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Stewart A. Resnick
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September 4, 2009

Senator Dianne Feinstein
331 Hart Senate Office Building
Washington D.C. 20510-0504

Dear Senator Feinstein:

Today I received a copy of a letter from Secretary of Interior Ken Salazar and Secretary Gary Locke to Governor Arnold Schwarzenegger regarding the California Bay-Delta water situation. In a blatant attempt to deflect scrutiny of the federal wildlife agencies' roles in exacerbating the state's severe drought, the letter minimized the very real impact of regulatory-induced water shortages and misstated the law regarding reinitiation of consultation.

By the Secretaries' own reckoning, approximately a quarter of the current water shortfall in California is due to environmental restrictions imposed by the projects. At the same time, the letter acknowledges that other factors—water quality, invasive species, climate change, and others—continue to negatively impact the Delta. This is precisely why an independent review of the biological opinions and reinitiation of consultation has been called for. Quite simply, the federal agencies have used sloppy science to attribute the entire Delta fisheries decline to the state and federal water projects, and have imposed regulations accordingly. It is ironic that the agencies now invoke the other Delta stressors to claim that the Delta crisis is California's mess.

Moreover, the statement that the law allows for reinitiation only where there is new scientific information or there are changes to the project is simply not true. Reinitiation of consultation is *required* in those situations, but the agencies can reinitiate consultation, when warranted, in other circumstances. In this case, where there are clear conflicts between the smelt and the salmon biological opinions, and where serious questions have been raised about the adequacy of the science, reinitiation of consultation is the proper course of action.

From the recent correspondence between the Governor and Secretaries Salazar and Locke, it is clear that this situation is quickly degenerating into a blame game at a time when constructive action is desperately required. As you recognized at the Harris Ranch meeting, an independent science review is needed to resolve the disagreements over the science in the biological opinions. The agencies should also reinitiate consultation on the



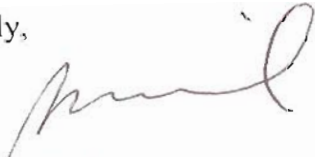
two biological opinions, as requested by the Governor and the Department of Water Resources, to reconcile the conflicts between smelt and salmon measures, and to incorporate the findings of the independent review.

Attached is an e-mail from William D. Phillimore to your staff discussing a proposal for the National Research Council (NRC) to conduct an immediate review of the science underlying the delta smelt and salmon biological opinions. I believe that the NRC is the only body that has the reputation, credibility, and expertise to conduct a truly independent science review in the requisite time frame. Secretary Salazar and Secretary Locke suggest that they are "actively exploring options" for "additional, independent scientific reviews to complement the independent reviews" that have already been performed. The so-called "independent reviews" that the biological opinions "have already received" were, in fact, hurried reviews of portions of the individual biological opinions that do not meet applicable peer review standards. I also believe that we need to initiate the science review now. I am afraid that any further delay will make it impossible to address some of the science disputes before the next water year. This would be disastrous for cities, businesses and farmers throughout the state.

We have been working with our scientists to craft a proposal for a short-term, six month NRC review of the biological opinions, along with medium- and longer-term studies of the Delta. We vetted our questions with NRC staff, and they indicated that they could begin such a study as soon as funding was secured. Mr. Phillimore is prepared to provide any additional information that your staff may need.

I really appreciate your involvement in this issue, which I think is a key one for California.

Sincerely,



Stewart Resnick
President and CEO
Roll International Corporation

Enclosures

From: Phillimore, Bill
Sent: Thursday, September 03, 2009 10:40 AM
To: 'leah_russin@feinstein.senate.gov'; 'johnwatts@feinstein.senate.gov'
Subject: Next steps for the Delta

After last Wednesday's meeting at Harris Ranch, I am encouraged that we have an opportunity to make real progress on resolving some of the Delta science issues. However, it is imperative that any independent science review commences quickly, and in a manner that is independent, credible, and objective. A National Academy of Sciences National Research Council (NRC) committee will be able to provide a study that achieves both of these objectives.

At the Harris Ranch meeting last week, Deputy Secretary of Interior David Hayes expressed reservations about the NRC process. In particular, he did not think an NRC study could be completed in the short period of time required, and he voiced concerns about politicizing the science. But he was mistaken on both accounts.

The NRC has the capacity and the experience to finish an initial assessment of the science underlying the biological opinions within a six month time frame—a time frame which will allow the wildlife agencies to consider the NRC findings for the 2010 water year. This is critically important; we must ensure that decisions that affect millions of Californians are based on sound science. The NRC is well equipped to quickly ramp up for a requested study. Unlike any potential *ad hoc* effort to assemble scientists for an independent science review, the NRC already possesses an accepted protocol for the committee selection process, a protocol for avoiding conflicts of interest, and a ready pool of potential experts across scientific disciplines. Preliminary indications from the National Academy of Sciences are that the NRC could start work immediately if they had the funding in hand, and that an expedited, six-month review of the biological opinions is feasible.

Furthermore, an NRC study would do anything *but* politicize the science. The NRC and its associated organization, the National Academy of Sciences, is the most distinguished and respected scientific institution in the world. The NRC is regularly called upon to provide independent and unbiased opinions to agencies, governments, and lawmakers. As the NRC has explained:

The mission of the NRC is to improve government decision making and public policy, increase public education and understanding, and promote the acquisition and dissemination of knowledge in matters involving science, engineering, technology, and health. The institution takes this charge seriously and works to inform policies and actions that have the power to improve the lives of people in the U.S. and around the world.

On numerous occasions in the last two decades, the NRC has convened committees to investigate various scientific issues concerning the administration of the Endangered Species Act, often in cases where the high stakes and controversial science make it necessary to solicit an independent review of agency decisions. The NRC also enforces strict protocols in the staffing

of its committees to ensure unbiased and balanced representation as well as unparalleled expertise.

I have worked with our science team to re-organize tasks previously identified by the NRC into a set of clear, concise, and objective task statements for an NRC committee that will allow for a review of the scientific data and analyses that form the bases for the biological opinions, a scientific assessment of Delta and its at-risk species, consideration of the potential for environmental restoration in the Delta, and investigation of the use of adaptive management and other tools to accomplish such restoration. In order to obtain initial findings quickly, but still incorporate a more comprehensive study of the Delta, we propose a set of three nested studies. The first study, to be completed within six months of funding, addresses the most immediately critical question of the application of science in the biological opinions. A longer, 15-month study, which is based on questions already proposed by the NRC, will address trends in Delta species, the stressors affecting them, and the prospects for restoration of the Delta. A third study, which would take an additional 18 months, would tackle issues pertinent to long term, adaptive management of the Delta ecosystem. We have provided this set of task statements to the NRC, and their initial response to the task statements was positive.

I have not circulated the attached set of task statements to the Departments of the Interior or Commerce; I believe Senator Feinstein would be in the best position to promulgate a set of task statements that are acceptable to the interested parties. I urge you to immediately provide these task statements to Deputy Secretary Hayes and Secretary Locke, and to work with Secretary Vilsack to secure funding for the initial study as quickly as possible. Waiting 30 more days for Deputy Secretary Hayes to propose a plan will only delay the process further and anything less than a National Academy study will fall short of the goal of reaching an acceptable resolution to the disputed science.

The Senator's leadership on this issue could prevent protracted litigation, and resolve one of the thorniest and most significant problems facing our state. As Governor Schwarzenegger explained in a recent letter, the status quo "cannot and must not go on." An independent, credible, and objective assessment of Fish and Wildlife Service's and National Marine Fisheries Service's application of science will also enable our legislators, wildlife agencies, and stakeholders to come to a consensus about the best course of action to meet the co-equal goals of protecting the environment and ensuring a reliable water supply for the State.

NRC Committee Task Statement
Delta Study No. 1
(To be completed within 6 months of funding)

Review and evaluate the scientific information referenced in the U.S. Fish and Wildlife Biological Opinion for delta smelt in the Sacramento-San Joaquin Delta (USFWS, Dec. 15, 2008) and the National Marine Fisheries Service Biological Opinion for various listed species in the Sacramento-San Joaquin river systems (NMFS, June 4, 2009), the interpretation of that information in the agencies' effects analyses, and the extent to which the agencies' effects analyses supports their jeopardy and adverse modification determinations, and reasonable and prudent alternatives. In doing so the committee should address the following questions.

1. Did USFWS/NMFS adopt definitions of habitat that are appropriate in light of the contemporary understanding and use of that concept in the biological sciences? Did USFWS/NMFS apply the concept of habitat to inform their respective evaluations of the status of the listed species, and to determine the environmental baseline and effects of the action?
2. Did USFWS/NMFS utilize available scientific data and analyses to distinguish between the environmental baseline and effects of the action in order to inform the selection of reasonable and prudent alternatives in the Biological Opinions?
3. Did USFWS/NMFS reference and apply the best available data and analyze those data using the appropriate, prevailing statistical techniques to develop the reasonable and prudent alternatives? Have any relevant scientific data and/or analyses become available since USFWS and NMFS prepared the biological opinions that could improve their respective analyses?
4. Taking into account the relevant scientific data and analyses, did USFWS/NMFS consider a reasonable range of alternative actions when developing their reasonable and prudent alternatives and select reasonable and prudent alternatives that are scientifically justified in light of their effects analyses and jeopardy/adverse modifications determinations?
5. Do the reasonable and prudent alternatives in the Biological Opinions create management conflicts among the listed species?

NRC Committee Task Statement
Delta Study No. 2

(To be completed 15 months after initiation of the study, using funding in the 2010 Interior Appropriation bill)

1. Review the scientific information assessing the extent of ecosystem decline in the Sacramento-San Joaquin delta and rivers systems (the Delta system), including the status and trends of pelagic organisms and anadromous fish species.
2. Identify the factors that may have contributed materially to the decline of at-risk species in the Delta system. To the extent practicable, rank the contribution of those factors, in order of their likely impact on the survival and recovery of Delta species for purposes of informing future conservation actions. Describe gaps in available scientific information and uncertainties that constrain the ability to identify those factors.
3. Describe the physical components, food web, species composition, and other essential attributes of the historical Delta system, and how anthropogenic and non-anthropogenic perturbations have influenced those ecosystem attributes. How do those changes limit the ability of resource managers to restore physical and biotic conditions in the system?
4. What level of restoration of the Delta system is attainable? Identify metrics that can be used by resource managers to measure progress toward restoration goals, including recovery of populations of at-risk fish species, and the habitats and ecosystem processes that support those species?
5. To the extent that water flows through the Delta system contribute to ecosystem structure and function, explore flows options that would contribute to sustaining and restoring desired, attainable ecosystem attributes, while providing for urban, industrial, and agricultural uses of tributary, mainstem, and Delta waters.

NRC Committee
Delta Study No. 3

(To be completed 18 months after second study, assuming funding is provided)

We envision a third study that will advise water planners and resource managers as to how they can most effectively incorporate science, adaptive management, and decision-support tools into real-time monitoring and water allocation actions to provide for water export deliveries and sustainable Sacramento-San Joaquin delta and rivers systems. We propose to develop a specific task statement closer in time to the commencement of that study that can take into account the information gleaned in the first two studies, emerging findings from ongoing scientific research, and the needs of water planners and resource managers.