

1 NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP  
2 ROBERT D. THORNTON (SBN 072934)  
3 rthornton@nossaman.com  
4 PAUL S. WEILAND (SBN 237058) (Counsel for Service)  
5 pweiland@nossaman.com  
6 18101 Von Karman Avenue, Suite 1800  
7 Irvine, CA 92612-0177  
8 Telephone: (949) 833-7800  
9 Facsimile: (949) 833-7878

10 Attorneys for Plaintiffs Coalition for a Sustainable Delta, Belridge Water  
11 Storage District, Berrenda Mesa Water District, Lost Hills Water District,  
12 Wheeler Ridge-Maricopa Water Storage District, and Dee Dillon

13 UNITED STATES DISTRICT COURT  
14 EASTERN DISTRICT OF CALIFORNIA

15 COALITION FOR A SUSTAINABLE DELTA, )  
16 BELRIDGE WATER STORAGE DISTRICT, )  
17 BERRENDA MESA WATER DISTRICT, LOST )  
18 HILLS WATER DISTRICT, WHEELER RIDGE- )  
19 MARICOPA WATER STORAGE DISTRICT, )  
20 AND DEE DILLON, )

21 Plaintiffs, )

22 vs. )

23 JOHN CARLSON, JR., in his official capacity as )  
24 Executive Director of the California Fish and )  
25 Game Commission, RICHARD ROGERS, in his )  
26 official capacity as President of the California Fish )  
27 and Game Commission, CINDY GUSTAFSON, )  
28 in her official capacity as Vice President of the )  
California Fish and Game Commission, JIM )  
KELLOGG, in his official capacity as Member of )  
the California Fish and Game Commission, )  
MICHAEL SUTTON, in his official capacity as )  
Member of the California Fish and Game )  
Commission, CALIFORNIA FISH AND GAME )  
COMMISSION, JOHN MCCAMMAN, in his )  
official capacity as Interim Director of the )  
California Department of Fish and Game, AND )  
CALIFORNIA DEPARTMENT OF FISH AND )  
GAME, )

Defendants. )

Case No:

COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

1 **JURISDICTION AND VENUE**

2 1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
3 question) and 16 U.S.C. § 1540(c) and (g) (actions arising under the ESA).

4 2. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) (an ESA-citizen suit  
5 may be brought in the District where the violation occurs) and 28 U.S.C. § 1391(b) (suit may be brought  
6 in the District where a substantial part of the activities that are the subject of the action are situated).

7 3. Pursuant to 16 U.S.C. § 1540(g), plaintiffs provided defendants and the Secretary of the  
8 Interior with 60 days’ notice of the violations contained herein. *See* Exhibit A, attached hereto. This  
9 notice was sent to all defendants on October 25, 2007. Defendants have not taken adequate action to  
10 remedy the violations set forth herein.

11 **INTRODUCTION**

12 4. This lawsuit seeks to cure continuing and unlawful harm, injury, and death to fish species  
13 native to the Sacramento-San Joaquin Delta (“the Delta”) including the Sacramento River winter-run  
14 chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt  
15 due to the California Fish and Game Commission’s (“CFGC”) and California Department of Fish and  
16 Game’s (“CDFG”) (collectively, the Agencies”) adoption and enforcement of sport fishing regulations,  
17 which were promulgated and enforced in order to manage and maintain the non-native striped bass  
18 population in the Delta.

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

24 6. The health of the Delta is crucial to the water supply of the State of California, as it is a  
25 critical link in both the State Water Project (“SWP”) and Central Valley Project (“CVP”), which deliver  
26 water to urban, agricultural, and industrial water users throughout the State. Two-thirds of California’s  
27 residents (an estimated 23 million people) rely on the Delta for at least a portion of their drinking water.  
28

1 In addition, the SWP and CVP provide water to more than 4 million acres of irrigated farmland in the  
2 State, primarily in the San Joaquin Valley.

3 7. In addition to diversions associated with the SWP and CVP, there are other diversions  
4 from the Delta, including diversions associated with urban and agricultural uses within, and outside of  
5 the Delta. In total, more than 7,000 diverters obtain water from the Delta and its tributaries.

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

10 9. Of the Delta's 738,000 acres, roughly two-thirds support agriculture. More than 500,000  
11 acres of the Delta currently are in agricultural production. Thus, the Delta also serves as a drainage area  
12 for vast areas of agricultural land.

13 10. The Delta supports more than 750 plant and animal species, including 130 species of fish.  
14 The Delta serves as an important fishery habitat; it supports an estimated 25 percent of all warm water  
15 and anadromous sport fishing species, and 80 percent of California's commercial fishery species live in,  
16 or migrate through, the Delta. The Delta also provides habitat for a number of species that are protected  
17 by the Endangered Species Act ("ESA"), including the Sacramento winter-run chinook salmon, Central  
18 Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt (collectively, the  
19 "Federally-Protected species").

20 11. The overall health of the Delta ecosystem, including the health of the populations of  
21 various species in the Delta, is in decline due to a number of factors, including degradation of water  
22 quality due to urban and agricultural runoff to Delta waterways, introduction of invasive and predatory  
23 species into the Delta ecosystem, water withdrawals from the Delta to support the needs of growing  
24 human populations in the Delta, the Bay Area, the San Joaquin Valley, and southern California, climate  
25 change, and other factors.

26 12. In the fall of 2004, routine fish surveys registered sharp declines in the numbers of fish  
27 species in the Delta, including the delta smelt. Subsequent surveys have confirmed the trend, raising  
28

1 concerns that the delta smelt, which is sometimes viewed as an indicator of ecosystem health in the  
2 Delta, risks extinction if the Delta ecosystem continues to decline.

3 13. A decade ago, in hopes of finding a way to solve the problems in the Delta and to balance  
4 the competing interests in the Delta, federal and state leaders forged a collaborative research and  
5 decision-making process known as “CALFED” to try to create a common vision for improving the  
6 Delta. Billions of dollars have been spent by the taxpayers of the United States and the State of  
7 California to address the ecological issues of the Delta, including the threats to the continued existence  
8 of the Federally-Protected species. In addition, the State and the United States have reduced water  
9 deliveries from the SWP and CVP and imposed other significant restrictions on urban and agricultural  
10 users of SWP and CVP water in an effort to address the declining health of the Delta ecosystem.  
11 Despite this enormous public investment and the material restrictions on urban and agricultural water  
12 users, CALFED has not accomplished its ultimate goal of developing and implementing a strategy to  
13 successfully address the decline of the Delta ecosystem. CALFED failed, in part, because the state and  
14 federal agencies with regulatory responsibility for the management of the Delta have failed to regulate a  
15 number of material contributors to the decline of the Delta, including issues related to non-native species  
16 and their impacts on the Federally-Protected species.

17 14. Some special interests have attributed many of the problems in the Delta, including the  
18 decline in the health of species such as the delta smelt, to the pumps that provide water to the SWP and  
19 CVP systems. These systems export water to millions of urban and agricultural users throughout the  
20 State, including users in the Bay Area and other parts of Northern California. Recently, a federal district  
21 court ruled that SWP and CVP deliveries must be reduced substantially to protect the delta smelt.  
22 *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D.Cal. 2007). However, there are many other  
23 factors that are significant contributors to the decline in the Delta ecosystem, including predation of the  
24 Federally-Protected species by non-native species, such as the striped bass.

25 15. The Agencies have adopted and enforced striped bass sport fishing regulations, which are  
26 intended to manage and maintain or increase the striped bass population in the Delta. Through adoption  
27 and enforcement of the these regulations, the Agencies have allowed and encouraged the population of  
28

1 striped bass in the Delta to thrive, thereby contributing to the decline in the populations of the Federally-  
2 Protected species and the overall health of the Delta ecosystem.

3 **LEGAL FRAMEWORK OF THE ENDANGERED SPECIES ACT**

4 16. Congress enacted the ESA in order to protect species that “have been so depleted in  
5 numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). The ESA  
6 was enacted in response to a growing public concern about the extinction or near extinction of a number  
7 of populations of animal and plant species, and in recognition of the fact that such species provide  
8 “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its  
9 people.” 16 U.S.C. § 1531(a)(3).

10 17. The ESA provides protection for endangered and threatened species and their habitats,  
11 including the Federally-Protected species. 16 U.S.C. §§ 1536; 1538. Specifically, section 9(a)(1)(B) of  
12 the ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). The ESA  
13 expressly provides that the United States Fish and Wildlife Service (“FWS”) and National Marine  
14 Fisheries Service (“NMFS”) (hereinafter individually, the “Wildlife Agency” and collectively, the  
15 “Wildlife Agencies”) can extend the take prohibition of Section 9(a)(1)(b) to threatened species. 16  
16 U.S.C. § 1533(d).

17 18. The ESA broadly defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill,  
18 capture or collect, or to attempt to engage in such conduct.” 16 U.S.C. § 1532(19). The Wildlife  
19 Agencies define “harm” to mean “an act which actually kills or injures wildlife. Such act may include  
20 significant habitat modification or degradation where it actually kills or injures wildlife by significantly  
21 impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §§ 17.3,  
22 222.102. “Harassment” is defined by the Wildlife Agencies as “an intentional or negligent act or  
23 omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to  
24 significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding,  
25 or sheltering.” 50 C.F.R. §§ 17.3, 222.102.

26 19. A governmental entity can be liable for illegal take of listed species in violation of  
27 section 9 of the ESA where such take springs from the exercise of regulatory authority by that  
28

1 governmental entity. *E.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii*  
2 *Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

### 3 **FACTUAL BACKGROUND**

4 20. The Sacramento River winter-run chinook salmon is an anadromous fish that migrates  
5 through the Delta to the upper Sacramento River from December to May. Anadromous fish spend most  
6 of their life in the ocean but must enter fresh water rivers and streams to spawn. NMFS listed the  
7 Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed.  
8 Reg. 440 (Jan. 4, 1994). NMFS designated critical habitat for the Sacramento River winter-run chinook  
9 salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

10 21. The Central Valley spring-run chinook salmon is an anadromous fish that migrates  
11 through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley  
12 spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept.  
13 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon on  
14 September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

15 22. The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San  
16 Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the  
17 distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout  
18 permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on  
19 March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS designated critical habitat for the  
20 Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

21 23. The delta smelt is a small translucent fish with a narrow geographic range limited to low  
22 salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing the  
23 delta smelt as threatened). The delta smelt is the only true native estuarine species found in the Delta.  
24 *Id.* The FWS listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. at 12,854.  
25 FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec.  
26 19, 1994).

1           24.     The ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B).  
2 The Sacramento River winter-run chinook salmon is listed as an endangered species. 59 Fed. Reg. 440  
3 (Jan. 4, 1994).

4           25.     The ESA expressly provides that the Wildlife Agencies can extend the take prohibition of  
5 Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies have by  
6 regulation extended the take prohibition to the threatened delta smelt, Central Valley spring-run chinook  
7 salmon, and Central Valley steelhead. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

8           26.     The striped bass is a fish species that is not native to the Delta and was introduced into  
9 the area in the late 19<sup>th</sup> century.

10          27.     According to estimates, the striped bass population in the Delta has fluctuated from a low  
11 of approximately 600,000 to a high of 3,000,000.

12          28.     Striped bass adversely affect the Federally-Protected species that reside in or are native to  
13 the Delta through predation. CDFG estimates that at a population of 765,000 adults, striped bass  
14 consume 6 percent of the Sacramento River winter-run chinook salmon population and 3 percent of the  
15 threatened Central Valley spring-run chinook salmon population annually. *Conservation Plan for the*  
16 *California Department of Fish and Game Striped Bass Management Program* at 26, App. E (Nov. 12,  
17 1999) (hereinafter “*Conservation Plan for the Striped Bass Management Program*”). CDFG estimates  
18 that at a population of 765,000 adults, striped bass consume 5.3 percent of the delta smelt population  
19 annually. *Conservation Plan for the Striped Bass Management Program* at 32, App. E.

20          29.     In addition, the FWS has opined that “the introduced striped bass may have caused an  
21 increase in predation on all size classes of the delta smelt.” 58 Fed. Reg. 12,854, 12,860 (March 5,  
22 1993).

23          30.     Under California law, CFGC has regulatory authority to establish seasons, bag limits, and  
24 methods of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203. CFGC adopts  
25 sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman from taking  
26 striped bass less than 18 inches in length and bar sports fisherman from taking more than two striped  
27 bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit. 14,  
28 § 5.75. CDFG is responsible for enforcing sport fishing regulations including through the appointment

1 of deputies. Cal. Fish & Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management*  
2 *Program* at 43.

3 31. In the early 1980s, the sports fishing industry successfully lobbied the State of California  
4 to enact legislation that created a striped bass fishing stamp to generate funds to support the non-native  
5 striped bass population in the Delta. *Striped Bass Restoration and Management Plan for the*  
6 *Sacramento – San Joaquin Estuary Phase I* at 6 (Sept. 1989) (hereinafter “*Striped Bass Restoration and*  
7 *Management Plan*”). Among other things, the funds were used to raise striped bass in hatcheries and  
8 stock the Delta with more than 5.5 million striped bass. *Id.*

9 32. The funds from the stamp program also were used to prepare the *Striped Bass*  
10 *Restoration and Management Plan*, which represents what CDFG believes should be done to restore the  
11 striped bass population to levels of more than three million adult fish. *Id.* at 1.

12 33. In 1996, CFGC adopted a striped bass policy. Consistent with the CDFG *Striped Bass*  
13 *Restoration and Management Plan*, the *CFGC Striped Bass Policy* establishes a long-term striped bass  
14 restoration goal of 3,000,000 adult striped bass in the Delta. *See CFGC Striped Bass Policy*. The  
15 *CFGC Striped Bass Policy* also requires CDFG to stabilize and restore the striped bass fishery in the  
16 Delta.

17 34. Around the same time that CFGC adopted its *Striped Bass Policy*, CDFG began work on  
18 a conservation plan for activities associated with management of the striped bass population in the Delta.  
19 *See Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the*  
20 *California Department of Fish and Game for Activities under the Striped Bass Management Program* at  
21 1 (National Marine Fisheries Service, June 23, 2000). The purpose of the *Conservation Plan for the*  
22 *Striped Bass Management Program* was to obtain authorization from NMFS and FWS for take of ESA-  
23 listed species “that may result from implementation of its Striped Bass Management Program.”  
24 *Conservation Plan for the Striped Bass Management Program* at 2 (Nov. 12, 1999).

25 35. NMFS and FWS both issued incidental take permits for the Striped Bass Management  
26 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service, June  
27 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June 23,  
28 2000). The incidental take permits authorized take of, *inter alia*, the endangered Sacramento River

1 winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central  
2 Valley steelhead, and threatened delta smelt.

3 36. The *Conservation Plan for the Striped Bass Management Program* described activities  
4 covered by the incidental take permits as: stocking of striped bass in the Delta at numbers sufficient to  
5 stabilize and maintain a population of 712,000 adults; possible recommendations to the CFGC for  
6 changes to striped bass fishing regulations to reach and maintain the target population level; and striped  
7 bass monitoring. See *Conservation Plan for the Striped Bass Management Program* at 2.

8 37. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*  
9 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,  
10 respectively. The incidental take permits did not provide take coverage for the striped bass fishing  
11 regulations already in place as of the date of issuance of those permits.

12 38. The Agencies' sport fishing regulations operate to protect and increase the non-native  
13 striped bass population in the Delta because they bar sports fisherman from taking striped bass less than  
14 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18  
15 inches in length; this is consistent with CFGC's goal of increasing the striped bass population in the  
16 Delta to 3,000,000 and with CDFG's *Striped Bass Restoration and Management Plan*. Code Regs. tit  
17 14, § 5.75.

18 39. As a result of implementation and enforcement of striped bass sport fishing regulations  
19 and programs, as described above, the CFGC and CDFG have taken the Federally-Protected species in  
20 violation of the ESA.

### 21 PARTIES

22 40. Plaintiff Coalition for a Sustainable Delta ("Coalition") is comprised of agricultural water  
23 users in the San Joaquin Valley. Coalition members depend on State Water Project ("SWP") deliveries  
24 from the Delta to the San Joaquin Valley for their water supply. The continued operation of the SWP is,  
25 in turn, dependent on the overall health of the Delta and its ecosystem, which includes the maintenance  
26 of viable populations of species living in the Delta and protected by the ESA, such as the Sacramento  
27 River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead,  
28 and delta smelt. In 2007, a federal district court ruled that deliveries of SWP water to parties with water

1 contracts, such as the Coalition members, must be reduced substantially to protect the delta smelt.  
2 *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D.Cal. 2007). Recently, the California  
3 Department of Water Resources reported that in an average water year, the court's order in *NRDC v.*  
4 *Kempthorne* would reduce water exports from the Delta by 22 to 30 percent. Department of Water  
5 Resources Advisory, DWR Releases Water Delivery Impact Estimates Following Wanger Decision  
6 (Dec. 24, 2007). Violations of the ESA by defendants, including the take of the Federally-Protected  
7 species, contribute to a decline in the health of the Delta ecosystem. Furthermore, such violations  
8 contribute to declines of the populations of species in the Delta protected by the ESA. The illegal and  
9 unmitigated take of the Federally-Protected species, including the delta smelt, by defendants injures the  
10 Coalition because it reduces the population of the Federally-Protected species thereby worsening the  
11 baseline status of the species, which must be taken into account by FWS and NMFS when they  
12 determine whether proposed SWP exports from the Delta comply with the ESA. Therefore, defendants'  
13 ESA violations threaten deliveries of SWP water to members of the Coalition. In sum, because the  
14 CFGC and CDFG have contributed to the decline of the delta smelt population by violating the ESA,  
15 they have contributed to the reduction in SWP water deliveries to members of the Coalition. Reduced  
16 deliveries of SWP water have an economic impact on members of the Coalition. Thus, Coalition  
17 members have been, and will continue to be, harmed by defendants' violations of the ESA.

18 41. Plaintiff Belridge Water Storage District ("BWS") is a California Water Storage  
19 District, organized and existing under and by virtue of the provisions of Division 14 of the California  
20 Water Code. The BWS provides SWP water to land within its boundaries through a contract with the  
21 Kern County Water Agency ("KCWA"). The BWS depends on SWP deliveries from the Delta to the  
22 San Joaquin Valley for its water supply. The continued operation of the SWP is, in turn, dependent on  
23 the overall health of the Delta and its ecosystem, which includes the maintenance of viable populations  
24 of species living in the Delta and protected by the ESA, such as the Sacramento River winter-run  
25 chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt.  
26 In 2007, a federal district court ruled that deliveries of SWP water to parties with water contracts, such  
27 as the BWS, must be reduced substantially to protect the delta smelt. *NRDC v. Kempthorne*, 2007  
28 U.S. Dist. LEXIS 48261 (E.D.Cal. 2007). Recently, the California Department of Water Resources

1 reported that in an average water year, the court's order in *NRDC v. Kempthorne* would reduce water  
2 exports from the Delta by 22 to 30 percent. Department of Water Resources Advisory, DWR Releases  
3 Water Delivery Impact Estimates Following Wanger Decision (Dec. 24, 2007). Violations of the ESA  
4 by defendants, including the take of the Federally-Protected species, contribute to a decline in the health  
5 of the Delta ecosystem. Furthermore, such violations contribute to declines of the populations of species  
6 in the Delta protected by the ESA. The illegal and unmitigated take of the Federally-Protected species,  
7 including the delta smelt, by defendants injures BWSO because it reduces the population of the  
8 Federally-Protected species thereby worsening the baseline status of the species, which must be taken  
9 into account by FWS and NMFS when they determine whether proposed SWP exports from the Delta  
10 comply with the ESA. Therefore, defendants' ESA violations threaten deliveries of SWP water to the  
11 BWSO. In sum, because the CFGC and CDFG have contributed to the decline of the delta smelt  
12 population by violating the ESA, they have contributed to the reduction in SWP water deliveries to the  
13 BWSO. Reduced deliveries of SWP water have an economic impact on the BWSO. Thus, the BWSO  
14 has been, and will continue to be, harmed by defendants' violations of the ESA.

15 42. Plaintiff Berrenda Mesa Water District ("BMWD") is a California Water District,  
16 organized and existing under and by virtue of the provisions of Division 13 of the California Water  
17 Code. The BMWD encompasses approximately 55,000 acres. The BMWD provides SWP water to land  
18 within its boundaries through a contract with KCWA. The BMWD depends on SWP deliveries from the  
19 Delta to the San Joaquin Valley for its water supply. The continued operation of the SWP is, in turn,  
20 dependent on the overall health of the Delta and its ecosystem, which includes the maintenance of viable  
21 populations of species living in the Delta and protected by the ESA, such as the Sacramento River  
22 winter-run chinook salmon, Central Valley spring-run chinook salmon, Central Valley steelhead, and  
23 delta smelt. In 2007, a federal district court ruled that deliveries of SWP water to parties with water  
24 contracts, such as the BMWD, must be reduced substantially to protect the delta smelt. *NRDC v.*  
25 *Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D.Cal. 2007). Recently, the California Department of  
26 Water Resources reported that in an average water year, the court's order in *NRDC v. Kempthorne*  
27 would reduce water exports from the Delta by 22 to 30 percent. Department of Water Resources  
28 Advisory, DWR Releases Water Delivery Impact Estimates Following Wanger Decision (Dec. 24,

1 2007). Violations of the ESA by defendants, including the take of the Federally-Protected species,  
2 contribute to a decline in the health of the Delta ecosystem. Furthermore, such violations contribute to  
3 declines of the populations of species in the Delta protected by the ESA. The illegal and unmitigated  
4 take of the Federally-Protected species, including the delta smelt, by defendants injures BMWD because  
5 it reduces the population of the Federally-Protected species thereby worsening the baseline status of the  
6 species, which must be taken into account by FWS and NMFS when they determine whether proposed  
7 SWP exports from the Delta comply with the ESA. Therefore, defendants' ESA violations threaten  
8 deliveries of SWP water to the BMWD. In sum, because the CFGC and CDFG have contributed to the  
9 decline of the delta smelt population by violating the ESA, they have contributed to the reduction in  
10 SWP water deliveries to the BMWD. Reduced deliveries of SWP water have an economic impact on  
11 the BMWD. Thus, the BMWD has been, and will continue to be, harmed by defendants' violations of  
12 the ESA.

13 43. Plaintiff Lost Hills Water District ("LHWD") is a California Water District, organized  
14 and existing under and by virtue of Division 13 of the California Water Code, for the purpose of  
15 providing irrigation water from the SWP to land within the District through a contract with KCWA. The  
16 LHWD contains approximately 72,183 acres in the northwest portion of Kern County. The LHWD  
17 depends on SWP deliveries from the Delta to the San Joaquin Valley for its water supply. The  
18 continued operation of the SWP is, in turn, dependent on the overall health of the Delta and its  
19 ecosystem, which includes the maintenance of viable populations of species living in the Delta and  
20 protected by the ESA, such as the Sacramento River winter-run chinook salmon, Central Valley spring-  
21 run chinook salmon, Central Valley steelhead, and delta smelt. In 2007, a federal district court ruled  
22 that deliveries of SWP water to parties with water contracts, such as the LHWD, must be reduced  
23 substantially to protect the delta smelt. *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D.Cal.  
24 2007). Recently, the California Department of Water Resources reported that in an average water year,  
25 the court's order in *NRDC v. Kempthorne* would reduce water exports from the Delta by 22 to 30  
26 percent. Department of Water Resources Advisory, DWR Releases Water Delivery Impact Estimates  
27 Following Wanger Decision (Dec. 24, 2007). Violations of the ESA by defendants, including the take  
28 of the Federally-Protected species, contribute to a decline in the health of the Delta ecosystem.

1 Furthermore, such violations contribute to declines of the populations of species in the Delta protected  
2 by the ESA. The illegal and unmitigated take of the Federally-Protected species, including the delta  
3 smelt, by defendants injures LHWD because it reduces the population of the Federally-Protected species  
4 thereby worsening the baseline status of the species, which must be taken into account by FWS and  
5 NMFS when they determine whether proposed SWP exports from the Delta comply with the ESA.  
6 Therefore, defendants' ESA violations threaten deliveries of SWP water to the LHWD. In sum, because  
7 the CFGC and CDFG have contributed to the decline of the delta smelt population by violating the ESA,  
8 they have contributed to the reduction in SWP water deliveries to the LHWD. Reduced deliveries of  
9 SWP water have an economic impact on the LHWD. Thus, the LHWD has been, and will continue to  
10 be, harmed by defendants' violations of the ESA.

11 44. Plaintiff Wheeler-Ridge Maricopa Water Storage District ("WRMWS D") is a California  
12 Water Storage District, organized and existing by virtue of Division 14 of the California Water Code for  
13 the purpose of securing a surface water supply for agricultural water purposes from the SWP through a  
14 contract with KCWA. The WRMWS D encompasses approximately 147,000 acres of land in Kern  
15 County at the extreme southern end of the San Joaquin Valley south of Bakersfield. The WRMWS D  
16 depends on SWP deliveries from the Delta to the San Joaquin Valley for their water supply. The  
17 continued operation of the SWP is, in turn, dependent on the overall health of the Delta and its  
18 ecosystem, which includes the maintenance of viable populations of species living in the Delta and  
19 protected by the ESA, such as the Sacramento River winter-run chinook salmon, Central Valley spring-  
20 run chinook salmon, Central Valley steelhead, and delta smelt. In 2007, a federal district court ruled  
21 that deliveries of SWP water to parties with water contracts, such as the WRMWS D, must be reduced  
22 substantially to protect the delta smelt. *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D.Cal.  
23 2007). Recently, the California Department of Water Resources reported that in an average water year,  
24 the court's order in *NRDC v. Kempthorne* would reduce water exports from the Delta by 22 to 30  
25 percent. Department of Water Resources Advisory, DWR Releases Water Delivery Impact Estimates  
26 Following Wanger Decision (Dec. 24, 2007). Violations of the ESA by defendants, including the take  
27 of the Federally-Protected species, contribute to a decline in the health of the Delta ecosystem.  
28 Furthermore, such violations contribute to declines of the populations of species in the Delta protected

1 by the ESA. The illegal and unmitigated take of the Federally-Protected species, including the delta  
2 smelt, by defendants injures WRMWSD because it reduces the population of the Federally-Protected  
3 species thereby worsening the baseline status of the species, which must be taken into account by FWS  
4 and NMFS when they determine whether proposed SWP exports from the Delta comply with the ESA.  
5 Therefore, defendants' ESA violations threaten deliveries of SWP water to the WRMWSD. In sum,  
6 because the CFGC and CDFG have contributed to the decline of the delta smelt population by violating  
7 the ESA, they have contributed to the reduction in SWP water deliveries to the WRMWSD. Reduced  
8 deliveries of SWP water have an economic impact on the WRMWSD. Thus, the WRMWSD has been,  
9 and will continue to be, harmed by defendants' violations of the ESA.

10 45. Plaintiff Dee Dillon has been a legal resident of California for his entire life, and has  
11 engaged in boating-related activities for the majority of his adult life. Prior to moving to Sacramento in  
12 2001, Mr. Dillon lived in southern California and frequently engaged in recreational boating in the  
13 Pacific Ocean. In the last six years, Mr. Dillon and his family have visited the Delta approximately 200  
14 times. Mr. Dillon and his family engage in recreational boating, swimming, fishing, and wildlife  
15 viewing in the Delta. Mr. Dillon is deeply concerned about the health of the Delta ecosystem as he has  
16 personally witnessed its decline over the last six years. Mr. Dillon has engaged in boating for most of  
17 his adult life, in both the ocean and in inland waters, and it is his view that the Delta provides a  
18 freshwater boating and recreating experience that is different than any other in the western United  
19 States. Mr. Dillon is concerned about the continued survival of species in the Delta, including the  
20 Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central  
21 Valley steelhead and the delta smelt. Mr. Dillon derives aesthetic, recreational, and conservation  
22 benefits from the overall health of the Delta ecosystem, including the fish species that live in the Delta.  
23 Defendants' violations of the ESA harm Mr. Dillon's aesthetic, recreational, and conservation interests  
24 in the Delta.

25 46. Defendant CFGC has regulatory authority to establish seasons, bag limits, and methods  
26 of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203.

27 47. Defendant John Carlson, Jr. is Executive Director of the CFGC. He is sued in his official  
28 capacity.

1 48. Defendant Richard Rogers is President of the CFGC. He is sued in his official capacity.

2 49. Defendant Cindy Gustafson is Vice President of the CFGC. She is sued in her official  
3 capacity.

4 50. Defendant Jim Kellogg is a Member of the CFGC. He is sued in his official capacity.

5 51. Defendant Michael Sutton is a Member of the CFGC. He is sued in his official capacity.

6 52. Defendant CDFG is responsible for enforcing sport fishing regulations. Cal. Fish &  
7 Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management Program* at 43.

8 53. Defendant John McCamman is Interim Director of the CDFG. He is sued in his official  
9 capacity.

10 54. Violations of the ESA by defendants, including the take of the Federally-Protected  
11 species, threaten deliveries of SWP water to the Coalition, BWS, BMWD, CWD, LHWD, and the  
12 WRMWS (‘‘Water District Plaintiffs’’). In addition, the violations of the ESA by defendants have  
13 contributed to reduced SWP deliveries from the Delta to the Water District Plaintiffs, thus the Water  
14 District Plaintiffs have, and will continue to be harmed, by defendants’ violations of the ESA.

15 55. Defendants’ violations of the ESA also harm Mr. Dillon’s aesthetic, recreational and  
16 conservation interests in the Delta, including but not limited to, his interest in the protection of the  
17 Federally-Protected species.

18 56. If defendants’ violations of the ESA are corrected then the harm to plaintiffs will be  
19 reduced or eliminated, thus redressing plaintiff’s injuries.

20 **FIRST CLAIM FOR RELIEF**

21 **(Defendants’ Unlawful Take of Sacramento River Winter-Run Chinook Salmon,**

22 **16 U.S.C. § 1538(a)(1)(B))**

23 57. Paragraphs 1 through 56 are realleged and incorporated as if fully set forth herein.

24 58. The Sacramento River winter-run chinook salmon is an anadromous fish that migrates  
25 through the Delta to the upper Sacramento River from December to May. Anadromous fish spend most  
26 of their life in the ocean but must enter fresh water rivers and streams to spawn. NMFS listed the  
27 Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed.  
28

1 Reg. 440 (Jan. 4, 1994). NMFS designated critical habitat for the Sacramento River winter-run chinook  
2 salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

3 59. The ESA prohibits all take of all ESA-listed species, even of a single individual of the  
4 species. *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla.  
5 1995); 16 U.S.C. § 1538.

6 60. Under California law, defendant CFGC has regulatory authority to establish seasons, bag  
7 limits, and methods of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203.  
8 CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman  
9 from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than  
10 two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code  
11 Regs. tit. 14, § 5.75. Defendant CDFG is responsible for enforcing sport fishing regulations. Cal. Fish  
12 & Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management Program* at 43.

13 61. Striped bass prey upon juvenile salmon. *NMFS Proposed Recovery Plan for the*  
14 *Sacramento River Winter-run Chinook Salmon* at III-80 (Aug. 1997).

15 62. CDFG estimates that at a population of 765,000 adults, striped bass consume 6 percent of  
16 the Sacramento River winter-run chinook salmon population annually. *Conservation Plan for the*  
17 *Striped Bass Management Program* at 26, App. E.

18 63. In its Proposed Recovery Plan for the Sacramento River winter-run chinook salmon,  
19 NMFS identified defendants' Striped Bass Management Program as one of a number of factors affecting  
20 the species. *NMFS Proposed Recovery Plan for the Sacramento River Winter-run Chinook Salmon* at  
21 III-77 to III-82.

22 64. In its 2007 Recovery Outline for the Sacramento River winter-run chinook salmon,  
23 Central Valley spring-run chinook salmon, and Central Valley steelhead, NMFS identified predation  
24 including predation by striped bass, as a threat to Sacramento River winter-run chinook salmon. *2007*  
25 *Recovery Outline for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook*  
26 *Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of*  
27 *California Central Valley Steelhead* at 21, 25 (May 2007).

1           65.     The *Striped Bass Restoration and Management Plan* was developed by CDFG in 1989;  
2 this plan called for increasing the striped bass population in the Delta to three million adults.

3           66.     In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore  
4 the striped bass fishery in the Delta; consistent with the *Striped Bass Restoration and Management Plan*,  
5 the CFGC *Striped Bass Policy* establishes a long-term striped bass restoration goal of 3,000,000. *See*  
6 *CFGC Striped Bass Policy*.

7           67.     Around the same time that CFGC adopted its *Striped Bass Policy*, CDFG began work on  
8 a conservation plan for activities associated with management of striped bass in the Delta. *See*  
9 *Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the*  
10 *California Department of Fish and Game for Activities under the Striped Bass Management Program at*  
11 *1* (National Marine Fisheries Service, June 23, 2000). The purpose of the *Conservation Plan for the*  
12 *Striped Bass Management Program* was to obtain authorization from NMFS and FWS for take of ESA-  
13 listed species “that may result from implementation of its Striped Bass Management Program.”  
14 *Conservation Plan for the Striped Bass Management Program at 2.*

15           68.     NMFS and FWS issued incidental take permits for the Striped Bass Management  
16 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service, June  
17 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June 23,  
18 2000). The incidental take permits authorized take of, *inter alia*, the endangered Sacramento River  
19 winter-run chinook salmon.

20           69.     The *Conservation Plan for the Striped Bass Management Program* described the  
21 activities covered by the incidental take permits as: stocking of striped bass in the Delta at numbers  
22 sufficient to stabilize and maintain a population of 712,000 adults; possible recommendations to the  
23 CFGC for changes to striped bass fishing regulations to reach and maintain the target population level;  
24 and striped bass monitoring. *See Conservation Plan for the Striped Bass Management Program at 2.*

25           70.     The *Conservation Plan for the Striped Bass Management Program* by its own terms did  
26 not provide take coverage for the striped bass fishing regulation to the extent those regulations limit  
27 catch of striped bass and thereby result in take of the Federally-Protected species. Rather, it only  
28

1 provided take coverage “because striped bass anglers, as an indirect result of fishing regulations, may  
2 incidentally take chinook salmon and/or Central Valley steelhead.” *Id.* at 43.

3 71. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*  
4 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,  
5 respectively.

6 72. The Agencies’ sport fishing regulations operate to protect and increase the non-native  
7 striped bass population in the Delta because they bar sports fisherman from taking striped bass less than  
8 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18  
9 inches in length; this is consistent with CFGC’s goal of increasing the striped bass population in the  
10 Delta to 3,000,000 and with CDFG’s *Striped Bass Restoration and Management Plan*. Code Regs. tit.  
11 14, § 5.75.

12 73. By enacting and enforcing regulations to protect and increase the non-native striped bass  
13 population, the Agencies are taking the Federally-Protected species in violation of section 9 of the ESA;  
14 a governmental entity can be liable for illegal take of listed species in violation of section 9 where such  
15 take springs from the exercise of regulatory authority by that governmental entity. *E.g., Strahan v.*  
16 *Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*,  
17 639 F.2d 495, 498 (9th Cir. 1981).

18 74. The illegal take of Sacramento River winter-run chinook salmon by the Agencies has  
19 occurred ever since the time of listing of that species, including the period when the *Conservation Plan*  
20 *for the Striped Bass Management Program* and associated incidental take permits were effective (*i.e.*,  
21 June 2000 to December 2004).

22 75. The Agencies have violated and continue to violate the ESA by taking the endangered  
23 Sacramento River winter-run chinook salmon; these illegal actions have contributed to the decline of the  
24 Sacramento River winter-run chinook salmon, and the overall decline of the Delta ecosystem.

## 25 **SECOND CLAIM FOR RELIEF**

### 26 **(Defendants’ Unlawful Take of Central Valley Spring-Run Chinook Salmon,**

### 27 **16 U.S.C. § 1538(a)(1)(B))**

28 76. Paragraphs 1 through 56 are realleged and incorporated as if fully set forth herein.

1           77.     The Central Valley spring-run chinook salmon is an anadromous fish that migrates  
2 through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley  
3 spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept.  
4 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon on  
5 September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

6           78.     The ESA prohibits all take of protected species, even of a single individual of the species.  
7 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995); 16  
8 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take prohibition  
9 of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies have by  
10 regulation extended the take prohibition to the threatened Central Valley spring-run chinook salmon. 50  
11 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

12           79.     Under California law, defendant CFGC has regulatory authority to establish seasons, bag  
13 limits, and methods of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203.  
14 CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman  
15 from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than  
16 two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code  
17 Regs. tit 14, § 5.75. Defendant CDFG is responsible for enforcing sport fishing regulations. Cal. Fish &  
18 Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management Program* at 43.

19           80.     CDFG estimates that at a population of 765,000 adults, striped bass consume 3 percent of  
20 the threatened Central Valley spring-run chinook salmon population annually. *Conservation Plan for*  
21 *the Striped Bass Management Program* at 26, App. E.

22           81.     In its 2007 Recovery Outline for the Sacramento River winter-run chinook salmon,  
23 Central Valley spring-run chinook salmon, and Central Valley steelhead, NMFS identified predation  
24 including predation by striped bass, as a threat to the Central Valley spring-run chinook salmon. *2007*  
25 *Recovery Outline for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook*  
26 *Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of*  
27 *California Central Valley Steelhead* at 21, 25 (May 2007).  
28

1           82.     The *Striped Bass Restoration and Management Plan* was developed by CDFG in 1989;  
2 this plan called for increasing the striped bass population in the Delta to three million adults.

3           83.     In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore  
4 the striped bass fishery in the Delta; consistent with the *Striped Bass Restoration and Management Plan*,  
5 the CFGC *Striped Bass Policy* establishes a long-term striped bass restoration goal of 3,000,000. *See*  
6 *CFGC Striped Bass Policy*.

7           84.     Around the same time that CFGC adopted its *Striped Bass Policy*, CDFG began work on  
8 a conservation plan for activities associated with management of striped bass in the Delta. *See*  
9 *Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the*  
10 *California Department of Fish and Game for Activities under the Striped Bass Management Program at*  
11 *1* (National Marine Fisheries Service, June 23, 2000). The purpose of the *Conservation Plan for the*  
12 *Striped Bass Management Program* was to obtain authorization from NMFS and FWS for take of ESA-  
13 listed species “that may result from implementation of its Striped Bass Management Program.”  
14 *Conservation Plan for the Striped Bass Management Program at 2.*

15           85.     NMFS and FWS issued incidental take permits for the Striped Bass Management  
16 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service, June  
17 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June 23,  
18 2000). The incidental take permits authorized take of, *inter alia*, the threatened Central Valley spring-  
19 run chinook salmon.

20           86.     The *Conservation Plan for the Striped Bass Management Program* described the  
21 activities covered by the incidental take permits as: stocking of striped bass in the Delta at numbers  
22 sufficient to stabilize and maintain a population of 712,000 adults; possible recommendations to the  
23 CFGC for changes to striped bass fishing regulations to reach and maintain the target population level;  
24 and striped bass monitoring. *See Conservation Plan for the Striped Bass Management Program at 2.*

25           87.     The *Conservation Plan for the Striped Bass Management Program* by its own terms did  
26 not provide take coverage for the striped bass fishing regulation to the extent those regulations limit  
27 catch of striped bass and thereby result in take of the Federally-Protected species. Rather, it only  
28

1 provided take coverage “because striped bass anglers, as an indirect result of fishing regulations, may  
2 incidentally take chinook salmon and/or Central Valley steelhead.” *Id.* at 43.

3 88. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*  
4 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,  
5 respectively.

6 89. The Agencies’ sport fishing regulations operate to protect and increase the non-native  
7 striped bass population in the Delta because they bar sports fisherman from taking striped bass less than  
8 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18  
9 inches in length; this is consistent with CFGC’s goal of increasing the striped bass population in the  
10 Delta to 3,000,000 and with CDFG’s *Striped Bass Restoration and Management Plan*. Code Regs. tit  
11 14, § 5.75.

12 90. By enacting and enforcing regulations to protect and increase the non-native striped bass  
13 population, the Agencies are taking listed species in violation of section 9 of the ESA; a governmental  
14 entity can be liable for illegal take of listed species in violation of section 9 where such take springs  
15 from the exercise of regulatory authority by that governmental entity. *E.g., Strahan v. Coxe*, 127 F.3d  
16 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495,  
17 498 (9th Cir. 1981).

18 91. The illegal take of Central Valley spring-run chinook salmon by the Agencies has  
19 occurred ever since the time of listing of that species, including the period when the *Conservation Plan*  
20 *for the Striped Bass Management Program* and associated incidental take permits were effective (*i.e.*,  
21 June 2000 to December 2004).

22 92. The Agencies have violated and continue to violate the ESA by taking the threatened  
23 Central Valley spring-run chinook salmon; these illegal actions have contributed to the decline of the  
24 Central Valley spring-run chinook salmon, and the overall decline of the Delta ecosystem.

### **THIRD CLAIM FOR RELIEF**

#### **(Defendants’ Unlawful Take of Central Valley Steelhead,**

#### **16 U.S.C. § 1538(a)(1)(B))**

28 93. Paragraphs 1 through 56 are realleged and incorporated as if fully set forth herein.

1           94.     The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San  
2 Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the  
3 distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout  
4 permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on  
5 March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS designated critical habitat for the  
6 Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

7           95.     The ESA prohibits all take of protected species, even of a single individual of the species.  
8 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995); 16  
9 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take prohibition  
10 of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies have by  
11 regulation extended the take prohibition to the threatened Central Valley steelhead. 50 C.F.R.  
12 §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

13           96.     Under California law, defendant CFGC has regulatory authority to establish seasons, bag  
14 limits, and methods of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203.  
15 CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman  
16 from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than  
17 two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code  
18 Regs. tit 14, § 5.75. Defendant CDFG is responsible for enforcing sport fishing regulations. Cal. Fish &  
19 Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management Program* at 43.

20           97.     In its 2007 Recovery Outline for the Sacramento River winter-run chinook salmon,  
21 Central Valley spring-run chinook salmon, and Central Valley steelhead, NMFS observed that predation  
22 rates do not account for the large decline in West Coast steelhead populations, but that predation may  
23 influence Delta steelhead populations. *2007 Recovery Outline for the Evolutionarily Significant Units of*  
24 *Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the*  
25 *Distinct Population Segment of California Central Valley Steelhead* at 29 (May 2007).

26           98.     The *Striped Bass Restoration and Management Plan* was developed by CDFG in 1989;  
27 this plan called for increasing the striped bass population in the Delta to three million adults.  
28

1           99.     In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore  
2 the striped bass fishery in the Delta; consistent with the *Striped Bass Restoration and Management Plan*,  
3 the CFGC *Striped Bass Policy* establishes a long-term striped bass restoration goal of 3,000,000. *See*  
4 *CFGC Striped Bass Policy*.

5           100.   In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore  
6 the striped bass fishery in the Delta. *See CFGC Striped Bass Policy*. Consistent with the *Striped Bass*  
7 *Restoration and Management Plan*, the CFGC *Striped Bass Policy* establishes a long-term striped bass  
8 restoration goal of 3,000,000. *See id.*

9           101.   Around the same time that CFGC adopted its *Striped Bass Policy*, CDFG began work on  
10 a conservation plan for activities associated with management of striped bass in the Delta. *See*  
11 *Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the*  
12 *California Department of Fish and Game for Activities under the Striped Bass Management Program at*  
13 *1* (National Marine Fisheries Service, June 23, 2000). The purpose of the *Conservation Plan for the*  
14 *Striped Bass Management Program* was to obtain authorization from NMFS and FWS for take of ESA-  
15 listed species “that may result from implementation of its Striped Bass Management Program.”  
16 *Conservation Plan for the Striped Bass Management Program at 2.*

17           102.   NMFS and FWS issued incidental take permits for the Striped Bass Management  
18 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service, June  
19 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June 23,  
20 2000). The incidental take permits authorized take of, *inter alia*, the threatened Central Valley  
21 steelhead. The *Conservation Plan for the Striped Bass Management Program* described the activities  
22 covered by the incidental take permits as: stocking of striped bass in the Delta at numbers sufficient to  
23 stabilize and maintain a population of 712,000 adults; possible recommendations to the CFGC for  
24 changes to striped bass fishing regulations to reach and maintain the target population level; and striped  
25 bass monitoring. *See Conservation Plan for the Striped Bass Management Program at 2.*

26           103.   The *Conservation Plan for the Striped Bass Management Program* by its own terms did  
27 not provide take coverage for the striped bass fishing regulation to the extent those regulations limit  
28 catch of striped bass and thereby result in take of the Federally-Protected species. Rather, it only

1 provided take coverage “because striped bass anglers, as an indirect result of fishing regulations, may  
2 incidentally take chinook salmon and/or Central Valley steelhead.” *Id.* at 43.

3 104. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*  
4 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,  
5 respectively.

6 105. The Agencies’ sport fishing regulations operate to protect and increase the non-native  
7 striped bass population in the Delta because they bar sports fisherman from taking striped bass less than  
8 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18  
9 inches in length; this is consistent with CFGC’s goal of increasing the striped bass population in the  
10 Delta to 3,000,000 and with CDFG’s *Striped Bass Restoration and Management Plan*. Code Regs. tit.  
11 14, § 5.75.

12 106. By enacting and enforcing regulations to protect and increase the non-native striped bass  
13 population, the Agencies are taking listed species in violation of section 9 of the ESA; a governmental  
14 entity can be liable for illegal take of listed species in violation of section 9 where such take springs  
15 from the exercise of regulatory authority by that governmental entity. *E.g., Strahan v. Coxe*, 127 F.3d  
16 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495,  
17 498 (9th Cir. 1981).

18 107. The illegal take of Central Valley steelhead by the Agencies has occurred ever since the  
19 time of listing of that species, including the period when the *Conservation Plan for the Striped Bass*  
20 *Management Program* and associated incidental take permits were effective (*i.e.*, June 2000 to  
21 December 2004).

22 108. The Agencies have violated and continue to violate the ESA by taking the threatened  
23 Central Valley steelhead; these illegal actions have contributed to the decline of the Central Valley  
24 steelhead, and the overall decline of the Delta ecosystem.

#### **FOURTH CLAIM FOR RELIEF**

#### **(Defendants’ Unlawful Take of Delta Smelt,**

#### **16 U.S.C. § 1538(a)(1)(B))**

28 109. Paragraphs 1 through 56 are realleged and incorporated as if fully set forth herein.

1           110. The delta smelt is small translucent fish with a narrow geographic range limited to low  
2 salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing the  
3 delta smelt as threatened). The delta smelt is the only true native estuarine species found in the Delta.  
4 *Id.* The FWS listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. at 12,854.  
5 FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec.  
6 19, 1994).

7           111. The ESA prohibits all take of protected species, even of a single individual of the species.  
8 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995); 16  
9 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take prohibition  
10 of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies have by  
11 regulation extended the take prohibition to the threatened delta smelt. 50 C.F.R. §§ 17.21(c), 17.31(a),  
12 222.301(b), 223.203(a).

13           112. Under California law, defendant CFGC has regulatory authority to establish seasons, bag  
14 limits, and methods of take for sport fish, including the striped bass. Cal. Fish & Game Code § 203.  
15 CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman  
16 from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than  
17 two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code  
18 Regs. tit. 14, § 5.75. Defendant CDFG is responsible for enforcing sport fishing regulations. Cal. Fish  
19 & Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management Program* at 43.

20           113. CDFG estimates that at a population of 765,000 adults, striped bass consume 5.3 percent  
21 of the delta smelt population annually. *Conservation Plan for the Striped Bass Management Program* at  
22 32, App. E.

23           114. In its final rule listing the delta smelt, the FWS opined that “the introduced striped bass  
24 may have caused an increase in predation on all size classes of the delta smelt.” 58 Fed. Reg. 12,854,  
25 12,860 (March 5, 1993).

26           115. The FWS Recovery Plan for the delta smelt states that, due to predation, “it is quite  
27 possible that at low population levels interactions with [striped bass] could prevent recovery.” *Recovery*  
28 *Plan for the Sacramento/San Joaquin Delta Native Fishes* at 23 (Nov. 1996).

1           116.    The *Striped Bass Restoration and Management Plan* was developed by CDFG in 1989;  
2 this plan called for increasing the striped bass population in the Delta to three million adults.

3           117.    In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore  
4 the striped bass fishery in the Delta; consistent with the *Striped Bass Restoration and Management Plan*,  
5 the CFGC *Striped Bass Policy* establishes a long-term striped bass restoration goal of 3,000,000. *See*  
6 *CFGC Striped Bass Policy*.

7           118.    Around the same time that CFGC adopted its *Striped Bass Policy*, CDFG began work on  
8 a conservation plan for activities associated with management of striped bass in the Delta. *See*  
9 *Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the*  
10 *California Department of Fish and Game for Activities under the Striped Bass Management Program at*  
11 *1* (National Marine Fisheries Service, June 23, 2000). The purpose of the *Conservation Plan for the*  
12 *California Department of Fish and Game Striped Bass Management Program* was to obtain  
13 authorization from NMFS and FWS for take of ESA-listed species “that may result from implementation  
14 of its Striped Bass Management Program.” *Conservation Plan for the Striped Bass Management*  
15 *Program at 2*.

16           119.    NMFS and FWS issued incidental take permits for the Striped Bass Management  
17 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service, June  
18 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June 23,  
19 2000). The incidental take permits authorized take of, *inter alia*, the threatened delta smelt. The  
20 *Conservation Plan for the Striped Bass Management Program* described the activities covered by the  
21 incidental take permits as: stocking of striped bass in the Delta at numbers sufficient to stabilize and  
22 maintain a population of 712,000 adults; possible recommendations to the CFGC for changes to striped  
23 bass fishing regulations to reach and maintain the target population level; and striped bass monitoring.  
24 *See Conservation Plan for the Striped Bass Management Program at 2*.

25           120.    The *Conservation Plan for the Striped Bass Management Program* by its own terms did  
26 not provide take coverage for the striped bass fishing regulation to the extent those regulations limit  
27 catch of striped bass and thereby result in take of the Federally-Protected species. Rather, it only  
28

1 provided take coverage “because striped bass anglers, as an indirect result of fishing regulations, may  
2 incidentally take chinook salmon and/or Central Valley steelhead.” *Id.* at 43.

3 121. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*  
4 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,  
5 respectively.

6 122. The Agencies’ sport fishing regulations operate to protect and increase the non-native  
7 striped bass population in the Delta because they bar sports fisherman from taking striped bass less than  
8 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18  
9 inches in length; this is consistent with CFGC’s goal of increasing the striped bass population in the  
10 Delta to 3,000,000 and with CDFG’s *Striped Bass Restoration and Management Plan*. Code Regs. tit  
11 14, § 5.75.

12 123. By enacting and enforcing regulations to protect and increase the non-native striped bass  
13 population, the Agencies are taking listed species in violation of section 9 of the ESA; a governmental  
14 entity can be liable for illegal take of listed species in violation of section 9 where such take springs  
15 from the exercise of regulatory authority by that governmental entity. *E.g., Strahan v. Coxe*, 127 F.3d  
16 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495,  
17 498 (9th Cir. 1981).

18 124. The illegal take of delta smelt by the Agencies has occurred ever since the time of listing  
19 of that species, including the period when the *Conservation Plan for the Striped Bass Management*  
20 *Program* and associated incidental take permits were effective (*i.e.*, June 2000 to December 2004).

21 125. The Agencies have violated and continue to violate the ESA by taking the threatened  
22 delta smelt; these illegal actions have contributed to the decline of the delta smelt, and the overall  
23 decline of the Delta ecosystem.

#### 24 **CLAIM FOR RELIEF**

25 126. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

26 127. Defendants are “persons” within the meaning of the ESA.

27 128. By failing to comply with the prohibition on “take” of listed species in the ESA, and its  
28 implementing regulations, defendants have violated the ESA.

