table 1 is based:

- 1992/1993 Winter-Run Chinook Incidental Take and Monitoring Program Annual Data Report (DWR 1993);
- June 1, 1994 Weekly Summary of daily salvage and hydrologic data for winter Chinook 1993/1994 incidental take (DWR 1994);
- May 17, 1995 Weekly Summary of daily salvage and hydrologic data for winter Chinook 1994/1995 incidental take (DWR 1995);
- June 9, 1995 Weekly Summary of daily salvage and hydrologic data for winter Chinook 1994/1995 incidental take (DWR 1995);
- 1995/1996 Winter-Run Chinook Incidental Take and Monitoring Program Annual Data Report (DWR 1996);
- 1996/1997 Winter-Run Chinook Incidental Take and Monitoring Program Annual Data Report (DWR 1998);
- 1997/1998 Winter-Run Chinook Incidental Take and Monitoring Program Annual Data Report (DWR 1999);
- 1998/1999 Winter-Run Chinook Incidental Take and Monitoring Program Annual Data Report (DWR 2001);
- May 31, 2000 Weekly Summary of daily salvage and hydrologic data for winter chinook 1999/2000 incidental take (DWR 2000);
- U.S. Bureau of Reclamation Central Valley Operations Office Fish Report, September 2001.