

## **Recent state and federal court actions affecting the Delta**

### Incidental Take Permit:

*Watershed Enforcers, a project of the California Sportfishing Protection Alliance, v. California Department of Water Resources* – On May 7, DWR filed an appeal which stays the Alameda Superior Court ruling. On same day, DWR withdrew its 4/9/07 request to the Department of Fish and Game for a consistency determination with regard to the federal OCAP biological opinions, and entered into an MOU with DFG to facilitate an expedited reinitiation process on new OCAP biological opinions.

On May 21, the California Sportfishing Protection Alliance was back in Alameda Superior Court seeking to force DFG to make a consistency determination on federal OCAP biological opinions. A hearing is set for June 16, when the CSPA is expected to argue that the Fish and Game Code doesn't give the DFG Director latitude to not respond to the DWR request, even though it has been withdrawn.

### Challenges to OCAP Biological Opinions for Smelt and Salmon under FESA:

*Natural Resources Defense Council v. Kempthorne* – U.S. District Court Judge Oliver Wanger on May 25 ruled that a biological opinion on delta smelt issued by the United States Fish and Wildlife Service was unlawful and inadequate. The biological opinion had concluded that, with the incorporation of certain mitigation measures, operating the CVP and SWP as described in the operating criteria and plan (OCAP) would not jeopardize the existence of delta smelt.

Judge Wanger declared that an appropriate remedy must be implemented, but said "... all parties agree that it is not prudent to impose a remedy without further input from the parties." A May 30 scheduling conference was continued until June 1 to afford the parties time for discussions to set a remedies hearing and to consider a stay.

A second case before Judge Wanger challenging a USFWS biological opinion on winter-run salmon is pending.

### Endangered Species Act

Three environmental groups have served the US Fish and Wildlife Service with a 60-day notice of intent to sue, seeking to have the delta smelt listed as an endangered species. The three groups – The Bay Institute, the Natural Resources Defense Council and the Center for Biological Diversity – say the planned lawsuit is based in part on USFWS's failure last year to meet deadlines to consider a request last year to change the status of the smelt from "threatened" to "endangered".