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“Creating Jobs by Overcoming Man-Made Drought: Time for Congress to Listen and Act”
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Good afternoon, Chairman McClintock, Ranking Member Napolitano, and Members of the Subcommittee. My name is Jim Beck. I am the General Manager of the Kern County Water Agency.

Introduction

The Kern County Water Agency (KCWA) is located in Bakersfield, California and serves the urban and agricultural areas in the surrounding region. KCWA’s mission is: “To ensure that adequate, reliable and affordable water supplies are available for beneficial use by the people and economy of Kern County.”

KCWA participates in a wide range of water management activities including protecting water quality, providing domestic, municipal and industrial water supplies, and constructing and managing groundwater banking facilities. KCWA is the second largest participant in the State Water Project (SWP), a water storage and delivery system of reservoirs, aqueducts, power plants, and pumping plants.

KCWA holds a contract for one million acre-feet (af) of SWP water and is delivered to 14 public water agencies that serve domestic and irrigation supplies to the farms, families and businesses in Kern County.

Since 1987, KCWA and the local water districts it serves have been faced with extreme variations in water supply from its local and SWP sources due to drought, but also in major part due to regulations imposed under the Endangered Species Act (ESA). These reductions in deliveries have resulted in significant reductions in agricultural production, and significant adverse impacts on Kern County’s economy.

In 1961, when KCWA contracted with the State of California for water from the SWP, we expected that KCWA would receive nearly 100 percent of the water contracted for each and every year (about one million af). However, between 1960 and 2005 that expectation had to change because the SWP was not completed, additional criteria were imposed on SWP operations, and because of federally imposed restrictions to protect Chinook salmon and Delta smelt. By 2005, we were forced to expect only 68 percent of our total contract amount, or about 680 thousand af on average. After new biological opinions were issued by the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) (collectively, the Services) in 2008, the SWP delivery capability dropped to 60 percent, or about 600 thousand af on average.

While federal officials have pointed to a hydrologic drought as the major impact to water supplies over the past three years, the federal endangered species act has accounted for over 1.5 million af of water loss to the SWP since the beginning of 2008. Because the SWP was not able to deliver as much water to Kern County, farmers in Kern County paid more than \$120 million for water that was not delivered. In addition to that amount, farmers had to pump additional groundwater and acquire very expensive surface water from other sources to make up for the losses.

Under these conditions, making the best possible use of our existing surface and groundwater supplies has become our most important objective. But if we are to do that effectively, the State and federal governments must do a better job of balancing ecosystem and water supply needs in the Sacramento-San Joaquin Delta (Delta).

Balancing the Delta

The Delta is a valuable ecosystem and the hub of California's water supply. It must serve both purposes equally. In the recent past, State and federal agencies have proposed and implemented measures in the Delta based on the presumption that ecosystem needs are paramount and water supply needs are incidental. To effectively manage the Delta to meet the co-equal goals of ecosystem protection and enhancement and water supply reliability, federal agencies that exercise regulatory authority in the Delta must: (1) adapt the regulatory regime to new realities; (2) significantly improve the quality of scientific information that is used by federal agencies in making regulatory decisions in the Delta; and (3) improve coordination among federal agencies and high-level federal government leadership.

In addition, Congress should amend the ESA to streamline federal involvement in the Bay Delta Conservation Plan (BDCP) and to help achieve the co-equal goals of ecosystem protection and enhancement and water supply reliability consistent with State law.

Adapt the Regulatory Scheme to New Realities

The ESA was passed by Congress almost 38 years ago. It was designed to protect both species and the ecosystems upon which they depend, but generally the ESA reflects a species-by-species and project-by-project approach to protecting species and ecosystems. In 1982, Congress amended the ESA to encourage non-federal parties to undertake conservation planning. Coupled with regulatory changes adopted in the 1990s, the 1982 amendments facilitated multi-species, regional conservation planning. In contrast, the basic structure of Section 7 of the Act which governs federal agency actions has remained largely unchanged over the last four decades.

The 1982 amendments to Section 10 of the ESA led to the development of landscape-level conservation plans in many parts of California and on the lower Colorado River. In lieu of conservation planning, the federal government and State of California opted to pursue ecosystem and water supply management in the Delta through the development of CALFED. But the CALFED experiment came up short as the number of listed species in the Delta continued to grow, their status worsened, and the State and federal wildlife agencies imposed species-specific measures intended to halt the declines of the growing number of listed species. It is now clear that conservation planning shows promise as an established regulatory tool to realize the goal of long-term water supply reliability coupled with protection of multiple aquatic and terrestrial species and the ecosystems upon which those species depend.

The BDCP is an effort to marshal conservation planning to realize these co-equal goals. The BDCP is intended to fulfill the conservation planning requirements established in the 1982 amendments to the ESA and the natural communities conservation planning requirements set forth in the State of California's Natural Communities Conservation Planning Act. Those two regimes allow regulatory agencies to take a more comprehensive approach to addressing the needs of the Delta's native, at-risk species.

Unfortunately, the Services have approached the BDCP process as if it were a consultation on operation of the Central Valley Project (CVP) and SWP under Section 7(a)(2) of the ESA rather than a conservation plan under Section 10(a)(1)(B) of the ESA. As a result, the Services' work on the BDCP lacks the kind of regulatory flexibility necessary to really look comprehensively at the full suite of activities in the Delta that affect listed species and their respective habitats. While controlling the operations of the CVP and the SWP remain a central focal point of the Services, other components of the BDCP designed to address activities that likely influence the survival and potential recovery of listed species are given less attention.

Emerging scientific information regarding the Delta and its native species illustrates the need for a comprehensive approach that focuses on, among other things, habitat restoration and projects to address other stressors on the listed species in a manner that is equal to the Services' focus on CVP and SWP operations. But, unfortunately, the species-by-species, project-by-project focus of Section 7 of the ESA is in conflict with the regional conservation planning approach reflected in Section 10 and with the co-equal goals of water supply and ecosystem restoration established by the State of California for the Delta. For this reason, as I previously mentioned, Congress should amend the ESA to facilitate development and implementation of the BDCP.

Specific Suggestions to Improve ESA Regulations in the Delta

A recent idea that we would like to explore with the subcommittee staff following this hearing is the possibility of allowing the U.S. Bureau of Reclamation (USBR) to receive Section 10 coverage under the ESA. Currently, all federal agencies are prohibited from seeking coverage under Section 10 of the ESA, which is broader than the take coverage available under Section 7. In the Delta this circumstance creates the problem of State and local agencies receiving Section 10 coverage, but USBR only being able to receive Section 7 coverage. It is likely that this does not present a problem in most areas of the nation.

But in the Delta, where the confluence of stressors that affect the species are complex and highly interrelated, the species-by-species, project-by-project approach of Section 7 is inadequate. In developing the BDCP, the Services are forced to analyze the proposed actions based on Section 7's jeopardy standard. They don't have the flexibility to look more broadly at the suite of conservation measures being taken to restore habitat or address the long list of other stressors, and instead are required to look at the specific action being taken, in this case the operations of a new conveyance facility. As a result, they must impose limits on CVP and SWP water supplies as their main approach to Delta environmental protection.

However, if the Services were able to issue permits to USBR under Section 10, they could look more broadly at the entire suite of actions being taken to protect the Delta ecosystem and include all of those

actions in their analysis. The Services could be less restrictive in how they regulate water supply because they could rely on the broader suite of environmental actions being implemented to support a finding that the project as a whole provides benefits to the Delta ecosystem.

This more comprehensive approach releases the Services from the narrowly focused Section 7 approach and increases the suite of conservation measures the Services can consider in making their determinations about the net benefit of the BDCP to the Delta ecosystem.

Under the current ESA regulations, economic impacts also receive short shrift. The long term goals of water supply protection and endangered species protection can best be served by modifications to Section 10 of the ESA that ensure adequate consideration of the economic impacts of plans developed under that section. The goal should be to foster economically efficient multi-species plans that provide adequate protection to the ecosystem, but also provide protection of water supplies to avoid the economic disruptions that have occurred in recent years. We believe that flexibility to achieve these goals currently exists, but amendment of the statute to require such consideration would stabilize the regulatory environment and avoid undue protracted litigation in defense of such plans.

In the immediate future, however, the coordinated operations of the State and federal projects must rely on Section 7 take authorizations (under biological opinions) to avoid the take prohibitions of Section 9 of the act. A reasonable biological opinion was overturned by litigation in the mid-2000s and now water users have overturned an adverse biological opinion that is under reconsultation.

Targeted statutory guidance for reasonable and prudent alternatives that protect water supplies and our economy would help to stabilize the current situation and reduce litigation while long term solutions are developed. Due to the significant effect on interstate commerce and the economy of the nation, those reasonable and prudent alternatives allowing take of species should govern the operations of both the CVP and the SWP without additional regulation by the State of California.

Significantly Improve Delta Science

Science in the Delta has grown myopic. For decades, State and federal agencies, as well as scientists that obtain funding from those agencies through CALFED and the Interagency Ecological Program, have focused an inordinate amount of time and attention on CVP and SWP pumping operations in the south Delta. The CVP and SWP collect reams of data regarding water quality, fish entrainment, tides and water flows, and fish salvage and release every day at their facilities. It is not surprising that, in studying the Delta and its declining fish populations, agency personnel and scientists assumed that CVP and SWP pumping operations pose a threat to listed fish, even though empirical research is contrary to this assumption.

The focus on collecting data regarding impacts of the CVP and SWP contributed to a paucity of data on other factors that could affect the survival and potential recovery of the listed species. Factors like toxics, food web deficiencies, predation, in-Delta diversions, habitat loss due to continuing development, ocean conditions, ocean harvest, and invasive species received relatively little attention compared to operations of the CVP and SWP pumps. Recent work in a number of these areas has shown surprising results; but the results are surprising only because agency personnel and scientists didn't spend the time and effort necessary to understand these factors years ago. New studies undertaken or supported by the water agencies, show that food web deficiencies and predation may be two of the most significant factors among several factors in the decline of some Delta species.

For example, Dr. Patricia Glibert of the University of Maryland focused on the changing forms and ratios of nitrogen and phosphorous caused by increasing concentrations of ammonia from wastewater treatment plants that discharge their effluent to the Delta. In one published study, she noted that the changes in these constituents are related to the changes in species composition and abundance from the smallest organisms all the way up the food web. Dr. Glibert theorizes that much of the Delta's ecologic struggle may be traceable to changes to the food web caused by nutrient discharges from wastewater treatment plants.

Predation by non-native species in the Delta is also a new focus of study that is showing significant promise. Sport fishing trade journals often remark about the "heavy losses" of out-migrating juvenile salmon to predation by the non-native striped bass. A March 2009 story in Western Outdoors described predation by the invasive striped bass this way:

"The peak of the baby salmon's downstream journey corresponds with the spring spawning run of striped bass. Somewhere along the line, the two migrations crash headlong into one another." . . . "It's a one-sided blood bath, and when the spray and foam settles, stripers emerge fat and happy while Chinook suffer heavy losses."

While the effects of predation are well known by sport fishermen, it has been of little interest in the Delta scientific community until very recently. A 2010, Sacramento Bee article notes that a supervising biologist for the California Department of Fish and Game worries because in his words "Last night a chill ran down my spine imagining that Delta smelt go extinct – while we have done nothing proactive to address predation by striped bass." The same state biologist also stated that: "I'm again thinking we should propose revising the striped bass policy to consider them a 'weed' like pigs or a similar pest." Slowly this lack of scientific attention to "common sense" factors like predation that affect the Delta's endangered fish species is changing, but it needs to change faster.

The most recent volley of litigation in the Delta is a ruling by Judge Wagner finding that significant aspects of the current delta smelt biological opinion for the CVP and SWP were arbitrary and capricious. In making his findings Judge Wagner didn't lightly skip over the inappropriate application of scientific information about the delta smelt, and the effect of continued operations of the CVP and SWP on the species. In his conclusion of the case Judge Wanger notes that "...the public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs." The Judge is correct; balancing the Delta's water supply purpose with its environmental value will require a sea change among agency personnel and scientists.

Actively Engage the Federal Administration

The primary federal agencies with regulatory authority over various components of the Delta ecosystem are the Fish and Wildlife Service, National Marine Fisheries Service, Environmental Protection Agency, U.S. Army Corps of Engineers, and Federal Emergency Management Agency. While each of these agencies has the potential to make a significant contribution toward efforts to protect and restore the Delta ecosystem, the Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) are the agencies that implement the ESA, which is the statutory program that most severely restricts CVP and SWP operations.

For two decades, California's major public water agencies have tried to work with the federal regulatory agencies to find a balance between the needs of species in the Delta and the provision of water to the State's population. Most recently those efforts included the 1994 Bay Delta Accord and the CALFED Bay Delta Program. Both of those efforts failed both to contribute to conservation of listed species in the Delta and to assure water supply reliability.

As a result, the public water agencies initiated the BDCP as a way to secure take permits under the ESA from federal and state agencies for up to 50 years. To be successful, the BDCP requires the full engagement of the CVP and SWP water contractors, environmental groups, state agencies and federal agencies. Unfortunately, the engagement of the federal agencies has been sporadic.

At the regional level, in California, the Fish and Wildlife Service, National Marine Fisheries Service and Bureau of Reclamation have worked hard to participate constructively and to help move the BDCP forward. But their efforts are compromised by a lack of decision-making above the regional level. Progress toward the completion of the BDCP was substantial when new leadership was appointed to the Departments of the Interior and Commerce to oversee the work of the Services. Since that time the federal agencies have struggled to find direction, commit to decisions, or advance solutions in negotiations regarding the BDCP.

The federal agency staff at the regional level in California is capable of making decisions and moving the BDCP forward. However, the connection between the regional staff and the policy-makers in Washington D.C. must be strengthened to facilitate timely decision-making. If development of the BDCP comes to a standstill every time an issue is sent to Washington D.C. it will fail just like the Bay Delta Accord and the CALFED Bay Delta Program failed.

Conclusion

In conclusion, on behalf of the Kern County Water Agency, I want to again thank the Subcommittee for investing their time and energy to bring this hearing to California's Central Valley. The opportunity to meet face-to-face and constructively work toward better collaboration is appreciated and, we believe, can lead to new progress. Thank you for considering our input and for your service on what are critical issues to our state and country.