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REFER TO FILE #
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September 27, 2007

VIA CERTIFIED MAIL

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Lieutenant General Robert L. Van Antwerp
Commander and Chief of Engineers
U.S. Army Corps of Engineers, Headquarters
441 G. Street, NW
Washington, DC 20314

Re: Notice of Intent to Sue for Violations of the Endangered Species Act

To Whom It May Concern:

On behalf of Coalition for a Sustainable Delta (“Coalition”), Belridge Water Storage District, Berrenda Mesa Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and Mr. Dee Dillon, I write to provide you notice pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(1)(A), that Mirant Delta

LLC (“Mirant”) and the U.S. Army Corps of Engineers (“Corps”) have violated and continue to violate the Endangered Species Act.

- Mirant has violated and continues to violate the ESA by failing to comply with the prohibition on “take” of listed species in the ESA and its implementing regulations, 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a), and failing to avoid an irreversible or irretrievable commitment of resources pending the completion of consultation which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would not violate ESA section 7(a)(2), 16 U.S.C. § 1536(d).
- The Corps has violated and continues to violate the ESA and Administrative Procedure Act (“APA”) by failing to insure that its actions do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat, 16 U.S.C. § 1536(a)(2), and failing to avoid making an irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would not violate section 7(a)(2), 16 U.S.C. § 1536(d).

The Coalition, Belridge Water Storage District, Berrenda Mesa Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and Mr. Dillon are concerned about the harm caused to the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt due to the operation of two natural gas fired electrical generating power plants by Mirant (that are also owned by Mirant and for which Mirant has obtained permits from the Corps) known as the Contra Costa Power Plant and Pittsburg Power Plant. The Coalition, Belridge Water Storage District, Berrenda Mesa Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and Mr. Dillon are prepared to initiate litigation if these violations are not adequately addressed.

I. Factual background

A. The Affected Listed Species

1. Sacramento River winter-run chinook salmon

The Sacramento River winter-run chinook salmon is an anadromous fish that migrates through the Sacramento-San Joaquin Delta (hereinafter, “the Delta”) to the upper Sacramento River from December to May. Anadromous fish spend most of their life in the ocean but must enter fresh water rivers and streams to spawn. The National Marine Fisheries Service (“NMFS”) listed the Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed. Reg. 440 (Jan. 4, 1994). NMFS designated critical habitat for the Sacramento River winter-run chinook salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

2. Central Valley spring-run chinook salmon

The Central Valley spring-run chinook salmon is an anadromous fish that migrates through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

3. Central Valley steelhead

The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS designated critical habitat for the Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

4. The Delta Smelt

The delta smelt is small translucent fish with a narrow geographic range limited to low salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing the delta smelt as threatened). The delta smelt is “the only true native estuarine species found in the Delta.” *Id.* The delta smelt is one of a number of pelagic organisms that are in decline in the Delta. “Pelagic organisms live in the ocean or estuaries like the Delta.” Resources Agency et al., Pelagic Fish Action Plan at 4 (March 2007). The sources of the pelagic organism decline are manifold and poorly understood. *Id.* at 10 (identifying numerous contributors to the decline of the Delta’s health and indicating that more research is essential to evaluate those contributors). The Fish and Wildlife Service (“FWS”) listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. at 12,854. FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994).

B. *Mirant’s Contra Costa and Pittsburg Power Plants*

Mirant owns and operates two natural gas fired electrical generating power plants in Contra Costa County, California. The Contra Costa Power Plant is a 690 megawatt (MW) facility located on the south shore of the San Joaquin River, east of the City of Antioch. Mirant Delta, LLC, Mirant Proposed BDCP Covered Activities at 3 (BDCP Steering Committee May 4, 2007). The Pittsburg Power Plant is a 1,400 MW facility located on the south shore of Suisin Bay, west of the City of Pittsburg. *Id.* at 2.

The power plants use large volumes of water to cool steam used to rotate turbines that generate electricity. Cooling water intake structures intake water from the Delta and return water

at a higher temperature to the Delta. The maximum design flow of the power plant systems is over one billion gallons per day. *Id.* at 2-3.

Mirant's ownership and operation of the power plants adversely affects ESA-listed species, including the endangered Sacramento winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt, in the Delta. Cooling water intake structures directly and indirectly cause a number of detrimental effects on fish populations, including the Sacramento winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt. Adverse effects on fish and fish habitat include, but are not limited to, entrainment, impingement, and increased water temperature (i.e., thermal effects).

A Draft Multispecies Habitat Conservation Plan prepared by Mirant for the Pittsburg and Contra Costa Power Plants includes data regarding entrainment and impingement of the Sacramento winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt at the Plants. The data are derived from two studies: one conducted in 1978 and 1979 and a second conducted from 1986 through 1992. Mirant Delta LLC, Draft Multispecies Habitat Conservation Plan at 3-26 to 3-36, 3-70 to 3-84 (Jan. 31, 2001). Without endorsing or accepting as correct the data or Mirant's interpretation of the data, we nevertheless reproduce a subset of *Mirant's own data* that plainly establish that Mirant has taken and continues to take listed species through its operation of the power plants.

1. Effects on Anadromous Fish

According to the 1978-79 study, at the Pittsburg Power Plant annual impingement of winter-run chinook salmon was 323 of 808 ± 132 and annual impingement of spring-run chinook salmon was 469 of 808 ± 192 .¹ Draft Multispecies Habitat Conservation Plan at 3-34. Based on this data, Mirant estimated annual impingement in 2001 to be 23 for winter-run chinook salmon and 469 of 808 ± 192 for spring-run chinook salmon. *Id.* Thus, Mirant itself acknowledged that its operation of the Pittsburg Power Plant results in the take of the listed Central Valley spring-run chinook salmon and Sacramento winter-run chinook salmon.

According to the 1978-79 study, at the Contra Costa Power Plant annual impingement of winter-run chinook salmon was 53 of 763 ± 22 , annual impingement of spring-run chinook salmon was 275 of 763 ± 114 , and annual impingement of steelhead was 38 ± 39 . Draft Multispecies Habitat Conservation Plan at 3-79. Based on this data, Mirant estimated annual impingement in 2001 to be 4 for winter-run chinook salmon, 275 of 763 ± 114 for spring-run chinook salmon, and 38 ± 39 for steelhead. *Id.* Thus, Mirant itself acknowledged that its

¹ According to Mirant, where an estimate in this section or the following section includes a range (i.e., $x \pm y$), that range is the 95 percent confidence interval. Also, according to Mirant, estimates for the salmon species include the total number of such species and the proportion believed to fall within the relevant ecologically significant unit (or ESU).

operation of the Contra Costa Power Plant results in the take of the listed Central Valley spring-run chinook salmon, Sacramento winter-run chinook salmon, and Central Valley steelhead.

On October 17, 2002, NMFS issued a biological opinion and incidental take statement for the Contra Costa and Pittsburg Power Plants. In a cover letter to the biological opinion, NMFS explained that the biological opinion “analyzes impacts to the endangered Sacramento winter-run Chinook salmon (*Oncorhynchus tshawytscha*), threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*), and threatened Central Valley steelhead (*O. mykiss*), and their designated critical habitat resulting from Mirant Delta, LLC.’s proposed Aquatic Filter Barrier (AFB) Project at the Contra Costa Power Plant ... and Pittsburg Power Plant ... and the dredging of the area of Suisun Bay adjacent to the cooling water intake structures at the [Pittsburg Power Plant].” Letter from R. McInnis, National Marine Fisheries Service to M. Finan and C. Fong, U.S. Army Corps of Engineers at 1 (Oct. 17, 2002).

The biological opinion characterizes the proposed action as follows:

The analysis in this biological opinion focuses on the Corps’ issuance of 5-year permits for the deployment of the Aquatic Filter Barrier at [the Contra Costa and Pittsburg Power Plants] and issuance of a 5 or 10-year permit for dredging at the [Pittsburg Power Plant]. During the permit term, Mirant proposes to operate the plants pursuant to a conservation program so as to minimize and fully mitigate the impacts of plant operation.

NMFS Biological Opinion at 25 (Oct. 17, 2002).

In a letter to Mirant dated April 9, 2004, NMFS stated that its incidental take statement is moot.

It is NOAA Fisheries’ understanding that the Corps permits have not been issued and the proposed AFB project has not been pursued or considered further by Mirant. These activities were the basis of the biological opinion. Unless and until a permit is issued and the proposed activities proceed, the biological opinion and accompanying incidental take statement are moot.

Letter from R. McInnis, National Marine Fisheries Service to R. Kino, Mirant California LLC at 1 (April 9, 2004).

2. Effects on Delta Smelt

According to the 1978-79 study, annual entrainment of delta smelt at the Pittsburg Power Plant was $455,413 \pm 184,516$. Draft Multispecies Habitat Conservation Plan at 3-28. Based on this data, Mirant estimated annual entrainment in 2001 to be 46,000. *Id.* According to the 1986-92 study, entrainment of delta smelt at the Pittsburg Power Plant during the period May through July was $12,924 \pm 12,661$. *Id.* at 3-30. The 1978-79 study also provided data regarding impingement of delta smelt at the Pittsburg Power Plant concluding that estimated annual

impingement totaled $14,082 \pm 6,454$. *Id.* at 3-34. Based on this data, Mirant estimated annual impingement in 2001 to be 1,400. *Id.* Thus, Mirant itself acknowledged that its operation of the Pittsburg Power Plant results in the take of the listed delta smelt.

Likewise, according to the 1978-79 study, annual entrainment of delta smelt at the Contra Costa Power Plant (for all units) was $21,887 \pm 23,881$. Draft Multispecies Habitat Conservation Plan at 3-72. Based on this data, Mirant estimated annual entrainment in 2001 to be 2,200. *Id.* According to the 1986-92 study, entrainment of delta smelt at the Contra Costa Power Plant (for all units) during the period May through July was $11,863 \pm 11,621$. *Id.* at 3-75. The 1978-79 study also provided data regarding impingement of delta smelt at the Contra Costa Power Plant concluding that estimated annual impingement totaled $8,253 \pm 1,595$. *Id.* at 3-79. Based on this data, Mirant estimated annual impingement in 2001 to be 825. *Id.* Thus, Mirant itself acknowledged that its operation of the Contra Costa Power Plant results in the take of the listed delta smelt.

The FWS Recovery Plan for the delta smelt states that the Contra Costa and Pittsburg Power Plants “entrain large numbers of delta smelt juveniles and larvae.” Recovery Plan for the Sacramento/San Joaquin Delta Native Fishes at 21. More recently, in a major report on the Delta, the Public Policy Institute of California indicated that “entrainment of fish at the power plants at Pittsburg and Antioch is potentially a major source of mortality, especially of larval fish, that could significantly contribute to the pelagic organism decline.” Envisioning Futures for the Sacramento-San Joaquin Delta at 222 (2007).

On November 4, 2002, FWS issued a biological opinion and incidental take statement for the Contra Costa and Pittsburg Power Plants. According to the biological opinion, the proposed action includes:

- (1) Constructing, deploying, operating, maintaining, repairing, monitoring and evaluating an AFB to reduce entrainment and impingement of aquatic organisms at the Contra Costa Power Plant.
- (2) Using the Variable Speed Drive (VSD) Program at the Contra Costa Power Plant as a temporary backup measure in the event that the AFB is damaged.
- (3) Using the VSD Program at the Pittsburg Power Plant to reduce cooling flows while the AFB is evaluated at the Contra Costa Power Plant, and implementing an AFB at the Pittsburg Power Plant if it is found to be effective at the Contra Costa Power Plant.
- (4) Enhancing and preserving 139 acres at the Montezuma enhancement site.
- (5) Implementing a number of other conservation measures to reduce overall effects to fish and wildlife.

FWS Biological Opinion at 3 (Nov. 4, 2002).

The terms and conditions of the biological opinion state – with respect to both the Contra Costa and Pittsburg Power Plants – that “[t]he project shall be implemented as proposed in the project description and [Draft Multispecies Habitat Conservation Plan] except as modified by terms and conditions of this biological opinion.” *Id.* at 40-41 (conditions 1.a. and 4.a.).

In a letter to the Corps of Engineers dated August 25, 2004, FWS noted that it “completed a November 4, 2002, biological opinion ... based on a project description that included the AFB...” FWS went on to state that its biological opinion “required reinitiation of formal consultation in the event the AFB is not implemented.” Then in a subsequent letter to the Corps of Engineers dated January 31, 2006, FWS stated that it expects “that the operation of the power plants has resulted in take and continues to take delta smelt.” FWS went on to make the following statement: “Mirant is not covered for take of delta smelt at the Pittsburg and Contra Costa power plants through the November 4, 2002 biological opinion because the AFB was not implemented to exclude delta smelt from entrainment.” In a letter dated February 16, 2006, the Corps of Engineers requested reinitiation of consultation. Reinitiation has not resulted in a new or amended biological opinion.

II. Legal Violations of the Endangered Species Act

Mirant has violated and continues to violate the take prohibition in section 9(a)(1)(B) of the ESA and its implementing regulations as well as section 7(d) of the ESA. Section 9(a)(1)(B) of the ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (stating, in part, that “with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to ... take any such species within the United States or the territorial sea of the United States). The ESA expressly provides that FWS and NMFS can extend this take prohibition to threatened species, such as the delta smelt. 16 U.S.C. § 1533(d) (“The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife”). And FWS and NMFS have by regulation extended the take prohibition to the threatened delta smelt, Central Valley spring-run chinook salmon, and Central Valley steelhead. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a). Mirant is violating section 7(d) by failing to avoid an irreversible or irretrievable commitment of resources pending the completion of consultation which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would not violate section 7(a)(2). 16 U.S.C. § 1536(d).

The Corps has violated and continues to violate the sections 7(a)(2) and 7(d) of the ESA. 16 U.S.C. § 1536(a)(2), (d). The Corps is violating section 7(a)(2) by failing to insure that actions taken by Mirant and authorized by the Corps do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The Corps is violating section 7(d) by failing to avoid an irreversible or irretrievable commitment of resources pending the completion of consultation which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures that would not violate section 7(a)(2). 16 U.S.C. § 1536(d).

A. *Violation of the Take Prohibition by Mirant*

Mirant violated and continues to violate the take prohibition because the operation of the power plants in the Delta “take” listed species. The ESA and its implementing regulations prohibit any person from “taking” any endangered and certain threatened species of fish or wildlife listed under the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a). “Any taking and every taking – even of a single individual of the species – is prohibited by the Act.” *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) (citing 16 U.S.C. § 1538, emphasis omitted). “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. *Id.* at § 1532(19). FWS and the NMFS have defined “harm” 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.

There is indisputable evidence that Mirant has taken and continues to take the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt through its operation of the Contra Costa and Pittsburg Power Plants. *See Draft Multispecies Habitat Conservation Plan; see also U.S. Environmental Protection Agency, Case Study Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule E3-1 to E3-17* (Feb. 2002); Zoltan Matica & Ted Sommer, *Draft Aquatic Impacts of the Pittsburg and Contra Costa Power Plants* (Cal. Dept. of Water Res. Sept. 30, 2005). The illegal take of the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt by Mirant has occurred ever since the time of listing of each of these fish species.

The incidental take statement issued by the Fish and Wildlife Service together with its 2002 Biological Opinion does not authorize the take of delta smelt by Mirant. An incidental take statement only immunizes an action agency (and third party applicant) from the take prohibition in section 9 if the taking by that action agency (and third party applicant) is in compliance with the terms and conditions of the incidental take statement. 16 U.S.C. § 1536(o)(2) (“any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned”); *see also Arizona Cattle Grower's Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001) (“the Incidental Take Statement functions as a safe harbor provision immunizing persons from Section 9 liability and penalties for takings committed during activities that are otherwise lawful and in compliance with its terms and conditions”). “[I]f the terms and conditions of the Incidental Take Statement are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9.” *Arizona Cattle Grower's Ass'n*, 273 F.3d at 1239.

Mirant failed to comply with numerous terms and conditions of the incidental take statement. For example, condition 1.a. states with respect to the Contra Costa Power Plant that “[t]he project shall be implemented as proposed in the project description and [Draft

Multispecies Habitat Conservation Plan] except as modified by terms and conditions of this biological opinion.” FWS Biological Opinion at 40. The project includes construction and deployment of an AFB at the Contra Costa Power Plant. *E.g.*, FWS Biological Opinion at 3 (Mirant “gas submitted an application to Corps that would commit Mirant to deploy and operate an aquatic filter barrier (AFB) at the Contra Costa Power Plant...”); Draft Multispecies Habitat Conservation Plan at ES-20 (“The AFB will be deployed, maintained, monitored and evaluated at the Contra Costa Power Plant...”). Mirant has failed to comply with this condition. In fact, Mirant informed the FWS in 2005 that it does not intend to install the AFB. Letter from J. Hernandez, Beveridge & Diamond to R. Olah, FWS (April 11, 2005).

Likewise, Mirant failed to comply with conditions 2.a. and 2.b. respecting monitoring. *See* FWS Biological Opinion at 40. The FWS and National Marine Fisheries Service joint regulations respecting inter-agency consultation state that the “applicant must report the progress of the action and its impact to the species to the Service as specified in the incidental take statement.” 50 C.F.R. 402.14(i)(3); Final ESA Section 7 Consultation Handbook at 9-1 (March 1998) (“the terms and conditions must include provisions for monitoring project activities to determine the actual project effects on listed fish or wildlife species”). Mirant has failed to provide periodic reports to FWS regarding effects on the delta smelt of entrainment, impingement, and increased water temperature due to operation of the power plants. In fact, Mirant has not provided a single monitoring report to FWS since the issuance of the Biological Opinion almost five years ago.

In 2006, FWS informed Mirant that “Mirant is not covered for take of delta smelt at the Pittsburg and Contra Costa power plants through the November 4, 2002 biological opinion because the AFB was not implemented to exclude delta smelt from entrainment.” Letter from W. White, FWS to M. Finan and J. Hicks, U.S. Army Corps of Engineers (Jan. 31, 2006). Nevertheless, Mirant continues to operate the power plants thereby violating the ESA.

Similarly, the incidental take statement issued by the National Marine Fisheries Service together with its 2002 Biological Opinion does not authorize the take of the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead by Mirant. Issuance of the incidental take statement was premised on implementation of Mirant’s Draft Multispecies Habitat Conservation Plan. NMFS Biological Opinion at 4-21. And Mirant has failed to implement the Plan. Additionally, Mirant failed to comply with terms and conditions of the incidental take statement including those terms related to implementation of the AFB and respecting monitoring. NMFS Biological Opinion at 48, 51. NMFS notified Mirant in 2004 that the 2002 Biological Opinion and accompanying incidental take statement are moot and Mirant cannot rely upon the incidental take statement to authorize take of listed species. Letter from R. McInnis, National Marine Fisheries Service to R. Kino, Mirant California LLC at 1 (April 9, 2004). Despite the fact that Mirant did not comply with the terms and conditions of the NMFS Biological Opinion and therefore does not have take coverage, Mirant continues to operate the power plants thereby violating the ESA.

B. *Violation of the Requirement to Avoid Jeopardy and Adverse Modification by the Corps of Engineers*

Section 7(a)(2) of the ESA imposes an affirmative duty on federal agencies, including the Corps, “to insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species...” 16 U.S.C. § 1536(a)(2); *TVA v. Hill*, 437 U.S. 153, 173 (1978). The Corps violated section 7(a)(2) by authorizing Mirant to take listed species and destroy or adversely modify critical habitat of those listed species without insuring that Mirant would implement conservation measures described in the FWS Biological Opinion and NMFS Biological Opinion.

This case is analogous to *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987). In *Marsh*, the FWS issued a biological opinion including reasonable and prudent alternatives for a project that the Corps funded and subsequently approved. One important provision of the biological opinion required the Corps to acquire and preserve mitigation habitat to offset impacts to two listed bird species. The Corps failed to ensure the acquisition and preservation of the mitigation habitat *prior to* the impacts to the listed species. The Court held that the Corps is in violation of section 7(a)(2) because it allowed impacts to the listed species without first insuring that conservation measures would be implemented to offset those impacts. *Id.* at 1389 (“if an agency plans to mitigate its project’s adverse effects on an endangered species by acquiring habitat and creating a refuge, it must insure the creation of that refuge before it permits destruction or adverse modification of other habitat”).

With respect to the FWS Biological Opinion, the Corps requested reinitiation of consultation on February 16, 2006.² This action by the Corps does not change the fact that the Corps is in violation of section 7(a)(2) because it failed to ensure that Mirant would implement conservation measures that provided a basis for FWS’s biological opinion and incidental take statement. Construction and maintenance of the AFB is the principal conservation measure set forth to reduce the massive amounts of entrainment and impingement of listed fish species that occurred prior to issuance of the FWS Biological Opinion. Mirant’s failure to implement this conservation measure has led to continued entrainment and impingement of listed fish at both the Contra Costa and Pittsburg Power Plants. By allowing Mirant to proceed, the Corps failed to fulfill the requirements of section 7(a)(2). *Cf. Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (stating that, in order to avoid violating section 7(a)(2), an action agency must develop mitigation measures that are “reasonably specific, certain to occur, and capable of implementation; ... subject to deadlines or otherwise-enforceable obligations; and most important, ... address the threats to the species in a way that satisfies the jeopardy and adverse modification standards”).

² To date, reinitiation has neither resulted in a new nor an amended biological opinion.

With respect to the NMFS Biological Opinion, the Corps has neither reinitiated consultation nor taken any other action to ensure that Mirant will implement the conservation measures described in the biological opinion prior to impacts to listed species and their critical habitat. For the same reasons stated above, by allowing Mirant to continue to operate its power plants, the Corps failed to fulfill the requirements of section 7(a)(2).

C. *Violation of Requirement to Avoid Irreversible or Irretrievable Commitment of Resources by the Corps and Mirant*

Section 7(d) imposes an affirmative duty on federal agencies (including the Corps) and permit applicants (including Mirant) to, after initiation of consultation, “not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [section 7(a)(2)].” 16 U.S.C. § 1536(d). *Accord* 50 C.F.R. §§ 402.01 (“Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”), 402.09 (“After ... reinitiation of consultation ... the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.”).

The term agency action is defined broadly to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States...” 50 C.F.R. § 402.02; *see also TVA v. Hill*, 437 U.S. at 173. The Corps and Mirant violated and continue to violate section 7(d). The Corps has done so by allowing Mirant to continue to operate the Power Plants and thereby alter the status quo by taking listed fish species and adversely modifying or destroying their critical habitat before completing the consultation process that the Corps itself initiated by letter dated February 16, 2006. Mirant has done so through the continued operation of its Power Plants, which altered the status quo and resulted in the take of listed fish species and adverse modification or destruction of their critical habitat, subsequent to reinitiation by the Corps.

Caselaw interpreting section 7(d) reiterates the plain language requiring federal agencies and permit applicants to maintain the status quo pending completion of consultation. For example, the Ninth Circuit has held that “section 7(d) clarifies the requirements of Section 7(a), ensuring that the status quo will be maintained during the consultation process” *Connor v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988). *Accord Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n.14 (9th Cir. 1994). Additionally, “[s]ection 7(d) applies both to public and

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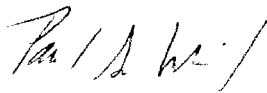
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private lands, to any action requiring federal authorization, and to federal agencies and permit applicants, irrespective of whether the applicant is a private or public actor.” *EPIC v. Pacific Lumber Co.*, 67 F. Supp. 2d 1090, 1112 (N.D. Cal. 1999).

III. Conclusion

Mirant and the Corps have violated and continue to violate the ESA. Their illegal actions have contributed to the decline of a number of listed fish species native to the Delta.

Very truly yours,



Paul S. Weiland
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

PSW/lhh