



Westlands Water District

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Public Water Agencies Throughout California File Suit to Prevent Further Water Cutbacks

(Fresno, CA – December 8, 2008) The Westlands Water District today joined with 31 other public water agencies in the Central Valley in filing a lawsuit to block a new regulation that would enable state Fish and Game officials to cut off up to a million acre feet of water for two-thirds of California’s people. Those reductions in freshwater supplies would come on top of the court-ordered cutbacks that last year reduced the state’s water supplies by roughly one-third in the midst of the drought.

“We’re taking this action to protect the public interest in our own water supply,” said Jean P. Sagouspe, a farmer on the westside of the San Joaquin Valley who is the president of Westlands Water District. “The Department of Fish and Game’s plan represents an abuse of power and a failure of good science and common sense.”

The lawsuit filed jointly by Westlands and the San Luis and Delta-Mendota Water Authority (SLDMWA) is one of three suits filed against the Fish and Game regulation by public water agencies from Northern and Southern California as well as the Bay Area. Together, the public water agencies opposed to the regulation are responsible for delivering water to more than 25 million Californians and nearly two million acres of agricultural land.

Fish and Game officials want to shut down the operation of the state and federal pumps in order to protect a species of minnow called the longfin smelt. But Fish and Game’s own studies show that longfin smelt do not live anywhere near the pumps. As a result, the agencies point out that shutting down the pumps will not produce any benefit for the fish.

Worse, the Department of Fish and Game is proposing to do nothing at all to reduce the effects of toxic pollution, invasive species, and other problems that the department’s own scientists admit are harming longfin smelt.

If the new restrictions are enforced and the drought persists, Water Resources Director Lester Snow has warned that it “could create a water supply and delivery crisis the likes of which Californians have not seen in decades.” In November, the Department of Water Resources joined with public water agencies from throughout California in submitting extensive scientific evidence in an unsuccessful effort to persuade the state Fish and Game Commission not to adopt this rule.

“California’s leaders should be working together to conserve our limited water supplies and help the public get through this drought emergency,” Sagouspe said. “Instead we see two state agencies working at cross purposes. Nobody benefits if Fish and Game follows

through on this plan that proposes to spill into the ocean enough fresh water to serve five million people for an entire year.”

The new rule adds an additional and very expensive measure of uncertainty to the water crisis California is facing. Even if Fish and Game doesn't start shutting down the pumps, public water agencies are required to make arrangements for alternative supplies in case they do – a process that will add an estimated \$220 million to local water bills. Farmers will face additional problems in securing financing to plant their crops if there's no assurance there will be enough water to grow them. And new housing developments cannot proceed under California law unless they can demonstrate they have a secure water supply.

California's Endangered Species Act requires that actions taken to protect a species have to be proportionate to the actual threat they face. Westlands' suit, however, points out that if as few as 50 longfin smelt are harmed out of a species that numbers in the millions and ranges as far north as Alaska, Fish and Game would be empowered to begin shutting off water supplies for millions of people at an untold cost of billions to the state's economy.

“There is no proportionality here,” said Sagouspe. “No rhyme or reason to the regulation. It simply reflects a false and destructive obsession with blaming the pumps for every ailment in the Delta.”

Although they support the other water agencies' litigation, Westlands and SLDMWA needed to file a separate action as well because they rely on water from the federal Central Valley Project. The lawsuit filed today is based on violations of State law. Westlands and SLDMWA have an additional reason to ask for the new rule to be suspended because the U.S. Constitution bars the state from imposing these restrictions on a federal system.



What's Wrong with the Longfin Smelt Regulation

On November 13, 2008, 58 public water agencies, which are responsible for supplying more than 25 million Californians and nearly 2 million acres of farmland with water, joined in submitting a detail scientific analysis of the deficiencies in the longfin regulation to the California Fish and Game Commission. This is a summary of the key findings in that document.

Major Message Points in Public Water Agencies Cover Letter

- The Proposed Regulation is not supported by available data, provides no measurable protection to longfin smelt, and violates the most basic principles of regulatory law.
- The Proposed Regulation calls for potentially enormous reductions in the delivery of water supplies pumped through the Sacramento-San Joaquin Delta to serve the needs of two-thirds of California's population.
- It is being proposed in the midst of one of the worst droughts in our history when the State's water supply systems are already hampered by court-ordered

restrictions, and just after the Department of Water Resources (DWR) has announced drastically reduced allocations of water for the coming year.

- There is no evidence that these costly restrictions would provide any appreciable benefit to the longfin smelt. Worse, the Proposed Regulation ignores important factors driving the decline of longfin smelt in the Delta.
- This is a prime example of poor science being used to justify bad public policy.

Impacts on Water Supply

- DWR estimates the Proposed Regulation could result in additional water supply impacts of 1,100,000 acre-feet for average year conditions. These cutbacks would come on top of 660,000 acre feet lost in 2008 under court ordered cutbacks intended to assist another species of smelt.
- The Department of Fish and Game (DFG) contends the likelihood of such a high degree of impact is remote but it also acknowledges severe impacts are possible.
- Public Water Agencies have to plan for at least a 90% level of certainty when preparing to meet the needs of the public.
- The lack of certainty resulting from the Proposed Regulation by itself, will result in water being lost because, for example, farmers will be unable to plant irrigated crops for which no water supply is certain.
- The potential costs of the Proposed Regulation to Public Water Agencies could exceed \$220,000,000 per year. The costs to the state's economy in lost jobs, business failures, and ruined crops would run into many billions of dollars.

No Benefit to Fish

- DFG's own surveys demonstrate that longfin smelt rarely inhabit areas influenced by operation of CVP and SWP pumps. Instead they are found in abundance miles away and seaward.
- . The highest year of longfin smelt entrainment in December was 1997, when an estimated 0.6% of the population was entrained. Entrainment in other years was often zero.
- The highest percentage of entrainment of larvae and juveniles from March through June occurred in 2002, when an estimated 0.0017% of the population was entrained.

Fish and Game Ignores Well Known Threats to Longfin

- The Proposed Regulation fails to offer any measures to address, understand, and control the important threats to the longfin smelt populations in the Delta that DFG itself has previously referenced including invasive species, toxics, predation, ocean conditions, and a changing food web.
- DFG also turns a blind eye to in-Delta diversions which number in the thousands. DFG previously recognized that these diversions are a source of longfin smelt mortality but nevertheless extended take authorization to them without requiring any monitoring, minimization, or mitigation
- The Proposed Regulation also ignores DFG's assurances in a letter to the Bureau of Reclamation March 5, 2008, in which it acknowledged that numerous activities

harm the longfin smelt in the Delta and promised to evaluate the adverse effects of those activities and develop protective measures to minimize them.

The Proposed Regulation Oversteps the Commission's Legal Authority

- The Commission has no authority to regulate DWR and Reclamation under the California Endangered Species Act (CESA).
- According to the Supremacy Clause of the U.S. Constitution, the Commission cannot use a state statute to regulate a federal water system.
- The Proposed Regulation also ignores the proportionality requirements under CESA that bars regulations if their adverse impacts far exceed their benefits.

Recommended Alternative

- Omit the sections of the Proposed Regulation related to the CVP and SWP, as the data indicate take has had no measurable impact on longfin smelt population.
- Authorize continued operation of the CVP and SWP for the longfin smelt candidacy period; provided that DWR and Reclamation continue to monitor and report the take of longfin smelt and meet their other regulatory obligations to protect fish and wildlife.
- Inventory all sources of industrial and wastewater discharges that affect the region occupied by longfin smelt
- Require monitoring of all activities producing toxicity that might result in take.
- Implement analysis program to identify chemical constituents and specific levels of toxicity affecting the natural mortality of longfin smelt.
- Promulgate regulations to mitigate for these impacts.
- Prohibit all boating and watercraft activities in areas where monitoring data indicate the presence of longfin smelt, as DFG states that larval longfin smelt reside at the surface of the water column and therefore are exposed to unlawful take by these unregulated activities.