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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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NATURAL RESOURCES DEFENSE )  
COUNCIL, et al., )

1:05-cv-1207 OWW GSA

10

Plaintiffs, )

INTERIM REMEDIAL ORDER  
FOLLOWING SUMMARY JUDGMENT  
AND EVIDENTIARY HEARING

11

v. )

12

DIRK KEMPTHORNE, in his official )  
capacity as Secretary of the )  
Interior, et al., )

14

Defendants. )

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CALIFORNIA DEPARTMENT OF WATER )  
RESOURCES, )

17

Defendant-Intervenor, )

18

STATE WATER CONTRACTORS, )

19

Defendant-Intervenor, )

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SAN LUIS & DELTA-MENDOTA WATER )  
AUTHORITY, et al., )

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Defendant-Intervenors. )

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Following the Court's May 25, 2007, Order Granting In Part

26

and Denying In Part Plaintiffs' Motion for Summary Judgment,

27

finding the Long-Term Central Valley Project Operations Criteria

28

And Plan ("OCAP") Biological Opinion ("BiOp") unlawful and

1 inadequate, as well as the accompanying Delta Smelt Risk  
2 Assessment Matrix ("DSRAM") adopted to implement the 2005 OCAP  
3 BiOp, in violation of the Administrative Procedure Act, 5 U.S.C.  
4 § 705 et seq. (Doc. 323), a seven-day evidentiary hearing was  
5 held on August 21-24 and 29-31, 2007, to determine what interim  
6 remedies to impose. Based on the contemporaneous Findings of  
7 Fact and Conclusions of Law, after review of all the evidence,  
8 seven days of testimony, the parties' memoranda of law, and fully  
9 considering all the parties' oral arguments and proposed interim  
10 remedies, the Court enters the following:

11  
12 I. INTERIM REMEDIAL ORDER

13 A. REMAND

14 1. Completion of New Biological Opinion

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

27  
28 2. Vacatur

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

7  
8 B. INTERIM INJUNCTIVE RELIEF

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

23  
24 1. Surveys And Monitoring

25 a. Delta Smelt Surveys

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

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

4  
5 2. Frequency of Sampling for Delta Smelt

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

11  
12 a. Sampling Triggers

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

22  
23 b. Larval Delta Smelt Monitoring

24 (1) Monitoring Triggers

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

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

6  
7 (2) Timing of Monitoring

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

17  
18 (3) Termination of Monitoring

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

22  
23 3. Flow Restrictions

24 a. Winter Pulse Flows

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

1 2,000 cfs over the implementation period described in  
2 subparagraph (3).

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

10 (3) This action shall end after a period of ten (10) days  
11 or when one of the following terminating conditions is met,  
12 whichever occurs first: (1) the three-day average of flow in the  
13 Sacramento River at Freeport exceeds 80,000 cfs; (2) the onset of  
14 spawning by Delta smelt occurs as shown by the presence of spent  
15 female Delta smelt in the Spring Kodiak Trawl survey or at either  
16 export plant's salvage facilities; (3) when larval Delta smelt  
17 are detected in the 20mm survey or at either export Plant's  
18 salvage facility; or when water temperature in the Delta reach  
19 12°C determined by the average of the daily water temperatures at  
20 the Mossdale, Antioch, and Rio-Vista Monitoring stations.

21  
22 b. Pre-Spawning Adults

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

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

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

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

15  
16 4. Larval And Juvenile Delta Smelt

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

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

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

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

9  
10 5. Vernalis Adaptive Management Plan

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

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

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

21  
22 6. Barriers

23 a. Head of Old River Barrier

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

27  
28 b. Agricultural Barriers



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

6  
7 C. ADMINISTRATIVE DISCRETION

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

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

18  
19 D. FEDERAL DEFENDANTS' ADDITIONAL MEASURES PENDING THE NEW  
20 BIOLOGICAL OPINION

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

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

1 Opinion is completed;

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

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

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

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

16

17 **E. PUBLIC HEALTH AND SAFETY EXCEPTION**

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

24

25 **F. DURATION OF THIS ORDER**

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

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

3

4 G. STATUS REPORT

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

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10

IT IS SO ORDERED.

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Dated: December 14, 2007

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/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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