UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, et al., Plaintiffs, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior, et al., Defendants. CALIFORNIA DEPARTMENT OF WATER RESOURCES, Defendant-Intervenor, STATE WATER CONTRACTORS, Defendant-Intervenor, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al., Defendant-Intervenors.	1:05-cv-1207 OWW GSA INTERIM REMEDIAL ORDER FOLLOWING SUMMARY JUDGMENT AND EVIDENTIARY HEARING

Following the Court's May 25, 2007, Order Granting In Part and Denying In Part Plaintiffs' Motion for Summary Judgment, finding the Long-Term Central Valley Project Operations Criteria And Plan ("OCAP") Biological Opinion ("BiOp") unlawful and

inadequate, as well as the accompanying Delta Smelt Risk Assessment Matrix ("DSRAM") adopted to implement the 2005 OCAP BiOp, in violation of the Administrative Procedure Act, 5 U.S.C. § 705 et seq. (Doc. 323), a seven-day evidentiary hearing was held on August 21-24 and 29-31, 2007, to determine what interim remedies to impose. Based on the contemporaneous Findings of Fact and Conclusions of Law, after review of all the evidence, seven days of testimony, the parties' memoranda of law, and fully considering all the parties' oral arguments and proposed interim remedies, the Court enters the following:

I. INTERIM REMEDIAL ORDER

A. REMAND

1. Completion of New Biological Opinion

The Court orders the 2005 OCAP BiOp on the effects of the coordinated Central Valley Project ("CVP") and State Water Project ("SWP") operations on the Delta smelt, REMANDED to the United States Fish & Wildlife Service ("FWS") for further consideration consistent with this Court's orders and the requirements of law. This remand shall conclude not later than September 15, 2008, at which time FWS shall issue a new Biological Opinion ("BiOp") to the U.S. Department of the Interior, U.S. Bureau of Reclamation ("Reclamation"), and the California Department of Water Resources ("DWR"), as an applicant and joint operator, on the effects of the operation of the CVP and SWP upon the Delta smelt.

2. Vacatur

To avoid the potentially draconian consequences of operating the CVP and SWP without incidental take authority, this remand is made WITHOUT VACATUR. The operation of the CVP and SWP by Interior, Reclamation, and DWR, respectively, during this interim period, shall not violate the additional conditions set forth below.

B. INTERIM INJUNCTIVE RELIEF

Based on the previous findings of the imminent peril to the survival of the Delta smelt and adverse effects on its critical habitat, a preliminary injunction shall issue restraining Interior, Reclamation, and DWR, their officers, employees, agents, and all those acting in concert with them in those parties' operation of the CVP and SWP, respectively from taking any actions that are contrary to, inconsistent with, or that violate the following interim remedial measures to prevent the extinction of the Delta smelt, a threatened species, or that would destroy or adversely modify its critical habitat. This preliminary injunction shall remain in effect until the remand of and reconsultation on the BiOp is completed and a new BiOp is issued by FWS, on or before September 15, 2008, or further order of the Court, whichever shall first occur.

1. Surveys And Monitoring

a. Delta Smelt Surveys

Reclamation, DWR, and any other party shall take no action to prevent the full implementation of surveys for the Delta smelt which have been conducted by the California Department of Fish &

Game ("CDFG") including, but not limited to, the Fall Midwater Trawl ("FMWT"), Summer Townet, Spring Kodiak Trawl, and 20mm surveys.

2. Frequency of Sampling for Delta Smelt

Reclamation shall increase the frequency of sampling for Delta smelt that may be entrained at the Jones Pumping Plant to a minimum of twenty-five percent (25%) of the time, at regular intervals, whenever the Jones Pumping Plant is diverting water into the Delta-Mendota Canal.

a. Sampling Triggers

Sampling at this frequency shall commence upon either: (1) an increase in the average daily flow of the Sacramento River at Freeport to 25,000 cubic feet per second ("cfs"); or (2) when there is an increase in the average daily flow of the San Joaquin River at Vernalis by ten percent (10%) over three consecutive days after December 25; (3) survey data from the FMWT or Kodiak Survey indicate Delta smelt have moved to and are moving upstream of the confluence of the Sacramento and San Joaquin Rivers and into the Delta or January 15.

b. Larval Delta Smelt Monitoring

(1) Monitoring Triggers

Reclamation and DWR shall each monitor for the presence of larval or juvenile Delta smelt, that are less than twenty (20) millimeters (mm) in length, by Reclamation at the Jones Pumping Plant and by DWR at the Banks Pumping Plant. Such monitoring

shall occur when the pumping plants are diverting water into the Delta-Mendota Canal or the California Aqueduct, respectively. Such monitoring shall provide for sampling at least once every six (6) hours during periods in which the pumping plants are operating.

(2) Timing of Monitoring

Monitoring for the presence of larval or sub-twenty mm juvenile Delta smelt shall begin at the onset of spawning by Delta smelt as shown by: (1) the presence of spent female Delta smelt in the Spring Kodiak Trawl survey or at either export plant's salvage facility; or (2) when water temperatures in the Delta reach 12°C as determined by the average of the daily water temperatures at the Mossdale, Antioch, and Rio Vista Monitoring Stations; or (3) when larval Delta smelt are detected in the 20mm survey, whichever occurs first.

(3) Termination of Monitoring

Such monitoring shall end June 15 or a minimum of 5 consecutive days without detection of larval or juvenile Delta smelt at the CVP or SWP facilities, whichever comes last.

3. Flow Restrictions

a. Winter Pulse Flows

(1) If the triggering conditions set forth below in subparagraph I.B.3.a.(2) are met, Reclamation and DWR shall modify the operations of the CVP and SWP to achieve an average net upstream flow in Old and Middle Rivers ("OMR") not to exceed

2,000 cfs over the implementation period described in subparagraph (3).

(2) The action described in subparagraph (1) shall be initiated within three (3) calendar days after December 25 when the average daily water turbidity exceeds twelve (12) nephelometric turbidity units ("NTU") at Prisoner's Point, Holland Tract, or Victoria Canal, unless, at that time, the three-day average of flow in the Sacramento River at Freeport exceeds 80,000 cfs.

(3) This action shall end after a period of ten (10) days or when one of the following terminating conditions is met, whichever occurs first: (1) the three-day average of flow in the Sacramento River at Freeport exceeds 80,000 cfs; (2) the onset of spawning by Delta smelt occurs as shown by the presence of spent female Delta smelt in the Spring Kodiak Trawl survey or at either export plant's salvage facilities; (3) when larval Delta smelt are detected in the 20mm survey or at either export Plant's salvage facility; or when water temperature in the Delta reach 12°C determined by the average of the daily water temperatures at the Mossdale, Antioch, and Rio-Vista Monitoring stations.

b. <u>Pre-Spawning Adults</u>

(1) Reclamation and DWR shall operate the CVP and SWP to achieve a daily average net upstream (reverse) flow in the OMR not to exceed 5,000 cfs on a seven-day running average. In the event that the three-day average of flows in the Sacramento River is in excess of 80,000 cfs, when this action would otherwise commence, the action is not required to be undertaken until such

time as the three-day average of flow in the Sacramento River at Freeport falls below 80,000 cfs.

(2) This action shall commence immediately following the conclusion of the action described in subparagraph I.B.3.a., above, or on January 15, whichever is earlier.

(3) This action concludes at the onset of the spawning by Delta smelt as shown by: (1) the presence of spent female Delta smelt in the Spring Kodiak Trawl survey or at either export plant's salvage facility; (2) when larval Delta smelt are detected in the 20mm survey or at either export pumping plant's salvage facility; or (3) when water temperature in the Delta reaches 12°C determined by the average of the daily water temperatures at the Mossdale, Antioch and Rio Vista monitoring stations.

4. Larval And Juvenile Delta Smelt

a. Reclamation and DWR shall operate the CVP and SWP to achieve a daily average net upstream flow in OMR of between 750 and 5,000 cfs on a seven-day running average. The specific biological flow objective within this range shall be set by FWS, in consultation with Reclamation and DWR, to be determined on a weekly basis and based upon the best available scientific and commercial information concerning the distribution and status of the Delta smelt.

b. This action shall commence immediately upon the onset of spawning of Delta smelt as shown by: (1) the presence of spent female Delta smelt in the Spring Kodiak Trawl survey or at either export plant's salvage facility; (2) the larval Delta smelt are

detected in the 20mm survey or at either export plant's salvage facility; (3) when water temperature in the Delta reaches 12°C determined by the average of the daily water temperatures at the Mossdale, Antioch and Rio Vista monitoring stations.

c. This action shall continue at each facility until, when in the reasonable discretion of the Bureau, FWS, and DWR, the entrainment risk at each facility is abated, or June 20, whichever occurs first.

5. Vernalis Adaptive Management Plan

a. Reclamation and DWR shall continue to implement the Vernalis Adaptive Management Plan ("VAMP"), San Joaquin River flow enhancement and CVP and SWP export curtailment as specified under the VAMP experimental design.

b. This action shall commence on a date decided upon by the VAMP Steering Committee, but not later than May 1 and shall continue for thirty-one (31) calendar days after its initiation.

c. The requirement set forth in subparagraph I.B.4.a. shall not apply during the period in which the VAMP action is being implemented.

6. Barriers

a. Head of Old River Barrier

The installation of the spring Head of Old River Barrier by either DWR or Reclamation is prohibited until the end of VAMP action implementation.

b. Agricultural Barriers

Reclamation and DWR shall ensure that the tidal effects of the three south Delta agricultural barriers are minimized or avoided by tying open all flap gates on the barriers, from the time of their installation until the end of VAMP action implementation.

C. ADMINISTRATIVE DISCRETION

Nothing in this Order is otherwise intended to usurp or interfere with the exercise of Interior's, Reclamation's, FWS's, and DWR's discretion and expertise in their operation and management of the Projects, protection of the Delta smelt, and the implementation of the terms and conditions of this Interim Remedial Order.

It is the intent of this Interim Remedial Order that its terms and conditions be implemented to protect the interests of all parties and their constituents under the law and to achieve the minimum disruption and damage to their respective interests.

D. FEDERAL DEFENDANTS' ADDITIONAL MEASURES PENDING THE NEW BIOLOGICAL OPINION

Federal Defendants in their opening brief on injunctive relief identified measures that they committed to implement as necessary to prevent an irreversible or irretrievable commitment of resources under ESA Section 7(d) pending completion of a new Biological Opinion. [Fed. Def. Brief, Doc. 396 at pp. 19-20]. Federal Defendants committed, as of July 9, 2007, that:

a. The Bureau will not execute any long-term water service contracts with CVP contractors until the new Biological

Opinion is completed;

b. The Bureau will not implement new construction activities and long-term projects in the Delta until the new Biological Opinion is completed, including the South Delta Improvement Project, the Delta Mendota Canal/California Aqueduct Intertie Program, the Lower American River Flow Standards, and the Long Term Environmental Water Accounts;

c. The Bureau will "not increase exports from the south Delta and will operate Jones Pumping Plant within recent historical limits;" and

d. The Bureau has committed resources and staff to the continuing study of pelagic organism decline in the Delta.

These measures shall be implemented during the duration of this Order as Federal Defendants admit the measures are necessary to preserve the Delta smelt and its critical habitat.

E. PUBLIC HEALTH AND SAFETY EXCEPTION

This Interim Remedial Order shall not prevent Interior, Reclamation, or DWR from taking any action in operating the Projects that is reasonably necessary to protect human health or safety of the public, including, but not limited to, any act or omission reasonably necessary to protect the structural integrity of any CVP and SWP facility.

F. DURATION OF THIS ORDER

This Order shall take effect on the date it is filed and shall continue in effect until completion of the reconsultation on the OCAP and issuance of a new OCAP Biological Opinion, entry

of final judgment in this case, or further order of this Court; whichever first occurs.

G. STATUS REPORT

FWS shall provide the court and parties a status report on the progress of the Biological Opinion. FWS's status report shall be filed April 30, 2008.

IT IS SO ORDERED.

Dated: December 14, 2007 **/s/ Oliver W. Wanger**
UNITED STATES DISTRICT JUDGE