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Environmental Regulations and Water Supply Reliability

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Mr. Chairman and members of the Committee, my name is Daniel G. Nelson, and I am the Executive Director of the San Luis & Delta-Mendota Water Authority. I appreciate the opportunity to testify today on *"Environmental Regulations and Water Supply Reliability."*

The Authority, which was formed under California law in 1992 as a joint powers authority, has its principal office in Los Banos, California. The Authority is comprised of 32 water agencies, each of which contracts with the United States for water supplies stored, pumped, and conveyed by facilities of the Central Valley Project ("CVP"). The Authority's member agencies are entitled to approximately 2.5 million acre-feet of water for agricultural lands within the western San Joaquin Valley, San Benito and Santa Clara Counties, between 150,000 and 200,000 acre-feet of water for municipal and industrial uses principally within the Silicon Valley, and an additional 250,000 to 300,000 acre-feet of water for wildlife refuges for habitat enhancement and restoration activities. In addition, pursuant to a contract with the United States Bureau of Reclamation ("Reclamation") the Authority operates and maintains CVP facilities used to pump CVP water from the Sacramento-San Joaquin Rivers Delta and convey that water to south-of-Delta CVP water service and settlement contractors. Two such facilities are the Tracy Pumping Plant, located in the southern portion of the Delta, near the city of Tracy, and the Delta-Mendota Canal, which is used to deliver water from the Tracy Pumping Plant to the Authority's member agencies.

Water Supply Reductions Resulting from Regulatory Constraints

Agriculture, as well as homes, industry, business, and waterfowl habitat in the Authority's service area depend on adequate, reliable supplies of water. These water supplies and consequently the agriculture and industries they support are at risk because of reductions resulting from regulatory constraints imposed on CVP operations. The water supply for south-of-Delta CVP agricultural water service contractors is approximately 1.83 million acre-feet, and prior to 1991 those supplies were very reliable. Indeed, between 1952, when CVP deliveries to the west side of the San Joaquin Valley began, and 1991, CVP water deliveries were reduced only during periods of extreme drought. Since 1991, the implementation of three federal laws has significantly reduced the reliability of these supplies by rededicating significant quantities of CVP water historically used by south-of-Delta CVP agricultural contractors to environmental purposes.

The three federal laws that resulted in the rededication of this water are:

1. The Endangered Species Act of 1973:
    a. Listing of the Winter run salmon (1991)
    b. Listing of Delta Smelt (1992)
2. The Central Valley Project Improvement Act (1992):
    a. More than 800,000 acre-feet annually dedicated to fish and wildlife enhancement
    b. More than 250,000 acre-feet annually to waterfowl refuge supplies

c. As much as 400,000 acre-feet annually to restoration of the Trinity River fishery

3. The Clean Water Act:
   a. State Water Resources Control Board Decision 1485
   b. The 1995 Water Quality Control Plan for the Bay-Delta

The reliability of water supplies for the 24 south-of-Delta CVP agricultural water service contractors went from approximately 92% in 1991 to approximately 50% in 2000, when the CalFED Record of Decision was adopted. Although this reliability has improved since 2000 as a result of the exercise of discretion by Reclamation and the Fish and Wildlife Service ("Service"), there is great fear that a change in administration will result in a loss of these gains.

Implementation of the Endangered Species Act

No one could reasonably argue that the original purpose of the Endangered Species Act, to identify and recover species that are at risk of becoming extinct, is not laudable, and the Authority fully supports that goal. However, implementation of the Endangered Species Act has been ineffective, and the Authority's experience suggests that it is in need of reform. I have reviewed the outline of the Endangered Species Recovery and Reauthorization Act of 2005 and believe that if it were enacted it would make the Endangered Species Act a much more effective tool for accomplishing its original purpose. I hope that a few examples of our experience with the Endangered Species Act will illustrate the basis of this belief.

Since 1994 the Authority, which is a public agency of the State of California, has spent in excess of $3 million collecting and analyzing data concerning the status of listed and candidate species, their abundance, and the effectiveness of regulatory actions intended to protect and recover these species. The Authority has retained pre-eminent biologists and other scientists to conduct these analyses. An example of the type of analyses prepared for the Authority, "Estimating Population Level and Water Supply Effects of Delta Water Project Actions" by William J. Miller, Ph.D., is attached to my testimony as Exhibit 1, and I request that the Committee accept this report into its record. Notwithstanding the acknowledged expertise of the Authority's consultants, the Service has demonstrated a consistent unwillingness to consider these analyses in the implementation of the Endangered Species Act. We have been left with the impression that this unwillingness results from the fact that the analyses are often at odds with the "best professional judgment" of the Service's biologists.

The Service's unwillingness to consider analyses prepared by other agencies extends to agencies other than the Authority. Indeed, it even extends to analyses prepared by the California Department of Fish & Game. In one situation this unwillingness resulted in a successful challenge by the Authority to a Service decision to list a species as threatened. In February 1999 the Service published a final rule to list as a threatened species the Sacramento splittail. The Authority filed a lawsuit to challenge this decision on the grounds that the Service had failed to consider all of the available abundance data for the

species and had failed to consider analyses and comments by the California Department of Fish & Game to the effect that the species did not need to be listed. In June 2000 the United States District Court for the Eastern District of California ruled that the Service's decision to list the splittail was unlawful. The District Court found that the decision was arbitrary and capricious, in part, because the Service failed to give adequate consideration to the comments of the Department of Fish & Game, which the District Court found had expertise that was equivalent to that of the Service. After a thorough review of the District Court's judgment and the best scientific and commercial information available, including the analysis and comments of the Department of Fish & Game, the Service determined that the status of the splittail did not warrant listing under the Endangered Species Act.

This is the only case I am aware of in which someone successfully challenged on substantive, rather than procedural grounds, a decision to list a species under the Endangered Species Act. However, an agency like the Authority should not be forced to sue the Service to compel it to consider reliable scientific analyses by another fish and wildlife agency. Enactment of the Endangered Species Recovery and Reauthorization Act of 2005, which would require cooperation and coordination with local and state governments would help address this problem.

Another frustration that the Authority has experienced with the Service's implementation of the Endangered Species Act is the arbitrary nature of restrictions on CVP operations imposed under the Act. The Service will often impose pumping curtailments at the Tracy Pumping Plant, at a cost of hundreds of thousands of acre-feet of water, without any apparent benefit to a listed species. For example, during a consultation on the Delta smelt in 1995 the Service determined that during the April 15 – May 15 period, export rates from the Delta equivalent to the flow of the San Joaquin River measured at Vernalis would not cause jeopardy to the species. Notwithstanding this determination, the Service imposed a "reasonable and prudent measure" to restrict export pumping to a rate equivalent to one-half of flow of the San Joaquin River measured at Vernalis. Like other restrictions imposed by the Service, this restriction was based on the "best professional judgment" of the Service's biologists, but according to the Service's own data this restriction provides negligible, if any benefit, to the abundance of Delta smelt. Again, the Authority has good company in questioning the efficacy of restrictions imposed on CVP operations under the Endangered Species Act. The CalFED Independent Science Board, created by the CalFED Record of Decision, annually reviews regulatory restrictions imposed on operations of the CVP and State Water Project and has raised significant doubts concerning the biological benefits of these actions. To date, however, these doubts have not affected the Service's actions. The Endangered Species Recovery and Reauthorization Act would help to address this problem by creating a uniform scientific review process to which Service decisions would be subject.

Unfortunately, over the course of the last decade the Authority has learned that the only effective way to engage the Service in a dialogue concerning its actions under the Endangered Species Act is through litigation. As I described earlier, the Authority successfully filed suit to compel the Service to consider abundance data and analyses and

comments by the Department of Fish & Game in connection to the decision to list the Sacramento splittail. The Authority has also filed litigation to challenge the lawfulness of biological opinions issued in connection with the Department of the Interior's Record of Decision on Trinity River Restoration and to compel the Service to perform a mandatory five-year status review concerning the Delta smelt. In the former case the Court of Appeals for the Ninth Circuit held that the biological opinions were unlawful because the "reasonable and prudent measures" contained in the non-jeopardy opinions imposed major changes to CVP operations through terms for incidental take. If the biological opinions had been implemented as written, they would have in some years reduced water supplies available for other CVP purposes by more than 100,000 acre-feet. In the latter litigation, the Service agreed to entry of an order compelling it to conduct the mandatory five-year status review.

Although the Authority was successful in each of the lawsuits it filed, having to file such a lawsuit to engage in a meaningful dialogue is an inefficient use of public resources. The Endangered Species Recovery and Reauthorization Act of 2005 would address this inefficient use of public resources by establishing an administrative appeal process and encouraging mediation of issues before litigation is filed.

There are many factors limiting the abundance of listed species affecting CVP operations. Paramount among these limiting factors is invasive species that occupy the Delta. As an example, Delta smelt juveniles and adults have two primary prey, Eurytemora and Pseudodiaptomus. Eurytemora were quite abundant until the Asian clam was introduced into the Delta in 1986. This clam consumed early life stages of Eurytemora, whose population is now very low. In addition, Pseudodiaptomus has been on a steady decline in the lower Sacramento River in the late Summer since sampling for them began in 1989. Last year, Pseudodiaptomus density was nearly zero. No one knows why this decline has occurred. However, a prime suspect is another invasive species, Microcystis aeruginosa, which was introduced in 1999. This subspecies produces substances that are toxic to both Pseudodiaptomus and their prey. Little effort has been made to remove these invasive species from Delta smelt habitat, and it is my view that the provisions of the Endangered Species Recovery and Reauthorization Act of 2005 that provide new authorities to remove harmful invasive species would dramatically aid in the recovery of the smelt.

Another area in which reform of the Endangered Species Act is required involves the designation of critical habitat. The Endangered Species Recovery and Reauthorization Act of 2005 would provide much needed reform by clarifying the definition of critical habitat to mean habitat that is used by a listed species or, if presently used habitat is insufficient, is likely to use an area for key basic activities vital to breeding, feeding, sheltering or other essential behavioral patterns of the listed species. This clarification would have dramatically affected the designation of critical habitat for the giant garter snake, which included areas not used by the species in several decades. In this regard, I would like to express the Authority's support of HR 1299, the "Critical Habitat Enhancement Act of 2005," which was introduced by Mr. Cardoza. It would provide needed clarification to the definition of critical habitat and would reiterate the obligation

to consider the economic impact of a critical habitat designation. Too often the Service has ignored this requirement by finding that there is no need to consider the economic impact of a designation of critical habitat because any economic impact occurred as a result of the listing, a decision in which economic impacts are not considered.

I want to reiterate that the Authority supports the original purpose of the Endangered Species Act, to identify and recover species that are at risk of extinction. However, our experience has been that the Service works in a vacuum, without regard to the views of other agencies, without regard to the effect its actions have on water supply, and in many cases, without regard to the effectiveness of restrictions imposed on CVP operations for the benefit of listed species.

Thank-you once again Mr. Chairman and Committee members for this opportunity.