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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15
16 COALITION FOR A SUSTAINABLE DELTA) Case No: 1:09-CV-00480 OWW GSA
and KERN COUNTY WATER AGENCY,)
17 Plaintiffs,) FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF
18 vs.)
19 UNITED STATES DEPARTMENT OF)
INTERIOR, KEN SALAZAR, in his official)
20 capacity as Secretary of the United States)
Department of Interior, UNITED STATES FISH)
21 AND WILDLIFE SERVICE, ROWAN W.)
GOULD, in his official capacity as Acting)
22 Director of the United States Fish and Wildlife)
Service, UNITED STATES ENVIRONMENTAL)
23 PROTECTION AGENCY, LISA JACKSON,)
in her official capacity as Administrator of the)
24 Environmental Protection Agency, UNITED)
STATES DEPARTMENT OF)
25 TRANSPORTATION, RAY LaHOOD, in his)
official capacity of Secretary of Transportation,)
26 MARITIME ADMINISTRATION, JAMES E.)
CAPONITI, in his official capacity as Acting)
27 Deputy Maritime Administrator, UNITED)
STATES DEPARTMENT OF HOMELAND)
28 SECURITY, JANET NAPOLITANO, in her)
official capacity as Secretary of Homeland)

1 Security, FEDERAL EMERGENCY)
MANAGEMENT AGENCY, WILLIAM CRAIG)
2 FUGATE, in his official capacity as Administrator)
of the Federal Emergency Management Agency,)
3 UNITED STATES ARMY CORPS OF)
ENGINEERS, Lieutenant General Robert L. Van)
4 Antwerp, in his official capacity as Commanding)
General of the United States Army Corps of)
5 Engineers,)

6 Defendants.)

7 UNITED STATES BUREAU OF)
RECLAMATION and J. WILLIAM)
8 MCDONALD, in his official capacity as Acting)
Commissioner, United States Bureau of)
9 Reclamation,)

10 and)

11 CALIFORNIA DEPARTMENT OF WATER)
RESOURCES and LESTER SNOW, in his official)
12 capacity as Director, California Department of)
Water Resources,)
13)

14 Real Parties in Interest.)

15
16 **INTRODUCTION**

17 1. The Sacramento-San Joaquin Delta (the “Delta”) is the largest estuary on the West Coast.
18 The Delta is crucial to California’s economy, and it also provides critical ecosystem services to the
19 State. Economically, the Delta is the center of California’s two largest water distribution systems, the
20 California State Water Project (“SWP”) and the Central Valley Project (“CVP”). These projects deliver
21 water to urban, agricultural, and industrial water users throughout the State and provide water to more
22 than 4 million acres of irrigated farmland in California that in turn sustains billions of dollars in
23 agriculture.

24 2. Ecologically, the Delta supports more than 750 plant and animal species, including 130 fish
25 species. Importantly, the Delta provides habitat for a number of species that are protected by the
26 Endangered Species Act (“ESA”), including the delta smelt, the Sacramento River winter-run chinook
27 salmon, the Central Valley spring-run chinook salmon, and the Central Valley steelhead (collectively,
28 the “Listed Species”).

1 3. There are numerous factors that are contributing to the decline of the Delta generally and the
2 Listed Species in particular, including: agricultural and municipal water diversions that entrain fish and
3 reduce outflow, agricultural runoff including return flows that contain pesticides and other harmful
4 substances, urban runoff containing harmful substances, development in the Delta that harms or destroys
5 habitat and contributes to urban runoff, leaching of contaminants into the Delta and the waterways that
6 run into the Delta, and predation of the Listed Species by non-native species.

7 4. With regard to the decline of the Listed Species, the federal government has focused much of
8 its attention on the potential impact to the species caused by the SWP and CVP and has largely ignored
9 other stressors. This is evidenced by the U.S. Fish and Wildlife Service's ("FWS") conclusions in the
10 biological opinion it issued for the continued operation of the SWP and CVP and by the failure of other
11 federal agencies to consult with FWS and/or NOAA National Marine Fisheries Service ("NMFS") under
12 section 7(a)(2) of the ESA on actions that may affect the Listed Species.

13 5. In 2008, FWS conducted consultation under section 7(a)(2) of the ESA and issued a
14 biological opinion for the continued operation of the SWP and CVP ("2008 BiOp"). The 2008 BiOp
15 concluded that SWP and CVP operations would jeopardize the delta smelt. Therefore, FWS devised a
16 set of restrictions on the operation of the SWP and CVP, thereby reducing the amount of water delivered
17 to 23 million Californians. The 2008 BiOp contains numerous errors, and FWS violated the ESA and
18 the Administrative Procedure Act ("APA") by: (1) not using the best scientific and commercial data
19 available, (2) failing to connect the facts found to the conclusions made, (3) not adequately analyzing the
20 status of the species and the environmental baseline, (4) failing to adequately analyze the effects of the
21 CVP and SWP, and (5) not complying with the requirements for specifying reasonable and prudent
22 alternatives.

23 6. There are several other federal agencies that carry out discretionary actions and programs
24 that have an adverse effect on the Listed Species and their critical habitat within the Delta. These
25 agencies are authorizing, funding, and carrying out actions and programs that are contributing to the
26 decline of the Delta and the Listed Species. The following agencies have failed to consult with FWS to
27 ensure that their actions are not likely to jeopardize the continued existence of the Listed Species or
28 result in the destruction or adverse modification of their designated critical habitat: the U.S.

1 Environmental Protection Agency (“EPA”), the Maritime Administration (“MARAD”), FWS, the
2 Federal Emergency Management Agency (“FEMA”), and the U.S. Army Corps of Engineers (“ACOE”).

3 7. EPA registers and reregisters pesticides for use in the United States under the Federal
4 Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). The Delta serves as a vast drainage area for
5 agricultural runoff, which contains a variety of pesticides. Certain pesticides have both direct and
6 indirect adverse effects on the Listed Species. EPA failed to complete consultation with FWS and/or
7 NMFS under section 7(a)(2) of the ESA regarding the registering or reregistering of a number of
8 pesticides under FIFRA.

9 8. In addition to pesticides, a variety of contaminants are present in the Delta. Portions of the
10 Delta are listed as impaired under section 303(d) of the Clean Water Act for a variety of pollutants.
11 Exposure to certain contaminants, such as metals, can exert toxic effects on aquatic organisms. One
12 source of the contaminants that may be affecting the Listed Species is the National Defense Reserve
13 Fleet (“NDRF”). Certain NDRF vessels are kept at Suisun Bay and are known as the Suisun Bay
14 Reserve Fleet (“SBRF”). This fleet of retired Navy vessels is maintained by MARAD, which has been
15 charged by Congress to dispose of the fleet. MARAD prepared a Comprehensive Management Plan for
16 the NDRF without completing consultation with FWS and/or NMFS under sections 7(a)(2) and 7(a)(1)
17 of the ESA regarding how the plan would affect the Listed Species.

18 9. The Delta also suffers from invasion of non-native species and is considered the most
19 invaded estuary in the world. Two non-native species, the striped bass and the largemouth bass, are
20 predators of the Listed Species. The California Department of Fish and Game (“DFG”) has several
21 programs devoted to the study and enhancement of these non-native predators, which are funded in
22 substantial part by FWS through the Sport Fish Restoration Act, 16 U.S.C. § 777 *et seq.* FWS has not,
23 as required by the ESA, completed consultation with itself and NMFS under section 7(a)(2) and 7(a)(1)
24 of the ESA regarding the distribution of funds to these programs and the effect they may have on the
25 Listed Species.

26 10. Development in the Delta also has adverse impacts on the Listed Species by reducing habitat
27 and increasing urban runoff that may be contaminated with substances harmful to the Listed Species.
28 FEMA administers the National Flood Insurance Program (“NFIP”), which offers subsidized flood

1 insurance to property owners in eligible local communities, which in turns leads to more development in
2 the flood-prone areas of the Delta. FEMA has not completed consultation with FWS and NMFS
3 regarding the affect of the administration of the NFIP on the Listed Species as required by section
4 7(a)(2) and 7(a)(1) of the ESA.

5 11. One area of the Delta that has been developed and is continuing to undergo development is
6 the Port of Stockton. The Port of Stockton (“Port”) is located within the San Joaquin County along a
7 portion of the San Joaquin River known as the Stockton Deepwater Channel. The Port has proposed a
8 project that involves significant dredging of the San Joaquin River in order to increase the depth of the
9 Stockton Deepwater Channel to allow for greater commercial activity through the Port. The Port
10 applied for Clean Water Act permits from the ACOE, and the ACOE in turn initiated informal
11 consultation with FWS and NMFS regarding the affect of the proposed activities on the Listed Species.
12 NMFS did not concur with the ACOE’s findings and initiated formal consultation under the ESA. FWS
13 on the other hand, concurred that the activities would not have an adverse affect on the delta smelt or its
14 critical habitat, despite the fact that the proposed action is within designated critical habitat for the delta
15 smelt, the action would adversely modify that habitat by deepening the channel and thereby reducing the
16 level of dissolved oxygen in the water, and the action would result in a substantial increase in maritime
17 activity at the Port and through the Delta. FWS violated the ESA and APA in concurring with the
18 ACOE’s determination, and the ACOE violated section 7(a)(2) of the ESA by failing to initiate formal
19 consultation with FWS.

20 12. The Delta is in what some deem “an ecological tailspin” due to the many stressors placed on
21 it. Plaintiffs the Coalition for a Sustainable Delta (“Coalition”) and the Kern County Water Agency
22 (“KCWA”) (collectively “Plaintiffs”) bring this action to seek relief.

23 **JURISDICTION AND VENUE**

24 13. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question)
25 and 5 U.S.C. § 703 (actions arising under the APA). As required by the ESA, 16 U.S.C. § 1540(g),
26 Plaintiffs provided EPA, MARAD, FEMA, and FWS with a notice of intent to sue 60 days prior to the
27 filing of this First Amended Complaint. A copy of the notice is attached as Exhibit A.

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1 14. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.
2 As such, this Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

3 15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) (suit may be brought in the
4 District where a substantial part of the activities that are the subject of the action are situated).

5 **PARTIES**

6 16. Plaintiff Coalition for a Sustainable Delta is comprised of individual and agricultural water
7 users and of individuals in the San Joaquin Valley. The Coalition is bringing this action on behalf of
8 itself and its members. The Coalition and its members depend on water from the Delta; the water is
9 essential to their livelihood and economic well-being. In addition to their economic interest in the Delta,
10 the Coalition and its members are dedicated to protecting the Delta and committed to promoting a
11 strategy to ensure its sustainability. The purpose of the Coalition is to advance the interests of its
12 members, namely, (1) to better the conditions of those engaged in agricultural pursuits in the San
13 Joaquin Valley and (2) to ensure a sustainable and reliable water supply by protecting the Delta and
14 promoting a strategy to ensure its sustainability. Participation of individual Coalition members in this
15 litigation is not necessary in light of the claims asserted and relief requested.

16 17. Certain Coalition members have contracts with various agencies for the delivery of SWP and
17 CVP water, and as such, depend on SWP and CVP deliveries from the Delta to the San Joaquin Valley
18 for their water supply. Certain Coalition members have contracts to receive SWP deliveries through
19 2035. These contracts are expected to be extended beyond that date. Thus, the Coalition and its
20 members have a long-term interest in the overall health of the Delta and its ecosystem, which includes
21 the maintenance of viable populations of the delta smelt.

22 18. Defendants' actions have significant economic and contractual impacts on members of the
23 Coalition because of their contracts with water agencies, including SWP contractors, for deliveries of
24 SWP water. Defendants' actions also threaten the livelihood of Coalition members. Certain Coalition
25 members' contracts for delivery of SWP water require payment for their full contractual entitlement
26 regardless of the amount of water actually delivered in any given year through the SWP. Further,
27 because Coalition members require water for irrigation of their crops, reduced delivery of surface water
28 through the SWP is likely to result in increased reliance on groundwater for irrigation supplies, which

1 will result in overdraft of the groundwater basins that underlie the lands of Coalition members. Reduced
2 water availability and reduced deliveries of SWP water have an economic impact on members of the
3 Coalition because such members are required to pay for the full contractual entitlement, even if the
4 entitlement is not delivered and because the members must develop other sources of water for irrigation
5 of their crops or forego irrigation altogether thus impacting their livelihood. Thus, Coalition members
6 have been, and will continue to be, harmed by Defendants' actions and programs.

7 19. Coalition members visit the Delta and appreciate the Delta ecosystem. Coalition members
8 view, enjoy, and use the Delta ecosystem. Coalition members routinely engage in various recreational
9 activities in the Delta – including boating, fishing, and wildlife viewing – and have concrete plans to
10 continue to do so in the future. Coalition members derive significant use and enjoyment from the
11 aesthetic, recreational, and conservation benefits of the Delta ecosystem, including the delta smelt and
12 other Listed Species. The Coalition and its members are deeply concerned about the health of the Delta
13 ecosystem and its evident decline. The decline of the delta smelt and other Listed Species has had and
14 continues to have a substantial negative impact on Coalition members, impairing their use and
15 enjoyment of the Delta and the Listed Species.

16 20. Defendants' violations of the ESA have caused and are causing significant harm to the Listed
17 Species and the Delta, which in turn causes significant harm to the Coalition and its members. If the
18 relief herein requested is granted, then harm to the aesthetic, conservation, and recreational interests of
19 the Coalition and its members in the Delta will be reduced because the health of the overall Delta
20 ecosystem will improve, particularly the health and continued viability of the Listed Species.

21 21. Plaintiff Kern County Water Agency is a public agency that was created in July 1961 by a
22 special act of the California State Legislature and ratified by the electorate of Kern County in September
23 1961. KCWA was granted the primary power to acquire and contract for water supplies for Kern
24 County. KCWA serves as Kern County's local contracting entity for the State Water Project. In 1963,
25 KCWA contracted with the California Department of Water Resources ("DWR") for a water supply of
26 up to 998,750 acre-feet of SWP table A water annually. KCWA is a wholesaler of SWP water for both
27 agricultural and municipal and industrial uses. KCWA contracts with 13 individual water districts in
28 Kern County, which supply SWP water directly to water users for agricultural use. KCWA also

1 contracts for the delivery of treated water supplies with water purveyors who supply water directly to
2 residents of the City of Bakersfield and surrounding areas. The service area for KCWA encompasses all
3 the territory within the San Joaquin Valley portion of Kern County. KCWA provides a portion of, and
4 in some cases the entire water supply for approximately 719,000 acres of prime farmland, of which
5 approximately 240,000 acres are permanent crops, and for some 500,000 residents of Kern County.
6 Approximately 98 percent of KCWA's water is imported by the SWP. The balance of KCWA's water
7 supply is from high flow Kern River water rights. In terms of contract amount with DWR, KCWA is
8 the second largest SWP contractor. KCWA participates in a wide scope of water management activities
9 related to both surface and groundwater in order to preserve and enhance Kern County's water supply.

10 22. Defendants' actions have significant economic and contractual impacts on KCWA because
11 of its contract with DWR for deliveries of SWP water. KCWA's contract for delivery of SWP water
12 requires payment for its full contract amount regardless of the amount of water actually delivered in any
13 given year through the SWP.

14 23. KCWA depends on SWP deliveries through the Delta to the San Joaquin Valley for 98
15 percent of its water supply. The continued operation of the SWP is, in turn, dependent on the overall
16 health of the Delta and its ecosystem, which includes the maintenance of viable populations of species
17 living in the Delta and protected by the ESA, including the Listed Species.

18 24. Defendants' ESA violations have injured KCWA by reducing the amount of water available
19 to KCWA. Such violations will continue to injure KCWA, as they will threaten KCWA's ability to
20 obtain water supplies it has contracted for, which is the primary function of KCWA; therefore, KCWA
21 has been, and will continue to be, harmed by Defendants' violations of the ESA.

22 25. Defendant Department of the Interior ("DOI") is a department of the United States
23 Government, established by statute and charged by Congress with administering federal programs under
24 the ESA.

25 26. Defendant Ken Salazar is the current Secretary of the Department of the Interior ("Interior
26 Secretary"). The Interior Secretary is responsible under the ESA for consulting with federal agencies
27 regarding any action authorized, funded, or carried out that may affect the continued existence of any
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1 threatened or endangered species, or result in the destruction or adverse modification of critical habitat
2 of any threatened or endangered species.

3 27. Defendant U.S. Fish and Wildlife Service is an agency under the DOI to which the DOI has
4 delegated its responsibility for administration of the ESA.

5 28. Defendant Rowan W. Gould is Acting Director of the Fish and Wildlife Service, and thus is
6 charged with administration of the ESA.

7 29. Defendant Environmental Protection Agency is the federal agency charged with registering
8 pesticides under FIFRA and with ensuring that the pesticide uses it authorizes will not have
9 unreasonable adverse effects on the environment, including on threatened and endangered species and
10 their habitat. 7 U.S.C. §§ 136-136y. EPA also has duties to regulate and restrict pesticide uses under
11 the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act, 21 U.S.C.
12 §§ 301-397. EPA is further charged with complying with the ESA with respect to its programs,
13 authorities, and actions. 16 U.S.C. § 1536.

14 30. Defendant Lisa Jackson is Administrator of EPA. She is sued in her official capacity.

15 31. Defendant Department of Transportation (“DOT”) is a department of the United States
16 Government. Congress has charged DOT with preparing the Comprehensive Management Plan
17 (“CMP”) and managing the NDRF. In carrying out these responsibilities, DOT has a legal duty to
18 comply with the ESA.

19 32. Defendant Ray LaHood is Secretary of Transportation. He is sued in his official capacity.

20 33. Defendant Maritime Administration is an agency within DOT. MARAD has been delegated
21 with carrying out DOT’s responsibilities with respect to the CMP and the NDRF. In carrying out its
22 responsibilities, MARAD has a legal duty to comply with the requirements of the ESA.

23 34. Defendant James E. Caponiti is Acting Deputy Maritime Administrator. He is sued in his
24 official capacity.

25 35. Defendant Department of Homeland Security (“DHS”) is a department of the United States
26 Government. DHS is responsible for overseeing the protection of the United States and oversees
27 disaster prevention and preparedness. In carrying out these responsibilities, DHS has a legal duty to
28 comply with the requirements of the ESA.

1 36. Defendant Janet Napolitano is Secretary of Homeland Security. She is sued in her official
2 capacity.

3 37. Defendant Federal Emergency Management Agency is a federal agency charged with
4 administering the National Flood Insurance Program. In carrying out this program, FEMA has an
5 obligation to comply with the requirements of the ESA.

6 38. Defendant William Craig Fugate is Administrator of FEMA. He is sued in his official
7 capacity.

8 39. Real Party in Interest U.S. Bureau of Reclamation is an agency under the DOI and is a water
9 management agency that provides drinking water to over 31 million people and irrigation water to over
10 10 million acres of farmland in the western United States. The Bureau of Reclamation is charged with
11 operation of the CVP.

12 40. Real Party in Interest J. William McDonald is Acting Commissioner of the Bureau of
13 Reclamation, and thus is charged with operation and administration of the CVP.

14 41. Real Party in Interest California Department of Water Resources is an agency of the State of
15 California created pursuant to California Water Code section 120 *et seq.* and is charged with operation
16 of the SWP.

17 42. Real Party in Interest Lester Snow is the Director of DWR, and thus is charged with
18 operation and administration of the SWP.

19 **FACTUAL AND LEGAL BACKGROUND**

20 **I. The Sacramento-San Joaquin Delta**

21 43. The Delta is the largest estuary (i.e., coastal area where freshwater from rivers mixes with
22 ocean waters) on the West Coast, comprising more than 738,000 acres. The Delta's major source of
23 freshwater comes from the Sacramento and San Joaquin Rivers; saltwater comes from the Pacific Ocean
24 through San Francisco Bay. Approximately 50 percent of California's average annual streamflow flows
25 to the Delta.

26 44. The Delta is also home to 500,000 residents and is a major recreation and tourist destination.
27 The Delta's 635 miles of boating waterways are served by 95 marinas supporting 11,700 in-water boat
28

1 slips and dry storage for 5,500 boats. In 2000, there were an estimated 2.13 million boating trips in the
2 Delta.

3 45. Roughly two-thirds of the Delta's 738,000 acres support agriculture. More than 500,000
4 acres of the Delta currently are in agricultural production. The Delta serves as a drainage area for this
5 cropland.

6 46. In addition, the Delta supports more than 750 plant and animal species, including 130 species
7 of fish. The Delta provides important fishery habitat; it supports an estimated 25 percent of all warm-
8 water and anadromous sport-fishing species in the State. Eighty percent of California's commercial
9 fishery species live in, or migrate through, the Delta. The Delta also provides habitat for a number of
10 species that are protected by the ESA, including the Listed Species.

11 47. The overall health of the Delta ecosystem, including the health of the populations of various
12 Delta species, including the Listed Species, is in decline due to a number of factors. Among the factors
13 suspected of contributing to this decline are the demise of the food web in the Delta, climate change,
14 agriculture in the Delta that both diverts water and returns agricultural flows containing pesticides and
15 other pollutants, urban development within the Delta that destroys habitat and results in stormwater
16 runoff, leaching of contaminants into the Delta and into waterways that run into the Delta, predation of
17 the delta smelt and other native fishes by non-native species, diversions of water to power plants, and
18 water exports from the Delta.

19 48. An independent Blue Ribbon task force appointed by Governor Schwarzenegger ("Blue
20 Ribbon Task Force") acknowledged both the severity of the decline of the Delta and the role of a variety
21 of factors in the decline, including invasive species, urban growth, urban and agricultural pollution, and
22 water diversions by stating that the Delta is an "ecological tailspin." In its Biological Assessment for
23 the continued operation of the SWP and CVP, the U.S. Bureau of Reclamation also identified a number
24 of factors, other than operation of the SWP and CVP, that have substantive harmful effects on delta
25 smelt including predation by non-native recreational fisheries, contaminants, water diversions, reduced
26 habitat quality, and invasive species.

27 49. Agriculture is one of the principal land uses in the Delta. In 1991, 538,000 acres of the Delta
28 was used for agriculture. The effects on the Delta from this agricultural use include the effects of

1 in-Delta diversions of water (including fish entrainment and reduced outflow) and agricultural return
2 flows, including the introduction of pesticides. In 2006, the California Department of Pesticide
3 Regulation, Pesticide Use Reporting database reported approximately 20 million and 42 million pounds
4 of pesticides used in the Sacramento and San Joaquin River watersheds respectively. During a three-
5 year study, the U.S. Geological Service reported that of 28 dissolved pesticides subject to testing, 23
6 were detected in water samples from the Delta. Pesticides have been found to have both direct and
7 indirect adverse effects on the Listed Species.

8 50. In addition to pesticides, the Delta is also affected by the introduction of numerous other
9 contaminants. A wide array of metals, including aluminum, arsenic, cadmium, copper, chromium, lead,
10 mercury, nickel, and zinc have been detected in the Delta. Exposure to such metals, even at low
11 concentrations, can exert toxic effects on aquatic organisms by impacting their feeding, growth, and
12 swimming behavior.

13 51. The Delta is also highly invaded by non-native species, such as the striped bass and the
14 largemouth bass. These two species were introduced into the Delta in the late 19th century and they
15 prey on the Listed Species. The striped bass is the most broadly distributed and abundant large
16 piscivorous fish in the Delta.

17 52. Finally, development in the Delta has eliminated much of the historical habitat of native
18 Delta fishes and harmed the remaining habitat. In 2008, the Blue Ribbon Task Force concluded that
19 “urban development is reducing wildlife habitat today and foreclosing future opportunities to improve
20 the ecosystem.” Urban development adversely affects the Listed Species by increasing urban
21 stormwater runoff that may be contaminated with pesticides, oil, grease, heavy metals and other
22 organics and nutrients that have negative impacts on the Listed Species.

23 53. Development is not just limited to land development – dredging of river channels for
24 shipping began in the early 20th century. These deepwater shipping channels alter the water flows
25 within the Delta and reduce the natural tendency of the San Joaquin and Sacramento Rivers to create the
26 floodplains that provide the necessary habitat for native fish.

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1 **II. The Listed Species**

2 54. The delta smelt is a small translucent fish with a narrow geographic range, which is limited
3 to low salinity and freshwater habitats of the Delta. The delta smelt is the only true native estuarine
4 species found in the Delta. FWS listed the delta smelt as a threatened species on March 5, 1993. FWS
5 designated critical habitat for the delta smelt on December 19, 1994. Delta smelt spawn in shallow fresh
6 or slightly brackish water upstream of the mixing zone where saltwater and freshwater interface. By
7 contrast, deeper river channels provide less suitable habitat as they have smaller total surface area,
8 contain fewer shoal areas, have swifter, more turbulent water current, and lack high zooplankton
9 productivity. The delta smelt is one of a number of pelagic organisms that are on the decline in the
10 Delta.

11 55. The Sacramento River winter-run chinook salmon is an anadromous fish that migrates
12 through the Delta to the upper Sacramento River from December to May. Anadromous fish spend most
13 of their life in the ocean but must enter freshwater rivers and streams to spawn. NMFS listed the
14 Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. NMFS
15 designated critical habitat for the Sacramento River winter-run chinook salmon on June 16, 1993.

16 56. The Central Valley spring-run chinook salmon is an anadromous fish that migrates through
17 the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley spring-run
18 chinook salmon as a threatened species on September 16, 1999. NMFS designated critical habitat for
19 the Central Valley spring-run chinook salmon on September 2, 2005.

20 57. The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and
21 San Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the
22 distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout
23 permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on
24 March 19, 1998. NMFS designated critical habitat for the Central Valley steelhead on September 2,
25 2005.

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1 **III. The Endangered Species Act**

2 58. Congress enacted the ESA in order to protect species that “have been so depleted in numbers
3 that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). The ESA was enacted
4 in recognition of the fact that endangered and threatened species provide “esthetic, ecological,
5 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C.
6 § 1531(a)(3).

7 59. The ESA provides protection for endangered and threatened species and their habitats,
8 including the Listed Species. 16 U.S.C. §§ 1536 and 1538.

9 60. Section 7(a)(1) of the ESA requires federal agencies (the “action agency”) to consult with
10 FWS and/or NMFS to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying
11 out programs for the conservation of endangered species and threatened species.” 16 U.S.C.
12 § 1536(a)(1).

13 61. Section 7(a)(2) of the ESA requires federal agencies (the “action agency”) to consult with
14 FWS and/or NMFS to ensure that any action “authorized, funded, or carried out” by such agency is “not
15 likely to jeopardize the continued existence of any endangered species or threatened species or result in
16 the destruction or adverse modification of [designated critical habitat].” 16 U.S.C. § 1536(a)(2).

17 62. The Joint Consultation regulations developed by FWS and NMFS to implement section
18 7(a)(2) of the ESA specify that an agency’s duty to consult is triggered whenever it is determined that an
19 agency’s action “may affect” a threatened or endangered species or its critical habitat. 50 C.F.R.
20 § 402.14.

21 63. The Joint Consultation regulations define the scope of agency actions that are subject to
22 consultation as “all activities or programs of any kind authorized, funded, or carried out, in whole or
23 in part, by Federal agencies.” 50 C.F.R. § 402.02. This includes the promulgation of regulations,
24 the granting of licenses, and actions that directly or indirectly cause modifications to the land, water,
25 or air. *Id.*

26 64. The formal consultation process is initiated when the action agency sends a written request to
27 FWS. As part of the formal consultation, FWS prepares a biological opinion to determine whether the
28

1 action is likely to jeopardize the continued existence of a listed species. 50 C.F.R. § 402.14(g)(4),
2 (h)(3).

3 65. The ESA requires that federal agencies use the “best scientific and commercial data
4 available” in fulfilling the consultation requirements of the statute. 16 U.S.C. § 1536(a)(2).

5 66. In developing a biological opinion, FWS is obligated to consider the effects of the proposed
6 action together with the environmental baseline when determining whether the action is likely to
7 jeopardize one or more listed species or destroy or adversely modify designated critical habitat of such
8 species. 16 U.S.C. § 1536; 50 C.F.R. § 402.02.

9 67. When preparing a biological opinion, FWS is responsible for, *inter alia*, reviewing all
10 relevant information provided by the action agency or otherwise available, evaluating the status of the
11 listed species and its designated critical habitat, evaluating the effects of the action and cumulative
12 effects on the listed species and its designated critical habitat, and formulating its biological opinion.
13 50 C.F.R. § 402.14(g).

14 68. A biological opinion that is issued under section 7 of the ESA must include a summary of the
15 information on which the opinion is based, a detailed discussion of the effects of the action on the listed
16 species and its designated critical habitat, and FWS’s opinion as to whether the action is likely to
17 jeopardize the continued existence of a listed species or result in the destruction or adverse modification
18 of its designated critical habitat. 50 C.F.R. § 402.14(h).

19 69. Any biological opinion that includes a finding of jeopardy or adverse modification of critical
20 habitat must also include reasonable and prudent alternatives (“RPA”) to the proposed action. 50 C.F.R.
21 § 402.14(h)(3). The Joint Consultation regulations define a “reasonable and prudent alternative” as an
22 alternative to the proposed action that (1) can be implemented in a manner consistent with the intended
23 purpose of the action, (2) can be implemented consistent with the scope of the action agency’s legal
24 authority, (3) is economically and technologically feasible, and (4) would avoid the likelihood of
25 jeopardizing the continued existence of listed species and avert the destruction or adverse modification
26 of critical habitat. 50 C.F.R. § 402.02.

27 70. The issuance of a biological opinion is the formal completion of the consultation process
28 required by Section 7 of the ESA. 50 C.F.R. § 402.14.

1 71. Section 7(a)(1) of the ESA imposes an obligation on the Secretary of the Interior and on the
2 Secretary of Commerce to utilize programs under the jurisdiction of the Departments of Interior and
3 Commerce in furtherance of the purposes of the ESA. Section 7(a)(1) mandates that all federal agencies
4 consult with FWS or NMFS, as applicable, and “utilize their authorities in furtherance of the purposes
5 of” the ESA by “carrying out programs for the conservation of endangered species and threatened
6 species.” 16 U.S.C. § 1536(a)(1).

7 72. Congress intended section 7(a)(1) to complement the requirements of section 7(a)(2) by
8 requiring federal agencies to utilize their authorities for the conservation of endangered and threatened
9 species regardless of whether the agencies were undertaking agency actions subject to section 7(a)(2).

10 73. During any consultation process initiated under section 7(a)(2), the ESA imposes specific
11 limitations on the actions that may be undertaken by the action agency and permit applicant. Under
12 section 7(d), “[a]fter initiation of consultation required under subsection (a)(2) of this section, the
13 Federal agency and the permit or license applicant shall not make any irreversible or irretrievable
14 commitment of resources with respect to the agency action which has the effect of foreclosing the
15 formulation or implementation of any reasonable and prudent alternative measures which would not
16 violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d).

17 74. Section 7(d) clarifies the requirements of section 7(a) by ensuring the status quo will be
18 maintained during the consultation process. *Connor v. Burford*, 848 F.2d 1448, 1455 n.34 (9th Cir.
19 1998).

20 **FIRST CLAIM FOR RELIEF AGAINST FWS**

21 **Failure to Comply with the Best Scientific and Commercial Data Available Requirement in** 22 **Violation of the ESA and APA**

23 75. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

24 76. The health of the Delta is crucial to the water supply of the State of California, as it is critical
25 to operation of both the SWP and CVP, which deliver water to urban, agricultural, and industrial water
26 users throughout the State. Two-thirds of California’s residents rely on the Delta for at least a portion of
27 their drinking water. In addition, the SWP and CVP provide water to more than 4 million acres of
28 irrigated farmland in the State, primarily in the San Joaquin Valley. Although the SWP and CVP are

1 distinct water infrastructure facilities operated by the California and federal governments respectively,
2 the SWP and CVP are operated pursuant to a cooperative agreement.

3 77. The SWP is owned by the State of California and is operated by DWR. The SWP is the
4 largest state-operated water supply project in the United States and includes 32 storage facilities,
5 reservoirs, and lakes; 17 pumping plants; 3 pumping-generating plants; 5 hydroelectric power plants;
6 and about 660 miles of pipelines and open canals that collectively stretch from Oroville Reservoir,
7 located on the Feather River in the north, to Perris Reservoir, located in Riverside County in the south.
8 Twenty-nine regional and local public water supply agencies have contracted with the State of
9 California for a supply of water from the SWP. These public agencies, in turn, supply water to about
10 750,000 acres of the State's most productive irrigated farmland and 23 million people located in the San
11 Francisco Bay Area, the San Joaquin Valley, the Central Coast, and southern California. Plaintiff
12 KCWA has a contract with the State of California for a supply of water from the SWP.

13 78. By means of pumping facilities located near Tracy, California, water is pumped from the
14 southern end of the Delta for transmittal to end users in: the southern San Francisco Bay Area via the
15 South Bay Aqueduct, the San Joaquin Valley along the Central Coast, and southern California via the
16 California Aqueduct. Particularly during winter months, when water is not generally needed for
17 agricultural uses, SWP facilities pump water from the Delta for transport to and storage in San Luis
18 Reservoir, a joint use facility shared by the State with the Federal Government that is located near the
19 City of Los Banos. Such water is stored in San Luis Reservoir until it is needed for irrigation,
20 municipal, and other uses during dry summer months.

21 79. Some stakeholders have attributed many of the problems in the Delta, including the decline
22 in the health of species such as the delta smelt, to the pumps that provide water to the SWP and CVP
23 systems. These systems export water to millions of urban and agricultural users throughout the State,
24 including users in the Bay Area and other parts of northern California. But the best scientific and
25 commercial data available suggests that there are a wide diversity of factors that are significantly
26 contributing to the ongoing decline of biotic and abiotic (i.e., physical) conditions in the Delta
27 ecosystem.

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1 80. The relative contribution of the pumps to the decline of the Delta ecosystem in general, and
2 the decline of the delta smelt in particular, is unknown. *E.g.*, Wim J. Kimmerer, *Losses of Sacramento*
3 *River Chinook Salmon and Delta Smelt to Entrainment in Water Diversions in the Sacramento-San*
4 *Joaquin Delta*, 6(2) San Francisco Estuary & Watershed Science 1, 2 (2008) (noting that while it has
5 been “assumed” by many people that the pumps have a strong influence on populations of the species
6 listed under the ESA, including the delta smelt, there is a “lack of evidence” for population-level
7 effects); William A. Bennett, *Critical Assessment of the Delta Smelt Population in the San Francisco*
8 *Estuary, California*, 3(2) San Francisco Estuary & Watershed Science 1, 34 (2005) (stating that there is
9 “a fundamental gap in knowledge” regarding the pump’s impacts on the delta smelt population).

10 81. While some efforts have been made to test the hypothesis that operation of the CVP and
11 SWP export pumps have contributed to the decline of delta smelt, neither the data available nor cause-
12 and-effect model outputs have established a causal link between operation of the pumps and population-
13 level effects in delta smelt. No studies have demonstrated a relationship between water exports and the
14 decline delta smelt abundance.

15 82. Under section 7(a)(2) of the ESA, the Bureau of Reclamation must consult with FWS
16 regarding the effects of the CVP and SWP on the delta smelt in order to operate the CVP and SWP
17 pursuant to the OCAP. 16 U.S.C. § 1536(a)(2). In July 2004, FWS issued the Long-Term Operations
18 Criteria and Plan Biological Opinion (“2004 BiOp”) on the delta smelt related to operation of the SWP
19 and CVP.

20 83. In *Natural Resources Defense Council v. Kempthorne*, a coalition of environmental
21 organizations challenged the 2004 BiOp’s conclusions regarding the effect of CVP and SWP operations
22 on the delta smelt. In response to that challenge, FWS issued an amended biological opinion in
23 February 2005 (“2005 BiOp”), and the plaintiffs amended their complaint to challenge the amended
24 biological opinion.

25 84. In May 2007, the United States District Court for the Eastern District of California
26 invalidated the 2005 BiOp, however, the court declined to vacate the 2005 BiOp and ordered the parties
27 to propose modifications to CVP and SWP operations to protect the delta smelt while a new biological
28 opinion was being prepared. On August 31, 2007, the court issued a decision imposing restrictions on

1 CVP and SWP operations until a new biological opinion could be prepared and directing FWS to
2 prepare a new biological opinion.

3 85. After requesting and receiving an extension of time to do so, FWS issued the new biological
4 opinion on December 15, 2008.

5 86. The 2008 BiOp concludes that the operations of the SWP and CVP proposed in the OCAP
6 “are likely to jeopardize the continued existence of the delta smelt.”

7 87. In addition to finding that proposed SWP and CVP operations are likely to jeopardize the
8 continued existence of the delta smelt, the 2008 BiOp concludes that such operations are likely to
9 adversely modify delta smelt critical habitat: “It is the Service’s biological opinion that the coordinated
10 operations of the CVP and SWP, as proposed, are likely to adversely modify delta smelt critical habitat”
11 and “the Service concludes that implementation of the proposed action is likely to prevent delta smelt
12 critical habitat from serving its intended conservation role.”

13 88. Section 7 of the ESA requires that federal agencies use the “best scientific and commercial
14 data available” in fulfilling the consultation requirements of the statute. 16 U.S.C. § 1536(a)(2). The
15 purpose of this requirement “is to ensure that the ESA not be implemented haphazardly, on the basis of
16 speculation or surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997). Thus, while FWS “can draw
17 conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no
18 evidence.” *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003) (citation
19 omitted).

20 89. Reliance on suppositions or untested hypotheses constitutes a violation of the ESA because
21 suppositions and untested hypotheses do not constitute available scientific and commercial data.
22 16 U.S.C. § 1536(a)(2).

23 90. Further, when making a determination or recommendation, FWS cannot “disregard
24 scientifically superior evidence.” *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 930 (E.D.N.C.
25 1995).

26 91. And where FWS is aware of the need for a discrete study or analysis to evaluate the presence
27 and vulnerability of the species or the likelihood of an activity that may jeopardize that species, the
28 failure to undertake such study or analysis may constitute a violation of the best scientific and

1 commercial data available requirement. *Roosevelt Campobello Int'l Park Comm'n v. U.S. Env'tl*
2 *Protection Agency*, 684 F.2d 1041, 1052-53 n.9 (1st Cir. 1982).

3 92. FWS has not used the best available scientific and commercial data in development of the
4 2008 BiOp as required by the ESA. FWS's failure to use the best scientific and commercial data
5 available include, but are not limited to, the following specific examples:

6 (a) FWS acknowledges analyses of scientific and commercial data available that concluded
7 there were no important, statistically significant, year-to-year relationships between delta smelt
8 entrainment and subsequent spawning abundance but they nevertheless conclude that delta smelt
9 entrainment at the CVP and SWP export pumps is a sporadically significant influence on population
10 dynamics.

11 (b) FWS fails to identify available scientific and commercial data that support the claim that
12 every day the system is in "balanced conditions," the CVP and SWP are a primary driver of delta smelt
13 abiotic and biotic habitat suitability, health, and mortality.

14 (c) FWS fails to identify available scientific and commercial data to support the claim that
15 the impact of toxics, in-Delta diversion losses, predation, and other environmental stressors on delta
16 smelt are effects of CVP and SWP export pumping.

17 (d) FWS relies, in part, on an untested hypothesis proposed by Dr. William Bennett to
18 support the conclusion that "entrainment and habitat availability/quality jointly contribute to downward
19 pressure on [delta smelt] spawner recruitment..."

20 (e) FWS fails to consider available scientific and commercial data when determining how
21 ongoing climate change is affecting delta smelt.

22 (f) FWS fails to consider available scientific and commercial data when developing
23 Reasonable and Prudent Alternative Component 3, which is purportedly designed to improve habitat
24 conditions in the fall for delta smelt.

25 93. The failure to use the best available scientific and commercial data in the 2008 BiOp violates
26 the ESA. As such, the BiOp should be invalidated and FWS should be required to undertake a
27 biological opinion that complies with the requirements of the ESA.

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SECOND CLAIM FOR RELIEF AGAINST FWS

Failure to Connect the Facts Found to the Conclusions Made in Violation of the APA

94. Paragraphs 1 through 93 are realleged and incorporated as if fully set forth herein.

95. The APA provides that agency action may be set aside if such action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

96. To comply with this requirement, FWS “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). *Accord Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1202 (9th Cir. 2008).

97. “[W]here the agency’s reasoning, although complex, is rational, clear, and complete, [the judiciary] must affirm. Contrarily, where the agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret, [the judiciary] must disapprove the agency’s action.” *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting) (internal citations and quotation marks omitted) (cited in *Nw. Coal. for Alternatives to Pesticides v. U.S. Eenvtl. Prot. Agency*, 544 F.3d 1043, 1052 (9th Cir. 2008)).

98. FWS’s approval of the 2008 BiOp violates the APA because FWS has failed to provide a rational connection between the analyses of the status of the species, environmental baseline, and effects of the action on one hand and the jeopardy and adverse modification determinations on the other hand.

99. Additionally, FWS’s approval of the 2008 BiOp violates the APA because FWS has failed to provide a rational connection between the jeopardy and adverse modification determinations on the one hand and the reasonable and prudent alternative on the other hand.

100. The failure to connect the facts found to the conclusions made violates the APA. As such, the 2008 BiOp should be invalidated and FWS should be required to undertake a biological opinion that complies with the requirements of the ESA and APA.

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THIRD CLAIM FOR RELIEF AGAINST FWS

Failure to Adequately Analyze the Status of the Species and Environmental Baseline in the 2008 BiOp in Violation of the ESA and APA

101. Paragraphs 1 through 100 are realleged and incorporated as if fully set forth herein.

102. The purpose of interagency consultation under section 7(a)(2) of the ESA is to ensure that the action (that is, operation of the CVP and SWP) is not likely to jeopardize the continued existence of delta smelt or result in the destruction or adverse modification of its designated critical habitat.

16 U.S.C. § 1536(a)(2).

103. As part of the consultation, FWS must evaluate the current status of the delta smelt and its designated critical habitat. 50 C.F.R. § 402.14(g)(2). In addition, FWS must evaluate the effects of the action on the delta smelt and its designated critical habitat. 50 C.F.R. § 402.14(g)(3). The effects of the action encompass “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 to the environmental baseline.” *Id.* § 402.02. FWS is thus required to analyze both the effects of the action and the environmental baseline. But FWS cannot conflate the effects of the action and the environmental baseline.

104. “The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area.” 50 C.F.R. § 402.02.

105. FWS cannot analyze the effects of the action in a vacuum when it makes a jeopardy or adverse modification determination pursuant to section 7(a)(2) of the ESA; instead, FWS must consider the effects of the action in light of the environmental baseline (that is, in the context in which they are occurring). *Nat’l Wildlife Fed’n v. Idaho*, 524 F.3d 917, 930 (9th Cir. 2008).

106. The 2008 BiOp fails to analyze adequately the status of the delta smelt and environmental baseline of the species.

107. It is, for example, impossible to discern where FWS has drawn the line between the environmental baseline and the effects of the action.

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1 108. The failure to analyze adequately the status of the species and environmental baseline
2 violates the ESA. As such, the 2008 BiOp should be invalidated and FWS should be required to
3 undertake a biological opinion that complies with the requirements of the ESA.

4 **FOURTH CLAIM FOR RELIEF AGAINST FWS**

5 **Failure to Adequately Analyze the Effects of the Action in the 2008 BiOp in Violation of the**
6 **ESA and APA**

7 109. Paragraphs 1 through 108 are realleged and incorporated as if fully set forth herein.

8 110. According to the Joint Consultation regulations, the biological opinion must include a
9 detailed discussion of the effects of the action. 50 C.F.R. § 402.14(h)(2).

10 111. The Joint Consultation regulations define the term “action” and state that the regulations
11 apply “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R.
12 §§ 402.02, 402.03.

13 112. The Joint Consultation regulations define “effects of the action” as “the direct and
14 indirect effects of an action on the species or critical habitat, together with the effects of other activities
15 that are interrelated or interdependent with that action that will be added to the environmental baseline.”
16 50 C.F.R. § 402.02.

17 113. If there is not a direct causal connection between an effect on the species or its critical
18 habitat and the action that is the subject of consultation, then that effect is not an effect of the action.
19 *Endangered Species Consultation Handbook* at 4-25 – 4-27; 51 Fed. Reg. 19,926, 19,932 (June 3, 1986)
20 (preamble to final rule establishing the joint consultation regulations).

21 114. The environmental baseline is not part of the effects of the action. *Nat’l Wildlife Fed’n*,
22 524 F.3d at 924 (“‘Effects of the action’ include both direct and indirect effects of an action ‘that *will be*
23 *added to the environmental baseline.*’” (quoting 50 C.F.R. § 402.02) (emphasis added)); *see also*
24 *Endangered Species Consultation Handbook* at 4-22 (“The environmental baseline is a ‘snapshot’ of a
25 species’ health at a specified point in time. It does not include the effects of the action under review in
26 the consultation.”).

27 115. The 2008 BiOp fails to adequately analyze the effects of the OCAP on the delta smelt.
28 The effects analysis contained in the BiOp focuses on three types of effects: “entrainment of delta smelt,

1 habitat restriction, and entrainment of *Pseudodiaptomus forbesi*, the primary prey of delta smelt during
2 summer-fall.” 2008 BiOp at 203. The analyses of these effects use conclusions that have been drawn
3 from biological studies, but misrepresent findings or inappropriately consider the uncertainties
4 associated with the results of those studies, creating substantive flaws in the effects analyses that
5 undermine the validity of the 2008 BiOp and violate the ESA and APA.

6 116. Additionally, the 2008 BiOp attributes the effects of actions in the environmental
7 baseline to the action that is the subject of consultation. 2008 BiOp at 202. The 2008 BiOp states that a
8 multitude of factors affect delta smelt including predation, contaminants, introduced species,
9 entrainment, habitat suitability, food supply, aquatic macrophytes, and micosystis and that “[t]he extent
10 to which these factors adversely affect delta smelt is related to hydrodynamic conditions in the Delta,
11 which in turn are controlled to a large extent by CVP and SWP operations.” This statement is
12 inappropriate because it includes unsupported assertions that (1) the adverse effects of the factors are
13 related to hydrodynamic conditions in the Delta and (2) hydrodynamic conditions in the Delta are
14 controlled to a large extent by CVP and SWP operations.

15 117. The failure to adequately analyze the effects of the operation of the SWP and CVP
16 violates the ESA and APA. As such, the 2008 BiOp should be invalidated and FWS should be required
17 to undertake a biological opinion that complies with the requirements of the ESA and APA.

18 **FIFTH CLAIM FOR RELIEF AGAINST FWS**

19 **Failure to Comply with the Regulatory Requirements for Specifying a Reasonable and Prudent** 20 **Alternative in Violation of the ESA and APA**

21 118. Paragraphs 1 through 117 are realleged and incorporated as if fully set forth herein.

22 119. Under section 7(b)(3) of the ESA, if a biological opinion finds that a proposed agency
23 action will cause jeopardy to a protected species or result in the adverse modification of its critical
24 habitat, the biological opinion must also contain “reasonable and prudent alternatives” to the proposed
25 action, if any exist. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 401.14(h)(3).

26 120. The Joint Consultation regulations define a “reasonable and prudent alternative” as an
27 alternative to the proposed action that (1) can be implemented in a manner consistent with the intended
28 purpose of the action, (2) can be implemented consistent with the scope of the action agency’s legal

1 authority, (3) is economically and technologically feasible, and (4) would avoid the likelihood of
2 jeopardizing the continued existence of listed species and avert the destruction or adverse modification
3 of critical habitat. 50 C.F.R. § 402.02.

4 121. In formulating RPAs, FWS may propose alternatives that utilize the full range of
5 discretionary authority held by the action agency and may specify an RPA that “involves the maximum
6 exercise of Federal agency authority” when necessary to avoid jeopardy to the species. Preamble to the
7 Joint Consultation Regulations, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986).

8 122. When more than one RPA is available to meet the requirements of section 7(b)(3)(A) of
9 the ESA, FWS has broad discretion to choose among them. *Sw. Ctr. for Biological Diversity v. U.S.*
10 *Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).

11 123. FWS does not satisfy the requirements of the ESA for consideration and inclusion of
12 RPAs. For example, FWS fails to consider whether the RPA “can be implemented in a manner
13 consistent with the intended purpose” of the SWP and CVP.

14 124. In addition, FWS fails to consider the cost of undertaking the RPA, and therefore does
15 not satisfy the requirement that an RPA be economically feasible.

16 125. FWS also fails to explain how the RPA would avoid the likelihood of jeopardizing the
17 continued existence of delta smelt and avert the destruction or adverse modification of its critical habitat.

18 126. Furthermore, FWS has failed to satisfy the requirements of the APA because more than
19 one RPA is available to meet the requirements of section 7(b)(3)(A) of the ESA, and FWS selected an
20 RPA from among those available that poses greater risks to public health and safety. By choosing an
21 RPA that will cause greater harm to public health and safety than the alternative RPAs, which satisfy the
22 ESA and its implementing regulations, FWS has violated section 706 of the APA.

23 127. The failure to comply with the regulatory requirements for specifying a reasonable and
24 prudent alternative violates the ESA and APA. As such, the 2008 BiOp should be invalidated and FWS
25 should be required to undertake a biological opinion that complies with the requirements of the ESA and
26 APA.

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SIXTH CLAIM FOR RELIEF AGAINST THE EPA

Failure to Consult on Pesticide Registrations that May Affect Endangered and Threatened Species in the Delta in Violation of the ESA

128. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

129. Congress enacted FIFRA to regulate the sale and use of insecticides, fungicides, and rodenticides (collectively “pesticides”) within the United States. EPA is charged with registering, reviewing, and reregistering chemical and chemical formulations for use as pesticides. 7 U.S.C. §§ 136-136y. Under FIFRA, a pesticide generally may not be sold or used in the United States unless it has an EPA registration for that particular use. 7 U.S.C. § 136a(a). Before EPA may register a pesticide, it must make the following determinations: (1) the composition claims are warranted; (2) the labeling conforms to the requirements of FIFRA; (3) the product will perform its intended function without unreasonable adverse effects on the environment; and (4) when used in accordance with widespread and commonly recognized practice, it will not cause unreasonable adverse effects on the environment. 7 U.S.C. § 136a(c)(5). The culmination of EPA’s registration process is approval of the label for that particular pesticide.

130. Once EPA approves a pesticide registration, EPA retains discretionary involvement and control over that registration. FIFRA mandates that EPA periodically review pesticide registrations, with a goal of reviewing each pesticide registration every 15 years. 7 U.S.C. § 136a(g)(1). EPA has the authority to require the submission of data for reregistration review. 7 U.S.C. § 136a(g)(2). EPA also has the authority to cancel a registration if the pesticide or its labeling does not comply with FIFRA or “when used in accordance with widespread and commonly recognized practices, generally causes unreasonable adverse effects on the environment.” 7 U.S.C. § 136d(b). If EPA determines that action is necessary to prevent an imminent hazard, EPA may suspend the registration of the pesticide immediately. 7 U.S.C. § 136d(c).

131. Congress amended FIFRA in 1988, establishing a comprehensive scheme for reregistration of pesticides. The reregistration process consists of five phases: (1) EPA must list the active ingredients of the pesticides; (2) registrants must submit notices of their intent to seek reregistration and identify any missing or inadequate data and commit to replace such data;

1 (3) registrants must submit summaries of studies that were previously submitted concerning the active
2 ingredient in the pesticide and reformat data regarding adverse effects, re-commit to satisfying all
3 applicable data requirements and pay the final registration fee; (4) EPA conducts an independent, initial
4 review of submissions under Phases 2 and 3, identifies outstanding data requirements, and issues any
5 necessary requests for additional data; and (5) EPA reviews data submitted for reregistration and
6 determines whether or not pesticide products containing the active ingredients are eligible for
7 reregistration. 7 U.S.C. § 136a-1. In order for EPA to reregister a pesticide, EPA must determine that
8 the pesticide satisfies each of the four requirements for registration, including whether the pesticide will
9 cause unreasonable adverse effects on the environment. 7 U.S.C. §§ 136a-1(g)(1)(C), 136a(c)(5).

10 132. EPA retains discretionary authority and control over pesticide registrations. EPA
11 periodically reviews pesticide registrations and also has the authority to require the submission of data
12 for reregistration review. In addition, EPA has the authority to cancel a registration if the pesticide or its
13 labeling does not comply with FIFRA or will cause unreasonable adverse effects on the environment.

14 133. In 2006, the California Department of Pesticide Regulation, Pesticide Use Reporting
15 database reported approximately 20 million and 42 million pounds of pesticides used in the Sacramento
16 and San Joaquin River watersheds, respectively. These numbers do not include residential consumer
17 use. Monitoring data from May 2004 to October 2006 for the Delta exceed the Central Valley Regional
18 Water Quality Control Board's triggers for pesticides for 57 percent of the sites tested on at least one
19 occasion.

20 134. Pyrethroid insecticides are found to be increasing in the Delta. These pesticides are being
21 used in both the Central Valley and in urbanized areas around the Delta and being transported back to
22 the Delta via area rivers. Pyrethroid use has increased over the past 20 years due to the rise in the
23 number of pyrethroids available. The toxicity of pyrethroids is extremely high in fish and other aquatic
24 species.

25 135. Pesticide impacts on fish may be acute (lethal), chronic (sublethal), or nondetectable.
26 Acute effects are usually expressed as the concentration that kills a designated percentage of the
27 population over a given time period. Sublethal effects include impaired growth, impaired reproduction,
28 and behavioral changes. Behavioral changes in fish, such as a decreased ability to detect prey and avoid

1 predation, have been associated with exposure to very low concentrations of contaminants. Acute and
2 chronic effects can become more severe when there is exposure to multiple compounds. Delta smelt in
3 particular appear to be more sensitive than the standard species on which the effects of contaminants are
4 tested.

5 136. A three-year study from 1998-2000 of pesticides in the Delta detected 23 out of 28
6 pesticides in the water samples that were collected. The most frequently detected pesticides were
7 metolachlor, molinate, thiobencarb, atrazine, carbfuran, eptam, simazine, and trifluralin. The study
8 found that pesticide concentrations were elevated throughout the Delta during the period that delta smelt
9 were present. The study's results suggest that large numbers of individual larval and juvenile delta
10 smelt are exposed to a complex mixture of pesticides for a period of weeks. Exposure during the larval
11 and juvenile life stages is critical as these are the periods when organisms are particularly sensitive to
12 toxic effects. Moreover, chronic exposure to individual and multiple pesticides may hinder growth rate,
13 reproduction as well as swimming performance. For example, tests of pesticide exposure to larval fish
14 such as the striped bass, a less sensitive species than the delta smelt, has found that high concentrations
15 of molinate can cause decreased swimming performance.

16 137. Pesticides in runoff are of particular concern to delta smelt since their spawning season
17 corresponds with the rainy season in the Central Valley and with peak pesticide application to orchards,
18 alfalfa, and rice. Pesticides have also been found to have direct or indirect adverse effects on salmonid
19 populations.

20 138. Atrazine is currently registered for use by EPA and is used within the Delta. EPA issued
21 a Reregistration Eligibility Determination for atrazine in April 2006. EPA issued an effects
22 determination for atrazine for effects on the delta smelt on February 19, 2009. EPA concluded that
23 atrazine has the potential to adversely affect the delta smelt and adversely modify its critical habitat
24 either by reducing available food, by impacting the riparian habitat of grassy and herbaceous riparian
25 areas, or by impacting water quality via effects to aquatic vegetation. Based on EPA's conclusions,
26 EPA is required to conduct a formal consultation under section 7 of the ESA. EPA has failed to consult
27 with FWS to ensure that the registration and reregistration of atrazine does not jeopardize the continued
28 existence of the delta smelt or does not adversely modify its designated critical habitat. EPA has failed

1 to consult with NMFS to ensure that the registration and reregistration of atrazine does not jeopardize
2 the continued existence of the Sacramento River winter-run chinook salmon, the Central Valley spring-
3 run chinook salmon, or the Central Valley steelhead or does not adversely modify their designated
4 critical habitat. Atrazine is slightly to moderately toxic to freshwater and estuarine/marine fish. EPA
5 concluded in the Reregistration Eligibility Determination that the “indirect effects of atrazine on fish and
6 aquatic invertebrates may be severe due to the loss of up to 60 to 95 percent of the vegetative cover,
7 which provides habitat to conceal young fish and aquatic invertebrates from predators.” Atrazine has
8 the potential to adversely affect the delta smelt and modify its critical habitat by reducing available food,
9 impacting the riparian habitat, or degrading water quality via effects to aquatic vegetation.

10 139. Carbaryl is currently registered for use by EPA and is used within the Delta. EPA issued
11 an Amended Reregistration Eligibility Determination for carbaryl in August 2008. EPA has failed to
12 consult with FWS to ensure that the registration and reregistration of carbaryl does not jeopardize the
13 continued existence of the delta smelt or adversely modify its designated critical habitat. Carbaryl is
14 very highly toxic on an acute exposure basis to estuarine/marine invertebrates, and other aquatic
15 animals.

16 140. Carbofuran is currently registered for use by EPA and is used within the Delta. EPA
17 issued a Reregistration Eligibility Determination for carbofuran in September 2007. EPA has failed to
18 consult with FWS to ensure that the registration and reregistration of carbofuran does not jeopardize the
19 continued existence of the delta smelt or adversely modify its designated critical habitat. Carbofuran is
20 very highly toxic on an acute exposure basis to freshwater and estuarine/marine fish.

21 141. Chlorpyrifos is currently registered for use by EPA and is used within the Delta. EPA
22 issued a Reregistration Eligibility Determination for chlorpyrifos in July 2006. EPA has failed to
23 consult with FWS to ensure that the registration and reregistration of chlorpyrifos does not jeopardize
24 the continued existence of the delta smelt or adversely modify its designated critical habitat.
25 Chlorpyrifos is moderately to very highly toxic to both fish and aquatic invertebrates. EPA concluded
26 that based on its calculated risk quotients, a single application of chlorpyrifos may pose high risks to fish
27 for nearly all registered outdoor uses.

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1 142. Chlorothalonil is currently registered for use by EPA and is used within the Delta. EPA
2 issued a Reregistration Eligibility Determination for chlorothalonil in September 1998. EPA has failed
3 to consult with FWS to ensure that the registration and reregistration of chlorothalonil does not
4 jeopardize the continued existence of the delta smelt or adversely modify its designated critical habitat.
5 The Reregistration Eligibility Determination for chlorothalonil concluded that it is very highly toxic to
6 fish.

7 143. Diazinon is currently registered for use by EPA and is used in the Delta. EPA issued a
8 Reregistration Eligibility Determination for diazinon July 2006. EPA has failed to consult with FWS to
9 ensure that the registration and reregistration of diazinon does not jeopardize the continued existence of
10 the delta smelt or adversely modify its designated critical habitat. Diazinon is moderately to very highly
11 toxic to freshwater fish. The estimated environmental concentrations for diazinon from water modeling
12 are within the range of acute toxicity to fish for some application rates, and EPA concluded that acute
13 mortality to fish is a possibility. Diazinon is applied frequently to orchards during the winter months,
14 which coincides with periods of high-energy demand of adult delta smelt migrating upstream and
15 spawning in freshwater.

16 144. Malathion is currently registered for use by EPA and is used within the Delta. EPA
17 issued a Reregistration Eligibility Determination for malathion in July 2006. EPA failed to consult with
18 FWS to ensure that the registration and reregistration of malathion does not jeopardize the continued
19 existence of the delta smelt or adversely modify its designated critical habitat. Malathion is classified as
20 very highly toxic to freshwater fish and highly to very highly toxic to freshwater invertebrates.

21 145. Methomyl is currently registered for use by EPA and is used in the Delta. EPA issued a
22 Reregistration Eligibility Determination for methomyl in March 1999. EPA failed to consult with FWS
23 to ensure that the registration and reregistration of methomyl does not jeopardize the continued existence
24 of the delta smelt or adversely modify its designated critical habitat. Methomyl is moderately to highly
25 toxic to freshwater fish and moderately toxic to estuarine fish.

26 146. Metolachlor is currently registered for use by EPA and it is used within the Delta.
27 EPA issued a Reregistration Eligibility Determination for metolachlor in December 1994. EPA failed to
28 consult with FWS to ensure that the registration and reregistration of metolachlor does not jeopardize

1 the continued existence of the delta smelt or adversely modify its designated critical habitat. Testing has
2 shown that technical metolachlor is moderately toxic to freshwater fish in acute exposures and that
3 chronic toxicity is also a concern.

4 147. Oxyfluorfen is currently registered for use by EPA and is used in the Delta. EPA issued
5 a Reregistration Eligibility Determination for oxyfluorfen in August 2002. EPA failed to consult with
6 FWS to ensure that the registration and reregistration of oxyfluorfen does not jeopardize the continued
7 existence of the delta smelt or destroy or adversely modify its designated critical habitat. Oxyfluorfen is
8 highly toxic to very highly toxic to fish and aquatic invertebrates. Chronic risk to fish and acute and
9 chronic risk to aquatic invertebrates may occur from some uses of oxyfluorfen.

10 148. Propanil is currently registered for use by EPA and is used in the Delta. EPA issued an
11 amended Reregistration Eligibility Determination for propanil in March 2006. EPA has failed to consult
12 with FWS to ensure that the registration and reregistration of propanil does not jeopardize the continued
13 existence of the delta smelt or destroy or adversely modify its designated critical habitat. EPA has failed
14 to consult with NMFS to ensure that the registration and reregistration of propanil does not jeopardize
15 the continued existence of the Sacramento River winter-run chinook salmon, the Central Valley spring-
16 run chinook salmon, or the Central Valley steelhead. Propanil is slightly to moderately toxic to
17 freshwater fish and is highly toxic to aquatic invertebrates, an important food source for fish. Propanil
18 undergoes abiotic and/or biotic enzymatic degradation resulting in the formation of more highly toxic
19 metabolites. Propanil is applied in May through July when toxicity to smelt embryos and larvae is
20 possible.

21 149. Simazine is currently registered for use by EPA and is used within the Delta. EPA issued
22 a Reregistration Eligibility Determination for simazine in April 2006. EPA failed to consult with FWS
23 to ensure that the registration and reregistration of simazine does not jeopardize the continued existence
24 of the delta smelt or destroy or adversely modify its designated critical habitat.

25 150. Thiobencarb is currently registered for use by EPA and is used within the Delta. EPA
26 issued a Reregistration Eligibility Determination for thiobencarb in September 1997. EPA failed to
27 consult with FWS to ensure that the registration and reregistration of thiobencarb does not jeopardize the
28 continued existence of the delta smelt or destroy or adversely modify its designated critical habitat.

1 Thiobencarb is moderately toxic to freshwater fish on an acute basis and has been associated with fish
2 kills in agricultural drains near the Sacramento and San Joaquin rivers in the Delta. Thiobencarb is also
3 highly toxic to aquatic invertebrates on an acute basis. Aquatic invertebrates are an important food
4 source for fish.

5 151. Trifluralin is currently registered for use by EPA and is used within the Delta. EPA
6 issued a Reregistration Eligibility Determination for trifluralin in April 1996. EPA failed to consult with
7 FWS to ensure that the registration and reregistration of trifluralin does not jeopardize the continued
8 existence of the delta smelt or destroy or adversely modify its designated critical habitat. Trifluralin is
9 considered moderately to highly toxic for fish and poses acute toxicity risks of concern to endangered
10 species. Trifluralin adsorbed to sediment may pose a risk for fish species that forage by feeding from
11 sediment, particularly since it has a moderate tendency to bioaccumulate.

12 152. Cypermethrin is a pyrethroid currently registered for use by EPA and is used within the
13 Delta. EPA issued a revised Reregistration Eligibility Determination for cypermethrin in January 2008.
14 EPA failed to consult with FWS to ensure that the registration and reregistration of cypermethrin does
15 not jeopardize the continued existence of the delta smelt or adversely modify its designated critical
16 habitat. EPA has failed to consult with NMFS to ensure that the registration and reregistration of
17 cypermethrin does not jeopardize the continued existence of the Sacramento River winter-run chinook
18 salmon, the Central Valley spring-run chinook salmon, or the Central Valley steelhead. Cypermethrin is
19 very highly toxic on an acute basis for both freshwater and estuarine/marine fish.

20 153. Permethrin is a pyrethroid currently registered for use by EPA and is used within the
21 Delta. EPA issued an amended Reregistration Eligibility Determination for permethrin in December
22 2007. EPA failed to consult with FWS to insure that the registration and reregistration of permethrin
23 does not jeopardize the continued existence of the delta smelt or adversely modify its designated critical
24 habitat. EPA has failed to consult with NMFS to ensure that the registration and reregistration of
25 permethrin does not jeopardize the continued existence of the Sacramento River winter-run chinook
26 salmon, the Central Valley spring-run chinook salmon, or the Central Valley steelhead. Permethrin is
27 highly toxic to both freshwater and estuarine aquatic organisms.

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1 154. EPA has violated section 7(a)(2) of the ESA by failing to initiate consultation with FWS
2 and/or NMFS to insure that the registration and reregistration of the above-named pesticides are not
3 likely to jeopardize the continued existence of the applicable Listed Species and result in the destruction
4 or adverse modification of their designated critical habitat.

5 **SEVENTH CLAIM FOR RELIEF AGAINST EPA**

6 **Commitment of Irretrievable and Irreversible Resources in Violation of Section 7(d) of the ESA**

7 155. Paragraphs 1 through 74 and 128 through 153 are realleged and incorporated as if fully
8 set forth herein.

9 156. On information and belief, Plaintiffs allege that EPA has initiated consultation under
10 section 7(a)(2) of the ESA with FWS and/or NMFS with regard to registration and/or reregistration of
11 the above-identified pesticides and their effect on the applicable Listed Species.

12 157. After initiation of consultation, the ESA prohibits federal agencies from making any
13 irreversible or irretrievable commitment of resources with respect to an agency action which has the
14 effect of foreclosing the formulation or implementation of any reasonable and prudent alternative
15 measures which would not violate section 7(a)(2) of the ESA. 16 U.S.C. § 1536(d).

16 158. EPA has violated section 7(d) of the ESA by committing the agency's limited resources
17 to continued registration and reregistration of pesticides for use under FIFRA. For example, during the
18 2007 fiscal year EPA expended more than \$50 million on review and reregistration of existing
19 pesticides.

20 **EIGHTH CLAIM FOR RELIEF AGAINST MARAD**

21 **Failure to Consult in Violation of Section 7(a)(2) of the ESA**

22 159. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

23 160. The Federal Property and Administrative Services Act of 1949 charges MARAD with the
24 disposing of obsolete National Defense Reserve Fleet vessels ("NDRF"). The NDRF is divided into two
25 vessel categories: retention vessels and non-retention vessels. Non-retention vessels are also referred to
26 as obsolete vessels, and they include MARAD and former Navy ships that cannot be activated within a
27 reasonable amount of time and have no further military use or value to MARAD. Non-retention vessels
28 are intended for disposal and receive minimal maintenance.

1 161. MARAD keeps most of the NDRF vessels in three separate fleets: the James River
2 Reserve Fleet at the James River near Fort Eustis, Virginia, the Beaumont Reserve Fleet at Beaumont,
3 Texas, and the Suisun Bay Reserve Fleet (“SBRF”) at Suisun Bay, which is part of the Delta.
4 The SBRF contains approximately 78 ships, 56 of which are considered to be obsolete non-retention
5 vessels intended for eventual disposal.

6 162. In 1994, Congress mandated that MARAD remove and dispose of all the obsolete ships
7 in the NDRF by September 30, 1999. National Maritime Heritage Act of 1994, Pub. L. No. 103-451,
8 § 6, 108 Stat. 4769, 4777 (1994). In 1997, Congress extended this deadline to September 30, 2001.
9 National Defense Authorization Act for Fiscal year 1998, Pub. L. No. 105-85, § 1026, 111 Stat. 1629,
10 1878 (1997). In October 2000, Congress again extended the deadline for disposal of obsolete ships to
11 September 30, 2006. Floyd D. Spence National Defense Authorization Act for FY 2001, Pub. L. No.
12 106-398, § 3502, 114 Stat. 1654, 1654A-490-492 (2000). At that time, Congress also mandated that the
13 Secretary of Transportation “prepare, publish and submit to Congress . . . a comprehensive plan for
14 management of the vessel disposal program of the Maritime Administration. . . .” National Defense
15 Authorization Act for FY 2006, Pub. L. No. 109-163, § 3505, 119 Stat. 3136, 3551 (2006).

16 163. In 2006, MARAD prepared, finalized and provided to Congress the *Comprehensive*
17 *Management Plan for the Disposal of Maritime Administration (MARAD) Non-Retention Vessels FY*
18 *2006* (“CMP”). The purpose of the CMP is to establish a program to mitigate the environmental threat
19 posed by deteriorated ships.

20 164. The obsolete vessels in the SBRF are highly deteriorated. A 2007 draft *Vessel*
21 *Environmental Review* of the SBRF analyzed the hulls of 40 of the SBRF vessels and concluded that
22 they contained elevated concentrations of zinc, copper, mercury, lead, hexavalent chromium, tributyltin
23 and other heavy metals and pollutants. The paint and other materials that contain these pollutants and
24 others have fallen and are continuing to fall off the ships’ corroded hulls and into Suisun Bay.
25 According to the report, *the 40 ships have lost over 20 tons of hexavalent chromium, copper, lead, zinc*
26 *and other heavy metals from their hulls*. These substances, which are being released into waters
27 designated as critical habitat for the delta smelt, are toxic to delta smelt and other aquatic organisms.
28 Exposure, even at low concentrations often measured in the environment, can exert adverse effects, such

1 as changes in feeding, growth, and swimming behavior on aquatic organisms, especially on sensitive
2 early life stages. For example, copper is highly toxic to all elements of the food web that support delta
3 smelt and to the fish themselves.

4 165. In its 2008 environmental assessment for disposal of the NRDF, MARAD recognized
5 that leaving the vessels in place in Suisun Bay “could pose potentially increasing environmental risks
6 over time due to deterioration of their hulls, hull breaches, or vessel sinkings that could release some
7 hazardous materials or oil into the Suisun Bay environment.” MARAD further concluded that “PCBs,
8 lead and other heavy metals, fuels and oils, floatable objects, trash, and paints can all have major
9 impacts to water quality immediately surround the fleet, and to date, these substances have caused
10 considerable concern for water quality in the area. . . . leaving the reserve fleet in its current location has
11 the potential to have significant, long-term, adverse and regional impacts to water resources” and can
12 “be expected to have long-term, significant, and adverse impacts on water resources within the vicinity
13 of the SBRF.”

14 166. No vessels have been removed from the SBRF since January 2007. On February 21,
15 2007, MARAD issued a temporary suspension of any additional movement of non-retention vessels
16 from the SBRF and two other NDRF anchorages. Because of the delay in removing the ships, MARAD
17 is planning for longer-term management of the vessels.

18 167. MARAD retains discretionary involvement and control over the management of the
19 SBRF and has an ongoing obligation to make decisions regarding which vessel should be disposed of
20 and which should remain in Suisun Bay. MARAD determines how a vessel will be disposed and how
21 and to what extent a vessel will be cleaned prior to removal from Suisun Bay. These actions are
22 discretionary agency actions subject to sections 7(a)(2) and 7(a)(1) of the ESA.

23 168. MARAD has violated section 7(a)(2) of the ESA by failing to initiate consultation with
24 FWS to insure that its actions including but not limited to completion of the CMP are not likely to
25 jeopardize the continued existence of the delta smelt and result in the destruction or adverse
26 modification of its designated critical habitat.

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NINTH CLAIM FOR RELIEF AGAINST MARAD

Failure To Consult in Violation of Section 7(a)(1) of The ESA

169. Paragraphs 1 through 74 and 159 through 168 are realleged and incorporated as if fully set forth herein.

170. Under ESA section 7(a)(1), federal agencies must to “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species” listed under the ESA. 16 U.S.C. § 1536(a)(1). Section 7(a)(1) of the ESA requires MARAD to review the programs it administers and consult with FWS to ensure that they utilize their authorities to conserve the delta smelt.

171. MARAD administers a vessel management program that has the potential to affect the delta smelt.

172. MARAD has not undertaken a review of its program to determine how to utilize it to conserve the delta smelt, as required by section 7(a)(1) of the ESA. Therefore, MARAD is violating section 7(a)(1) of the ESA.

TENTH CLAIM FOR RELIEF AGAINST MARAD

Commitment of Irreversible and Irretrievable Resources in Violation of section 7(d) of the ESA

173. Paragraphs 1 through 74 and 159 through 167 are realleged and incorporated as if fully set forth herein.

174. MARAD has consulted with and is being currently assisted by NMFS in addressing its obligations pursuant to section 7 of the ESA with respect to the effects of the CMP and maintaining the SBRF on the Sacramento River winter-run chinook salmon, the Central Valley spring-run chinook salmon, and the Central Valley steelhead. On information and belief, Plaintiffs allege that MARAD is also consulting with FWS regarding the CMP and maintaining the SBRF on the delta smelt.

175. After initiation of consultation, the ESA prohibits federal agencies from making any irreversible or irretrievable commitment of resources with respect to an agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate section 7(a)(2) of the ESA. 16 U.S.C. § 1536(d).

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1 176. MARAD has violated section 7(d) of the ESA by continuing to expend irreversible or
2 irretrievable resources toward maintaining the SBRF. For example, for Fiscal Year 2010, MARAD has
3 requested a \$15 million budget for maintenance and disposal of the NDRF.

4 **ELEVENTH CLAIM FOR RELIEF AGAINST FWS**

5 **Failure To Consult in Violation of Section 7(a)(2) of the ESA**

6 177. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

7 178. The Delta is considered the most invaded estuary in the world. The striped bass and
8 largemouth bass are both non-native species that are predators of the Listed Species. Typically, adult
9 striped bass move from freshwater in the fall, spend winter in the Delta, and migrate up Central Valley
10 tributaries in the spring. However, recent studies indicate that instead of migrating to salt water bays,
11 adult striped bass may congregate year-round in areas of higher prey densities. Striped bass are
12 typically found in turbid, open-water habitats and these same habitats support native, listed fishes, the
13 Listed Species.

14 179. The striped bass was introduced to the Delta in the late 19th century. According to
15 estimates, the striped bass population in the Delta has fluctuated from a low of approximately 600,000
16 to a high of 3,000,000. Today, the striped bass in the most broadly distributed and abundant large
17 piscivorous fish in the Delta. DFG estimates the population of striped bass to be over 1 million.

18 180. The striped bass is a voracious feeder and is the most significant predator of chinook
19 salmon and delta smelt. Striped bass also prey upon steelhead. Foraging striped bass typically move in
20 groups, which aids them in locating and capturing prey.

21 181. DFG estimates that at a population of 765,000 adults, striped bass consume three percent
22 of the Central Valley spring-run chinook salmon population annually, six percent of the Sacramento
23 River winter-run chinook salmon population annually, and 5.3 percent of the delta smelt population
24 annually. As of 2007, DFG estimated the striped bass population to be approximately 806,000. DFG
25 has also estimated that if the striped bass adult population decreased from 712,000 to 515,000, annual
26 striped bass consumption of Sacramento River winter-run chinook salmon would decrease by 1.6
27 percent, annual striped bass consumption of delta smelt would decrease by 1.4 percent, and annual
28 striped bass consumption of Central Valley sprint-run chinook salmon would decrease by 1.0 percent.

1 182. The largemouth bass is also a significant predator of delta smelt. It was introduced to the
2 Delta in the late 1800s. It also preys on chinook salmon and steelhead. The abundance of adult
3 largemouth bass in the Delta has increased in the last decade. Evidence suggests that rapid increases in
4 habitat have facilitated population growth of the largemouth bass. Largemouth bass consume a greater
5 number of native fishes than either the Sacramento pikeminnow or striped bass, even though they have
6 a lower spatial overlap with native fishes.

7 183. DFG funds and operates projects that are aimed at increasing the population of sport fish
8 including the striped bass and largemouth bass. Some of the funding for these programs comes from
9 FWS through the Federal Aid in Sport Fish Restoration Act, which authorizes the Secretary of the
10 Interior to provide federal aid to states for the management and restoration of sport fish. 16 U.S.C. §
11 777 *et seq.*

12 184. To receive funds under the Act, states must pass laws for the conservation of fish, which
13 include a prohibition against the diversion of license fees for any other purpose than the administration
14 of the state fish department. 16 U.S.C. § 777. Before a state may receive funds, the state must submit
15 programs or projects for fish restoration in one of two ways: (1) prepare and submit a comprehensive
16 fish and wildlife resource management plan that will insure the perpetuation of the resources for the
17 economic, scientific, and recreational enrichment of the people; or (2) submit full and detailed
18 statements of any fish restoration and management project proposed for that state. 16 U.S.C. § 777e.

19 185. For fiscal year 2008, DFG received approximately \$33 million from FWS under the Sport
20 Fish Restoration Act. DFG funds various programs and projects with the money it receives from FWS
21 under the Sport Fish Restoration Act that are aimed at increasing the population of sport fish, such as the
22 striped bass and largemouth bass. For example, DFG uses the funds for a project to provide population
23 and exploitation information on the striped bass. This information will be used “to inform decisions
24 about developing and adjusting angling regulations and targeted enforcement activities.” The
25 information from the project is also intended to be used by DFG to promote sport fish needs.

26 186. The funds subsidize numerous programs to protect and enhance the striped bass and
27 largemouth bass in the Delta. One such program includes the development and enforcement of the sport
28 fishing regulations. Current sport fishing regulations bar sports fishermen from taking striped bass less

1 than 18 inches in length and also bar the taking of more than two striped bass in excess of 18 inches in
2 length within the Delta. Cal. Code Regs. tit. 14, § 5.75. The sport fishing regulations, which are based
3 in part on information gained from programs funded by FWS, operate to protect and increase the
4 non-native striped bass population in the Delta by restricting the type and number of striped bass a
5 sports fisherman may take. Thus the regulations artificially maintain the striped bass populations,
6 increasing the striped bass predation of the Listed Species.

7 187. The provision of funds is an agency action subject to section 7(a)(2) of the ESA. FWS
8 has violated section 7(a)(2) of the ESA by failing to initiate consultation with itself and NMFS to insure
9 that the funds it provides to the California Department of Fish and Game, which contribute to the
10 protection and enhancement of non-native striped bass and largemouth bass in the Delta that in turn prey
11 upon the Listed Species, are not likely to jeopardize the continued existence of the Listed Species and
12 result in the destruction or adverse modification of their designated critical habitat.

13 **TWELFTH CLAIM FOR RELIEF AGAINST FWS**

14 **Failure to Consult in Violation of Section 7(a)(1) of the ESA**

15 188. Paragraphs 1 through 74 and 177 through 187 are realleged and incorporated as if fully
16 set forth herein.

17 189. The ESA requires that federal agencies, in consultation with FWS or NMFS, utilize their
18 authorities in furtherance of the purposes of the ESA by developing and carrying out programs for the
19 conservation of the Listed Species. 16 U.S.C. § 1536(a)(1).

20 190. FWS grants money to DFG under the Sport Fish Restoration Act on an ongoing basis.

21 191. FWS has not reviewed its programs to determine how to utilize them to conserve the
22 Listed Species, as required under section 7(a)(1) of the ESA. FWS has not consulted with FWS or
23 NMFS about utilizing authorities to conserve the Listed Species under section 7(a)(1). Therefore, FWS
24 has violated the requirements of section 7(a)(1) of the ESA.

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THIRTEENTH CLAIM FOR RELIEF AGAINST FWS

Commitment of Irreversible or Irrecoverable Resources in Violation of Section 7(d) of the ESA

192. Paragraphs 1 through 74 and 177 through 186 are realleged and incorporated as if fully set forth herein.

193. On information and belief, Plaintiffs allege that FWS has initiated consultation with itself and NMFS regarding the effect of making grants under the Sport Fish Restoration Act on the Listed Species.

194. After initiation of consultation, the ESA prohibits federal agencies from making any irreversible or irretrievable commitment of resources with respect to an agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate section 7(a)(2) of the ESA. 16 U.S.C. § 1536(d).

195. FWS has violated section 7(d) of the ESA by continuing to provide tens of millions of dollars to DFG under the Sport Fish Restoration Act to enhance the habitat and population of the striped bass and largemouth bass. Distribution of this money by FWS to DFG constitutes an irreversible or irretrievable commitment of resources.

FOURTEENTH CLAIM FOR RELIEF AGAINST FEMA

Failure to Consult in Violation of Section 7(a)(2) of the ESA

196. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

197. Congress established the National Flood Insurance Program (“NFIP”) with the passage of the National Flood Insurance Act of 1968. 42 U.S.C. § 4001 *et seq.* The purpose of the NFIP is to provide affordable flood insurance to the nation while encouraging land use that would minimize the exposure of a property to flood damage. 42 U.S.C. § 4001(d)-(f); *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1136 (11th Cir. 2008). Under the NFIP, which is administered by FEMA, local communities become eligible for federal flood insurance once they have adopted “adequate land use and control measures” that are consistent with criteria developed by FEMA. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22. If a community has not adopted land use control measures that are consistent with FEMA’s eligibility criteria, then it is foreclosed from receiving flood insurance from FEMA.

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1 198. For purposes of the NFIP, a “community” is defined as “any State or area, or political
2 subdivision . . . which has the authority to adopt and enforce flood plain management regulations for the
3 areas within its jurisdiction.” 44 C.F.R. § 59.1.

4 199. There are three basic components to the NFIP: (1) identification and mapping of
5 flood-prone communities, (2) a requirement that communities adopt and enforce regulations that meet
6 FEMA’s eligibility criteria in order to qualify for flood insurance, and (3) the provision of flood
7 insurance. FEMA conducts a Flood Insurance Study within each flood-prone community and presents
8 the results of the flood study on a map known as a Flood Insurance Rate Map (“Flood Map”) and in a
9 narrative report. The Flood Map and the report are the technical basis for the administration of the
10 NFIP. FEMA is required to review the flood maps at least once every five years to assess the need to
11 update all floodplain areas and flood risk zones. 42 U.S.C. § 4101(e), (f)(1).

12 200. Before FEMA provides flood insurance, the community must have evidenced an interest
13 in securing flood insurance coverage under the NFIP and have adopted adequate land use and control
14 measures consistent with criteria developed by FEMA. 42 U.S.C. §§ 4012(c), 4022(a). These
15 “comprehensive criteria” are intended to encourage the adoption of land use measures that reduce
16 development in areas exposed to flood damage, assist in reducing damage caused by floods and improve
17 the long-range land management and use of flood-prone areas. 42 U.S.C. § 4102(c). FEMA’s current
18 comprehensive criteria scheme is set forth in 44 C.F.R. § 60.1-26. The criteria are designed to reduce
19 threats to lives and to minimize damages to structures and water systems, and are not designed to protect
20 aquatic habitat, threatened or endangered species or other environmental values. *Nat’l Wildlife Fed’n*
21 *v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1156, (W.D. Wash. 2004).

22 201. Finally, FEMA provides flood insurance to communities through arrangements with
23 private sector property insurance companies or through state-licensed insurance agents and brokers.
24 44 C.F.R. §§ 62.23, 62.24, 62.3, 62.4. Only those property owners in communities enrolled in the NFIP
25 are eligible for flood insurance through the program. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22.
26 A community that does not adopt or enforce land-use regulations that meet the FEMA criteria is not
27 eligible to participate in the NFIP. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1.

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1 202. FEMA continually regulates the NFIP communities to ensure that they are complying
2 with the program and eligibility requirements of the NFIP. 44 C.F.R. §§ 59.22, 59.24. FEMA conducts
3 community visits to assess local programs and provide technical assistance to local officials. FEMA
4 also may place a community on probation and suspend a community from the NFIP for failure to
5 enforce minimum land-use regulations. 44 C.F.R. § 59.24. In addition, FEMA issues letters of map
6 revisions and letters of map amendments as necessary to communities participating in the NFIP.

7 203. FEMA also implements a Community Rating System (“CRS”) that provides discounts
8 on flood insurance premiums to those communities already in the NFIP that go beyond the NFIP’s
9 minimum eligibility criteria. “The CRS provides incentives to protect areas designated as critical habitat
10 for endangered species . . . [h]owever, because fish enhancement goals and flood risk reduction goals are
11 sometimes conflicting, the CRS also rewards activities that are detrimental to floodplains and aquatic
12 species.” *Nat’l Wildlife Fed’n*, 345 F. Supp. 2d at 1157.

13 204. Development within flood-prone areas is inextricably tied to participation in the NFIP.
14 Failure to participate in the NFIP decreases the opportunities for development, thereby leading to
15 decreased property values. The National Flood Insurance Act prohibits other federal agencies from
16 providing loans to property owners in non-NFIP communities. 42 U.S.C. § 4012a. Federally regulated
17 banks are also prohibited from making, increasing, extending or renewing any loan secured by property
18 located within a floodplain area unless that property is covered by flood insurance. 42 U.S.C.
19 § 4012a(b).

20 205. There are 15 communities in the Delta that are within the geographic boundaries of the
21 range of the Listed Species that also participate in the NFIP. In the years since the listing of the Listed
22 Species, FEMA has issued hundreds of new individual flood insurance policies for new structures within
23 floodplains utilized by and relied upon by the Listed Species. Furthermore, FEMA continues to
24 implement other elements of the program, such as revising flood maps, assuring community
25 compliance, and reviewing local regulations. FEMA continues to conduct these activities without
26 considering the potential impacts to the Listed Species.

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1 206. Development in the Delta has eliminated much of the historical habitat of native Delta
2 fishes and harms the remaining habitat. In 2007, the Public Policy Institute of California stated that over
3 130,000 new homes are in the planning stages in the Delta.

4 207. FEMA's actions under the NFIP result in numerous adverse impacts on the Listed
5 Species by leading to increased development, destroying the habitat of the Listed Species by converting
6 tidal wetlands to upland development and increasing wastewater and urban runoff from laws, sidewalks
7 and roads. Such runoff contains pesticides and other contaminants harmed to the Listed Species.

8 208. Specifically, development in the Delta has resulted in the clearing of riparian habitat
9 along the Sacramento River, which reduces the volume of large wood debris needed to form and
10 maintain the stream habitat that salmon depend on in their various life stages. In addition, development
11 leads to increased sedimentation, which can adversely affect salmonids during all freshwater life stages.
12 Other land use activities associated with development, such as road construction, recreation, agriculture
13 have all significantly altered the fish habitat quantity and quality by altering the streambank and channel
14 morphology, altering water temperatures, and eliminating spawning and rearing habitat.

15 209. FEMA's administration of the NFIP is a federal agency action. FEMA's ongoing
16 implementation of the NFIP in the Delta includes, but is not limited to certifying community eligibility
17 in the program, monitoring community compliance and enforcement with FEMA's comprehensive
18 criteria, and revising Flood Maps.

19 210. Implementation of the NFIP is a federal agency action that may affect the Listed Species.
20 Every county within the Delta participates in the NFIP. FEMA's administration of the NFIP in the Delta
21 provides incentives for development within the Delta, and without FEMA's implementation of the NFIP
22 in the Delta, some development would not occur. Thus, development within the Delta is affected by
23 FEMA's actions and program, which has affected the Listed Species. FEMA's administration of the
24 NFIP within the Delta is a federal action that may affect the Listed Species and is therefore subject to
25 the consultation requirements of section 7(a)(2) of the ESA.

26 211. Courts have consistently held that FEMA has discretion in its administration of the NFIP
27 and as such is subject to the requirements of sections 7(a)(1) and 7(a)(2) of the ESA. In *Florida Key*
28 *Deer v. Paulison*, the court explained that "Congress set out several purposes for FEMA to consider in

1 FEMA's development of the criteria relevant to its assessment of whether a requesting locality has
2 adequate land use and control measures in place." 552 F.3d at 1142. FEMA is "charged with
3 developing those criteria and enjoys broad discretion in so doing." 552 F.3d at 1142.

4 212. The ESA requires federal agencies to ensure that any action it carries out is not likely to
5 jeopardize the continued existence of endangered or threatened species or result in the destruction or
6 adverse modification of its critical habitat through consultation with FWS or NMFS. 16 U.S.C.
7 § 1536(a)(2).

8 213. FEMA has violated section 7(a)(2) of the ESA and its regulations by failing to initiate
9 and/or complete consultation with FWS and NMFS to insure that its actions administration of the NFIP
10 are not likely to jeopardize the continued existence of the Listed Species and result in the destruction or
11 adverse modification of their designated critical habitat.

12 **FIFTEENTH CLAIM FOR RELIEF AGAINST FEMA**

13 **Failure To Consult in Violation of Section 7(a)(1) of the ESA**

14 214. Paragraphs 1 through 74 and 196 through 213 are realleged and incorporated as if fully
15 set forth herein.

16 215. The ESA requires that federal agencies, in consultation with FWS or NMFS, utilize their
17 authorities in furtherance of the purposes of the ESA by developing and carrying out programs for the
18 conservation of the Listed Species. 16 U.S.C. § 1536(a)(1).

19 216. FEMA administers the NFIP on an ongoing basis by developing the minimum eligibility
20 criteria, determining whether communities satisfy such criteria, updating flood maps, and administering
21 the community rating system.

22 217. FEMA has not reviewed its programs to determine how to utilize them to conserve the
23 Listed Species, as required under section 7(a)(1) of the ESA. FEMA has not consulted with FWS or
24 NMFS about utilizing authorities to conserve the Listed Species under section 7(a)(1). Therefore,
25 FEMA has violated the requirements of section 7(a)(1) of the ESA.

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SIXTEENTH CLAIM FOR RELIEF AGAINST FEMA

Commitment of Irreversible and Irretrievable Resources in Violation of Section 7(d) of the ESA

218. Paragraphs 1 through 74 and 196 through 212 are realleged and incorporated as if fully set forth herein.

219. On information and belief, Plaintiffs allege that FEMA has initiated consultation with FWS and NMFS regarding the effect of the NFIP on the Listed Species.

220. After initiation of consultation, the ESA prohibits federal agencies from making any irreversible or irretrievable commitment of resources with respect to an agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate section 7(a)(2) of the ESA. 16 U.S.C. § 1536(d).

221. FEMA is continuing to commit resources through its ongoing administration of the NFIP by, for example, issuing flood insurance in the Delta and monitoring community compliance with the eligibility criteria. In addition, FEMA continues to revise and amend the Flood Maps. Thus, FEMA has violated section 7(d) of the ESA by committing irreversible or irretrievable commitment of resources.

SEVENTEENTH CLAIM FOR RELIEF AGAINST ACOE

Failure To Comply With ESA Regulations in Analyzing the Effects of the Action in Violation of the ESA and APA

222. Paragraphs 1 through 74 are realleged and incorporated as if fully set forth herein.

223. The Port owns and operates a major marine transportation center that encompasses a 200-acre operating area located within San Joaquin County along a portion of the San Joaquin River known as the Stockton Deepwater Channel. In 2004, the Port commenced a project to increase commerce through the Port (“Development Project”). The Development Project involves significant dredging of the San Joaquin River (“Dredging Activities”).

224. The Dredging Activities are aimed at increasing the depth of the Stockton Deepwater Channel from a depth of 30 feet to 35 feet below mean lower low water. The Dredging Activities will involve the dredging of 584,000 cubic yards of sediment and another 550,000 cubic yards over the next five to ten years.

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1 225. In 2003, the Port submitted three permit applications to the ACOE pursuant to section
2 404 of the Clean Water Act, 33 U.S.C. § 1344, to conduct the Dredging Activities. In connection with
3 these applications, ACOE initiated consultation with FWS and NMFS regarding the effects of the
4 Dredging Activities on the Listed Species. The ACOE submitted a biological assessment for the
5 dredging activities covered in two of the 404 permit applications to FWS and NMFS in April 2003.
6 The ACOE submitted a second biological assessment for the dredging activities covered in the third 404
7 permit application in September 2003. Both the April 2003 biological assessment and the September
8 2003 biological assessment (collectively “BAs”) include determinations by the ACOE that the proposed
9 Dredging Activities are not likely to adversely affect the delta smelt or its critical habitat. FWS
10 concurred with the determinations made by the ACOE in the BAs. NMFS disagreed with the ACOE not
11 likely to adversely effect determinations and therefore prepared a biological and conference opinion
12 after requesting additional information from ACOE.

13 226. A biological assessment and not likely to adversely affect determination is inadequate
14 where the action agency “‘entirely failed to consider an important aspect of the problem’ or to
15 ‘consider[]the relevant factors and articulate [] a rational connection between the facts found and the
16 choice made.’” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901 (9th Cir. 2002). In addition,
17 the ESA regulations require that a “not likely to adversely effect” determination address the effects of
18 the proposed action on designated critical habitat. 50 C.F.R. § 402.14(b)(1). The ACOE’s BAs and not
19 likely to adversely effect determinations are arbitrary and capricious in violation of the APA because the
20 BAs and not likely to adversely effect determinations contain inadequate analysis of the effects of the
21 proposed action in violation of the ESA. For example, the BAs and not likely to adversely effect
22 determinations fail to: (1) adequately define the action area of the Dredging Activities, (2) adequately
23 analyze the direct, indirect, and cumulative effects of the Dredging Activities and (3) address the effects
24 of the action on delta smelt critical habitat.

25 227. The ESA regulations define “action area” as “all areas to be affected directly or indirectly
26 by the Federal action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02.

27 228. The BAs and not likely to adversely effect determinations define the action area too
28 narrowly by limiting the action area to the immediate area in which the Dredging Activities will occur

1 and to Robert's Island, where the dredged material will be placed. The BAs and not likely to adversely
2 effect determinations fail to include within the defined action area those areas that will be affected both
3 directly and indirectly by the Dredging Activities. These areas include designated critical habitat for the
4 delta smelt because the Dredging Activities will both directly and indirectly effect such areas as
5 discussed below, even if they are not within the immediate area of the Dredging Activities.

6 229. The Joint Consultation regulations define "effects of the action" as "the direct and
7 indirect effects of an action on the species or critical habitat, together with the effects of other activities
8 that are interrelated or interdependent with that action, that will be added to the environmental baseline."
9 50 C.F.R. § 402.02. Indirect effects are defined as "those [effects] that are caused by the proposed
10 action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02.

11 230. The BAs and not likely to adversely effect determinations concluded that there were no
12 indirect effects caused by the Dredging Activities. However, the BAs and not likely to adversely effect
13 determinations fail to identify several indirect effects and thereby failed to analyze their effects on the
14 delta smelt. For example, the BAs and not likely to adversely effect determinations did not identify
15 increased maritime activity as an indirect effect, but the Dredging Activities will result in a doubling or
16 near doubling of ships that pass through the Port. Indirect effects associated with increased maritime
17 activity include increased propeller entrainment, reduced dissolved oxygen, and increased ballast water
18 discharges resulting in the introduction of invasive species to the habitat. These effects may adversely
19 affect the delta smelt.

20 231. For example, generally, low dissolved oxygen levels are the most common cause of fish
21 kills. Fish have specific oxygen level requirements, below which they will not reproduce, feed or
22 survive. Most fish will show signs of distress at oxygen levels below 3 mg/l.

23 232. In addition, the BAs and not likely to adversely effect determinations fail to adequately
24 analyze the direct effects of the Dredging Activities. As an example, the BAs acknowledge that there is
25 the potential for delta smelt to occur within the project area from December 1 through June 30. At the
26 same time, both BAs and not likely to adversely effect determinations conclude that the Dredging
27 Activities are not likely to adversely affect the delta smelt because the dredging would be limited to June
28 1 through December 30. This period includes two months of every year the permits are in effect

1 (i.e., June 1-30 and December 1-30) when ACOE has acknowledged delta smelt may occur in the
2 project area.

3 233. Dredging has negative impacts on fish such as the delta smelt. With respect to its habitat,
4 dredging increases sedimentation, simplifies stream bank and riparian habitat, and modifies hydrology,
5 which results in changes to features that are essential for the delta smelt and their conservation.

6 234. The BAs and not likely to adversely effect determinations also provide inadequate
7 analysis of the cumulative effects of the Dredging Activities. Cumulative effects are defined as “those
8 effects of future State or private activities, not involving Federal activities, that are reasonably certain to
9 occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02. ACOE
10 failed to consider the cumulative effects of the new Dredging Activities combined with the effects that
11 past dredging has had on the environment. For example, dredging can lead to decreased dissolved
12 oxygen levels, which can prove to be lethal for fish. To the extent that the proposed action exacerbates
13 existing conditions that harm the delta smelt or its critical habitat, it triggers the need to seek and obtain
14 a biological opinion to comply with section 7(a)(2) of the ESA.

15 235. The BAs and not likely to adversely effect determinations also failed to directly address
16 the effects of the Dredging Activities on designated delta smelt critical habitat. While the BAs and not
17 likely to adversely effect determinations acknowledged that the delta smelt may be present in the project
18 area and the area had been designated as critical habitat, the BAs and not likely to adversely effect
19 determinations ignore the effects of the action on delta smelt critical habitat.

20 236. The BAs and not likely to adversely effect determinations constitute final agency actions
21 that fail to adequately analyze the effects of the Dredging Activities in violation of the ESA and the Joint
22 Consultation Regulations, 50 C.F.R. pt. 402 (“Joint Regulations”), and are therefore arbitrary and
23 capricious in violation of the APA.

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EIGHTEENTH CLAIM FOR RELIEF AGAINST FWS

Failure To Comply With ESA Regulations in Analyzing the Effects of the Action in Violation of the ESA and APA

237. Paragraphs 1 through 74 and 222 through 236 are realleged and incorporated as if fully set forth herein.

238. In two separate letters dated January 9, 2004, FWS concurred with ACOE's BAs and not likely to adversely effect determinations for the Dredging Activities.

239. FWS's concurrences are based on inadequate analysis of the effects of the proposed action in violation of the ESA. For example, the concurrences are based on BAs and not likely to adversely effect determinations that fail to: (1) adequately define the action area of the Dredging Activities, (2) adequately analyze the direct, indirect, and cumulative effects of the Dredging Activities and (3) address the effects of the action on delta smelt critical habitat.

240. FWS's January 9, 2004 concurrences in ACOE's not likely to adversely effect determination each individually constitutes a final agency action that is arbitrary and capricious in violation of the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment as follows:

- 1) Declare that FWS violated the ESA and APA in issuing the 2008 BiOp;
- 2) Enjoin FWS from implementing the 2008 BiOp;
- 3) Direct FWS to remedy the violations of the ESA and APA within a reasonable time;
- 4) Declare that EPA has violated section 7(a)(2) of the ESA by failing to consult with FWS and/or NMFS concerning effects of EPA the above-identified pesticide registrations on the Listed Species;
- 5) Order EPA to initiate consultation pursuant to ESA § 7(a)(2) on the effects of the above-identified pesticide registrations on the Listed Species as applicable;
- 6) Enjoin EPA from authorizing uses of the identified pesticides in the Delta until the consultation process has been completed and EPA has brought its pesticide registrations into compliance with the ESA § 7(a)(2);

1 7) Declare that MARAD violated the ESA by failing to consult with FWS and NMFS to
2 insure that its actions under the Comprehensive Management Plan do not jeopardize the Listed Species;

3 8) Declare that MARAD violated the ESA by failing to use its authorities to develop or
4 carry out programs, in consultation with FWS and NMFS, to conserve the Listed Species;

5 9) Declare that MARAD is violating the ESA by continuing to commit irretrievable and
6 irreversible resources by maintaining the SBRF;

7 10) Order MARAD to initiate consultation pursuant to ESA § 7(a)(1) and (a)(2) on the effects
8 to the Listed Species;

9 11) Declare that FWS violated the ESA by failing to consult with FWS and NMFS to insure
10 that its action in granting money under the Sport Fish Restoration Act does not jeopardize the Listed
11 Species;

12 12) Declare that FWS violated the ESA by failing to use its authorities to develop or carry out
13 programs, in consultation with FWS and NMFS, to conserve the Listed Species;

14 13) Declare that FWS violated the ESA by continuing to commit irretrievable and irreversible
15 resources by continuing to grant money to DFG;

16 14) Order FWS to initiate consultation pursuant to ESA § 7(a)(1) and (a)(2) on the effects of
17 its actions under the Sport Fish Restoration Act on the Listed Species;

18 15) Enjoin FWS from granting funds to DFG under the Sport Fish Restoration Act with
19 respect to programs related to the Striped Bass and Largemouth Bass until the consultation process has
20 been completed;

21 16) Declare that FEMA has violated the ESA by failing to consult with FWS or NMFS to
22 insure that its action of implementing the NFIP does not jeopardize the Listed Species;

23 17) Declare that FEMA has violated the ESA by failing to use its authorities to develop or
24 carry out programs, in consultation with FWS and NMFS, to conserve the Listed Species;

25 18) Declare that FEMA has violated the ESA by continuing to commit irretrievable and
26 irreversible resources to administration of the NFIP;

27 19) Order FEMA to initiate consultation pursuant to the ESA on the effects of its actions in
28 administering the NFIP on the Listed Species;

1 20) Enjoin FEMA from issuing and/or authorizing insurance policies for new development
2 through the NFIP within the Delta until it complies with section 7 of the ESA;

3 21) Declare that FWS has violated the ESA and APA in concurring with the not likely to
4 adversely affect determination in the biological assessments issued for the Dredging Activities for the
5 Port, as described in paragraphs __ to __;

6 22) Declare that ACOE violated the APA in issuing the biological assessments for the
7 Dredging Activities for the Port, as described in paragraphs __ to __;

8 23) Order FWS to initiate formal consultation for the Dredging Activities for the Port of
9 Stockton;

10 24) Retain jurisdiction over this matter until such time as each of the Defendants has fully
11 complied with the requirements of the ESA;

12 25) Award Plaintiffs their costs of litigation pursuant to the ESA, 16 U.S.C. § 1540(g)(4);

13 26) Award Plaintiffs their costs and reasonable fees and expenses pursuant to the Equal
14 Access to Justice Act, 28 U.S.C. § 2412; and

15 27) Grant plaintiffs such other further relief, including injunctive relief, as the Court may
16 deem just and proper.

17 Dated: May 28, 2009

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