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The past couple of weeks have been crazier than usual on the Bay-Delta. The pumps were first ramped up and then ramped down. Senator Dianne Feinstein (D-CA) pandered to the irrigation crowd (or at least a part of it) by proposing to ease endangered species protections in the Delta. And the fall-run chinook salmon population, which supports the commercial fishery, crashed.

First, the pumps. Recall that last fall Judge Oliver Wanger ruled that the Bureau of Reclamation violated NEPA by implementing the 2008 smelt biological opinion without first undertaking environmental analysis. I think that's incorrect as a matter of law; it can't be a violation of NEPA to reduce pumping for conservation purposes, but not a violation to gradually ramp up pumping over the decades that the CVP and SWP have been operating. NEPA analysis should happen, but it should happen when the Bureau is developing its proposed Operating Criteria and Procedures (or when it is considering renewing irrigation contracts), not at the back end of the ESA analysis.

Be that as it may, Judge Wanger is sticking to his NEPA guns. He has now ruled that water users are likely to succeed on their parallel argument that implementing the salmon BiOp also violated NEPA. On February 5, Judge Wanger granted a TRO prohibiting implementation for two weeks of a provision of the salmon BiOp that limits the extent to which pumping can reverse river flows. The TRO rested on Judge Wanger's belief that limiting pumping would cause real harm to the water users, but lifting the limit would not cause significant harm to the protected fish. (Curious reasoning, since he also concluded that plaintiffs were not likely to succeed on their substantive ESA challenge to the BiOp. If a valid BiOp says that pumping limits are needed to protect the fish, how can it be that a federal judge knows that those pumping limits are not in fact needed to protect the fish? It makes my brain hurt, but I digress.)

Just a few days later, after smelt were salvaged at the pumps, the Bureau ramped its pumping down again (and apparently the State Water Project never ramped up because it believed independent state law obligations to protect precluded more pumping). Although the water users tried to get that change enjoined, Judge Wanger refused. But federal pumping may again increase; at its most recent meeting the smelt working group suggested that the risk of smelt salvage is again low.

As for DiFi, she may just have been airing a trial balloon. She said that she was considering adding an amendment to the federal jobs bill being crafted in the Senate that would allow increased water deliveries to irrigators. The details have not been revealed, but according to the S.F. Chronicle Feinstein plans to pattern her proposal after an earlier provision that "guaranteed water deliveries in New Mexico despite restrictions imposed to protect the silvery minnow." That provision, included in the Energy and Water Development and Appropriations Act of 2004, Pub. L. No. 108-137, temporarily prohibited the Bureau of Reclamation from reducing deliveries from the San-Juan Chama Reclamation Project in New Mexico in order to meet ESA requirements, and declared that a Biological Opinion that had been struck down by a federal court was sufficient to satisfy the ESA. Although Feinstein says it would not be a waiver of the ESA, the difference is only semantic and temporal. For the 2 years her amendment would operate (according to the L.A. Times, which says it has reviewed a copy of the draft legislation), it would make the ESA irrelevant.

Trial balloon or not, Feinstein's proposal represents political pandering of the worst kind. She claims that it would be a jobs measure for the Central Valley, but (as I've already pointed out) the best available economic evidence shows that unemployment in the Central Valley is overwhelmingly due to the construction slow-down, not irrigation restrictions. Ironically, the farmers who keep complaining that pumping restrictions aren't saving fish can't meet the evidentiary standard they would set for conservation measures — they can't show (and clearly don't think they should have to show) that increasing pumping will turn the Valley's economic woes around.

The timing of Feinstein's proposal could not be worse. She apparently now can't wait for the National Research Council review of the BiOps that she herself set in motion. This new wrinkle would also further complicate efforts to reach agreement on a Bay-Delta Conservation Plan, not to mention the work of the new state Delta Stewardship Council to draw up a comprehensive Delta Plan.

Feinstein's proposal is drawing the reactions you would expect. Irrigators are cheering — according to High Country News, lobbying by Westlands Water District was largely responsible for it. Environmentalists and fishermen are booing, Bay Area and north Coast Democrats are reportedly "livid" (but Republicans are trying to take advantage, and some Central Valley Democrats enthusiastically endorsed the proposal. The SF Chronicle, Sacramento Bee, Silicon Valley Mercury News, and LA Times have editorialized against the proposal. Rep. Grace Napolitano (D-CA), who represents an urban Southern California district and chairs the Water and Power

subcommittee of the House Natural Resources Committee, sent Feinstein a letter of opposition (hat tip: Aquafornia).

Meanwhile, the bad news for the salmon just keeps getting worse. Federal and state fisheries biologists reported that "The lowest number of chinook salmon in recorded history made their way up the Sacramento and San Joaquin rivers last fall." (quote from the SF Chronicle). That makes a third year without commercial salmon fishing almost inevitable, prompting complaints that Feinstein's approach would kill more jobs in the fishing sector than it would produce in the farming sector.

Trial balloon or not, Feinstein is not yet backing down. In a Chronicle op-ed appearing today, she argues that "Water is jobs in California," and that while the ESA is important:

> . . . there currently exists an imbalance in the measures the government will take to protect the delta smelt and those it will take to protect people from economic devastation. I seek to remedy this imbalance by making technical modifications to the biological opinions that restrict delta pumping and give west side farmers the minimum amount of water necessary to work this year – 38-40 percent of their contractual allocation – while respecting environmental protections.