Dear Secretary Kempthorne and Director Hall:

This letter provides you with 60 days notice that the Center for Biological Diversity, The Bay Institute, and Natural Resources Defense Council (“Petitioners”) intend to sue the U.S. Department of the Interior, the Secretary of the Interior and the U.S. Fish and Wildlife Service (collectively “the Service”) for violating Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, and its implementing regulations in failing to issue a 90-day finding or a 12-month finding regarding Petitioners’ petition requesting endangered listing for the delta smelt (Hypomesus transpacificus). This letter is issued pursuant to the 60-day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

Congress enacted the ESA to ensure the protection and conservation of threatened and endangered species. 16 U.S.C. § 1531(b). The fundamental express purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend. Id. To achieve this purpose, the statute requires the Service to list species of plants and animals that are facing extinction as either “threatened” or “endangered.” 16 U.S.C. § 1533(c)(1). Upon receiving a petition to list a species, the Service has approximately 90 days to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). Twelve months after receipt of the petition, the Service must make one of three determinations: 1) listing is not warranted, 2) listing is warranted, or 3) listing is warranted but presently precluded by other pending proposals for listing species, provided other circumstances are met. 16 U.S.C. § 1533(b)(3)(B). If the Service determines that listing a species is warranted, it must then promptly publish in the Federal register a proposed rule to list the species. 16 U.S.C. § 1533(b)(5).

On March 8, 2006, Petitioners submitted a formal petition to the Service requesting changing the listing of the delta smelt from a threatened to an endangered species under the ESA. In a letter to petitioners dated June 20, 2006, the Service acknowledged receiving the petition on March 9, 2006. Accordingly, the 90-day finding was due on or about June 9, 2006 and a 12-month finding was due on or about March 9, 2007.
The petition outlined in explicit detail the catastrophic decline of the delta smelt population since it was listed as threatened under the ESA in 1993, explaining that in 2004 and 2005 the delta smelt population collapsed to record low numbers, with its abundance only 2.4 percent of that measured in 1993. The petition showed that delta smelt are in critical condition due to reduced freshwater inflows, record-high water diversions, and harmful non-native species that thrive in the degraded Delta habitat. The petition also contained new analyses showing that recent record-high Delta water exports are related to the delta smelt population decline - the five highest years of water exports from the Delta have occurred since 2000 and seasonal exports in the 2000s are up to 49 percent higher than in the early 1990s. The petition also reported on recently published population viability analyses indicating that the species has a 50 percent probability of going extinct in the next 20 years.

The petition requested that the delta smelt be listed as endangered on an emergency basis, under the Service’s authority to promulgate an emergency listing rule for any species when an emergency exists that poses a significant risk to the species (16 U.S.C. §1533(b)(7)). In a letter to Petitioners dated June 20, 2006, the Service determined that an emergency reclassification to endangered was not warranted, but that if conditions changed, the Service could determine that emergency reclassification is warranted and develop an emergency rule.

Since the petition was submitted, the delta smelt population has continued to accelerate toward extinction. The 2006 smelt abundance levels were the second lowest ever recorded. The preliminary data from 2007 is alarming, indicating a staggering, possibly fatal drop in the smelt population. The California Department of Fish and Game (“CDFG”) has released the March through May 2007 data from their ongoing larval and juvenile (20mm) delta smelt surveys (see http://www.delta.dfg.ca.gov/data/20mm/CPUE_map.asp). Larval delta smelt numbers are an order of magnitude lower than 2006 (which was a record low) - and so far, more young smelt have been salvaged at the federal pumps than have been caught in the surveys. The catch per unit effort in 2007 (28.06) so far is the lowest on record, and is an order of magnitude lower than the previous low in 2003 (265.42). The highest abundance of smelt in the 2007 surveys so far is only 7.49 fish as compared to a median highest abundance of 173.5 from 2000-2006.

On May 15, the Delta Smelt Working Group issued a briefing statement to the Delta Water Operations Management Team declaring that an "emergency response" is warranted:

“To date, the 2007 20-mm Survey for juvenile delta smelt has collected record low numbers of juvenile delta smelt. After the fifth of eight surveys, only 25 individuals have been collected, about 7.7 percent of the 326 taken to this point in 2006, and only 7.1% of the 2000-2006 average of 353. The DSWG has reviewed the progression of catches that typically occur during the course of the 20-mm Survey to evaluate the chance that there will be an upswing in the number of larvae collected later this year that will bring 2007 catches more in line with previous years. The group considers such an increase in catches to be possible but unlikely.”

“The likelihood of a very low outcome creates a very high degree of concern for the Delta Smelt Working Group. Water temperatures in the Delta have risen above the range wherein the majority of delta smelt spawning occurs, meaning that very little additional spawning is likely to take place this year. Further, the
most recent 20-mm Survey results shows that delta smelt are distributed in the central Delta, increasing the risk of entrainment. In fact, the first salvage of delta smelt juveniles were observed at the Federal water export facility on May 11. For an annual species such as delta smelt, failure to recruit a new year-class is an urgent indicator that the species has become critically imperiled and an emergency response is warranted.”

Since the petition was filed, federal and state management of delta smelt and its habitat has been revealed to be blatantly illegal and clearly inadequate to protect the species from extinction. A report released in February 2007 by the Public Policy Institute of California, Envisioning Futures for the Sacramento-San Joaquin Delta, concluded that the current management of smelt habitat is “dangerously unsustainable” and warned that the Delta “could become an environmental and economic disaster.” An Alameda County Court ruled in January that the Department of Water Resources (“DWR”) has been illegally pumping water out of the Delta because they do not have a permit under the California Endangered Species Act (“CESA”) and are illegally killing delta smelt. DWR and CDFG are attempting to evade compliance with CESA for another year by relying on a federal permit which has also been challenged in court as inadequate to protect smelt and is currently being reevaluated by the Service because of the delta smelt’s low numbers. The Service’s 2005 Biological Opinion on the operations of the state and federal water projects in the Delta finding no jeopardy to delta smelt from federal and state water exports clearly failed to use the best available science and allows water export rates that will drive the delta smelt further toward extinction. This Biological Opinion was challenged in court and a ruling on the litigation challenging the Biological Opinion is expected as early as this month.

The Service has not published a 90-day finding or a 12-month finding for the delta smelt petition despite the fact that over 14 months have passed since the Service received the petition. In Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166 (9th Cir. 2002), the Ninth Circuit explicitly held that 90-day and 12-month findings on a citizen petition to list a species under the ESA must in all cases be made within 12 months of receipt of the petition. As a result, the Service is currently in indisputable violation of the ESA, 16 U.S.C. § 1533.

Recent information demonstrates that an emergency situation clearly exists for the delta smelt. Accordingly, we suggest that the Service remedy its violations of the ESA by immediately publishing an emergency rule listing the delta smelt as endangered in the Federal Register and by promptly publishing a positive 90-day finding and proposed rule listing the species as endangered.

This letter puts you on statutory notice that we intend to file suit in federal court to remedy these ESA violations. We will seek injunctive and declaratory relief and legal fees and costs regarding these violations. If you have any intention of making the required 90-day finding or 12-month finding within the next two months please inform us immediately. If you have any questions, wish to discuss this matter, or feel the notice is in error, please contact me at 415-436-9682 ext. 302.

The Center for Biological Diversity is a non-profit corporation with over 32,000 members and offices in California, Arizona, New Mexico, Oregon, and Washington, D.C. The Center is dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems through science, policy, education, and environmental law. The Bay Institute is
a non-profit organization that works to protect and restore the ecosystems of San Francisco Bay, the Sacramento-San Joaquin Delta, and the rivers, streams, and watersheds tributary to the Estuary, using a combination of scientific research, public education, and advocacy. Natural Resources Defense Council is a nonprofit, environmental organization with over 1.2 million members that works to restore the integrity of the elements that sustain life – air, land and water – and to defend endangered natural places. Members and staff of these petitioning organizations reside in the San Francisco Bay Area, California, and regularly use areas within delta smelt habitat in the San Francisco Bay and Sacramento-San Joaquin River Delta for recreational, wildlife viewing, scientific, and educational purposes, and intend to continue to use and enjoy these areas for these purposes. The Petitioners bring this notice on their own behalf and on behalf of their members and staff who have been, and will continue to be, harmed by the Service’s failure to process the listing petition and to adequately protect the delta smelt and its habitat.

Sincerely,

Justin Augustine

On behalf of the Center for Biological Diversity, The Bay Institute, and Natural Resources Defense Council

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