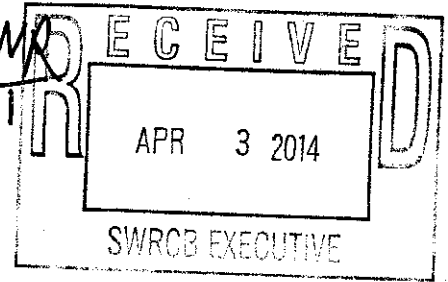


April 1, 2014

OCC

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VIA CERTIFIED MAIL

Administrator Gina McCarthy
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue Regarding the California State Water Resources Control Board and California Department of Water Resource's Bay-Delta Barrier Construction

Dear Administrator McCarthy,

Pursuant to Section 505(b) of the Clean Water Act (CWA), 33 U.S.C. 1365(b), this letter provides notice that my client, the Center for Environmental Science, Accuracy and Reliability (CESAR) intends to commence civil litigation against the State Water Resources Control Board (SWRCB) and the California Department of Water Resources (DWR) for any failure to obtain necessary permits required under the CWA related to the proposed construction of barriers in the California Delta.

BACKGROUND

The SWRCB and DWR propose to construct temporary rock barriers in the Delta.¹ These barriers will make significant changes to existing flows and habitat conditions that result from the specific requirements of the 2008 OCAP Biological Opinion ("biological opinion") to avoid jeopardizing the continued existence of the delta smelt. The barriers currently being considered by the SWRCB and DWR have not been considered under the 2008 biological opinion will be constructed within the designated critical habitat of the delta smelt.

Construction of such barriers at a minimum requires a permit under Section 404 of the Clean Water Act from the Army Corps of Engineers; and any discretionary agency actions under that

¹ <http://www.water.ca.gov/waterconditions/emergencybarriers.cfm>

Act are subject to the consultation requirements of under the Endangered Species Act Section 7(a)(2).

INTERESTS OF THE PARTY

CESAR is a California non-profit public benefit corporation dedicated to ensuring consistency of environmental regulations to, among other objectives, ensure effective and necessary conservation of threatened and endangered species. CESAR has members throughout California who have an interest in effective conservation.

NATURE OF THE CHALLENGE

Construction of barriers in the delta is within the “waters of the United States” and is subject to the permitting requirements under the CWA.

The California delta is an expansive inland river delta and estuary in Northern California. The delta is subject to the ebb and flow of the tide and is used in connection with interstate commerce; thus, it is properly considered within the scope of the CWA as a water of the United States.

Under the CWA Section 301(a), the discharge of any pollutant, except in compliance with other provisions of the CWA, is unlawful. For purposes of the CWA, "Pollutant" means:

“dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 40 CFR 122.2.

The construction of the proposed barriers will result in the discharge of pollutants into waters of the United States in violation of effluent standards or limitations. Absent compliance with the law, CESAR hereby issues its notice of intent to sue to enjoin such activities under 33 U.S.C. 1365(a)(1).

Sincerely,



Leah Zabel
Attorney
Zabel Law

Cc:

Mark Cowin, Director
California Department of Water Resources ✓
P.O. Box 942836, Room 1115-1
Sacramento, CA 94236-0001

Felica Marcus, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

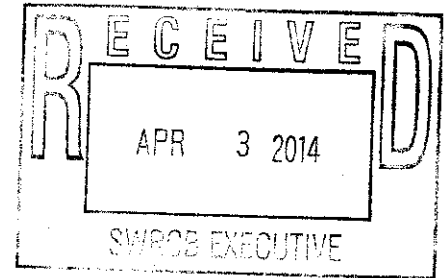
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April 1, 2014

VIA CERTIFIED MAIL

Dan Ashe, Director
Director of the U.S. Fish and Wildlife Service
MS-1413, MIB
1849 C Street, NW
Washington, DC 20240



RE: Notice of Intent to Sue Regarding the California State Water Resources Control Board and California Department of Water Resource's Bay-Delta Barrier Construction

Dear Director Ashe,

Pursuant to Section 11 (g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), this letter provides notice that my client, the Center for Environmental Science, Accuracy and Reliability (CESAR) intends to commence civil litigation against the California State Water Resources Control Board (SWRCB) and the California Department of Water Resources (DWR) for violating the Endangered Species Act as amended. This Act prohibits the take of protected listed species such as the delta smelt without a requisite permit.

BACKGROUND

The SWRCB and DWR propose to construct temporary barriers in the Delta. These barriers will make significant changes to existing flows and habitat conditions that result from the specific requirements of the 2008 OCAP Biological Opinion to avoid jeopardizing the continued existence of the delta smelt. The barriers will be constructed within the designated critical habitat of the delta smelt. Section 9 of the ESA prohibits 'take' of listed species. The definition of 'take' includes harm, which is defined to be habitat modification or degradation (in this case construction of barriers within the Delta) that significantly impairs essential behavioral patterns of fish or wildlife.

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Fresno, CA 93721

The SWRCB and the DWR are 'taking' the threatened delta smelt by constructing barriers in the Delta that will, during their construction and operation, result in habitat modification or degradation, that harms the delta smelt by significantly impairing essential behavioral patterns of threatened delta smelt. Construction of such barriers at a minimum requires a permit under Section 404 of the Clean Water Act from the Army Corps of Engineers; and any discretionary agency actions under that Act are subject to the consultation requirements of Section 7(a)(2).

INTERESTS OF THE PARTY

CESAR is a California non-profit public benefit corporation dedicated to ensuring consistency of environmental regulations to, among other objectives; ensure effective and necessary conservation of threatened and endangered species. CESAR has members throughout California who have an interest in effective conservation. By constructing barriers in critical habitat, the SWRCB and DWR violate the provisions of section 9 of the ESA and affected the interests of CESAR's membership.

NATURE OF THE CHALLENGE

The construction of barriers within the Delta will significantly alter essential habitat and significantly impair essential behavioral patterns of threatened delta smelt and thus result in 'take' of listed species which violates Section 9 of the ESA.

Section 9 of the ESA makes it unlawful for any person – including private and public entities – to "take" individuals of an endangered species and, by regulation, a threatened species. 16 U.S.C. § 1538(a). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." Id. at § 1532(19). "Harm" is further defined to include significant habitat modification or degradation which "actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102; see also id. § 17.3 Section 7 of the ESA requires a federal agency to consult with the Secretary of the Interior to ensure that the proposed project does not jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat. The barriers will do both. The flows and habitat conditions resulting from implementation of the 2008 Biological Opinion were established for the survival of the delta smelt. Construction of dams that were not considered by the Biological Opinion will alter conditions and flow requirements resulting in significant habitat modification or degradation in a manner sufficient to constitute "take" under the ESA. The necessary 404 permit required by this construction and issued by the US Army Corps of Engineers triggers the consultation requirement in Section 7 of the ESA.

The necessary clean water permits for this action require consultation under Section 7 of the ESA, by the Corps. Absent such consultation and its accompanying incidental take permit, any

take of endangered and threatened species is a violation of the law under the ESA. As such, the SWRCB and DWR must take action prior to the construction of the proposed dams, in order to avoid violation of the ESA. Absent compliance with the law, CESAR hereby issues its notice of intent to sue to enjoin such activities.

Sincerely,



Leah Zabel
Attorney
Zabel Law

Cc:

Mark Cowin, Director
California Department of Water Resources
P.O. Box 942836, Room 1115-1
Sacramento, CA 94236-0001

Felica Marcus, Chair
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