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REFER TO FILE #
300062 - 0001

October 25, 2007

VIA U.S. MAIL

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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"), Beldridge Water Storage District, Berrenda Mesa Water District, Cawelo 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)(2)(A), that the California Fish and Game Commission (“CFGC”) and California Department of Fish and Game (“CDFG”) (collectively, the “Agencies”) have violated and continue 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). The Coalition, Belridge Water Storage District, Berrenda Mesa Water District, Cawelo 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 Agencies’ sport fishing regulations, which were promulgated and are enforced in order to manage and maintain the non-native striped bass population in the Sacramento-San Joaquin Delta (hereinafter, “the Delta”).

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 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. *The Agencies’ Sport Fishing Regulations*

The striped bass is a fish species that is not native to the Delta and was introduced into the area in the late 19th century. According to estimates, the striped bass population in the Delta has fluctuated from a low of approximately 600,000 to a high of 3,000,000. Striped bass adversely affect ESA-listed species, including the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt, that migrate through (in the case of the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead) or reside in (in the case of the delta smelt) and are native to the Delta. Adverse effects on fish are the result of striped bass predation of listed fish species.

In the early 1980s, the sports fishing industry successfully lobbied the State of California to enact legislation that created a striped bass fishing stamp to generate funds to support the non-native striped bass population in the Delta. Striped Bass Restoration and Management Plan for the Sacramento – San Joaquin Estuary Phase I at 6 (Sept. 1989). Among other things, the funds were used to raise striped bass in hatcheries and stock the Delta with more than 5.5 million striped bass. *Id.* The funds also were used to prepare the Striped Bass Restoration and Management Plan. *Id.* at 7.

In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore the striped bass fishery in the Delta. See CFGC Striped Bass Policy, available at <http://www.fgc.ca.gov/html/p2fish.html#STRIPED>. Consistent with the Striped Bass Restoration and Management Plan, the CFGC striped bass policy establishes a long-term striped bass restoration goal of 3,000,000. See *id.*

Around the same time that CFGC adopted its striped bass policy, CDFG began work on a conservation plan for activities associated with management of striped bass in the Delta. *See* Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the California Department of Fish and Game for Activities under the Striped Bass Management Program at 1 (National Marine Fisheries Service, June 23, 2000). The purpose of the Conservation Plan for the California Department of Fish and Game Striped Bass Management Program was to obtain authorization from NMFS and FWS for take of listed species “that may result from implementation of its Striped Bass Management Program.” Conservation Plan for the Striped Bass Management Program at 2 (Nov. 12, 1999). NMFS and FWS both issued incidental take permits (hereinafter “take permits”) for the Striped Bass Management Program on June 23, 2000. Federal Fisheries Permit No. 1257 (National Marine Fisheries Service, June 23, 2000); Federal Fish and Wildlife Permit No. TE028154-0 (Fish and Wildlife Service, June 23, 2000). The take permits authorize take of, *inter alia*, the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt.

The Conservation Plan for the Striped Bass Management Program described the covered activities as: stocking of striped bass in the Delta at numbers sufficient to stabilize and maintain a population of 712,000 adults; possible recommendations to the CFGC for changes to striped bass fishing regulations to reach and maintain the target population level; and striped bass monitoring. *See* Conservation Plan for the Striped Bass Management Program at 2. The take permits issued by NMFS and FWS for the Conservation Plan for the Striped Bass Management Program expired on December 31, 2004 and December 30, 2004, respectively.

Under California law, CFGC has regulatory authority to establish seasons, bag limits, and methods of take for sport fish including the striped bass. Cal. Fish & Game Code § 203. CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. CDFG is responsible for enforcing those regulations including through the appointment of deputies. Cal. Fish & Game Code §§ 850-53; Conservation Plan for the Striped Bass Management Program at 43.

CDFG estimates that at a population of 765,000 adults, striped bass consume 6 percent of the Sacramento River winter-run chinook salmon population and 3 percent of the threatened Central Valley spring-run chinook salmon population. Conservation Plan for the Striped Bass Management Program at 26, App. E. In its Proposed Recovery Plan for the Sacramento River winter-run chinook salmon, NMFS identified the Striped Bass Management Program as one of a number of factors affecting the species. NMFS Proposed Recovery Plan for the Sacramento River Winter-run Chinook Salmon at III-77 to III-82 (Aug. 1997). NMFS notes that striped bass prey upon juvenile salmon. *Id.* at III-80. Likewise, in its 2007 Recovery Outline for the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead, NMFS identifies predation including predation by striped bass, as a threat to Sacramento River winter-run chinook salmon and Central Valley spring-run chinook

salmon. 2007 Recovery Outline for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead at 21, 25 (May 2007). The 2007 Recovery Outline states that predation rates do not account for the large decline observed in West Coast steelhead populations but may significantly influence local steelhead populations. *Id.* at 29.

CDFG estimates that at a population of 765,000 adults, striped bass consume 5.3 percent of the delta smelt population annually. Conservation Plan for the California Department of Fish and Game Striped Bass Management Program at 32, App. E. In its final rule listing the delta smelt, the FWS opines that “the introduced striped bass may have caused an increase in predation on all size classes of the delta smelt.” 58 Fed. Reg. 12,854, 12,860 (March 5, 1993). Furthermore, the FWS Recovery Plan for the delta smelt states that, due to predation, “it is quite possible that at low population levels interactions with [striped bass] could prevent recovery.” Recovery Plan for the Sacramento/San Joaquin Delta Native Fishes at 23 (Nov. 1996).

II. Legal Violations of the Endangered Species Act

The Agencies have violated and continue to violate the ESA’s take prohibition. 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 1533 of this title 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 1538(a)(1) of this title, 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).

Through adoption and enforcement of striped bass sport fishing regulations that maintain the population of non-native striped bass in the Delta, the Agencies violated and continue to violate the ESA’s take prohibition. “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 strong evidence that striped bass prey upon juvenile salmon and steelhead as well as delta smelt. In fact, as mentioned above, CDFG has estimated that striped bass consume

more than five percent of the total delta smelt population, six percent of the Sacramento River winter-run chinook salmon population, and three percent of the threatened Central Valley spring-run chinook salmon population annually. Even using conservative population estimates for these listed species, striped bass predation results in the take of a significant number of protected fish. For example, assuming a Central Valley spring-run chinook salmon population of 50,000 juveniles and assuming that CDFG is correct in estimating that striped bass consume 3 percent of that population, such predation accounts for “take” of over 1500 Central Valley spring-run chinook salmon annually. The illegal take of listed fish species by the Agencies has occurred ever since the time of listing of those species including the period when the Conservation Plan for the Striped Bass Management Program and associated take permits were effective (*i.e.*, June 2000 to December 2004). The Conservation Plan for the Striped Bass Management Program by its own terms did not provide take coverage for the *existing* striped bass fishing regulations. In any event, *the take permits expired more than two-and-one-half years ago.*

The Agencies’ sport fishing regulations operate to protect and increase the non-native striped bass population in the Delta because they bar sports fisherman from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18 inches in length. This is consistent with CFGC’s goal of increasing the striped bass population in the Delta to 3,000,000 and with CDFG’s Striped Bass Restoration and Management Plan. By enacting and enforcing regulations to protect and increase the non-native striped bass population, the Agencies are taking listed species in violation of section 9 of the ESA. There is substantial precedent holding that a governmental entity can be liable for illegal take of listed species in violation of section 9 where such take springs from the exercise of regulatory authority by that governmental entity. *E.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

This case is analogous to *Palila*. Plaintiffs in that case argued that the State of Hawaii violated section 9 of the ESA through the implementation of game management policies to maintain herds of feral sheep and feral goats in an area that is habitat for the ESA-listed endangered Palila (a bird species). These policies included manipulation of public hunting seasons. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985, 989 (D. Hawaii 1979). The Ninth Circuit stated in its holding that the feral sheep and goats degrade the Palila’s habitat due to their feeding and bedding behaviors. 639 F.2d at 496. The Ninth Circuit held that “[t]he state violated the Endangered Species Act by maintaining feral sheep and goats in the Palila’s habitat.” *Id.* at 498. Both here and in *Palila* the state implemented specific policies to maintain populations of non-native species that, in turn, threaten species listed under the ESA. And in both cases, the state acted in violation of the ESA.

III. Conclusion

The Agencies have violated and continue to violate the ESA by taking the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook

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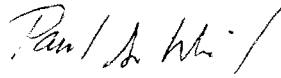
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salmon, threatened Central Valley steelhead, and threatened delta smelt. These illegal actions have contributed to the decline of these listed fish species in the Delta.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul S. Weiland". The signature is written in a cursive style with a long horizontal stroke at the end.

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

PSW/lhh