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5. WATER: Calif. project at risk from court ruling on fish kills

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In a preliminary decision issued March 22, Alameda County Superior Court Judge Frank Roesch ruled that operations at a critical water pumping facility on the California State Water Project system are killing chinook salmon and delta smelt in violation of the California Endangered Species Act. He declared that the Department of Water Resource has never obtained an incidental take permit covering the affected species. The judge gave DWR 60 days to obtain such a permit from the Department of Fish and Game or to otherwise make a showing that it is in compliance with the law, or risk shutting down the Harvey O. Banks pumping station, near Tracy.

Such a move could jeopardize state water exports to millions of people, farms and business in Central and Southern California.



The 444-mile long California aqueduct carries massive amounts of water to farms and communities in Southern California. Photo courtesy of DWR.

While DWR says it will appeal the ruling, officials faced withering criticism this week during a hearing of the state Senate's Natural Resources Committee. Lawmakers pointedly reminded them that, during hearings in 2005, committee members had stressed the need to obtain the permits.

The case against DWR was filed last June by Watershed Enforcers, a litigation project of the California Sportsfishing Protection Alliance [*Watershed Enforcers v. CDWR*, No RG06292124]. As the judge noted in his **decision**, "The parties are in general agreement about almost all of the underlying facts in this matter but strongly disagree about

the legal consequences attendant to those facts."

Basically, DWR contends that it is already in compliance with the law as a result of its participation in five agreements governing operations of the state water project and exports from the Sacramento-San Joaquin River Delta, including the 1994 CalFed framework agreement.

Judge Roesch rejected that argument out of hand. "The best that can be said about the five documents ... is that the documents accept that fish will be killed in the Harvey O. Banks Pumping Plant Operations and that the parties agree that mitigation measures will be undertaken." He found that contrary to DWR's assertions the documents, "do not qualify as carte blanche authorization of incidental take" at the pumping station.

Though the judge has given parties until April 6 to file comments before he finalizes the ruling, he put DWR

on notice that unless the agency complies with requirements for the take permit within 60 days, he will impose the cease and desist order against water project operations.

"We're perplexed with the court's ruling in this case," DWR Director Lester Snow told reporters last Friday after the ruling was released. "We find the prospect of curtailing pumping to be unacceptable in terms of the economic consequences to the state."

As the agency did during the case, Snow tried to promote several pending processes for resolving intractable delta problems, including a "Delta Vision" and a Bay-Delta Conservation Plan, as providing mitigations for the fish kills that have nearly wiped out the endangered delta smelt. "We certainly will suggest that the judge reconsider his draft decision and put it in terms that are more logical and acceptable to developing a conservation program for the delta," Snow said.

Speaking with *Land Letter* this week, Mike Chrisman, secretary of the California Resources Agency confirmed the state intends to appeal the ruling because it cannot obtain a permit in the time frame. "We understand it, we just don't agree with it," he said.

Smokescreen

"DWR seems to be in a state of denial," responded Bill Jennings, executive director of the sportsfishing group that prevailed in its case. "I'm fascinated that given the gravity of the situation, DWR is playing Russian roulette."

John Buettler, conservation director for the group called California's position on the possible consequences to the state's economy as a smokescreen. "They've known for a long time they are not in compliance with the law," he said.

"I see a lot of this as trying to apply pressure on the court to win concessions," he said.

Buettler also rejected the reliance on a conservation plan. "That could take four to six years to complete," he added. "They still wouldn't have a permit and no plan to replace the fish."

Jennings said that the increase in fish mortality can be tied to higher levels of water exports that the state has approved in recent years. The real goal of the litigation is to try to restore fish to sustainable levels. "We can't take any lower indices of delta smelt and expect them to survive," he said.

A "sight reduction" in exports -- by about 1.5 million acre-feet per year -- "might not be the calamity they expect," Jennings said.

[Click here](#) to read the judge's ruling.

