

Statement of Michael L. Connor, Commissioner, Bureau of Reclamation  
Before the  
Committee on Natural Resources Subcommittee on Water and Power  
U.S. House of Representatives  
HR 1837 – San Joaquin Valley Water Reliability Act  
June 2, 2011

Section 108 deems all requirements of the ESA to be considered fully met for the protection and conservation of all listed species for operation of the CVP and California's State Water Project (SWP), if the CVP and SWP are operated consistent with the 1994 "Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government" also known as the Bay Delta Accord. The Bay-Delta Accord committed that the CVP and SWP would be operated to a set of Delta habitat protective objectives that were eventually incorporated into the State Water Resources Control Board's 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. These objectives, along with the Vernalis Adaptive Management Program, were included with other changes by the State Water Resources Control Board in water rights decision D-1641, which amended the water rights of the CVP and SWP. Section 108 also preempts any California law that authorizes the imposition of conditions or restrictions on the operations of the CVP or SWP for the protection or conservation of species that is more restrictive than the requirements of Section 108 of HR 1837. It is unclear whether this section applies only to those species listed under the ESA or to all species.

This type of broad and complete preemption of state law represents a complete paradigm shift from over 100 years of Reclamation law and purposeful direction from Congress of deference to state water law. In particular, California's Sacramento-San Joaquin Delta Reform Act of 2009 was a bipartisan product that had the support of water users, affected communities, the environmental community, and other stakeholders. Given that broad support and the balanced approach promoted by the legislation, limiting its application through congressional fiat is simply unwarranted and sets a damaging precedent. Moreover, limiting the extent to which the CVP and SWP contribute to requirements for species and other environmental needs under state law would likely result in the inequitable shifting of the burden of meeting those requirements to other water rights holders. Finally, we believe the broad state preemption provisions are likely to adversely affect programs beyond the ESA. As written, HR1837 impinges on the State Water Resources Control Board's ability to establish and enforce the aquatic resource protection provisions of the federal Clean Water Act and comprehensive California Porter-Cologne Water Quality Control Act insofar as implementation of those laws may involve requirements to protect species listed under the ESA. Most parties believe that state water quality regulations will need to be revised to accommodate potential changes in Delta conveyance. The draft legislation severely limits the State Board's ability to change those water quality regulations, and mandates the continued use of an outdated regulatory scheme that was based on a physical Delta configuration that no longer serves any of its intended functions.

From a science perspective, at the time the Bay-Delta Accord was signed, only two aquatic

species affected by CVP and SWP operations had been listed under the ESA, Sacramento River winter-run Chinook salmon originally listed in 1989 under emergency provisions and delta smelt listed in 1993. Therefore, the actions in the Bay-Delta Accord reflect only the best assessment of the needs of winter-run Chinook salmon and delta smelt in 1994. The Bay-Delta Accord was intended to be in force for three years and then revisited. It was also intended to prevent the need for listing additional aquatic species under the ESA, an intent that has not been realized. The more recent biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in 2008 and 2009, respectively, address several additional listed species and more recently designated critical habitat. Since 1994, other species affected by CVP/SWP operations have been listed, including spring-run Chinook salmon, Central Valley steelhead, the Southern distinct population segment (DPS) of North American green sturgeon, the southern resident DPS of killer whales, and Southern Oregon/Northern California Coast coho salmon. All of these species have life histories and biological needs different from winter-run Chinook salmon and delta smelt. There have also been significant strides in the knowledge regarding species needs and habitat functionality since the Bay-Delta Accord was signed. Reverting back to the Bay-Delta Accord as the sole means of protecting all listed species would result in negative impacts to the habitat for all currently listed fish species affected by CVP and SWP operations and would cause an increase in the amount of fish taken by the CVP and SWP export facilities. Conditions have changed substantially since 1994 and the scientific understanding of the Bay-Delta system continues to evolve.