

The Good Fight - Check Your Facts Regarding the Delta Water Wars

By Doug Lovell

Editor's note: this article is best viewed at our website, where the Internet links are "live" or "hot." Doug Lovell has built this article around some blatantly biased video that has appeared on TV and the Internet. He has also supported his thesis and research with other Internet links. Enjoy California Fly Fisher's first excursion into web articles. And let us know if you like this format.

The media coverage regarding 2009 irrigation water deliveries to San Joaquin Valley agriculture serves to illustrate how the "facts" can be grossly distorted. Bring up the following media clips:

<http://www.youtube.com/watch?v=TwD59PrqCNg&feature=related>

<http://www.youtube.com/watch?v=5d-xqFFPxc>.

And lest you think Sean Hannity and FOX News are biased, they claim to present opposing views — sort of:

<http://www.youtube.com/watch?v=1IOF-11wmlY>.

Of course Governor Schwarzenegger has some morsels of wisdom regarding this debate:

<http://www.youtube.com/watch?v=4G2XgwbDHOY>.

And if you dig a little deeper, you start to ferret out some of the real issues:

<http://www.youtube.com/watch?v=0a6psry6t60&feature=channel>.

Had enough? Sometimes you can only put things in perspective via comedic relief (the interesting part starts at 1:50 into this clip):

<http://www.thedailyshow.com/watch/tue-september-29-2009/where-the-riled-things-are>.

Many media pieces regarding the export of water from the Delta and its environmental effects are at best so simplistic as to be worthless and at worst downright disingenuous. Anytime someone boils down an issue as complex as water exports and its effects on the environment into a slanted, three-word frame, as these video clips do, such as "farmers versus smelt," or even a six-word frame, "farmers versus salmon fishermen versus smelt," it is likely disingenuous. That is not to imply that anyone should refrain from prioritizing the issues and goals and pursuing a simple and clear strategy, but where the issues are this complex, simplification can easily turn into mystification.

Just as you can't condense these issues in simplistic ways that serve the interests of water exporters, you can't boil them down to the simplistic opinion expressed by some folks in the

fishing and environmental community, such as: “All we need do is enforce the laws and regulations that currently exist.” Let common sense be your guide — what’s involved in protecting the Delta is obviously more complex than deciding whether to enforce laws or not to enforce laws. And none of these issues are likely to be settled either easily or quickly.

What’s All This Fuss about Shutting Off the Water?

The current brouhaha over the Delta and its water is large part the consequence of two documents prepared by federal agencies with jurisdiction over its threatened and endangered fisheries. The U.S. Fish and Wildlife Service prepared a biological opinion regarding impacts to Delta smelt from the Federal Central Valley Project and the State Water Project. (See http://www.fws.gov/sacramento/es/documents/SWP-CVP_OPs_BO_12-15_final_signed.pdf). The National Marine Fisheries Service prepared a biological opinion regarding the impacts to threatened and endangered salmon, steelhead, sturgeon, and killer whales from the Federal Central Valley Project and the State Water Project. (See <http://swr.nmfs.noaa.gov/ocap.htm>). The water projects include a system of reservoirs to store water (principally, Shasta and Oroville), two pumping stations located in the south Delta near Tracy, and canals to deliver the water (principally, the California Aqueduct and the Delta-Mendota Canal).

Both of these biological opinions concluded that the proposed operation of the state and federal water-diversion and water-export projects would unduly risk extinction of the identified special-status fish and adversely modify their critical habitat. Accordingly, “reasonable and prudent” mitigation measures were deemed necessary. The reasonable and prudent measures included, most controversially, restrictions on the timing and magnitude of water exports.

For example, the reasonable and prudent measures for Delta smelt delineated restrictions on the allowable reverse flow (also known as “negative flow” or “upstream flow”) in the Old and Middle Rivers of the San Joaquin caused by the pumping stations in the south Delta. You read that correctly — the “reasonable and prudent” alternative still allows reverse flows in the historic San Joaquin channels nearby the pumps, albeit at lower magnitude than before.

For threatened and endangered salmon and steelhead, the reasonable and prudent measures delineated cold-water storage in Shasta Reservoir and cold-water management below Keswick Dam (actions favorable to both adult and juvenile life stages of anadromous species), out-migrating water-management alternatives that are favorable to the salmon and steelhead smolts, plus reductions in reverse flows in the south Delta to reduce migratory confusion and entrainment.

Depending on what you choose as the “baseline,” along with the type of water year (wet, normal, dry, critically dry) that you wish to consider, total annual water exports from the state and federal pumping plants in the south Delta will be curtailed by about 15 to 35 percent, pursuant to the biological opinions. That’s not inconsequential. However, given only a rudimentary knowledge of the negative impacts of water diversion and export on fish species, one may have expected even greater curtailments.

Credit for the forward-thinking, objective biological opinions goes to the federal fisheries agencies. In a recent letter from more than 30 fishing and environmental organizations, anglers and environmentalists thanked the agencies for their biological opinions and encouraged the agencies to stand behind their recommendations. It has been years since the agencies published a document concerning Delta and Central Valley fish with such broad support from fishing and environmental organizations.

Credit goes to the Obama administration, which, early on, promised to restore the role of science in policy decisions, a promise on which the administration has largely followed through. The elevated role of science in the Obama administration has emboldened the fisheries agencies to take up the good fight once again for other, important, diminished salmon runs, such as the Columbia River runs. (See http://www.nmfs.noaa.gov/mediacenter/docs/salmon_biop_sep09.pdf.)

Credit also goes to the environmental attorneys at Earthjustice and the Natural Resources Defense Council for prosecuting the lawsuits that challenged the previous biological opinions, along with the plaintiff groups who sued, including California Trout, the Friends of the River, the Northern California Council of the Federation of Fly Fishers, the Pacific Coast Federation of Fishermen's Associations, the Sacramento River Preservation Trust, the San Francisco Baykeeper, the Bay Institute, and the Winnemem Wintu Tribe.

The lawsuits were no small effort, with expenses exceeding \$100,000 for expert witnesses, court reporters, transcripts, and so on, and that doesn't include attorney's fees, which were donated by Earthjustice and the NRDC. But the effort was worthwhile. Judge Oliver Wanger, from the Eastern District Federal Court of California, a weathered veteran of the Delta water wars, threw out the previous biological opinions, which had not called for curtailment of water exports. (See <http://www.earthjustice.org/news/press/007/federal-judge-throws-out-delta-smelt-biop.html> and <http://www.earthjustice.org/news/press/2008/judge-rules-water-projects-imperil-central-valley-salmon-and-steelhead.html>.) Judge Wanger directed the federal fisheries agencies to develop new, more protective biological opinions.

In terms of official, written governmental policies, this is largely where we stand today, with more favorable water management and lower risk to the threatened and endangered fisheries that depend on the Delta. Other species that are not threatened and endangered, including fall-run chinook salmon and striped bass, will also benefit from the revised water-management policies. However, the Delta water wars are never over.

The Battle over Water Never Ends

The two new biological opinions represent significant fishery and environmental victories . . . top-tier victories, which have unfortunately been few and far between over the past decade. They rank right up there with rewatering of the San Joaquin River below Friant dam and stopping the increase of water exports at the state's Banks pumping station from 6,680 to 8,500 cubic feet per second, an effort known as the South Delta Improvements Program.

Because of the value and scarcity of water in arid California, along with the multitude of businesses and individuals dependent on water diversions and exports from the Delta, the biological opinions are under attack. This is part of a never-ending battle in which the "balance" between abundant, economical, subsidized, drought-resistant, developed water and clean, cold, natural, in-stream flows is played out in the political and legal arenas.

No fewer than a dozen lawsuits have been filed claiming, in part, that the federal fisheries agencies overstepped their Endangered Species Act mandates via the biological opinions. Plaintiffs include the Westlands Water District (the fishing community's poster child for fishery and environmental contempt), the Kern County Water Agency (vying to displace Westlands for this dubious distinction), the (misnamed) Coalition for a Sustainable Delta (which filed the lawsuit to remove game-fish status for striped bass), the Metropolitan Water District of Southern California, the San Luis and Delta-Mendota Water Authority, the State Water Contractors, and

the Stockton East Water District. In fishing vernacular, it is a “cluster fish-out.” Judge Oliver Wanger will hear the case. The federal fish agencies are the primary defendants, and the Obama administration’s policies will determine how vigorously the biological opinions are defended.

Earthjustice has confronted the legal challenge by filing for defendant-intervener status on behalf of the groups that initiated the previous lawsuits that facilitated the new biological opinions now being challenged by the water interests. (See <http://www.earthjustice.org/news/press/2009/groups-intervene-to-protect-california-salmon-from-industry-attack.html>.) Those wishing to make meaningful monetary donations on behalf of the Delta should consider supporting Earthjustice and the environmental and fishery groups credited above. They are organizations that have delivered and that continue to deliver on their promise to protect the Delta.

In addition to the legal challenges, our elected officials and their appointees have weighed in regarding the biological opinions. Governor Schwarzenegger has been blunt and blatant: He has oversimplified the issue as farmers versus fish and, not surprisingly, has thrown his support to the farmers. Fish neither vote nor make political contributions.

Lester Snow, Schwarzenegger’s appointment as director of the California Department of Water Resources, has attempted to undermine support for the biological opinions. In an early response to the opinions, Director Snow characterized the curtailments of water exports as “extreme.” He also put forward theories about how the fisheries may be protected without curtailing water exports. (See <http://www.nytimes.com/gwire/2009/05/12/12greenwire-calif-water-agency-changes-course-on-delta-sme-10572.html>.)

Representatives Devin Nunes, Dennis Cardoza, Jim Costa, and George Radanovich have pulled out all the stops in the U.S. Congress and have prayed for relief from the Endangered Species Act with calls to convene a special federal panel nicknamed “the God Squad” to implement a provision of the act to waive protections when reasonable and prudent measures cause damage to interests deemed to be more important than preventing extinction. (See <http://familyfarmalliance.clubwizard.com/IMUUpload/2009-06%20Monthly%20Briefing%20June1.pdf>.) In a straightforward reply to these congressmen, U.S. Secretary of the Interior Ken Salazar, and Deputy Secretary David Hayes responded that such an approach would defeat the expressed goals of restoring the Delta environment and preserving a reliable water supply— a defeat the Obama administration is unwilling to accept. (See http://www.doi.gov/documents/California_Reality_Check.pdf.)

In what may turn out to be the boldest move of all, Senator Diane Feinstein has called for a review of the biological opinions by the National Academy of Sciences, stating that the NAS “is the only body whose views will be respected by all relevant parties as a truly independent voice.” (See http://feinstein.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=21889c88-78b7-4b83-b4e3-049eef4e463d.) Secretary Salazar responded with a commitment to undertake and complete the review, requesting “additional scientific analysis of the California Bay Delta ecosystem and help identifying whether there are scientifically defensible alternatives to current water management plans in California.” (See http://www.doi.gov/news/09_News_Releases/093009a.html.) Approximately \$750,000 has been appropriated for the review, and it is getting underway.

Senator Feinstein’s motives have been questioned — specifically, she has admitted that Stewart Resnick, a wealthy farmer dependent on water exported from the Delta, influenced her

decision. (See <http://www.sacbee.com/capitolandcalifornia/story/2375052.html>.) DiFi attached a letter from Stewart Resnick to her request for the NAS review.

Whatever the motives involved in initiating the review, the National Academy of Sciences is universally considered the Supreme Court of scientific opinion, and its conclusions carry great weight. The conclusions will undoubtedly reiterate the conventional wisdom regarding fish and the Delta: Invasive species and toxics are important stressors, in addition to water exports; the Delta environment has been irretrievably altered, and restoration of predevelopment conditions is not feasible; and great uncertainty exists regarding the fishery impacts directly attributable to water exports. Fortunately, the scientist's unfettered thinking *will* see the light of day — an outcome I greatly appreciate and one that was most uncertain had the review been performed under the Bush administration. In general, the more science brought to bear on the policy question of how much water should be diverted from the Delta, the better.

The most deceitful media pieces regarding the biological opinions have failed to consider the impacts California's recent drought. Several attempts have been made to parse the reductions of irrigated water delivery, including a December 2009 report by the Congressional Research Service (See <http://switchboard.nrdc.org/blogs/dobegi/media/CRS%20CA%20Drought%20Report%20R409791.pdf>), a nonpartisan research arm of congress that apportioned 70-75% of the reductions from lack of rainfall and 20-25% to fishery protections. I find it unconscionable that any media piece on recently reduced water diversions from the Delta would fail to identify the primary cause as lack of precipitation — but our fishing community has at times taken a similar approach — how many times have you heard that the fall-run chinook salmon collapse in our Central Valley rivers results from Delta water diversions, without mention of ocean conditions and dams?

New State Delta/Water Legislation

In early November 2009, the legislature passed and Governor Schwarzenegger signed a package of bills intended, among other goals, to provide a comprehensive framework for resolution of water exports from the Delta. (See <http://gov.ca.gov/images/page/water/HistoricWaterPackage.pdf>.) This legislation was intended to break the stalemate or gridlock that has plagued the state since the CALFED Bay-Delta Program fizzled several years ago. The legislation largely codifies the results of Governor Schwarzenegger's Delta Vision Blue Ribbon Task Force, a multiyear effort that formalized the pragmatic, coequal goals of water supply reliability and a healthy Delta ecosystem. (See <http://deltavision.ca.gov>.)

The legislation remains very controversial, and just in the past month, much information and disinformation has been published regarding the expected fishery impacts. I could not do justice to this legislation were I to devote this entire article to it. However, one of the legislative provisions bears directly on the issue of water exports — the State Water Resources Control Board, in conjunction with the California Department of Fish and Game, has been empowered/mandated to determine the Delta inflows that are necessary to meet public-trust requirements under California law. This determination has been a priority for the fishing and environmental community for years. This provision does not depend on the success or failure of the major water bond that is part of the legislative package and will be on the ballot in November 2010.

Another Piece of the Puzzle: The Bay Delta Conservation Plan

Under the direction of the California Resources Agency, the agency containing the Department of Water Resources and the Department of Fish and Game, in collaboration with federal and local agencies, a major planning effort is underway that will largely determine water diversions from the Delta for decades to come. This is the effort to develop the Bay Delta Conservation Plan. (See <http://baydeltaconservationplan.com/default.aspx>.) The agencies charged with developing the plan maintain that the plan will comply with the Federal Endangered Species Act and the California Natural Communities Conservation Planning Act (NCCPA). That remains to be seen.

One of the benefits of the recently enacted Delta/Water legislation was a mandate for the plan to comply with the NCCPA. Prior to this, compliance was not mandatory. This provision, too, does not depend on the success or failure of the major water bond that will be on the ballot in November 2010. Adherence to the NCCPA raises the bar for fisheries restoration during the planning process, from “avoiding jeopardy” (the likelihood of species extinction) to “recovery” (species delisting). The important details of how this will be accomplished, along with how much water can be diverted while realistically achieving recovery, remain to be seen.

American Rivers, the Defenders of Wildlife, the Environmental Defense Fund, the Natural Heritage Institute, the Nature Conservancy, and the Bay Institute constitute the nongovernmental organizations representing fishery and environmental interests in the planning process. Public involvement has been and will continue to be solicited.

It is largely a foregone conclusion that the final Bay Delta Conservation Plan will be challenged in court, and several fishing and environmental organizations are currently planning their strategies.

The Good Fight Is the Long Fight — Supported by Reliable Information

I could go on, but suffice it to say that the amount and timing of water diversion and export from the Delta is, has always been, and will forever be a complex and controversial issue. When I was introduced to Delta water issues more than a decade ago, I held the optimistic view that all parties would eventually exhaust all arguments, and some objective arbiter could condense those arguments to a final, objective, defensible conclusion. I no longer hold that view. I have decided, at least until proven wrong, that the debate is inexhaustible, never-ending, and perpetually inconclusive. It is a debate in which we will forever need to be engaged, and fishery flows are something for which we will forever need to advocate. We, as fish huggers and ecosystem disciples, must diligently train our replacements to prosecute and persevere in the pursuit of our core values. To state it another way, those who naively believed we solved the problem by defeating the Peripheral Canal in the 1980s were grossly mistaken.

As you participate in this debate, it is paramount that you view your information sources with skepticism — and this includes my words. There is no substitute for diligent research, but it is research that will reap great benefits for your soundly held views. There are no simplistic questions, no simplistic answers and few reliable sources of information.

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