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A little bitty fish did all that?

Written by By R. William Robinson and Ralph E. Shaffer Friday, 21 September 2007
 "Wanger's decision threatens California's economy. If the ruling stands, the state project that delivers water to 25 million Californians will be significantly crippled in the near future."
 — R. William Robinson and Ralph E. Shaffer

Ignoring environmental protection laws has become a standard response from developers and government agencies that prefer profits and an increased tax base to preservation of an endangered species. But this time a federal judge in

Fresno refused to roll over. As a result, Californians face a Hurricane Katrina-like calamity of our own making. U. S. District Judge Oliver Wanger last month ordered a major decrease, perhaps as much as one-third, in the amount of water pumped out of the Delta. His ruling came in a suit involving the near extinction of the Delta smelt, whose sole habitat is the Delta.

Wanger's decision threatens California's economy. If the ruling stands, the state project that delivers water to 25 million Californians will be significantly crippled in the near future. But the judge had no option in light of the law and the failure of government agencies to properly respond.

A flawed biological report presented earlier this year to Wanger by the U.S. Fish and Wildlife Service and the California Department of Fish and Game, might have resulted in a less draconian ruling. In rejecting that report, Wanger characterized it as "arbitrary, capricious and contrary to law" and ordered the agencies back to the drawing boards.

Their tardy report, which made necessary the judge's ruling, should have been finished as much as a year ago. Another overdue review, from the state Department of Water Resources, is the critical Delta Risk Management Study. The department claims it is finished, but insiders hint that the governor's office embargoed the report for political reasons.

Nor is the Legislature above reproach in the matter of Delta water delivery and environmental protection. Legislators have deliberately delayed action on bills vital to the Delta's future.

Such legislative, administrative and gubernatorial complacency must end.

Incentives for fixing the state's plumbing should not come from court rulings. Judges, experts in interpretation of the law, are poorly equipped to analyze complex scientific questions or to substitute their judgment for the timely work product of citizen advisory committees composed of experts in the field.

The courtroom time required to accumulate, analyze and weigh all the relevant evidence for such complex environmental cases would take years, not the few days given Wanger.

His decision should be appealed. Unfortunately, higher courts rarely accept new evidence. A more desirable choice would be to remand back to the trial level for a more thorough rehearing. Our water supply and economy must be protected from this legal morass.

State pumps may not be the real culprits in the decline of the Delta smelt. Other, more significant triggers for the decline could be water chemical toxicity and endocrine disruption. Poor water quality has been proven to actually change the sex of fish in many parts of the world.

Other explanations exist for the smelt's near disappearance. Invasive foreign species and plants threaten native flora and fauna. Open water species, such as the smelt, may be in decline because they are no longer robust enough to survive in their natural competitive environment.

Additionally, the avalanche of recent locally controlled land-use rezoning has severely impacted Delta species. Irresponsible development, like the River Islands project near Lathrop, and the general trend toward urbanization of the

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Delta have so compromised the smelt habitat that the future viability of the species is in doubt. Extinction may be inevitable.

The court ignored land-use control, the province of city and town councils. Moreover, marshland and wetlands need to be conserved and preserved, but that doesn't help the local tax base. Apparently, no towns were defendants in the smelt case.

Sober examination of other scenarios and a more complex evidentiary record for the species collapse are necessary. Concerned citizens of all stripes must force bureaucrats to do their work in a more timely fashion.

Better public policy management would take the burden off courtrooms, judges and lawyers, who are poor substitutes by schooling and experience for responsible legislatures and administrative agencies backed by free, open and transparent argument and debate.

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