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January 11, 2010

The Honorable Ken Salazar
Secretary Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Re: Family Farm Alliance (Alliance) Information Quality Act (IQA) Appeal of the Draft Effects Analysis of the Biological Opinion on the Continued Long-Term Operations of the Central Valley Project (CVP) and the State Water Project (SWP) April 1, 2009

Dear Secretary Salazar:

As you know, the above-referenced biological opinion has had a serious, ongoing, deleterious impact on the economy and the environment of California in the period since it was issued on December 15, 2008. But the restrictions on water supplies that the Fish and Wildlife Service (FWS) have imposed are not helping the intended beneficiary, the delta smelt. According to the most recent surveys, smelt numbers are continuing to fall. And serious questions have been raised by public water agencies and the state about the competence, thoroughness and legal adequacy of the restrictions FWS has imposed.

We know that the Department of the Interior is working with the National Academy of Sciences to review the science underlying the opinion, and the Department's Interim Federal Action Plan for the California Bay-Delta proposes several actions that may mitigate the harmful effects of the biological opinion. The Alliance applauds these efforts.

These efforts, however, are very different from the obstinate resistance we have encountered with FWS. We recently submitted 25 questions to ensure that the biological opinion has received the kind of scientific rigor and review that is required by the Endangered Species Act (ESA) and the Information Quality Act (IQA). FWS refused to answer any of them. The Alliance has never had to file lawsuits before now. But we are writing to advise you that we have found that litigation seems to be the only way to determine whether there was ever any scientific basis for FWS's restrictions on water deliveries in California.

In response to the legal actions brought by others, the court has already determined that FWS violated the National Environmental Policy Act when it adopted these restrictions without performing an environmental impact statement to assess the harm they are doing to other endangered species and the human environment.

But those are not the only requirements FWS has failed to comply with.

ESA and IQA set strict standards to ensure that federal agencies use the best available scientific data 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.

The Alliance submitted a request for correction under IQA on December 14, 2008. We asked FWS 25 questions about their smelt restrictions. They answered none of them. Instead, this is how the agency responded:

- Our initial request was summarily rejected by FWS on March 12, 2009. We appealed that decision and had to go to court. FWS finally responded on November 20, eleven months after our request and only in response to our litigation.
- None of the members of FWS's original independent peer review panel met the standards required by law and three of the five members had authored the studies which FWS used to develop its restrictions – in effect, they were being asked to review the quality of their own work. When this was revealed, FWS agreed to appoint a second panel of independent reviewers.
- To assemble and chair this second panel, FWS hired the same company that had been responsible for putting together the first one and used the same former FWS employee to supervise the panel's work. Once again, as nearly as we can determine, none of the members of this panel were required to meet the standards set by law.
- The panelists were not asked to address the 25 questions that the Alliance submitted. Instead, FWS 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 that FWS has manipulated for its own purposes. The Alliance is deeply concerned with this abuse of the public process, not just because of the harm to California, but also because of the threat this kind of behavior poses for our members and for the larger agricultural community throughout the United States.

It shouldn't take a court order to break through the stone wall that FWS has erected. We would prefer to work with you, constructively, to restore the transparency and scientific objectivity that the law requires and the public expects for these decisions.

Transparency requires the use of original and supporting data and analytic results that are substantially reproducible. We asked for corrections precisely because FWS has not met that requirement. We requested that FWS either provide data to support its assertions and assumptions in the biological opinion or remove them. But FWS's final response fails to address the concern that assumptions, not data, formed the basis of their opinion.

Worse, FWS's assumptions are actually contradicted by the data.

The Family Farm Alliance advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. We are focused on one mission - to ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. All of our members in farming are vulnerable to arbitrary or capricious actions by federal regulators. It is inherent in the basic nature of our alliance that we work together to ensure that fairness and scientific integrity are observed in regulatory decisions that could wind up affecting us all.

We hope that you share our disappointment in FWS's intransigence and that you will use your authority as Secretary of the Interior to correct these problems. In the meantime, you will surely understand why we are going to seek an order from the court to compel the agency to follow its own regulations.

Sincerely,

A handwritten signature in cursive script that reads "Patrick F. O'Toole". The signature is written in black ink and is positioned above the printed name and title.

Pat O'Toole

President