Legal Update, January 24, 2013 – Janelle Krattiger, Legal Intern

1. THE YUBA COUNTY WATER AGENCY'S CHALLENGE TO NMFS BIOP

This case comes to us out of Yuba County. It involves the Yuba County Water Agency's challenge to the National Marine Fisheries Service BiOp adopted last February. This controversy is outside the Council's jurisdiction, however the Biological Opinion involved, if implemented, could have serious implications for the Bay-Delta region.

Background: The YCWA relies on two debris dams owned by the Army Corps of Engineers ("Corps") for hydropower generation and water delivery facilities. The dams, Daguerre Point Dam and Englebright Dam, are located in the lower Yuba River. They were constructed by the Corps to contain Gold Rush mining debris and sediment and to control for potential navigation and flood risks.

The Corps consulted NMFS regarding the two dams under the Endangered Species Act ("ESA"). NMFS adopted the BiOp as a result of this consultation. The NMFS BiOp concludes that the proposed operations of the dams would jeopardize several ESA-protected fish species as well as adversely modify or destroy critical habitat. The BiOp asserts that the preferred "reasonable and prudent alternative" ("RPA") to continued operation is dam removal.

The YCWA estimates that the dams contain thirty million cubic yards of contaminated debris which includes mercury and other harmful chemicals that can have a substantial negative impact on fish habitat and public health in the lower Yuba River and the Delta. YCWA estimates that the RPA, if implemented, could cost up to $1 billion.

YCWA says that the BiOp is "replete with technical errors and flawed legal analysis," and that NMFS reached conclusions based upon erroneous analyses.

YCWA sought to collaboratively correct the flaws of the BiOp with the Corps and NMFS to no avail. They filed suit on January 9, 2013 seeking a declaration that the BiOp is illegal and for an injunction prohibiting NMFS and the Corps from implementing the BiOp.

Implications: We will continue to monitor this case and provide updates as they arise.

2. WESTLANDS WATER DISTRICT'S $1 BILLION CLAIM REJECTED

Facts: A Westlands Water District ("Westlands") claim against the federal government was dismissed on January 15 from the U.S. Court of Federal Claims. The judge rejected Westlands claims that the federal government should be liable to pay for failing to build a drainage system for removing used irrigation water. The court shrugged cited minor technical legal reasons for the claim's failure, including an expired statute of limitations.

The problem stems from the authorization of the Central Valley Project dams and canals back in 1960. Westlands claims that the federal government was legally obligated under

several contracts from the 1960s to complete a drainage system. The Federal Claims judge reasoned that "government representations are not binding contractual obligations unless stated as an undertaking rather than an intention."

The drainage issue in Westlands has been long-standing problem for the San Joaquin Valley. In the 1980s thousands of waterfowl were killed from selenium concentrations in the water at the Kesterson National Wildlife Refuge as a result of toxic buildup from the lack of irrigation drainage.

There are several lawsuits regarding this drainage problem. We will continue to monitor these cases and provide updates as they arise.

Legal Update January 24, 2013—Tori Sundheim, Legal Intern

I. CONSOLIDATED FISH (Smelt and Salmonid) CASES

Consol. Delta Smelt Cases, 717 F. Supp. 2d 1021, 1026 (E.D. Cal. 2010);
Refresher: Challenges the FWS and NMFS BiOps.
9th Circuit Appeal:

- NRDC- court should defer to FWS's determinations, not court's job, battle of experts.
- Water Users- best available science was not used; FWS did not do its job.

Oral Arguments Sept. 10, 2012. We are waiting—fed courts a year after oral argument.

Relevancy to the Council You will hear from our lead scientist later on at this meeting about the Fall Midwater Trawl. Fish abundance and take limits are at the essence of the ongoing smelt/salmon litigation. We thought we'd pose a couple of really basic questions to an involved attorney, who will remain nameless. These responses reflect that attorney's opinions.

Questions:

1. Which BiOps currently control operations?
    a. Since December 19, 2012, FWS's 2008 Smelt BiOp has been controlling operations. The first flush RPA Action 1 was implemented around the 19th. We're now on action 2 operating to -3500 cfs. OMR is the controlling factor.
        i. The Salmon BiOp would allow up to -5000, but since smelt is more restrictive it controls.
    b. The Federal District Court in both cases invalidated the 2008 Smelt BiOp and the 2009 Salmon BiOp. However, it didn't vacate them. Since they were only remanded, operators still have to comply with the RPAs until a new BiOp is issued or the court can rule something else.
2. DWR and the Federal Agencies recently filed for an extension of the remanded BiOp for three years, what will be the legal effect?
    a. NRDC and others have filed opposition to these motions.
        i. The argument against the extension is to avoid having continued litigation and uncertainty around the BiOps- new BiOps will hopefully resolve our issues.
        ii. Note: Court came out with an Order after this Legal Update giving DWR and the federal fishery agencies until March 1 to produce information sufficient to support an extension.
3. The current remand schedule requires the new Smelt BiOp in December of this year.
    a. The Salmon BiOp is not due until 2016.
    b. No articulated plans to combine the BiOp. If they were combined, it would be through the BiOp process if for some reason the Salmon BiOp affects the smelt. Otherwise, NMFS can propose no jeopardy for all species. Nobody knows how that will play out.
4. Other than the extension request, is there any other litigation in the District court?
    a. Smelt: Court of Appeals still awaiting a ruling. No date.

   b. Salmon: Opening Briefs completed, Replys pending. Briefing will be complete April 22, 2013 in the Court of Appeals.

5. Nonscientific understanding based on conversations. What legal effect of the new decline in fish abundance per Midwater Trawl?
   a. Not sure that it will affect the BiOps. It affects the four species that showed decline, at the heart of the pelagic organism decline. Only one, Delta Smelt, is listed under endangered species act. Decline not unexpected, bad water year.
      i. BiOps not designed to recover just to keep from going extinct.
   b. Fewer fish can be killed at the pumps because of the take statement. If more fish out there, pumps allowed to take more.

We will continue to monitor the potential effects and implications of these consolidated cases.