

1 Security, FEDERAL EMERGENCY)
 2 MANAGEMENT AGENCY, WILLIAM CRAIG)
 3 FUGATE, in his official capacity as Administrator)
 4 of the Federal Emergency Management Agency,)
 5 UNITED STATES ARMY CORPS OF)
 6 ENGINEERS, Lieutenant General Robert L. Van)
 7 Antwerp, in his official capacity as Commanding)
 8 General of the United States Army Corps of)
 9 Engineers,)
 10)
 11 Defendants.)

INTRODUCTION

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

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

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

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

7 5. In 2008, FWS conducted consultation under section 7(a)(2) of the ESA and issued a
8 biological opinion for the continued operation of the SWP and CVP ("2008 BiOp"). The 2008 BiOp
9 concluded that SWP and CVP operations would jeopardize the delta smelt. Therefore, FWS devised a
10 set of restrictions on the operation of the SWP and CVP, thereby reducing the amount of water delivered
11 to 23 million Californians.

12 6. In 2009, NMFS completed consultation under section 7(a)(2) of the ESA and issued a
13 biological opinion for the continued operation of the SWP and CVP ("2009 BiOp"). The 2009 BiOp
14 concluded that SWP and CVP operations would likely jeopardize the continued existence of the
15 salmonids, and are also likely to destroy or adversely modify the designated critical habitat of the
16 salmonids. Therefore, NMFS also devised a set of restrictions on the operation of the SWP and CVP,
17 thereby reducing the amount of water delivered to 23 million Californians.

18 7. There are several other federal agencies that carry out discretionary actions and programs
19 that have an adverse effect on the Listed Species and their critical habitat within the Delta. These
20 agencies are authorizing, funding, and carrying out actions and programs that are contributing to the
21 decline of the Delta and the Listed Species. Among the agencies that have failed to consult with FWS
22 and NMFS to ensure that their actions are not likely to jeopardize the continued existence of the Listed
23 Species or result in the destruction or adverse modification of their designated critical habitat is the
24 Federal Emergency Management Agency ("FEMA").

25 8. Urban and agricultural development in the Delta has adverse impacts on the Listed Species
26 by reducing habitat and increasing urban runoff that may be contaminated with substances harmful to
27 the Listed Species. According to the United States Geological Survey, *more than 95 percent* of the
28

1 historic tidal marshes in the Delta have been leveed and filled with attendant losses in fish and wildlife
2 habitat.

3 9. FEMA administers the National Flood Insurance Program (“NFIP”), which offers subsidized
4 flood insurance to property owners in eligible local communities, which in turns leads to more
5 development in the flood-prone areas of the Delta.

6 10. FEMA has not completed consultation with FWS and NMFS regarding the affect of the
7 administration of the NFIP on the Listed Species as required by section 7(a)(2) and 7(a)(1) of the ESA.

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

11 **JURISDICTION AND VENUE**

12 12. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).
13 As required by the ESA, 16 U.S.C. § 1540(g), Plaintiffs provided FEMA with a notice of intent to sue
14 60 days prior to the filing of the First Amended Complaint. A copy of the notice is attached as
15 Exhibit A.

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

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

20 **PARTIES**

21 15. Plaintiff Coalition for a Sustainable Delta is comprised of agricultural water users and
22 individuals in the San Joaquin Valley. The Coalition is bringing this action on behalf of itself and its
23 members. The Coalition and its members depend on water from the Delta; the water is essential to their
24 livelihood and economic well-being. In addition to their economic interest in the Delta, the Coalition
25 and its members are dedicated to protecting the Delta and committed to promoting a strategy to ensure
26 its sustainability. As stated most recently in its 2009 Amended and Restated Bylaws, consistent with the
27 Coalition’s Restated Articles of Incorporation, the purpose of the Coalition is to (1) promote the long-
28 term, ecological health of the Sacramento-San Joaquin Delta and its native species and (2) ensure a

1 sustainable, reliable water supply for persons and entities engaged in agricultural pursuits in the San
2 Joaquin Valley. Participation of individual Coalition members in this litigation is not necessary in light
3 of the claims asserted and relief requested.

4 16. Certain Coalition members have contracts with various agencies for the delivery of SWP and
5 CVP water, and as such, depend on SWP and CVP deliveries from the Delta to the San Joaquin Valley
6 for their water supply. Certain Coalition members have contracts to receive SWP deliveries through
7 2035. These contracts are expected to be extended beyond that date. Thus, the Coalition and its
8 members have a long-term interest in the overall health of the Delta and its ecosystem, which includes
9 the maintenance of viable populations of the Listed Species.

10 17. Defendants' actions have significant economic and contractual impacts on members of the
11 Coalition because of their contracts with water agencies, including SWP contractors, for deliveries of
12 SWP water. Defendants' actions also threaten the livelihood of Coalition members. Certain Coalition
13 members' contracts for delivery of SWP water require payment for their full contractual entitlement
14 regardless of the amount of water actually delivered in any given year through the SWP. As a result of
15 this contractual relationship, Coalition members have been forced to pay full contractual amounts
16 despite receiving less water. Further, because Coalition members require water for irrigation of their
17 crops, reduced delivery of surface water through the SWP is likely to result in increased reliance on
18 groundwater for irrigation supplies, which will result in overdraft of the groundwater basins that
19 underlie the lands of Coalition members. Reduced water availability and reduced deliveries of SWP
20 water have an economic impact on members of the Coalition because such members are required to pay
21 for the full contractual entitlement, even if the entitlement is not delivered and because the members
22 must develop other sources of water for irrigation of their crops or forego irrigation altogether thus
23 impacting their livelihood. Thus, Coalition members have been, and will continue to be, harmed by
24 Defendants' actions and programs.

25 18. Coalition members visit the Delta and appreciate the Delta ecosystem and its many benefits,
26 routinely engaging in a variety of recreational activities related to the Delta and the Listed Species –
27 including boating, fishing (when permitted), wildlife photography, and wildlife viewing – and have
28 concrete plans to continue to do so in the future. Thus, Coalition members derive significant use and

1 enjoyment from the aesthetic, recreational, and conservation benefits of the Delta ecosystem, including
2 the Listed Species. The Coalition and its members are deeply concerned about the health of the Delta
3 ecosystem and its evident decline. The decline of the Listed Species has had and continues to have a
4 substantial negative impact on Coalition members, impairing their use and enjoyment of the Delta and
5 the Listed Species by, among other things, impairing their ability to view the Listed Species.

6 19. The Coalition invests substantial resources in efforts to protect the Delta and the Listed
7 Species. For example, the Coalition is one of a number of plaintiffs in *Coalition for a Sustainable Delta*
8 *v. Carlson*, No. 08-397 (E.D. Cal. filed Jan. 29, 2008) (a suit against the Director of the California
9 Department of Fish and Game alleging violations of the Endangered Species Act stemming from the
10 State's striped bass management program) and *Coalition for a Sustainable Delta v. City of Stockton*, No.
11 09-466 (E.D. Cal. filed Feb. 18, 2009) (a suit against the City of Stockton and County of San Joaquin
12 alleging violations of the Clean Water Act and Endangered Species Act stemming from mismanagement
13 of the municipal stormwater system).

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

19 21. Plaintiff Kern County Water Agency is a public agency that was created in July 1961 by a
20 special act of the California State Legislature and ratified by the electorate of Kern County in September
21 1961. KCWA was granted the primary power to acquire and contract for water supplies for Kern
22 County. KCWA serves as Kern County's local contracting entity for the State Water Project. In 1963,
23 KCWA contracted with the California Department of Water Resources ("DWR") for a water supply of
24 up to 998,750 acre-feet of SWP table A water annually. KCWA is a wholesaler of SWP water for both
25 agricultural and municipal and industrial uses; although a wholesaler, KCWA does not merely pass
26 along its costs to the water districts it serves. KCWA contracts with 13 individual water districts in
27 Kern County, which supply SWP water directly to water users for agricultural use. KCWA also
28 contracts for the delivery of treated water supplies with water purveyors who supply water directly to

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

9 22. Defendants' actions have significant economic and contractual impacts on KCWA because
10 of its contract with DWR for deliveries of SWP water. KCWA's contract for delivery of SWP water
11 requires payment for its full contract amount regardless of the amount of water actually delivered in any
12 given year through the SWP. As a result of this contractual relationship, KCWA has been forced to pay
13 its full contract amount despite receiving less water.

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. Reduced deliveries of
18 surface water through the SWP are likely to result in increased reliance on groundwater and other
19 sources, which will require potentially significant capital expenditures by KCWA.

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

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

27 26. Defendant William Craig Fugate is Administrator of FEMA. He is sued in his official
28 capacity.

FACTUAL AND LEGAL BACKGROUND

I. The Sacramento-San Joaquin Delta

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

28. The Delta is also home to 500,000 residents and is a major recreation and tourist destination. The Delta's 635 miles of boating waterways are served by 95 marinas supporting 11,700 in-water boat slips and dry storage for 5,500 boats. In 2000, there were an estimated 2.13 million boating trips in the Delta.

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

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

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

1 32. An independent Blue Ribbon task force appointed by Governor Schwarzenegger (“Blue
2 Ribbon Task Force”) acknowledged both the severity of the decline of the Delta and the role of a variety
3 of factors in the decline, including invasive species, urban growth, urban and agricultural pollution, and
4 water diversions by stating that the Delta is an in “ecological tailspin.” In its Biological Assessment for
5 the continued operation of the SWP and CVP, the U.S. Bureau of Reclamation also identified a number
6 of factors, other than operation of the SWP and CVP, that have substantive harmful effects on delta
7 smelt including predation by non-native recreational fisheries, contaminants, water diversions, reduced
8 habitat quality, and invasive species.

9 33. Agriculture is one of the principal land uses in the Delta. In 1991, 538,000 acres of the Delta
10 was used for agriculture. The effects on the Delta from this agricultural use include the effects of in-
11 Delta diversions of water (including fish entrainment and reduced outflow) and agricultural return flows,
12 including the introduction of pesticides. In 2006, the California Department of Pesticide Regulation,
13 Pesticide Use Reporting database reported approximately 20 million and 42 million pounds of pesticides
14 used in the Sacramento and San Joaquin River watersheds respectively. During a three-year study, the
15 U.S. Geological Service reported that of 28 dissolved pesticides subject to testing, 23 were detected in
16 water samples from the Delta. Pesticides have been found to have both direct and indirect adverse
17 effects on the Listed Species.

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

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

1 **II. The Listed Species**

2 36. 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 37. 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 38. 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 39. 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.

26 **III. The Endangered Species Act**

27 40. Congress enacted the ESA in order to protect species that “have been so depleted in numbers
28 that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). The ESA was enacted

1 in recognition of the fact that endangered and threatened species provide “esthetic, ecological,
2 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C.
3 § 1531(a)(3).

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

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

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

14 44. The Joint Consultation regulations developed by FWS and NMFS to implement section
15 7(a)(2) of the ESA specify that an agency’s duty to consult is triggered whenever it is determined that an
16 agency’s action “may affect” a threatened or endangered species or its critical habitat. 50 C.F.R.
17 § 402.14.

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

23 46. The formal consultation process is initiated when the action agency sends a written request to
24 FWS or NMFS. As part of the formal consultation, FWS or NMFS prepares a biological opinion to
25 determine whether the action is likely to jeopardize the continued existence of a listed species.
26 50 C.F.R. § 402.14(g)(4), (h)(3).

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

1 48. In developing a biological opinion, FWS and NMFS are obligated to consider the effects of
2 the proposed action together with the environmental baseline when determining whether the action is
3 likely to jeopardize one or more listed species or destroy or adversely modify designated critical habitat
4 of such species. 16 U.S.C. § 1536; 50 C.F.R. § 402.02.

5 49. The effects of the action encompass “the direct and indirect effects of an action on the
6 species or critical habitat, together with the effects of other activities that are interrelated or
7 interdependent with that action, that will be added to the environmental baseline.” *Id.* § 402.02. FWS
8 and NMFS are thus required to analyze both the effects of the action and the environmental baseline.
9 But FWS and NMFS cannot conflate the effects of the action and the environmental baseline.

10 50. “The environmental baseline includes the past and present impacts of all Federal, State, or
11 private actions and other human activities in the action area.” 50 C.F.R. § 402.02. Thus, FWS and
12 NMFS cannot analyze the effects of the action in a vacuum; instead, FWS must consider the effects of
13 the action in light of the environmental baseline (that is, in the context in which they are occurring).
14 *Nat’l Wildlife Fed’n v. Idaho*, 524 F.3d 917, 930 (9th Cir. 2008).

15 51. When preparing a biological opinion, FWS and NMFS are responsible for, *inter alia*,
16 reviewing all relevant information provided by the action agency or otherwise available, evaluating the
17 status of the listed species and its designated critical habitat, evaluating the effects of the action and
18 cumulative effects on the listed species and its designated critical habitat, and formulating its biological
19 opinion. 50 C.F.R. § 402.14(g).

20 52. A biological opinion that is issued under section 7 of the ESA must include a summary of the
21 information on which the opinion is based, a detailed discussion of the effects of the action on the listed
22 species and its designated critical habitat, and an opinion by FWS or NMFS as to whether the action is
23 likely to jeopardize the continued existence of a listed species or result in the destruction or adverse
24 modification of its designated critical habitat. 50 C.F.R. § 402.14(h).

25 53. Any biological opinion that includes a finding of jeopardy or adverse modification of critical
26 habitat must also include reasonable and prudent alternatives (“RPA”) to the proposed action. 50 C.F.R.
27 § 402.14(h)(3). The Joint Consultation regulations define a “reasonable and prudent alternative” as an
28 alternative to the proposed action that (1) can be implemented in a manner consistent with the intended

1 purpose of the action, (2) can be implemented consistent with the scope of the action agency's legal
2 authority, (3) is economically and technologically feasible, and (4) would avoid the likelihood of
3 jeopardizing the continued existence of listed species and avert the destruction or adverse modification
4 of critical habitat. 50 C.F.R. § 402.02.

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

7 55. Section 7(a)(1) of the ESA imposes an obligation on the Secretary of the Interior and on the
8 Secretary of Commerce to utilize programs under the jurisdiction of the Departments of Interior and
9 Commerce in furtherance of the purposes of the ESA. Section 7(a)(1) mandates that all federal agencies
10 consult with FWS or NMFS, as applicable, and "utilize their authorities in furtherance of the purposes
11 of" the ESA by "carrying out programs for the conservation of endangered species and threatened
12 species." 16 U.S.C. § 1536(a)(1).

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

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

23 58. Section 7(d) clarifies the requirements of section 7(a) by ensuring the status quo will be
24 maintained during the consultation process. *Connor v. Burford*, 848 F.2d 1448, 1455 n.34 (9th Cir.
25 1998).

26 **IV. The State Water Project, the Central Valley Project, and the Delta Ecosystem**

27 59. The health of the Delta is crucial to the water supply of the State of California, as it is critical
28 to operation of both the SWP and CVP, which deliver water to urban, agricultural, and industrial water

1 users throughout the State. Two-thirds of California's residents rely on the Delta for at least a portion of
2 their drinking water. In addition, the SWP and CVP provide water to more than 4 million acres of
3 irrigated farmland in the State, primarily in the San Joaquin Valley. Although the SWP and CVP are
4 distinct water infrastructure facilities operated by the California and federal governments respectively,
5 the SWP and CVP are operated pursuant to a cooperative agreement.

6 60. The SWP is owned by the State of California and is operated by DWR. The SWP is the
7 largest state-operated water supply project in the United States and includes 32 storage facilities,
8 reservoirs, and lakes; 17 pumping plants; 3 pumping-generating plants; 5 hydroelectric power plants;
9 and about 660 miles of pipelines and open canals that collectively stretch from Oroville Reservoir,
10 located on the Feather River in the north, to Perris Reservoir, located in Riverside County in the south.
11 Twenty-nine regional and local public water supply agencies have contracted with the State of
12 California for a supply of water from the SWP. These public agencies, in turn, supply water to about
13 750,000 acres of the State's most productive irrigated farmland and 23 million people located in the San
14 Francisco Bay Area, the San Joaquin Valley, the Central Coast, and southern California. Plaintiff
15 KCWA has a contract with the State of California for a supply of water from the SWP.

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

24 62. Some stakeholders have attributed many of the problems in the Delta, including the decline
25 in the health of species such as the delta smelt, to the pumps that provide water to the SWP and CVP
26 systems. These systems export water to millions of urban and agricultural users throughout the State,
27 including users in the Bay Area and other parts of northern California. But the best scientific and
28 commercial data available suggests that there are a wide diversity of factors that are significantly

1 contributing to the ongoing decline of biotic and abiotic (i.e., physical) conditions in the Delta
2 ecosystem.

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

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

17 **FIRST CLAIM FOR RELIEF AGAINST FEMA**

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

19 65. Paragraphs 1 through 64 are realleged and incorporated as if fully set forth herein.

20 66. Congress established the National Flood Insurance Program (“NFIP”) with the passage of the
21 National Flood Insurance Act of 1968. 42 U.S.C. § 4001 *et seq.* The purpose of the NFIP is to provide
22 affordable flood insurance to the nation while encouraging land use that would minimize the exposure of
23 a property to flood damage. 42 U.S.C. § 4001(d)-(f); *Florida Key Deer v. Paulison*, 522 F.3d 1133,
24 1136 (11th Cir. 2008). Under the NFIP, which is administered by FEMA, local communities become
25 eligible for federal flood insurance once they have adopted “adequate land use and control measures”
26 that are consistent with criteria developed by FEMA. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22. If a
27 community has not adopted land use control measures that are consistent with FEMA’s eligibility
28 criteria, then it is foreclosed from receiving flood insurance from FEMA.

1 67. 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 68. There are three basic components to the NFIP: (1) identification and mapping of flood-prone
5 communities, (2) a requirement that communities adopt and enforce regulations that meet FEMA’s
6 eligibility criteria in order to qualify for flood insurance, and (3) the provision of flood insurance.

7 69. 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 70. The Flood Map identifies areas that are at high, moderate, and low risk of flooding. An area
13 that is at high risk of flooding, which is defined as an area that will be inundated by a flood event having
14 a 1% chance of being equaled or exceeded in any given year, is identified on the Flood Map as a Special
15 Flood Hazard Area (“SFHA”). The NFIP establishes certain requirements and criteria for property
16 located in a SFHA. For example, if property located within a SFHA is secured by a federally backed
17 mortgage or loan, the NFIP requires the property owner to purchase a flood insurance policy. 42 U.S.C.
18 § 4012a. But this requirement, as well as other restrictions established by the NFIP, does not exist for
19 land located in a low or moderate flood risk area. Thus, FEMA’s implementation of the NFIP
20 encourages development in low and moderate flood risk areas.

21 71. Pursuant to regulations promulgated by FEMA, the boundaries of a SFHA can be revised
22 through manmade alterations, such as the placement of fill, modification of a channel, and construction
23 or modification of a culvert or levee. *E.g.*, 44 C.F.R. §§ 65.5, 65.10, 72.1.

24 72. For example, an area that would otherwise qualify as a SFHA can be classified as a moderate
25 flood risk through the construction of a “certified” levee. Certified levees must comply with design,
26 operation, and maintenance standards promulgated by FEMA. 44 C.F.R. § 65.10. Following
27 certification by FEMA, the areas protected by the levee will be “mapped out” of the SFHA, and
28 classified as a moderate flood risk. As a result, the areas protected by the levee will not be subject to the

1 flood insurance purchase requirement or other criteria of the NFIP. Thus, FEMA’s implementation of
2 the NFIP incentivizes developers to construct levees so as to avoid the impacts of a SFHA designation.
3 For example, many Delta communities avoided the SFHA designation by levee systems constructed as
4 part of master planned development projects.

5 73. In order for a landowner in a SFHA to obtain flood insurance from FEMA, the community in
6 which the area is situated must be participating in the NFIP. 42 U.S.C. § 4106(a). And in order to
7 participate in the NFIP, the community must have adopted adequate land use and control measures
8 consistent with criteria developed by FEMA. 42 U.S.C. §§ 4012(c), 4022(a). These “comprehensive
9 criteria” are intended to encourage the adoption of land use measures that reduce development in areas
10 exposed to flood damage, assist in reducing damage caused by floods and improve the long-range land
11 management and use of flood-prone areas. 42 U.S.C. § 4102(c). FEMA’s current comprehensive
12 criteria scheme is set forth in 44 C.F.R. § 60.1-26. The criteria are designed to reduce threats to lives
13 and to minimize damages to structures and water systems, and are not designed to protect aquatic
14 habitat, threatened or endangered species or other environmental values. *Nat’l Wildlife Fed’n v. Fed.*
15 *Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1156, (W.D. Wash. 2004).

16 74. Finally, FEMA provides flood insurance to communities through arrangements with private
17 sector property insurance companies or through state-licensed insurance agents and brokers. 44 C.F.R.
18 §§ 62.23, 62.24, 62.3, 62.4. Only those property owners in communities enrolled in the NFIP are
19 eligible for flood insurance through the program. 42 U.S.C. § 4012(c)(2); 44 C.F.R. § 59.22.
20 A community that does not adopt or enforce land-use regulations that meet the FEMA criteria is not
21 eligible to participate in the NFIP. 42 U.S.C. § 4022(a)(1); 44 C.F.R. § 60.1.

22 75. FEMA continually regulates the NFIP communities to ensure that they are complying with
23 the program and eligibility requirements of the NFIP. 44 C.F.R. §§ 59.22, 59.24. FEMA conducts
24 community visits to assess local programs and provide technical assistance to local officials. FEMA
25 also may place a community on probation and suspend a community from the NFIP for failure to
26 enforce minimum land-use regulations. 44 C.F.R. § 59.24. In addition, FEMA issues letters of map
27 revisions and letters of map amendments as necessary to communities participating in the NFIP.
28

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

7 77. Development within flood-prone areas is inextricably tied to FEMA’s implementation of the
8 NFIP. For example, if an area is designated a SFHA, failure to participate in the NFIP decreases the
9 opportunities for development, thereby leading to decreased property values. The National Flood
10 Insurance Act prohibits other federal agencies from providing loans to property owners in non-NFIP
11 communities. 42 U.S.C. § 4012a. Federally regulated banks are also prohibited from making,
12 increasing, extending or renewing any loan secured by property located within a floodplain area unless
13 that property is covered by flood insurance. 42 U.S.C. § 4012a(b).

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

21 79. Development in the Delta has eliminated much of the historical habitat of native Delta fishes
22 and harms the remaining habitat. In 2007, the Public Policy Institute of California stated that over
23 130,000 new homes are in the planning stages in the Delta.

24 80. FEMA’s actions under the NFIP result in numerous adverse impacts on the Listed Species by
25 leading to increased development, destroying the habitat of the Listed Species by converting tidal
26 wetlands to upland development and increasing wastewater and urban runoff from laws, sidewalks and
27 roads. Such runoff contains pesticides and other contaminants harmful to the Listed Species.
28

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

8 82. FEMA's administration of the NFIP is a federal agency action. FEMA's ongoing
9 implementation of the NFIP in the Delta includes, but is not limited to certifying community eligibility
10 in the program, monitoring community compliance and enforcement with FEMA's comprehensive
11 criteria, and revising Flood Maps.

12 83. Implementation of the NFIP is a federal agency action that may affect the Listed Species.
13 Every county within the Delta participates in the NFIP. FEMA's administration of the NFIP in the Delta
14 provides incentives for development within the Delta, and without FEMA's implementation of the NFIP
15 in the Delta, some development would not occur. Thus, development within the Delta is affected by
16 FEMA's actions and program, which has affected the Listed Species. FEMA's administration of the
17 NFIP within the Delta is a federal action that may affect the Listed Species and is therefore subject to
18 the consultation requirements of section 7(a)(2) of the ESA.

19 84. Courts have consistently held that FEMA has discretion in its administration of the NFIP and
20 as such is subject to the requirements of sections 7(a)(1) and 7(a)(2) of the ESA. In *Florida Key Deer v.*
21 *Paulison*, the court explained that "Congress set out several purposes for FEMA to consider in FEMA's
22 development of the criteria relevant to its assessment of whether a requesting locality has adequate land
23 use and control measures in place." 552 F.3d at 1142. FEMA is "charged with developing those criteria
24 and enjoys broad discretion in so doing." *Id.*

25 85. The ESA requires federal agencies to ensure that any action it carries out is not likely to
26 jeopardize the continued existence of endangered or threatened species or result in the destruction or
27 adverse modification of its critical habitat through consultation with FWS or NMFS. 16 U.S.C.
28 § 1536(a)(2).

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

5 **SECOND CLAIM FOR RELIEF AGAINST FEMA**

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

7 87. Paragraphs 1 through 86 are realleged and incorporated as if fully set forth herein.

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

11 89. FEMA administers the NFIP on an ongoing basis by developing the minimum eligibility
12 criteria, determining whether communities satisfy such criteria, updating flood maps, and administering
13 the community rating system.

14 90. FEMA has not reviewed its programs to determine how to utilize them to conserve the Listed
15 Species, as required under section 7(a)(1) of the ESA. FEMA has not consulted with FWS or NMFS
16 about utilizing authorities to conserve the Listed Species under section 7(a)(1). Therefore, FEMA has
17 violated the requirements of section 7(a)(1) of the ESA.

18 **THIRD CLAIM FOR RELIEF AGAINST FEMA**

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

20 91. Paragraphs 1 through 6, and 8 through 84 are realleged and incorporated as if fully set forth
21 herein.

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

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

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

5 **PRAYER FOR RELIEF**

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

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

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

11 3) Declare that FEMA has violated the ESA by continuing to commit irretrievable and
12 irreversible resources to administration of the NFIP;

13 4) Order FEMA to initiate consultation pursuant to the ESA on the effects of its actions in
14 administering the NFIP on the Listed Species;

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

17 6) Retain jurisdiction over this matter until such time as Defendant has fully complied with
18 the requirements of the ESA;

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

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

22 9) Grant plaintiffs such other further relief, including injunctive relief, as the Court may
23 deem just and proper.

24 Dated: June 9, 2010

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27 By: /s/ Paul S. Weiland, Esquire

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