San Luis & Delta-Mendota Water Authority

P.O. Box 2157
Los Banos, CA93635
Phone: (209) 826-9696
Fax: (209) 826-9698

State Water Contractors

1121 L St., Suite 1050
Sacramento, CA95814
Phone: (916) 447-7357
Fax: (916) 447-2734

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By Hand Delivery and Electronic Mail

Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

modifiedrulemakingprocess.comment@deltacouncil.ca.gov

Re: Delta Stewardship Council Proposed Rulemaking - Modifications to Proposed Regulatory Text Submitted to the Office of Administrative Law on April 4, 2013

Dear Chairman Isenberg and Council Members:

The State Water Contractors and the San Luis & Delta-Mendota Water Authority, on behalf of themselves and their member agencies, collectively referred to herein as the "Public Water Agencies,"[1] submit the following comments in response to the Notice of Modifications to Proposed Regulatory Text the Delta Stewardship Council ("Council") submitted to the Office of Administrative Law ("OAL") on April 4, 2013 (hereafter, "Proposed Regulations" or "modified Proposed Regulations"). The comments presented herein are relevant to the draft Delta Plan and the draft Programmatic Environmental Impact Report for the Delta Plan. As a result, the Public Water Agencies respectfully submit this letter to the Council, for consideration and inclusion in the administrative record for those other, related efforts as well.

There have been some modest improvements to the Council's original proposed regulations submitted to OAL on November 16, 2012. The Public Water Agencies are encouraged that former proposed Section 5007 "Update Delta Flow Objectives" has been removed from the modified Proposed Regulations package, and has become a recommendation. In addition, it is encouraging that the modified Proposed Regulations extend the exclusion of water transfers of less than one year in duration from the

[1] For the entire list of the Public Water Agencies, see Attachment 1 to the Public Water Agencies' prior comment letter on the draft proposed regulations and economic impact analysis dated January 14, 2013 (attached).

definition of "covered action" to January 1, 2017, although it is not satisfactory to limit the exclusion to that date.

In spite of those improvements, the Public Water Agencies remain very concerned with the draft Delta Plan, its supporting draft environmental impact report and the Proposed Regulations. The Public Water Agencies supported and value the integral though circumscribed role the Legislature established for the Council in the Sacramento San Joaquin Delta Reform Act of 2009 (Water Code, § 85000 et seq., "Delta Reform Act" or "Act"). In addition to its limited "covered action" review role, the Legislature has directed the Council to: (1) help facilitate the coordination of often disparate State agency actions in the Delta to further the achievement of the coequal goals; (2) prioritize levee investments in the Delta to protect "state interests"; and, (3) take the lead in developing a robust and more effective and efficient Delta Science Plan and Program. Regrettably, instead of providing the value added the Legislature intended, thus far the Council is poised to become yet another regulatory hurdle in the Delta hampering achievement of the coequal goals, notwithstanding its lack of statutory authorities to undertake such a role.

The numerous fundamental and fatal deficiencies identified in the Public Water Agencies' comment letter of January 14, 2013, particularly relating to exceeding limited authorities granted to the Council in the Delta Reform Act, have not been cured.[2]

As the Public Water Agencies previously demonstrated, the Council's Proposed Regulations are based on a fundamental misreading of the Delta Reform Act. The Council asserts the authority to adopt the Proposed Regulations, regardless of whether they are expressly authorized by the Act. The Council largely bases its claim of authority on a single phrase in Water Code section 85001, subdivision (c). That section expresses a legislative intent to "establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." But it is a long and unsupported leap from that statement of intent to the Council's interpretation – that it has the duty and power to make the entirety of the Delta Plan legally enforceable through the adoption of regulations.

Under established principles of law, the Delta Reform Act undoubtedly affords the Council power to adopt regulations, but that power is limited to those regulations necessary to carry out the specific "powers and duties identified" for it by the Legislature

[2] The Public Water Agencies hereby incorporate by reference the prior comments presented in their January 14, 2013 letter. In addition, because the modified Proposed Regulations will be central to the implementation of the Delta Plan, which itself is the subject of a legally deficient Programmatic Environmental Impact Report ("PEIR"), the Public Water Agencies incorporate by reference their prior comments on the Final Draft Delta Plan and the Final Draft PEIR. In addition, because the Council staff did not propose changes to all of the previously published draft Proposed Regulations, those prior comments remain applicable. The Public Water Agencies' prior comments are attached as Exhibits 1, 2 and 3.

in the Delta Reform Act. (Water Code, § 85210(i).) That is a much narrower scope than making all of the various provisions of the Delta Plan "legally enforceable."

The Legislature defined the manner and extent to which the Delta Plan will be legally enforceable. In particular, for covered actions, it requires agencies to provide written certification of consistency with the Delta Plan. That certification must be supported by detailed findings, and may be appealed to the Council. (Water Code, § 85225.) If the Council concludes that an agency's conclusions regarding consistency are not supported by substantial evidence, it may remand for further explanations and findings. (Water Code, § 85225.25.) In addition, the Delta Reform Act contemplates that the Delta Plan will rely on the existing authorities of federal and state agencies that regulate and carry out activities in the Delta. For example, the Bay Delta Conservation Plan will be incorporated into the Delta Plan if it meets the permitting requirements of the Natural Communities Conservation Planning Act and the federal Endangered Species Act. (Water Code § 85320.) The Bay Delta Conservation Plan will be legally enforceable. Thus, the Delta Plan will be legally enforceable, as and to the extent specified by the Legislature in the Delta Reform Act. Not only is the Council's claim of broad authority unnecessary to fulfill the intent expressed in section 85001(c), its proposed regulations would conflict with the Delta Reform Act, by altering the legally enforceable effect of the Delta Plan. The Council is overstepping its authority.

If the Legislature had intended for the Council to have such broad powers through the term "legally enforceable," it would have expressly stated that in the chapter of the Delta Reform Act regarding the "Mission, Duties, And Responsibilities Of The Council," Water Codes sections 85210 through 85214. It did not. In the alternative, the Legislature could have included such broad authority in Water Code section 85300, which requires the Council to develop and adopt the Delta Plan. It did not. Or, it could have included "legally enforceable" in the list of requirements for the Delta Plan in Water Code section 85308. Again, it did not. Given the absence of the broad duty and power claimed by the Council from the most pertinent sections of the Delta Reform Act, it is unreasonable and unlawful to find that expansive power and duty nonetheless implied in the expression of legislative intent in Water Code section 85001(c).

Many of the modified Proposed Regulations (like the proposed regulations of November 16, 2012) also fail to satisfy other basic standards set forth in the Government Code to which any proposed regulations must conform (necessity, clarity, consistency, reference, and non duplication).

In light of the Council's carefully defined and delegated authority, and based on the arguments presented in our prior comments and in Attachment 1 hereto, the Public Water Agencies respectfully urge the Council to direct staff to:

(1) remove from the Proposed Regulations section 5003 because it exceeds the Legislature's express grant of statutory authority to the Council;

(2) remove from the Proposed Regulations, draft Delta Plan, and existing regulations governing the administrative appeal process any claim of authority to stop covered actions from being implemented; such an assertion of authority is inconsistent with the plain language in, and legislative intent supporting the Act;[3]

(3) exempt from covered activities (without any sunset provision) all water transfers of up to one year in duration; and

(4) recirculate the Proposed Regulations, as further modified, for full 45-day comment.

Unless and until the Council eliminates from the Proposed Regulations provisions that exceed the Council's authority, provisions that are not necessary, provisions that are not clear, provisions that are not consistent, and provisions that are duplicative, as identified above, in Attachment 1 hereto, and in our prior comments, the Proposed Regulations will remain fundamentally and legally flawed. The requested revisions of the Proposed Regulations would also help the Council re-focus, allowing it to devote more resources toward progress on the tasks the Legislature was most interested in having the Council perform.

The Public Water Agencies have worked faithfully with the Council and its staff to help guide the development of a Delta Plan, and its regulations, that will further the coequal goals while not exceeding the Council's powers delegated to it by the Legislature. We look forward to continuing this constructive relationship into the future as the Plan continues to evolve.

Sincerely Yours,

Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Terry L. Erlewine
General Manager
State Water Contractors

[3] Public Water Agencies' comment letter dated January 14, 2013 at pp. 4-7.

ATTACHMENT 1

Specific Comments on the Modified Proposed Regulations

Section 5001(f) – The definition of "best available science" has undergone a major revision. As revised, the definition now mandates that "[b]est available science shall be consistent with the guidelines and criteria found in Appendix 1A." By doing so, it has elevated the "guidelines" into a regulatory definition.[4] Such a major revision to a draft regulation requires a minimum of 45-day notice and comment. (Govt. Code, §§ 11346.4(a), 11346.8(c).) The Council should remove the guidelines and criteria as an appendix to the Proposed Regulations.

Section 5001(h) – This subdivision continues to incorporate substantive mandates regarding the achievement of the coequal goals into a regulatory definition. In addition, as explained in our prior comments,[5] these mandates exceed the Council's specific statutory authority.[6] The unlawful provisions must be removed.

Section 5001(dd) – "Significant Impact" is still defined as a substantial negative <u>or positive</u> impact on the achievement of one or both of the coequal goals. As demonstrated in our prior comments, the inclusion of projects that will have a significant positive impact on the achievement of the coequal goals is unnecessary, but more importantly, it exceeds the Council's statutory authority.[7] State policy is to <u>further</u> the coequal goals by avoiding the carrying out of actions that are inconsistent with, i.e., <u>adverse</u> to their achievement, not by adding another regulatory obstacle to projects that significantly <u>advance</u> them.

The proposed definition also lacks clarity and lacks consistency. Specifically, for purposes of the California Environmental Quality Act ("CEQA"), "significant impact" and "significant effect" are defined as "substantial, or potentially substantial <u>adverse</u> change in any of the physical conditions within the area . . .." (14 Cal. Code Regs., § 15382, underline added; see also, *id*, § 15358 ["effects" and "impacts" synonymous].) The conflict with CEQA's definition will likely lead to confusion in the regulated community, especially given the explicit references to CEQA in Section 5001(dd). The Council must exclude from the definition of significant impacts positive impacts.

Section 5001(dd)(3) – The Proposed Regulations should except from covered actions water transfers, particularly those of duration of up to one year. Water transfers occur regularly in connection with the operations of the State Water Project ("SWP") and Central Valley Project ("CVP"), and are therefore "routine operations" of the SWP and CVP that are

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[4] In addition, as demonstrated in our detailed comments on Appendix 1A below, the criteria themselves include unlawful mandates and misrepresent key aspects of what may constitute best available science.
[5] Public Water Agencies' comment letter dated January 14, 2013 at p. 15.
[6] *Ibid.*
[7] Public Water Agencies' comment letter dated January 14, 2013 at pp. 16-17, 19.

expressly excluded from the statutory definition of "covered action" in Water Code section 85057.5, subdivision (b)(2). Temporary water transfers are exempted from CEQA, (Water Code, § 1729; 14 Cal. Code Regs. § 15282, subd. (u)), and should likewise be excluded from the definition of "covered action" to ensure clarity and consistency among laws.[8]

Exclusion of water transfers from covered actions is important to further the co-equal goals. Transfers are an important means to meet water needs for both consumptive and in-stream beneficial uses. However, given the purpose of the transfer and their duration, time is often, if not always, of the essence. If not exempted from the definition of "covered actions," delays caused by challenges to either determinations that given transfers will not have significant impacts on the achievement of the coequal goals, or consistency certifications for such transfers, would likely impair, if not preclude, such transfers (a result intended to be avoided by exempting temporary transfers from CEQA). The Proposed Regulation would have a chilling effect on the use of this important water management tool, and should be rejected because it is antithetical to the coequal goal of improved water supply reliability.

Related to this, the modified Proposed Regulations now create an inconsistency between the Proposed Regulations and CEQA that may result in the Proposed Regulations requiring environmental review where the Legislature has provided a statutory exemption under CEQA. In the modified Section 5001(dd)(4), projects other than temporary water transfers that are exempted from CEQA are excluded from the definition of "covered actions" unless an unusual circumstance applies. However, because the modified Proposed Regulations attempt to redefine CEQA terms, it is unclear whether the dozens of other statutory exemptions can be exempt from the definition of "covered action," since statutory exemptions do not have an unusual circumstances exception under CEQA.

Categorical exemptions were created based on the fact that they are recognized to be actions that, under normal circumstances, do not have significant environmental effects. On this basis, categorical exemptions have an unusual circumstances exception that prevents application of the exemption if there is something about the action that makes it unlike other, similar actions such that it is likely to have significant impacts. In contrast, statutory exemptions were not created based on their general lack of environmental impacts but for other reasons the legislature found compelling, thus, there are no "usual" or "unusual" circumstances that relate to statutory exemptions.

The proposed extension of an inapplicable "unusual circumstances" exception to statutory exemptions may create a requirement that virtually all actions statutorily exempt from CEQA may require some level of environmental review in order to determine whether they are a covered actions, and if so, it would require more environmental review to demonstrate that they are consistent with the coequal goal of restoring the Delta

[8] See also, Public Water Agencies' comment letter dated January 14, 2013 at pp. 17. Notably, none of the code section references with regard to the entirety of section 5001 provides authority for application of the consistency certification regulatory scheme to CEQA exempted activities.

ecosystem. Thus, the Proposed Regulation would override the statutory exemptions provided in CEQA.

Section 5002(b)(2) – The proposed consistency findings continue to require lead agencies that are undertaking or approving a covered action that is not exempt from CEQA to include feasible mitigation measures identified in the Delta Plan's PEIR. First, as drafted, this regulation would improperly require lead agencies to adopt mitigation measures even where the underlying project would qualify for a Negative Declaration because it would have no significant impact on the environment. Thus, the requirement is contrary to the requirements of CEQA and should be deleted.

Second, this requirement would trump a lead agency's discretion to adopt feasible mitigation measures that it determines are appropriate to the specific project at hand. Even where lead agencies produce project-level environmental documents that tier off of program EIRs, under CEQA there is no mandate that the lead agency adopt the same mitigation measures, or mitigation measures that are deemed to be at least as effective, as those adopted in connection with a program EIR.

Third, the regulation must be revised to ensure clarity, consistency and avoid duplication of measures (including mitigation) adopted through the BDCP and those adopted by the Council. Given the limited authority for the Council to adopt mitigation requirements, as previously addressed in the Public Water Agencies' comments, and the statutory construct, which among other provisions, mandates the Council incorporate the BDCP into the Delta Plan if specific conditions are satisfied, the regulations should make plain that the mitigation measures adopted through the BDCP will supersede any measures adopted by the Council, and those Council adopted measures will not apply to or otherwise affect the BDCP.

Section 5002(b)(3) – The modified Proposed Regulations continue to unlawfully impose on all lead agencies a requirement to use and document the use of best available science. As detailed in our prior comments, the Council lacks the authority to impose this requirement on lead agencies undertaking or approving covered actions, and this requirement suffers numerous defects, in large part because it concerns the standard of information needed to support agency decision-making.[9] It also conflicts with the substantial evidence standard in CEQA, and it overlaps with similar, but not identical requirements to use the best available scientific and commercial data to support permits and consultations under the California Endangered Species Act, and federal Endangered Species Act. The Public Water Agencies urge the Council to recast this into a recommendation in the Delta Plan instead of elevating it to a regulatory mandate.[10]

[9] Public Water Agencies' comment letter dated January 14, 2013 at pp. 7-8.
[10] Public Water Agencies' comment letter dated January 14, 2013 at pp. 7-8.

Section 5003 (Water Resources Policy 1 of the draft Delta Plan) – As demonstrated in detail in the Public Water Agencies' prior comments,[11] neither the plain language of the Delta Reform Act nor its legislative history empowers the Council to adopt regulations purporting to prohibit water exports from, or transfers through the Delta if, in the Council's opinion, one or more agricultural or urban water suppliers "have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance" consistent with the Council's proposed regulatory standards.[12] The Act authorizes the Council to review appeals of consistency determinations for covered actions in the Delta and Suisun Marsh. But it does not authorize it to deny water transfers and exports based on the statewide policy of reduced regional reliance on the Delta to meet future water supply needs, either through the consistency appeal process, or through a direct prohibition, as Section 5003 purports to do.

The modified Proposed Regulations cite as authority a host of code sections from the Delta Reform Act. However, as demonstrated below, none of the cited statutory references provide the Council with the authority it asserts. The Proposed Regulations should not include any language that would result in a ban of water exports from, or transfers through the Delta, or otherwise regulate actions of water suppliers outside the Delta and Suisun Marsh.

Water Code Section 85210, subdivision (i) provides that the authority to "adopt regulations or guidelines as needed" is limited to adopting only those regulations necessary "to carry out the powers and duties identified" in the Delta Reform Act. In and of itself, this section does not authorize any specific regulations as only those "powers and duties identified in" the Act can provide justification for a proposed regulation. In other words, the Council has only those powers and duties expressly provided in the Act. The specific "references" cited as support for the Council's authority to adopt proposed Section 5003 fail to provide any legitimate basis for exercising the "authority" asserted under section 85210, subdivision (i) because none of them specifies "powers and duties identified in" the Delta Reform Act.

Water Code Sections 10608, 10610.2, 10610.4, 10801, and 10802, are not part of the Delta Reform Act. Instead, they set forth the requirements for Agricultural and Urban Water Management Plans. Thus, they do not provide the Council with the claimed authority.

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[11] Public Water Agencies' comment letter dated January 14, 2013 at pp. 8-11, 20.

[12] Notwithstanding the lack of authority to promulgate Section 5003, the way "water supplier" is defined for purposes of Section 5003 is both too broad and too narrow. Too narrow, because, as stated at the March 25 and 26 public meeting, both in-Delta and upstream water users are exempt, leaving the policy to apply to only water users who export water through the State Water Project or the Central Valley Project. In-Delta diversions can have an individually or cumulatively significant adverse impact on achieving the coequal goals, thus, they should not be exempted. It is also too broad, because, as explained below, the Council seeks to judge water management decisions of agencies outside of the Delta.

Water Code Section 85001, subdivision (c) expresses the Legislature's finding and conclusion that the Council serve as a "governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." This is a general statement of legislative intent, not a grant of regulatory authority. It does not provide any authority to the Council to regulate the activities of local agencies throughout the state of California, or to constrain the operations of the State Water Project or Central Valley Project, including use of water transfers for the benefit of State Water Project or Central Valley Project water users.

Water Code Section 85004, subdivision (b) expresses the Legislature's finding and declaration that various water management strategies, alternative water supply development, and new storage and conveyance facilities are "involved" in "providing a more reliable water supply for the state." It does not provide the Council with the "power and duty" to mandate reduced reliance.

Water Code Section 85020, subdivision (a) provides a very general legislative assessment that "inherent in the coequal goals for management of the Delta" is to "Manage the Delta's water and environmental resources and the water resources of the state over the long term." The section begins by stating: "The policy of the State of California to achieve the following objectives" which is not a delegation of a "power and duty." The section expresses state policy.

Water Code Section 85020, subdivision (d) specifies efforts to "Promote statewide water conservation, water use efficiency, and sustainable water use" are considered "inherent in the coequal goals for management of the Delta." Again, there is no "power and duty" identified or conferred upon the Council that may be a "reference" for the assertion of "authority" under section 85210, subdivision (i). Furthermore, the plain meaning of the word "promote" cannot justify the promulgation of a regulatory mandate. If the Legislature intended to "require" an action it would have written the statute to include mandatory language. Instead it chose the word "promote" which means to "support or encourage" something, not to mandate or regulate it.

Water Code Section 85020, subdivision (h) explains that "the policy of the State of California" was to "establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve" the objectives inherent in the coequal goals. The Legislature carried out this policy by forming the Council and creating and revising the "powers and duties" of other State agencies related to management of the Delta, i.e. the Delta Conservancy and the Delta Protection Commission. This provision provides no authority to regulate water suppliers. And it cannot reasonably be interpreted to constitute a general and sweeping delegation of "powers or duties" upon the Council in addition to and independent of the Council's powers and duties specifically identified in the Delta Reform Act.

Water Code Section 85021 does not confer upon the Council a "power and duty." It establishes a policy separate and distinct from the policy, which must guide the

Council, in Water Code section 85020. Water Code section 85020 establishes the objectives "inherent in the coequal goals for management of the Delta" which the Council is charged with furthering through the Delta Plan, whereas Water Code section 85021 expresses legislative intent that, through a "statewide strategy" of investment "in improved regional supplies", the policy "of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs." The Legislature itself acted to implement that policy (Water Code section 85021) by adopting SBX 7X – a comprehensive statutory scheme to achieve statewide water conservation goals -- as part of the extensive package of water legislation that included the Delta Reform Act.

Water Code Section 85023 is a statement of basic principles governing water rights and water management in California ("reasonable and beneficial use" and "the public trust doctrine") and does not confer a "power and duty" upon the Council consistent with section 85210, subdivision (i). In fact, these principles are central to the purview of the State Water Resources Control Board, the authorities of which, as noted above, were expressly reserved solely to it in the Delta Reform Act. (Water Code, § 85031 (d).)

Water Code Section 85054 sets forth the legislative definition of "coequal goals." This "definition" cannot be interpreted to be a "power and duty identified" in the division providing direction and authority for the Council to promulgate the "reduce reliance" policy of draft Section 5003.

Water Code Section 85300, subdivision (a) states that the Council will "develop, adopt, and commence implementation" of a Delta Plan that "furthers" the coequal goals and does so through "subgoals and strategies to assist in guiding state and local agency actions" and further that "[t]he Delta Plan may also identify specific actions that state or local agencies may take to implement the subgoals and strategies." (Water Code, § 85300, subd. (a), underline added.) Unfortunately, proposed Section 5003 would mandate actions rather than "assist in guiding" them or identifying those that local agencies "may" take to further the policy. Simply put, the plain language of the Act does not authorize the Council to create the mandates in proposed Section 5003. Again, section 85210, subdivision (i), and bedrock principles of statutory construction do not allow such elasticity of interpretation.

Water Code Section 85302, subdivision (d) repeats the legislative direction that "the Delta Plan shall include measures to promote [not regulate] a more reliable water supply" to meet the State's needs, ensure economic vitality and improve water quality. There is no "power and duty" included, only the direction that the Delta Plan "promote" measures that can contribute to improving water supply reliability and three criteria the Legislature identified as representing the targeted outcomes of doing so. The "reduce reliance" policy of proposed Section 5003 seeks to utilize section 85302, subdivision (d) as justification for its promulgation when, if adopted, the proposed policy would undermine water supply reliability by increasing the uncertainty of water supplies. For example, it would reduce the security of pursuing water transfers as a flexible means of preparing for and

responding to drought. It also imposes mandates on local water agencies without considering financial and other limitations, as well as changing conditions and circumstances. Here again, there has been no "power and duty" identified in the statute that would provide a legal basis for the Council's regulation.

Water Code Section 85303 echoes section 85020, subdivision (d), likewise using the word "promote." Thus, it does not provide a "power and duty" conferred upon the Council to include the mandates of proposed Section 5003 as an enforceable regulation or policy in the Delta Plan. Consequently, it too provides no justification for proposed Section 5003.

Water Code Section 85304 directs that the Delta Plan shall "promote," not mandate, "options" relating to conveyance, storage and operation of both. This does not state that the Council shall determine and direct what is to be done based on an asserted authority to ban exports from or transfer water through the Delta. Instead, promoting options is a function of developing information and facilitating conversations among agencies and stakeholders and scientists. It would be error to read into the Legislature's careful choice of words a broad authority to mandate specific actions outside the Delta.

As has been shown by the explication above, while the Council cites Water Code section 85210, subdivision (i), as the foundation of its "authority" to promulgate Section 5003, that authority is dependent upon the provision of specific "powers and duties identified" in the Delta Reform Act. Furthermore, the foregoing analysis of each of the sections relied upon by the Council to substantiate its proposed policy shows that none of them provide such a power and duty. Thus, proposed Section 5003 should be removed from the Proposed Regulations because the Council lacks the authority to adopt it.

If the Council's specious rationale of grounding its asserted regulatory authority upon the general statements of policy and legislative declarations of intent in the Delta Reform Act is allowed to stand, then any state agency could infer that it, too, has an obligation and "duty" to mandate certain activities to "promote" the achievement of broad policy objectives legislatively declared in most statutes. The Legislature did not provide the Council with, nor does our governmental structure allow for, such unbridled authority.

Proposed Section 5003 is particularly illustrative of the fatal flaw of phantom authority being cited as the basis for a regulation. Similar analyses can be done for other modified Proposed Regulations, but as applied to proposed Section 5003, this shortcoming is perhaps the most egregious, especially when one considers the negative effect this proposed policy would have on the achievement of the water supply reliability coequal goal – in direct opposition to the overall intent of the Delta Reform Act.

Finally, the Council has not adequately assessed the potential adverse economic impacts of the potential forced reduction in exports pursuant to proposed Section 5003. Under Government Code sections 11346.2(b)(5), 11346.3 and 11346.5(a)(7)-(a)(12), the Council must assess and make supported findings regarding the economic impacts of its proposed

regulations on California business enterprises and individuals. The Cost Analysis For Proposed Delta Plan Regulations falls well short. It offers only a single sentence, on page 6, regarding the potential economic impact of lost export supplies. It says that private individuals and businesses may incur "costs" from changes in "water supply reliability." There is no analysis or estimate of the cost to users of developing alternatives supplies to replace lost exports, or of the economic impacts including lost jobs that will occur if existing farms and businesses cannot feasibly replace water supplies from the Delta, and hence must reduce or cease economic activity. An adverse economic impact from lost water supplies is an obvious but still unexamined potential result of a draconian halt to exports pursuant to Section 5003. Even putting aside the Council's lack of authority to adopt Section 5003, it cannot lawfully adopt Section 5003 until it has adequately assessed and disclosed the potential adverse economic impact on California businesses and individuals from Section 5003, as required by Government Code section 11346.3 and related sections.

The Council was provided only limited authority by the Legislature.

In contrast to the code sections of the Delta Reform Act the Council uses as references for modified proposed Section 5003, there are sections in the Act, such as the following, which do explicitly identify authority and direction to the Council regarding its "power" and "duty" to review *land use activities* in the Delta, i.e. "covered actions," and explicit guidance for the Council's review of them.

Within the Act's three section "Delta Policy" chapter, it is notable that unlike sections 85020 and 85021, which set forth general statewide policies, section 85022, subdivision (a) is the only section in the chapter that specifically refers to "covered actions." Moreover, that section limits the use of the "covered action" regulatory scheme to land use activities in the Delta and Suisun Marsh. If the Legislature had intended "covered actions" to be applicable to the enforcement of any and all general policies and objectives specified in sections 85020 and 85021 regarding statewide water management policies, it easily could have done so. It did not.

Section 85022, subdivision (a) declares the Legislature's intent that state and local land use actions identified as "covered actions" pursuant to section 85057.5 be consistent with the Delta Plan. This section's findings, policies, and goals apply to Delta land use planning and development, not water management decisions far outside the Delta. Moreover, the provision of lengthy and specific direction to the Council regarding how it is to carry out its "power" and "duty" to review appeals of covered action certifications related to land use activities in the Delta and Suisun Marsh evidences the Legislature's intent to limit the Council's authority to appellate review of consistency certifications in the land use arena.[13] This stands in stark contrast to the sections referenced in ostensible support of any "power" and "duty" related to promulgating proposed Section 5003.

[13] Chapter 3 of the Act is entirely dedicated to establishing this specific scheme. (Water Code, § 85225 et. seq.)

A specific "power and duty" is "identified" in section 85022, subdivision (b), which directs that the Council shall be guided by the findings, policies, and goals expressed in this section when reviewing decisions of the Delta Protection Commission pursuant to Division 19.5 (commencing with section 29700) of the Public Resources Code.

In section 85034, the Legislature also provided specific direction that the Council shall assume the powers and duties of the California Bay-Delta Authority. But the Bay-Delta Authority was not a regulatory body, and certainly had no authority to prohibit appropriation of water conveyed through the Delta. Again, this is consistent with the Legislature's care in seeking to avoid creating a new regulatory agency with broad jurisdiction to regulate actions outside the Delta, but instead was focused on a narrow application of "covered actions" review powers to land use actions in the Delta and Suisun Marsh.

The Legislature's definition of "covered actions" cannot be expanded by fiat.

Through its proposed Section 5003, the Council seeks to functionally, and unlawfully, expand the specific language of section 85057.5's definition of "covered action". Though the statute limits potential "covered actions" to those occurring in the Delta or Suisun Marsh, Section 5003 asserts authority to reach outside those specified areas to exercise jurisdiction over water suppliers outside the Delta, based on the legal fiction that it is only assessing the "consistency" of the actual "covered action" being proposed to occur within the Delta. By doing so, the Council inappropriately and without basis establishes the potential for a proposed "covered action" that is consistent with the Delta Plan and furthers the achievement of the coequal goals (more reliable water supply and restoration of the Delta's ecological health), but is proscribed by the Council because the proponent of the "covered action" has not "adequately" satisfied its unjustified regulatory scheme.

The Legislature made it clear that the Council's geographic reach is limited to the Delta and the Suisun Marsh, with two limited exceptions. First, Water Code section 85302, subdivision (b) provides: "The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals." (Underline added.) Second, Water Code section 85307 provides: "The Delta Plan may identify actions to be taken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta." Thus, if the Legislature had intended the Council to have the authority to mandate "reduced reliance" on water conveyed through the Delta, it would have expressly provided it with that power. It did not.

Because the Delta Reform Act does not authorize the Council to regulate actions outside the Delta by purporting to regulate "covered actions" within the Delta, the Council should direct staff to remove Section 5003 from the next draft of the proposed regulations.

Not only does the Council lack the authority to adopt Section 5003, it is unnecessary and redundant. In the last 20 years, both urban and agricultural water users that receive water from the Central Valley Project and State Water Project, which is conveyed through the Delta, have invested billions of dollars to implement water conservation programs, improve efficiency, create new storage both above and below ground, and develop local and alternative supplies. Because of this investment, water use in those areas looks much different than it did in the early 1990's and before. Per capita usage has decreased significantly in urban areas. Similarly in those areas, agricultural water use has been reduced considerably resulting in less water being applied to a crop while maintaining high levels of production. Regulatory uncertainty in recent years has made these investments a further necessity. In addition, other sections of the Water Code have increased incentives for urban and agricultural water suppliers to further improve reduced reliance. Section 5003 seeks to add further regulatory and reporting requirements on the communities reliant on exports, and only those communities. As stated by staff at the March 28 and 29 public meeting, neither in-Delta water users nor upstream water users are subject to the policy. Instead, the Council seeks to regulate water suppliers often hundreds of miles from the Delta who are already subject to numerous other federal, state, and local controls on water quantity and quality.

Section 5004 is redundant and unnecessary, as demonstrated in the Public Water Agencies' prior comments (formerly numbered Section 5006). The Department of Water Resources and United States Bureau of Reclamation have contracting processes for water from the State Water Project and Central Valley Project, respectively, that require transparency. There is no need for the Council to repeat those requirements in its regulations. Further, section 5004 would arguably provide the Council with authority to regulate the form of state and federal water contracting statewide, a power the Council does not and cannot have. For these and other reasons presented by the Public Water Agencies, section 5004 should be removed from the Proposed Regulations.

Section 5006 requires all habitat restoration in the Delta to be consistent with a <u>draft</u> conservation strategy issued by the Department of Fish and Wildlife in 2011. Elevating another agency's <u>draft</u> strategy to the status of an enforceable mandate creates potential ambiguity, inconsistencies, and duplication.

This approach highlights serious concerns that apply more broadly regarding the relationship of the Proposed Regulations (as well as the Delta Plan and the "mitigation measures" identified in the Delta Plan PEIR) to formulation and implementation of the BDCP. The BDCP presents an opportunity to further the coequal goals and achieve significant benefits for the Delta ecosystem as well as protects and restores water supplies, in a manner that is consistent with the carefully defined statutory authority of the Council.

The Council's proposed actions could create inconsistencies with the BDCP, however, despite the BDCP's legislatively mandated incorporation into the Delta Plan. The Council's proposed actions purport to impose strategies and mitigation measures that are

premature, potentially detrimental to achievement of the coequal goals, and the language could be interpreted as improperly pre-committing resources and constraining other agencies' discretion in evaluating alternatives and mitigation measures in the BDCP. This is not what the Legislature intended.

The Delta Reform Act sought a detailed roadmap for water management that depends on the BDCP as well as dozens of plans and studies needed from other agencies. Without these plans and studies on issues such as how to improve the delivery of water, flood protection, and the regional economy, the Council lacks the technical information needed to make basic planning decisions and to realistically evaluate their environmental and economic costs and benefits. Not only has the Council failed to adequately assess the economic implications of the Proposed Regulations, but it also proposes a framework that is likely to prevent successful formulation and implementation of other crucial planning efforts.

The provision in proposed Section 5006 is also inconsistent with the broad exemption from this requirement included in the modified Section 5002(c) for conservation measures proposed to be implemented pursuant to an NCCP or HCP that was developed by a local government in the Delta and approved and permitted by the Department of Fish and Wildlife before the Delta Plan is adopted. The language added to proposed Section 5002(c) provides that such conservation measures will be "deemed consistent" with the requirements of Sections 5005-5009 if the certification of consistency "includes a statement confirming the nature of the conservation measure from the Department of Fish and Wildlife." It is unclear what this means. If it is intended to prevent local agencies in the Delta from undertaking conservation measures that may be inconsistent with the Department of Fish and Wildlife's 2011 draft strategy, it does not fulfill that intent.

Section 5011 mandates that "[w]ater management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans . . . ." In addition, it mandates that "[p]lans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland."

There is no basis in the Delta Reform Act for the asserted authority to regulate the siting of water management facilities, ecosystem restoration, and flood management infrastructure, regardless of whether the regulated action is a covered action. Nor does the Act authorize the Council to regulate all purchases of land that may be developed for ecosystem restoration.

Proposed Section 5011 cites as authority Water Code section 85210, subdivision (i), and lists as references sections 85020, 85022, 85054, 85300, and 85305. Neither the authority cited, nor the sections referenced, authorize the Council to dictate what feasible alternative

sites or mitigation measures must be considered by anyone proposing to site water or flood management facilities or ecosystem restoration projects or proposing to purchase land for ecosystem restoration purposes.

Proposed Section 5011 also conflicts with federal and state law. Absent a waiver of sovereign immunity, federal and state agencies are not subject to compliance with local general plans and zoning ordinances. In addition, under California law, cities and counties enjoy an intergovernmental immunity, and are exempt from each other's building and zoning regulations, including compliance with general plans. Although Government Code section 53091 requires a local agency to comply with cities' and counties' building and zoning ordinances, "local agencies" do not include cities or counties. (Gov. Code, § 53090.) Furthermore, the siting and construction of "facilities for the production, generation, storage, treatment, or transmission of water" by any agency is also expressly immune from city and county building and zoning ordinances. (Gov. Code, § 53090, subds. (c)-(d).) Yet modified Section 5011(a) attempts to render the siting of "water management facilities" subject to consistency with city and county general plans. Thus, proposed Section 5011(a) conflicts with federal and state law, and would be preempted if adopted.

Many of the activities that would be subject to this new regulation would be exempt from CEQA, and thus should not be covered actions subject to the consistency certification requirements of the Delta Reform Act. For instance, the purchase of land for restoration of natural conditions, including plant or animal habitats, is exempt from CEQA. (14 Cal. Code Regs. § 15325, subd. (c).) Thus, absent "unusual circumstances," such actions should not be covered actions under the Council's modified proposed Section 5001(dd)(4). Thus, the proposed regulation of the purchase of land for ecosystem restoration exceeds the Council's statutory authority and should be removed for the Proposed Regulations and Delta Plan policies.[14]

In addition, the Proposed Regulation is unnecessary. Public agencies undertaking habitat restoration projects already have ample financial and regulatory incentives to ensure that their habitat restoration projects are consistent with local land use designations, and site restoration activities on publicly owned lands when feasible and consistent with the project's purpose. And for any ecosystem restoration projects that must undergo state or federal environmental review, lead agencies are already required to consider feasible mitigation measures and project alternatives that would substantially lessen any significant adverse impacts. Thus, even if the Council had the legal authority to regulate land acquisition for ecosystem restoration projects, which it does not, the modified Section 5011 would nevertheless be unnecessary.

[14] Furthermore, the modified Section 5011(a) is not limited in geographic scope to land purchased in the Delta and Suisun Marsh. Thus, the regulation also exceeds the Council's jurisdiction in this regard as well.

Modified Section 5011 is beyond the Council's statutory authority and unnecessary. Accordingly, it should be removed from the next draft of the Proposed Regulations and the Final Delta Plan policies.

Section 5012 (formerly numbered Section 5014) - Renumbered Section 5012 strikes the priorities proposed for state investments in Delta levees previously included as subdivisions (a)-(c). While we agree that these old priorities needed to be improved, it would be a mistake to weaken or make more subjective these provisions, and the Public Water Agencies strongly urge that the Council comply with the intent of the Reform Act (Water Code, §§ 85306-85307), and set island-by-island priorities based upon calculated public benefits and costs which include the increasing risks from seismic, climate change, sea level rise and on-going subsidence.

By striking subdivisions (a)-(c), the Council has abandoned any deadline for implementing levee funding prioritization, and has instead proposed very broad, non-specific interim priorities which leaves so much room for interpretation that it will do nothing to address the status quo, which has led to haphazard investment in levee repairs that may not serve the public's interest in levee maintenance or the coequal goals of improved ecosystem health and water supply reliability. Indeed, prior comments on the Delta Plan and proposed regulations have documented the ecological benefits of certain flooded islands, but to date, none of the drafts have acknowledged these comments.

Hard deadlines should be introduced in the next draft of Section 5011.

In addition, we urge the Council to strike the sentence in modified draft Section 5011(a) that reads: "The goals for funding priorities are all important, and it is expected that over time, the Department of Water Resources must balance achievement of those goals." This provision leaves too much room for maintaining the status quo, which has not advanced the coequal goals.

Finally, we urge that the improvement of all Delta levees to the Hazard Mitigation Plan (HMP) standard be deleted from modified draft Section 5006(a). FEMA has stated recently that it has no obligation to restore levees under the Hazard Mitigation Plan Memorandum of Understanding.[15] Such a requirement risks wasting limited public funds, and it may ultimately reduce the reliability of water supply. The FEMA policy is further justification to eliminate this requirement in proposed Section 5011(a).

Appendix 1A ("Best Available Science) – As demonstrated above and in previous comments, it is unlawful and unnecessary to require all covered actions to document the use of best available science. In addition, Appendix 1A, with which all documentation of best available science must be "consistent" under the Proposed Regulations, includes inappropriate criteria, some of which are expressed in mandatory terms. For instance, Appendix 1A states: "Best available science changes over time, and decisions may need to

[15] See Letter from Nancy Ward, Regional Administrator, FEMA Region IX, to Mark Ghilarducci, Governor's Authorized Representative, California Emergency Management Agency (Oct. 23, 2012), attached as Exhibit 4.

be revisited as new scientific information becomes available." While true that best available science changes over time, there is no universal requirement in law that decisions such as project approvals or permits must be "revisited" as new information becomes available. Statements like this should be removed.

It is also incorrect to state that "best available science" "has undergone peer review conducted by active experts in the applicable field(s) of study." In many instances, the best available science may not have undergone peer review. Peer review may be an ideal, but it is not a pre-requisite to information constituting the best available scientific data at the time a proposed project is being evaluated.

In addition, the peer review criteria in Table 1A-1 mandates that "Independent scientific peer review shall be applied formally to proposed projects and initial draft plans, in writing after official draft plans or policies are released to the public, and to final released plans." (Underline added.) The Delta Reform Act does not authorize the Council to impose this "criterion" on covered actions. Moreover, it would impose an unnecessary and impossibly heavy burden on a host of projects, increasing costs and delays to a point beyond which few, if any, projects would be undertaken or approved. In addition, while peer review may be appropriate for scientific studies and papers, it is unclear what "peer review" of a proposed project or initial draft plans means.

The Council states that it "understands that varying levels of peer review may be commonly accepted in various fields of study and professional communities." However, the Council does not recognize that the best available data (e.g., field studies, phase 1 site assessments, and monitoring of background conditions) may not require any peer review to provide reliable, relevant, and legally adequate information for informed decision-making.

Appendix 1B (Adaptive Management) – The Council lacks the authority to require proponents of covered actions to implement adaptive management. Notwithstanding that fatal defect with the modified Proposed Regulations, Appendix 1B confuses minor adjustments to real-time operations of "water management" projects with formal adaptive management, stating: "For example, decisions might need to be made daily (e.g., Delta water operations), yearly (e.g., implementation of landscape-scale restoration), or decadal (adaptive management of landscape-scale restoration design)." This reflects a fundamental misunderstanding of the adaptive management framework, and must be corrected.

These are just a few of the more egregious problems with the proposed "criteria" in Appendix 1A and 1B. Correcting these problems, and others, does not address the more fundamental issue that the Council has no authority to require proponents of covered actions to document the use of best available science.

EXHIBIT 1

San Luis & Delta-Mendota Water Authority

P.O. Box 2157
Los Banos, CA 93635
Phone: (209) 826-9696
Fax: (209) 826-9698

State Water Contractors, Inc.

1121 L St., Suite 1050
Sacramento, CA 95814
Phone: (916) 447-7357
Fax: (916) 447-2734

January 14, 2013

By Regular and Electronic Mail
Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

cindy.messer@deltacouncil.ca.gov
RulemakingProcessComment@deltacouncil.ca.gov

RE: Delta Stewardship Council Proposed Rulemaking

Dear Chairman Isenberg and Council Members:

The State Water Contractors, Inc. and San Luis & Delta-Mendota Water Authority, collectively referred to herein as the "Public Water Agencies",[1] submit this letter pursuant to the Notice of Proposed Rulemaking the Delta Stewardship Council ("Council") submitted to the Office of Administrative Law ("OAL") on November 16, 2012. The Public Water Agencies value the role the Legislature established for the Council. However, the regulations the Council submitted to OAL on November 16, 2012 and propose for adoption ("Proposed Regulations") go well beyond statutory authorities granted to the Council through the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq., "Delta Reform Act" or "Act"). For that reason, as well as the Proposed Regulations failing to meet other important OAL requirements, the Proposed Regulations, if adopted, would be unlawful. The Public Water Agencies respectfully request that the Council revise the Proposed Regulations, consistent with these comments, before the Council considers their adoption.

I. INTRODUCTION

As detailed below, the Proposed Regulations include a number of provisions that fail to meet the standards of necessity, authority, clarity, consistency, reference, and non-duplication set forth in the Government Code. The Public Water Agencies and their member agencies object to the Proposed Regulations particularly because in numerous respects they exceed and conflict with the limited authority the Legislature conferred upon the Council through the Delta Reform Act.

In the Initial Statement of Reasons, the Council asserts that "implementation of the proposed regulatory policies is necessary in order to *achieve* the coequal goals as enumerated in the 2009 Delta

[1] Descriptions of the Public Water Agencies are included in Attachment 1 hereto.

Reform Act."[2] The Council further states that "[t]he authority vested in the Council to make consistency determinations ensures that Delta-related activities will be coordinated and legally enforceable under the oversight of the Council." (Initial Statement of Reasons at p. 14.) Thus, the Council conceives of its role as that of a "super-regulatory" agency with approval authority over all "Delta-related actions."[3] In a similar vein, the Council states that "Section 5005 is aimed at achieving [the] policy of reduced reliance on the Delta and improving regional self-reliance *by requiring a significant reduction in the amount of water used, or in the percentage of the water used, from the Delta watershed*." (Initial Statement of Reasons at p. 4, emphasis added.) It is striking that the Council asserts this outcome as an apparent central responsibility of the Council to achieve, through its appellate review of Delta Plan consistency certifications, notwithstanding the clear absence of such authority in the Delta Reform Act.

Nowhere does the Delta Reform Act authorize or require the Council to act as a "super-agency" with the authority or mandate to "achieve" the coequal goals through its appellate review of covered actions for consistency with the Delta Plan, or to impose reductions in water use from the Delta or the Delta watershed. Such action by the Council would exceed the authority conferred upon it in the Delta Reform Act. The Act simply requires the Council to "develop, adopt, and commence implementation of the Delta Plan pursuant to this part that *furthers* the coequal goals." (Wat. Code, § 85300(a), emphasis added.) Specifically, the Act states that "the Delta Plan shall include subgoals and strategies to *assist in guiding* state and local agency actions related to the Delta"; the Delta Plan "may also identify specific actions that state or local agencies *may* take to implement the subgoals" (*ibid*., emphasis added); and "[t]he Delta Plan shall *promote* statewide water conservation, water use efficiency, and sustainable use of water" (*id*., § 85303, emphasis added).

As evidenced by the Legislature's specific word choices, there was no intent to provide or even imply a regulatory role for the Council with regard to broad water management activities. Indeed, to the contrary, the Council and the Delta Plan are directed to provide guidance and advisory recommendations to further the achievement of various pertinent state policies, with the *limited* exception of establishing an administrative scheme for reviewing appeals of consistency certifications only applicable to statutorily defined "covered actions" undertaken *in* the Delta and Suisun Marsh.

Notably, the state policy in the Delta Reform Act pertaining to reduced reliance on the Delta to meet *future* water supply needs through a statewide strategy is not included in the statutory objectives the Legislature determined are inherent in the coequal goals (*id*., § 85020), and it is conspicuously absent from the specifically described elements of the Delta Plan (*id*., § 85300 et. seq.). Thus, nothing in the Delta Reform Act empowers the Council to force "significant reductions" in water use from the Delta watershed, or a significant reduction in water exports to meet current or historic water supply needs.

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[2] State of California, Delta Stewardship Council, California Code of Regulations, Title 23. Water, Division 6. Delta Stewardship Council, Chapter 2. Consistency with Regulatory Policies Contained in the Delta Plan, Initial Statement of Reasons 14 ("Initial Statement of Reasons"), http://deltacouncil.ca.gov/sites/default/files/documents /files/3%20-%20InitialStatementReasonDraftNov2012.pdf.

[3] "Delta-related actions" is not a term defined in the Act or in the Proposed Regulations. By statute, the Council has no authority to adjudicate appeals over consistency certifications for all "Delta-related actions," but only for statutorily defined "covered actions."

Moreover, the Delta Reform Act expressly recognizes the continuing authority of other state and federal regulatory regimes over the management and regulation of water and other resources in the Delta. (See, e.g., Wat. Code, §§ 85031(d), 85032.) This was made clear in the final analysis of SBX7-1 considered by the Senate before voting on the Act. The analysis concludes that the various savings clauses in the bill "maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies such as SWRCB and DFG."[4] Thus, the substantive mandates that the Council seeks to promulgate and enforce are inconsistent with the Delta Reform Act and other statutes.

In addition, the coequal goals are set forth in the statute as state *policy*. As demonstrated below, these policies are not legislative mandates, and they are clearly not mandates that the Legislature authorized the Council to enforce. Instead, the Delta Plan is expressly defined in a way that acknowledges it is but one tool that will provide policy makers with an important source of guidance for, and a means of tracking progress toward, achieving the coequal goals established by the Legislature. Rather than creating an agency charged with regulating the State's water resources, the Legislature established a framework for a collaborative and synergistic approach to improving overall Delta management and contributing to the achievement of the coequal goals by the pertinent local, state and federal agencies already responsible for carrying out or regulating various components of the Delta Plan.

Because the Council is not authorized to impose substantive mandates regarding water use through the Delta Plan, the Public Water Agencies respectfully request that the Council revise its proposed regulations to remove any such mandates.

II. LEGAL STANDARD FOR REGULATIONS

At the most fundamental level, the Proposed Regulations must be within the scope of the Council's statutory authority and consistent with controlling law. (Gov't Code, § 11342.1 ["Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"].) An administrative agency such as the Council has no inherent power; it possesses only those powers granted to it by the Constitution or by statute. (*Security National Guaranty, Inc. v. California Coastal Commission* (2008) 159 Cal.App.4th 402, 419.) "That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area." (*Ibid*.) Thus, any act taken in excess of the power conferred upon an agency is void. (*Ibid*.)

Similarly, no regulation adopted by a state agency is "valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov't Code § 11342.2; see *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 796 ["agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute or amend the statute or enlarge its scope," citation omitted]; *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal. App. 3d 110, 114 [an agency "may exercise such additional powers as are necessary for

[4] Bill Analysis for SBX7-1 as amended November 3, 2009, p. 15, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_cfa_20091104_035148_asm_floor.html.

the due and efficient administration of powers expressly granted by statute, or as may be fairly be implied from the statute granting the powers"].)

Government Code section 11349 *et seq*. governs the OAL review of regulations. OAL must make determinations of the necessity, authority, clarity, and consistency of proposed regulations in addition to ensuring compliance with the other procedural and substantive mandates of the Administrative Procedure Act ("APA"). As explained below, a number of provisions in the Proposed Regulations fail to meet the OAL's standards and must be removed or revised accordingly.

III. DEFICIENCIES WITH PROPOSED REGULATIONS

A. The Proposed Regulations Exceed The Council's Authority Granted To It Through The Water Code

To be valid and effective, the Council must demonstrate that the Proposed Regulations are authorized by the Delta Reform Act, and do not conflict with controlling law. "Authority," as defined by Government Code section 11349(b), means "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Proposed regulations are also invalid if they impair or conflict with the statute they purport to implement. (*California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269.) The Proposed Regulations fail these standards as they exceed and transgress the Council's statutory authority and conflict with controlling law.

1. The Substantive Mandates in Proposed Sections 5004 and 5005 Exceed the Council's Statutory Authority and Conflict with Controlling Law; Therefore, They Must Be Removed from the Proposed Regulations

Section 5004: The requirements imposed through this section of the Proposed Regulations are intended to govern certifications of consistency filed by state or local public agencies with regard to covered actions. The proposed requirements, however, are not fully set forth in the Proposed Regulations. On page 59 of the current draft of the Delta Plan, it states: "If the covered action is found to be inconsistent, *the project may not proceed until it is revised so that it is consistent with the Delta Plan*." (Emphasis added.) In other words, the Council claims the authority to preempt already established statutory processes and to itself *prohibit* the action from moving forward until it has determined the project is consistent with the Delta Plan. That claim of what is essentially permitting authority is inconsistent with the language of the Delta Reform Act, as well as its legislative history. It also is unenforceable because it is an unlawful "underground regulation" that has not been submitted to OAL.

The Plain Language of the Delta Reform Act Does Not Authorize the Council to Prohibit a Covered Action Until It Determines It Is Consistent with the Delta Plan: Under the Delta Reform Act the proponent of a proposed action potentially affecting the Delta must determine if it is a "covered action." If the agency determines it is a covered action, it must certify to the Council that it is consistent with the Delta Plan. (Wat. Code, § 85225.) Absent an appeal, the agency may continue to pursue regulatory

approvals and implement the action. If the certification is appealed, the Council must determine whether the certification is supported by substantial evidence. If the Council determines the certification is not so supported, it remands it to the agency. (Wat. Code, §§ 85225.10-85225.25.)

On remand the "agency may determine whether to proceed with the covered action." (Wat. Code, § 85225.25.) Its options are to (i) "proceed with the action" as proposed or (ii) proceed with "the action as modified to respond to the findings of the council." (*Ibid*.) In either case it must, "prior to proceeding with the action file a revised certification of consistency that addresses each of the findings by the council." (*Ibid*.) That is the end of the certification process. Nothing in this language prohibits the agency from proceeding with the covered action even if the Council has deemed it inconsistent, so long as the agency files a revised certification addressing the Council's findings. The Council's assertion that a covered action is prohibited unless the Council deems it consistent simply is not supported by the plain language in the Delta Reform Act.

<u>The Delta Reform Act's Legislative History also Undermines the Council's Assertion of Authority to Prohibit Implementation of a Covered Action Until an Appeal Is Resolved to the Council's Satisfaction</u>. The October 2008 Delta Vision Strategic Plan, an early step in developing the governance structure that resulted in the Delta Reform Act, would have created a Council as a "regulatory and oversight body" with numerous and broad regulatory authorities. (Delta Vision Strategic Plan, pp. 121-24.) These would have included the power to determine the consistency of covered actions and to "ensure federal and state consistency with the [Plan]." (Delta Vision Strategic Plan, pp. 123-24.) The Delta Reform Act significantly pared these proposals down. In particular, the authority to determine consistency in the first instance and the authority to "ensure" consistency overall before a project may be implemented are both absent from the Delta Reform Act.

The legislative history of the Delta Reform Act demonstrates that the Legislature purposefully removed provisions that would have authorized the Council to prevent an inconsistent "covered action" from being implemented. Proposed Conference Report No. 1, dated September 9, 2009, contains an appeals process similar to that in the enacted Delta Reform Act. Like the enacted version, it provided that a covered action may be implemented if no appeal is filed to the consistency certification. However, the *pre-print* version of section 85225.25 provided:

> Upon remand, the state or local agency may determine not to proceed with the covered action or may modify the appealed action and resubmit the certification of consistency to the council. A proposed covered action appealed pursuant to these provisions shall not be implemented until the council has adopted written findings, based on substantial evidence in the record, that the covered action, as modified, is consistent with the Delta Plan.

Delta Reform Act section 85225.25 *as enacted* is significantly changed from this earlier version. While the prior version gives the agency the option of either not proceeding with the action or modifying the action to satisfy the Council, the enacted version gives the agency the option to "proceed with the action" *without* modification, or as modified, provided it files a revised certification. Finally, the

Legislature pointedly removed the prohibition that the proposed action "shall not be implemented" without a Council consistency determination. Despite the Legislature's purposeful refusal to adopt a statute mandating that a covered action shall not be implemented absent a Council blessing, the Council is attempting to reinsert that rejected mandate. This attempt clearly is an illegal alteration, amendment and enlargement of the statute that is beyond the Council's authority. (Gov't Code, §§ 11342.2 & 11349.1; see also OAL Handbook, p. 19.)

These changes to subsequent versions of the Act and the language of the Delta Reform Act expressly permit implementation of a covered action when the Council disagrees with an implementing agency's consistency certification. Upon remand from an appeal, an agency is not required to modify a proposed covered action, but only to file a revised certification addressing the Council's findings. The plain language of the Act and its legislative history manifest the Legislature's intent to preserve the authority of state and local agencies to proceed with "covered actions" even if the Council ultimately disagrees with a proffered consistency certification.

Attempts to Implement Underground Regulation Are Unlawful: The APA specifically prohibits an agency from making use of a rule which meets the definition of a "regulation" but has not been submitted to the OAL for approval, referred to as an "underground regulation." (Gov't Code, § 11340.5(a); OAL Handbook, pp. 12-16.) "Underground regulations" are a means to avoid the requirements of the APA and can take the form of "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency." (OAL Handbook, pp. 13-14, citing *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198.)

Here, the Council claims the authority to prohibit an agency from proceeding with a project unless the Council has deemed it consistent with the Delta Plan: "If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan." (Draft Delta Plan at p. 59.) As explained above, this proposed rule is not within the Council's authority. Nevertheless, the Council has included it in the Delta Plan.[5]

Although the Council has not designated it as a Regulatory Policy, it clearly would meet the definition of "regulation" under Government Code Section 11342.600, that is, a "rule, regulation, order or standard" contained in a Delta Plan adopted by the Council purportedly "to implement, interpret, or make specific the law . . . administered by it." The proposed mandate meets the three part test specified in the OAL Handbook at p. 14: (1) it is a rule of standard or general application with respect to the consistency process; (2) it is a policy adopted by the Council to implement or make specific the law administered by it; and (3) it is not exempt under the APA.

The Council's assertion of the authority to prohibit implementation of an action it deems inconsistent with the Delta Plan is not supported by the language or legislative history of the Delta

[5] The Council is authorized to adopt "administrative procedures governing appeals" that are not required to be submitted to OAL. (Wat. Code, § 85225.30.) However, the provision at issue is not procedural. It is instead a substantive rule of law affecting the State's or a public agency's ability to carry out its statutory responsibilities, and it impairs the property rights of an entity applying for the permit or other approval at issue.

Reform Act and is an unlawful "underground regulation." The Council's assertion of authority is unenforceable and should be deleted from the Delta Plan.

Section 5004(b)(3): The Proposed Regulations state that "[a]s relevant to the purpose and nature of the project, *all covered actions must document use of best available science* (as described in Appendix 1A)." (Emphasis added.) The Council asserts that this regulatory requirement is necessary for consistency with the Delta Plan "to ensure that all significant actions [affecting the Delta] utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.)

The use of best available science in evaluating the merits of a covered action should be encouraged. However, this proposed regulation exceeds the Council's authority to the extent that it imposes higher standards for state and local agency actions than can be found in the Delta Plan or elsewhere in controlling law. (*See, e.g.*, Code Civ. Proc., § 1094.5(c) [substantial evidence in light of the whole administrative record]; Pub. Resources Code, § 21168.5 [abuse of discretion established for purposes of CEQA if a determination or decision is not supported by substantial evidence]; Cal. Code Regs., tit. 14, § 15384 [defining substantial evidence].) The Council lacks authority to limit or alter the scope of local agency discretion by requiring that all covered actions that have a significant impact on the achievement of the coequal goals must use (and document the use of) best available science and adaptive management, *even where no other applicable law imposes such a requirement*.

The Council's stated basis for this requirement is that "despite the Delta's special status, there are no overarching guidelines or best management practices to ensure that all significant actions utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.) However, the Delta Reform Act does not require proponents of covered actions to support their decisions with the best available science or utilize adaptive management in all situations . The *Council's* adoption of the Delta Plan must be supported by the best available science. (Wat. Code, §§ 85302(g), 85308(a).) But nothing in the Act authorizes the Council to impose that evidentiary standard on covered actions. In addition, the Delta Plan itself can be based upon the best available science without requiring every covered action to also be based on the best available science. Thus, the proposed requirement is not reasonably necessary for the Council to fulfill its obligation to use the best available science.

In addition, such a requirement would result in a new standard for implementing agency decision making. This new standard could, in turn, expose implementing agencies and the Council to potential litigation over the intensively fact-specific determination whether an implementing agency has used the best available science, whether it has adequately documented such use, and whether the Council's determination to that effect in a certification appeal is supported by substantial evidence in the administrative record.

To the extent that such a requirement is already imposed by other statutes or regulations, the regulation is duplicative, and would add nothing but another layer of paperwork to an implementing agency's regulatory burden. Thus, the proposed requirement is not only unauthorized, unnecessary, and administratively burdensome, it could lead to unintended consequences for implementing agencies as well as the Council.

The requirement that all covered actions that significantly impact the achievement of the coequal goals must use and document the use of the best available science should be removed from the Proposed Regulations.

Section 5004(b)(5): This subsection requires a certifying agency that will carry out a covered action to also certify that "the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning[,]" and if the certifying agency will approve or fund, but not carry out, the covered action, then it must "include a certification . . . that the covered action complies with all applicable laws of the type listed above over which that agency has enforcement authority or with which that agency can require compliance." These additional certifications are not authorized in the Delta Reform Act, and they are unnecessary and duplicative of existing laws. If these additional certifications are required by regulation, then, in addition to any potential liability for an alleged failure to comply with the *substantive* mandates of those other applicable laws, project opponents could also bring an appeal before the Council, and potentially file litigation in state court challenging the *certification* of compliance with other substantive laws, *and* the Council's determination of consistency on any appeal, in addition to litigation in state or federal court challenging the alleged failure to comply with the *substantive* mandates of the law.

Consequently, this requirement should be removed because it would increase regulatory burdens on agencies, including the Council, and it would increase the potential for litigation and the attendant costs and delays without providing any benefits in terms of compliance with the law, consistency with the Delta Plan, or furthering achievement of the coequal goals.

Section 5005: The proposed "regulatory policy" WR P1 unlawfully asserts regulatory power to undertake the enforcement of a new policy of the State to "reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." (Wat. Code, § 85021.) In the Notice of Proposed Rulemaking, the Council claims that requiring reduced reliance on the Delta is "consistent with the Delta Reform Act contained in Water Code §85021 (Notice of Proposed Rulemaking at 3), but this assertion of authority reaches far beyond the substantive and geographic scope of its authorities as explicitly delineated by the Legislature. Furthermore, because the Delta Reform Act does not expressly give the Council a duty or the power to enforce or regulate the general state policy of seeking to "reduce reliance on the Delta in meeting future water supply needs," there is no implied authority to promulgate regulations pertaining to that policy. The only specific language articulated in the Act arguably related to such potential authority merely directs the Council to "promote" conservation and other water management activities that would contribute to furthering the state policy expressed in Section 85021 and elsewhere in the Act and other bills that were part of the comprehensive water package of which the Act was only a part.

The Language of the Statute Does Not Support the Council's Asserted Authority to Require a Significant Reduction in Water Use. Nowhere in the Act's sections providing explicit direction to the Council regarding content of the Delta Plan (see Wat. Code, §§ 85300-85308) is the reduced reliance policy mentioned or cited as a focus of the Delta Plan. The reduced reliance policy in Section 85021 of

the Act is simply a statement of policy, not a delegation to the Council of power to expand or enforce the policy. The Council is not even mentioned in section 85021, let alone authorized to enforce the policy through forced reductions in current or historic supplies pumped from the southern Delta. It is telling that while the Act did not include any standards or criteria in the Section 85021 policy statement, other bills included as part of the comprehensive water package did specifically target establishing statewide standards and criteria related to increasing water conservation throughout California.[6]

In fact, Section 85021 does not require a "reduction" in current supplies from the Delta at all, let alone a "significant reduction." Instead, it states a policy to take positive actions to increase local supplies and water efficiency through investment as a means to reduce reliance on the Delta "in meeting California's future water supply needs." The Council's proposed Section 5005 attempts to turn that positive, statewide investment policy into a prescriptive rule prohibiting entities that need to export, transfer through, or use water in the Delta or in the entire Delta watershed from doing so unless they have demonstrated "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed." The Council's attempt to add this requirement where the Legislature did not would "alter or amend [the] statute or enlarge or impair its scope" and therefore "is void and must be struck down by a court." (OAL Handbook at p. 19.)

Moreover, the Council ignores the Legislature's focus on reducing reliance in meeting California's *future* water supply needs and instead attempts to require a reduction from current use. But on its face, section 85021, through the express use of the term "future," applies solely to water supply needs that do not currently exist as opposed to current water supply needs. In *Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board* (2000), the court, in interpreting a statute, was required to distinguish between "continuing" or "further" medical treatment and "future" treatment. (80 Cal.App.4th 1041, 1046.) Looking to the Webster Dictionary, a common reference for statutory interpretation, the Court concluded that whereas "continuing" means "constant" and "further" means "going or extending beyond what exists", the term "future" means "existing or occurring at a later time." (*Id*.) The court went on to find that "future" medical care suggested medical attention that would be required at a later date but is not ongoing. (*Id*.) Using this definition of the term "future," Section 85021 applies to water supply needs that do not currently exist but would arise in the future due to population an economic growth absent the statewide investment strategy called for in Water Code section 85021.

The principles of statutory interpretation require that each word in a statute be given significance. (*Dyna-Med, Inc*. *v. Fair Employment and Housing Comm'n* (1987) 43 Cal.3d 1379, 1386-87.) The Council's interpretation that Section 85021 calls for a reduction in the use of Delta water from current water supply levels renders the term "future" as surplusage. Under that interpretation, Section

[6] See generally 2009 Water Bills SBx7-7 and SBx7-8, which specifically discuss and seek to reduce per capita use of water in the context of statewide strategies related to conservation, diversification of water supply portfolios, and funding to further achieve those policy goals.

85021 would have stated a policy to reduce reliance on the Delta in meeting California's water supply needs, generally, which the Legislature explicitly chose not to do[7].

Moreover, two other significant sections of the Delta Reform Act are inconsistent with the Council's position. In Section 85020, the section immediately preceding Section 85021, the Legislature spelled out in specific detail the objectives "inherent in the coequal goals for management of the Delta." Rather than requiring, as the Council would, the "significant reduction" in use of water from the Delta watershed, the Legislature stated the objective is to "promote" statewide water conservation, water use efficiency and sustainable water use. This Legislative objective demonstrates that the Legislature did not choose to confer regulatory authority on the Council but instead provided discretion to "promote" activities related to "sustainable water use." The Legislature's use of "promote" cannot legitimately be interpreted to mean "mandate."

Part 4, Chapter 1 of the Delta Reform Act (Wat. Code, §§ 85300-85309) also demonstrates that Section 85021, while a general policy statement that is certainly relevant when considering actions affecting the Delta, does not delegate any enforcement authority to the Council or even to any of the agencies that do have regulatory authority in the Delta. In particular, while the Legislature devoted these several sections to specifying in detail the elements to be required in the Delta Plan, it did not include or refer to the general Section 85021 policy. What it did do was require that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." (Wat. Code, § 85303.) This is yet another demonstration that the Legislature did not empower the Council to regulate water use but instead directed it to "promote" good water management in line with section 85021. (See also Wat. Code, § 85302(d)(1), (2) [directing the inclusion of measures to "promote" a more reliable water supply that "[m]eet[s] the needs for reasonable and beneficial uses of water" and "[s]ustain[s] the economic vitality of the state"].)

In addition, the Delta Reform Act limits the Council's consistency review authority to "covered actions," which are limited to projects that "[w]ill occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (Wat. Code, § 85057.5.) Thus, the Council's assertion of authority to mandate reductions in the use of water anywhere in the State is clearly beyond the geographic scope of the Council's authority.

Moreover, the Council's assertion of authority over water use is inconsistent with several savings clauses in the Delta Reform Act. The statute provides that:

> Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the [State Water Resources Control Board's] regulation of diversion and use of water, including, but not limited to, water rights priorities, the protection provided to

[7] This is clearly revealed by the legislative history described below, which also illuminates the significance of the Legislature's use of the phrase "reduce reliance" on the Delta, in contrast to "reduce dependence." The legislative history confirms that the Legislature did not intend the Delta Plan to be an *enforcement* mechanism for the newly established policy of reducing reliance on the Delta to meet future water supply needs, or for the Council to be its enforcer.

> municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the court's existing concurrent jurisdiction over California water rights.

(Wat. Code, § 85031(d).)

The Council's assertion of authority to mandate reductions in water diversions and water use throughout the State is inconsistent with these important savings provisions in the statute, and would intrude upon the exclusive concurrent jurisdiction of the State Water Resources Control Board and the courts to adjudicate and regulate water diversions and water rights.

The courts have held that general statements of legislative intent do not create an affirmative duty or authority on the part of the agency to impose a mandate in furtherance of the policy. (E.g., *City of Arcadia v. State Water Resources Control Bd.* (2011) 191 Cal.App.4th 156, 175-176; *Shamsian v. Dept. of Conservation* (2006) 136 Cal.App.4th 621, 633.) Therefore, the Council's assertion of authority to regulate water use is inconsistent with the express statutory language and an enlargement of the Council's authorities beyond those provided in the Delta Reform Act.

Ultimately, while it is consistent with the statutory scheme for the Council to "promote" activities that could contribute to reducing reliance on the Delta in meeting future water supply needs, the proposed section 5005 mandate is not "reasonably necessary to effectuate the purpose" of the Delta Reform Act, and it is therefore beyond the Council's authority and should be removed from the Proposed Regulations. (Gov't Code §§ 11342.2, 11349(a)(1) & (2).)

Thus, this provision should be removed from the Proposed Regulations.

Section 5005(c): The prohibition of exports from the Delta proposed in subsection (c) is also not authorized by the Delta Reform Act for the reasons explained above; and it is also inconsistent with the Delta Reform Act's exclusion of routine project operations from the definition of covered actions and with its several savings clauses.

The Delta Reform Act specifically excludes from the definition of "covered action" "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." (Wat. Code, § 85057.5(b)(2).) In addition, as demonstrated, the Delta Reform Act provides that "[n]othing in the application of this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or common law" (*id*., § 85057.5(c)), and "[n]othing in this division expands or otherwise alters the [State Water Resources Control Board's] existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights" (*id*., § 85031(d)).

Thus, the Council lacks the authority to require a reduction in exports of water via the routine operation of the State Water Project ("SWP") or the federal Central Valley Project ("CVP"), and this provision should be removed from the Proposed Regulations.

The Legislative History Directly Contradicts the Council's Assertion of Regulatory Authority to Prohibit or Mandate the Actions Required in Section 5005: While it is clear from the face of the statute that the Council does not have the authority to promulgate the mandates in Section 5005, the legislative history provides additional evidence of the Legislature's intent that the reduced reliance policy promote general water management activities and programs to meet future water supply needs, rather than delegating authority to the Council to mandate a requirement that water use be "significantly reduced."

Statements by legislators who were key in the sponsorship, drafting and adoption of the Act explicitly sought to clarify the reach of Section 85021 as it was being considered. They agreed it was a "broad statement of a policy goal . . . certainly not a mandate." And they agreed that *reducing dependence* on the Delta to meet California's water supply needs *was not* an appropriate policy objective. These conclusions were articulated at a September 3, 2009, joint Senate and Assembly conference committee hearing discussing the various bills that would result in the Delta Reform Act, including SBx7-1, which established the Council and outlined in detail the contents and purposes of the Delta Plan:

Senator Aanestad: "To say that we are going to be able to decrease dependency on the Delta is an impossible goal . . . . The solution is the second part of this paragraph [revised 85021 referring to statewide strategy of investment] and that is to improve efficiency, conservation, etc. . . . , it's foolishness to say we are going to become less dependent on the Delta. I think it's imperative to say we're going to be more responsible with the water that goes through the Delta . . . ."

Colloquy between Senator Steinberg (Senate Majority Leader and coauthor of SBx7-1) and Assemblyman Huffman (Chairman of the Assembly Water, Parks and Wildlife Committee and author of Preprint Assembly Bill No. 1, the Assembly's version of SBx7-1):

> ***Senator Steinberg***: "[O]ne question for consideration is whether or not the proponents of this language [section 85021] intended it to have legal import or is it a statement of intent."
>
> ***Assemblyman Huffman***: "I think, Mr. Chair, ***we know how to write mandates when we want to, that's not how this reads, it reads as a broad statement of policy of a goal that will guide things going forward*** . . . . You reduce dependence by following some of the ***conservation measures that we are asking folks to do in separate legislation*** . . . . So, I think it reflects a prudent policy guidance for the state going forward but ***certainly not a mandate***." [Emphasis added.]
>
> ***Senator Cogdill*** (Lead sponsor of the companion Water Bond): "[I]t ought to be more about how we make the Delta a more reliable source of water rather than to say we are going to do everything we can to limit exports from that very important source."

The Legislators' agreement reflected in these exchanges is supported by the Legislative drafting history of section 85021 and related sections. As originally drafted Water Code Section 85021 read:

> The policy of the State of California is to ***reduce dependence on water from the Delta watershed, over the long-term*,** for statewide water supply reliability. Each region that depends on water from the Delta shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. (Preprint SB 1 (Aug. 4, 2009).) [Emphasis added.]

That language was amended on September 9, 2009,[8] after the September 3 discussions quoted above, to the language adopted ultimately and now codified in section 85021:

> The policy of the State of California is to **reduce reliance on the Delta** in meeting California's **future water supply needs** through a **statewide strategy** of investing in improved regional supplies, conservation, and water-use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. [Emphasis added.]

The significant changes to the first sentence of the section are italicized and bolded to emphasize the differences between the earlier draft version, and the ultimately adopted version of section 85021. The first revision changes "reduce dependence" on water from the Delta watershed "over the long-term" to "reduce reliance" on the Delta "in meeting California's future water needs." Similar to the discussion above of *Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board*, the adopted term "future" (as opposed to "continuing" or "existing") means "existing or occurring at a later time." In other words, the Section 85021 policy envisions reduced reliance on use of Delta water over use that would exist or occur *in the future* if the policy were not implemented. It does not mean reduce "continuing" or "existing" reliance on Delta water "beyond what exists" currently or historically.

The second significant change is the addition of the language regarding a "statewide strategy of investment." This is an important reflection of legislative intent that meeting the policy directive set forth in Section 85021 is to be achieved on a "statewide" basis that would include local initiatives and investments, statewide bond initiatives, or other funding mechanisms. Notably, nowhere does this language expressly or impliedly authorize the Council to impose an obligation to "significantly reduce" the current use of water from the Delta watershed, or an authorization to the Council to "enforce" its particular interpretation of Section 85021 through the Delta Plan.

<u>The Proposed "Significant Reduction" Requirement Is Inconsistent with the Legislature's Deletion from the Bill of a Similar Requirement</u>: Another indication the Legislature did not intend to require (or authorize the Council to regulate) a reduction of current use of water is its consideration and rejection of a proposed section 85219. That section would have prohibited construction of a

[8] Conference Rept. No. 1, SB 12 (Sept. 9, 2009).

conveyance facility within or around the Delta until the Council made a determination that agencies relying on the facility for water deliveries had submitted "long-term plan[s] for reducing reliance on those exports." (Preprint SB 1 (Aug. 4, 2009).) That language, which could have been interpreted to support the "significant reduction" requirement the Council is attempting to impose, was deleted at the same time Section 85021 was amended to add "future water supply needs" and the "statewide strategy of investment" language.

The substantive mandate in proposed Section 5005 is inconsistent with both the plain language of the Delta Reform Act and its legislative history, and should be removed from the Proposed Regulations.

Section 5005(e)(1): The language of the statute does not support the Council's asserted authority to require (e)(1)(A), (B), and (C), as a prerequisite for using, exporting, or transferring water through the Delta. For example, subdivision (A) mandates that every water supplier that might receive water from the "covered action" has an urban and agricultural management plan. This is a current requirement under law for certain water suppliers, and is therefore duplicative and unnecessary. (Wat. Code, § 10620 [urban water suppliers]; *id*., §10820 [agricultural water suppliers].)

Of more concern, as currently proposed Subsections 5005(c) – (e) appear to create a new consequence for water supplies that fail to meet novel requirements that the Council has proposed for inclusion in urban and agricultural water management plans in subsections (e)(1)(B) and (C); namely, a potential denial of the ability to use or export water from, or transfer water through, the Delta. Current law, however, has very limited specific repercussions for a failure to adopt these plans in compliance with the specific requirements set forth in the Water Code. (Wat. Code, §§10608.56(a), (c), (e), (f); 10631.5 [terms of and eligibility for certain water management grants or loans for urban water suppliers]; *id.*, §§ 10608.56(b), (e), (f); 10852 [agricultural water suppliers].) Nothing in the Delta Reform Act provides authority for the novel requirements for urban and agricultural water management plans proposed in subsections (e)(1)(B) and (C) of Section 5005. In addition, insofar as these subsections duplicate existing law, they are unnecessary and create confusion in the regulated community.

Furthermore, Section 5005(e)(1)(B) distorts the purpose of urban and agricultural water management plans. These plans are internal long-range documents that are to be revised over time as conditions and technologies change. Therefore, the implementation schedules set forth in the plans must remain flexible and adaptable. These plans are meant to inform local water management planning, not to create a new forum for regulation by the Council. Similarly, in subsection 5005(e)(1)(C) the Council grants itself the authority to require a new provision in all water management plans starting in 2015. The Delta Reform Act does not give the Council this authority, and there is no such requirement in existing law. (See Wat. Code, § 10631 [elements of an urban water management plan]; *id.*, § 10826 [agricultural water management plan]; *id*., § 10608 et seq. [requirements for urban and agricultural water management plans related to sustainable water use and demand reduction].)

Thus, Subsections 5005(c) – (e) should be removed from the Proposed Regulations.

2. The Definition of "Achieving the Coequal Goal of Providing a More Reliable Water Supply for California" Includes Unlawful Substantive Mandates to Reduce Water Use

Section 5001(e)(1)*:* The Council proposes to include a definition of "achieving the coequal goal of providing a more reliable water supply for California" to include "[b]etter matching the state's demands for reasonable and beneficial uses of water to the available water supply" (§ 5001(e)(1)(A)), and states that "[r]egions that use water from the Delta watershed *will* reduce their reliance on this water for reasonable and beneficial uses, and improve regional self-reliance" (§ 5001(e)(1)(B), emphasis added), and "[w]ater exported from the Delta *will* more closely match water supplies available to be exported, based on water year type and consistent with the coequal goal of protecting, restoring, and enhancing the Delta ecosystem" (§ 5001(e)(1)(C), emphasis added). In addition, the proposed definition states: "Delta water that is stored in wet years will be available for water users during dry years, *when the limited amount of available water must remain in the Delta*, making water deliveries more predictable and reliable." (§ 5001(a)(1)(C), emphasis added.)

The proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" conflicts with the language and structure of the Delta Reform Act. (Wat. Code, § 85302(d)(1).) Specifically, the statute mandates that "[t]he Delta Plan shall include measures to promote a more reliable water supply that address all of the following," including "[m]eeting the needs for reasonable and beneficial uses of water." (*Ibid*.) Furthermore, the Delta Reform Act's coequal goal for water supply is to provide "a more reliable water supply for California . . . ." (Wat. Code, §§ 85054, 85020(a).) The Legislature has declared that seven specific objectives "are inherent in the coequal goals for management of the Delta[,]" including the objectives to "[i]mprove the water conveyance system and expand statewide water storage." (Wat. Code, § 85020(f).)

First, the proposed definition of achievement of the coequal goal of a more reliable supply of water does not promote or identify actions that will *meet* water needs. Instead, it defines achieving the coequal goal of a more reliable water supply in a manner that *limits* use of water from anywhere in the Delta watershed, and limits water exports from the Delta.

Specifically, the proposed definition purports to impose a substantive requirement on all those who use water that originates anywhere in the Delta watershed to "reduce reliance on this water for reasonable and beneficial uses." This mandate is an unauthorized expansion beyond the *policy* of the State of California articulated in the Delta Reform Act "to reduce reliance on the Delta in meeting California's *future* water supply needs through a *statewide strategy* of investing in improved regional supplies, conservation, and water use efficiency." (Wat. Code, § 85021, emphasis added.)

As demonstrated above, the Legislature did not include the statewide policy of reduced reliance on the Delta to meet *future* water supply needs in the policies "inherent" in the coequal goals, or in its specified elements required to be part of the Delta Plan. (Wat. Code, §§ 85020, 85300 et. seq.) Thus, the Legislature has not authorized the Council to adopt a new mandate applicable to all users of water from the Delta watershed regarding *current or historic* water supply needs based on this general

expression of state policy that depends on a *statewide* strategy to reduce reliance on the Delta to meet *future* water supply needs. (See Wat. Code, §§ 85210 [enumerated powers of the Council notably lacks any authority to convert state policy into new substantive mandates]; 85212 [authorizing Council to "provide timely *advice* to local and regional planning agencies regarding consistency of local and regional planning documents . . . with the Delta Plan," emphasis added]; 85300(a) [requiring the Council to develop a Delta Plan pursuant to the Delta Reform Act "that *furthers* the coequal goals" and includes "subgoals and strategies *to assist in guiding* state and local agency actions related to the Delta," emphasis added].) The precatory and permissive language in the Delta Reform Act cannot be reasonably interpreted as authorizing the Council to mandate reductions in water use or water exports.

Second, the proposed definition purports to require that those who export water from the Delta, i.e., the Department of Water Resources and U.S. Bureau of Reclamation, reduce exports in "dry years, when the limited amount of available water must remain in the Delta . . . ." This provision in the proposed definition implies that consumptive uses will only get what is available after other "in-stream" uses are met. In addition, the statement is ambiguous, suggesting that in undefined "dry years," exports may be reduced to zero because "the limited amount of available water must remain in the Delta . . . ."

The failure to recognize or even reference the "public interest" integral to the reasonable and beneficial use of water and the Public Trust doctrine is a fatal deficiency in the Council's unsubstantiated interpretation of the objective to further the achievement of the coequal goal of a more reliable water supply. Nowhere in the Delta Reform Act did the Legislature authorize the Council to adopt a mandate that state and federal agencies must reduce exports from the Delta. Instead, any limits on exports are governed by other statutory and regulatory requirements administered by other state and federal agencies, including the State Water Resources Control Board, Department of Fish and Wildlife, [9] the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

The proposed definition conflicts with the savings clauses in the Delta Reform Act that expressly acknowledge the authority of other state and federal laws and regulations that affect the management of water resources in the Delta and Delta watershed. (See Wat. Code, §§ 85031 [limitations on division], 85032 [subjects not affected by division]; see also Wat. Code, § 85320(e)-(g) [recognizing that the Department of Water Resources, Department of Fish and Wildlife, and other agencies besides the Council are "charged with BDCP implementation," and that the Council's authority is limited to making recommendations to the BDCP implementing agencies regarding implementation of the BDCP, which is to be incorporated into the Delta Plan].)

3. The Proposed Definition of "Significant Impact" Is Inconsistent with CEQA and Should Be Removed or Substantially Revised

<u>Section 5001(s)</u>: The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, § 15125; *In re Bay-Delta Coordinated*

[9] Formerly named the Department of Fish and Game.

Proceedings (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.) The Council has no authority to alter the fundamental framework of environmental review, which is concerned with whether approval of a proposed action may result in a significant *adverse* physical change in the existing environment. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15060 (c)(2), 15061, 15064, 15125, 15358, 15360, 15378(a); 15382.)

Of special concern is the Council's inclusion of an overbroad definition of any proposed project that appears to include any contribution, no matter how insignificant, to any existing cumulatively significant impact on achievement of the coequal goals. It is conceivable that a proposed project may have an insignificant contribution to a cumulatively significant impact that has resulted from over a century of development in the Delta and Delta watershed. At a minimum, the definition of "significant impact" should be revised to expressly exclude such projects from the definition.

Section 5003(b)(2)(C): One-year temporary CVP- and SWP-related water transfers occur regularly and are subject to all terms and conditions and other environmental protections imposed on the SWP and CVP. They therefore are "routine operations" of the SWP and CVP and expressly excluded from the definition of "covered action" by Water Code section 85057.5(b)(2). Moreover, one-year transfers approved by State Water Resources Control Board are exempt from the application of CEQA pursuant to Water Code section 1729, and therefore are not a "project" under Public Resources Code section 21065. Although the proposed regulation administratively exempts one-year temporary water transfers, it does so "only through December 31, 2014." This proposed sunsetting of the covered action exclusion is inconsistent with the express language in the Delta Reform Act and will hinder achievement of the coequal goal of improving water supply reliability. Accordingly, this Section should be removed from the Proposed Regulations.

Section 5003(b)(2)(D): The proposed definition of "covered actions" impermissibly attempts to alter and amend established CEQA principles regarding the definition of a "project," as well as the application of statutory and categorical exemptions, and is in direct conflict with controlling law. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15300.2 (c), 15378; 15382.) Statutory exemptions under CEQA are absolute; they reflect legislative policy determinations and are not subject to any exceptions for "unusual circumstances." (Cal. Code Regs., tit. 14, § 15061(b)(2); *Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902, 907; *Great Oaks Water Co. v. Santa Clara Water Dist.* (2009) 170 Cal.App.4th 9576, 966, fn. 8; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128-129.) The Proposed Regulations directly conflict with these established principles. Furthermore, "unusual circumstances" as they pertain to categorical CEQA exemptions have been defined and interpreted under CEQA. (Cal. Code Regs., tit. 14, §§ 15300.2(c); *see, e.g., Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 261; *Turlock Irrigation District v. Zanker* (2006) 140 Cal.App.4th 1047; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261.) The Council has no authority to fundamentally alter controlling law.

4. Section 5006 Includes an Unauthorized Assertion of Regulatory Authority over State and Federal Water Contracting

Section 5006: The Proposed Regulations require "improved transparency in water contracting." The Council does not have the statutory authority to impose that requirement merely because it is based on a Council determination that water contracting is a "covered action." While the Delta Reform Act authorizes the Council to review on appeal whether a covered action is consistent with the Delta Plan, it has no role in the initial determination whether a proposed action is a "covered action." As described above, early language had proposed to give the Counsel a direct role, but the Legislature declined to do so as reflected in the Act. The Council recognizes this at page 54 of the Delta Plan—"The state or local agency . . . determines whether the proposed plan, program or project is a covered action . . ." Nevertheless, Section 5006(b) appears to be an attempt to administratively declare that the Department of Water Resources' and U.S. Bureau of Reclamation's administration of their contracts are covered actions. The Legislature, however, has explicitly provided otherwise by excluding routine operations of the SWP and CVP—which includes routine execution and amendment of a water supply contract—in Water Code Section 85057(b)(2). The Delta Reform Act does not authorize the Council to regulate the contract renewal process, and its attempt to do so is inconsistent with the Delta Reform Act.

In addition, any attempt by the Council to alter or amend those contracting policies would be inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the Central Valley Project; the Burns-Porter Act (see, e.g., Wat. Code § 12937), which governs the State Water Project; and the Delta Reform Act savings clause (including the provision that nothing in the Act affects the Burns-Porter Act). (Wat. Code, § 85032(e).)

For the foregoing reasons, Section 5006 should be removed from the Proposed Regulations.

Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be an adverse physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) These ubiquitous uncertainties violate OAL requirements. Thus, Section 5009 must be removed or revised.

B. Sections of the Proposed Regulations Are Not Necessary or Are Unreasonable

The OAL will review the Proposed Regulations for compliance with the "necessity" standard. Government Code section 11349(a) defines the necessity standard:

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To satisfy this standard, Council must provide:

> (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
>
> (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

Numerous sections of the Proposed Regulations do not meet these legal standards. Examples are set forth below.

Section 5001: In the Initial Statement of Reasons, the Council states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, at least the following five provisions within the proposed definitions are unnecessary.

Subsection 5001(k): The proposed regulatory definition of "feasible" merely repeats the language of Public Resources Code section 21061.1. (See also Cal. Code Regs., tit. 14, § 15364.) As such, the regulation is unnecessary and duplicative.

Subsection 5001(s): The proposed regulatory definition of "significant impact" conflicts with existing statutory and regulatory definitions of the same term used in the same context. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382; *see also In re Bay-Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.)

Section 5005: The Initial Statement of Reasons describes section 5005 as necessary to "ensure[] that urban and agricultural water suppliers are taking appropriate actions to contribute to the achievement of reduced reliance on the Delta . . ." (Initial Statement of Reasons at p. 4.) In addition, the text of section 5005 of the Proposed Regulations requires use of water from the Delta watershed to be "significantly reduced." The Council's proposed implementation of that requirement violates the Savings Clauses of the Delta Reform Act. (Wat. Code, §§ 85031-85032.) Moreover, the legislative purpose of the Act was to further the coequal goals through the establishment of the Council to improve coordination of state agency actions in the Delta, develop a new Science Program to improve water and ecosystem management in the Delta, and ensure activities of the State and local governments in the

Delta did not preclude progress toward achievement of the coequal goals. These outcomes were to be achieved through the Delta Plan, under which the Council was given the authority to review appeals of consistency certifications for "covered actions." Regulations seeking to reduce water use statewide and SWP and CVP water deliveries are not necessary for the Council to effectuate these purposes of the Delta Reform Act, which the Legislature directed it to pursue with very limited, rather than expansive, authorities provided in the Act.

Subsection 5005(c): Water Code section 85021 calls for a statewide strategy of investment in regional water supply and management actions as a means to help reduce reliance on the Delta in meeting future water supply needs. However, proposed subsection 5005(c) turns this statutory, forward-looking investment policy into a highly punitive threat to current and future water supplies. In doing so, the Council has proposed a regulation that is unnecessary, unreasonable, and inconsistent with the statute itself and that "does not reasonably effectuate the statute." (Gov. Code, §§ 11342.2, 11346.3, 11349.1(a).)

The Council's proposed section 5005(c) could prevent water supply entities the use of their water rights, or their contract rights to water service, even if those entities meet all statutory requirements, simply because the Council has decided that another entity has not, in the Council's opinion, adequately reduced its reliance on water from the Delta watershed. For example, the Council apparently claims the authority (1) to determine that one entity sharing a supply with others (e.g., several retailers served by the same wholesale supplier) has not implemented "all programs and projects" identified in its water management plan as cost effective and technically feasible; and (2) to prohibit the delivery to other parties sharing that supply and for which water management plan compliance has not been questioned. Under this proposed regulation, if "one or more" water suppliers have not satisfied the Council, it claims the right to consider that factor in deciding whether to halt delivery of any of that water to all of the entities sharing that supply. Not only is this assertion of power untenable and not supported by the language of the statute or its legislative history, it also is invalid and ineffective under Government Code section 11342.2.

Section 5006: In the Initial Statement of Reasons, the Council asserts that section 5006 is intended to remedy the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses" through "improved public involvement and transparency in decision making processes by enforcing . . . existing contracting policies within the [DWR] and the Bureau of Reclamation." (Initial Statement of Reasons at p. 5.) However, the requirement in the Proposed Regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's own appendices. The specific language merely requires the Department of Water Resources and U.S. Bureau of Reclamation to follow contracting policies that each has developed and is currently utilizing. There is no need for the requirement.

C. Sections of the Proposed Regulations Lack Clarity

The OAL will review the Proposed Regulations to determine whether they comply with the "clarity" standard. (Gov. Code, § 11349.1(a)(3).) "Clarity" as defined by Government Code section

11349(c) means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." "Clarity" is further defined in California Code of Regulations, title 1, section 16(a):

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
>
> > (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> >
> > (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning . . . .

Because the Proposed Regulations contain so many vagaries, the regulated community cannot know how they may be required to comply. The Council has an obligation to provide clear and complete regulations for public review and comment such that their requirements are readily apparent. The following examples illustrate where the Proposed Regulations do not satisfy that obligation.

Subsection 5001(s): As noted above, the Initial Statement of Reasons states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, the proposed definition of "significant impact" is confusing. Subsection 5001(s) does not explain what would constitute a "*substantial* impact on the achievement of one or both of the coequal goals," which is a key component of the proposed definition of "significant impact." (Emphasis added.) Thus, in addition to being unnecessary and inconsistent with controlling law, subsection 5001(s) lacks clarity.

Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be a physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) Further, it is unclear how the proposed mandatory language requiring that "opportunity" impacts "must be avoided or mitigated" is to be satisfied.

IV. DEFICIENCIES WITH COST ANALYSIS

The Cost Analysis of the DSC proposed regulations contains analytical errors, errors of omission, and simply ignores significant costs.

A. The Cost Analysis Does Not Adequately Explain the Assumption of No Cost to Comply with Existing Regulations

The proposed regulations are based on an apparent assumption that the Proposed Regulations merely duplicate, and do not add to the substantive requirements of existing law, so the costs of the proposed regulations would occur in any case. That assumption is not explicitly stated or supported by

citations to law. Thus, the assumption that particular results of the regulations are already defined in law, and thus generate no costs, is unsupported. To the extent that the Proposed Regulations add substantive mandates, as demonstrated above, the assumption is inaccurate.

B. The Cost Analysis Greatly Underestimates the Cost of Complying with the Proposed Regulations

Most simply put, the cost analysis is limited to administrative costs of compliance with the Proposed Regulations; thus, it fails to address the larger direct and indirect economic and social costs associated with application of the regulations as written.

The Proposed Regulations fail to consider:

- Costs (both opportunity and direct costs) due to delays in private projects for consistency determinations;
- Costs due to delays that result in the abandonment of projects;
- Costs due to appeals regarding consistency certifications, and the lack of clear definition of many of the terms of the regulation lend themselves to interminable, hyper-technical legal challenges based on differing interpretations of vague and ambiguous provisions;

Also, the cost analysis ignores the costs associated with the mandatory reductions in the quantity of water conveyed through the Delta, and in reductions in water used from within the Delta watershed set forth in Section 5005 of the Proposed Regulations. The economic and social costs of those reductions are severe. The Public Water Agencies' prior letter regarding the Delta Plan Draft Program Environmental Impact Report, dated February 2, 2012, discusses the work of economists from U.C. Davis and the University of the Pacific, which concluded that in 2009, as a result of a relatively dry hydrology and water supply restrictions imposed on the State Water Project and Central Valley Project, the San Joaquin Valley population lost as many as 7,434 jobs, more than $278 million in income, and more than $368 million in overall economic output. (Michael J., et al. 2009. A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (Sep. 28, 2010).) Additional support can be found in several court decisions. (*Delta Smelt Consol. Cases* (E.D. Cal. 2010) 717 F.Supp.2d 1021, 1052; *Consol. Salmonid Cases* (E.D. Cal. 2010) 713 F.Supp.2d 1116, 1148; *San Luis & Delta-Mendota Water Authority v. Salazar (Delta Smelt Consol. Cases)* (E.D. Cal. 2009) 2009 WL 1575169 at *5-6.)

To the extent the proposed regulations assume the reductions in the quantity of water conveyed through the Delta would be "offset" by localized actions, the cost analysis does not identify costs associated with those other actions. For example, if the offset is to occur with increased production of groundwater, the cost analysis does not consider the cost of overdrafting groundwater basins.

C. The Cost Analysis Erroneously Interprets Habitat Restoration as No Cost

The cost analysis assumes that all habitat restoration will result from the operation of CEQA. There is no basis for this assumption, as nowhere in the Proposed Regulations are habitat restoration goals tied to those required to fulfill CEQA obligations to implement feasible alternatives or mitigation measures to address significant environmental impacts. As a result, the cost analysis improperly assumes no cost for habitat restoration that may be required as a result of the Proposed Regulations.

Further, the related requirement to protect opportunities to restore habitat imposes additional opportunity and direct costs, as use of private property may be affected by restoration effort mandates. The discussion in the cost analysis focuses on areas that are currently regulated to justify its finding of no additional costs, but fails to examine the costs associated with those areas which are not currently regulated.

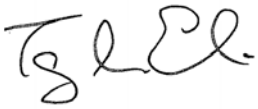
D. The Cost Analysis Ignores Potential Costs Associated with Implementing the Requirements to Reduce Reliance on Delta Watershed Water to Meet Future Water Supply Needs

While existing law may require regions to improve water conservation, groundwater management, and multiple other water use changes (see Wat. Code, § 10608 et seq.), Section 5005 of the Proposed Regulations threatens loss of water supply for failing to meet certain reductions in water used from the Delta watershed. The Proposed Regulations state, if a region fails to '"adequately contribute," to water use reductions,[10] those within that region may not receive water from within the Delta, or conveyed through the Delta. If restrictions on water supply are imposed pursuant to Section 5005, such draconian consequences will drive significant expenditures beyond what is currently underway. Conversely, those regions which have already significantly complied with the requirements may have limited ability to further reduce their demand. Those regions may lose opportunities to have sufficient water to meet demands or be forced to spend large sums of money on projects that are not otherwise cost-effective. Thus, the Council has yet to analyze the economic costs associated with the implementation of Section 5005.

[10] "Adequately contribute" is undefined. Thus, the cost of compliance may be unknowable. However, the Council cannot promulgate an unlawfully vague and ambiguous regulation, then use the vagueness and ambiguity as an excuse not to conduct the required economic analysis of the impact of implementing the Proposed Regulations.

For all the reasons stated above, the Proposed Regulations including the Cost Analysis are fundamentally flawed and should be revised and recirculated for public comment.

Sincerely,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Terry L. Erlewine
General Manager
State Water Contractors

ATTACHMENT 1

The State Water Contractors (SWC) represents 27 public agencies that contract with the State of California for water from the State Water Project (SWP). These agencies are each organized under California law and provide water supplies to nearly 25 million Californians and 750,000 acres of prime farmland from Napa County to San Diego and points between.

The San Luis & Delta-Mendota Water Authority (SLDMWA), which was formed in 1992 as a joint powers authority, consists of 29 member agencies, 27 of which contract with the United States Department of the Interior, Bureau of Reclamation (Reclamation), for supply of water from the federal Central Valley Project (CVP). SLDMWA's member agencies hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water. CVP water provided to SLDMWA's member agencies supports approximately 1.2 million acres of agricultural land, as well as more than 100,000 acres of managed wetlands, private and public, in California's Central Valley. SLDMWA's member agencies also use CVP water to serve more than 1 million people in the Silicon Valley and the Central Valley.

SLDMWA Member Agencies:	SWC Member Agencies:
Banta-Carbona Irrigation District Broadview Water District Byron Bethany Irrigation District (CVPSA) Central California Irrigation District City of Tracy Del Puerto Water District Eagle Field Water District Firebaugh Canal Water District Fresno Slough Water District Grassland Water District Henry Miller Reclamation District #2131 James Irrigation District Laguna Water District Mercey Springs Water District Oro Loma Water District Pacheco Water District Pajaro Valley Water Management Agency Panoche Water District Patterson Irrigation District Pleasant Valley Water District Reclamation District 1606 San Benito County Water District San Luis Water District Santa Clara Valley Water District Tranquility Irrigation District Turner Island Water District West Side Irrigation District West Stanislaus Irrigation District Westlands Water District	Alameda County Flood Control and Water Conservation District Zone 7 Alameda County Water District Antelope Valley-East Kern Water Agency Casitas Municipal Water District Castaic Lake Water Agency Central Coast Water Authority City of Yuba City Coachella Valley Water District County of Kings Crestline-Lake Arrowhead Water Agency Desert Water Agency Dudley Ridge Water District Empire-West Side Irrigation District Kern County Water Agency Littlerock Creek Irrigation District Metropolitan Water District of Southern California Mojave Water Agency Napa County Flood Control and Water Conservation District Oak Flat Water District Palmdale Water District San Bernardino Valley Municipal Water District San Gabriel Valley Municipal Water District San Gorgonio Pass Water Agency San Luis Obispo County Flood Control and Water Conservation District Santa Clara Valley Water District Solano County Water Agency Tulare Lake Basin Water Storage District

EXHIBIT 2

January 14, 2013

Cindy Messer
Delta Plan Program Manager III
Delta Stewardship Council
980 Ninth Street, Suite 1500

Re: Comments on Final Draft Delta Plan

The State and Federal Water Contractors Water Agency (SFCWA), the San Luis & Delta-Mendota Water Authority, and State Water Contractors, on behalf of themselves and each of their member agencies, appreciates the opportunity to provide the following brief comments on the final draft Delta Plan. As always, we intend our comments and criticisms to be constructive and we strongly believe they are consistent with Legislative intent as memorialized in the Delta Reform Act. To be responsive to the Council's direction, we do not repeat here our detailed comments regarding the September 5, 2012 version of the Delta Plan; however we do incorporate them by reference as they are still broadly applicable.[1] We also include an appendix to this letter with more specific comments that point out inaccurate statements found in the draft Delta Plan. In addition, we are separately submitting detailed comments on the Recirculated Program Environmental Impact Report, as well as comments in response to the proposed new Division 6 of Title 23 of the California Code of Regulations (CCR).

Over the course of this arduous though generally collegial process the Council has made revisions to the prior drafts that have added value to resolving California's ongoing and vexing water management challenges related to the Delta. Nevertheless, we reaffirm our view that the Council simply should not just become *another* regulator. Instead, it should focus on its fundamental legislative charge to help coordinate, integrate and synthesize the activities of the various state agencies (and federal where possible) with jurisdiction or mission related activities in the Delta.

Notwithstanding improvements, there remain significant issues that have not been resolved and which highlight the basic issue of the limit of the Council's authorities, which will be addressed through the Office of Administrative Law process and, no doubt, at some point in the future in the Courts. We find this state of affairs unfortunate and believe it can still be averted with a few necessary changes to the Delta Plan and proposed new regulations.

We appreciate the efforts by the Council to try to develop a more acceptable implementation approach for WR P1. But we still believe that the fundamental flaw with WR P1 is that there is nothing in the statute or the legislative history to justify the Council's assertion of authority to require a "significant reduction in the amount of water used, or the percentages of water used, from the Delta watershed." This proposed regulation should be eliminated or at minimum made a recommendation and not a "policy". As we have demonstrated in previous comments, and do so again in our comments regarding the proposed new Division 6 of Title 23 in the CCR, the Council is both misinterpreting §85021 ("reduced reliance") and injudiciously seeking to make it THE central tenet and driving force of the Plan – a Plan that is unambiguously charged with the task of furthering the <u>coequal goals</u> of both *improved* water supply reliability and ecosystem restoration in the Delta.

[1] We attach a copy of our specific comments regarding the September 5, 2012 draft Delta Plan to this letter for the convenience of the reader.

Urban and agricultural regions have long maximized the use of regional sources of supply and have suffered disproportionate and severe water supply and reliability losses due to operational constraints imposed with the intent to protect federally listed species. Public Water Agencies are looking at solutions that would increase the amount of water used from the Delta watershed from today's levels, but within contract limits, through development and implementation of comprehensive solutions such as the Bay Delta Conservation Plan. As currently written, WR P1 can too easily be interpreted to mean that irrespective of any water supply solutions or improvements in the status of listed species, regions reliant upon appropriated water flowing through the Delta will have to do with less.

It remains frustrating to us that the Draft's perspective on the water supply coequal goal continues to stubbornly rely on selective and incomplete citations to the State's foundational governing principles and laws that apply to water management. In particular, the Draft Plan ignores the Constitutional requirement to consider the "public interest" in the beneficial use of water. Article X, § 2 requires that "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable [avoiding waste and unreasonable use], and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." The pertinent Constitutional text of Article X, §2 should be included to truly reflect the coequal status of Californians' public interest in the beneficial use of water along with environmental restoration in the Delta. As we've noted before, the Delta Plan perpetuates a similarly selective and incomplete citation with respect to the Public Trust Doctrine which should also be corrected. Both of these incomplete references are indicative of the overall dismissal of the Delta Reform Act's statutory direction that the Delta Plan address "meeting the needs for reasonable and beneficial uses of water" and "sustaining the economic vitality of the state". (§85302(d)(1) and (2)).

We maintain our objections to the appellate procedures specified in Appendix B regarding the Bay Delta Conservation Plan (BDCP), as we have since they first were drafted. Staff has stated that the Council will reopen and review the current Appendix B procedures soon after adoption of the Delta Plan. The Draft Plan should explicitly recognize this commitment and clarify that the procedures will not be considered final until this review occurs.

The Council's asserted role vis-à-vis the implementation of the BDCP also remains a troubling area of concern for SFCWA's member agencies. While providing a "short form" consistency certification for BDCP projects is an improvement, logic would dictate if the BDCP is incorporated into the Delta Plan then by definition all of its activities are consistent with the Delta Plan and thus there is no need for any certification process. A consistency determination requirement by the Council is redundant and would only provide an avenue for delay in furthering the achievement of the coequal goals.

We remain concerned as well that the Draft Plan's recommendation that a Delta Flood Risk Management Assessment District be formed by the Legislature is premature. Until there is a comprehensive assessment of what the State's priorities in the Delta are and the funding mechanisms available to implement them, there is no need for a new entity to be created with fee authority.

Notwithstanding the above criticisms and concerns, as well as those in our attached comments to the September 5, 2012 Delta Plan, Recirculated DPEIR and the proposed Title 23 regulations, we acknowledge the hard work the Council's staff has put into this process from the outset. We look

forward to continuing to engage with you as you move into the implementation phase of this important work after correcting identified deficiencies in the Delta Plan, RDPEIR and proposed regulations.

Thank you for your consideration.

Sincerely,

Byron M. Buck
Executive Director
SFCWA

Terry Erlewine
General Manager
SWC

Dan Nelson
Executive Director
San Luis and Delta Mendota Water Authority

Attachments: Appendix 1; Attachment 1, September 26, letter to Delta Stewardship Council

Appendix 1

There are numerous statements contained in the Delta Plan related to descriptions of the Delta ecosystem and factors allegedly affecting it that are unsupported by the science, misleading, incomplete, and/or inaccurate. Examples of such statements include, but are not limited to, the following:

- The statement, "Yet, the long-term impacts of these diversions, on the Delta and its watershed, in combination with many other factors, are causing native fisheries to decline," is unsupported by any scientific citation. (Delta Plan, p. 71.) What long-term impacts are being referenced?

- The description of the constraints on CVP-SWP project operations between 2007 and 2013 is inaccurate. (Delta Plan, p. 71.) Court ordered injunctions modified certain requirements of the Biological Opinions in 2007 and 2008. Since 2009, the Biological Opinions have been controlling CVP-SWP project operations.

- The numbers in the sidebar "Where California's Water Comes From" are not well referenced. (Delta Plan, p.75.) There is a citation to the California Water Plan without an indication of where in the multi-volume document the material can be located.

  In the sidebar, the definition of agricultural and urban water use appears to be calculated using "Applied Water Demand"; this is improper as Applied Water Demand does not account for the reuse that occurs. "Net Water Demand" is the appropriate metric for measuring agricultural and urban water use. Admittedly, the California Water Plan erroneously uses Applied Water Demand. To be accurate, at the very least the Delta Plan should acknowledge water reuse is not accounted for.

- The text indicates that 20 MAF are mandated as required to provide for sufficient instream environmental flows. This quantity does not reflect the flows that are surplus to instream flows. These surplus flows are not identified in the text, and the failure to account for the surplus flow appears to be related to the erroneous use of Applied Water Demand. (Delta Plan, p. 77.)

- The Delta Plan is inconsistent in its definition of "average water year." The Delta Plan describes "average" as the year 2000, the average of water years 1998-2005, and the long-term average from CALSIM. (See e.g., Delta Plan, p. 77.) A single definition of average should be adopted and applied throughout.

- The Central Valley generally flushes the northern San Francisco Bay, very rarely the southern San Francisco Bay. (Delta Plan, p. 84.) Is there a citation to support the statement that the southern San Francisco Bay is flushed by Delta outflow? How would the authors determine the flushing effect of local run-off as compared to Delta outflow?

- The Delta Plan should clarify that reliance on the Delta for water supply varies by region and within regions. (Delta Plan, p. 85.)

- On page 85, the discussion of San Francisco Bay water supplies is misleading. The text indicates that 57 percent of the water supply is from local surface and groundwater sources. However, the reference for this is the DWR report card, but that document assumes that <u>all</u> streamflows in the San Francisco Bay Area are needed in some, but not all, years. The majority of these instream flows are likely surplus, not mandated. The percentage of local water used for developed water uses in the Bay Area is relatively small, and would consist only of Marin Municipal Water District, small amounts of local contribution for Hetch Hetchy Project, and incidental amounts of groundwater use. Probably more than 80% of Bay Area developed water relies on imported supplies.

- On page 87, the percentage of SWP and CVP use is expressed as a percentage of inflow to the Delta. Hetch Hetchy and East Bay MUD use is expressed as a percentage of flow from the Delta watershed. Water use should be described consistently. Both should be described as a percentage of flow from the Delta and watershed.

- The CVP-SWP projects already pump more water in the wet years than in dry. (Delta Plan, p. 93.) Making a comparison using percentage of inflow diverted results in a misleading characterization of wet verses dry year pumping. Current total pumping is higher in wet years as compared to dry years. It should be further noted that the ability to further increase wet year pumping under current conditions is highly unlikely as the Biological Opinions do not provide such flexibility.

- The statement, "Were sufficient storage available, flows that exceed the instream flow criteria could be captured and stored," is perplexing. (Delta Plan, p. 83.) Does this statement refer to the 2010 Flow Criteria Report by the State Water Resources Control Board? The Flow Criteria Report's January-June recommendation of 75% of the unimpaired hydrograph on the Sacramento River would greatly limit the ability of existing reservoirs to capture high flows and store water. It is therefore unclear what benefit additional storage would provide.

- The text implies that the CVP-SWP pumping continues to have a significant and unmitigated effect on the Delta. (Delta Plan, p. 129.) There is no citation provided to support this statement. The current science does not support this statement.

- It should be acknowledged that the list of stressors identified in the Delta Plan is incomplete. (Delta Plan, p. 133.) For example, the list does not include: predation, ocean harvest, or water quality contamination.

- The citations that state that, ”flow is the master variable,” can be misleading if taken out of context. (Delta Plan, p. 136.) The referenced studies are considering how changes in flow can be used to restore relatively unmodified riverine environments. Other authors caution that flow modification for the purposes of habitat restoration in highly modified systems can have highly uncertain results, where additional outflows or changes in timing of outflows can have negative and positive results.

- The list of factors influencing in-channel flows should include “hydrology.” (Delta Plan, p, 138.)

- The tides also affect Old and Middle River flows. (Delta Plan, p. 138.)

- The operation of the CVP-SWP facilities does not affect water temperature in the Delta.

- The operation of the CVP-SWP can only influence the location of the low salinity zone (LSZ) under certain hydrologic conditions. (Delta Plan, p. 138.) The language in the Delta Plan implies that the location of the LSZ is primarily, or exclusively, controlled by project pumping, and this is incorrect.

- There is no evidence to suggest that the current variability of Delta outflow is limiting the diversity of fish species. (Delta Plan, p. 138.)

- Unless there has been an official determination and enforcement action, the factual basis for concluding that certain dam owners have not complied with Fish and Game Code section 5937 is questionable. (Delta Plan, p. 138.)

- The science does not support the conclusion that negative OMR disrupts migratory cues for fish. (Delta Plan, p. 138.) No citation is provided in the text to support this position.

- The current science does not support the inference that CVP-SWP pumping causes Sacramento River juvenile salmon to be entrained in the central Delta through the Delta cross channel or Georgiana Slough. (Delta Plan, p. 142.) USGS studies suggest that the number of fish that travel into the central Delta is unaffected (not statistically) by CVP-SWP project pumping.

- There is insufficient evidence to reach a conclusion about the potential magnitude of entrainment resulting from operation of "small" diversions in the Delta. (Delta Plan, p. 142.)

- The text implies that the current rate of entrainment in the CVP-SWP facilities has a significant effect on species abundance. The entrainment data does not support this inference. For example, the NMFS OCAP Biological Opinion limits entrainment to 1-2% of the population. The FWS OCAP Biological Opinion limits entrainment of delta smelt to 200 individuals. There are no published studies that conclude this level of entrainment has a population level effect on the species.

- The meaning of the following sentence is unclear: "The functional habitat available to these open water fish has shrunk even though the areas covered by open water has remained fairly stable." (Delta Plan, p. 142.) It is unclear what is meant by "functional habitat." There is scientific uncertainty regarding how "habitat" is defined for each pelagic species, and it is unlikely that each pelagic species has the same habitat requirements.

- The text implies that the CVP-SWP pumps are the reason a comparatively small amount of San Joaquin River water exits the Delta. (Delta Plan, p. 148.) The San Joaquin River has significantly less water than the Sacramento River regardless of SWP-CVP project pumping. There is water consumption by upstream diverters that contributes to reduced flows on the San Joaquin River.

- What evidence is there that the Sacramento River flows are obscuring migration cues on the San Joaquin River? (Delta Plan, p. 149.) No citation was provided.

SFCWA
State & Federal Contractors Water Agency
1121 L Street, Suite 806, Sacramento, CA 95814

September 26, 2012

Chairman Isenberg and Council Members
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chairman Isenberg and Council Members:

The State and Federal Contractors Water Agency is pleased to provide the attached specific comments regarding the final draft strike-out/underline addition Delta Plan discussed by the Council at its September 13th, 2012 meeting. Please note that the page and line citations are referenced to the redline versions of the documents.

While we realize the Council did not provide additional direction regarding various criticisms of more policy related issues we have raised in these and prior comments, we are hopeful that our other comments, which make up the bulk of our submittal, can be incorporated into the final draft as they are editorial suggestions to improve clarity and tone and correct factual errors that do not alter the substantive content of the draft.

We look forward to the publication of the supplemental volume of the Draft PEIR and subsequently the response to comments received on both the original PEIR and the supplemental volume. We also look forward to the review and further discussion this fall regarding your previously adopted administrative procedures, including those which we continue to object to related to a potential appeal of the Department of Fish and Game's certification of the Bay Delta Conservation Plan's satisfaction of the criteria set forth in the Delta Reform Act for its incorporation into the Delta Plan.

We request that when the final draft Delta Plan is released that you provide an index of language deletions and additions as compared to the September 5th draft to help expedite review.

We appreciate all the effort you and your staff have put into this process and the responsiveness to our constructive engagement and that of other stakeholders. We will continue our participation to help develop a successful Delta Plan that furthers the coequal goals.

Sincerely,

Byron M. Buck
Executive Director

Enclosure (1)

P xxvi, last bullet WQ R8: delete duplicate language, "and determine control measures for implementation starting in 2020."

P 3, L 18: New language though somewhat improved still gives impression of population equally spread over region when that is far from the case. Suggest the following as a substitute for the last sentence: "The Delta is comprised of both a Primary Zone formed by the unique patchwork of mostly agricultural islands and an increasingly urban landscape of the Secondary Zone that includes the cities of West Sacramento, Stockton, Tracy and other communities. Of the Delta's half million residents, about 98% live in the Secondary Zone."

P 4, L 23-24: This sentence referencing the state policy to reduce reliance on the Delta should accurately reflect the statute and thus "in meeting future water supply needs" should be added after "Delta".

P 5, L 30: Use of "from past abuses" is inappropriate and inaccurate as most of the actions were taken consistent with law etc. We suggest "from past actions" as a substitute.

P 9, L 22: Use of "threaten" is inappropriate as it can be read to imply incompatibility. We suggest "impact" as a substitute.

P 13, L 39: To improve accuracy, we suggest an addition; "run backward, and some fish, lacking…."

P 15, Sidebar, 3rd bullet: Suggest adding language that 98% of residents live in the Secondary Zone.

P 16, L 17-18: This sentence regarding the salmon fishery is out of place and, if included at all, should not be part of a "Water Exports Cut" paragraph. Moreover, it is important to reference the fact that the PFMC determined that ocean conditions were most determinative of salmon population levels and not other factors that are often cited.

P 19, L 11-14: This sentence falsely equates the State's new "reduce reliance" policy with an absolute reduction in exports from the Delta and a "give back" to the system. In fact, new paradigm is to better integrate activities, construct new infrastructure to enhance operational flexibility, and to seek to shift exports from drier times to wetter ones. Consequently, the first sentence of this paragraph and the word "Thus" from the second should be deleted.

P 39, Table 2-1: Description of Delta Watermaster > suggest adding "under authority delegated by the SWRCB" at end of sentence. Description of Bureau of Reclamation > suggest addition "which, among other activities, pumps water through…." to reflect the fact the CVP includes units other than the San Luis Unit.

P 40, L 9: The word "transparent" should not have been deleted as that is included in the statutory direction to the Council. It needs to remain.

P 43, L 19: The word "transparent" should not have been deleted as that is included in the statutory direction to the Council. It needs to remain.

P 54, L 23-26: The use of "baseline" and the "cumulative impact" approach to assessing whether a "proposed action" will have a "significant impact" only adds confusion and uncertainty. The cumulative

effect concept essentially moots the Legislature's intention and definition of a "covered action" as itself having to have a significant impact as it is hard to imagine any action in the Delta, combined with the "probable future" actions of the BDCP, not having a significant "cumulative" effect. That can not have been the intent of the statute.

P 56, L 16-17: Leaving in the expiration date is problematic as it removes certainty from the transfer market leading up to that date. Instead, we suggest substituting language stating that "This exemption will be reviewed by the Council for possible amendment by ~~on~~ January 1, 2015. ~~unless the Council acts to extend the exemption prior to that date.~~ The Council contemplates that any amendments ~~extension~~ would be…."

P 56, L 38-39: Staff and Council previously indicated this language would be updated pending the outcome of Lois Wolk's bill (1495). The Wolk bill includes a much more narrow definition of what is considered a "routine" activity for the purposes of exemption from covered action applicability. The Governor has signed 1495 and thus we suggest deleting the current language and replacing it with specific reference to the bill language in the administrative exemption. The bill reads: "(i) Dredging to maintain the Stockton Deep Water Ship Channel at a depth of 40 feet in the sediment trap at the confluence of the San Joaquin River, between river mile 39.3 to river mile 40.2, and to maintain the remaining Stockton Deep Water Ship Channel at a depth of 35 feet plus two feet overdredge from river mile 35 to river mile 43."

P 57, L 36-41: We reiterate out position that if the BDCP is incorporated into the Delta Plan then by definition all of the activities undertaken pursuant to it will be consistent with the Delta Plan and thus there is no need for a certification process. A consistency determination requirement by the Council, no matter how pro forma, is redundant, unnecessary, and provides an avenue for delay in furthering the achievement of the coequal goals.

P 60, L 11: In addition to "organizes and integrates" the Council's science plan should be one that prioritizes ongoing research and monitoring as well.

P 72, Sidebar, last bullet: Delete "when the limited amount of available water must remain in the Delta". This language implies that NO water may be diverted and deleting it does not change the point of the sentence.

P 73, L 10: Insert the following to be more accurate, "…one corner of the state can have ripple effects" since not all actions have these sorts of connections.

P 73, L 19: Term "geographic situation" is confusing. This sentence is awkward and should be revised.

P 73, L 23: Insert the following to be more accurate, "…fear the impacts of reduced water supply reliability…."

P 73, L 32: Insert the following to be accurate, "…meet the projected additional water demands…."

P 74, L 12: Problem with this sentence in that "exports" don't "support" flow patterns nor do they reduce vulnerability to disruption. New conveyance facilities will provide the capability to achieve these identified outcomes. The sentence should be revised accordingly.

P 81, L 27-30: Suggest addition for clarity, "Maintaining freshwater conditions to meet regulatory requirements in the Delta…." Also, it is unclear how it follows that it will "increase risk from catastrophic levee failure and floods." This last part should be explained or deleted.

P 82, L 8-9: The Public Trust is NOT a "longstanding constitutional" doctrine. It is a common law doctrine. Suggest deleting "constitutional" as easiest way to handle.

P 82, L 23-27: It is not enough to quote the full text of Article X, Section II in the Glossary. The portion of the Constitution directing that the State's waters be put to beneficial use to the "fullest extent" should be included here are well, as it is that fullest use that is subject to the reasonable use requirement.

P 83, L 2-5: This discussion of the Public Trust doctrine leaves the reader with a false impression that serving "public trust" resources trumps all other considerations. Even if "feasible" the touchstone of the Public Trust is serving the *public interest*, which may require not dedicating resources to the public trust values. To provide the full picture, the following quotation from the decision would be beneficial, "as a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses."

P 95, L 40-41: It is important to note that DWR's reliability assessment is based upon the capability of existing infrastructure so as not to give the impression this is necessarily a continuing trend.

P 97, L 24: Water transfers are an important tool for improving water supply reliability, as the original language stated. The concept of "predictability of exports" is not related to transfers and, in fact, the following sentences point out the uncertainty related to the capability to move transfer water. We suggest keeping the original language with the addition of "improving", i.e. "…important tool for improving water supply reliability."

P 97, L 40: The term "past expectation" should be deleted as it never existed and doesn't exist today. If anyone is aware of the variability of water supplies and the impact of hydrology it is the exporters. This and the following clause in the sentence are without basis. The entire first paragraph (L 39-42) of the section should be deleted.

P 110, L 14-15: Famigletti did not measure lost groundwater storage capability as this statement implies, he measured how much groundwater was extracted and not replaced, i.e. the space created by that use. Not all of that resulted in subsidence and the loss of groundwater storage capacity.

P 110, L 16: Replace "many" with "some". As written, implies unmanaged overdraft is widespread and it is not.

P 115, L 31: Why was footnote 19 deleted and relegated to a mention in the appendix? This is an important definition to include in the text as it originally appeared to help alleviate potential uncertainty. In addition, it is critical that the definition of "water supplier" be forwarded to OAL as part of the policy and severing it from it raises concerns about that being done.

P 118, L 32-37: We reiterate our 6th draft comment regarding this language as overstating the "problem" and ignoring the vast majority of California's groundwater that is actively and well managed. There are some areas that are not utilizing best practices and information related to groundwater management should be more transparent. However, the sky is not falling as this "problem statement" suggests.

P 124, L 39-42: This sentence should be rewritten. Again, the Council appears to inappropriately equate the reduce reliance policy with reducing exports in absolute terms. This is a position without support. To make the point that seems to underlie this language we suggest the following, "….that will ~~benefit the amount of water,~~ improve the quality of water and the timing of flows in and through…."

P 139, L 7-8: This sentence implies that the projects are the only cause of harm to the ecosystem. The proscriptions on project operations may have "fully" mitigated the harm caused but other stressors in the system may have blocked those benefits from being realized since they cause harmful impacts too. We suggest a period after "reduce damage" and deletion of the rest of the sentence.

P 139, L 18-19: There are a number of "other stressors" that should be referenced along with invasives, e.g. pollution, unscreened diversions, etc.

P 145, L 40: We do not think the use of the term "master variable" is constructive or informative, but it does perpetuate misunderstanding. We suggest substituting "important" for "master".

P 150, Figure 4-4: The graphic describing "unimpaired" flows should state that while the water facilities are removed, flood control facilities and the channelization of the rivers and Delta still exist. Historically, "unimpaired" flows would have flooded the Sacramento Valley and created what was known as a great inland sea, which would reduce the volume of outflow and attenuate that flow dramatically as compared to current conditions.

P 150, L 12-13: There seems to be some verbiage missing here.

P 152, Sidebar, last line of 2nd to last paragraph: This statement is inaccurate. The appeal the Council may hear is regarding the DFG certification of the BDCP meeting the statutory criteria for its inclusion in the Delta Plan, not whether the BDCP will be included or not. This is stated correctly in the sidebar on page 103.

P 153, L 2-3: There seems to be some verbiage missing here.

P 153, L 37: This statement begs the question of what "significant numbers" are. Even if this were true, which we are skeptical of since the issue is not just entrainment through the pumps but also providing a feeding haven for predators such that entrainment is relatively low because the fish have been "entrained" into predators' stomachs. Moreover, under the ESA, ANY take is "significant". This sentence should be revised or deleted.

P 158, L 22-23: Why was the sentence regarding other stressors deleted? We request it be returned to the text.

P 161, L 14-21: There is no discussion of the current exemption to this policy that exists for California, which I think is in place? Also, the issue is not just forcing removal of vegetation, but also a prohibition

on new planting which is critical to ecosystem restoration along channels, especially where setback levees are not feasible.

P 164, L 30: Need to keep the word "century" in the sentence and not delete it.

P 166, L 25-44: Any discussion of the critical role of ocean conditions in the health of salmon populations is conspicuously absent considering the conclusions of the PFMC as to being a key factor.

P 167, L 12: If there are "unmitigable stressors" it seems worth mentioning the possibility of having to adapt expectations of restoration or of the tools used to try to achieve it as well.

P 167, L 24: It is inappropriate to state that flows are insufficient to "protect" the Delta based on the SWRCB's 2010 flow report as that report was non-regulatory in nature and, as the SWRCB itself caveated heavily, did not take into account any balancing of other beneficial uses as required by law when establishing water quality objectives. This sentence should be deleted and doing so will not change the paragraph's purpose or message.

P 176, L 28: The proper term is "mark select", not "marking selective".

P 201, L 11-23: It is important to note that the DPC's LURMP and ESP must be consistent with the Delta Plan and that it is the Council that makes those determinations.

P 210, L 37: There are some islands in the central Delta that have subsided as much as 30 feet. This should be noted.

P 227, L 6: At the end of the sentence add the following, "…guided by the DPC's ESP, consistent with the Delta Plan."

P 245, L 27-36: The entire discussion of X2 should be deleted as it does "continue to be studied and debated". Instead, keep the first 2 sentences of the paragraph and the last. Most of the verbiage in-between repeats hypotheses that have been rejected by the courts and are in dispute; it should be deleted.

P 245, L 43-45: This sentence should be deleted as it is referring to a hypothetical future scenario and it is out of place with the rest of the paragraph: [~~The combined effects of sea level rise and changes in other aspects of estuarine habitat caused by climate change and increased water diversions are likely to pose a significant threat to the future survival of Delta smelt (Feyrer et al. 2011).~~]

P 250, L 6-12: The last sentence in the "Ammonium" bullet should be deleted and replaced with a sentence reflecting current scientific information. [~~It is not known, however, how much this inhibition extends to freshwater algae in the Delta.~~] "Ammonium impacts on phytoplankton have also been observed in the Sacramento River below the Sacramento Regional WWTP. Parker et al. (2012a; 2012b) observed not just an inhibition of nitrate uptake, but also an inhibition of nitrogen uptake and a decline in primary productivity when ammonium concentrations are greater than about 4 µmol/L."

P 259, L 14-20: The target date of January 2018 to adopt and implement nutrient objectives for the Delta and Suisun Marsh is unnecessarily and inappropriately distant. The San Francisco Bay Regional

Water Quality Control Board and the SWRCB both have policy development programs underway to develop nutrient objectives, and the analysis of nutrient impacts in the Delta and Suisun Bay is an active area of current research. The Water Boards should be able to adopt nutrient objectives for the Delta and Suisun Marsh well before 2018. The Council should seek to prioritize an earlier and more reasonable date for development of nutrient objectives that reflects all the progress to date.

P 276, L 5: after "development," add "ecosystem restoration,".

P 277, Sidebar, last paragraph: It would be informative, and remove a false impression of how much levee restoration costs today, to include an estimate of what the cost to make the identified repairs would be today.

P 278, L 13-14. This is an incomplete statement. Levee failures can, in some places, cause damage to the ecosystem. But in other areas, levee failures can and have created new habitat (e.g., Liberty, Little Holland, Mildred Islands).

P 282, L 9: "12 to 15 feet" should be replaced with "5 to 29 feet" or "up to 29 feet". (per Joel Dudas, DWR Lidar specialist and "Contemporaneous Subsidence and Levee Overtopping Potential, Sacramento-San Joaquin Delta, California", San Francisco Estuary and Watershed Science, 10(1), Brooks et al).

P 282, L 16-18. Undo deletion.

P 289, L 41-42. This statement is untrue. USGS has found ecosystem benefits (phytoplankton growth) on the flooded Mildred Island.

P 312, L 5-15: Add new bullets: "Establish Acreage goals for new ecosystem enhancements, including set-back levees and breached levees." And, "Agencies avoid spending public money on levees that will eventually be breached for ecosystem enhancement."

P 322, Glossary, "coequal goals": Why was "shall" replaced with "must" when "shall" is what is in the statutory definition? The statutory language should be used.

P 340, Glossary, "low salinity zone": Everything after the first sentence should be deleted as superfluous and irrelevant to the definition of the LSZ. "X2" is defined later so it should not be mentioned here. Moreover, including the "hypothesized" conclusion has no place in a Glossary.

P 342, Glossary, "Public Trust Doctrine": This definition completely ignores the central tenet of the doctrine that it is the *public interest* that is key and that there may be times when it is either infeasible or a reasonable policy choice is made to take the most "protective" action. This presents only one side of the coin.

P 345, Glossary, "unimpaired flow": This does not state that the measurements are made with the current flood management facilities in place and the current geometry of the system which is not what that "natural" system would be. "Unimpaired flows" in a "natural" condition would be significantly different from those under the DWR contrived "unimpaired flow" model.

P C-1, Appendix C, WR P1: This new language doesn't make much sense and is unclear. The "covered actions" aren't going to be completing current UWMP/AWMPs?

P C-12, Appendix C, FR R1: This is a bit confusing. Shouldn't it include actions that "contribute to" or "further" the coequal goals, not just "do or may achieve"?

P N-1, Appendix N, Table N-1: We reiterate our objection to including a $20M placeholder for Studies/Grants for 2013-2014 forward, in addition to the almost $10M of "other studies", prior to undertaking an inventory and prioritization of the science already being undertaken and the development of a new, integrated Science Plan.

P P-3, Appendix P, L 10: there are two "that"s and one needs to be deleted.

EXHIBIT 3
(Part 1 of 3)

San Luis & Delta-Mendota Water Authority

P.O. Box 2157
Los Banos, CA 93635
Phone: (209) 826-9696
Fax: (209) 826-9698

State Water Contractors, Inc.

1121 L St., Suite 1050
Sacramento, CA 95814
Phone: (916) 447-7357
Fax: (916) 447-2734

January 14, 2013

By Regular and Electronic Mail
Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

cindy.messer@deltacouncil.ca.gov
recirculateddpeircomments@deltacouncil.ca.gov

RE: Recirculated Draft Delta Plan Environmental Impact Report, November 2012 [SCH #2010122028]

Dear Chairman Isenberg and Council Members:

The San Luis & Delta-Mendota Water Authority and State Water Contractors (collectively, the "Public Water Agencies")[1] write on their own behalf and on behalf of their member agencies to express continuing significant concerns with the Delta Plan Draft Environmental Impact Report as recirculated in November 2012 ("RDEIR"). The RDEIR does not address the deficiencies under the California Environmental Quality Act ("CEQA") identified in detail in the Public Water Agencies' prior letter regarding the Delta Plan Draft Program Environmental Impact Report, dated February 2, 2012 ("DEIR"). Those comments remain valid and relevant, and the Public Water Agencies incorporate them by reference as if set forth fully herein. Additionally, although the Delta Stewardship Council ("Council") requested that comments be limited to the RDEIR, CEQA does not prohibit the public from submitting comments on the DEIR, especially when the RDEIR incorporates so much of the DEIR. Thus, the following general comments, and the additional specific comments presented in the Attachment 2, incorporated herein by this reference, address deficiencies in both the DEIR and the RDEIR (collectively referred to as the "EIR").

The RDEIR is legally deficient for the following reasons:

- The RDEIR does not identify or analyze the environmental impacts that would result from implementation of the proposed project. Further, the RDEIR does not adequately

[1] Descriptions of the San Luis & Delta-Mendota Water Authority and State Water Contractors are provided in Attachment 1 hereto.

address issues of the Council's authority, and lack thereof, to implement the proposed project. The RDEIR perpetuates and compounds the fundamental defects identified in the Draft Program EIR.

Under CEQA, an environmental impact report must be prepared with a sufficient degree of analysis to provide decision makers with information that enables them to intelligently account for a proposed project's environmental consequences. (CEQA Guidelines, § 15151.) The document's conclusions must be supported by substantial evidence (i.e., facts and analysis). (*Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376.) Despite these standards, the RDEIR contains virtually no analysis of the environmental impacts of the proposed project and little or no substantial evidence to support most of the conclusions presented therein. Rather the RDEIR does not adequately support conclusions as to the significance of impacts in the RDEIR.

The format of the RDEIR, like that of the DEIR, is extremely redundant. For each resource area, the narrative in the RDEIR says essentially the same thing using the same language – resulting in the excessive length of the document.

In addition to being unsupported by facts or analysis, the RDEIR's conclusions are conflicting and inconsistent. Throughout most of the RDEIR, the conclusions indicate that because future projects are mostly unknown, impacts could be "significant." At the same time, for each of these conclusions the RDEIR also states that due to the imposition of non-specific mitigation measures, the impacts also could be "not-significant." This dichotomy of possible conclusions does not satisfy the Council's CEQA duties to prepare meaningful impact analyses and identify enforceable mitigation measures.

Many of the mitigation measures presented in the RDEIR are inadequate either because they do not constitute mitigation as defined under CEQA, are vague and uncertain, or are improperly deferred to future environmental documents without any performance standards or specific criteria to ensure effectiveness and enforceability. Additionally, many of the measures are so generic that they would apply to virtually any type of project. Overall, the document is far too general to enable decision-makers to make required CEQA findings as to whether particular mitigation measures would be effective, much less whether they would be feasible. The legal sufficiency of the mitigation measures is further in question because the language in them is repetitive – containing the exact same language irrespective of impact or resource area affected.

- The RDEIR creates further confusion regarding the elements of the proposed project and fails to address critical issues concerning the project description, project objectives, and a reasonable range of alternatives, among others. In this manner, the RDEIR does not satisfy CEQA's core policy of informed public involvement and decision-making.[2]

[2] This comment letter and the attached specific comments refer to "proposed project," "original Proposed Project," and "Revised Project." As a result of the noted error, those terms may be used interchangeably at times.

In the RDEIR, the "Revised Project" is presented as a new alternative that apparently is the Council's preferred proposal. The "Revised Project" thus appears to be the actual project for purposes of CEQA. Yet the document continues to refer to the original proposal as the "Proposed Project". Characterization of the "Revised Project" as an alternative creates unnecessary confusion that compounds the concerns of clarity, accuracy and sufficiency, and stability of the project description identified in our previous comments.

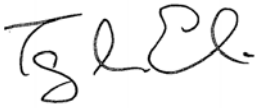
The emphasis of the RDEIR is purportedly to illustrate the differences between the "Revised Project" and the "Proposed Project," yet the DEIR's and RDEIR's limited environmental analysis results in an inability to meaningfully compare these two iterations of the project. The qualitative "*greater than*" or "*less than*" comparisons in the RDEIR do not constitute the meaningful evaluation of alternatives CEQA requires. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.)

- The RDEIR continues to support a proposed project that would impede, rather than promote, achievement of the coequal goals. Illustrative of this deficiency is that through its administrative procedures related to review of covered actions the Council seeks to require that even projects undertaken pursuant to the BDCP must comply with Delta Plan certification requirements. Using simple logic, if the BDCP is incorporated into the Delta Plan, as the Legislature has directed, then by definition all of its actions are consistent with the Delta Plan of which they are a part. This is not a question necessitating review and would lead to unnecessary administrative process and could lead to unnecessary litigation.

- Because of the deficiencies identified in this letter, the attachment, and in the Public Water Agencies' February 2012 comment letter, the RDEIR does not satisfy CEQA's requirements. Accordingly, the Council should not certify the EIR. However, if it does, the Council must first revise the EIR to make it legally compliant with CEQA. Such revisions would constitute new information of substantial importance under CEQA and thus require recirculation before the Council considers certification of a subsequent, legally sufficient document. (State CEQA Guidelines, § 15088.5.)

Thank you for the opportunity to submit these additional comments.

Sincerely,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Terry L. Erlewine
General Manager
State Water Contractors

ATTACHMENT 1

The SWC represents 27 public agencies that contract with the State of California for water from the State Water Project (SWP). These agencies are each organized under California law and provide water supplies to nearly 25 million Californians and 750,000 acres of prime farmland from Napa County to San Diego and points between.

The SLDMWA, which was formed in 1992 as a joint powers authority, consists of 29 member agencies, 27 of which contract with the United States Department of the Interior, Bureau of Reclamation (Reclamation), for supply of water from the federal Central Valley Project (CVP). The Authority's member agencies hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water. CVP water provided to the Authority's member agencies supports approximately 1.2 million acres of agricultural land, as well as more than 100,000 acres of managed wetlands, private and public, in California's Central Valley. The Authority's member agencies also use CVP water to serve more than 1 million people in the Silicon Valley and the Central Valley.

San Luis & Delta-Mendota Water Authority Member Agencies:	State Water Contractors Member Agencies:
Banta-Carbona Irrigation District	Alameda County Flood Control and Water Conservation District Zone 7
Broadview Water District	Alameda County Water District
Byron Bethany Irrigation District (CVPSA)	Antelope Valley-East Kern Water Agency
Central California Irrigation District	Casitas Municipal Water District
City of Tracy	Castaic Lake Water Agency
Del Puerto Water District	Central Coast Water Authority
Eagle Field Water District	City of Yuba City
Firebaugh Canal Water District	Coachella Valley Water District
Fresno Slough Water District	County of Kings
Grassland Water District	Crestline-Lake Arrowhead Water Agency
Henry Miller Reclamation District #2131	Desert Water Agency
James Irrigation District	Dudley Ridge Water District
Laguna Water District	Empire-West Side Irrigation District
Mercey Springs Water District	Kern County Water Agency
Oro Loma Water District	Littlerock Creek Irrigation District
Pacheco Water District	Metropolitan Water District of Southern California
Pajaro Valley Water Management Agency	Mojave Water Agency
Panoche Water District	Napa County Flood Control and Water Conservation District
Patterson Irrigation District	Oak Flat Water District
Pleasant Valley Water District	Palmdale Water District
Reclamation District 1606	San Bernardino Valley Municipal Water District
San Benito County Water District	San Gabriel Valley Municipal Water District
San Luis Water District	San Gorgonio Pass Water Agency
Santa Clara Valley Water District	San Luis Obispo County Flood Control and Water Conservation District
Tranquility Irrigation District	Santa Clara Valley Water District
Turner Island Water District	Solano County Water Agency
West Side Irrigation District	Tulare Lake Basin Water Storage District
West Stanislaus Irrigation District	
Westlands Water District	

ATTACHMENT 2

THE PUBLIC WATER AGENCIES' SPECIFIC CONCERNS WITH THE DELTA PLAN RECIRCULATED AND DRAFT PROGRAM EIR

A. <u>Project Description Deficiencies.</u>[1]

An accurate, stable and finite project description is the *sine qua non* of CEQA. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) It allows the lead agency to identify the proper environmental baseline, to evaluate the no-project alternative, to develop a range of reasonable and viable alternatives, to consider mitigation measures, and to balance a project's benefits against its environmental costs. (*Id*., pp. 192-93.) The Project description provided in the EIR does not meet CEQA's requirements for several reasons.

1. The Project Description Fails to Identify and Disclose Replacement Water Sources, Precluding Any Meaningful Analysis of Foreseeable Environmental Impacts.

First and foremost, the EIR states that the Delta Plan will result in an overall decrease of water conveyed through the Delta (often referred to as "exported" from the Delta). (*E.g.*, DEIR p. 2A-67 [The Plan asserts it would reduce water exports as compared to the current, "no project" conditions].) Second, the EIR concludes that, even though the Delta Plan will result in less water conveyed through the Delta, the total amount of water supplied to end users will remain the same because agencies other than the Council will offset the reduced supply conveyed through the Delta through increased groundwater use, development of desalination plants, development of recycled water facilities, and increased water transfers. However, although the EIR recognizes that these actions to offset the impacts of the Delta Plan are foreseeable impacts of the proposed project and all alternatives (except the No Project Alternative), there is no analysis of whether each of these actions is feasible, the amount of water these actions will need to produce to offset the impacts of the proposed project, or the environmental impacts of each action. Indeed, if such analysis were undertaken, the EIR would reflect that in many, if not most, areas, local supplies are utilized, and, in a few areas, have been over-utilized, sometimes resulting in groundwater overdraft. If the Council cannot quantify and analyze the amount of water affected, including the amount of local supplies that will need to be developed, where those supplies will likely come from, and the environmental impacts of developing and utilizing those supplies, then the Council's CEQA significance conclusions cannot be supported by substantial evidence. The Council's conclusions regarding impacts amount to little more than a speculative guess. (See State CEQA Guidelines, § 15384 [substantial evidence includes facts, but not speculation or unsubstantiated opinion].)

[1] In addition to the errors presented in this letter, the project description fails because the proposed project is unlawful. (See Appendix, which includes comments on the drafts of the Delta Plan and on the regulations the Council has proposed for adoption, all of which are incorporated herein by this reference.)

2. All Alternatives Focus on Decreasing Water Exports Without Analysis of Jurisdiction or Impacts of Increased Reliance on Local Supplies.

The type of alternatives analyzed do not constitute a reasonable range of alternatives as required by CEQA (see State CEQA Guidelines, § 15126.6(a)), because they all focus on decreasing the quantity of water conveyed through the Delta without considering the Council's jurisdiction over management of that water or the Council's desired impacts of increased reliance on local supplies. This is problematic. For example, groundwater wells will not be an adequate replacement for water otherwise conveyed through the Delta since, as the EIR acknowledges, some areas that receive water conveyed through the Delta and utilize groundwater are in a state of overdraft and currently rely heavily on the water conveyed through the Delta to prevent the worsening of this overdraft. (See, e.g., DEIR pp. 2A-16, 3-29 to 3-31, 3-34, 3-37, 3-41, 3-44, 3-56, etc.; other pages fail to disclose the status of the relevant groundwater basins, see p. 3-58) The EIR recognizes this, and that surface water is needed to recharge existing wells, and yet, in direct contradiction, continues to claim establishing additional groundwater wells will help achieve a more secure water supply for California. In addition, in coastal areas where desalination could be considered, those plants take years—often, decades—to plan and develop. (See DEIR p. 3-49, noting that Marin Municipal Water District has been investigating desalination since the 1990s, with no resulting facilities, p. 3-74, noting that there are enormous obstacles to large-scale desalination, due to difficulties with land acquisition, treatment, operational costs, environmental review and permitting processes involving more than 20 local, state, and federal agencies, and that of all of the proposed desalination plants, only a single one has actually progressed to the construction phase, more than five years after the EIR was released [p. 4-61], and will only deliver 56,000 acre-feet once fully completed and operational). All of this, and additional realities and feasibility limitations of water management, directly contradicts the EIR's unsupported conclusion that sufficient, feasible replacement water sources exist.

3. The EIR Does Not Analyze Foreseeable Impacts of Replacement Sources.

The EIR does not analyze how many replacement sources of water would be required and the environmental impacts of developing those different types of replacement sources. For example, accepting for the sake of argument that the Council actually had the ability to reduce the quantity of water conveyed through the Delta, as discussed in the EIR, if the EIR anticipates the use of desalination plants as a replacement source, the EIR must analyze how many desalination plants would be required to replace the loss of supply; the time required to design, permit and construct such plants; and the energy requirements of desalination plants. Alternatively, if the EIR anticipates the use of local groundwater as a replacement supply, the EIR must analyze the number of wells required, the impacts of additional pumping on groundwater basins, including those already overdrafted, and the potential for subsidence and other relevant impacts. Similarly, the EIR's reliance on water transfers must be supported by a complete analysis of the amount of water available for transfer, and identify the areas water would be available for transfer from. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 440-41.)

Where the EIR anticipates the use of recycled water in place of State Water Project (SWP) / Central Valley Project (CVP) water, CEQA requires that the EIR analyze the environmental impacts of doing so. In violation of CEQA, these foreseeable impacts that would directly and indirectly result from the imposition of the proposed Water Resources Policy 1 (WR

P1), notwithstanding the Council's lack of authority to enforce it, are not disclosed in the EIR. Desalination, additional groundwater resources, and the other replacement sources the EIR identifies are available only in limited amounts and areas.

While recycled water facilities are a potential future source of water for some locales, many areas already recycle significant amount of wastewater. (See DEIR p. 3-74.) In addition, at this time, recycled water facilities often do not produce large amounts of potable water, and, because it is often high in salt content, the resulting recycled water has limited utility. Such recycled water may not be usable for drinking water, but may be limited in use to irrigation where purple pipes or other similar infrastructure is available, or for groundwater recharge. However, even these uses may be threatened without adequate amounts of imported water for blending, since water with higher salt content may need to be blended with higher quality water to allow its most beneficial use. Recycled water, much groundwater, and some other alternative sources (i.e., Colorado River water) may not be available to recharge groundwater (without blending with higher quality water) if the recycled water is too high in salts. (See, e.g., DEIR p. 3-63 ["Groundwater quality is degraded through increased salinity and other constituents…the use of imported Colorado River water with higher salinities has resulted in degradation of groundwater quality in much of Southern California."].) None of these issues are disclosed or analyzed in the EIR, in violation of CEQA. While the EIR states that (unidentified) Urban Water Management Plans describe the existing use of recycled water and identify the potential for increased use by 2020, there is no incorporation by reference of these documents or analysis of their contents, so the feasibility or amount of these is unknown. In addition, the EIR states that the State Water Resources Control Board mandates the increased use of recycled wastewater by 200,000 AFY by 2020 (DEIR p. 2A-21), so such increase would not be as a result of the proposed project, but would properly be part of the baseline or No Project alternative.

4. The Vague Project Description Fails to Disclose the Timeline or Detail Necessary for Future Modifications.

Even if the Council had the authority to curtail water exports as it asserts through WR P1, the EIR improperly fails to disclose as part of the Project description, or anywhere in the analysis, what the timeline would be for reductions in the quantity of water conveyed through the Delta. This violates CEQA's disclosure and analysis requirements. While the EIR refers to the dates 2100, 2030, and 2016 (DEIR p. 1-14), it is not disclosed whether the quantity of water conveyed through the Delta would be affected before that time, by which of those dates any or all of the supposed replacement water sources would be available, how much water those new sources could be producing by what date, etc. Also, while the EIR recognizes that small-scale storage projects may take 5-10 years and new major dams and larger projects more than 10 years to implement (DEIR p. 2A-11), specifics as to how many projects could be completed, the environmental effects of doing so, as well as when and how much water would be available are necessary to analyze the potential impacts of the Plan.

The EIR also confirms that there are "numerous studies and programs, the results of which should be considered in development of the Delta Plan" but that "those studies have not been completed and several are not anticipated to be completed before 2020." (DEIR p. 1-14.) The EIR goes on to imply that modifications in the Delta Plan may be necessitated by the result of these studies. If these studies must be considered in the Delta Plan because they have the potential to modify the Plan, they must be identified and analyzed. If they must be considered

and are not, substantial evidence cannot support the Project description that was put forth in the EIR. The Council should explain what modifications are likely and then analyze those in the EIR.

5. Assumptions for the No Project Alternative Are Contradictory.

The No Project alternative is arbitrary and illogical. In one paragraph, the EIR states that state law requires urban water supplies to reduce statewide urban per capita water use by 2020. Accordingly, the expectation that per capita water usage will be reduced as required by law should be assumed as part of the No Project alternative. It is not. In addition, the No Project alternative assumes there will be no additional regional or local supplies. However, the EIR states that local agencies are today already increasing their recycled water availability and expanding and building recycled water facilities. (DEIR pp. 2A-11, 2A-86.) Therefore, the DEIR's No Project alternative does not assume current plans will be continued, contrary to what is stated in the EIR and in violation of CEQA. (See State CEQA Guidelines, § 15126.6(e)(2) ["The 'no project' analysis shall discuss the existing conditions at the time the notice of preparation is published… **based on current plans** and consistent with available infrastructure and community services"] [Emphasis added].)

6. The Project Description Lacks Identification of Necessary Agency Approvals.

CEQA requires that a project description include a list of other agency approvals that may be necessary to implement the project. (State CEQA Guidelines, § 15124.) However, the project description does not appear to include any such list. For example, the EIR states that some federal agencies may consider the EIR in their review processes (DEIR p. 1-14), but there is no indication of what federal agency approvals are necessary or in what capacity the federal agencies may be considering the EIR. Similarly, the EIR does not identify whether approvals from other state or local agencies are required. Given that the EIR repeatedly states that the bulk of Plan implementation will fall on the shoulders of local agencies, failing to identify which agencies may be relying upon the EIR or issuing approvals to implement the Plan is improper.

7. The RDEIR Proposes a Changed Project Description Without the Requisite Detailed Analysis.

The "alternative" discussed in the RDEIR is problematic because it appears to, in reality, be a change in the project description rather than a potential alternative. To the extent an "alternative" is approved rather than the project as proposed, all of the requirements for the project description must still be met, and that alternative must have received the same level of analysis as the proposed project. (See *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533 [an action that is more limited than a proposed project may be approved, but not vice versa]; *Dusek v. Redevelopment Agy.* (1985) 173 Cal.App.3d 1029, 1041.)

B. <u>Baseline Deficiencies</u>.

Under CEQA, an EIR must have a clear statement of what baseline was used for purposes of determining the significance of environmental impacts. (See, e.g., State CEQA Guidelines, § 15125.) The EIR states that, "[t]he baseline for assessing the significance of impacts of the proposed project is the existing environmental setting." (DEIR p. 2A-85.) However, the EIR gives no description of what those existing conditions actually are or how those existing

conditions were determined on a state-wide basis. Specifically, the EIR does not make clear whether it assumes that the "existing conditions" are drought conditions or "average" conditions, whether the ability to convey water through the Delta was assumed to be curtailed by various biological opinions or not, or what assumptions were made regarding the storage capacity and conveyance capabilities. Absent such a description, the EIR's baseline usage cannot be supported by substantial evidence because it is not based on any discrete facts. (See State CEQA Guidelines, § 15384 ["substantial evidence" includes facts, but not mere opinions or unsupported conclusions].)

The inadequate baseline described above is also impermissible under CEQA because no account was taken of the rapidly changing circumstances affecting water supply within the State of California. Where, as here, changing conditions may affect an agency's significance conclusions, courts have held that it is appropriate for the lead agency to take account of those changing conditions by considering a range of circumstances in the baseline. (See *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1570.) A baseline should entail "a realistic description of existing conditions" without the project and whether that baseline would be "an illusory basis" for analyzing project impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121 [appropriate baseline for determining "real conditions on the ground" included a range of years of water usage].) Accordingly, the Council's baseline is legally insufficient since it both (1) fails to describe the physical baseline conditions used and (2) compounds this problem by apparently using one illusory moment in time for the baseline, even though such a "snapshot" is not representative of overall water supply conditions in California. The EIR should instead consider overall water supply conditions and use a baseline based on a range of water year types.

Although the Public Water Agencies provided this same comment on the DEIR, it is equally applicable to the RDEIR, because the RDEIR repeatedly states that it uses the same environmental setting as that set forth in the DEIR. (E.g., RDEIR, pp. 3-1, 4-1, 5-1, etc.)

C. Project Features and Mitigation Measure Deficiencies.

1. Delta Plan Policies and Mitigation Measures, Which Are the Basis of the Impacts Analysis, Are Not Mandatory or Enforceable by the Council.

The newly revised November 2012 draft Delta Plan (like earlier draft Delta Plans) includes dozens of policies that are allegedly "mandatory." (E.g., RDEIR p. ES-2 ["The Delta Plan is a suite of regulatory policies that would have the force of law and nonbinding recommendations…."].) Those policies are shown in the revised draft Delta Plan (November 2012) on pages xiii through xxxi and in Appendix C of the RDEIR. The RDEIR for the revised draft Delta Plan makes the same mistake as the DEIR by determining the Plan's impacts assuming that the policies will be implemented. Specifically, the RDEIR "assumes that the Delta Plan will be successful and will lead to other agencies taking the encouraged actions" through the "Revised Project's policies and recommendations." (RDEIR p. ES-2.) What a plain reading of these policies actually shows, however, is that they are far from mandatory, and thus it is error for the EIR to assume their implementation. For example, the policies are full of non-binding language stating that certain agencies "should" undertake certain tasks "where feasible" to implement the Plan. (E.g., Policies ER P1, ER P2, ER P4, etc.) Likewise, the policies are

unenforceable insofar as they seek to command other public agencies, over which the Council has no clear authority (such as the State Water Resources Control Board and Caltrans), to take certain actions to implement the Plan. (E.g., Policies ER P1, DP P1, etc.) The EIR does not account for or explain what impacts may result if the Policies are not implemented. The Council cannot offer up a "wish list" of future actions that may or may not occur, and then evaluate the Plan's impacts by assuming that this "wish list" will be granted.

As with the DEIR, the application of the Mitigation Measures proposed in the RDEIR is unclear. On the one hand, the EIR states that "covered activities" must include the mitigation measures identified in the EIR. On the other hand, however, the EIR is replete with statements that the implementation of mitigation measures and Delta Plan policies may or may not be feasible, calling into question whether these mitigation measures are actually required when the Plan is implemented. The EIR should be clarified in that regard, and the consequences of potential incompatibility with the Delta Plan should be presented. If it is reasonably foreseeable that the Council's mitigation measures will be infeasible for implementing agencies, then the Council has the obligation to disclose to the public what the potentially significant and unavoidable impacts actually are. It is not enough to merely state that impacts may be significant, because CEQA's information disclosure requirement is only satisfied by a detailed discussion of what the impacts may be. (*Keep Jets Over the Bay Comm. v. Bd of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1371 [an EIR cannot simply state an impact is significant without first providing its analysis].)

Moreover, and again as with the DEIR, the mitigation measures proposed in the RDEIR are unenforceable. As the Public Water Agencies pointed out in their February 2, 2012 letter, mitigation measures must be specific and mandatory, such that they are "fully enforceable." (State CEQA Guidelines, § 15126.4.) To that end, under CEQA, the formulation of mitigation measures may not be deferred until a later time, although an agency is allowed to provide specific performance standards that specify the extent to which impacts will be mitigated. (State CEQA Guidelines, § 15126.4; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20.) To the extent that it is infeasible to impose enforceable mitigation measures, the lead agency must "reference that fact and briefly explain the reasons underlying the Lead Agency's [infeasibility] determination." (*Ibid.*) Just as with the DEIR, the RDEIR fails to provide enforceable mitigation and does not impose mitigation that will actually avoid or lessen the identified impacts. Furthermore, and again as explained more fully in the Public Water Agencies' comments on the DEIR, the Council fails to explain why it is infeasible to make the mitigation measures enforceable or to fund additional mitigation that might ease the burden on local agencies while also reducing the significant impacts caused by the Council's proposed project. Additionally, the proposed project and the proposed mitigation are inconsistent with each other, in that they encourage ocean desalination facilities and other water treatment facilities to assure adequate water supply (Recirculated EIR p. ES-2), but at the same time forbid, throughout the State, the siting of all future projects to improve water supply *anywhere* that would result in a substantial reduction in fish and wildlife species habitat. (See DEIR pp. 4-71 [Impact 4-2a] and 4-83 [Mitigation Measure 4-1].) This could potentially apply as well to ocean desalination facilities. The mitigation measures are even internally inconsistent, in that they are worded one way in the main text and worded in another way (with important elements absent) in the Executive Summary (examples provided below). Again, information that is contradictory and that gives with one hand what the other takes away, is not substantial evidence. (See State CEQA Guidelines, § 15384.)

2. Vague and Unenforceable Mitigation Measures.

The following are several examples of the vagueness and unenforceability of the mitigation measures included in the EIR. Because they are vague, unenforceable, and inadequate under CEQA, the Council should delete them.

Biological Resources

- MM 4-2 requires scheduling construction to avoid special status species' breeding, spawning, or migration locations, yet cannot identify when and where construction must be halted.

- MM 4-2 also requires preconstruction surveys for special-status species but cannot mandate how close in time to construction these surveys must occur, the species that must be surveyed, or the seasons in which the surveys may or may not occur.

- MM 4-2 also requires relocation of special-status species "when appropriate," yet cannot identify any specific or enforceable criteria for determining appropriateness.

- MM 4-2 and 4-3 require that unavoidable impacts to special status species or substantial loss of habitat be compensated by restoring or preserving in-kind suitable habitat, but cannot identify any specific or enforceable performance standards for the ecological value or location of the in-kind habitat.

- MM 4-4 requires that connectivity of habitats be protected, restored and enhanced, but cannot identify specific and enforceable performance standards.

Delta Flood Risk

- MM 5-1, 5-2, 5-4, and 5-5 require a future drainage study to assess the need for drainage-related mitigations, improperly deferring mitigation.

- MM 5-1 and 5-5 require setback levees or bypass channels where in-stream construction sites "might reduce channel capacity" yet cannot identify performance standards. Similarly, they require a sediment management program where low channel velocities "might result from construction."

- MM 5-1 also requires a long-term sediment removal program at in-river structures, but cannot provide performance standards, time frame, or other necessary specifics for enforcing this measure.

- MM 5-4 requires future preparation of evacuation and emergency response plans, but cannot identify specific and enforceable criteria for these plans.

- MM 5-4 also requires future research and settlement analyses to assess the need for settlement-related mitigations, improperly deferring mitigation.

- MM 5-4 also requires construction of new evacuation roads and access roads "as necessary" but cannot identify where, when, or how to determine whether these roads are necessary.

- MM 5-4 also requires a seepage and stability analyses to assess the need and act as a basis for design of seepage and stability related mitigations, improperly deferring mitigation.

Land Use and Planning

- MM 6-1 provides examples of methods of minimizing physical division of residential areas (i.e. burying or masking new facilities, restoring disturbed landscapes, etc.) but cannot require any of these measures, making this measure impermissibly uncertain.

- MM 6-2 requires compensation for the loss or reduction in environmental values protected by an applicable land use plan and identifies potential mitigation actions for compensation (deed restrictions, buffers, project redesign, and restoration). However, none of these potential compensation methods can be mandated by the measure.

Agricultural and Forestry Resources

- MM 7-1 and 7-2 require that proposed projects minimize "to the greatest extent feasible" the loss of agricultural land, but measures conditioned on feasibility rather than applied directly, are impermissibly uncertain.

Visual Resources

- MM 8-1 requires development of turnouts and scenic vista points "where appropriate" but cannot identify these locations.

- MM 8-1 also reads, "Consider developing aesthetically well-designed [visitor facilities]", which is vague, uncertain, and unenforceable.

- MM 8-2 requires replacement of scenic resources "when feasible." The measure is impermissibly uncertain because it is based on feasibility.

Air Quality

- MM 9-1 requires use of "lower emitting alternative fuels… where feasible" without defining lower emitting fuels. The measure is also impermissibly uncertain because it is based on feasibility.

- MM 9-1 also requires implementation of "applicable BMPs to reduce potential dust emissions" from agricultural operations, but does not identify any specific BMPs or other requirements.

- MM 9-2 says, "Applicants should development and implement a project-specific Odor Management Plan" making this measure uncertain and voluntary.

Cultural Resources

- MM 10-3 requires that projects "identify measures to avoid significant historic resources", impermissibly deferring identification of mitigation measures.

Noise

- MM 15-1 limits idling of construction equipment "to the extent feasible to reduce the time that noise is emitted" yet cannot set specific idling time, making this measure impermissibly uncertain.

Transportation

- MM 19-2 requires avoidance of modifications to roadways and bridges that may reduce vehicle capacity "to the extent feasible" but cannot identify any specific capacity criteria or thresholds.

3. Internally Inconsistent Mitigation Measures.

As limited examples of the EIR's internal inconsistency, the following mitigation measure components identified in the main EIR's text are <u>not</u> included in the Executive Summary:

- As part of MM 3-2: Conduct a survey of all wells located adjacent to the construction site.

- As part of MM 3-2: Install monitoring wells adjacent to any necessary dewatering wells or pumps.

- As part of MM 4-4: For new or expanded wildlife refuges, establish vegetation, hydrology and other habitat components for optimized use by migratory waterfowl and shorebirds.

- As part of MM 4-5: Acquire areas with the potential to increase connectivity between habitats, and protect these areas with conservation easements, deed restrictions, and similar tools.

- As part of MM 7-1: Require that project proponents ensure through easements, lot line adjustments, and parcel mergers, that any non-project areas be of sufficient size and otherwise able to sustain farming operations.

- As part of MM 7-1: Require that project proponents acquire easements or provide compensation for indirect effects on sensitive species or habitats.

- As part of MM 7-1: Require easements for temporary or intermittent interruption in farming activities.

- As part of MM 7-1: Require acquisition or compensation for any permanent or significant loss of economically viable operations.

- As part of MM 9-1: Implement conservation cropping sequences and wind erosion protection measures; apply soil stabilization chemicals; re-apply drain water to establish protective vegetation; reuse irrigation return flows to irrigate windbreaks. (Note: these are identified just as BMPs that "could" be used, but are not required, making them unenforceable mitigation in any case.)

D. Environmental Analysis Deficiencies.

The RDEIR states that the analysis of the new alternative presented in the RDEIR was based on the same methodology presented in the DEIR. (E.g., RDEIR pp. 3-1, 4-1, etc.) Accordingly, the RDEIR's analysis of the revised project is invalid for all the reasons presented in the Public Water Agencies' comment letter (dated February 2, 2012) on the DEIR. In addition, both the DEIR and the RDEIR's analyses are invalid because they fail to account for major changes in water supply issues that have arisen in the last year and because they rely upon inaccurate information and Biological Opinions that have been found legally deficient.

1. DEIR and RDEIRs Fail to Account for Major Changes in Water Supply Issues Arising Over the Past Year.

Coordinated Quantification Settlement Agreement Cases.

The Coordinated Quantification Settlement Agreement ("QSA") cases have been remanded to the trial court for determination of the CEQA claims against the Transfer Project EIR and the Programmatic EIR (see *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758). The district court's decision to uphold the Colorado River Water Delivery Agreement (which is interrelated with the QSA and other QSA-related agreements) against challenges under the National Environmental Policy Act and Clean Air Act is currently on appeal to the Ninth Circuit. (See *Cal. ex rel. Imperial County Air Pollution Control Dist. v. United States DOI* (S.D. Cal. 2012) 2012 U.S.Dist.LEXIS 49020.) The outcome of these cases could adversely affect the delivery of Colorado River water to Southern California. Since the Legislative command to the Council is to provide coequal consideration to environmental issues and to water supply reliability (Delta Reform Act of 2009), the failure to address this issue means that the EIR's analysis and consideration of water availability cannot be supported by substantial evidence.

Invalidation of the December 2008 and June 2009 Biological Opinions

Both the USFWS December 2008 and the NMFS June 2009 Biological Opinions for the long-term operations of the CVP and SWP have been found by the courts to be arbitrary and capricious and were remanded to the Services for reconsideration. The DEIR inaccurately states that the court challenge to the NMFS June 2009 is still pending, (DEIR, § 3.3 at p. 3-15). The DEIR should be updated to appropriately characterize the status of the Biological Opinions. Of greater concern, however, is how the Biological Opinions were considered within the baseline and thus relied upon by both the DEIR and RDEIR for purposes of determining project-related impacts. It impossible to discern how the Biological Opinions were factored into the baseline and the assessment of project effects. Inappropriate consideration could result in significant

inaccuracies in many of the resource categories analyzed in the DEIR and RDEIR. This is a deficiency that must be corrected throughout the documents to ensure the legally adequate disclosure of existing conditions and potential project environmental impacts.

Studies Cited In The Delta Plan Were Previously Found To Have Been Used Improperly To Justify Measures That Would Restrict The Quantity Of Water Conveyed Through The Delta

The Council's conclusion that studies, particularly those outlined below, demonstrate the need for reduced quantities of water conveyed through the Delta is foundational to various aspects of the revised Delta Plan. Simply put, those studies do not support the Council's conclusion. The United States District Court found that they did not justify the reductions on water provided in the biological opinions (BiOps) issued for long-term operations of the Central Valley Project and State Water Project.

The revised Delta Plan cites to and relies upon various studies and articles prepared by Wim Kimmerer and Frederick Feyrer for propositions related to the impacts of Delta turbidity and salinity on fish rearing (Revised Delta Plan p. 139); invasive plants and bass predation on fish population (Revised Delta Plan p. 152); and the correlation, alleged by Feyrer, between the location of X2 and Delta smelt population abundance (Revised Delta Plan p. 231). Mr. Feyrer's work is especially suspect, as the court found it scientifically unacceptable in many respects, especially regarding X2. (See *Consol. Delta Smelt Cases* (E.D. Cal. 2011) 812 F.Supp.2d 1133.) These pervasive problems include Mr. Feyrer's: (1) attempt to prove a correlation in a graph, while improperly using the same data on both axes (which itself induces a correlation); (2) using the "scientifically improper" "chaining" of the results of multiple modeling efforts together without accounting statistically for the error introduced at each step; (3) considering abiotic habitat alone rather than any of the biotic factors that have a greater impact; (4) failing to separate salinity from turbidity; and (5) failing to recognize and account for a significant portion of the delta smelt population that lived in the Cache Slough. (*Id.* at 1153-1156.) Ultimately, in considering all the evidence, including Kimmerer's and Feyrer's work, the court concluded that there was "no support for a direct link between X2 and smelt abundance." (*Id.* at 1202, emphasis added.) Kimmerer's work must also be used with caution, as the court also found that it did not support some of the propositions for which it was being used in the BiOps. (*Consol. Salmonid Cases v. Locke* (E.D. Cal. 2011) 791 F.Supp.2d 802, 903 [salmonid BiOp's "interpretation and use of Kimmerer and Nobriga (2008) was not accurate"]; see also *Delta Smelt Consol. Cases v. Salazar* (E.D. Cal. 2010) 760 F.Supp.2d 855, 877 [noting Kimmerer (2008) has a number of disclaimers and caveats, limiting the purposes for which it can be cited], 893 [delta smelt BiOp inappropriately relied on Kimmerer regarding specific flow measures that reduced water exports].) The Delta Plan and supporting EIR should not make the same mistakes.

2. Lack of Authority Notwithstanding, the EIR Avoids Analysis of Impacts by Limiting the Geographical Scope of Analysis and Deferring Analysis to an Unspecified Future Date.

One of CEQA's fundamental purposes is to ensure that public agencies take responsibility for the impacts that their projects have on the environment and the public. Courts have held that CEQA "requires public officials, in approving environmentally detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support." (*Communities for a Better Environment v.*

California Resources Agency (2002) 103 Cal.App.4th 98, 124.) CEQA includes such a purpose in order to "enable the public to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree." (State CEQA Guidelines, § 15003(e) [citing *People v. County of Kern* (1974) 39 Cal.App.3d 830].) Despite these requirements, both the DEIR and the RDEIR attempt to obfuscate the true impacts of the Delta Plan, by repeatedly claiming that the Council's action is merely the adoption of the Plan and that it is really only the later activities of "other agencies" that will cause impacts on the environment. (E.g., EIR p. 2B-1 et seq.) Although both the DEIR and RDEIR do acknowledge significant and unavoidable impacts in numerous resource areas, the repeated attempt to deflect responsibility for those impacts onto other agencies is improper under CEQA. The EIR states that the connection between the Plan and future activities is "complex" and "unclear." Contrary to these statements, it is plainly evident that, should the Delta Plan's WR P1 be enforced notwithstanding the Council's lack of authority to do so, local agencies may need to look at and develop alternative sources of water. That simple and clear connection should be set forth in both the DEIR and RDEIR. Finally, it is not enough to merely say that impacts may be significant and then forego any detailed discussion of what the exact impacts may be. (*Keep Jets Over the Bay Comm. v. Bd of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1371 [an EIR cannot simply state an impact is significant without first providing its analysis].) The foreseeable development of these other sources is a <u>direct</u> result of the proposed project, and the environmental impacts of developing these sources must be disclosed and analyzed in the Delta Plan EIR. The Council has the obligation to make a good faith effort to determine what the potentially significant impacts may be related to this and to disclose them.

Every section of the DEIR states that the analysis focuses on a "study area defined as the geographic area in which the majority of the potential impacts are expected to occur." (E.g., DEIR pp. 9-1, 10-1, 11-1.) The DEIR goes on to make clear that this area of analysis consists of the "Delta and Suisun Marsh." (E.g., DEIR pp. 9-1, 10-1, 11-1.) The RDEIR, then, refers back to and incorporates the DEIR's methodology, such that any defects in the DEIR are incorporated into the RDEIR as well. Although the EIR claims to also take a general look at areas outside the Delta, the EIR states that those areas are analyzed "to a lesser extent." (E.g., EIR p. 9-1.) For example, visual resources and geology, among other sections, have no analysis for areas outside of the Delta, despite the high likelihood of significant impacts in those areas due to Delta Plan's effort to restrict the quantity of water conveyed through the Delta; water conservation methods, which would likely reduce landscaping and greenery; and subsidence which may result from increased pumping of groundwater. The repeated admission that the impacts within the Delta region are the ones upon which the EIR focuses constitutes a violation of CEQA. Specifically, CEQA case law makes it very clear that a lead agency has the obligation to analyze <u>all</u> reasonably foreseeable impacts, even if they occur hundreds of miles away. (E.g., *County Sanitation District v. Kern County* (2005) 127 Cal.App.4th 1544.) For the Council to imply that impacts further away from the Delta are somehow less important and thus in less need of analysis or mitigation is improper and seeks to obscure the true impact of the proposed project. The EIR must be revised to correctly identify all impacts at the same level of detail, without regard for where they occur.

Additionally, the RDEIR – like the DEIR – defers analysis of nearly every single impact. The entire analysis is premised on the assumption that <u>other</u> agencies will conduct additional CEQA review at a <u>later</u> time and will work out what the Plan's impacts are and what mitigation

is appropriate for those impacts at a future date. This failure to provide any meaningful or detailed analysis of the proposed project's impacts violates CEQA. (See, e.g., *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 206.) Since the Council's proposed project assumes reduced water conveyed through the Delta, it is incumbent upon the Council to fully analyze the impacts that will occur as a result of water suppliers having to obtain substitute water from other sources and/or implement enhanced conservation efforts if feasible. Both the DEIR and the RDEIR fail to do this, instead repeatedly deferring the analysis to other agencies. (See, e.g., DEIR pp. 3-85 [water supply impacts may be determined to be significant by other agencies at a future date]; 9-35 [construction impacts would be analyzed by other agencies at a later time]; 9-41 [odors to be analyzed at a later time]; 9-41 [health risks to be analyzed at a later time]; 10-46 [cultural impacts to be determined at a later time].) The RDEIR commits the same error under CEQA. (RDEIR pp. 6-8 [land use impacts to be determined at a later time]; 6-10 [construction impacts to be determined at a later time]; 6-12 [water quality impacts to be determined at a later time].)

CEQA states that a program EIR should include "a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action." (State CEQA Guidelines, § 15168(b), emphasis added.) In fact, the purpose behind a program EIR is to "deal with the effects of the program as specifically and comprehensively as possible" in order to allow other agencies to perform a more focused and limited review of project-specific impacts. (*Ibid*.) Instead of providing that more exhaustive consideration of impacts, the DEIR and RDEIR defer meaningful analysis of water supply and other impacts to other agencies at a future time. This is impermissible under CEQA.

3. The DEIR and RDEIR Fail to Make Factually Supported Significance Conclusions.

Both the DEIR and RDEIR fail to provide a good faith disclosure of potential environmental impacts. The DEIR and RDEIR repeatedly state that the proposed project's impacts may be mitigated to a level of less than significant or may be significant and unavoidable. And following this discussion, the Council calls most impacts potentially significant. As one example, the DEIR states that, "it is possible that air quality impacts of projects encouraged by the Delta Plan may be less than significant, or could be mitigated to a less-than-significant level…. and it is possible that significant and unavoidable impacts on air quality could occur." (DEIR p. 9-27.) The RDEIR, likewise, repeatedly states that it "is possible that biological resource impacts of projects encouraged by the Revised Project may be less than significant, or could be mitigated to a less than significant level [but that] the details of many of the aspects of projects encouraged by the Revised Project are not currently known." (E.g., RDEIR p. 4-3.) Accordingly, "it is possible that significant and unavoidable biological resource impacts could occur." (*Ibid*.) The public cannot be expected to intelligently comment upon an EIR that cannot definitely identify whether a given impact would be significant or insignificant. The Council, as the lead agency, has the obligation under CEQA to analyze the impacts of its proposed project and to make a good faith effort obtain the information needed to reach a factually-supported significance conclusion rather than put forth an EIR that merely speculates as to any number of potential outcomes. (See, e.g., State CEQA Guidelines, §§ 15083, 15086 [consultation with affected agencies and the public is required to assist in the determination of impacts].) Where – as here – an EIR fails to provide a "meaningful assessment of the true scope of numerous potentially serious adverse environmental effects," courts have struck down the

CEQA document as inadequate. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220-21.) The EIR has failed to provide a good faith, public disclosure of the proposed project's impacts, and the EIR thus fails under CEQA and must be revised.

4. The Deficient Water Resources Analysis Ignores Known Factors and Constraints Affecting Water Supply Availability and Ignores Foreseeable Impacts of Water Resources Mitigation Measures.

The analysis regarding Water Resources is seriously deficient. For example, the DEIR states that there are three DWR Surface Water Storage programs that could help achieve the goal of greater water supply reliability. (DEIR pp. 2A-12, 3-77.) The RDEIR's analysis is based on the DEIR's assumptions. However, two of the three storage projects mentioned are north of the Delta. This means that the stored water will need to be sent through the Delta, and it is reasonably foreseeable based on existing and past conditions, that conveyance of that water would be limited by restrictions under SWRCB water right and water quality decisions, measures under the federal Endangered Species Act, and possibly measures under the California Endangered Species Act, among others. Similar regulatory prescriptions will exist for the foreseeable future. Further, the RDEIR fails to disclose what the water management related restrictions could be, much less analyze them and how they will affect the ability to convey water from these new storage projects through the Delta. Fundamentally, however, regulating water supply and water quality is within the jurisdiction of the SWRCB, not the Council, and it is not appropriate for the Council to merely assume what will be done by another agency without supporting evidence.

In its very short discussion of the supply of water conveyed through the Delta on pages 3-14 to 3-15 of the DEIR and occasional mention elsewhere, the RDEIR fails to analyze that water supply and the factors that impact it. While the DEIR states the raw quantities of water conveyed through the Delta in 2007 through 2009, it does not disclose how these quantities of water have varied over time and how they vary depending on the water year type, or how those numbers have been impacted by the relevant biological opinions and other restrictions. These failures violate CEQA, and these same failures exist in the RDEIR. Significantly more disclosure, discussion, and analysis needs to be added.

The DEIR notes that, in many areas, existing water supplies are fully used, further groundwater development is limited due to declining and poor quality groundwater, and existing reductions are already challenging the areas' ability to meet its water needs. (E.g., DEIR p. 3-69 to 3-70.) Despite this, both the DEIR and the RDEIR simply assume that the quantity of water that can be conveyed through the Delta can be decreased under the Delta Plan and unidentified new wells, desalination plants, water storage, recycled water, and transfers can easily make up this loss of water, without any disclosure or analysis of how this would be possible, and with the ultimate conclusion that finding and using these other sources will have a less-than-significant impact on groundwater. (RDEIR p. 3-2.) Assertions in the EIR without support do not constitute substantial evidence. In addition, Mitigation Measure 3-2, which is in both the DEIR and the RDEIR, for impacts on groundwater, merely requires surveys made of new wells to see if their operation affects water levels in other wells, installation of sheet piles, or, if not feasible, trucking in water supplies to satisfy the well user's water supply needs. (RDEIR p. 3-18.) This does not address how the project will reduce impacts to groundwater, disclose how much water

might have to be trucked in, where water is available to be trucked in from, or the fact that trucking in water supplies on a wide-spread basis would have significant air quality, traffic, and other impacts. The significant impacts of mitigation measures require disclosure and analysis in the EIR. (State CEQA Guidelines, § 15126.4(a)(1)(D).)

The DEIR contains a significance conclusion for construction-related impacts to "Reliable Water Supply," but not from proposed project operations. (See DEIR pp. 3-80 to 3-81.) Similarly, neither the DEIR nor the RDEIR has any conclusion of significance for Reliable Water Supply, Impact 3-3a; the assertion, notwithstanding the Council's lack of authority to carry out, that the proposed project will "Substantially Change Water Supply Availability to Water Users That Use Delta Water." The two-sentence discussion of this statement (DEIR p. 3-82) is clearly inadequate in any case, as it, like the rest of the EIR, merely assumes the feasibility of replacement water, despite the fact that the EIR elsewhere notes the lack of groundwater, the near-impossibility of constructing new dams or desalination plants, and other problems that will prevent the development of new water sources. The same defect exists in the RDEIR. (RDEIR p. 3-5.) The DEIR and RDEIR assume some unknown level of significant decrease in the availability of water conveyed through the Delta. Such losses would result in a significant impact on water supply for water users, particularly because most have already had their water supplies cut back. The environmental impacts of this must be disclosed, evaluated, and mitigated.

5. The Deficient Discussion of Colorado River Water Supplies Fails to Disclose Known Uncertainties.

The DEIR's discussion of the availability of Colorado River water supplies and the QSA (DEIR p. 3-69) is deficient, as it does not describe where or how such supplies are used or acknowledge that the QSA and related agreements are currently in litigation. The EIR should recognize this, and disclose how the uncertainty in the outcome of the litigation could potentially adversely affect Colorado River water deliveries to Southern California.

6. The Deficient Biological Resources Discussion Fails to Disclose Special Status Species and Potential Impacts.

The Biological Resources analysis is inadequate under CEQA, as it fails to disclose the special status species in the areas outside the Delta that will be impacted by reductions in the quantity of water conveyed through the Delta, much less analyze the potential impacts to them (notwithstanding the Council's lack of authority to regulate exports). Furthermore, and as set forth above, the biological "analysis" does not actually describe potential impacts, instead stating that impacts may or may not be significant – the EIR does not provide sufficient information to make a determination, in violation of CEQA. (E.g., EIR p. 4-3.)

7. Deficient Land Use Analysis Fails to Analyze Significant Impacts on Land Uses Outside the Delta.

The Land Use analysis is inadequate under CEQA, as it does not analyze the impacts of the proposed project on land uses in areas outside the Delta (see DEIR p. 6-26). The level of impacts on the areas outside the Delta that would potentially be impacted by the proposed project requires the same level of consideration as areas in the Delta. Also, while there is a single figure showing the land uses in California, the impact of the proposed project on these land uses is not

disclosed, much less analyzed, despite the fact the proposed project will have a host of significant impacts on an area that, as stated in the DEIR, "represents 74 percent of the incorporated population in the state and 60 percent of the total state population." (DEIR p. 6-43.) Furthermore, neither the DEIR nor the RDEIR address the impacts of displaced population as a result of the Delta Plan's intended moratorium on all land use development beyond that already identified on existing general plans. (See revised Delta Plan Policy DP P1 [forbidding development on any Delta lands that are not already designated for development in existing city and county general plans].) Indeed, the land use analysis does not even mention Policy DP P1, even though that policy seeks to shut down future growth and expansion of all cities/counties within the Delta and to displace that growth and development to other areas of the state.

8. The EIR's Deficient Discussion of Multiple Resources Fails to Analyze or Disclose the Plan's Impacts Throughout California.

The Visual Resources analysis is inadequate under CEQA, as it does not analyze or disclose the visual impacts of reducing water deliveries to 24 million acres – 23% of the entire land mass of California, or any other visual impacts to areas outside the Delta. (DEIR p. 8-15.) Instead, it focuses solely on the areas in the Delta. The Geology and Soils section also fails to analyze impacts on areas outside the Delta, despite the significant potential for subsidence due to increased groundwater pumping that could result if the proposed project were to be implemented as proposed. These errors, which are evident in the DEIR, are equally present in the RDEIR.

9. The EIR's Deficient Air Quality Analysis Fails to Even Qualitatively Analyze Impacts, Which Are Likely to Include Increased Particulate Emissions, Increased Emissions Due to Use of Desalination Plants, and Impacts to Sensitive Receptors.

The Air Quality analysis is inadequate, insufficiently detailed, and fails to provide even a basic public disclosure of the proposed project's impacts as required by CEQA. These comments apply equally to the DEIR, which is defective, and to the RDEIR which uses the same methodologies and approaches for "determining" impacts as did the DEIR. (RDEIR § 9.4.1 ["The impact analysis methods and significance criteria are the same as the methods presented in the Draft PEIR."]; see also §§ 3.4.1, 4.4.1, 5.4.1, etc.)

Although the EIR states that any quantification of air quality impacts would be too speculative to provide in the EIR (EIR p. 9-18), the Council has failed even to provide an adequate <u>qualitative</u> discussion of impacts. The EIR fails to provide the thresholds of significance that are used in various air basins and fails to give a potential magnitude of impacts as a result of the proposed project. This makes it impossible to determine whether the proposed project will result in impacts that are twice the applicable thresholds of significance or 200 times the applicable thresholds.

Further, the EIR provides no analysis of the types of impacts that might occur within each air basin, instead providing just a couple of <u>paragraphs</u> of general discussion to describe significant impacts the might occur state-wide. This general disclosure provides little more than a flat conclusion that the Council has no idea what the impacts of the proposed project actually are and flies in the face of CEQA's requirement that a good faith analysis be done <u>before</u> reaching a significance conclusion. For example, potential risks from particulate emissions in the Central Air Basin due to the proposed project's assumed reductions in the quantity of water

conveyed through the Delta are neither identified nor analyzed. The potential for certain air basins (i.e., coastal basins) to disproportionately bear the impacts of desalination plants is not discussed. The Council must significantly expand its discussion to actually analyze on a basin-by-basin level what impacts are likely to result from implementation of the proposed project.

The EIR also provides no real discussion of sensitive receptors or what specific pollutants those receptors may be exposed to. Although the EIR states that impacts to sensitive receptors may be significant (or insignificant), the EIR does not clarify what those actual impacts are. It is not enough to merely state that significant impacts may result – the Council must describe the connection between the potentially significant emissions and the actual health risks that may occur. (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219 [EIR struck down where it "failed to correlate the identified adverse air quality impacts to resultant adverse health effects"].) Further, the EIR must identify whether certain communities or schools are more at risk than others for being exposed to such pollutants based on those communities' proportionate need for replacement water facilities.

10. The EIR's Deficient Greenhouse Gas Analysis Ignores the Vast Array of Water and Energy Projects Proposed by the Delta Plan, Despite the Massive Amounts of Electricity They Will Require.

The Greenhouse Gas ("GHG") analysis is inadequate, insufficiently detailed, and fails to provide even a basic public disclosure of the proposed project's impacts as required by CEQA. These comments apply equally to the DEIR, which is defective, and to the RDEIR which uses the same methodologies and approaches for "determining" impacts as the DEIR. (RDEIR § 21.4.1 ["The impact analysis methods and significance criteria are the same as the methods presented in the Draft PEIR."]; see also §§ 3.4.1, 4.4.1, 5.4.1, etc.)

The entire "analysis" of construction and operational GHG emissions are contained on pages 21-3 and 21-4 of the RREIR. Given the vast array of water transport, water treatment, water conservation, and energy projects contemplated by the proposed project, and given that water transport and treatment impose significant energy demands – this two page "analysis" is inadequate. Moreover, and as with other impact areas, the RDEIR concludes that it would be "speculative" to try and provide any kind of more-detailed analysis. (RDEIR p. 21-4.) This in no way meets CEQA's requirements for a good faith disclosure of potential impacts.

As limited examples of items that need to be addressed in both the DEIR and the RDEIR, the Council must discuss and attempt to analyze how the potential fallowing of thousands of acres of agricultural lands (lands which previously grew crops or trees which remove CO2 from the air) would contribute to climate change. Similarly, "[t]he Revised Project would encourage projects such as new or expanded reservoirs, groundwater production facilities (wells and pipelines), ocean desalination facilities, and recycled water facilities" as potential sources of replacement drinking water (RDEIR p. ES-2), yet the RDEIR fails to discuss the fact that all of these options require massive amounts of electricity to process and treat water. Since electricity generation is one of the largest producers of GHGs, the failure to discuss this impact is inadequate under CEQA. Another issue is that the proposed project could generate GHGs through the construction and operation of replacement water supply facilities. No mention is made of this fact. Both the DEIR and RDEIR must be revised to provide a detailed discussion of climate changes, including discussing what impacts certain communities may see (i.e., the

impacts of climate change are different depending on whether one lives in a coastal community, the Delta area, the central valley, or the mountains).

11. The EIR's Analysis Regarding Delta Flood Risk is Deficient

The RDEIR's discussion regarding Delta flood risk is deficient. First, the statement in lines 6-8 on page 5-13 should be expanded to state that most, if not all, ecosystem restoration projects will reduce the flood risk impacts by expanding flood conveyance and removing infrastructure, and by providing increased protection for people and property.

Second, the RDEIR incorrectly concludes that the Revised Project does not encourage projects promoting placement of additional housing within the Delta because current efforts on Bethel Island to improve the levees to an equivalent 100-year FEMA urban standard could ultimately facilitate additional urbanization, false sense of security, and increased potential loss of life and property.

Third, Mitigation Measure 5-4 should be expanded. Even with the proposed project, preventing floods is impossible[2], especially floods from seismically induced levee failures. Therefore, the portfolio of economically and ecologically based risk-reduction strategies for the Delta must prioritize investments in the levee system. Risks can be reduced through an emergency preparedness, response, and recovery system; appropriate land uses; land acquisition and conversion to ecosystem functions; subsidence reversal strategies; and strategic levee improvements. The mitigation measures in the Draft EIR should recognize and evaluate the following: (1) Investment in alternative risk reduction strategies which include comparing levee upgrades to flood-proofing, land acquisition and conversion to habitat; subsidence reversal; relocation of infrastructure, and flood insurance, (2) Long-term drivers of change and economic sustainability before establishing funding priorities, and (3) Integrated risk reduction investments with the coequal goals through the coordinated transition of some islands to habitat.

12. The EIR Fails to Consider Potentially Significant Impacts

CEQA requires analysis of the potentially significant impacts of the Council's proposed project. (State CEQA Guidelines, §§ 15064, subd. (d), 15126.2, subd. (a), 15130, 15355; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 361.) The EIR does not satisfy CEQA because it fails to adequately describe and disclose the potentially significant effects of the proposed project, some of which has been previously identified, such as effects associated with reductions in the quantity of water conveyed through the Delta, impacts of the use of substitute water sources such as groundwater, resulting overdraft and/or ground subsidence, impacts of likely increased water quality from alternative supplies, adverse impacts to air quality from increased dust and particulate matter or from actions to obtain alternative

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[2] DWR August 2012 press release – "According to the 2009 Delta Risk Management Strategy prepared by the Department of Water Resources, a ground motion equivalent to less than 20 percent of the acceleration of gravity would be capable of collapsing, or liquefying, the loose, sandy soils in many Delta levees. An earthquake capable of generating such motion has a 45 percent chance of being exceeded in the western Delta in the next 30 years, according to experts. The hazard decreases farther from the Bay; experts put the probability at 26 percent in the eastern Delta. **However, the hazard increases each year that passes without an earthquake."** (Emphasis added.)

supplies (new facilities, increased use of wells), and social and economic impacts of reduced water supplies on local communities.

Further, the Council has not adequately considered economic and social factors in determining the feasibility of proposed mitigation measures to reduce or avoid the Delta Plan's significant environmental effects. (State CEQA Guidelines, § 15131m subd. (c).) Severe impacts on agricultural communities, including job and income losses, increased food and housing costs, and lost economic output, are the reasonably foreseeable result of the proposed project. (See, e.g., Michael, et al., A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (2010).) The EIR ignores these effects and their relationship to the feasibility of the Proposed Regulations and to mitigation measures.

Similarly, the EIR fails to analyze the impacts of the Proposed Regulations from the loss of productive agricultural lands due to fallowing, levee setbacks, habitat restoration, or limitations on use based on potential for restoration. The EIR ignores the relationship of these impacts to the feasibility of proposed regulations and mitigation measures. In short, and as previously presented, the EIR continues to ignore the impacts of its proposed regulatory policies.

E. <u>Alternatives</u>.

The Comparison of Alternatives (RDEIR p. 25-1) fails to identify and quantify the environmental impacts of the Revised Project as compared to each alternative. It also fails to identify how each iteration of the project meets the project objectives. As a result, it is impossible for the reader to meaningfully compare the alternatives, nor is a reader able to determine if any alternatives are capable of avoiding or lessening the significant impacts of the project. (See State CEQA Guidelines, § 15126.6(b).)

The RDEIR compares the Revised Project to the original Proposed Project, the No Project alternative, and four additional alternatives. However, <u>not a single comparison</u> is based on any quantitative evaluation of an alternative's impacts. Instead, the alternatives are described as having a potentially lesser or greater impact on a specific resource. No details are provided regarding how much less or how much greater the impacts would be for any particular alternative. No details are provided regarding where the differences in impacts would occur geographically, nor is it clear if the greater or lesser relative impacts involve significant effects versus less than significant effects. In many cases, no details are given as to why the differences in a certain impact's magnitude occur. Without these salient details, the comparison of alternatives is rendered meaningless and certainly does not meet CEQA's mandate that the EIR include "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison." (State CEQA Guidelines, § 15126.6(d).) These missing details include, but are not limited to the following:

- The proposed project (Revised Project, the Proposed Project), and Alternative 3 have "less water-supply impact than Alternative 2" but the RDEIR fails to quantify to what degree. (RDEIR p. 25-6.)

- Alternative 2 is described as "contribut[ing] more to improving conditions for biological resources" yet the RDEIR does not identify in what quantity, for which particular resources, or where this would occur. (RDEIR p. 25-7.)

- The No Project Alternative and Alternatives 1A, 1B and 3 are described as having "a lower potential than the Revised Project to convert agricultural lands or timberland/forest resources to other uses" but again, the comparison provides no information in the difference of converted acreage, or the location of the land most likely to be converted. (RDEIR p. 25-9.)

- Air quality impacts from operation of large or complex facilities such as reservoirs, desalination or water treatment facilities or major conveyance systems are briefly referred to, but no even rough estimate of the difference in potential air quality impacts between the alternatives is identified. (RDEIR p. 25-9, 10.)

- Impacts on recreational facilities and activities under the No Project Alternative, the proposed project Alternative and Alternatives 1A, 1B, 2 and 3 are described as being "less than under the Revised Project" but again, there are no quantities or even orders of magnitude identified to provide any meaningful comparison. (RDEIR p. 25-14.)

Because the alternatives analysis is based solely on general qualitative comparisons, it is wholly unclear from the text whether the alternatives reduce any significant impacts posed by the Revised Project or the original Proposed Project, defeating the very purpose of the alternatives analysis. (State CEQA Guidelines, § 15126.6(b).)

There is no meaningful comparison of each alternative to the project objectives. It is unclear from the short descriptions of each alternative whether each meets the project objectives in total, in part, or not at all. The very purpose of identifying the objectives sought by a project is to evaluate a reasonable range of alternatives. (State CEQA Guidelines, § 15124(b).) Each alternative must be compared against the project objectives in order for decision makers to determine the acceptability of each alternative, and meaningfully compare them against one another.

The alternatives comparison of the RDEIR does not include a sufficient degree of analysis to provide decision makers with the information needed to make an intelligent judgment on the project. (*Napa Citizens for Honest Govt. v. Napa Cnty Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 356.) As written, the RDEIR does not include an adequate comparison of alternatives. No quantitative analysis of each alternative's impacts is provided, and no comparison of each alternative's ability to meet the project objectives is given. Without this essential information, there can be no meaningful alternatives analysis, as required by CEQA.

F. Cumulative Impacts.

1. The Cumulative Impacts Discussion Is Deficiently Vague.

The cumulative impacts analysis of the RDEIR identifies the "past projects, other current projects, and probable future projects" that may contribute to cumulative impacts along with the Revised Project in only the vaguest of terms. (RDEIR p. 22-1.)

For example, under Water Resources, other projects identified as possibly leading to cumulative impacts to water resources include specific projects such as the San Diego County Water Authority Emergency Storage Project and El Monte Valley Mining, Reclamation, and Groundwater Recharge Project as well as general and undefined projects such as "fish screen projects." (RDEIR p. 22-2.) No locations or project descriptions are provided, and there is no discussion of how cumulative impacts from these other projects were calculated and added to those of the Revised Project. Additionally, as discussed above, the impacts of the Revised Project are so vague and uncertain, there is no meaningful way to assess their contribution to cumulative impacts in the region.

2. No Quantitative Comparison of Cumulative Impacts Between the Original Proposed Project and the Revised Project.

The RDEIR's cumulative impacts analysis provides only vague, qualitative comparisons between the cumulative impacts of the Revised Project and the original Proposed Project. For each analysis area, the impacts of the Revised Project are only identified as being "greater than," "less than," or "the same" as those of the original Proposed Project. No quantitative information, not even to identify vague orders of magnitude, are provided in the cumulative impacts analysis. Examples of deficient cumulative impacts analysis include, but are not limited to, the following:

- In each of the analysis areas, from water resources to climate change and greenhouse gas emissions, the Revised Project's cumulative impacts related to reliable water supply actions are described as being "greater than" the Proposed Project. Absolutely no additional information regarding the quantity of the additional cumulative impacts is provided. (See RDEIR pp. 22-3 to 22-24.)

- Similarly, in each of the analysis areas, from water resources to climate change and greenhouse gas emissions, the Revised Project's cumulative impacts related to Delta ecosystem restoration actions are also described as being "the same" as the Proposed Project, however no calculations to support this assertion are provided. (See RDEIR pp. 22-3 to 22-24.)

- Similarly, in each of the analysis areas, from water resources to climate change and greenhouse gas emissions, the Revised Project's cumulative impacts related to Delta enhancement actions are described as being "greater than" the Proposed Project, however no calculations to support this assertion are provided. (See RDEIR pp. 22-3 to 22-24.)

G. <u>The Council's Proposed Regulations Raise Additional Concerns About CEQA Compliance</u>[3]

1. The Proposed Regulations Directly and Substantially Conflict with Controlling Law

Under the APA, proposed regulations purporting to implement or interpret a statute must be consistent and not in conflict with statutory authority, and must be reasonably necessary to effectuate the statutory purpose. (Gov. Code, § 11342.2.) Regulations are invalid if they impair of conflict with the statute they purport to implement. (*California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269.) No deference is accorded to the agency proposing the regulations as to whether it has exceeded its statutory authority. (*Rank, supra,* 51 Cal.3d at pp. 11-12; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108-109.)

<u>Section 5001(e)(1)</u>

The proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" conflicts with the authorizing statute. (Wat. Code, § 85302, subd. (d)(1).) Specifically, the statute mandates that "[t]he Delta Plan shall include measures to promote a more reliable water supply that address all of the following," including "[m]eeting the needs for reasonable and beneficial uses of water." (*Ibid.*) The Council's proposed regulation conflicts with this key criterion identified in the Delta Reform Act to achieve the goal of water supply reliability.

<u>Section 5001(s)</u>

The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, § 15125; *In re Bay-Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.) The Council has no authority to alter the fundamental framework of environmental review, which is concerned with whether approval of a proposed action may result in an *adverse physical change* in the existing environment. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15060, subd. (c)(2), 15061, 15064, 15125, 15358, 15360, 15378, subd. (a); 15382.)

<u>Section 5003(b)(2)(D)</u>

The proposed definition of "covered actions" impermissibly attempts to alter and amend established CEQA principles regarding the definition of a "project," as well as the application of

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[3] As established in footnote 1, the Public Water Agencies submitted comments on the drafts of the Delta Plan and on the regulations the Council has proposed for adoption, all of which were attached and incorporated herein by reference. Those comments provide additional information on legal deficiency with the actions proposed by the Council.

statutory and categorical exemptions, and is in direct conflict with controlling law. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15300.2, subd. (c), 15378; 15382.) Statutory exemptions under CEQA are absolute; they reflect legislative policy determinations and are not subject to any exceptions for "unusual circumstances." (Cal. Code Regs., tit. 14, § 15061, subd. (b)(2); *Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902, 907; *Great Oaks Water Co. v. Santa Clara Water Dist.* (2009) 170 Cal.App.4th 9576, 966, fn. 8; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128-129.) The Council's proposed regulation directly conflicts with these established principles. Furthermore, "unusual circumstances" as they pertain to categorical CEQA exemptions have been defined and interpreted under CEQA. (Cal. Code Regs., tit. 14, §§ 15300.2, subd. (c); see, e.g., *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 261; *Turlock Irrigation District v. Zanker* (2006) 140 Cal.App.4th 1047; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261.) The Council has no authority to fundamentally alter controlling law.

Section 5004(b)(3)

The proposed regulation states that "[a]s relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A)." While the use of best available science certainly should be encouraged, this regulation appears to exceed the Council's authority to the extent that it imposes higher standards of proof for local agency actions than can be found in the controlling law. (See, e.g., Code Civ. Proc., §§ 1085, 1094.5.) The Council lacks authority to limit or alter the scope of local agency discretion.

Section 5006

The Council's proposed regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's appendices. Furthermore, any attempt by the Council to alter or amend those policies is inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the CVP.

Section 5009

The Council's proposed regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be an adverse *physical i*mpact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.)

2. The Initial Statement of Reasons Fails to Establish Necessity for Most of the Proposed Regulations

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all proposed regulations for compliance with the "necessity" standard. Government Code section 11349, subdivision (a), defines necessity to mean that "the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the

statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record." (See also Cal.Code Regs., tit. 1, § 10, subd. (b).) For the reasons set forth below, the proposed regulations fail to comply with this standard.

Section 5001(k)

The proposed regulatory definition of "feasible" merely repeats the language of Public Resources Code section 21061.1. (See also Cal. Code Regs., tit. 14, § 15364.) As such, the regulation is unnecessary and duplicative.

Section 5001(s)

The proposed regulatory definition of "significant impact" conflicts with existing statutory and regulatory definitions of the same term used in the same context. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382; see also *In re Bay-Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.)

Section 5006

The Council's proposed regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's appendices. Furthermore, any attempt by the Council to alter or amend those policies is inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the federal CVP.

3. The Proposed Regulations are Ambiguous and Confusing

OAL must review each proposed regulation to determine whether it complies with the clarity standard set forth in Government Code section 11349.1, subdivision (a)(3). "Clarity" means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (See also Cal.Code Regs., tit. 1, § 16, subd. (a).)

The Council's proposed regulations will be implemented through a series of vaguely described processes, with many of the critical details unknown. The proposed regulations do not comport with the applicable standard of clarity, requiring that the regulations be "written or displayed so that the meaning . . . will be easily understood by the persons directly affected by them." (Gov. Code, § 11349, subd. (c).) Because the regulations contain so many vagaries, the regulated community cannot know how they may be required to comply. The Council has an obligation to provide clear and complete regulations for public review and comment such that their requirements are readily apparent.

Section 5009

The Council's proposed regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be a *physical i*mpact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) Further, it is unclear how the proposed mandatory language requiring that "opportunity" impacts "must be avoided or mitigated" is to be satisfied.

4. The Proposed Regulations Duplicate and Conflict with Areas Already Regulated

Nothing in the Council's authorizing statute permits it to supersede the regulatory authority of any other California department or agency, or to duplicate or adopt conflicting regulations in areas already regulated. A number of significant conflicts with existing statutes, regulations, and established case law are created by and embedded in the Council's proposed regulations. For example, the California Resources Agency is responsible for adopting guidelines implementing CEQA, and the courts have extensively interpreted that statute's definitions and requirements pertaining to environmental impact assessment, mitigation requirements, and environmental disclosure standards in relation to project approval, among others. The Council has no authority to adopt regulations that attempt to supersede, and create substantial conflicts with, those established requirements.

Section 5001(k)

The proposed regulatory definition of "feasible" merely repeats the language of Public Resources Code section 21061.1. (See also Cal. Code Regs., tit. 14, § 15364.) As such, the regulation is unnecessary and duplicative.

Section 5001(s)

The proposed regulatory definition of "significant impact" conflicts with existing statutory and regulatory definitions of the same term used in the same context. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382; see also *In re Bay-Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.)

Section 5003(b)(2)(D)

The proposed definition of "covered actions" impermissibly attempts to alter and amend established CEQA principles regarding the definition of a "project," as well as the application of statutory and categorical exemptions, and is in direct conflict with controlling law. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15300.2, subd. (c), 15378; 15382.) Furthermore, "unusual circumstances" as they pertain to categorical CEQA exemptions have

been defined and interpreted under CEQA. (Cal. Code Regs., tit. 14, §§ 15300.2, subd. (c); see, e.g., *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 261; *Turlock Irrigation District v. Zanker* (2006) 140 Cal.App.4th 1047; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261.) The Council has no authority to duplicate, supersede, or adopt conflicting regulations in areas already regulated.

Section 5006

The Council's proposed regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's appendices. Furthermore, any attempt by the Council to alter or amend those policies is inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the federal CVP.

H. Conclusion.

For the reasons set forth above, the proposed regulations exceed and transgress the Council's statutory authority. As such they are invalid under the Delta Reform Act of 2009 (Wat. Code, § 85001 et seq.), the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.), and the APA (Gov. Code, § 11342.2). Additionally, this EIR does not provide a legal basis for the Council to adopt the Delta Plan. Accordingly, the Council should not certify the EIR. However, if it does, the Council must first revise the EIR to make it legally compliant with CEQA. Such revisions would constitute new information of substantial importance under CEQA and thus require recirculation before the Council considers certification of a subsequent, legally sufficient EIR. (State CEQA Guidelines, § 15088.5.)

EXHIBIT 3
(Part 2 of 3)

APPENDIX

Comments on Recirculated Draft Delta Plan Environmental Impact Report, November 2012

1. February 15, 2012 Comments from the State and Federal Contractors Water Agency regarding the Delta Protection Commission's "Proposal to Protect, Enhance, and Sustain the Unique Cultural, Historical, Recreational, Agricultural and Economic Values of the Sacramento-San Joaquin Delta as an Evolving Place" (Proposal).

2. June 27, 2012 Comments from the San Luis & Delta-Mendota Water Authority, Westlands Water District, Del Puerto Water District, San Luis Water District, San Benito County Water District, San Joaquin River Exchange Contractors Water Authority regarding WR P1.

3. September 26, 2012 Comments from the State and Federal Contractors Water Agency regarding the final draft strike-out/underline addition Delta Plan discussed by the Delta Stewardship Council at its September 13, 2012 meeting.

4. *Consol. Salmonid Cases* (E.D. Cal. 2010) 713 F.Supp.2d 1116.

5. *Consol. Salmonid Cases* (E.D. Cal. 2011) 791 F.Supp.2d 802.

6. *San Luis & Delta-Mendota Water Authority, et al. v. Salazar, et al. (Delta Smelt Consol. Cases)* (E.D. Cal. 2009) 2009 WL 1575169.

7. *Delta Smelt Consol. Cases* (E.D. Cal. 2010) 717 F.Supp.2d 1021.

8. *Delta Smelt Consol. Cases* (E.D. Cal. 2010) 760 F.Supp.2d 855.

9. Department of Water Resources, News for Immediate Release: Researchers Shake Delta Soil to Better Understand Earthquake Risk (Aug. 15, 2012), available online at: http://www.water.ca.gov/news/newsreleases/2012/081512shaketest.pdf.

10. Kimmerer, WJ. 2008, Losses of Sacramento River Chinook salmon and delta smelt to entrainment in water diversions in the Sacramento-San Joaquin Delta. San Francisco Estuary and Watershed Science 6. http://repositories.cdlib.org/jmie/sfews/vol6/iss1/art4.

11. Kimmerer, WJ, Nobriga, ML 2008, Investigating particle transport and fate in the Sacramento-San Joaquin Delta using a particle tracking model. San Francisco Estuary and Watershed Science 6. http://repositories.cdlib.org/jmie/sfews/vol6/iss1/art4.

12. Michael, J., et al. 2009, A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (Sept. 28, 2010).

13. January 14, 2013 Comments from the San Luis & Delta-Mendota Water Authority and State Water Contractors regarding Delta Stewardship Council Proposed Rulemaking.

APPENDIX DOC. 1

SFCWA
State & Federal Contractors Water Agency
1121 L Street, Suite 806, Sacramento, CA 95814

February 15, 2012

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chairman Isenberg and Council Members:

I am writing to provide the perspective of the State and Federal Water Contractors Water Agency (SFCWA) regarding the Delta Protection Commission's (Commission) "Proposal to Protect, Enhance, and Sustain the Unique Cultural, Historical, Recreational, Agricultural and Economic Values of the Sacramento-San Joaquin Delta as an Evolving Place" (Proposal) dated January 26, 2012, that was the subject of the Council's deliberations on February 9 and 10 this past week. As with the Economic Sustainability Plan (ESP) prepared for the Commission, which provides the foundation for the Proposal, there is much to be supported but also much that reflects an unfortunate agenda that continues unproductive opposition to effective implementation of the Delta Plan and the Bay Delta Conservation Plan (BDCP), as well as a "fortress Delta" mentality that is unproductive and inconsistent with the Legislative intent of the Delta Reform Act (Act). Once again, as with the ESP itself, in many areas the Proposal represents a missed opportunity to move beyond obstruction and toward an active, positive relationship with the Council and other stakeholders to constructively address issues of mutual concern by developing strategies for reducing impacts while meeting the State's interest in achieving the co-equal goals and providing for an economically sustainable Delta.

Generally, we concur with your staff's review, analysis and conclusions related to the Proposal as conveyed to you in the staff report prepared for your early February meeting. Still, there are some areas where we have some disagreement so here provide further detail and elevate specific concerns for your consideration. Of overarching concern is that we do not believe that the Proposal is consistent with furthering the achievement of the coequal goals in many respects. Critiques of habitat restoration and water supply reliability infrastructure activities particularly are couched in terms that contradict the effective pursuit of the coequal goals, and are notably more appropriately raised within the BDCP EIR/EIS public process.

Another significant problem is that much of what is actually "proposed" is dependent upon a levee maintenance philosophy that perpetuates the failures of the past with regard to an absence of any prioritization or notion of a "strategic levee investment" program as called for by the Act. Simply stating that certain levees should be maintained to a higher standard than other levees misses the fundamental problem that there are insufficient resources to undertake such a universal program and that there must be a ranking of which levees are "more important" to invest in than others – not just what levee stability standard should ultimately be achieved in any given location.

Below we provide specific feedback regarding the Proposal, working from the Council staff's memo.

LEVEES AND PUBLIC SAFETY RECOMMENDATIONS

1. **Improve and maintain all non-project levees to at least the Delta-specific PL 84-99 standard.** We concur with the Council staff's notes regarding the lack of prioritization and add that the question of who would pay for such a sweeping and universal approach is conspicuously absent as the cost of achieving this proposal would be very high, generally beyond the capabilities of the Delta's local landowners and Reclamation Districts.

2. **Improve most "lowland" levees and selected other levees and other levees to a higher Delta-specific standard….** We concur with the Council staff's notes regarding a lack of prioritization and uncertain costs. We also suggest it would be useful to incorporate the Council's previously developed notion that prioritization and categorization of levees should seek to match a particular level of protection with the value of what is being protected by any particular levee.

3. **The Delta Levee Subventions and Special Projects Program should continue to be supported.** We agree with this recommendation with a caveat. Instead of simply continuing the Subventions program, we encourage the Council to facilitate and/or undertake its own review of the program in the context of the Delta Plan and the coequal goals to ensure that it is carried out consistent with these new mandates and in a manner that most effectively furthers them.

4. **Transfer to a regional agency with fee assessment authority on levee beneficiaries' responsibility for allocating funds ….** We concur with the Council staff's conclusion that "discussion needed". Much discussion will be needed, as we are generally skeptical of the value of adding *another* agency layer in the Delta. While emergency preparedness and response could certainly be appropriately within the purview of such a regional agency, issues regarding levee maintenance and investments of limited financial resources reach well beyond the Delta and the State and those other interests paying the fees would need to be involved in any prioritization and decision-making processes.

5. **In addition to providing funding for longer-term levee improvements, provide ongoing funding for regular levee maintenance and expanded emergency preparedness, response and recovery.** We concur with the Council staff's notes and would also inquire where the funding is to come from and who is supposed to receive it? Is this separate from the "regional entity" proposed in recommendation # 4? In addition, this recommendation seems to be seeking financial support for what is and should be primarily a local responsibility.

We concur with Council staff's perspective regarding recommendations # 6, 7, and 8.

GENERAL RECOMMENDATIONS FOR ECONOMIC SUSTAINABILITY

1. **Designate a regional agency to implement and facilitate economic development efforts.** We concur with Council staff's perspective, although we again remain somewhat skeptical that adding another agency layer in the Delta is truly consistent with the intent of the Act, particularly when this sort of activity is within the Conservancy's mission description. Still, there is much that could be done to address the economic development needs of the Delta.

For example, consideration should be given to creating "visitor development zones" associated with the legacy communities to try to reduce investment risk and thus encourage increased investments in visitor serving facilities. In such areas there could be standard variances to otherwise applicable regulatory requirements etc. to facilitate appropriate and necessary business development.

2. **Economic impacts of habitat creation and development of facilities for export water supply should be fully mitigated.** We concur with Council staff's perspective. Use of "fully mitigated" is well beyond the requirements of California law. The Act already requires in-lieu property tax be paid for lands impacted by the construction of and mitigation for new conveyance facilities. As written, this recommendation is inappropriate with respect to habitat restoration as restoring the Delta is part of the coequal goal. However, there is no doubt that there will be economic impacts, particularly within the Primary Zone, from implementation of the Delta Plan over the decades to come and facilitating near-term discussions amongst appropriate stakeholders as to how to ameliorate them and reduce them when practicable should be part of the Council's implementation plan. As the Proposal concludes its description of this recommendation: "Measuring and effectively compensating communities for dispersed and indirect net economic impacts should be further explored."

3. **Land use planning and regulation must be clear and consistent across agencies.** We concur with Council staff's perspective. It is critical to emphasize, however, that it is the Delta Plan and the coequal goals against which local land use and planning occurring in the Delta must be compared for consistency, not the other way around. With the significant exception of the Council's "covered action" review, the Commission's recently updated Land Use and Resource Management Plan (LURMP) already is supposed to ensure a high level of consistency in land use planning and regulation in the Delta.

RECOMMENDATIONS FOR ECONOMIC SUSTAINABILITY OF AGRICULTURE

1. **Maintain and enhance the value of Delta agriculture.** We agree with Council staff's assessment. While this recommendation may be aspirational, it isn't terribly realistic or helpful. The fact that the Proposal seeks to justify it by asserting consistency with a draft "performance measure" in the 5th iteration of the Delta Plan which had been previously described as "a mistake" (and repeated as such on 2/9) is more troubling. It should be noted that the LURMP would not satisfy this recommendation. In fact, according to the ESP itself, it would be difficult to achieve this recommendation if the status quo were continued in the Delta as the trends today are downward with respect to economic activity, particularly in the Primary Zone.

2. **Limit the loss of productive farmland…to the greatest extent practicable.** We disagree with the Council staff's determination that this recommendation is "consistent" with Delta Plan objectives. The staff notes are on point, but we believe the wording of the recommendation is "inconsistent" with the Delta Plan objectives since "greatest practical extent" begs the question of what's "practical". We agree that where it can be done consistent with implementation of the Delta Plan and furthering the coequal goals, including BDCP if it is incorporated consistent with the requirements of the Act, preservation of agricultural lands should be a priority, and starting habitat restoration projects on publicly owned lands is logical. The BDCP's adaptive management approach incorporates the Proposal's recommendation that habitat acreage goals be reassessed over time.

3. **Protect Delta water quality and water supplies for agriculture.** Based upon the ESP, we assume this recommendation is intended to apply only to "in-Delta" agriculture. Consequently, we disagree with Council staff's assessment that this recommendation is "consistent" with the Delta Plan objectives. As with other aspects of the Proposal and the ESP, this recommendation reflects expectations of the Commission and the authors that are ultimately inconsistent and in conflict with the effective implementation of the Delta Plan and the furthering of the coequal goals. Council staff correctly points out in the notes that this issue is within the purview of the State Water Resources Control Board (SWRCB), which has the responsibility to balance all beneficial uses of water as it reviews and potentially updates its Water Quality Control Plan (WQCP) for the Delta.

We concur with Council staff's perspective regarding recommendations # 4 and 5.

RECOMMENDATIONS FOR ECONOMIC SUSTAINABILITY OF RECREATION AND TOURISM

1. We concur with Council staff's position.

2. We concur with Council staff's position.

3. **Implement Economic Sustainability Plan through specific strategies.** We concur with Council staff's notes on this recommendation but would simply add that only those portions of the Proposal and ESP that are consistent with the Delta Plan and furthering the achievement of the coequal goals are appropriate for implementation.

RECOMMENDATIONS FOR INFRASTRUCTURE

1. **Planning of levee investments must fully consider the economic value of infrastructure services along with all other benefits.** We concur with Council staff's evaluation, and would specifically add the need for prioritization remains.

2. **All owners and operators of infrastructure that depend on Delta levees must contribute to levee system investment and maintenance.** We concur with the Council staff's notes on this recommendation. Of course, the "devil will be in the details".

3. **Protect and improve Delta water quality and supply for agricultural, municipal and industrial uses.** As with recommendation # 3 regarding sustaining Delta agriculture, we assume this recommendation is intended to apply only to "in-Delta" uses. Consequently, we disagree with Council staff's assessment that this recommendation is "consistent" with the Delta Plan objectives. As with other aspects of the Proposal and the ESP, this recommendation reflects expectations of the Commission and the authors that are ultimately inconsistent and in conflict with the effective implementation of the Delta Plan and the furthering of the coequal goals. In addition, water quality is an important issue for ecosystem restoration, which should be identified as well. Council staff correctly points out in the notes that this issue is within the purview of the SWRCB, which has the responsibility to balance all beneficial uses of water as it reviews and potentially updates its WQCP for the Delta.

4. **Ensure that future development of infrastructure in the Delta is aligned with economic sustainability strategies.** We disagree with Council staff's assessment of this recommendation

in that we would categorize it as "potentially consistent". Again, we believe that the recommendation and language used imply expectations of the Commission and the authors that cannot be fulfilled consistent with the Delta Plan and furthering the achievement of the coequal goals. There is an implicit "trumping" of infrastructure development by the ESP incorporated in this recommendation. We would add "to the extent practicable" at the end of the recommendation, and even then it would remain "potentially consistent".

5. **Support expansion and development of the ports.** As with # 4 above, we disagree somewhat with the Council staff's determination and would instead designate it "potentially consistent". In addition, while the staff notes call out potential environmental impacts associated with increased activity at the ports, there are also potential water supply, water quality and water supply reliability impacts due to potential channel modifications that could arise and thus both prongs of the coequal goals are implicated by this recommendation.

RECOMMENDATIONS FOR HABITAT AND ECOSYSTEM IMPROVEMENTS

1. **Emphasize strategies with little or no conflict with the Delta economy.** We disagree with the Council staff's designation of "premature" and instead think it is important to be honest and upfront and designate this recommendation as "inconsistent" with the Delta Plan and furthering the coequal goals. As the Public Policy Institute of California pointed out as when it issued its first Delta Vision report a few years ago, the notion of "win-win" is a mirage, due to inevitable large scale changes driven by seismic vulnerability and sea level rise. This recommendation simply ignores the realities of the status quo as well as the Legislative direction to move forward with the Delta Plan (and BDCP subject to the requirements of the Act). Certainly it will be critical to try to minimize and ameliorate impacts resulting from habitat conversion, but the expectations implicit in this recommendation are simply unrealistic. We note, as well, that in the Proposal's description of this recommendation the authors call out "increased fresh water flows" as an "example" of how to achieve it. All questions related to water quality regulation in the Delta will be appropriately before the SWRCB and are not a subject for the Delta Plan or the ESP to seek to address.

We concur with Council staff's determinations for recommendations # 2 – 6.

RECOMMENDATIONS FOR WATER SUPPLY RELIABILITY

We concur with Council staff's determinations for recommendations # 1 – 3, although we reiterate our view that the Council is not the proper forum to receive the Proposal's concerns regarding the BDCP, but rather the BDCP's EIR/EIS public process is the appropriate venue.

RECOMMENDATIONS FOR RESEARCH AND MONITORING

1. **Conduct a comprehensive and credible cost-benefit analysis to analyze Delta alternatives.** We disagree with Council staff's determination regarding this recommendation. This is not "potentially consistent" but rather it is "inconsistent" with the Delta Plan objectives because it is not appropriately an issue for the Delta Plan to address. Council staff seems to have interpreted this as applicable to discrete projects that may become part of the Delta Plan. The reality is this is targeted at the HCP/NCCP alternatives analysis being conducted as part of the BDCP EIR/EIS

process and as such is again inappropriate to be included as a recommendation to the Council. This comment should be addressed within the BDCP EIR/EIS public process.

We concur with Council staff's determinations with regard to recommendations # 2 – 5

Thank you for the opportunity to provide these comments. There is much to promote within the Proposal but, as highlighted and called out above, there is much that is not appropriate to the legislative intent of having the ESP developed to inform the Council's deliberations. Finally, we remind the Council that it maintains complete discretion as to the incorporation of any or none of the ESP's and Proposal's recommendations as it determines consistency with the Delta Plan and furtherance of the coequal goals.

Sincerely,

Byron M. Buck
Executive Director

APPENDIX DOC. 2

June 27, 2012

Delta Stewardship Council
Mr. Phil Isenberg – Chair
Ms. Gloria Gray
Ms. Felicia Marcus
Mr. Don Nottoli
Mr. Randy Fiorini
Mr. Patrick Johnston
Mr. Hank Nordhoff

RE: Support for ACWA Ag-Urban WR P1 Alternative Language

Dear Council Members:

We appreciate the enormity of your undertaking to develop the Delta Plan. Over the last year and half, the Plan has benefitted greatly from your dedication to participate in the vast number of meetings held to hear from the array of stakeholder groups that have helped shape the current draft version. We understand that it is your intention during the next Council meeting to make decisions regarding the content of the final draft of the Plan that will then be subject to another round of public review and comment under the California Environmental Quality Act process prior to final adoption.

To that end, we are writing to strongly encourage your consideration of the attached language addressing "WR P1: Reduce Reliance on the Delta and Improve Regional Self-Reliance". We recognize the importance of this issue to all regions of the State and have worked closely with our colleagues in the Delta and upstream through the ACWA Ag-Urban Coalition to help them develop this optional language. We share your desire to further promote improved water management throughout the State and believe that the most effective way to ensure advancement of this important State policy is to maintain a single standard of compliance, appropriately applicable to the entity seeking the covered action, and verifiable through routine review by the Council.

We appreciate and look forward to the ongoing opportunity to review and comment on the next iteration of the draft Plan and continued cooperation with you and your staff toward ensuring a Plan that is effective, enhancing, and durable. Thank you for your consideration.

Sincerely,

Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Thomas W. Birmingham
General Manager
Westlands Water District

William Harrison
General Manager
Del Puerto Water District

Martin McIntyre
General Manger
San Luis Water District

Jeff Cattaneo
District Manger & Engineer
San Benito County Water District

Steve Chedester
Executive Director
San Joaquin River Exchange Contractors WA

WR P1: Reduce Reliance on the Delta and Improve Regional Self-Reliance

A covered action is inconsistent with the Delta Plan if (1) the service area of the entity seeking the covered action has failed to reduce its reliance on the Delta or adequately contribute to improved regional self-reliance; (2) that failure has significantly caused the need for the covered action; and (3) the covered action would have a significant adverse environmental impact in the Delta.

This policy addresses a covered action to export water from, transfer water through, or use water in the Delta.

For the purposes of this policy, "reducing reliance on the Delta or adequately contributing to improved regional self-reliance" means (1) a reduction in net per capita water use; (2) a reduction in the percentage of Delta water used as a part of total regional water supply; or (3) compliance with state laws regarding water conservation, water efficiency and urban and agricultural water management planning. For an entity that is required to have a plan and does not, its covered action is deemed inconsistent with the Delta Plan. (1), (2), and (3) identified in this paragraph may be achieved through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

For the purpose of determining if a covered action is consistent with the Delta Plan, the Council's review shall be limited to the entity taking the covered action.

To ensure advances are being made to reduce reliance on the Delta and improve regional self-reliance, the Delta Stewardship Council will request that the Department of Water Resources and Bureau of Reclamation provide to the Council a periodic (annual) update of reports that describe the manner in which water agencies are implementing State and federal water use efficiency standards.

APPENDIX DOC. 3

SFCWA
State & Federal Contractors Water Agency
1121 L Street, Suite 806, Sacramento, CA 95814

September 26, 2012

Chairman Isenberg and Council Members
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chairman Isenberg and Council Members:

The State and Federal Contractors Water Agency is pleased to provide the attached specific comments regarding the final draft strike-out/underline addition Delta Plan discussed by the Council at its September 13th, 2012 meeting. Please note that the page and line citations are referenced to the redline versions of the documents.

While we realize the Council did not provide additional direction regarding various criticisms of more policy related issues we have raised in these and prior comments, we are hopeful that our other comments, which make up the bulk of our submittal, can be incorporated into the final draft as they are editorial suggestions to improve clarity and tone and correct factual errors that do not alter the substantive content of the draft.

We look forward to the publication of the supplemental volume of the Draft PEIR and subsequently the response to comments received on both the original PEIR and the supplemental volume. We also look forward to the review and further discussion this fall regarding your previously adopted administrative procedures, including those which we continue to object to related to a potential appeal of the Department of Fish and Game's certification of the Bay Delta Conservation Plan's satisfaction of the criteria set forth in the Delta Reform Act for its incorporation into the Delta Plan.

We request that when the final draft Delta Plan is released that you provide an index of language deletions and additions as compared to the September 5th draft to help expedite review.

We appreciate all the effort you and your staff have put into this process and the responsiveness to our constructive engagement and that of other stakeholders. We will continue our participation to help develop a successful Delta Plan that furthers the coequal goals.

Sincerely,

Byron M. Buck
Executive Director

Enclosure (1)

P xxvi, last bullet WQ R8: delete duplicate language, "and determine control measures for implementation starting in 2020."

P 3, L 18: New language though somewhat improved still gives impression of population equally spread over region when that is far from the case. Suggest the following as a substitute for the last sentence: "The Delta is comprised of both a Primary Zone formed by the unique patchwork of mostly agricultural islands and an increasingly urban landscape of the Secondary Zone that includes the cities of West Sacramento, Stockton, Tracy and other communities. Of the Delta's half million residents, about 98% live in the Secondary Zone."

P 4, L 23-24: This sentence referencing the state policy to reduce reliance on the Delta should accurately reflect the statute and thus "in meeting future water supply needs" should be added after "Delta".

P 5, L 30: Use of "from past abuses" is inappropriate and inaccurate as most of the actions were taken consistent with law etc. We suggest "from past actions" as a substitute.

P 9, L 22: Use of "threaten" is inappropriate as it can be read to imply incompatibility. We suggest "impact" as a substitute.

P 13, L 39: To improve accuracy, we suggest an addition; "run backward, and some fish, lacking…."

P 15, Sidebar, 3rd bullet: Suggest adding language that 98% of residents live in the Secondary Zone.

P 16, L 17-18: This sentence regarding the salmon fishery is out of place and, if included at all, should not be part of a "Water Exports Cut" paragraph. Moreover, it is important to reference the fact that the PFMC determined that ocean conditions were most determinative of salmon population levels and not other factors that are often cited.

P 19, L 11-14: This sentence falsely equates the State's new "reduce reliance" policy with an absolute reduction in exports from the Delta and a "give back" to the system. In fact, new paradigm is to better integrate activities, construct new infrastructure to enhance operational flexibility, and to seek to shift exports from drier times to wetter ones. Consequently, the first sentence of this paragraph and the word "Thus" from the second should be deleted.

P 39, Table 2-1: Description of Delta Watermaster > suggest adding "under authority delegated by the SWRCB" at end of sentence. Description of Bureau of Reclamation > suggest addition "which, among other activities, pumps water through…." to reflect the fact the CVP includes units other than the San Luis Unit.

P 40, L 9: The word "transparent" should not have been deleted as that is included in the statutory direction to the Council. It needs to remain.

P 43, L 19: The word "transparent" should not have been deleted as that is included in the statutory direction to the Council. It needs to remain.

P 54, L 23-26: The use of "baseline" and the "cumulative impact" approach to assessing whether a "proposed action" will have a "significant impact" only adds confusion and uncertainty. The cumulative

effect concept essentially moots the Legislature's intention and definition of a "covered action" as itself having to have a significant impact as it is hard to imagine any action in the Delta, combined with the "probable future" actions of the BDCP, not having a significant "cumulative" effect. That can not have been the intent of the statute.

P 56, L 16-17: Leaving in the expiration date is problematic as it removes certainty from the transfer market leading up to that date. Instead, we suggest substituting language stating that "This exemption will be reviewed by the Council for possible amendment by ~~on~~ January 1, 2015. ~~unless the Council acts to extend the exemption prior to that date.~~ The Council contemplates that any amendments ~~extension~~ would be…."

P 56, L 38-39: Staff and Council previously indicated this language would be updated pending the outcome of Lois Wolk's bill (1495). The Wolk bill includes a much more narrow definition of what is considered a "routine" activity for the purposes of exemption from covered action applicability. The Governor has signed 1495 and thus we suggest deleting the current language and replacing it with specific reference to the bill language in the administrative exemption. The bill reads: "(i) Dredging to maintain the Stockton Deep Water Ship Channel at a depth of 40 feet in the sediment trap at the confluence of the San Joaquin River, between river mile 39.3 to river mile 40.2, and to maintain the remaining Stockton Deep Water Ship Channel at a depth of 35 feet plus two feet overdredge from river mile 35 to river mile 43."

P 57, L 36-41: We reiterate out position that if the BDCP is incorporated into the Delta Plan then by definition all of the activities undertaken pursuant to it will be consistent with the Delta Plan and thus there is no need for a certification process. A consistency determination requirement by the Council, no matter how pro forma, is redundant, unnecessary, and provides an avenue for delay in furthering the achievement of the coequal goals.

P 60, L 11: In addition to "organizes and integrates" the Council's science plan should be one that prioritizes ongoing research and monitoring as well.

P 72, Sidebar, last bullet: Delete "when the limited amount of available water must remain in the Delta". This language implies that NO water may be diverted and deleting it does not change the point of the sentence.

P 73, L 10: Insert the following to be more accurate, "…one corner of the state can have ripple effects" since not all actions have these sorts of connections.

P 73, L 19: Term "geographic situation" is confusing. This sentence is awkward and should be revised.

P 73, L 23: Insert the following to be more accurate, "…fear the impacts of reduced water supply reliability…."

P 73, L 32: Insert the following to be accurate, "…meet the projected additional water demands…."

P 74, L 12: Problem with this sentence in that "exports" don't "support" flow patterns nor do they reduce vulnerability to disruption. New conveyance facilities will provide the capability to achieve these identified outcomes. The sentence should be revised accordingly.

P 81, L 27-30: Suggest addition for clarity, "Maintaining freshwater conditions to meet regulatory requirements in the Delta…." Also, it is unclear how it follows that it will "increase risk from catastrophic levee failure and floods." This last part should be explained or deleted.

P 82, L 8-9: The Public Trust is NOT a "longstanding constitutional" doctrine. It is a common law doctrine. Suggest deleting "constitutional" as easiest way to handle.

P 82, L 23-27: It is not enough to quote the full text of Article X, Section II in the Glossary. The portion of the Constitution directing that the State's waters be put to beneficial use to the "fullest extent" should be included here are well, as it is that fullest use that is subject to the reasonable use requirement.

P 83, L 2-5: This discussion of the Public Trust doctrine leaves the reader with a false impression that serving "public trust" resources trumps all other considerations. Even if "feasible" the touchstone of the Public Trust is serving the *public interest*, which may require not dedicating resources to the public trust values. To provide the full picture, the following quotation from the decision would be beneficial, "as a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses."

P 95, L 40-41: It is important to note that DWR's reliability assessment is based upon the capability of existing infrastructure so as not to give the impression this is necessarily a continuing trend.

P 97, L 24: Water transfers are an important tool for improving water supply reliability, as the original language stated. The concept of "predictability of exports" is not related to transfers and, in fact, the following sentences point out the uncertainty related to the capability to move transfer water. We suggest keeping the original language with the addition of "improving", i.e. "…important tool for improving water supply reliability."

P 97, L 40: The term "past expectation" should be deleted as it never existed and doesn't exist today. If anyone is aware of the variability of water supplies and the impact of hydrology it is the exporters. This and the following clause in the sentence are without basis. The entire first paragraph (L 39-42) of the section should be deleted.

P 110, L 14-15: Famigletti did not measure lost groundwater storage capability as this statement implies, he measured how much groundwater was extracted and not replaced, i.e. the space created by that use. Not all of that resulted in subsidence and the loss of groundwater storage capacity.

P 110, L 16: Replace "many" with "some". As written, implies unmanaged overdraft is widespread and it is not.

P 115, L 31: Why was footnote 19 deleted and relegated to a mention in the appendix? This is an important definition to include in the text as it originally appeared to help alleviate potential uncertainty. In addition, it is critical that the definition of "water supplier" be forwarded to OAL as part of the policy and severing it from it raises concerns about that being done.

P 118, L 32-37: We reiterate our 6th draft comment regarding this language as overstating the "problem" and ignoring the vast majority of California's groundwater that is actively and well managed. There are some areas that are not utilizing best practices and information related to groundwater management should be more transparent. However, the sky is not falling as this "problem statement" suggests.

P 124, L 39-42: This sentence should be rewritten. Again, the Council appears to inappropriately equate the reduce reliance policy with reducing exports in absolute terms. This is a position without support. To make the point that seems to underlie this language we suggest the following, "….that will ~~benefit the amount of water,~~ improve the quality of water and the timing of flows in and through…."

P 139, L 7-8: This sentence implies that the projects are the only cause of harm to the ecosystem. The proscriptions on project operations may have "fully" mitigated the harm caused but other stressors in the system may have blocked those benefits from being realized since they cause harmful impacts too. We suggest a period after "reduce damage" and deletion of the rest of the sentence.

P 139, L 18-19: There are a number of "other stressors" that should be referenced along with invasives, e.g. pollution, unscreened diversions, etc.

P 145, L 40: We do not think the use of the term "master variable" is constructive or informative, but it does perpetuate misunderstanding. We suggest substituting "important" for "master".

P 150, Figure 4-4: The graphic describing "unimpaired" flows should state that while the water facilities are removed, flood control facilities and the channelization of the rivers and Delta still exist. Historically, "unimpaired" flows would have flooded the Sacramento Valley and created what was known as a great inland sea, which would reduce the volume of outflow and attenuate that flow dramatically as compared to current conditions.

P 150, L 12-13: There seems to be some verbiage missing here.

P 152, Sidebar, last line of 2nd to last paragraph: This statement is inaccurate. The appeal the Council may hear is regarding the DFG certification of the BDCP meeting the statutory criteria for its inclusion in the Delta Plan, not whether the BDCP will be included or not. This is stated correctly in the sidebar on page 103.

P 153, L 2-3: There seems to be some verbiage missing here.

P 153, L 37: This statement begs the question of what "significant numbers" are. Even if this were true, which we are skeptical of since the issue is not just entrainment through the pumps but also providing a feeding haven for predators such that entrainment is relatively low because the fish have been "entrained" into predators' stomachs. Moreover, under the ESA, ANY take is "significant". This sentence should be revised or deleted.

P 158, L 22-23: Why was the sentence regarding other stressors deleted? We request it be returned to the text.

P 161, L 14-21: There is no discussion of the current exemption to this policy that exists for California, which I think is in place? Also, the issue is not just forcing removal of vegetation, but also a prohibition

on new planting which is critical to ecosystem restoration along channels, especially where setback levees are not feasible.

P 164, L 30: Need to keep the word "century" in the sentence and not delete it.

P 166, L 25-44: Any discussion of the critical role of ocean conditions in the health of salmon populations is conspicuously absent considering the conclusions of the PFMC as to being a key factor.

P 167, L 12: If there are "unmitigable stressors" it seems worth mentioning the possibility of having to adapt expectations of restoration or of the tools used to try to achieve it as well.

P 167, L 24: It is inappropriate to state that flows are insufficient to "protect" the Delta based on the SWRCB's 2010 flow report as that report was non-regulatory in nature and, as the SWRCB itself caveated heavily, did not take into account any balancing of other beneficial uses as required by law when establishing water quality objectives. This sentence should be deleted and doing so will not change the paragraph's purpose or message.

P 176, L 28: The proper term is "mark select", not "marking selective".

P 201, L 11-23: It is important to note that the DPC's LURMP and ESP must be consistent with the Delta Plan and that it is the Council that makes those determinations.

P 210, L 37: There are some islands in the central Delta that have subsided as much as 30 feet. This should be noted.

P 227, L 6: At the end of the sentence add the following, "…guided by the DPC's ESP, consistent with the Delta Plan."

P 245, L 27-36: The entire discussion of X2 should be deleted as it does "continue to be studied and debated". Instead, keep the first 2 sentences of the paragraph and the last. Most of the verbiage in-between repeats hypotheses that have been rejected by the courts and are in dispute; it should be deleted.

P 245, L 43-45: This sentence should be deleted as it is referring to a hypothetical future scenario and it is out of place with the rest of the paragraph: [~~The combined effects of sea level rise and changes in other aspects of estuarine habitat caused by climate change and increased water diversions are likely to pose a significant threat to the future survival of Delta smelt (Feyrer et al. 2011).~~]

P 250, L 6-12: The last sentence in the "Ammonium" bullet should be deleted and replaced with a sentence reflecting current scientific information. [~~It is not known, however, how much this inhibition extends to freshwater algae in the Delta.~~] "Ammonium impacts on phytoplankton have also been observed in the Sacramento River below the Sacramento Regional WWTP. Parker et al. (2012a; 2012b) observed not just an inhibition of nitrate uptake, but also an inhibition of nitrogen uptake and a decline in primary productivity when ammonium concentrations are greater than about 4 µmol/L."

P 259, L 14-20: The target date of January 2018 to adopt and implement nutrient objectives for the Delta and Suisun Marsh is unnecessarily and inappropriately distant. The San Francisco Bay Regional

Water Quality Control Board and the SWRCB both have policy development programs underway to develop nutrient objectives, and the analysis of nutrient impacts in the Delta and Suisun Bay is an active area of current research. The Water Boards should be able to adopt nutrient objectives for the Delta and Suisun Marsh well before 2018. The Council should seek to prioritize an earlier and more reasonable date for development of nutrient objectives that reflects all the progress to date.

P 276, L 5: after "development," add "ecosystem restoration,".

P 277, Sidebar, last paragraph: It would be informative, and remove a false impression of how much levee restoration costs today, to include an estimate of what the cost to make the identified repairs would be today.

P 278, L 13-14. This is an incomplete statement. Levee failures can, in some places, cause damage to the ecosystem. But in other areas, levee failures can and have created new habitat (e.g., Liberty, Little Holland, Mildred Islands).

P 282, L 9: "12 to 15 feet" should be replaced with "5 to 29 feet" or "up to 29 feet". (per Joel Dudas, DWR Lidar specialist and "Contemporaneous Subsidence and Levee Overtopping Potential, Sacramento-San Joaquin Delta, California", San Francisco Estuary and Watershed Science, 10(1), Brooks et al).

P 282, L 16-18. Undo deletion.

P 289, L 41-42. This statement is untrue. USGS has found ecosystem benefits (phytoplankton growth) on the flooded Mildred Island.

P 312, L 5-15: Add new bullets: "Establish Acreage goals for new ecosystem enhancements, including set-back levees and breached levees." And, "Agencies avoid spending public money on levees that will eventually be breached for ecosystem enhancement."

P 322, Glossary, "coequal goals": Why was "shall" replaced with "must" when "shall" is what is in the statutory definition? The statutory language should be used.

P 340, Glossary, "low salinity zone": Everything after the first sentence should be deleted as superfluous and irrelevant to the definition of the LSZ. "X2" is defined later so it should not be mentioned here. Moreover, including the "hypothesized" conclusion has no place in a Glossary.

P 342, Glossary, "Public Trust Doctrine": This definition completely ignores the central tenet of the doctrine that it is the *public interest* that is key and that there may be times when it is either infeasible or a reasonable policy choice is made to take the most "protective" action. This presents only one side of the coin.

P 345, Glossary, "unimpaired flow": This does not state that the measurements are made with the current flood management facilities in place and the current geometry of the system which is not what that "natural" system would be. "Unimpaired flows" in a "natural" condition would be significantly different from those under the DWR contrived "unimpaired flow" model.

P C-1, Appendix C, WR P1: This new language doesn't make much sense and is unclear. The "covered actions" aren't going to be completing current UWMP/AWMPs?

P C-12, Appendix C, FR R1: This is a bit confusing. Shouldn't it include actions that "contribute to" or "further" the coequal goals, not just "do or may achieve"?

P N-1, Appendix N, Table N-1: We reiterate our objection to including a $20M placeholder for Studies/Grants for 2013-2014 forward, in addition to the almost $10M of "other studies", prior to undertaking an inventory and prioritization of the science already being undertaken and the development of a new, integrated Science Plan.

P P-3, Appendix P, L 10: there are two "that"s and one needs to be deleted.

APPENDIX DOC. 4

United States District Court,
E.D. California.
The CONSOLIDATED SALMONID CASES.

No. 1:09–cv–1053 OWW DLB.
May 18, 2010.
Supplemental Opinion June 1, 2010.

Background: State water contractors, water districts, water authorities, and irrigation districts filed actions against Bureau of Reclamation and National Marine Fisheries Service (NMFS) under National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Administrative Procedure Act (APA) regarding water restrictions associated with salmonid biological opinion (BiOp). Actions were consolidated. California Department of Water Resources (DWR) intervened as plaintiff. Various parties sought temporary restraining order and preliminary injunction against implementation of various provisions of BiOp.

Holdings: The District Court, Oliver W. Wanger, J., held that:
(1) comparisons of juvenile salvage to negative flows in particular rivers, by utilizing raw salvage numbers, rather than scaling salvage to population size, was arbitrary and capricious;
(2) defendants violated NEPA by not making reasonable evaluation, analysis, taking "hard look at," or disclosure of harms and damage to human health and safety, human environment, and other environments not inhabited by listed species;
(3) Court could consider extra administrative record expert testimony for explanation of technical terms and complex subject matter beyond court's knowledge, to understand agency's explanations, or lack thereof, underlying reasonable and prudent alternative (RPA) actions, and to determine if any bad faith existed;
(4) Court could take judicial notice of Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook;
(5) alleged deficiencies in analysis of impacts to orcas in BiOp did not justify preliminary injunction to enjoin implementation of RPA water supply reductions;
(6) NMFS applied viable salmonid population (VSP) concept in sufficiently rigorous manner by using that VSP methodology in BiOp in qualitative manner, as conceptual framework;
(7) imposition of limit on water exports, without any reasoned and scientifically justified biological explanation for selecting specific remedial measures chosen, was arbitrary and capricious; and
(8) public interest of enhancing water supply to reduce adverse harms had to be addressed without jeopardizing species and their critical habitat.

Ordered accordingly.

West Headnotes

[1] Injunction 212 1598

212 Injunction
212V Actions and Proceedings
212V(G) Determination
212k1598 k. Operation and effect. Most Cited Cases
(Formerly 212k158)

The denial of a motion for a temporary restraining order (TRO) is not dispositive of the merits of a related motion for preliminary injunction.

[2] Injunction 212 1007

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1007 k. Extraordinary or unusual nature of remedy. Most Cited Cases
(Formerly 212k1)

Injunction 212 1075

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General

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212II(A) Nature, Form, and Scope of Remedy
212k1075 k. Extraordinary or unusual nature of remedy. Most Cited Cases
(Formerly 212k132)

Injunctive relief, whether temporary or permanent, is an extraordinary remedy, never awarded as of right.

[3] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases
(Formerly 212k138.1)

Injunction 212 1571

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1571 k. Preponderance of evidence. Most Cited Cases
(Formerly 212k138.1)

Four factors must be established by a preponderance of the evidence to qualify for a temporary injunction: (1) likelihood of success on the merits; (2) likelihood the moving party will suffer irreparable harm absent injunctive relief; (3) the balance of equities tips in the moving parties' favor; and (4) an injunction is in the public interest.

[4] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Comparisons of juvenile salvage to negative flows in particular rivers, relied upon by National Marine Fisheries Service (NMFS) in salmonid biological opinion (BiOp) for reasonable and prudent alternative (RPA) water supply reductions, by utilizing raw salvage numbers, rather than scaling salvage to population size, was arbitrary and capricious under ESA, since scaling salvage to population size was standard fisheries science practice and could have been accomplished for several of listed species based on existing population data. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[5] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to consider environment in general. Most Cited Cases

Bureau of Reclamation, that had co-equal objective of providing water service, and National Marine Fisheries Service (NMFS) violated NEPA by not making reasonable evaluation, analysis, taking "hard look at," or disclosure of harms and damage to human health and safety, human environment, and other environments not inhabited by listed species in implementation of reasonable and prudent alternative (RPA) water supply reductions as referenced in salmonid biological opinion (BiOp) such as destruction of permanent crops, fallowed lands, increased groundwater consumption, land subsidence, reduction of air quality, destruction of family and entity farming businesses, and social disruption and dislocation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[6] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to consider environment in general. Most Cited Cases

NEPA insures that federal agencies make informed decisions and contemplate the environmental impacts of their actions. National Environmental Policy Act of 1969, § 2, 42 U.S.C.A. § 4321.

[7] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of government bodies to

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consider environment in general. Most Cited Cases

NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to insure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[8] Environmental Law 149E ⚷608

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek607 Effect of Deficiency
149Ek608 k. In general. Most Cited Cases

Environmental Law 149E ⚷695

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek695 k. In general. Most Cited Cases

Where a federal agency takes action in violation of NEPA, that action will be set aside. National Environmental Policy Act of 1969, § 2, 42 U.S.C.A. § 4321.

[9] Environmental Law 149E ⚷700

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek700 k. In general. Most Cited Cases

A court may not issue an injunction under NEPA that would cause a violation of other statutory requirements, such as interagency cooperation mandates of ESA. Endangered Species Act of 1973, § 7, 16 U.S.C.A. § 1536; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[10] Environmental Law 149E ⚷700

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek700 k. In general. Most Cited Cases

An injunction should not issue under NEPA when enjoining government action would result in more harm to the environment than denying injunctive relief. National Environmental Policy Act of 1969, § 2, 42 U.S.C.A. § 4321.

[11] Administrative Law and Procedure 15A ⚷676

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak676 k. Record. Most Cited Cases

Administrative Law and Procedure 15A ⚷753

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak753 k. Theory and grounds of administrative decision. Most Cited Cases

Judicial review under the Administrative Procedure Act (APA) must focus on the administrative record already in existence, not some new record made initially in a reviewing court; parties may not use post-decision information as a new rationalization either for sustaining or attacking the agency's decision. 5 U.S.C.A. § 706(2)(A).

[12] Environmental Law 149E ⚷688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

Judicial review of a biological opinion under the Administrative Procedure Act (APA) is based upon the evidence contained in the administrative record. 5 U.S.C.A. § 706(2)(A).

[13] Administrative Law and Procedure 15A ⚷676

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15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak676 k. Record. Most Cited Cases

Exceptions to administrative record review for technical information or expert explanation make such evidence admissible only for limited purposes, and those exceptions are narrowly construed and applied. 5 U.S.C.A. § 706(2)(A).

[14] Environmental Law 149E ⚷688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

District court could consider extra administrative record expert testimony for explanation of technical terms and complex subject matter beyond court's knowledge, to understand agency's explanations, or lack thereof, underlying reasonable and prudent alternative (RPA) actions, and to determine if any bad faith existed, on judicial review under Administrative Procedure Act (APA) of salmonid biological opinion (BiOp) issued by National Marine Fisheries Service (NMFS). 5 U.S.C.A. § 706(2)(A).

[15] Administrative Law and Procedure 15A ⚷760

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak760 k. Wisdom, judgment or opinion. Most Cited Cases

Administrative Law and Procedure 15A ⚷763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

On judicial review of agency action under the Administrative Procedure Act (APA), a district court must defer to the agency on matters within the agency's expertise, unless the agency completely failed to address some factor, consideration of which was essential to making an informed decision; the court may not substitute its judgment for that of the agency concerning the wisdom or prudence of the agency's action. 5 U.S.C.A. § 706(2)(A).

[16] Administrative Law and Procedure 15A ⚷763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

Administrative Law and Procedure 15A ⚷785

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak785 k. Clear error. Most Cited Cases

When conducting an Administrative Procedure Act (APA) review, a court must determine whether the agency's decision is founded on a rational connection between the facts found and the choices made and whether the agency has committed a clear error of judgment; the agency's action need be only a reasonable, not the best or most reasonable, decision. 5 U.S.C.A. § 706(2)(A).

[17] Administrative Law and Procedure 15A ⚷763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General

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15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

Administrative Law and Procedure 15A 785

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak785 k. Clear error. Most Cited Cases

Although deferential, judicial review under the Administrative Procedure Act (APA) is designed to ensure that the agency considered all of the relevant factors and that its decision contained no clear error of judgment. 5 U.S.C.A. § 706(2)(A).

[18] Administrative Law and Procedure 15A 759

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak759 k. Technical questions. Most Cited Cases

Administrative Law and Procedure 15A 763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

The deference accorded an agency's scientific or technical expertise is not unlimited, on judicial review of agency action under the Administrative Procedure Act (APA); deference is not owed when the agency has completely failed to address some factor consideration of which was essential to making an informed decision. 5 U.S.C.A. § 706(2)(A).

[19] Administrative Law and Procedure 15A 763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, unreasonable or capricious action; illegality. Most Cited Cases

On judicial review of agency action under the Administrative Procedure Act (APA), an agency's decision is arbitrary and capricious if it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2)(A).

[20] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Under the ESA, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction; likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[21] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Under the ESA, a failure by the agency to utilize the best available science is arbitrary and capricious. 5 U.S.C.A. § 706(2)(A); Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R.

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§ 402.14(g)(8).

[22] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Under the ESA, a decision about jeopardy must be made based on the best science available at the time of the decision; the agency cannot wait for or promise future studies. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[23] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Environmental Law 149E 688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

Under the ESA, what constitutes the "best" available science implicates core agency judgment and expertise to which Congress requires the courts to defer; a court should be especially wary of overturning such a determination on review. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[24] Environmental Law 149E 688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

Under the ESA, an agency's scientific methodology is owed substantial deference and extends to the use and interpretation of statistical methodologies. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[25] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Environmental Law 149E 551

149E Environmental Law
149EXI Plants and Wildlife
149Ek548 Evidence
149Ek551 k. Weight and sufficiency. Most Cited Cases

Mere uncertainty, or the fact that evidence may be weak, is not fatal to an agency decision under the ESA. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[26] Environmental Law 149E 550

149E Environmental Law
149EXI Plants and Wildlife
149Ek548 Evidence
149Ek550 k. Presumptions, inferences, and burden of proof. Most Cited Cases

Under the ESA, the presumption of agency expertise may be rebutted if the agency's decisions, although based on scientific expertise, are not reasoned; agencies cannot disregard available scientific evidence better than the evidence on which it relies. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[27] Environmental Law 149E 688

149E Environmental Law

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149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

A district court is not required by the ESA to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[28] Environmental Law 149E 551

149E Environmental Law
149EXI Plants and Wildlife
149Ek548 Evidence
149Ek551 k. Weight and sufficiency. Most Cited Cases

Under the ESA, a court should reject conclusory assertions of agency expertise where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

[29] Evidence 157 48

157 Evidence
157I Judicial Notice
157k48 k. Official proceedings and acts. Most Cited Cases

District court could take judicial notice of United States Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook, in action against Bureau of Reclamation and National Marine Fisheries Service (NMFS) under ESA regarding implementation of reasonable and prudent alternative (RPA) water supply reductions as referenced in salmonid biological opinion (BiOp). Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. § 402.14(f).

[30] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Under the ESA, when an agency considers the effects of its actions within the context of other existing human activities that impact the listed species, it is not required to quantify and/or parcel out the "proportional share" of harms among the baseline and the proposed action; however, the record must reasonably demonstrate that the agency's proposed actions, when viewed in the present and future human and natural contexts, will cause jeopardy or adverse modification. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14(f).

[31] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Where an agency is required by law to perform an action, it lacks the power under the ESA to insure that the action will not jeopardize the species. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[32] Environmental Law 149E 701

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek701 k. Preliminary injunction. Most Cited Cases

Alleged deficiencies in analysis of impacts to orcas in salmonid biological opinion (BiOp) issued by National Marine Fisheries Service (NMFS) did not justify preliminary injunction to enjoin implementation of reasonable and prudent alternative (RPA) water supply reductions, in action under ESA, since NMFS adopted RPA primarily for benefit of salmon, steelhead, and green sturgeon that migrated through delta and were harmed by export pumping

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that interfered with their migrations, not orcas which resided in ocean and indirect effect of alleged reductions of orca prey was not mentioned as direct justification for challenged RPA. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[33] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Environmental Law 149E 688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

National Marine Fisheries Service (NMFS) applied viable salmonid population (VSP) concept in sufficiently rigorous manner under ESA by using that VSP methodology in salmonid biological opinion (BiOp) in qualitative manner, as conceptual framework, even if analysis in BiOp may have benefited from application of quantitative VSP methodologies and it was disputed whether failure to do so represented breach of accepted scientific practice, since court had to defer to agency in such scientific disputes; requiring NMFS to adapt VSP methodology to operate as quantitative model would have been equivalent of requiring NMFS to generate data and agency was not required to generate new studies. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[34] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

National Marine Fisheries Service (NMFS) was not required by ESA to engage in population modeling and/or life cycle analysis before issuing reasonable and prudent alternative (RPA) water supply reductions in salmonid biological opinion (BiOp), despite scientific preference for such modeling, where NMFS had not been presented with then-existing best available science representing appropriate population or life cycle models for species of concern prior to issuance of BiOp and primary purpose of RPA was to protect outmigrating juvenile members of steelhead for which no population indices, whether absolute or relative, were available. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[35] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Imposition of limit on water exports by National Marine Fisheries Service (NMFS) in salmonid biological opinion (BiOp), as reasonable and prudent alternative (RPA) water supply reduction, without any reasoned and scientifically justified biological explanation for selecting specific remedial measures chosen, was arbitrary and capricious, in action under ESA particularly in light of enormous human impacts caused by even small changes in flow regime reducing exports, where there was no way to know whether those levels were sufficiently protective, not protective enough, or far more protective than necessary. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[36] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

Margin of error, i.e. taking precautionary approach, built into reasonable and prudent alternative

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(RPA) actions, had to be properly justified and disclosed by record, even if it was scientifically justifiable under ESA to do so. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[37] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

National Marine Fisheries Service (NMFS), when issuing reasonable and prudent alternative (RPA) water supply reductions in salmonid biological opinion (BiOp), did not act rationally, and was not scientifically justified under ESA, in relying on studies for findings that authors themselves refused to make. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[38] Environmental Law 149E 688

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek688 k. Plants and wildlife; endangered species. Most Cited Cases

Deference was owed to National Marine Fisheries Service (NMFS) unless NMFS was unreasonably wrong, despite undeniable problems with basis in salmonid biological opinion (BiOp) for reasonable and prudent alternative (RPA) water supply reductions in San Joaquin basin, where studies supported proposition that, for those populations spawning entirely within San Joaquin basin, increasing exports negatively impact salmonid smolt survival. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[39] Environmental Law 149E 537

149E Environmental Law
149EXI Plants and Wildlife
149Ek535 Public Plans, Projects, and Approvals; Agency Action
149Ek537 k. Consultation. Most Cited Cases

A federal action agency must not blindly adopt the conclusions of a consulting agency to conclusively establish its compliance with its substantive obligations the under ESA to ensure that its actions will not jeopardize a listed species. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[40] Environmental Law 149E 701

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek701 k. Preliminary injunction. Most Cited Cases

On motion for preliminary injunction, public interest of enhancing water supply to reduce adverse harms of destruction of permanent crops, fallowed lands, increased groundwater consumption, land subsidence, reduction of air quality, destruction of family and entity farming businesses, and social disruption and dislocation, such as increased property crimes and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness had to be addressed under ESA without jeopardizing species and their critical habitat. Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C.A. § 1536(a)(2).

[41] Environmental Law 149E 700

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek700 k. In general. Most Cited Cases

All harms may be considered in evaluating a claim for injunctive relief under NEPA. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

[42] Environmental Law 149E 701

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek701 k. Preliminary injunction. Most

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Cited Cases

In light of up-to-date evidence of status of affected fish species, preliminary injunction against water pumping restrictions, found to have violated NEPA and to have likely violated ESA, until date of their planned termination, would not deepen jeopardy to affected species. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

***1121** Daniel Joseph O'Hanlon, Hanspeter Walter, K. Eric Adair, Hanspeter Walter, ***1122** Kronick, Moskovitz, Tiedemann & Girard, David A. Diepenbrock, Jon David Rubin, Jonathan R. Marz, Eileen M. Diepenbrock, Diepenbrock Harrison, Linus Serafeim Masouredis, Metropolitan Water District of Southern California, Sacramento, CA, Charles Wesley Strickland, Brownstein Hyatt Farber and Schrek LLP, Santa Barbara, CA, Geoffrey M. Williamson, PHV, Mark J. Mathews, PHV, Martha F. Bauer, PHV, Michelle C. Kales, PHV, Brownstein Hyatt Farber Schreck LLP, Denver, CO, Steve O. Sims, PHV, Brownstein Hyatt Farber Schreck LLP, Albuquerque, NM, Harold Craig Manson, Thomas William Birmingham, Westlands Water District, Fresno, CA, Alexis Keane Galbraith, Jeanne M. Zolezzi, Karna E. Harrigfeld, Jennifer L. Spaletta, Herum Crabtree, Stockton, CA, Tim P. O'Laughlin, O'Laughlin & Paris, LLP, Chico, CA, Audrey M. Huang, Paul S. Weiland, Nossaman LLP, Irvine, CA, Christopher J. Carr, William M. Sloan, Edgar B. Washburn, Morrison & Foerster, LLP, San Francisco, CA, Amelia Minaberrigarai, Bakersfield, CA, for Plaintiffs.

Clifford Thomas Lee, California Attorney General's Office, Department of Justice Daniel S. Harris, CA Department of Justice, Office of the Attorney General, Allison Ernestine Goldsmith, Attorney General's Office for the State of California, Cecilia Louise Dennis Michael M. Edson California Department of Justice San Francisco, CA for Intervenor Plaintiffs.

Bridget Kennedy McNeil, United States Department of Justice, Environment & Natural Res. Div., Wildlife & Marine Resources, Denver, Co, Bradley H. Oliphant, US Department of Justice, Env. & Natural Resources Division, Washington, DC, Charles Ray Shockey, William James Shapiro, United States Department of Justice, Sacramento, CA, Kathleen A. Meehan, Office of the Attorney General, Fresno, CA, Michael M. Edson, California Department of Justice, San Francisco, CA, for Defendants.

Erin Marie Tobin, Michael Ramsey Sherwood, Earthjustice Legal Defense Fund Incorporated, Oakland, CA, Katherine Scott Poole, Doug Andrew Obegi, Natural Resources Defense Council, San Francisco, CA, for Intervenor Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION (Docs. 161 & 230)
OLIVER W. WANGER, District Judge.

I. *INTRODUCTION*

[1] Plaintiffs San Luis & Delta Mendota Water Authority (the "Authority") and Westlands Water District ("Westlands") (collectively "San Luis Plaintiffs") seek a Temporary Restraining Order ("TRO") [FN1] and a Preliminary Injunction ("PI") against the implementation of Reasonable and Prudent Alternative ("RPA") Action IV.2.1 set forth in the National Marine Fisheries Service's ("NMFS") June 4, 2009 Biological Opinion ("2009 Salmonid BiOp"), which addresses the impacts of the coordinated operations of the federal Central Valley Project ("CVP") and State Water Project ("SWP") on the Central Valley winter-run and spring-run Chinook salmon, Central Valley steelhead, Southern Distinct Population Segment of Green ***1123** Sturgeon, and Southern Resident Killer Whales ("Listed Species"). Both motions were filed February 22, 2010. Docs. 230, 233.

FN1. Plaintiffs' request for a TRO against the imminent implementation of Action IV.2.1, which took effect as of April 1, Doc. 233, was denied for the reasons stated in open court on the record on March 31, 2010. Doc. 306. The denial of a TRO motion is not dispositive of the merits of a related motion for preliminary injunction. *See Office of Personnel Management v. Am. Fed'n of Gov't Employees*, 473 U.S. 1301, 1305, 105 S.Ct. 3467, 87 L.Ed.2d 603 (1985).

Plaintiffs State Water Contractors, Stockton East Water District, Oakdale Irrigation District, and South San Joaquin Irrigation District, and Plaintiff–Intervenor California Department of Water Resources ("DWR") filed statements of non-opposition. Docs. 247, 248 & 251. Federal Defendants and Defendant–

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Intervenors opposed. Docs. 273 & 274.

Additionally, San Luis Plaintiffs seek a PI against the implementation of Action IV.2.3 in the 2009 Salmonid BiOp. Doc. 164 (filed Jan. 27, 2010). Plaintiffs Kern County Water Agency and Coalition for a Sustainable Delta joined. Doc. 181. DWR filed a partial joinder in and statement of non-opposition to the motion. Doc. 249. Federal Defendants and Defendant–Intervenors opposed. Docs. 273 & 274.

The PI motions came on for evidentiary hearing and argument, in Courtroom 3 of the above-captioned Court from March 30 through April 2, 2010. The parties were represented by counsel, as noted on the record in open court.

After consideration of the testimony of the witnesses, the exhibits received in evidence, the written briefs of the parties, oral arguments, and the parties' proposed findings of fact and conclusions of law, Docs. 316 & 314, and disapprovals thereto, Docs. 320, 321 & 336, the following findings of fact and conclusions of law concerning the motion for interim relief/preliminary injunction are entered.

To the extent any finding of fact may be interpreted as a conclusion of law or any conclusion of law may be interpreted as a finding of fact, it is so intended.

II. *BACKGROUND*

The 2009 Salmonid BiOp found that planned coordinated Project operations would jeopardize the continued existence of and/or adversely modify the critical habitat of several of the Listed Species.[FN2] BiOp at 1–2. As required by law, NMFS proposed a Reasonable and Prudent Alternative ("RPA") that imposes a number of operating restrictions and other measures on the Projects. The RPA included numerous elements for each of the various project divisions and associated stressors, which NMFS concluded "must be implemented *in its entirety* to avoid jeopardy and adverse modification." *Id.* at ¶ 578 (emphasis added). The description of the RPA comprises approximately 90 pages of the 2009 Salmonid BiOp. *See id.* at 581–671.

FN2. Jeopardy was found as to all of the covered species; adverse habitat modification was found as to the designated critical habitat of winter-run, spring-run, steelhead, and green sturgeon. BiOp at 1–2.

The RPA includes five principle components, with numerous sub-parts, but Plaintiffs currently seek to restrain only:

• Action IV.2.1, which will limit pumping based on San Joaquin River inflow, measured at Vernalis, from April 1 through May 31; and

• Action IV.2.3, which imposes restrictions on negative flows in Old and Middle Rivers ("OMR") between January 1 and June 15, or until average daily water temps at Mossdale (a location on the San Joaquin River west of Manteca, California) are greater than 72°F, whichever is earlier.

III. *SUMMARY OF MOTION*

Plaintiffs seek preliminary injunctive relief against implementation of Actions IV.2.1 and IV.2.3 on the grounds that:

1) the district court already found that the United States Bureau of Reclamation***1124** ("Reclamation") failed to comply with the National Environmental Policy Act ("NEPA") in implementing the 2009 Salmonid BiOp; and

2) the 2009 Salmonid BiOp is arbitrary, capricious, and contrary to law because:

a) NMFS allegedly conducted an effects analysis that improperly overstates impacts attributable to the coordinated operations of the CVP and SWP;

b) NMFS failed to clearly define or consistently apply a relevant environmental baseline;

c) NMFS failed to distinguish between discretionary and non-discretionary CVP and SWP activities, which overstated the effects of coordinated operations of the Projects; and

d) RPA Actions IV.2.1 and IV.2.3 are arbitrary and capricious, because they are without factual or scientific justification and/or not supported by the best available science.

Plaintiffs further claim that the implementation

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of Actions IV.2.1 and IV.2.3 will cause them continuing irreparable harm and that the public interest and balance of hardships favor injunctive relief.

IV. *STANDARD OF DECISION*

[2][3] Injunctive relief, whether temporary or permanent, is an "extraordinary remedy, never awarded as of right." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008); *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). Four factors must be established by a preponderance of the evidence to qualify for temporary injunctive relief:

1. Likelihood of success on the merits;

2. Likelihood the moving party will suffer irreparable harm absent injunctive relief;

3. The balance of equities tips in the moving parties' favor; and

4. An injunction is in the public interest.

Winter, 129 S.Ct. at 374; *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009).

V. *FINDINGS OF FACT*

A. *The Agency Action.*

1. The agency action is the coordinated operation of the CVP and SWP, pursuant to an Agreement for the Coordinated Operation of the two projects ("COA").

2. According to the Rivers and Harbors Act of 1937, the dams and reservoirs of the CVP "shall be used, first, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses; and, third, for power." 50 Stat. 844, 850.

3. The CVP was reauthorized in 1992 through the Central Valley Improvement Act ("CVPIA"), which modified the 1937 Act and added mitigation, protection, and restoration of fish and wildlife as project purposes. Pub.L. 102–575 § 3402, 106 Stat. 4600, 4706 (1992). One of the stated purposes of the CVPIA is to address impacts of the CVP on fish and wildlife. 3406(a). The CVPIA made environmental protection and water deliveries co-purposes.

4. This case presents a critical conflict between these dual legislative purposes, providing water service for agricultural, domestic, and industrial use versus enhancing environmental protection for fish species whose habitat is maintained in rivers, estuaries, canals, and other waterways that comprise the Sacramento–San Joaquin Delta.

5. It is of manifest significance to the public interest that DWR, a co-operator and the State contractual partner of Reclamation,***1125** disagrees with at least some portions of the RPA and seeks limited injunctive relief against RPA Action IV.2.3.

B. *Facts Relevant to NEPA Claims.*

6. It is undisputed that neither NMFS nor Reclamation engaged in any NEPA analysis in connection with preparation or implementation of the 2009 Salmonid BiOp.

7. It is undisputed that a March 17, granted San Luis Plaintiffs' motion for summary judgment on their claim that Federal Defendants violated NEPA when they adopted and implemented the 2009 NMFS BiOp RPA without conducting the required NEPA analysis. Doc. 288.

8. NMFS asserts that it did consider a range of alternative RPA actions, including those proposed by Reclamation and DWR, and "carefully avoided prescribing measures that are not necessary to meet section 7 requirements." BiOp at ¶ 578, 580 & 720 (NMFS endeavored "through the iterative consultation process to avoid developing RPA actions that would result in high water costs, while still providing for the survival and recovery of listed species."). However, this process did not fully or sufficiently evaluate, explain or analyze the extent and gravity of the harms to humans and the environment visited upon Plaintiffs by Project water service reductions and pumping restrictions.

9. The 2009 Salmonid BiOp phases in some elements of the RPA over time, provides a health and safety exception to ensure a minimum level of water exports, uses monitoring programs and adaptive management to initiate RPA actions when species are present and protections are most needed, and includes

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specific scientific studies and engineering programs to refine RPA elements. *Id.* at ¶ 579–80, 719–23. In addition, the challenged RPA Actions were modified between the draft and final RPA to lessen water supply impacts, including shortening the duration of Action IV.2.1 from 90 to 60 days. *Id.* at 723; NMFS AR 104419.

10. A legally sufficient NEPA analysis should identify and analyze alternatives that minimize harm to humans and the human environment. Federal Defendants do not claim that they engaged in a systematic consideration of impacts to humans and the human environment and/or the alternatives that would have minimized harm to human and the human environment while still protecting the species.

11. Federal Defendants did not take the hard look required to achieve, to the maximum extent possible, the co-equal Reclamation Law objective of providing water service.

C. *Facts Relevant to ESA Challenges.*

(1) *Current Status of the Species.*

a. *Sacramento River Winter–Run Chinook Salmon.*

12. Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*) ("winter-run") are listed as "endangered" under the ESA. 70 Fed. Reg. 37,160 (June 28, 2005). Winter-run critical habitat includes portions of the Sacramento River and other waters. Historical winter-run population estimates were as high as approximately 100,000 fish in the 1960s, but declined to under 200 fish in the 1990s. Gov't Salmon Ex. 4 (Second Stuart Decl., Doc. 273–3), 45. In recent years, population surveys of winter-run estimated a high of 17,344 fish in 2006, followed by a decline in 2007 (2,542 fish) that persisted into 2008 (2,830 fish). *Id.* In 2009, there was a modest increase in adult escapement (4,658 fish). *Id.* Winter-run are "currently not viable." BiOp at 88; *see also* 4/1/10 Tr. 175: 11–12.

13. Winter-run juvenile rearing and migration typically occurs between July ***1126** and February in the upper Sacramento River, with juvenile emigration downstream through the Delta taking place between November through May or June. BiOp at 81, 94; *Pac. Coast Fed'n of Fishermans' Ass'ns. v. Gutierrez ("Gutierrez II "),* 606 F.Supp.2d 1195, 1216–17 (E.D.Cal.2008); 4/1/10 Tr. 167:5–19; Gov't Salmon Ex. 1 (First Stuart Decl., Doc. 190–4) at (internal) Exhibit 1a. Historically, the peak emigration period for winter-run occurs during March. Gov't Salmon Ex. 4, 47.

14. During the current emigration year (2009–2010), juvenile winter-run began entering the Delta in October 2009. *Id.* at 46. On April 1, 2010, Mr. Stuart, an NMFS biologist, testified that "about 1,600 winter-run" juveniles have been salvaged at the pumping facilities for the season. 4/1/10 Tr. 174:11.

15. The estimate of juvenile winter-run production (known as the Juvenile Production Estimate ("JPE")) for 2009 is 1,144,860. Gov't Salmon Ex. 1, at 3. The BiOp sets an incidental take limit of two percent of the JPE of winter-run salmon, or 22,897. BiOp at 775; 3/31/10 Tr. 112:16–25–113:1.

16. In addition, although winter-run are currently at the "tail end" of their emigration through the Delta (90% moved through the Delta by the end of March), 3/31/10 Tr. 172:3–6, Mr. Stuart opined that the "tail end" of the winter-run migration period is "significant" because it "represents fish that would probably show a different life history than fish that occur during the other parts" and, "protecting the tail end would be important to maintain the diversity of that winter-run population," 4/1/10 Tr. 174:19–175:8.

17. The emigration period for winter-run is all but concluded for this water year.

18. Designated critical habitat for winter-run includes the Sacramento River, the Delta, and downstream bays to the Golden Gate Bridge. *Gutierrez II,* 606 F.Supp.2d at 1217. Currently, the value of winter-run critical habitat is "degraded." BiOp at 93.

b. *Central Valley Spring–Run Chinook Salmon.*

19. Central Valley spring-run Chinook salmon (*O. tshawytscha*) ("spring-run") are listed as "threatened" under the ESA. 71 Fed. Reg. 834 (June 5, 2005); 70 Fed. Reg. 37160 (June 28, 2005) (critical habitat designated). Spring-run are not currently viable. 4/1/10 Tr. 179:12–15. Spring-run Chinook have been declining over recent years; this past year was one of the lowest adult escapements ever seen. 3/31/10 Tr. 137:22–138:2.

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20. It is estimated that the entire Evolutionarily Significant Unit ("ESU") consists of 3,800 adults. 4/1/10 Tr. 180:9–11; Gov't Salmon Ex. 4 at (internal) Ex. 7 (March 2010 population estimates).

21. The emigration period for spring-run extends from November to May, *see* Gov't Salmon Ex. 4, ¶ 50, although spring-run may occur in the Delta in low abundance in June, *see* Gov't Salmon Ex. 1 at (internal) Exhibit 1a. Historically, April is the peak period for spring-run salvage at the CVP and SWP. 3/31/10 Tr. 125:14; *see also* Gov't Salmon Ex. 4, 52.

22. Emigration for spring-run for 2009–2010 is substantially complete.

23. During the current emigration year (2009–2010), spring-run began entering the Delta in October 2009. Gov't Salmon Ex. 4, ¶ 52. Under the 2009 Salmonid BiOp, NMFS uses the release of specially-marked late fall-run Chinook as a surrogate for determining take of spring-run Chinook at the export pumps. BiOp at 776, 782; Gov't Salmon Ex. 4, ¶ 52; *id.* at (internal) Exhibit 10 (graph showing peak of spring-run salvage in April). For ***1127** spring-run, the incidental take limit is one percent of the marked fall-run surrogates. 3/31/10 Tr. 113:1–2; *see also* BiOp at 776. Take of the tagged late-fall surrogate releases exceeded the caution level of 0.5% this year, which would have triggered a reduction in negative OMR flows under RPA Action IV.2.3. *See* 3/31/10 Tr. 113:1–4; Gov't Salmon Ex. 4, ¶ 52; BiOp at 649. However, because Action IV.2.3 was enjoined, NMFS could not implement Action IV.2.3 for several days. *See* Gov't Salmon Ex. 4, ¶ 52.

24. Designated critical habitat for spring-run includes the Sacramento River, tributaries supporting spring-run, the Delta, and downstream bays to the Golden Gate Bridge. *Gutierrez II*, 606 F.Supp.2d at 1217. The value of spring-run critical habitat currently is "degraded." BiOp at 101, 104.

c. *Central Valley Steelhead.*

25. Central Valley steelhead (*O. mykiss*) ("CV steelhead") are listed as "threatened" under the ESA. 71 Fed. Reg. 834 (Jan. 5, 2006). Wild CV steelhead are confined mostly to the upper Sacramento River and its tributaries. BiOp at 107. Recent surveys also have detected small, self-sustaining populations on the Stanislaus, Mokelumne, and Calaveras rivers, as well as observations of juvenile steelhead on the Tuolumne and Merced rivers. *Id.* These small populations make up the remaining representatives of the Southern Sierra Nevada Diversity Group ("SSNDG") of CV Steelhead. *Id.* at 198.

26. Approximately 90% of historical CV Steelhead range is blocked by dams. 3/31/10 Tr. 99:25–100:2. Mortality rates for CV steelhead, estimated by using fall-run Chinook as surrogates, are approximately 70 to 90%. *Id.* at 102:21–23.

27. While there is limited information on population size, one population estimate in 2005 calculated that there were approximately 3,600 female CV steelhead spawning in the entire Central Valley, compared with 40,000 spawners in the 1960s. BiOp at 106.

28. All available data indicate that the CV steelhead population continues to decline. *Id.* at 108–09; *see also id.* at 100:8.

29. The SSNDG is one of the population groups of the CV steelhead. 3/31/10 Tr. 98:2–3. Under the Viable Salmonid Population ("VSP") concept and the Lindley (2007) paper applying the VSP concept to Central Valley salmonids, NMFS must maintain all extant populations within the Central Valley, in order to maintain the viability of the Distinct Population Segment ("DPS") as a whole. *Id.* at 98:3–7.

30. The SSNDG is a very small population, represented by very few adult fish moving back into the system and potentially only a few hundred to a few thousand juveniles moving out each year. *Id.* at 98:9–12; 100:12–23. These numbers are an "assumption" because of the limited monitoring data available. *Id.* at 98:12–15.

31. The risk of extirpating the SSNDG is very high because 100% of this very small population must travel through the Delta, where it is exposed to numerous risks. *Id.* at 103:2–11. Mr. Stuart opined that this diversity group has a "very tenuous hold on survival" and that "[i]t wouldn't take much to extirpate it." *Id.* at Tr. 104:11–13. Extirpation of this diversity group would further decrease the viability of the CV steelhead DPS as a whole. *Id.* at 103:24–104:3.

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32. The CV steelhead DPS as a whole is not currently viable. *Id.* at 99:8–11.

33. Juvenile CV steelhead typically emigrate through the Delta from late September through June. Gov't Salmon Ex. 1, at (internal) Exhibit 1a. "Peak entrainment typically occurs between mid-February and mid-March with a prolonged tail into June." Gov't Salmon Ex. 4, ¶ 57. CV ***1128** steelhead are currently migrating through the Delta, including the Sacramento and San Joaquin Rivers and their associated tributaries. *See* 3/31/10 Tr. 118:8–10. As of March 15, 2010, approximately 420 wild CV steelhead had been taken at the CVP since October 2009, and 204 wild steelhead had been taken at the SWP. Gov't Salmon Ex. 4, ¶ 57. The "highest rates of fish collection did overlap with the period in which the TRO [issued in this case against the implementation of Action IV.2.3] allowed increased exports (February 5 through February 10, 2010)." *Id.*

34. The 2009 incidental take for CV steelhead is 3,000 fish based on "fairly old data." 3/31/10 Tr. 135:19–20.

35. CV steelhead critical habitat is severely degraded. 3/31/10 Tr. 67:21–68:8.

36. Despite over five (5) years of active controversy over relevant ESU designation and preservation of CV steelhead, Federal Defendants have no credible population figures, nor a reliable life cycle model for this species.

d. *Southern DPS of North American Green Sturgeon.*

37. The southern distinct population segment of the North American green sturgeon ("green sturgeon") (*Acipenser medirostris*) is listed as "threatened" under the ESA. 71 Fed. Reg. 177¶ 57 (Apr. 7, 2006); 73 Fed. Reg. 52,084 (critical habitat designated).

38. Green sturgeon are anadromous fish that spawn and rear in freshwater rivers and estuaries but spend most of their lives in the ocean. Gov't Salmon Ex. 4, ¶ 58. Juvenile green sturgeon are present in the Delta year round. *Id.* at ¶ 59. The green sturgeon "is at substantial risk of future population declines" due to, among other things, "loss of juvenile green sturgeon due to entrainment at the project fish collection facilities in the South Delta ...." BiOp at 126.

39. There are no population counts or figures for the Southern DPS green sturgeon. 3/31/10 Tr. 73:1. Mr. Stuart was unable to provide an estimate of the actual population of green sturgeon because relevant data is sparse. 4/1/10 Tr. 177:7–8, 183:17–18. The BiOp estimates salvage of green sturgeon to be highly variable, with a 10–year historical average of 74 adults and 106 juveniles per year. BiOp at 777. However, Mr. Stuart noted that green sturgeon have not been detected in salvage this year. 4/1/10 Tr. 177:10–11.

40. Green sturgeon are another species for which no reliable population estimates and/or life cycle models have been developed, preventing the formulation of more precise protective measures.

e. *Southern Resident Killer Whale.*

41. The Southern Resident killer whale DPS ("Southern Residents") of *Orcinus orca* was listed as an "endangered" species under the ESA on November 18, 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005).

42. Southern Residents are found throughout the coastal waters off Washington, Oregon, and Vancouver Island and are known to travel as far south as central California and as far north as the Queen Charlotte Islands, British Columbia. BiOp at 159. The Southern Residents were formerly thought to range southward along the coast to about Grays Harbor or the mouth of the Columbia River. However, recent sightings of members of K and L pods in Oregon (in 1999 and 2000) and California (in 2000, 2003, 2005, 2006 and 2008) have extended the southern limit of the Southern Resident range. *Id.* at 160.

43. The Southern Residents have fewer than 90 members and loss of even a single individual, or the decrease in reproductive capacity of a single individual, is likely to reduce the likelihood of survival and recovery of the DPS. BiOp at 573. NMFS concluded that Southern Residents prefer ***1129** Chinook salmon as prey. *Id.* at 163 (salmon constitute up to 96% of Southern Resident prey, with Chinook salmon constituting 72% of that prey); *id.* at 573. In addition, genetic and chemical evidence indicate that Southern Residents consume Chinook salmon from the Central Valley. *Id.* at 164. Orca sightings off the

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Coast of California coincide with large runs of Central Valley salmon. *Id.* at 159–62, 573.

44. NMFS concluded that extinction of winter-run and spring-run Chinook salmon, as well as reductions in fall-run Chinook salmon populations [FN3], "would reduce prey availability and increase the likelihood for local depletions of prey in particular locations and times," which would, in turn increase the risk of extinction of the Southern Residents. *Id.* at ¶ 573–74.

FN3. Fall-run Chinook salmon are not listed as threatened or endangered under the ESA. 3/31/10 Tr. 126:19–21

E. There is no direct evidence of orca mortality attributable to the Projects.

(2) *Effects of Ocean Conditions on Salmon Declines.*

46. Mr. Cramer testified that poor fall-run Chinook adult returns during 2007 and 2008 could be attributed to a change in ocean conditions and very poor survival in the ocean. 3/30/10 Tr. 111:10–112:2; 117:17–118:2.

47. The BiOp cites the Lindley (2009) analysis of this fishery collapse for the proposition that "the rapid and likely temporary deterioration in ocean conditions acted on top of a long-term steady degradation of the freshwater and estuarine environment." BiOp at 149. The BiOp also concludes:

> Because the potential for poor ocean conditions exists in any given year, and there is no way for salmon managers to control these factors, any deleterious effects endured by salmonids in the freshwater environment can only exacerbate the problem of an inhospitable marine environment. Therefore, in order to ensure viable populations, it is important that any impacts that can be avoided prior to the period when salmonids enter the ocean must be carefully considered and reduced to the greatest extent possible.

Id. at 152–53

48. Mr. Cramer clarified that the fish of concern were already at low abundance and that, over the course of decades, there were other factors operating on their population trajectories besides ocean conditions. 3/31/10 Tr. 2:18–3:2. Mr. Stuart testified that the collapse of fall-run Chinook was not exclusively caused by ocean conditions, but also was brought about by freshwater environmental conditions, including reduced flows, water temperatures, predators, and non-native species. 3/31/10 Tr. 127:22–25; *id.* at 128:1–11.

49. Other causes of freshwater degradation, including, but not limited to, toxics, increased salinity, alien and invasive species, predators, riparian pumping and in-Delta diversions are unaddressed by any alternatives. These other causes have not been systematically addressed by Federal Defendants or any other potentially interested agency or entity.

(3) *Action IV.2.1.*

a. *Operation and Purpose(s) of Action IV.2.1.*

50. The stated objectives of Action IV.2.1 are to: (a) reduce vulnerability of emigrating CV Steelhead in the San Joaquin River (i.e., the SSNDG) to conditions in the South Delta and at the pumps; and ***1130** (b) enhance likelihood of salmonids successfully exiting the Delta by creating more suitable hydraulic conditions in the mainstem of the San Joaquin. BiOp at 641; 3/31/10 Tr. 65:10–18.

51. NMFS's analysis of the scientific basis for Action IV.2.1 is found in Appendix 5 to the BiOP. Gov't Salmon Ex. 20 ("BiOp App. 5").

52. While spring flow increases and export reductions have been provided as part of the Vernalis Adaptive Management Plan ("VAMP") since 2000, the proposed operation did not carry VAMP forward, as funding for such flows was set to expire in 2009, and the San Joaquin River Agreement, a key to implementing VAMP, expires in 2012. *Id.* at 2. Based on uncertainty that VAMP would continue, NMFS determined it necessary to develop an RPA which ensured the flows necessary for successful juvenile outmigration and maintenance of critical habitat. *Id.* at 3.

53. Action IV.2.1 is in effect from April 1 through May 31 and has two requirements. First, the Action requires a minimum flow, as measured at Vernalis, based on an index of storage at New Melones ("New Melondes Index"). BiOp at 642. Based on this Index, the minimum flow required at Vernalis

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from April 1, 2010 to May 31, 2010 under Action IV.2.1 is the greater of 3,000 cubic feet per second ("cfs") or the flow needed to meet the requirements of State Water Resources Control Board Decision 1641 ("D–1641"). Gov't Salmon Ex. 5 (Third Milligan Decl.), ¶ 5. The Vernalis flow requirement is not challenged here.

54. The second requirement of Action IV.2.1 restricts combined CVP and SWP export pumping based on the flows at Vernalis, with the permissible exports rising in relation to increased flows at Vernalis. BiOp at 642. The baseline export rate is set at 1,500 cfs, as this has been deemed an operational minimum required to address health and human safety needs. 3/31/10 Tr. 64:9–11. As of a March 15, 2010 estimate provided by the day-to-day manager of the CVP, Ronald Milligan, Vernalis flows are likely to be less than 6,000 cfs, meaning that Action IV.2.1 likely will limit export pumping to 1,500 cfs. BiOp at 642; Gov't Salmon Ex. 5, ¶ 5.

55. Action IV.2.1 will not control exports for the entire 60–day period, as VAMP will limit combined exports to 1,500 cfs for 30 days in April and May. Gov't Salmon Ex. 5, ¶ 23. This year, VAMP likely will be initiated April 22, 2010. *Id.*

56. Action IV.2.1 is designed primarily to benefit the SSNDG (i.e. steelhead that originate in the San Joaquin basin from the Stanislaus, Tuolumne, and Merced Rivers). 3/31/10 Tr. 65:10–13. Action IV.2.1 will also benefit those salmonids that emigrate out of the Calaveras and Mokelumne Rivers and those salmonids that come from the Sacramento River basin but enter into the central and southern Delta through Georgiana Slough or the Delta Cross Channel ("DCC") and the Mokelumne River system when the DCC gates are open. *Id.* at 65:13–18.

57. Increased flows from Action IV.2.1 will also benefit designated critical habitat for the CV steelhead within this region by enhancing riparian habitat, flow, and decreasing ambient temperature, as well as increasing turbidity and juvenile migration time, both of which lessen the risk of predation. 3/31/10 Tr. 67:2–17. However, habitat protection is not one of the rationales for Action IV.2.1 articulated in the BiOp or Appendix 5.

b. *Viable Salmonid Population Methodology.*

58. There is considerable dispute about whether NMFS went far enough in its use of the Viable Salmonid Population ("VSP") concept to evaluate the effects of Project operations on the Listed Species.

***1131** 59. It is undisputed that VSP can serve as a "conceptual framework" around which the analysis of a project can be structured. BiOp at 51–53. The BiOp describes VSP as follows:

> The VSP concept provides specific guidance for estimating the viability of populations and larger-scale groups of Pacific salmonids such as ESU or DPS. Four VSP parameters form the key to evaluating population and ESU/DPS viability: (1) abundance; (2) productivity (i.e., population growth rate); (3) population spatial structure; and (4) diversity.

Id.

60. Under the VSP concept, abundance is just one of several criteria that must be met for a population to be considered viable. BiOp at 84. ESU viability also depends on the number of populations and subunits within the ESU, their individual status, their spatial arrangement with respect to each other and sources of catastrophic disturbance, and diversity of the populations and their habitat. *Id.; see also* NMFS AR 00123481 (Lindley (2007)).

61. The BiOp explains that under the VSP framework, viability requires more than attaining a particular level of population abundance. "Rather, for an ESU to persist, populations within the ESU must be able to spread risk and maximize future potential for adaptation." BiOp at 84. Lindley (2007) further found that an important risk facing salmonid ESUs is "that much of the diversity historically present in these ESUs has been lost." NMFS AR 00123489. Lindley (2007) thus recommends that "every extant population" of the listed salmonids "be viewed as necessary for the recovery of the ESU," because all three ESUs "are far short of being viable, and extant populations, even if not presently viable, may be needed for recovery." NMFS AR 00123494. Based on this recommendation, the BiOp "assumed that if appreciable reductions in any population's viability are expected to result from implementation of the proposed action, then this would be expected to appreciably reduce the likelihood of both the survival

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and recovery of the diversity group the population belongs to as well as the listed ESU/DPS." BiOp at 50.

62. The BiOp used the VSP concept, extensively discussed it, and addressed the various VSP factors in considering the current status of and the impacts of proposed Project operations on the Listed Species. *See BiOp* at 105 at 43; *see also, id.* at 50–53, 68, 84–88, 93–101, 108–111, 124, 173, 309, 443, 451, 472. However, NMFS used VSP as a *qualitative* framework.

63. There is a dispute over whether NMFS should have used the VSP as a starting point for a *quantitative* analysis. Mr. Cramer opines that the VSP concept described in Lindley (2006) ("NMFS Science Center Evaluation of the Peer Reviews of the Long–Term Central Valley Project and State Water Project Operations Section 7 Consultation"), identifies attributes of a population that are useful in determining a population's ability to persist, but is not a quantitative framework. 3/30/10 Tr. 105:5–13.

64. Lindley 2006 states that the VSP framework was designed to be a conceptual framework. SLDMWA Ex. 379 at 5. However, Lindley 2006 also stated: "while VSP would provide a conceptual framework, an analytical framework will still need to be assembled to assess the impacts of specific projects on VSP parameters." *Id.*

65. Mr. Cramer opines that there was data cited in the 2009 Salmonid BiOp that would have permitted quantitative analyses within the VSP framework. 3/30/10 Tr. 123:1–12.

***1132** 66. However, the NMFS Science Center's 2006 peer evaluation of the previous salmonid biological opinion, for which Lindley was the lead author, disagrees: "While new information or models," beyond the VSP criteria, "may help make the analysis more transparent and rigorous, it is not required and many times is not realistic given the limitations on time and resources." SLDMWA Ex. 379 at 5.

67. Although the analysis in the BiOp could have benefited from the application of quantitative methodologies within the VSP framework, there is a scientific dispute whether the failure to do so represents a breach of accepted scientific practice.

c. *Population Modeling/Life Cycle Analysis.*

68. Mr. Cramer opines that the BiOp should have performed population modeling and/or life cycle modeling. *See* 3/30/10 Tr. 94:8–96:1. In the context of anadromous salmonids, the application of such a methodology involves evaluation of the life history of the population, from adults spawning in fresh water, to fry emergence from gravel, to downstream migration as smolts rear, and then to the species' salt-water life history. At each stage, population modeling would be used to evaluate the factors that affect survival. *Id.* at 94:8–96:1. Mr. Cramer opined that proper use of a life cycle model involves testing of a hypothesis against available data to determine whether predicted outcomes match up with observed values. *Id.* at 97:13–98:8.

69. NMFS did not explicitly evaluate the impact of project operations in a life cycle model. This failure has been criticized as not complying with accepted scientific principles for population analysis. Plaintiffs presented no evidence regarding the existence or availability of such a life cycle model for the species in question. Plaintiffs did not present evidence that they, or anyone else developed or made available to NMFS an appropriate life cycle model or the results of an appropriate life cycle analysis prior to the issuance of the BiOp.

70. The primary purpose of Action IV.2.1 is to protect outmigrating juvenile members of the SSNDG of CV steelhead, for which no population indices (whether absolute or relative) exist.

71. Despite years of controversy and litigation over CV steelhead, the absence of reliable population data complicates the analysis.

d. *Lack of Statistically Significant Correlation Between Exports and Effects on Salmonid Survival.*

72. The crux of Plaintiffs' critique of Action IV.2.1 is that it is unsupported by the various studies and analyses actually relied upon in the BiOp. The rationale for Action IV.2.1, provided in Appendix 5 to the BiOp, relies on a number of sources.

(1) *Treatment of VAMP Data in the BiOp.*

73. VAMP is a multi-agency collaborative effort designed to test the hypothesis that exports and flow in the San Joaquin River influence survival of smolts

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emigrating down the San Joaquin River. 3/30/10 Tr. 126:21–127:4. Annual reports presenting the results of the VAMP experiment have been produced since 2000. *Id.* at 127:5–7.

74. Analyses of the evidence gathered during VAMP have been equivocal regarding the impact of exports on survival. The BiOp recognized that "recent papers examining the effects of exports on salmon survival have been unable to prove a statistically significant reduction in survival related to exports (Newman 2008)." BiOp at 426.

75. Newman's 2008 statistical analyses of the VAMP data concludes that environmental***1133** variables could obscure any relationship between exports and survival. 3/31/10 Tr. 88:11–14. This caveat was recognized in the BiOp. BiOp at 426.

76. The VAMP experimental design has not been implemented in full, in that not all of the planned relationships have been tested. 3/31/10 Tr. 83:11–15. Over the ten years VAMP data was collected, there have been six replications of conditions at 3,200 cfs Vernalis flow and 1,500 cfs exports. *Id.* at 84:2–4. Newman noted that the small number of variables tested in the existing VAMP data did not provide the ability to discriminate between survival effects. *Id.* at 88:19–22. Plaintiffs' expert, Mr. Cramer, and DWR's expert, Mr. Cavallo, recognize these limitations in the VAMP data. *Id.* at 191:6–12; 4/1/10 Tr. 100:4–11.

77. The BiOp also recognizes these limitations. BiOp at 426. To build a more robust data set, NMFS is implementing a six-year acoustic tag study prescribed by RPA Action IV.2.2. 3/31/10 Tr. 87:11–15.

78. The BiOp considered the VAMP evidence and its limitations and did not disregard any important conclusions generated from the VAMP data.

(a) *Figure 10.*

79. Notwithstanding the lack of statistical significance, evidence contained in the VAMP reports demonstrates that, during times when the Head of Old River Barrier ("HORB") [FN4] was in place, as the ratio between Vernalis flow and exports increased, survival increased. 3/31/10 Tr. 86:6–9; BiOp App. 5 at 20. [FN5] Figure 10 in Appendix 5 of the BiOp demonstrates a positive relationship between the Vernalis flow/export ratio and survival. BiOp App. 5 at 20. The relationship was not statistically significant, but the BiOp states that this may have been due to the narrow range of export rates tested. *Id.*

FN4. HORB is a removable rock barrier that "when installed, directs flows on the San Joaquin River away from the Old River into the Central Delta." Finding of Fact # 47 Re: Interim Remedies Re: Delta Smelt ESA Remand and Reconsultation, *NRDC v. Kempthorne*, 2007 WL 4462395 (Dec. 14, 2007).

FN5. It is undisputed that when HORB is in place, there is a statistically significant relationship between Vernalis *flows* and survival. *See* BiOp App. 5 at 20; Tr. 3/30/10–128:3–130:11 (Cramer); SLDMWA Ex. 128. This is not equivalent to a statistically significant effect of *exports or the Vernalis flow/export ratio* on survival.

80. RPA Action IV.2.1 assumes a physical or nonphysical barrier will be installed at the head of Old River in order to prevent the fish from following the flow split at the juncture of the mainstem San Joaquin and Old Rivers. 3/31/10 Tr. 92:4–8. However, because the HORB negatively impacts the Delta smelt, NMFS worked with Reclamation, DWR, and other parties to develop alternative engineering solutions, which resulted in an additional RPA Action to study ways to separate fish from the flow. *Id.* at 95:22–96:3.

81. A non-physical barrier, or "bubble barrier," which uses bubbles, LED strobe lights, and acoustic noise to deter the fish from entering Old River is planned to be installed this year. *Id.* at 96:10–14. Based on a 2009 study, the bubble barrier was 83% successful in blocking fish from moving through the barrier. *Id.* at 96:19–21. NMFS has determined that the bubble barrier will serve as an effective substitute for the physical barrier at the head of Old River required by RPA Action IV.2.1. *Id.* at 96:22–25. As of March 31, the installation of the bubble barrier was scheduled to commence on April 6, 2010. *Id.* at 180:19.

82. Mr. Cramer opined that without HORB in place, studies of survival with HORB in place should not be used. *See id.* at 132:13–24; SLDMWA Ex.

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129. Mr. ***1134** Cramer did not address whether the alternative bubble barrier will produce conditions similar enough to those present with HORB in place to permit the reliance on survival data from when HORB was in place.

83. The record suggests that an effective barrier will be in place at the head of Old River. It was not unreasonable for NMFS to consider data with HORB in place.

(2) *Escapement Data.*

84. In Figure 11 of Appendix 5, the BiOp relied on an analysis presented in the 2006 VAMP annual report that showed a positive relationship between the spring Vernalis flow/export ratio and adult escapement (i.e. return from the ocean to freshwater) two and a half years later, based on data from 1951 through 2003. 3/31/10 Tr. 70:12–14, 74:7–20; BiOp App. 5 at 21.

85. The analysis in Figure 11 did not attempt to account for variable ocean conditions or commercial harvest of salmonids. *See* generally 3/31/10 Tr. 142–43 (Cramer). Elsewhere in the BiOp, NMFS acknowledges that escapement survival may be significantly impacted by ocean conditions. *See, e.g.,* BiOp 96, 144–45, 148–53, 166–68, 218. There is a conceptual model in the administrative record that suggests even though ocean conditions and harvest may vary from year to year, the species' long-term declines may be attributed to other factors affecting survival during the freshwater life stages of the species in question. DI 1002 (Lawson conceptual model).

86. Although Figure 11 did not account for variable ocean conditions and/or commercial harvest, Plaintiffs' expert, Mr. Cramer, testified that a reasonable biologist would use this data. 3/30/10 Tr. 192:21–193:3. This suggests that it was not unreasonable for NMFS to consider the analysis depicted in Figure 11.

e. *Delta Action 8 Studies.*

87. The BiOp also considered data from the so-called "Delta Action 8 studies," which compared the relative survival rates of coded-wire tagged salmon released at (a) Ryde on the Sacramento River and (b) Georgiana Slough, a channel that splits off of the Sacramento River at Walnut Grove and leads to the interior Delta, joining the South Fork of the Mokelumne River just before it meets the San Joaquin River.

88. Evaluating the data from the Delta Action 8 studies, Newman (2008) first explained that there was a high level of environmental variation in the data. *Id.* at 78:18–23. Dr. Newman performed further analysis to reduce the amount of environmental variation and subsequently found a 98% probability that a negative relationship between exports and survival is present. *Id.* at 79:5–7. Mr. Stuart stated the significance of Newman's finding is that as exports increased, survival decreases for those salmonid smolts that are moving down into the San Joaquin River, where they would be exposed to the influences of the export pumps. 4/2/10 Tr. 32:8–34:12. For those fish released into Georgiana Slough, survival was better when exports were lower.

89. This study is relevant to assessing the impacts of export pumping on fish migrating through the San Joaquin River, because fish released into Georgiana Slough must exit into the San Joaquin River, where they are subject to the influence of the pumps. 3/31/10 Tr. 76:20–23. The Georgiana Slough fish share a common migratory pathway with fish that exit the San Joaquin River basin. *Id.* at 76:24–77:6. Regardless of their origin, once the fish are in this common migratory pathway, they are subject to the same hydraulic conditions. *Id.* at 78:1–17.

90. Mr. Cavallo stated that his interpretation of the Newman (2008) study is ***1135** that there is a weak relationship between exports and survival in the interior Delta, but conceded that there was some relationship. 4/1/10 Tr. 98:24–99:4. Mr. Stuart testified that Newman's studies are the best available and the fact that Newman could find a relationship given the considerable amount of "environmental noise" and the very low signal to noise ratio "shows that the relationship is probably very real." *Id.* at 159:6–10. Whether this opinion is entitled to weight is disputed by Plaintiffs.

91. A September 26, 2008 paper prepared by Dr. Newman with Patricia L. Brandes entitled "Hierarchical Modeling of Juvenile Chinook Salmon Survival as A Function of Sacramento–San Joaquin Delta Water Exports" ("Newman and Brandes 2008") examined the Delta Action 8 data concerning the relative survival rates for Ryde and Georgiana Slough

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releases and declared: what "*we cannot conclude is that exports are the cause of this lower relative survival.*" 4/1/10 Tr. 67:20–23 (emphasis added); DWR Ex. 507 at 22. Newman and Brandes 2008 reached this conclusion because "the evidence for an association between exports and survival is somewhat weak" and because of the study's inability to randomize export levels within a given outmigration season. 4/1/10 Tr. 68:1–12; DWR Ex. 507 at 22–23. A later version of this study, dated 2009, omitted this language from the conclusion. 4/2/10 Tr. 28:2–13.[FN6]

FN6. Mr. Stuart explained that although the BiOp cited the 2008 version of the Newman and Brandes study, he actually used the 2009 version to prepare the BiOp and the 2009 paper was in his reference list. He does not know why the BiOp used the 2008 citation. 4/2/10 Tr. 28:2–13.

92. The Delta Action 8 studies seek to relate to exports survival of juvenile salmonids and steelhead passing through the interior Delta from the San Joaquin River basin. These studies show a negative relationship, although admittedly weak, between export levels and survival for fish passing through this area of the Delta.

f. *Limited Amount of Water Available in Storage to Increase Flows at Vernalis.*

93. Figure 11 and other studies cited in Appendix 5 suggest that maximizing the difference between Vernalis flows and export levels (or maximizing the Vernalis flow/export ratio) improves survival. BiOp App. 5 at 8, 20–21.

94. NMFS determined that, because there was a limited amount of water available to increase flows at Vernalis, capping export levels would provide the greatest differential between flows at Vernalis and export levels. 3/31/10 Tr. 71:12–17; 97:14–21.

95. This reason for controlling exports is unrelated to any direct scientific evidence connecting export levels to fish survival, making the reason arbitrary, capricious, unsupported by reasonable explanation, and not based on best available science.

g. *Justification for Ratios Used in Action IV.2.1.*

96. Although not the subject of extensive testimony during the evidentiary hearing, there is little to no justification in the record for the exact flow ratios chosen for RPA Action IV.2.1.

97. NMFS looked at the VAMP data to develop the ratio.

> *Current VAMP studies have ratios of flow to exports clustered around 2:1, which have provided low survival indices for upstream releases compared to downstream releases, particularly in recent years.* Studies which would have had higher flows (i.e., 7,000 cfs) ***1136** to export (1,500 cfs) ratios were not conducted, since the necessary environmental conditions to implement this part of the study protocol never occurred. Recent conditions in which high flows did occur in the San Joaquin River basin and which would have given flow to export ratios greater than 3:1 in 2005 and 10:1 in 2006 were confounded by poor ocean conditions during the smolts entry into the marine environment, and returning adult fall-run Chinook salmon escapement numbers from these brood years were very low (brood years 2004, 2005 which returned in 2007 and 2008). *From the available data, including the information contained in figures 10* [FN7] *and 11* [FN8]*, flow to export ratios should be at least 2:1 and preferably higher to increase survival and abundance. In light of these factors, NMFS initially developed flow to export ratios of 4:1 for wet, above normal, below normal, and dry years,* based on the minimum export level of 1,500 cfs and a targeted minimum Vernalis flow of 6,000 cfs. *Flows in critically dry years were targeted to be a minimum 3,000 cfs, which gives a flow to export ratio of 2:1* when exports are targeted to be 1,500 cfs.

FN7. Figure 10 suggests there is a positive relationship between the ratio of Vernalis flow to exports and survival of salmonids in the interior Delta.

FN8. Figure 11 relied on an analysis presented in the 2006 VAMP annual report that showed a positive relationship between the spring Vernalis flow/export ratio and adult escapement.

BiOp App. 5 at 22–23 (emphasis added). The feasibility and water supply implications of imple-

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menting such flow versus export ratios were then examined through computer modeling. *Id.* at 24–68. The BiOp reasoned that a 2:1 ratio was insufficient because the VAMP studies demonstrated low survival rates at that ratio, and that higher ratios would be "prefera[ble]" to increase survival and abundance. Yet, without any *biological* explanation, the BiOp chose to impose a 1,500 cfs limit when flows at Vernalis are lower than 6,000 cfs,[FN9] and a ratio of *4:1* (as opposed to 2.5:1, or 3:1, or even 5:1 or higher) when Vernalis flows are between 6,000 cfs and 21,750 cfs. *Id.* at 71–72.

FN9. This 1,500 cfs limit is the minimum export level that would maintain health and safety criteria. BiOp App. 5 at 22. At flows of 5,000 cfs, for example, the ratio would therefore be 5,000/1,500 or approximately 3.33:1.

98. The absence of explanation and analysis for adoption of these limits uses no science, let alone the best available and is simply indefensible.

h. *Will Enjoining Action IV.2.1 Appreciably Diminish The Likelihood Of Survival Or Recovery Of The Listed Species Or Adversely Modify Their Critical Habitat?*

99. The evidence supports NMFS's general finding that some form of restriction on the Vernalis flow/export ratio is needed to prevent jeopardy to the SSNDG of CV Steelhead. Enjoining any flow/export ratio restriction will appreciably diminish the likelihood of the SSNDG's survival or recovery and/or adversely modify its critical habitat.

a. Mr. Stuart testified that enjoining Action IV.2.1 would "jeopardize" the SSNDG of CV steelhead, 3/31/10 Tr. 122:9, 121:3–5, which in turn would "further decrease the viability of the Central Valley" steelhead DPS, *id.* at 104:2–3. Plaintiffs' expert, Mr. Cramer, did not provide an opinion on the impact of enjoining Action IV.2.1 on the SSNDG of CV steelhead. *Id.* at 24:23–25:1.

***1137** b. For critical habitat, Mr. Stuart opined that Action IV.2.1 provides benefits by enhancing migratory corridors, increasing riparian zones and rearing areas which can be used by migrating juveniles, and shortening migration time and increasing turbidity, both of which can decrease vulnerability to predation. *Id.* at 110:24–111:14. Mr. Stuart testified that enjoining Action IV.2.1 would remove these beneficial effects. *Id.* at 111:1–2, 121:13–19; *see also* Gov't Salmon Ex., 4 (enjoining Action IV.2.1 would "negate" the benefits provided by Action IV.2.1). Mr. Cramer did not opine what effect enjoining Action IV.2.1 would have on CV steelhead critical habitat. 3/31/10 Tr. 25:7–11, 110:24–25, 111:1–2 (Stuart testimony that Mr. Cramer "didn't look at the effects of the flow on enhancing critical habitat in migratory corridors in the Delta").

100. The low levels of incidental take of steelhead in this water year do not undermine this conclusion.

a. Mr. Cramer opined that the current estimated take of salmon and steelhead is below the incidental take limits in the BiOp. *See* SLMWA Ex. 122, Doc. 244, Cramer Decl., ¶¶ 41–43.[FN10]

FN10. Mr. Cramer also suggests in his declaration that "once fish have entered the south Delta, their best chance for survival is to be salvaged at the fish facilities." SLDMWA Ex. 122, ¶ 26. However, Mr. Stuart disagreed with this position and pointed out that, in addition to the mortality at the salvage facility, there is a high chance of predation for the fish released back into the western Delta after salvage. 3/31/10 Tr. 132:16–24. The best option is to keep the fish out of Old River. *Id.* at 132:24–133:1. This is a matter of scientific dispute among experts.

b. The purpose of the incidental take limit is to identify a point at which reinitiation of consultation should occur. 3/31/10 Tr. 113:20–22. It is not the default level at which the facilities should be operated. If the RPA works as designed, the incidental take limit should never be reached. *Id.* at 113:25–114:7, 133:15–24. Mr. Stuart opines that the take limits alone are not sufficiently protective without implementation of the RPA Actions. *See, e.g., id.* at 148:20–149:1; BiOp 105 at 729 ("If less take occurs from the proposed action than is anticipated, this does not indicate that the actions compromising the RPA are not necessary to avoid jeopardizing listed species.").

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b. Take of salmon and steelhead at the pumps is only a "small fraction" of their overall mortality, 3/31/10 Tr. 126:5–7, and does not account for indirect impacts of export pumping. 3/31/10 Tr. 114:10–15. Mr. Cramer, expressed no opinion whether enjoining Action IV.2.1 would increase indirect mortality. 3/31/10 Tr. 36:22–37:25.

101. Action IV.2.1 also helps spring-run Chinook salmon, because "the reduced export rates [caused by Action IV.2.1] create a more positive OMR flow within the southern central Delta," resulting in less fish entrained when entering the San Joaquin River at Mokelumne. 3/31/10 Tr. 124:9–15.

102. However, the record does not support a finding that the specific Vernalis flow to export ratios imposed by Action IV.2.1 (as opposed to lesser or greater ratios) are necessary to avoid jeopardy and/or adverse modification to any of the Listed Species. The total absence of explanation for the exact flow limits chosen makes Action IV.2.1 arbitrary and capricious.

(4) *Action IV.2.3.*

103. Action IV. 2.3 operates from January 1 through June 15 or until the average daily water temperature at Mossdale is ***1138** greater than 72° F, and limits OMR flows to no more negative than -2,500 to -5,000 cfs, depending on juvenile entrainment levels. BiOp at 648–52. At the first level of increased juvenile loss, exports must be reduced to achieve an average net flow of -3,500 cfs for a minimum of five days, and at the second level, a more positive OMR average of -2,500 cfs must be achieved for at least five days. *Id.* For each trigger, OMR averages can return to -5,000 cfs only after three consecutive days of not meeting the higher-density juvenile loss trigger. *Id.*

103. Action IV. 2.3 is meant to:

> [r]educe the vulnerability of emigrating juvenile winter-run, yearling spring-run, and CV steelhead within the lower Sacramento and San Joaquin rivers to entrainment into the channels of the South Delta and at the pumps due to the diversion of water by the export facilities in the South Delta. Enhance the likelihood of salmonids successfully exiting the Delta at Chipps Island by creating more suitable hydraulic conditions in the mainstem of the San Joaquin River for emigrating fish, including greater net downstream flows.

BiOp at 648. RPA Action IV.2.3 is intended to benefit fish coming from both the Sacramento and San Joaquin River basins. 4/1/10 Tr. 101:18–102:2.

105. NMFS utilized several sources of data to determine that export flow limitations would achieve the objectives of RPA Action IV.2.3, including the relationship between OMR flows and salvage, particle tracking model simulations, and other studies evaluating survival of fish within the central and southern Delta. 4/1/10 Tr. 134:5–17.

a. *Reliance on Particle Tracking Model Simulations.*

106. Plaintiffs' seminal challenge to Action IV.2.3 is that NMFS improperly based its rationale for the Action on outputs from computer model runs utilizing the so-called Particle Tracking Model ("PTM"), which models the flow of inert particles as they move within a flowing body of water.

107. PTM is a hydrodynamic simulation used to assess the fate of particles, as a function of flow, tides, exports, and other factors. 4/1/10 Tr. 18:12–15; *see also id.* at 143:9–25. NMFS used PTM to assess the effects of different OMR flows on the movement of neutrally buoyant particles injected at nine different locations in the Delta. Gov't Salmon Ex. 23 at 2; BiOp at 364–66. The 2009 Salmonid BiOp states that "NMFS uses the findings of PTM simulations to look at the eventual fate of objects in the river over a defined period of time from a given point of origin in the system." BiOp at 366. According to the BiOp, "PTM data can be useful to indicate the magnitude of the net movement of water through the channel after the junction split (and the route selected by the fish), and thus can be used to infer the probable fate of salmonids that are advected into these channels during their migration." *Id.* at 367.

108. Mr. Cavallo opined that PTM data are not useful to infer the probable fate of salmonids because, in contrast to PTM particles, which have no behavior characteristics, fish have behavior, swim quickly, and have a destination in mind. 4/1/10 Tr. 20:14–21:5. Mr. Cramer explained that "[j]uvenile salmonids are strong swimmers whose movements

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are determined by a wide variety of factors varying with species, size, developmental state, season, time of day, and water temperature, as well as relative hydraulic conditions in a channel. Unlike passive particles, juveniles can and do swim against significant currents." SLDMWA Ex. 120 at ¶ 6. To illustrate the problems with PTM, Mr. Stuart compared PTM simulations to actual***1139** data from mark-recapture studies of Chinook salmon. This comparison demonstrated that salmon move approximately 3.5 times faster though the water than neutrally buoyant particles and would arrive at Chipps Island in a considerably shorter time frame. 4/1/10 Tr. 37:13–38:4.

109. This was a concern expressed in other studies by other experts. For example, the BiOp relied upon Wim J. Kimmerer and Matthew Nobriga's report entitled "Investigating Particle Transport and Fate in the Sacramento–San Joaquin Delta Using a Particle Tracking Model" ("Kimmerer and Nobriga 2008"). BiOp 105 at 380–381; Gov't Salmon Ex. 1 at 4; Gov't Salmon Ex. 4 at 8. Kimmerer and Nobriga 2008 disclaims: "[w]e do not claim that the specific results presented here represent actual movements of salmon; rather, these results indicate what factors may or may not be important in determining how salmon smolts may move through the Delta." DWR Ex. 501 at 18.

110. DWR expressed similar concerns in an email to NMFS dated April 20, 2009 regarding the draft 2009 Salmonid BiOp, asserting that NMFS improperly applied the PTM results in determining the eventual fate of salmonids. Attachment 1 to DWR's comments is a comparison of the results of an experimental release of coded wire tagged salmon in the San Joaquin River under known hydrodynamic conditions with a PTM simulation under identical conditions. 4/1/10 Tr. 32:19–33:8. These results indicate that under low flow conditions, the coded wire tag salmon reached the end location of Chipps Island long before the arrival of most of the PTM particles. The PTM results only partially corresponded with the coded wire tag results under high flow conditions. *Id.* at 34:3–35:18; DWR Ex. 502 at AR 00086765, AR 00086767.

111. NMFS recognized the limitations of applying the PTM model simulation to salmonids. 4/1/10 Tr. 144:2–8. There were discussions with DWR concerning this issue during the consultation process. *Id.* at 144:9–11. In discussions between DWR and NMFS, NMFS indicated it was using the PTM to evaluate water movement and the potential vulnerability to particle entrainment from various locations in the Delta. *Id.* at 144:13–19. NMFS was explicit that it was not using PTM to predict exactly how fish were moving within these same channels, but that the information gleaned from PTM about water movement through the Delta could provide information on vulnerability to entrainment. *Id.* at 144:19–25.

112. DWR's expert, Mr. Cavallo, agrees with the BiOp that PTM data can be useful to indicate the magnitude of the net movement of water through a channel after a junction split. *Id.* at 20:21–23; BiOp at 367.

113. Mr. Cavallo also agrees that PTM results may be informative with regard to salmon movement. 4/1/10 Tr. 28:21–25. Mr. Cavallo stated that under the appropriate conditions, PTM simulations would be an appropriate tool to describe fish movement in discharge-driven portions of the Delta watershed. *Id.* at 86:8–10. Mr. Cavallo stated that the Kimmerer and Nobriga PTM study shows that "flow has a big effect on the path that water takes through the Delta," and that fish in a riverine system will tend to go with the flow. *Id.* at 30:11–15.

114. Mr. Cavallo's time-step critique of the PTM simulations used in the BiOp is unsupported.

a. Mr. Cavallo opines that the correct approach to PTM simulations is be to ensure that the time horizon used in the model was consistent with the time horizon of the fish being studied. *Id.* at 25:6–11. Mr. Cavallo interpreted particular graphs in the biological opinion to ***1140** indicate that NMFS used a 31–day time horizon in its PTM simulations, *id.* at 26:6–16, and opined that this time horizon was too long and would skew the results of the simulation, *id.* at 27:7–11.

b. The PTM simulations NMFS used were run by DWR. *Id.* at 86:14–15; 146:9–10. These simulations included four model runs for the months of February through June, using both wet year, a dry year, and varied whether HORB was installed during the April/May period. *Id.* at 146:14–24, 147:4–6. Three different OMR flows were examined: –

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3,000 cfs, -2,500 cfs, and -1,250 cfs. *Id.* at 147:15–18. During that simulation, the particles actually were tracked every five days for the first 30 days. *Id.* at 147:1–4; Gov't Salmon Ex. 23 at 2. Mr. Cavallo was unsure that the particles were tracked every five days, nor did he review Mr. Stuart's memorandum explaining the PTM simulation results. 4/1/10 Tr. 87:11–13.

115. Mr. Cavallo's critique of the choice of injection sites is weakened by his agreement that at least two of the particle injection sites modeled by DWR, at NMFS' request, were useful in evaluating the movement of water particles at channel junctions. *Id.* at 90:17–91:16. NMFS selected the particular injection sites in order to model the vulnerability of particles within the waterways of the south Delta. *Id.* at 147:22–149:13.

116. NMFS' PTM simulation also showed that, as export levels increase, OMR levels became more negative. 4/1/10 Tr. 150:21–21. Mr. Cavallo stated that exports are highly correlated with OMR flows. 4/1/10 Tr. 40:25–41:2.

117. NMFS' PTM simulation showed that, as exports increased, the percentage of particles entrained at the export facilities increased, particularly from the Mossdale and Union Island sites and stations 912, 815, 902, and 915. 4/1/10 Tr. 150:22–25; *see* Gov't Salmon Ex. 18 (map of injection sites). The proximity of the injection point to the export facilities led to a much higher level of particle entrainment. 4/1/10 Tr. 151:1–3. As exports increased, the rate at which the particles arrived at the export facilities increased. *Id.* at 151:3–5; *see also* BiOp at 365–66; 4/1/10 Tr. 151:21–153:9 (explaining graphs in biological opinion).

118. Despite the statement in the Kimmerer and Nobriga study that they could not establish a "zone of influence" of exports, Mr. Stuart testified that the shorter time horizon used in NMFS' PTM simulations distinguished it from the Kimmerer and Nobriga simulations, which utilized a 90–day period. 4/2/10 Tr. 23:21–24:2.

119. Mr. Stuart testified that there is no precisely defined boundary for the influence of the exports, and that the boundary of influence depends on river flow, tides, and the magnitude of the exports. *Id.* at 29:4–9. If there are extremely low-flow conditions and high exports, the extent of the exports could travel considerably farther downstream, even towards the junction of the Sacramento and San Joaquin Rivers. *Id.* at 29:9–13. Typically, according to Mr. Stuart, the boundary would be close to station 815 at the confluence of Georgiana Slough and the Mokelumne River or slightly farther downstream. *Id.* at 29:13–15. As the BiOp explains:

> The data output for the PTM simulation of particles injected at the confluence of the Mokelumne River and the San Joaquin River (Station 815) indicate that as net OMR flow increases southwards from -2,500 to -3,500 cfs, the risk of particle entrainment nearly doubles from 10 percent to 20 percent, and quadruples to 40 percent at -5,000 cfs. At flows more negative than -5,000 cfs, the risk of entrainment increases at an even greater ***1141** rate, reaching approximately 90 percent at -7,000 cfs. Even if salmonids do not behave exactly as neutrally buoyant particles, the risk of entrainment escalates considerably with increasing exports, as represented by the net OMR flows. The logical conclusion is that as OMR reverse flows increase, risk of entrainment into the channels of the South Delta is increased. Conversely, the risk of entrainment into the channels of the South delta is reduced when exports are lower and the net flow in the OMR channels is more positive—that is, in the direction of the natural flow toward the ocean.
>
> BiOp at 652.

120. This is a dispute among scientists. While DWR criticizes PTM modeling, Stuart and NMFS recognized its limitations and found PTM studies helpful to support its conclusions that: (a) as exports increase, negative OMR flows also increase; and (b) that at Station 815 (the confluence of the Mokelumne River and the San Joaquin River), *particle entrainment* increases from 10% at -2,500 cfs, to 20% at -3,500 cfs, to 40% at -5,000 cfs, and 90% at -7,000 cfs. NMFS, through Mr. Stuart, took into account inherent differences in the movement of neutrally buoyant particles and their speed and direction of travel. Administrative law requires deference to the Agency. Additional record analysis is necessary to determine the extent of support for NMFS's additional opinion that exports affect salmonid survival.

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b. *Additional Data Relied Upon by NMFS.*

(1) *Salvage Data.*

[4] 121. NMFS also relied on salvage data provided by Plaintiff–Intervenor DWR. 4/1/10 Tr. 134:21; *see* Gov't Salmon Ex. 1 at (internal) Exhibit 3. This data collected monthly average OMR flows for the months of December to April 1995–2007 and the monthly older juvenile loss numbers for both the state and the federal facilities. *Id.* at 135:18–136:8.

122. This data was presented in Figures 6–65 and 6–66 of the BiOp:

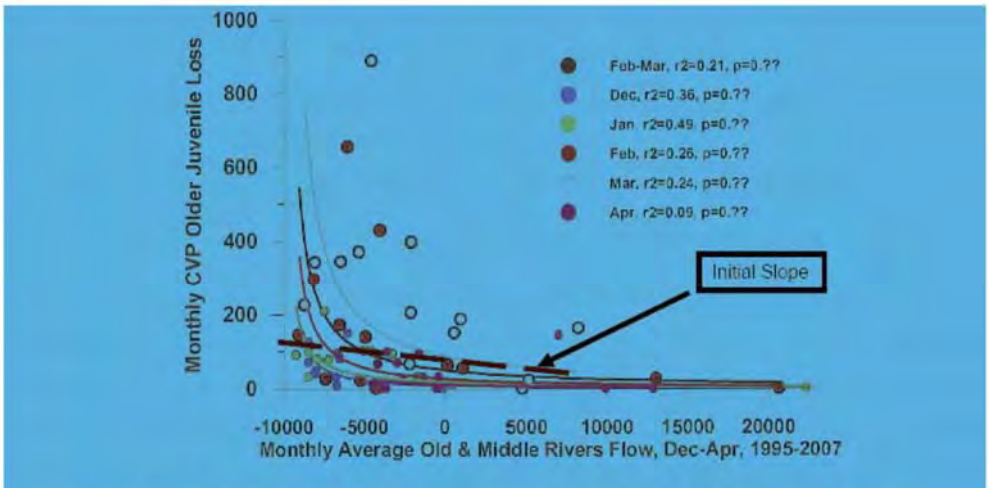

Figure 6-65. Relationship between OMR flows and entrainment at the CVP, 1995-2007 (DWR 2008).

***1142**

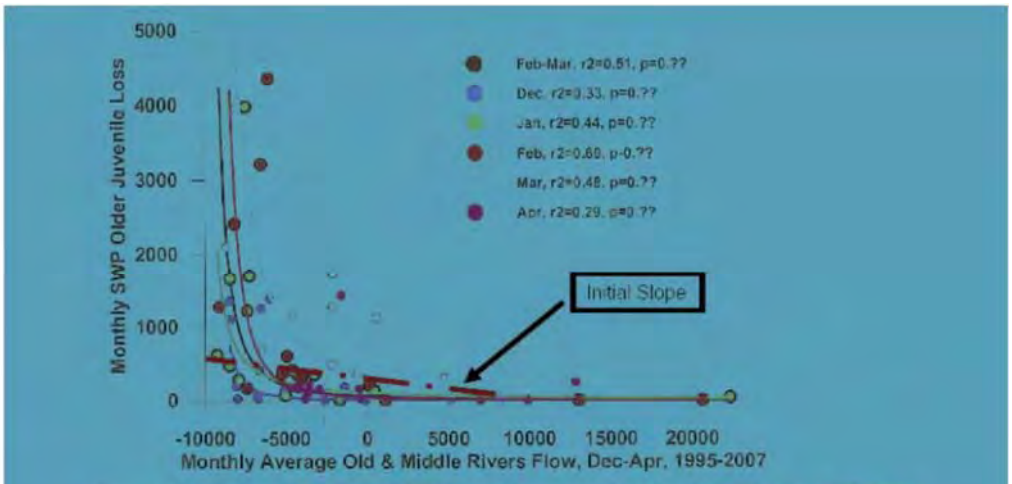

Figure 6-66. Relationship between OMR flows and entrainment at the SWP, 1995-2007 (DWR 2007).

BiOp at 361–62.

123. Based on this data, NMFS determined that there was a threshold level of pumping, as reflected by OMR flows, below which entrainment was low, but above which entrainment at the Project facilities markedly increases. 4/1/10 Tr. 139:11–16. The threshold level identified by NMFS is -5,000 cfs. *Id.* at 139:18–21.

124. There is evidentiary support for the conclu-

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sions that: (1) entrainment data show that as exports increase, so does juvenile salvage; and (2) that at flows more negative than -5,000 cfs, OMR salvage increases more rapidly than at lower flow levels.

125. However, The comparisons of salvage to negative OMR flows relied upon in the BiOp utilize raw salvage numbers, rather than scaling salvage to population size. *See* Doc. 179, Declaration of Richard B. Deriso at¶¶ 3–5. Scaling salvage to population size is standard fisheries science practice and could have been accomplished for several of the Listed Species based on existing population data. *See id.* at ¶¶ 5–6. This failure is a fundamental and inexplicable error. Salvage may have been higher in some years simply because the population was higher, not because of any differences in negative OMR flows. Salvage may have been lower in other years because the population was lower. Dr. Deriso demonstrated the potential significance of this failure by plotting the population adjusted Juvenile Chinook Incidental take rate against OMR flow. Based upon this revised analysis for spring-run and winter-run, Dr. Deriso concluded that there is no statistically significant relationship between the take index and OMR flows. *Id.* at 6.

126. The BiOp's conclusions reached about the spring-run and winter-run Chinook failed to utilize the best available scientific methodology, because population data was available at the time the BiOp was issued that would have permitted NMFS to perform the straightforward population adjustment required to conform to standard, generally accepted practices for fisheries population measurements utilized in their field of expertise. If, in those years when salvage was greatest, population sizes overall were 10 or 100 times larger than other years, the effects might not be jeopardizing. Without adjustment for population size, NMFS's reliance on that figure was arbitrary and capricious.

***1143** 127. As to the CV steelhead, for which no population numbers are available, it is less clear whether the use of raw salvage numbers is always inappropriate. Figures 6–65 and 6–66 ambiguously reference monthly CVP and SWP "Older Juvenile Loss" on the y axis. Were most of the salvaged fish represented on these charts Chinook salmon? No reason is offered why NMFS did not segregate the steelhead figures from those of Chinook salmon. If the species had been evaluated separately, would it have been reasonable for NMFS to fail to adjust the steelhead figures for population size? Separate analysis was not done.

(2) *Delta Action 8 Studies.*

128. NMFS relied upon Newman's 2008 analysis of the Delta Action 8 studies discussed above. *See also* BiOp at 373 (General Discussion of Relationship of Exports to Salvage). These results demonstrate that as exports increase there is decreased survival for salmonids passing through the south and central Delta. Georgiana Slough enters the Delta at Station 815.

129. Newman's and Brandes' (2009) Delta Action 8 studies found that determining the proportion of all Sacramento River smolts volitionally migrating through Georgiana Slough is essential to evaluating the population level or biological significance of any export effects, at least on those populations that spawn in the upper Sacramento basin (e.g., winter-run Chinook salmon). DWR Ex. 507 at 24. NMFS did not address relative population impacts in developing or explaining RPA Action IV.2.3.[FN11]

FN11. Although the same failure applies to NMFS's use of the Delta Action 8 data in IV.2.1, that Action was designed to help the SSNDG of CV Steelhead, all of whom must pass through the central Delta on their way to the ocean.

130. Even assuming all smolts traveled through Georgiana Slough, Mr. Cavallo testified that under Newman's weak export-mortality relationship, a 2,000 cfs increase (from 4,000 to 6,000 cfs) in exports would increase total mortality by five percent. 4/1/10 Tr. 63:8–25. However, based on his review of available data, Mr. Cavallo estimated that no more than 22% of smolts originating in the Sacramento River would pass through Georgiana Slough, lowering the impact on these populations of a 2,000 cfs increase to one percent. *Id.*

131. NMFS's failure to evaluate the population level impacts of exports is inexplicable. A population level evaluation would shed light on the relative impact of exports on the winter-run, for which no population spawns in the San Joaquin basin. This failure is less critical to the analysis of impacts on spring-run and CV steelhead, as both species have important

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populations that spawn in tributaries of the San Joaquin and necessarily must pass through the interior Delta on their way to the ocean.

c. *Perry & Skalski.*

132. The BiOp utilized the Perry and Skalski (2008) study that concluded survival of fish moving into Georgiana Slough and nearby channels was reduced compared to those in the mainstem of the Sacramento River. 4/1/10 Tr. 161:20–162:1. These fish enter a portion of the San Joaquin River that NMFS found to be impacted by exports in its PTM simulation. *Id.* at 162:5–17; 4/2/10 Tr. 18:12–20, 19:22–20:11.

133. However, Perry and Skalski 2008 noted that "there is limited understanding of how water management actions in the Delta affect population distribution and route-specific survival of juvenile salmon." SDLMWA Ex. 227 at 3. Mr. Cavallo testified that Perry and Skalski 2008 does not ***1144** provide scientific support for the view that salmonids are lost due to water project-induced alterations to Delta hydrologic conditions. 4/1/10 Tr. 66:5–9.

134. Mr. Stuart admitted that Perry and Skalski 2008 did not address water project impacts on Delta hydrology, fish behavior, or the indirect mortality of fish in the central and southern channels of the Delta. Mr. Stuart further admitted that he reached his conclusions regarding water project impacts on Delta hydrology, fish behavior, and indirect salmonid mortality based upon his personal extrapolation from the data contained in Perry and Skalski 2008, and not from any conclusions reached by Perry and Skalski. 4/2/10 Tr. 19:2–21:24. However, these personal extrapolations are not documented or otherwise explained in the BiOp or elsewhere in the record.

d. *Vogel.*

135. The BiOp also relied upon Vogel (2004), which reviewed telemetry-tagging data to investigate fish route selection in the channels leading to the south Delta. *See* BiOp at 380–81. Based on Vogel's work, the BiOp found that when export levels were reduced and San Joaquin River flows were increased, more fish stayed in the main channel of the San Joaquin River, heading downstream toward the San Francisco Bay. *Id.*

136. Mr. Cavallo maintains that Vogel (2004) does not support the conclusion that a reduction in export pumping resulted in the reduction of salmon leaving the mainstem of the San Joaquin River and entering the southern Delta. 4/1/10 Tr. 47:20–24, 49:8–13, 49:25–50:4, 50:17–23; DWR Ex. 505. The Vogel (2004) study concluded that the experiments it conducted "could not explain *why* some fish move off the mainstem of the San Joaquin River into the south Delta channels," noting that "[d]ue to the wide variation in hydrologic conditions" during the course of the experiments, "it was difficult to determine the principal factors affecting fish migration. Based on the limited data from these studies, it may be that a combination of a neap tide, reduced exports, and increased San Joaquin River flows is beneficial for outmigrating smolts, but more research is necessary." DWR Ex. 505 at 37.

137. When asked about Vogel's inconclusive results, not discussed in the BiOp, Mr. Stuart admitted that the BiOp's failure to disclose the conclusion was "an oversight on my part," for which he had no explanation. 4/2/10 Tr. 15:4–9.

138. It was not rational nor scientifically justified for the BiOp to rely on Vogel (2004) for findings the authors themselves refused to make.

e. *Justification for Specific Flow Levels.*

139. The only discernable and scientifically justifiable support provided in the BiOp for the negative 5,000 cfs ceiling on OMR flows under Action IV.2.3 is the salvage data, represented in Figures 6–65 and 6–66 of the BiOp. *See* Gov't Salmon Ex. 1 at (internal) Exhibit 3. Based on this data, NMFS concluded that - 5,000 cfs represented a "threshold level" of pumping, reflected by OMR flows, below which species entrainment was low, but above which entrainment at the Project facilities markedly increases. 4/1/10 Tr. 139:11–16. The BiOp discusses Figures 6–65 and 6–66:

> Loss of older juveniles at the CVP and SWP fish collection facilities increase sharply at Old and Middle River flows of approximately -5,000 cfs and depart from the initial slope at flows below this.

The record does not explain whether NMFS utilized a statistical analysis to choose -5,000 cfs as the break point, or whether that figure was based on a

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visual inspection of Figures 6–65 and 6–66.

***1145** 140. NMFS considered setting more positive OMR flow requirements, which would have been more beneficial for the listed salmonids, but would place more restrictions on exports. 4/1/10 Tr. 178:17–22. Mr. Stuart testified that he "tried to find a point that would be *equitable*" to balance species protection and burdens on the exports. *Id.* at 178:24–179:6 (emphasis added).

141. Mr. Stuart testified that:

> [T]he minus 5,000 was sufficiently [ ] restrictive to protect the fish from entrainment. To go more positive than that would have been better, but I don't think that I would have gained that much. And, you know, I did, you know, consider that to go more positive you'd have to put more restrictions on the exports. And I tried to balance that relationship. You know, more negative would have taken more [ ] fish, which was less protective of our species. To go more positive would have been more protective, but it would have been a very onerous burden on the exports. [¶] So, you know, I tried to find a point that would be equitable. I didn't run a full detailed hydraulic analysis and water analysis on that, but, you know, to balance those two was in my mind as I was looking at the minus 5,000 as the trigger point.

4/1/10 Tr. 178:17–179:6. This effort to choose a "balance point," is not supported by any scientific analysis.

142. Mr. Stuart testified that he "looked at ... the level where we saw increasing take and use[d] precautionary ... principles to protect the fish." Yet, nowhere in the BiOp (or any other document in the administrative record cited by the parties) does NMFS disclose its intent to use a "precautionary principle" to design the RPA Actions, nor is that "level" specifically defined or justified.

143. The -5,000 cfs OMR ceiling is based, predominantly on speculation.

144. Moreover, Figures 6–65 and 6–66, do not scale salvage to population size. This further undermines NMFS's extrapolation of the -5,000 cfs "break point," and affects the credibility of Mr. Stuart's testimony.

f. *Will Enjoining Action IV.2.3 Appreciably Diminish The Likelihood Of Survival Or Recovery Of The Listed Species Or Adversely Modify Their Critical Habitat?*

145. Although the moving papers seek an unlimited injunction of Action IV.2.3, at the evidentiary hearing, Plaintiff–Intervenor DWR clarified that an injunction was sought only against the so-called "calendar-based triggers" of Action IV.2.3, and that it does not oppose the salvage-based triggers of Action IV.2.3. 4/1/10 Tr. 9:7–10:17. DWR accepts the underlying scientific principle that when significant salvage occurs at project pumps, the projects operations must be altered. *Id.* at 10:11–13. In prior remedial proceedings, some Plaintiffs have acknowledged that at flows more negative than -7,000 cfs, Delta smelt and the continued existence of two Chinook salmon species are jeopardized. *See, e.g.,* *PCFFA v. Gutierrez*, 2008 WL 4657785, *6 (Oct. 21, 2008). The proposed injunction applies only to the "calendar-based triggers" of RPA Action IV.2.3.

146. There are serious questions whether there is support in the record for the general proposition that exports reduce survival of salmonids in the interior Delta.

a. The PTM studies do stand for the proposition that neutrally buoyant particles injected at Station 815 have a higher chance of entrainment as negative OMR flows increase. But, particles are not a reasonably accurate prototype for ***1146** the behavior of strong-swimming Chinook salmon, steelhead, and sturgeon.

b. The salvage data was not scaled for population size, which any prudent and competent fish biologist and statistician would have done, making NMFS' reliance on the salvage data scientifically erroneous for those species for which abundance data are available. The effect of this error on NMFS's evaluation of export impacts on CV steelhead is less clear.

c. NMFS's reliance on the Perry & Skalski and Vogel studies is unjustified and unreasonable, given that NMFS relied upon those studies to sup-

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port conclusions the authors refused to reach without explanation.

d. The Delta Action 8 studies, at the very least, support the proposition that, for those salmonid populations spawning entirely within the San Joaquin basin, increasing exports can negatively impact salmonid smolt survival. This data, coupled with the highly criticized PTM studies, are the questionable foundation underlying NMFS's rationale for Action IV.2.

e. Mr. Stuart testified that if the calendar-based portion of the Action were enjoined, jeopardy to the species would not be avoided because it would "affect a large proportion of the spring-run population, a portion of the steelhead population, and that portion of the green sturgeon population that's currently within the Delta." *Id.* and 186:2–5. (Although, not one sturgeon has been taken as of April 4, 2010.) As further explained in Mr. Stuart's declaration:

> Without the protection of RPA action IV.2.3, OMR flows will increase in relation to the increase in exports, and more fish will be lost to the export actions over current conditions. In addition to the loss [of] salmonids during the salvage process, it is expected that a greater number of listed fish will be exposed to stressors in the delta as they are advected into the channels of the central and southern delta by the altered hydraulic conditions. Loss to predation, as well as other stressors such as contaminants, is expected to occur as a result of this increased exposure.

Gov't Salmon Ex. 4, ¶ 62. Action IV.2.3 is designed to protect the fish from being pulled south towards the facilities; a purely salvage-based operation is reactionary and reflects the pre-biological opinion status quo, which NMFS determined was not sufficiently protective. 4/1/10 Tr. 170:9–171:7.

147. Plaintiffs' offer to use the species' incidental take limits to avoid jeopardy is not sufficiently protective. The ITL is not meant to be a ceiling on mortality, in part because it "doesn't address all of the different forms of take that can occur throughout the whole Central Valley." 4/1/10 Tr. 172:21–73:1.

148. NMFS's choice of -5,000 cfs as the calendar based ceiling for Action IV.2.1 is not scientifically justified and is not based on best available science.

(5) *Indirect Mortality.*

149. Indirect mortality is that mortality that does not occur directly as a result of the entrainment process at the Project pumps. 3/31/10 Tr. 104:22–24. Stated another way, it is the sum of mortality that occurs to fish that are under the influence of the changed hydraulic field within the Delta. *Id.* at 105:1–3.

150. Indirect mortality is observed within the channels and waterways of the northern, central, and southern Dela. *Id.* at 109:23–24.

151. DWR's expert, Mr. Cavallo, does not contend that there is no indirect loss, 4/1/10 Tr. 94:10–12, nor that indirect mortality***1147** is not a stressor on fish as they move through the system, *id.* at 94:13–15. Mr. Cavallo agrees that a reasonable biologist addressing the impacts of the Projects should not have ignored indirect mortality. *Id.* at 94:16–19.

152. This belies DWR's present contention that indirect mortality is not related to Project operations, as does information submitted by DWR in the prior litigation estimating indirect mortality attributable to exports. 4/1/10 Tr. 190:7–191:10; *see* D–I Ex. 1003 at (internal) Exhibit 2. NMFS relied on this information in preparation of the current biological opinion. 4/1/10 Tr. 191:13–18; *see* D–I 1011. The information provided by DWR suggests that, based on certain water year types and export to inflow ("E/I") ratios, there could be substantial export-related mortality in the interior Delta. 4/1/10 Tr. 192:9–14. Such mortality may be substantially greater than direct take at the CVP and SWP. *See id.* at 190:17–190:10; *see also* D–I Ex. 1011.

153. Plaintiffs' expert, Mr. Cramer, did not deny the existence of indirect mortality, but stated that it had not been adequately tested. 3/31/10 Tr. 19:2–15.

154. Acoustic tag studies are beginning to provide estimates of indirect mortality in the Delta. *Id.* at 105:9–10. The Perry and Skalski (2008) paper showed a survival rate of about 30 to 35% for interior Delta waters. *Id.* at 105:15–17, 108:15–18; *see* SLDMWA Ex. 227 (Perry & Skalski (2008)). Perry and Skalski did not attribute any particular portion of

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this to the projects.

(6) *Other Stressors.*

155. It is undisputed that there are numerous stressors unrelated to project operations that adversely affect and jeopardize the viability of the Listed Species and the quality of their critical habitat. The BiOp dedicates a lengthy section to "Factors Responsible for the Current Status of Winter–Run, Spring–Run, CV Steelhead, and the Southern DPS of Green Sturgeon." BiOp at 134–157. Among other causes, this section discusses the following factors adverse to survival and habitat quality:

- Habitat blockage by dams of the CVP SWP and other municipal and private entities;
- Water diversion and storage;
- Anderson–Cottonwood Irrigation District ("ACID") Dam and Red Bluff Diversion Dam ("RBDD");
- Water conveyance and flood control facilities;
- Land use activities throughout the Central Valley;
- Water quality degradation;
- Hatchery operations and practices;
- Over utilization through commercial and/or sport harvest;
- Disease and predation;
- Environmental variation (including natural environmental cycles, ocean productivity, and global climate change); and
- Non–Native Invasive Species.

156. Whether and to what extent these factors are exacerbated by project operations has been the subject of continuing debate in this and the Consolidated Smelt Cases. It was not the subject of briefing in the PI motion in this case.

157. Plaintiffs have argued that Federal Defendants have wrongfully ignored these other causes and have put the burden of remediation wholly on the water supply and Project operations. Plaintiffs contend that the overwhelming causes of jeopardy to the species and their habitats are these other stressors.

158. Federal Defendants have not quantified relative harms, nor has any party***1148** suggested what remedies will effectively address these other causes.

D. *Irreparable Harm.*

159. The evidence has established a variety of adverse impacts to humans and the human environment from reduced CVP and SWP deliveries, including "irretrievable resource losses (permanent crops, fallowed lands, destruction of family and entity farming businesses); social disruption and dislocation; as well as environmental harms caused by, among other things, increased groundwater consumption and overdraft, and possible air quality reduction." Doc. 202, 2/5/10 TRO Decision, at 15:24–24–16:1–4.

160. At the same time, the declining health of the salmonid population is harming other interests, including those of commercial fishermen and Native Americans with cultural and spiritual interests in salmon.

(1) *Water Supply Impacts.*

161. It has previously been recognized that "any lost pumping capacity directly attributable to the 2009 Salmonid BiOp will contribute to and exacerbate the currently catastrophic situation faced by Plaintiffs, whose farms, businesses, water service areas, and impacted cities and counties, are dependent, some exclusively, upon CVP and/or SWP water deliveries." Doc 202, TRO Decision, at 15:17–24.

162. Every acre-foot of pumping foregone during critical time periods is an acre-foot that does not reach the San Luis Reservoir where it can be stored for future delivery to users during times of peak demand in the water year.

163. It is undisputed that, in the three water years prior to the 2009–2010 water year, California has experienced three consecutive years of drought conditions. Gov't Salmon Exh. 5 at (internal) Exhibit 1 at 18. This influences the amount of run-off forecasted for 2010 and is indicative of why reservoir storages

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were at a low state entering the 2009–2010 water year. 4/1/10 Tr. 208:7–15. Hydrologic conditions are not within the control of the parties and have materially contributed to water service reductions to contractors.

164. It is also undisputed that other, non-project factors, such as tides, wind events, storm surges, San Joaquin River flows, Contra Costa Water District operations, and diversions by in-Delta water users impose limitations on how Reclamation must operate the project to meet flow targets. *See id.* at 202:12–204:1.

165. The projects are subject to export reductions required to protect species listed under the California Endangered Species Act, including longfin smelt, delta smelt, winter-run Chinook salmon, and spring-run Chinook salmon, which subject the water project operators to controls under state law that are similar, and, in some cases, identical to those contained in the 2009 Salmonid BiOp and the United States Fish and Wildlife Service's ("FWS") December 15, 2008 Biological Opinion ("2008 Delta Smelt BiOp"). *See id.* at Tr. 212:4–213:8; 4//10 Tr. 20:18–21:20. In the absence of the BiOps' RPAs, those protections are argued to have likely limited export pumping to levels below those allowable under D–1641, which also limits Project pumping at certain times of the year. *See, e.g.,* SWC Ex. 938 (DWR's 3/30/10 allocation announcement considered several "SWP operational constraints" including "the incidental take permit for longfin smelt").

166. Plaintiffs' estimates of water losses do not account for or otherwise offset losses attributable to proposed remedies in the consolidated Delta Smelt and Salmon cases. *See* 4/7/10 Tr. 17:10–20:14.

***1149** a. *Water Supply Impacts of Action IV.2.1.*

167. Action IV.2.1 lasts from April 1, 2010 through May 31, 2010. SLDMWA Ex. 105 at 641–643. The flow requirements in Action IV.2.1 vary depending on the February New Melones Index. SLDMWA Ex. 105 at 642. Based on the February 2010 New Melones Index of 1,779 thousand acre-feet ("TAF") under the 50% exceedance forecast,[FN12] the minimum flows at Vernalis under Action IV.2.1 will be those required to meet the D–1641 requirements or 3,000 cfs, whichever is greatest. Gov't Salmon Ex. 55 at 5. Additionally, flows at Vernalis are anticipated to be less than 6,000 cfs in April and May 2010, which means that combined exports will likely be limited to 1,500 cfs in April and May when Action IV.2.1 controls. Gov't Salmon Ex. 55 at 5; SLDMWA Ex. 105 at 642.

FN12. Reclamation only can estimate what will be controlling CVP operations in the future. 4/1/10 Tr. 204:5–7. The degree of certainty in predicting what will control Project operations, particularly in the winter and spring, declines rapidly past two or three days. *Id.* at 204:7–9. Reclamation uses DWR's monthly run-off forecasts to develop monthly 50% and 90% exceedance forecasts of CVP operations. *Id.* at 206:13–207:15.

168. Action IV.2.1 began affecting pumping and water supply allocations beginning April 1. 4/6/10 Tr. 188:11–14. Terry Erlewine, General Manager of the State Water Contractors, estimated that from April 1 through April 5, 2010 SWP and CVP experienced a loss of exports of approximately 50,000 acre feet. 4/6/10 Tr. 188:18–19. He also estimated that the two Projects would incur additional losses of approximately 50,000 acre feet, or more, during the months of April and May 2010, as a result of the 2009 Salmonid and 2008 Delta Smelt BiOps. 4/6/10 Tr. 196:19–21; 199:10–16, 23; SWC Ex. 939.

169. The 2009 Salmonid BiOp estimates that, on average, Action IV.2.1 could reduce monthly exports by 73 percent in April and 67 percent in May. SLDMWA Ex. 105, App. 5 at 44. NMFS has acknowledged that these reductions are in addition to the reductions mandated under the 2008 Delta Smelt BiOp. *Id.* at 60. If Action IV.2.1, Action IV.2.3, or the 2008 Delta Smelt BiOp RPA are enjoined, Reclamation expects to increase CVP water supply allocations in May and June. 4/1/10 Tr. 213:14–20.

b. *Water Supply Impacts of Action IV.2.3.*

170. Action IV.2.3 began controlling Reclamation's and DWR's operation of the CVP and SWP, respectively, on January 20, 2010. 4/1/10 Tr. 199:8–9; Gov't Salmon Ex. 5 at ¶ 6. This restriction lasted until January 27, 2010. *Id.* at 199:11–13; Gov't Salmon Ex. 5 at 6. From January 27, 2010 through February 5, 2010, Action IV.2.3 required OMR flow reductions which, in turn, required Reclamation to restrict its pumping at the CVP's Jones Pumping

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Plant to approximately 3,300 cfs. Gov't Salmon Ex. 5 at 6. On February 6, 2010, Reclamation increased pumping at the Jones Pumping Plant to approximately 4,200 cfs in order to comply with the temporary restraining order granted on February 5, 2010, 2010 WL 481230. Gov't Salmon Ex. 5 at ¶ 6. On February 10, 2010, the OMR requirement for the 2008 Smelt BiOp began controlling operation of the pumping facilities. 4/1/10 Tr. 200:6–10.

171. From February 19 through March 15, 2010, NMFS and FWS independently made flow recommendations of -5,000 cfs for OMR flow targets, in order to comply with Action IV.2.3 and the 2008 Delta Smelt BiOp, respectively. 4/1/10 Tr. 200:5–7; Gov't Salmon Ex. 5 at ¶ 8.

172. San Luis Plaintiffs estimate that for every day that Action IV.2.3 controls ***1150** under a -5,000 cfs limit, Reclamation's pumping output is reduced by 500 cfs per day. TRO Decision at 14:8–15. Mr. Erlewine estimates that losses to the combined projects between January 20 and January 26, 2010 exceeded 90,000 acre-feet ("AF"), and combined losses from January 27 through February 5, 2010 were approximately another 100,000 AF. TRO Decision at 14:19–22; TR 4/6/10–183:14–15; SWC Ex. 903. It has been recognized that even if estimates of loss by Thomas Boardman and Erlewine "are so excessive that they double actual loss, the figures are still significant." TRO Decision at 15:1–4.

c. *Other Facts Relevant to Water Supply Impacts.*

173. It is undisputed that even in the absence of the RPAs, the quantity of exportable water is still subject to regulation, e.g. under Decision 1641. 4/6/10 Tr. 184–185. However, the quantity of exportable water has been reduced by the implementation of the salmonid and smelt RPAs. *Id.* From January 20 through March 24, 2010, Mr. Erlewine testified that potential and actual exports were diminished by 522,561 acre feet, of which a 433,000 AF loss was attributable to the SWP and a 89,000 AF loss was attributable to the CVP. 4/6/10 Tr. 185:16–19; SWC Demonstrative Ex. 903.

174. DWR made its initial water supply allocation announcement on November 30, 2009, allocating five percent of Table A contracted amounts for SWP water contractors. 4/6/10 Tr. 240:16–22; SWC Ex. 923, Ex. B. As of March 30, 2010, DWR increased the SWP allocation for 2010 to a 20% allocation. 4/6/10 Tr. 189:15–17; SWC Ex. 938; 4/1/10 Tr. 249:22–25.

175. Reclamation announced its initial allocation of CVP water on February 26, 2010. Fed. Salmon Ex. 55 at ¶ 1. Under the 90% exceedance forecast, Reclamation allocated CVP agricultural users 5% of their contract amounts, and CVP municipal and industrial ("M & I") contractors 55% of their contract amounts. Fed. Salmon Ex. 55 at 12. Under the 50% exceedance forecast, north-of-Delta agricultural and M & I contractors would receive 100% of their contract amounts, while south-of-Delta agricultural contractors would receive 30% and M & I contractors 75%. *Id.*

176. CVP water users faced similar reductions to their individual allocations. Farmers on the west side of the San Joaquin Valley have received reduced CVP water supply allocations in the 2007–2008, 2008–2009, and 2009–2010 water years, and face similar reductions in 2010–2011. SLDMWA Ex. 153 at 3; SLDMWA Ex. 154 at ¶ 4; SLDMWA Ex. 156 at ¶ 4. In 2007–2008, Reclamation allocated to Westlands 40% of its contract supply. In 2008–2009, that allocation was 10%. SLDMWA Ex. 155 at ¶ 8. For the 2009–2010 water year, Westlands was advised the initial allocation was zero percent. SLDMWA Ex. 155 at ¶ 9.

177. On March 16, 2010, Reclamation announced an increase in allocations, raising the allocation for south-of-Delta agricultural users to 25% under a 90% forecast and 30% under a 50% forecast. 4/1/10 Tr. 210:14–22; Gov't Salmon Exh. 13.

178. Judicial notice is taken of the fact that as of April 1, 2010, CVP water supply allocations to south-of Delta agricultural contractors were increased from 25% to 30%. *See* Doc. 318–2 (U.S. Department of the Interior Press Release). On April 23, 2010, DWR increased its allocation of SWP deliveries to 30%. *See* Doc. 323–2 (DWR Press Release). This does not alter the fact that water deliveries will likely increase if the two RPAs are enjoined. 4/1/10 Tr. 213:14–20 (acknowledging that deliveries would increase by 5%—10% if the RPAs were enjoined).

***1151** 179. The quantity of water lost through pumping reductions translates directly into water

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losses for urban and agricultural water users. In the SWP service area, one acre-foot of water serves about five to seven people for one year. 4/6/10 Tr. 186:25–187:1–3. The SWP loss of 433,000 AF, if available to urban users, would have supplied approximately 2.6 million people for one year. 4/6/10 Tr. 187:8–11. Seventy-five to eighty-five percent of SWP supply is provided for urban uses, with the remainder provided to agricultural users. 4/6/10 Tr. 187:15–17. The Metropolitan Water District of Southern California alone serves approximately 20 million urban users.

180. Water loss for agricultural users results in reduction in the number of acres that may be sustained with actual water supply. Water duty is the amount of water that a crop needs per acre for a growing season. 4/6/10 Tr. 187:21–22. DWR information indicates that for the SWP service area, the water duty is approximately three AF per acre. 4/6/10 Tr. 187:22–25. If the 433,000 AF were withheld from almond crops, for example, almond production would be reduced by approximately 140,000 acres. 4/6/10 Tr. 188:1–4.

181. Reduced CVP and SWP water supply allocations have increased the cost of supplemental water. Farmers have been forced to purchase supplemental water at drastically increased cost. SLDMWA Ex. 154 at ¶ 7, SLDMWA Ex. 155 at ¶ 17, SLDMWA Ex. 156 at ¶ 6. Since 2007, the cost of securing supplemental water has more than tripled. SLDMWA Ex. 156 at ¶ 6; SLDMWA Ex. 154 at ¶ 7. As of January 2010, the cost for buying replacement water for transfer in a dry year is at least $300 per acre foot, plus transportation costs. SLDMWA Ex. 1¶ 57 at ¶ 12.

182. Increased water allocations may lessen this increased cost, and will mitigate anticipated harms from reduced water allocations. Farmers anticipate that increased water allocations would mitigate anticipated damage to crops in proportion to the amount of water received and prevent further layoffs of farm employees. SLDMWA Ex. 156 at ¶ 10.

183. In 2009, the Department of the Interior accounted for actions taken under the Delta smelt biological opinion, including federal export reductions, as (b)(2) actions, pursuant to section 3406(b)(2) of the CVPIA. 4/1/10 Tr. 213:24–214:2. In 2010, the Department of the Interior intends to follow the same accounting allocation for federal export reductions related to both biological opinions, to the extent that (b)(2) assets are available at the time the action is taken. *Id.* at 214:3–7.

(2) *Other Resource Impacts Caused or Exacerbated by the 2009 Salmonid BiOp RPA Actions.*

184. Plaintiffs attribute a number of other human impacts to reductions in the water supply. There is considerable dispute among the parties regarding the extent to which the 2009 Salmonid BiOp RPA Actions are responsible for a number of other impacts. It is undisputed that these RPA Actions are, at the very least, exacerbating the following impacts.

(1) *Permanent Crops.*

185. Reductions in the quantity of water supply deliveries have resulted in changes to farming practices, including an increased reliance on permanent crops. SLDMWA Ex. 154 at ¶ 6; SLDMWA Ex. 155 at ¶¶ 18, 22; SLDMWA Ex. 157 at ¶ 11.

186. Permanent crops place farmers at greater risk than row crops, as farmers cannot cut back on the water to permanent crops without destroying them. ***1152** SLDMWA Ex. 154 at ¶ 6; SLDMWA Ex. 155 at ¶¶ 18, 22; SLDMWA Ex. 157 at ¶ 11.

(2) *Fallowed Lands.*

187. Because of reduced water forecasts and uncertainty regarding future water supply, farmers have fallowed hundreds and thousands of acres of fields. SLDMWA Ex. 155 at ¶ 10; SLDMWA Ex. 153 at ¶ 3; SLDMWA Ex. 156 at ¶ 5.

188. Fallowed lands and reduced water supply has caused the loss of thousands of acres of crops. Todd Allen, a third-generation farmer in Fresno County, was able to salvage and harvest only 40 acres of a wheat crop out of a total arable 616 acres on his farm in 2009. SLDMWA Ex. 153 at ¶ 3.

189. For every 1,000 AF of water lost by the San Luis Plaintiffs' member agencies, approximately 400 acres of land may remain out of production. SLDMWA Ex. 1¶ 57 at ¶ 13.

190. Fallowing fields also negatively impacts the air quality of the San Joaquin Valley by increasing

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dust and particulate matter. SLDMWA Ex. 155 at ¶ 20. Reduced air quality in turn impairs major transportation routes through the valley. SLDMWA Ex. 155 at ¶ 20.

191. The commander of Lemoore Naval Air Station described increased bird-on-aircraft strikes attributable to land fallowing. 4/7/10 Tr. 213:20–214:6. Reclamation responded by allocating an emergency water supply to farms adjacent to Lemoore. *See id.* at 213.

(3) *Lack of Access to Credit.*

192. The more unreliable the water supply, the more difficult it is for farmers to secure necessary financing for their farming operations. SLDMWA Ex. 153 at ¶ 4; SLDMWA Ex. 154 at ¶ 13, SLDMWA Ex. 155 at ¶ 26, SLDMWA Ex. 156 at ¶ 7, SLDMWA Ex. 157 at ¶ 15. In some cases, lenders deny loan applications because of a lack of reliable water supply. SLDMWA Ex. 153 at ¶ 4; SLDMWA Ex. 154 at ¶ 13, SLDMWA Ex. 155 at ¶ 26, SLDMWA Ex. 156 at ¶ 7, SLDMWA Ex. 1¶ 57 at ¶ 15. In others, lenders' concerns about availability to lands irrigated by federally-supplied water has required farmers to make a 50 percent down payment to secure any loans. SLDMWA Ex. 156 at ¶ 7.

(4) *Social Disruption and Dislocation.*

193. It is undisputed that farm employees and their families have faced devastating losses due to reductions in the available water supply. The impact on the farm economy from the combination of a three-year drought and diversion limitations relating to the delta smelt has already been severe. SLDMWA Ex. 1¶ 57 at ¶ 14.

194. Lost water supply has decreased the number of productive agricultural acres, which has resulted in reductions in employee hours, salaries, and positions, devastating farm employees and their families. SLDMWA Ex. 154 at ¶ 11, SLDMWA Ex. 156 at ¶ 8.

195. The removal of 250,000 acres from production translates to a loss of approximately 4,200 permanent agricultural worker positions. SLDMWA Ex. 155 at ¶ 19. Water shortages also cause jobs to be lost in agriculture-related businesses, such as packing sheds, processing plants, and other related services. *Id.* The projected agriculture-related wage loss for the San Joaquin Valley stands at $1.6 billion. *Id.*

196. Dr. Michael, Defendant Intervenors' economist with expertise in regional and environmental economics, counters that "[a]lthough water impacts have affected parts of the west side, there is no evidence that reduced water deliveries have had a severe effect on farm or nonfarm employment in the Central Valley as a whole." D–I Exh. 1006 (Michael Decl.) ¶ 10. Instead, it is a combination of factors,***1153** including the three-year drought, the global economic recession, the foreclosure crisis, and the collapse of the real estate market and construction industry, that are mainly driving crop and job losses, food bank needs, and credit problems in the Central Valley-not RPA Action IV.2.1. *Id.* at 6–10. Dr. Michael estimates that ESA-related pumping restrictions have resulted in the loss of less than 2,000 jobs. *See id.* at ¶ 4.

197. Unemployment has led to hunger on the west side of the San Joaquin Valley. SLDMWA Ex. 158 at ¶ 8. The Community Food Bank, serving Fresno, Madera and Kings Counties, estimates 435,000 people in the area it serves do not have a reliable source of food. SLDMWA Ex. 158 at ¶ 4. The Chief Executive Officer of the Community Food Bank, Dana Wilkie, believes that hunger in the communities served by the Food Bank in the western San Joaquin Valley will continue to increase in 2010 because of ongoing water shortages. SLDMWA Ex. 158 at ¶ 5. Ms. Wilkie understands that at least 42,000 people served by the Food Bank in October 2009 were employed by farm-related businesses before losing their jobs. SLDMWA Ex. 158 at ¶ 8.

(5) *Groundwater Consumption and Overdraft.*

198. Reductions in the available water supply have caused water users to increase groundwater pumping in attempts to make up the difference between irrigation need and allocated water supplies. SLDMWA Ex. 155 at ¶¶ 4, 7; SLDMWA Ex. 1¶ 57 at 10; 4/6/10 Tr. 216:6–7.

199. However, groundwater pumping is not always available, and cannot be used in all areas or for all crops. SLDMWA Ex. 155 at ¶ 11. Increased groundwater pumping reduces the quality of water applied to the soil by increasing soil salinity. SLDMWA *Id.* at ¶ 15. Not all fields and crops can be irrigated with groundwater. *Id.* at ¶¶ 11, 15.

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200. Increased reliance on and overuse of groundwater has caused groundwater overdraft, which occurs when pumping exceeds the safe yield of an aquifer. *Id.* at ¶ 12. Overdraft causes increased land subsidence and potential damage to CVP conveyance facilities, *id.* at ¶¶ 12–13, although it is not clear that any subsidence of CVP facilities has occurred as a result of the implementation of the 2009 Salmonid BiOp RPA Actions, as the only reported incident of subsidence at a SWP conveyance facility predates current implementation, 4/7/10 Tr. 16:1–13.

201. Increased groundwater pumping also increases demand for energy. SLDMWA Ex. 155 at ¶ 16. Due to the falling water table, wells require increased amounts of energy. *Id.* Westlands estimates that pumping of groundwater in 2009 required approximately 425,000,000 kWh. *Id.* Adverse environmental impacts are associated with such increased demand for and use of energy. *Id.*

202. Increased groundwater pumping has depleted groundwater reserves. Groundwater reserves that were at 2 million acre feet in the beginning of 2007 are now less than 900,000 AF. 4/6/10 Tr. 216:21–24. Within MWD's service area, storage levels are at 1.3 million AF, about half of normal storage levels. 4/6/10 Tr. 217:4–8.

a. *Impacts of Decreased Salmonid Populations.*

203. It is undisputed that declines in salmon populations have caused harm to other residents of California, predominantly the salmon fishing industry, although the extent to which the Projects should be assigned the blame for such harms and the extent to which the RPA Actions will alleviate these harms is a matter of considerable dispute.

***1154** (1) *Impacts on the Commercial and Recreational Salmon Fishing Industries*

204. Mr. Zeke Grader, Executive Director of Defendant–Intervenor Pacific Coast Federation of Fishermen's Associations ("PCFFA"), testified that the commercial fishing industry has suffered tremendous losses as a result of the near total collapse of California's salmon fishery, which precipitated a shutdown of the salmon fishing seasons in 2008 and 2009 and threatens another shutdown in the future. D–I Ex. 1007 (Supp. Declaration of William F. "Zeke" Grader) ¶¶ 5, 8. The fall-run (a non-listed species) collapse is believed to have been brought about by a combination of environmental stressors in the Delta, including reduced flows, water temperature, predation, and non-native species, as well as declining ocean conditions. *Id.* at ¶ 5; *see also* 3/31/10 Tr. 127:22–128:10.

205. The evidence establishes that the costs of these closures are substantial: the 2008–2009 closures cost the states of California, Oregon, and Washington approximately 4,200 jobs and well over $500 million. *See id.* ¶ 7, Att. 3; *see also* D–I Ex. 1006 at ¶ 14.

206. According to Mr. Stuart, fall-run Chinook emigrate through the Delta during the same time period as Central Valley steelhead (April and May). 3/31/10 Tr. 128:17–18. The BiOp notes, "[m]any RPA actions intended to avoid jeopardy to listed winter-run and spring-run, or adverse modification of their critical habitat, are also expected to reduce adverse effects of the action on the short- and long-term abundance and the long-term viability of non-listed fall-run and late-fall run." BiOp at 715. RPA Actions IV.2.1 and IV.2.3 are also designed to "reduce exposure of fall-run and late fall-run juveniles to export facilities and increase survival for fall-run leaving the San Joaquin River." *Id.* at 716, 717.

207. Reduced fall-run populations could lead to further closures in future seasons, which, according to Mr. Grader, "would have devastating effects on the commercial fishermen of PCFFA and likely would lead to additional job and income losses. Continued fishery closures threaten the long term viability of the salmon fishery, as the infrastructure and expertise that sustains the fishery is lost." D–I Ex. 1007 (Supp. Grader Decl.) ¶ 8.

208. Dr. Michael compared the economic impacts to the agricultural and salmon fishing industries and concluded that the "short-run economic impacts of the endangered species pumping restrictions and salmon fishery closure are of a similar scale." D–I Exh. 1006 at ¶ 16.

c. *Impacts On the Winnemem Wintu Tribe's Cultural Interests in Salmon*

209. The Winnemem Wintu, a Native American tribe, also have significant interests in Sacramento River Chinook salmon that could be affected by in-

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junctive relief against Actions IV.2.1 or IV.2.3. *See* D–I Ex. 1008 (Declaration of Gary Hayward Slaughter Mulcahy ("Mulcahy Decl.")) ¶¶ 2–3. The declaration of Gary Mulcahy demonstrates that, for centuries, salmon have sustained the Winnemem Wintu and have formed the foundation of the Tribe's cultural and spiritual ceremonies and beliefs. *Id.* at ¶ 3. However, like the salmon, the Tribe is "struggling to survive," in part due to the decline of native wild salmon and the dietary and health effects this has had on Tribal members. *Id.* at ¶ 5. In addition, the loss of native salmon runs has transformed the Winnemem Wintu's way of life, which once involved community celebrations, salmon bakes, and festivals, all centered around the salmon. *Id.* at ¶¶ 3, 6. The Winnemem Tribe's connection ***1155** to salmon is so strong that they believe "that if the salmon go, the Winnemem Wintu will also disappear." *Id. at* ¶ 3.

210. To the extent that an injunction of either Action IV.2.1 or Action IV.2.3 would harm Sacramento River Chinook salmon, as discussed above, it will threaten the significant cultural and spiritual interests of the Winnemem Wintu.

(3) *Harm to Species.*

211. The potential harms to the species of enjoining Action IV.2.1 and/or IV.2.3 are discussed above.

212. The NMFS's and related fish agencies continuing failure, after more than ten (10) years of disputes, to acquire credible and reliable species population figures, perform impact analyses in light of population levels, and develop appropriate population life-cycle models, with explicit knowledge that such data and modeling are generally accepted scientific methods in the field, is still unexplained, except that it is difficult to accomplish.

VI. *CONCLUSIONS OF LAW*

A. *Jurisdiction.*

1. Jurisdiction over claims brought under NEPA exists under 28 U.S.C. § 1331 (Federal Question) and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 et seq. Jurisdiction over the ESA claims exists under the ESA citizen-suit provision, 16 U.S.C. § 1540(g)(1)(A). Personal jurisdiction over all the parties exists by virtue of their participation in the lawsuit as Plaintiffs, Defendants, and Intervenors.

B. *Likelihood of Success on the Merits: NEPA Claim.*

[5] 2. Plaintiffs have already succeeded on their NEPA claim. *See* Memorandum Decision Re Cross–Motions for Summary Judgment on NEPA Issues. Doc. 266.

[6] 3. NEPA insures that federal agencies "make informed decisions and 'contemplate the environmental impacts of [their] actions.' " *Ocean Mammal Inst. v. Gates*, 546 F.Supp.2d 960, 971 (D.Hi.2008) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir.1998)).

[7] 4. "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to insure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir.2003).

5. The agencies' violations of NEPA prevented the required reasonable evaluation, analysis, "hard look at," and disclosure of the harms and damage of implementing the 2009 Salmonid BiOp RPA Actions to human health and safety, the human environment and other environments not inhabited by the Listed Species.

6. Harms that have been caused by RPA water supply reductions include but are not limited to: destruction of permanent crops; fallowed lands; increased groundwater consumption; land subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation, such as increased property crimes and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness.

[8] 7. Where a federal agency takes action in violation of NEPA, "that action will be set aside." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 640 (9th Cir.2004).

[9][10] 8. However, a court may not issue an injunction under NEPA that ***1156** would cause a violation of other statutory requirements, such as those found in section 7 of the ESA. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) ("A district

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court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited"). Nor should an injunction issue under NEPA when enjoining government action would result in more harm to the environment than denying injunctive relief. *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir.1984); *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir.1983) (holding public interest does not favor granting an injunction where "government action allegedly in violation of NEPA might actually jeopardize natural resources"); *Alpine Lakes Prot. Soc'y v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir.1975) (denying injunctive relief in NEPA case where more harm could occur to forest from disease if injunction was granted).

C. *Likelihood of Success on ESA Claims.*

(1) *Legal Standards.*

9. The Administrative Procedure Act ("APA") requires Plaintiffs to show that NMFS's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

a. *Record Review.*

[11][12] 10. A court reviews a biological opinion "based upon the evidence contained in the administrative record." *Arizona Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1245 (9th Cir.2001). Judicial review under the APA must focus on the administrative record already in existence, not some new record made initially in a reviewing court. Parties may not use "post-decision information as a new rationalization either for sustaining or attacking the agency's decision." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir.1980).

[13] 11. Exceptions to administrative record review for technical information or expert explanation make such evidence admissible only for limited purposes, and those exceptions are narrowly construed and applied. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir.2005).

[14] 12. Here, the Court has considered expert testimony only for explanation of technical terms and complex subject matter beyond the Court's knowledge; to understand the agency's explanations, or lack thereof, underlying the RPA Actions; and to determine if any bad faith existed.

b. *Deference to Agency Expertise.*

[15][16] 13. The Court must defer to the agency on matters within the agency's expertise, unless the agency completely failed to address some factor, consideration of which was essential to making an informed decision. *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 798 (9th Cir.2005). The court "may not substitute its judgment for that of the agency concerning the wisdom or prudence of the agency's action." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir.2009).

> In conducting an APA review, the court must determine whether the agency's decision is "founded on a rational connection between the facts found and the choices made ... and whether [the agency] has committed a clear error of judgment." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir.2001). "The [agency's] action ... need be only a reasonable, not the best or most reasonable, decision." ***1157** *Nat'l Wildlife Fed. v. Burford*, 871 F.2d 849, 855 (9th Cir.1989).

Id.

[17][18][19] 14. Although deferential, judicial review under the APA "is designed to ensure that the agency considered all of the relevant factors and that its decision contained no clear error of judgment." *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir.1987) (internal citations omitted). "The deference accorded an agency's scientific or technical expertise is not unlimited." *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir.2001) (internal citations omitted). Deference is not owed when "the agency has completely failed to address some factor consideration of which was essential to making an informed decision." *Id.* (internal citations and quotations omitted).

> [An agency's decision is] arbitrary and capricious if it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ("A reviewing court may overturn an agency's action as arbitrary and capricious if the agency failed to consider relevant factors, failed to base its decision on those factors, and/or made a clear error of judgment.").

c. *General Obligations Under the ESA.*

15. ESA Section 7(a)(2) prohibits agency action that is "likely to jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification" of its critical habitat. 16 U.S.C. § 1536(a)(2).

16. To "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02; *see also* *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917 (9th Cir.2008) (" *NWF v. NMFS II* ") (rejecting agency interpretation of 50 C.F.R. § 402.02 that in effect limited jeopardy analysis to survival and did not realistically evaluate recovery, thereby avoiding an interpretation that reads the provision "and recovery" entirely out of the text). An action is "jeopardizing" if it keeps recovery "far out of reach," even if the species is able to cling to survival. *Id.* at 931.

[20] 17. "[A]n agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Id.* at 930.

18. To satisfy this obligation, the federal agency undertaking the action (the "action agency") must prepare a "biological assessment" that evaluates the action's potential impacts on species and species' habitat. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(a).

19. If the proposed action "is likely to adversely affect" a threatened or endangered species or adversely modify its designated critical habitat, the action agency must engage in "formal consultation" with NMFS to obtain its biological opinion as to the impacts of the proposed action on the Listed Species. 16 U.S.C. § 1536(a)(2), (b)(3); *see also* 50 C.F.R. § 402.14(a), (g). ***1158** Once the consultation process has been completed, NMFS must give the action agency a written biological opinion "setting forth [NMFS's] opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A); *see also* 50 C.F.R. § 402.14(h).

20. If NMFS determines that jeopardy or destruction or adverse modification of critical habitat is likely, NMFS "shall suggest those reasonable and prudent alternatives which [it] believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e)." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 652, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007).

d. *Best Available Science.*

[21] 21. Under the ESA, an agency's actions must be based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8) ("In formulating its Biological Opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available."). "The obvious purpose of the [best available science requirement] is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). A failure by the agency to utilize the best available science is arbitrary and capricious. *See* *Pacific Coast Federation of Fishermen's Associations v. Gutierrez (Gutierrez II)*, 606 F.Supp.2d 1122, 1144 (E.D.Cal.2008).

[22] 22. A decision about jeopardy must be made based on the best science available at the time of the decision; the agency cannot wait for or promise future studies. *See* *Ctr. for Biological Diversity v.*

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Rumsfeld, 198 F.Supp.2d 1139, 1156 (D.Ariz.2002).

23. The "best available science" mandate of the ESA sets a basic standard that "prohibits the [agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C.Cir.2008) (citation omitted).

[23][24] 24. What constitutes the "best" available science implicates core agency judgment and expertise to which Congress requires the courts to defer; a court should be especially wary of overturning such a determination on review. *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983) (a court must be "at its most deferential" when an agency is "making predictions within its area of special expertise, at the frontiers of science"). As explained by the en banc panel of the Ninth Circuit in *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir.2008), courts may not "impose on the agency their own notion of which procedures are best or most likely to further some vague, undefined public good." *Id.* In particular, an agency's "scientific methodology is owed substantial deference." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir.2004).

25. This deference extends to the use and interpretation of statistical methodologies. As explained by the D.C. Circuit in ***1159***Appalachian Power Co. v. EPA*, 135 F.3d 791 (D.C.Cir.1998), in reviewing a challenge to a decision of the Environmental Protection Agency ("EPA") under the "arbitrary and capricious" standard of review:

> Statistical analysis is perhaps the prime example of those areas of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of the land. Although computer models are "a useful and often essential tool for performing the Herculean labors Congress imposed on EPA in the Clean Air Act," [citation] their scientific nature does not easily lend itself to judicial review. Our consideration of EPA's use of a regression analysis in this case must therefore comport with the deference traditionally given to an agency when reviewing a scientific analysis within its area of expertise without abdicating our duty to ensure that the application of this model was not arbitrary.

Id. at 802.

26. More generally, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Lands Council*, 537 F.3d at 1000 (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

[25] 27. Mere uncertainty, or the fact that evidence may be "weak," is not fatal to an agency decision. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir.1992) (upholding biological opinion, despite uncertainty about the effectiveness of management measures, because decision was based on a reasonable evaluation of all available data); *Nat'l Wildlife Fed'n v. Babbitt*, 128 F.Supp.2d 1274, 1300 (E.D.Cal.2000) (holding that the "most reasonable" reading of the best scientific data available standard is that it "permits the [FWS] to take action based on imperfect data, so long as the data is the best available").

28. The deference afforded under the best available science standard is not unlimited. For example, *Tucson Herpetological Society v. Salazar*, 566 F.3d 870, 879 (9th Cir.2009), held that an agency may not rely on "ambiguous studies as evidence" to support findings made under the ESA. Because the studies did not lead to the conclusion reached by FWS, the Ninth Circuit held that these studies provided inadequate support in the administrative record for the determination made by FWS. *Id.*; *see also Rock Creek Alliance v. U.S. Fish & Wildlife Service*, 390 F.Supp.2d 993 (D.Mont.2005) (rejecting FWS's reliance on a disputed scientific report, which explicitly stated its analysis was not applicable to the small populations addressed in the challenged opinion); *Greenpeace v. NMFS*, 80 F.Supp.2d 1137, 1149–50 (W.D.Wash.2000) (where agency totally failed to develop any projections regarding population viability, it could not use as an excuse the fact that relevant data had not been analyzed).

[26] 29. The presumption of agency expertise may be rebutted if the agency's decisions, although based on scientific expertise, are not reasoned.

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Greenpeace, 80 F.Supp.2d at 1147. Agencies cannot disregard available scientific evidence better than the evidence on which it relies. *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir.2006); *S.W. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C.Cir.2000).

30. Courts routinely perform substantive reviews of record evidence to evaluate the agency's treatment of best available science. The judicial review process is not one of blind acceptance. *See, e.g.*, *Kern County*, 450 F.3d 1072 (thoroughly reviewing three post-comment studies and FWS's ***1160** treatment of those studies to determine whether they "provide[d] the sole, essential support for" or "merely supplemented" the data used to support a listing decision); *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 529 F.Supp.2d 1110, 1120 (N.D.Cal.2007) (examining substance of challenge to FWS's determination that certain data should be disregarded); *Trout Unlimited v. Lohn*, 645 F.Supp.2d 929 (D.Or.2007) (finding best available science standard had been violated after thorough examination of rationale for NMFS's decision to withdraw its proposal to list Oregon Coast Coho salmon); *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 217–18 (D.D.C.2005) (carefully considering scientific underpinnings of challenge to Service's use of a particular model, including post decision evidence presented by an expert, to help the court understand a complex model, applying one of several record review exceptions articulated in *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C.Cir.1989), which are similar to those articulated by the Ninth Circuit).

[27][28] 31. Courts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. *See, e.g.*, *Am. Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016–17 (9th Cir.1984) (NMFS's decision under the Marine Mammal Protection Act was not supported by substantial evidence because agency ignored data that was product of "many years' effort by trained research personnel"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir.1983) ("court may properly be skeptical as to whether an EIS's conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent experience[ ]") (internal citations omitted). Here, DWR has a scientifically-based, contrary view of the science, has considered the economic consequences of the RPA Actions, and has intervened to protect humans and the human environment. A court should "reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation." *N. Spotted Owl v. Hodel*, 716 F.Supp. 479, 483 (W.D.Wash.1988) (citing *Am. Tunaboat Ass'n*, 738 F.2d at 1016).

32. In *Conner v. Burford*, 848 F.2d 1441, 1453–54 (9th Cir.1988), the agency attempted to defend its biological opinions by arguing that there was a lack of sufficient information. In rejecting this defense, the court held that "incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available," and it noted that FWS could have completed more analysis with the information that was available. *Id.* at 1454 (emphasis added). The Ninth Circuit stated:

> In light of the ESA requirement that the agencies use the best scientific and commercial data available ... the FWS cannot ignore available biological info or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species. We hold that the FWS violated the ESA by failing to use the best information available to prepare comprehensive biological opinions.

848 F.2d at 1454 (emphasis added).

(2) *Environmental Baseline.*

33. Plaintiffs argue that the BiOp is flawed because NMFS improperly attributed negative effects to the Project that should have been included in the environmental baseline. Doc. 164 at 10–16.

***1161** 34. The relevant regulatory definition of the "environmental baseline" is provided within the definition of the "effects of the action":

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added

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> to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

50 C.F.R. § 402.02.

35. When determining the "effects of the action," the agency first must evaluate the status of the species or critical habitat, which will involve "consideration of the present environment" in which the species or habitat exists as well as "the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat." 51 Fed. Reg. 19,926, 19,932 (June 3, 1986). This evaluation is to serve as the "baseline" for determining the effects of the action on the species or critical habitat. *Id.* However, it is all evaluated together as the "effects of the action."

[29] 36. If additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and that the action agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(f); U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook (March 1998) at 4–6.[FN13]

> FN13. Judicial notice may be taken of this Handbook, which is available at: http:// www. fws. gov/ endangered/ consultations/ s 7 hndbk/ s 7 hndbk. htm.

37. The Ninth Circuit directed NMFS to consider the effects of its actions "within the context of other existing human activities that impact the listed species." *NWF v. NMFS II*, 524 F.3d at 930. "[T]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts." *Id.* The relevant jeopardy analysis is whether this Project will tip a species into a state of "likely extinction." 524 F.3d at 930.

> Even under the so-called aggregation approach NMFS challenges, then, an agency only "jeopardize[s]" a species if it causes some new jeopardy. An agency may still take action that removes a species from jeopardy entirely, or that lessens the degree of jeopardy. However, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm. Our approach does not require NMFS to include the entire environmental baseline in the "agency action" subject to review. It simply requires that NMFS appropriately consider the effects of its actions "within the context of other existing human activities that impact the listed species." [citation]. ***1162** This approach is consistent with our instruction (which NMFS does not challenge) that "[t]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts." [citation].
>
> *Id.* (footnote omitted).

[30] 38. The agency is not required to quantify and/or parcel out the "proportional share" of harms among the baseline and the proposed action. *See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir.2005); *see also Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 226 Fed.Appx. 715, 718 (9th Cir.2007) (rejecting water users' argument that agency action must be the "historical cause" of the jeopardy to salmon). However, the record must reasonably demonstrate that the agency's proposed actions, when viewed in the present and future human and natural contexts, will cause jeopardy or adverse modification.[FN14]

> FN14. Plaintiffs' motion for preliminary injunction specifically addresses the treatment of hatcheries and gravel loss below Whiskeytown Dam. Doc. 164 at 11–12. However,

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this issue was not presented or discussed at the evidentiary hearing or in Plaintiffs' proposed findings. It appears that these specific arguments have been abandoned.

39. Here, Plaintiffs identify only two potential flaws in the environmental baseline in their Proposed Findings of Fact and Conclusions of Law, namely NMFS's general failure to segregate discretionary from non-discretionary actions, Doc. 316, Pltf's Proposed Findings of Fact 65–66, 80, and, more specifically, NMFS's failure to treat certain obligations arising under the Coordinated Operations Agreement ("COA") as "mandatory," *id.* at Proposed Findings of Fact 67–80.[FN15]

FN15. It is unclear whether Plaintiffs contend that all other stressors now jeopardizing the San Joaquin and Sacramento Rivers and the Delta are part of the Baseline and must not be considered cumulatively with the effects of coordinated Project operations.

a. *Treatment of Discretionary v. Non–Discretionary Operations.*

[31] 40. Plaintiffs complain that the BiOp does not distinguish between discretionary and non-discretionary actions. *Home Builders*, 551 U.S. 644, 127 S.Ct. 2518, held that ESA 7's consultation requirements do not apply to non-discretionary actions. Where an agency is *required* by law to perform an action, it lacks the power to insure that the action will not jeopardize the species. *Id.* at 667, 127 S.Ct. 2518.

41. However, *Home Builders* *says nothing about whether, once section 7 consultation is triggered, the jeopardy analysis should segregate discretionary and non-discretionary actions, relegating the non-discretionary actions to the environmental baseline.* *Home Builders* fundamentally concerns whether the section 7 consultation obligation attaches to a particular agency action at all. *See* *Home Builders*, 551 U.S. at 679–80, 127 S.Ct. 2518 ("duty does *not attach* to actions ... that an agency is required by statute to undertake....") (emphasis added).

b. *Reclamation's Treatment of the Coordinated Operations Agreement.*

The same reasoning applies to Plaintiffs' related argument that Federal Defendants acted unlawfully by attributing to the project the effects of "mandatory" compliance with the Coordinated Operations Agreement ("COA"). Even assuming, *arguendo*, ***1163** that any mandatory obligation exists under the COA, a proposition that is questionable given the open-ended wording of the COA and language in the CVPIA subjecting project operations to the ESA, *Home Builders* does not require the agency to segregate discretionary from non-discretionary activities during an ESA § 7 consultation.[FN16] Moreover, this argument was not presented in Plaintiffs' opening brief. *See* *Alaska Ctr. for Envt. v. U.S. Forest Serv.*, 189 F.3d 851, 858 n. 4 (9th Cir.1999) ("Arguments not raised in opening brief are waived").

FN16. To the extent that Plaintiffs suggest that section 7 does not apply to the projects at all under *Home Builders*, this paradigm-shifting argument has not properly been raised or briefed.

(3) *Southern Resident Indirect Effects Analysis.*

[32] 42. Plaintiffs raise another argument based on an alleged error in the effects analysis pertaining to the impacts of the projects on Southern Resident Killer whales. Doc. 164 at 16–19. While the parties briefed the issue, engaging in considerable debate over both the appropriate standard to be applied to indirect effects analyses and the sufficiency of the evidence cited in the record to support NMFS's conclusions, this issue was not a focus of the evidentiary hearing.

43. It is unnecessary to reach this issue because, even if, *arguendo*, Plaintiffs demonstrated a likelihood of success on this claim, the alleged deficiencies in the BiOp's analysis of impacts to orcas do not justify enjoining either RPA Action IV.2.1 or IV.2.3. An injunction must be "narrowly tailored" to give only the relief to which plaintiffs are entitled. *See* *Orantes–Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir.1990). Here, NMFS adopted Actions IV.2.1 and IV.2.3 primarily for the benefit of salmon, steelhead, and green sturgeon that migrate through the Delta and are harmed by export pumping that interferes with their migrations, not orcas which reside in the ocean. *See* 4/1/10 Tr. 184:4–17 (Action IV.2.3 was not designed with the objective to protect orcas or fall-run Chinook salmon). The indirect effect of alleged reductions of orca prey is not mentioned as a direct justification for either challenged RPA.

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(4) *Challenges to Action IV.2.1.*

a. *Viable Salmonid Population Methodology/ Population Modeling/ Life Cycle Analysis.*

[33] 44. Plaintiffs' argument that NMFS failed to apply the VSP methodology in a sufficiently rigorous manner is unpersuasive. The BiOp did not ignore the VSP methodology. Rather, it chose to use VSP in a qualitative manner as a conceptual framework, as recommended by Lindley (2006). Although the analysis in the BiOp may have benefited from the application of quantitative VSP methodologies, it is disputed whether the failure to do so represents a breach of accepted scientific practice. A court must defer to the agency in such scientific disputes.

45. The agency is not required to generate new studies. For example, in *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58, 60–61 (D.C.Cir.2000), the district court found the available evidence regarding FWS's decision not to list the Queen Charlotte goshawks "inconclusive" and held that the agency was obligated to find better data on the species' abundance. The D.C. Circuit reversed, emphasizing that, although "the district court's view has a superficial appeal ... this superficial appeal cannot circumvent the statute's clear wording: The secretary must make his decision as to whether to list a species as threatened or endangered ***1164** 'solely on the basis of the best scientific and commercial data available to him....' 16 U.S.C. § 1533(b)(1)(A)." *Id.* at 61. Requiring NMFS to adapt the VSP methodology to operate as a quantitative model would be the equivalent of requiring NMFS to generate data. The court has no authority to do so.

[34] 46. The same conclusion is required for Plaintiffs' contention that NMFS should have engaged in population modeling and/or life cycle analysis. Although such modeling is scientifically preferred, Plaintiffs presented no evidence that they, or anyone else, presented NMFS with *then-existing* best available science representing appropriate population or life cycle models for the species of concern prior to the issuance of the BiOp. Moreover, the primary purpose of Action IV.2.1 is to protect outmigrating juvenile members of the SSNDG of CV steelhead, for whom no population indices (whether absolute or relative) are available.

b. *Correlation Between Exports and Effects on Salmonid Survival.*

47. NFMS relied on a number of circumstances to support its general conclusion that salmonid survival in the interior Delta was adversely affected by export pumping.

a. The VAMP data demonstrated some observable negative impacts, but no statistically significant connection, albeit the lack of statistical significance was likely due to limitations in the data.

b. Figure 10 of Appendix 5 supports the conclusion that, at least when HORB is in place, there is an observable (but not statistically significant) negative relationship between survival and exports. Questions exist whether it is appropriate to rely on data collected when HORB was in place, given that HORB cannot be used under the Smelt BiOp. However, NMFS presented evidence that a workable substitute (the bubble barrier) for HORB will be utilized. Plaintiffs have not suggested the barrier would be inadequate.

c. Highly questionable support for the BiOp's conclusion that exports negatively influence survival derives from a comparison of exports and adult escapement two and a half years later, from 1951 through 2003. *See* BiOp App. 5 at Figure 11. All parties agreed that adult escapement can be significantly influenced by factors such as ocean conditions and harvest. It is undisputed that Figure 11 did not adjust for these factors. However, NMFS relied on a conceptual model that suggests because ocean conditions and harvest were likely to fluctuate over time, long-term downward trends in population could be caused by declining freshwater conditions.

d. NMFS also relied extensively on Newman's 2008 analysis of the Delta Action 8 studies, which released coded-wire tagged salmon into Georgiana Slough and compared their survival to coded-wire tagged salmon released into the mainstem Sacramento River. Newman found a statistically significant, although weak, negative relationship between exports and salmonid survival.

e. There is no question that the remaining data connecting exports to reduced salmonid survival is not what NMFS represents it to be. Recognizing that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the *rea-*

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sonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive," *Lands Council*, 537 F.3d at 1000 (quoting *Marsh*, 490 U.S. 360, 109 S.Ct. 1851) (emphasis added), deference is not required "where the agency offers an explanation for an action that runs counter ***1165** to the evidence before the agency," *Tucson Herpetological Society*, 566 F.3d at 878. NMFS did not just rely on "ambiguous studies." Rather, it uncritically examined the body of evidence, sometimes disregarding the express qualifications and reservations of independent studies, to reach the conclusion that the exports negatively impact salmonid survival. This conclusion, although not scientifically unassailable, has marginal support in the record.

48. NMFS's opinion that low Vernalis flow to export ratios threaten to appreciably increase the likelihood that the SSNDG of CV steelhead will become extinct is also based on incomplete and conflicting evidence. Although no absolute or relative population numbers are available for either the SSNDG or the entire ESU, it is undisputed that both are small and imperiled. It is also undisputed that, pursuant to the VSP approach, every extant population of the CV steelhead must be protected. All members of the SSNDG must pass through the interior Delta on their way to the ocean. As exports increase, their chances of survival decrease. On the whole, the record corroborates NMFS's conclusion that planned project operations will jeopardize the CV steelhead.[FN17]

FN17. It is not necessary to now examine whether NMFS was justified in concluding that planned project operations during this time period will jeopardize any of the other Listed Species. Action IV.2.1 is designed primarily to aid CV steelhead.

49. Other adverse impacts from toxics, invasive species, predators, in-Delta pumping, and other nonoperational hazards were not compared with Project operations to determine the extent these other stressors contribute to the jeopardy to the species and their habitat.

c. *Did NMFS Adequately Justify the Ratios Imposed?*

[35] 50. The fundamental flaw in NMFS's justification of Action IV.2.1 is its selection of the specific ratios imposed under the Action. As discussed in the Findings of Fact, the record reveals no *biological* explanation why NMFS chose to impose a 1,500 cfs limit on exports when flows at Vernalis are lower than 6,000 cfs,[FN18] and a ratio of 4:1, as opposed to any other ratio, when Vernalis flows are between 6,000 cfs and 21,750 cfs. *Id.* at 71–72.

FN18. This 1,500 cfs limit is the minimum export level NMFS found necessary to maintain health and safety criteria. BiOp App. 5 at 22. At flows of 5,000 cfs, for example, the ratio would be 5,000/1,500 or approximately 3.33:1.

[36] 51. This is a quintessential example of arbitrary action. There is no way to know whether these levels are sufficiently protective, not protective enough, or far more protective than necessary.[FN19] Particularly in light of the enormous human impacts caused by even small changes in the flow regime reducing exports, the agency must provide a reasoned and scientifically justified basis for selecting the specific remedial measures chosen. They have failed to do so.

FN19. It may be scientifically justifiable to build a margin of error (i.e. to take a precautionary approach) when designing an RPA, but this must be properly justified and disclosed by the record.

52. This conclusion is particularly justified in light of the concurrent NEPA violation. Had either NMFS or Reclamation performed a proper NEPA evaluation of the human and environmental impacts of the RPA Actions before implementing them, or if both NMFS and Reclamation had worked together to do so, this would have at least forced the agencies to fully ***1166** consider and rationally balance the biological need for certain flow levels against the adverse water supply and resulting human impacts those restrictions effectuate.

53. There is insufficient record evidence to conclude what alternative flow/export ratio would be sufficiently protective of the SSNDG of CV steelhead, the population Action IV.2.1 was designed to protect. NMFS's scientifically justified conclusion that a low Vernalis flow to export ratio during the spring threatens to jeopardize CV steelhead makes it inappropriate to completely remove any Vernalis

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flow to export ratio restriction. Plaintiffs offered no scientifically justifiable alternative except the unjustified argument there is no jeopardy caused by project operations and no evidence of peril to the species.

(5) *Challenges to Action IV. 2.3.*

54. Action IV.2.3 operates from January 1 through June 15 or until the average daily water temperature at Mossdale is greater than 72° F, whichever is earlier. It limits OMR flows to no more negative than -2,500 to -5,000 cfs, depending on juvenile entrainment levels. BiOp at 648–52.

55. Plaintiffs and DWR only seek an injunction against the -5,000 cfs "calendar-based" ceiling.

a. *Use of PTM for salmonids.*

56. Although the PTM model, a hydrodynamic simulation used to assess the fait of particles as a function of flow, tides, project operations, and other factors, has shortcomings, it is an indicator of directions of river flows that salmonids follow, recognizing their strong swimming ability. NMFS relied on the PTM studies to support its conclusions that: (a) as exports increase, negative OMR flows also increase; and (b) that at Station 815 (the confluence of the Mokelumne River and the San Joaquin River), *particle entrainment* increases as negative OMR flows increase. Above -5,000 cfs, 40% of particles injected at that station are entrained, while 90% are entrained at -7,000 cfs.

57. Although particles decidedly do not mirror the behavior of salmonid smolts, which move approximately 3.5 times faster, they provide a very rough approximation of salmonid behavior, one ground supporting NMFS's utilization of the PTM as part of its overall rationale for Action IV.2.1.

b. *Salvage Data.*

58. NMFS also relied on salvage data, which demonstrated that, as negative OMR flows increases, salvage increases, and that at some point more negative than - 5,000 cfs, salvage increases much more rapidly than at lower levels.

59. The data utilized does not scale salvage to population size, an undisputed failure to use the best available scientific methods, at least with respect to the winter-run and spring-run, for which population data is available. Dr. Deriso opined that scaling salvage to population size is standard accepted practice in the field of fisheries science. Even from a lay perspective, it is obvious that absolute salvage numbers vary depending on the size of the extant population. NMFS's reliance on comparisons of raw salvage numbers to negative OMR flow was clear scientific error and not the best available science.

60. Action IV.2.3 is also designed to protect CV steelhead, for which no population data is available. It is less certain whether NMFS could legitimately apply comparisons of raw salvage data to OMR flows to assess the impact of negative OMR flows on CV steelhead.

c. *Delta Action 8 Studies.*

61. As with Action IV.2.1, NMFS also relied extensively on Newman's 2008 analysis of the Delta Action 8 studies, which released coded-wire tagged salmon into Georgiana Slough. Newman found a statistically***1167** significant, although "weak," negative relationship between exports and salmonid survival.

62. There are additional concerns that, as to upper Sacramento River populations, NMFS failed to consider the relative number of fish that are exposed to conditions in the interior Delta, compared to those that remain in the mainstem of the Sacramento River. This critique is not relevant to NMFS's application of the Delta Action 8 Studies to those populations of CV steelhead and spring-run that originate in the San Joaquin basin. For those populations, the Delta Action 8 studies support the conclusion that the higher the export levels, the lower the chance a salmonid smolt may survive to reach the ocean.

d. *Perry & Skalski and Vogel.*

[37] 63. Perry and Skalski (2008) concluded that survival of fish moving into Georgiana Slough and nearby channels was reduced compared to those in the mainstem of the Sacramento River. 4/1/10 Tr. 161:20–162:1. However, Perry and Skalski observed that "there is limited understanding of how water management actions in the Delta affect population distribution and route-specific survival of juvenile salmon." SDLMWA Ex. 227 at 3. Mr. Stuart admitted that Perry and Skalski 2008 did not address water project impacts on Delta hydrology, fish behavior, or the indirect mortality of fish in the central and southern channels of the Delta. Mr. Stuart further admitted

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that he reached his conclusions regarding water project impacts on Delta hydrology, fish behavior, and indirect salmonid mortality based upon his personal extrapolation from the data contained in Perry and Skalski 2008, and not from any conclusions reached by the study. 4/2/10 Tr. 19:2–21:24. The BiOp and Stuart used Perry and Skalski (2008) to support a proposition that Perry and Skalski themselves disclaimed. The BiOp provides no explanation to justify this use of Perry and Skalski for this purpose, which is arbitrary and capricious.

64. A similar problem exists with the BiOp's reliance on the Vogel (2004) review of telemetry-tagging data to investigate fish route selection in the channels leading to the south Delta. *See* BiOp at 380–81. The BiOp used Vogel's work to find that when export levels were reduced and San Joaquin River flows were increased, more fish stayed in the main channel of the San Joaquin River, heading downstream toward the San Francisco Bay. *Id.* However, the Vogel study concluded its experiments "could not explain *why* some fish move off the mainstem of the San Joaquin River into the south Delta channels," noting that "[d]ue to the wide variation in hydrologic conditions" during the course of the experiments, "it was difficult to determine the principal factors affecting fish migration. Based on the limited data from these studies, it may be that a combination of a neap tide, reduced exports, and increased San Joaquin River flows is beneficial for outmigrating smolts, but more research is necessary." DWR Ex. 505 at 37 (emphasis added).

65. The BiOp's reliance on the Perry and Skalski and Vogel studies presents the same infirmities as in *Tucson Herpetological Society*, 566 F.3d at 879, where the FWS wrongfully "affirmatively relie[d] on ambiguous studies."

e. *Does the Record Support NMFS's General Conclusion that Negative OMR Flows Appreciably Reduce Salmonid Smolts' Chances of Survival?*

[38] 66. There are undeniable problems with NMFS's basis for Action IV.2.3. However, the Delta Action 8 studies support the proposition that, for those populations spawning entirely within the San Joaquin basin, increasing exports negatively impact salmonid smolt survival. The highly disputed PTM studies constitute the ***1168** other colorable support for Action IV.2.3. In such a scientific dispute, deference is owed unless the Agency is unreasonably wrong.

f. *Did NMFS Adequately Justify the Calendar-based -5,000 cfs Ceiling of Action IV.2.3?*

67. The -5,000 cfs OMR ceiling is based, in large measure, on speculation. It is also based upon BiOp Figures that do not scale salvage to population size. This is not the best available science and is arbitrary and capricious.

(6) *Reclamation's ESA Responsibility.*

68. The ESA regulations require the action agency to 123 "determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a). Prior to accepting and implementing the 2009 Salmonid BiOp RPA, Reclamation had an independent obligation under ESA section 7(a)(2) to ensure that it "use[d] the best scientific and commercial data available."

[39] 69. Reclamation, as the federal action agency, "may not rely solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy*, 898 F.2d 1410, 1415 (9th Cir.1990). "[T]he action agency must not blindly adopt the conclusions of the consultant agency." *City of Tacoma v. Fed. Energy Regulatory Comm'n*, 460 F.3d 53, 76 (D.C.Cir.2006).

70. Reclamation did not ensure that the RPA utilized the best available science, nor did it independently identify and analyze alternative RPA Actions that minimized jeopardy to humans and the human environment while protecting threatened species.

D. *Balancing of the Harms.*

(1) *Balancing of the Harms in ESA Cases.*

[40] 71. The Supreme Court held in *TVA v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), that Congress struck the balance in favor of affording endangered species the highest of priorities. In adopting the ESA, Congress intended to "halt and reverse the trend toward species' extinction, *whatever*

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the cost." *Id.* at 184, 98 S.Ct. 2279 (emphasis added). *TVA v. Hill* continues to be viable. *See Home Builders,* 551 U.S. at 669–71, 127 S.Ct. 2518; *see also Oakland Cannabis Buyers' Co-op.,* 532 U.S. at 496–97, 121 S.Ct. 1711; *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 543 n. 9, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

72. Winter does not modify or discuss the *TVA v. Hill* standard.[FN20] Although Winter altered the Ninth Circuit's general preliminary injunctive relief standard by making that standard *more rigorous,* Winter did not address, nor change, the approach to the balancing of economic hardships where endangered species and their critical habitat are jeopardized. *See Biodiversity Legal Found. v. Badgley,* 309 F.3d 1166, 1169 (9th Cir.2002) (Congress removed the courts' traditional equitable discretion to balance parties' competing interests in ESA injunction proceedings); *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.,* 23 F.3d 1508, 1510–11 (9th Cir.1994) (same).

FN20. Although *Winter* involved ESA-listed species, the *Winter* decision did not address any ESA claims.

73. Prior decisions involving the coordinated projects' operations found that ***1169** *TVA v. Hill* and related Ninth Circuit authorities foreclose the district court's traditional discretion to balance equities under the ESA. There is no such bar in NEPA injunction proceedings.

74. Plaintiffs have advanced a human health and safety exception and contend that unlike any of the prior cases, this case juxtaposes species' survival against human welfare, requiring a balancing of the BiOp's threats of harm to humans, health, safety and protection of affected communities. No case, including *TVA v. Hill,* which concerned the competing economic interest in the operation of a hydro-electric project, expressly addresses whether the ESA precludes balancing of harms to humans and the human environment under the circumstances presented here.

75. Even if it is permissible to balance harm to humans and the human environment against Congress' stated desire to protect the Listed Species, doing so in practice is complicated by the harm caused to other human communities by the reduced abundance of salmonids, such as to the salmon fishing industry and the Winnemem Wintu Tribe.

76. This case is at the intersection of harm to threatened species and humans and their environment. Congress has not nor does *TVA v. Hill* elevate species protection over the health and safety of humans.

(2) *Balancing the Harms under NEPA.*

[41] 77. Although it is undisputed that all harms may be considered in evaluating a claim for injunctive relief under NEPA, an injunction should not issue if enjoining such government action would result in more harm to the environment than denying injunctive relief. *Save Our Ecosystems,* 747 F.2d at 1250.

78. Here, it appears that interim relief is justified, if deepening of the species' jeopardy can be avoided.

E. *The Public Interest.*

79. In adopting the ESA, Congress explicitly found that all threatened and endangered species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The ESA advances a Congressional policy to "halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill,* 437 U.S. at 184, 98 S.Ct. 2279 (emphasis added).

80. The public policy underlying NEPA favors protecting the balance between humans and the environment. *See* 42 U.S.C. § 4321 (declaring a national policy to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation....").

81. If both these objectives can all be realized by astute management, it is the government's obligation to do so.

82. It is in the public interest that relief be granted to Plaintiffs, who represent a substantial population of water users in California, to enhance the water supply to reduce the adverse harms of de-

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struction of permanent crops; fallowed lands; increased groundwater consumption; land subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation, such as increased property crimes and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness. This must be done without jeopardizing the species and their critical habitat.

***1170** VII. *CONCLUSION*

1. Plaintiffs have succeeded on the merits of their NEPA claim.

a. NEPA requires that the responsible agency take a hard look at the environmental consequences of its actions, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), obligating federal agencies to prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

b. Federal Defendants are required to evaluate the impact of the coordinated operations of the CVP and SWP, which constitutes major federal action. The evidence overwhelmingly establishes significant detrimental effects visited on the quality of the human environment by implementation of the BiOp's RPA Actions, which impose virtually year-round substantial restrictions on the water supply to California to protect the Listed Species.

c. Where required, an EIS discloses environmental affects of a proposed action and considers alternative courses of action. *Id.* Here, Federal Defendants completely abdicated their responsibility to consider alternative remedies in formulating RPA Actions that would not only protect the species, but would also minimize the adverse impact on humans and the human environment.

d. In considering RPA alternatives, the record shows the burden of other causes is allocated to the water supply, without the required analysis whether alternatives, less harmful to humans and the human environment, exist.

2. Plaintiffs have also shown a likelihood of success on the merits of their ESA claim. Although the premise underlying the RPA Actions—that the species may be jeopardized by increased negative flows occasioned by export pumping—has some record support, NMFS has failed to adequately justify by generally recognized scientific principles the precise flow prescriptions imposed by RPA Actions IV.2.1 and IV.2.3. The exact restrictions imposed, which are inflicting material harm to humans and the human environment, are not supported by the record. Rather, they are product of guesstimations and attempts to try to achieve "equity," rendering it impossible to determine whether the RPA Actions are adequately protective, too protective, or not protective enough. Judicial deference is not owed to such arbitrary, capricious, and scientifically unreasonable agency action.

3. It is highly significant that the co-operator of the Projects, DWR, with access to scientific competence in the fields of fish biology and ecology, and project operations, strongly criticizes some of the science NMFS used to justify RPA Action IV.2.3, seeks to enjoin Action IV.2.3, and does not oppose enjoining Action IV.2.1

4. Under the balance of hardships analysis, Defendants' contention that the ESA, under *TVA v. Hill,* precludes equitable weighing of Plaintiffs' interests is not supported by that case, as evidence of harm to the human environment in the form of social dislocation, unemployment, and other threats to human welfare were not present in *Hill.* They are in this case.

5. Defendants argue that jeopardy to the species cannot be avoided without continuing substantial reduction of pumping, with resultant reduction of water supply to Plaintiffs, representing over 20,000,000 persons, affected communities, and the agricultural industry in Northern, Central, and Southern California. Harm to the species has had equally detrimental effects on the Pacific Coast salmon fishing industry and impairs the interests of Native ***1171** Americans. These additional harms are deserving of equal protection.

6. Congress created public expectations in the Amended Reclamation Act by instructing Reclamation to contract for water service to hundreds of public-entity water service providers that supply water to millions of people and thousands of acres of productive agricultural land. The agencies have not fully discharged their responsibility to effectively allocate

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Project water resources. Federal Defendants have acted arbitrarily and capriciously in formulating RPA Actions to protect threatened species under the ESA that lack factual and scientific justification, while effectively ignoring the irreparable harm those RPA Actions have inflicted on humans and the human environment.

7. The species and their critical habitats are entitled to protection under the ESA. The species have been and will be protected. That is the law. Nonetheless, NMFS and Reclamation, as the consulting and action agencies, must take the hard look under NEPA at the draconian consequences visited upon Plaintiffs, the water supply of California, the agricultural industry, and the residents and communities devastated by the water supply limitations imposed by the RPA Actions. Federal Defendants have failed to comprehensively and competently evaluate whether RPA alternatives can be prescribed that will be mutually protective of all the statutory purposes of the Projects.

8. This is a case of first impression. The stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated. NMFS and Reclamation have not complied with NEPA. This prevented in-depth analysis of the potential RPA Actions through a properly focused study to identify and select alternative remedial measures that minimize jeopardy to affected humans and their communities, as well as protecting the threatened species. No party has suggested that humans and their environment are less deserving of protection than the species. Until Defendant Agencies have complied with the law, some injunctive relief pending NEPA compliance is appropriate, so long as it will not further jeopardize the species or their habitat.

9. Injunctive relief is also warranted under the ESA, because, although the general premises underlying Actions IV.2.1 and IV.2.3 find marginal support in the record, the precise flow prescriptions imposed on coordinated project operations as part of Action IV.2.1's Vernalis flow/export ratio and Action IV.2.3's -5,000 cfs “calendar based” ceiling are not supported by the best available science and are not explained as the law requires.

10. Injunctive relief cannot be imposed without up-to-date evidence of the status of the species to assure that altered operations will not deepen jeopardy to the affected species or otherwise violate other laws. The evidence has not sufficiently focused on remedies to provide a confidence level that completely removing the Vernalis flow to export ratio prescriptions of Action IV.2.1 or permitting negative flows in excess of the -5,000 cfs OMR flow ceiling imposed by Action IV.2.3 to increase water supply will not jeopardize the continued existence of the species and/or adversely modify their critical habitats.

11. Legal and equitable grounds for injunctive relief have otherwise been established by a preponderance of the evidence.

12. A hearing to address the proposed injunction and any imminence of harm to species shall be held May 19, 2010 in Courtroom 3 at 10:00 a.m.

SO ORDERED.

***1172** SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION (SUPPLEMENTING DOC. 347)

I. *INTRODUCTION*

On May 18, 2010, the Court issued findings of fact and conclusions of law concerning motions for interim relief/ preliminary injunction. Findings of Fact and Conclusions of Law re: Plaintiffs' Request for Preliminary Injunction (Docs. 161 & 230), Doc. 347 (“Findings & Conclusions”). The motions were brought by Plaintiffs San Luis & Delta–Mendota Water Authority and Westlands Water District (collectively “San Luis Plaintiffs”). Docs. 164, 230, 233. Plaintiffs State Water Contractors, Stockton East Water District, Oakdale Irrigation District, and South San Joaquin Irrigation District; and Plaintiff–Intervenor California Department of Water Resources (“DWR”) filed statements of non-opposition regarding San Luis Plaintiffs' request to enjoin Action IV.2.1. Docs. 247, 248, 251. The motion regarding Action IV.2.3 was joined by plaintiffs Kern County Water Agency and Coalition for a Sustainable Delta. Doc. 181. DWR filed a partial joinder in and statement of non-opposition to the Action IV.2.3 motion. Doc. 249.

The Findings and Conclusions explained that the

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requested relief could not be ordered without further evidence to establish that the requested relief would not violate section 7 of the federal Endangered Species Act ("ESA"). Specifically, "[i]njunctive relief cannot be imposed without up-to-date evidence of the status of the species to assure that altered operations will not deepen jeopardy to the affected species or otherwise violate other laws." Findings & Conclusions 134:4–7. A hearing to address the proposed injunction and any imminence of harm to the species was scheduled for May 19, 2010. Findings & Conclusions 134:21–23. After hearing argument from the parties on May 19, further proceedings were scheduled for May 25, 2010. 5/19/10 Rough Tr. 39:16–19.

Plaintiffs filed the declarations of Terry Erlewine (Doc. 356) and Bradley Cavallo (Doc. 358), and exhibits thereto. Federal Defendants filed the declarations of Jeffrey Stuart and exhibits thereto (Doc. 364) and Ronald Milligan (Doc. 366), and a partial joinder in Defendant–Intervenors' supplemental opposition (Doc. 369). Defendant–Intervenors filed a supplemental memorandum in opposition to Plaintiffs' motions for preliminary Injunction (Doc. 365), and a related request for judicial notice (Doc. 368) and supporting declaration (Doc. 368–2). At the May 25, 2010 hearing, the parties presented evidence concerning the status of the species

The original Findings and Conclusions are incorporated by this reference. After considering additional testimony, exhibits received in evidence, the parties' additional submissions, and oral arguments, the Court makes these supplemental findings of fact and conclusions of law.

To the extent any finding of fact may be interpreted as a conclusion of law or any conclusion of law may be interpreted as a finding of fact, it is so intended.

II. *FINDINGS OF FACT*

A. *Limited Time Period.*

1. Under the National Marine Fisheries Service's ("NMFS") June 4, 2009 Biological Opinion ("BiOp" or "Salmonid BiOp"), the pumping restrictions associated with Action IV.2.1 terminate May 31. BiOp at 641–42. The proposed injunction would enjoin the implementation of Action IV.2.1 from May 26 to May 31, 2010 only.

2. Under the BiOp, the pumping restrictions associated with Action IV.2.3 terminate on June 15 or when the average ***1173** daily water temperature at Mossdale is greater than 72° Fahrenheit for seven consecutive days, whichever is sooner. BiOp at 650.

3. Given the time limit in the BiOp, the proposed injunction against Action IV.2.3 will be in effect at most from May 26 to June 15, 2010. The requested injunction includes a three day "ramping-up" period, during which time exports will be gradually increased. 5/25/10 Rough Tr. 207:25–208:8.

B. *Current Status Of The Species.*

4. The parties agreed at the May 25 hearing that only the

current status of the Central Valley spring-run Chinook salmon ("spring-run") and Central Valley steelhead ("CV steelhead") are relevant to the requested relief.[FN1] 5/25/10 Rough Tr. 20:1–21:9; 37:13–38:5; 5/25/10 Rough Tr. 139:22–25. These findings focus on these two species.

FN1. Defendant–Intervenors advance an argument about fall-run Chinook salmon, which are not a listed species.

(1) *Central Valley Spring–Run Chinook Salmon (O. tshawytscha).*

5. NMFS listed the spring-run as a "threatened" species under the ESA on January 5, 2006. 71 Fed. Reg. 834 (Jan. 5, 2006). NMFS designated critical habitat for the spring-run on September 2, 2005. 70 Fed. Reg. 52,604 (Sept. 2, 2005).

6. The current population figure for spring-run returning in 2009 is 3,802 fish. Gov't Salmon Exh. 102 at internal Exhibit 7. This is a decrease from 10,828 returning spring-run adults in 2006, the last time this cohort spawned in the Central Valley. *Id.*; *id.*, ¶ 10.

7. Mr. Stuart testified that based on the historical salvage data, the majority of spring-run emigrate through the Delta in April, with emigration tailing off into May and early June. 5/25/10 Rough Tr. 108:9–16.

8. Mr. Cavallo estimated that 90 percent of the

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mixed pool of spring-run and fall-run Chinook young-of-the-year will exit the Delta by May 25, 2010. 5/25/10 Rough Tr. 23:21–24:1; DWR Ex. 519 at ¶ 7. Mr. Stuart testified that typically 98 percent of the spring-run have passed through the Delta by the end of May. Gov't Salmon Ex. 102 at ¶ 12. This means between 90 to 98 percent of spring-run are not within the influence or affect of the remedy sought by Plaintiffs. 5/25/10 Rough Tr. 207:21–24.

9. The total direct seasonal loss of spring-run size Chinook salmon at the export facilities as of May 17, 2010, was 4,419 fish. Gov't Salmon Ex. 102 at 112. Mr. Stuart testified that the Salmonid BiOp does not use spring-run sized Chinook salmon as a metric to determine the ESA take limit. 5/25/10 Rough Tr. 150:18–20. This is because spring-run Chinook are not reliably distinguishable from fall-run Chinook using a length at date criteria. 5/25/10 Rough Tr. 21:17–22. Instead, the one percent incidental take limit for spring-run Chinook uses hatchery late-fall Chinook salmon as surrogates for the yearling spring-run. 5/25/10 Rough Tr. 150:6–10.

10. Mr. Stuart testified that if the proposed preliminary injunction were issued, he did not anticipate that the incidental take limit for yearling spring-run Chinook would be exceeded. 5/25/10 Rough Tr. 161:10–14. However, the purpose of the incidental take limit is to identify a point at which reinitiation of consultation should occur. 3/31/10 Tr. 113:20–22. It is not the default level at which the facilities should be operated. If the RPA works as designed,***1174** the incidental take limit should never be reached. *Id.* at 113:25–114:7, 133:15–24. Mr. Stuart's testified that the low number of steelhead taken at the pumps is evidence that the RPA is "functioning" as it was "designed." *Id.,* 126: 12–20.

11. Because spring-run and fall-run Chinook are "indistinguishable when captured in the Delta or its salvage facilities," the breakdown between spring-run and fall-run within the 4,419 fish figure is unknown. 5/25/10 Rough Tr. 24:2–11, 31:5–18; *see* 5/25/10 Rough Tr. 147:20–23. Mr. Cavallo opined that it is "reasonable to assume ... that most of those fish [4,419 salvage] are, in fact, fall-run." 5/25/10 Rough Tr. 31:5–18.

12. In the BiOp, NMFS stated that "for Chinook salmon, the losses are probably overestimated due to the inability to identify individuals to race (e.g., most Chinook salmon reported to be within the spring-run size category are actually fallrun)." BiOp at 776; 5/25/10 Rough Tr. 143:21–12. Mr. Stuart agreed with this statement. 5/25/10 Rough Tr. 144:4–12.

13. Mr. Stuart testified that he was not aware of the existence of any studies that specifically determined late-emigrating spring-run Chinook are genetically diverse from fish that out-migrated at an earlier date. 5/25/10 Rough Tr. 157:18–25. However, Mr. Stuart relied upon the McElhany study and his general knowledge as a molecular biologist to support his opinion that the tail of the spring-run possess specific genetic diversity that make them sufficiently valuable genetically and deserving of protection. 5/25/10 Rough Tr. 156:18–157:17. Mr. Stuart's testimony has foundation, making this a dispute among scientists about the value in terms of genetic diversity of the tail end of the spring-run. 5/25/10 Rough Tr. 212:25–213:12.

14. Mr. Stuart testified that he could not provide a quantified estimate of the proportion of the spring-run Chinook that have not exited the Delta that would have to be adversely affected before there is a negative impact on spatial or genetic diversity of the species. 5/25/10 Rough Tr. 159:20–24.

15. There is no reasonable prospect that the proposed remedy will salvage all of the remaining 2 to 10 percent of spring-run in the Delta. 5/25/10 Rough Tr. 208:9–16.

16. Mr. Cavallo testified that the best available coded wire tag studies do not demonstrate any export related mortality effect for fish emigrating from the San Joaquin system. 5/25/10 Rough Tr. 39:1–24. Mr. Cavallo also opined that the proposed remedy would not "significantly reduce the survival or recovery probability" of the spring-run, nor would it "significantly diminish the value of their critical habitat for survival or recovery." *Id.;* DWR Ex. 519 at ¶ 12. "17. This opinion that unlimited pumping will have no adverse effect on the species is contrary to the evidence. There is ample record evidence that at elevated pumping levels, the hydrologic influence of exports directs the listed salmonids into areas of the Delta that are hostile because of temperature, toxics, and other influences.

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17. Mr. Stuart admitted he could not state unequivocally that the proposed injunction would result in jeopardy to the spring-run Chinook or would result in adverse modification to their critical habitat, nor could Mr. Stuart state that such jeopardy or adverse modification would be avoided. 5/25/10 Rough Tr., 160:9–19; *id.*, 174: 15–21.

(2) *Central Valley Steelhead (O. mykiss).*

18. NMFS listed the CV steelhead as a "threatened" species under the ESA on January 5, 2006. ***1175**71 Fed. Reg. 834 (Jan. 5, 2006). NMFS designated critical habitat for the CV steelhead on September 2, 2005. 70 Fed. Reg. 52,604.

19. There is limited information on the overall population size of CV steelhead. Findings & Conclusions 14:21–23. However, Mr. Stuart testified to an approximate population of 3,000 adult steelhead spawners. 5/25/10 Rough Tr. 121:19–122:7.

20. It is unknown what percentage of the total CV steelhead population is comprised of the Southern Sierra Nevada Diversity Group of CV steelhead. 5/25/10 Rough Tr. 67:1–8.

21. Mr. Cavallo estimated that 87 percent of the CV non-clipped steelhead will have exited the Delta past Chipps Island by May 25, 2010. DWR Ex. 519 at ¶ 9. Mr. Stuart agreed with this estimate. 5/25/10 Rough Tr. 154:14–155:2.

22. The incidental take limit for unmarked juvenile and adult CV steelhead is 3,000. BiOp at 776. Eight hundred seventy four (874) juvenile non-clipped CV steelhead have been salvaged so far this year. 5/25/10 Rough Tr. 155:3–8. Daily salvage of non-clipped CV steelhead peaked toward the end of January or beginning of February, and then tapered off. 5/25/10 Rough Tr. 32:17–25.

23. Mr. Stuart testified that if the proposed preliminary injunction were issued, he did not anticipate that the incidental take limit for CV steelhead would be exceeded. 5/25/10 Rough Tr. 155:9–14. However, the incidental take limit is not the default level at which the facilities should be operated. If the RPA works as designed, the incidental take limit should never be reached. *Id.* at 113:25–114:7, 133:15–24.

24. Approximately 13% of the population of Central Valley steelhead are within the influence of export operations. Mr. Stuart indicated that an important criteria in determining the necessity of protection of the steelhead, particularly at this time, is that the end of their run can extend into June. 5/25/10 Rough Tr. 211:17–24.

25. Mr. Stuart opined that increased salvage of CV steelhead that exhibit late migratory behavior would diminish the genetic diversity present in the population. Gov't Salmon Ex. 102 at ¶ 35. Although Mr. Stuart acknowledged that he was not aware of the existence of any studies that specifically showed that late emigrating CV steelhead were genetically diverse from fish that out-migrated at an earlier date, 5/25/10 Rough Tr. 157:10–14, he relied upon the McElhany study to support his opinion that the tail run of the steelhead possess specific genetic diversity that make them sufficiently valuable genetically and deserving of protection. 5/25/10 Rough Tr. 212:16–25. Mr. Stuart's testimony has record support, making this a dispute among scientists about the value in terms of genetic diversity of the tail end of the steelhead run. 5/25/10 Rough Tr. 212:25–213:12.

26. Mr. Stuart testified that he could not provide a quantified estimate of the proportion of the CV steelhead that have not exited the Delta that would have to be adversely affected before an adverse impact on spatial or genetic diversity of the species, but recognized that any such proportion would be lower for the Southern Sierra Nevada diversity group because of their small population size. 5/25/10 Rough Tr., 160:4–8.

27. Of the remaining 13 percent of the CV steelhead population potentially within the influence of the pumps, Mr. Stuart could not testify that there would be a total extirpation of this remaining percentage. 5/25/10 Rough Tr. 213:21–214:1.

28. Mr. Cavallo opined that the proposed remedy would not "significantly reduce the survival or recovery probability" ***1176** of the CV steelhead, nor would it "significantly diminish the value of their critical habitat for survival or recovery." 5/25/10 Rough Tr. 39:1–24; DWR Ex. 519 at ¶ 12. This was based in part, however, on his unsupported conclusion that exports do not affect smolt survival.

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29. Mr. Stuart admitted he could not state unequivocally that the proposed injunction would result in jeopardy to the spring-run Chinook or would result in adverse modification to their critical habitat, nor could Mr. Stuart state that such jeopardy or adverse modification would be avoided. 5/25/10 Rough Tr., 160:9–19; *id.,* 174: 15–21.

C. *Findings Of Fact Regarding Operation Of The Projects For The Period Of May 26th Through June 15th (With RPA Actions IV.2.1 And IV.2.3 Enjoined).*

(1) *Summary of RPA Actions IV.2.1 And IV.2.3.*

30. RPA Action IV.2.1 limits combined water exports by the CVP and SWP based on San Joaquin River flows as measured at Vernalis. BiOp at 642. When flows at Vernalis range from 0 to 6,000 cfs, Action IV.2.1 limits combined CVP and SWP exports to 1,500 cfs. BiOp at 642. When flows at Vernalis range from 6,000 to 21,750, Action IV.2.1 imposes an inflow to combined CVP and SWP exports ratio of 4:1. BiOp at 642.

31. RPA Action IV.2.3 limits Old and Middle River ("OMR") flows to no more negative than -2,500 to -5,000 cubic feet per second ("cfs") between January 1 and June 15, or until the average daily water temperature at Mossdale is greater than 72 degrees Fahrenheit for one week, whichever occurs first. BiOp at 648–50.

(2) *The Delta Smelt BiOp and/or State Water Resources Control Board Decision D–1641 Will Likely Limit Combined Project Exports During The Period That The Injunction Applies.*

32. If RPA Actions IV.2.1 and IV.2.3 are enjoined through June 15, 2010, the 2008 Delta Smelt Biological Opinion ("Smelt BiOp") would control Project operations between May 26th and June 15th, unless it is also enjoined. The Smelt BiOp requires OMR flows to be no more negative than -1,250 to -5,000 cfs over a fourteen-day running average through June 30 or until water temperatures reach 25 degrees Celsius at Clifton Court. *See* Fourth Milligan Declaration (Gov't Salmon Exh. 105), ¶ 5.

33. If the Delta Smelt BiOp is enjoined as well, State Water Resources Control Board Water Rights Decision 1641 ("D–1641") will control. Declaration of Terry Erlewine in Support of Preliminary Injunction ("Erlewine Decl.") (Doc. No. 356; SWC Ex. 968) ¶ 2; D–1641 (SWC Ex. 965); 5/25/10 Rough Tr. 79:4–8.

34. D–1641 sets forth requirements that the Projects must meet in order to implement applicable water quality and other objectives for the Delta. *See* Erlewine Decl. (SWC Ex. 968) at A–1; D–1641 (SWC Ex. 965) at 1.

35. Two specific restrictions in D–1641 are likely to control combined Project pumping on various days in the period from May 26 to June 15, 2010, the 35% Export/Inflow (E/I) ratio and the "spring X2" standard. Specifically, D–1641 limits Project exports to a combined total of not more than 35% of total Delta inflow and further limits Project operations to ensure that certain water quality standards are met as measured by the location of X2 (2.64 mmhos/cm electrical conductivity). 5/25/10 Rough Tr. 80:21–81:1, 92:22–24; ***1177** Erlewine Decl. (SWC Ex. 968) at ¶¶ 5, 11; D–1641 (SWC Ex. 965).

a. *Project Exports Are Currently Limited By D–1641 To A Combined Total of Not More than 35% of Total Delta Inflow.*

36. D–1641 requires that the Projects export a total of not more than 35% of Delta inflows during the period of February through June. Erlewine Decl. (SWC Exs. 968) Exhibit A at A–5; D–1641 (SWC Ex. 965) at 5; 5/25/10 Rough Tr. 80:21–24. Delta inflow is the combined total of the Sacramento River inflow at Freeport, the Yolo Bypass inflow, inflow from streams including the Mokelumne River and the San Joaquin River, and all other flows entering the Delta. 5/25/10 Rough Tr. 81:10–14.

37. Total Delta inflows and outflows are reported daily, including on the Bureau of Reclamation's ("Reclamation") website. 5/25/10 Rough Tr. 81:16–18; see also Erlewine Decl. (SWC Ex. 968) at ¶ 5; Erlewine Decl. Exhibit B (SWC Ex. 968).

38. For the calculation of maximum percent Delta inflow diverted, the export rate is a 3–day running average and the Delta inflow is a 14–day running average, except when the CVP or the SWP is making storage withdrawals for export, in which case both the export rate and the Delta inflow are 3–day running averages. Erlewine Decl. Exhibit A (SWC Exs. 968) at A–7; D–1641 (SWC Ex. 965) at 7;

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5/25/10 Rough Tr. 86:4–9.

b. *Combined Project Exports Are Also Limited by D–1641's Requirement That X2 Be Maintained At Specified Locations.*

39. During February through June, D–1641 requires that exports be limited to ensure that X2 is positioned at one of three locations in the western Delta, most notably near Chipps Island, based on unimpaired runoff as indicated by the Central Valley 8–Stream/River Index. Erlewine Decl. (SWC Ex. 968) ¶ 11; Erlewine Decl. Exhibit A (SWC Exs. 968) at A–9, fn (b); D–1641 (SWC Ex. 965) at 9, fn(b); *see also* 5/25/10 Rough Tr. 93:5–10 (the purpose of maintaining X2 near Chipps Island is "to keep salinity low").

40. More specifically, this spring X2 standard operates in addition to the 35% E/I ratio limitation described above and requires that Project exports be limited to hold X2 at or westerly of Chipps Island on a daily or 14–day average basis and, in any event, to provide Delta outflows of at least 11,400 cubic feet per second ("cfs"). Erlewine Decl. (SWC Exs. 965, 968) ill; Erlewine Decl. Exhibit A (SWC Ex. 968) at A–9; D–1641 (SWC Ex. 965) at 9.

c. *The Anticipated Effect Of D–1641.*

41. Although it cannot be estimated with certainty what total Delta inflows will be in the upcoming weeks, Mr. Erlewine prepared two sets of hydrology projections to determine what Project operations would likely be between May 26th and June 15th, given D–1641's requirement that Projects export be no greater than 35% of Delta inflows. Erlewine Decl. (SWC Ex. 968) at ¶ 6.

42. The first projection assumed that total Delta inflows from all sources would continue to decline through June 15th. Erlewine Decl. (SWC Ex. 968) at ¶ 7 and Table 1; Erlewine Decl. Exhibit C (SWC Ex. 967). Under that scenario, total Project exports are likely to progressively decline from 7,300 cfs to 5,100 cfs between May 26th and June 15th. Erlewine Decl. (SWC Ex. 968) at 17 and Table 1; Erlewine Decl. Exhibit C (SWC Ex. 967). This decline in Project exports does not directly correlate to OMR flows, but the OMR flows under this projection would likely range from approximately -4,691 cfs to -5,432 cfs during the same May to June period. Erlewine Decl. (SWC Ex. 968) at ***1178** ¶ ¶ 8–9 and Table 1; Erlewine Exhibit D (SWC Ex. 968).

43. The second projection assumed that total Delta inflows would remain constant through June 15th. Erlewine Decl. (SWC Ex. 968) at 110 and Table 1. As of May 25, 2010, it appears that San Joaquin River flows will likely remain about 4,000 cfs through the first week of June due to releases caused by snow melt and for flood control purposes on the Tuolumne River. 5/25/10 Rough Tr. 87:15–22, 99:8–11. Under this scenario, total Project exports are likely to remain steady at approximately 7,500 cfs, and OMR flows would range between - 5,350 cfs and -6,000 cfs. Erlewine Decl. (Doc. No. 356) at ¶ 10 and Table 1.

44. Regarding D–1641's further restrictions vis-a-vis the location of X2 through June 15, and based on current water quality, Delta inflow patterns, and other conditions, it is "nearly certain" that the spring X2 limitation will be triggered in June, likely for a period of at least 20 days. Erlewine Decl. (SWC Ex. 968), ¶ 11; Milligan Decl., (Gov't Salmon Ex. 105), ¶ 9; 5/25/10 Rough Tr. 94:1. Although the Project operators have discretion about which 20 days in June will be utilized to meet the D–1641 spring X2 requirement, it is likely the 20 day period will occur earlier in the month. 5/25/10 Rough Tr. 98:9–14. To meet these further restrictions, "Project exports would have to be reduced to levels more restrictive than those summarized above" related to the 35% limitation. Erlewine Decl. (SWC Ex. 968) ¶ 11. These additional restrictions will further reduce the magnitude of reverse flows in Old and Middle Rivers to a likely range of -5,700 cfs to less negative than -3,000 cfs and, ultimately, will lower the rate of combined Project exports to a range well below 7,000 cfs, to as low as 3,000 cfs. Erlewine Decl. (SWC Ex. 968) ¶ 11; 5/25/10 Rough Tr. 95:5–7.

(3) *Ramping Period And Daily Monitoring.*

45. Plaintiffs proposed that Project operations not be instantaneously operated at the highest allowable levels of exports under D–1641, but instead that exports be ramped up from their current levels to higher levels over a three day period beginning May 26, 2010 if Actions IV.2.1 and IV.2.3 are enjoined. 5/25/10 Rough Tr. 200:10–15.

46. In conjunction with ramping up and throughout the period of injunctive relief, NMFS, Reclama-

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tion and DWR will be ordered to monitor take at the CVP and SWP export pumps on a day-by-day basis. If NMFS or Reclamation believe that any increased salvage is sufficient to jeopardize either the spring-run Chinook or CV steelhead species, or there is adverse modification to the species' critical habitat, they may immediately file notice seeking to dissolve the injunctive relief. 5/25/10 Rough Tr., 215:23–216:3. Any such application will be heard on shortened time.

(4) *Salvage–Triggered OMR Flow Restrictions Remain In Effect.*

47. Plaintiffs propose that Action IV.2.3's calendar-based -5,000 cfstrigger be enjoined, but that its salvage triggers remain in effect. Therefore, if during the period May 26 through June 15, the density of juvenile salmonid losses at the export pumps increases sufficiently to pose an increased risk to the species as contemplated by these salvage-based triggers, export pumping will be reduced to meet Action IV.2.3's OMR flow restrictions. BiOp at 648–52.

III. *CONCLUSIONS OF LAW*

A. *Legal Standards For Injunctive Relief.*

1. Plaintiffs must establish four factors by a preponderance of the evidence to receive temporary injunctive relief:

***1179** (1) Likelihood of success on the merits;

(2) Likelihood the moving party will suffer irreparable harm absent injunctive relief;

(3) The balance of equities tips in the moving parties' favor; and

(4) An injunction is in the public interest.

Winter v. Natural Resources Defense Council, 555 U.S. 7, ——, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008); *Am. Trucking Ass'n v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir.2009).

[42] 2. As explained in the Findings and Conclusions, Plaintiffs have already succeeded on their NEPA claim and have shown a likelihood of success on the merits of the ESA claims raised in their preliminary injunction motion. Findings & Conclusions 129:2–3; 130:11–12. Additionally, Plaintiffs have shown a likelihood of irreparable harm from loss of water supply. Findings & Conclusions 69:6–85:17; 5/25/10 Rough Tr. 204:8–205:7. Plaintiffs have further shown that the balance of harms and the public interest favor injunctive relief, provided such relief will increase the water supply available to the CVP and SWP without jeopardizing the continued existence of the species and/or adversely modifying their critical habitats. Findings & Conclusions 134:4–20.

B. *Central Valley Spring–Run Chinook Salmon.*

3. Plaintiffs' expert Mr. Cavallo testified that if Plaintiffs' injunction were granted, operations would not jeopardize the spring-run Chinook salmon or adversely modify its critical habitat. 5/25/10 Rough Tr. 39:1–24; DWR Ex. 519 at ¶ 12.

4. On cross examination, NMFS's expert Mr. Stuart could not say whether or not these injunctions will jeopardize the continued existence of the species or adversely impact their habitats. 5/25/10 Rough Tr. 210:18–25; 160:9–19.

5. The small percentage of the population in the area of concern that might be potentially affected by the injunction and the fact that there is no reasonable prospect that all of the remaining spring-run Chinook will be subject to salvage justifies the conclusion that the short period of injunctive relief requested will not deepen the jeopardy or adversely modify the critical habitat of the spring-run. 5/25/10 Rough Tr. 208:4–16.

C. *Central Valley Steelhead.*

6. Mr. Stuart testified that the tail end of the CV steelhead migration was important to the species as a whole due to a genetic characteristic for late migration. Gov't Salmon Ex. 102 at ¶ 35. Mr. Cavallo disagreed and stated there was no evidence of a genetic difference between CV steelhead that migrate during the other portions of the migration period and the late migratory steelhead. 5/25/10 Rough Tr. 33:20–34:24. This is a scientific dispute that must be resolved in favor of the government.

7. Mr. Stuart testified that he could not opine whether or not the proposed injunction would jeopardize the CV steelhead or adversely modify their critical habitat. 5/25/10 Rough Tr. 160:9–19.

8. Only a small percentage of the population re-

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mains in the area of concern that might be potentially affected by the injunction. In addition, there is no reasonable prospect that all of the remaining individuals in the tail end of the CV steelheads' migration would be subject to salvage or extirpation, and therefore any important genetic contribution from these late-migrating individuals to the overall species will remain even if the injunction is granted. 5/25/10 Rough Tr. 214:16–20.

9. Accordingly, granting the requested injunction is not likely to deepen the jeopardy of the the CV steelhead or destroy ***1180** adversely modify its critical habitat during the limited period May 26 through June 15.

D. *Green Sturgeon, Orca, And Winter–Run Chinook Salmon.*

10. The parties agreed that the proposed injunction will not cause harm that would rise to the level of jeopardizing or adversely modifying the critical habitat of the green sturgeon, orcas, and winter-run Chinook.

E. *Stay Pending Appeal.*

11. At the May 25, 2010 hearing, Federal Defendants and Defendant–Intervenors requested a stay pending appeal of the preliminary injunction ordered by this Court. This request was denied because any stay would effectively deprive Plaintiffs of any benefit of the preliminary injunction.

F. *Bond.*

12. Plaintiffs are required to post a $5,000.00 bond.

SO ORDERED.

E.D.Cal.,2010.
Consol. Salmonid Cases
713 F.Supp.2d 1116, 72 ERC 1291

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APPENDIX DOC. 5

THE CONSOLIDATED SALMONID CASES; SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; WESTLANDS WATER DISTRICT v. GARY F. LOCKE, as Secretary of the United States Department of Commerce; et al. (1:09-cv-01053-OWW-DLB); STOCKTON EAST WATER DISTRICT, et al. v. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, et al. (1:09-cv-01090-OWW-DLB); STATE WATER CONTRACTORS v. GARY F. LOCKE, et al. (1:09-cv-01378-OWW-SMS); KERN COUNTY WATER AGENCY, et al. v. UNITED STATES DEPARTMENT OF COMMERCE, et al. (1:09-cv-01520-OWW-SMS); OAKDALE IRRIGATION DISTRICT, et al. v. UNITED STATES DEPARTMENT OF COMMERCE, et al. (1:09-cv-01580-OWW-DLB); THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA v. NATIONAL MARINE FISHERIES SERVICE, et al. (1:09-cv-01625-OWW-SMS)

1:09-CV-01053 OWW DLB,1:09-CV-01090 OWW DLB,1:09-cv-01378-OWW-SMS,1:09-CV-01520 OWW SMS,1:09-CV-01580 OWW DLB,1:09-CV-01625 OWW SMS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

791 F. Supp. 2d 802*; *2011 U.S. Dist. LEXIS 109012*; *41 ELR 20300

September 20, 2011, Decided
September 20, 2011, Filed

PRIOR HISTORY: *Delta Smelt Consol. Cases v. Salazar, 2010 U.S. Dist. LEXIS 70770 (E.D. Cal., June 30, 2010)*

JUDGES: Oliver W. Wanger, United States District Judge.

OPINION BY: Oliver W. Wanger

OPINION

[*811] MEMORANDUM DECISION RE CROSS MOTIONS FOR SUMMARY JUDGMENT (DOCS. 430, 435, 446, 474, 477)

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[*812] I. [**15] INTRODUCTION

These consolidated cases arise out of continuing efforts to protect several species listed under the Endangered Species Act ("ESA"), namely the endangered Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*) ("winter-run"), threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*) ("spring-run"), threatened Central Valley [*813] steelhead (*O. mykiss*) ("CV steelhead"), threatened Southern Distinct Population Segment ("DPS") of North American green sturgeon (*Acipenser medirostris*), and endangered Southern Resident killer whales (*Orcinus orca*) (collectively, "Listed Species"); and associated impacts to the water supply for more than half the State of California.

Plaintiffs, San Luis & Delta Mendota Water Authority and Westlands Water District; State Water Contractors ("SWC"); Kern County Water Agency and Coalition for a Sustainable Delta; and Metropolitan Water District of Southern California ("MWD" or "Metropolitan") (collectively "Export Plaintiffs") move for summary judgment on their claims that the United States National Marine Fisheries Service's ("NMFS") June 4, 2009 Biological Opinion, addressing the impacts of the coordinated operations of the federal [**16] Central Valley Project ("CVP") and State Water Project ("SWP") (collectively the "Project") on the Listed Species ("2009 Salmonid BiOp" or "BiOp") and its Reasonable and Prudent Alternative ("RPA"), violates the ESA and the Administrative Procedure Act ("APA"). Doc. 430. [1] Plaintiffs Stockton East Water District, Oakdale Irrigation District, and South San Joaquin Irrigation District ("Stanislaus River Plaintiffs" or "SR Plaintiffs") filed a separate motion for summary judgment, raising unique challenges to the BiOp. Doc. 435. Plaintiff-in-Intervention, the California Department of Water Resources ("DWR") filed a separate motion for summary judgment on narrower grounds. Doc. 446.

1 Export Plaintiffs previously prevailed on their claims that the Bureau of Reclamation violated the National Environmental Policy Act ("NEPA") by failing to perform any NEPA analysis prior to provisionally adopting and implementing the BiOp and its RPA. Doc. 288.

Federal Defendants, the United States Department of Commerce ("DOC"), the National Oceanic and Atmospheric Administration ("NOAA"), the agency within DOC of which NMFS is a part, NMFS, the United States Department of the Interior ("DOI"), and its sub-agency [**17] the United States Bureau of Reclamation ("Reclamation"), oppose and cross move for summary judgment on all remaining claims, Doc. 477, as do Defendant-Intervenors California Trout, Friends Of The River, Natural Resources Defense Council, Northern California Council of the Federation of Fly Fishers, Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources, Sacramento River Preservation Trust, San Francisco Baykeeper, The Bay Institute, and the Winnemem Wintu Tribe, Doc. 474. All parties filed replies. Docs. 487, 492, 513, 515. These cross motions, which included over 700 pages of briefing and thousands of pages of supporting declarations and exhibits, came on for hearing on December 16 and 17, 2010.

II. BACKGROUND

A. The Listed Species.

1. Sacramento River Winter-Run Chinook Salmon.

Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*) ("winter-run") is listed as "endangered" under the *ESA. 70 Fed. Reg. 37,160 (June 28, 2005).* Historical winter-run population estimates were as high as approximately 230,000 fish in the 1960s, BiOp at 82, but declined to under 200 fish in the 1990s. *Id.* at 81. In recent years, population surveys of winter-run [**18] estimated a high of 17,344 fish in 2006, followed by a decline in 2007 (2,542 fish) that persisted into 2008 (2,830 fish). *Id.* [2]

2 More recent population figures were presented during hearings on motions for injunctive relief; only data available at the time the BiOp was issued has been considered.

[*814] Adult winter-run Chinook salmon migrate upstream from the Pacific Ocean through the Bay-Delta estuary during November through July, moving upstream past Red Bluff Diversion Dam ("RBDD") from mid-December through early August, with peak passage occurring in mid-March. BiOp at 80. Spawning typically

occurs in the mainstem Sacramento River downstream of Keswick Dam during April through August, with the greatest spawning activity typically taking place during May and June. *Id.*

Winter-run fry begin to emerge from the gravel beds where eggs are laid in late June and early July, continuing through October. *Id.* Juvenile rearing and emigration typically occurs between July and February in the upper Sacramento River, with juvenile migration downstream past RBDD beginning as early as mid-July, peaking in September, and continuing through March in some years. *Id.* at 80-81.

Juvenile winter-run occur in the [**19] Delta from November through May. *Id.*; *Pac. Coast Fed'n of Fishermans' Ass'ns. v. Gutierrez ("Gutierrez II"), 606 F. Supp. 2d 1195, 1216-17 (E.D. Cal. 2008).* Winter-run juveniles typically remain in the Delta until they reach a fork length of approximately 118 millimeters and are from 5 to 10 months of age. BiOp. at 81. Juveniles begin exiting to the ocean as early as November and continue to do so through May. *Id.*

Designated critical habitat for winter-run includes the Sacramento River, the Delta, and downstream bays to the *Golden Gate Bridge. 58 Fed. Reg. 33,212 (June 16, 1993). Gutierrez II, 606 F. Supp. 2d at 1217*. The following physical and biological features are identified as essential for the conservation of winter-run:

> (1) access from the Pacific Ocean to appropriate spawning areas in the upper Sacramento River, (2) the availability of clean gravel for spawning substrate, (3) adequate river flows for successful spawning, incubation of eggs, fry development and emergence, and downstream transport of juveniles, (4) water temperatures between 42.5 and 57.5 °F for successful spawning, egg incubation, and fry development, (5) habitat areas and adequate prey that are not contaminated, [**20] (6) riparian habitat that provides for successful juvenile development and survival, and (7) access downstream so that juveniles can migrate from spawning grounds to San Francisco Bay and the Pacific Ocean.

BiOp at 90. Currently, the value of winter-run critical habitat is "degraded," by, among other things, the presence of dams, temperature control issues on the upper Sacramento River, unscreened diversions, and degraded spawning and riparian habitat. *Id.* at 93.

2. Spring Run Chinook.

Central Valley spring-run Chinook salmon (*O. tshawytscha*) ("spring-run") is listed as "threatened" under the *ESA. 71 Fed. Reg. 834 (June 5, 2005)*; *70 Fed. Reg. 37160 (June 28, 2005)* (critical habitat designated). There are three "independent" populations of spring-run, located on Butte, Deer and Mill Creeks, several "dependent" populations (which rely on the three independent populations for continued existence), and a population of hatchery fish from the Feather River Hatchery (FRH). BiOp at 93-94.

Spring-run Chinook have been declining over recent years. The Central Valley as a whole is estimated to have supported spring runs as large as 600,000 fish between the late 1880s and 1940s. *Id.* at 94. [*815] The 2007 [**21] escapement was 7,819 for all tributary populations (all independent and dependent populations, excluding those fish returning to FRH). *Id.* at 97.

Adult spring-run enter freshwater in the spring, beginning in late January, entering the Sacramento River between March and September, primarily in May and June, and entering spawning grounds between mid-April and mid-June. *Id.* at 93. Adults hold over the summer in cool, high elevation streams while they sexually mature, and then spawn in the fall, between September and October, depending on water temperatures. *Id.* at 93.

Juveniles typically spend a year or more in freshwater before emigrating to the ocean. *Id.* at 93. The emigration period for spring-run extends from November to June and is highly variable. *Id.* at 94.

Designated critical habitat for spring-run includes the Sacramento River, tributaries supporting spring-run, the Delta, and downstream bays to the Golden Gate Bridge. *Gutierrez II, 606 F. Supp. 2d at 1217*. The value of spring-run critical habitat currently is "degraded." BiOp at 101, 104.

3. Central Valley Steelhead.

Central Valley steelhead (*O. mykiss*) ("CV steelhead") is listed as "threatened" under the *ESA. 71 Fed. Reg. 834 (Jan. 5, 2006).* [**22] Wild CV steelhead are confined mostly to the upper Sacramento River and its tributaries. BiOp at 107. Recent surveys also have detected small, self-sustaining populations on the Stanislaus, Mokelumne, and Calaveras Rivers, as well as observations of juvenile steelhead on the Tuolumne and Merced Rivers. *Id.* These small populations make up the remaining representatives of the Southern Sierra Nevada Diversity Group ("SSNDG") of CV Steelhead. *Id.* at 198.

While there is limited information on population size, NMFS estimates that the current population for the entire distinct population segment ("DPS") [3] (including

the SSNDG as well as all other populations) in the Central Valley is less than 3,628 spawning females, compared with 40,000 spawners in the 1960s. BiOp at 106. The CV Steelhead population has shown a pattern of negative growth since the late 1960s, and there is no indication that the trend has changed. BiOp at 108-09 & Figures 4-4 & 4-5.

3 The term "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *16 U.S.C. § 1532*. NMFS has issued guidance on how to apply [**23] the ESA's DPS concept, *see Modesto Irr. Dist v. Gutierrez, 619 F.3d 1024, 1028 (9th Cir. 2010)* (citing *56 Fed. Reg. 58,612 (Nov. 20, 1991))*, and has "struggled for two decades over how to apply the term DPS to steelhead," *id.*

CV steelhead generally leave the ocean from August through April and spawn from December through April in small streams and tributaries where cool, well-oxygenated water is available year-round. *Id.* at 104. Unlike Pacific salmon, steelhead are capable of spawning more than once before death. Although one-time spawners are the great majority, approximately 17.2 percent in California streams are repeat spawners. *Id.* at 103-104.

Steelhead eggs hatch approximately 30 days after spawning, and fry emerge from the gravel four to six weeks later into shallow areas where they feed. *Id.* at 105. Steelhead rear during the summer and emigrate "episodically" from their natal streams during fall, winter, and spring high flows. *Id.* at 106. Emigrating CV Steelhead use the lower reaches of the Sacramento River and Delta for rearing and as a migration corridor to the ocean. *Id.* Juvenile CV steelhead typically emigrate [*816] through the Delta from late September through June. *Id.* at 105 (Table 4-6).

Approximately [**24] 80% of historical CV Steelhead range is blocked by dams. *Id.* at 109. CV steelhead critical habitat is degraded. *Id.* at 113.

4. Green Sturgeon.

The southern distinct population segment of the North American green sturgeon ("green sturgeon") (*Acipenser medirostris*) is listed as "threatened" under the *ESA. 71 Fed. Reg. 17757 (Apr. 7, 2006)*; *73 Fed. Reg. 52,084* (critical habitat designated).

Green sturgeon are anadromous fish that spawn and rear in freshwater rivers and estuaries but spend most of their lives in the ocean. *See* BiOp at 114-15. They are a long-lived, slow-growing species. *68 Fed. Reg. 4,433, 4,436 (Jan. 29, 2003)*. Juvenile green sturgeon are present in the Delta year round. BiOp at 119.

There are no definitive population counts or figures for the Southern DPS green sturgeon. Evidence available at the time the BiOp was written suggests that the population in the Delta watershed is "relatively small," ranging from several hundred to a few thousand adults. *Id.* at 124.

Critical habitat for the Southern DPS of green sturgeon was proposed on September 8, 2008, *73 Fed. Reg. 52,084*, but had not been adopted as of the issuance of the BiOp. Proposed critical habitat included "approximately [**25] 325 miles of riverine habitat and 1,058 square miles of estuarine habitat in California, Oregon, and Washington, and 11,927 square miles of coastal marine habitat off California, Oregon, and Washington within the geographical area presently occupied by the Southern DPS of green sturgeon." BiOp at 126. In addition, approximately 136 square miles of habitat within the Yolo and Sutter bypasses, adjacent to the Sacramento River, are proposed for designation. *Id.* The BiOp concluded that the current condition of proposed critical habitat for the Southern DPS of green sturgeon is "degraded over historical conditions." *Id.* at 134.

5. Southern Resident Killer Whale.

The Southern Resident DPS of killer whale (*Orcinus orca*) ("Southern Residents") was listed as "endangered" under the ESA on November 18, 2005, *70 Fed. Reg. 69,903 (Nov. 18, 2005)*, and the DPS is designated as "depleted" under the Marine Mammal Protection Act. BiOp at 158-59. Southern Residents are found throughout the coastal waters off Washington, Oregon, and Vancouver Islands and are known to travel as far south as central California. *Id.* at 159.

The BiOp addresses the impact of Project operations on Southern Residents and concludes [**26] that extinction of winter-run and spring-run Chinook salmon, as well as reductions in fall-run [4] Chinook salmon populations, "would reduce prey availability and increase the likelihood for local depletions of prey in particular locations and times," which would, in turn, increase the risk of extinction of the Southern Residents. BiOp at 573-74.

4 Fall-run Chinook salmon are not listed as threatened or endangered under the ESA.

B. The 2009 Salmonid BiOp and RPA.

The 2009 Salmonid BiOp, prepared pursuant ESA § 7, *16 U.S.C. § 1536(a)(2)*, concluded that "the long-term operations of the CVP and SWP are likely to jeopardize the continued existence" of the Listed Species and "destroy or adversely modify" critical habitat for winter-run,

spring-run, and CV steelhead. BiOp at 575. As required by law, the BiOp includes an RPA designed to allow the projects to continue [*817] operating without causing jeopardy to the species or adverse modification to its critical habitat. *Id.* at 575-671. The RPA "is composed of numerous elements for each of the various project divisions and associated stressors," which, according to the BiOp, "must be implemented in its entirety to avoid jeopardy and adverse modification." [**27] *Id.* at 578. The BiOp provides a succinct overview of the RPA:

> There are several ways in which water operations adversely affect listed species that are addressed in this RPA. We summarize the most significant here:
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> 1) Water operations result in elevated water temperatures that have lethal and sub-lethal effects on egg incubation and juvenile rearing in the upper Sacramento River. The immediate operational cause is lack of sufficient cold water in storage to allow for cold water releases to reduce downstream temperatures at critical times and meet other project demands. This elevated temperature effect is particularly pronounced in the Upper Sacramento for winter-run and mainstem spring-run, and in the American River for steelhead. The RPA includes a new year-round storage and temperature management program for Shasta Reservoir and the Upper Sacramento River, as well as long-term passage prescriptions at Shasta Dam and re-introduction of winter-run into its native habitat in the McCloud and/or Upper Sacramento rivers.
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> 2) In Clear Creek, recent project operations have led to increased abundance of Clear Creek spring-run, which is an essential population for the short-term and long-term [**28] survival of the species. Nonetheless, in the proposed action, continuation of these operations is uncertain. The RPA ensures that essential flows and temperatures for holding, egg incubation and juvenile survival will be maintained.
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> 3) Red Bluff Diversion Dam (RBDD) on the Sacramento River impedes both upstream migration of adult fish to spawning habitat and downstream migration of juveniles. Effects are significant for winter-run and spring-run, but are particularly pronounced for green sturgeon and its proposed critical habitat in that a significant portion of the population is blocked from its spawning and holding habitat. The RPA mandates gate openings at critical times in the short term while an alternative pumping plant is built, and, by 2012, opening of the gates all year.
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> 4) Both project and non-project effects have led to a significant reduction in necessary juvenile rearing habitat in the Sacramento River Basin and Delta. The project's flood control operations result in adverse effects through reduced frequency and magnitude of inundation of rearing habitat. To minimize these effects, the RPA contains both short-term and long-term actions for improving juvenile rearing habitat [**29] in the Lower Sacramento River and northern Delta.
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> 5) Another major effect of water operations is diversion of out-migrating juveniles from the north Delta tributaries into the interior Delta through the open DCC gates. Instead of migrating directly to the outer estuary and then to sea, these juveniles are caught in the interior Delta and subjected to pollution, predators, and altered food webs that cause either direct mortality or impaired growth. The RPA mandates additional gate closures to minimize these adverse effects to winter-run, spring-run, and steelhead.
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> 6) Similarly, water pumping causes reverse flows, leading to loss of juveniles migrating out from the Sacramento River system in the interior Delta and more juveniles being exposed to the State and [*818] Federal pumps, where they are salvaged at the facilities. The RPA prescribes Old and Middle River flow levels to reduce the number of juveniles exposed to the export facilities and prescribes additional measures at the facilities themselves to increase survival of fish.
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> 7) The effects analysis shows that juvenile steelhead migrating out from the San Joaquin River Basin have a particularly high rate of loss due to both project and non-project [**30] related stressors. The RPA mandates additional measures to improve survival of San Joaquin steelhead smolts, including both increased San Joaquin River flows and export curtailments. Given the uncertainty of the relationship

between flow and exports, the RPA also prescribes a significant new study of acoustic tagged fish in the San Joaquin Basin to evaluate the effectiveness of the RPA and refine it over the lifetime of the project.

8) On the American River, project-related effects on steelhead are pronounced due to the inability to consistently provide suitable temperatures for various life stages and flow-related effects caused by operations. The RPA prescribes a flow management standard, a temperature management plan, additional technological fixes to temperature control structures, and, in the long term, a passage at Nimbus and Folsom Dams to restore steelhead to native habitat.

9) On the Stanislaus River, project operations have led to significant degradation of floodplain and rearing habitat for steelhead. Low flows also distort cues associated with out-migration. The RPA proposes a year-round flow regime necessary to minimize project effects to each life-stage of steelhead, including [**31] new spring flows that will support rearing habitat formation and inundation, and will create pulses that cue out-migration.

10) Nimbus Fish Hatchery steelhead program contribute to both loss of genetic diversity and mixing of wild and hatchery stocks of steelhead, which reduces the viability of wild stocks. The Nimbus and Trinity River Hatchery programs for non-listed fall-run also contribute to a loss of genetic diversity, and therefore, viability, for fall-run. The RPA requires development of Hatchery Genetics Management Plans to improve genetic diversity of both steelhead and fall-run, an essential prey base of Southern Resident.

Id. at 576-78.

III. STANDARD OF DECISION

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* The claims in this case involve NMFS's issuance of a biological opinion, final agency action subject to judicial review under the APA, *5 U.S.C. § 702. Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 925 (9th Cir. 2008)* ("*NWF v. NMFS II* ") . A court conducting APA judicial review may [**32] not resolve factual questions, but instead determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Mainella, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)* (quoting *Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985)).* "[I]n a case involving review of a final agency action under the [APA] ... the standard set forth in *Rule 56(c)* does not apply because of the limited role of a court in reviewing the administrative record." *Id. at 89*. In this context, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative [*819] record and otherwise consistent with the APA standard of review." *Id. at 90*.

IV. BASIC LEGAL FRAMEWORK

A. Review under the APA.

APA invalidation of a biological opinion requires Plaintiffs to prove that NMFS's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *5 U.S.C. § 706(2)(A).*

1. Record Review.

APA review of a biological opinion is "based upon the evidence contained in the administrative record." *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1245 (9th Cir. 2001).* [**33] Judicial review under the APA must focus on the administrative record already in existence, not some new record made initially in a reviewing court. Parties may not use "post-decision information as a new rationalization either for sustaining or attacking the agency's decision." *Ass'n of Pac. Fisheries v. EPA, 615 F.2d 794, 811-12 (9th Cir. 1980).* Exceptions to administrative record review for technical information or expert explanation make such evidence admissible only for limited purposes, and those exceptions are narrowly construed and applied. *Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005).*

Here, as evidentiary rulings explained, *see, e.g.*, Docs. 387, 392 (10/19/09 Hearing Transcript ("Tr.")), 406, 407, 462, 740 (7/8/10 Tr.), 750, expert testimony has been considered solely for explanation of technical terms and complex scientific subject matter beyond the Court's knowledge; and to understand the agency's explanations, or lack thereof, and the parties' arguments.

2. Deference to Agency Expertise.

A court must defer to the agency on matters within the agency's expertise, unless the agency completely failed to address some factor, consideration of which was essential [**34] to making an informed decision. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 798 (9th Cir. 2005) ("NWF v. NMFS I").* A court "may not substitute its judgment for that of the agency concerning the wisdom or prudence of the agency's action." *River Runners for Wilderness v. Martin, 593 F.3d 1064, 1070 (9th Cir. 2009)*:

> In conducting an APA review, the court must determine whether the agency's decision is "founded on a rational connection between the facts found and the choices made ... and whether [the agency] has committed a clear error of judgment." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1243 (9th Cir. 2001).* "The [agency's] action ... need be only a reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed. v. Burford, 871 F.2d 849, 855 (9th Cir. 1989).*

Id.

Although deferential, judicial review under the APA is designed to "ensure that the agency considered all of the relevant factors and that its decision contained no clear error of judgment." *Arizona v. Thomas, 824 F.2d 745, 748 (9th Cir. 1987)* (internal citation and quotation omitted). "The [**35] deference accorded an agency's scientific or technical expertise is not unlimited." *Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001).*

> [An agency's decision is] arbitrary and capricious if [it] has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, [*820] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)* (reviewing court may overturn an agency's action as arbitrary and capricious if the agency failed to consider relevant factors, failed to base its decision on those factors, and/or made a "clear error of judgment"), *overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)).*

More generally, "[u]nder the APA 'the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice [**36] made.'" *Humane Soc. of U.S. v. Locke, 626 F.3d 1040, 1048 (9th Cir. 2010)* (quoting *Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43*). "The reviewing court should not attempt itself to make up for an agency's deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

B. General Obligations Under the ESA.

ESA Section 7(a)(2) prohibits agency action that is "likely to jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification" of its critical habitat. *16 U.S.C. § 1536(a)(2).* To "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *50 C.F.R. § 402.02*; *see also NWF v. NMFS II, 524 F.3d 917* (rejecting agency interpretation of *50 C.F.R. § 402.02* that in effect limited jeopardy analysis to survival and did not realistically evaluate recovery, thereby avoiding an interpretation that reads the provision "and recovery" entirely out [**37] of the text). An action is "jeopardizing" if it keeps recovery "far out of reach," even if the species is able to cling to survival. *NWF v. NMFS II, 524 F.3d at 931*. "[A]n agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Id. at 930*.

To satisfy this obligation, the federal agency undertaking the action (the "action agency") must prepare a "biological assessment" that evaluates the action's potential impacts on species and species' habitat. *16 U.S.C. § 1536(c)*; *50 C.F.R. § 402.12(a).* If the proposed action "is likely to adversely affect" a threatened or endangered species or adversely modify its designated critical habitat, the action agency must engage in "formal consultation" with NMFS [5] to obtain its biological opinion as to the impacts of the proposed action on the listed species. *See 16 U.S.C. § 1536(a)(2), (b)(3)*; *see also 50 C.F.R. § 402.14(a), (g).* Once the consultation process has been completed, NMFS must give the action agency a written biological opinion [**38] "setting forth [NMFS's] opin-

ion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." *16 U.S.C. § 1536(b)(3)(A)*; [*821] *see also 50 C.F.R. § 402.14(h).*

> 5 Generally, where the listed species in question is marine or anadromous, consultation must involve NMFS. For terrestrial and freshwater species, the United States Fish and Wildlife Service ("FWS") must be consulted.

If NMFS determines that jeopardy or destruction or adverse modification of critical habitat is likely, NMFS "shall suggest those reasonable and prudent alternatives which [it] believes would not violate *subsection (a)(2)* of this section and can be taken by the Federal agency or applicant in implementing the agency action." *16 U.S.C. § 1536(b)(3)(A).* "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to *16 U.S.C. § 1536(e).*" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 652, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2008).*

1. Best Available Science.

Under the ESA, an agency's actions must be based on "the [**39] best scientific and commercial data available." *16 U.S.C. § 1536(a)(2)*; *50 C.F.R. § 402.14(g)(8)* ("In formulating its Biological Opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available...."). A failure by the agency to utilize the best available science is arbitrary and capricious. *See Gutierrez II, 606 F. Supp. 2d at 1200.*

"The obvious purpose of the [best available science requirement] is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear, 520 U.S. 154, 176, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).*

> While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective [of the best available science requirement] (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. That economic consequences are an explicit concern of the ESA is evidenced by *§ 1536(h)*, which provides exemption from *§ 1536(a)(2)*'s no-jeopardy mandate where there are no reasonable and prudent alternatives [**40] to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations.

Id. at 176-77.

A decision about jeopardy must be made based on the best science available at the time of the decision; the agency cannot wait for or promise future studies. *See Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1156 (D. Ariz. 2002)* (the best scientific and commercial data available standard "recognizes that better scientific evidence will most likely always be available in the future"). The "best available science" mandate of the ESA sets a basic standard that "prohibits the [agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Am. Wildlands v. Kempthorne, 530 F.3d 991, 998, 382 U.S. App. D.C. 78 (D.C. Cir. 2008)* (internal quotation omitted).

What constitutes the "best" available science implicates core agency judgment and expertise to which Congress requires the courts to defer; a court should be especially wary of overturning such a determination [**41] on review. *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 103, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)* (a court must be "at its most deferential" when an agency is "making predictions within its area of special expertise, at the frontiers of science"). As explained in the *en banc* decision in *Lands* [*822] *Council, 537 F.3d at 993*, courts may not "impose on the agency their own notion of which procedures are best or most likely to further some vague, undefined public good." In particular, an agency's "scientific methodology is owed substantial deference." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1066 (9th Cir. 2004).*

When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Lands Council, 537 F.3d at 1000* (quoting *Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)).* Mere uncertainty, or the fact that evidence may be "weak," is not fatal to an agency decision. *Greenpeace Action v. Franklin, 14 F.3d 1324, 1337 (9th Cir. 1992)* (upholding biological opinion, despite uncertainty about the effectiveness [**42] of management measures, because deci-

sion was based on a reasonable evaluation of all available data); *Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1300 (E.D. Cal. 2000)* (holding that the "most reasonable" reading of the best scientific data available standard is that it "permits [NMFS] to take action based on imperfect data, so long as the data is the best available"). NMFS "must utilize the best scientific ... data available, not the best scientific data possible." *Building Indus. Ass'n v. Norton, 247 F.3d 1241, 1246, 345 U.S. App. D.C. 426 (D.C. Cir. 2001)*, cited with approval in *Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1080-81 (9th Cir. 2006)* ("Absent superior data occasional imperfections do not violate" the ESA best available data standard); *see also Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D.D.C. 1997)* (best available science standard does not require "conclusive evidence," only that agency use best science available and not ignore contrary evidence).

The deference afforded under the best available science standard is not unlimited. For example, *Tucson Herpetological Society v. Salazar, 566 F.3d 870, 879 (9th Cir. 2009)*, held that an agency may not rely on "ambiguous [**43] studies as evidence" to support findings made under the ESA. There, in the context of an ESA § 4 listing determination, NMFS "affirmatively relie[d] on ambiguous studies as evidence of persistence (i.e., stable and viable populations), and in turn argue[d] that this 'evidence' of persistence ... proves that the lizard's lost range is insignificant for purposes of the ESA." *Id.* The Ninth Circuit found this conclusion to be unreasonable because "[t]he studies do not lead to the conclusion that the [species] persists in a substantial portion of its range, and therefore cannot support [NMFS's] conclusion. *Id.* [6]; *see also Rock Creek Alliance v. U.S.* [*823] *Fish & Wildlife Service, 390 F. Supp. 2d 993, 1008 (D. Mont. 2005)* (rejecting section 7 biological opinion's reliance on a disputed scientific report, which explicitly stated its analysis was not applicable to the small populations addressed in the challenged opinion).

6 Export Plaintiffs repeatedly rely on *Tucson* to argue that NMFS erred by relying on "ambiguous studies" as affirmative proof of scientific fact. Federal Defendants suggest that Export Plaintiffs' reading of this holding is incorrect, and emphasize that the Ninth Circuit re-affirmed [**44] the general rule that "when examining decisions made under conditions of scientific uncertainty 'a reviewing court must be at its most deferential.'" *Tucson, 566 F.3d at 879*. Federal Defendants suggest that the holding in *Tucson* resulted from the special circumstances in that case, where FWS relied on a single study to affirmatively conclude that a species persisted in a significant portion of its range, even though that one study only addressed two discrete sections of the species' current range. Doc. 484 at 34 (citing *Tucson, 566 F.3d at 882*). This is a distinction without a difference. *Tucson* stands generally for the proposition that, while a court must be deferential in areas where there is scientific uncertainty, such deference is not unlimited. More specifically, an agency may not rely on an ambiguous study for affirmative proof of something the study does not establish.

Alternatively, the presumption of agency expertise may be rebutted if the agency's decisions, although based on scientific expertise, are not reasoned, *Greenpeace v. NMFS, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000)*, or if the agency disregards available scientific evidence better than the evidence on which it [**45] relies, *Kern County Farm Bureau, 450 F.3d at 1080*.

Courts routinely perform substantive reviews of record evidence to evaluate the agency's treatment of best available science. The judicial review process is not one of blind acceptance. *See, e.g., Kern County, 450 F.3d at 1078-79* (thoroughly reviewing three post-comment studies and FWS's treatment of those studies to determine whether they "provide[d] the sole, essential support for" or "merely supplemented" the data used to support a listing decision); *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv., 529 F. Supp. 2d 1110, 1120 (N.D. Cal. 2007)* (examining substance of challenge to FWS's determination that certain data should be disregarded); *Trout Unlimited v. Lohn, 645 F. Supp. 2d 929 (D. Or. 2007)* (finding best available science standard had been violated after thorough examination of rationale for NMFS's decision to withdraw its proposal to list Oregon Coast Coho salmon); *Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 217-18 (D.D.C. 2005)* (carefully considering scientific underpinnings of challenge to FWS's use of a particular model, including post decision evidence presented by an expert to help the court understand [**46] the complex model, applying one of several record review exceptions articulated in *Esch v. Yeutter, 876 F.2d 976, 991, 278 U.S. App. D.C. 98 (D.C. Cir. 1989)*, which are similar to those articulated by the Ninth Circuit).

Courts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. *See, e.g., American Tunaboat Asso. v. Baldrige, 738 F.2d 1013, 1016-17 (9th Cir. 1984)* (NMFS's decision under the Marine Mammal Protection Act was not supported by substantial evidence because agency ignored data that was product of "many years' effort by trained research personnel"); *Sierra Club v. U.S. Army Corps of Eng'rs, 701 F.2d 1011, 1030 (2d Cir. 1983)* ("court may properly be skeptical as to whether [the conclusions of an environmental impact statement prepared

under the National Environmental Policy Act] have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent experience[]"). A court should "reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative [**47] explanation." *N. Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988)* (citing *Am. Turnboat Asso., 738 F.2d at 1016*).

In *Conner v. Burford, 848 F.2d 1441, 1453-54 (9th Cir. 1988)*, the agency attempted to defend its biological opinions by arguing that there was a lack of sufficient information to perform additional analysis. In rejecting this defense, the Ninth Circuit held that "incomplete information ... does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available," and noted that FWS could have completed more analysis with the information that was available. *Id. at 1454*.

> In light of the ESA requirement that the agencies use the best scientific and commercial data available ... the FWS [*824] cannot ignore available biological info or fail to develop projections of ... activities which may indicate potential conflicts between development and the preservation of protected species. We hold that the FWS violated the ESA by failing to use the best information available to prepare comprehensive biological opinions.

Id.

2. Best [**48] Available Science Standards and the Application of Analytical/Statistical Methodologies.

These above-described standards apply with equal force to the use and interpretation of statistical methodologies. As the D.C. Circuit in *Appalachian Power Co. v. EPA, 135 F.3d 791, 328 U.S. App. D.C. 379 (D.C. Cir. 1998)*, explained in reviewing a challenge to a decision of the Environmental Protection Agency ("EPA") under the "arbitrary and capricious" standard of review:

> Statistical analysis is perhaps the prime example of those areas of technical wilderness into which judicial expeditions are best limited to ascertaining the lay of the land. Although computer models are "a useful and often essential tool for performing the Herculean labors Congress imposed on EPA in the Clean Air Act," [citation] their scientific nature does not easily lend itself to judicial review. Our consideration of EPA's use of a regression analysis in this case must therefore comport with the deference traditionally given to an agency when reviewing a scientific analysis within its area of expertise without abdicating our duty to ensure that the application of this model was not arbitrary.

Id. at 802.

The model must fit the available data. *See Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 565, 351 U.S. App. D.C. 42 (D.C. Cir. 2002)* [**49] ("*NWF v. EPA*") (a court will only reject the choice of a model "when the model bears no rational relationship to the characteristics of the data to which it was applied"). For example, *Oceana, 384 F. Supp. 2d at 220*, rejected a challenge to NMFS's use of a particular analytical model that used data drawn from existing literature, even though experts "suggested that reliable take limits cannot be established without quantitative data gathered from in-water' surveys." Although NMFS conceded "a thorough quantitative analysis based on empirical estimates of population size would be a superior way to analyze the impact [] on [the species]," it was undisputed that "given the paucity of information on sea turtles and the difficulties of using the data that does exist, [a] different or more complex model [than that used by NMFS] was not available and could not even be constructed." *Id.* (internal quotations omitted). Likewise, "the fact that a given model has some imperfections does not prevent it from constituting the 'best scientific information available.'" *Oceana v. Evans, 2005 U.S. Dist. LEXIS 3959, 2005 WL 555416, *16-*17 (D.D.C. Mar. 9, 2005)* (citing *16 U.S.C. § 1851(a)(2)*) (approving NMFS's use of a model despite [**50] known limitations, where it was the only model available and the agency supplemented its analysis with other sources to address areas where the model was unable to make accurate predictions).

V. EXPORT PLAINTIFFS' & DWR'S CLAIMS.

A. Alleged Clear Scientific Errors Pertaining to Delta Operations.

A major premise of the BiOp is that pumping "causes reverse flows, leading to loss of juveniles migrating out from the Sacramento River system in the interior Delta and more juveniles being exposed to the State and Federal pumps, where they are salvaged [7] at the facilities." BiOp at [*825] 577. The effects analysis also concluded "that juvenile steelhead migrating out from

the San Joaquin River Basin have a particularly high rate of loss due to both project and non-project related stressors." *Id.* at 577-78. To mitigate for these impacts, the RPA "prescribes Old and Middle River flow levels to reduce the number of juveniles exposed to the export facilities and prescribes additional measures at the facilities themselves to increase survival of fish." *Id.* at 577. In addition, "to improve survival of San Joaquin steelhead smolts," the RPA prescribes "both [**51] increased San Joaquin River flows and export curtailments." *Id.* at 578.

> 7 The State and Federal pumping facilities use louvers to divert salmonids entrained by the pumping process into collection tanks where operators attempt to "salvage" them by returning them to other areas of the Delta. BiOp at 341, 345.

Plaintiffs strenuously argue that NMFS made certain "clear" scientific errors in reaching the conclusion that exports adversely affect juvenile salmonid survival.

1. Challenged Statistical Methodologies.

a. Use of Raw Salvage in Figures 6-65 and 6-66.

NMFS relied on salvage data provided by Plaintiff-Intervenor, DWR, presented in Figures 6-65 and 6-66 of the BiOp:

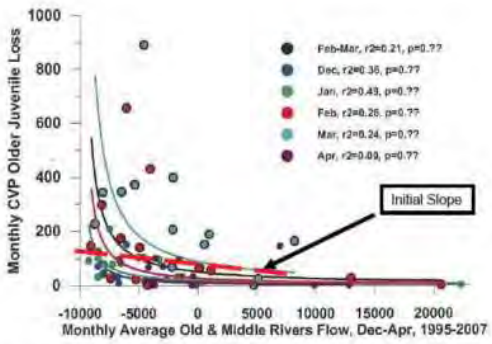

Figure 6-65. Relationship between OMR flows and entrainment at the CVP, 1995-2007 (DWR 2008).

[*826]

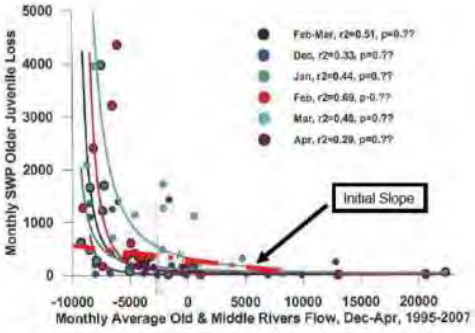

Figure 6-66. Relationship between OMR flows and entrainment at the SWP, 1995-2007 (DWR 2007).

Id. at 361-62. These figures were cited to demonstrate that "[l]oss of older juveniles at the CVP and SWP fish collection facilities increase sharply at [OMR] flows of approximately -5,000 cfs and depart from the initial slope at flows below this." *Id.* at 361. Federal Defendants' cross motion explains that NMFS used this data to "help evaluate where along the spectrum of OMR flows any significant change in salvage could be observed." Doc. 477-1 at 53.

These figures, which are based upon average salvage figures over many years, [**52] use "raw" salvage numbers that are not scaled to reflect the size of the population from which the fish were salvaged at the time the particular sample was taken. Previous rulings in this and the related *Consolidated Delta Smelt Cases* have discussed at length why the use of such data is not consistent with standard practice in the fields of fish biology and population dynamics. *See San Luis & Delta-Mendota Water Authority v. Salazar, 760 F. Supp. 2d, 855, 885-90* (E.D. Cal. 2010). The May 18, 2010 Findings of Fact and Conclusions of Law Re Plaintiffs' Request for Preliminary Injunction ("PI Decision") in this case found:

> 125. ...The comparisons of salvage to negative OMR flows relied upon in the BiOp utilize raw salvage numbers, rather than scaling salvage to population size. *See* Doc. 179, Declaration of Richard B. Deriso at ¶¶ 3-5. Scaling salvage to population size is standard fisheries science practice and could have been accomplished for several of the Listed Species based on existing population data. *See id.* at ¶¶ 5-6. This failure is a fundamental and inexplicable error. Salvage may have been higher in some years simply because the population was higher, not because of any differences [**53] in negative OMR flows. Salvage may have been lower in other years because the population was lower. Dr. Deriso demonstrated the potential significance of this failure by plotting the population adjusted Juvenile Chinook Incidental take rate against OMR flow. Based upon this revised analysis for spring-run and winter-run, Dr. Deriso concluded that there is no statistically significant relationship between the take index and OMR flows. *Id.* at ¶6.
>
> 126. The BiOp's conclusions reached about the spring-run and winter-run Chinook failed to utilize the best available [*827] scientific methodology, because

> population data was available at the time the BiOp was issued that would have permitted NMFS to perform the straightforward population adjustment required to conform to standard, generally accepted practices for fisheries population measurements utilized in their field of expertise. If, in those years when salvage was greatest, population sizes overall were 10 or 100 times larger than other years, the effects might not be jeopardizing. Without adjustment for population size, NMFS's reliance on that figure was arbitrary and capricious.
>
> 127. As to the CV steelhead, for which no population numbers are [**54] available, it is less clear whether the use of raw salvage numbers is always inappropriate. Figures 6-65 and 6-66 ambiguously reference monthly CVP and SWP "Older Juvenile Loss" on the y axis. Were most of the salvaged fish represented on these charts Chinook salmon? No reason is offered why NMFS did not segregate the steelhead figures from those of Chinook salmon. If the species had been evaluated separately, would it have been reasonable for NMFS to fail to adjust the steelhead figures for population size? Separate analysis was not done.

Consol. Salmonid Cases, 713 F. Supp. 2d 1116, 1142-43 (E.D. Cal. 2010) (emphasiss added).

Federal Defendants attempt to explain their use of these figures in two ways. First, Jeffrey Stuart, NMFS Fisheries Biologist and the primary author of the Delta section of the BiOp, opines that "the general trend in fish loss should still be apparent regardless of scaling." Fourth Stuart Decl., Doc. 485 at ¶ 72. He insists that this data "indicates that additional loss of fish occurs with increasing export levels as measured by the OMR flow values." *Id.* This explanation simply defies common sense. When trying to discern trends from data points that range across [**55] many years, an obvious "confounding variable" is population size. A trend observed in data that is unscaled for population size may change or completely disappear when scaled for population size. *See* Deriso Decl., Doc. 440 at ¶¶ 13 - 31. Federal Defendants had the information needed to perform such a simple analysis of the available data, but did not do so, and unjustifiably relied on the unscaled data to form a quantitative conclusion that salvage rates increased sharply above -5,000 cfs OMR. This was a clear scientific error.

Defendant-Intervenors argue that the agency cannot violate the ESA by failing to take an additional step to scale the salvage data to salmonid population abundance. They maintain that all the ESA requires is that NMFS consider the "available" evidence not that it create new data or "follow scientific practices defined by Export Plaintiffs experts." Doc. 484 at 51. It is true that the best available science standard does not require NMFS to create new data or apply new models to existing data, *Building Indus. Ass'n, 247 F.3d at 1246*. However, here, NMFS put data to a use for which it is not appropriate, as it produces unreliable results. *Cf. NWF v. EPA, 286 F.3d at 565* [**56] (a court may reject agency's choice of model when it "bears no rational relationship to the characteristics of the data to which it was applied"). Every biostatistics expert who presented evidence in this and related fish cases has agreed that it is wholly inappropriate and scientifically unreasonable to draw management conclusions from a plot comparing unscaled salvage data to OMR flows collected over a period of years when population varied. The agency is required to apply generally recognized and accepted biostatistical principles, which constitute best available science, in reaching its decisions.

[*828] b. Was the BiOp's Reliance on Figures 6-65 and 6-66 Harmless?

Alternatively, Federal Defendants argue that any such error was harmless given the other record evidence that supports the BiOp's conclusions. No party has provided authority that a harmless error rule applies when the agency commits a substantive error under the ESA. [8] *Arguendo*, Defendants' alternative evidence is considered.

> 8 ESA procedural errors are subject to a harmless error analysis. *See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995).*

(1) Record Citations Provided by Mr. Stuart.

Mr. Stuart states: "[additional [**57] assessment of the effects of the OMR flow levels on salmon loss was derived from data provided by NMFS staff for the BDCP. NMFS 79238-239; 79240-83808; 90852-98." Fourth Stuart Decl., Doc. 485 at ¶ 73. These are several thousand pages of documents. Mr. Stuart does not explain how the voluminous referenced information was used or analyzed. It is impossible to determine whether these referenced pages provide a sufficient alternative basis for the BiOp's conclusions. NMFS has provided no explanation for an alternative to its scientifically unreliable conclusions. *Humane Soc. v. Locke, 626 F.3d at 1048* (holding NMFS did not offer a satisfactory explanation for its findings); *Am. Turnboat Asso., 738 F.2d at*

1016 (finding that despite broad discretion afforded NOAA, where record evidence detracts from that relied upon by the agency, a court may find the agency's decision arbitrary and capricious). Citing this information and then failing to explain it is arbitrary and capricious.

(2) Particle Tracking Model Results.

The BiOp also relied on outputs from computer model runs utilizing the so-called Particle Tracking Model ("PTM"). Export Plaintiffs' and DWR's 2010 PI Motion challenged the use [**58] of PTM, arguing that while PTM is useful to track the fate of neutrally buoyant particles, it does not accurately reflect the behavior of salmonids, which are strong, volitional swimmers. These challenges were rejected in the May 18, 2010 PI Decision on the grounds that the BiOp acknowledged the limitations of PTM and reasonably relied on PTM studies to support certain conclusions:

> 120. This is a dispute among scientists. While DWR criticizes PTM modeling, Stuart and NMFS recognized its limitations and found PTM studies helpful to support its conclusions that: (a) as exports increase, negative OMR flows also increase; and (b) that at Station 815 (the confluence of the Mokelumne River and the San Joaquin River), particle entrainment increases from 10% at -2,500 cfs, to 20% at -3,500 cfs, to 40% at -5,000 cfs, and 90% at -7,000 cfs. NMFS, through Mr. Stuart, took into account inherent differences in the movement of neutrally buoyant particles and their speed and direction of travel. Administrative law requires deference to the Agency. Additional record analysis is necessary to determine the extent of support for NMFS's additional opinion that exports affect salmonid survival.

Cosol. Salmonid Cases, 713 F. Supp. 2d at 1141. [**59] These challenges are discussed in other sections of this decision. Here, it is sufficient to note that the PTM results are not a complete replacement for Figures 6-65 and 6-66, as they only explain how particles, not actual fish, would respond to increased OMR flow. Nor do Federal Defendants point to any other information in the record that delineates "where along the spectrum of OMR flows any significant change in salvage could be observed," the [*829] purposes for which Federal Defendants use 6-65 and 6-66.

The same reasoning applies to acoustic tag studies and other data the BiOp relies upon. This other data was treated in the May 18, 2010 decision and below in greater detail. It is undisputed that none of these studies or additional data pinpoint for management purposes at what point negative OMR flows must be controlled. Doc. 347 ¶¶ 128-138.

It is not appropriate to speculate how NMFS's analysis and/or conclusions would have changed had the data used in figures 6-65 and 6-66 been scaled to population size. This must be done on remand.

Whether there is sufficient data to scale CV steelhead salvage information to population size is unclear. *Compare* BiOp at 107 (discussing existing population [**60] data and difficulties posed by "lack of monitoring program") *with* Doc. 431 at 11 (citing Burnham Decl., Doc. 439 at ¶ 42 ("NMFS has access to the number of hatchery-produced salmon each year), for the proposition that NMFS had "readily available" data regarding how many CV Steelhead were released from hatcheries each year)). That scaling for population size may not be possible for all species may limit NMFS's efforts. If population data is unavailable for certain species, the agency must nevertheless explain how it can make management conclusions without such information. The extent to which any such limitations mitigate NMFS's failure to scale raw salvage data cannot be discerned from the present record.

(3) Figures 6-71, 6-72, and 6-73.

The BiOp also relies on a series of plots, taken directly from Reclamation's Biological Assessment ("BA" or "OCAP BA"), of monthly juvenile salmonid "loss" against average exports. The first set of plots, Figure 6-71, depicts loss of juvenile Chinook salmon versus average monthly CVP and SWP exports for a period from 1995 through 2007.

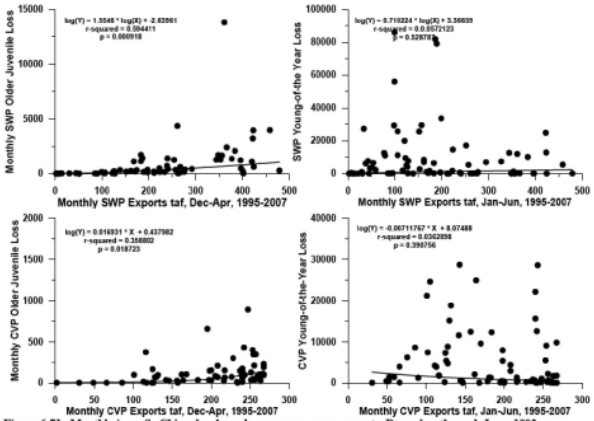

Figure 6-71. Monthly juvenile Chinook salmon loss versus average exports, December through June, 1993 through 2006, at each facility; SWP and CVP (CVP/SWP operations BA figure 13-40).

[*830] BiOp at 370. This plot was specifically cited as quantitative evidence of a relationship between exports and loss at [**61] the pumps:

> The CVP/SWP operations BA presented data that regressed the loss of older juvenile Chinook salmon against exports (figure 6-71) and found that a significant relationship existed. The relationship was stronger for exports at the SWP (p = 0.000918) than for exports at the CVP (p = 0.0187). The months of December through April resulted in the most informative relationship based on the historical number of older juvenile Chinook salmon salvaged each month and the relationship of each month to salvage and exports. Conversely, regressions performed for monthly salvage of YOY Chinook salmon against exports did not result in a significant relationship at either the SWP or CVP facilities....

Id. at 368-69. In this way, the BiOp used Figure 6-71 as quantitative evidence of a statistically significant connection between loss of older juvenile Chinook salmon and export levels. These plots suffer from the same flaw of mis-using raw salvage data. They must be re-analyzed and explained on remand if they are to be used as scientific justification for the BiOp's conclusions.

Figures 6-72 and 6-73 present a more difficult issue, as they concern CV steelhead salvage, for which much less data [**62] is available. Figure 6-72 plots monthly CV Steelhead salvage (both clipped/hatchery and unclipped/wild [9]) against exports:

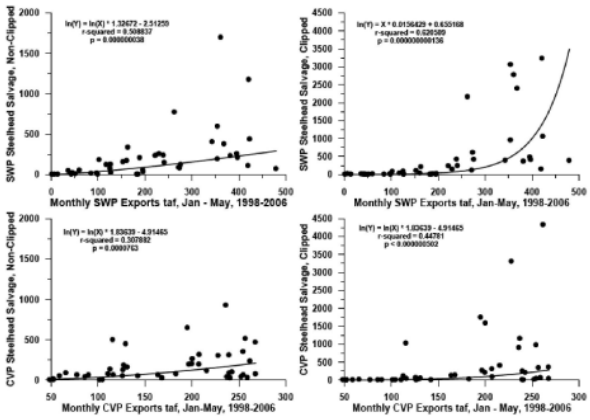

Figure 6-72. Monthly steelhead salvage versus average exports, January through May, 1998 through 2006, at each facility; SWP and CVP (CVP/SWP operations BA figure 13-45).

Id. at 371. The BiOp indicates that these "regressions resulted in significant relationships [*831] between exports and salvage of steelhead at the facilities, more so for the SWP than the CVP." *Id.* at 369. Figure 6-73 plots monthly CV Steelhead salvage against the monthly average export to inflow ratio, finding significant relationships:

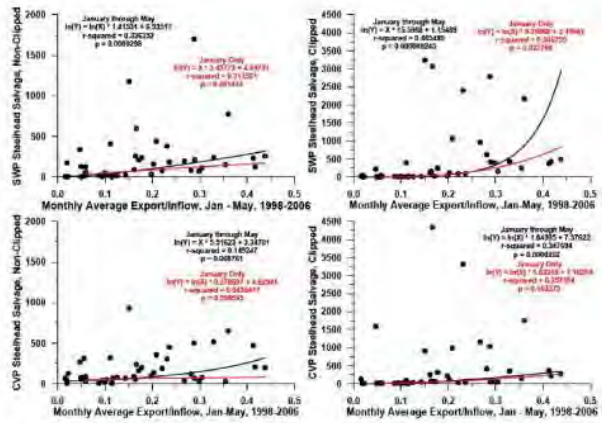

Figure 6-73. Monthly steelhead salvage versus average Export/Inflow ratio in TAF, January through May, and January alone, 1998 through 2006, at each facility; SWP and CVP (CVP/SWP operations BA figure 13-46).

Id. at 370-71. The 2010 PI Decision found that "[a]s to the CV steelhead, for which no population numbers are available, it is less clear whether the use of raw salvage numbers is always inappropriate." *Consol. Salmonid Cases, 713 F. Supp. 2d at 1143*. Export Plaintiffs do not explain how it would be possible to scale to overall population size the wild CV steelhead salvage data, referenced in Figure 6-73 as "unclipped" CV steelhead. However, plaintiffs point out that the exact number of hatchery CV steelhead released each year is known, and therefore argue that NMFS could have scaled the hatchery or "clipped" CV Steelhead data to population size. Doc. 431 at 11. Federal Defendants do not respond to this assertion. There appears to be no [**63] reason to distinguish between the clipped CV steelhead analyses and Chinook salmon analyses, for which population scaling is the best available scientific methodology.

> 9 The term "unclipped" refers to wild fish with intact adipose fins, while "clipped" fish have had their adipose fins clipped before release from a hatchery. BiOp at 337

More importantly, Federal Defendants do not explain how these figures, even if valid, serve the same purpose as Figures 6-65 and 6-66, which were cited to demonstrate that "[l]oss of older juveniles at the CVP and SWP fish collection facilities increase sharply at [OMR] flows of approximately -5,000 cfs and depart from the initial slope at flows below this." *Id.* at 361.

None of the alternative bases offered by Federal Defendants are sufficient to render NMFS's reliance on Figures 6-65 and 6-66 "harmless error." The significance of

[*832] Mr. Stuart's voluminous record citations is unexplained. Neither the PTM Modeling Results, nor Figures 6-71, 6-72, or 6-73 provide alternative bases for NMFS's conclusions regarding the negative OMR flows below which loss of juvenile salmonids "increases sharply." Export Plaintiffs' motion for summary judgment that Federal Defendants [**64] acted unlawfully by relying on raw salvage analyses is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

c. Separate Challenges to Statistical Analyses in Figures 6-71, 6-72, and 6-73.

Export Plaintiffs also maintain that all three sets of graphs misrepresent the statistical significance of the data because "the decision to divide the data by month created an arbitrarily large sample size." Doc. 431 at 10. According to Export Plaintiffs, this "produce[d] facially incredible P-values (the standard statistical measure of significance) that misrepresented the validity of the models that were fit to the data." *Id.* A P-value "represents the probability that the result obtained in a statistical test is due to chance rather than a genuine relationship between the variables." Burnham Decl., Doc. 439 at ¶ 43. Regression analysis is generally considered statistically significant when the P-value is smaller than 0.05. *Id.*

The upper right graph from Figure 6-72, which plots monthly SWP exports for January through May of 1998 through 2006 against the raw salvage of hatchery steelhead, presents a P-value of 0.000000000136. This is several million times smaller than 0.05. [**65] Dr. Burnham opines that while "[s]uch a P-value is not impossible ... it would be surprising and especially so with this graph" because "[t]he scatter of the data points indicates that the regression is not a very good fit." *Id.* at ¶ 44.

Dr. Burnham describes the R^2 value of 0.62 as not very strong. The R^2 value is a statistical measure of how well the regression explains the data. "Roughly speaking an R^2 of 0.5 means that the regression accounts for 50% of the variation observed in the data, while the other 50% is explained by other, unknown factors. Generally speaking an R^2 of 0.5 is considered weak, while an R^2 of 0.8 or above is considered strong." *Id.* at ¶ 36.

Dr. Burnham opined that this high level of apparent "significance" is the result of treating each of the monthly export points as an independent data point, which increases the sample size and influences the P-value. *Id.* at ¶ 45. Because the monthly data is "highly correlated with each individual year, due to the unique natural conditions that characterize each year, such as the abundance of the salmon cohort, patterns of flow, changes in temperature, etc." *Id.* at 47. Dr. Burnham offers a helpful explanation of why this is [**66] a problem:

> For example, a medical researcher could misrepresent the significance of a drug study by performing [a] test on 10 people, and then treating the results for each individual person as if that person was 100 people. If the initial result of the test on 10 people was that 80% had been cured by the drug, nothing would change by acting as if the test had been performed on 1000 people: 80% would still be cured. However, the study would appear more significant because of the claim the results were true for a 1000 people rather than 10 people.

Id. at ¶ 46. In the present case, Dr. Burnham opines that NMFS's approach caused the relationship between exports and salvage to "appear more significant than it really is," when in fact "the high salvage levels in [certain] years may have actually been primarily caused by one independent factor, such as a large hatchery release [*833] that year." *Id.* at ¶ 49. The results of the "January Only" data depicted in red on Figure 6-73, are different, showing much higher P-values, with only one of the four graphs showing statistical significance. *Id.* at 51.

Mr. Stuart responds to these critiques in his Fourth Declaration:

> ... Dr. Burnham critiques the statistical [**67] analysis of the data that was presented to NMFS in the biological assessment by DWR. NMFS reported the data presented by DWR in the BA as it was written without altering its content. While the probability of the regressions lines is unusual, having an unusually low "p" value, this is not a reason to completely disregard the data because the general trend of the lines is consistent with trends previously seen in consultations and reports provided to NMFS. This data is also consistent with the results of the radio tagged salmon studies conducted by Vogel in the South Delta in 2000 and 2001 in which tagged fish were drawn to the export facilities in higher numbers when exports were high as compared to lower levels of exports (Vogel 2002 cited in Vogel 2004). NMFS regarded the trends as more explanatory biologically than the accuracy of the statistical analysis being reported.

Doc. 485 at ¶ 75. Mr. Stuart now argues that the trend lines have biological significance even if the statistical analyses were incorrectly performed. Yet, the BiOp specifically emphasizes how these graphs demonstrated "significant relationship[s]" between the variables. *See, e.g.*, BiOp at 369.

Mr. Stuart also provides [**68] a substantive rebuttal to Dr. Burnahm's critique of the statistical analyses, premised on Dr. Burnham's argument that it was clear error to use monthly data points in the correlation analysis because they are highly correlated within years. Mr. Stuart opines that this premise is flawed because "[m]onthly exports do not necessarily correlate with each other between months or between years." Fourth Stuart Decl., Doc. 485 at ¶ 76.

> For example, exports in March do not correlate with exports in April and May from 2000 to 2006, as Dr. Burnham has alleged, since exports are curtailed in April and May for the VAMP experiment during this time period. So regardless of what the March pumping rate is, the exports in April and May will be lower. Likewise, exports in January are allowed to reach a maximum of 65 percent of the inflow to the Delta, while exports from February through June are only allowed to reach a maximum of 35 percent of inflow.

Id. This provides a partial explanation for the statistical analyses.

This is an area of disagreement among experts. The agency is due deference in such circumstances, unless its experts' opinions are unsupported or wrong. *Cactus Corner, LLC v. U.S. Dept. of Agric., 346 F. Supp. 2d 1075, 1113 (E.D. Cal. 2004).*

> When [**69] specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (explaining in the context of an agency's decision not to supplement a NEPA environmental impact statement that "courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation [*834] of the significance-or lack of significance-of the new information" and noting that "[a] contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors").

This is a close call. Dr. Burnham's opinion suggests that it was unreasonable for NMFS to rely on the statistical analyses it performed. Mr. Stuart offers some explanation to counter certain aspects Dr. Burnham's critique, but does not satisfactorily explain the [**70] anomalous statistical results. Because the BiOp's reliance on these graphs must be remanded for other reasons, the agency must explain the flaws in its approach to the statistical analyses on remand.

2. Failure to Perform a Population-Level Quantitative Analysis.

Plaintiffs maintain that the BiOp violated the best available science requirement because it failed to employ a "population-level quantitative analysis." Doc. 431 at 15. It is undisputed that quantitative population dynamics models, or life cycle models, are the most reliable method to evaluate the impacts of various stressors on a fish population. This has been indisputably established in these related cases. Plaintiffs' expert Dr. Hilborn opined:

> Life cycle modeling for salmonids is widely recognized as an available and necessary scientific tool, and is generally accepted in the scientific community as the best method for identifying the factors affecting fish population abundance and determining the significance or relative importance of distinct factors causing salmonid fish population increases or decreases.

Hilborn Decl., Doc. 443 at ¶ 5. The BiOp concedes that "[i]deally, a life cycle approach, in which the effects on individual [**71] life stages on the life cycle could be estimated independent of the effects on other stages, would be implemented to assess the relative impacts on abundance...." BiOp at 66.

However, such models only qualify as "best available science" where an appropriate model is available. [10] In the *Consolidated Delta Smelt Cases*, an appropriate smelt population dynamics was not available at the time the biological opinion in dispute in that case was issued:

The ESA does not require FWS[] to generate new studies. In *Southwest Center for Biological Diversity v. Babbitt, 215 F.3d 58, 342 U.S. App. D.C. 58 (D.C. Cir. 2000)*, the district court found "inconclusive" the available evidence regarding FWS's decision not to list the Queen Charlotte goshawk, and held that the agency was obligated to find better data on the species' abundance. The D.C. Circuit reversed, emphasizing that, although "the district court's view has a superficial appeal ... this superficial appeal cannot circumvent the statute's clear wording: The secretary must make his decision as to whether to list a species as threatened or endangered 'solely on the basis of the best scientific and commercial data available to him....' *16 U.S.C. § 1533(b)(1)(A)*." *Id. at 61* [**72] (emphasis added); *see also American Wildlands v. Kempthorne, 530 F.3d 991, 998,* [*835] *382 U.S. App. D.C. 78 (D.C. Cir. 2008)* (the "best available data" standard "requires not only that the data be attainable, but that researchers in fact have conducted the tests").

Plaintiffs advocate a narrow reading of both *Southwest Center* and *American Wildlands*, arguing these cases only mean that the agency is not required to gather new data in the field regarding a species if such information is not already available. Doc. 697 at 22. Plaintiffs object that "[n]either of these cases supports Defendants' position that FWS could disregard the smelt abundance data that were already in its possession and fail to undertake the necessary statistical analyses to satisfy its statutory mandate to determine 'whether the action ... is likely to jeopardize the continued existence of the species.' *50 C.F.R. § 402.14(g)(4)*." *Id.*

Plaintiffs cite no authority suggesting that the nonexistence of an analytical model should be treated any differently from the non-existence of raw field data. FWS did not have an off-the-shelf form of "statistical analysis" it could apply to determine the effects of Project Operations on the delta smelt population. [**73] Although life-cycle modeling is standard practice in the field of fisheries biology, and a life-cycle model is being (and should have been) developed for delta smelt, it is undisputed that an appropriate life cycle model had not been developed at the time the BiOp issued. FWS must apply the best "available" science; not the best science possible. FWS's failure to apply a life cycle model did not per se violate the ESA or the APA.

San Luis v. Salazar, 760 F. Supp. 2d at 884-85.

10 Plaintiffs also point to several documents in the administrative record where scientific experts recommended that NMFS use a quantitative life cycle model. *See, e.g.*, AR 00108170 (CALFED Science Panel commissioned by NMFS to review a draft version of the BiOp noted that the "lack of quantitative modeling ... and lack of integrative life-cycle modeling for salmon" was "[o]ne of the most important limitations to the analyses used in the draft [BiOp]"). However, these recommendations are not dispositive of whether the models discussed were "available."

The 2010 PI Decision in this case found that Plaintiffs' were not likely to succeed on the merits of their life cycle modeling claim because they had not "present[ed] [**74] evidence that they, or anyone else[,] developed or made available to NMFS an appropriate life cycle model or the results of an appropriate life cycle analysis prior to the issuance of the BiOp." *Consol. Salmonid Cases, 713 F. Supp. 2d at 1132*. However, the PI Decision is not law of the case. *S. Or. Barter Fair v. Jackson County, Or., 372 F.3d 1128, 1136 (9th Cir. 2004)* ("[D]ecisions on preliminary injunctions are just that-preliminary-and must often be made hastily and on less than a full record.") (citing *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981))*.

Plaintiffs insist that NMFS did have access to "several fully featured quantitative life-cycle models[,] which had been specifically designed for use in the Delta...." Doc. 431 at 15. Plaintiffs focus on the Interactive Object-Oriented Salmon simulation ("IOS") model, developed by Bradley Cavallo, and the *Oncorhynchus* Bayesian Analysis ("OBAN") model, which was developed in coordination with NMFS. *Id.* at 19

a. IOS.

The BiOp discussed its decision not to use IOS, which was designed to evaluate the influence of different Central Valley water operations on the life cycle of winter-run using simulated historical flow and water temperature [**75] inputs." BiOp at 65.

NMFS did not use the results of the IOS model for our analysis in this Opinion because the intended application of the model in the CVP/SWP operations BA was not useful for estimating, in an overall sense, how winter-run might respond to the proposed action. For example, the CVP/SWP operations BA cautions the use of the IOS model results in making inferences related to how winter-run abundance is affected by the proposed action: "*In evaluating effects of the proposed actions, differences* [*836] *between the three studies rather than absolute trends should be examined*" (Appendix O in CVP/SWP operations BA). Thus, it seems that the IOS model results presented in the CVP/SWP operations BA are not intended to reflect either abundance estimates observed in the past or future abundance with implementation of the proposed Project. Estimates based on observations are much different than estimates based on modeling without observation input. Results of the IOS model presented in the CVP/SWP operations BA show an increasing trend in winter-run escapement throughout the entire simulation period (i.e., from 1923 through 2002), such that by 2002, escapement is above 40,000 fish for [**76] all CALSIM II studies examined (figure 11-5 in CVP/SWP operations BA). Those results contrast with observed winter-run escapement estimates, which show a dramatic population crash during this period (see Grandtab at http://www.delta.dfg.ca.gov/afrp/), eventually leading to their endangered status under the ESA.

In the Opinion, NMFS must consider how winter-run is expected to respond to implementation of the proposed action. Model results, such as the IOS model results presented in the CVP/SWP operations BA, that are not intended to at least generally approximate past or future conditions, do not inform us in this consideration. If the IOS model results in the CVP/SWP operations BA are intended to be used strictly as an alternatives comparison tool, as the CVP/SWP operations BA indicates, instead of one that produces somewhat meaningful trend information for individual model runs, then the utility of those results for the Opinion is limited, particularly considering that a model alternative representing just baseline conditions does not exist. The CALFED Peer Review Panel stated that, "*The default should be comparing the CALSIM studies of future scenarios (with different scenarios for* [**77] *climate change) to baseline"*(Anderson *et al.* 2009). The context of this statement was that comparisons among alternatives such as those used in the IOS model (e.g., CALSIM studies 6, 7, and 8) are inconsistent with the Opinion's analytical approach. As such, NMFS did not use the IOS model results presented in the CVP/SWP operations BA as evidence for analyzing how winter-run will be affected by the proposed action.

Another consideration for not using the IOS model in the Opinion is that the model has not yet been published in peer reviewed scientific literature, and NMFS does not understand either the model's limitations or its extent. As described in Paine *et al.* (2000), mathematical models intended to help guide management of natural populations must be used wisely and with understanding of limitations. One potential limitation associated with applying large scale models over the entire life cycle of a species, as is done in the IOS model, is whether enough data are available to reliably estimate model parameters. Paine *et al.* (2000) state: *"When the data are not available for the needed estimates of parameter values, there is a tendency to insert values based on opinion or expert* [**78] *testimony. This practice is dangerous. The idea that opinion and "expert testimony" might substitute for rigorous scientific methodology is anathema to a serious modeler and clearly represents a dangerous trend."* With these considerations in mind, NMFS did not utilize the IOS model in this Opinion.

Id. at 65-65 (italics in original). It is ironic that NMFS's reverence for "rigorous scientific methodology" is honored in the breach by the agency's failure to utilize [*837] the most rigorous method possible in the disputed BiOp.

Garwin Yip, supervisor for the Water Operations and Delta Consultations branch of NMFS's Sacramento Area Office, elaborated on the first explanation provided in the BiOp -- that IOS estimates did not match actual historic winter run population levels -- by pointing out that even Plaintiffs' expert Dr. Burnham stated that: "If the data does generally not match the model, then we know that our assumption is somehow incorrect and needs refinement." Yip Decl., Doc. 481 at ¶ 9 (citing Burnham Decl., Doc. 439, at ¶ 24). Mr. Yip points out that "[h]ad NMFS based our conclusion for winter-run on the quantitative approach of the IOS life cycle model results contained in the BA, we [**79] would have erroneously concluded that the proposed CVP/SWP operations would help a great deal in recovering the species, rather than jeopardizing it." *Id.* at ¶ 10.

Second, Mr. Yip points out that the CalFed Science Panel, in its review of the December 11, 2008, draft BiOp, discussed NMFS's decision not to use IOS in the BiOp and acknowledged that "the IOS model is relatively new and has not been extensively vetted and published, but all of these types of models are flexible and the Panel wonders if, with sufficient time and with some adjustments and modifications, whether a new version of the IOS could be used." *Id.* at ¶ 11 (citing AR [11] 00108178 (Anderson, *et al.* 2009)). The CalFed Science Panel did not recommend or encourage the use of IOS in its current state at the time the BiOp was being developed.

> 11 All references to the NMFS administrative record are noted as "AR" references. References to the separate Reclamation administrative record will be noted as "USBR AR."

Mr. Yip points out that the NMFS Central Valley Office requested that NMFS's Southwest Fisheries Science Center ("NMFS-SWFSC") review various models, including IOS, for overall assumptions and limitations. According to [**80] Yip, NMFS-SWFSC "did not have the considerable staff resources and time it would take to adequately review and comment on the IOS model, it did have previous experience with similar models developed by Cramer Fish Sciences, and therefore, offered some comments." *Id.* at ¶ 12.

> To adequately review such a model [IOS model] one must thoroughly examine the model's foundation, functional relationships, error structure, and parameter values in order to assess the quality of the model's resulting inferences. The range of elements incorporated in similar models developed by this contractor [Cramer Fish Sciences] is extensive, many of which are hypothetical in nature and remain the focus of active research. For those model elements that are well-founded, many of the parameter values will, given the data poor situation we find ourselves in, have been set using data from other populations, locations, species, or simply by assumption. Adequate review of the appropriateness of the assumed functional relationship and parameter values would require a significant amount of time.... Parenthetically, we note that the use of large and complex models in data-poor situations runs directly counter to the [**81] advice given to NMFS by expert scientific review panels concerned with salmon recovery.

AR 00101045-6 (emphasis added).

NMFS contends that the IOS model was not available in a reliable, appropriate, and usable form at the time the BiOp was developed, and denies that IOS could have been adapted in a reasonable amount of time for use in the BiOp. NMFS knows all experts agree a life cycle model is the best methodology for measuring population effects. The agency continues to dodge serious [*838] questions the parties are entitled to have answered by refusing employ existing models. At the same time, NMFS continues to plead poverty by describing this case as a "data-poor situation." If the data is so sparse that a workable model cannot be formulated, when does NMFS's failure to ensure appropriate data collection is taking place constitute bad faith? After more than five years of dispute, future pleas of data poverty will no longer be accepted.

As to the IOS model, although it is a close call, Federal Defendants' contention that IOS was not available in a reliable form at the time the BiOp issued has not been rebutted. Plaintiffs' motion for summary judgment that NMFS violated the ESA by failing [**82] to apply IOS in the BiOp is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

b. OBAN.

Plaintiffs further argue that NMFS acted unlawfully by failing to apply the OBAN model in the BiOp. The BiOp mentions OBAN, but does not specifically address it, opting instead to generally explain that because existing life-cycle models only address population abundance, leaving out other aspects of the Viable Salmonid Population ("VSP") framework (e.g., spatial structure and genetic and life history diversity), the BiOp's analysis is superior because it encompasses these other factors:

> An alternative approach recommended by the CALFED Science Review Panel for estimating an ASR for the Central Valley includes the use of computer models. In particular, the IOS model (Cavallo *et al.* 2008) and the Oncorhynchus Bayesian Analysis (OBAN) model (Hendrix 2008) were referenced as potentially useful tools. IOS is a detailed mechanistic model that describes the entire life cycle of both winter-run and spring-run in the Sacramento River, while the OBAN model is a Bayesian statistical model for winter-run in the Sacramento River. Although the CALFED Science Review Panel identified [**83] these models as potentially viable options either in combination or independently, it acknowledged the necessary refinement and implementation of this type of model by NMFS for the Opinion may not have been practical because of time constraints and the need for additional modeling expertise. Further development of mortality rates at different life stages specific to the Central Valley could be incorporated into the model to reduce the amount of assumptions currently required, and lead to more realistic and informative results. However, as previously mentioned, this type of information will not be available in the near term. Moreover, in order to sufficiently address the issue of fish routing through the Delta, identified as a critical component by the CALFED Science Review Panel, additional data collection and modeling over the long term (i.e., beyond the timeline allowed for the development of this Opinion) would be required.
>
> As discussed above, this Opinion equates a listed species' probability or risk of extinction with the likelihood of both the survival and recovery of the species, and uses "likelihood of viability" as a standard to bridge between the VSP framework (McElhany *et* [**84] *al.* 2000) and the jeopardy standard. Assessing the viability of salmonid populations requires the consideration of other parameters in addition to population abundance, including productivity (*i.e.*, population growth rate), spatial structure, and genetic and life-history diversity (McElhany *et al.* 2000) . All four VSP parameters are deemed important in evaluating a population's ability to persist, especially when faced with catastrophic [*839] disturbances (Lindley *et al.* 2007) . Although the life cycle modeling approaches discussed above have the potential to provide information on all VSP parameters at some point in the future, it would require substantial data collection and model refinement. Any present attempt to complete such an exercise would only address one of those parameters (*i.e.*, abundance), and any results would include making many assumptions. Therefore, although a method for evaluating impacts during a specific life stage in terms of the overall loss in numbers of fish would be useful, there are other potential consequences resulting from project operations that need to be considered. For example, are mortalities at different life stages, or the loss of historical habitats, [**85] likely to have effects on the other VSP parameters? The analyses within this Opinion, in an attempt to encompass this broader range of effects, focused on determining whether or not appreciable reductions were expected from the proposed action, rather than trying to quantify the absolute magnitude of those reductions.

Id. at 67-68.

NMFS staff from the Seattle office collaborated with Dr. Nobel Hendrix, the author of the OBAN model, during the model's development. AR 00050578. Throughout 2008, NMFS communicated with Dr. Hendrix about the model, AR 00023869-70, and NMFS staff scheduled and attended meetings about the model, *see, e.g.*, AR 00050874. NMFS requested that its own Science Center review the OBAN model. AR 00046767-69.

Plaintiffs argue that Dr. Brian Wells, an NMFS fisheries biologist, described the OBAN model as "a great approach," AR 00050825, "a superior model design" and "well thought out," a model that "is the best approach laid out yet and deserves full attention," AR 00103798. Plaintiffs selectively quote Dr. Wells. For example, in a November 13, 2008 letter to Bruce Oppenheim, a NMFS biologist working on the BiOp, Dr. Wells did compliment the OBAN model:

> Statistically, this [**86] is a superior model design because it integrates each life-history phase transition appropriately

> through a string of Beverton-Holt recruitment models [citations]. The approach is well thought out and, with appropriate data, could result in an intriguing model that will allow the user to determine the potential impact of management decisions at any given life-history stage on the ultimate production of the stock...

AR 000103798. However, his next paragraph raises a concern about the available data set:

> The only criticism I have for this approach is in the capacity of the dat[a] to address these questions. At each stage the data is compromised. For instance, Chipp's Island data does not allow for stock-specific allocation of production and ocean data is reliant on notoriously poor effort data which is not stock specific. Such data will undoubtedly reduce the precision of these models to predict the effects of variability at each life-history phase on the cohort and it is possible that the process error could become cumulatively greater as additional life stages are strung together. Having said that, this is the best approach laid out yet and deserves full attention. The author is clearly [**87] aware of the data limitations and through his approach has done the best to accommodate.

Id.

The model's own developer agreed with the Science Center's concern that OBAN contains "a lot of factors that are hypothesized to affect winter run relative to the [*840] amount of data," and suggested that a "goal of the modeling effort is to identify some of the most important places to collect additional data." AR 00054082 (emphasis added). As of February 2009, NMFS still had not received a clear response about whether appropriate and sufficient data were available to reliably model population dynamics using OBAN. AR 00070672 (indicating it "is uncertain as to whether appropriate and sufficient data are available to reliably model the population dynamics of winter-run Chinook salmon and spring-run Chinook salmon. If appropriate data are not available, application of the OBAN and IOS models to inform risk analysis may lead to erroneous management decisions. Before utilizing the OBAN or IOS models, it is necessary for PRD to gain further confidence in the various results each model can produce.").

Plaintiffs also do not address the 2010 PI Decision's finding that the application of population or life [**88] cycle models is not feasible for any analyses applicable to the CV steelhead, for which no population indices are available. *Consol. Salmonid Cases, 713 F. Supp. 2d at 1164.*

Federal Defendants also remonstrate that even if sufficient data had been available, email communications in late 2008 and early 2009, while the BiOp was being prepared, describe the model as still under development. *See* AR 00060571 (January 21, 2009 email discussing need to develop temperature metrics). The software needed to run the model was not available until late April 2009. AR 00086362 (April 20, 2009 workshop demonstrating new software for OBAN model).

Plaintiffs rejoin that "Defendants' principal criticism of the OBAN model ... that the data were incomplete ... suggests a fundamental misunderstanding of life-cycle modeling generally." Doc. 48 at 15. Plaintiffs characterize Defendants' position as based on an erroneous premise that a life cycle model can never be used unless and until it is fully and finally perfected, peer reviewed, and populated with perfect data." *Id.* Plaintiffs complain that this is an impossible standard that ignores the reality that perfect data does not exist and that modeling is an [**89] iterative process. For example, Dr. Hilborn opines that life cycle models are "always evolving and many times being challenged by models that make alternative assumptions." Hilborn Reply Decl., Doc. 496 at ¶ 26.

> The standard scientific approach is a process of confronting competing models with data, not having a perfect and unchanging model. To suggest that a model is unavailable for use because it will require some adjustment or refinement ignores this reality.

Id. Dr. Hilborn pointed out that preliminary results from OBAN indicated that water temperature and harvest were the dominant factors affecting salmonid populations and that water exports was "not one of the most powerful explanatory factors." *Id.* at ¶ 25.

The record reflects that NMFS was working in late 2008 to integrate OBAN into the consultation process, *see* AR 00060572-73; AR 00052306-07, but that the agency elected not to make use of the model in the final BiOp approximately three months months before the BiOp was issued, AR 0065191-94. Plaintiffs assert that this was unreasonable because OBAN was "fully functional and ready to be integrated into the BiOp." Doc. 487 at 16. Agency experts concluded that there was not enough [**90] data to reliably apply OBAN. [12]

12 NMFS also claims it did not have the expertise to make use of such a model. Plaintiffs rejoin that any lack of modeling resources was manufactured by NMFS, "which could easily have made modeling resources available to the BiOp team," pointing to various individuals within NMFS who could have done the work. Doc. 487 at 17-18. This debate raises difficult issues. On the one hand, an agency cannot be permitted to ignore the best available science simply because it refuses to assign to the task personnel with the expertise to understand and apply that science. On the other hand, NMFS has limited resources, and a court cannot instruct an agency how to allocate those assets. While it may be reasonable to demand that NMFS assign to the BiOp team individuals who can correctly apply readily available statistical methodologies, at some point Plaintiffs' demands that NMFS assign specific experts on its staff to fine tune the application of OBAN to the purposes of the BiOp becomes a demand that NMFS develop new science. Where the line between these two extremes should be drawn is not clear. It is relevant that no outside expert (government, academic, or consultant) [**91] had applied OBAN in the manner Plaintiffs demand prior to the issuance of the BiOp. Plaintiffs were free to submit their own studies and results for NMFS's consideration. They did not.

[*841] This is more disassembling by NMFS. Having not devoted necessary attention to OBAN, it rationalizes its doubts about the reliability of application of OBAN in the BiOp as not clearly erroneous. NMFS remains in the position where it can raise doubt about all conflicting science and hide behind the rubric it cannot be compelled to collect data or develop a model. Plaintiffs' motion for summary judgment that NMFS violated the ESA by failing to apply the OBAN model in the BiOp is DENIED and Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED, but this is the last time NMFS will be permitted to avoid studying, analyzing, and applying a life cycle model. NMFS's chronic failure to do so now approaches bad faith in view of the undeniable importance of the information to resolve the perennial dispute over population dynamics. At some point, this diminishes the agency's credibility.

c. Ricker and/or Beverton-Holt Models.

Plaintiffs argue that, even if use of the IOS and/or OBAN models was not [**92] legally required, NMFS violated the ESA because it did not make use of certain "basic tools of fisheries management," such as the Ricker or Beverton-Holt models, two mathematical models developed in the mid-1900s. *See* Doc. 431 at 26. According to Plaintiffs' expert Dr. Burnham, these models make use of "simple mathematical expressions, based solely on past observations [that] combine all life history and environmental information into the period between parent spawners and the resultant returning spawners in the next generation." Burnham Decl., Doc. 439 at ¶ 18. According to another of Plaintiffs' experts, Dr. Ray Hilborn, these models are part of a "standard set of population dynamics models ... that form the core of the body of knowledge" among fisheries biologists. Hilborn Reply Decl., Doc. 493 at ¶ 6. Dr. Hilborn concludes:

> NMFS should have at the very minimum used simple multiple regression with Ricker or Beverton-Holt models (as discussed in the declaration submitted by Dr. Richard B. Deriso (Doc. 440-0)) to see if exports or OMR flows and other factors such as ocean harvest rates, ocean upwelling, and (for winter Chinook) water temperatures on the spawning grounds were related [**93] to the cohort replacement rates. Such an analysis can be done in a matter of hours, and NMFS has dozens of scientists at the Science Centers who could have done this analysis. I find no explanation in the BiOp or the administrative record why such an analysis was not performed. It is 1940s science, is available, and could have and should have been performed at the very outset of the BiOp.

Id. at ¶ 30.

NMFS's biologist Garwin Yip submitted a detailed response:

> [*842] 23. Dr. Hilborn suggests that NMFS should have performed a statistical regression analysis to identify whether or not various environmental factors were related to, for example, the cohort replacement rate. Hilborn Reply Decl. ¶7, ¶30. While it's true that building a multiple regression model can be relatively simple and straightforward using available programs such as Excel, it is also true that many data are not suited for analysis with a straightforward multiple regression model. For example, Newman and Rice (2002, NMFS 127363-73) note that:

> "The work of Kjelson *et al.* (1989) was closely scrutinized by numerous interested parties, and their methodology was criticized on a number of grounds. The assumptions and methods for estimating [**94] the indices, the application of standard linear regression to dependent variables ranging between 0 and 1, and the selection of covariates were major criticisms. In light of these criticisms, the interested parties chose to bring in statisticians previously unaffiliated with this work (namely, the authors) in an attempt to develop an alternative approach for modeling the release-recovery data. This article describes the resulting model. Although the approach here was quite different from that of Kjelson *et al.*, some of our conclusions were quite similar-for example, the sizeable effect of water temperature."

NMFS 127364. Indicative of the sophistication of the Newman and Rice (2002) analysis is the fact that it was published not in a fisheries or ecological journal, but rather in the Journal of the American Statistical Association.

24. Further warning of the potential pitfalls of using a "basic procedure" comes from p. 285 of Hilborn and Walters (1992), on the page immediately following the excerpt quoted by Dr. Hilborn, Hilborn Reply Decl. ¶7. After providing general equations for including multiple environmental terms in the Ricker and Beverton-Holt models, Hilborn and Walters (1992) [**95] ask "Why is this dangerous?" and proceed to say that "as tempting as it is to add environmental variables to stock-recruitment data, this is a potentially dangerous practice." On the same page, an explicit "warning" message reads "Be very, very cautious in fitting environmental variables, as it is almost impossible to make sure the apparent correlation is not spurious." (see Exhibit 1).

25. The devil is in the details, of course. I do not disagree with Dr. Hilborn's view that a basic regression analysis, possibly including an assessment of environmental terms in a standard stock-recruitment relationship, can be useful in many situations. However, in the specific case of evaluating the effects of CVP/SWP operations on cohort replacement rates of ESA-listed fish in California's Central Valley, I note that the "basic procedure" he suggests grows rather quickly either into a more complicated procedure, or into a "basic procedure" that relies on a set of assumptions that make interpretation and application of the analysis result more complicated. Consider, for example, a simple regression of cohort replacement rate (CRR) for winter-run Chinook salmon, against a single environmental factor. [**96] Below, I discuss several issues that would either complicate the analysis, or require simplifying assumptions: the interaction of age structure with the environmental variable of interest, and the selection of specific environmental measures.

26. First, how would the age structure of the spawning population in a given year be handled? One could, as did NMFS in the CRR summary provided in the status section for winter-run Chinook [*843] salmon (BiOp at 83), assume that the spawning population was composed entirely of three year olds. Using this assumption, the CRR is calculated as the spawning population at time t divided by the spawning population at t-3. While this assumption keeps the life-history model simple, it introduces an inaccuracy into the estimate of cohort replacement rate (unless one makes yet additional assumptions), since the 2- and 4-year olds in the spawning population at time t have actually been produced by spawners at time t-2 and t-4, respectively. The assessment of potential environmental influences on CRR can also be affected by this assumption of no age structure in the spawning

population, depending on the environmental factor being considered. For example, an assessment [**97] of attraction flows in year t (the year of return) as a factor affecting CRR would still be very appropriate, since all returning fish, regardless of age, would have experienced the flows observed in year t. In contrast, an assessment of OMR flows (or Sacramento River flow, or exports) during the juvenile outmigration period in year t-3 (the brood year) as a factor affecting CRR would be less appropriate, since the 2- and 4-year olds would not have experienced those OMR flows (or Sacramento River flow, or exports). Even if 3-year olds do make up the majority of spawners in a given year, 2- and 4-year old fish may well introduce sufficient mismatch into the model as to mask any environmental effect. Adjusting the model to allow appropriate matching of environmental factor with each age class of spawner leads down a yet more complicated analysis path.

27. Second, what measure would one use to assess "simple" effects like exports or OMR? Looking at row 16e of the stressor table for winter-run Chinook salmon (Table 9-1, BiOp at 452-460), one might choose to assess the impacts of OMR flows during the juvenile emigration period on CRR. Row 16e notes that OMR flows are a potential stressor [**98] in the Delta for juvenile winter-run Chinook salmon from November through May, so that's one possible averaging period, though clearly winter-run are more prevalent in the Delta in some months within that period than in others. Dr. Deriso, in his basic analysis of winter-run population growth rate against OMR flows, used the average OMR flow from December through March. Mechanistically, the impacts of OMR are likely to occur on the scale of days to weeks - it is not clear how to capture the effects of OMR variability at this temporal resolution in a model that (unless it is made more complex) calls for an environmental time series with a single value per year.

28. As described in the previous paragraph, a single, "simple" effect could be modeled in many ways. If one wants to consider additional effects (e.g., temperature during the spawning period, exports), each of which also can be modeled in various ways (and for factors such as temperatures, may have watershed-specific values), the possible list of environmental time series grows large very quickly. With this abundance of possible environmental effects, one needs to be very cautious about the risks of overfitting the model (which [**99] is an increasing risk as one includes more and more environmental factors into a single regression analysis) or the risks of increasing the Type 1 error rate by performing a large number of simple, single-factor comparisons. While there are various stepwise model-fitting procedures and multiple comparison procedures available to address these two issues, respectively, I note yet again that even the seemingly simple analysis proposed [*844] by Dr. Hilborn requires a not insignificant set of assumptions.

29. NMFS did perform some basic analyses in evaluating effects of the projects, (e.g. for estimating reasonable OMR targets to manage entrainment), and has been roundly criticized by other plaintiffs' experts (e.g., Dr. Burnham, Dr. Deriso) for the statistical imperfections of those analyses. On the whole, NMFS used a mix of quantitative and qualitative analyses, including analyses provided in the BA and selected scientific literature, in order to come up with its assessment of project effects and the suite of actions necessary to avoid jeopardy.

Third Yip Decl., Doc. 518. The application of these "simple" models is not as straightforward as Plaintiffs claim. The law relegates their use and application [**100] to the discretion of the agency unless clearly erroneous. Plaintiffs have not demonstrated that NMFS's use or non-use of these models is more than scientific dispute, which is resolved in favor of the agency. A court cannot lawfully second-guess the agency, unless clear scientific error or bad faith is so manifest that the agency's judgments can no longer be trusted. Plaintiffs' motion for summary judgment that NMFS acted unlawfully by failing to use the Ricker and Beverton-Holt models is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED. [13]

13 In their opening brief, Plaintiffs also argued that the conceptual model applied in the BiOp was biologically implausible because it relied on a particular study, Naiman & Turner (2000), for the proposition that it is possible to drive population to extinction by only slight changes in survival at each life history stage. Doc. 431 at 27-31. Plaintiffs complained that NMFS was misusing a "thought experiment" from that study as though it were scientific fact. *Id.* Federal Defendants respond that "NMFS did not rely upon the Naiman and Turner conceptual model to conclude that any one project effect causing small reductions [**101] in one life stage would jeopardize the species. The Naiman and Turner model was used in evaluating how slight incremental changes in life history stages affect already-diminished populations, as such changes are difficult to quantify and may take years to resolve." Doc. 477 at 28. Plaintiffs appear to have abandoned this argument.

d. Does the Absence of a Quantitative Analysis Render the BiOp's Quantitative Limits Per Se Unjustified?

Plaintiffs argue that even if the BiOp's failure to apply quantitative life cycle modeling was not per se unlawful, the absence of such analyses "necessarily cripple[s] the specific quantitative limits imposed by the RPAs." Doc. 431 at 31. The Peer Review Panel addressed this issue:

> The preparation of the RPAs shifts the questions from jeopardy/no-jeopardy to questions like: Will proposed export and other modifications in the Delta provide the expected benefit for targeted species? Will water withdrawals through a new pumping facility at Red Bluff impose new mortality on downstream migrants that largely offsets the reduced mortality from lifting the dam gates at RBDD? Will remedial actions be effective or will they become expensive projects that show little [**102] improvement in species status? How will specific RPAs affect other listed species (e.g., delta smelt) and unlisted species (e.g., fall-run Chinook salmon)?
>
> Tier 1 comments, especially related to defining baseline and lack of quantitative integrative tools, become even more important in addressing these and similar RPA related questions. The long-term solution to this challenge is targeted research on the critical issues; careful monitoring of responses to implemented [*845] actions; and further development of models for generating baseline conditions, downscaling temporally and spatially coarse outputs, and simulating life cycle dynamics. The modeling and monitoring before and after implementation of actions is needed to highlight or test key uncertainties and to increase our understanding of the system in order to facilitate improved management in the future. We believe that lack of quantitative integrative tools will hinder the development of RPAs because NMFS cannot presently quantify the relative contributions of the different project effects to population status nor can NMFS quantitatively determine the potential benefits of specific remedial actions to population recovery. Without this [**103] information, it is difficult to rank the many possible remedial actions by their biological effectiveness relative to their fiscal and social costs in order to logically develop an optimal mix of actions.

AR 00089620-21 (emphasis added). Although the Peer Review certainly warned of the pitfalls of attempting to formulate RPA's without "quantitative integrative tools," it acknowledged that the "long-term solution" was further development of modeling tools. The Peer Review did not outright advise the abandonment of quantitative RPAs in the short term. It did caution that the benefits cannot be quantified, nor can the fiscal and social costs.

For the purposes of this challenge to the BiOp and its RPAs, it is not appropriate or justified to find all the RPA Actions unlawful simply because Plaintiffs were not satisfied with the quantitative analyses performed in the BiOp. Each challenged RPA must be analyzed in light of the record evidence.

B. Baseline Analysis Challenges.

1. Failure to Distinguish Between Discretionary and Nondiscretionary Actions.

Plaintiffs opening brief advances an elaborate argument based on *National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007),* [**104] which held that the ESA's consultation requirement was not triggered when an agency undertook nondiscretionary actions, because the agency has no choice. Plaintiffs argue that NMFS erred by failing to distinguish between the discretionary and

nondiscretionary aspects of CVP and SWP project operations. Doc. 431 at 48-55. Although it is undisputed that Reclamation operates the project to fulfill certain mandatory water delivery obligations, Plaintiffs' argument that *Home Builders* should be extended to require NMFS to segregate discretionary from non-discretionary operations, placing non-discretionary ones in the "baseline" for purposes of evaluating the action's effect on the Listed Species, was rejected in a December 14, 2010 Memorandum Decision issued in the related *Consolidated Delta Smelt Cases:*

> Plaintiffs complain that the BiOp's Project Effects analysis was "tainted" because it does not distinguish between discretionary and non-discretionary actions. [] *National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2008),* held that ESA § 7's consultation requirements do not apply to non-discretionary actions. Where an agency is required by law to perform an action, [**105] it lacks the power to insure that the action will not jeopardize the species. *Id. at 667.* Plaintiffs' cite the Coordinated Operations Agreement, the Central Valley Project Improvement Act's ("CVPIA") requirements [*846] to deliver water for Central Valley wildlife refuge areas, and D-1641 as examples of mandatory aspects of Project operations that, they claim, should have been segregated from other Project Operations in the Project Effects Analysis.
>
> However, *Home Builders* does not address whether, once section 7 consultation is triggered, the jeopardy analysis must separately identify and segregate discretionary from non-discretionary actions, relegating the non-discretionary actions to the environmental baseline. *Home Builders* addressed whether the section 7 consultation obligation attaches to a particular agency action at all. *See Home Builders, 551 U.S. at 669-70* (holding that consultation "duty does not attach to actions... that an agency is required by statute to undertake....") (emphasis added). Plaintiffs do not suggest that section 7 does not apply to the coordinated operations of the Projects. Rather, Plaintiffs contend that the section 7 consultation process requires distinguishing [**106] between discretionary and non-discretionary Project operations to identify the actions not subject to Section 7. Neither *Home Builders* nor the regulation interpreted in *Home Builders, 50 C.F.R. § 402.03*, includes any such requirement. Plaintiffs' motion for summary judgment that the BiOp unlawfully failed to distinguish between discretionary and non-discretionary actions is DENIED. This does not mean non-discretionary actions required by law must not be considered in the consultation process. Federal Defendants and Defendant-Intervenors' cross-motion on identification of non-discretionary actions is GRANTED.

San Luis v. Salazar, 760 F. Supp. 2d at 947-48. Any voluntary efforts by NMFS to segregate discretionary from non-discretionary actions in the BiOp does not alter the fact that *Home Builders* imposes no legal obligation to do so.

Plaintiffs advance a related argument that even if *Home Builders* does not require segregation of discretionary from non-discretionary project operations in the BiOp, the ESA otherwise requires NMFS to consider only discretionary operations when evaluating the "effects of the action" vis-à-vis the environmental baseline. Doc. 431 at 55-58. This is based in [**107] part on the Science Panel's recommendation that NMFS model a baseline that represents a "hypothetical situation in which physical project infrastructure exists, but no project operations are performed except those mandated by prior agreements or those that are not part of the proposed actions." AR 00108175. The Panel offered:

> For example, the decline of stream habitat because the dams block gravel recruitment from upstream would be part of baseline, as would providing water to fulfill senior water rights agreements. Modeling in the Delta seemed to use recent conditions rather than an estimate of baseline conditions (i.e., recent conditions minus effects of project-related actions). This definition of baseline was described in words (although too succinctly, in the opinion of the Panel) in the draft BO but never quantified with model results. This can be a serious omission because without a proper baseline, one struggles to make straightforward comparisons of scenarios that differ only by whether proposed project operations are included or not. Much of the draft BO involves comparing re-

> sults of various simulations, but we had difficulty interpreting results without direct comparisons [**108] of the correct baseline to the correct baseline with project operations.... NMFS must clearly define the baseline used in analyses and explain why this baseline was used rather than [*847] the baseline quoted above and seemingly required by the ESA.

Id. (emphasis added).

NMFS addressed this recommendation in the BiOp:

> ESA regulations define the environmental baseline as "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process" (*50 CFR 402.02*). The "effects of the action" include the direct and indirect effects of the proposed action and of interrelated or interdependent activities, "that will be added to the environmental baseline" (*50 CFR 402.02*). Implicit in both these definitions is a need to anticipate future effects, including the future component of the environmental baseline. Future effects of Federal projects that have undergone consultation and of contemporaneous State and private [**109] actions, as well as future changes due to natural processes, are part of the future baseline, to which effects of the proposed project are added.
>
> In consultations on continuing actions such as CVP/SWP operations, it is quite difficult to separate future baseline effects from the anticipated effects of the proposed action. Operations of existing structures, such as dams and gates, for water supply, flood control, and other purposes -- the proposed action -- are integrally related to the existence of the structures themselves, but effects of the mere existence of the structures are not effects of the proposed action. *See National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917, 930-31 (9th Cir. 2008)*. Similarly, some activities that are part of the proposed project are nondiscretionary, and their effects are also not effects of the proposed action. *See id. at 928-29* (citing *National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007)*[)].
>
> Consequently, it is not surprising that in its review of NMFS' December 11, 2008, draft OCAP Opinion, the CALFED Science Review Panel (Anderson *et al.* 2009) commented that a clearly defined baseline was lacking. Reclamation [**110] (2009) provided similar comments. NMFS acknowledges that it was not easy to discern a uniform approach to characterizing the environmental baseline in the draft Opinion. NMFS believes, however, that this is due to the nature of the action under consultation and available information, rather than a flawed approach to the analysis. NMFS clarifies its approach here and in relevant sections of the Opinion.
>
> In *National Wildlife Federation*, a case regarding consultation on the effects of operating hydropower dams on the Columbia River, the 9th Circuit Court of Appeals rejected NMFS' attempt to narrow the "effects of the action" by defining the baseline to include operations that NMFS deemed to be "nondiscretionary." The Court observed that many of the actions NMFS deemed "nondiscretionary" actually were subject to the action agencies' discretion, and it held that it was impermissible to create an imaginary "reference operation" excluding these actions, to which the effects of the action could be compared. Rather, the Court said that the regulatory requirement to consider the effects of the action added to the environmental baseline "simply requires NMFS to consider the effects of [the] actions [**111] 'within the context of other existing human activities that impact the [*848] listed species.' [citations omitted]" *Id. at 930*. In other words, the effects of a particular Federal action are intended to be evaluated not simply on their own, but as they affect the species in combination with other processes and activities.

The question addressed in a consultation is whether the project jeopardizes the species' continued existence. As the court stated in *National Wildlife Federation*, even if the baseline itself causes jeopardy to the species, only if the project causes additional harm can the project be found to jeopardize the species' continued existence. *Id.* This determination requires an evaluation of the project's effects, separate from the conditions that would exist if the project were not carried out.

NMFS and Reclamation together attempted to isolate the effects of proposed project operations by segregating the activities that are within Reclamation's discretion to change in the future from those that are not. This effort was not fruitful. The CVP/SWP operations BA begins with a summary of legal and statutory authorities, water rights, and other obligations relevant to the action (Chapter [**112] 1), all of which are incorporated into the project description (Chapter 2). Neither chapter describes what Reclamation's nondiscretionary operations would be if discretionary aspects of the proposed action were not implemented. In addition, in all of the models and simulations that Reclamation used to prepare the CVP/SWP operations BA, a "no project" scenario was not run. For example, table 2-1 in the CVP/SWP operations BA identifies the major proposed operational actions for consultation, including implementation of the water quality control plan (WQCP), but it is not clear whether implementing the WQCP, or some portion of it, is a non-discretionary action.

Consequently, we determined that if NMFS were to propose a "no project operations" scenario to characterize the environmental baseline, it would be speculative and not supported by the model runs. Following the 9th Circuit's reasoning, with limited exceptions, NMFS assumed that all CVP and SWP operations are subject to the discretion of the project agencies and, thus, that all effects of future operations are effects of the proposed action. The only project effects considered to be within the future baseline (and thus not effects [**113] of the proposed action) are those caused by activities that are clearly outside the agencies' authority. For example, as in *National Wildlife Federation*, it is not within the agencies' discretion to remove dams, so the effects of their existence are part of the baseline. Figure 2-12 provides a conceptual diagram of how NMFS characterizes the past and future components of the environmental baseline for consultations on an ongoing action.

BiOp at 57-60.

NWF v. NMFS II, 524 F.3d 917, 929, applies to whether the BiOp's baseline rationale is reasonable for the proposed action. There, NMFS's 2004 biological opinion for the Federal Columbia River Power System ("FRCPS") "included in the environmental baseline for the proposed action the existing FCRPS, various supposedly nondiscretionary dam operations, and all past and present impacts from discretionary operations." *Id. at 926*. In addition, NMFS "adopted a novel 'reference operation' approach ... purportedly in order to account for the existence of the FCRPS dams." *Id.*

> The reference operation consisted of the dams and a hypothetical regime for operating them, which, according to NMFS, was the most beneficial to listed [*849] fishes of any possible [**114] operating regime. NMFS also found, though, that certain aspects of FCRPS operations-such as operations relating to irrigation, flood control, and power generation-were nondiscretionary, given the dams' existence, and that those aspects should not be considered part of the action under ESA review. The BiOp offers little detail on the nature and extent of the purportedly nondiscretionary obligations or NMFS's basis for finding them to be nondiscretionary.

Id. The Ninth Circuit evaluated this "reference operation" approach:

> The district court properly held that NMFS may not use a hypothetical "reference operation" in its jeopardy analysis to exclude from the proposed actions' impacts the effects of related operations NMFS deems "nondiscretionary." NMFS admits that it chose the reference operation approach in order to avoid "trying to precisely determine the extent of the Action Agencies' discretionary operation." However, neither the ESA nor *Home*

Builders permits agencies to ignore potential jeopardy risks by labeling parts of an action nondiscretionary. We cannot approve NMFS's interpretation of this rule as excluding from the agency action under review discretionary agency actions taken [**115] pursuant to a broad congressional mandate.

***

...NMFS's contention that competing mandates for flood control, irrigation, and power production create any immutable obligations that fall outside of agency discretion is not persuasive. Indeed, NMFS's interpretation is neither mandated nor intimated by the Court's holding in *Home Builders*. The Court's concern in *Home Builders* was that "[a]n agency cannot simultaneously obey the differing mandates set forth in § 7(a)(2) of the ESA and § 402(b) of the CWA." *127 S.Ct. at 2534*. In this context, compliance with the CWA provision is problematic because the provision "affirmatively mandates that [a specific action which conflicts with the ESA] 'shall' be [taken] if the specified criteria are met. The provision operates as a ceiling as well as a floor." *Id. at 2533*. Here, in contrast, Congress has imposed broad mandates which do not direct agencies to perform any specific nondiscretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals.

The 2004 BiOp itself recognizes that Congress has not quantified any of those broad goals, or otherwise specified the manner in which the agencies must fulfill [**116] them. NMFS found, for instance, that Congress has mandated that dam operations include flood control, though "Congress has not prescribed precisely how the Corps must achieve its flood control responsibilities." 2004 BiOp at 5-5. Similarly, Congress has mandated that the BPA market and transmit "some level of power, although the precise level is not defined." *Id.* Thus, the 2004 BiOp recognizes that Congress has not specified the manner in which the agencies must fulfill their various obligations. In other words, while the goals themselves may be mandatory, the agencies retain considerable discretion in choosing what specific actions to take in order to implement them. The agencies are therefore obligated to satisfy the ESA's requirements. *See Pac. Coast Fed'n, 426 F.3d at 1084-85* ("The ESA obligates federal agencies 'to afford first priority to the declared national policy of saving endangered species.' ") (quoting *TVA v. Hill, 437 U.S. 153, 185, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978))*.[FN8]

> [*850] FN8. Moreover, at least some of the competing statutory mandates clearly acknowledge that implementing agencies must accommodate wildlife needs. *See* Northwest Power Act, *16 U.S.C. § 839* (providing for purposes of 1980 Pacific Northwest [**117] Electric Power Planning and Conservation Act "to be construed in a manner consistent with applicable environmental laws"); *ALCOA, 175 F.3d at 1163* ("The Northwest Power Act's goal of providing economical power, however, does not supplant the BPS's obligation to comply with environmental mandates."); Confederated Tribes & Bands of the *Yakima Indian Nation v. FERC, 746 F.2d 466, 473 (9th Cir.1984)* (finding Northwest Power Act places "fish and wildlife concerns on an equal footing with power production").

NMFS may not avoid determining the limits of the action agencies' discretion by using a reference operation to sweep so-called "nondiscretionary" operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis. And *Home Builders* cannot be read, as the State of Idaho would have us do, to immunize discre-

> tionary agency actions simply because they are taken in pursuit of a non-discretionary goal. The concern that an agency cannot "simultaneously obey" with both the ESA and the broad mandates relevant to this case is simply not at issue here.
>
> ESA compliance is not optional. "[A]n agency cannot escape its obligation to comply with the ESA merely because [**118] it is bound to comply with another statute that has consistent, complementary objectives." *Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1032 (9th Cir. 2005).* As the Court emphasized in *Home Builders*, "ESA's no-jeopardy mandate applies to every discretionary agency action-regardless of the expense or burden its application might impose." *127 S. Ct. at 2537*. When an agency, acting in furtherance of a broad Congressional mandate, chooses a course of action which is not specifically mandated by Congress and which is not specifically necessitated by the broad mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation. Because NMFS's approach in the 2004 BiOp produces the opposite result, it is inconsistent with the ESA and its accompanying regulations, and cannot stand.

Id. at 928-29.

NWF v. NMFS found it inappropriate for NMFS to treat as "non-discretionary" activities undertaken to achieve "broad mandates which do not direct agencies to perform any specific nondiscretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals." The opinion does not address the converse situation, present here, where [**119] it is alleged that NMFS included non-discretionary aspects of Project operations in the effects of the action, rather than in the environmental baseline.

Whether or not a particular aspect of project operations is "non-discretionary" is a complex legal inquiry that may take years of litigation to resolve. *See, e.g., Natural Resources Defense Council v. Kempthorne, 627 F. Supp. 2d 1212 (E.D. Cal. 2009)* (resolving lengthy cross motions for summary judgment on the issue of whether Sacramento River Settlement Contracts constituted non-discretionary water delivery obligation). Practically speaking, in all but the most obvious of situations or for obligations that have previously been determined to be "mandatory," it is not feasible for the action agency to finely parse the legal determinations required to distinguish discretionary aspects of the action from non-discretionary ones in the preparation [*851] of a biological opinoin, especially in a system as complex as the joint Project operations. This is reflected in the 2009 Salmonid BiOp's explanation that NMFS could not reliably propose a "no project operations" scenario to characterize the environmental baseline.

Plaintiffs' ultimate argument [**120] is that if non-discretionary project operations are backed out of the "effects of the action" and instead are included in the "baseline" the effects of the action will no longer be "appreciable." This identical argument was explicitly rejected by *NWF v. NMFS II's* holding that comparison of the effects of the action against a hypothetical "reference operation" is not appropriate because the jeopardy analysis must focus on "whether the actionps] effects, when added to the underlying baseline conditions, would tip the species into jeopardy." *524 F.3d at 930*. The Ninth Circuit reasoned:

> To "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *50 CFR § 402.02*; *16 U.S.C. § 1536(a)(2)*. NMFS argues that, under this definition, it may satisfy the ESA by comparing the effects of proposed FCRPS operations on listed species to the risk posed by baseline conditions. Only if those effects are "appreciably" worse than baseline conditions must a full jeopardy [**121] analysis be made. Under this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.
>
> Requiring NMFS to consider the proposed FCRPS operations in their actual context does not, as NMFS argues, effectively expand the "agency action" at issue to include all independent or baseline harms to listed species. Nor does it have the effect of preventing any federal action once background conditions place a species in jeopardy. To "jeopardize"-the action ESA prohibits-means to "expose to

loss or injury" or to "imperil." Either of these implies causation, and thus some new risk of harm. Likewise, the suffix "-ize" in "jeopardize" indicates some active change of status: an agency may not "cause [a species] to be or to become" in a state of jeopardy or "subject [a species] to" jeopardy. American Heritage Dictionary of the English Language (4th ed.). Agency action can only "jeopardize" a species' existence if that agency action causes some deterioration in the species' pre-action condition.

Even under the so-called aggregation approach NMFS [**122] challenges, then, an agency only "jeopardize[s]" a species if it causes some new jeopardy. An agency may still take action that removes a species from jeopardy entirely, or that lessens the degree of jeopardy. However, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.

Our approach does not require NMFS to include the entire environmental baseline in the "agency action" subject to review.[FN9] It simply requires that NMFS appropriately consider the effects of its actions "within the context of other existing human activities that impact the listed species." *ALCOA, 175 F.3d at 1162 n. 6* (citing *50 C.F.R. § 402.02*'s definition of the environmental baseline). This approach is consistent with our instruction (which NMFS [*852] does not challenge) that "[t]he proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and [**123] future human and natural contexts." *Pac. Coast Fed'n, 426 F.3d at 1093* (emphasis added).

> FN9. We note that under NMFS's jeopardy approach, the environmental baseline serves only as a point of reference to determine the net effects of a narrowly-defined action. Thus, whether an action is included in the baseline determines whether its impacts are considered at all in the agency's basic jeopardy analysis.

> The current existence of the FCRPS dams constitutes an "existing human activity" which is already endangering the fishes' survival and recovery. *See ALCOA, 175 F.3d at 1162 n. 6* (citing *50 C.F.R. § 402.02*). Although we acknowledge that the existence of the dams must be included in the environmental baseline, the operation of the dams is within the federal agencies' discretion under both the ESA and the Northwest Power Act, *16 U.S.C. § 839*. Any proposed agency action must be evaluated in the contest of this baseline in order to properly determine whether the proposed actions will jeopardize the listed fishes.

Id. at 929-31 (emphasis added).

Nothing in the law requires NMFS to segregate discretionary aspects of coordinated Project operations from non-discretionary ones in the manner Export [**124] Plaintiffs demand. If feasible, it could have made sense for NMFS to do this to better document the relationship between the requirements of the species and the action agency's statutory authority to implement the RPA. But, NMFS disclaims the capacity to undertake appropriate modeling and related analysis. Export Plaintiffs have not demonstrated that NMFS's disclaimer is unreasonable.

Plaintiffs' motion for summary judgment that NMFS acted unlawfully by failing to segregate discretionary aspects of Project operations from non-discretionary ones is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

2. Treatment of Available Data on Ocean Harvest and Ocean Conditions.

Plaintiffs next argue that NMFS acted unlawfully by failing to quantitatively analyze available data on ocean conditions and ocean harvest. Plaintiffs assert that these failures resulted in an "improper jeopardy finding and invalid RPA." Doc. 431 at 34.

a. Consideration of Ocean Conditions Data.

Plaintiffs argue that the BiOp should have used available data to quantitatively analyze the impact of ocean conditions on the Listed Species. Doc. 43 at 40-45. Specifically, Plaintiffs assert that NMFS [**125] should have performed quantitative analyses using data measuring the Pacific Decadal Oscillation ("PDO"), a recognized index of ocean conditions, so that the "major role ocean conditions play in determining abundance levels of salmonids ... could be compared with other stressors, such as the effects caused by water exports." Deriso Decl., Doc. 440 at ¶ 41. Record evidence suggests ocean conditions play a substantial role in salmon abundance. *See id.* (citing Hare & Mantua (1997), AR 00120076-84); *see also* AR 00084001 (Reclamation arguing to NMFS that "[o]cean conditions likely amount to 99.999% of the cause of the status of Central Valley species" and complaining that NMFS "isn't acknowledging this overwhelming stressor").

[*853] In a four and a half page section, the BiOp discusses the importance of natural environmental cycles, including those affecting ocean productivity:

> 4.2.4.11.1 Natural Environmental Cycles
> Natural changes in the freshwater and marine environments play a major role in salmonid abundance. Recent evidence suggests that marine survival among salmonids fluctuates in response to 20- to 30-year cycles of climatic conditions and ocean productivity (Hare *et al.* 1999, Mantua and [**126] Hare 2002). This phenomenon has been referred to as the Pacific Decadal Oscillation. In addition, large-scale climatic regime shifts, such as the El Niño condition, appear to change productivity levels over large expanses of the Pacific Ocean. A further confounding effect is the fluctuation between drought and wet conditions in the basins of the American west. During the first part of the 1990s, much of the Pacific Coast was subject to a series of very dry years, which reduced inflows to watersheds up and down the west coast.
>
> "El Niño" is an environmental condition often cited as a cause for the decline of West Coast salmonids (NMFS 1996b). El Niño is an unusual warming of the Pacific Ocean off South America and is caused by atmospheric changes in the tropical Pacific Ocean [El Niño Southern Oscillation (ENSO)] resulting in reductions or reversals of the normal trade wind circulation patterns. El Niño ocean conditions are characterized by anomalous warm sea surface temperatures and changes to coastal currents and upwelling patterns. Principal ecosystem alterations include decreased primary and secondary productivity in affected regions and changes in prey and predator species distributions. [**127] Cold-water species are displaced towards higher latitudes or move into deeper, cooler water, and their habitat niches are occupied by species tolerant of warmer water that move upwards from the lower latitudes with the warm water tongue.
>
> A key factor affecting many West Coast stocks has been a general 30-year decline in ocean productivity. The mechanism whereby stocks are affected is not well understood, partially because the pattern of response to these changing ocean conditions has differed among stocks, presumably due to differences in their ocean timing and distribution. It is presumed that survival in the ocean is driven largely by events occurring between ocean entry and recruitment to a sub-adult life stage.
>
> The freshwater life history traits and habitat requirements of juvenile winter-run and fall-run are similar. Therefore, the unusual and poor ocean conditions that caused the drastic decline in returning fall-run populations coast wide in 2007 (Varanasi and Bartoo 2008) are suspected to have also caused the observed decrease in the winter-run spawning population in 2007 (Oppenheim 2008). Lindley *et al.* (2009) reviewed the possible causes for the decline in Sacramento River [**128] fall-run in 2007 and 2008 for which reliable data were available. They concluded that a broad body of evidence suggested that anomalous conditions in the coastal ocean in 2005 and 2006 resulted in unusually poor survival of the 2004 and 2005 broods of fall-run. However, Lindley *et al.* (2009) recognize that the rapid and likely temporary deterioration in ocean conditions acted on top of a long-term, steady degradation of the freshwater and estuarine environment.
>
> 4.2.4.11.2 Ocean Productivity

The time at which juvenile salmonids enter the marine environment marks a critical period in their life history. Studies have shown the greatest rates of [*854] growth and energy accumulation for Chinook salmon occur during the first 1 to 3 months after they enter the ocean (Francis and Mantua 2003, MacFarlane *et al.* 2008)....Therefore, the conditions that juvenile salmonids encounter when they enter the ocean can play an important role in their early marine survival and eventual development into adults.

It is widely understood that variations in marine survival of salmon correspond with periods of cold and warm ocean conditions, with cold regimes being generally favorable for salmon survival and warm ones [**129] unfavorable....

***

The generally warmer ocean conditions in the California Current that began to prevail in late 2002 have resulted in coastal ocean temperatures remaining 1-2 °C above normal through 2005. A review of the previously mentioned indicators for 2005 revealed that almost all ecosystem indices were characteristic of poor ocean conditions and reduced salmon survival....

Updated information provided by Peterson *et al.* (2006) on the NWFSC Climate Change and Ocean Productivity website shows the transition to colder ocean conditions, which began in 2007, has persisted throughout 2008. All ocean indicators point toward a highly favorable marine environment for those juvenile salmon that entered the ocean in 2008.... Therefore, ocean conditions in the broader California Current appear to have been favorable for salmon survival in 2007 and to a greater extent in 2008, which bodes well for Chinook salmon populations returning in 2009 and 2010. These ecosystem indicators can be used to provide an understanding of ocean conditions, and their relative impact on marine survival of juvenile salmon, throughout the broader, northern portion of the California Current. However, they may not [**130] provide an accurate assessment of the conditions observed on a more local scale off the California coast.

Wells *et al.* (2008a) developed a multivariate environmental index that can be used to assess ocean productivity on a finer scale for the central California region. This index (also referred to as the Wells Ocean Productivity Index) has also tracked the Northern Oscillation Index, which can be used to understand ocean conditions in the North Pacific Ocean in general. The divergence of these two indices in 2005 and 2006 provided evidence that ocean conditions were worse off the California coast than they were in the broader North Pacific region. The Wells *et al.* (2008a) index incorporates 13 oceanographic variables and indices and has correlated well with the productivity of zooplankton, juvenile shortbelly rockfish, and common murre production along the California coast (MacFarlane *et al.* 2008). In addition to its use as an indicator of ocean productivity in general, the index may also relate to salmon dynamics due to their heavy reliance on krill and rockfish as prey items during early and later life stages. For instance, not only did the extremely low index values in 2005 and 2006 [**131] correlate well with the extremely low productivity of salmon off the central California coast in those years, but the index also appears to have correlated well with maturation and mortality rates of adult salmon from 1990-2006 in that region (Wells and Mohr 2008). Although not all of the data are currently available to determine the Wells *et al.* (2008a) index values for 2007 and 2008, there is sufficient information to provide an indication of the likely ocean conditions for those 2 years, which can then be compared to 2005 and 2006.

[*855] A review of the available information suggests ocean conditions in 2007 and 2008 have improved substantially over those observed in 2005 and 2006. For instance, the spring transition, which marks the beginning of the upwelling season and typically occurs between March and June, was earlier in 2007 and 2008 compared to 2005 and 2006. An early spring transition is often indicative of greater productivity throughout the spring and summer seasons (Wells and Mohr 2008, Peterson *et al.* 2006). Coastal upwelling, the process by which cool, nu-

trient rich waters are brought to the surface (perhaps the most important parameter with respect to plankton productivity), [**132] was also above average in 2007 and 2008. Moreover, coastal sea surface temperature and sea level height (representative of the strength of the California current and southern transport) values were also characteristic of improved ocean productivity (Wells and Mohr 2008). Thus, contrary to the poor ocean conditions observed in the spring of 2005 and 2006, the Wells *et al.* (2008a) index parameters available at this time indicate spring ocean conditions have been generally favorable for salmon survival off California in 2007 and 2008.

In contrast to the relatively "good" ocean conditions that occurred in the spring, the Wells *et al.* (2008a) index values for the summer of 2007 and 2008 were poor in general, and similar to those observed in 2005 and 2006. Summer sea surface temperature followed a similar pattern in both 2007 and 2008, starting out cool in June, and then rising to well above average in July before dropping back down to average in August (Wells and Mohr 2008). The strong upwelling values observed in the spring of 2007 and 2008 were not maintained throughout the summer, and instead dropped to either at or below those observed in 2005 and 2006. Finally, sea level height and [**133] spring curl values (a mathematical representation of the vertical component of wind shear which represents the rotation of the vector field), which are negatively correlated with ocean productivity, were both poor (Wells and Mohr 2008). Therefore, during the spring of 2007 and 2008, ocean conditions off California were indicative of a productive marine environment favorable for ocean salmon survival (and much improved over 2005 and 2006). However, those conditions did not persist throughout the year, as Wells *et al.* (2008a) index values observed in the summer of 2007 and 2008 were similar to those experienced in the summer of 2005 and 2006, 2 years marked by extremely low productivity of salmon off the central California coast.

> Evidence exists that suggests early marine survival for juvenile salmon is a critical phase in their survival and development into adults. The correlation between various environmental indices that track ocean conditions and salmon productivity in the Pacific Ocean, both on a broad and local scale, provides an indication of the role they play in salmon survival in the ocean. Moreover, when discussing the potential extinctions of salmon populations, Francis and [**134] Mantua (2003) point out that climate patterns would not likely be the sole cause but could certainly increase the risk of extinction when combined with other factors, especially in ecosystems under stress from humans. Thus, the efforts to try and gain a greater understanding of the role ocean conditions play in salmon productivity will continue to provide valuable information that can be incorporated into the management of these species and should continue to be pursued. However, the highly variable nature of these environmental factors makes it very difficult, [*856] if not impossible, to accurately predict what they will be like in the future. Because the potential for poor ocean conditions exists in any given year, and there is no way for salmon managers to control these factors, any deleterious effects endured by salmonids in the freshwater environment can only exacerbate the problem of an inhospitable marine environment. Therefore, in order to ensure viable populations, it is important that any impacts that can be avoided prior to the period when salmonids enter the ocean must be carefully considered and reduced to the greatest extent possible.

BiOp at 149-53.

Plaintiffs do not argue that [**135] the BiOp entirely failed to consider ocean conditions and/or the PDO. [14] Rather, they argue that NMFS should have evaluated the impact ocean conditions have on salmon populations quantitatively, so that the effect of ocean conditions can be compared to the effects of project operations. In support of this argument, Plaintiffs quote the Peer Review: "[T]he possibility exists that we may be analyzing effects that occur within the system that ultimately are overshadowed by dynamics and effects in the marine phase." Doc. 487 at 36 (citing AR 0089603).

Plaintiffs' quotation is incomplete; the whole paragraph provides:

> The ocean phase remains a major knowledge gap for all of the species. Some information is available for salmon and adult green sturgeon, but little is known for steelhead and sub-adult green sturgeon. Growth and mortality after leaving the system can be affected by a variety of sources including climate patterns and effects on productivity and species community, harvest, trawl by catch, and predation by marine mammals and other predators. The draft BO does not directly address growth and survival during the ocean phase for any of the species. While we understand the logic, [**136] and time and knowledge limitations, the possibility exists that we may be analyzing effects that occur within the system that ultimately are overshadowed by dynamics and effects in the marine phase.

AR 0089603. Although the Peer Review expressly recognizes a need to consider "the dynamics and effects in the marine phase," as possibly significant to the species, this is not a pronouncement that standard scientific practice demands a quantitative analysis of ocean conditions. Plaintiffs cite no legal requirement that NMFS perform a quantitative analysis to determine the relative impact of ocean conditions on salmon populations. The ESA does not require such an analysis. The caselaw affirmatively decries such a relativistic approach. *See NWF v. NMFS II, 524 F.3d at 930* ("even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm"). The relevant question is whether or not the record supports NMFS's conclusion that Project operations appreciably diminish those species' likelihood of survival and recovery in light of all pre-existing natural and manmade conditions. The appropriate focus, under *NWF v. NMFS* [**137] *II*, is not on the Projects' relative [*857] contribution to harm compared to ocean conditions, but rather, whether Project operations cause separate harm, including by making the species more vulnerable to adverse ocean conditions.

> 14 The BiOp explains why the PDO is not necessarily the ideal measurement of ocean conditions off the California coast. While general ecosystem indicators, like the PDO, "can be used to provide an understanding of ocean conditions, and their relative impact on marine survival of juvenile salmon, throughout the broader, northern portion of the California Current... they may not provide an accurate assessment of the conditions observed on a more local scale off the California coast." BiOp at 151. Instead, the BiOp examined available data using the Wells index, which does provide specific information about conditions off the California coast. *Id.*

The BiOp concludes that because the natural cycles that drive ocean conditions are "highly variable," it makes it "very difficult, if not impossible, to accurately predict what they will be like in the future," and because "the potential for poor ocean conditions exists in any given year, and there is no way for salmon managers [**138] to control these factors, any deleterious effects endured by salmonids in the freshwater environment can only exacerbate the problem of an inhospitable marine environment." BiOp at 152-53.

The BiOp cites Lindley (2009) for the proposition that deterioration in ocean conditions has "acted on top of a long-term, steady degradation of the freshwater and estuarine environment." *Id.* at 149 (citing Lindley (2009), AR 00123514-631). Plaintiffs are correct that Lindley (2009) found that ocean conditions and fishery management played roles in the low escapement of 2007. AR 00123517-18. Plaintiffs quote Lindley (2009)'s conclusion that "unfavorable ocean conditions were the proximate cause" of declines to the 2004 and 2005 broods. Doc. 487 at 38. Plaintiffs take these statements out of context. Before discussing impacts to salmon populations caused by human effects on the freshwater environment, Lindley (2009) emphasized the difference between "proximate" and "ultimate" causation:

> So far, we have restricted our analysis to the question of whether there were unusual conditions affecting Sacramento River fall-run Chinook from the 2004 and 2005 broods that could explain their poor performance, reaching [**139] the conclusion that unfavorable ocean conditions were the proximate cause. But what about the ultimate causes?

AR 00012355. The paper concluded that human manipulation of the freshwater environment likely "played a significant role in making this stock susceptible to collapse during periods of unfavorable ocean conditions." AR 00123551.

The law does not require a quantitative, comparative fault type analysis. If the species is in decline and one of the causes is Project operations, the agency has discretion to address and mitigate the resulting harm. The ex-

tent to which the record affirmatively demonstrates that Project operations cause separate harm is examined below in connection with Plaintiffs' challenges to the effects analysis.

Plaintiffs' motion for summary judgment that NMFS violated the ESA by failing to quantitatively analyze ocean conditions is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

b. Consideration of Ocean Harvest Impacts.

Plaintiffs also argue that NMFS acted unlawfully by failing to quantify the effect of ocean harvest on the Listed Salmonids. Their argument is that: (1) NMFS has sufficient quantitative data to analyze the effects [**140] of ocean harvest on the Listed Salmonids because it manages the ocean harvest; (2) that data, if it had been quantitatively analyzed in the BiOp, would have revealed that the losses caused by Project operations are miniscule in comparison to losses caused by ocean harvest. Doc. 431 at 37-40.

The ESA requires NMFS to evaluate to what extent the losses are caused by the proposed action, here the operation of the CVP and SWP. The action in question does not include ocean harvest, which in part is the result of separate government activity. NMFS quantitatively evaluated the impacts of ocean harvest on the Listed Species in a separate biological opinion. [*858] The Salmonid BiOp acknowledges that ocean harvest is a part of the environmental baseline affecting species viability, *see* BiOp at 144-46 (discussing ocean commercial and ocean and inland sport harvest as "factors responsible for the current status" of the Listed Species), but does not quantitatively integrate the impact of ocean harvest into the analysis of Project-related impacts on the species.

NMFS's obligation under the ESA is to evaluate how Project operations affect the Listed Species, in light of a depleted population impacted by [**141] ocean harvest and other conditions. It is inexplicable that these species are being managed in a piecemeal fashion, without considering all aspects of their life cycle in the same analysis, which would facilitate description of the true effect Project operations have on the species in light of other conditions. What population is available to be affected by Project operations is entirely relevant, as all Defendants have sought to attribute the species' decline to Project operations. Nonetheless, under *NWF v. NMFS*, the analytical focus is not on the relative contribution of the Projects to the species' condition, but whether the Projects cause additional, independent harm. Plaintiffs' motion for summary judgment that NMFS acted unlawfully by failing to quantitatively analyze ocean harvest impacts to determine whether, relatively speaking, they overwhelm Project impacts is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

C. Effects Analysis Challenges.

1. Use of a 100-Year Timeframe.

The BiOp evaluated how the proposed action would impact the species' risk of extinction over a 100-year time period. BiOp at 51. The BiOp explains that the jeopardy standard [**142] has been interpreted in the Joint Consultation Regulations as "a requirement that Federal agencies ensure that their actions are not likely to result in appreciable reductions in the likelihood of both the survival and recovery of the species in the wild by reducing its numbers, reproduction, or distribution." *Id.* at 42 (citing *50 C.F.R. § 402.02*). This means:

> .... NMFS equates a listed species' probability (or risk) of extinction with the likelihood of both the survival and recovery of the species in the wild for purposes of conducting jeopardy analyses under section 7(a)(2) of the ESA. In the case of listed salmonids, we use the Viable Salmonid Populations (VSP) framework (McElhany *et al.* 2000) as a bridge to the jeopardy standard. A designation of "a high risk of extinction" or "low likelihood of becoming viable" indicates that the species faces significant risks from internal and external processes that can drive it to extinction. The status assessment considers and diagnoses both the internal and external processes affecting a species' extinction risk.

BiOp at 42. The VSP framework estimates the viability of salmonid populations by defining a viable salmonid population as one that [**143] "has a negligible probability of extinction over a 100-year time frame." *Id.* at 51. More specifically, the BiOp sets the threshold for jeopardy as the point at which the effects of the action, in the context of the baseline, result in a risk of extinction of greater than five percent over 100 years. The threshold combines two types of information: a probability of extinction expressed as the percentage likelihood of extinction and a timeframe within which that probability may come to pass, expressed in years. NMFS utilizes a NMFS technical memorandum by McElhany *et al.* (2000), AR 00124576, and a 2007 article by Lindley *et al.*, AR 00123475, as "a bridge to [this] jeopardy standard." BiOp at 42-43, 51-53.

[*859] The five percent probability of extinction component of the BiOp's standard is derived Lindley (2007), which opines: "We assume a 5% risk of extinction in 100 years is an acceptably low extinction risk for populations (Thompson, 1991)." AR 00123477 (emphasis added). Lindley (2007) describes specific criteria for assessing the risk of extinction, and "assume[s] that a 5% risk of extinction in 100 years is [] acceptably low...." AR 00123477. Lindley (2007) characterizes a risk of extinction [**144] of less than five percent within 100 years as "low," greater than five percent within 100 years as "moderate," and greater than 20% within 20 years as "high." AR 00123478.

The BiOp appears to derive the 100-year timeframe from McElhany (2000). *See* BiOp at 51. McElhany (2000) describes a viable salmonid population as "an independent population of any Pacific salmonid [ ] that has a negligible risk of extinction due to threats from demographic variation (random or directional), local environmental variation, and genetic diversity changes (random or directional) over a 100-year time frame." AR 00124594. Regarding the selection of the 100-year time frame, McElhany (2000) states: "While it is ultimately an arbitrary decision, the 100-year time scale was chosen to represent a 'long' time horizon for evaluating extinction risk." Plaintiffs claim that neither the BiOp nor McElhany provide a reasoned basis for the decision to choose a time frame of 100 years, as opposed to any other, shorter, timeframe. When the McElhany (2000) sentence is read in context, an explanation is provided for the 100-year time scale emerges:

> While it is ultimately an arbitrary decision, the 100-year time scale was [**145] chosen to represent a "long" time horizon for evaluating extinction risk. It is necessary to evaluate extinction risk at a long time scale for several reasons. First, many recovery actions (such as habitat restoration) are likely to affect population status over the long term. Second, many genetic processes important to population function (such as the loss of genetic diversity or accumulation of deleterious mutations) occur over decades or centuries and current actions can affect these processes for a long time to come. Third, at least some environmental cycles occur over decadal (or longer) time scales (e.g., oceanic cycles-Beamish and Bouillon 1993, Mantua *et al.* 1997, Hare *et al.* 1999). Thus, in order to evaluate a population's status it is important to look far enough into the future to be able to accommodate large-scale environmental oscillations and trends.

AR 00124595. Plaintiffs identify no record evidence suggesting that this explanation is irrational.

Plaintiffs also argue that the 100-year timeframe is arbitrary in light of the fact that NMFS used a 24-year time frame just a year earlier in the biological opinion for the Federal Columbia River Power System ("FCRPS BiOp"). [**146] AR 00130923. The FCRPS BiOp addressed critiques suggesting that it use a 100-year extinction risk period as follows:

> Some suggested that NOAA Fisheries evaluate a 100-year extinction risk time horizon, rather than a 24-year period, or else set standards for both periods. The rationale was that the 24-year extinction risk is lower than the 100-year extinction risk (i.e., it "inflates" survival probability compared to the 100-year time horizon). It has been well-documented that extinction risk increases with longer time horizons, with the probability of extinction "approaching 100% for all species if the period is long enough" (NRC 1995). For example, Oregon's comments (page 5) include a Figure 2 that shows a low likelihood of extinction over 24 and 48 years and a high likelihood [*860] of extinction over 100 years for Upper John Day spring Chinook. This population is not listed under ESA, and is considered by the state of Oregon to be healthy (ODFW 2006a). While NOAA Fisheries is not familiar with the data or assessment methodology used in Oregon's 100-year extinction risk estimates for this population, their result suggests that even healthy salmon stocks may appear to have a high likelihood [**147] of extinction under this assumption. It has been equally well-documented that the precision of the risk estimate decreases with longer time horizons. For example, Fieberg and Ellner (2000) estimated that reliable estimates of extinction risk may only be possible when the number of base period observations is 5-10 times greater than the number of years in the time horizon.
>
> NOAA Fisheries continues to rely primarily on the 24-year time horizon for this analysis because the main purpose of

> the metric is to inform our judgment regarding the ability of the species to survive while actions to promote recovery are implemented under the Prospective Actions and through other processes. The 24-year period is more than twice that of most of the Prospective Actions and is identical to the short-term period considered in the 2000 FCRPS Biological Opinion (NMFS 2000b). However, NOAA Fisheries did calculate extinction risk over the 100-year time horizon to allow comparison of the 24-year extinction risk results with the 100-year extinction risk results of interest to some parties in the region. The 100-year extinction risk estimates and associated confidence intervals are reported in the Aggregate [**148] Analysis Appendix.

AR 00130937.

Plaintiffs maintain that these paragraphs from the FRCPS BiOp demonstrate that NMFS adopted a "prior practice" of using a 24-year extinction period and that NMFS failed to supply a reasoned basis for departing from that prior practice. *See River Runners for Wilderness v. Martin, 593 F.3d 1064, 1075-76 (9th Cir. 2010)* ("Part of the discretion granted to federal agencies is the freedom to change positions.... [A]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.") (internal citations and quotations omitted).

Plaintiffs suggest there is conflict between these two biological opinions. The FRCPS BiOp utilizes a 24-year timeframe to quantitatively evaluate short-term extinction risk where sufficient data was available to do so. AR 00131546. That was only possible for six of the 13 species covered by that biological opinion. NMFS did not have sufficient data to perform a 24-year analysis for the remaining seven species, so NMFS used a qualitative analysis of the VSP factors that considers a 100-year timeframe. *See* FCRPS BiOp, Chapter [**149] 8. [15] Plaintiffs have not established that the 2009 Salmonid BiOp is a marked departure from prior and/or contemporaneous practice for the risk of extinction assessment. No evidence shows the shorter time span represents the best available science. This is another dispute that ends by default, with NMFS claiming the absence of data to permit it to engage in its preferred analysis. What has not been explained is whether or not a 100-year [*861] period introduces bias toward an extinction finding.

> 15 The AR contains a portion of the FCRPS BiOp. The complete BiOp is available at http://www.nwr.noaa.gov/Salmon-Hydropower/Columbia-Snake-Basin/final-BOs.cfm.

Based on limited precedent, the agency's partial justification, and the lack of any evidence demonstrating the agency's approach was irrational, the law defers to the agency. Plaintiffs' motion for summary judgment that NMFS acted unlawfully by failing employing a 100-year timeframe is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

2. Winter-Run Viability Analysis.

Plaintiffs contend that the BiOp's determination that winter-run are at a "high risk of extinction" is not based on the best available science because [**150] that determination is an unexplained departure from a "nearly contemporaneous classification" to the contrary by Lindley (2007). AR 00123478. In addition, Lindley (2007) incorporates assessments of spatial distribution, as well as genetic and life history diversity. Plaintiffs maintain that Lindley classified the winter-run as "low risk" in 2007 and that the BiOp's reclassifying the species as being at "high risk" of extinction is unexplained. Doc. 431 at 64-66.

This argument is unconvincing for two reasons. First, Lindley (2007) did not unequivocally classify the winter-run as "low risk." Lindley (2007) assesses a population's viability by examining criteria relating to: (1) population size, (2) population growth rate, (3) the occurrence of catastrophic declines, and (4) the degree of hatchery influence. AR 000123478. In Table 1 of Lindley (2007) the thresholds for finding "high," "moderate," or "low" risk as to each of these four criteria are defined.

> **Table 1.** Criteria for assessing the level of risk of extinction for populations of Pacific salmonids. Overall risk is determined by the highest risk score for any category. (Modified from Allendorf et al. 1977)

	Risk of Extinction		
Criterion	High	Moderate	Low

	Risk of Extinction		
Criterion	High	Moderate	Low
Extinction risk	> 20% within	> 5% within	< 5% within
from PVA	20 years	100 years	100 years
	- or any ONE	- or any ONE	- or ALL of -
	of -	of -	
Population size[a]	N_e 50	50 < N_e 500	N_e > 500
	-or-	-or-	-or-
	N 250	250 < N	N > 2500
		2500	
Population decline	Precipitous	Chronic decline	No decline
	decline[b]	or depression[e]	apparent or
			probable
Catastrophe, rate	Order of	Smaller but	not apparent
and effect[d]	magnitude	significant	
	decline within	decline [e]	
	one generation		
Hatchery unfluence[f]	High	Moderate	LOW

[a] Census size N can be used if direct estimates of
effective size N_e are not available,
assuming $N_e/N = 0.2$.
[b] Decline within last two generations to
annual run size 500 spawners, or run size
> 500 but declining at 10% per year.
Historically small but stable population not included.
[c] Run size has declined LO 500, but new stable.
[d] Catastrophes occuring within the last 10 years.
[e] Decline < 90% but biologically significant.
[f] See Kigure 1 for assessing hatchery impacts.

[*862] AR [**151] 00123478.

Lindley (2007) concluded that, at the time the paper was published, winter run "easily satisfie[d] the low-risk criteria for population size, population decline, and catastrophe, but hatchery influence [was] a looming concern." AR 000123486. Lindley (2007) also factors in spatial distribution, as well as genetic and life-history diversity as part of an overall assessment of viability. AR 00123481. Applying these additional criteria to winter-run, Lindley (2007) concluded:

> The Sacramento River winter-run Chinook salmon ESU does not currently satisfy the representation and redundancy rule because it has only one population, and that population spawns outside of the ecoregion where it evolved. For the Sacramento River winter-run Chinook salmon ESU to satisfy the representation and redundancy rule, at least two populations would need to be re-established in the basalt-and-porous-lava region. This may require passage past Shasta and Keswick dams.

Obviously, an ESU represented by a single population at moderate risk of extinction is at high risk of extinction over the long run. A single catastrophe could extirpate the entire Sacramento River winter-run Chinook salmon ESU, if its effects [**152] persisted for four or more years. The entire stretch of the Sacramento River used by winter run Chinook salmon is within the zone of influence of Mt. Lassen. Some other possible catastrophes include a prolonged drought that depletes the cold water storage of Lake Shasta or some related failure to manage cold water storage, a spill of toxic materials with effects that persist for four years, or a disease outbreak.

AR 00123487.

Lindley (2007) advocated that an alternative assessment, population viability analysis ("PVA"), be applied where possible and that the results of the PVA be compared to the "simpler" criteria described in Lindley (2007). The authors opined that, at the time the paper was published, winter run were at a "moderate extinction risk" according to the PVA. AR 00123486.

Federal Defendants accurately described the Lindley (2007) findings and identified more recent information, including the 2007 population crash, that render Lindley (2007)'s specific conclusions outdated. NMFS first focused on the catastrophe criteria:

> At the time of publication, Lindley *et al.* (2007) indicated that winter-run satisfies the low-risk criteria for population size, population decline, and catastrophe. [**153] However, they also acknowledged that the previous precipitous decline to a few hundred spawners per year in the early 1990s would have qualified it as high risk at that time, and the 1976-77 drought would have qualified as a high-risk catastrophe. In consideration of the almost 7-fold decrease in population in 2007, coupled with the dry water year type in 2007, followed by the critically dry water year type in 2008 (which could be qualified as a high-risk catastrophe) and likely a similar forecast for 2009, NMFS concludes that winter-run are at a high risk of extinction based on population size.

BiOp at 86.

Plaintiffs argue that the BiOp's conclusion that the almost seven-fold decrease in population in 2007, and resulting conclusion that winter run were at "high risk" of extinction based on population size is without support in the record, because, according to Lindley, even the 2007 population decline does not meet the "high risk" criteria (*see* Table 1 above). The population never fell to or below 500 spawners, nor [*863] did the 2007 decline meet or exceed the 90% "order of magnitude" decline definition. Cramer Decl., Doc. 448 at ¶¶ 42, 44. [16] Federal Defendants do not attempt to refute this [**154] criticism, and it appears that the record does not support a high risk finding in light of Lindley (2007)'s definition of a "high risk" designation based on population. [17]

16 Plaintiffs invoke Lindley (2009) to argue that the impacts to the species in the freshwater phase during recent years were inconsequential in comparison to the impacts resulting from poor ocean conditions. This argument fails for the reasons discussed above. Lindley recognized that the period of deteriorated ocean conditions, which were a major short-term cause of population decline, acted in conjunction with a long-term steady degradation of the freshwater environment leaving Chinook vulnerable to other stressors. *See* BiOp at 149; AR 00123517.

17 Federal Defendants attempt to defend this analysis by asserting that the winter-run "population trend has been consistently negative for several decades." Doc. 477-1 at 50. Plaintiffs point out that Federal Defendants rely on a comparison of 2008 figures to 1969 figures to reach this conclusion. Doc. 487 at 47. Lindley (2007) states that "[p]opulation growth (or decline) [] is estimated from the slope of the natural logarithm of spawners versus time for the most recent 10 [**155] years of spawner count data." AR 00123481. In fact, when Lindley applied this standard to the most recent 10 years of data available at the time of publication, the population showed growth not decline. AR 00123486. Defendants do not explain this inconsistency.

Plaintiffs also challenge this determination on the ground that Lindley (2000) defines a "catastrophe," as an event occurring within the last 10 years that caused "an order of magnitude decline within one generation," which "is created by a 90% decline in population size" over that generation. AR 00123478. Plaintiffs point out, and Federal Defendants do not dispute, that the 2007 population decline of 76% in one generation, while significant, did not meet this standard. Doc. 487 at 46. A 76% decline arguably meets the standard for "moderate" catastrophe, which is described as one that is "smaller" than a high-risk catastrophe, but "still [a] significant decline." NMFS's conclusion that the three subsequent years of drought caused a "high-risk" catastrophe is not supported by the record. It is at most a "moderate-risk" catastrophe.

Federal Defendants point out that in order for a population to be considered viable, it "must meet [**156] all the low-risk thresholds." Doc. 477-1 (citing BiOp at 84). Whether the drought was a "high" or "moderate" risk catastrophe or whether the population should actually have been classified as "low-risk" based on population size, does not change the fact that the winter-run are "not viable," because a classification of "moderate" is justified as to at least one criteria: catastrophe.

In addition, the BiOp found that winter-run are at a high-risk of extinction based on spatial structure. BiOp at 86-87. Although "spatial structure" was not one of Lind-

ley (2007)'s primary criteria for population viability, it was considered. AR 00123481, 00123487. Lindley (2007) concluded that the winter-run "does not currently satisfy the representation and redundancy rule because it has only one population and that population spawns outside of the ecoregion where it evolved." AR 00123487. To satisfy this rule at least two populations would need to be re-established. *Id.* Plaintiffs emphasize that this situation is "entirely attributable to baseline conditions (i.e., dams)." Doc. 487 at 48. Lindley acknowledges this, noting that establishment of additional winter-run populations "may require passage past [**157] Shasta and Keswick dams." AR 00123487. But, this does not render spatial structure irrelevant to the BiOp's analysis. "[A]n agency may not take action that will tip a [*864] species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *NWF v. NMFS II, 524 F.3d at 930.*

Is there a practical implication in the BiOp of NMFS's unsupported description that the winter-run are at "high-risk," as opposed to the less serious classification of "not viable"? Plaintiffs cite Steven Cramer's Reply Declaration to support their argument that the BiOp used the "high-risk" designation to "justify its failure to do a careful, scientific analysis of the RPA because immediate radical action supposedly is necessary." Doc. 487 at 44 (citing Cramer Reply Decl., Doc. 487 at ¶¶ "20-17[sic]"). Cramer opines:

> ...Although "high-risk" of extinction is not a necessary criteria for determination of jeopardy, NMFS uses the "high risk" rating that stems from its misapplication of Lindley *et al.* (2007) to indicate that immediate additional constraints on [**158] water operations are needed to avoid extinction. In other words, from its initial, scientifically incorrect premise, NMFS implies that substantial new restrictions are necessary because the population is supposedly at high risk of extinction, so any careful analysis of the RPAs is inconsequential compared to a claimed urgent need to take radical action. (*See* Fed. Def. Br. at 8-9.)

Id. at ¶ 20. Cramer's accusations are troubling, but are not reflected in the record. Mr. Cramer cites pages 8-9 of Federal Defendants' memorandum in support of their cross motion for summary judgment. Nowhere on those pages do Federal Defendants even mention the "high-risk" rating, let alone rely upon it to justify the RPAs in any way.

Plaintiffs have identified areas of NMFS's analysis that are completely unsupported by the record, constituting "clear error." The extent to which they undermine the viability determination is properly addressed on remand. This aspect of the BiOp must be remanded for correction.

3. Orca Analysis.

The BiOp concluded that the Southern Resident population was so diminished that "the loss of a single individual, or the decrease in reproductive capacity of a single individual, is likely [**159] to reduce the likelihood of survival and recovery of the DPS." BiOp at 573. The BiOp also concluded that any reduction in the Southern Resident's prey base may have adverse physiological effects on Southern Residents. *Id.*

Plaintiffs point to yet another separate biological opinion issued May 5, 2009, evaluating the effects of the Pacific Coast Salmon Plan, which governs management of commercial and recreational salmon fishing off the west coast of the United States, on the Southern Residents ("Orca Salmon Harvest BiOp"). *See* AR 00131721 - 802. According to Plaintiffs, the Orca Salmon Harvest BiOp "produced an extraordinarily detailed quantitative analysis of the effect of decreases in the adult [C]hinook population on Southern Residents ... that incorporated data on factors such as orca abundance, size, and kilocalorie requirements, which NMFS used to project the percent changes in prey availability at different locations in the orcas' range, different times of the year, and different levels of quality in yearly [C]hinook salmon production." Doc. 431 at 35. The Orca Salmon Harvest BiOp concluded that planned ocean harvest of salmon would not jeopardize the Southern Resident Killer Whales. [**160] AR 00131781.

[*865] The crux of Plaintiffs' complaint is that both the conclusions reached and the methodologies used in the 2009 Salmonid BiOp are inconsistent with those of the earlier-issued, more comprehensive and focused Orca Salmon Harvest Biop. Plaintiffs argue:

> One would think that the Orca BiOp's analysis-which found that percent reductions in available chinook ranging up to 11.8% would not jeopardize the Southern Residents-would represent the best available science, and would provide extensive guidance to NMFS in its analysis of the effect of the projects' take of juvenile salmonids. And yet, NMFS relied instead on an earlier quantitative analysis, produced

February 4, 2009, which it never updated or revised to reflect the new state of the agency's own science represented by the Orca BiOp. (BiOp, App. 3, AR 00107119-136.) The earlier study contained in Appendix 3 did not include any of the analysis of Southern Resident metabolic needs, location, or seasonal migration-all of which were described as "necessary" in the NMFS Orca BiOp study issued a full month before the final publication of the Salmonid BiOp. In fact, Appendix 3 of the BiOp does not even mention the Orca BiOp, despite [**161] its obvious relevance and its status as the best available science on the effect of the take of adult salmon on Southern Residents. This, on its own, was a failure to use the best available science in violation of the ESA.

What Appendix 3 did instead was to quantitatively analyze the effect of the projects on adult salmon abundance under the various Reclamation Study scenarios. It compared these analyses with a scenario representing salmon production without the water projects ("No Project"), which it defined as the highest salmon production year on record. (BiOp, App. 3 at 1, AR 00107119.).... What does this study show? It shows that in the worst case scenario-which is a comparison of the best possible outcome and the worst possible outcome-the reduction in total number of adults would be 13.9% (see highlighted figures above).

It is useful to look at this very worst case scenario in terms of numbers: the total projected population reduction caused by that 13.9% reduction is 120,945 adult salmon. To put that in perspective, that hypothetical worst case scenario is smaller than the actual reported total loss in the lowest ocean harvest on record (161,845 adult salmon). RJN, Ex. 2, Ocean Harvest BiOp at 31. [**162] Looking at the average projected reduction in Study 7.1 and Study 8.0 (the column labeled "Mean") compared with the "No Project" scenario, the result of the projects is a much more modest take of about 20,150 fish, which is eight times less than the lowest salmon ocean harvest ever recorded.

Doc. 431 at 35-36.

Federal Defendants maintain that the two biological opinions are not inconsistent because they address impacts over different time frames and from different actions. The Orca Salmon Harvest BiOp describes short-term impacts to prey availability in specific months during high abundance Chinook years. The 2009 Salmonid BiOp considered impacts to Southern Residents caused by long-term increase in the risk of extinction for winter-run and spring-run Chinook, in addition to long-term impacts to fall-run. BiOp at 573. The Orca Salmon Harvest BiOp concluded the long-term impact of ocean harvest is not likely to appreciably reduce the survival and recovery of the listed Chinook and other salmon affected by harvest, in part because the fishery is managed to adjust harvest levels annually according to the actual salmon population available for harvest, thereby [*866] avoiding harm to the species. [**163] AR 00131776-81. The 2009 Salmonid BiOp concluded that Project operations would increase the risk of extinction of winter-run and spring-run, which "increases the risk of a permanent reduction in prey available to Southern Residents, and increases the likelihood for local depletions of prey in particular locations and times." *Id.* at 574.

Although these biological opinions facially consider different time frames and different actions, it is undeniable that they are temporally and factually interrelated. The Salmonid BiOp specifically concludes that Project operations will reduce the abundance of naturally produced CV fall run Chinook salmon, a source of prey to the Southern Residents. BiOp at 574. As a result, the Salmonid BiOp concludes "Southern Residents would likely experience nutritional, reproductive, or other health effects from reduced prey as a result of the proposed action." *Id.* In contrast, the Orca Salmon Harvest BiOp concludes that, even in the long run, implementation of the Pacific Coast Salmon Plan will not have long-term deleterious effects on Chinook salmon. AR 00131776-77. It is true that the Pacific Coast Salmon Plan is designed to manage commercial and recreational [**164] salmon harvest to meet salmon recovery goals and requires conservation measures, including suspension of all harvest if necessary, when Chinook stocks are doing poorly. AR 00131777. This amounts to a "do no harm" approach to managing the fishery. However, under such a management approach, it is plausible that any impact to fall-run Chinook, and any related impact to orca, caused by Project operations could be automatically mitigated by reduced harvest in the ocean. How these two sets of human actions (Project operations and harvest restrictions) interplay, and how this interplay might impact the likelihood that Project operations

would harm the Southern Residents, is not discussed in the Salmonid BiOp, which post-dates the Orca Salmon Harvest BiOp, albeit by only one month. NMFS's own findings in the Orca Salmon Harvest BiOp are certainly "relevant factors" NMFS should have taken into consideration before issuing the Salmonid BiOp. Federal Defendants, through counsel, provide a partial, but insufficient, post hoc explanation.

Plaintiffs' motion for summary judgment that the Orca jeopardy analysis is unlawful is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are [**165] DENIED. On remand, NMFS must explain how the findings of these two biological opinions can be reconciled.

4. Interior Delta Mortality as an Indirect Effect.

Plaintiffs assert that the BiOp unlawfully classifies mortality from predators, pollution, and other adverse conditions in the interior delta, as "indirect effects" caused by Project operations. Doc. 431 at 66-72.

a. Applicable Legal Standard.

The Joint Consultation Regulations promulgated by FWS and NMFS explain that "effects of the action" refers to "the direct and indirect effects of an action on the species or critical habitat... that will be added to the environmental baseline...." *50 C.F.R. § 402.02*. "Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *Id.* (emphasis added). The ESA's definition differs from NEPA's [*867] definition of indirect effects of an action: "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *40 C.F.R. § 1508.8(b)* (emphasis added). In the preamble of the Final Rule adopting the ESA regulations, NMFS and FWS explained that it intended a narrower [**166] regulatory definition of indirect effects under the ESA than applied in the NEPA context (i.e., compare "reasonably certain to occur" with "reasonably foreseeable"). *51 Fed. Reg. 19,926 (June 3, 1986)*. NMFS and FWS distinguished the ESA from NEPA and expressly explained the intent and rationale for adopting the more narrow "reasonably certain to occur" standard for indirect and cumulative effects under the ESA:

> If the jeopardy standard is exceeded, the proposed Federal action cannot proceed without an exemption. This is a substantive prohibition that applies to the Federal action involved in consultation. In contrast, NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of cumulative effects. Otherwise, in a particular situation, the jeopardy prohibition could operate to block "nonjeopardy" actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species. Congress did not intend that Federal actions be precluded by such speculative actions.

51 Fed. Reg. at 19,933.

Shortly after adoption of the ESA regulations, the Ninth Circuit confirmed "[t]he reasonably certain [**167] to occur' standard applies to 'indirect effects ... caused by the proposed action." *Sierra Club v. Marsh, 816 F.2d 1376, 1388 (9th Cir. 1987)*; *Ctr. for Biological Diversity v. U.S. Dept. of Hous. & Urban Dev., 541 F. Supp. 2d 1091, 1100-01 (D. Ariz. 2008)* (dismissing a suit alleging federal agencies had violated the ESA by failing to analyze the indirect effects of providing federal funding to local development projects, concluding that the link between such financial assistance and groundwater depletion that could harm listed species was "too attenuated" to meet the standards of *50 C.F.R. § 402.02*).

The December 14, 2010 summary judgment Decision in the *Consolidated Delta Smelt Cases* found that the "reasonably certain to occur" standard controlled the asserted causes of indirect mortality to the smelt in the interior Delta. *San Luis v. Salazar*, 760 F. Supp. At 146-47. Here, NMFS resists such a finding, arguing that Plaintiffs (and by implication the December 14, 2010 MSJ Decision in the *Consolidated Delta Smelt Cases)* confuse the BiOp's discussion of "indirect mortality" with the regulatory term "indirect effect." Doc. 477-1 at 55. Federal Defendants argue that the "reasonably certain [**168] to occur" standard does not refer to the certainty of the effect on the species, but rather to the certainty of whether a future activity (i.e. the activity that may have an effect on the species) will occur. The federal register notice promulgating the relevant regulations explains that NMFS considers "effects to listed species from such future activities that are reasonably certain to occur under the analysis of 'indirect effects.'" *51 Fed. Reg. 19,926, 19,932 (June 3, 1986)*(emphasis added). Indirect effects are further defined as "those that are caused by the action and are later in time but are still reasonably certain to occur." *Id.* (emphasis added). Federal Defendants point out that the kinds of "indirect mortality" discussed in the BiOp are not "future activities." Rather, they are a category of effects that are purportedly occurring all the time.

Plaintiffs rejoin by citing a single sentence from the Final ESA Section 7 Consultation Handbook, jointly

prepared by FWS and NMFS, which explains that "[i]ndirect effects may include other Federal actions that have not undergone section 7 consultation but will result from the action under consideration." AR 00217743 ("Consultation [**169] Handbook") at 4-29 (emphasis added). [18] Plaintiffs argue that th [*868] e use of the word "include" suggests "that NMFS considers effects from future activities to be only a subset of possible indirect effects, and that indirect effects are not limited to future activities." Doc. 487 at 57. Plaintiffs do not mention the very next sentence of the Consultation Handbook. The entire paragraph reads:

> Indirect effects may include other Federal actions that have not undergone section 7 consultation but will result from the action under consideration. In order to treat these actions as indirect effects in the biological opinion, they must be reasonably certain to occur, as evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by the agency in the action area; or they are a logical extension of the proposed action.

Id. (emphasis added). Here, the indirect mortality findings challenged by Plaintiffs do not constitute "indirect effects." The indirect mortality discussed in the BiOp is caused by the action subject to consultation, not by some other action that is the subject of work plans, permits, or budgeting. The emphasized language specifies [**170] actions "reasonably certain to occur," not those that have occurred. This suggests but does not explicitly reference actions other than the action under consultation.

18 NMFS's and FWS's joint Consultation Handbook "provides internal guidance and establishes national policy for conducting consultation and conferences pursuant to Section 7 of the Endangered Species Act of 1973, as amended." AR 00217635.

The "reasonably certain to occur" standard does not apply to the indirect mortality analysis in the BiOp. [19] However, this does not immunize the indirect mortality findings from review. "Jeopardize" means to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild but reducing the reproduction, numbers and distribution of that species." *50 C.F.R. § 402.02*. The BiOp finds project operations cause indirect mortality. Whether such findings are reasonable must be addressed. [20]

19 This finding applies with equal force to the analysis of the causes of indirect mortality discussed in the *Consolidated Delta Smelt Cases'* December 14, 2010 Summary Judgment Decision, namely the [**171] negative influence of Project operations on delta smelt food supply and the exacerbation of the impacts of pollution and contaminants by Project operations. Although the reasonably certain to occur standard was applied in that case, the link between Project operations and these purported sources of indirect mortality were not clearly articulated in the BiOp or justified by record evidence, so the application of the incorrect standard did not make a material difference.

20 Plaintiffs also argue that NMFS must affirmatively acknowledge its own regulatory standard in the BiOp, presumably by making direct reference to the relevant regulatory language. Doc. 431 at 67. Although a court "cannot infer an agency's reasoning from mere silence," *PCFFA v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1091 (9th Cir. 2005)*, so long as the record, as evidenced by the agency's reasoning in the BiOp, supports a finding that Project operations reasonably would be expected to cause indirect mortality, the ESA does not require NMFS to use "magic words" in a biological opinion. An agency's rationale must be upheld if it can "reasonably be discerned." *See Modesto Irr. Dist. v. Gutierrez, 619 F.3d 1024, 1035 (9th Cir. 2010)*.

a. [**172] Does the Record Support a Finding that ProjectC Operations Can Reasonably Be Expected to Cause More Salmonids to Enter the Interior Delta?

Plaintiffs concede that the mortality rate of migrating salmonids is generally higher for fish traveling through the interior Delta than for fish that remain in the mainstem Sacramento River. Doc. 431 at 68. [*869] Plaintiffs argue, however, that the record does not support the BiOp's conclusion that project operations cause more salmonids to take the more dangerous routes through the interior Delta. *Id.* at 67-70. Plaintiffs fault the BiOp for not providing any "analysis or articulation whatsoever of [what] additional fraction of emigrating salmonids -- above the baseline number that will enter the Delta irrespective of the projects -- will be induced to enter the interior Delta solely as a result of proposed project operations." Doc. 431 at 68. Plaintiffs incorporate by reference the arguments made by DWR in its challenge to Action IV.2.1. *Id.* at 69-70. As Plaintiffs' challenge turns on the merits of DWR's challenge, which is thoroughly discussed below in the context of Action IV.2.1, there is no need to separately discuss them here.

b. Does the Record Support [**173] a Finding that Project Operations Can Reasonably Be Expected to Cause Indirect Mortality from Exotic Species, Pollution, and/or Food Limitations in the Interior Delta?

Plaintiffs also contend that there is no record evidence to support the BiOp's implied conclusion that project operations cause indirect mortality from exotic species, pollution, and other adverse environmental conditions in the interior Delta. Doc. 431 at 70-71.

(1) Exotic Species.

Among other things, the BiOp concludes that Project operations create conditions that favor exotic over native species:

> In addition to the "direct" effects of the CVP and SWP operations manifested by flows and exports, the modification of the Delta hydraulics for the conveyance of water has altered the suitability of the Delta for native species of fish, such as Chinook salmon, steelhead, and green sturgeon. Since the inception of the CVP and later the SWP, the natural variability in the hydrology of the Delta has been altered. As previously explained, the amount and timing of runoff from the Sacramento and San Joaquin Rivers has been altered and shifted to accommodate human needs. When large-scale exports of water were initiated in the South [**174] Delta, it became necessary to "freshen up" the Delta to guarantee high quality fresh water was available to export from the facilities on a reliable basis (e.g., construction of the DCC). This necessitated an increase in the stability of the Delta's hydrology and the formation of a large freshwater "lake" for the reliable conveyance of water from the river sources to the export facilities. The enhanced stability of the freshwater pool in the Delta enabled non-native species, such as centrarchids and catfish, as well as invasive plants, such as *Egeria densa* and water hyacinth, to thrive in this "new" Delta hydrology (Brown and Michniuk 2007). In addition, the altered ecological characteristics of the Delta have been proposed as a contributing factor in the recent Pelagic Organism Decline (POD) observed in the Delta. The combination of these exotic species and altered ecological characteristics of the Delta interact to decrease the suitability of the Delta for native species of fish and have increased the potential for predation and loss (see 2008 CVP/SWP operations BA, Delta smelt sections for a more detailed explanation).

BiOp at 382 (emphasis added). Elsewhere, the BiOp concludes:

> As [**175] described earlier in the Delta effects analysis, many of the sources of loss associated with moving fish through the Delta, such as predator populations and the increased prevalence of non-native aquatic weeds such as *Egeria densa*, have their own interconnections with the operations of the CVP and SWP, and [*870] their continued presence is linked to maintaining an artificially stable Delta environment conducive to moving freshwater towards the pumps.

Id. at 433.

Plaintiffs do not directly contest the conclusion that the altered hydrologic conditions are favorable for invasive species. Nor do Plaintiffs challenge the BiOp's conclusion that CVP and SWP operations contribute to this ecosystem alteration. Rather, they argue that the operators of the CVP and SWP did not release the exotic predators or introduce the exotic weeds, nor can the operators of the projects control these alien species. Doc. 431 at 71.

This is not disputed. The BiOp does not assert, as it cannot, that the Projects were the original cause of these problems. The BiOp concludes that the hydrologic conditions created by the projects favor the continued presence of these exotics and that proposed project operations are likely [**176] to make this situation worse. *See* BiOp at 382 ("Continued operations of the CVP and SWP are unlikely to benefit the health of the Delta, and increases of the facility operations are likely to degrade the system beyond their current conditions, rather than return the Delta to a more natural condition, with more functional hydraulics conducive to a healthy ecosystem."). The BiOp cites recent studies, including Brown and Michniuk (2007), *see* BiOp at 382, to support its conclusion that this "new" Delta hydrology favors exotic species over native ones. Plaintiffs do not challenge the BiOp's reliance on these studies.

However, assuming the BiOp properly found a Project-exotics connection, NMFS failed to adequately consider this factor in its jeopardy analysis. What effect do these exotics have on the Listed Species? To what extent

does the contribution of the Projects to the continued presence of these exotics contribute to the jeopardy finding? Could altered project operations reduce the presence of exotics? NMFS's logic taken to the extreme means the Projects cannot operate, as no analysis has been done to evaluate the impact on the Listed Species from this indirect effect at varying pumping [**177] levels. It may be that there is insufficient information to answer these questions, but this is pure speculation, as the sufficiency of information is not discussed. This is another example of the need for a realistic analysis of relative effect from Project operations on conditions that are not related to pumping.

The BiOp's analysis of the influence of Project operations on the continued presence of exotic species, and how this relates to indirect mortality to the Listed Species, must be explained. Plaintiffs' motion for summary judgment on this issue is GRANTED. Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

(2) Pollution and Food Limitation.

Plaintiffs also argue that the BiOp unlawfully "blames the project for pollution and food limitation by labeling them effects of the action." Doc. 431 at 72. This is the logical inference drawn from the focus on predators and contaminants, which are mentioned throughout the BiOp. The agency does not explain how the projects influence contaminants or cause food limitations. Plaintiffs point to a statement in the biological assessment that "there is no direct evidence of food limitation for salmon in the delta or lower [**178] estuary," AR 00143672. It is not clear that the BiOp actually asserts that there is a food limitation in the lower estuary. This imprecision contributes to the inadequacy of the BiOp. There is no way to understand the BiOp's attribution of adverse indirect effects to the Projects.

Plaintiffs' motion for summary judgment that the record does not support the BiOp's conclusions about the connection [*871] between Project operations and pollution and food limitation, causing indirect mortality to the Listed Species is GRANTED. Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

D. Critical Habitat Analysis.

1. There Is No Requirement that NMFS Identify a Numerical Threshold for Adverse Modification.

Destruction or adverse modification is defined by regulation to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." *50 C.F.R. § 402.02*. Previous rulings in related cases have held "that NMFS and FWS have interpreted the term 'appreciably diminish' to mean 'considerably reduce.'" Findings of Fact and Conclusions of Law Re the Existence of Irreparable Harm, *PCFFA v. Gutierrez*, 1:06-cv-245 [**179] OWW GSA, Doc. 367 at 24:6-9 (citing Consultation Handbook at 4-34).

Plaintiffs demand that NMFS set a threshold for adverse modification and directly analyze whether the action "appreciably diminishes" the capability of habitat to support survival or recovery vis-à-vis this threshold. *Id.* at 75. This demand was rejected in the December 14, 2010 MSJ Decision in the *Consolidated Delta Smelt Cases:*

> Plaintiffs cite *Gifford Pinchot, 378 F.3d at 1074*, and *NWF v. NMFS II, 524 F.3d at 932* & n.10, for the principle that FWS must identify a threshold for adverse modification and assess and explain whether the magnitude and extent of any claimed effects to critical habitat reach that threshold. These cases do not support Plaintiff's argument. *Gifford Pinchot* rejected FWS's interpretation of "adverse modification" in a manner that only triggered an adverse modification finding where there is "an appreciable diminishment of the value of critical habitat for both survival and recovery." *Id. at 1069*. After rejecting FWS's rationale for applying the regulation, the Ninth Circuit reasoned that the various biological opinions at issue could nevertheless be found valid if they actually evaluated the impact [**180] to recovery. The *Gifford Pinchot* plaintiffs raised concerns about FWS's complete failure to address the issue of recovery in that biological opinion's critical habitat analysis. The Appeals Court specifically found that FWS detailed the percentage loss of critical habitat but did not discuss the specific impact of that loss on recovery, rendering the BiOp insufficient. *378 F.3d at 1074*.
>
> Following *Gifford Pinchot, NWF v. NMFS II* held that NMFS acted arbitrarily and capriciously by failing to analyze the impacts of dam operations on the recovery value of critical habitat. *524 F.3d at 932*. NMFS' argument "that it 'implicitly' analyzed recovery in its survival analysis" was rejected as a "post hoc justification," because a court cannot consider "an analysis that is not shown in the record."

> *Id. at 932 n.10* (internal citations and quotations omitted). Plaintiffs do not directly challenge the BiOp's recovery analysis; rather, they argue that the BiOp should have set a "threshold" for adverse modification. Nothing in *Gifford Pinchot* or *NWF v. NMFS II* requires FWS to set a "threshold" for adverse modification.
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> *Butte Envtl. Council v. United States Army Corps of Eng'rs, 607 F.3d 570, 582-83 (9th Cir. 2010),* [**181] suggests exactly the opposite. *Butte* upheld FWS's determination that destruction of a very small percentage (less than 1%) of designated critical habitat would not adversely modify the species' critical habitat. Relevant here is the Ninth Circuit's rejection of a demand that FWS address [*872] the rate of loss of critical habitat, finding that nothing in the statute or regulations requires FWS to perform such a calculation. *Id.*

San Luis v. Salazar, 760 F. Supp. 2d at 945. NMFS is not required to set a numeric threshold for adverse modification.

2. Significance of Impacts to Critical Habitat.

Plaintiffs argue that the adverse modification findings are unlawful because the BiOp explicitly declines to apply the regulatory definition of adverse modification found in *50 C.F.R. 402.02*. Doc. 431 at 75. The BiOp states:

> For critical habitat, NMFS did not rely on the regulatory definition of "destruction or adverse modification" of critical habitat at *50 CFR 402.02*. Instead, we have relied upon the statutory provisions of the ESA to complete the analysis with respect to critical habitat. NMFS will evaluate "destruction or adverse modification" of critical habitat by determining if the action reduces the [**182] value of critical habitat for the conservation of the species.

BiOp at 43. Plaintiffs maintain that this reads the word "appreciably" out of the regulatory definition of adverse modification. Doc. 431 at 75-76. The record provides a reasoned basis for this statement in the BiOp and demonstrates that NMFS has not read the term "appreciably diminish" out of the definition.

In 2005, after *Gifford Pinchot* invalidated FWS's application of the regulatory definition in *50 C.F.R. § 402.02* because FWS had not evaluated whether the amount of habitat anticipated to be lost would impact recovery, NMFS issued a guidance memo on how to conduct "destruction or adverse modification" determination. *See* AR 00005204-209. That memo explicitly directs NMFS to identify the current condition of the Primary Constituent Elements ("PCE") [21] of each critical habitat designation before examining how the proposed action will affect the function and conservation role of each PCE. *Id.* Federal Defendants do not assert that this guidance has invalidated the "appreciably diminishes" aspect of the critical habitat regulation. Doc. 515 at 29. Rather, the guidance memo, which instructs NMFS to "discuss the significance [**183] of anticipated effects to critical habitat," is sufficient to implement an "appreciably diminish" standard. AR 00005208 [22] (emphasis added). The guidance memo's requirement of "significant" impacts to critical habitat is consistent with the regulatory definition of adverse modification to include only those alterations that "appreciably diminish[] the value of critical habitat."

> 21 PCEs are those elements of a critical habitat designation deemed essential for the conservation of the listed species and are described as the sites and habitat components that support one or more life stages or requirements of the species. PCEs are made up of essential features, which are needed to support that specific life-stage requirement. An example is the PCE of spawning habitat, which includes such essential features as clean spawning gravel, clean water, and appropriate water temperatures. *See* BiOp at 56.
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> 22 The pages in this document appear to be out of order in the AR. What appears to be page 3, AR 00005208, is before what appears to be page 2, AR 00005209.

Because an agency's rationale must be upheld if it can "reasonably be discerned," *see Modesto Irr. Dist. v. Gutierrez, 619 F.3d 1024, 1035 (9th Cir. 2010),* [**184] there is no requirement that the agency use "magic words" in its analysis. The key question is whether the record supports the adverse modification findings in the BiOp. In other words, does the record demonstrate that Project operations will have a significant [*873] (i.e., appreciable or considerable) impact on the critical habitat of each of the listed species for which adverse modification was found.

The BiOp examines impacts to critical habitat at length. For each species, the BiOp describes the PCEs of

that species' critical habitat, examines the current status of the critical habitat and describes factors responsible for the current status, evaluates the impacts of current and future non-project (i.e., baseline) impacts, and describes the anticipated impacts of proposed project operations on that habitat.

a. Winter-Run Habitat Analysis.

The evaluation of winter-run critical habitat provides a representative example. There are seven PCEs of Chinook critical habitat: (1) access from the Pacific Ocean to appropriate spawning areas in the Upper Sacramento River; (2) clean gravel for spawning; (3) adequate river flows for spawning, egg incubation, fry emergency, and juvenile downstream migration; [**185] (4) appropriate water temperatures for spawning, egg incubation, and fry development; (5) uncontaminated habitat and food sources; (6) riparian habitat for juvenile development and survival; and (7) downstream migration access to the Pacific Ocean. BiOp at 90. The BiOp evaluates the current status of each of these PCEs. *Id.* at 90-92. In addition, the BiOp contains a lengthy section describing the factors responsible for the current status of the species, many of which also affect the species' habitat. *See id.* at 134-142. The BiOp concludes that the current condition of critical habitat is degraded and has low value for the conservation of the species. *Id.* at 93.

> Critical habitat for winter-run is composed of physical and biological features that are essential for the conservation of winter-run, including up and downstream access, and the availability of certain habitat conditions necessary to meet the biological requirements of the species. Currently, many of these physical and biological features are impaired, and provide limited conservation value. For example, when the gates are in, RBDD reduces the value of the migratory corridor for upstream and downstream migration. Unscreened [**186] diversions throughout the mainstem Sacramento River, and the DCC when the gates are open during winter-run outmigration, do not provide a safe migratory corridor to San Francisco Bay and the Pacific Ocean.
>
> In addition, the annual change in TCP has degraded the conservation value of spawning habitat (based on water temperature). The current condition of riparian habitat for winter-run rearing is degraded by the channelized, leveed, and riprapped river reaches and sloughs that are common in the Sacramento River system. However, some complex, productive habitats with floodplains remain in the system (e.g., Sacramento River reaches with setback levees (i.e., primarily located upstream of the City of Colusa) and flood bypasses (i.e., Yolo and Sutter bypasses).
>
> Based on the impediments caused by RBDD when the gates are in, unscreened diversions, annual changes to the TCP, the time when the DCC gates are open during the winter-run outmigration period, and the degraded condition of spawning habitat and riparian habitat, the current condition of winter-run critical habitat is degraded, and has low value for the conservation of the species.

Id. (emphasis added).

In the environmental baseline analysis, [**187] NMFS concluded climate change will negatively affect all of the Central Valley critical habitat designations at issue. *Id.* at [*874] 173. With respect to upstream habitat, NMFS evaluated the current and future environmental baseline of winter-run Chinook critical habitat in the Shasta and Sacramento Divisions of the CVP, and concluded that the current baseline is "degraded, and has low value for the conservation of the species," and future baseline habitat impacts will "affect the fitness... of the critical habitat...." *Id.* at 181-83, 187-91. For the Delta Division, NMFS concluded that the migratory function of this critical habitat is degraded, *id.* at 203-05, and that the future environmental baseline included continued "ongoing habitat modifications" and adverse habitat impacts from levees, predation, non-native species, contaminants, entrainment, dredging, recreational boating, and temporary irrigation barriers, *id.* at 215-16.

(1) Project Impacts to Winter-Run Spawning Habitat.

In addition to these past, current, and future non-project adversities, NMFS found that proposed project operations in the Sacramento River constrain spawning habitat by providing relatively less cool water temperatures [**188] below Keswick Dam and by stranding or dewatering redds and juveniles. *See id.* at 273. The BiOp's section on the "Effects of the Action on Critical Habitat in the Sacramento River" in particular on "Spawning Habitat" provides:

> For winter-run and spring-run, potential spawning habitat is constrained by temperature control to smaller and smaller areas below Keswick Dam. The impacts of

operations on cold water have already been described above. However, the changes to the habitat downstream are far more widespread and difficult to detect. The volume of water stored in Shasta reservoir tends to dampen the seasonal variation in water temperatures. This moderation of water temperatures, combined with a loss in spawning habitat above Shasta and Keswick dams, may have profound effects on life history patterns. Warmer water temperatures during the spring-run and CV steelhead egg incubation have resulted in earlier emergence time. Spawning habitat, which is now located 60 to 240 miles downstream from historical sites above Shasta Dam, truncates the juvenile emigration timing by 2-3 months. Therefore, juveniles leave the spawning area at much smaller size and are less likely to survive downstream. [**189] For steelhead the cold summer-time flow regime favors residency over anadromy, which reduces the variability in life history that distinguished runs. In addition, with more spatial and temporal overlap between the listed anadromous salmonid species, competition for space reduces the value of the spawning habitat for the conservation of any one species.

The value of spawning habitat for the conservation of the species is also reduced by flow fluctuations twice a year every year to install and remove the ACID diversion dam. These sudden drops in flow strand and/or isolate juveniles rearing along 5 miles of habitat above the diversion dam, and likely for miles downstream. Flow fluctuations can also dewater winter-run and fall-run redds. Since the majority of winter-run have shifted to spawning above the ACID diversion dam (e.g., 62 percent in 2006), flow fluctuations are likely to have greater impacts in future years.

Climate change, as a modeled future baseline stressor, is likely to reduce the conservation value of the spawning habitat PCE of critical habitat by increasing water temperatures, which will reduce the availability of suitable spawning habitat. Cold water in Shasta Reservoir [**190] will run out sooner in the summer, impacting winter-run and spring-run spawning habitat. This reduction in an [*875] essential feature of the spawning habitat PCE will reduce the spatial structure, abundance, and productivity of salmonids.

Id. at 273. Spawning habitat has been impacted by baseline conditions (such as the presence of Shasta and Keswick Dams) and climate change. The BiOp provides explanation for its conclusion that additional Project operations will add to those baseline impacts. As to winter-run spawning habitat, the section references an earlier discussion of "the impacts of operations on cold water;" addressing CALSIM II modeling runs, comparing temperature conditions (and resulting egg mortality) between baseline operations and operations under the proposed action. Figure 6-14, which depicts winter-run egg mortality by water year type, permits comparison of the baseline (Study 7.0), near future project operations (Study 7.1) and future project operations (Study 8.0).

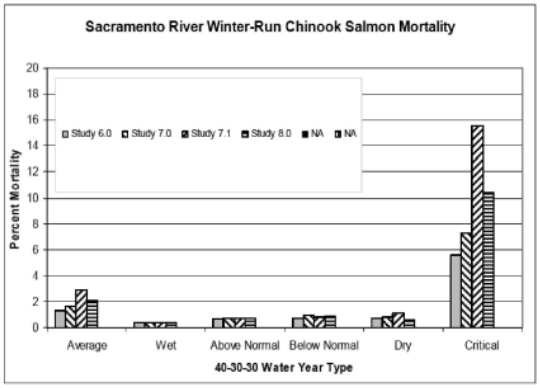


Figure 6-14. 2008 Winter run average egg mortality by water year type at Balls Ferry. Study 6.0 represents 2004 operations, study 7.0 represents current operations, 7.1 represents near future operations, and 8.0 represents future operations (CVP/SWP operations BA figure 11-39).

Id. at 259. These results show that in critical years, which are 15 percent (15%) of the years modeled, egg mortality more than doubles between Study 7.0 and Study 7.1, and increases by 50 percent between Study [**191] 7.0 and Study 8.0, under past and future operations. (No explanation is given for why study 7.1 shows higher mortality than Study 8.0.) Because egg mortality is a direct result of temperature conditions in winter-run spawning habitat, this demonstrates that Project operations will significantly reduce spawning habitat in critical years.

(2) Project Impacts to Rearing and Migratory Habitat.

Information to support NMFS's finding of significance for winter-run rearing and migratory habitat is less apparent. In Section 6.3.8 ("Effects of the Action on Critical Habitat in the Sacramento River"), the BiOp reviews impacts to rearing and migratory habitat very generically:

6.3.8.2 Rearing Habitat [*876] Stream flows within the Sacramento River have been altered by the operations of Shasta and Keswick dams. Generally, the changes have increased flows during the summer and fall, and decreased flows in the winter and spring compared to historical conditions (figure 5-13). The result of the change in historical flow patterns has been a decrease in the hydrologic variability and a loss of complexity in the freshwater aquatic habitat. Specific areas of rearing habitat loss due to changes in the flow pattern [**192] include fewer oxbows, side channels, braided channels, less LWD, and less shaded aquatic riparian habitat. The Nature Conservancy (2007) model shows that these are necessary for proper functions of riverine ecosystems. A more natural flow regime with higher spring flows and lower summer flows would support riverine functions like the creation of oxbows, side channels and more varied riparian communities. In turn, this would increase cottonwood regeneration, shaded aquatic habitat, food supply, rearing areas, and LWD recruitment, all important components that are being degraded under continued project operations.

The decrease in the biological value of the rearing habitat is due to the simplification of the processes that create these important areas. The CVP and SWP have for years used the river as a conveyance system, neglecting the natural processes that are necessary to support river dependent species. This altered stream flow pattern has indirectly led to an increase in bank stabilization, levees, riprap, and armoring to keep the river in place. The reduction in rearing habitat quality has decreased the survival of juvenile salmonids and favored the proliferation of introduced non-native [**193] species that prey or compete with juvenile salmonids. Due to the stream flow changes, introduced warm water predators are much more numerous today than historically. Therefore, the conservation value of rearing habitat along the entire 300 miles has been degraded by project operations.

Rearing habitat for CV steelhead has been modified in the Sacramento River to cooler summer time releases for winter-run spawning. This change in summer temperature regime has increased the resident rainbow trout population. The change in summer temperatures may reduce the number of steelhead that choose to migrate to the ocean because conditions are too favorable. If the resident trout population is as large as the trout population above Shasta dam (i.e., estimated at 10,300 trout per mile), then competition for food and space could reduce the value of the rearing habitat PCE.

Climate change, as modeled future baseline stressor, is likely to reduce availability of rearing habitat, and in turn, the value of the rearing habitat PCE of critical habitat, by increasing water temperatures. As the juveniles migrate downstream, they will emigrate earlier, encounter thermal barriers sooner, and be subjected to [**194] predators for longer periods of time. This reduction in the essential elements of critical habitat will reduce the spatial structure, abundance, and productivity of salmonids. Juveniles would be expected to concentrate in areas of cold water refugia, like in the few miles below Keswick Dam, where competition for food, space, and cover would be intense. Those individuals that stayed to over summer would be forced into one life history pattern consistent with project operations (i.e., yearling life history and emigration during the following spring). Those juveniles that did emigrate early would be exposed to greater stress regimes as they encounter higher water temperatures [*877] and greater concentrations of predators downstream.

6.3.8.3 Migratory Corridors

The conservation value of the migratory corridor along the mainstem Sacramento River for all 4 listed species is degraded by the presence of barriers to upstream and downstream migrations.

An essential feature of the migratory corridor PCE is unobstructed passage of emigrating fish through the upper Sacramento River to the spawning areas. This characteristic of the PCE will continue to

be degraded by the continued operation of the RBDD and [**195] ACID diversion dam. Adult salmonids are blocked and/or delayed in passing these obstructions. Juveniles are subjected to higher concentrations of predators at these locations. Entrainment losses will continue into the future from operation of fish screens at these diversions.

RBDD backs up water on the Sacramento River to form Lake Red Bluff during the summer months, when juvenile winter-run are migrating downstream. This action reduces the conservation value of the critical habitat within the 6-mile lake (or 15 miles of shoreline) for winter-run, spring-run and CV steelhead (TCCA 2008). The inundation of the Sacramento River slows down flows, covers riparian areas, warm water predators become more numerous, and the value of the habitat is reduced. Juvenile salmon and steelhead are disoriented and confused as they migrate downstream through the lake, similar to what happens on the Columbia River above its dams. Stranding and isolation occur in sloughs adjacent to the lake when the gates come out in September (USFWS 1998). The rising waters in the spring kill any vegetation along the sides by submerging it underwater and covering it with silt. Water temperatures increase in the lake [**196] as flows are slowed and surface water is heated by the sun. Large shade trees and riparian areas are prevented from becoming established leaving the near shore areas devoid of vegetation. Food supply, shelter and cover are reduced by this action and will continue to be reduced under future operations until a new pumping plant is built and operational.

Approximately, 8 miles of river habitat is modified (or 13.3 percent of the available habitat above RBDD) to less suitable lake habitat for 4 to 6 months of every year when the diversions are in place (i.e., 6 miles above RBDD, and 2 miles above ACID). This seasonal loss of habitat reduces food availability, shelter, and cover, and causes permanent changes that reduce the value of that habitat for the rest of the year (i.e., from sedimentation, loss of shaded aquatic habitat, loss of riffle areas that produce food). The loss of habitat value leads to a reduction in the abundance of juvenile winter-run and spring-run that enter the Delta. Productivity and growth are also reduced from modified habitat and reduced complexity. Juvenile salmonids reach the Delta sooner and at a smaller size, making them more vulnerable to predation. Larger [**197] fish are more likely to survive the stressful transition into the marine environment than smaller fish, which have less energy reserves stored in their bodies. Therefore, salmonids with life history stages (representing a year in freshwater) like spring-run yearlings and CV steelhead smolts are less likely to be affected by these habitat changes in the migratory corridor, since they move through mainstem quickly prior to entering the ocean.

BiOp at 273-74.

The BiOp's "Synthesis of Effects" provides the following additional discussion of rearing habitat:

[*878] 9.2.2 Project Effects on Sacramento River Winter-Run Chinook Salmon Critical Habitat Critical habitat for winter-run is comprised of physical and biological features that are essential for the conservation of winter-run, including freshwater spawning sites, rearing sites, and migration corridors to support one or more life stages of winter-run. As summarized below, the conservation value of critical habitat throughout the Sacramento River from Keswick Dam to the Delta (302 miles) will be degraded by the proposed action.

***

9.2.2.2 Rearing Habitat

The value of rearing habitat will continue to be degraded as hydrologic conditions resulting [**198] from operations favor the proliferation of introduced non-native warm water predators of juvenile salmonids.

Reclamation will continue to operate RBDD (modification of 6 miles of free-flowing riverine habitat to lake-like habi-

tat) and the ACID diversion dam (modification of 3 miles of free-flowing riverine habitat to lake-like habitat) for 4 to 6 months of every year. Food supply, shelter, and cover will continue to be reduced during the 4 months that the gates are in. In the future full build out scenario, the value of rearing habitat will improve when the gates are out for up to 10 months of each year. However, stranding and isolation in sloughs adjacent to the lake would still occur, and riparian habitat will not likely establish.

9.2.2.3 Migratory Corridors

The value of upstream and downstream migratory corridors will continue to be degraded as a result of the continued operation of RBDD and the ACID diversion dam, which preclude unobstructed passage. The creation of Lake Red Bluff results in the reduction in value of rearing habitat and degradation of 15 miles of shoreline that slows down flows, inundates riparian areas, and increases habitat for warm water predators. The value of [**199] the migratory corridor will also continue to be degraded when the RBDD gates come out in September and cause stranding and isolation in sloughs adjacent to the lake. In the future full build out scenario (2030, which we assume the effects will be realized starting in year 2019), the 10-month gates out and 2-month (which is really 2 1/2 months) gates in scenario will improve the value of the migratory corridor by providing unobstructed passage.

During outmigration, the DCC, when the gates are open, continues to degrade the value of the mainstem Sacramento River as a migratory corridor by entraining a portion of the outmigrating juveniles into the Central Delta, where survival and successful outmigration to the Pacific Ocean is lower than if the juveniles remained in the main migratory corridor of the Sacramento River. The proposed action exacerbates this problem by altering water movement through the Sacramento River and Delta such that water in the north part of the Delta (e.g., immediately upstream of the DCC) is pulled southward towards the Federal and State pumping plants through the DCC and/or Georgiana Slough.

Id. at 469-70. The next sub-section assesses risk to winter-run critical [**200] habitat.

9.2.3 Assess Risk to the Winter-Run Chinook Salmon Critical Habitat Many of the physical and biological features that are essential for the conservation of winter-run are currently degraded. As a result of implementing the proposed action, some of those physical and biological features will likely remain the same, which will keep their conservation [*879] value low. However, the conservation value of many of the physical and biological features will likely be further degraded. For example, the proposed action will further degrade the value of spawning, rearing, and migratory habitat. Reoperation of RBDD in the future full build out scenario, so that the gates are down for 2 1/2 months instead of the 4-month near-future (i.e., 2009-2019) scenario, will slightly improve the value of rearing and migratory habitat. However, the conservation value of these habitats will remain degraded by other stressors related to both the proposed action and the baseline (see figure 9-4).

The effects of the proposed action under climate change scenarios would likely further degrade the value of spawning and rearing habitat by increasing water temperatures. Cold water in Shasta Reservoir will run out sooner [**201] in the summer, degrading winter-run spawning habitat, and the value of rearing habitat would likely be further degraded by juveniles emigrating earlier, encountering thermal barriers sooner, and be subjected to predators for longer periods of time. Juveniles that do not emigrate earlier will likely congregate in areas of cold water refugia, like in the few miles below dams where competition for food, space, and cover would be intense.

Based on the analysis of available evidence, NMFS concludes that the proposed action is likely to reduce the conservation value of the critical habitat, as designated, for the conservation of Sac-

> ramento River winter-run Chinook salmon (table 9-3).

Id. at 470.

All of these discussions of impacts to rearing and migratory habitat on the Sacramento River focus on the operation of Red Bluff Diversion Dam ("RBDD") and Anderson Cottonwood Irrigation District ("ACID") diversion dam, which obstruct passage and alter large areas of habitat. For example:

> Reclamation will continue to operate RBDD (modification of 6 miles of free-flowing riverine habitat to lake-like habitat) and the ACID diversion dam (modification of 3 miles of free-flowing riverine habitat to lake-like [**202] habitat) for 4 to 6 months of every year. Food supply, shelter, and cover will continue to be reduced during the 4 months that the gates are in. In the future full build out scenario, the value of rearing habitat will improve when the gates are out for up to 10 months of each year. However, stranding and isolation in sloughs adjacent to the lake would still occur, and riparian habitat will not likely establish.

Id. at 469. Although the BiOp does not offer a numerical analysis of what percentage of the designated rearing and/or migratory habitat is disturbed by these operations, at least for those fish that must pass these structures (the entire winter and spring-run populations) the significance of such barriers is obvious.

Similar evidence of significant impacts for other aspects of critical habitat exists for each of the species. *E.g., id.* at 260 (demonstrating significant impacts to the spring-run spawning habitat); *id.* at 501-503, 504 (summarizing project impacts to spring-run habitat), *id.* at 549-53 (same as to steelhead); *id.* at 570-71 (same as to green sturgeon proposed critical habitat, noting that "[w]hen the gates are down, RBDD precludes access to 53 miles of spawning habitat [**203] for 35-40 percent of the spawning population of green sturgeon").

Plaintiffs' argument is simply that Federal Defendants acted unlawfully by failing to directly articulate that project operations have "appreciable" or "significant" impacts on critical habitat. The test is that the agency's reasoning should reasonably be discerned from the BiOp. A number [*880] of evident causes are identified, which adversely impact the Listed Species. NMFS provided no quantification other than year-to-year population fluctuations. Data for CV Steelhead and green sturgeon are sparse. The record reflects a number of adverse modifications of the species' critical habitat. Although the BiOp does not show what proportion of the population will be affected, this is not required. The explanation of the adverse effects on habitat and how these changes have the ability to effect harm to the species is sufficient.

Plaintiffs' motion for summary judgment that the critical habitat analysis is unlawful because NMFS did not apply the proper standard for adverse modification is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

E. Use of Surrogates.

In the effects analysis, the BiOp utilized [**204] fall-run Chinook salmon as a surrogate for steelhead, and hatchery Chinook salmon as a surrogate for wild Chinook salmon. Plaintiffs argue that NMFS violated the best available science standard by failing to "validate" its use of surrogate species. Doc. 431 at 81.

Plaintiffs' expert Kenneth Cummins opines that there is a consensus in the scientific community that, whenever possible the use of surrogates should be avoided. Cummins Decl., Doc. 445 at ¶ 8. Surrogates should be a "tool of last resort." *Id.* This is undisputed.

Dr. Cummins further opines that "for a surrogate to be appropriate, it should share the same key ecological or behavioral traits that make the target ... sensitive to environmental disturbance and the relationship between population vital rates (for example, survival) and level of disturbance should match that of the target." *Id.* at ¶ 11 (citing Caro *et al.* (2005)). Dr. Cummins maintains that because "all species are different to some degree in regards to their life history strategies, ecological relationships with other species, and selection and use of habitat, substituting data from one species to draw inferences about another for purposes of conservation planning [**205] without validating that decision a priori is not justified." *Id.* at ¶ 14. He continues: "since no two co-occurring species are biologically identical, that would seem to rule out management planning for one species that is informed using biological information that is available for another unless use of a surrogate species for the target species is validated." *Id.* Dr. Cummins cites a study by Favreau, *et al.* (2006), which found that "in less than 2 percent of the cases examined did a surrogate represent the target species better than a random selection of potential surrogates. Further, in less than 4 percent of the cases could the surrogate be considered as effective in representing the target species." *Id.* From this, Dr. Cummins concludes:

> This makes it clear that without detailed data supporting very similar responses of juvenile Chinook salmon and juvenile steelhead to specific stressors, such as a given set of flow conditions, there is no scientific justification to choose Chinook as a surrogate over any other co-occurring species.

Id. Dr. Cummins describes "various approaches to validation that scientists may employ before relying on surrogate data."

> One approach to validation sets [**206] forth three criteria that must be met in order to use a surrogate confidently: (1) establish the relationship between levels of environmental disturbance and demographic vital rates for the surrogate species; (2) identify the key traits that affect demographic viability in both the surrogate and target species with regard to the environmental disturbance; and [*881] (3) establish the relationship between the key trait and the disturbance threshold Caro *et al.* (2005). Under this approach NMFS should have identified the key traits for both Chinook and steelhead that affect their survival as they migrate through the Delta. NMFS failed to do this.

Id. at ¶ 15. The problem with Plaintiffs validation argument, and Dr. Cummins' related opinions, is that they require that NMFS conduct new experiments to justify reliance on existing experimental data. For this reason, those portions of Dr. Cummins' declarations that opine NMFS should have conducted validation experiments were stricken from the record. *See* Doc. 536 at ¶ 15; *see also S.W. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60, 342 U.S. App. D.C. 58 (D.C. Cir. 2000)* (best available science standard does not impose an obligation to conduct independent studies). [**207] The record does not support Plaintiffs' validation requirement argument. [23]

> 23 It is unclear whether Dr. Cummins is correct to assert that validation is standard practice in the field. Garwin Yip opines that his review of tagging studies in the Pacific Northwest reveals that the surrogate validation process is not typically used due to increased time and funding required to complete the validation process. Third Yip Decl., Doc. 518 at ¶ 16.

To the extent Plaintiffs advance a more generic challenge to NMFS's use of surrogates, NMFS explained its use of surrogates and addressed the limitations of surrogate data:

> NMFS understands that the use of surrogates in the form of hatchery releases (e.g., late fall-run to determine spring-run behavior), different species (e.g., Chinook salmon to determine steelhead behavior; Atlantic or shovelnose sturgeon to determine effects of contaminant exposures on green sturgeon), and even the same run and species (e.g., hatchery fish and laboratory studies to determine wild/natural fish behavior) may not accurately predict or emulate the exact behavior of the species under analysis in its natural environment in order to determine exact fish routing, timing, [**208] duration of migration, and export pumping entrainment patterns. However, when direct evidence or similar evaluations are not available for the species under analysis, NMFS has utilized data and results from the use of surrogates that exhibit strong similarities in physiological needs, in life history stages, and in general behaviors. In the absence of data on salmonids and green sturgeon in the wild, NMFS considers these studies one of the best available sources of information used to determine the potential effects of CVP/SWP operations.

BiOp at 62. NMFS maintains that the use of surrogates "minimizes the amount and extent of take associated with tagging or capturing listed species to monitor take." *Id.* at 62-63. Appendix 3 of the BiOp contains a comparison of delta survival rates between hatchery and wild Chinook. BiOp App. 3, at 10-11.

One of the draft BiOp peer reviewers considering the BiOp's analyses of winter- and spring-run Chinook noted: "where information was lacking, reasonable surrogates are used." AR 00061498. Plaintiffs' own experts, *e.g.*, Mr. Cramer, Dr. Hanson, and Mr. Cavallo, used data from experiments utilizing surrogates without independently validating the surrogates. [**209] *See* Second Yip Decl., Doc. 481 at ¶ 33; Third Yip Decl., Doc. 518 at ¶ 16. It is undisputed that in many circumstances unverified surrogate data was the only data available for use by NMFS to evaluate the impact of project operations on the Listed Species. Eliminating the surrogate data would

have "considerably limit[ed] the utility [*882] of any biological analyses undertaken" in the BiOp. *Id.* at ¶ 14.

Plaintiffs' motion for summary judgment that the BiOp's use of surrogates violated the ESA's best available science standard is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED. The agency recognized there were shortcomings in using surrogates. This is a dispute among scientists.

F. Challenges to the Reasonable and Prudent Alternative.

1. RPA Action IV.2.1.

Action IV.2.1 limits export pumping from April 1 through May 31 and has two requirements. First, the Action requires a minimum flow, as measured at Vernalis, based on an index of storage at New Melones Reservoir ("New Melondes Index"). BiOp at 642; BiOp App. 5 at 71. The Vernalis flow requirement is not challenged.

The second requirement of Action IV.2.1 restricts combined CVP and SWP export pumping based on the [**210] flows at Vernalis, with the permissible level of exports rising in relation to increased flows at Vernalis. BiOp at 642; BiOp App. at 71-72. The action is phased. Phase I governs operations during 2010 and 2011, when combined CVP and SWP exports were restricted as follows:

Flows at Vernalis (cfs)	Combined CVP and SWP Export
0-6000	1,500 cfs
6,000-21,750	4:1 (Vernalis flow:export ratio)
21,750 or greater	Unrestricted until flood recedes below 21,750

BiOp at 642. Under Phase I, the baseline export rate is set at 1,500 cfs, deemed an operational minimum required to address health and human safety needs. *Id.* at 74. Flood warning stage at Vernalis is 21,750 cfs. *Id.* at 71 n.2.

During Phase II, which operates from 2012 on, combined exports are governed by the following table from April 1 through May 31:

San Joaquin Valley Classification	Vernalis flow (cfs): CVP/SWP combined export ratio
Critically dry	1:1
Dry	2:1
Below normal	3:1
Above normal	4:1
Wet	4:1
Vernalis flow equal to or greater than 21,750 cfs	Unrestricted exports until flood recedes below 21,750.

Id. at 643-44. Action IV.2.1 includes an exception for multiple dry years and a health and safety exception. *Id.* at 644.

Action IV.2.1 is designed primarily to [**211] "reduce the vulnerability of emigrating CV steelhead within the lower San Joaquin River to entrainment into the channels of the South Delta and at the pumps caused by the diversion of water by the export facilities in the South Delta, by increasing the inflow to export ratio." BiOp at 641. A secondary purpose of Action IV.2.1 is to more generally "enhance the likelihood of salmonids successfully exiting the Delta at Chipps Island by creating more suitable hydraulic conditions in the main stem of the San Joaquin River for emigrating fish, including greater net downstream flows." *Id.*

Both the Export Plaintiffs and DWR have twice previously sought injunctive relief against the imposition of Action IV.2.1. On May 18, 2010, Action IV.2.1 was addressed in Findings of Fact and Conclusions of Law, granting in part and denying in part Plaintiffs' motion for preliminary injunction:

> The evidence supports NMFS's general finding that some form of restriction on the Vernalis flow/export ratio is needed to prevent jeopardy to the SSNDG of CV

Steelhead. Enjoining any flow/export ratio restriction will appreciably diminish the likelihood of the SSNDG's survival or recovery and/or adversely modify its [**212] critical habitat.

> [*883] a. Mr. Stuart testified that enjoining Action IV.2.1 would "jeopardize" the SSNDG of CV steelhead, 3/31/10 Tr. 122:9, 121:3-5, which in turn would "further decrease the viability of the Central Valley" steelhead DPS, *id.* at 104:2-3. Plaintiffs' expert, Mr. Cramer, did not provide an opinion on the impact of enjoining Action IV.2.1 on the SSNDG of CV steelhead. *Id.* at 24:23-25:1.
>
> b. For critical habitat, Mr. Stuart opined that Action IV.2.1 provides benefits by enhancing migratory corridors, increasing riparian zones and rearing areas which can be used by migrating juveniles, and shortening migration time and increasing turbidity, both of which can decrease vulnerability to predation. *Id.* at 110:24-111:14. Mr. Stuart testified that enjoining Action IV.2.1 would remove these beneficial effects. *Id.* at 111:1-2, 121:13-19; *see also* Gov't Salmon Ex., ¶4 (enjoining Action IV.2.1 would "negate" the benefits provided by Action IV.2.1). Mr. Cramer did not opine what effect enjoining Action IV.2.1 would have on CV steelhead critical habitat. 3/31/10 Tr. 25:7-11, 110:24-25, 111:1-2 (Stuart testimony that Mr. Cramer "didn't look at the effects of the flow on enhancing critical [**213] habitat in migratory corridors in the Delta").
>
> ***
>
> Action IV.2.1 also helps spring-run Chinook salmon, because "the reduced export rates [caused by Action IV.2.1] create a more positive OMR flow within the southern central Delta," resulting in less fish entrained when entering the San Joaquin River at Mokelumne. 3/31/10 Tr. 124:9-15.
>
> However, the record does not support a finding that the specific Vernalis flow to export ratios imposed by Action IV.2.1 (as opposed to lesser or greater ratios) are necessary to avoid jeopardy and/or adverse modification to any of the Listed Species. The total absence of explanation for the exact flow limits chosen makes Action IV.2.1 arbitrary and capricious.

Doc. 347 ¶¶ 99-102 (internal paragraph numbers omitted from quotation to avoid confusion). The injunction decision found likely success on the merits, but requested additional information on the status of the species before ordering injunctive relief:

> Injunctive relief is also warranted under the ESA, because, although the general premises underlying Actions IV.2.1 ... find marginal support in the record, the precise flow prescriptions imposed on coordinated project operations as part of Action IV.2.1's [**214] Vernalis flow/export ratio ... are not supported by the best available science and are not explained as the law requires.
>
> Injunctive relief cannot be imposed without up-to-date evidence of the status of the species to assure that altered operations will not deepen jeopardy to the affected species or otherwise violate other laws. The evidence has not sufficiently focused on remedies to provide a confidence level that completely removing the Vernalis flow to export ratio prescriptions of Action IV.2.1 ... to increase water supply will not jeopardize the continued existence of the species and/or adversely modify their critical habitats.

Id. at 133-34.

After receiving additional evidence about the status of the species, Action IV.2.1 was enjoined for a limited period of time (from May 26 through May 31, 2010), in part because only a small percentage of the population of concern, the SSNDG of CV Steelhead, remained in the area that [*884] would be impacted by the injunction. Doc. 380.

A second motion for injunctive relief was filed against Action IV.2.1 in February 2011, Doc. 538, and then withdrawn in light of wet hydrologic conditions that obviated the need to implement the challenged aspects of [**215] the Action in this water year. Doc. 625, filed March 30, 2011.

Export Plaintiffs and DWR again challenge the scientific basis for Action IV.2.1. Export Plaintiffs' and DWR's briefs on the issue substantially overlap.

a. Does the Record Support NMFS's Imposition of an Flow:Export Ratio Requirement?

(1) Studies Cited by DWR.

DWR's principle argument is that the last twenty years of San Joaquin River fisheries studies have not produced any statistically significant evidence of a negative relationship between salmonid survival and project pumping. Doc. 446-1 at 11. DWR's expert, Bradley Cavallo, refers to various statistical analyses of San Joaquin River salmonid experiments that reveal either no statistically significant relationship, or a positive one. His citation to a study by Kjelson, Loudermilk, Hood, and Brandes, "The Influence of San Joaquin River Inflow, Central Valley and State Water Project Exports and Migration Route on Fall-Run Chinook Smolt Survival in the Southern Delta During the Spring of 1989," published in 1990, is representative of these critiques. Kjelson, *et al.* (1990) concluded:

> Survival of tagged smolts released under low export conditions was not greater than for those [**216] released under high export conditions (Table 4). This was an unexpected result as we believed conditions for survival should have improved when exports were lowered, since direct losses at the Project facilities were decreased, flow in the mainstem San Joaquin was increased and reverse flows in the Delta were eliminated.

AR 00122358-59 (cited in Cavallo Decl., Doc. 452 at ¶8a).

Mr. Stuart, the lead author of the Delta section of the BiOp, asserts that Mr. Cavallo has selectively quoted from the relevant studies. For example, as to the Kjelson, *et al.* study:

> ...Mr. Cavallo selectively cites a paragraph from the Kjelson *et al.* (1990) study without including the discussion concerning the results of the study. Kjelson *et al.* reached a different conclusion as to the potential role of exports than would be arrived at by reading Mr. Cavallo's excerpt from his declaration. Starting on page 11 of the Kjelson *et al.* study, the authors discuss the potential reasons for the lower survival during lower export levels. NMFS 122357. These included: (1) the duration of the low export period in May 1989 under the low San Joaquin River flow conditions was too short, thereby not allowing the tagged smolts [**217] sufficient time to successfully exit the Delta before high export conditions were resumed, (2) a short curtailment period may be sufficient if San Joaquin River flows are high compared to the export rates at the time of smolt migration, (3) the relatively low number of tagged fish released under each export period that would make recovery at Chipps Island difficult if survival was low, and (4) elevated temperatures and poor trucking survival for the Stanislaus River releases that potentially lowered initial survival rates, thus biasing the export relationship. Kjelson *et al.* finishes with recommendations for future studies, including: (1) a wider range of inflow to export ratios assessed, particularly between 1 and 5 when river flows are above 5,000 cfs in the San Joaquin River, and (2) document the proportion of fish that enter upper Old River under various flow, export, and [*885] tidal conditions. The fact that Mr. Cavallo did not offer these additional points in his declaration limits the utility of his opinion.

Fourth Stuart Decl., Doc. 485 at ¶ 13. The BiOp specifically discussed Kjelson, *et al.* (1990)'s conclusions in Appendix 5:

> In a study assessing the influence of San Joaquin River [**218] inflows, state and

> federal exports and migration routes, Kjelson *et al.* (1990) released experimental fish (coded wire tagged hatchery Chinook salmon) during the spring of 1989 at Dos Reis on the San Joaquin River below the head of Old River, and in Old River itself downstream of the head under conditions with low San Joaquin River flow (? 2,000 cfs) and high/low export conditions (10,000 cfs and 1,800 cfs). The results of the study were unexpected as the rate of survival was not greater for the low export conditions compared to the higher export conditions. Upon further examination of the data, Kjelson *et al.* found that survival was comparatively lower for all upstream release groups that year compared to other studies conducted in previous years. In addition, Kjelson *et al.* surmised that the short period of reduced exports (7 days) was not long enough to allow fish to exit the system and move beyond the influence of the exports when higher pumping resumed. Based on the times to recovery at Chipps Island, it was concluded that a sizeable proportion of the released fish were still in the Delta when the higher export levels resumed. This conclusion is further reinforced by the salvage [**219] of fish released at Jersey Point, indicating that fish were drawn upstream into the interior of the Delta and towards the pumps. The study, although having several significant flaws, did conclude that survival was higher in the main stem San Joaquin River compared to Old River and that survival in the Delta interior was lower compared to the western Delta (i.e., Jersey Point releases). The authors cautioned about drawing conclusions about export rates and survival from the data due to its obvious flaws.

BiOp App. 5 at 5-6.

DWR correctly rejoins that Mr. Stuart does not contest that Kjelson, *et al.* (1990) concluded that survival was lower during low exports than high exports. DWR is also correct that Mr. Stuart does not explain how the study "affirmatively supports the United States' claim that a relationship exists between project exports and smolt survival sufficient to justify the Inflow/Export ratio." Doc. 495 at 16. Mr. Stuart never opined that Kjelson's study provides such affirmative support. The BiOp considered the study, its caveats, and acknowledged the study's "surprising" conclusion that survival was not higher during low export conditions.

Mr. Cavallo quotes from five more [**220] studies, Cavallo Decl., Doc. Doc. 452 at ¶ 8:

> o Brandes and McLain, "Juvenile Chinook Salmon Abundance, Distribution, and Survival in the San Sacramento-San Joaquin Estuary," Fish Bulletin 179, Vol. 2 (2001):
>
> > To determine if exports influenced the survival of smolts in the San Joaquin Delta, experiments were conducted in 1989, 1990 and 1991 at medium/high and low export levels. Results were mixed showing in 1989 and 1990 that survival estimates between Dos Reis and Jersey Point were higher with higher exports whereas in 1991 between Stockton and the mouth of the Mokelumne River (Tables 11 and 12) survival was shown to be lower (0.008 compared to 0.15) when exports were higher.... In addition, results in 1989 and 1990 also showed that survival indices of the upper Old River groups relative to the Jersey Point groups were also higher during the higher [*886] export period, but overall still about half that of the survival of smolts released at Dos Reis (Table 11).
>
> AR 00109602-604.
>
> o San Joaquin River Group Authority, "2005 Annual Technical Report":
>
> > Regression of exports to smolt survival without the HORB were weakly or not statistically significant (Figure 5-17) using both the Chipps Island and

[**221] Antioch and ocean recoveries, but both relationships indicated survival increased as exports increased."

AR 00134289-90.

o California Department of Fish and Game, "Final Draft 11-28-05 San Joaquin River Fallrun Chinook Salmon Population Model"

There is no correlation between exports and adult salmon escapement in the Tuolumne River two and one-half years later (Figure 24).

AR 00212424, 00212477.

o Mesick, McLain, Marston and Heyne, "Draft Limiting Factor Analyses & Recommended Studies for Fall-run Chinook Salmon and Rainbow Trout in the Tuolumne River" (February 27, 2007)

[Preliminary correlation analyses suggest that the combined State and Federal export rates during the smolt outmigration period (April 1 to June 15) have relatively little effect on the production of adult recruits in the Tuolumne River compared to the effect of winter and spring flows. Furthermore, reducing export rates from an average of 264% of Vernalis flows between 1980 and 1995 to an average of 43% of Vernalis flows and installing the head of Old River Barrier between 1996 and 2002 during the mid-April to mid-May VAMP period did not result in an increase in Tuolumne River adult recruitment (Figures 3 and 17).

AR [**222] 00125522.

o Ken B. Newman, "An Evaluation of Four Sacramento-San Joaquin River Delta Juvenile Salmon Survival Studies" (March 31, 2008) (AR 00127144.)

The Bayesian hierarchical model analyzed the multiple release and recovery data, including Antioch, Chipps Island, and ocean recoveries, simultaneously.... There was little evidence for any association between exports and survival, and what evidence there was pointed towards a somewhat surprising positive association with exports.

AR 00127219-00127220.

Mr. Stuart now submits alternative explanations to support his opinion why each of these studies does not definitively rule out a relationship between exports and survival:

o Brandes and Maclain (2001) elsewhere concludes that direct mortality at the pumps is higher when exports are higher. Fourth Stuart Decl., Doc. 485 at ¶ 14 (citingAR 000109605-07).

o While the San Joaquin River Group Authority ("SJRGA") 2005 VAMP Technical Report did not find a statistically significant relationship between exports and smolt survival without HORB in place, the report does explain that there are apparent relationships between survival and the flow to export ratio. *See* AR 00134293 (suggesting survival through [**223] the Delta can be improved with increased flow/export ratios when HORB is not installed).

o The Mesick study concerned only the Tuolumne River, which Mr. Stuart admits is "extremely flow limited" making it unlikely that non-flow factors would affect escapement into that watershed. *See* Stuart Decl., Doc. 485 at ¶ 11.

o Mr. Stuart does not dispute that Newman (2008)'s analysis of VAMP data [*887] concluded "[t]here was little evidence for any association between exports and survival, and what evidence there was pointed toward a somewhat surprising positive association with exports." AR 00127220. This statement has been extensively discussed. Mr. Stuart argues out that Newman (2008) also explained that these analyses "are not the ultimate definitive explanations for what affects juvenile salmon survival through the Delta, particularly for outmigrants from the San Joaquin River," citing data limitaions, low re-capture probabilities, high environmental variation, and "lack of balance" in the release strategy as affecting the accuracy of estimates of effects on survival. AR 00127148.

The best that can be said from all these studies is that they do not affirmatively support the purported relationship [**224] between exports and survival NMFS uses to justify Action IV.2.1's flow:export ratio. However, without more, DWR has not established that these studies were not properly evaluated. NMFS relies on additional record evidence to support imposition of Action IV.2.1's flow:export ratio limitation.

(2) Studies Cited by NMFS in Support of a Flow:Export Ratio.

(a) VAMP Data.

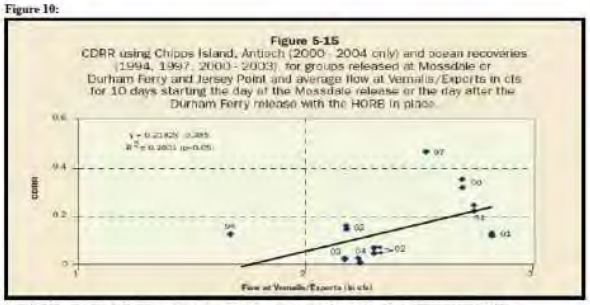
The BiOp concedes that analyses of the evidence gathered during the Vernalis Adaptive Management Program ("VAMP") [24] are equivocal regarding the impact of exports on survival. BiOp at 373. The BiOp also recognizes that the VAMP experiments may have resulted "in weak to negligible" associations because of the "correlation between flow and export rates during VAMP." *Id.* Mr. Stuart explains the VAMP experimental design was not implemented in full, in that not all of the planned relationships have been tested, with overrepresentation at certain combinations of flow and exports. Fifth Stuart Decl., Doc. 516 at ¶ 6. Mr. Stuart opined: "Newman (2008) concluded that the testing of the extremes of combinations is necessary to increase the precision of the experiments and allow discrimination of differences between the parameters." *Id.* [**225] at ¶ 50. The 2010 PI Decision found that the BiOp considered the VAMP evidence and its limitations and did not disregard any important conclusions generated from the VAMP data. *Consol. Salmonid Cases, 713 F. Supp. 2d at 1132-34.*

24 VAMP is a multi-agency collaborative effort that is part of the San Joaquin River Agreement ("SJRA"). "SJRA is a negotiated settlement agreement between SJR water suppliers, water purveyors, and both State and Federal Fishery Agencies that calls for specific spring South Delta (e.g. SJR at Vernalis) river flows and Delta export pumping rates. The San Joaquin River Group Authority provides the flows necessary to attain the Vernalis flow objectives. State and Federal agencies ensure that Delta exports rates are met. [VAMP] is a scientific study that evaluates the effects of Delta inflow, and outflow, upon fall-run Chinook salmon smolt survival." AR 00212419.

Notwithstanding the lack of statistical significance, the BiOp relied on the following Figure copied from the 2006 VAMP Technical Report to demonstrate that, during times when the Head of Old River Barrier ("HORB") was in place, as the ratio between Vernalis flow and exports increased, survival increased. [**226] BiOp App. 5 at 20.

[*888]

Figure 10:



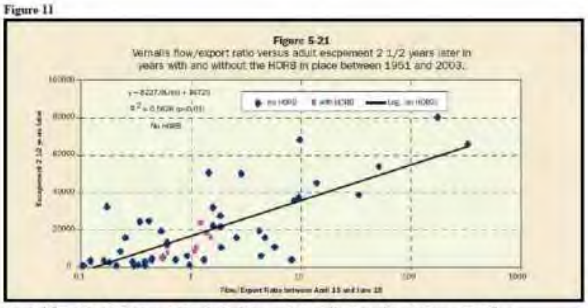
Copied from the 2006 Annual Technical Report, Vernalis Adaptive Management Plan

BiOp App. 5 at 20. The relationship was not statistically significant, but the BiOp states that this may have been due to the narrow range of export rates tested. *Id.* The 2010 PI Decision found NMFS's reliance on this data was not arbitrary. *Consol. Salmonid Cases, 713 F. Supp. 2d at 1133-34.*

(b) Escapement Data.

NMFS includes the following chart from the 2006 VAMP annual report that showed [*889] a positive relationship between the spring Vernalis flow/export ratio and adult escapement (i.e. return from the ocean to freshwater) two and a half years later, based on data from 1951 through 2003. BiOp App. 5 at 21.

Figure 11

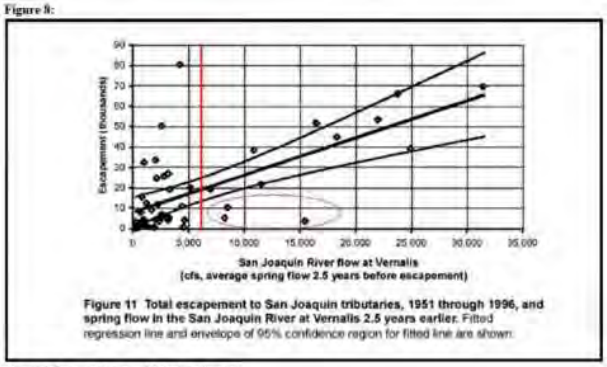


Copied from the 2006 Annual Technical Report, Vernalis Adaptive Management Plan

The 2010 PI Decision found it not unreasonable for NMFS to consider the analysis depicted in Figure 11. *Consol. Salmonid Cases, 713 F. Supp. 2d at 1134.*

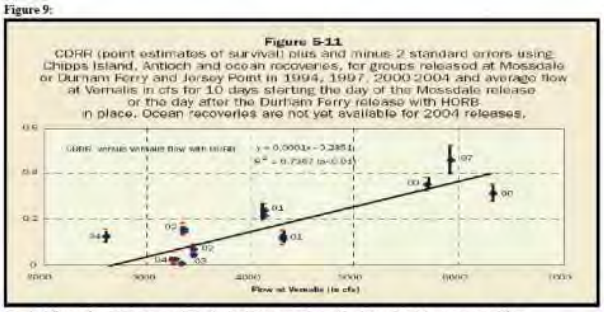
DWR argues that NMFS's reliance on Figures 10 and 11 to support the conclusion that there is a correlation between exports and survival is unfounded. Doc. 446-1 at 14. DWR's expert, Bradley Cavallo, compares Figures 10 and 11 to Figures 8 and 9, which plot the impact of San Joaquin River ("SJR") flow against exports:

Figure 8:



Copied from Baker and Morhardt 2001.

Figure 9:



Copied from the 2006 Annual Technical Report, Vernalis Adaptive Management Plan

BiOp App. 5 at 19. Mr. Cavallo opines that "inspection of the degree of scatter in [Figures 10 and 11] [**227] relative to [Figures 8 and 9] suggests SJR inflow to export ratio [*890] provides a poorer fit to observed data than does SJR inflow alone." Cavallo Decl., Doc. 452 at ¶ 12. For example, "the model describing smolt survival in relation to SJR flows alone (Exhibit 1, bottom) has an r^2 value of 0.73 while the comparable model with the ratio of SJR flows to exports has an r^2value of only 0.26 (Exhibit 2, bottom). [¶] An r^2 value closer to 1 signifies that salmon survival is better explained by SJR flows (r^2 = 0.73) than by the ratio of SJR flows to exports (r^2 = 0.26)." *Id.* at ¶¶ 12-13. Although SJR flows better explain salmon survival than the ratio of SJR flows to exports, Mr. Cavallo does not opine that there is no relationship between salmon survival and the ratio of SJR flows to exports depicted in Figures 10 and 11. Although NMFS overstates and over-relies on questioned data, this is a scientific dispute among experts that does not involve error of the magnitude that rises to unlawfulness.

(c) CDFG (2005).

DWR also criticizes NMFS's treatment of a 2005 Department of Fish and Game ("CDFG") study, which provides a "description of the process [CDFG] used to develop, and apply, its Model in [**228] the formulation of spring Vernalis flow objectives that were submitted to the [State Water Resources Control Board]." AR 00212414. Mr. Stuart opined that the report "clearly shows that while flows are the primary driver, exports play a role, albeit less than that attributable to flows." Fourth Stuart Decl., Doc. 485 at 14. DWR responds that NMFS "misrepresents the [report's] flow and export conclusions." DWR focuses on several statements from the report, including the conclusion that "Delta export level, relative to Delta inflow level, does not influence juvenile salmon survival on a regular, normal, or repetitive pattern." AR 000212423. CDFG determined that non-flow parameters, such as exports, ocean conditions, "have little, or no, relationship to fall-run Chinook salmon population abundance in the SJR and that spring flow magnitude, duration, and frequency all had significant influence upon SJR fall-run Chinook salmon abundance in the SJR." AR 00212413. CDFG excluded consideration of project exports, ocean conditions, and/or density dependence from its model because of "the lack of substantial cause and effect relationships" [**229] between these non-flow factors and abundance. AR 00212426.

DWR's contextual approach requires examination of the entire section:

> Delta Exports It has long been surmised, due to salvage of many juvenile salmon at both the State and Federal Delta export facilities in the spring months, that entrainment of juvenile salmon at the export facilities in the spring months has impacted fall-run Chinook salmon populations in the SJR. A statistically significant regression correlation relationship exists between the ratio of Delta exports and Delta inflow, from the SJR in April-June,

and in-river escapement of fall-run salmon two and one-half years later (Figure 17). If the measurement metric of production cohort is used, instead of escapement 2.5 years later, the curvilinear regression correlation relationship improves (r-square value rises from 0.44 to 0.58) (Figure 18). This seems to suggest that both flow and exports are influencing salmon production in the SJR basin. However, in every instance where salmon production was high, Vernalis flows are in excess of 10,000 cfs. Conversely when salmon production was low, Vernalis flow levels are less than 2,000 cfs (Figure 18). The question becomes [**230] is it the flow, or the exports?

In an attempt to answer this question, the Department took a closer look at smolt survival data that has been collected [*891] in recent years (data from P. Brandes USFWS). Smolt survival data collected during VAMP shows that juvenile survival increases as exports increase (Figure 19). In addition smolt survival as a function of the export to Vernalis flow ratio has a low correlation (Figure 20), indicating that Delta export level, relative to Delta inflow level, does not influence juvenile salmon survival on a regular, normal, or repetitive pattern. When exports are combined with Vernalis flow in a multiple regression against juvenile survival (both with the Head of Old River Barrier in or out), a strong positive regression occurs (as both exports and Vernalis flow increase, juvenile salmon survival increases (Figures 21 and 22)). For [**231] both cases, with either the HORB in or out, export level has a slightly stronger positive influence upon survival than does inflow level. What is surprising about this occurrence is not that export level influences survival, but that there is a positive, rather than a negative, response in juvenile survival as export level increases. It is noted that due to VAMP, when exports are up, Vernalis flows are increased with export level tied to Vernalis Flow level. This is a noteworthy Delta system operational change, as prior to VAMP there was no correlation between South Delta spring inflow level (e.g. Vernalis flow) and spring Delta export level (unpublished data). Here again, the variable that seems to be controlling salmon production (e.g. survival) is spring Delta inflow not spring Delta export.

When Delta exports are subtracted from Vernalis flow levels (Figure 23) and escapement is regressed against this difference, a statistically significant regression correlation results. There is no correlation between exports and adult salmon escapement in the Tuolumne River two and one-half years later (Figure 24). When spring Vernalis flow and spring Delta exports are regressed against salmon [**232] escapement two and one-half years later, no improvement in the flow to salmon escapement correlation occurs (VAMP 2005), suggesting that spring flow level, not exports, is the variable limiting salmon production in the South Delta.

To summarize the relationship between exports, flow, and SJR salmon production the primary relationship suggesting that exports influence SJR salmon production is that when the ratio of exports to Vernalis flow decreases both escapement and cohort production increases. The relationships that suggest that flow, not export, is the primary factor influencing SJR salmon production are: 1) when the ratio of spring exports to spring Vernalis flow decreases, Vernalis flow greatly increases and SJR salmon production greatly increases; 2) when the ratio of spring exports to spring Vernalis flow increases, Vernalis flow greatly decreases and SJR salmon production substantially decreases; 3) juvenile salmon survival increases when spring Vernalis flow increases; 4) spring export to spring Vernalis flow ratio has little influence upon juvenile salmon survival; and 5) as the difference between spring Vernalis flow level and spring export flow level increases, escapement [**233] increases.

In conclusion, while the influence of Delta export upon SJR salmon production is not totally clear, overall it appears that Delta exports are not having the negative influence upon SJR salmon production they were once thought to have. Rather it appears that Delta inflow (e.g. Vernalis flow level) is the variable influencing SJR salmon production, and that increasing

> flow level into the Delta during the spring months results in substantially increased salmon production.

[*892] AR 00212423-24 (footnotes omitted)(emphasis added). [25] Although the CDFG report supports Mr. Cavallo's assessment that flows are the primary driver of salmon abundance in the SJR, the report acknowledges that as the export:flow ratio "decreases" (i.e., as the flow:export ratio increases) escapement and cohort production increases. This supports NMFS's use of a flow:export ratio. NMFS's minimization of the CDFG study was scientifically undesireable, but the law does not prevent it, by extending discretion to be mistaken. A candid appraisal of the true effect of flows, without masking the lack of significance in a flow:export ratio, would be welcome.

25 Contrary to Export Plaintiffs' assertion that ocean conditions [**234] are the primary driver of salmonid abundance, the CDFG report concludes ocean conditions are far less influential than spring flows:

> Ocean Harvest It has also long been postulated that ocean harvest is a controlling influence upon long-term in-river salmon escapement population trends in the SJR. However, comparing the Central Valley Harvest Index to Sacramento and San Joaquin River salmon escapements (Figures 25) suggests that ocean harvest is not a variable influencing the long-term trend in SJR salmon escapement. Unlike in the Sacramento River basin, no noticeable increase in SJR salmon escapement occurred when substantial changes in ocean sport and commercial fish regulations restricted ocean harvest in recent years. Additionally, regressing the Central Valley Harvest Index against annual SJR escapement produces a weak, but statistically significant, regression correlation (Figure 26). The relationships depicted in Figure 25 and 26 suggest that factors other than ocean harvest, such as in-Delta or in-river conditions, are controlling the long-term SJR salmon escapement trend. With Delta condition influence upon long term SJR escapement trend being determined by Delta inflow, which [**235] in turn is largely controlled by east-side SJR tributary flow21, the focus shifts to in-river, specifically in east-side SJR tributary, conditions.

AR 00212424-25 (footnotes omitted).

(d) Delta Action 8 Studies.

The BiOp considered data from the so-called "Delta Action 8 studies," which compared the relative survival rates of coded-wire tagged salmon released at (a) Ryde on the Sacramento River and (b) Georgiana Slough, a channel that splits off of the Sacramento River at Walnut Grove and leads to the interior Delta, joining the South Fork of the Mokelumne River just before it meets the San Joaquin River. The 2010 PI Decision discussed NMFS's treatment and critiques of these studies in detail:

> Evaluating the data from the Delta Action 8 studies, Newman (2008) first explained that there was a high level of environmental variation in the data. [3/30/10 Tr.] at 78:18-23. Dr. Newman performed further analysis to reduce the amount of environmental variation and subsequently found a 98% probability that a negative relationship between exports and survival is present. *Id.* at 79:5-7. Mr. Stuart stated the significance of Newman's finding is that as exports increased, survival decreases for those [**236] salmonid smolts that are moving down into the San Joaquin River, where they would be exposed to the influences of the export pumps. 4/2/10 Tr. 32:8-34:12. For those fish released into Georgiana Slough, survival was better when exports were lower.
>
> This study is relevant to assessing the impacts of export pumping on fish migrating through the San Joaquin River, because fish released into Georgiana Slough must exit into the San Joaquin River, where they are subject to the influence of the pumps. 3/31/10 Tr. 76:20-23. The Georgiana Slough fish share a common migratory pathway with fish that exit the San Joaquin River basin. *Id.* at 76:24-77:6. Regardless [*893] of their origin,

once the fish are in this common migratory pathway, they are subject to the same hydraulic conditions. *Id.* at 78:1-17.

Mr. Cavallo stated that his interpretation of the Newman (2008) study is that there is a weak relationship between exports and survival in the interior Delta, but conceded that there was some relationship. 4/1/10 Tr. 98:24-99:4. Mr. Stuart testified that Newman's studies are the best available and the fact that Newman could find a relationship given the considerable amount of "environmental noise" and the [**237] very low signal to noise ratio "shows that the relationship is probably very real." *Id.* at 159:6-10. Whether this opinion is entitled to weight is disputed by Plaintiffs.

A September 26, 2008 paper prepared by Dr. Newman with Patricia L. Brandes entitled "Hierarchical Modeling of Juvenile Chinook Salmon Survival as A Function of Sacramento-San Joaquin Delta Water Exports" ("Newman and Brandes 2008") examined the Delta Action 8 data concerning the relative survival rates for Ryde and Georgiana Slough releases and declared: what "we cannot conclude is that exports are the cause of this lower relative survival." 4/1/10 Tr. 67:20-23 (emphasis added); DWR Ex. 507 at 22. Newman and Brandes 2008 reached this conclusion because "the evidence for an association between exports and survival is somewhat weak" and because of the study's inability to randomize export levels within a given outmigration season. 4/1/10 Tr. 68:1-12; DWR Ex. 507 at 22-23. A later version of this study, dated 2009, omitted this language from the conclusion. 4/2/10 Tr. 28:2-13.[FN 6]

> [FN6] Mr. Stuart explained that although the BiOp cited the 2008 version of the Newman and Brandes study, he actually used the 2009 version [**238] to prepare the BiOp and the 2009 paper was in his reference list. He does not know why the BiOp used the 2008 citation. 4/2/10 Tr. 28:2-13

> The Delta Action 8 studies seek to relate to exports survival of juvenile salmonids and steelhead passing through the interior Delta from the San Joaquin River basin. These studies show a negative relationship, although admittedly weak, between export levels and survival for fish passing through this area of the Delta.

Consol. Salmonid Cases, 713 F. Supp. 2d at 1134-35 (emphasis added).

DWR again challenges NMFS's reliance on Newman's review of the Delta Action 8 studies to demonstrate that increasing exports will negatively affect salmonids migrating to the ocean through the San Joaquin River and its tributaries. Mr. Cavallo opines that it is inappropriate to rely on the Delta Action 8 studies to reach conclusions about San Joaquin basin salmonids. Cavallo Decl., Doc. 452 at ¶¶ 19-25. He also opines that the overall effect even on migrating salmon smolts in the Sacramento River is relatively small. *Id.* at ¶ 23. NMFS acknowledged the limitations of these studies in the BiOp, yet relies on them to support Action IV.2.1.

The Delta Action 8 studies marginally [**239] support Action IV.2.1. Newman's analysis of the Delta Action 8 studies revealed that for those fish passing through Georgiana slough and the interior Delta, survival was negatively impacted by exports. Those fish share a common migratory pathway with all of the fish exiting the San Joaquin Basin. Fourth Stuart Decl., Doc. 485 at ¶¶ 28-29. It continues to be marginal logic to apply the admittedly weak correlative results of Newman's analysis to San Joaquin salmonids. Mr. Cavallo's criticism that Georgiana Slough, which is not a tidally influenced watercourse and which never [*894] experiences reverse flows, is distinct from the SJR, which is tidally influenced and regularly experiences reverse flows, Cavallo Reply Decl., Doc. 497 at ¶ 55, does not abrogate the use of Delta 8 studies. Once fish exit Georgiana Slough, they must travel into the Mokelumne River system and the lower SJR, where they are influenced by tidal movements and exports. Fourth Stuart Decl., Doc. 485 at ¶ 28. Mr. Cavallo's criticisms represent another dispute among experts, to which the agency is due deference, even recognizing that DWR and Mr. Cavallo have no apparent incentive to reach objective opinions contrary to NMFS, [**240] while Mr. Stuart makes every call in favor of the species, no matter how questionable the basis.

(3) Treatment of Data Related to the Use of Bubble Curtains at HORB.

Export Plaintiffs argue that NMFS ignored record evidence demonstrating the effectiveness of non-physical barriers, such as bubble curtains, which use sound, lights, and air bubbles, to guide fish. Doc. 431 at 91. A May 18, 2009 transmittal of "preliminary data" from Reclamation Biologist Dr. Mark Bowen showed that a bubble curtain kept a substantial percentage of fish in the San Joaquin River, rather than allowing them to move into the Old River toward the pumps. AR 00093348. Export Plaintiffs' contention that NMFS did not consider this data in developing Action IV.2.1 is incorrect. NMFS considered Dr. Bowen's preliminary data, Fourth Stuart Decl., Doc. 485 at ¶ 91, and recognized Dr. Bowen's warning that the results were preliminary and was "NOT to be cited!" AR 00093348 (emphasis and punctuation in original). Export Plaintiffs' objection on this ground is not valid.

b. Does the Record Support the Specific Flow/Export Ratios Imposed?

The 2010 PI Decision discussed NMFS's rationale for the 4:1 Ratio:

> NMFS looked at the VAMP [**241] data to develop the ratio.
>
> > Current VAMP studies have ratios of flow to exports clustered around 2:1, which have provided low survival indices for upstream releases compared to downstream releases, particularly in recent years. Studies which would have had higher flows (i.e., 7,000 cfs) to export (1,500 cfs) ratios were not conducted, since the necessary environmental conditions to implement this part of the study protocol never occurred. Recent conditions in which high flows did occur in the San Joaquin River basin and which would have given flow to export ratios greater than 3:1 in 2005 and 10:1 in 2006 were confounded by poor ocean conditions during the smolts entry into the marine environment, and returning adult fall-run Chinook salmon escapement numbers from these brood years were very low (brood years 2004, 2005 which returned in 2007 and 2008). From the available data, including the information contained in figures 10 and 11, flow to export ratios should be at least 2:1 and preferably higher to increase survival and abundance. In light of these factors, NMFS initially developed flow to export ratios of 4:1 for wet, above normal, below normal, and dry years, based on the minimum [**242] export level of 1,500 cfs and a targeted minimum Vernalis flow of 6,000 cfs. Flows in critically dry years were targeted to be a minimum 3,000 cfs, which gives a flow to export ratio of 2:1 when exports are targeted to be 1,500 cfs.

BiOp App. 5 at 22-23 (emphasis added). The feasibility and water supply implications of implementing such flow versus export ratios were then examined through computer modeling. *Id.* at 24-68. The BiOp reasoned that a 2:1 ratio was insufficient because the VAMP [*895] studies demonstrated low survival rates at that ratio, and that higher ratios would be "prefera[ble]" to increase survival and abundance. Yet, without any biological explanation, the BiOp chose to impose a 1,500 cfs limit when flows at Vernalis are lower than 6,000 cfs, and a ratio of 4:1 (as opposed to 2.5:1, or 3:1, or even 5:1 or higher) when Vernalis flows are between 6,000 cfs and 21,750 cfs. *Id.* at 71-72.

> The absence of explanation and analysis for adoption of these limits uses no science, let alone the best available and is simply indefensible.

Consol. Salmonid Cases, 713 F. Supp. 2d at 1135-36 (emphasis added) (footnote omitted).

The PI Decision addressed the Phase I flow:export ratio, which operated [**243] through May 31, 2011. Phase II, which will control operations starting next spring (from April 1 through May 31), imposes the following flow:export ratios:

San Joaquin Valley Classification	Vernalis flow (cfs): CVP/SWP combined export ratio
Critically dry	1:1
Dry	2:1
Below normal	3:1
Above normal	4:1
Wet	4:1
Vernalis flow equal to or greater than 21,750 cfs	Unrestricted exports until flood recedes below 21,750.

BiOp at 643-44.

Defendant-Intervenors offer the following record-based justification for these ratios:

> NMFS explained the rationale for the 2:1 flow/export ratio in dry years as follows:
>
> > Studies identify increased flows as a factor that increases survival of tagged Chinook salmon smolts. To date, most VAMP experiments have utilized San Joaquin River flows to export pumping ratios of approximately 2:1. Survival to Chipps Island of smolts released upstream has been relatively low under these conditions. Historical data indicates that high San Joaquin River flows in the spring result in higher survival of outmigrating Chinook salmon smolts and greater adult returns 2.5 year later (Kjelson *et al.* 1981, Kjelson and Brandes 1989, USFWS 1995) and that when the ratio between spring flows and exports [**244] increase, Chinook salmon production increases (CDFG 2005, SJRGA 2007).

NMFS 00106725 (BO at 645) (emphasis added); *see also* NMFS 00107220-21 (BO, App. 5, at 74-75). Figure 11 in Appendix 5 of the BiOp depicts data of flow/export ratios over a 50 year period (1951 to 2003) and reveals that increasing the flow/export ratio was positively correlated with increased escapement of fall-run Chinook salmon 2 1/2 years later. *See* NMFS 00107166-67 (BO, App. 5, at 21-22).

The BiOp's rationale for the 4:1 flow/export ratio is likewise clearly set forth and logical:

> The data from the ongoing VAMP experiments provided useful information in developing the ratio. Current VAMP studies have ratios of flow to exports clustered around 2:1, which have provided low survival indices for upstream releases compared to downstream releases, particularly in recent years. Studies which would have

> had higher flow (i.e., 7,000 cfs) to export (1,500 cfs) ratios were not conducted, since the necessary environmental conditions to implement this part of the study protocol never occurred.

NMFS 00107168 (BO, App. 5, at 22). NMFS went on to explain that:

> From the available data, ... flow to export ratios should be at least [**245] 2:1 and preferably higher to increase survival and abundance. In light of these factors, NMFS initially developed flow to export ratios of 4:1 for wet, above normal, below normal, and dry years, based on the minimum export level of 1,500 cfs and a targeted minimum Vernalis flow of 6,000 cfs. Flows in critically dry years were targeted to be a minimum 3,000 cfs which gives a flow to export ratio of [*896] 2:1 when exports are targeted to be 1,500 cfs.

Id. (emphasis added). These flow and export levels were then assessed through computer modeling. *Id. See* NMFS 00107169-00107214 (BO, App. 5, at 23-68).

NMFS acknowledged and responded to DWR's objections to Action IV.2.1: "Both the Bureau of Reclamation and DWR have strong initial opposition to the proposed RPA. DWR has indicated that the RPA is unfeasible as it [is] currently written. They have proposed alternative actions that NMFS has investigated." NMFS 00107214 (App. 5 at 68). Among the alternative proposals made by DWR was "real time monitoring at Mossdale utilizing additional Kodiak trawling." NMFS responded, reasonably, by stating that:

> [Recoveries of steelhead in the Mossdale trawl are a rare event and in many years only a handful of fish [**246] are recovered. Given these rare recoveries of fish, an appropriate trigger to initiate flow increase or export reductions in a timely manner to protect outmigrating fish would be difficult to determine.... Therefore, what parameters would DWR suggest to indicate when the pulse of steelhead is exiting the system?

NMFS 00107214 (BO, App. 5, at 68).

The analysis discussed above amply demonstrates that, rather than base Action IV.2.1 solely on feasibility concerns, as Export Plaintiffs incorrectly argue, see Export Br. at 94-96, NMFS used the VAMP fish experiments as a starting point for the agency's analysis of a flow/export ratio. *See* NMFS 00107168 (BO, App. 5, at 22). The results of those VAMP studies established that a 2:1 ratio (involving a 1,500 cfs export limit) resulted in "low survival indices," and that a larger ratio was preferable when possible to "increase survival" and adequately protect the species. Id. After modeling results showed that it would be difficult to increase this ratio in dry years, NMFS reasonably set the Phase II ratios at 1:1 for critically dry years and 2:1 for dry years. NMFS 00107219 (BO, App. 5, at 73). In below normal and above normal years, however, NMFS [**247] reasonably concluded that more water would be available to meet the more protective ratios, thus allowing a 3:1 ratio in below normal years and a 4:1 ratio in above normal years. *Id.*

In its PI ruling, this Court questioned whether Action IV.2.1 was "protective enough" or whether a "5:1 or higher" ratio was necessary. PI Findings, CoL ¶ 51; id. FoF ¶ 97. As NMFS explained in Appen-

dix 5 of the BiOp, there are no conclusive studies of flow/export ratios greater than 2:1, but the best available data supports a minimum feasible flow of 6,000 cfs in most years, along with a ratio somewhat higher than the historically tested 2:1 ratio, which had proved insufficiently protective as discussed above. See NMFS 00107164-68 (BO, App. 5, at 18-22). Specifically, the 6,000 cfs target minimum flow was determined based on (1) water reasonably available based on historical flow patterns since 1922; and (2) flow-to-escapement relationships indicating that flows over 5,000 to 6,000 cfs "were required to move into the linear phase of increasing fish escapement." NMFS 00107167-68 (BO, App. 5, at 21-22). Unless NMFS reduced exports to even less than 1,500 cfs - the minimum believed necessary to protect human [**248] health and safety - simple math reveals that it would be impossible to achieve a 5:1 or higher ratio, assuming 6,000 cfs as the target minimum flow.

[*897] As to whether a less restrictive ratio (e.g., 3:1) was biologically appropriate, NMFS did adopt a 3:1 ratio for below normal years. Only in "above normal" or "wet" years is a 4:1 ratio required. Given the parameters for a flow/export ratio that could feasibly be implemented using a 6,000 cfs target for flows - somewhere between 2:1 and 4:1 - and the lack of data on any of the ratios in between, NMFS reasonably adopted a sliding scale that allows the absolute minimum ratio during drought conditions but increases protections for species when it is feasible to do so, as determined by hydrological conditions.

Of course, NMFS cannot prove with absolute certainty that the 4:1 ratio is protective enough for the species. The existing data simply does allow it. But, given the record evidence of harm to salmon and the need to modify the flow/export ratio, the best available science standard does not require that NMFS stand by and do nothing, paralyzed by a lack of perfect data. To the contrary, NMFS had to act and reasonably exercised its expertise [**249] by adopting a flow/export ratio that is both feasible and more protective of the species than the status quo. *See Greenpeace Action, 14 F.3d at 1337* (upholding biological opinion even though FWS admitted that it was "uncertain about the effectiveness of its management measures" because it "premised these measures on a reasonable evaluation of available data, not on pure speculation").

Thus, rather than base its decision on "no evidence," as was the case in Pacific Coast I, here NMFS's conclusions are explicitly based on scientific evidence, although some of that data may be "less than conclusive." *426 F.3d at 1094*. As acknowledged in Pacific Coast I, this is reasonable and consistent with the ESA. Accordingly, Defendant-Intervenors respectfully urge the Court to reconsider and reverse its preliminary finding that NMFS failed to articulate a reasonable basis for RPA Action IV.2.1. *See* PI Findings, FoF ¶¶ 97, 98; CoL ¶¶ 50, 51.

Doc. 484 at 68-71.

This explanation for the basis for the ratios imposed by Action IV.2.1 is supported by record references, which now explain in part NMFS's choice of ratios, aided by hindsight and judicial review. This is another close call. DWR opposes the flow [**250] ratings as infeasible and arguably unnecessary. NMFS uses VAMP flow data to corroborate its position that a 2:1 ratio is insufficiently protective. It justifies the use of a 3:1 ratio when possible (e.g., in below normal years) as necessarily more protective than a 2:1 ratio. The consequences of imposing a 4:1 ratio in above normal and wet years demand a clearer explanation of NMFS's rationale for imposing a 4:1 ratio, rather than a 3:1 ratio in above normal and wet years. The ESA Handbook requires "a thorough explanation of how each component of the [RPA] is essential to avoid jeopardy and/or adverse modification." ESA Handbook at 4-43 (emphasis added). [26] This is not to be [*898] done by attorneys, post hoc, in litigation. The importance of this requirement is heightened in light of the weak (arguably equivocal) evidence supporting the imposition of any ratios at all. [27]

26 Plaintiffs repeatedly assert that NMFS was required to articulate in the BiOp how and provide supporting evidence demonstrating that each RPA action "will avoid jeopardy to the continued existence of a listed species." Doc. 431 at 92, 101. This suggests a requirement that each individual RPA action must be designed to [**251]

avoid jeopardy. The requirement is more subtle. The Handbook requires each aspect be an "essential" component of an overall RPA designed to avoid jeopardy and adverse modification. Although each element need not achieve avoidance on its own, Federal Defendants incorrectly assert that "the Court's task here is not to dissect and reanalyze this RPA bit by bit, but analyze the overall management scheme proposed by the RPA and determine whether NMFS acted arbitrarily and capriciously in concluding that the RPA, in its entirety, was necessary to avoid the likelihood of jeopardizing the continued existence of the multiple species at issue." Doc. 477-1 at 71. In fact, the Handbook requires an action-by-action analysis. NMFS must thoroughly explain how "each" component of the RPA is "essential." While the Handbook is not deserving of Chevron deference, *N. Cal. River Watch v. Wilcox, 633 F.3d 766, 778-79 (9th Cir. 2011)*, as its purpose is to provide "information and guidance," its text is routinely cited as NMFS's and FWS's interpretation of the ESA, entitled to at least *Skidmore* deference, *Az. Cattle Growers Ass'n v. Salazar, 606 F.3d 1160, 1165 (9th Cir. 2010)*. In at least one case, the Secretary [**252] of the Interior argued that the Handbook was not binding on the consulting agencies. *Nat'l Wildlife Fed'n v. Babbitt, 128 F. Supp. 2d 1274, 1292 (E.D. Cal. 2000)*. But no such suggestion has been made here, nor is the agency's alternative interpretation that it may omit specific justification of each RPA action reasonable. "Although interpretations contained in agency manuals and comments are not entitled to the highest level of deference, a court may nevertheless defer to an agency's interpretation of its own regulation, depending upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Medina County Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 700-701 (5th Cir. 2010)* (quoting *United States v. Mead Corp., 533 U.S. 218, 227-30, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001))*. Applying this standard, the Fifth Circuit concluded that an interpretation contained in the Handbook was entitled to deference. *Id. at 701*.

27 NMFS is entitled to deference in its interpretation and application of the body of relevant science, most of which is equivocal on the [**253] issue, and had some basis to reach the conclusion that some form of flow:export ratio limitation should be imposed. It is as apparent that the record contains no strong evidence that a flow:export ratio limitation will improve salmonid survival.

Plaintiffs' and DWR's challenge to Action IV.2.1 is valid and their MSJ is GRANTED IN PART AND DENIED IN PART, as are Federal Defendants' and Defendant-Intervenors' cross motions. Although there is marginal record support for the imposition of some form of flow:export ratio, the Action must be remanded for further explanation of the necessity of a 4:1 ratios in above normal and wet years.

2. RPA Action IV.2.3.

Action IV.2.3 operates from January 1 through June 15 or until the average daily water temperature at Mossdale is greater than 72° F, and limits OMR flows to no more negative than -2,500 to -5,000 cfs, depending on juvenile entrainment levels. BiOp at 648-52. At the first level of increased juvenile loss, exports must be reduced to achieve an average net flow of -3,500 cfs for a minimum of five days, and at the second level, a more positive OMR average of -2,500 cfs must be achieved for at least five days. *Id.* For each trigger, OMR averages [**254] can return to -5,000 cfs only after three consecutive days of not meeting the higher-density juvenile loss trigger. *Id.*

Action IV.2.3 is meant to:

> [r]educe the vulnerability of emigrating juvenile winter-run, yearling spring-run, and CV steelhead within the lower Sacramento and San Joaquin rivers to entrainment into the channels of the South Delta and at the pumps due to the diversion of water by the export facilities in the South Delta. Enhance the likelihood of salmonids successfully exiting the Delta at Chipps Island by creating more suitable hydraulic conditions in the mainstem of the San Joaquin River for [*899] emigrating fish, including greater net downstream flows.

Id. at 648.

NMFS utilized several sources of data to determine that export flow limitations would achieve the objectives of RPA Action IV.2.3, including the relationship between OMR flows and salvage, particle tracking model simulations, and other studies evaluating survival of fish within the central and southern Delta. Export Plaintiffs and DWR challenge the scientific basis for NMFS's determination that an export limitation should be part of the

RPA. Export Plaintiffs' general arguments largely overlap with and incorporate [**255] the specific arguments presented in DWR's briefs, this discussion focuses on DWR's briefs.

a. Challenge to the Use of the Particle Tracking Method.

DWR argues that the record does not support NMFS's use of the Particle Tracking Model ("PTM"). A similar argument was addressed in the 2010 PI Decision, which provides the starting point:

> Plaintiffs' seminal challenge to Action IV.2.3 is that NMFS improperly based its rationale for the Action on outputs from computer model runs utilizing the so-called Particle Tracking Model ("PTM"), which models the flow of inert particles as they move within a flowing body of water.
>
> PTM is a hydrodynamic simulation used to assess the fate of particles, as a function of flow, tides, exports, and other factors. 4/1/10 Tr. 18:12-15; *see also id.* at 143:9-25. NMFS used PTM to assess the effects of different OMR flows on the movement of neutrally buoyant particles injected at nine different locations in the Delta. Gov't Salmon Ex. 23 at 2; BiOp at 364-66. The 2009 Salmonid BiOp states that "NMFS uses the findings of PTM simulations to look at the eventual fate of objects in the river over a defined period of time from a given point of origin in the system." BiOp at 366. [**256] According to the BiOp, "PTM data can be useful to indicate the magnitude of the net movement of water through the channel after the junction split (and the route selected by the fish), and thus can be used to infer the probable fate of salmonids that are advected into these channels during their migration." *Id.* at 367.
>
> Mr. Cavallo opined that PTM data are not useful to infer the probable fate of salmonids because, in contrast to PTM particles, which have no behavior characteristics, fish have behavior, swim quickly, and have a destination in mind. 4/1/10 Tr. 20:14 - 21:5. Mr. Cramer explained that "[j]uvenile salmonids are strong swimmers whose movements are determined by a wide variety of factors varying with species, size, developmental state, season, time of day, and water temperature, as well as relative hydraulic conditions in a channel. Unlike passive particles, juveniles can and do swim against significant currents." SLDMWA Ex. 120 at ¶6. To illustrate the problems with PTM, Mr. Stuart compared PTM simulations to actual data from mark-recapture studies of Chinook salmon. This comparison demonstrated that salmon move approximately 3.5 times faster though the water than neutrally [**257] buoyant particles and would arrive at Chipps Island in a considerably shorter time frame. 4/1/10 Tr. 37:13 - 38:4.
>
> This was a concern expressed in other studies by other experts. For example, the BiOp relied upon Wim J. Kimmerer and Matthew Nobriga's report entitled "Investigating Particle Transport and Fate in the Sacramento-San Joaquin Delta Using a Particle Tracking Model" ("Kimmerer and Nobriga 2008"). BiOp 105 at 380-381; Gov't Salmon Ex. 1 at [*900] ¶4; Gov't Salmon Ex. 4 at ¶8. Kimmerer and Nobriga 2008 disclaims: "[w]e do not claim that the specific results presented here represent actual movements of salmon; rather, these results indicate what factors may or may not be important in determining how salmon smolts may move through the Delta." DWR Ex. 501 at 18.
>
> DWR expressed similar concerns in an email to NMFS dated April 20, 2009 regarding the draft 2009 Salmonid BiOp, asserting that NMFS improperly applied the PTM results in determining the eventual fate of salmonids. Attachment 1 to DWR's comments is a comparison of the results of an experimental release of coded wire tagged salmon in the San Joaquin River under known hydrodynamic conditions with a PTM simulation under identical conditions. [**258] 4/1/10 Tr. 32:19-33:8. These results indicate that under low flow conditions, the coded wire tag salmon reached the end location of Chipps Island long before the arrival of most of the PTM particles. The PTM results only partially corresponded with the coded wire tag results under high flow conditions. *Id.* at 34:3-35:18; DWR Ex. 502 at AR 00086765, AR 00086767.
>
> NMFS recognized the limitations of applying the PTM model simulation to

salmonids. 4/1/10 Tr. 144:2-8. There were discussions with DWR concerning this issue during the consultation process. *Id.* at 144:9-11. In discussions between DWR and NMFS, NMFS indicated it was using the PTM to evaluate water movement and the potential vulnerability to particle entrainment from various locations in the Delta. *Id.* at 144:13-19. NMFS was explicit that it was not using PTM to predict exactly how fish were moving within these same channels, but that the information gleaned from PTM about water movement through the Delta could provide information on vulnerability to entrainment. *Id.* at 144:19-25.

DWR's expert, Mr. Cavallo, agrees with the BiOp that PTM data can be useful to indicate the magnitude of the net movement of water through a channel after [**259] a junction split. *Id.* at 20:21-23; BiOp at 367.

Mr. Cavallo also agrees that PTM results may be informative with regard to salmon movement. 4/1/10 Tr. 28:21-25. Mr. Cavallo stated that under the appropriate conditions, PTM simulations would be an appropriate tool to describe fish movement in discharge-driven portions of the Delta watershed. *Id.* at 86:8-10. Mr. Cavallo stated that the Kimmerer and Nobriga PTM study shows that "flow has a big effect on the path that water takes through the Delta," and that fish in a riverine system will tend to go with the flow. *Id.* at 30:11-15.

Mr. Cavallo's time-step critique of the PTM simulations used in the BiOp is unsupported.

Mr. Cavallo opines that the correct approach to PTM simulations is [] to ensure that the time horizon used in the model was consistent with the time horizon of the fish being studied. *Id.* at 25:6-11. Mr. Cavallo interpreted particular graphs in the biological opinion to indicate that NMFS used a 31-day time horizon in its PTM simulations, *id.* at 26:6-16, and opined that this time horizon was too long and would skew the results of the simulation, *id.* at 27:7-11.

The PTM simulations NMFS used were run by DWR. *Id.* at 86:14-15; 146:9-10. [**260] These simulations included four model runs for the months of February through June, using both [a] wet year [and] a dry year, and varied whether HORB was installed during the April/May period. *Id.* at 146:14-24, 147:4-6. [*901] Three different OMR flows were examined: -3,000 cfs, -2,500 cfs, and -1,250 cfs. *Id.* at 147:15-18. During that simulation, the particles actually were tracked every five days for the first 30 days. *Id.* at 147:1-4; Gov't Salmon Ex. 23 at 2. Mr. Cavallo was unsure that the particles were tracked every five days, nor did he review Mr. Stuart's memorandum explaining the PTM simulation results. 4/1/10 Tr. 87:11-13.

Mr. Cavallo's critique of the choice of injection sites is weakened by his agreement that at least two of the particle injection sites modeled by DWR, at NMFS' request, were useful in evaluating the movement of water particles at channel junctions. *Id.* at 90:17-91:16. NMFS selected the particular injection sites in order to model the vulnerability of particles within the waterways of the south Delta. *Id.* at 147:22-149:13.

NMFS' PTM simulation also showed that, as export levels increase, OMR levels became more negative. 4/1/10 Tr. 150:21-21. Mr. Cavallo stated that [**261] exports are highly correlated with OMR flows. 4/1/10 Tr. 40:25-41:2.

NMFS' PTM simulation showed that, as exports increased, the percentage of particles entrained at the export facilities increased, particularly from the Mossdale and Union Island sites and stations 912, 815, 902, and 915. 4/1/10 Tr. 150:22-25; *see* Gov't Salmon Ex. 18 (map of injection sites). The proximity of the injection point to the export facilities led to a much higher level of particle entrainment. 4/1/10 Tr. 151:1-3. As exports increased, the rate at which the particles arrived at the export facilities increased. *Id.* at 151:3-5; *see also* BiOp at 365-66; *4/1/10* Tr. 151:21-153:9 (explaining graphs in biological opinion).

Despite the statement in the Kimmerer and Nobriga study that they could not establish a "zone of influence" of ex-

ports, Mr. Stuart testified that the shorter time horizon used in NMFS' PTM simulations distinguished it from the Kimmerer and Nobriga simulations, which utilized a 90-day period. 4/2/10 Tr. 23:21-24:2.

Mr. Stuart testified that there is no precisely defined boundary for the influence of the exports, and that the boundary of influence depends on river flow, tides, and the magnitude of [**262] the exports. *Id.* at 29:4-9. If there are extremely low-flow conditions and high exports, the extent of the exports could travel considerably farther downstream, even towards the junction of the Sacramento and San Joaquin Rivers. *Id.* at 29:9-13. Typically, according to Mr. Stuart, the boundary would be close to station 815 at the confluence of Georgiana Slough and the Mokelumne River or slightly farther downstream. *Id.* at 29:13-15. As the BiOp explains:

> The data output for the PTM simulation of particles injected at the confluence of the Mokelumne River and the San Joaquin River (Station 815) indicate that as net OMR flow increases southwards from -2,500 to -3,500 cfs, the risk of particle entrainment nearly doubles from 10 percent to 20 percent, and quadruples to 40 percent at -5,000 cfs. At flows more negative than -5,000 cfs, the risk of entrainment increases at an even greater rate, reaching approximately 90 percent at -7,000 cfs. Even if salmonids do not behave exactly as neutrally buoyant particles, the risk of entrainment escalates considerably with increasing exports, as represented by the net OMR flows. The logical conclusion is that as OMR reverse flows increase, risk of entrainment [**263] into the channels of the South Delta is increased. Conversely, the risk of entrainment into the channels of the South delta is reduced when exports [*902] are lower and the net flow in the OMR channels is more positive -- that is, in the direction of the natural flow toward the ocean.

BiOp at 652.

> This is a dispute among scientists. While DWR criticizes PTM modeling, Stuart and NMFS recognized its limitations and found PTM studies helpful to support its conclusions that: (a) as exports increase, negative OMR flows also increase; and (b) that at Station 815 (the confluence of the Mokelumne River and the San Joaquin River), particle entrainment increases from 10% at -2,500 cfs, to 20% at -3,500 cfs, to 40% at -5,000 cfs, and 90% at -7,000 cfs. NMFS, through Mr. Stuart, took into account inherent differences in the movement of neutrally buoyant particles and their speed and direction of travel. Administrative law requires deference to the Agency. Additional record analysis is necessary to determine the extent of support for NMFS's additional opinion that exports affect salmonid survival.

Consol. Salmonid Cases, 713 F. Supp. 2d at, 1138-41. DWR raises several additional arguments regarding the use [**264] of PTM.

(1) DWR's Argument that NMFS Failed to Address PTM Limitations Described by Kimmerer and Nobriga.

DWR argues that NMFS did not adequately address PTM limitations described in Kimmerer and Nobriga's 2008 article "Investigating Particle Transport and Fate in the Sacramento San Joaquin Delta using a Particle Tracking Model." AR 00122246-71.

First, Kimmerer and Nobriga cautioned that PTM "was a useful predictor of entrainment probability if the model were allowed to run long enough to resolve particles' ultimate fate" and that "model accuracy varies depending on the length of the simulation." AR 00112246, 00122250. DWR argues that NMFS disregarded these "words of caution." Doc. 446-1 at 20. This is inaccurate.

NMFS convened a group of State and federal scientists to discuss PTM simulations, including DWR representatives, who raised some of the same criticisms asserted here. AR 00106021-25 (June 3, 2009 Memo Re: PTM "results for [OMR] flow manipulation" ("PTM Memo")). NMFS considered the length of simulation at multiple meetings, AR 00106021-22 (PTM Memo discussing meetings from January through March 2009 and durations of PTM tracking); AR 00061290-91 (communication between Jeffrey [**265] Stuart and Tracy Hinojosa at DWR regarding PTM simulations), AR 00060023-24 (agenda items for discussion at "Modeling work group), and addressed concerns raised in the PTM Memo, *see* AR 00105025-27.

Second, DWR highlights that Kimmerer and Nobriga (2008) notes that the PTM model "has not been calibrated." AR 00122262. DWR argues that NMFS should not have used an un-calibrated model. Doc. 446-1 at 20. This ignores the fact that DWR and others have in fact performed validation and calibration on the PTM to ensure that it accurately depicts hydrodynamics. Fourth Stuart Decl., Doc. 485 at ¶ 47.

Finally DWR argues that NMFS's reliance on this study to "analyz[e] the potential 'zone of effects' for entraining emigrating juvenile and smolting salmonids," BiOp at 361, conflicts with the recommendations of Kimmerer and Nobriga, Doc. 446-1 at 21. Specifically, Kimmerer and Nobriga stated: "[w]e are ... not inclined to define a 'zone of influence' of the pumps on the basis of our results." AR 00122263. The entire paragraph goes on:

> A consequence of this is that simple questions (e.g., what proportion of particles are entrained under a given set of [*903] conditions) have no clear answer. Instead, the answer [**266] depends on the time horizon, which in turn depends on the overall flow conditions and the site of the release. We are, furthermore, not inclined to define a "zone of influence" of the pumps on the basis of our results, since the probability of entrainment depends on time horizon which, in many cases, is too long to be useful for analyzing the movements of larval fish. By the end of the modeled time period, the fish would already have metamorphosed, and their behavior would have become more complex.

AR 00122263. Kimmerer and Nobriga (2008) addresses both larval delta smelt and juvenile salmonids. Their reluctance to define a "zone of influence" is focused on the difficulties posed by modeling larval delta smelt, which may metamorphose to a more complex state within the time horizon of the PTM simulation. This apologetic does not suggest there are not problems with using PTM to define a of zone of influence, it is simply a statement that endeavors to explain uncertainty. Although NMFS's interpretation and use of Kimmerer and Nobriga (2008) was not accurate, again it is the agency's spin on the science. It is not unlawfully erroneous.

(2) DWR's Argument that NMFS Failed to Address Evidence [**267] in the Record Critical of the Use of PTM to Explain Salmonid Behavior.

DWR revisits the issue of whether NMFS gave adequate consideration to record evidence critical of the use of PTM to explain salmonid behavior. DWR specifically cites a 2001 article by Baker and Morhardt, AR 00108384-403, and an analysis conducted by DWR included in DWR's April 24, 2009 comments on the draft BiOp. *See* Doc. 446-1 at 22-23. Baker and Morhardt (2001) demonstrated that the fate of particles in the PTM was different from actual salmon behavior. AR 00108394 ("for the hydraulic simulations available to us ... 77 % of the tracer [PTM] particles ended up at the export pumps, while only 13% of the smolts arrived there"). Likewise, the DWR (2009) analysis concluded there "is no correlation" between coded wire tagged ("CWT") Chinook recoveries and PTM particle behavior. AR 00105430.

These additional studies do not undermine the reasoning of the 2010 PI Decision:

> NMFS recognized the limitations of applying the PTM model simulation to salmonids. 4/1/10 Tr. 144:2-8. There were discussions with DWR concerning this issue during the consultation process. *Id.* at 144:9-11. In discussions between DWR and NMFS, NMFS indicated [**268] it was using the PTM to evaluate water movement and the potential vulnerability to particle entrainment from various locations in the Delta. *Id.* at 144:13-19. NMFS was explicit that it was not using PTM to predict exactly how fish were moving within these same channels, but that the information gleaned from PTM about water movement through the Delta could provide information on vulnerability to entrainment. *Id.* at 144:19-25.

Consol. Salmonid Cases, 713 F. Supp. 2d at 1139. DWR has acknowledged that this is a permissible PTM use. It has cast doubt on the efficacy of NMFS's reliance on the PTM, even for this narrow purpose, but has not shown it to be substantially unreasonable.

There is more to DWR's critique. To validly rely on the PTM results to impose management measures designed to aid salmonid survival, the movement of water described by the PTM must be reasonably related to the movement of salmonids. Citing the Baker and Morhardt (2001) study and DWR (2009) comments, Mr. Cavallo [*904] opines that this "has been shown to be incorrect." Cavallo Decl., Doc. 452 at ¶ 54.

NMFS justifies reliance on PTM simulations as a proxy for salmonid behavior:

> NMFS uses the findings of the PTM simulations [**269] to look at the eventual fate of objects in the river over a defined period of time from a given point of origin in the system. While salmonids and green sturgeon are not "neutrally buoyant particles", they can be represented to some degree by the PTM modeling results. The fish occupy a given body of water in the river and that body of water has eventual fates in the system, as represented by the dispersion of the injected particles. The salmonids have volitional movement within that body of water and react to environmental cues such as tides, water velocity vectors, and net water flow movement within the channel. The eventual fate of that body of water signifies the potential vulnerabilities of fish within that body of water to external physical factors such as export pumping or river inflows. For example, if exports increase, and the eventual fate of the water body indicates that it has a higher probability of entrainment compared to other conditions (i.e., lower export pumping), then NMFS believes that salmonids within that same body of water will also experience a higher probability of entrainment by the export pumping. Conversely, under conditions where the eventual fate of injected [**270] particles indicate a high probability of successfully exiting the Delta at Chipps Island, NMFS believes salmonids traveling in the same body of water will have a higher probability of exiting the Delta successfully. Furthermore, conditions which delay movement of particles out of the Delta yet don't result in increased entrainment at the export facilities would indicate conditions that might delay migration through the Delta, which would increase vulnerabilities to predation or contaminant exposure. Finally, flow conditions at river channel splits indicate situations where migrating fish must make a "decision" as to which channel to follow. If water is flowing into a given channel, then fish closer to that channel bifurcation are more likely to be influenced by the flow conditions adjacent to the channel opening than fish located farther away from the channel mouth. Burau *et al.* (2007) describes the complexity of these temporal and spatial conditions and their potential influence on salmonid movement. PTM simulations currently do not give the necessary fine scale resolution both temporally (minutes to fractions of hours) and spatially (three dimensional on the scale of meters) to give [**271] clear results at these channel splits. Burau states that spatial distribution of fish across the river channel occurs upstream of the channel splits and is dependent "upon the interaction between local hydrodynamic processes (e.g., secondary currents) and subtle behaviors that play out in a Lagrangian reference frame. These spatial structures evolve over fractions of hours to hours. Junction interactions, on the other hand, happen very rapidly, typically within minutes. Thus, route selection may only minimally depend on behavioral responses that occur in the junction, depending to a greater degree on spatial distributions that are created by subtle behavioral responses/interactions to geometry-mediated current structures that occur up-current of a given junction." This description illustrates the complexity of route selection. Based on Burau's explanation, fish upstream of the split are dispersed by the environmental conditions present in the channel into discrete locations across the channel's cross section. The proximity of these locations to [*905] the channel mouth is predictive of the risk of diversion into the channel itself. PTM data can be useful to indicate the magnitude of the net [**272] movement of water through the channel after the junction split (and the route selected by the fish),

> and thus can be used to infer the probable fate of salmonids that are advected into these channels during their migrations.

BiOp 366-67. The BiOp does not explain the basis for NMFS's "belief" that salmonids within a body of water with a higher probability of particle entrainment will themselves "also experience a higher probability of entrainment by the export pumping"; its "belief" that salmonids within a body of water "where the eventual fate of injected particles indicate a high probability of successfully exiting the Delta at Chipps Island" will themselves have a "higher probability of exiting the Delta successfully"; nor its conclusion that conditions which delay movement of particles out of the Delta yet don't result in increased entrainment at the export facilities suggest conditions that might delay migration through the Delta. What support for these conclusions does the record contain?

(3) Salvage Data.

The BiOp relies in part on the plots of juvenile loss versus monthly OMR flows in Figures 6-65 and 6-66 discussed above to link the PTM results to salmonid behavior.

> Based on particle [**273] tracking modeling, the Delta smelt work group concluded that net river flows greater than -2000 ± 500 cfs in the Old River and Middle River complex reduced the zone of entrainment so that particles injected into the central Delta at Potato Slough would not be entrained towards the pumps (Kimmerer and Nobriga 2008 op cit. CVP/SWP operations BA). NMFS considers this information useful in analyzing the potential "zone of effects" for entraining emigrating juvenile and smolting salmonids. A similar pattern is observed in material (figures 6-65 and 6-66) provided to NMFS by DWR (Greene 2009). Loss of older juveniles at the CVP and SWP fish collection facilities increase sharply at Old and Middle River flows of approximately -5,000 cfs and depart from the initial slope at flows below this. Given the data derived from the CVP/SWP operations BA Appendix E, flows in Old and Middle River are consistently in excess of the -2000 ± 500 cfs threshold for entrainment (i.e., more upstream flow). Assuming that in the normal (natural) flow patterns in the Delta, juvenile and smolting Chinook salmon and steelhead will use flow as a cue in their movements and will orient to the ambient flow conditions [**274] prevailing in the Delta waterways, then upstream flows will carry fish towards the pumps during current operations. General tendencies of the modeling results indicate that Old River and Middle River net flows trend towards greater upstream flow in the near future and future conditions, resulting in even more fish carried towards the pumps.

BiOp at 361. The BiOp's reliance on figures 6-66 and 6-66 has been found unlawful. Without scaling for population size, the trends seen in Figures 6-65 and 6-66 are meaningless, because data points indicating greater salvage may simply be the result of a greater absolute number of individuals present in the entire Delta. The number of individuals lost to salvage could go up simply because the volume of water pumped through the salvage facility increases, not because increasing exports causes a greater percentage of the population to make its way toward the salvage facilities than would otherwise be present there.

[*906] (4) Other Studies.

In addition to Figures 6-65 and 6-66, NMFS relied on other studies, namely Vogel (2004), Perry & Skalski (2008), Newman (2008), and Newman and Brandes (2009), to conclude that as exports increase, greater numbers of salmonids [**275] are drawn into the interior Delta.

(a) Vogel (2004).

The 2010 PI Decision addressed the BiOp's reliance on Vogel (2004):

> The BiOp also relied upon Vogel (2004), which reviewed telemetry-tagging data to investigate fish route selection in the channels leading to the south Delta. See BiOp at 380-81. Based on Vogel's work, the BiOp found that when export levels were reduced and San Joaquin River flows were increased, more fish stayed in the main channel of the San Joaquin River, heading downstream toward the San Francisco Bay. *Id.*
>
> Mr. Cavallo maintains that Vogel (2004) does not support the conclusion that a reduction in export pumping resulted in the reduction of salmon leaving the mainstem of the San Joaquin River

> and entering the southern Delta. 4/1/10 Tr. 47:20-24, 49:8-13, 49:25 - 50:4, 50:17-23; DWR Ex. 505. The Vogel (2004) study concluded that the experiments it conducted "could not explain why some fish move off the mainstem of the San Joaquin River into the south Delta channels," noting that "[d]ue to the wide variation in hydrologic conditions" during the course of the experiments, "it was difficult to determine the principal factors affecting fish migration. Based on the limited [**276] data from these studies, it may be that a combination of a neap tide, reduced exports, and increased San Joaquin River flows is beneficial for outmigrating smolts, but more research is necessary." DWR Ex. 505 at 37.
>
> When asked about Vogel's inconclusive results, not discussed in the BiOp, Mr. Stuart admitted that the BiOp's failure to disclose the conclusion was "an oversight on my part," for which he had no explanation. 4/2/10 Tr. 15:4-9.
>
> It was not rational nor scientifically justified for the BiOp to rely on Vogel (2004) for findings the authors themselves refused to make.

Consol. Salmonid Cases, 713 F. Supp. 2d at 1144. Defendant-Intervenors attempt to justify NMFS's reliance on Vogel (2004):

> [T]he paragraph from page 380 of the BiOp (NMFS 00106460) that DWR quotes and claims misstates Vogel (2004) is based not only on the 2004 Vogel study, but also the subsequent VAMP experiments. Vogel did conclude, as DWR states, that: "These [radio-tagged] experiments could not explain why some fish moved off the mainstem San Joaquin River into south Delta channels." NMFS 00217996 (Vogel 2004 at 37). But Vogel also went on to observe that "[b]ased on limited data from these studies, it may be that [**277] [a]combination of a neap tide, reduced exports, and increased San Joaquin River flows is beneficial for outmigrating smolts, but more research is necessary." *Id.* (emphasis added). According to Vogel, "[m]ore detailed analyses of fish movements in relation to quantitative measures of Delta hydrodynamics such as tidal excursion, net flow over a complete tide cycle, and flow structure at specific channel flow splits ... may provide more definitive conclusions on fish migration behavior." *Id.* Such further studies, according to Vogel, should include "water particle tracking model results in comparison to radio-tagged fish migration data," *id.* (emphasis added), as well as acoustic tagged salmon releases. *Id.* Thus, NMFS's conclusions are based [*907] not only on Vogel (2004), but the subsequent PTM and VAMP studies, discussed above, that Vogel and others recommended. And, NMFS has required the acoustic tag studies recommended by Vogel and others in Action IV.2.2.

Doc. 484 at 48-49. Vogel's call for further experiments or statement that he believes reduced exports, in conjunction with other factors, "may be" beneficial to migrating salmonids, does not change the fact that Vogel's own 2004 work does [**278] not explain why the fish studied moved off the mainstem San Joaquin. Reliance on this study to demonstrate that that Action IV.2.3's negative OMR flow limitations will reduce the vulnerability of juvenile salmonids to entrainment in the Delta is unreasonable.

(b) Perry and Skalski (2008).

The BiOp also relied upon a 2008 study by Perry and Skalski, which was previously addressed in the 2010 PI Decision:

> The BiOp utilized the Perry and Skalski (2008) study that concluded survival of fish moving into Georgiana Slough and nearby channels was reduced compared to those in the mainstem of the Sacramento River. 4/1/10 Tr. 161:20-162:1. These fish enter a portion of the San Joaquin River that NMFS found to be impacted by exports in its PTM simulation. *Id.* at 162:5-17; 4/2/10 Tr. 18:12-20, 19:22-20:11.
>
> However, Perry and Skalski 2008 noted that "there is limited understanding of how water management actions in the Delta affect population distribution and route-specific survival of juvenile salmon." SDLMWA Ex. 227 at 3. Mr. Cavallo testified that Perry and Skalski 2008 does not provide scientific support for the view that salmonids are lost due to

> water project-induced alterations to Delta hydrologic [**279] conditions. 4/1/10 Tr. 66:5-9.134.
>
> Mr. Stuart admitted that Perry and Skalski 2008 did not address water project impacts on Delta hydrology, fish behavior, or the indirect mortality of fish in the central and southern channels of the Delta. Mr. Stuart further admitted that he reached his conclusions regarding water project impacts on Delta hydrology, fish behavior, and indirect salmonid mortality based upon his personal extrapolation from the data contained in Perry and Skalski 2008, and not from any conclusions reached by Perry and Skalski. 4/2/10 Tr. 19:2 - 21:24. However, these personal extrapolations are not documented or otherwise explained in the BiOp or elsewhere in the record.

Consol. Salmonid Cases, 713 F. Supp. 2d at 1143-44.

Mr. Stuart's Fifth Declaration clarifies that the BiOp cited Perry and Skalski (2008) in reference to "the risk that individual salmon smolts face to entrainment into either the channel of the Delta Cross Channel (when it is open) or into the channel of Georgiana Slough as they migrate downstream in the Sacramento River and not to the probability of ending up at the export facilities." Fifth Stuart Decl., Doc. 519 at ¶ 19. The BiOp did not rely on Perry [**280] and Skalski to justify its conclusion that the PTM is a valid proxy for salmonids or to demonstrate that exports cause salmonids to move toward the export facilities. Perry and Skalski does not support PTM as a proxy and should not have been cited.

(c) Newman (2008).

Newman (2008), which concluded that salmonids passing through Georgiana slough into the interior delta had slightly reduced survival when exports were higher relative to times when exports were lower, has been discussed. This lends marginal support to NMFSs conclusion that increasing exports negatively impacts salmonids moving through the interior delta.

[*908] (d) Newman and Brandes (2009).

DWR cites a 2008 draft of a study by Newman and Brandes analyzing the Delta Action 8 studies, "Hierarchical Modeling of Juvenile Chinook Salmon Survival as a Function of Sacramento-San Joaquin Delta Water Exports." In that draft, discussing the lower rate of survival of smolts traveling through Georgiana slough and the interior delta under high export conditions relative to low export conditions, the authors opined: "what we cannot conclude is that exports are the cause of this lower relative survival." NMFS 00127347. However, that sentence and [**281] several following paragraphs were eliminated by Newman and Brandes from the final, published version of the study. *See* AR 00089883. Like Newman (2008), Newman and Brandes (2009) found negative relationships between exports and survival. Fifth Stuart Decl., Doc. 519 at ¶ 33 (citing AR 00089884).

(e) Brandes & McLain (2001).

DWR also cites Brandes and McLain, "Juvenile Chinook Salmon Abundance, Distribution, and Survival in the Sacramento-San Joaquin Estuary" (2001). This study found "mixed results":

> Results were mixed showing in 1989 and 1990 that survival estimates between Dos Reis and Jersey Point were higher with higher exports whereas in 1991 between Stockton and the mouth of the Mokelumne River (Tables 11 and 12) survival was shown to be lower (0.008 compared to 0.15) when exports were higher. One potential bias in the 1989 and 1990 data is that as mentioned earlier, smolts released at Dos Reis in 1989 were from the Merced River Fish Facility while those released at Jersey Point were from Feather River hatchery. Using different stocks to estimate smolt survival between two locations may introduce bias. In addition, results in 1989 and 1990 also showed that survival indices of the [**282] upper Old River groups relative to the Jersey Point groups were also higher during the higher export period, but overall still about half that of the survival of smolts released at Dos Reis (Table 11).

AR 00109602. That the study's authors question the validity of the results from the years showing a positive relationship between exports and survival and do not critique the results from the year showing a negative relationship, lends minimal support to NMFS's conclusion that exports influence salmonid survival.

(f) Kimmerer 2008.

Defendant-Intervenors point to a Kimmerer 2008 that unequivocally found that "[t]he estimated proportion of migrating fish salvaged at the export facilities in-

creased with increasing export flow." AR 00122236. DWR and Export Plaintiffs do not contest this conclusion.

(g) SJRGA 2007

Finally, Defendant-Intervenors point to the San Joaquin River Group Authority ("SJRGA") 2007 review of VAMP data, which found evidence of a negative relationship between exports and survival. *See* AR 00134423 ("The CDRRs [combined differential recovery rates] measured for the first group released in 2006, under low exports, appeared higher than those obtained in 2003-2005 and for the [**283] 2006 group released under higher exports and higher temperature.").

This entire record shows that the science is conflicting and often equivocal. Most of the evidence does not show a negative relationship between levels of exports and salmon survival. It is impossible to discern the effect of exports on salmon behavior from the record. Despite these numerous criticisms, NMFS chose to use PTM as a modeling tool for salmonid behavior. DWR's own staff biologist, [*909] Sheila Greene, testified in a related case by declaration that "Given the insufficiency of behavioral data, particle tracking is the best available science to estimate the proportions of juvenile Chinook salmon that emigrate through the Delta." AR 00118803. DWR is bound by this statement. Whether to use PTM modeling then becomes a matter of agency discretion.

b. Justification for the Specific Flow Prescriptions in Action IV.2.3.

Existence of record support for NMFS's reliance on the PTM does not end the inquiry. The BiOp applied the PTM to generate flow prescriptions using the following approach:

> The data output for the PTM simulation of particles injected at the confluence of the Mokelumne River and the San Joaquin River (Station [**284] 815) indicate that as net OMR flow increases southwards from -2,500 to -3,500 cfs, the risk of particle entrainment nearly doubles from 10 percent to 20 percent, and quadruples to 40 percent at -5,000 cfs. At flows more negative than -5,000 cfs, the risk of entrainment increases at an even greater rate, reaching approximately 90 percent at -7,000 cfs. Even if salmonids do not behave exactly as neutrally buoyant particles, the risk of entrainment escalates considerably with increasing exports, as represented by the net OMR flows. The logical conclusion is that as OMR reverse flows increase, risk of entrainment into the channels of the South Delta is increased. Conversely, the risk of entrainment into the channels of the South delta is reduced when exports are lower and the net flow in the OMR channels is more positive -- that is, in the direction of the natural flow toward the ocean.

BiOp at 652. Even if the PTM is the best available mechanism for modeling salmonid behavior, NMFS has failed to justify this leap of logic, which in essence assumes that salmonids will be drawn toward the export facilities to the same extent as neutrally buoyant particles. In light of undisputed record evidence [**285] discussed above demonstrating the many deficiencies in the PTM and that it is far from a perfect proxy for salmon behavior, NMFS has not provided "a thorough explanation of how each component of the [RPA] is essential to avoid jeopardy and/or adverse modification." ESA Handbook at 4-43 (emphasis added). Conclusory explanations of the value of RPA actions are insufficient. *PCFFA v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1093 (9th Cir. 2005).*

Plaintiffs' and DWR's motion challenges to Action IV.2.3 is GRANTED IN PART AND DENIED IN PART, as are Federal Defendants' and Defendant-Intervenors' cross motions. There is nominal record support for the imposition of some form of OMR flow restriction, but the Action must be remanded for further explanation of the necessity the specific flow prescriptions imposed, which are derived primarily from PTM simulations, a method that is undisputedly an imperfect predictor of salmon behavior.

3. Action IV.3.

From November 1 through December 31, Action IV.3 restricts combined CVP and SWP exports to 6,000 cfs or 4,000 cfs when certain salvage thresholds are met. BiOp at 653. The 6,000 cfs export limit is triggered when daily SWP and CVP older juvenile loss [**286] density is greater than 8 fish per thousand acre feet ("TAF"), daily loss is greater than 95 fish per day, or the Coleman National Fish Hatchery coded wire tagged late fall-run Chinook salmon ("Coleman CWT fish") or Livingstone Stone National Hatchery coded wire tagged winter-run ("L-S CWT fish") cumulative loss is greater than 0.5%. *Id.* [*910] The more restrictive 4,000 cfs export limit is triggered when the daily older juvenile loss density is grater than 15 fish per TAF, daily loss is greater than 120 fish per day, or the Coleman CWT or L-S CTW fish cumulative loss is greater than 0.5%. Either export restriction remains in place for three days, or until daily older

juvenile loss density is less than 8 fish per TAF. *Id.* Action IV.3 also establishes an "alert," which signals that export restrictions may need to be altered when either the Knights Landing or Sacramento catch index is greater than 10 fish captured per day from November 1 to February 28, or greater than 15 fish captured per day from March 1 to April 30. *Id.* at 652.

The objective of Action IV.3 is to "[r]educe losses of winter-run, spring-run, CV steelhead, and Southern DPS of green sturgeon by reducing exports when large numbers [**287] of juvenile Chinook salmon are migrating into the upper Delta region, at risk of entrainment into the central and south Delta and then to the export pumps in the following weeks." *Id.*

DWR does not challenge this RPA Action. Export Plaintiffs, however, raise several objections. First, Export Plaintiffs challenge NMFS's underlying assumption for Action IV.3 that "[e]xport pumping changes flow patterns and increases residence time of ... diverted fish in the central Delta, which increases the risk of mortality from [other factors], as well as the likelihood of entrainment at the pumps." *Id.* at 653. They argue that this assumption is not supported by the best available science, reiterating the argument that the studies relied upon by NMFS do not "connect mortality in the interior delta to export levels," and that NMFS's use of PTM studies to show "potential vulnerabilities of fish" is not appropriate. Doc. 431 at 106-108. Although the evidence supporting a survival effect of increased exports weak and disputed, NMFS's conclusion that export pumping negatively impacts salmonid survival has marginal support in the record and is not unlawfully erroneous. The BiOp's related use of PTM as a [**288] modeling tool for salmonids is a highly disputed scientific choice, described by DWR as the best available science in at least one application.

Export Plaintiffs also challenge the specific triggers used in Action IV.3, on the grounds that: (1) as was the case with the plots of raw salvage used to justify other Actions, the triggers do not account for the relative size of the various salmonid populations; and (2) "NMFS nowhere explains how it arrived at these thresholds. Doc. 431 at 108-09.

Federal Defendants respond that Plaintiffs' concern that Action IV.3 fails to scale the loss triggers against the population size is "a red herring" because "NMFS did not conclude that Action IV.3 alone is avoiding jeopardy. Rather, the measure simply reflects NMFS's conclusion that it is important to have increased protections when you have more fish at the salvage facilities." Doc. 477-1. This is a total abdication from NMFS's self-imposed requirement that the RPA provide "a thorough explanation of how each component of the [RPA] is essential to avoid jeopardy and/or adverse modification." ESA Handbook at 4-43 (emphasis added). Federal Defendants cannot impose a complex and burdensome RPA, damaging [**289] of other interests, without specifically justifying each of its components. Adoption of Federal Defendants' "trust me" approach would mean that the more complex an RPA, the more obscured it is from judicial review. Each component need not eliminate jeopardy on its own, but that does not excuse NMFS from separately justifying individual Actions.

While there is record explanation for an action designed to prevent large numbers [*911] of fish from being killed or harmed at the export pumping facilities, Export Plaintiffs raise serious questions related to the need to scale the triggers to the overall size of the salmonid populations they aim to protect. Given previous findings about the use of raw salvage figures, the best available science calls for an index related to population size, rather than a fixed number. More importantly, even if this were not a problem, Federal Defendants have entirely failed to provide any record explanation for why the specific triggers were chosen. NMFS must address and correct this failure on remand. Plaintiffs' motion is GRANTED on this issue; Federal Defendants' and Defendant-Intervenors' cross motion is DENIED.

G. Compliance with *50 C.F.R. § 402.02*.

ESA section 7(b)(3)(A) [**290] provides that, "[i]f jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of [Section 7] and can be taken by the Federal agency ... in implementing the agency action." *Id.* "Reasonable and prudent alternatives refer to alternative actions identified during formal consultation [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." *50 C.F.R. § 402.02* (the "four RPA requirements").

NMFS and FWS's joint Consultation Handbook explains that during the formal consultation period, NMFS should "meet or communicate with the action agency ... to gather any additional information necessary to conduct the consultation." Consultation Handbook at 4-6. Among other things, the formal consultation [**291] period should be used to "develop reasonable and prudent alternatives to an action likely to result in jeopardy or adverse modification...." *Id.*

Consultation "should be undertaken cooperatively with the action agency and any applicant, thus allowing the Services to develop a better understanding of direct and indirect effects of a proposed action and any cumulative effects in the action area. Action agencies also have the project expertise necessary to help identify reasonable and prudent alternatives, and reasonable and prudent measures. Other interested parties (including the applicant, and affected State and tribal governments) should also be involved in these discussions.... These cooperative efforts should be documented for the administrative record." *Id.*

The Handbook contains a section on RPAs, which provides as follows:

> Reasonable and prudent alternatives This section lays out reasonable and prudent alternative actions, if any, that the Services believe the agency or the applicant may take to avoid the likelihood of jeopardy to the species or destruction or adverse modification of designated critical habitat (*50 CFR § 402.14(h)(3)*). When a reasonable and prudent alternative consists [**292] of multiple activities, it is imperative that the opinion contain a thorough explanation of how each component of the alternative is essential to avoid jeopardy and/or adverse modification. The action agency and the applicant (if any) should be given every opportunity to assist in developing the reasonable and prudent alternatives. Often they are the only ones who can determine if an alternative is within their legal authority and jurisdiction, and if it is economically and technologically feasible.
>
> [*912] If adopted by the action agency, the reasonable and prudent alternatives do not undergo subsequent consultation to meet the requirements of section 7(a)(2). The action agency's acceptance in writing of the Services' reasonable and prudent alternative concludes the consultation process.
>
> Section 7 regulations (*50 CFR §402.02*) limit reasonable and prudent alternatives to:
>
> o alternatives the Services believe will avoid the likelihood of jeopardy or adverse modification,
>
> o alternatives that can be implemented in a manner consistent with the intended purpose of the action,
>
> o alternatives that can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, and
>
> o [**293] alternatives that are economically and technologically feasible.
>
> If the Services conclude that certain alternatives are available that would avoid jeopardy and adverse modification, but such alternatives fail to meet one of the other three elements in the definition of "reasonable and prudent alternative," the Services should document the alternative in the biological opinion to show it was considered during the formal consultation process. This information could prove important during any subsequent proceeding before the Endangered Species Committee (established under section 7(e) of the Act), which reviews requests for exemptions from the requirements of section 7(a)(2).
>
> Although a strong effort should always be made to identify reasonable and prudent alternatives, in some cases, no alternatives are available to avoid jeopardy or adverse modification.
>
> Examples include cases in which the corrective action relies on:
>
> o an alternative not under consideration (e.g., locating a project in uplands instead of requiring a Corps permit to fill a wetland);
>
> o actions of a third party not involved in the proposed action (e.g., only the County, which is not a party to the consultation, has the authority [**294] to regulate speed limits);
>
> o actions on lands over which the action agency has no jurisdiction or no residual authority to enforce compliance; and
>
> o data not available on which to base an alternative.
>
> In these cases, a statement is included that no reasonable and prudent alternatives are available, along with an explana-

> tion. When data are not available to support an alternative, the explanation is that according to the best available scientific and commercial data, there are no reasonable and prudent alternatives to the action undergoing consultation. The Services are committed to working closely with action agencies and applicants in developing reasonable and prudent alternatives. The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains that the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities [**295] to implement reasonable and prudent alternatives.

Consultation Handbook, 4-41 - 4-42.

San Luis & Delta-Mendota Water Authority v. Salazar (Consolidated Delta Smelt Cases), 666 F. Supp. 2d 1137 [*913] *(E.D. Cal. 2009)*, discussed *section 402.02* in considering a facial challenge to a related biological opinion, filed before the administrative record was completed. Plaintiffs argued that FWS acted unlawfully by failing to discuss the four *§ 402.02* factors on the face of the biological opinion. The decision found that FWS was only required to make explicit findings in the biological opinion on the fourth factor, namely whether the RPA will avoid the likelihood of jeopardy or adverse modification. "[W]hether FWS properly promulgated the RPA [consistent with the requirements of *§ 402.02*] must be decided on the basis of the entire record." *Id. at 1158-59*.

Export Plaintiffs now bring a record-based challenge to NMFS's alleged non-compliance with *§ 402.02*, asserting that entire RPA is invalid because the record does not support a finding that NMFS complied with the four *§ 402.02* factors. Doc. 431 at 109-118. DWR joins this aspect of Export Plaintiffs' motion. Doc. 446-1 at 27.

There is scant authority [**296] to aid interpretation of *§ 402.02*. The text of the Federal Register Notice promulgating *§ 402.02* provides limited guidance:

> "Reasonable and prudent alternatives" is defined in the final rule. Section 7(b) of the Act requires the Service to include reasonable and prudent alternatives, if any, in a "jeopardy" biological opinion. An alternative is considered reasonable and prudent only if it can be implemented by the Federal agency and any applicant in a manner consistent with the intended purpose of the action, and if the Director believes it would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat of such species. Further, the Service should be mindful of the limits of a Federal agency's jurisdiction and authority when prescribing a reasonable and prudent alternative. An alternative, to be reasonable and prudent, should be formulated in such a way that it can be implemented by a Federal agency consistent with the scope of its legal authority and jurisdiction. However, the Service notes that a Federal agency's responsibility under section 7(a)(2) permeates the full range of discretionary [**297] authority held by that agency; i.e., the Service can specify a reasonable and prudent alternative that involves the maximum exercise of Federal agency authority when to do so is necessary, in the opinion of the Service, to avoid jeopardy. The Service recognizes that economic and technological feasibility are factors to be used in developing reasonable and prudent alternatives, as requested by one commenter. The definition of "reasonable and prudent alternatives" has been amended to reflect these considerations. If there are no alternatives that meet the definition of "reasonable and prudent alternatives," the Service will issue a "jeopardy" biological opinion without alternatives.
>
> Two commenters stated that reasonable and prudent alternatives should include mitigation measures designed to reduce adverse effects, i.e., conservation recommendations. One of those commenters urged the Service to limit the scope of recommended alternatives to those "consistent with the scope, magnitude, and duration of the project as well as the extent of its adverse effects." First, because there is a distinction between "reasonable and prudent alternatives" (that satisfy section 7(a)(2)) and "conservation [**298] recommendations" (that are authorized by section 7(a)(1)), the Service

> declines to include conservation measures within the scope of the definition. Second, the Service agrees that reasonable and prudent alternatives should be [*914] consistent with the intended purpose of the action and should therefore be economically and technologically feasible, but the Service cannot limit its range of choices to the criteria suggested by the commenter. Reasonable and prudent alternatives must cover the full gamut of design changes that are economically and technologically feasible for an action, independent of who is sponsoring the action.

51 Fed. Reg. 19,926, 19,937 (June 3, 1986).

1. Consistency with Purposes of the Action.

The BiOp reasons that because the operational changes demanded by the RPA do not preclude continued operation of the CVP and SWP, the RPA is consistent with the purpose of the action:

> [T]his RPA is consistent with the intended purpose of the action. According to the BA, "[t]he proposed action is the continued operation of the CVP and SWP." (CVP and SWP operations BA, P. 2-1) Specifically, Reclamation and DWR "propose to operate the Central Valley Project (CVP) and State Water Project [**299] (SWP) to divert, store, and convey CVP and SWP (Project) water consistent with applicable law and contractual obligations." (CVP and SWP operations BA, p.1-1) Changes in operation of the projects to avoid jeopardizing listed species or adversely modifying their critical habitats require that additional sources of water for the projects be obtained, or that water delivery be made in a different way than in the past (e.g., elimination of RBDD), or that amounts of water that are withdrawn and exported from the Delta during some periods in some years be reduced. These operational changes do not, however, preclude operation of the Projects.

BiOp at 724. The BiOp also discussed the various purposes of the CVP:

> ....The Rivers and Harbors Act of 1937, which established the purposes of the CVP, provided that the dams and reservoirs of the CVP " 'shall be used, first, for river regulation, improvement of navigation and flood control; second, for irrigation and domestic uses; and, third, for power.'" (CVP and SWP operations BA, p. 1-2). The CVP was reauthorized in 1992 through the CVPIA, which modified the 1937 Act and added mitigation, protection, and restoration of fish and wildlife as project [**300] purposes. The CVPIA provided that the dams and reservoirs of the CVP should be used "'first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and fish and wildlife mitigation, protection and restoration purposes; and, third, for power and fish and wildlife enhancement." (CVP and SWP operations BA p. 1-3) One of the stated purposes of the CVPIA is to address impacts of the CVP on fish and wildlife. CVPIA, Sec. 3406(a). The CVPIA gives Reclamation broad authority to mitigate for the adverse effects of the projects on fish and wildlife, and nothing in the Rivers and Harbors Act of 1937 requires any set amount of water delivery.
>
> In addition to adding protection of fish and wildlife as second tier purposes of the CVP, the CVPIA set a goal of doubling the natural production of anadromous fish in Central Valley rivers and streams on a long-term sustainable basis, by 2002. Sec. 3406(b)(1). This goal has not been met. Instead, as detailed in this Opinion, natural production of anadromous fish has declined precipitously....

Id. at 724-25.

Export Plaintiffs challenge NMFS's finding that the RPA is consistent with the multiple purposes of [**301] the Projects. First, [*915] Export Plaintiffs argue that NMFS ignored warnings about the water costs of the RPA. For example, DWR commented that "the average combined water supply impact to the SWP and the CVP of the NFMS proposed RPA is roughly 900 [thousand acre feet ("taf")] to 1.1 [million acre feet ("Maf")] (or about 16% to 19%)." AR 00086760. DWR's estimate continues:

> By taking an alternative approach and layering the NFMS proposed RPA on top of the terms of the USFWS 2008 [Smelt] BiOp RPA that have been provisionally accepted by Reclamation, the average combined water supply impact of the NMFS draft RPA to the SWP and CVP is roughly 150 taf to 750 taf, or about 3% to 15% above the impact of the USFWS 2008 [Smelt] BiOp RPA depending on the range of adaptive actions implemented by the USFWS under the terms of the [Smelt] BiOp. When compared to OCAP Study 7.0, the average combined water supply impact of the collective USFWS [Smelt] RPA and NMFS draft RPA to the SWP and CVP is roughly 1.3 Maf to 1.6 Maf (or about 23% to 29%).
>
> [I]t should be noted that these estimated impacts are incomplete, and we would expect them to be greater because they do not include reoperation of CVP reservoirs as [**302] specified in the draft NMFS RPA. In addition, these studies do not include any assessment of the USFWS Fall X2 measure which has not been accepted by Reclamation as reasonable or prudent.

Id. Plaintiffs also point to Reclamation's comments on the RPA, which express general concerns over water supply impacts. AR 00210461-69, 00210473-76, 00105273.

That there are water supply impacts does not necessarily render the RPA inconsistent with the purposes of the action. However, NMFS is absolutely obligated do more than simply check to ensure that the proposed operational changes do not "preclude operation of the Projects." *See* BiOp at 724. Assumedly, if the Projects delivered ten AF of water in a water year, the Projects would be "operating." An RPA that effectively eliminates Project water deliveries to parts of the CVP's service area is inconsistent with one of the co-equal purposes of that project. [28] What is [*916] the ultimate impact of the salmonid BiOp RPA? The BiOp does not provide explicit answers to these questions. The BiOp predicted a lower estimate of water supply costs than DWR:

> NMFS estimates the water costs associated with the RPA to be 5-7% of average annual combined exports: 5% for [**303] CVP, or 130 TAF/year, and 7% for SWP, or 200 TAF/year. The combined estimated annual average export curtailment is 330 TAF/year. These estimates are over and above export curtailments associated with the USFWS' Smelt Opinion. The OMR restrictions in both Opinions tend to result in export curtailments of similar quantities at similar times of year. Therefore, in general, these 330 TAF export curtailments are associated with the NMFS San Joaquin River Ratio actions in the RPA.
>
> NMFS also considered that there may be additional localized water costs not associated with South Delta exports. These may include, in some years, localized water shortages necessitating groundwater use, water conservation measures, or other infrastructure improvements in the New Melones service area, and localized impacts in the North of Delta in some years, associated with curtailments of fall deliveries used for rice decomposition. NMFS considered whether it was feasible to model and estimate any water costs associated with the Shasta or American River RPA actions, and discussed this issue with Reclamation. In general, it was decided that modeling tools were not available to assess these costs and/or that costs [**304] would be highly variable depending on adaptive management actions, and therefore, not meaningful to model.

BiOp at 720-21 (footnote omitted).

28 Federal Defendants cite *Kandra v. United States, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001),* which briefly discusses consistency with the project purposes, for the proposition that so long as wildlife protection is a legitimate purpose of a project, an RPA designed to protect a species is consistent with the purposes of that. In *Kandra*, water user plaintiffs sought to enjoin Reclamation from implementing a 2001 Annual Operations Plan for the Klamath Reclamation Project, which included RPAs that would modify flows to support listed species, resulting in complete curtailment of water deliveries to the majority of land within the Klamath Project. *Id. at 1195-96*. Plaintiffs argued that the purpose of the Klamath Project, pursuant to the Reclamation Act, is irrigation, and that the RPAs adopted by Reclamation benefit fish to the detriment of irrigation was inconsistent with the Project's purpose. *Id. at 1207*.

The district court found this argument unpersuasive:

> True, an RPA is defined as an alternative action[,] which is "consistent with the purposes [**305] of the action...." *50 C.F.R. § 402.02*. ...[A]gency actions taken pursuant to the Reclamation Act must comply with the requirements of the ESA. See *Tennessee Valley Authority v. Hill, 437 U.S. 153, 185, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978)* (ESA obligations take "priority over the 'primary' missions" of federal agencies). Further, agency actions are subject to the government's duty to protect tribal resources. Reclamation's legal duty to operate the Project consistent with its ESA and tribal trust obligations does not render the RPAs inconsistent with the Project's purpose. [*Klamath Water Users Protective Ass'n v.] Patterson, 204 F.3d [1206,] 1213-14 [(9th Cir. 1999)]*.

Id. at 1207. This non-binding decision is decidedly unpersuasive, as it ignores the competing, Congressionally mandated irrigation purpose. Even if the logic of *Kandra* is accepted, *arguendo*, the Agency has a duty to closely examine the adverse effects to prevent emasculation of the co-equal purpose of irrigation.

The agency abandoned its legal duties and said in effect: "we can't model, we won't do it." However, much of the Defendants' support for the BiOp and its RPA actions is based upon the same highly variable and questionable modeling of species [**306] populations and effects from exports. As this agency practices, what is "science" for the "goose" is clearly not "for the gander."

Export Plaintiffs argue that NMFS has failed to explain why its estimate is more reliable than the 900,000 - 1,100,000 AF water cost estimate (16%-19% of the Projects' combined water supply) provided by DWR, one of the Project co-operators. Doc. 431 at 113-14. In particular, Export Plaintiffs challenge the BiOp's consideration of only the impacts of export curtailments "associated with the NMFS San Joaquin River Ratio actions in the RPA," presumably a reference to Action IV.2.1. The BiOp explains that many of the OMR restrictions in both the Salmon and Smelt BiOps "tend to result in export curtailments of similar quantities at similar times of year," but does not explain why it is appropriate to entirely ignore the effects of those curtailments that may overlap with those mandated by the Smelt BiOp. This requires further clarification and revision in light of competent and meaningful impact studies. [29]

> 29 Export Plaintiffs also challenge the BiOp's related conclusion that the 330,000 AF of export curtailments "can be offset by application of (b)(2) water resources, [**307] water conservation, groundwater use, water recycling and other processes currently underway." BiOp at 580. This is not an essential element of the BiOp's reasoning, as NMFS later concedes that "NMFS could not be reasonably certain b(2) water would be available" and indicates that the BiOp's analysis of the RPA actions does not depend on the availability of (b)(2) water. *Id.* at 722.

[*917] Even assuming, *arguendo*, the BiOp's water cost prediction is correct, is such a reduction "consistent" with the irrigation purpose of the CVP? How should the RPA analyze the extent of water supply reductions that are consistent with the co-equal legislative irrigation purpose? The ESA provides no guidance, nor do the joint ESA regulations or any other authority identified by any party. It cannot simply be said that if an ESA-listed species' protection is at stake, the "no balancing of hardships" principle excludes such consideration. This would impermissibly rewrite Reclamation law to eliminate the regulatory requirement that NMFS consider the RPA's effect on the co-equal statutory purpose of irrigation. Federal Defendants' examination of this factor is insufficient. Export Plaintiffs' motion for summary [**308] judgment on this issue is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

2. Consistency with the Action Agency's Legal Authority and Jurisdiction.

Export Plaintiffs dispute the BiOp's conclusion that the RPA can be implemented in a manner consistent with the legal authority and jurisdiction of Reclamation and DWR. The BiOp reasons that "[t]he CVPIA gives Reclamation broad authority to mitigate for the adverse effects of the projects on fish and wildlife, and nothing in the Rivers and Harbors Act of 1937 requires any set amount of water delivery." BiOp at 724-25. The BiOp also recognizes that the CVPIA contains a goal of doubling the natural production of anadromous fish in Central Valley rivers and streams, and that this goal has not yet been met. *Id.* at 725. As Federal Defendants well know, the CVPIA dedicates a finite 800,000 AF of annual CVP yield to the fish-doubling objective.

The BiOp reasons that Reclamation has broad powers to restore anadromous fish populations:

> A 2008 report on the CVPIA anadromous fish program by independent reviewers (Cummins *et al.* 2008), recommended by the Office of Management and Budget and requested by Reclamation and [**309] the USFWS, stated that
>
> > "it is far from clear that the agencies have done what is possible and necessary to improve freshwater conditions to help these species weather environmental variability, halt their decline and begin rebuilding in a sustainable way. A number of the most serious impediments to survival and recovery are not being effectively addressed, especially in terms of the overall design and operation of the [CVP] system."
>
> One of the review panel's specific recommendations was that the agencies
>
> > "should develop a more expansive view of the authorities at their disposal to address the problems, especially with regard to water management and project operations. The agencies have followed a more restrictive view of their authorities than appears legally necessary or appropriate to the seriousness of the mission. "
>
> The report notes that the CVPIA contains a "long list of operational changes, actions, tools, and authorities - some quite specific and discrete, some general and on-going -that Interior is to use to help achieve the anadromous fish restoration purposes of the CVPIA ...." (Cummins *et al.* 2008 at 5) The report then describes development of a Final Restoration Plan that would [**310] utilize these authorities, but concludes that "[t]he agencies implement the CVPIA . . . in a way that bears little resemblance to the integrated, coordinated, holistic vision of [*918] the Final Restoration Plan." (Cummins *et al.* 2008 at 9)
>
> Most relevant to this consultation, the review panel observed that
>
> > "[i]t would seem that CVPIA activities and personnel should be central to the OCAP plan, the Section 7 consultation, and the agencies' efforts to satisfy the requirements of the ESA (that is, after all, one of the directives of the CVPIA). The panel received no information or presentations on the involvement of the CVPIA program or personnel in the ESA consultation effort ... and in the determination of what actions the agencies should be taking to meet the ESA."
>
> (Cummins *et al.* 2008 at 11)

Id. The CVPIA contains prescriptives; it does not elevate the ESA over all other statutory purposes for use of Project water. Although specific provisions of the law may authorize finite increase in fish protection water appropriation, there is no indefinite, unlimited power for NMFS to take whatever Project water it deems essential for the species.

The BiOp also finds that "state law gives DWR authority [**311] to provide for needs of fish and wildlife independent of the connection of the two water projects."

> According to the [Biological Assessment], DWR
>
> > "is required to plan for recreational and fish and wildlife uses of water in connection with State-constructed water projects and can acquire land for

> such uses (Wat. Code Sec. 233, 345,346, 12582). The Davis-Dolwig Act (Wat. Code Sec. 11900-11925) establishes the policy that preservation of fish and wildlife is part of State costs to be paid by water supply contractors, and recreation and enhancement of fish and wildlife are to be provided by appropriations from the General Fund."

> (CVP/SWP operations BA, page 1-4) DWR, like Reclamation, has broad authority to preserve and enhance fish and wildlife.

Id. at 726.

Although *§ 402.02*'s RPA requirements demand that NMFS engage in an evaluation of its legal authority to implement the RPA Actions, NMFS's interpretations of these laws set forth in the BiOp are not entitled to deference, as they were neither promulgated through notice and comment rulemaking procedures, *see Chevron v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*, nor contained within an agency policy statement, manual, enforcement guideline, or other document [**312] entitled to limited deference, *see Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*; *Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)*.

State and federal law impose upon Reclamation and DWR a nondiscretionary duty to comply with state water rights law. *See 43 U.S.C. § 383*; *California v. United States, 438 U.S. 645, 675, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)*. Export Plaintiffs point to the "obligation imposed upon both Reclamation and DWR by D-1641 to comply with the reasonable and beneficial use requirements and prohibition against waste [of water] set forth in *Article X, section 2 of the California Constitution*, in their respective operations of the CVP and SWP." Doc. 431 at 117. The argument continues:

> Because there is no indication in the record that NMFS undertook any analysis of whether DWR and Reclamation have jurisdiction and authority under the reasonable and beneficial use requirements of California law to annually reallocate hundreds of thousands of acre feet of project water, particularly where the benefits to listed salmonid species [*919] have not been demonstrated, the requirements of *Section 402.02 and the ESA* have been violated.

Id.

It is undisputed that California law identifies the preservation of fish and [**313] wildlife as a beneficial use of water. *Cal. Water Code § 1243*. In addition to requiring compliance with California's reasonable and beneficial use standard, D-1641 imposes a condition upon both Reclamation's and DWR's water rights requiring both to "meet[] all requirements of the applicable Endangered Species Act for the project authorized under [their respective] permit[s]/license[s]." D-1641 at 148. When jeopardy is found, the ESA requires implementation of a RPA. D-1641 authorizes Reclamation's implementation of lawful RPAs. [30]

30 In light of D-1641's requirement that DWR and the Bureau comply with the ESA, Export Plaintiffs have not pointed to any substantive statute or jurisdictional limitation that precludes the Reclamation or DWR from implementing a lawful ESA RPA. The SR Plaintiffs have made such an argument. That argument is addressed below.

However, several of the specific RPA prescriptions have failed to demonstrate compliance with the Handbook's requirement that every RPA be "essential to avoid jeopardy and/or adverse modification." Obviously, to the extent that any RPA Action has been found unlawful, Federal Defendants cannot establish that implementation of that RPA is consistent [**314] with Reclamation's legal authority.

Export Plaintiffs' motion for summary judgment that NMFS failed to demonstrate the RPA's consistency with Reclamation and DWR's legal authority is GRANTED IN PART AND DENIED IN PART, as are Federal Defendants' and Defendant-Intervenors' cross motions. To the extent individual RPA Actions are otherwise lawful, Export Plaintiffs' argument that Federal Defendants' failed to demonstrate Reclamation's authority to implement those Actions is belied by D-1641, which expressly requires implementation of lawful RPA Actions. Correlatively, to the extent individual RPA Actions are unlawful, Federal Defendants cannot find authority for their implementation.

3. Economic and Technical Feasibility.

The BiOp contains a lengthy discussion of economic and technical feasibility. Export Plaintiffs attack the discussion as insufficient in several respects. First, Export Plaintiffs argue that NMFS ignored objections and evidence submitted by Reclamation and DWR suggesting that the RPA was not technologically or economically feasible. A March 23, 2009 letter from Reclamation to NMFS details a number of concerns with the proposed RPA. *See* AR 00105277-84. A March 20, 2009 letter [**315] from DWR to NMFS describes some specific feasibility concerns and a general objection that several of the RPA actions were not economically feasible. *See* AR 00105285-99.

Export Plaintiffs object generally that NMFS failed to articulate a reasoned response to DWR and Reclamation's objections. Doc. 431 at 114. The BiOp explained that the relevant state and federal agencies engaged in a back-and-forth exchange of information regarding feasibility of the RPA and adjustments were made:

> Some of the more complex RPA actions, including Shasta Storage, Habitat Rearing Actions, Passage Program, Stanislaus Flows and the San Joaquin River Inflow Export Ratio, went through many iterations of review, re-drafting, and refinement, involving interagency staff and management expertise, including biology, ecology, hydrology, and operations, in order to ensure that the [*920] actions were based on best available science, would be effective in avoiding jeopardy, and would be feasible to implement. NMFS also secured outside contractual services to provide additional modeling expertise in evaluating draft RPA actions.
>
> Examples of Feasibility Concerns in RPA Actions As a result of this iterative consultation process, [**316] NMFS considered economic and technological feasibility in several ways when developing the CVP/SWP operations RPA. Examples include:
>
> > 1) Providing reasonable time to develop technologically feasible alternatives where none are "ready to go" -e.g., the Delta engineering action (Action IV.1.3), and lower Sacramento River rearing habitat action (Action I.6.1);
> >
> > 2) Calling for a stepped approach to fish passage at dams, including studies and pilot projects, prior to a significant commitment of resources to build a ladder or invest in a permanent trap and haul program. A reinitiation trigger is built into this action in the event passage is not deemed feasible, prior to construction of permanent infrastructure;
> >
> > 3) Considering limitations of the overall capacity of CVP/SWP systems of reservoirs in determining feasibility of flow actions below reservoirs, and considering the hydrologic record and CALSIM modeling results (Shasta/Sacramento River, Folsom/American River, New Melones/Stanislaus River).
> >
> > 4) Tiering actions to water year type and/or storage in order to conserve storage at reservoirs and not unduly impact water supplies during drought (e.g., see appendix 5);
> >
> > 5) Providing health and safety [**317] exceptions for export curtailments;
> >
> > 6) Using monitoring for species presence to initiate actions when biologically supported and most needed, in order to limit the duration of export curtailments;
> >
> > 7) Incorporating scientific uncertainty into the design of the action, when appropriate, in order to refine the action over time (e.g., 6-year acoustic tag study for San Joaquin steelhead).

> 8) Incorporating performance goals into more complex actions (for example, Shasta storage, rearing habitat and San Joaquin acoustic tag study). A performance goal approach will allow for adaptation of the action over time to incorporate the most up-to-date thinking on cost-effective technologies or operations.
>
> 9) Allowing for interim, further constrained, water deliveries to TCCA through modified RBDD operations for 3 years, while an alternative pumping plant is being built.

Id. at 719-20.

NMFS viewed adaptive management as another tool to address feasibility issues:

> The RPA includes collaborative research to enhance scientific understanding of the species and ecosystem, and to adapt actions to new scientific knowledge. This adaptive structure is important, given the long-term nature of the consultation and the [**318] scientific uncertainty inherent in a highly variable system. Monitoring and adaptive management are both built into many of the individual actions and are the subject of an annual program review. This annual program review will provide for additional opportunities to address any unforeseen concerns about RPA feasibility that may arise.

Id. at 720.

Export Plaintiffs do not identify any specific technological feasibility objection [*921] that was not addressed by NMFS's adjustments to the draft RPA. Export Plaintiffs do argue that NMFS ignored "extensive evidence" submitted by DWR about economic feasibility. DWR informed NMFS of its opinion as to the economic impact of the RPA:

> For the 2004 scenario, the NMFS draft RPA would have a net economic impact of about $320 million to $390 million per year while the combined costs of both the USFWS and NMFS opinions would be about $500 million to $670 million per year. For the 2030 scenario, the NMFS draft RPA in the Delta would have a net economic impact of about $320 million to $390 million per year while the combined costs of both the USFWS and NMFS opinions would be about $480 million to $620 million per year.

AR 00113831-32. Export Plaintiffs argue [**319] that according to DWR's figures, the net cost of the NMFS RPA over a 20-year implementation period could exceed $8 billion dollars. Doc. 431 at 115. Based on its own figures, DWR urged NMFS to find that the RPA did not meet the standard for economic feasibility. AR 00113831-32.

Does *section 402.02* contemplate consideration of economic costs to third parties or just to the action agencies? Without any analysis or legal authority, the district court in *Kandra* conluded: "Read in context ... the RPAs must be economically and technically feasible for the government to implement." *Id. at 1207* (emphasis added). The regulation itself does not specify whether feasibility should be limited to the economic impact on the action agencies or on others affected by the agency action. Defendants contend the regulation must be interpreted in a manner that does not violate *Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978),* which concluded that Congress enacted the ESA to "halt and reverse the trend toward species extinction, whatever the cost." (Emphasis added.) This language directs the conclusion that the economic feasibility requirement refers only to the costs to the action agency, requiring analysis of whether [**320] the corrective measures required by an RPA can be implemented from a purely budgetary perspective.

NMFS engaged in such an analysis. Starting with its 330,000 AF water supply impact projection, which has been remanded for other reasons, NMFS examined the impact of water supply reductions on Reclamation and DWRs costs:

> In evaluating economic feasibility, NMFS examined the direct costs of the modified operations to the Federal action agency, Reclamation. According to the [California State Legislative Analyst's Office ("LAO")], 85% of Reclamation's

costs are reimbursed by water users, and 95% of DWR's SWP costs are reimbursed:

> Irrigation water users pay about 55 percent of CVP reimbursable costs ($1.6 billion), while municipal and industrial water users are responsible for the remaining 45 percent (or about $1.3 billion). These reimbursements are paid through long-term contracts with water agencies. The total capital cost to construct the CVP as of September 30, 2006, is about $3.4 billion. The federal Bureau of Reclamation calculates how much of the capital construction cost is reimbursable from water users. Currently, users pay about 85 percent of total costs. In contrast, more than 95 [**321] percent of SWP's costs are reimbursable from water users. The costs assigned to such CVP purposes as flood control, navigation, and fish and wildlife needs are not reimbursable and are paid by the federal government.

(LAO, 2008) Through this arrangement, costs to the action agency itself are minimized.

[*922] BiOp at 723. NMFS also evaluated direct Project Costs.

> In addition to water costs, Reclamation and DWR will incur project costs associated with certain RPA actions (e.g., the fish passage program). The State of California has authorized $19.6 billion in water-related general obligation bonds since 2000, and these bonds often contain provisions for environmental conservation related purposes (LAO, 2008). Over $3 billion has been spent through the Calfed Bay-Delta Program. The CALFED ROD contains a commitment to fund projects through the Ecosystem Restoration Program. Similarly, the CVPIA AFRP funds eligible restoration projects, using federal authorities. Some of the projects in the RPA may qualify for those sources of funds.

Id. at 723-24.

Even assuming DWR's higher water costs figures (approximately three times NMFS's estimate), no party suggests that the costs to the agency would be prohibitive, [**322] given the reimbursement structure. Export Plaintiffs' motion for summary judgment that NMFS failed to demonstrate economic and technological feasibility is DENIED. Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED. DWR's specific challenge to the feasibility of Action IV.4.2 is addressed separately below.

4. Avoidance Jeopardy and/or Adverse Modification.

Export Plaintiffs incorporate by reference their substantive challenges to the RPA, arguing that for all those reasons, NMFS failed to comply with the fourth requirement of *section 402.02*. Consistent with and incorporating the rulings on the merits of the challenges to RPA Actions IV.2.1, IV.2.3 and IV.3, Export Plaintiffs' motion regarding the fourth *section 402.02* requirement is GRANTED IN PART AND DENIED IN PART and Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED IN PART AND DENIED IN PART. While there is some record support for the general approaches used in these RPA Actions, the specific prescriptions imposed are not sufficiently justified. As a result, NMFS did not reasonably conclude that Actions IV.2.1, IV.2.3 and IV.3 were essential to avoid jeopardy to the continued existence [**323] of the Listed Species and/or destruction or adverse modification of the species' critical habitat.

5. DWR's Feasibility Challenges to Action IV.4.2.

The stated objective of Action IV.4.2, entitled "Skinner Fish Collection Facility Improvements to Reduce Pre-Screen Loss and Improve Screening Efficiency," is to "[i]mplement specific measures to reduce pre-screen loss and improve screening efficiency at state facilities." BiOp at 655. The Action requires DWR to undertake the following actions at the Skinner Fish Collection Facility:

> 1) By December 31, 2012, operate the whole Skinner Fish Protection Facility to

achieve a minimum 75 percent salvage efficiency for CV salmon, steelhead, and Southern DPS of green sturgeon after fish enter the primary channels in front of the louvers.

2) Immediately commence studies to develop predator control methods for Clifton Court Forebay that will reduce salmon and steelhead pre-screen loss in Clifton Court Forebay to no more than 40 percent.

a) On or before March 31, 2011, improved predator control methods. Full compliance shall be achieved by March 31, 2014. Failure to meet this timeline shall result in the cessation of incidental take exemption at SWP [*923] facilities [**324] unless NMFS agrees to an extended timeline.

b) DWR may petition the Fish and Game Commission to increase bag limits on striped bass caught in Clifton Court Forebay.

3) Remove predators in the secondary channel at least once per week.

Id. at 655-56.

a. Is Action IV.4.2 Inconsistent with Action IV.4.

DWR argues that Action IV.4.2 is arbitrary and capricious because it is inconsistent with Action IV.4 ("Modifications of the Operations and Infrastructure of the CVP and SWP Fish Collection Facilities"), which provides:

Objective: Achieve 75 percent performance goal for whole facility salvage at both state and Federal facilities. Increase the efficiency of the Tracy and Skinner Fish Collection Facilities to improve the overall salvage survival of winter-run, spring-run, CV steelhead, and green sturgeon.

Action: Reclamation and DWR shall each achieve a whole facility salvage efficiency of 75 percent at their respective fish collection facilities. Reclamation and DWR shall implement the following actions to reduce losses associated with the salvage process, including: (1) conduct studies to evaluate current operations and salvage criteria to reduce take associated with salvage, (2) develop new procedures [**325] and modifications to improve the current operations, and (3) implement changes to the physical infrastructure of the facilities where information indicates such changes need to be made. Reclamation shall continue to fund and implement the CVPIA Tracy Fish Facility Program. In addition, Reclamation and DWR shall fund quality control and quality assurance programs, genetic analysis, louver cleaning loss studies, release site studies and predation studies. Funding shall also include new studies to estimate green sturgeon screening efficiency at both facilities and survival through the trucking and handling process.

By January 31 of each year, Reclamation and DWR shall submit to NMFS an annual progress report summarizing progress of the studies, recommendations made and/or implemented, and whole facility salvage efficiency. These reports shall be considered in the Annual Program Review.

Id. at 653-54. DWR suggests that Action IV.4 defines 75% salvage efficiency as a "performance goal," rather than a requirement, and therefore that Action IV.4.2's "requirement" of 75% efficiency is inconsistent with Action IV.4. Action IV.4 does not relegate the 75% target to the status of a "performance [**326] goal." The action sets a requirement for the Bureau and DWR "shall each achieve a whole facility salvage efficiency of 75 percent." *Id.* at 653. There is nothing equivocal about this language and no inconsistency between Actions IV.4 and IV.4.2.

DWR's motion for summary judgment that Action IV.4.2 is unlawful because it is inconsistent with IV.4 is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

b. DWR's Argument that the Record Does not Support the Conclusion that Action IV.4.2 (Subpart(1)) is Economically and Technologically Feasible.

DWR next complains that the record does not support the conclusion that the first subpart of Action IV.4.2, which requires 75% salvage efficiency at the Skinner Fish Facility for Chinook salmon, CV steelhead, and Southern DPS of green sturgeon by December 31, 2012, is technologically or economically feasible. DWR maintains that NMFS arbitrarily took the "goal" of Action IV.4, namely achieving a [*924] 75% salvage efficiency for the Skinner Fish Facility, turned it into an "action," and "slapped a date for compliance on the goal." Doc. 446-1. DWR's first premise -- that the 75% efficiency target in Action IV.4.2 is a "goal" - is [**327] mistaken. Nor is it inherently illogical for NMFS to impose a compliance deadline for the 75% target. DWR has been studying salvage efficiency and ways to improve the salvage process for many years, *see, e.g.*, AR 00109712-31, and NMFS was warned by a Reclamation biologist with experience working with individuals at the facility that without a deadline, improvements might never take place, AR 00105052. The deadline of December 31, 2012 provided DWR with approximately three and a half years from the adoption of the BiOp in June 2009. DWR has not demonstrated that imposing this deadline was irrational or arbitrary.

DWR next argues that the record does not support the conclusion that the standard of 75% efficiency at the Skinner Fish Facility is technologically or economically feasible. DWR points to its assertion in a March 20, 2009 letter to NMFS that it might not be possible to meet the December 31, 2012 deadline.

> Part 1 of this action is infeasible because it requires DWR to operate Skinner Fish Protection Facility to achieve a minimum 75% salvage efficiency for salmonids and green sturgeon by December 31, 2012. While DWR can strive to achieve this rate of success by that date, there [**328] is uncertainty that it can occur within that timeframe. To incrementally improve the salvage efficiency within Skinner Fish Protection Facility will require the efficiency of each component to be determined and a strategy developed to identify the most effective improvements to be made. Testing within a hydraulic lab may be required to evaluate the improvements of potential structural changes within the facility. In addition, making the actual modifications will take time. It is quite likely that these efforts will extend past the required implementation date. We recommend that a process involving the annual progress reports required by January 31 st be incorporated into this action. The process would involve the review of the annual status report by DWR and NMFS to determine if satisfactory progress is being made toward meeting the salvage requirement and, if it is determined that satisfactory progress is being made but the deadline of December 31,2012 will not be met, NMFS will adjust the deadline accordingly.

AR 00078204. That DWR's expressed "uncertainty" to NMFS that it could not meet the higher target by the end of 2010 does not mean the action is "infeasible." One and one-half [**329] years remain to perform.

DWR also maintains that NMFS had information indicating that DWR could not even complete the necessary studies on the current facilities' efficiency by the deadline. Steelhead studies had been ongoing since 2005, AR 00003660, 3642, 4105, 4128-29. DWR maintains that "[t]here are no similar studies as to sturgeon and salmon and "[f]rom the steelhead facility study, NMFS was aware that a study on facility efficiency would take at least three years to perform." However, DWR provides no record citation to support this three-year timeframe. To the contrary, the methods described in a 2008 technical study plan for the Tracy Fish Facility suggest that the actual experiments would be run over a period of only several months. AR 00078557, 00078563 (explaining that efficiency experiments for fiscal year 2009 will be "completed during the months of March-June," with results available by August 2010).

[*925] DWR next argues "the standard for efficiency imposed by NMFS seems to have changed from 90%, to 80%, to 75%" without explanation as to whether one or any of the standards was economically or technologically feasible. Doc. 446-1 at 6. Federal Defendants emphasize that a study [**330] cited by DWR found that the Skinner Fish Collection Facility is already operating at an estimated 74% efficiency for steelhead. AR 00113798 (cited in BiOp at 346). Federal Defendants further explain the reasoning behind the 75% efficiency standard:

> ... NMFS's decision to require this efficiency rate was based on numerous studies and NMFS's own technical experience working with both the state and federal facilities over the last 20 years. In choos-

ing the 75% salvage efficiency at the Skinner Fish Facility, NMFS considered, among other things: (i) the fish facilities' original design, which was 90-95% efficiency based on juvenile striped bass similar in size to Chinook salmon smolts; (ii) historical efficiency testing performed by the California Department of Fish and Game; (iii) and current efficiency estimates performed by DWR, which is 74% ± 7%. NMFS 00113798.

NMFS considered whether the original 90-95% design efficiency could be met at the facilities. However, over the years the efficiency of both the State and the Federal facility has varied due a variety of problems in the southern Delta, including, among other things, surface water levels, aquatic weeds, corrosion, introduced species [**331] like the mitten crab, and infrastructure age. NMFS 50871-73; NMFS 112963 (DWR noting similar "challenges"). Thus, given these changes in Delta conditions, NMFS concluded it would be unreasonable to assume the original 90-95% design efficiency could be met.

To determine a reasonable efficiency rate, NMFS also reviewed the history of the facilities and consulted with the Denver Technical Center. Contrary to DWR's claim that "facility efficiency is currently unknown," DWR Br. at 6, there have been a number of studies to determine the what that efficiency rate is in order to mitigate for the loss of striped bass and Chinook salmon (i.e., mitigation requirements established in the 1986 4-Pumps Agreement between DFG and DWR). A study conducted by DFG and DWR in 1994 based on 13 years of data established methods and a process for DWR to use to calculate the facility efficiency at each one of its four bays. NMFS 109712-731 (Brown *et al.* 1996). A review of the salmon losses related to the CVP and SWP export pumping in that study found that facility efficiency ranged from 70 - 85% at the primary louvers, and 70 - 95% at the secondary louvers for the Skinner Fish Facility. NMFS 109712-731 (Brown [**332] *et al.* 1996). NMFS's 75% criteria is within the established range and conservatively lower than the average efficiency as stated in previous studies. Similarly, the first biological opinion on winter-run Chinook salmon assumed 75% salvage efficiency in calculating the loss at Skinner Fish Facility. NMFS 127399-454 (NMFS 1992).

Moreover, the current Skinner Fish Facility efficiency, which is calculated on a daily basis by DFG in order to estimate the loss at facility, uses a efficiency rate for the louvers is 0.630 for fish < 101 mm and 0.568 for fish 100 mm, plus the primary channel flow divided by the primary channel volume. Overall, calculated louver efficiencies are typically in the range of 70-80% for most salmon that enter the facility. *See e.g.*, NMFS 109725-26 (estimating "70 and 85 percent" at primary louvers and "70 to 95 percent" at secondary louvers, and noting CDFG "combined the data to obtain [*926] an overall ... screen efficiency ... calculated as 0.630 for fish < 101 mm, and 0.568 for fish 100 mm, divided by an approach velocity"). Critically, DWR's own brief states that the Skinner Fish Facility efficiency "was estimated to be 74% +- 7%" in a 2008 DWR study, DWR Br. at 6, which [**333] meets the criteria set forth in the BiOp. NMFS 113798. Thus, it is possible that no further action may be necessary, except to initiate a study to determine efficiency for green sturgeon through the facility.

Doc. 477 at 104-106.

DWR argues that Brown, *et al.* (1996) is based upon obsolete data collected at the louvers approximately 40 years ago, in 1970 and 1971. AR 00109725. The Brown study recognized that changes to the Skinner Fish Facility had been made between the time the data was collected and the article's publication. AR 00109728. Therefore, DWR argues that the data relied upon in Brown, *et al.* (1996) does not reflect the current or potential efficiency at the Skinner Fish Facility. Doc. 495 at 10. Nor does the data reflect the entire process by which DWR protects fish at Skinner, which involves handling, trucking, and releasing entrained fish. The focus of Action 4.2.1(1) is the overall efficiency of the Skinner Facility, not just the louver facility. *Id.*

Federal Defendants do not respond to these critiques of the obviously outdated Brown (1996) study, but instead focus on the fact that DWR's own 2007 study predicted that efficiency at the entire Skinner Facility was

estimated [**334] to be "74 ± 5% (mean ±95% Confidence Interval) for the 2007 study period. AR 00113798. DWR objects that "even this data does not support Federal Defendants' conclusion that an improvement of 1% to 75% overall efficiency standard for operating the Skinner Fish Facility as to Chinook salmon, steelhead trout, and green sturgeon, is economically and technologically feasible by the date imposed under the BiOp." Doc. 495 at 10-11. Based on the information before NMFS, was it unreasonable to conclude that a 1% improvement was technologically or economically feasible? NMFS justifies its conclusion on the ground that DWR "did not say it could not possibly reach a one percent higher efficiency target by 2012." Doc. 477-1 at 107 (emphasis added). Rather, DWR's comment letter stated that DWR had "uncertainty" as to whether the efficiency improvements were feasible.

To uphold an agency's decision, its rationale must "reasonably be discerned," from the record. *See Modesto Irr. Dist., 619 F.3d at 1035*. Here, NMFS has failed to cite any record evidence indicating that the efficiency improvement, albeit a minor one, is economically or technologically feasible. DWR's own 2007 study indicates the efficiency [**335] is close to the target, from which it could be inferred that the technological changes may be possible, but the record lacks affirmative support for a finding of feasibility.

DWR's motion for summary judgment that the record lacks support for a finding that Action IV.4.2(1) is feasible is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

c. DWR's Argument that the Record Does not Support the Conclusion that Action IV.4.2 (Subpart(2)) is Economically and Technologically Feasible

DWR maintains that the record does not support NMFS's economic and feasibility determination as to subpart 2 of Action IV.4.2, which requires reduction of predation at Clifton Court Forebay to 40% by March 31, 2014.

There is undisputed record evidence that at DWR's facility, most loss of fish occurs in the Clifton Court Forebay. AR 00117410-441 (Gingras 1997). DWR concedes [*927] that pre-screen loss at the Forebay is estimated at between 63 and 99% for juvenile Chinook salmon. Doc. 446-1 at 7 (citing BiOp at 348 and AR 00106736).

It is also undisputed that reducing predation would improve survival across the Forebay. *See* AR 00113817 (DWR (2008)). However, DWR argues that the record does [**336] not support Action IV.4.2(2)'s imposition of the specific requirement that DWR reduce "predation" in the Forebay to 40%. In support of Action IV.4.2(d), NMFS cites a 2008 DWR study that in turn cites a 1952 study by Ricker. Doc. 477-1 (citing AR 113817). Ricker concluded that when survival rates are below 25%, a reduction of predator numbers to below 50% can double the survival rate of the prey. But, DWR points out that Ricker's finding that predator numbers should be reduced to below 50% is distinct from whether predation should be reduced to below 50%. [31] In response, Federal Defendants disclaim reliance on Ricker, asserting that NMFS considered DWR (2008) as support for the proposition that predator removal is a method of reducing pre-screen loss. Doc. 515 at 44. Rather than rely directly on Ricker's work, NMFS "reasoned by simple math that if predation was reduced by half to no more than 40%, giving 60% survival rather than 20-25% survival, overall survival through the Skinner Facility would reach approximately 39%, roughly equivalent to the current CVP survival efficiency." *Id.* Federal Defendants provide no record citation related to this imprecise guestimate.

31 DWR points out [**337] that, in response to DWR's motion to admit expert testimony, Federal Defendants made a judicial admission that they would not rely on Ricker's 1952 study or the statement that when survival is below 25%, a reduction of predator numbers to below 50% can double survival. *See* Doc. No. 464; Draft Tr. 7/19/10 at 61-67. Relying on that admission, the Court concluded expert testimony was not needed to explain application of the Ricker study. Doc. 464 at 1-2. DWR now asserts that it is prejudiced by Federal Defendants reliance on a passage that discusses Ricker because DWR "does not have an expert to explain DWR (2008) and the Ricker equation. However, DWR successfully explains the Ricker study and NMFS's use of it. *See* Doc. 495 at 4-5. Expert clarification is unnecessary. Nonetheless, Federal Defendants are precluded from using the 1952 Ricker study after they said they would not.

Even if the 40% target is scientifically justified, whether predation in the Forebay is a problem and/or whether a reduction to 40% is a reasonable goal is an entirely different inquiry from whether reducing predation to 40% is feasible. NMFS mentions numerous examples of methods of reducing predators on juvenile [**338] salmon and steelhead, but nothing in the record indicates whether the 40% target can be met, or whether it could be met by the deadline imposed by the BiOp. [32] It cannot be determined from the existing record whether NMFS's feasibility determinations are supportable. There is no explanation.

32 While Action IV.4.2(2) provides that NMFS may agree to an extended timeline, the Action

provides no basis for determination of whether an extension should be given.

DWR's motion for summary judgment that the record lacks support for a finding that Action IV.4.2(2) is feasible is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

d. DWR's Argument that Action IV.4.2 is Arbitrary and Capricious Because it Fails to Explain How the Action Will Avoid Jeopardy and/or Adverse Modification.

DWR also argues that the record does not support NMFS's finding that Action IV.4.2 is essential to avoid jeopardy and/or adverse modification. There is record evidence to support NMFS's findings that [*928] prescreen loss and loss due to salvage are significant and that reducing these sources of loss will improve survival. However, the record does not explain why increasing the existing salvage [**339] efficiency by 1% and/or reducing predation to 40% "is essential to avoid jeopardy and/or adverse modification." ESA Handbook at 4-43 (requiring a "thorough explanation of how each component of the [RPA] is essential to avoid jeopardy and/or adverse modification"). The RPA is not lawful without the required through explanation, which shall be provided on remand.

VI. STANISLAUS RIVER PLAINTIFFS' CLAIMS.

A. Relevant Factual Background.

1. The New Melones Project.

The New Melones Project was approved as the last unit of the CVP in 1962. Pub. L. No. 87-874, 76 Stat. 1173, 1191-92 (1962). The New Melones Project includes a dam and 2.4 million acre-foot reservoir on the Stanislaus River. USBR AR 007570. The New Melones Reservoir is "operated primarily for purposes of water supply, flood control, power generation, fishery enhancement, and water quality improvements in the lower San Joaquin River. The reservoir and river also provide recreation benefits." *Id.* The United States holds appropriative water rights issued by the SWRCB for the New Melones Project, conditioned by Water Rights Decisions 1422, 1616 and Revised Decision 1641 ("D-1641"). *See generally* USBR AR 007571-73.

2. The Stanislaus River [**340] Plaintiffs.

Plaintiffs Oakdale Irrigation District ("OID"), and South San Joaquin Irrigation District ("SSJID") hold pre-1914 water rights to Stanislaus River water. OID and SSJD receive water from New Melones under a 1988 Agreement with the United States designed to fulfill their prior rights. USBR AR 007571-72; USBR AR 011751. That agreement requires Reclamation to provide to OID and SSJID:

> o The inflow into New Melones plus the amount derived by the formula of (600,000 minus inflow) divided by 3, not to exceed 600,000 AF per year, USBR AR 011751; and
>
> o The right to conserve up to 200,000 AF in New Melones, USBR AR 011752.

Plaintiff Stockton East Water District ("SEWD") is one of only two "Eastside Contractors" that receive a CVP supply from New Melones pursuant to Reclamation water service contracts. SWED's contract provides for up to 75,000 AF of water annually. *See* USBR AR 011728-29. (Collectively, these three plaintiffs are referred to as the "Stanislaus River Plaintiffs" or "SR Plaintiffs.")

3. The Status of Steelhead in the Stanislaus River.

The OCAP BA summarizes the history and status of Steelhead in the Stanislaus River:

> Historically, steelhead distribution extended into the headwaters [**341] of the Stanislaus River (Yoshiyama *et al.* 1996). Dam construction and water diversion for mining and irrigation purposes began during and after the Gold rush. Goodwin Dam, constructed in 1913, was probably the first permanent barrier to significantly affect Chinook salmon access to upstream habitat. Goodwin Dam had a fishway, but Chinook could seldom pass it. Steelhead may have been similarly affected. The original Melones Dam, completed in 1926, permanently prevented access to upstream areas for all salmonids. Currently, steelhead can ascend over 58 miles up the Stanislaus River to the base of Goodwin Dam. Al [*929] though steelhead spawning locations are unknown in the Stanislaus, most are thought to occur upstream of the City of Oakdale where gradients are slightly higher and more riffle habitat is available.
>
> The Fishery Foundation of California (Kennedy and Cannon 2002) has monitored habitat use by juvenile steelhead/rainbow since 2000 by snorkeling seven sites from Oakdale to Goodwin Dam every other week. Steelhead fry be-

gin to show up in late March and April at upstream sites, with densities increasing into June and distribution becoming more even between upstream and downstream sites [**342] through July. Beginning in August and continuing through the winter months, densities appeared highest at upstream sites (Goodwin to Knights Ferry). Age 1-plus fish were observed throughout the year with densities generally higher at upstream sites (Goodwin to Knights Ferry). Low densities were observed from late December until April. It is unknown whether fish left the system in December or if, with the cooler winter water temperatures, they were less active and more concealed during the day.

Since 1993, catches of juvenile steelhead/rainbow in rotary screw traps (RSTs) indicate a small portion of the Stanislaus River steelhead/rainbow population displays downstream migratory characteristics at a time that is typical of steelhead migrants elsewhere. The capture of these fish in downstream migrant traps and the advanced smolting characteristics exhibited by many of the fish indicate that some steelhead/rainbow juveniles might migrate to the ocean in spring. However, it is not known whether the parents of these fish were anadromous or fluvial (they migrate within freshwater). Resident populations of steelhead/rainbow in large streams are typically fluvial and migratory juveniles look [**343] much like smolts. Further work is needed to determine the parental life histories that are producing migratory juveniles. The Stanislaus River Weir has been installed annually since 2003 at RM 31.4. The primary purpose of the weir[] is to monitor escapement of fall-run Chinook salmon, so it is installed from September through June each year. Fish passing the weir are monitored using a Vaki infrared RiverWatcher Fish Counter. From 2003 through 2007, O. mykiss have been observed passing the weir a total of 16 times. Scale analysis of one individual indicated that it was a steelhead.

Smolts have been captured each year since 1995 in RSTs at Caswell State Park and at Oakdale (Demko *et al.* 2000). Captures occurred throughout the time the traps were run, generally January through June. Most fish were between 175 and 300 mm at the Caswell site, with only six fish in seven years less than 100 mm. Larger numbers of fry were captured upstream at Oakdale. During 2001, 33 smolts were captured at Caswell and 55 were captured at Oakdale, the highest catch of all years. Although improved traps were used, the higher catch in 2001, was likely due to more fish present and not due to better trap efficiencies [**344] (Doug Demko, personal communication, 2001). RSTs are generally not considered efficient at catching fish as large as steelhead smolts and the number captured is too small to estimate capture efficiency so no steelhead smolt outmigration population estimated has been calculated.

USBR AR 007670-71.

The BiOp describes the impacts of proposed operation of New Melones on survival of CV steelhead and its critical habitat, [*930] BiOp at 296-313, and imposes a number of RPAs that affect the New Melones Unit.

o Action III.1. - Establishes a real-time operational decisionmaking team, the Stanislaus Operations Group ("SOG"), to "provide direction and oversight to ensure that the East Side Division actions are implemented, monitored for effectiveness and evaluated." *Id.* at 620.

o Action III.1.2 - Requires Reclamation to make releases from New Melones to achieve specified water temperatures at two locations downstream of Goodwin Dam. Temperature compliance is to be measured on a seven-day average daily maximum temperature. *Id.* at 620-22.

o Action II.1.3 - Requires Reclamation to release water pursuant to a year-round minimum flow schedule, dependent on hydrologic year time, to "optimize CV steelhead habitat [**345] for all life history stages and to incorporate habitat maintaining geomorphic flows in a flow pattern that will provide migratory cues to smolts and facilitate out-migrant smolt movement on [the] declining limb of [the] pulse." *Id.* at 622; BiOp App. 2-E.

o Action III.2.1 - Calls for the addition of 50,000 cubic yards of gravel to improve spawning habitat by 2014, and 8,000 cubic yards per year for the duration of the Project Actions. BiOp at 626-27.

o Action III.2.2 - Requires Reclamation, with advice from SOG, to develop an operational strategy to achieve floodplain inundation flows that inundate CV steelhead juvenile rearing habitat on a one- to three-year return schedule. A proposed plan shall be submitted by June 2011. If NMFS approves the plan, Reclamation will begin to implement it in 2012. *Id.* at 627.

o Action III.2.3 - Requires Reclamation, in cooperation with SOG, to develop a list of projects to improve the habitat values of freshwater migratory habitat in the Stanislaus River. *Id.* at 627-28.

o Action III.2.4 - Requires an evaluation of options to enable steelhead to pass New Melones, Goodwin, and Tulloch dams in order to access their historic habitat. A report detailing options [**346] is to be prepared by December 13, 2016. *Id.* at 628.

o Action IV.2.1 - This Delta action, a part of which is discussed above, requires Reclamation to release water from New Melones, in addition to the minimum flow schedule set forth in Appendix 2-E, to meet certain flow requirements at Vernalis. This requirement is valid through 2011. At that time, it is anticipated that the SWRCB will establish minimum flows for the San Joaquin River. BiOp at 642-43. There is no information about such minimum flows or whether they have been established. SR Plaintiffs raise a number of challenges to the treatment of New Melones in the BiOp, its effects analysis, and RPAs related to New Melones. [33]

33 SR Plaintiffs' motion suffers from a lack of internal organization, repeatedly shifting back and forth between challenges to the effects analysis and challenges to the RPA, making evaluation of the merits of their arguments unnecessarily time consuming and difficult.

B. Inclusion of the New Melones Unit in the Proposed Action Subject to Consultation.

SR Plaintiffs challenge NMFS's decision to include the New Melones Unit in the action subject to consultation. The ESA's consultation requirement applies to "agency [**347] actions." *See 16 U.S.C. 1536(a)(2).* The ESA implementing regulations define "action" to mean "all activities [*931] or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." *50 C.F.R. § 402.02.* No regulation defines the scope of the action to be considered. The question is whether NMFS's definition of the scope of the action is reasonable in light of the record. *See PCFFA, 426 F.3d at 1090* ("Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned.").

SR Plaintiffs make two attacks on NMFS's decision to include New Melones in the Project Description. They first argue that the touchstone of inclusion in the action appears to be "coordination" of the Unit in question with Project operations. For example, the SWP is included in the action because its operations are closely coordinated with those of the CVP through the Coordinated Operating Agreement. BiOp at 31; USBR AR 007495 (BA 1-4) ("SWP operations are coordinated with CVP operations and, as such, are consulted on as part of the [**348] proposed action described in the BA."). In contrast, the Friant Unit was deliberately excluded from the action because it operates separately from the rest of the CVP and is not integrated into the CVP OCAP." BiOp App. 1 at 79. SR Plaintiffs argue that while "New Melones is an element of the CVP, it is also clear that operation of New Melones is not coordinated with the operation of the rest of the CVP and/or SWP." Doc. 454 at 37. This assertion is belied by the record. Stanislaus Plaintiffs admit that New Melones is one of the major reservoirs in the CVP system and releases from it are needed to meet non-consumptive downstream purposes, such as water quality and the preservation and enhancement of fish and wildlife in both the Stanislaus and San Joaquin rivers. *Id.* at 37-38; *see also* Sixth Milligan Decl., Doc. 517 at ¶ 10 (explaining that "[r]eleases from New Melones down the Stanislaus River affect Reclamation's ability to comply with Vernalis flow and water quality requirements.").

SR Plaintiffs also argue that inclusion of New Melones in the action subject to consultation will lead to "absurd results" because the Incidental Take Statement provides that the RPAs must be implemented [**349] as a whole and if Reclamation and/or DWR fail to comply with the terms of the ITS, they may no longer comply with the ESA. *See* BiOp at 728. SR Plaintiffs maintain

that this is "absurd given the lack of coordination" between New Melones and other operations of the CVP and SWP. Doc. 454 at 38. "Simply put, what happens on the Sacramento River as a result of actions taken by the CVP and/or SWP has nothing to do with the listed species contained in the Stanislaus River, and vice-versa." *Id.* This statement is incorrect. Mr. Milligan opines: "during balanced conditions, releases from New Melones down the Stanislaus River affect overall Delta conditions, which potentially play a role in determining how Reclamation operates the rest of the CVP.... Therefore [Reclamation] typically coordinate[s] operations of the various Delta facilities and CVP reservoirs, including New Melones Reservoir ... with DWR in its operation of the SWP, on a daily basis." Sixth Milligan Decl., Doc. 517 at ¶ 10. SR Plaintiffs have presented no contrary evidence.

SR Plaintiffs' motion for summary judgment that Federal Defendants erred by including New Melones in its coordinated Project description is DENIED. Federal [**350] Defendants' and Defendant-Intervenors' cross motions are GRANTED.

C. Effects Analysis Challenges.

1. New Melones Operations v. Baseline Effects.

SR Plaintiffs argue that the BiOp is unlawful because NMFS improperly [*932] identified as "effects of the action," effects caused by the existence of New Melones Dam. Doc. 454 at 18-21. Specifically, SR Plaintiffs point to the BiOp's conclusions that the action (1) altered flows, which impact habitat conditions and survival at various life history stages, and (2) modified the hydrograph to dampen peak flood flows, mute flow variability, and reduce or eliminate channel forming flows. *Id.* at 19. SR Plaintiffs maintain that "[t]hese are effects associated with the fact that the dam exists, rather than effects associated with the operational plan." *Id.* at 20. SR Plaintiffs' seminal argument is that NMFS has "failed to identify with any clarity how continued operations, as opposed to the basic existence of the dam itself, cause any additional incremental harm to steelhead, deepen their jeopardy, or otherwise 'tip' them into extinction." Doc. 454 at 20.

The record does explain how continued operations will cause additional incremental harm. The BiOp compares [**351] effects of the action both to pre-dam "unimpeded" conditions and to the "future baseline" which includes the existence of the dams:

> The future baseline of the existing dams prevents access to historical habitat, but the proposed operations of the dams control the quality and quantity of available alternative habitat below Goodwin Dam and the suitability of the physical conditions to support CV steelhead at various life history stages. Survival of CV steelhead may be affected by operations of the East Side Division in the following ways:
>
> o Operational releases control extent of cool water habitat available below Goodwin Dam.
>
> o Operational release levels control the quantity and functionality of instream habitat for spawning, egg incubation, juvenile rearing and smoltification.
>
> o Operational releases are typically lower than unimpaired flows, requiring smolting juveniles to expend more energy to outmigrate and lower stream velocities increase the exposure of juveniles and smolts to predation.
>
> ***
>
> The proposed New Melones operations will create an altered hydrograph as compared to the unimpaired flows and as compared to the future baseline. The dampening of flood events and freshets eliminates [**352] the geomorphic processes that are important to CV steelhead to replenish and rejuvenate spawning riffles and to inundate floodplain terraces to provide nutrients and rearing habitat for juvenile salmonids. The Corps has limited controlled flood releases from New Melones Dam to 8,000 cfs. The dampening of flood events also eliminates or reduces the intensity and duration of freshets and storm flows that would otherwise convey smolting CV steelhead to the ocean and create a clear signature for the river. A more moderated hydrograph has eliminated periodic channel forming flows. The dams (a future baseline condition) capture sediment that would otherwise be transported downstream for geomorphic

> processes. Operations of the dams result in channel incision that further reduces the chance of inundated floodplain habitat and degrades spawning habitat quality. Releases from New Melones can affect downstream temperatures at critical times to affect adult migration, spawning, egg incubation success, juvenile survival and anadromy. Predicted increases in temperature as a result of climate change will affect instream water temperatures directly, and will affect New Melones operations as more precipitation [**353] will fall as rain, rather than snow, and as storm event intensity is expected to increase. Climate [*933] change may affect the types and cover rates of vegetation upslope of the river, potentially increasing the rate of fine sediment transport to the river and to spawning areas. Future baseline stressors that are exacerbated by the proposed East Side Division operations include increased vulnerability to non-native fish predators owing to flow velocities and downstream temperatures conducive to these species and competition from resident O. mykiss, which may be more abundant as a result of less variability in instream conditions.

BiOp at 300-301 (emphasis added). The subsequent pages provide more specific support for these conclusions. *Id.* at 302-309.

SR Plaintiffs specifically challenge only one aspect of this analysis; NMFS's reliance on a 2001 Kondolf, *et al.* study to support the assertion that available steelhead spawning gravel habitat decreased 40% since 1994. BiOp at 308. Kondolf, et al. (2001) concluded that spawning gravel habitat decreased 40% between 1972 and 1993, and thereafter decreased by a smaller percentage, within the study's margin of error, between 1993 and 2000, excluding [**354] gravel augmentation efforts. The significance of this minor error to SR Plaintiffs' argument is unclear. The BiOp does not specifically attribute this 40% loss to Project operations. Rather, later in the same paragraph, NMFS explains with specificity the ongoing impact of dam operations:

> Operational criteria have resulted in channel incision of 1-3 feet since the construction and operation of New Melones Reservoir (Kondolf *et al.* 2001). This downcutting, combined with operational criteria, have effectively cut off overbank flows which would have inundated floodplain rearing habitat, as well as providing areas for fine sediment deposition, rather than within spawning gravels, as occurs now. Additionally, the flow reductions in late spring and early summer are too rapid to allow recruitment of large riparian trees such as Fremont cottonwoods. Consequently, within 10 to 20 years as existing trees scenesce and fall, there will be no younger riparian trees to replace them, resulting in less riparian shading, higher instream temperatures, less food production from allochtonous sources, and less LWD for nutrients and channel complexity[.]

BiOp at 308.

SR Plaintiffs do not dispute the science [**355] underlying this conclusion, nor do they suggest that the impacts of operations, per se, are *de minimis.* Rather, they argue that the real issue is whether the amount of New Melones water within Reclamation's discretion is significant enough to cause appreciable harm to CV Steelhead and/or appreciable diminishment of its critical habitat. *See* Doc. 492 at 4-6. The median historical unimpaired runoff in the Stanislaus River Basin is 1.1 million acre feet per year ("MAFY"). BiOp App. 1 at 69. OID and SSJID are legally entitled to the first 600,000 AF. USBR AR 011751-53. In addition, Reclamation must release between 98,300 and 302,000 AF for fish pursuant to its agreement with CDFG. BiOP App. 1 at 71. Additional releases may be required to meet dissolved oxygen criteria and D-1641. BiOp App. 1 at 72-73, 76-77. [34]

> 34 SR Plaintiffs mention further legal constraints on the Bureau's use of water set forth in the September 30, 2009 Federal Circuit Ruling, *Stockton E. Water Dist. v. United States, 583 F.3d 1344 (Fed. Cir. 2009),* which post-dates the June 4, 2009 issuance of the BiOp by several months. *See* Doc. 492 at 6 (discussing holding that Reclamation does not have discretion to breach SEWD [**356] CVP contract to comply with the ESA). Those subsequent constraints and their future effects do not apply to the reasonableness of the BiOp when issued.

[*934] Federal Defendants concede that these mandatory delivery requirements do exist, but emphasize that Reclamation nonetheless possesses discretion over how those releases are made. *See* Doc. 515 at 49. For example, while OID and SSJID have an entitlement to 600,000 AF, past water use data demonstrates that this

full amount is not always requested, which in turn changes the amount of water available for other beneficial uses. *See* Hilts Decl., Doc. 480, Ex. 1 (showing that during the 1987-1992 drought, OID and SSJID never requested full allocation). In addition, Reclamation has the ability to request temporary exemptions from SWRCB conditions such as for dissolved oxygen and Vernalis flow objectives when warranted, and assumptions to reflect this option were inserted into the CalSim II modeling for the Stanislaus River. Fifth Milligan Decl., Doc. 479 at ¶¶ 7-8; Hilts Decl., Doc. 480 at ¶ 12. Defendants do not suggest these are not *Home Buidlers* non-discretionary obligations on Reclamation.

SR Plaintiffs argue that NMFS must independently demonstrate [**357] that discretionary operations alone satisfy the jeopardy/adverse modification standard. This contention was rejected above. The ESA does not require the agency to segregate discretionary from non-discretionary impacts for the purposes of the effects analysis. (Whether an agency can implement an RPA within its legal authority if an insufficient amount of discretionary water is available is a different question.) Given that there is some discretionary water in the New Melones system and that Reclamation authority over how make discretionary deliveries, is there enough discretionary project water to cause appreciable harm to the species?

The BiOp identifies several negative impacts caused by Project operations, including increasing the likelihood that CV Steelhead will be exposed to unfavorable temperatures at various life stages and, by lowering instream flows, the amount of energy juveniles and smolts must expend to avoid predation is increased. BiOp at 301. SR Plaintiffs do not challenge these underlying findings. The BiOp does not have to demonstrate that these negative effects, alone, satisfy the jeopardy standard by "reduc[ing] appreciably the likelihood of both the survival and [**358] recovery of [the] listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Rather, the jeopardy analysis must determine the overall impact on the species of the entire project, not just the New Melones unit. *See 50 C.F.R. § 402.14* (NMFS's obligation during formal consultation is to determine "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat").

SR Plaintiffs' motion for summary judgment that the BiOp's effects analysis is unlawful because it does not properly distinguish between baseline effects and effects of the action is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED on this issue.

2. Challenge to Critical Habitat Adverse Modification Finding.

SR Plaintiffs complain that NMFS has not specifically identified ow the proposed action will cause "adverse modification" to the steelhead's critical habitat. Doc. 492 at 7-9. [35]

35 Defendant-Intervenors and Federal Defendants suggest that SR Plaintiffs' opening brief failed to challenge NMFS's determination that the actin [**359] would adversely modify CV steelhead critical habitat. Doc. 484 at 88 & Doc. 515 at 53. However, although the critical habitat analysis was not a direct subject of discussion in SR Plaintiffs' opening brief, that brief did directly challenge the effects analysis regarding the Stanislaus River, which includes both effects on the species and critical habitat. Defendant-Intervenors' discussion of critical habitat as an alternative justification for the RPAs, Doc. 484 at 82-85, invites SR Plaintiffs' discussing critical habitat in reply.

[*935] a. Spawnable Area.

SR Plaintiffs first challenge aspects of the BiOp's treatment of the "spawnable area" aspect of CV Steelhead critical habitat. Doc. 492 at 8. The BiOp found that steelhead spawning habitat would be "maximized" if instream flows were maintained at 200 cfs. However, operations for the protection of fall-run Chinook require higher flow rates may "conflict" with the needs of steelhead. BiOp at 311. SR Plaintiffs argue that habitat "maximization" is not a requirement of the ESA and is not relevant to the effects analysis. Doc. 492 at 8. NMFS does not explain why it set the benchmark for evaluating project impacts at the spawning habitat "maximum." [**360] To ascertain whether project operations will impact the likelihood of CV steelhead survival and recovery, the more appropriate benchmark is that amount of habitat that is "essential" for survival and recovery. The BiOp does not identify the extent of this "essential" habitat or how it relates to the "maximum" habitat. The use of the "maximum" habitat benchmark necessarily resulted in a finding of adverse modification to this aspect of CV habitat. That finding is not justified.

SR Plaintiffs motion for summary judgment that the record does not support NMFS's findings regarding spawnable area is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

b. Spawning Gravel Quality and Quantity.

SR Plaintiffs dispute the BiOp's findings related to "Spawning Gravel Quality and Quantity." The entire section on this topic provides:

> Pebble counts and sediment size analysis of spawning areas has shown an increase in sand and fine material in spawning beds since construction of New Melones Dam (Kondolf *et al.* 2001, Mesick 2001). Most non-enhanced riffles had sufficient fine material to impair egg incubation and survival.
>
> Gravel replenishment actions below Goodwin Dam add suitably-sized [**361] gravel for CV steelhead spawning, but it is rapidly mobilized at flows as low as 280 cfs (Kondolf *et al.* 2001). CVPIA spawning gravel additions have targeted 3,000 cubic yards per year. This is not of sufficient volume to offset the deficits created by the loss of recruitment from upstream sources (over 1 million cubic yards, Kondolf *et al.* 2001). At best, these additions may strategically maintain the quality of few spawning riffles. The project description does not specify a level of spawning gravel addition to be performed on the Stanislaus River.

BiOp at 311. SR Plaintiffs contest the BiOp's reliance on the 2001 Kondolf, *et al.* study to find that an increase in fine material in spawning beds since the construction of New Melones impairs egg incubation and survival. *Id.* at 311. Federal Defendants acknowledge that the loss of gravel recruitment from upstream sources is not the result of the proposed action. *See* Doc. 515 at 51. However, Federal Defendants argue that "continuing discretionary flow releases eliminates the variability which replenishes spawning riffles," *id.*, citing page 301 of the BiOp, which discusses how "[t]he dampening of flood events and freshets eliminates the [**362] geomorphic processes that are important to CV steelhead to replenish and rejuvenate [*936] spawning riffles and to inundate floodplain terraces to provide nutrients and rearing habitat for juvenile salmonids." Page 301 includes this finding, but the section of the BiOp challenged by SR Plaintiffs, at page 311, specifically discusses gravel recruitment (i.e. the volumes of gravel present), not "riffle rejuvenation." There is no record evidence that loss of gravel recruitment is an effect of the action. This effect is completely without support and the purported impact of any changed analysis on the overall critical habitat discussion must be addressed by NFMS on remand.

SR Plaintiffs motion for summary judgment that the record does not support NMFS's finding that New Melones operations effect gravel recruitment is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED on this issue.

c. Challenge to Temperature Requirements for Spawning Habitat.

SR Plaintiffs also purport to challenge the BiOp's finding regarding "degradation of rearing habitat conditions," but actually advance arguments about temperature requirements for spawning habitat. *See* Doc. 492 at 9. The BiOp [**363] explains that "[b]ecause CV steelhead are unable to reach their historical spawning areas above Goodwin Dam, they are dependent on East Side Division operations maintaining temperatures suitable for spawning below the dam..." and concludes that appropriate temperature conditions likely cannot be met for April and May for future operations. BiOp at 310. SR Plaintiffs argue "NMFS fails to explain whether or not these 'temperature conditions' will be met with the proposed operations or whether there is any evidence that temperatures, as the result of existing operations, have been detrimental to steelhead." Doc. 492 at 9. This argument entirely ignores the four-and-a-quarter page discussion of temperature at BiOp pages 302 through 306, discussing results of computer modeling showing that project operations will result in temperature exceedances that will have detrimental effects on certain life stages of CV steelhead in the Stanislaus. This challenge is without merit.

SR Plaintiffs motion for summary judgment that the record does not support NMFS's findings regarding New Melones operations' impacts on temperature conditions in spawning habitat is DENIED; Federal Defendants' and Defendant-Intervenors' [**364] cross motions are GRANTED on this issue.

d. Freshwater Migration Corridors.

SR Plaintiffs challenge the BiOp's finding that proposed operations will negatively affect upstream and downstream migration corridors. The relevant section of the BiOp provides:

> Under proposed operations the freshwater migration corridors on the Stanislaus River will continue to require juvenile CV steelhead to pass through predator-rich abandoned mining pits, incised channels that limit channel complexity and water temperatures that may be physiologically lethal or sublethal. The spring pulse flows defined in VAMP are generally less than the spring pulse flows measured in 1989,

> a critically dry year (Kondolf *et al.* 2001), hence the operational assistance provided to assist CV steelhead outmigrants is only representative of the lowest migratory volumes historically experienced by CV steelhead.
>
> Channel incision resulting from post New Melones operations has produced overhanging large wood and river edge aquatic vegetation but the lack of scouring and channel forming flows has effectively channelized and simplified the corridor. The variety of habitats that allow them to avoid high flows, avoid predators, [*937] successfully [**365] compete, begin the behavioral and physiological changes needed for life in the ocean, and reach the ocean in a timely manner has been limited by operational conditions. Obstruction of access to historic spawning and rearing habitat requires CV steelhead to utilize these freshwater migration corridors at times that may not be optimal with respect to temperature, forage availability and exposure to predators.
>
> Adult CV steelhead migrating upstream frequently are delayed entering the river owing to poor water quality conditions in the Delta. Fall attraction flows released for Fall Run typically improve conditions for steelhead migration also, hence steelhead tend to be observed on the Stanislaus River earlier in the year than in other Central Valley streams.

BiOp at 312-13. SR Plaintiffs argue "there is nothing in the AR that indicates that existing operations have negatively affected upstream or downstream migration to begin with, let alone that future operations will 'continue' to do so." Doc. 492 at 9. SR Plaintiffs' argument continues:

> ...[T]he AR reveals that as to fall attraction, existing pulse flows for fall-run salmon appear to also attract steelhead (BO at 625). Nonetheless, NMFS [**366] imposes additional fall pulse-flows to attract steelhead. (BO at 624). For out-migration, the BO explains that steelhead are larger than fall-run smolts and may be less dependent on pulse flows to convey them out of the Stanislaus River (Id.). Without any evidence that the existing population of steelhead in the Stanislaus River that has been unable to outmigrate due to impaired flows, the BO states that the late spring flows in Action III.1.3 are needed to "allow more smolted fish to migrate out of the system."

Doc. 492 at 9. The pages cited by SR Plaintiffs are from the section of the BiOp discussing the need for the RPA Actions. SR Plaintiffs do not challenge the clearly explained conclusions of the effects section. Project operations reduce spring pulse flows to levels that are below normal migratory flows, and the flow regime implemented by Reclamation under the action results in channel incision, which reduces connection to floodplain areas necessary for steelhead to rear to large enough size to begin the smolting process. BiOp at 312-13.

SR Plaintiffs motion for summary judgment that the record does not support NMFS's finding that New Melones operations effect downstream migration [**367] corridors is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

D. Stanislaus River RPA Challenges.

1. Challenge to the Assumptions Used to Model New Melones Project Operations.

SR Plaintiffs' claim that NMFS used a flawed project description for New Melones and that this "fundamental error renders the entire consultation for the New Melones unit erroneous." Doc. 454 at 17. This objection concerns the assumptions used to represent New Melones operations in computer modeling.

In 1997, Reclamation and FWS adopted an Interim Plan of Operations to guide the annual operations for New Melones ("NMIPO"). Although the NMIPO was only a two-year plan, it is still used today as an operational guide. USBR AR 0007573-74. Reclamation has deviated from NMIPO in recent years to provide more water to meet State Water Resources Control Board ("SWRCB") conditions and fulfill CVP Contracts, USBR AR 0007575. The 2008 OCAP BA described [*938] the modified operating plan that was the subject of consultation as a "Transitional Operating Plan" ("TOP"). *See* USBR AR 0007513. The TOP differs from the NMIPO in several ways, which are described in Table 2-11 of the BA. USBR AR 0007576. SR Plaintiffs [**368] note that under the NMIPO, allocations to CVP contractors are capped at 90,000 af, while under the TPO Reclamation provides for the full 155,000 AF allocation in "high allocation years." *Id.*

It is undisputed that NMFS used the TOP as the basis for its effects analysis. *See* Doc. 477-1 at 119; Doc.

492 at 4. SR Plaintiffs object instead to NMFS's decision to use the NMIPO assumptions to model RPA options. NMFS elected to use the NMIPO assumptions after it concluded that the TPO would not provide sufficient water for fishery needs in 59% of years. BiOp at 306. The BiOp explained that a 1993 study by Aceituno applied the so-called "instream flow incremental methodology" to the Stanislaus River between Riverbank and Goodwin dam and "determined that 155 TAF was needed to maximize weighted usable habitat area for salmon, not including outmigration flows or fall attraction flows." *Id.* The BiOp then determined that the proposed allocation strategy for the East Side Division under the TPO only commits to providing this level of water for fisheries in 41 percent of years (meaning insufficient supplies would be present in 59% percent of years). *Id.*

SR Plaintiffs assert in a footnote that this conclusion [**369] is "bogus" because NMFS did not explain to "[w]hich fisheries" it was referring, nor how much water is "sufficient." Doc. 492 at 4 n. 4. More importantly, the BiOp nowhere explains why it is "essential" to achieve flows designed to "maximize" steelhead habitat area. Is the status of the species so dire that improvement to 60, 70, 80, or 90% of the "maximum" would be insufficient, even if that marginal difference from the maximum saved large amounts of water? The record provides no explanation of the decision to aim for "maximum" habitat in a system of limited resources. This must be specifically addressed and explained on remand.

NMFS admits that the modeling used to support the RPA builds upon this unexplained decision to set a "maximum habitat" goal. Doc. 477-1 at 119. The agency's own internal guidance requires an explanation why operating to this goal is "essential." None is provided. It is impossible to determine how a change in this goal impacts the overall rationale for the RPA. This too must be addressed on remand.

SR Plaintiffs' motion for summary judgment that Federal Defendants erred by modeling RPA actions based on inappropriate assumptions is GRANTED. Federal Defendants' [**370] and Defendant-Intervenors' cross motions are DENIED.

2. Do Actions III.1.2, III.1.3, and IV.1.2 Improperly Require Reclamation to Infringe Upon OID and SSJID's Prior Right to Stanislaus River Water in violation of *50 C.F.R. § 402.02*?

"Reasonable and prudent alternatives refer to alternative actions identified during formal consultation [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that [are] economically and technologically feasible, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." *50 C.F.R. § 402.02* (the "four RPA requirements").

SR Plaintiffs claim that Actions III.1.2, III.1.3, and IV.1.2 exceed Reclamation's [*939] legal authority because they require Reclamation to infringe upon OID and SSJID's prior (superior) water rights in the Stanislaus River. It is undisputed that OID and SSJID hold perfected water rights to Stanislaus River water that are senior to Reclamation's rights to divert [**371] from the Stanislaus. OID and SSJD receive water from New Melones under a 1988 Agreement with the United States designed to fulfill their prior rights. USBR AR 0007571-72; USBR AR 0011751. That agreement requires Reclamation to provide to OID and SSJID:

> o The inflow into New Melones plus the amount derived by the formula of (600,000 minus inflow) divided by 3, not to exceed 600,000 AF per year, USBR AR 011751; and
>
> o The right to conserve up to 200,000 AF in New Melones, USBR AR 011752.

SR Plaintiffs point to studies in the record that they claim indicate the RPAs will require Reclamation to short OID and SSJID 13,000 AF on average. AR 00219154. They maintain that this is actually an underestimate of the amounts they will be shorted under the Stanislaus River RPA Actions because of certain of NMFS's modeling assumptions. Specifically, the modeling assumed:

> (1) OID and SSJID's senior water rights would be shorted;
>
> (2) non-compliance with a Court order to limit non-flood flows to no more than 1500 cfs
>
> (3) relaxation of dissolved oxygen ("DO") requirement that is a condition of Reclamation's water right for New Melones;
>
> (4) a successful petition to the SWRCB to relax D-1641 salinity requirements [**372] at Vernalis; and
>
> (5) a successful petition to the SWRCB to relax D-1641 flow requirements at Vernalis.

Doc. 492 at 13.

Neither the underlying study purportedly demonstrating that water rights will be shorted, nor the inclusion of the listed modeling assumptions require Reclamation to short senior water rights or demonstrated that it is likely they will be unable to comply with the RPA without doing so. The study cited by SR Plaintiffs was restricted to modeling two years, 2010-2011, when the Phase I requirements of Action IV.2.1 were in place. AR 00219154. Reclamation complied with the RPA during this period and there is no indication that Reclamation shorted senior water rights. More to the point, neither NMFS nor the Bureau has discretion to violate these water rights. It is inappropriate to speculate they will break the law.

As for the modeling assumptions, each is justified based on past practice and experience and has long been included in the CALSIM II modeling process. The Calsim II model inputs do not assume that OID and SSJID's rights will be shorted. They cannot be. Rather, the RPAs assume that demand from these districts will be reduced under certain circumstances, based upon [**373] land use projections developed by the California Department of Planning and Local Assistance. Hilts Decl., Doc. 480 at ¶ 6 ("hydrology-land-use-demand input [data] set ... was best available... [and] suggest that OID and SSJID will not use their full entitlement in most years"); Fifth Milligan Decl., Doc. 479 at ¶ 5 (SR Plaintiffs' expert Mr. Steiner participated in 2005 update of land use demand assumptions, which were used in the BA and relied upon in the BiOp). In addition to the land-use based assumptions, the relevant modeling included assumptions designed to reasonably reflect water usage [*940] by the Stanislaus basin stakeholders during sustained dry periods. Hilts Decl., Doc. 480 at ¶ 10.

SR Plaintiffs cite a number of cases in which mitigation measures were deemed unsatisfactory to satisfy an agency's burden to insure against jeopardy because those measures were not "reasonably specific, certain to occur, [] capable of implementation, [and] subject to deadlines or otherwise-enforceable obligations...." *Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152-54 (D. Ariz. 2002)*. But, the cases cited are distinguishable, and it is unclear whether the "reasonably certain [**374] to occur" language should be applied to RPAs. *Rumsfeld* concerned a biological opinion's "no jeopardy" finding that relied upon the action agency to mitigate groundwater impacts of its activities through participation in a regional plan to protect groundwater resources, despite the fact that the action agency had no authority to ensure the regional plan was implemented. Nor did the biological opinion set any goals or deadlines regarding groundwater protection. *Rumsfeld* reasoned that necessary mitigation measures designed to prevent adverse impacts to groundwater must be identified and included either in the proposed action or as RPAs. *Id. at 1154*. Without these adjustments there was no rational basis for the "no jeopardy conclusion." *Id. Rumsfeld* address the requirements for mitigation measures, not RPAs. *See also NWF v. NMFS, 254 F. Supp. 2d 1196, 1213-14 (D. Ore. 2003)* (requiring reasonable certainty when NMFS relied upon off-site federal actions to conclude that jeopardy will not occur).

Rumsfeld relied upon *Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)*, which addressed whether an agency was required to reinitiate formal consultation after failing to acquire certain mitigation [**375] lands. Those lands were considered a "vital" RPA by FWS in its biological opinion concerning the agency's action. *Id. at 1378*. Marsh explained that the "reasonably certain to occur" standard applies to "[i]ndirect effects ... caused by the proposed action," not to RPA actions. *See id. at 1388* (citing *50 C.F.R. § 402.02*). Rather, *Marsh* applied the regulatory criteria from *50 C.F.R § 402.16* to determine whether the action agency unlawfully failed to reinitiate consultation. *Id. at 1388-89*.

Even if reasonable certainty is the benchmark, it is satisfied here. The RPAs in question here require Reclamation to use its own water resources for particular purposes. Reclamation has reasonably examined past patterns of Project water use by third parties and concluded that water will be available to implement the RPAs. *See S.W. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 518-19 (9th Cir. 1988)* (upholding generalized RPA requiring agency to protect 1,400 acres without identifying the particular location or timeframe). SR Plaintiffs have not demonstrated that reliance on past practice is unreasonable. If, however, Reclamation's predictions prove incorrect and make the [**376] RPAs' implementation infeasible, the burden cannot be imposed on senior water rights holders. Rather, Reclamation must then re-initiate consultation.

Federal Defendants have reasonably explained the remaining modeling assumptions about acquisition of waivers from the SWRCB regarding dissolved oxygen and D-1641 flow and salinity requirements. Fifth Milligan Decl., Doc. 497 at ¶ 7-8; Hilts Decl., Doc. 48 at ¶ 12 (explaining it is "reasonable to assume the SWRCB will take a holistic approach and grant such petitions" under relevant conditions). This is speculation and may be mistaken, however the law does not require more. If no Petitions are granted, absent available existing water, NMFS must reinitiate consultation. [*941] SR Plaintiffs have not demonstrated that these assumptions were clearly erroneous.

SR Plaintiffs' final challenge to the modeling assumptions is based on a March 10, 1982 injunction imposed in *United States v. California*, purportedly requiring Reclamation to limit non-flood flows to no more than 1,500 cfs. It is undisputed that Action III.1.3 calls for spring pulse flow releases as high as 5,000 cfs, BiOp at 623, Fig. 11-1, and Action IV.1.2 requires releases from New Melones [**377] to meet higher Vernalis flow rates, BiOp at 642.

The Ninth Circuit's March 10, 1982 injunction "pending determination of appeal," required the United States to provide the State of California with a plan to protect downstream property from damage caused by inundation or seepage. SR Plaintiffs' Request for Judicial Notice ("SRJN"), Doc. 453-7, Ex. 7 at 2. That plan, set forth in a February 1982 memo drafted by the Bureau, indicated that flows above 1,500 cfs would "create water tables high enough to have the potential to damage the almond and walnut orchards adjacent to the [Stanislaus] river." *Id.*, Ex. 8, at 1. [36] But, the injunction, by its own terms, was limited to the time period pending appeal. The appeal was decided nine months later on December 20, 1982. *694 F.2d 1171 (9th Cir. 1982)*. The Ninth Circuit's remanded with instructions that "[t]he injunction previously issued by the court may be modified or amended by the district court as it deems necessary and appropriate in view of this opinion and the present circumstances of the dam and its storage facility," *id.*, but there is no evidence in the record that the district court ever imposed a similar 1,500 cfs ceiling on non-flood [**378] flows. NMFS reasonably concluded that the limitation no longer applies and could be omitted from Stanislaus River modeling. [37] This is not the appropriate forum for SR Plaintiffs to attempt to enforce a nineteen-year-old injunction, which has no continuing validity.

36 Both SRJN Exhibit 7 and 8 are public records subject to judicial notice for their content. *San Luis Unit Food Producers v. United States, 772 F. Supp. 2d 1210, 1216 n.1 (E.D. Cal. 2011).*

37 SR Plaintiffs cite a May 2009 Memo authored by NMFS's Rhonda Reed, which discussed the purported 1,500 non flood flow limit:

> Issues raised were his understanding that Reclamation couldn't exceed 1500 cfs because of seepage. Roger Guinee pointed out that the 1500 cfs cap related to a ruling in a judgment that applied only to the period that New Melones reservoir was filling, and no longer applies (per Jim Monroe, FWS). Kaylee Allen (Reclamation) said she was researching the issue and wasn't sure of outcome. I asked how long it takes for high flows to cause seepage problems. Ron was not definite, but implied about ten days.

AR 105885. SR Plaintiffs erroneously assert that this paragraph indicates that an NMFS scientist, Roger Guinee, offered [**379] a "legal opinion" that the injunction no longer applied. In fact, the paragraph states that the legal opinion came from Jim Monroe, a federal government attorney.

SR Plaintiffs' motion for summary judgment that the RPA improperly requires Reclamation to infringe on OID and SSJID's prior rights to Stanislaus River water is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

3. Use of the San Joaquin River Temperature Model.

Federal agencies must use "the best scientific and commercial data available" in developing reasonable and prudent alternatives. *16 U.S.C. § 1536(a)(2)*; *50 C.F.R. §402.14(g)(8)*. SR Plaintiffs assert that Federal Defendants did not use the best available science in formulating [*942] the Stanislaus River RPAs because they did not model the feasibility of the RPAs using the San Joaquin River Water Temperature Model ("SJRWTM").

There is no dispute that temperature modeling is critical to the management of the Stanislaus River and to implementation of the Stanislaus River RPAs. NMFS relied on Reclamation's "USBR Temperature Model," to run an operational scenario involving a draft RPA for new minimum flow releases on the Stanislaus. AR 00105890.

SR Plaintiffs' [**380] expert, Avery Dotan, opines that no reasonably prudent modeler would choose to use the USBR Temperature Model, which can only simulate the mean monthly vertical temperatures, to assess the feasibility of meeting a seven-day average daily maximum temperature requirement, such as Action III.1.2. *See* Dotan Decl., Doc. 442 at ¶¶ 53-58

The agencies had numerous discussions throughout 2009 regarding temperature modeling, including some specific requests to look into the use of the SJRWTM. *See, e.g.*, AR 00065939 (Feb. 6, 2009 email regarding modeling), 00070965, 00074969 (requesting use of a different model), 00077217 (Feb. 18, 2009 email asking questions about "Derek's model run"), 00077613 (Mar. 20, 2009 inquiry regarding application of the SJRWTM), 00078887 (Mar. 29, 2009 email containing information about SJRWTM), 00079052 (Mar. 27, 2009 email containing information about SJRWTM), 00085078 (Apr.

10, 2009 email asking for assistance from "Don Smith and Avry Dotan" as the "SJR-Basin wide temperature modelers"). CalFed's Science Program held a special workshop on temperature modeling for the BO in April 2008 and advised the agencies to utilize the "latest technology" in temperature modeling, [**381] including adopting models with "smaller time-steps to better assess biological effects." AR 00038723. The CalFed Science Review Panel, in reviewing the draft BiOp, specifically recommended that Federal Defendants utilize the SJRWTM, a sub-daily temperature model developed for the Stanislaus River by Avry Dotan and Resources Management Associates. *See* AR 00219651. Several federal agencies, including NMFS, FWS, and Reclamation, participated in its development. Dotan Decl., Doc. 442 at ¶¶ 6, 23-34. The model was funded by CalFed and peer reviewed by CalFed scientists. *Id.* at ¶¶ 24, 21, 26.

The SJRWTM could have modeled temperatures on a seven-day average daily maximum basis, a more appropriate time scale according to Mr. Dotan. *Id.* at ¶¶ 53, 80. SR Plaintiffs assert that the SJRWTM was the best available science and should have been used to evaluate the feasibility of the RPA actions.

The model runs in the AR using the USBR Temperature Model predict that the new flow requirements in Action III.1.3 will occasionally cause temperatures to exceed the objectives set forth in Action III.1.2. Dotan Decl., Doc. 442 at ¶¶ 73-77. Mr. Dotan opines that these results are unreliable because the model [**382] could only predict monthly mean temperatures and was not capable of determining when the seven-day average daily maximum temperature was or was not met. *Id.* at ¶¶ 52-72. To demonstrate that this error is material, Mr. Dotan repeated the analysis using the SJRWTM. The results of this analysis are depicted in Figure 7 to his Declaration, which shows that in February, March, April, May, June, July, August, and September the Bureau's model estimates fewer exceedances than does the SJRWTM. Doc. 441-15. (Mr. Dotan does not discuss the fact that this figure also shows that in October and November, the SJRWTM indicates fewer exceedances than the Bureau's model. *Id.*)

[*943] The SJRWTM model also predicts that the water cost associated with meeting Action III.1.2 vary between 22,000 - 190,000 AF per year with an average cost of 84,000 AF, Dotan Decl., Doc. 442 at ¶ 87; that operating for temperature control will deplete the volume of water in New Melones by as much as 717,000 AF during 1987-1995, *id.* at ¶¶ 86; and that this successive operation for temperature control will eventually cease to be effective as New Melones' pool of cold water is depleted, *id.* at ¶¶ 89.

Federal Defendants do not dispute [**383] the superiority of the SJRWTM. Rather, they strenuously object that contemporaneous documents in NMFS administrative record demonstrate that the model was not "available" to the agencies during the consultation. Doc. 477-1 at 131. Although employees of the Federal Defendants were trained to use the model between 2001 and 2009, Dotan Decl., Doc. 442 at ¶¶ 35-42, and Mr. Dotan answered specific questions posed by NMFS and Reclamation regarding the use of model, *see, e.g.,* NAR 00093319 & 00094138, there were concerns that documentation of the complex model was insufficient to allow others to run it, AR 00089101 (May 1, 2009 email indicating "NMFS has the model" but discussing problems with the contract for technical support); AR 00089027 (model in public domain but difficult to run unassisted). The BiOp explains why it did not use the SJRWTM:

> When evaluating the effect on salmonids of an operational strategy on the Stanislaus River, [USBR] would normally take the CalSim modeled results and conduct post-processing to determine temperature effects. When we met in early March to discuss the March 3 version of the RPA with the action agencies, we requested help from [USBR] to do temperature [**384] modeling on these flows using their tools. In subsequent discussion with USFWS and CDFG, the need to perform temperature modeling on these flows was also identified, but NMFS and USFWS lacked internal expertise to perform the modeling. CDFG was unable to assist with running the San Joaquin River Basin temperature model because of funding freezes. Tetra Tech was hired by NMFS to assist with such activities...[but] [i]nsufficient time was available to them to learn and apply the specifics of the operating model.

AR 00105884.

Record evidence demonstrates that the model was not self-explanatory, even for staff with background in a related model used as the basis for the SJRWTM: HEC-5Q. NMFS had to seek outside help to use the model, and encountered implementation issues. *See* AR 00077320 (NMFS discussing hiring Tetra Tech to help run SJRWTM), 00092267 (NMFS seeking assistance from Bureau engineer with model), 00093101 (NMFS obtaining promise of documentation from FWS), 00093319 (Dotan answering NMFS's questions about

application of model), 00093538 (discussing "numerous issues (above and beyond downscaling) with bringing CalSim data into the SJ temp model"), 00094138 (Dotan answering NMFS's [**385] questions about application of model). Once NMFS engaged a consultant to run the modeling, the model's other co-developer, Don Smith, resisted providing the assistance necessary to run the model. *See* AR 00089096. In addition, the material provided with the then-available version of the SJRWTM did not allow the model to be correctly utilized. Reed Decl., Doc. 482 at ¶¶ 10-13.

SR Plaintiffs concede that Federal Defendants are only required to use the best science available, and not the best science possible. *See* Doc. 492 at 17 (citing *S.W. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60-61, 342 U.S. App. D.C. 58 (D.C. Cir. 2000))*. However, [*944] SR Plaintiffs assert it "stretches credulity" to accept that the Government was unable to run this model because:

> [its] development began in 1999 with the assistance and participation of Reclamation and FWS (Dotan Decl., ¶ 6), [it] is based upon the HEC-5Q platform that has been around since the 1980s and which is the platform of the USBR's Upper Sacramento River Water Temperature Model used in this consultation (Id., ¶ 8; BA, App. H, p. H-5), [it] was completed for the Stanislaus River only in 2001 (Dotan Decl., ¶ 19), and [it] has been used by Reclamation for its [**386] Friant Restoration Project and Delta-Mendota Canal Recirculation Project. (Dotan Decl. ¶ 33).

Id. This argument continues:

> All of this, coupled with the fact that representatives from NMFS, FWS and Reclamation sit on the TAC and Super TAC committees overseeing the development and use of the SJRWTM, and that employees from these agencies have received specific training on how to run the model (Dotan Decl., ¶¶ 36-43), shows that the Government's defense is, at best, one of willful ignorance that should not be tolerated. Moreover, the Government was told repeatedly to use a temperature model with a smaller time-step, and specifically the Stanislaus River portion of the SJRWTM, well before the BO was due, yet the Government failed to do so at every turn.
>
> In April 2008, the CALFED Science Program told the Government that it needed to use the latest technology in temperature modeling by utilizing models with smaller time-steps (NMFS AR at 00038723), but the Government chose not to take this advice in regards to the Stanislaus River. In January 2009, a mere six months before the final BO was due and eight months after the Science Program recommended using models with shorter time-steps, a draft [**387] of the BO was reviewed by the CALFED Science Review Panel. The Panel again noted the paucity of relevant temperature data for the Stanislaus River and specifically recommended that the Government incorporate into the BO the "considerable temperature work" that had been done on the Stanislaus River with the Stanislaus River portion of the sub-daily SJRWTM. (NMFS AR at 00219651). Again, the Government did nothing. In fact, only in March 2009 - almost a full year after being told to use a model with shorter timesteps and only three months before the final BO was due - did the Government finally have internal discussions with its modeler TetraTech about its ability to conduct water temperature modeling for the Stanislaus River. (Reed Decl., ¶ 15). Any inability to run the SJRWTM has more to do with the Government's delay in responding to the advice of the CALFED review teams than with the Government's lack of knowledge or resources.

Id. at 17-18.

Ms. Reed, an NMFS employee with significant involvement in the development of the BiOp disagrees with Plaintiffs' assessment of the circumstances. She declares that the SJRWTM was not functionally available during the consultation:

> 8. ... NMFS was [**388] aware of the development of the SJRWTM and participated in some of the advisory group meetings, but NMFS's attempts to use this model in developing the BiOp were not successful.
>
> 9. NMFS disagrees with Mr. Dotan's assertion that the November 2008 version

of the SJRWTM was sufficiently complete to utilize. Mr. Dotan states that the final version of the SJRWTM was submitted to CALFED October 2009, months after the June 4, 2009 completion date of the BiOp. Dotan [*945] Decl. ¶ 43. He goes on to state that this version "was almost identical" to the November 19, 2008 pre-release version that he made available to stakeholders including NMFS. Dotan Decl. ¶ 42. However, the flaws in the November 2008 version and supporting documentation made it so that NMFS was unable to run the model.

10. On December 10, 2008, Mr. Craig Anderson, hydrologist/modeler for NMFS, attended a Super TAC meeting. Dotan Decl. Exhibit C. This was his first introduction to the model and its availability. He subsequently downloaded a version of the SJRWTM and documentation from the ftp site, as directed by Mr. Dotan. Mr. Anderson forwarded this model and associated information to Mustafa Faizullabhoy at Tetra Tech who was under [**389] contract with NMFS to conduct temperature and other modeling related to the biological opinion development. NMFS 85074-7. Mr. Faizullabhoy has extensive experience with developing, implementing, and evaluating water quality and flow models for environmental analyses including applications of the BASINS, QUAL2E, EFDC, and CE-QUAL-W2 models amongst others. However, Mr. Faizullabhoy had substantial difficulty running the model based only on the information provided at the ftp site and sought advice from Mr. Dotan and Mr. Don Smith, Mr. Dotan's partner in developing the model. NMFS 85074-77, 86560-1, 87111-3, 92267-8, 93310-18, 93319-20, and 94185.

11. The communication between NMFS, Mr. Faizullabhoy, and the model developers reflects that the material was not self-explanatory, and that it was still in development mode. See e.g. NMFS 93319-20. For example, the Tetra Tech modeler had difficulty running the model because the documentation he received had an old version of a table necessary to run the model, which Mr. Dotan admitted "reflects our early work on the Stanislaus model." NMFS 93320. In any case, the model files made available on the FTP site did not include the source code necessary [**390] to fully evaluate model numerical schemes and mechanics and important pre-and post processing algorithms. Essentially, the pre-release modeling package contained compiled source code that limits an outside user's ability to effectively alter the model in any substantial way.

12. Mr. Dotan also asserts that he provided training to NMFS and Reclamation staff so that they should have known how to run the model as a result of this participation. Dotan Decl. ¶¶ 37, 39, 40, 41. NMFS disagrees with this contention. While staff participated in the coordination meetings during the development of the SJRWTM, Mr. Dotan's implication that attendees were all fully trained to run the model is incorrect. For example, in response to a request to run the SJRWTM to evaluate early versions of the RPA Actions, Mr. Dean Marston of the California Department of Fish and Game responded that DFG had no resources to run the model, despite the fact that Mr. Marston attended almost all the meetings. NMFS 77613-5; Dotan Decl. Exhibit C. Based on personal communication with other attendees of these trainings, I understand that these sessions were more like demonstrations of the model's features, rather than a training [**391] course intended to prepare the participant to be able to run the model (Pers. comm. Mr. Craig Anderson, now USFWS, and Mr. Russ Yaworsky, Reclamation).

13. In order to apply the SJRWTM to the RPA or to Reclamations proposed action, the CalSim II results that govern allocations would have to be disaggregated from a monthly time step for use with the SJRWTM, which operates on a 6-hour time step. The manner in which [*946] the disaggregation is done is important, as indicated in Mr. Milligan's declaration. Milligan Decl. ¶9. The November 2008 documentation available for running the SJRWTM stated the following regarding using CalSim II data in the model:

> "2.8 Using Addition Tools
>
> The Dss file viewer, HecDssVue, is provided as a tool within the application for viewing and editing dss file data. It can be accessed through the Tool menu in the main HWMS application window. Downscale CalSim will also be included. This tool is used to modify the CalSim output files for use in the HEC5Q model."

HWMS-HEC5Q User Interface at 8, Exhibit 1. This is the only reference to how to use CalSim II inputs to the model and it indicates that while a tool to downscale CalSim II information will be included in a future [**392] version of the model, it was not included in the version available in November 2008. In the absence of that data, there was no explanation which would have allowed NMFS staff to perform the disaggregation process on their own.

14. Mr. Dotan states that the SJRWTM has already been used in several proceedings, including the Stanislaus River studies, Friant Restoration Project, presentations for the SWRCB [303(d)/305(b)] workshop, and the USBR Delta Mendota Recirculation Project. However, Mr. Dotan does not disclose that the operation of this model was usually performed by Mr. Dotan or his partners who worked with him in the development of the code. Dotan Decl. ¶¶ 21, 25 and 33, SJRGA 2007 at 52, Exhibit 2. Their intimate and proprietary knowledge of the model made use of the model possible in those proceedings.

15. In November 2008, NMFS advertised a contract solicitation to contract for outside modeling expertise. This contract was announced on http://www.gsa.gov/portal/content/103541, a public website for advertising Federal contract opportunities. Mr. Dotan did not submit a bid as a direct contractor or subcontractor. NMFS could only have contracted for Mr. Dotan's services through [**393] this sort of public, competitive solicitation given that this model is based on public domain code and is intended to be nonproprietary. It would have been inappropriate for NMFS to attempt to justify contracting Mr. Dotan's services as a sole-source contractor. In December 2009, the contract was awarded to Tetra Tech Inc. Early efforts by Tetra Tech were focused on modeling the Shasta Reservoir carryover storage RPA actions. Initial, internal discussions regarding Stanislaus River water temperature modeling by Tetra Tech occurred in late March 2009 (see NMFS 77320-1), and an official response from Tetra Tech re: their ability to conduct said water temperature modeling occurred on April 16, 2009. NMFS 86560-1. As discussed above, Tetra Tech staff (primarily Mr. Faizullabhoy) subsequently transmitted five emails to Mr. Anderson (NMFS 87111-3, 88597-602, 93310-18, 00093319-20, and 94185) containing model specific technical questions through the remainder of April 2009 into May 2009, with the final email transmission occurring on May 22, 2009 (NMFS 94185). Where appropriate, Mr. Anderson sought the assistance and technical advice of SJRWTM experienced practitioners, including Mr. Dotan. [**394] Despite these efforts neither NMFS nor their contractor was able to conduct runs with the SJRWTM for the BiOp analysis.

16. In summary, NMFS disputes that the model was sufficiently available for use in the preparation of our BiOp, without the direct and extensive intervention [*947] of the developer, Mr. Dotan or his consulting firm, and he did not choose to make his services available to NMFS through a legal contracting process.

Reed Decl., Doc. 482.

NMFS claims it did not have the expertise and could not get Dotan to respond. This is a factual dispute over whether NMFS could use the model. There is no dispute using the shorter time step was the best science. The Supreme Court has "repeated time and again, an agency has broad discretion to choose how best to marshal its lim-

ited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. EPA, 549 U.S. 497, 527, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).* Although the record suggest that the resources required to run this model properly would be modest, that the model results would be preferable to those presented in the BiOp, and that NMFS had knowledge of the model for over 8 years, a court does not have the authority to order the agency how to direct [**395] and allocate its resources. Congress has chosen to partially immunize such agency "mis-performance." SR Plaintiffs' motion for summary judgment that Federal Defendants acted unlawfully by failing to utilize the SRJWTM is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

4. Exceptions Built into Action III.1.2.

Even if, *arguendo*, Federal Defendants' failure to employ the SJRWTM was unlawful, Federal Defendants alternatively argue that that exceptions built into Action III.1.2 render any dispute over the model used irrelevant. Action III.1.2 was developed to address the impacts of adverse temperatures on the species. The temperature compliance schedule is purportedly based on the species' biological and physiological needs. Reed Decl., Doc. 482 at ¶¶ 3-4. Because the modeling indicated that these temperatures could not always be achieved, the RPA action has a built-in exception, which can be exercised any time the temperature requirements of Action III.1.2 will be exceeded on a three-day average daily maximum temperature. BiOp at 621. Operational adjustments to address such exceptions will be coordinated through the SOG and WOMT. *Id.* NMFS concluded:

> Because [**396] every year is a bit different, we determined that matching temperature requirements to the appropriate life cycle timing and providing for exceptions was an appropriate way to provide necessary protections for listed species while allowing for occasional off-ramps when meeting temperatures was not feasible. That is, an approach using feasibility-based exceptions to biologically-based temperature criteria was deemed more protective.

Reed Decl., Doc. 482 at ¶ 29. Because the exception provision "has no limitations," Federal Defendants argue it is immaterial whether the SJRWTM would have shown more instances of exceeding the RPA Action's seven-day average daily maximum temperatures. Doc. 477-1 at 133.

This argument presents a conflict between the adaptive management scheme and the ESA Regulations' explicit demand that Federal Defendants demonstrate the necessity and feasibility of implementing every RPA Action. Flexibility is the essence of adaptive management, a tool that is indisputably beneficial both to the species and impacted stakeholders. But, Federal Defendants describe an exception that "has no limitations." [38] How often can the exception be triggered without rendering the Action [**397] ineffectual? This is not examined. Without such an analysis, the extent [*948] to which this RPA is "essential" to avoiding jeopardy cannot be evaluated. This makes the RPA unlawful and it must be addressed on remand.

> 38 Federal Defendants later clarify that Reclamation must support an invocation of the exception with iterative modeling that demonstrates varying allocations and delivery schedules do not let them meet the required temperatures." BiOp at 621. But, this does not place a limit on the number of times the exception may be invoked, nor does it demonstrate the extent to which repeated invocation of the exception will undermine the purpose of the Action.

5. Does the Record Support the Finding that Action III.1.3 Will Avoid Jeopardy to or Adverse Modification of CV Steelhead or Critical Habitat?

The objective of Action III.1.3 is to operate the East Side Division [39] dams to "optimize CV steelhead habitat for all life history stages and to incorporate habitat maintaining geomorphic flows in a flow pattern that will provide migratory cues to smolts and facilitate out-migrant smolt movement on [the] declining limb of pulse." BiOp at 622. Specifically, the Action requires the Bureau to achieve [**398] a minimum flow schedule prescribed in Appendix 2-E and generally described in Figure 11-1, copied below:

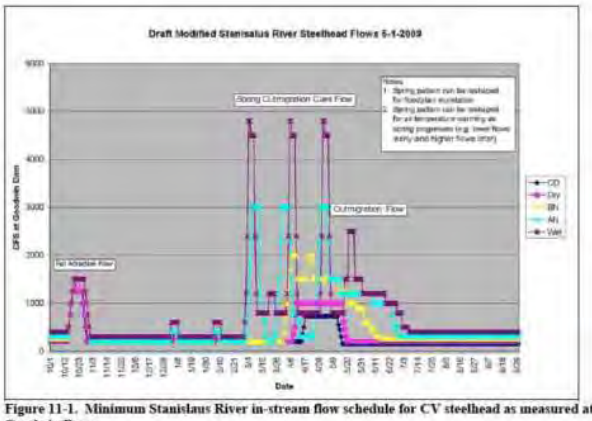


Figure 11-1. Minimum Stanislaus River in-stream flow schedule for CV steelhead as measured at Goodwin Dam

Id. at 623. SR Plaintiffs take issue with the requirement of releases as high as 5,000 cfs in the spring of wet years, which represents a drastic change from the prior flow regime and such high flows are unjustified.

> 39 New Melones Dam operates in conjunction with Tulloch Reservoir and Goodwin Dam on the Stanislaus River to form the East Side Division. *See* BiOp at 197.

NMFS explains in a May 31, 2009 memo from Rhonda Reed to Maria Rea that the flow requirements of Action III.1.3 are based on a 1993 study by Aceituno, which uses "In-stream Flow Incremental Methodology" ("IFIM"). AR 00105879. NMFS then conferred with CDFG and [*949] FWS biologists regarding CV Steelhead's need for pulse flows. AR 00105881-82. These consultations revealed that a fall attraction pulse was needed. This is included in Action III.1.3 and is not challenged by SR Plaintiffs.

NMFS also assessed whether CV steelhead needed a spring pulse flow:

> Do steelhead need spring pulse flows, or can they just swim out on their own? CV steelhead are captured at the RSTs before the pulse flows, so early smolts may not need a spring [**399] pulse. However, the spring pulse does improve downstream water quality conditions for smolts that are leaving later, and this may be more important than for swimming assistance.

AR 00105882. SR Plaintiffs object that this language is equivocal and that a life stage of the species "may" need a particular pulse flow is not sufficient justification for requiring one.

Although this passage from the Reed Memo does admit that "early smolts may not need a spring pulse," AR 00105882, Defendants point to other record evidence supporting the imposition of a spring pulse flow requirement. Spring pulse flows cue more smolts to migrate, protecting the anadromous form. BiOp at 306-307; AR 00105882 (variability in flow triggers important to anadromy), AR 00105883 (flow variability important to anadromy).

SR Plaintiffs do not directly challenge this rationale. Rather, they argue that even if some form of spring pulse is justified, nothing in the BiOp justifies a 5,000 cfs pulse flow. SR Plaintiffs point out that Aceituno's 1993 IFIM study called for flows ranging from between 50-500 cfs. Aceituno's study focused on instream needs, and did not include an assessment of water needed for spring pulse flows [**400] to convey steelhead to delta. BiOp at 307 ("IFIM analysis did not include an assessment of the volume of water needed for a spring pulse flow to convey CV steelhead or fall run from the Stanislaus River into the Delta"); AR 00107828 (Aceituno (1993) explicitly acknowledging that "[t]his study did not directly provide information on flows needed for smolt emigration in the spring").

CDFG's initial draft recommendation for the RPA Action called for a spring pulse flow of 3,500 cfs. AR 00105882. CDFG's highest recommendation was for a pulse of 4,000 cfs. AR 00061652. NMFS raised the pulse to 5,000, reasoning that this would provide "minimum channel forming flows." AR 00105887. In support of providing such "channel forming flows," NMFS cites Kondolf (2001), which provides an analysis of pre- and post-New Melones flood frequency rates at Knights Ferry on the Stanislaus River. Kondolf (2001) concludes: "flows in excess of 5,000 to 8,000 cfs are needed to mobilize the bed and thereby maintain channel form and gravel quality." AR 00122645. Such flows are "important to rejuvenate spawning beds and floodplain rearing habitat and to recruit allochthonous nutrients and large wood into the river." [**401] BiOp at 308.

According to Kondolf (2001), channel-forming flows occurred every 1.4-1.8 years prior to the construction of New Melones, but only once every 5 to 20 years since construction of New Melones. *Id.* Kondolf further explains:

> The frequent floods, those with return intervals of one to five years, and the flows that move the most sediment over time in many natural alluvial channels (commonly considered the "channel forming" flows) (Kondolf *et al.* 1999; Leopold *et al.* 1964), are three to four times smaller since the construction of New Melones Dam. For example, the Ql.s (i.e., the flow equaled or exceeded once per 1.5 years), considered the bankfull flow in many rivers, has been reduced from 5,340 cfs to 1,840 cfs. The [*950] Qlo and Q20 were reduced by six to eight times after construction of New Melones Dam.

AR 00122626. Kondolf (2001) then evaluated the post-dam flood frequency, and concluded that the two-year return flow is 3,070 cfs, meaning that such a flow returns every two years. AR 00122714. A 5,000 cfs flow has a return rate of just over three years. *Id.* Kondolf (2001) supports a regime that would provide for high pulse

flows to maintain gravel quality. In general, this is what [**402] Action III.1.3 attempts to achieve.

However, in light of Kondolf (2001)'s conclusion that "flows in excess of 5,000 to 8,000 cfs are needed to mobilize the bed and thereby maintain channel form and gravel quality," SR Plaintiffs challenge whether RPA Action III.1.3, which calls for peak flows of 3,000 cfs in above normal years and 5,000 in wet years, would maintain channel form and gravel quality. Kondolf (2001) provides the only record support for flows above the 3,000 suggested by CDFG, yet Action III.1.3 does not actually implement the flow regime suggested by Kondolf (2001). The record provides no support for the conclusion that the regime imposed by Action III.1.3 is sufficient to maintain gravel quality. Particularly in light of the potentially high water costs of these pulse flows, the rationale for Action III.1.3 must be lawfully explained and justified on remand.

SR Plaintiffs' motion for summary judgment that the record does not support the imposition of Action III.1.3's 5000 cfs spring pulse flow is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

6. DFG Salmon Population Model

a. Use of the Model to Set Out-Migration Flows.

In calculating the [**403] flows CV Steelhead need for outmigration, NMFS relied upon the "SJR salmon model (V.1.0) (output for doubling salmon and calculating the Stanislaus flow contribution....)" AR 00105883. It is undisputed that this is a reference to a CDFG model used to determine flows needed to double salmon in the San Joaquin River. SR Plaintiffs complain that NMFS's use of the model was inappropriate because: (1) steelhead are not salmon; and (2) the "doubling" goal is distinct from the goal of "avoiding jeopardy." Doc. 454 at 29.

The former argument is identical to the surrogate challenges raised by Plaintiffs and rejected above. Salmon are the best available surrogates for CV steelhead, for which the available data is inadequate for modeling purposes.

Nothing in the record explains why it is appropriate to use a model designed to double the existing salmon population to set numeric flow targets to avoid jeopardy to the CV steelhead. The BiOp must explain why each aspect of the RPA is essential to avoid jeopardy or adverse modification. The facial disconnect between the goal of the salmon-doubling model and the goal of ESA section 7 consultation requires explanation on remand.

SR Plaintiffs' motion for [**404] summary judgment that the BiOp unlawfully utilized the CDFG salmon doubling model is GRANTED IN PART AND DENIED IN PART; and Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED IN PART AND DENIED IN PART. That the model used salmon as a surrogate for CV Steelhead was not inappropriate, but the record does not support the use of a model designed to double salmon to set flow targets to avoid jeopardy.

b. NMFS's Reliance on Draft Model Runs from Outdated Version 1.

The record further suggests that NMFS relied on runs from an outdated version of the CDFG Salmon Model. When it produced [*951] the data to NMFS, CDFG explained that the results were preliminary and based upon version 1.0, AR 00061644, which was subsequently subject to peer review and further clarification, AR 00103255-58. CDFG specifically warned NMFS that the results would need to be confirmed through the performance of several checks. AR 00061644. The record reveals no evidence that such corrections were made. The need for confirmation must be addressed on remand.

SR Plaintiffs' motion for summary judgment that the BiOp unlawfully and unreasonably relied upon an outdated version of the CDFG salmon model is GRANTED; [**405] Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

7. SR Plaintiffs' "Impermissible Major Changes" Argument.

SR Plaintiffs originally advanced the argument that the Stanislaus River RPAs were unlawful because they constituted "impermissible major changes" to the New Melones Project. This argument was based on SR Plaintiffs citation to *50 C.F.R. § 402.14(i)(2)* which provides that "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." However, reasonable and prudent measures ("RPMs") are those measures "necessary or appropriate to minimize [the] impact" of incidental take. *50 C.F.R. § 402.02*. No RPMs are imposed upon Stanislaus River operations. There is no "impermissible major changes" language associated with the imposition of RPAs. SR Plaintiffs' motion for summary judgment on this ground is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED. [40]

40 SR Plaintiffs' alternatively argue that the RPA definition impliedly incorporates the "impermissible major changes" prohibition contained

> [**406] in the RPM definition. SR Plaintiffs offer no support for this argument, which is contradicted by the general rule that the plain language of a statute governs, absent "some indication of [] regulatory intent that overcomes plain language ... referenced in the published notices that accompanied the rulemaking process." *See Webb v. Smart Document Solutions, 499 F.3d 1078, 1084 (9th Cir. 2007).*

8. Challenges to the BiOp's Feasibility Analyses?

SR Plaintiffs argue that it is impossible to determine from the record whether certain of the Stanislaus River RPA Actions are feasible.

a. General Objection that Feasibility Modeling Employed Erroneous Assumptions.

First, SR Plaintiffs argue that the feasibility modeling employed erroneous assumptions, such as assumptions that constrain allocations to OID and SSJID below their entitlements. Doc. 492 at 12-13. This objection has been rejected, as the modeling captures the actual operation of these districts with reasonable accuracy.

SR Plaintiffs' motion for summary judgment that the BiOp's feasibility modeling employed erroneous assumptions is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

b. Objection that Action [**407] III.1.2's Exception Proceedure Renders the BiOp's Feasibility Analysis of that Action Arbitrary and Capricious.

Second, SR Plaintiffs argue that the RPA's exception procedures render any feasibility analysis irrational. *Id.* at 13. SR Plaintiffs do not specifically identify which Action, III.1.2, III.1.3 or IV.2.1, they assert is rendered infeasible by its exception procedures; but they must be referring [*952] to Action III.1.2, which contains the broad exception procedure discussed above, *see* BiOp at 621. Action III.1.3 contains no exception procedure, BiOp at 622-26, and Action IV.2.1's exception procedure is narrowly limited, BiOp at 644. SR Plaintiffs succeeded on their argument that Action III.1.2's exception procedure is so broad that it has the potential, without further refinement, to render the RPAs ineffectual. Relatedly, an exception procedure without any guarantees as to whether the exception may be successfully invoked when necessary renders any feasibility analysis impossible. Although Federal Defendants' feasibility analysis need not be perfect, it must be rational. Federal Defendants must reconsider their approach to the feasibility analysis in light of the numerous problems [**408] with the exception process identified above.

SR Plaintiffs' motion for summary judgment that the BiOp's feasibility analysis for III.1.2 is arbitrary and capricious is GRANTED; Federal Defendants' and Defendant-Intervenors' cross motions are DENIED.

c. Feasibility of Action III.2.2.

SR Plaintiffs also challenge the feasibility of Action III.2.2, which calls for Reclamation to confer with the SOG to develop an operational strategy to meet the purpose of achieving floodplain inundation flows on a one to three year schedule. [41] *See* Doc. 454 at 32. As this RPA defines no action per se, it is impossible to perform a feasibility analysis of it. Federal Defendants cannot escape the requirement of a feasibility analysis simply because they delay the design of this RPA. Before implementation, Federal Defendants must ensure that any action implemented under RPA Action III.2.2 complies with the requirements of law.

41 Action III.2.2 specifically requires:

> Reclamation shall seek advice from SOG to develop an operational strategy to achieve floodplain inundation flows that inundate CV steelhead juvenile rearing habitat on a one- to three-year return schedule. Reclamation shall submit a proposed plan [**409] of operations to achieve this flow regime by June 2011. This plan shall include the minimum flow schedule identified in Action III.1.2, or shall provide justification for any proposed modification of the minimum flow schedule. NMFS will review and, if satisfactory, approve the operational strategy. Reclamation will implement strategy starting in 2012.

BiOp at 627.

SR Plaintiffs' challenge to this feasibility analysis is correct to the extent there is no validly formulated RPA Action.

9. Are Actions III.1.3, III.2.2 Consistent with the Purposes of the Project?

SR Plaintiffs also argue that implementation of Actions III.1.3 and III.2.2 conflict with one of the express project purposes of New Melones, namely flood control, in violation of *50 C.F.R. § 402.02*'s requirement that an RPA be "consistent with the intended purpose of the ac-

tion." *See* Doc. 454 at 32. As to Action III.2.2, which calls for a plan to provide flows large enough to "inundate floodplains" in the winter or spring, no action has yet been defined. SR Plaintiffs' challenge to this feasibility analysis is valid to the extent there is not yet a validly formulated RPA Action.

Action III.1.3 imposes certain pulse flows to benefit [**410] CV Steelhead, including the 5,000 cfs pulse flows in wet years discussed above. SR Plaintiffs suggest that these pulse flows, designed to be "channel forming," will conflict with New Melones' flood control purpose. Doc. 454 at 32. However, the BiOp specifically explains that Action III.1.3 is to be implemented for ten days or less in order to limit seepage impacts to nearby landowners. BiOp at 624. SR Plaintiffs fail to [*953] acknowledge the short duration of the pulse flows, nor do they otherwise explain how flows of this magnitude and limited duration conflict with the flood control purpose of New Melones.

SR Plaintiffs' motion for summary judgment that RPA Action III.1.3 conflicts with the flood control purpose of the New Melones Dam is DENIED; Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED.

10. Waste and Unreasonable Use of Water (*California Constitution Article X, Section 2*).

Finally, the SR Plaintiffs argue that implementation of the Stanislaus River RPAs would require water waste and unreasonable use in violation of *Article X, Section 2 of the California Constitution*. The Bureau must comply with non-conflicting state water law. Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 288, at § 8 [**411] (June 17, 1902); *California v. United States, 438 U.S. 645, 675, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).*

The California Constitution states that the right to water is limited to reasonable use, and does not extend to waste or unreasonable use:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

Cal. Const. art. X, § 2.

SR Plaintiffs concede that release of water for fish is a beneficial use of water in California. However, they argue that the spirit of *Article X, Section 2* dictate that any releases must be carefully tailored to "just what is needed to avoid jeopardy so that the remaining water can be reserved for other equally important beneficial uses." Doc. 454 at 35. SR Plaintiffs then argue that Actions III.1.2, III.1.3, III.2.2 and IV.2.1 violate *Article X, Section 2* "absent record evidence to support a finding that these RPAs use only as much water as is reasonable and necessary to avoid jeopardy." [**412] *Id.* SR Plaintiffs underestimate the complexity of the waste and unreasonable use standard and the process by which they must establish waste and unreasonable use is occurring.

SR Plaintiffs cite no caselaw to support their assertion that the California Constitution's reasonable use doctrine demands that an RPA "be carefully tailored to just what is necessary to avoid jeopardy." To the contrary, the reasonable use doctrine protects a broad range of interests, including fish protection interests that go far beyond prevention of jeopardy. *See, e.g., Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 443, 189 Cal. Rptr. 346, 658 P.2d 709 (1983)* (use of water to maintain scenic and recreational values consistent with the reasonable use doctrine).

Nor do Federal Defendants bear any burden to affirmatively demonstrate that the RPA's comply with the California Constitution. The ESA's implementing regulations specifically enumerate in *50 C.F.R. § 402.02* the analyses NMFS and the Bureau must undertake when promulgating an RPA. It is Plaintiffs who bear the burden in a challenge based upon Article X. *State Water Resources Control Board Cases, 136 Cal. App. 4th 674, 762, 39 Cal. Rptr. 3d 189 (2006)* (rejecting allegation that releases of water pursuant [**413] to D-1641 constituted waste and unreasonable use because the plaintiffs failed to demonstrate that the releases "necessarily result[] in an unreasonable use of water."). The reasonableness of a use of water is a question of fact that depends on the particular circumstances [*954] of each case. *Id.* Any such claim arises under state law, not the APA, and is not limited to the administrative record. The briefing in this case has not addressed in any analytic respect the unreasonable use issue.

SR Plaintiffs motion for summary judgment that the Stanislaus River RPA Actions violate *Article X, Section 2 of the California Constitution* is DENIED WITHOUT PREJUDICE; Federal Defendants' and Defendant-Intervenors' cross motions are PREMATURE.

VII. RECLAMATION'S LIABILITY UNDER THE ESA.

All Plaintiffs move for summary judgment that Reclamation violated the ESA by adopting and implementing the BiOp. Following the issuance of a biological

opinion, the ESA regulations require the action agency, here, Reclamation, to "determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." *50 C.F.R. § 402.15(a)*. In making that determination, [**414] a federal action agency "may not rely solely on a [] biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2)." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990)*. In *City of Tacoma v. Fed. Energy Regulatory Comm'n, 460 F.3d 53, 76, 373 U.S. App. D.C. 117 (D.C. Cir. 2006)*, the D.C. Circuit summarized the caselaw culminating in *Pyramid Lake:*

> [The] interagency consultation process reflects Congress's awareness that expert agencies (such as the [NMFS] and [FWS]) are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species, and that those expert agencies are in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species. Congress's recognition of this expertise suggests that Congress intended the action agency to defer, at least to some extent, to the determinations of the consultant agency, a point the Supreme Court recognized in *Bennett v. Spear, 520 U.S. 154, 169-170, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)*. In *Bennett*, the Court stated [**415] that an action agency disregards a jeopardy finding in a BiOp "at its own peril" and bears the burden of articulating the reasons for reaching its contrary conclusion. *Id.*

Accordingly, when we are reviewing the decision of an action agency to rely on a BiOp, the focus of our review is quite different than when we are reviewing a BiOp directly. In the former case, the critical question is whether the action agency's reliance was arbitrary and capricious, not whether the BiOp itself is somehow flawed. *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir.1999)*; *Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir.1990)*; *Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1460 (9th Cir.1984)*; cf. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 790 (9th Cir. 2005)* (direct review of a BiOp). Of course, the two inquiries overlap to some extent, because reliance on a facially flawed BiOp would likely be arbitrary and capricious, but the action agency "need not undertake a separate, independent analysis" of the issues addressed in the BiOp. *Aluminum Co., 175 F.3d at 1161*. In fact, if the law required the action agency to undertake [**416] an independent analysis, then the expertise of the consultant agency would be seriously undermined. Yet the action agency must not blindly adopt the conclusions [*955] of the consultant agency, citing that agency's expertise. *Id.* Rather, the ultimate responsibility for compliance with the ESA falls on the action agency. *16 U.S.C. § 1536(a) (1)-(2)*. In *Pyramid Lake*, the Ninth Circuit balanced these two somewhat inconsistent principles and articulated the following rule:

> [E]ven when the [consultant agency's] opinion is based on "admittedly weak" information, another agency's reliance on that opinion will satisfy its obligations under the Act if a challenging party can point to no "new" information-i.e., information the [consultant agency] did not take into account-which challenges the opinion's conclusions.

898 F.2d at 1415; *see also Defenders of Wildlife v. U.S. EPA, 420 F.3d 946, 959, 976 (9th Cir. 2005)*; *Stop H-3 Ass'n, 740 F.2d at 1459-60*.

City of Tacoma, 460 F.3d at 75-76. The D.C. Circuit rejected the City of Tacoma's claim that the consultant agency in that case, FERC, was liable under the ESA because the City had not "presented FERC with new information that was unavailable to [NMFS] [**417] or [FWS] and that would give FERC a basis for doubting the expert conclusions in the BiOps those agencies prepared." *Id. at 76*.

Reclamation clearly disagreed with NMFS's approach to many important elements of the BiOp's analysis. *See* Doc. 431 at 119 (Plaintiffs' opening brief citing pages in the record containing Reclamation's critiques of the BiOp). This is not alone the litmus test for Reclamation's liability. In the context of ESA consultation, Reclamation is the regulated party and will not necessarily agree with every aspect of NMFS's opinion on the impacts of Reclamation's project on Listed Species. Under *City of Tacaoma*, Plaintiffs must demonstrate that, at the time it adopted the BiOp's RPA, Reclamation was in possession of any "new information" not considered by NMFS that provided Reclamation a basis for questioning the BiOp's expert conclusions. They have not. Absent such a showing, even though the BiOp is flawed in many ways, Reclamation could rely upon it without incurring ESA liability.

All Plaintiffs motions for summary judgment that Reclamation violated the ESA and/or the APA are DENIED; Federal Defendant and Defendant-Intervenors' cross motions are GRANTED.

VIII. CONCLUSION

For [**418] all the reasons set forth above:

(A) Plaintiffs' and DWR's motions for summary judgment that the BiOp violates the ESA and the APA are GRANTED IN PART AND DENIED IN PART; and Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED IN PART AND DENIED IN PART based on the following findings:

(1) It was clear error and inconsistent with standard practice in the field of fisheries biology for Federal Defendants to rely upon the raw salvage analyses set forth in Figures 6-65 and 6-66 to reach conclusions about the effect of specific levels of negative OMR flows on the Listed Species. None of the alternative record citations or analyses cited by Defendants, including the PTM Modeling Results, or Figures 6-71, 6-72, or 6-73, provide sufficient alternative bases for NMFS's conclusions regarding the negative OMR flows below which loss of juvenile salmonids "increases sharply."

(2) Federal Defendants' reliance on Figure 6-71 also suffers from the same unjustified use of raw salvage data. Federal Defendants must clarify on remand whether it is possible to scale the CV steelhead data used in Figures 6-72 and 6-73 to population size and, if not, [*956] why unscaled analyses are nevertheless [**419] useful. Federal Defendants must also further explain and/or refine the statistical methodologies used to develop these figures.

(3) Federal Defendants' did not act unlawfully in failing to apply either of the two suggested life-cycle models (IOS and/or OBAN) or other mathematical models, such as the Ricker or Beverton-Holt models, to evaluate project impacts on the Listed Species. However, NMFS's chronic and unsatisfactorily explained failure to avoid studying, analyzing, and applying a life cycle model approaches bad faith in light of all experts' opinions it can be done in far less than the five years the agency has been pleading lack of ability and resources, and in view of the undeniable importance of the information to resolve the perennial dispute over population dynamics.

(4) NMFS did not act unlawfully by failing to segregate discretionary from non-discretionary actions in evaluating the environmental baseline. Although such a delineation could better document the relationship between the requirements of the species and the action agency's statutory authority to implement the RPA, NMFS disclaims the capacity to undertake appropriate modeling and related analysis and Plaintiffs [**420] have failed to demonstrate that NMFS's claim is unreasonable or false.

(5) Although it is inexplicable that these species are being managed in a piecemeal fashion, without considering all aspects of their life cycles, including impacts to abundance from ocean conditions and ocean harvest, the ESA does not require a quantitative, causative analysis of the relative importance of these non-Project impacts vis-à-vis Project effects.

(6) NMFS did not act unlawfully by employing a 100-year timeframe for its analysis of extinction risk.

(7) Certain aspects of NMFS's winter-run viability analysis are clearly erroneous as identified above and must be corrected on remand.

(8) In view of the inconsistency, the 2009 Salmonid BiOp must explain on remand how its conclusions are consistent with the Orca Salmon Harvest BiOp.

(9) Although the BiOp contains some (uncontested) support for a connection between Project operations and the presence of exotic species, the BiOp is remanded for further explanation of how this relates to indirect mortality of the Listed Species.

(10) The record does not support the BiOp's conclusions about the connection between Project operations on the one hand and pollution and/or [**421] food limitations on the other. This is not the best available science.

(11) NMFS is not required to set a numeric threshold for adverse modification of critical habitat. The record supports the BiOp's conclusion that Project operations will have appreciable negative effects on the Listed Species' critical habitat.

(12) NMFS's use of surrogates was not unlawful.

(13) The record provides some, albeit equivocal, evidence to support the imposition of some form of flow:export ratio as part of Action IV.2.1. In a world of sound science, a questionable judgment that has significant adverse consequences for the water supply would not drive the formulation of an RPA. However, this is a scientific dispute between the State and water users' scientists on the one side and federal scientists on the other. Administrative law permits the [*957] agency to make mistakes, and the ESA requires such disputes be resolved in the species' favor. This is Congress' choice.

(14) However, the BiOp does not clearly explain the rationale for imposing a 4:1 ratio in above normal and wet years. Particularly in light of the potential adverse consequences of imposing such a ratio, this is unlawful. Full explanation on remand [**422] is required.

(15) Likewise, although there is marginal record support for the imposition of some form of OMR flow restriction, Action IV.2.3 must be remanded for further explanation of the necessity for the specific flow prescriptions imposed, which are derived primarily from PTM simulations, a method that is undisputedly an imperfect, if not incompetent, predictor of salmon behavior.

(16) Action IV.3 suffers from a similar defect. Although there is record support for some form of action designed to prevent large numbers of fish from being killed or harmed at the export facilities, lawful explanation is required to justify the specific triggers imposed by Action IV.3.

(17) As to Export Plaintiffs' and DWR's argument that the RPA fails to satisfy the four requirements of *50 C.F.R. § 402.02*:

(a) Federal Defendants failed to sufficiently explain whether the RPA can be implemented consistent with the co-equal, non-environmental statutory purposes of the action.

(b) Although the CVPIA does not grant NMFS unlimited power to take whatever Project water it deems essential for the species, under D-1641, lawful RPA's can (and must) be implemented in a manner consistent with the legal authority and [**423] jurisdiction of Reclamation and DWR.

(c) The BiOp reasonably concluded that the RPA is economically feasible for the action agency to implement. Only the costs to the action agency are relevant; economic burdens upon third parties cannot be considered under *TVA v. Hill.*

(d) The fourth *§ 402.02* requirement demands that an RPA avoid jeopardy and/or adverse modification. Consistent with and incorporating the rulings on the merits of the challenges to RPA Actions IV.2.1, IV.2.3 and IV.3, while there is anecdotal evidence for some of the general approaches used in these RPA Actions, the specific prescriptions imposed are not sufficiently justified or explained. NMFS acted arbitrarily and capriciously in concluding that Actions IV.2.1, IV.2.3 and IV.3 are essential to avoid jeopardy and/or adverse modification.

(18) Regarding DWR's related challenges to Action IV.4.2:

(a) Action IV.4.2 is not inconsistent with Action IV.4, and is not unlawful in that respect.

(b) The record lacks affirmative support for findings that either Action IV.4.2(1) or Action IV.4.2(2) are feasible.

(c) The record fails to explain why the measures imposed by Action IV.4.2 are essential to avoid jeopardy and/or adverse [**424] modification.

(B) Stanislaus River Plaintiffs' motion for summary judgment that the BiOp violates the ESA and the APA is GRANTED IN PART AND DENIED IN PART; and Federal Defendants' and Defendant-Intervenors' cross motions are GRANTED IN PART AND DENIED IN PART based on the following findings:

(1) It was not unlawful for NMFS to include the New Melones unit in the action under consideration.

[*958] (2) NMFS did not act unlawfully by failing to distinguish between baseline effects and effects of the action.

(3) As to SR Plaintiffs' challenges to the adverse modification findings related to New Melones:

(a) The BiOp's use of a "maximization" benchmark in connection with its analysis of spawnable area is without support in the record.

(b) The BiOp's finding that New Melones operations affect gravel recruitment is without support in the record.

(c) The record adequately supports the BiOp's findings regarding New Melones' effects on temperature conditions in spawning habitat and on downstream migration corridors.

(4) As to SR Plaintiffs' challenges to the New Melones RPA Actions:

(a) The BiOp does not reasonably or sufficiently explain its decision to set a "maximum habitat goal," which underlies its decision [**425] to use certain assumptions to model RPA actions.

(b) The Stanislaus River RPA Actions do not improperly require Reclamation to infringe on OID and SSJID's prior rights to Stanislaus River water.

(c) Federal Defendants did not act unlawfully by failing to utilize the San Joaquin River Water Temperature Model.

(d) The limitations of the exceptions built into Action III.1.2 must be defined on remand to explain how often the exception can be triggered without rendering the Action ineffectual.

(e) The record and best available science do not support Action II.1.3's 5,000 cfs spring pulse flow.

(f) In calculating the flows CV Steelhead need for outmigration, NMFS relied on a CDFG model used to determine flows needed to double salmon in the San Joaquin River. While it was not inappropriate for NMFS to use a model employing salmon as a surrogate for CV Steelhead, nothing in the record explains why it is appropriate to use a model designed to double the existing salmon population to set numeric flow targets to avoid jeopardy to the CV steelhead. This is arbitrary and capricious and must be fully explained on remand. In addition, NMFS must address the fact that the BiOp unreasonably relied upon runs [**426] from an outdated version of the model.

(g) SR Plaintiffs' argument that the Stanislaus River RPAs were unlawful because they constituted "impermissible major changes" to the New Melones Project is without merit, as this requirement applies to "reasonable and prudent measures," none of which were applied to the Stanislaus River.

(h) As to SR Plaintiffs' challenges to the BiOp's feasibility analyses of the Stanislaus River RPA Actions:

(1) The feasibility modeling did not employ erroneous assumptions.

(2) Action III.1.2's exception procedure is so broad that it renders any feasibility analysis wholly unreliable and arbitrary. It is unlawful as formulated.

(3) The feasibility of Action III.2.2 cannot be evaluated because the RPA has yet to be defined. This is not a valid RPA. Federal Defendants must ensure that any Action defined in the future complies with the requirements of law. SR Plaintiffs' challenge to this feasibility analysis is correct to the extent there is not a validly formulated RPA Action.

[*959] (i) SR Plaintiffs' challenge to Action III.2.2 as inconsistent with the flood control purposes of the New Melones Project is valid, as that Action has yet to be defined and is not yet a valid [**427] RPA.

(j) SR Plaintiffs' have not demonstrated that the pulse flows called for in Action III.1.3, designed to be of short duration to limit seepage impacts to nearby landowners, conflict with the flood control purpose of the New Melones Project.

(k) SR Plaintiffs' have failed to meet their burden to demonstrate that the Stanislaus River RPAs violate *Article X, Section 2 of the California Constitution*.

(C) All Plaintiffs' motions for summary judgment that Reclamation violated the ESA and/or the APA are DENIED; Federal Defendant and Defendant-Intervenors' cross motions are GRANTED.

It is undisputed that the law entitles the winter-run and spring-run Chinook, CV steelhead, Southern DPS of green sturgeon, and Southern Resident killer whales to ESA protection. Plaintiffs have succeeded on some of their challenges to the BiOp's justifications and analyses of Delta and Stanislaus River operations. The BiOp discusses and prescribes RPAs to address many other sources of harm, including adverse temperature conditions and blockages caused by dams on the Sacramento River. The BiOp's jeopardy conclusion is lawful. Project operations negatively impact the Listed Species and adversely modify their critical [**428] habitat in various ways that remain incompletely described and quantified.

Some of NMFS's analyses rely upon equivocal or bad science to impose RPA Actions without clearly explaining or otherwise demonstrating why the specific measures imposed are essential to avoid jeopardy and/or adverse modification. Given the potential serious impacts of these measures, the agency must do more to comply with the law.

The 2009 Salmonid BiOp and its RPA are ARBITRARY, CAPRICIOUS, and UNLAWFUL, and are REMANDED to NMFS for further consideration in accordance with this decision and the requirements of law.

Plaintiffs shall submit a form of order consistent with this memorandum decision within five (5) days of electronic service.

Within five (5) days of service of this decision, Federal Defendants shall provide a proposed date by which they shall file the new BiOp and any RPA.

SO ORDERED
Dated: September 20, 2011

/s/ Oliver W. Wanger

United States District Judge

APPENDIX DOC. 6

H

United States District Court,
E.D. California.
SAN LUIS & DELTA–MENDOTA WATER AUTHORITY; Westlands Water District, Plaintiffs,
v.
Kenneth Lee SALAZAR, as Secretary of the Interior, et al., Defendants,
Natural Resources Defense Council and the Bay Institute, Defendant–Intervenors.

No. 1:09–CV–00407 OWW DLB.
May 29, 2009.

West KeySummary**Environmental Law 149E**
701

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek701 k. Preliminary injunction. Most Cited Cases

California water districts were entitled to a preliminary injunction to enjoin the United States Fish and Wildlife Service ("FWS") from setting and implementing unnecessarily restrictive river flow restrictions designed to protect the threatened delta smelt. The districts alleged FWS failed to prepare an environmental impact statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"), before it took action. The districts presented evidence that irreparable harm was likely to occur without an injunction and, therefore, FWS was required to consider the harm that its decisions and actions were likely to cause humans, the community, and the environment. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

Daniel Joseph O'Hanlon, Hanspeter Walter, Rebecca Dell Sheehan, William Thomas Chisum, Kronick, Moskovitz, Tiedemann & Girard, Sacramento, CA, for Plaintiffs.

James A. Maysonett, Department of Justice, Washington, DC, for Defendants.

Trent William Orr, George Matthew Torgun, Earthjustice, Oakland, CA, for Defendant–Intervenors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
OLIVER W. WANGER, District Judge.

I. *INTRODUCTION*

***1** This case concerns the United States Fish and Wildlife Service's ("FWS") December 15, 2008 biological opinion ("BiOp" or "2008 BiOp") concerning the impact of coordinated operations of the Central Valley Project ("CVP") and State Water Project ("SWP") on the threatened delta smelt. San Luis & Delta–Mendota Water Authority ("Authority") and Westlands Water District ("Westlands") (collectively "Plaintiffs") move for a preliminary injunction to enjoin the application of Component 2 of the Reasonable and Prudent Alternative ("RPA") in the BiOp, which imposes certain flow restrictions on CVP operations in the Old and Middle Rivers ("OMR") of the Sacramento–San Joaquin Delta. Doc. 31, filed April. 24, 2009 (Notice of Mot.); Doc. 32 (Mem. in Sup. of Mot.).

Plaintiffs' underlying complaint and motion for preliminary injunction raise claims against FWS based on the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Plaintiffs have filed numerous supporting evidentiary declarations. Docs. 34–47, 71, 73–76, 78. Federal Defendants oppose the issuance of an injunction, and filed several evidentiary declarations. Doc. 56. Environmental Intervenors also oppose injunctive relief and filed an opposing evidentiary declaration. Doc. 58. The parties agreed to submit the Motion on the papers following oral argument.

Oral argument was heard May 22, 2009. Plaintiffs were represented by Kronick, Moskovitz, Tiedemann & Girard by Daniel J. O'Hanlon, Esq. Federal Defendants, including the Secretary of the Interior Kenneth Lee Salazar, the United States Department of the Interior, FWS, Acting Director of FWS Rowan Gould, Regional Director of FWS Ren Lohoefenor, United States Bureau of Reclamation ("Bureau" or "Reclamation"), Acting Commissioner of Reclamation J. William McDonald, and Regional

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Director Donald Glaser, were represented by James A. Maysonett, Esq., and William J. Shapiro, Esq ., Trial Attorneys, Environment and Natural Resources Division, U.S. Department of Justice. Defendant–Intervenors, The Bay Institute and Natural Resources Defense Council ("NRDC") were represented by George M. Torgun, Esq., Katherine Poole, Esq. and Doug Obegi, Esq. After considering all of the briefs, oral argument, and evidence, the following findings of fact and conclusions of law are entered.

II. *BACKGROUND*

The 2004 Biological Opinion on the effects of the coordinated operations of the CVP and SPW on the delta smelt, a species currently listed as "threatened" under the ESA, was found unlawful in a May 25, 2007 decision, *NRDC v. Kempthorne,* 1:05–CV–1207 (*"NRDC"*), 506 F.Supp.2d 322 (E.D.Cal.2007). *See NRDC* Doc. 323. After remand and a requested extension of time, on December 15, 2008, FWS issued a new biological opinion ("BiOp" or "2008 BiOp"). *See* Plaintiffs' Request for Judicial Notice ("PRJN"), Doc. 33, at Ex. A. [FN1] In the 2008 BiOp, FWS concludes that CVP and SWP operations, as proposed, are "likely to jeopardize the continued existence of" the delta smelt and "adversely modify" its critical habitat. BiOp at 276–79. Because FWS reached a "jeopardy" conclusion, it adopted a "reasonable and prudent alternative" ("RPA") designed to avoid jeopardy and/or adverse modification. BiOp at 279–85. Component 2 of that RPA requires Reclamation and the California Department of Water Resources ("DWR") to operate the Projects to limit negative water flows in OMR during a defined period in the spring to "no more negative than –1,250 to –5,000 [cubic feet per second (cfs)]," ending on June 30, or when water temperature reaches 25°C for three consecutive days, whichever is sooner. BiOp at 282, 357–68.

FN1. Plaintiffs request that the court take judicial notice of the following: (1) FWS December 15, 2008 biological opinion on proposed coordinated operations of the CVP and SWP, PRJN Ex. A; (2) Proclamation, State of Emergency—Water Shortage, Governor of the State of California, Arnold Schwarzenegger, February 27, 2009, PRJN Ex. B; (3) Executive Order S–06–08, Governor of the State of California, Arnold Schwarzenegger, June 4, 2008, PRJN Ex. C; (4) Proclamation, State of Emergency—Central Valley Region, Governor of the State of California, Arnold Schwarzenegger, June 12, 2008, PRJN Ex. D; (5) Proclamation of Existence of a Local Emergency and Request for the Governor to Proclaim a State of Emergency and Request for a Presidential Declaration and Request for State and Federal Assistance by the Board of Supervisors, County of Fresno, State of California, Resolution 09–134, signed April 14, 2009, PRJN Ex. E. Pursuant to Federal Rule of Evidence 201, these public record are subject to judicial notice as to their content and existence but not for the truth of the matters stated therein. Plaintiffs' request is GRANTED.

***2** OMR flow restrictions have been the subject of a previous order. In July 2007, NRDC's motion for a preliminary injunction on OMR flow restrictions was denied. *NRDC,* Doc. 394. In December 2007, after a seven day remedies trial, extensive findings of fact were issued on the effects of negative OMR flows and Reclamation and DWR were ordered, among other things, to "operate the CVP and SWP to achieve a daily average net upstream flow in OMR of between 750 and 5,000 cfs on a seven-day running average" during a defined period in the spring. *NRDC,* Doc. 560 at 7; *see also NRDC,* Doc. 561 at 15–20.

III. *FINDINGS OF FACT*

A. *Status of the Species.*

1. The available, uncontradicted data indicates a precipitous decline (by as much as several orders of magnitude) in the relative abundance of delta smelt since 2000. In previous, related proceedings, the expert witnesses were in agreement that the species is in serous trouble. *NRDC,* Doc. 561 at ¶ 11.

2. More recent evidence shows that the species has declined even further since its status was last reviewed in December 2007. Recent fall mid-water trawl ("FMWT") abundance indices are among the lowest ever recorded. BiOp at 153–156. The 2008 index was 23, the lowest level ever recorded. Doc. 38, First Hanson Decl. at ¶ 7; Doc. 56–2, Goude Decl. at ¶ 2. Cay Goude, FWS's Assistant Field Supervisor for the endangered species program in FWS's Sacramento Fish and Wildlife Office, opines

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that the delta smelt's failure to rebound in 2009 is not surprising because of the smelt's low abundance and the fact that California is in its third consecutive year of dry or critically dry conditions. Goude Decl. at ¶ 11.

3. On March 6, 2009, the California Fish and Game Commission reclassified delta smelt from threatened to endangered under the California Endangered Species Act ("CESA"), finding that the species has "declined significantly since its listing as threatened and the species' abundance is now extremely low." Doc. 59–2, Obegi Decl. at ¶ 7 & Attch. 6. On July 10, 2008, FWS announced a ninety-day finding that uplisting delta smelt as endangered under the ESA may be warranted. 73 Fed.Reg. 39,639 (July 10, 2008).

B. *Development of FWS's December 15, 2008 Biological Opinion.*

4. On remand from the Court, the Bureau and DWR, with the advice and assistance of Plaintiffs and other water contractors, prepared a biological assessment ("BA") describing the proposed operations for the consultation and evaluating the impact of proposed operations on the smelt. The BA included no measures to protect delta smelt, except for those measures required by the terms and conditions of the Projects' water rights permits and licenses. Obegi Decl. at ¶ 6 & Attch. 5.

5. FWS prepared a preliminary draft BiOp that was reviewed by both FWS's internal and an independent peer review team. *See* BiOp at vi. The final BiOp, issued December 15, 2008, concluded that the operations proposed in the BA would cause jeopardy to the continued existence and recovery of delta smelt and would adversely modify its critical habitat. *Id.* at 276–279. As a result of the jeopardy and adverse modification finding, FWS included a reasonable and prudent alternative ("RPA") designed to avoid jeopardy. *Id.* at 279–85.

C. *The Reasonable and Prudent Alternative.*

***3** 6. The RPA comprises five (5) components. Components 1, 2 and 3 establish a range of permissible OMR flows during different times of the winter and spring, with biologically based triggers to begin, suspend, or terminate each component. *Id.* at 279–285; *see also* BiOp Attch. B.[FN2] These components are designed to prevent entrainment of adults, juveniles, and larvae, as well as to improve flow conditions to allow delta smelt to spawn and rear successfully. *Id.* Once flow restrictions are triggered, FWS establishes the particular flow standard using an adaptive management process which incorporates current delta smelt surveys and sampling (including the FMWT, Spring Kodiak Trawl, 20–mm Survey, and TNS), water quality monitoring (turbidity and flow levels), particle tracking model ("PTM") [FN3] results, recent salvage data, and the advice of the Smelt Working Group ("SWG") and Water Operations Management Team ("WOMT"). *Id.; see* Goude Decl. at ¶ 7 & Ex. F (SWG notes). Plaintiffs' expert's initial suggestion that the adaptive management process places undue weight on PTM results, while ignoring actual delta smelt distribution, First Hanson Decl. at ¶ 15, is wrong.

FN2. Component 4, which requires DWR to implement a program to create or restore habitat in the Delta and Suisun Marsh, is "intended to provide benefits to delta smelt habitat to supplement the benefits resulting from the flow actions" described in Components 1 through 3. BiOp at 283. Component 5 requires the Bureau and DWR to implement a monitoring and reporting program. *Id* . at 284.

FN3. PTM focuses on the impact of flows upon imaginary particles "injected" into a particular location in the Central Delta, station 815. BiOp at 366.

7. The RPA is designed to avoid jeopardy to the continued existence and recovery of delta smelt and to prevent the adverse modification of critical habitat by:

> 1) preventing/reducing entrainment of delta smelt at Jones and Banks; 2) providing adequate habitat conditions that will allow the adult delta smelt to successfully migrate and spawn in the Bay–Delta; 3) providing adequate habitat conditions that will allow larvae and juvenile smelt to rear; and 4) providing suitable habitat conditions that will allow successful recruitment of juvenile delta smelt to adulthood.
>
> BiOp at 279.

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8. The current motion only seeks to enjoin application of Component 2. Doc. 32 at 5, 13–14. The period for Component 1 has expired, and Component 3 will not be implemented this year. *Id.* at 5 n. 2. Component 2 is designed to protect larval and juvenile delta smelt from entrainment and to provide adequate flow conditions "so that larval and juvenile delta smelt can successfully rear in the Central Delta and move downstream when appropriate." BiOp at 282. It is triggered by one of three events: completion of Component 1; capture of spent delta smelt females in salvage or surveys; or a 3–station average of Delta water temperatures reaching 12°C. *Id.* Component 2 ends when the three-day average of water temperatures at Clifton Court Forebay reaches 25°C, or June 30, whichever event comes first. *Id.* RPA Component 2 requires an OMR flow standard of between –1,250 and –5,000 cfs, on a 14–day running average, with the five-day running average within 25% of the required flow. *Id.*

9. The actual OMR flow levels permitted under Component 2 in May and June are based on an adaptive process developed in consultation with the SWG [FN4] starting in 2007, called "Influence–Exposure–Intensity–Response (IEIR) Analysis," which incorporates salvage data, distributional data from surveys, the location of X2, water temperature data, PTM results, and prior year FMWT data. *Id.* at 358–359, 364–366. "During most conditions, it is expected that maximum negative OMR flows will range between –2000 and –3500. During certain years of higher or lower predicted entrainment risk, flow requirements as low as –1,250 or –5,000 will be recommended to the Service by the SWG." *Id.* at 357, fn. 10; *see also id.* at 360, 363. FWS will set negative OMR flows in a range between –1,250 cfs and –5,000 cfs, depending upon whether entrainment risk is deemed "low," "lesser," or something greater. *Id.* at 359.

FN4. The SWG is no longer known as the "delta smelt working group" because it now also routinely considers protections for longfin smelt, another pelagic species that became a state candidate for listing under the California Endangered Species Act ("CESA") in 2008. *See* BiOp at 30.

***4** 10. If "available physical and biological real-time monitoring data" indicate a "low-entrainment risk scenario," then OMR flows can be as negative as –5,000 cfs. *Id.* at 358. "Low" entrainment risk is indicated only when "there has been no evidence of delta smelt in the South and Central Delta or larval delta smelt are not yet susceptible to entrainment." *Id.* The BiOp's "high-entrainment risk scenario" arises when any delta smelt have been found in the South and Central Delta from the Spring Kodiak Trawl or the 20 mm survey, or when there is ongoing entrainment at the pumps. BiOp at 358. In these conditions, FWS will be more restrictive than –5,000 cfs. *Id.* at 358–59.

11. Component 2 is designed to "minimize the entrainment of larval/juvenile delta smelt in the Central and South Delta." BiOp at 360. "In recent years, the densest concentrations of both spawners and larvae have been recorded in the Cache Slough/Sacramento Deepwater Ship Channel complex in the North Delta." *Id.* at 148. The BiOp provides that "[w]hen the distribution of delta smelt is in the North or North/Central Delta," minimization of take will be accomplished "by holding entrainment to ~1 percent of the individuals utilizing the Central and South Delta (south and east [upstream] of Station 815, see Map 2) across a 14–day particle modeling interval." *Id.* at 360. FWS calls this 1% entrainment standard its "protectiveness criterion." *Id.* Under this criterion, FWS will seek to limit entrainment to approximately 1% of the larvae and juveniles at Station 815 in the Central Delta, even if only a small portion of the overall recorded population of larvae and juvenile delta smelt is in the Central and South Delta.

12. The BiOp further explains:

> In circumstances where it is known or suspected that the Central Delta or South Delta is a principal source of emerging larvae, as occurred in WY 2003, OMR restrictions might be calculated using reduction of 14–day Station 815 entrainment below 1 percent, or other methods as needed to ensure protection of the larval population in conditions of such severe vulnerability. *The Action utilizes OMR restrictions to achieve the desired end, as OMR flow is a strong predictor of geographical variation in entrainment risk in the Central and North Delta.*

Id. (emphasis added).

13. In addition to the adaptive management framework provided in the BiOp, the RPA also in-

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cludes a provision stating that in consecutive dry or critically dry years, CVP/SWP export rates will never be required to drop below –1,500 cfs "in order to allow the CVP/SWP to provide health and safety needs, critical refuge supplies, and obligation[s] to senior water rights holders." BiOp at 296. The BiOp also allows for the reinitiation of consultation under certain circumstances. *Id.* at 296–297.

14. Since December 15, 2008, FWS and the Bureau have been using the adaptive management framework to implement the BiOp. The SWG has met approximately every week to provide guidance to FWS in setting OMR flow requirements and has based its recommendations on survey, salvage, water quality, and other data sets, in combination with PTM results. *See* Goude Decl. at ¶ 7 & Ex. F (SWG notes).

D. *Current Location of Smelt & Entrainment Risk.*

***5** 15. The Spring Kodiak Trawl surveys completed by the California Department of Fish and Game ("DFG") in January, February, March, and April of 2009 reflect the distribution of adult spawning delta smelt. First Hanson Decl. at ¶ 8. The results of these surveys indicate that, up until May of this year, most of the adult delta smelt spawned in the northern and western reaches of the Delta. *Id.* However, the month of May is historically a period when high numbers of smelt become entrained at the export facilities. Fed. Def. Ex. B (Service Decision May 21, 2009). The April 20–24 20 mm survey results found delta smelt at several stations in the Central and South Delta, including stations 705, 815, 910, and 914, while the May 5–8 20 mm survey results found delta smelt at stations 901, 815, 705, and 801. Goude Decl., Ex. A; Obegi Decl., Attach. 4. As of May 21, 2009, the most recent 20 mm survey again indicates that some delta smelt were caught in the Central Delta. Fed. Def. Ex. B.

16. Salvage has also increased: on May 16, 12 delta smelt were salvaged; 24 on May 17; 20 on May 18; 4 on May 19; 28 on May 20; and 8 on May 21. Fed. Def. Ex C (Central Valley Operations Office, Delta Smelt and Splittal, May–09). Larvae smaller than 20 mm are not counted in these salvage reports. BiOp at 163.

E. *Implementation of Related Actions.*

17. On February 23, 2009, DFG issued a permit to DWR authorizing the legal take of longfin smelt under CESA. Obegi Decl. at ¶ 2 & Attch. 1 (ITP permit). That permit imposes OMR flow restrictions to protect juvenile longfin smelt between January and June, which are very similar to those required by FWS's delta smelt BiOp. When triggered, OMR flows must remain between –1,250 and –5,000 cfs, based on "survey data, including all of the distributional and abundance data, and other pertinent biological factors that influence the entrainment risk of larval and juvenile delta smelt." *Id.* (ITP at 10–11). DFG identified likely flow conditions of –2,000 to –5,000 cfs for April and May, and –5,000 cfs for June. *Id.* (ITP at 11). One reason why DFG has not imposed pumping restrictions to protect longfin smelt is that "Current delta smelt advice will be protective of longfin smelt larvae." *See* Goude Decl., Ex. F (2009 SWG notes from 3/16, 3/23, 3/30, 4/6).

18. Action by the DWR or DFG is not a concern that need be addressed here due to the protections afforded by the RPA.

F. *Socioeconomic and Environmental Effects of Water Shortage, Drought, and Recession.*

19. On February 27, 2009, the Governor of California declared a state-wide drought emergency, based on his finding that "conditions of extreme peril to the safety of persons and property exist in California caused by the current and continuing severe drought conditions and water delivery restrictions." PRJN Ex. B. On April 14, 2009, the Fresno County Board of Supervisors adopted a proclamation declaring an emergency and requesting federal and state assistance to address soaring unemployment and shortages of food. According to the proclamation, due to water shortages "thousands of people who once relied on employment in the agricultural sector are now unemployed and struggling to meet their most basic needs, such as providing food for their family." PRJN Ex. E at 2:8–10. The Community Food Bank has inadequate capacity to meet the overwhelming increase in need. *Id.* at 2:21–3:2.

***6** 20. Plaintiffs' members are trying to compensate for these shortages through the use of groundwater. Doc. 36, Die drich Decl. at ¶¶ 4, 7; Doc. 35, Coburn Decl. at ¶ 4; Doc. 39, First Harris Decl. at ¶¶ 2–3; Doc. 43, Nelson Decl. at ¶¶ 3, 7; Doc. 37, First Freeman Decl. at ¶¶ 7, 11, 12. However, groundwater supplies cannot meet all crop demands, and often contain undesirably high concentrations of salts and

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minerals. *See* First Freeman Decl. at ¶ 12. Pumping of groundwater also entails increased energy usage. *Id.* at ¶ 17. Without replacement water supplies, many farmers' only other option is to fallow land. Harris Decl. at ¶¶ 4–5; Die drich Decl. at ¶ 4; Freeman Decl. at ¶ 11, 12. The water supply situation has resulted in loss of on-farm employment, reduced crop production, destruction of some permanent crops, and may require some farmers to sell their land and abandon farming altogether. Coburn Decl. at ¶¶ 5–7; Allen Decl. at ¶ 5; Harris Decl. at ¶¶ 7–8; Die drich Decl. at ¶ 8.

21. Based on the initial 2009 water year zero percent allocation from the CVP by Reclamation, 220,000 to 250,000 acres (of the total 560,000 normally under production) are expected to be fallowed within Westlands this year. Freeman Decl. at ¶¶ 3, 11. Substantial land fallowing is expected in other districts that depend upon CVP water deliveries for irrigation. Doc. 43, Nelson Decl. at ¶¶ 10–11; Doc. 40, Harrison Decl. at ¶ 11.

22. Plaintiffs submit the declarations of Robert Silva, Mayor of the City of Mendota, and Marcia Sablan, Mayor of the City of Firebaugh, who describe, from their perspective, the impact of agricultural job losses on their communities. These declarations assert that the current unemployment rate in Mendota and Firebaugh is 40 percent. Silva Decl. at ¶ 3; Sablan Decl. at ¶ 4. That reductions in employment and farm and farmworker incomes have resulted in a loss of tax revenue available to fund municipal services, leading to a reduction in staffing of local government. Silva Decl. at ¶ 4; Sablan Decl. at ¶ 6. Ms. Sablan believes that if the City of Firebaugh's tax revenues continue to decrease "it is possible that fire and police protection services will be faced with substantial cuts." Sablan Decl. at ¶ 6. Although the City of Mendota currently has no independent police force, the economic conditions have stalled the City's implementation of plans to start its own police department. Silva Decl. at ¶ 4

23. Local schools are suffering as well. Sablan Decl. at ¶ 7. Families of displaced farm workers are often forced to combine households resulting in crowded and stressful conditions impacting affected students' academic performance. *Id.* Additionally, as families and students relocate from rural areas due to a lack of employment, the rural school districts lose much needed revenue from the State. *Id.; see also* Hernandez Decl., Doc. 41.

***7** 24. Plaintiffs also submit the declaration of Dana Wilkie, the CEO of the Community Food Bank, a non-profit organization that provides food to hungry families in Fresno, Madera, and Kings Counties. Doc. 47. She declares that "[t]he number of people in our service area experiencing food insecurity has recently increased substantially." *Id.* at ¶ 6. In response, the Food Bank is endeavoring to increase its distribution of food to needy members of the community to respond to the increasing number of people requiring such assistance. *Id.* at ¶ 4.

25. There is also a possibility that increased reliance upon groundwater will lead to unsustainable overdraft of the groundwater basin and resulting land subsidence, causing damage to wells and water distribution facilities, as well as increased soil salinity and toxicity as a result of applying water with higher salinity and minerals to the soil. Freeman Decl. at ¶¶ 13–16. Increased land fallowing is also known to cause increased dust emissions which degrade air quality. *Id.* at ¶ 21.

26. Environmental Plaintiffs present the declaration of Jeffrey A. Michael, Ph.D., an economist who analyzes data from California's Employment Development Department regarding recent employment trends in the farm and non-farm sectors around the state. Dr. Michael explains that the San Joaquin Valley, like the rest of the United States, is suffering from the deepest recession since the Great Depression and that the recession is largely caused by foreclosures and the collapse of the real estate market. Doc. 58–2, Michael Decl. at ¶ 2. California has experienced the largest drop in real estate prices in the nation, and the San Joaquin Valley is experiencing among the highest foreclosure rates in the nation. *Id.* at ¶ 3. These factors have contributed to widespread unemployment across the state, particularly in non-farm sectors such as the construction and hospitality sectors. *Id.* at ¶¶ 2–3.

27. Dr. Michael opines that employment in the farm sector has fared "relatively well," with farm employment *increasing* by 2.5% across California between March 2008 and March 2009, and *increasing* in several Valley counties over the same time period, including Fresno (by 3.2%), Kern (by 4.2%)

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Tulare (by 4.3%), and Stanislaus–Merced–Madera–Kings (by 5.8%). *Id.* at ¶ 6 & Ex. 3. These increases in farm employment have buffered the overall decline in employment for metropolitan areas such as Fresno and Bakersfield, which are experiencing lower unemployment rates than eight other large metropolitan areas in the State, including Los Angeles, Sacramento, Oakland, Riverside, San Die go, Orange, San Jose, and San Francisco. *Id.* at ¶ 7 & Ex. 2. Dr. Michael also opines that declining school enrollment and sales tax revenue are being experienced across California and are largely explained by high rates of residential foreclosures and the real estate downturn. *Id.* at ¶ 9.

***8** a. In response to Dr. Michael's declaration, Plaintiffs offer the testimony of Dr. Richard Howitt of the University of California at Davis, an agricultural economics professor, who presents the results of his recent, published research on the predicted impacts of the current drought and fishery related pumping restrictions on the communities of the Central Valley. Doc. 74, Howitt Decl. at ¶ 2. Dr. Howitt opines that more than 34,000 jobs will be lost in the San Joaquin Valley as a result of the water delivery restrictions, and that most of these job losses will be suffered by farm workers and employees of packing houses and processing plants. *Id.* at ¶ 5. He further states that these individuals are typically low-income workers with few alternatives for other work. *Id.*

b. Dr. Howitt opines that Dr. Michael's declaration is "largely irrelevant to the question of measuring the incremental loss in employment due to water reductions to the Westside of the San Joaquin valley," because, among other things, Dr. Michael used employment data that extends only to the start of the current farm year in March 2009 and therefore cannot project the impacts of cuts in water supply; and the data he used is aggregated over all regions of Fresno County, obscuring relative impacts to the Westside. *Id.* at ¶ 9.

c. In light of Dr. Howitt's undisputed criticisms, Dr. Michael's declaration is only marginally relevant, as it measures economic trends at a "macro" scale.

G. *Predicted Impact of OMR Restrictions on Pumping during Late May and June.*

28. Under Reclamation's April forecast of operations, released April 21, south-of-Delta CVP water service agricultural contractors are projected to receive a 10% contract allocation, instead of the zero allocation indicated by the March forecast. Snow Decl. at ¶¶ 13–14; Exs. B, C. However, the volume of water actually delivered will depend, at least in part, upon how FWS regulates negative OMR flows from May 18 through June 30. *Id.* at ¶¶ 15–19.

29. Reclamation's April 2009 forecast of CVP operations, on which the 10% allocation is based, indicates a CVP export pumping for the period beginning May 18 through May 31 of about 65,000 acre-feet. *Id.* at ¶ 15. The forecast indicates an expected volume of CVP pumping of about 150,000 acre-feet during the month of June. *Id.* Reclamation's forecast further indicates that OMR flows will be at about –3,000 cfs during late May, and –3,900 cfs during June. *Id.* It is undisputed that if the CVP were free to pump water at rates unrestricted by the criteria for negative OMR flows prescribed by the BiOp, the allocation of water for south-of-Delta CVP contractors could be increased by approximately 60,000 acre-feet. *Id.* at ¶ 16. This is approximately equivalent to an additional 5% allocation. *Id.*

30. Relatedly, if FWS restricts OMR flows in late May and June more tightly than the April forecast indicates, the Bureau may not be able deliver the 10% allocation. *Id.* ¶ 18. The 10% allocation depends upon the assumed pumping in late May and June, because, under the current forecast, the CVP pumps will already be at maximum capacity beginning on July 1. *Id.* ¶ 19. There would be no opportunity to make up for lost May and June pumping using the CVP facility beginning in July. *Id.* Although the SWP pumps can pump CVP water under the "joint point of diversion" provisions of Decision 1641, this procedure is subject to a number of contingencies, including the Bureau having capacity to hold water in storage for pumping after June 30, whether the SWP will have available capacity at the Banks Pumping Plant, and whether the projects would be able to meet water quality requirements. *Id.* at ¶ 19.

IV. *CONCLUSIONS OF LAW*

A. *Standard of Review.*

***9** 1. In general, the standard for granting a preliminary injunction balances plaintiff's likelihood of success against the relative hardship to the parties.

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The Ninth Circuit previously recognized two different sets of criteria for preliminary injunctive relief. Under the traditional test, "a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir.2007). An "alternative" test required that "a plaintiff demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *Id.* "These two formulations represent[ed] two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They [were] not separate tests but rather outer reaches of a single continuum." *Id.*

2. The Supreme Court, in *Winter v. NRDC*, —— U.S. ——, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), rejected the Ninth Circuit's application of that part of the alternative test which permitted an injunction where there was only the "possibility of irreparable injury." *Winter* found this standard "too lenient," and reiterated that its own "frequently reiterated standard requires plaintiffs seeking preliminary injunctive relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Id.* at 375.

3. Following *Winter*, the Ninth Circuit revised its preliminary injunction standard:

> In *Winter*, the [Supreme] Court reversed one of our decisions, which, it determined, upheld a grant of a preliminary injunction by use of a standard that was much too lenient. As the Court explained, an injunction cannot issue merely because it is *possible* that there will be an irreparable injury to the plaintiff; it must be *likely* that there will be....
>
> The Court [defines] the rule ... as follows:
>
> > A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.
>
> To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.

Am. Trucking Ass'ns., Inc. v. City of Los Angeles, 559 F.3d 1046, 1042 (9th Cir.2009) (emphasis added).[FN5]

> FN5. Although it does not appear to be an issue in this case, district courts within the Ninth Circuit have suggested that the second prong of the alternative test, which permits injunctive relief where plaintiff is able to show "serious questions going to the merits," survived *Winter*. *See* *Save Strawberry Canyon v. Dept. of Energy*, 613 F.Supp.2d 1177, 2009 WL 723836, *13 n. 2 (N.D.Cal.2009).

B. *Analysis.*

1. *Likelihood of Success on the Merits.*

a. *Lack of Claims Against Reclamation.*

4. Plaintiffs request Federal Defendants be enjoined "from limiting pumping at the CVP's Jones pumping plant between now and June 30, 2009 pursuant to the provisions of the BiOp" unless FWS provides further justification for its decisions. *See* Doc. 48, Prop'd Order, at 2; Draft Hearing Transcript, May 22, 2009, at 29–30. Federal Defendants object to the issuance of any injunctive relief against the *Bureau* because, although Plaintiffs sued Reclamation, they have not alleged any claims against Reclamation. *See* Complaint, Doc. 1. Plaintiffs name the Bureau as a defendant, Compl. ¶ 18, but do not allege that Reclamation has violated any laws. Instead, their complaint asserts that they have only named Reclamation as a defendant "so that the Court may provide an adequate remedy ... regarding CVP operations...." Compl. at ¶ 51.

***10** 5. To enjoin the Bureau, the court must have jurisdiction over the agency, which requires, at a bare minimum, that Plaintiffs bring claims against the Bureau. *See Or. Natural Desert Ass'n v. Lohn*, 485 F.Supp.2d 1190, 1196 (D.Or.2007), vacated on other grounds, 2007 WL 2377011 (D.Or. June 11, 2007) (denying injunctive relief against an action agency in

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an ESA case where Plaintiffs "brought suit only against the consulting agencies"). However, the preliminary injunction Plaintiffs seek is *directed at how FWS will set OMR flows within the –1,250 to –5,000 cfs range* through June 30, or until the water temperatures reach 25°C in Clifton Court Forebay. Plaintiffs rejoin that "[o]nce FWS sets that limitation, Reclamation will presumably comply and pump what water it can consistent with that limitation to fulfill its contractual and other obligations." Doc. 70 at 12.

6. Component 2's adaptive management process affords the Bureau some say in the setting of OMR flows, but that input is subject to FWS's ultimate authority. Specifically, once FWS receives a recommendation from the SWG that an action should be initiated, changed, suspended, or terminated, FWS "determines whether the proposed action should be implemented, modified, or terminated; and the OMR flow needed to achieve the protection." BiOp at 280. FWS then presents its determination to the WOMT, which is made up of representatives from the *Bureau*, DWR, FWS, NMFS, and DFG. *Id.* at 28, 280. The WOMT may either "concur with the recommendation or provide a written alternative to the recommendation" to FWS within one calendar day. *Id.* at 280. FWS "shall then make a final determination on the proposed action to be implemented, which shall be documented and posted" on the internet. *Id.* If FWS determines that an OMR flow change is required, the Bureau and DWR "shall adjust operations to manage to the new OMR flow within two days of receipt of [FWS's] determination ." *Id.* Because FWS has ultimate control over setting OMR flows, and the Bureau must comply with those recommendations, it is sufficient that Plaintiffs filed suit against and seek to enjoin only FWS's actions.[FN6]

FN6. Under the circumstances, any injunction issued in this case will bind the Bureau's implementation of OMR flow restrictions pursuant to Federal Rule of Civil Procedure 65's provision that "persons who are in active concert or participation" with a properly named defendant can be bound by an injunction.

2. *NEPA Claims Against FWS.*

a. *Does the Issuance of the BiOp Trigger the Need for NEPA Compliance?*

7. Because the admissibility of evidence of economic harm turns on the viability of the NEPA claim, it is appropriate to first evaluate Plaintiffs' likelihood of success on that claim. Plaintiffs argue that FWS was required to prepare an environmental impact statement ("EIS") in connection with the issuance of the BiOp. It is undisputed that no NEPA document was prepared.

8. NEPA requires all federal agencies to prepare an EIS to evaluate the potential environmental consequences of any proposed "major Federal action [ ] significantly affecting the quality of the human environment" 42 U.S.C. § 4332(C). The preparation of an EIS serves a number of purposes:

> ***11** It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.
>
> Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies "to respond to the needs of environmental quality." 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).
>
> Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provides a springboard for public comment.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (internal citations and quotations omitted). "NEPA does not contain substantive requirements that dictate a particular result; instead, NEPA is

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aimed at ensuring agencies make informed decisions and 'contemplate the environmental impacts of their actions.' " *Ocean Mammal Inst. v. Gates*, 546 F.Supp.2d 960, 971 (D.Hi.2008) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir.1998)).

9. The Ninth Circuit has held that an agency must prepare an EIS "where there are substantial questions about whether a project may cause significant degradation of the human environment." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir.2005). An agency may choose to prepare an environmental assessment ("EA") to determine whether an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9(b). The EA must identify all reasonably foreseeable impacts, analyze their significance, and address alternatives. 40 C.F.R. §§ 1508.8, 1508.9, 1508.27. If, based on the EA, the agency concludes that the proposed actions will not significantly affect the environment, it may issue a Finding of No Significant Impact ("FONSI") and forego completion of an EIS. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1225 (9th Cir.1988); 40 C.F.R. § 1501.4(e).

10. Federal regulations implementing NEPA help to define when "major federal actions" take place:

> Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly ([40 C.F.R.] § 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.
>
> ***12** (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.
>
> (b) Federal actions tend to fall within one of the following categories:
>
> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
>
> (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
>
> (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
>
> (4) *Approval of specific projects, such as* construction or *management activities located in a defined geographic area.* Projects include actions approved by permit *or other regulatory decision* as well as federal and federally assisted activities.
>
> 40 C.F.R. § 1508.18 (emphasis added).

11. "Whether an action may 'significantly affect' the environment requires consideration of 'context' and 'intensity.' " *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir.2008) (citing 40 C.F.R. § 1508.27). "Context delimits the scope of the agency's action, including the interests affected." *Id.* (citing *Nat'l. Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722, 731 (9th Cir.2001)).

> Intensity refers to the "severity of impact," which includes both beneficial and adverse impacts, "[t]he degree to which the proposed action affects

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