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14 STATE WATER CONTRACTORS

15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA

17 STATE WATER CONTRACTORS,

18 Plaintiff,

19 v.

20 KENNETH L. SALAZAR, Secretary of the
21 United States Department of Interior;
22 UNITED STATES DEPARTMENT OF
23 INTERIOR; ROWAN W. GOULD, Acting
24 Director, United States Fish and Wildlife
25 Service; UNITED STATES FISH AND
26 WILDLIFE SERVICE; and DOES 1
27 through 5, inclusive,

28 Defendants.

LESTER SNOW, Director, California
Department of Water Resources;
CALIFORNIA DEPARTMENT OF
WATER RESOURCES,

Real Parties in Interest.

Case No.

Judge:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

[Filed concurrently with:

1. Request for Judicial Notice; and
2. Notice of Related Cases]

1 Plaintiff State Water Contractors (“Plaintiff” or “State Contractors”) alleges as follows:
2

3 **INTRODUCTORY INFORMATION**

4 1. Plaintiff brings this action for declaratory judgment and injunctive relief against
5 the United States Fish and Wildlife Service (the “Service”); the United States Department of the
6 Interior (“DOI”); Kenneth L. Salazar, Secretary of the DOI, and Rowan W. Gould, Acting
7 Director of the Service (collectively, “Defendants”) to challenge their unlawful actions, as set out
8 in this Complaint, to prevent the enforcement of those unlawful actions, and to obtain declaratory
9 and injunctive relief. At issue in this action is Defendants’ December 15, 2008 approval of a
10 Biological Opinion (“BiOp”) regarding the effect of the Operations Criteria and Plan (“OCAP”)
11 developed for the California State Water Project (“SWP”) and the federal Central Valley Project
12 (“CVP”) on the delta smelt, a small fish endemic to the Sacramento-San Joaquin Delta (“Delta”)
13 that is listed under the federal Endangered Species Act (“ESA”) (16 U.S.C. § 1531 et seq.).
14 Defendants issued a biological opinion for virtually the same project in 2005 that was
15 successfully challenged in the case of *Natural Resources Defense Council (NRDC), et. al. v.*
16 *Kemphorne*, E.D. Cal. Case No. 1:05-CV-01207 OWW. Pursuant to Orders issued in that case,
17 Defendants were directed to develop a new biological opinion regarding the effect of the OCAP
18 on delta smelt. Defendants’ most recent attempt at an OCAP biological opinion regarding the
19 smelt fails to rectify past problems and creates a host of new ones. Among other inadequacies,
20 the BiOp fails to comply with the ESA requirement to use the best available scientific data;
21 violates the ESA’s requirement that the reasonable and prudent alternative that is adopted satisfy
22 very specific criteria; includes no environmental review in violation of the National
23 Environmental Policy Act (42 U.S.C. § 4321 et. seq.); and fails to support, with the best available
24 scientific data, its finding of “jeopardy” to the species or explain why its reasonable and prudent
25 alternative will prevent “jeopardy.” A true and correct copy of the BiOp is attached as
26 Exhibit “1” to Plaintiff’s Request for Judicial Notice (“RJN”) filed concurrently herewith.

27 2. In a time of severe statewide drought and depleted reservoirs that has now risen to
28 the level of a formally declared State of Emergency, Defendants have adopted their inadequate

1 BiOp and seek to implement and enforce requirements that will: (i) “decreas[e] the amount of ...
2 the projects’ export pumping plants’ operations prior to, and during, the critical [delta smelt]
3 spawning period;” (ii) reduce Delta water exports to maintain Old and Middle River (“OMR”)
4 flows at levels much higher than have historically occurred, and (iii) allow for even greater
5 reductions in Delta water exports where “the Service [makes a] final determination as to OMR
6 flows required to protect delta smelt.” BiOp at 280, 281. These and other future actions that
7 Defendants may take under the BiOp, as well as their actions in drafting and approving the BiOp,
8 lack legal and factual support and are therefore arbitrary and capricious. Such actions are likely
9 to result in severe and irreparable water supply and environmental impacts to Plaintiff and its
10 member agencies that threaten the public health and safety of the millions of Californians who
11 rely on SWP supplies. The State Contractors seek injunctive and declaratory relief to, *inter alia*,
12 invalidate the BiOp without vacatur and compel Defendants to comply with applicable provisions
13 of law.

14 JURISDICTION AND VENUE

15 3. Jurisdiction of this action is properly vested with this Court pursuant to 28 U.S.C.
16 section 1331 in that the claims stated herein arise under the laws of the United States, including
17 the Endangered Species Act (“ESA”), the Administrative Procedure Act (“APA”) (5 U.S.C. § 551
18 et seq.), and the National Environmental Policy Act (“NEPA”). This Court is also vested with
19 jurisdiction pursuant to 28 U.S.C. section 2201 (declaratory relief) and 5 U.S.C. section 701
20 et seq. (federal agency action).

21 4. Venue in this judicial district is proper pursuant to 28 U.S.C. section 1391(e)(2)
22 and Rule 3-120 of the Local Rules of the United States District Court for the Eastern District of
23 California. The effects of Defendants’ actions will be felt by Plaintiff and its member agencies in
24 this judicial district. The member agencies of the State Contractors include 27 districts and
25 agencies which provide water to approximately 25 million people and hundreds of thousands of
26 acres of agricultural land in all or parts of numerous counties, including the provision of SWP
27 water to users in Kings and Kern Counties. Furthermore, reductions in exports from the Delta
28 will place greater demands upon alternative sources of water, including groundwater, that are

1 used to meet reasonable and beneficial water demands within Kings and Kern Counties. The
2 adverse environmental effects of the reductions in water supply caused by the improper actions
3 challenged herein will be felt in Kings and Kern Counties, among other locations.

4 **PARTIES**

5 5. Plaintiff State Contractors is, and at all times mentioned herein was, a non-profit
6 mutual benefit corporation organized and existing under the laws of the State of California to
7 represent the common interests of 27 public water supply agencies located in the San Francisco
8 Bay area, along California's Central Coast, in California's Central Valley, and in Southern
9 California. Each of the members of the State Contractors holds a valid contract with the State of
10 California to receive water from the SWP, and together they deliver that water to more than
11 750,000 acres of agricultural lands and 25 million people who live and work within their service
12 areas.

13 6. Defendant Department of the Interior is a department of the United States
14 Government, established by statute and charged with, *inter alia*, the responsibility for
15 administering federal programs under the ESA.

16 7. Defendant Kenneth L. Salazar is the Secretary of the Department of the Interior
17 ("Interior Secretary"). The Interior Secretary is responsible, under the ESA, for consulting with
18 federal agencies regarding any action authorized, funded, or carried out by such "action" agency
19 that may effect (or could jeopardize) the continued existence of any threatened or endangered
20 species or result in the destruction or adverse modification of critical habitat of any threatened or
21 endangered species under the jurisdiction of the Service.

22 8. Defendant United States Fish and Wildlife Service is an agency under the DOI to
23 which the DOI has delegated its responsibility for administration of the ESA.

24 9. Defendant Rowan W. Gould is Acting Director of the Service and is,
25 consequently, responsible for administering the ESA.

26 10. Real Party in Interest California Department of Water Resources ("DWR") is an
27 agency of the State of California created pursuant to California Water Code section 120 et seq.
28 and is charged with various duties and responsibilities, including operation of the SWP and

1 entering into and administering contracts for SWP water on behalf of the State of California.

2 11. Real Party in Interest Lester Snow is the Director of DWR and is, consequently,
3 responsible for operation and administration of the SWP.

4 12. Plaintiff does not know the true names and capacities of Defendants designated as
5 Does 1 through 5, inclusive. Plaintiff is informed and believes and thereupon alleges that each of
6 the Defendants sued as Does 1 through 5, inclusive, has, or claims to have, an interest in the
7 subject matter of this litigation.

8 **FACTUAL BACKGROUND**

9 **OPERATIONS OF THE STATE WATER PROJECT**

10 13. The State Water Project is owned by the State of California and is operated by
11 Real Party in Interest DWR. The SWP is the largest state-operated water supply project in the
12 United States and includes 32 storage facilities, reservoirs and lakes; 17 pumping plants; 3
13 pumping-generating plants; 5 hydroelectric power plants; and about 660 miles of pipelines and
14 open canals that collectively stretch from Oroville Reservoir, located on the Feather River in the
15 north, to Perris Reservoir, located in Riverside County in the south. Twenty-nine regional and
16 local public water supply agencies established under the laws of the State of California, including
17 each of the twenty-seven members of the State Contractors, have contracted with the State of
18 California for a supply of water from the SWP. These public agencies, in turn, supply
19 agricultural and urban water to about 750,000 acres of the State's richest irrigated farmland and
20 25 million people located in the San Francisco Bay Area, the San Joaquin Valley, the Central
21 Coast, and Southern California.

22 14. By means of pumping facilities located near Tracy, California, water is pumped by
23 the SWP from the southern end of the Delta for transmittal to end users in the Southern San
24 Francisco Bay Area via the South Bay Aqueduct, and in the San Joaquin Valley, along the
25 Central Coast, and in Southern California via the California Aqueduct. Particularly during the
26 winter months, when water is not generally needed for agricultural uses, SWP facilities pump
27 water from the Delta for transport to and storage in San Luis Reservoir, a joint use facility shared
28 by the State with the federal Government that is located near the City of Los Banos. Such water

1 is stored in San Luis Reservoir until it is needed for irrigation, municipal, and other uses during
2 the summer months.

3 15. During the past two years, DWR has been able to deliver only a small fraction of
4 the SWP water for which the members of the State Contractors hold water supply contracts. On
5 October 29, 2008, DWR issued a notice to its contractors, including each of Plaintiff's members,
6 indicating that initial SWP allocations for 2009 will only be 15 percent of contractual
7 entitlements. The notice advised DWR's contractors that hydrologic conditions in 2008 have
8 resulted in a "critically dry" water year in both the Sacramento and San Joaquin regions and that
9 SWP storage conditions going into the 2009 water year, as a result, are far below average. A true
10 and correct copy of DWR's notice to its water supply contractors is attached as Exhibit "2" to
11 Plaintiff's RJN. On February 27, 2009, the Governor of California declared a formal State of
12 Emergency to "combat California's third consecutive year of drought." A true and correct copy
13 of the Governor's Emergency Proclamation is attached as Exhibit "3" to Plaintiff's RJN.

14 16. Because delta smelt reside in the Delta, and because the SWP exports water from
15 the Delta, the BiOp's restrictions that are purportedly required to protect delta smelt will result in
16 operational limitations upon the SWP. As a result of Defendants' improper actions and failure to
17 use the best available scientific data in developing the BiOp, the State Contractors and its member
18 agencies will receive significantly less SWP water pursuant to their water supply contracts.

19 17. Unless Plaintiff's prayer for relief is granted and the BiOp's restrictions are
20 declared invalid, the State Contractors' interest in SWP water supplies will be adversely affected
21 and irreparably injured by Defendants' unlawful actions.

22 **BACKGROUND REGARDING THE DELTA SMELT AND**
23 **THE BIOLOGICAL OPINION**

24 18. The delta smelt (*Hypomesus transpacificus*) is a small pelagic fish, two- to three-
25 inches long, that is endemic to the Delta. It was listed under both the ESA and the California
26 Endangered Species Act in 1993. 58 Fed. Reg. 12854 (March 5, 1993). In July 2004, Defendant
27 Service issued a Long-Term Operations Criteria and Plan Biological Opinion ("2004 BiOp") on
28 the effect of continuing SWP and CVP operations on the delta smelt.

1 19. A coalition of environmental organizations challenged the 2004 BiOp's
2 conclusions regarding the effect of CVP and SWP operations on the delta smelt. In response, the
3 Service issued an amended biological opinion in February 2005 ("2005 BiOp"), and the plaintiffs
4 amended their complaint to challenge the amended biological opinion. In May 2007, the Federal
5 District Court for the Eastern District of California, in *NRDC v. Kempthorne*, *supra*, invalidated
6 the 2005 BiOp. However, the Court declined to vacate the 2005 BiOp because of concerns that
7 doing so would terminate the delivery of water to the service areas of the CVP and SWP. The
8 federal court ordered the parties to propose modifications to CVP and SWP operations to protect
9 the delta smelt while a new biological opinion was being prepared. The parties disagreed about
10 the flow restrictions and other measures to be undertaken during the interim period to protect the
11 species. After a multi-week trial on the issue of interim remedies, on August 31, 2007, the court
12 issued an oral decision ordering restrictions on CVP and SWP operations until a new biological
13 opinion could be prepared. On December 14, 2007, the federal court issued an Interim Remedial
14 Order Following Summary Judgment and Evidentiary Hearing ("*Kempthorne* Remedies"), which
15 ultimately had the effect of restricting CVP and SWP operations and reducing the amounts of
16 water deliveries made from the projects to urban and agricultural users throughout the State. The
17 *Kempthorne* Remedies had the effect of reducing SWP exports during the 2007-2008 water year
18 by approximately 500 thousand acre-feet ("TAF"). Total reductions of SWP and CVP exports,
19 combined, was about 700 TAF as a result of the *Kempthorne* Remedies. The federal court also
20 determined that "[a] preponderance of the evidence supports the conclusion that the Delta smelt is
21 presently being adversely affected by several environmental factors," including but not limited to
22 the CVP and SWP, but that the evidence did "not establish that there is a single efficient
23 proximate cause that is solely responsible for the decline of the Delta smelt." *NRDC v.*
24 *Kempthorne*, 66 ERC (BNA) 1891, (Findings, ¶ 8).

25 20. The *Kempthorne* court directed that a new FWS biological opinion be issued by
26 Defendants. After requesting and receiving an extension of time to do so, Defendants issued their
27 new BiOp on December 15, 2008. The 2008 BiOp issued by Defendants now concludes that the
28 operations of the SWP and CVP proposed in the OCAP will "jeopardize" the continued existence

1 of the delta smelt. *Inter alia*, the BiOp provides: “[I]t is the Service’s biological opinion that the
2 coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued
3 existence of the delta smelt.” BiOp at 276. The BiOp further states: “[T]he Service concludes
4 that the effects of the proposed action, taken together with cumulative effects, are likely to
5 appreciably reduce the likelihood of both the survival and recovery of delta smelt in the wild by
6 reducing its reproduction, abundance, and distribution.” BiOp at 278.

7 21. In addition to now finding that proposed SWP and CVP operations will jeopardize
8 the delta smelt, the BiOp concludes that such operations will adversely modify critical habitat for
9 the species. With respect to critical habitat, the BiOp states: “[I]t is the Service’s biological
10 opinion that the coordinated operations of the CVP and SWP, as proposed, are likely to adversely
11 modify delta smelt critical habitat” (BiOp at 278), and “the Service concludes that
12 implementation of the proposed action is likely to prevent delta smelt critical habitat from serving
13 its intended conservation role.” BiOp at 279.

14 22. For the reasons described herein, the new BiOp is legally defective because it does
15 not comply with the requirements of the ESA, NEPA or the APA.

16 **FIRST CLAIM FOR RELIEF**

17 **Against All Defendants for Violation of the Administrative Procedure Act for Failure to** 18 **Comply with Requirements of the ESA to Use Best Available Scientific Data**

19 23. Plaintiff realleges and incorporates, as if fully set forth herein, each and every
20 allegation contained in paragraphs 1 through 22, inclusive, of this Complaint.

21 24. Section 7(a)(2) of the ESA provides that federal agencies “*shall* use the best
22 scientific and commercial data available” in ensuring actions authorized, funded, or carried out by
23 a federal agency do not jeopardize the continued existence of any endangered species. 16 U.S.C.
24 § 1536(a)(2); emphasis added; *see also Bennett v. Spear*, 520 U.S. 154, 176 (1997); 50 C.F.R.
25 § 402.14(g)(8). “The obvious purpose of the requirement that each agency ‘use the best scientific
26 and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the
27 basis of speculation or surmise.” *Bennett*, 520 U.S. at 176. An additional purpose of the
28 requirement that the best available scientific data be used is to protect the economic interests of

1 parties adversely affected by erroneous biological opinions, which interests are also protected by
2 the ESA and the APA. *Id.* at 177-78. Even where federal agencies are afforded discretion in
3 making determinations, that “does not confer discretion to ignore the required procedures of
4 decisionmaking,” including the requirement to use the best available science. *Id.* at 172, *citing*
5 *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). Thus, in preparing and approving the BiOp,
6 Defendants were required to use the best available scientific data. Defendants failed to do so.

7 25. Over a lengthy period of time prior to issuance of the BiOp, Plaintiff engaged in
8 repeated efforts to provide Defendants with the best available scientific data related to the delta
9 smelt. Plaintiff participated in the process to develop the Biological Assessment, and submitted
10 multiple comment letters to Defendants regarding the best available scientific data relevant to the
11 analyses and conclusions in the BiOp, including October 20, 2008 and November 19, 2008 letters
12 submitted by the State Contractors and San Luis Delta-Mendota Water Authority, true and correct
13 copies of which are attached hereto as Exhibit “A” and Exhibit “B,” respectively.

14 26. Defendants ignored Plaintiff’s efforts and failed to use the best available scientific
15 data in multiple ways. As described further below, Defendants (1) disregarded relevant data
16 without explanation and arbitrarily selected the data they did rely upon; (2) based their analyses
17 on data that was incorrect and/or incomplete; (3) reached conclusions that are internally
18 inconsistent; (4) failed to disclose what data or reports were relied upon, or relied on reports that
19 were and are unavailable for review; (5) relied on unsupported speculation rather than data or
20 analysis; and (6) displayed a pervasive bias against the SWP and CVP, to the exclusion of all
21 other potential stressors (i.e., causes of harm) to delta smelt.

22 27. Defendants failed to use the best available scientific data in that they disregarded
23 relevant data without explanation and arbitrarily selected certain other data in reaching the BiOp’s
24 conclusions. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (stating “the FWS
25 cannot ignore available biological information”); *Kern County Farm Bureau v. Allen*, 450 F.3d
26 1072, 1080-81 (9th Cir. 2006). Thus, for example:

27 a. The BiOp disregards, with no explanation, the conclusions reached by the
28 same experts and studies it relies upon in other portions of the BiOp. *See Ecology Ctr.*,

1 *Inc. v. United States Forest Service*, 451 F.3d 1183, 1193 (10th Cir. 2006) (agency cannot
2 claim something is the best available science and then disregard its conclusions). For
3 instance, the BiOp relies on certain studies throughout, including studies produced by
4 Manly and Chotkowski, as well as Kimmerer, and cites these studies as concluding that
5 entrainment (and salvage) of delta smelt at the SWP and CVP pumps has no significant
6 effect on delta smelt abundance. BiOp at 159 (“entrainment is not a substantial source of
7 mortality every year”); BiOp at 210 (“currently published analyses of long-term
8 associations between delta smelt salvage and subsequent abundance do not support the
9 hypothesis that entrainment is driving population dynamics ...”). *See also* November 19,
10 2008 letter submitted by the State Contractors and San Luis Delta-Mendota Water
11 Authority at 4-9, Exh. B hereto. However, the BiOp subsequently disregards the
12 conclusions of these studies or experts, or both, and determines that entrainment (and
13 salvage) by the pumps *is* important to delta smelt population abundance. BiOp at 163,
14 189, 190, 209, 211.

15 b. The BiOp disregards, with no explanation, the scientific data and analyses
16 submitted by water users, including Plaintiff. Plaintiff submitted substantial evidence
17 showing that the location of X2 is not an important factor affecting delta smelt abundance.
18 *See* October 20, 2008 Letter from the State Contractors and San Luis & Delta-Mendota
19 Water Authority at 1-7 and Attachment 1 (David Fullerton, *Fall X2 and Ammonia*
20 *Correlations with Delta Smelt Abundance* (September 24, 2008), Exh. A hereto;
21 November 19, 2008 State Contractors’ Letter at 9-10, Exh. B hereto. The conclusion that
22 the location of X2 is *not* an important factor affecting delta smelt population abundance is
23 further supported by the same experts Defendants *did* rely upon, who independently
24 concluded that “abundance of delta smelt did not vary with X2.” *See, e.g.*, Kimmerer,
25 et al., *Is the Response of Estuarine Nekton to Freshwater Flow in the San Francisco*
26 *Estuary Explained by Variation in Habitat Volume?* at 11 (Nov. 2008). A true and correct
27 copy of the November 2008 Kimmerer article is attached hereto as Exhibit “C.” Despite
28 this substantial scientific evidence, the BiOp concludes, without substantial scientific

1 support, that the location of X2 is an important factor affecting delta smelt abundance.
2 BiOp at 234-36, 373.

3 c. The BiOp also disregards, with no explanation, scientific data and analyses
4 submitted by water users, including Plaintiff, showing that no relationship exists between
5 downstream *Pseudodiaptomus*¹ densities and SWP exports. See November 19, 2008
6 State Contractors letter at 3, 11-13, Exh. B hereto. Despite this evidence, and without
7 substantial scientific support or analysis or acknowledgment of conflicting scientific data,
8 the BiOp concludes just the opposite, viz., that a relationship exists between downstream
9 *Pseudodiaptomus* densities and SWP exports. BiOp at 228.

10 d. The BiOp disregards, with no explanation, prey data that contradict the
11 BiOp's conclusions. While the BiOp concludes that moving delta smelt downstream
12 would be beneficial (BiOp at 159), the best available scientific data indicate that densities
13 of key prey species are generally low throughout the Delta but, in fact, are higher
14 *upstream* than downstream, contradicting the BiOp's unsupported conclusion. (CDFG
15 unpublished monthly zooplankton data.)

16 e. The BiOp concedes that "stressors" in the Delta, other than the water
17 projects, may be impacting the delta smelt population. See, e.g., BiOp at 172-173, 182-
18 188. Despite this admission and the availability of substantial scientific data about the
19 impacts of these non-Project related stressors, the BiOp fails to perform any analysis to
20 quantify the effects of these other factors on delta smelt abundance or to compare the
21 effects of these stressors upon delta smelt with the impacts of the water projects. See
22 BiOp at 182-188 (admitting that other stressors such as predation, competition, disease,
23 food limitation, and contamination may be affecting delta smelt but declining to analyze
24 the effects of those stressors). Plaintiff also submitted scientific data that illustrate these
25 other factors contribute substantially to delta smelt abundance, but this scientific data was
26 disregarded by Defendants in the BiOp without explanation. For example, the best
27 available scientific data show a significant correlation between ammonia concentrations in

28 ¹ *Pseudodiaptomus* is one of the primary food sources for delta smelt. BiOp at 149, 151.

1 the Delta and delta smelt abundance, while relevant scientific data show that a less
2 significant relationship exists between SWP and CVP water exports from the Delta and
3 delta smelt abundance. *See* David Fullerton, *Fall X2 and Ammonia Correlations with*
4 *Delta Smelt Abundance*, Attachment 1 to Exh. A hereto; *see also* DWR, Potential Actions
5 to Reduce SWP Impacts on Delta Smelt and Listed Salmonids at 8-9 (Oct. 14, 2008), a
6 true and correct copy of which is attached as Exhibit “4” to Plaintiff’s RJN. Rather than
7 quantifying the effects of factors other than the SWP and CVP operations and comparing
8 the relative impacts of those effects to the SWP and CVP (or adding the effects of those
9 other stressors to the environmental baseline), the BiOp merely concludes, without
10 supporting scientific evidence or explanation, that the SWP and CVP are responsible for
11 the decline of the delta smelt. *See, e.g.*, BiOp at 189.

12 f. The BiOp *assumes*, without the support of best available scientific data,
13 that entrainment is measured by salvage and that a correlation exists among reverse flows
14 in Old and Middle Rivers (“OMR”), salvage and delta smelt abundance in the following
15 year. *See, e.g.*, BiOp at 159-162, 286. Indeed, the BiOp states, without justification, that
16 increasingly negative OMR flows in one year will cause increasingly diminished numbers
17 of delta smelt the following year. BiOp at 159, 163, 166. In doing so, Defendants fail to
18 acknowledge the best available scientific data, including data submitted by Plaintiff, that
19 demonstrate the lack of a statistically significant relationship between salvage, OMR
20 flows and delta smelt population abundance in the following year. *See* November 19,
21 2008 State Contractors’ letter at 2, Exh. B hereto. Moreover, Defendants’ assumption
22 leaves out numerous available scientific data points. It further fails to account for the 50-
23 fold decrease in delta smelt abundance that naturally occurs in many years between the
24 summer and fall periods. The available scientific data submitted by Plaintiff include
25 uncontradicted data showing that the Fall Midwater Trawl Index of delta smelt abundance
26 *increased* in many years following high levels of delta smelt salvage and in many
27 instances decreased following years of *lower* delta smelt salvage. Without explanation,
28 these data were disregarded by Defendants. Further, in concluding that OMR flows are

1 directly related to SWP and CVP salvage of delta smelt, the BiOp fails to adequately
2 address available scientific data submitted by DWR in *NRDC v. Kempthorne* that show
3 the non-linearity of salvage versus OMR flows. True and correct copies of the DWR
4 graphs containing this data are attached as Exhibit “5” to Plaintiff’s RJN. Moreover, the
5 BiOp disregards, without explanation, conclusions referenced in the BiOp and supported
6 by the best available scientific data that the effects of SWP and CVP operations on the
7 population abundance of delta smelt are episodic and relatively small. *See, e.g.,*
8 *Kimmerer, Losses of Sacramento River Chinook Salmon and Delta Smelt to Entrainment*
9 *in Water Diversions in the Sacramento-San Joaquin Delta* at 25 (June 2008). A true and
10 correct copy of the June 2008 Kimmerer article is attached hereto as Exhibit “D.” The
11 salvage of delta smelt at the SWP and CVP export facilities can be expected to vary
12 according to a number of factors, including hydrodynamics in the Delta, population
13 abundance and geographic distribution of the species in the estuary. The analysis
14 undertaken by Defendants considers only one of these factors, viz., Delta hydrodynamics.
15 It ignores all other factors, including population abundance at the time salvage is
16 measured, and geographic distribution within the estuary. Furthermore, the BiOp presents
17 no analysis of the importance of delta smelt salvage to subsequent population abundance
18 or “jeopardy” of the species. Nor did Defendants consider the number of salvaged delta
19 smelt that would have otherwise perished due to high temperature, predation, or other
20 factors unrelated to SWP and CVP operations. Without accounting for the actual
21 abundance of delta smelt throughout the estuary, or the presence or absence of high
22 temperature, predation or other non-Project factors, the conclusion that OMR flows and
23 salvage cause impacts to the population abundance of delta smelt is meaningless and is
24 not based on the best available scientific data.

25 g. In finding a purported correlation between OMR flows and salvage, the
26 BiOp improperly and arbitrarily excludes available scientific data from years with low
27 salvage as well as scientific data obtained in years when the December through March
28 average turbidity was less than 12 Nephelometric Turbidity Units. BiOp at 164. This

1 results in an exclusion of about 30 percent of the data points from Defendants’ “analysis”
2 of the relationship between OMR flows, salvage and delta smelt abundance. If all of the
3 available scientific data were used – as they were during DWR’s presentation of the same
4 data during the *Kemphorne* interim remedy proceedings and as they should have been in
5 the BiOp – the resulting analysis would show that the salvage of delta smelt at the SWP
6 and CVP pumps is unlikely to have any significant effect upon population abundance.
7 BiOp at 281; *see also Kemphorne, supra*, 66 ERC (BNA) 1891, (Findings, ¶ 38).
8 Instead, a key determinant of salvage is the occurrence of high turbidity when OMR
9 reverse flows are also high, a correlation supported by scientific data that were presented
10 to, but ignored by, Defendants.

11 28. Defendants’ use of data that are incorrect, incomplete or incompatible with other
12 scientific data, and the resulting assumptions in the BiOp that are based upon these data are
13 scientifically unsupportable and constitute a failure to use the best available scientific data in
14 violation of ESA requirements. Thus, for example:

15 a. The BiOp assumes a correlation exists between the number of delta smelt
16 entrained in the pumps in a particular year and the abundance of delta smelt the following
17 year. *See, e.g.*, BiOp at 222 (“increase[d] larval-juvenile entrainments will have an
18 adverse effect on delta smelt based on their current low population levels” [no citation]).
19 However, the BiOp admits that scientific data developed by the same studies or experts
20 (or both) that it relies upon for a connection between entrainment and salvage losses and
21 population abundance demonstrate there is *no statistically significant relationship*
22 between the number of delta smelt estimated to have been lost at the SWP and CVP
23 pumps and delta smelt abundance in the following year. BiOp at 210 (“currently
24 published analyses of long-term associations between delta smelt salvage and subsequent
25 abundance do not support the hypothesis that entrainment is driving population dynamics
26 year in and year out” [citing Bennett 2005; Manley and Chotkowski 2006; Kimmerer June
27 2008]). Available scientific data and analyses submitted by Plaintiff, but disregarded by
28 Defendants without explanation, demonstrate that no statistically significant correlation

1 exists between the number of delta smelt salvaged in the pumps in a particular year and
2 the abundance of delta smelt the following year.

3 b. The BiOp concludes “a larger habitat area ... presumably lessens the
4 likelihood of density-dependent effects (e.g. food availability) on the delta smelt
5 population.” BiOp at 234. However, available scientific data presented in a report
6 prepared by one of the experts hired by the Service to “peer review” portions of the BiOp
7 shows this assumption is scientifically unsupported. See November 2008 Kimmerer
8 article at 11-12, Exh. C hereto (concluding that the extent of physical habitat is *unrelated*
9 to the abundance of delta smelt).

10 c. The BiOp concludes “it is becoming increasingly clear that the long-term
11 decline of delta smelt has been affected by ecosystem changes caused by non-indigenous
12 species invasions and other non-CVP/SWP factors, [but] the CVP and SWP have played
13 an important direct role in that decline.” BiOp at 189. The BiOp refers to no scientific
14 data to support this contention. However, available scientific data showing the opposite
15 conclusion are included in a report that is referenced in the BiOp, *viz.*, that SWP and CVP
16 operations have a minor effect upon the abundance of delta smelt. These same data show
17 that, by comparison, non-Project causes result in a 50-fold decrease in smelt abundance
18 between the summer and fall. June 2008 Kimmerer article at 25, Exh. D hereto. These
19 scientific data were disregarded by Defendants without explanation.

20 d. The BiOp makes numerous assumptions, without adequate supporting
21 scientific data, to conclude a relationship exists between the location of X2 and delta smelt
22 abundance the following year. See, e.g., BiOp at 234-236. However, available scientific
23 data presented in a November 2008 Report by Kimmerer – one of the principal experts
24 relied upon by Defendants – show that no such relationship exists. November 2008
25 Kimmerer article at Table 2 and 6, 8, 11, Exh. C hereto (“abundance of delta smelt did not
26 vary with X2”). Kimmerer’s data regarding the lack of a relationship between delta smelt
27 abundance and the location of X2 are the best available data, yet were disregarded by
28 Defendants without explanation.

1 e. The BiOp concludes that an increased amount of habitat would have a
2 positive impact on the abundance of delta smelt. This conclusion, however, is
3 unsupported by any scientific data and is contradicted by scientific data presented in the
4 November 2008 Kimmerer Report, which concludes that “[d]espite the evident increase in
5 the amount of habitat, delta smelt abundance appears to be regulated by other factors so
6 far unidentified” November 2008 Kimmerer article at 11, Exh. C hereto.

7 f. The BiOp contains no scientific data to support its conclusion that limiting
8 take in accordance with the formula of 7.25 times the prior year’s FMWT index (BiOp at
9 287), rather than some larger number, is necessary to prevent jeopardy.

10 g. The BiOp’s conclusion that SWP and CVP pumping causes “jeopardy”
11 (BiOp at 276) is not supported by any scientific data showing that pumping by either or
12 both projects has a statistically significant population level effect on delta smelt or
13 otherwise jeopardizes its continued existence. Instead, through the BiOp, Defendants
14 impose an unsupported regulatory requirement that the SWP and CVP must be operated to
15 limit entrainment at the pumps to less than 1 percent of smelt in the central or southern
16 Delta, regardless of the proportion that such fish bear to the population abundance of delta
17 smelt. BiOp at 360. The BiOp cites no scientific data to show how this number was
18 calculated or that such a limitation is necessary to prevent jeopardy to the species.

19 h. Defendants’ preparation of the BiOp’s effects “analysis” is in direct
20 conflict with the explanation provided by Reclamation and DWR in the Biological
21 Assessment (“BA”) regarding the limits and proper uses of the modeling data.
22 Defendants fail to adequately explain their refusal to follow the recommendations of
23 Reclamation and DWR in this regard. *See* 50 C.F.R. § 402.02 (defining “Effects of the
24 Action”); BA at 9-32, 9-33. True and correct copies of excerpts of the BA are attached as
25 Exhibit “6” to Plaintiff’s RJN. Without adequate scientific or technical justification, the
26 BiOp misapplies and disregards the operational parameters and related modeling of the
27 CVP and SWP as described in the BA. BiOp at 206. For example:
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i. The BiOp fails to justify its comparison of monthly or seasonal results of scenarios *simulated* by models to baselines of *actual* historical monthly salvage to estimate the effects of proposed CVP and SWP operations on delta smelt entrainment. The Peer Review commissioned by Defendants to review portions of the draft BiOp expressly cautioned against using such mixed historic and simulated conditions. A true and correct copy of the “Independent Peer Review of USFWS’ Draft Effects Analysis of the [OCAP] Biological Opinion” (Oct. 28, 2008) is attached as Exhibit “7” to Plaintiff’s RJN. Notwithstanding, Defendants disregarded the comments of the peer reviewers, without explanation.

ii. The BiOp purports to “analyze” the effects of proposed project operations against an arbitrary, poorly described and incorrect “empirical baseline,” rather than the “Section 7.0” CALSIM-II modeling run DWR and Reclamation described in the BA. BiOp at 204, 206.

i. The BiOp concludes that increased demand for “Article 21” water by SWP Contractors since 2000 corresponds to “recent declines in the delta smelt population,” “contributes to habitat degradation,” and “would contribute to higher larval-juvenile entrainment” of delta smelt than what occurred from 1995-2007. BiOp at 215. This conclusion is contrary to the explanation in the Biological Assessment, based upon the best available scientific data, that overall delivery of water from the two projects “remains largely the same” because previous versions of the relevant modeling “overestimate[d] the delivery of Table A and underestimate[d] the delivery of Article 21 water by a like amount.” BA at 9-55, RJN Exh. 6. The BiOp makes no attempt to reconcile its assumptions about the effect of Article 21 water deliveries with the available scientific data presented in the BA.

1 29. Defendants acted arbitrarily and failed to use the best available science, as
2 demonstrated by the BiOp's internally inconsistent conclusions and citation to the same science to
3 support different, contradictory conclusions. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th
4 Cir. 1988); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (an agency
5 is afforded no deference when it ignores, rather than utilizes, the analysis of its own experts).
6 Thus, for example:

7 a. The BiOp acknowledges that multiple stressors, such as ammonia and other
8 contaminants, food limitation, predation, the introduction of non-native species, and other
9 factors, have adverse impacts to delta smelt. *See, e.g.*, BiOp at 182-188, 245-46; *see also*
10 *NRDC v. Kempthorne, supra*, 66 ERC (BNA) 1891, (Findings, ¶ 8) ("The evidence does
11 not establish that there is a single efficient proximate cause that is solely responsible for
12 the decline of the Delta smelt"). Despite this acknowledged existence of substantial
13 scientific data showing adverse impacts to the delta smelt population due to these other
14 stressors, the BiOp states that the incremental contributions of these other stressors is
15 generally unknown, but nevertheless concludes that past SWP and CVP operations are
16 primarily responsible for the decline of the species. *See, e.g.*, BiOp at 182-189.

17 b. The BiOp states there is no evidence showing a direct and empirical causal
18 relationship between the decline of the delta smelt and any one of the non-project
19 stressors, such as competition from introduced fish species, pollution, predation, high
20 ammonia concentrations/resulting alga blooms, and temperature. *See, e.g.*, BiOp at 153
21 (thresholds of toxicity for delta smelt undetermined), BiOp at 183 (impacts of predation
22 by striped bass unknown; no empirical evidence exists showing that competition between
23 species influences delta smelt abundance), BiOp at 186 (studies on algae bloom impacts
24 on delta smelt underway, no existing evidence), BiOp at 186-87 (contaminant impacts
25 unknown), BiOp at 187 (effect from exposure to pesticides unknown). The BiOp uses this
26 purported lack of empirical evidence and conflicting information to conclude that these
27 stressors *do not merit further analysis* because their impacts are ultimately unknown.
28 However, the BiOp also concedes that SWP and CVP impacts on delta smelt are not fully

1 understood. *See, e.g.*, BiOp at 163 (entrainment has been *suspected* as a contributing
2 cause of delta smelt decline), BiOp at 163 (operational changes *may* have contributed to a
3 shift in Delta hydrodynamics affecting fish), BiOp at 145 (data on entrainment is
4 *extrapolated* from *periodic* sampling of fish), BiOp at 147 (information about delta smelt
5 spawning impacts are *inferred* due to a lack of data from wild fish), BiOp at 159 (studies
6 showing that entrainment is *not* a substantial source of mortality every year). The BiOp
7 uses this purported lack of empirical evidence and conflicting information to conclude that
8 SWP and CVP operations *do merit further analysis* because their impacts significantly
9 contribute to the delta smelt decline. BiOp at 152, 159, 276. In short, Defendants rely on
10 uncertainty and purported lack of empirical evidence to discount all non-project stressors
11 while at the same time, utilizing the uncertainty and lack of empirical evidence about
12 project impacts to conclude that project operations *do have* a significant effect on delta
13 smelt. This diametrically different use of scientific uncertainty and a lack of data to
14 support opposite conclusions renders the BiOp internally inconsistent and constitutes a
15 failure to use the best available scientific data.

16 c. The BiOp concludes that entrainment (and salvage) in the SWP and CVP
17 pumps is an important factor in delta smelt population abundance. *See, e.g.*, BiOp at 331
18 (citing Kimmerer June 2008 for the proposition that entrainment impacts on delta smelt
19 can be substantial). However, the BiOp also cites Kimmerer, as well as Manly and
20 Chotkowski (BiOp at 159, 210) as concluding that entrainment in the SWP and CVP
21 pumps, at best, has a small and sporadic effect upon delta smelt population abundance.
22 Moreover, the BiOp completely ignores statements by one of these same experts that
23 project pumping makes “little difference to fall abundance in the context of the
24 approximately 50-fold variation in summer-fall survival” June 2008 Kimmerer article
25 at 25, Exh. D hereto.

26 30. The BiOp is not based on the best *available* science because it does not disclose
27 the data, information, or source relied upon as the basis for its conclusions, or the source was not
28 available to the public. *Am. Wildlands v. Kempthorne*, 382 U.S. App. D.C. 78, 85 (D.C. Cir.

1 2008) (the best available science concept “requires . . . that data be attainable”). Thus, for
2 example:

3 a. The BiOp expressly relies upon scientific sources of data that were
4 unavailable at the time the BiOp was published. *See, e.g.*, BiOp at 163 (referencing
5 “unpublished data” of P. Smith and a draft “accepted manuscript” by Grimaldo et al.),
6 BiOp at 170 (referencing Bennett unpublished analysis), BiOp at 303 (referencing
7 Kimmerer “in prep Draft report”), BiOp at 306 (referencing Nobriga and Feyrer report “in
8 press”), BiOp at 307 (referencing “Slater Steven unpublished data California Department
9 of Fish and Game”), BiOp at 308 (“Sullivan et al., unpublished information”), BiOp at
10 310 (several personal communications). Many of these data sources remain unavailable
11 for review.

12 b. The BiOp states that entrainment impacts are “sporadically significant”
13 with respect to delta smelt abundance based on periodic measurements and extrapolated
14 datasets. BiOp at 145, 210. However, the BiOp fails to disclose what these measurements
15 were, during what time periods the measurements were taken, or how “sporadically
16 significant” effects would not be detected in statistical analyses of year-to-year effects on
17 a fish with a one-year life cycle.

18 31. The BiOp utilizes extensive, unsupported speculation as a basis for many of its
19 conclusions. This violates the ESA because, “while the [agency] can draw conclusions based on
20 less than conclusive scientific evidence, it cannot base its conclusions on no evidence.” *Pac.*
21 *Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094-95 (9th
22 Cir. 2005); *Nat'l Ass'n. of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003). Thus, for
23 example:

24 a. The BiOp states that: “The movement of water in the summer and fall *may*
25 have negatively influenced habitat suitability and prey availability” (BiOp at 166);
26 “[d]isconnecting inflow and outflow via water exports *probably* represents the single
27 largest stressor for this primary constituent element” (BiOp at 197); “VAMP [Vernalis
28 Adaptive Management Plan] flows *are thought to* have selectively enhanced survival of

1 delta smelt larvae” (BiOp at 200); “[o]ur analysis also *assumes* that any of these three
2 major categories of effects described above will adversely affect delta smelt” (BiOp at
3 203); “[f]ish that may become trapped upstream of the TBP agricultural barriers *may*
4 suffer increased vulnerability to local agricultural diversions” (BiOp at 226; emphasis
5 added). *See also, e.g.*, BiOp at 174, 226, 234, BiOp at 163 (entrainment has been
6 *suspected* as a contributing cause of delta smelt decline), BiOp at 163 (operational
7 changes *may* have contributed to a shift in Delta hydrodynamics affecting fish), BiOp at
8 145 (data on entrainment is *extrapolated* from *periodic* sampling of fish), BiOp at 147
9 (information about delta smelt spawning impacts are *inferred* due to a lack of data from
10 wild fish), BiOp at 238 (citing *unpublished* data of Jan Thompson).

11 b. The BiOp states repeatedly that delta smelt spawning and eggs have never
12 been observed in the wild. *See, e.g.*, BiOp at 147-148. Despite this admission of a total
13 lack of scientific data, the BiOp nevertheless reaches conclusions regarding the impact of
14 the SWP pumps on delta smelt spawning and eggs. BiOp at 152-53, 158, 163.

15 32. The foregoing paragraphs demonstrate that bias forms the basis of much of the
16 BiOp. For example, when evidence is unclear or contradictory, the BiOp utilizes that lack of
17 evidence to *dismiss* non-project impacts to delta smelt, while at the same time using the same lack
18 of evidence as the basis for concluding that the SWP and CVP *will* have adverse impacts on the
19 species. *See, e.g.*, ¶ 29, above. Additionally, without reference to any available scientific data,
20 the BiOp concludes that invasive species have proliferated in areas of the Delta because SWP and
21 CVP operations have led to circumstances favoring that condition. BiOp at 189, 243. Further,
22 the BiOp recognizes that more than 2,200 other water diversions exist in the Delta besides the
23 SWP and CVP (BiOp at 172); that “the vast majority of these diversions do not have fish screens
24 to protect fish from entrainment” (BiOp at 172); and that the impacts of these other diversions
25 have not been studied, though they do entrain delta smelt (BiOp at 172, 174, 190, 202).
26 Nonetheless, the BiOp concludes that entrainment of delta smelt by these other diverters is either
27 negligible or – incredibly – is a result of SWP and CVP operations. BiOp at 159, 172, 202, 226,
28 238 (SWP operations will “increase the frequency with which delta smelt encounter unscreened

1 agricultural irrigation diversions in the Delta”).

2 33. Defendants’ failure to utilize the best available scientific data in preparing and
3 adopting the BiOp violates the ESA and the rule-making requirements of the APA. 5 U.S.C.
4 § 553(b), (c). Moreover, Defendants have failed to follow the applicable FWS Information
5 Standards Policy, DOI Information Quality Guidelines, FWS Information Quality Guidelines, and
6 FWS Scientific Code of Conduct. These errors, the analyses, reasoning, and conclusions of the
7 BiOp, and Defendants’ actions described herein, are arbitrary, capricious, an abuse of discretion,
8 not in accordance with the law, in excess of statutory authority, and without observance of
9 procedure required by law, in violation of Section 7 of the ESA and its implementing regulations,
10 and the standards of the APA. *See Northwest Ecosystem Alliance v. United States Fish &*
11 *Wildlife Service*, 475 F.3d 1136, 1148 (9th Cir. 2007), *citing Center for Biological Diversity v.*
12 *Lohn*, 296 F. Supp. 2d 1223, 1236-40 (W.D. Wash. 2003) (agency’s reliance on outdated science
13 or improper assumptions is arbitrary and capricious when the best available science shows these
14 to be incorrect).

15 34. Plaintiff has exhausted any and all administrative remedies required by law and
16 has performed any and all conditions precedent to the filing of this action.

17 35. Plaintiff’s interests have been, are, and will continue to be directly and adversely
18 affected by Defendants’ failures and unlawful actions.

19 36. Plaintiff has no plain, speedy or adequate remedy at law and, unless relief is
20 granted as prayed, Plaintiff’s interests in SWP water supplies will be adversely affected and
21 irreparably injured by Defendants’ unlawful acts.

22 **SECOND CLAIM FOR RELIEF**

23 **Against All Defendants for Violation of the Administrative Procedure Act (5 U.S.C. § 706**
24 **et seq.) for Failure to Make Findings or Undertake Analysis Regarding the Reasonable and**
25 **Prudent Alternative**

26 37. Plaintiff realleges and incorporates, as if fully set forth herein, each and every
27 allegation contained in paragraphs 1 through 36, inclusive, of this Complaint.

28 38. Under Section 7 of the ESA (16 U.S.C. § 1536(b)(3)(A)), if a biological opinion
finds that a proposed agency action will cause jeopardy to the species or result in the adverse

1 modification of its critical habitat, Defendants are required to suggest reasonable and prudent
2 alternatives (“RPAs”) to the proposed action that Defendants believe can be taken in
3 implementing the agency action and that will not cause jeopardy to the species or result in the
4 adverse modification of critical habitat. *See National Ass’n of Homebuilders v. Defenders of*
5 *Wildlife*, 551 U.S. 644, 127 S.Ct. 2518, 2526 (2007) (citing 16 U.S.C. § 1536(b)(3)(A) and 50
6 C.F.R. § 402.14(h)(3).) Pursuant to Section 7 of the ESA and title 50, parts 402.02 and 402.14(g)
7 of the Code of Federal Regulations – adopted to implement the ESA – if Defendants adopt a
8 “jeopardy” biological opinion, they are required to analyze their proposed RPAs to determine
9 whether: (1) the RPA can be implemented in a manner consistent with the intended purpose of
10 the agency action; (2) the RPA can be implemented consistent with the scope of the action
11 agency’s legal authority and jurisdiction; (3) the RPA is economically and technologically
12 feasible; and (4) the RPA will avoid the likelihood of jeopardizing the continued existence of
13 listed species or resulting in the destruction or adverse modification of its critical habitat.
14 50 C.F.R. §§ 402.02, 402.14(g).

15 39. Defendants expressly acknowledge the applicability of their implementing
16 regulations, including the requirements of an RPA, in the BiOp. BiOp at 279 (citing 50 C.F.R.
17 § 402.02). However, despite Defendants’ acknowledgement of the requirements for an RPA, the
18 BiOp fails to make any findings, undertake any analysis or otherwise determine whether the RPA
19 actually imposed satisfies the requirements of Section 7 of the ESA and the implementing
20 regulations Defendants themselves have adopted. Contrary to the requirements of Section 7 and
21 title 50, the BiOp makes no findings and undertakes no analysis of whether the sole RPA it adopts
22 “can be implemented in a manner consistent with the intended purpose” of DWR’s operation of
23 the SWP. *See* BiOp at 279. Nor does the BiOp make any findings or undertake any analysis of
24 whether DWR’s implementation of the RPA included in the BiOp is “economically or
25 technologically feasible.” Indeed, the BiOp shows that Defendants made no findings and
26 undertook no analysis *at all* of the RPA’s impacts on the SWP or CVP operations. Thus,
27 Defendants made no findings and undertook no analysis of whether the protection of adult or
28 larval/juvenile delta smelt, or the improvement of habitat for delta smelt growth and rearing as

1 required in the BiOp, can be accomplished consistently with the intended purpose of the SWP,
2 viz., to provide much needed water for the large majority of California's population. Nor did
3 Defendants make findings or undertake any analysis of the economic impact of the RPA upon
4 DWR or within the SWP service area. Defendants made no findings and undertook no analysis of
5 whether such economic impacts make the RPA economically infeasible or whether a more
6 economically feasible, less costly alternative exists that would prevent jeopardy. Defendants also
7 made no findings and undertook no analysis of whether there are feasible, less onerous
8 alternatives that will prevent jeopardy to delta smelt while better maintaining the intended
9 purpose of the SWP and CVP to provide water deliveries to the millions of Californians who
10 depend on the two projects for water for their homes, farms and businesses. See *Southwest Ctr.*
11 *for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 523 fn. 5 (9th Cir. 1998) (stating
12 the ESA does not limit the Secretary's analysis to apolitical considerations, and that if two
13 proposed RPAs would avoid jeopardy to a listed species, the Secretary must "choose the one that
14 best suits all of [the project's] interests, including political or business interests"). These failures
15 violate Section 7 of the ESA and Code of Federal Regulations, title 50, parts 402.02 and
16 402.14(g).

17 40. Failures by federal regulatory agencies to comply with applicable legal
18 requirements can be challenged under the Administrative Procedure Act. 5 U.S.C. § 706(2);
19 *Bennett v. Spear*, *supra*, 520 U.S. at 174-175.

20 41. As a result of the improper procedures used by Defendants in preparing and
21 approving the BiOp, including their failure to make findings or undertake any analysis regarding
22 compliance of the BiOp's reasonable and prudent alternative with the requirements of the
23 implementing regulations of the ESA, Plaintiff's members will receive significantly less water
24 pursuant to their water supply contracts than they would receive had Defendants complied with
25 applicable legal requirements.

26 42. Plaintiff has exhausted any and all administrative remedies required by law and
27 has performed any and all conditions precedent to the filing of this action.
28

1 Service is required to “evaluate the effects of the action and cumulative effects on the listed
2 species or critical habitat” and “formulate its biological opinion as to whether the action, taken
3 together with cumulative impacts, is likely to jeopardize the continued existence of listed species
4 or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. §§ 402.14(g)(3),
5 (g)(4), (h).

6 48. In determining whether a proposed Federal action will “jeopardize the continued
7 existence of a listed species,” the “relevant inquiry is whether the ‘action[’s] effects, when added
8 to the underlying baseline conditions,’ in the present and future human contexts, are cumulatively
9 such that they would cause jeopardy as that term is defined by law and agency regulation.” See
10 *Pacific Coast Federation of Fishermen’s Associations, et al. v. Gutierrez*, E.D. Cal. case no. 1:06-
11 CV-00245 (Findings of Fact and Conclusions of Law re the Existence of Irreparable Harm during
12 the Interim Period and Denying Plaintiffs’ Requests for Emergency Interim Remedies Regarding
13 Flows on Clear Creek and Gate Operations at Red Bluff Diversion Dam (Doc. 367) (“Gutierrez
14 Decision”), July 18, 2008, Conclusions of Law ¶ 47. A true and correct copy of the Gutierrez
15 Decision is attached as Exhibit 8 to Plaintiff’s RJN. By Service regulation, “jeopardize the
16 continued existence of means to engage in an action that reasonably would be expected, directly
17 or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed
18 species in the wild by reducing the reproduction, numbers or distribution of that species.”
19 50 C.F.R. § 402.02. The regulation, in turn, has been interpreted to mean that the proposed action
20 which is the subject of the consultation must be found to “considerably reduce” the abundance of
21 the listed species. Gutierrez Decision, Conclusions of Law ¶¶ 32.4, 32.5, RJN Exh. 8 (citing
22 Service’s Final ESA Section 7 Consultation Handbook (March 1998) at 4-34).

23 49. Section 7 of the ESA requires the Secretary to determine how the proposed agency
24 action affects the species or its critical habitat. 16 U.S.C. § 1536(b)(3)(A). Pursuant to the
25 regulations adopted to implement the consultation requirements of Section 7, the Secretary has
26 agreed that the “effects of the action” mean:

27 [T]he direct and indirect effects of an action on the species or
28 critical habitat, together with the effects of other activities that are
interrelated or interdependent with that action, that will be added to

1 the environmental baseline. The environmental baseline includes
2 the past and present impacts of all Federal, State, or private actions
3 and other human activities in the action area, the anticipated
4 impacts of all proposed Federal projects in the action area that have
5 already undergone formal or early Section 7 consultation, and the
6 impact of State or private actions which are contemporaneous with
7 the consultation in process. 50 C.F.R. § 402.02.

8 Further elaborating upon the requirements of Section 7, the Service's Final ESA Section 7
9 Consultation Handbook states that the "environmental baseline is a 'snapshot' of a species' health
10 at a specified point in time. It does not include the effects of the action under review in the
11 consultation." ESA Section 7 Consultation Handbook (March 1998), p. 4-22. The Consultation
12 Handbook further requires that, when determining the effect of ongoing water project operations,
13 the Service must structure its analysis so that:

14 The total effects of all past activities, including effects of the past
15 operations of the project, current non-Federal activities, and Federal
16 projects with completed section 7 consultations, form the
17 environmental baseline. To this baseline, future direct and indirect
18 impacts of the operation over the new license or contract period,
19 including effects of any interrelated and interdependent activities,
20 and any reasonably certain future non-Federal activities (cumulative
21 effects), are added to determine the total effect on listed species and
22 their habitat. ESA Section 7 Consultation Handbook pp. 4-28 to 4-
23 29, emphasis in original.

24 In addition, where a pre-existing dam has independent utility apart from the proposed project,
25 "[o]ngoing effects of the existing dam are already included in the Environmental Baseline and
26 would not be considered an effect of the proposed action under consultation." *Id.* at p. 4-27.

27 50. The BiOp issued by the Service on December 15, 2008 violates the requirements
28 of Section 7 of the ESA, title 50, C.F.R. sections 402.02 and 402.14, and the Service's Final ESA
29 Section 7 Consultation Handbook (March 1998), because Defendants failed to utilize the required
30 methodology to determine whether the proposed project will jeopardize the continued existence
31 of the delta smelt or destroy or adversely modify its critical habitat. Specifically, among other
32 failings:

33 a. The BiOp improperly describes the proposed agency action under ESA
34 review and fails to distinguish between the discretionary and nondiscretionary
35 components of SWP and CVP operations, including dam operations and actions required

1 to be implemented by DWR and the Bureau as a result of Decisions of the State Water
2 Resources Control Board. Certain aspects of the operation of the SWP and CVP, including
3 Project compliance with the water rights and water quality decisions and orders of the
4 State Water Resources Control Board, are *non-discretionary* as that term is utilized in
5 *Home Builders*. See Gutierrez Decision, Conclusions of Law ¶ 9, RJN Exh. 8. By failing
6 to distinguish the discretionary aspects of SWP and CVP operations from the non-
7 discretionary aspects of such operations, Defendants and the BiOp improperly attempt to
8 consult on the entirety of Project operations including those aspects of Project operations
9 that are non-discretionary.

10 b. The BiOp employs an environmental baseline that is not a “snapshot at a
11 specified point in time” and fails to evaluate the “past and present impacts of all Federal,
12 State, or private actions and other human activities in the action area, the anticipated
13 impacts of all proposed Federal projects in the action area that have already undergone
14 formal or early Section 7 consultation, and the impact of State or private actions which are
15 contemporaneous with the consultation in process” (50 C.F.R. § 402.02). Prior Project
16 operations that have already undergone formal Section 7 consultation should have been
17 included in the environmental baseline in the December 15, 2008 BiOp; instead, the BiOp
18 compares Project operations that are proposed as part of the OCAP to prior SWP and CVP
19 operations, including some operations that occurred more than 40 years ago. That is, the
20 BiOp improperly evaluates in its “Effects Analysis” – and inappropriately attributes to the
21 SWP and CVP – past and present impacts on the delta smelt of Federal, State or private
22 actions and other human activities in the action area that should have properly been
23 included in the environmental baseline. Similarly, and by way of example, on-going
24 human activities in the action area that have taken place for decades and involve the
25 discharge of toxic materials or the diversion of water by means of thousands of private
26 unscreened in-Delta diversions are not treated as part of the environmental baseline, but as
27 effects of the proposed Project. As a result, the BiOp inadequately describes the effects
28 on delta smelt of “other stressors” as they affect the environmental baseline. See BiOp,

1 pp. 172-174, 182-189.

2 c. The BiOp utilizes an “empirical baseline” that:

- 3 i. Demonstrably differs from that used in the biological assessment
4 without adequate explanation and is contrary to the
5 recommendations of Defendants’ own peer reviewers (BiOp,
6 p. 206; Peer Review at 5, RJN Exh. 7; and
7 ii. Compares monthly or seasonal results of scenarios simulated by
8 mathematical models to Defendants’ arbitrarily selected baseline of
9 actual historical monthly salvage to estimate SWP and CVP
10 entrainment of delta smelt, notwithstanding warnings by
11 Defendants’ own peer reviewers that the use of an historical
12 baseline is inappropriate because water supply system operations
13 today are substantially different from the operations that occurred
14 during the historical period and the choice of which time period to
15 use for the baseline could significantly affect the ultimate
16 assessment of SWP and CVP impacts on delta smelt.

17 51. Because of the above-described methodological failures, Defendants failed to
18 undertake the required analysis of the effects of proposed SWP and CVP operations on delta
19 smelt. As a result, the BiOp fails to properly determine whether proposed project operations
20 “would be expected, directly or indirectly, to reduce appreciably the likelihood of both the
21 survival and recovery of a listed species in the wild by reducing the reproduction, numbers or
22 distribution of that species.” 50 C.F.R. § 402.02. Instead, because of the BiOp’s faulty effects
23 analysis and methodology, Defendants grossly overestimate the impacts of proposed project
24 operations on delta smelt. Consequently, the “jeopardy” conclusion reached by Defendants is
25 without adequate support and is therefore arbitrary, capricious, an abuse of discretion, not in
26 accordance with the law, in excess of statutory authority, and without observance of procedure
27 required by law, in violation of Section 7 of the ESA and its implementing regulations and the
28 standards of the APA.

1 52. Section 7 of the ESA also requires that if “jeopardy” to a species or adverse
2 modification of critical habitat is found by the Secretary, the Secretary shall suggest reasonable
3 and prudent alternatives that are sufficient to prevent jeopardy. 16 U.S.C. § 1536(b)(3)(A);
4 50 C.F.R. § 402.14(h)(3). In formulating such an RPA, the Service is required to use the best
5 scientific and commercial data available, (16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8)), and
6 to demonstrate that the RPA that is imposed does not jeopardize the listed species or result in the
7 destruction or adverse modification of its critical habitat. *American Rivers v. National Marine*
8 *Fisheries Service*, 126 F.3d 1118, 1122-1123 n. 11 (9th Cir. 1997); *Greenpeace v. National*
9 *Marine Fisheries Service*, 237 F. Supp. 2d 1181, 1185 (W.D. Wash. 2002). Notwithstanding
10 these requirements Defendants fail to explain how the RPA set forth in the BiOp will serve to
11 remove the delta smelt from the “jeopardy” purportedly caused by SWP and CVP operations. As
12 one example, the BiOp fails to adequately explain how implementation of RPA Component 3 (pp.
13 282-283) (Fall X2 action) will serve to remove the delta smelt from the “jeopardy” purportedly
14 caused by the proposed operations of the SWP and CVP. The analysis, reasoning, and
15 conclusions of the BiOp with respect to the RPA imposed, and Defendants’ actions described
16 herein, are arbitrary, capricious, an abuse of discretion, not in accordance with the law, in excess
17 of statutory authority, and without observance of procedure required by law, all in violation of
18 Section 7 of the ESA and its implementing regulations and the standards of the APA.

19 53. Defendants’ failure to utilize the legally required methodology in preparing and
20 adopting the BiOp, including the RPA, and in determining whether the proposed federal action
21 will jeopardize the continued existence of the species or destroy or adversely modify delta smelt
22 critical habitat, violates the ESA and the requirements of the APA. 5 U.S.C. § 553(b), (c). The
23 analysis, reasoning, and conclusions of the BiOp, and Defendants’ actions described herein, are
24 arbitrary, capricious, an abuse of discretion, not in accordance with the law, in excess of statutory
25 authority, and without observance of procedure required by law, in violation of Section 7 of the
26 ESA and its implementing regulations and the standards of the APA. Through the above failures,
27 Defendants also unlawfully foreclosed evaluation in the BiOp of any other potential reasonable
28 and prudent alternatives which may have also better met the objectives of the SWP and CVP. *See*

1 *Southwest Ctr. for Biological Diversity v. Bureau of Reclamation, supra*, 143 F.3d at 523 n. 5.

2 54. Plaintiff has exhausted any and all administrative remedies required by law and
3 has performed any and all conditions precedent to the filing of this action.

4 55. Plaintiff's interests have been, are, and will continue to be directly and adversely
5 affected by Defendants' failures and unlawful actions.

6 56. Plaintiff has no plain, speedy or adequate remedy at law and, unless relief is
7 granted as prayed, Plaintiff's interests in SWP water supplies will be adversely affected and
8 irreparably injured by Defendants' unlawful acts.

9 **FOURTH CLAIM FOR RELIEF**

10 **Against All Defendants for Violation of the Administrative Procedure Act and the National**
11 **Environmental Policy Act (42 U.S.C. § 4321 et seq.)**

12 57. Plaintiff realleges and incorporates, as if fully set forth herein, each and every
13 allegation contained in paragraphs 1 through 56, inclusive, of this Complaint.

14 58. NEPA requires federal agencies to prepare a detailed Environmental Impact
15 Statement ("EIS") for all actions that are (1) federal, (2) "major," and (3) that may have a
16 significant effect on the human environment. 42 U.S.C. § 4332(2)(C); *Nat'l Wildlife Fed. v.*
17 *Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). Defendants' issuance of the BiOp constitutes a major
18 federal action that may have a significant effect on the environment.

19 59. Defendants are federal government agencies or officials that took final agency
20 action within the meaning of the APA by issuing the BiOp. *See Bennett v. Spear, supra*, 520 U.S.
21 at 178; *Ramsay v. Kantor*, 96 F.3d 434 (9th Cir. 1996); *Westlands Water Dist. v. United States*,
22 850 F.Supp. 1388, 1422 (E.D. Cal. 1994).

23 60. The "jeopardy" biological opinion issued by Defendants requires – for the take
24 authorization in the BiOp to be applicable (*see* BiOp at 286) – that the SWP and CVP be operated
25 outside the range of historical Project operations, in conformance with the RPA. *See generally*
26 *Bennett v. Spear, supra*, 520 U.S. at 169, 170 (determining that a biological opinion "has a
27 powerful coercive effect on the action agency" and that such opinions have "virtually
28 determinative effect"). Federal actions that require the operation of existing projects outside the

1 range of historical operations are major federal actions. *See Upper Snake River v. Hodel*, 921
2 F.2d 232, 235 (9th Cir. 1990); *see also County of Trinity v. Andrus*, 438 F.Supp. 1368, 1388
3 (N.D. Cal. 1977). Defendants' issuance of the BiOp with an RPA that requires operation of the
4 SWP and CVP outside the range of historical operations is a major federal action.

5 61. Implementation of the BiOp will significantly affect the quality of the human
6 environment for multiple reasons. Among other significant effects:

7 a. The BiOp will result in a substantial loss of water to humans and human
8 activities by reallocating hundreds of thousands, if not millions, of acre-feet of water
9 annually away from reasonable and beneficial uses reliant upon the SWP, including
10 drinking and other potable uses, municipal and industrial uses, and agricultural uses, but
11 contains no discussion whatsoever of the probable direct and indirect environmental and
12 other impacts of such decreased water availability.

13 b. The BiOp acknowledges that a decreased amount of water available to the
14 SWP and CVP will result in a decreased ability to store such water in reservoirs and
15 otherwise prepare for dry years and emergencies (BiOp at 19), but contains no discussion
16 of the probable direct and indirect environmental and other impacts of such decreased
17 water availability.

18 c. The BiOp will indirectly, but foreseeably, lead to a variety of effects to the
19 human environment, including, among other impacts:

- 20 i. the fallowing of annual crops and the loss of permanent crops on
21 thousands of acres of highly productive farmland;
- 22 ii. significantly increased groundwater pumping and concomitant
23 declining groundwater levels throughout wide areas of California
24 which will, in turn, lead to a host of significant impacts to the
25 human environment including increased energy consumption and
26 land subsidence with potential loss of recharge capability and
27 damage to levees, roads, sewer systems, buildings and other
28 improvements; and

1 f. A significantly increased potential for land subsidence resulting in an
2 enhanced potential for soil compaction and loss of recharge capability as well as damaged
3 levees, bridges, buildings, wells, and other improvements relied upon or operated by
4 Plaintiff's member agencies.

5 64. Implementation of the BiOp will also result in significant impacts to other
6 protected species, because water currently used for the benefit of those other species will be
7 reallocated to maintaining flows purportedly for the benefit of delta smelt.

8 65. The State Contractors have exhausted their administrative remedies regarding
9 Defendants' failure to comply with NEPA by submitting a comment letter to Defendants prior to
10 their issuance of the BiOp. A true and correct copy of the State Contractors' comment letter is
11 attached hereto as Exhibit "E."

12 66. Defendants' failure to prepare an adequate environmental document or undertake
13 any environmental review at any time preceding the decision to issue the BiOp is arbitrary,
14 capricious and an abuse of discretion and violates the Administrative Procedure Act. 5 U.S.C.
15 § 706(2)(A). Unless Defendants' conduct is reviewed pursuant to 5 U.S.C. § 701 et seq. and
16 restrained and enjoined, Defendants will continue to engage in a major federal action significantly
17 affecting the quality of the human environment without having considered the environmental
18 impacts of their action, in violation of NEPA and the APA.

19 67. Plaintiff has exhausted any and all administrative remedies required by law and
20 has performed any and all conditions precedent to the filing of this action.

21 68. Plaintiff's interests have been, are, and will continue to be directly and adversely
22 affected by Defendants' failures and unlawful actions.

23 69. Plaintiff has no plain, speedy or adequate remedy at law and, unless relief is
24 granted as prayed, Plaintiff's interests in SWP water supplies will be adversely affected and
25 irreparably injured by Defendants' unlawful acts.

FIFTH CLAIM FOR RELIEF

Against All Defendants for Violation of Section 7 of the Endangered Species Act by Requiring a Reasonable and Prudent Alternative that Cannot be Implemented Consistently with the Scope of DWR's Legal Authority and Jurisdiction

70. Plaintiff realleges and incorporates, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 69, inclusive, of this Complaint.

71. Section 7 of the ESA (16 U.S.C. § 1536) and title 50, section 402.02 of the Code of Federal Regulations require Defendants to ensure that any RPA they adopt is consistent with the scope of the action agency's legal authority and jurisdiction. Section 7 of the ESA and title 50, section 402.03 of the Code of Federal Regulations also provide that the consultation requirements of the ESA apply only to actions in which there is discretionary involvement or control, and do not extend to requirements that would compel agency action inconsistent with a nondiscretionary statutory mandate. *See National Ass'n of Homebuilders v. Defenders of Wildlife, supra*, 127 S.Ct. at 2534-2535. It is also the policy of Congress that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). Further, Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383) requires the Bureau to operate the CVP in accordance with state water rights law, including proscriptions imposed on the CVP by the State Water Resources Control Board. *See California v. United States*, 438 U.S. 645, 675; *National Ass'n of Homebuilders, supra*, 127 S.Ct. at 2535 (stating that *California v. United States* holds that "a statutory requirement that federal operating agencies conform to state water usage rules applied only to the extent that it was not 'inconsistent with other congressional directives'").

72. Under California law, DWR and the Bureau have a non-discretionary duty to operate the SWP and the CVP in conformity with the requirements of Article X, Section 2 of the California Constitution which prohibits the unreasonable use or waste of water. More specifically, Article X, Section 2 of the California Constitution provides:

It is hereby declared that because of the conditions prevailing in this State, 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, and the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such

1 waters is to be exercised with a view to the reasonable and
2 beneficial use thereof in the interest of the people and for the public
3 welfare. The right to water or to the use of flow of water in or from
4 any natural stream or water course in this State is and shall be
5 limited to such water as shall be reasonably required for the
6 beneficial use to be served, and such right does not and shall not
7 extend to the waste or unreasonable use or unreasonable method of
8 use or unreasonable method of diversion of water.

9 *See also National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 443 (1983).

10 73. The California Supreme Court has explained that: “[W]hat is a reasonable use of
11 water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo*
12 isolated from statewide considerations of transcendent importance. Paramount among these we
13 see the ever increasing need for the conservation of water in this state, an inescapable reality of
14 life quite apart from its express recognition in [Article X, § 2].” *Joslin v. Marin Municipal Water*
15 *Dist.*, 67 Cal.2d 132, 140 (1967).

16 74. Defendants violated Section 7 of the ESA and Title 50, sections 402.02 and 402.03
17 of the Code of Federal Regulations by imposing an RPA upon DWR and the Bureau that violates
18 the non-discretionary prohibition against the unreasonable use and waste of water set forth in
19 Article X, Section 2 of the California Constitution and is thus inconsistent with the scope of the
20 action agencies’ legal authority and jurisdiction.

21 75. Implementation of the BiOp threatens to result in the unreasonable use, and waste,
22 of hundreds of thousands, if not millions, of acre feet of water to which the SWP and CVP
23 already have an entitlement. In times of severe drought, such as that which currently exists in
24 California, water will be lost to the projects and the myriad public uses of water they support.
25 Instead, this water will be re-allocated for the purported benefit of delta smelt and will, instead, be
26 released downstream of the Delta to the Pacific Ocean, from where it cannot be recovered.

27 76. The RPA set forth in the BiOp requires such a re-allocation of water without any
28 demonstration that the hundreds of thousands, and perhaps millions, of acre feet of water that will
be taken from human consumptive purposes pursuant to its terms will provide any meaningful,
population-level benefit to the delta smelt. Pursuant to the interim remedy already imposed by
the federal district court at Defendants’ request in *Kemphorne, supra*, the SWP was unable to

1 utilize more than 500,000 thousand acre-feet of water from December 2007 through December
2 2008 that would have otherwise been available for human consumptive purposes.
3 Notwithstanding this commitment of hundreds of thousands of acre-feet of water to “benefit”
4 delta smelt during a time of critical dry year hydrology, the Fall Midwater Trawl (“FMWT”)
5 Index for 2008 reported the lowest level of delta smelt abundance on record. Not only do the
6 FMWT data from 2008 serve to reconfirm the lack of relationship between Project export
7 pumping and OMR flow levels, on the one hand, and delta smelt abundance, on the other, they
8 also show that Defendants’ imposition of water supply restrictions on the Projects through the
9 BiOp and its RPA is not in conformance with the constitutionally-based reasonable use
10 requirements of California law.

11 77. Defendants’ issuance of a BiOp with an RPA that compels the operators of the
12 SWP and the CVP to undertake actions that are inconsistent with the non-discretionary mandate
13 of Article X, Section 2 of the California Constitution and thus outside the scope of the agencies’
14 legal authority and jurisdiction is arbitrary, capricious, and an abuse of discretion, and violates
15 Section 7 of the ESA, the ESA implementing regulations adopted by Defendants, and the APA
16 (5 U.S.C. § 706(2)(A)).

17 78. Defendants’ failure to issue a BiOp with an RPA that complies with the waste and
18 unreasonable use requirements of the California Constitution is arbitrary, capricious and an abuse
19 of discretion and violates the APA. 5 U.S.C. § 706(2)(A). Unless Defendants’ conduct is
20 reviewed pursuant to 5 U.S.C. § 701 et seq. and restrained and enjoined, Defendants will continue
21 to require the implementation of an RPA that violates Article X, Section 2 of the California
22 Constitution, Section 7(a)(2) of the ESA and Title 50, sections 402.02 and 402.03 of the Code of
23 Federal Regulations.

24 **PRAYER**

25 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

- 26 A. That the Court invalidate the BiOp and find and declare that its issuance was
27 arbitrary and capricious, an abuse of discretion, and not in accordance with the
28 law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2);

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- B. That the Court order the Secretary to comply with the law forthwith by withdrawing its BiOp, but not vacating it, and reinitiating consultation that includes future operations of the SWP, as well as other Delta water diverters and other stressors of the delta smelt;
- C. That the Court issue temporary, preliminary, and permanent injunctive relief enjoining Defendants from enforcing the Reasonable and Prudent Alternative adopted as part of the BiOp and from taking any action against the State Contractors or the SWP in reliance on the BiOp;
- D. That the Court order Defendants to perform adequate and complete environmental review of the BiOp pursuant to the provisions of the National Environmental Policy Act;
- E. That the Court declare the Reasonable and Prudent Alternative of the BiOp was adopted in violation of the requirements of Section 7 of the Endangered Species Act and title 50 of the Code of Federal Regulations;
- F. That the Court retain jurisdiction over this matter until such time as Defendants have fully complied with the Court's Orders;
- G. That the Court award Plaintiff its costs of litigation, including reasonable attorneys' fees and expert witness fees; and

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H. That the Court grant Plaintiff such further and additional relief as the Court may deem just and proper.

Dated: March 4, 2009

BEST BEST & KRIEGER LLP

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