SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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| WATERSHED ENFORCERS, a project of California Sportsfishing Protection Alliance, a non-profit corporation,<br><br>Petitioner,<br><br>vs.<br><br>CALIFORNIA DEPARTMENT OF WATER RESOURCES, et al.,<br><br>Respondents. | No. RG06292124<br><br>PROPOSED STATEMENT OF DECISION |

The matter having been submitted on December 22, 2006, following the receipt of all post-hearing briefing, and a Statement of Decision having been requested, the Court issues this Proposed Statement of Decision.

This Proposed Statement of Decision shall be the Statement of Decision unless, within fifteen days after service is complete, a party files and serves objections to the Proposed Statement of Decision.

## I. INTRODUCTION

This matter is a Petition for Writ of Mandate pursuant to Code of Civil Procedure ("CCP") § 1085. Petitioner is a non-profit organization with members who assert an interest in the enforcement of the California Endangered Species Act (Fish & Game Code § 2050 et seq.[1]) ("CESA"). Respondent, the Department of Water Resources ("DWR"), is an agency of the State of California. The individual Respondents are officials of the DWR who were sued in that capacity. The parties are in general agreement about almost all of the underlying facts in this matter but strongly disagree about the legal consequences attendant to those facts. Following are the relevant undisputed underlying facts.

DWR operates the State Water Project's Harvey O. Banks Pumping Plant and the facilities associated with the pumping plant, the Clifton Court Forebay and the John E. Skinner Delta Fish Protective Facility. The entire operation of the pumping plant and related facilities is an integrated operation referred to herein as the "Harvey O. Banks Pumping Plant Operation." The Harvey O. Banks Pumping Plant Operation is a lawful activity and is vitally important to significant numbers of people and businesses. It is not hyperbole to describe as "massive" the amounts of water diverted to inland points south

[1] All further references will be to the Fish & Game Code unless otherwise stated.

of the pumping plant from their natural flow to the ocean. The Harvey O. Banks Pumping Plant Operation is the core of the State Water Project ("SWP") and SWP cannot continue without it.

Incident to the Harvey O. Banks Pumping Plant Operation is, among other things, the unfortunate entrainment and loss of life of significant numbers of fish, including the three species that are the subject of this Petition: (1) Winter-run Chinook Salmon; (2) Spring-run Chinook Salmon; and (3) Delta Smelt.

"Chinook salmon – Winter-run" has been listed by the California Department of Fish & Game ("DFG") as an endangered species since 1989. "Chinook salmon – Spring-run", a different species of Chinook Salmon, has been listed by the DFG as a threatened species since 1999. "Delta smelt" has been listed by the DFG as a threatened species since 1993.

## II. STATUTORY SCHEME

Before the Court are several provisions of the Fish & Game Code which regulate the taking of certain species of fish. Section 2080, in part, prohibits the taking of endangered/threatened species. Section 2080.1 establishes an exception to § 2080 authorizing the taking of endangered/threatened species if a person that has obtained an incidental take permit or statement pursuant to federal law, and has also obtained a determination from DFG that the statement is consistent with CESA. Section 2081 establishes another exception to § 2080 authorizing certain permitted takings, within

limitations, including that they be fully mitigated. Finally, central to the matter before the Court, are the provisions of § 2081.1, which permits an exception to the requirements of § 2080 proscribing the killing of fish classified as endangered/threatened species. Section 2081.1 states as follows with emphasis supplied to highlight the relevant portion:

> "Nothing in this chapter or in any other provision of law prohibits the taking or the incidental taking of any endangered, threatened, or candidate species if the taking was authorized by the department through a permit or memorandum of understanding, or in a natural communities conservation plan, habitat conservation plan, habitat management plan, or other plan or agreement approved by or entered into by the department, or in an amendment to such a permit, memorandum of understanding, plan, or agreement and all of the following conditions are met:
>
> (a) The application process commenced on or before April 10, 1997.
>
> (b) The department approved the permit, memorandum of understanding, plan, agreement, or amendment thereto within either of the following timeframes:
>
> (A) On or before April 10, 1997.
>
> (B) Between April 10, 1997, and January 1, 1998, and the department also certified that the permit, memorandum of understanding, plan, agreement, or amendment thereto meets the substantive criteria of subdivision (b) of Section 2081.
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> The permits, memoranda of understanding, plan, agreements, and amendments thereto described in this section are deemed to be in full force and effect, as of the date approved or entered into by the parties insofar as they authorize the take of species. This section does not apply to the "Emergency Management Measures Permit" issued by the department on March 15, 1995."

In sum, CESA includes three procedures for obtaining permission to take a listed species: (1) obtain a permit from DFG authorizing the take (§ 2081); (2) obtain a consistency determination (§ 2080.1); or (3) show that the grandfathering provision authorizes the take (§ 2081.1).

## III. SUMMARY OF ARGUMENTS

By way of this proceeding, Petitioner seeks an order commanding Respondents to cease the Harvey O. Banks Pumping Plant Operation on the ground that Respondents have not satisfied the mandatory requirement found in the CESA requiring authorization from the DFG for the incidental take of the endangered/threatened species of Winter-run Chinook Salmon, Spring-run Chinook Salmon and Delta Smelt. Petitioner argues that DWR is, by operation of the Harvey O. Banks Delta Pumping Plant Operation, violating § 2080 and that the DWR has not obtained any permit or authorization allowing it the "incidental take" of each of three species listed above. Petitioner also argues that the consistency determinations relating to Delta Smelt are limited in scope and do not extend to the entire operation of the Harvey O. Banks Delta Pumping Plant Operation.

DWR and its officials assert both procedural and substantive defenses. They assert procedural defenses of (1) Petitioner's lack of standing; (2) inappropriateness of the CCP § 1085 writ proceeding (focusing on the nature of the duty sought to be enforced); and (3) laches. DWR also asserts the substantive defense that it is in full compliance with all the incidental take requirements of the CESA.

Intervenors San Luis & Delta-Mendota Water Authority and Westlands Water District join in the procedural defenses advanced by DWR, emphasizing the prejudice they would face if the Court grants the relief Petitioner has requested.

Intervenors Kern County Water Agency and State Water Contractors join in DWR's procedural argument regarding the propriety of proceeding by way of a CCP § 1085 writ (and enlarge on it with argument that public agencies are not bound by the CESA) and join in DWR's substantive positions regarding compliance with the CESA.

## IV. PROCEDURAL ANALYSIS

The Court addresses first the procedural arguments advanced by Respondents and then addresses the substantive issue of whether DWR has complied with CESA.

### A. Standing

Petitioner's members have an interest in the enforcement of the CESA as it relates to Spring-run Chinook Salmon, Winter-run Chinook Salmon and Delta Smelt in the Sacramento/San Joaquin Delta and in the San Francisco Bay. As such, Petitioner has a clear, present and beneficial right to require performance of a mandatory duty prescribed by the CESA. Petitioner satisfies the standing test enumerated in Associated Builders and Contractors, Inc. v. San Francisco Airports Commission (1999) 21 Cal.4th 352, 361-362, and is thus a "party beneficially interested" as is required by CCP § 1086.

Moreover, it is clear that since the object of the instant Petition is to procure enforcement of a public duty (the duty to refrain from "taking" endangered species absent compliance with CESA), the Petitioner satisfies the standing requirement with no more

than its assertion that it is interested in having that public duty enforced. (Green v. Obledo (1981) 29 Cal.3rd 126, 144; Burrtec Waste Industries Inc. v. City of Colton (2002) 97 Cal. App.4th 1133, 1136-1137.)

In addition, while it appears clear that the DFG would have standing to pursue a similar action, there does not appear to be any legislative indication that DFG's responsibility for the enforcement of CESA is exclusive. "Generally, where the legislature wants only one agency to have jurisdiction over a matter, it says so unequivocally." (People ex rel Dept. of Conservation v. El Dorado County (2005) 36 Cal.4th 971, 992.)

Thus, the Court finds that Petitioner has standing to pursue the writ it filed.

B. Propriety of Proceeding by Writ of Mandate

A Writ of Mandate may be issued to "compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station...." (CCP § 1085), and the "writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law...." (CCP § 1086). Here, the responding public agency and its officials have a ministerial duty to comply with the prescriptions, both prohibitory and mandatory, found in the CESA and therefore proceeding by Petition for Writ of Mandamus is proper.

C. Applicability of the California Endangered Species Act to a State Agency

Respondents argue that § 2080 prohibits a "person" from taking an endangered species and because DWR is not a "person", it is not bound by CESA. However, the Court determines otherwise.

Section 2081(a) provides an exception to the requirements of § 2080 and includes in the exception the specific authorization to the DFG to issue permits to public agencies. This evidences an apparent intention on the part of the Legislature that public agencies fall within the provisions of the CESA. It would be nonsense to create an exception to § 2080 by passage of § 2081(a) if § 2080 did not apply to public agencies. Moreover, the following are cases in which the Court of Appeal has applied CESA to a state agency:

1) Planning and Conservation League v. Department of Fish & Game, as cited in San Bernadino Valley Audubon Society v. Metropolitan Water District (1999) 71 Cal.App.4th 382, 403;
2) San Bernadino Valley Audubon Society, supra;
3) San Bernadino Valley Audubon Society v. City of Moreno Valley (1996) 44 Cal.App.4th 593; and
4) Department of Fish & Game v. Anderson-Cottonwood Irrigation District (1992) 8 Cal.App.4th 1554.

In contrast, the parties have not cited the Court to a case holding that the provisions of the CESA may not be applied to a public entity on account of its status as a public agency.

D. Laches

The Court finds that the Petition is not barred by the doctrine of laches. After weighing the competing equities which bear on the issue of delay, the Court has determined that Respondents and Interveners have not demonstrated sufficient prejudice to require that Petitioner be barred from seeking the relief sought. (Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Association (1979) 89 Cal.App.3d 889.)

V. SUBSTANTIVE ANALYSIS

There is no dispute that DWR does, by the Harvey O. Banks Pumping Plant Operation, "take" a substantial number of the three protected species of fish and that DFG has issued no permit pursuant to § 2081, since the CESA was promulgated in 1984, for the general operation of the facilities and for the incidental take of endangered or threatened species caused by the operation.

DWR submits, however, that its take is an incidental taking authorized under the provisions of § 2081.1, a statute by which the Legislature grandfathered in agreements by DFG authorizing the incidental take of endangered species. The factual underpinning of DWR's position is that a series of five documents predating April 1997 provide the required authorization of the DFG for the take of the three species relevant herein.

The five documents are:

1) The 1986 Four Pumps Agreement (found as Exhibit "A" to the Declaration of Stephani Spaar) (the "1986 Four Pumps Agreement");

2) The 1990 Four Pumps Framework Agreement (found as Exhibit "A" to the Supplemental Declaration of Stephani Spaar) (the "1990 Framework Agreement");

3) The 1994 CALFED Framework Agreement (found as Exhibit "A" to the Declaration of Gerald Johns) (the "1994 CALFED Framework Agreement");

4) The 1994 CALFED Accord (found as Exhibit "B" to the Declaration of Gerald Johns) (the "1994 Accord Agreement"); and

5) The 1995 Article VII Agreement (found as Exhibit "D" to the Declaration of Gerald Johns) (the "1995 Article VII Agreement").

The analysis of the issue must begin with a review of the five documents which form the factual basis of DWR's position, as well as other pertinent documents relied on by the parties, with an eye toward determining if they authorize an incidental take and, if they do, of what species and under what limiting conditions, if any.

A. The 1986 Four Pumps Agreement

DFG and DWR entered into this agreement in 1986 entitled: "Agreement Between the Department of Water Resources and the Department of Fish and Game to Offset Direct Fish Losses in Relation to the Harvey O. Banks Delta Pumping Plant." This agreement, which is at the core of DWR's assertion that the incidental take by the pumping plant operation has been authorized by DFG, includes, *inter alia*, the following.

Stated prominently in the agreement at its opening is the following language: "THIS AGREEMENT is entered into . . . to offset direct losses of striped bass, chinook salmon and steelhead caused by the diversion of water by the Harvey O. Banks Delta Pumping Plant."

The agreement recites a "recognition" that some fall runs of Chinook Salmon are "in good condition" and other fall runs of Chinook Salmon "have been depleted to

varying degrees" (The 1986 Four Pumps Agreement, at p. 1). It further recites that "[w]inter and spring runs of Chinook salmon are severely depleted" (Id. at p. 1).

The purpose of the agreement is stated to be "to offset direct losses of some species of fish caused by the State Water Project Pumping Plant diversions." (Id. at p. 2, ¶ 1). The agreement makes clear that the only species covered by the agreement are steelhead, striped bass and chinook salmon (Id. at pp. 4 and 10), and makes no distinction between the separate species of Chinook Salmon, other than the recognition of their varying degree of depletion. Measures (if any) to offset losses caused by the Harvey O. Banks Pumping Plant Operation for "fish species not covered" in the agreement (Id. at p. 11) were to be included at a later date upon the occurrence of the condition that "information is obtained to develop effective measures" to offset those losses.

The agreement also recites that "[o]ther adverse fishery impacts related to State Water Operations need to be addressed," and "additional measures for impacts not covered in this agreement will have to be included in proposals by Water Resources to expand its diversions beyond the limitations [of the volume of the pumping] contained in this agreement and will be part of [future] agreements between Fish and Game and Water Resources . . ." (Id. at p. 3).

The agreement does not state that it was formed with the purpose of creating compliance with the CESA (§§ 2080 & 2081 (1984 versions)), does not state that any of the fish described as "depleted" are also classified as "endangered" or "threatened" (the

classifications used in the CESA) and does not distinguish between the various different species of Chinook Salmon other than as already described.

It does not contain any language that is susceptible to being interpreted as a "permit" for an incidental take; "permit" being the term used in the CESA (§ 2081) in its 1984 version.

In substance, the parties to the agreement agree that DWR will offset direct losses of striped bass, chinook salmon and steelhead caused by the pumping operation by a undefined plan to evaluate losses, provide funding and set up a procedure to evaluate and implement proposals to mitigate the take caused by the pumping operations.

B. The 1990 Framework Agreement

DFG, DWR and the U.S. Bureau of Reclamation entered into this agreement in 1990 entitled "Framework of Process to Address Fish and Wildlife Impacts of the State Water Project and Central Valley Project in the Sacramento-San Joaquin Estuary."

This purpose of this agreement is exactly as it states in its title: "Framework of Process to Address Fish and Wildlife Impacts...." It is an agreement that establishes a procedural mechanism within which DFG, DRW and the U.S. Bureau of Reclamation agree to discuss issues relating to the "identifiable problems, affecting fish and wildlife resources in the estuary...." Its substance is entirely procedural and it contains no discussion of an incidental take of any species or an authorization of any incidental take by DWR.

It is significant to note that the agreement does not purport to create compliance with the CESA and does not mention the CESA. Interestingly, it does reference CEQA (California Public Resources Code § 21000 et seq.) and states that the agreement's purpose is to provide a framework to guide negotiations toward agreements to "avoid, eliminate or offset SWP and/or CVP adverse impacts; and to comply with the environmental requirements . . .including those related to CEQA and NEPA."

The General Provisions section provides, *inter alia*, that "nothing in this agreement shall be construed as obligating any agency in the expenditure of funds...."

C. The 1994 CALFED Framework Agreement

The Governor's Water Policy Council of the State of California (the "Water Policy Council") and the Federal Ecosystem Directorate ("FED") entered into this agreement in July of 1994 entitled "Framework Agreement Between The Governor's Water Policy Council and the Federal Ecosystem Directorate."

While the parties to this agreement are the Water Policy Council and the FED, and it appears primarily to be a document concerned with increasing cooperation and communication between the State of California and the U.S. Government, the Directors of the DFG and the DWR are amongst those who signed the agreement on behalf of the State of California.

This document, like the earlier 1990 Framework Agreement, is one primarily concerned with procedure rather than the substance of compliance with any statutory

requirements – either state or federal. The opening paragraph of the agreement states its purpose as follows:

"to establish a comprehensive program for coordination and communication between the Council and the FED with respect to environmental protection and water supply dependability in the San Francisco Bay, Sacramento-San Joaquin Delta Estuary and its watershed....In particular, this agreement is intended to provide for increased coordination and communication with respect to:

- Substantive and procedural aspects of water quality standard setting.
- Improved coordination of water supply operations with endangered species protection and water quality standard compliance, and
- Development of a long term solution to fish and wildlife, water supply reliability, flood control an water quality problems in the Bay-Delta Estuary."

The agreement recites a reference to CEQA and recommends its use along with NEPA as the planning framework for the decision-making process relating to the development of a comprehensive program that includes, among other things, protecting the Bay-Delta Estuary and its fish and wildlife resources (the 1994 CALFED Framework Agreement, at p. 2).

The agreement also recites the FED's proposed actions to protect "winter run salmon, delta smelt and Sacramento Splittale" pursuant to the provisions of the Federal Endangered Species Act ("FESA") (Id., at p. 2).

The agreement does not recite that its purpose is to establish compliance by DWR with the CESA and does not even mention CESA or its provisions in the recitals portion of the agreement where one might expect to find such language.

The agreement does recite "Federal responsibilities" of listing species as endangered or threatened and of "conducting consultations under the Federal Endangered Species Act", but there is no recital of any comparable State responsibilities under the CESA (Id. at p. 2).

Notwithstanding the absence of any statement of purpose or recital related to the CESA, the agreement contains a provision in which the parties (the Water Policy Council and the FED) agree that they "endorse and concur in the points of agreement" in the documents attached to the agreement – Exhibit "B" being the only one relevant to this case.

Exhibit "B" is entitled "Points of Agreement on Coordinating CVP/SWP Operations With Endangered Species, Water Quality and CVPIA [Central Valley Project Improvement Act] Requirements."

Its paragraph 2 identifies a 1993 Biological Opinion issued by the National Marine Fisheries Service ("NMFS") relating to Winter-run Chinook Salmon which includes, *inter alia*, an incidental take statement and take limits. Included in paragraph 2 is the assertion that the 1993 NMFS Biological Opinion regarding Winter-run Chinook Salmon had been adopted by the DFG. (The adoption and approval referenced in this document originated in the February 22, 1993 DFG Memorandum to DWR, which will be discussed later).

Paragraph 3 makes reference to the 1994 Delta Smelt Biological Opinion issued by the U.S. Fish & Wildlife Service ("USFWS") (which included an incidental take

statement and take limits) and indicates that the DFG was at that point in time, considering the Biological Opinion for adoption.

The thrust of Exhibit "B" relates to mutual promises between federal and state agencies to communicate and coordinate the operations of the Central Valley Project and the State Water Project with the requirements of the Federal and State Endangered Species acts.

Neither Exhibit "B" nor any other part of the 1994 CALFED Framework Agreement states that it is intended to be an authorization by DFG to DWR regarding any incidental take. Paragraph 2 of Exhibit "B" might be evidence of the existence of some other referenced document which might satisfy either the permit requirements described in § 2081 in effect in 1994, or be evidence of an agreement approved by the DFG prior to the date requirements of § 2081.1. However, Exhibit "B" did not grant authorization for an incidental take by DWR, and it requires an examination of the referenced document adopting the 1993 NMFS Biological Opinion to determine what authorization, if any, was given by DFG in that document.

D. The 1994 Accord Agreement

An agreement, dated December 15, 1994, entitled "Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government," followed shortly after the 1994 CALFED Framework Agreement.

The preamble describes the parties to the agreement as "representatives of the State and Federal governments and urban, agricultural and environmental interests." The

agreement is described in its preamble as an agreement for "the implementation of a Bay-Delta protection plan. . . consistent with the following principles." The principles to which the parties agreed are described as "changes to the California Urban Water Agency/Agricultural Water Users (CUWA/AG) proposal as the base case for Bay-Delta protections." Further, the preamble states that those changes are intended to be in force for three years.

While it is not possible to determine what changes in the CUWA/AG proposal are accomplished by the Accord agreement (as the CUWA/AG proposal is not provided), the 1994 Accord Agreement limits, in principle, the maximum amounts of water that may be diverted from the Bay-Delta. It further requires that the CALFED procedure be utilized in making operational decisions relating to the flow amounts.

The 1994 Accord Agreement also references an agreement, dated December 12, 1994, regarding San Joaquin River protection measures. The substance of that December 12, 1994 agreement is attached as Attachment "B" to the 1994 Accord Agreement, and is entitled "Narrative Criteria for Chinook Salmon on the Sacramento and San Joaquin Rivers."

The December 12, 1994 agreement states that water quality conditions are to be maintained "sufficient to achieve a doubling of production of chinook salmon consistent with the mandates of State and Federal law," and lists implementation measures in both the San Joaquin River system and the Sacramento River system. The implementation measures relate exclusively to the regulation of water flows, and set a deadline of three

years to complete the implementation of the plan. This includes a reference that, during the 3-year period, the flows were to be provided "in accordance with the biological opinion for Delta smelt."

It is significant that Attachment "B" to the 1994 Accord Agreement does not mention incidental take of any species, does not distinguish between the various species of Chinook Salmon, does not mention the DFG and does not state or imply that DFG is giving or has given any authorization for the incidental take occurring at the Harvey O. Banks Pumping Plant Operation.

The 1994 Accord Agreement does require that "compliance with the take provisions of the biological opinions of the Federal Endangered Species Act (FESA) is intended to result in no additional loss of water supply...." (The 1994 Accord Agreement, at p. 3.)

CESA, on the other hand, is mentioned in passing on page 4 where the "Ops group" established under the 1994 CALFED Framework Agreement is allowed "operational flexibility" to regulate flow so long as its acts are "consistent with the Federal and State Endangered Species Acts."

The 1994 Accord Agreement addresses "non flow factors" by reference to "the principles set forth in Attachment C." Attachment "C" is entitled "Principles for Implementation of Category III." It recites a number of "principles" without binding the parties to anything.

The 1994 Accord Agreement contains "Institutional Agreements", including an intention that "[t]his plan in conjunction with Federal and State efforts, is intended to provide habitat protection sufficient for currently listed threatened and endangered species . . .", (Id. at p. 5.) then making clear that if there are additional listings of endangered species, their protection "shall result in no additional water costs." (Id.)

Another reference in the Institutional Agreements section of the 1994 Accord Agreement makes clear that all acts other than those recited in the 1994 Accord Agreement necessary to implement the FESA and CESA will be made utilizing the CALFED process.

Another Institutional Agreement in the 1994 Accord Agreement is that "there will be an immediate re-consultation on the biological opinions currently governing project operations . . ." (Id. at p 6). This portion of the 1994 Accord Agreement rules out (irrespective of the fact that DFG was not a party to the 1994 Accord Agreement) the concept that the 1994 Accord Agreement is an authorization for the incidental take of any species of fish. The parties' agreement that there was to be a review of the Biological Opinions governing the project operations is quite inconsistent with, and indeed is contradictory of, the theory that the agreement authorized incidental take limits.

E. The 1995 Article VII Agreement

The last agreement cited by DWR as a component of its authorization for the Harvey O. Banks Pumping Plant Operation incidental take was entered into by DWR and

DFG in June of 1995 and is entitled "Agreement Pursuant to Article VII Negotiations for Interim South Delta Facilities Concerning Fish in the Sacramento-San Joaquin Estuary."

Unlike some of the other cited agreements, the parties to this agreement include DFG and DWR. It recites that it is formed pursuant to the 1990 Framework Agreement, the 1986 Four Pumps Agreement and a 1992 agreement between DFG and the U.S. Bureau of Reclamation.

The agreement recites and lists "other agreements, laws regulations and policies that affect management of the estuary and influence this agreement." (The 1995 Article VII Agreement, at p. 1.) Specifically listed, among others, is "consultations with DFG under the California Endangered Species Act," (Id. at p. 1) clearly indicating that this agreement is not made to comply with the CESA, but that the CESA is something that "may influence" the agreement.

The agreement further recites "on December 15, 1994, State and Federal agencies...signed 'Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government' (December 15 Agreement) for an interim Bay-Delta protection plan." The "December 15 Agreement" is the 1994 Accord Agreement.

The parties further agreed that "any incremental impacts will be addressed through environmental documentation and permitting process, such as" the NEPA, CEQA, FESA and CESA, and that any "remaining obligations under Article VII . . . will be addressed in agreements developed for a long term solution for the Delta" using the planning process found in the 1994 CALFED Framework Agreement.

The agreement became effective in 1995 and, by its terms, "shall remain in effect until terminated by mutual agreement of the parties."

The parties to the agreement further agreed that "The December 15 Agreement sufficiently addresses existing impacts in the Sacramento-San Joaquin Estuary to satisfy Article VII of the 1986 Agreement and Article V of the 1992 Agreement as they pertain to proceeding with the interim South Delta Facilities."

Article VII of the 1986 Four Pumps Agreement of includes agreement by DFG and DWR to discuss "developing ways to offset average fishery impacts" and that water diversions will not increase in the interim period until agreement is reached.

The 1995 Article VII Agreement is, thus, an agreement that the parties have, over the 1986 to 1995 time period, satisfied the obligations to discuss the development of ways to offset adverse fishery impacts, as that was the only obligation required by Article VII of the 1986 Four Pumps Agreement and no increased diversions of water by DWR are mentioned in the 1995 Article VII Agreement.

The 1995 Article VII Agreement does not contain language from which one can conclude or infer that it is a permit in compliance with § 2081 (1984 version) or an incidental take agreement. The 1995 Article VII Agreement does not identify any particular species of fish, and it does not state that it was intended to provide authorization to DWR within the prescriptions of CESA.

F. Other Documents

Other relevant documents which are not put forward by DWR as pre-April 10, 1997 agreement authorizing its incidental take are (1) the DFG to DRW Memorandum of February 22, 1993 approving the 1993 Winter-run Chinook Salmon Biological Opinion (the "1993 Memorandum"); and (2) the set of three Consistency Agreements approved by DFG in 2000, 2003 and 2005.

1. The 1993 Memorandum

DFG, in February of 1993, by memorandum directed to DWR, advised of DFG's adoption of the NMFS Biological Opinion dated that same month and of its approval of DWR's incidental take of Winter-run Chinook Salmon. (Exhibit "S-10" to the Petition.) The one-page memorandum stated in relevant part as follows:

"Subject: State Water Project Operations Effect on Winter-run Chinook Salmon.

The Department of Fish and Game hereby adopts the Biological Opinion for the Operation of the Federal Central Valley Project and the California State Water Project, published by the National Marine Fishing Service on February 12, 1993. . . .

* * * *

Under the provisions of the California Endangered Species Act, this department hereby determines and specifies as reasonable and prudent alternatives to prevent such jeopardy [to the continued existence of Sacramento River winter-run Chinook Salmon] those measures set forth in Section VI of the NMFS Biological Opinion.

* * * *

The Department of Fish & Game hereby determines and specifies the terms and conditions of Section IX of the NMFS Biological Opinion as reasonable and prudent

measures necessary and appropriate to minimize the adverse impacts of such incidental taking."

2. The Consistency Determinations

The DFG issued a "consistency determination" to DWR pursuant to §2080.1 on June 13, 2000, relating only to the threatened Delta Smelt and only to the effects of the "project" of increasing the diversion rate of water during three months of the year. That 2000 consistency determination was followed in 2003 and again on May 20, 2005 with new consistency determinations all reaching the same conclusion, namely (from the 2005 Consistency Determination): "DFG agrees that extending the 500 cfs project activities falls within the scope of Biological Opinion #1-1-04-F-0140 and meets the conditions set forth in Fish and Game section 2081(b) and (c) for authorization of incidental take of species protected under CESA." (Exhibit "S-15" p. 2 of Petition.)

The 2000 Consistency Determination (Exhibit "S-11" of the Petition) states that on May 26, 2000 DWR sought determination from DFG, pursuant to § 2080.1, that the Biological Opinions described on pages 1 and 2 of the document were consistent with the CESA. (Id. at p. 3, first full paragraph). The Biological Opinions were (1) the USFWS March 6, 1995 Delta Smelt Biological Opinion for SWP and CVP Operations; (2) the NMFS February 12, 1993 Biological Opinion (as amended) on the effects of CVP and SWP operations on Winter-run Chinook Salmon; and (3) "the proposed OCAP Opinion for spring-run Chinook salmon." (Id. at p. 1, last full paragraph).

It is unclear from the document whether DWR had sought a consistency determination relating to all three species for the entire Harvey O. Banks Pumping Plant

Operation or for the limited scope of the "project" described as an "increase in the maximum allowable daily diversion rate into Clifton Court Forebay" during three months of the year. However, DFG's consistency determination was clear: it issued a determination that the project would not increase the incidental take of either spring-run or winter-run Chinook Salmon and thus, declined to issue a consistency determination "for the proposed action (increasing the allowed diversion rate into CCF [Clifton Court Forebay] by 500 cfs in July through September, 2000-2002) and the underlying operations of the SWP (Id. at p. 3, second full ¶).

The 2003 Consistency Determination (Exhibit "S-13" to Petition) continued the 2000 Determination on the basis that circumstances had not changed.

The 2005 Consistency Determination (Exhibit "S-15" to the Petition) extended the consistency determination of the same project for three additional years, determining again that there were no changed circumstances and that the requirements imposed by the OCAP Biological Opinion relating to Delta Smelt in the State Water Project (which had, in 2005, superceded and replaced the 1995 USFWS Biological Opinion and its 2004 successor) were consistent with the CESA.

G. Analysis re: authorization for the incidental taking of endangered species

In 1986, at the time of the 1986 Four Pumps Agreement, § 2081 permitted the DFG to authorize, through a permit, an incidental taking of endangered, threatened or candidate species upon a showing of minimizing the take and fully mitigating the take. The statute remained unchanged until 1997 when the Legislature promulgated §2081.1. It

established a grandfathering provision allowing an incidental take based on an agreement approved by or entered into by the DFG if the agreement was in place before April 1997.

Applying the pre-1997 §§ 2080 and 2081, and the post-1997 §§ 2081 and 2081.1, an entity, such as DWR, need not seek any further authorization from the DFG for the incidental take of any endangered, threatened or candidate species in the event that the DFG had, prior to April 1997, issued a permit or entered into an agreement authorizing that incidental take of said species.

It is Respondents' position that the five agreements cited are interrelated and intregrated such that they comprise an integrated agreement and that, when considered as a whole, state an authorization by DFG permitting the incidental take of Spring-run Chinook Salmon, Winter-run Chinook Salmon and Delta Smelt.

The best that can be said for the five documents put forth by DWR as a pre-1997 agreement for compliance with the incidental take requirements of the CESA, read separately or as a whole, is that the documents accept that fish will be killed in the Harvey O. Banks Pumping Plant Operations and that the parties agree that mitigation measures will be undertaken. While the documents certainly demonstrate the fact that DWR was and has been attentive to the issue of the incidental take caused by the pumping plant operation, it cannot be said that the documents state any agreement by the DFG authorizing the take of any species of fish, endangered or not. Even Exhibit "B" to the 1994 CALFED Framework Agreement cannot be considered an authorization for the incidental take described in the then existing 1993 Biological Opinion for Winter-run

Chinook Salmon. This is not only because DFG was not a party to the agreement, merely having signed for the State of California, but because it contains no more than a recitation that DFG had previously given the incidental take authority (in its February 22, 1993 memorandum).

If the documents cited by DWR were intended by the DFG to be an authorization for an incidental taking grandfathered under § 2081.1, the documents should state in some form or manner that there is some relationship between the CESA and the documents. None, however, does so.

Examining the documents advanced by DWR, it is clear that contrary to the assertion of Respondent, they do not qualify as the carte-blanche authorization of incidental take at the Harvey O. Banks Pumping Plant Operation for all species of endangered fish inspective of the date of listing of the species as endangered.

The 1986 Four Pumps Agreement did occur prior to 1997 and the parties thereto were the DFG and DWR, however it does not "authorize" any incidental "take of species" as is required under § 2081.1 to qualify as a pre-1997 agreement authorizing an incidental take of an endangered species. It also, categorically, cannot have authorized the take, for purposes of the CESA, of any species that was not listed as endangered on the 1986 date of the agreement. As none of the three species relevant herein were listed as endangered in 1986, the agreement could not authorize their take by DWR. There is nothing in the CESA to suggest that § 2081.1 referred to the grandfathering-in of take authority for unidentified species that were not protected by the CESA. In § 2081.1's grandfathering

provision, agreements are "deemed to be in . . . effect as of the date . . . entered into . . . insofar as they authorize the take of species." Thus, even if the 1986 Four Pumps Agreement was an agreement to authorize the take of a particular species if, or when, it became endangered, such an agreement would not satisfy § 2081.1 because it applies only to species already listed as endangered. "Nothing in this chapter... prohibits... the incidental taking of any endangered threatened or candidate species if... authorized...." (§ 2081.1 (emphasis supplied).)

The 1990 Framework Agreement is an agreement made prior to 1997 and both DFG and DWR are parties to it. However, it does not "authorize" any incidental take of any species protected by the CESA. It does not provide any substantive agreement on any subject and appears to have been created to establish a process for DFG, DWR and the U.S. Bureau of Reclamation to use when issues arose. It also appears to be directed at the state's CEQA requirements not the DWR's CESA-mandated obligations.

The 1994 CALFED Framework Agreement is an agreement preceding April 10, 1997 between the Water Policy Council and the FED. DFG is a part of the Water Policy Council but is not a party to the agreement. There is nothing in the document that states that this agreement authorized DWR any incidental take. The agreement states that the parties to this largely procedural agreement "endorse and concur" with the points of agreement found in its Exhibit "B". By this, the parties agreed that DFG adopted the 1993 Winter-run Chinook Salmon Biological Opinion. However, a concurrence among the parties that DFG adopted any particular Biological Opinion is not an authorization of

anything. And while it might be quite good as evidence that there had been an authorization, it is the adoption of the Biological Opinion itself that would provide the authorization for the incidental take, if the adoption did, in fact, include an incidental take authorization.

For the same reasons, the parties' concurrence in the points of agreement that there exists a Biological Opinion relating to Delta Smelt that was under consideration by DFG for adoption, cannot be construed as an agreement of DFG and DWR to approve the incidental take of Delta Smelt allowed in that Biological Opinion. Moreover, it is not even evidence that DFG had granted any authorization.

The 1994 CALFED Framework Agreement, like the 1990 Framework Agreement is clearly designed to create a procedural forum and mechanism for the state government and the federal government to coordinate and communicate about substantive issues and did not itself, reflect any agreement on any substantive issue like granting authorization to the DWR to incidentally take any species.

The 1994 Accord Agreement was entered into in 1994, the parties thereto being the State of California and the Federal Government. Neither DFG nor DWR was a party and neither was a signatory to the agreement. This agreement does not authorize DWR any incidental take of any species and does not state that it does.

Indeed, the 1994 Accord Agreement does not require much of its parties. It is an agreement on changes to a proposal, pending at the time, before the State Water Resources Control Board. If it requires anything, it requires that "there will be an

immediate reconsultation [presumably between the two parties to the agreement] on the biological opinions currently governing project operations...." (Id. at p. 6). Such an agreement is antithetical to an authorization to DWR of an incidental take (even if DFG and DWR were parties to the agreement) because a reconsultation would either set new, or retain the existing incidental take limit in the operative Biological Opinion. A reconsulation would not be required if the parties were in agreement as to an incidental take authorization being found in any Biological Opinion.

And, finally the 1995 Article VII Agreement between DFG, DWR and the U.S. Bureau of Reclamation does not authorize, directly or by implication, any incidental take by DWR of any of the three species relevant in this case. It does not state that it is an authorization; it does not name any species to which it applies. To say that it evidences agreement that Article VII of the 1986 Four Pumps Agreement has been satisfied as DWR argues is no more than to say that the parties agree that they have satisfied their obligations to discuss the development of ways to offset adverse fishery impacts, and specifically, that they have done so with regard to the Interim South Delta facilities, a different facility than the Harvey O. Banks Pumping Plant Operation. Moreover, the concession in the 1995 Article VII Agreement that, at best the CESA might "influence" the 1995 Article VII Agreement, coupled with the agreement in the 1995 Article VII Agreement of compliance with the obligations of the 1986 Four Pumps agreement indicates very strongly that, even at the late date of March 1995, neither the DFG nor the DWR was advancing the 1986 Four Pumps Agreement, the 1990 Framework Agreement,

the 1994 CALFED Framework Agreement, the 1994 Accord Agreement or the 1995 Article VII Agreement as authorization for the incidental take related to the Harvey O. Banks Pumping Plant Operation.

In sharp contrast to the above, the DFG did provide DWR with incidental take authority relating to the Harvey O. Banks Pumping Plant Operation when it adopted the 1993 Winter-run Chinook Salmon Biological Opinion on February 22, 1993, and forwarded to DWR a memorandum advising of the adoption. This was prior to April 10, 1997, is issued by DFG and identifies the incidental take of a specific endangered species.

It, however, does not provide grandfathered authorization regarding the incidental take of Winter-run Chinook Salmon because it does not satisfy all the requirements of § 2081.1. Section 2081.1 requires a "permit, . . . or other plan or agreement approved by or entered into by the department [DFG]. . . and all of the following conditions are met: (a) the application process commenced on or before April 10, 1997." (emphasis added.)

While the memorandum makes clear that the DFG does know how to be specific about an incidental take authorization, and appears to be doing so with the 1993 Memorandum, there is no indication in the memorandum, or in any other document submitted, that this authorization is an "agreement" or that the required "application process commenced" prior to April 10, 1997 had ever occurred. The Biological Opinion was issued by NMFS ten days prior to the memo, leaving scant time for any application.

Moreover, the incidental take authorization allowed in the 1993 Memorandum is based on a Biological Opinion that has since been superceded, and, in any event, the DWR does not put the memo forward as pre-1997 incidental take authorization.

Most significantly, however, is that the 1993 Memorandum belies the theory that DFG had intended in the 1986 Four Pumps Agreement to grant an authorization to DWR for its incidental take of Winter-run Chinook Salmon. Winter-run Chinook Salmon were listed as endangered in 1989; in 1993 DFG authorized DWR's incidental take of that species with the 1993 Memorandum. DFG would not have done so if the 1986 Four Pumps Agreement had already established DWR's take authorization. And, even if DFG might have done so, it is inconceivable that it would fail to mention the 1986 authorization if the 1993 Memorandum was either supplemental to it or superceded it.

All three Consistency Determinations to which the parties direct the Court's attention are based on applications by DWR to DFG post-1997 and all are limited to the "project" of an annual three month increase in diversion rate. It is not clear whether DWR sought authorization for the entire Harvey O. Banks Pumping Plant Operation for all three relevant species or whether a limited determination was sought for all three species.

In either event, DFG limited the scope of its determination to the increment of increase of diversion and applied it to all three species. As for the Delta Smelt, it determined that the minimization and mitigation measures stated in the federal Delta Smelt Biological Opinions were consistent with the CESA. As for the two species of

Chinook Salmon, DFG declined to make a determination based on the notion that the proposed project made no impact on those species.

The 2005 Consistency Determination (Exhibit "S-15" to the Petition) is advanced by DWR as authority for its take of Delta Smelt incidental to the Harvey O. Banks Pumping Plant Operations until 2008, but it is incorrect both on the scope and the validity of the authorization.

Section 2080.1(c) allows a consistency determination relating to incidental take only if the applicant has already obtained a federal incidental take permit. DFG's determination of consistency is that the terms of the federal incidental take statement or permit is consistent with the CESA ("the director shall determine whether the [federal] incidental take statement or permit is consistent with this chapter"). The DFG is not authorized by § 2080.1 to extend its authorization for an incidental take by way of a consistency determination beyond the life of the foundational federal permit.

As a consequence, upon the occurrence of an expiration in the federal incidental take permit/statement, the DFG consistency determination will expire. Herein, the evidence is that the 2005 consistency determination is founded upon a February 2005 Biological Opinion for Delta Smelt, so it is not invalid for that reason.

Rather, its validity rests on the distinction of whether the limited "project" is distinct and separable from the Harvey O. Banks Pumping Plant Operation or whether it is merely an incremental increase to that operation. If the "project" is merely an incremental change, the consistency determination related to it is not valid. Section

2080.1 does not allow for parsing of the take authority provided by a federal Biological Opinion. If, however, the proposed "project" is distinct from its related operation and there is a federal take statement/permit relating to the distinct project, § 2080.1 allows DFG to issue its determination of consistency.

Either way, the 2005 Consistency Determination is not valid. If a distinct project, there is no evidence of a separate federal Biological Opinion relating to the annual three month increased diversions project upon which to found the DFG's Consistency Determination and if the project is an incremental change, § 2080.1 does not provide statutory authority for such a parsing of the permitted incidental take.

## VI. CONCLUSION

The Petition for Writ of Mandate is GRANTED. Respondents and all of them are commanded to cease and desist from further operation of the Harvey O. Banks Pumping Plant Operation until and unless they have obtained authorization in compliance with the California Endangered Species Act from the Department of Fish and Game with regard to their incidental take of Chinook Salmon - Winter-run, Chinook Salmon – Spring-run and Delta Smelt.

This order is stayed for sixty days to provide Respondents the time needed to comply with the CESA's mandatory incidental take authorizing requirements. Petitioner is to provide a Judgment for the Court's signature consistent with the above.

As a final note: This decision has been made without any input from the DFG as to its perceptions of whether the documents put forth as DFG's authorization for the

incidental take were or were not intended as such. While no conclusions can be reached from any party's failure to provide declarations or information from DFG regarding those documents that were signed by the DFG (as well as those documents that were not signed by them), such information would have assisted the Court in its understanding of this matter. The DFG, after all, is the very entity obligated to determine the requirements of any incidental take under CESA. The Court regrets that an important case such as this one must be decided without all the possible available relevant information.

Dated: 3/22/07

Frank Roesch

Frank Roesch
Judge of the Superior Court

## CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.
Executed on March 22, 2007.

By: Vicki Daybell
Vicki Daybell, Deputy Clerk
Department 31