

Agenda Item: 3B  
Meeting Date: June 21, 2007

## CALIFORNIA BAY-DELTA AUTHORITY

### Status of Selected Delta-related Litigation and Proceedings (as of June 15, 2007)

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**Recommended Action:** This is an information item only.

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#### A. SWP Pumping/OCAP—State and Federal Endangered Species Acts

##### 1. SWP Pumping:

**(i) Watershed Enforcers I:** On May 9, 2007, the state Department of Water Resources (DWR) filed an amended notice of appeal in *Watershed Enforcers v. DWR*, a case brought in Alameda County Superior Court challenging DWR's incidental take authority under the California Endangered Species Act (CESA) for operation of the State Water Project (SWP) Pumping facilities.

The appeal in the 1<sup>st</sup> District Court of Appeal (San Francisco) stays an April 18, 2007, writ of mandate ordering DWR to cease and desist from further operation of the SWP Pumping facilities within 60 days until and unless it obtains appropriate CESA incidental take authorization for spring and winter run Chinook salmon and Delta smelt from the Department of Fish and Game. The appeals court has agreed to an expedited briefing schedule that could be completed by the end of September 2007 (with a decision possible by the end of the year).

DWR had asserted-- and continues to assert on appeal-- that, pursuant to a "patchwork" of relevant agreements with DFG in place prior and up to 1997, it has the requisite take authority pursuant to a statutory "grandfathering" provision added to CESA in 1997.

**(ii) Watershed Enforcers II:** In a related matter, while considering its options on appeal, above, DWR had applied for a determination from DFG that existing federal authorizations for SWP operations under the so-called OCAP biological opinions (see below regarding separate challenges to those opinions) are consistent with CESA. DWR withdrew that application on May 7, 2007. However, on May 16, 2007, *Watershed Enforcers* brought a second action in Alameda County Superior Court seeking to force DFG to make a determination on DWR's application even though it was withdrawn. A hearing on the merits, originally scheduled for June 15, 2007, has been continued to June 19, 2007.

## **2. OCAP cases:**

There are currently pending in federal district court in Fresno, two cases challenging the validity, under the federal Endangered Species Act, of biological opinions issued by federal fisheries agencies covering the ongoing, joint operating criteria and plan (OCAP) for the Bureau of Reclamation's Central Valley Project and DWR's State Water Project.

Each of the biological opinions—the first, covering Delta smelt, issued in February 2005 by the U.S. Fish & Wildlife Service; the second, covering salmon and steelhead, issued in October 2004 by the National Marine Fisheries Service—had concluded that, with the incorporation of certain mitigation measures, operating the CVP and SWP as described in the OCAP would not jeopardize the existence of the relevant listed fish species.

The coalition of environmental organizations that brought suit alleged, among other things, that the opinions failed to consider the best available science with regard to declining fish populations, and that they had relied on uncertain mitigation measures as a basis for reaching their “no jeopardy” conclusions.

Subsequent to the initiation of these lawsuits, Reclamation reinitiated consultation with the federal fisheries agencies on both of the biological opinions, citing new scientific information, and stated that new biological opinions would be completed in 2008. Reclamation (joined by DWR as an intervening party) petitioned the court to dismiss, or in the alternative, stay the lawsuits in light of the reinitiated consultation, and in any event, to join the two cases. These procedural motions were unsuccessful.

**(i) Status of Smelt case:** On May 25, 2007, Judge Wanger invalidated the biological opinion for delta smelt, finding it unlawful and inadequate on the following grounds: (1) uncertain mitigation measures; (2) failure to use best available science, including issue of climate change; (3) flawed approach to setting take limits; and (4) inadequate consideration of impacts to critical habitat. However, a separate remedies hearing is scheduled for August 21, 2007, and the effect of the order as to consequences of ESA noncompliance is stayed pending further order of the court or entry of final judgment. The stay is “without prejudice” to the right of any party to seek legal or equitable relief to address any injury in the interim.

**(ii) Status of Salmon case:** A hearing on the merits is scheduled for August 27, 2007. In addition to alleging similar types of deficiencies with the Salmon biological opinion, plaintiffs also contend that the Bureau of Reclamation should have prepared a comprehensive Environmental Impact Statement under NEPA discussing the cumulative environmental impacts of the entire OCAP.

## **3. Potential New ESA Smelt Lawsuit**

On May 24, 2007, the Bay Institute, Center for Biological Diversity, and NRDC sent a 60-day notice letter of intent to sue the U.S. Fish and Wildlife Service for allegedly

violating the federal ESA by failing to respond to a March 2006 petition to “up-list” smelt from a threatened to an endangered species. The groups also sent a request letter to the California Fish and Game Commission requesting that the commission reconsider an emergency state listing of endangered for the smelt under CESA.

## **B. CALFED Record of Decision—CEQA/NEPA**

**1. State Coordinated CEQA Cases:** These coordinated CEQA challenges to the CALFED Record of Decision (ROD), originally brought in 2000 by the Farm Bureau, the Regional Council of Rural Counties, and the South and Central Delta Water Agencies, are currently pending before the California Supreme Court. Review was granted on January 25, 2006 (from an appellate court decision in October 2005), and the parties are waiting for an oral argument date.

Issues on appeal are whether the CEQA documents underlying the ROD:

- (i) Should have analyzed an alternative that would reduce exports of water from the Delta.
- (ii) Adequately discussed sources of water for environmental purposes and relevant impacts; and
- (iii) Contained sufficient detail about the Environmental Water Account.

**2. Federal NEPA Case:** This NEPA challenge to the ROD was filed by the Farm Bureau and several individual farmers in 2000. The case—which involves many of the same issues as the state coordinated CEQA cases-- is currently pending in federal district court in Fresno. In June 2006, a joint status report was filed by the parties requesting that the proceedings be deferred pending the outcome of the California Supreme Court litigation.

## **C. Delta Land Use/Development---CEQA/Delta Protection Act**

1. **River Islands Project:** On August 18, 2006, several environmental groups brought suit in Sacramento Superior Court, challenging the state Reclamation Board’s approval of fill and encroachment permits for the River Islands Project, an 11,000-unit housing development near Lathrop. The suit alleges that the Reclamation Board, as a responsible agency under CEQA, should have prepared a supplemental EIR for the project, and that it violated its own regulations. One issue is whether the Reclamation Board should have analyzed greater flood risks associated with global warming, climate change and a potential rise in sea levels.

The case was set for hearing on April 27, 2007. In a tentative ruling, the judge ruled in favor of the Reclamation Board on the CEQA claims. However, the court did find that the Board violated its own regulations when it failed to require an easement over the entire physical levee structure from one toe to the other, and ten feet beyond the new landward toe, and when it permitted structures to be built atop a portion of the levee. A final ruling has not yet been issued.

2. **Old Sugar Mill Project**: On February 22, 2007, the Delta Protection Commission (DPC) made a final determination that the Clarksburg Old Sugar Mill Specific Plan and related documents, as approved by the Yolo County Board of Supervisors on October 24, 2006, are not consistent with three policies in the DPC's Resource Management Plan for the "Primary Zone" of the Delta and related provisions of the Delta Protection Act. The decision was based on interrelated concerns about levees, new residential development, and potential conflicts with existing agricultural use.

As required by the Delta Protection Act, the DPC remanded the matter back to Yolo County.

3. **East Cypress Corridor Project**: In April 2006, an environmental group filed a lawsuit in Contra Costa County Superior Court against the City of Oakley over plans to build more than 4,000 new homes on more than 2,000 acres of previously unincorporated land. In January 2007, the judge issued a tentative ruling in favor of the city on levee and flood issues, but against it on air quality issues. The judge has recently requested supplemental briefing by May 3, 2007; a final decision was expected 90 days thereafter, but has not yet been issued.