

The Time Has Come to Stop the Unnecessary Harm

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Back when I was studying water resources engineering in graduate school, I never would have imagined that my life – and the lives of the farmers I work for – would be so dominated by fish. Last Wednesday's ruling by a federal judge in Fresno provided a classic example of that.

U.S. District Court Judge Oliver Wanger last week denied a temporary restraining order requested by numerous California public water agencies to prevent pumping restrictions of the state and federal projects located in the Bay-Delta. As you likely know, the operations of those pumps – which supply water to some of the world's most productive farm ground and 25 million Californians – are restricted by a pile of court rulings and biological opinions written by federal fisheries biologists to satisfy requirements of the Endangered Species Act (ESA).

Stating his hands are tied by the inflexibility of the ESA, Judge Wanger had no choice but to deny the request because – are you ready for this? – six, count 'em, six Delta Smelt were recently entrained at the pumps. Moreover, if six more Delta Smelt are entrained, the U.S. Fish and Wildlife Service (USFWS) will enforce maximum restrictions on the projects, resulting in a shut down of additional pumps and leaving only a trickle of water to be used for farmers on the West side of the San Joaquin Valley. A similar situation last year resulted in hundreds of thousands of acres of fallowed farm ground, 20,000 lost jobs, and a \$1 billion hit to the local rural economy.

Clearly, the needs of fish have been placed ahead of the need for water to produce food, provide jobs and quench the thirst of millions of Southern Californians.

What is frustrating to see is that those restrictions aren't helping the smelt. Recent surveys show their numbers continue to fall. And USFWS is refusing to answer questions about whether there was any scientific basis for those restrictions in the first place.

The court has already determined that FWS violated the National Environmental Policy Act by adopting these restrictions without conducting an environmental impact analysis of the extraordinary harm they are doing to other endangered species and to the human environment. The agency has twice failed to perform the kind of independent review of these regulations that federal laws require. And now they're ducking questions about why the data on delta smelt don't support the limits on water deliveries that they have imposed.

The ESA and the federal Information Quality Act (IQA) set strict standards to ensure that federal

agencies use the best available scientific information and not their own assumptions and speculation when adopting regulations of this kind. These same laws establish a formal procedure enabling the public to ask questions and to request corrections. And they define the requirements that these agencies have to meet to ensure that independent peer reviews of proposed regulations are truly independent and objective.

My organization – the Family Farm Alliance - asked USFWS 25 questions about their smelt restrictions. They answered none of them. The so-called “independent” panel they assembled was never allowed to see the 25 questions that we submitted. Instead, USFWS chopped up the questions and scrambled all the bits and pieces in order to fashion what they called twelve general issues. They then chopped up the general issues and rescrambled everything a second time in order to make up nine questions of their own design. These are the only questions the panel was allowed to answer.

We are certainly not questioning the integrity or expertise of the individual panelists. They have simply participated in a process which USFWS has been manipulating for its own purposes.

As a result, the Alliance is seeking an order from the court to compel the agency to follow its own regulations.

All of our members in farming are vulnerable to arbitrary or capricious actions by federal regulators. However, the Alliance has a history of working cooperatively with public agencies to resolve this kind of problem. Until now, we've never had to file a lawsuit to compel an agency to follow its own regulations.

Our IQA litigation and other suits brought on by San Joaquin water users demonstrate the harm and likely continued decline of Delta smelt are due to ill-conceived and misplaced regulation. Meanwhile, desperate agriculture, water and business communities are working with elected officials to try to formulate a temporary, emergency plan to restore pumping so that the economic crisis that occurred last year is not repeated again.

The time has come to stop the unnecessary harm.