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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL DELTA WATER AGENCY and  
SOUTH DELTA WATER AGENCY,

1:09-CV-00861 OWW DLB

Plaintiffs,

MEMORANDUM DECISION AND ORDER  
GRANTING MULTIPLE MOTIONS TO  
DISMISS (DOCS. 106, 107, 112,  
113, 114, 116, 118), GRANTING IN  
PART AND DENYING IN PART WATER  
AGENCY DEFENDANTS' MOTION TO  
STRIKE (DOC. 173), AND DENYING  
AS MOOT STATE DEFENDANTS' MOTION  
TO QUASH SERVICE (DOC. 105).

v.

UNITED STATES FISH AND WILDLIFE  
SERVICE, *et al.*,

Defendants.

I. INTRODUCTION

This case concerns the ongoing development and preliminary environmental review of the Bay Delta Conservation Plan ("BDCP"), a yet-to-be consummated collaborative approach to restoring the Sacramento-San Joaquin Delta ecosystem, while also protecting water supplies. *See* Defendants' Request for Judicial Notice ("DRJN"), Ex. A, BDCP: An Overview and Update (March 2009) ("Overview and Update"). Plaintiffs, Central Delta Water Agency and South Delta Water Agency, filed this lawsuit against the members of the BDCP "Steering Committee,"<sup>1</sup> alleging that:

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<sup>1</sup> The "Steering Committee" is made up of federal, state, and local water agencies, as well as nonprofit organizations. Overview and Update at 17. Defendants United States Fish and

1 (1) defendants initiated the scoping process under the National  
2 Environmental Policy Act ("NEPA") and the California  
3 Environmental Quality Act ("CEQA") without releasing to the  
4 public a sufficiently detailed BDCP project description; (2) in  
5 retaining a contractor to study the BDCP's possible environmental  
6 impacts, defendants violated federal regulations governing  
7 contractor conflicts-of-interest; (3) federal and state agencies  
8 impermissibly are coordinating their NEPA/CEQA compliance  
9 activities; (4) the BDCP lists conservation and water supply as  
10 co-equal project goals in violation of the California Natural  
11 Communities Conservation Planning Act ("NCCPA"); and (5) the BDCP  
12 Steering Committee's meetings did not comply with the  
13 California's Bagley-Keene Open Meeting Act. *See* Doc. 1,  
14 Complaint. Plaintiffs have since abandoned their conflict-of-  
15 interest and NCCPA claims. Doc. 157 at 2 n.2.

18 Six groups of defendants move to dismiss all of the claims  
19 in the Complaint. Doc. 106 (California Farm Bureau Federation  
20 ("CFBF")), Doc. 107 (Environmental Non-Profits), Doc. 112  
21 (Federal Defendants), Doc. 113 (Mirant Delta LLC), Doc. 114 & 118  
22 (Water Agency Defendants), Doc. 116 (State Defendants). The  
23 memoranda in support of these motions overlap to a considerable  
24 degree. With leave of court, Plaintiffs filed a consolidated,

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26 Wildlife Service ("FWS") and the National Marine Fisheries  
27 Service ("NMFS"), are *ex officio* members of the Steering  
28 Committee. *See* DRJN Ex. B, "Planning Agreement regarding the  
[BDCP] (Oct. 6, 2006) ("Planning Agreement") at 14.

1 seventy-six page opposition. Doc. 157. All of the moving  
2 parties replied, again with largely overlapping memoranda. Docs.  
3 175, 177-181.

4 Defendants jointly filed a request for judicial notice.  
5 Doc. 110. Plaintiffs also filed a separate request for judicial  
6 notice. Doc. 165. The Water Agency Defendants move to strike  
7 certain declarations and exhibits submitted by Plaintiffs in  
8 opposition to the motions to dismiss. Doc. 173.<sup>2</sup>

10 II. STATUTORY BACKGROUND

11 A. NEPA.

12 With the passage of NEPA in 1970, Congress "recognize[ed]  
13 the profound impact of man's activity on the interrelations of  
14 all components of the natural environment" and "declare[d] that  
15 it is the continuing policy of the Federal Government, in  
16 cooperation with State and local governments, and other concerned  
17 public and private organizations, to use all practicable means  
18 and measures ... to create and maintain conditions under which  
19 man and nature can exist in productive harmony, and fulfill the  
20

21 \_\_\_\_\_  
22 <sup>2</sup> Plaintiffs object to the hearing of this motion to strike,  
23 which contains evidentiary objections directly related to the  
24 pending motions to dismiss, on less than thirty days notice.  
25 Doc. 182 at 2. This objection is without merit. Local Rule 78-  
26 230(e) allows any party to file a counter-motion or other motion  
27 that is related to the general subject matter of the original  
28 motion. The district court "may" then continue the hearing "so  
as to give all parties reasonable opportunity to serve and file  
oppositions and replies to all pending motions." *Id.* Here, the  
motion to strike was filed August 17, 2008, leaving Plaintiffs  
adequate time to file an opposition, which they did, on August  
18, 2009. There was no need to continue the hearing schedule.

1 social, economic, and other requirements of present and future  
2 generations of Americans." 42 U.S.C. § 4331. In order to  
3 facilitate informed decision-making and public disclosure,  
4 federal agencies prepare an environmental impact statement  
5 ("EIS") for "major Federal actions significantly affecting the  
6 quality of the human environment." *Id.* § 4332(C).  
7

8 NEPA, along with implementing regulations promulgated by the  
9 Council on Environmental Quality ("CEQ"), establishes procedures  
10 agencies must follow in determining whether an EIS is required  
11 and in developing the EIS itself. One of the first steps in the  
12 process of developing an EIS is "scoping," an "early and open  
13 process for determining the scope of issues to be addressed and  
14 for identifying the significant issues related to a proposed  
15 action." *Id.* § 1501.7. As soon as practicable after the  
16 decision is made to prepare an EIS and before scoping takes  
17 place, the lead agency<sup>3</sup> must publish in the Federal Register a  
18 Notice of Intent ("NOI"), which must briefly describe the  
19 proposed action and proposed alternatives, provide contact  
20 information for an agency representative to answer questions  
21 about the project, and describe the agency's proposed scoping  
22 process. 40 C.F.R. § 1508.22.  
23  
24

25  
26 <sup>3</sup> Where multiple agencies are involved in a project, the  
27 regulations mandate that there be a lead agency in preparing the  
28 EIS, but allow agencies to serve as "joint lead agencies" in  
order to facilitate inter-agency cooperation. 40 C.F.R. §  
1501.5.

1 B. Administrative Procedure Act ("APA").

2 The APA provides that "[a] person suffering legal wrong  
3 because of agency action, or adversely affected or aggrieved by  
4 agency action within the meaning of a relevant statute, is  
5 entitled to judicial review thereof." 5 U.S.C. § 702. Where no  
6 other statute provides a right of action, the "agency action" at  
7 issue must also be "final agency action." § 704. "A  
8 preliminary, procedural, or intermediate agency action or ruling  
9 not directly reviewable is subject to review on the review of the  
10 final agency action." *Id.* "Agency action" is defined as "the  
11 whole or a part of an agency rule, order, license, sanction,  
12 relief, or the equivalent or denial thereof, or failure to act."  
13 § 551(13). Agency action is considered final if it "mark[s] the  
14 consummation of the agency's decision making process" and defines  
15 parties' rights and obligations or carries other legal  
16 consequences. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).  
17  
18

19  
20 III. FACTUAL BACKGROUND

21 This is yet another lawsuit arising out of the "increasingly  
22 significant and intensifying conflict" between the ecological  
23 needs and sustainability of the Sacramento San-Joaquin Delta  
24 ("Delta") and the human users of the Delta's resources. *See*  
25 DRJN, Exhibit E, Overview of the Draft Conservation Strategy for  
26 the BDCP at 3 (Jan. 12, 2009) ("Draft Overview"). The Delta is  
27 the largest estuary on the west coast of the Americas, and  
28

1 includes parts of five California counties (Contra Costa, San  
2 Joaquin, Sacramento, Solano, and Yolo). Compl. ¶84. The estuary  
3 supports more than 750 species of plants and wildlife, including  
4 several species protected by the federal Endangered Species Act  
5 ("ESA"). Compl. ¶85. Twenty-three million people, two-thirds of  
6 California's population, obtain some of their drinking water from  
7 Delta supplies. Compl. ¶86. In addition, more than 4 million  
8 acres of farmland are irrigated with water from the Delta. *Id.*

9  
10 The Delta is the hub of both the federal Central Valley  
11 Project ("CVP") and the State Water Project ("SWP")  
12 (collectively, "the Projects"), which pump water from the Delta  
13 near the city of Tracy to supply municipal, industrial, and  
14 agricultural users to the south. *See* Compl. ¶86. The Projects  
15 currently use the Delta's natural and man-made channels to convey  
16 water from incoming watersheds to those pumps. This arrangement  
17 has deleterious effects on the ecosystem, while related efforts  
18 to protect the environment cause uncertainty for those who  
19 receive water from the Delta. *See* Draft Overview at 3. "[T]he  
20 continuing subsidence of lands within the Delta, increasing  
21 seismic risks and levee failures, and sea level rise associated  
22 with climate change, serve to exacerbate these conflicts." *Id.*  
23  
24 There is little dispute that the current system is in need of  
25 fundamental restructuring.  
26

27 In 2006, various federal and state regulatory agencies,  
28

1 water districts, and other interested parties, began to develop  
2 the BDCP, with the stated goal of "provid[ing] for the  
3 conservation of threatened and endangered fish species in the  
4 Delta and improv[ing] the reliability of the water supply system  
5 within a stable regulatory framework." Compl. ¶95; Overview and  
6 Update at 1. The participants in the BDCP process have all  
7 recognized that solving the Delta's problems will require, among  
8 other things, capital improvements to the Delta's water  
9 conveyance system. BDCP Notice of Intent and Notice of Public  
10 Scoping Meetings, 74 Fed. Reg. 7,257, 7,259 (Feb. 13,  
11 2009)("February 2008 NOI"). Through the BDCP, Defendants intend  
12 to obtain long term incidental take permits for any planned  
13 changes to the Projects under the NCCPA and ESA. Compl. ¶104.

14  
15  
16 The "principal forum within which key policy and strategy  
17 issues pertaining to the BDCP will be discussed and considered"  
18 is the "Steering Committee," a group made up of the relevant  
19 federal and state regulatory agencies, numerous water  
20 contractors, and nonprofit organizations, who all signed a  
21 "Planning Agreement," setting forth the goals of the BDCP  
22 planning process. See Planning Agreement at 22-25.

23  
24 On January 24, 2008, NMFS and FWS published a "Notice of  
25 Intent to Conduct Public Scoping and Prepare an Environmental  
26 Impact Report/Environmental Impact Statement," broadly outlining  
27 the BDCP. 73 Fed. Reg. 4,178 (Jan. 24 2008) ("January 2008  
28

1 NOI"). The January 2008 NOI explained:

2 The applicants have identified four potential water  
3 conveyance options that are being considered for the  
4 habitat conservation planning process: (1) the existing  
5 conveyance and system without physical change to  
6 conveyance facilities, (2) changes to conveyance in San  
7 Joaquin Old and Middle River channels plus separation  
8 of San Joaquin corridor from through-delta conveyance,  
9 (3) a dual conveyance in which existing conveyance  
10 would still be operational plus an isolated facility  
11 (not yet constructed) from the Sacramento River to the  
12 south Delta, and (4) an isolated conveyance facility  
13 (not yet constructed) from the Sacramento River to the  
14 south Delta. These four options are undergoing  
15 evaluations through the BDCP Steering Committee to  
16 assess the relative ability of each to contribute to  
17 the goals and objectives of the planning effort.  
18 Although the applicant has not yet decided which  
19 option(s) will be submitted for consideration under  
20 section 10 of the Endangered Species Act, the intent is  
21 to narrow the project focus to one or two of the four  
22 options or a mixture thereof by fall 2007.

23 *Id.*

24 The NOI was updated on April 15, 2008: (1) adding BOR as a  
25 third co-lead federal agency; (2) providing further details on  
26 the project; and (3) announcing the dates, times, and locations  
27 of ten scoping meetings throughout California, held in April and  
28 May 2008. 73 Fed. Reg. 20,326 (Apr. 15, 2008) ("April 2008  
NOI"). The April 2008 NOI described the BDCP as follows:

21 The BDCP will have several core purposes: Habitat  
22 restoration and enhancement to increase the quality and  
23 quantity of habitat in the Delta; other conservation  
24 actions to help address a number of stressors on  
25 covered species; conveyance facilities to enhance  
26 operational flexibility and water supply reliability  
27 while providing greater opportunities for habitat  
28 improvements and fishery conservation; water operations  
and management actions to achieve conservation and  
water supply goals; and a comprehensive monitoring,  
assessment, and adaptive management program guided by  
independent scientific input. Additional core purposes  
of the BDCP are to provide for the conservation of  
covered species within the planning area; to protect  
and restore certain aquatic, riparian, and associated



1 terrestrial natural communities that support these  
2 covered species; and to provide for and restore water  
3 quality, water supplies, and ecosystem health within a  
4 stable regulatory framework. The EIS/EIR will evaluate  
5 the effects of implementing the BDCP, conveyance  
6 alternatives, and power line alignments, other  
7 nonstructural alternatives, and describe the permits  
8 necessary for BDCP implementation.  
9 The BDCP will likely consist of several major elements,  
10 including new capital improvements to the water supply  
11 conveyance system, a restoration program for important  
12 habitats within and adjacent to the Delta in order to  
13 improve the ecological productivity and sustainability  
14 of the Delta, and monitoring and adaptive management  
15 for the restoration program. The plan will also likely  
16 include operational improvements for the water supply  
17 system in the near-term and for the long-term once any  
18 capital improvements have been completed and are  
19 operational.

20 73 Fed. Reg. 20,327. The April 2008 NOI then explained that the  
21 BDCP may include, but is not limited to, the following  
22 activities:

- 23 • Existing Delta conveyance elements and operations of  
24 the CVP and SWP;
- 25 • New Delta conveyance facilities (including power line  
26 alignments) and operations of the CVP and SWP generally  
27 described in the BDCP November 2007 Points of  
28 Agreement;
- Operational activities, including emergency  
preparedness of the CVP and SWP in the Delta;
- Operational activities in the Delta related to water  
transfers involving water contractors or to serve  
environmental programs;
- Maintenance of the CVP, SWP, and other PRES'  
facilities in the Delta;
- Facility improvements of the CVP and SWP within the  
Statutory Delta...;
- Ongoing operation of and recurrent and future  
projects related to other Delta water users, as defined  
by the Planning Agreement;
- Projects designed to improve Delta salinity  
conditions; and
- Conservation measures included in the BDCP,  
including, but not limited to, fishery related habitat  
restoration projects, adaptive management, and  
monitoring activities in the Delta.

1 *Id.* at 20,327-28. The April 2008 NOI also pointed toward the  
2 Steering Committee's "Points of Agreement" as the "basis for  
3 alternative development":

4 As part of the BDCP process, the Steering Committee  
5 evaluated potential options to address water supply  
6 reliability, water quality, and ecosystem health in the  
7 Delta. Initial options included various combinations of  
8 water conveyance facilities and habitat restoration  
9 actions. As a result of this evaluation, the Steering  
10 Committee developed the Points of Agreement document  
11 that provides an overall framework for moving forward  
12 with development of the BDCP. Previous evaluations and  
13 potential improvements to the water conveyance system  
14 and strategies for in-Delta habitat restoration and  
15 enhancement outlined in the Points of Agreement  
16 document will be used for the basis of alternative  
17 development, but will not preclude or limit the range  
18 of alternatives to be analyzed under NEPA.

19 *Id.* at 20,378.

20 Some comments received during the 2008 scoping meetings  
21 indicated that more detailed descriptions of the proposed  
22 activities and alternatives were needed to permit informed public  
23 comment. *See* 74 Fed. Reg. at 7,257. In response, on February  
24 13, 2009, the agencies published another NOI. *See id.* at 7,257-  
25 60. The February 2009 NOI contained additional detail about the  
26 BDCP's central elements and the alternative conveyance systems  
27 under consideration:

28 The BDCP will likely consist of three major elements:  
(1) Actions to improve ecological productivity and  
sustainability in the Delta; (2) potential capital  
improvements to the water conveyance system, and; (3)  
potential changes in Delta-wide operational parameters  
of the CVP and SWP associated with improved water  
conveyance facilities.

Potential habitat restoration measures that could  
improve ecological productivity and sustainability in  
the Delta may involve the restoration of floodplain;

1 freshwater intertidal marsh; brackish intertidal marsh;  
2 channel margin, and riparian habitats. Floodplain  
3 restoration opportunities exist in the North Delta/Yolo  
4 Bypass and upper San Joaquin River areas; intertidal  
5 marsh restoration opportunities exist throughout the  
6 Delta and in Suisun Marsh. Channel margin habitat  
7 restoration opportunities exist for improving habitat  
8 corridors and as a component of floodplain restoration.  
9 Riparian habitat restoration opportunities exist as a  
10 component of floodplain, freshwater intertidal marsh,  
11 and channel margin habitat restoration.

12 Three general alternatives are being considered as they  
13 relate to the potential changes in the water conveyance  
14 system and CVP/SWP operations. These include: (1) A  
15 through-Delta alternative; (2) a dual conveyance  
16 alternative; and (3) an isolated facility alternative.  
17 In addition, the implications of taking no action, the  
18 No Action alternative, will be considered in the  
19 analysis. The dual conveyance alternative may include  
20 potential new points of diversion at various locations  
21 in the North Delta, facilities to move water from new  
22 points of diversion to the existing SWP and CVP pumping  
23 facilities in the South Delta, and continued use of the  
24 existing diversions in the South Delta. The fully  
25 isolated facility alternative would include potential  
26 new points of diversion at various locations in the  
27 North Delta and facilities to move water from new  
28 points of diversion to the existing SWP and CVP pumping  
29 facilities in the South Delta. The improved through-  
30 Delta alternative could include new temporary or  
31 permanent barriers to modify existing hydraulics or  
32 fish movement within the Delta, armoring of levees  
33 along Delta waterways to ensure continued conveyance  
34 capacity, and/or actions to improve conveyance capacity  
35 in existing Delta waterways.

36 New points of diversion could be located along the  
37 Sacramento River between South Sacramento and Walnut  
38 Grove. The new conveyance facility could extend from  
39 the new points of diversion to the existing SWP and CVP  
40 pumping facilities in the South Delta and be located  
41 either to the west or east of the Sacramento River.  
42 Potential CVP/SWP operations changes include the  
43 seasonal, daily, and real time amounts, rates, and  
44 timing of water diverted through and/or around the  
45 Delta. Potential corresponding changes to water exports  
46 could also be developed.

47 Other actions to reduce threats to listed fish that may  
48 be evaluated for implementation by the BDCP include  
49 measures to minimize other stressors. These other  
50 stressors may include: (1) Non-native invasive species;  
51 (2) toxic contaminants; (3) other water quality issues;  
52 (4) hatcheries; (5) harvest; (6) non-project

1 diversions; and (7) commercial/recreational activities.  
2 Implementation of potential habitat restoration  
3 activities and measures to minimize other stressors  
4 will be evaluated throughout the Delta, and possibly  
5 upstream and downstream of the Delta, as appropriate to  
6 meet the objectives of the plan.

7 Preliminary locations, alignments, and capacities of  
8 new conveyance facilities, as well as habitat  
9 restoration activities and actions to address other  
10 stresses, to be evaluated in the EIS/EIR will be  
11 informed by the scoping process. In addition to the  
12 alternatives described above, other reasonable  
13 alternatives identified through the scoping process  
14 will be considered for potential inclusion in the  
15 alternatives analysis.

16 *Id.* at 7,259-60.

17 The co-lead agencies held a second round of twelve scoping  
18 meetings around the State in March 2009. *See id.* at 7,257.  
19 Comments submitted during both the 2008 and 2009 rounds of  
20 scoping meetings will be considered during the preparation of the  
21 EIS/EIR. *Id.*

22 Plaintiffs complain that the NOIs were "ambiguous," Compl.  
23 ¶100, and that neither the NOIs nor related documents, including  
24 the January 2009 "Overview of the Draft Conservation Strategy for  
25 the [BDCP]," provide sufficiently detailed information about the  
26 BDCP, Compl. ¶101:

27 108. The language in the NOI is muddled and ambiguous.  
28 The "BDCP covered activities may, but are not limited  
to existing or new activities related to" "new Delta  
conveyance facilities," "Facility improvements of the  
CVP and SWP within the Statutory Delta," "future  
projects related to other Delta water users," "Projects  
designed to improve Delta salinity conditions," and  
"Conservation measures included in the BDCP, including,  
but not limited to, fishery related habitat management,  
and monitoring activities in the Delta." (NOI, 7259  
(Exhibit 1) (bold added).) However, the facilities to

1 be completed such as the new Delta conveyance  
2 facilities, their nature and their location have yet to  
3 be defined. While a number of alternatives for the new  
4 conveyance facilities have been mentioned in other BDCP  
5 process documents, the new conveyance facilities remain  
6 undefined in the NOI. Also to be determined are the  
7 goals and objectives of the BDCP, the species to be  
8 covered, and the methods and locations of conservation.  
9 Since the project is yet to be defined, it is  
10 impossible to accurately describe.

11  
12 109. Also, to the extent that any decisions about the  
13 BDCP have been made, they are not accurately reflected  
14 in the NOI. The NOI lists a combination plate of the  
15 following proposed actions as constituting the project:

16  
17 The BDCP is a conservation plan....  
18 [I]ncidental take permits (ITP) for water  
19 operations and management activities .... These  
20 incidental take authorizations would allow the  
21 incidental take of threatened and endangered  
22 species resulting from covered activities and  
23 conservation measures that will be identified  
24 through the planning process, including those  
25 associated with water operations of the Federal  
26 Central Valley Project (CVP), as operated by  
27 Reclamation, the California State Water Project  
28 (SWP), as operated by DWR, as well as operations  
of certain Mirant Delta LLC (Mirant Delta) power  
plants....

Authorizations that would allow projects that  
restore and protect water supplies, water quality,  
and ecosystem health to proceed within a stable  
regulatory framework. [NOI, p. 7257 (Exhibit 1).]

This description implies that the BDCP is a  
conservation plan and a take permit for any activities  
identified in the planning process and an array of  
other non-specified "authorizations that would allow  
projects." This description is vague, and omits  
certain activities that will be included, such as the  
construction of a conveyance facility, identified in  
the NOP and is unequivocally, contrary to law. (NOP,  
p. 7257 (Exhibit 1).) While the location of the  
conveyance facility is not precisely known, the NOI for  
the BDCP fails to even include a list of cities and

1 counties where the facilities may be located and which  
2 entities' water supply and watersheds may be affected.

3 Compl. ¶¶ 108-109.

4 Defendants move to dismiss the NEPA claim for lack of  
5 subject matter jurisdiction on standing, ripeness, and sovereign  
6 immunity grounds. Alternatively, Defendants argue that the  
7 complaint fails to state a claim under NEPA. Finally, Defendants  
8 argue that the state law claims should be dismissed because  
9 supplemental jurisdiction cannot be exercised unless the district  
10 court possesses subject matter jurisdiction over at least one  
11 federal claim. Alternatively, Defendants argue that the state  
12 law claims should be dismissed on jurisdictional and/or  
13 substantive grounds.  
14

15  
16 IV. STANDARD OF DECISION.

17 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows  
18 a motion to dismiss for lack of subject matter jurisdiction. It  
19 is a fundamental precept that federal courts are courts of  
20 limited jurisdiction. Limits upon federal jurisdiction must not  
21 be disregarded or evaded. *Owen Equipment & Erection Co. v.*  
22 *Kroger*, 437 U.S. 365, 374 (1978). The plaintiff has the burden  
23 to establish that subject matter jurisdiction is proper.  
24 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).  
25 This burden, at the pleading stage, must be met by pleading  
26 sufficient allegations to show a proper basis for the court to  
27 assert subject matter jurisdiction over the action. *McNutt v.*  
28

1 *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); Fed.  
2 R. Civ. P. 8(a)(1). When a defendant challenges jurisdiction  
3 *facially*, all material allegations in the complaint are assumed  
4 true, and the question for the court is whether the lack of  
5 federal jurisdiction appears from the face of the pleading  
6 itself. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th  
7 Cir. 2004).

9  
10 V. ANALYSIS

11 A. Evidentiary Matters.

12 1. Requests for Judicial Notice.

13 a. Defendants' Request for Judicial Notice.

14 Defendants jointly request judicial notice of six documents  
15 pertaining to the BDCP, Doc. 110, all of which are officially  
16 published online at the BDCP's website,<sup>4</sup> rendering them "capable  
17 of accurate and ready determination by resort to sources whose  
18 accuracy cannot reasonably be questioned." Fed. R. Evid. 201.  
19 All six documents are judicially noticeable for their existence  
20 and content, although not for the truth of the matters asserted  
21 therein. In addition, three of the documents, the BDCP "Overview  
22 and Update" (Mar. 2009), Planning Agreement (Oct. 2006), and  
23 "Points of Agreement" (Nov. 2007), are properly considered  
24 because they are relied upon extensively in the Complaint.  
25  
26 *Inlandboatmens Union of Pac. v. Dutra Grp.*, 279 F.3d 1075, 1083  
27 (9th Cir. 2002) (although generally a district court may not

28 <sup>4</sup> <http://resources.ca.gov/bdcp>

1 consider material beyond the pleadings on a Rule 12(b)(6) motion,  
2 a document to which the complaint specifically refers may be  
3 considered if its authenticity is not questioned).

4 Defendants' request for judicial notice is GRANTED in its  
5 entirety.

6  
7 b. Plaintiffs' Request for Judicial Notice.

8 Plaintiffs request that judicial notice be taken of thirty  
9 six (36) documents. Doc. 165. Many of these, namely Documents  
10 1, 3-7, 9-15, 22-23, 25, 27-28, and 30-34, are statutes and/or  
11 regulations, which may be considered as a matter of course,  
12 without the necessity of judicial notice. Three others,  
13 Documents 17, 26, and 29, are treatises on NEPA and/or CEQA,  
14 which, as generally recognized scholarly source material, may  
15 also be considered, but only as persuasive authority.

16  
17 Plaintiffs' Document 24 is a publication in the Federal  
18 Register, which is judicially noticeable pursuant to 44 U.S.C. §  
19 1507 ("contents of the Federal Register shall be judicially  
20 noticed"). Documents 2 (BDCP Governance Working Group,  
21 Preliminary Recommendations for Governance Structure), 8 (BDCP  
22 EIR/EIS Process Presentation), and 16 (Memorandum Agreement for  
23 Supplemental Funding), are judicially noticeable public documents  
24 available on the BDCP website, although they are not admissible  
25 for the truth of the matters asserted therein. Documents 18  
26 through 21 are Memoranda and Handbooks concerning the  
27  
28



1 implementation of NEPA, all of which are public records  
2 judicially noticeable for their content and existence. The same  
3 applies to the opinions of the California Attorney General,  
4 Documents 35 and 36, which are judicially noticeable persuasive,  
5 but non-binding authority. *See Louis v. McCormick & Schmick*  
6 *Restaurant Corp.*, 460 F. Supp. 2d 1153, 1156 n.4 (C.D. Cal.  
7 2006).

9 Plaintiffs' request for judicial notice is GRANTED as to  
10 Documents 2, 8, 16, 18-21, and 24, and DENIED, as unnecessary, as  
11 to all other documents, which, as statutory legal authorities,  
12 may be considered without taking judicial notice.

13  
14 2. Motion to Strike.

15 In support of their opposition to Defendants' motions,  
16 Plaintiffs filed the Declarations of John Herrick, Manager and  
17 General Counsel for South Delta Water Agency, Doc. 159, and Dante  
18 John Nomellini, Sr., Manager and Co-Counsel for Central Delta  
19 Water Agency, Doc. 158. The Water Agency Defendants move to  
20 strike both declarations in their entirety.

22 Water Agency Defendants argue that where motions to dismiss  
23 present either a facial attack under Federal Rule of Civil  
24 Procedure 12(b)(1) and/or arguments under Rule 12(b)(6), a court  
25 is limited to consideration of the allegations contained in the  
26 complaint, with two exceptions:

27 First, a court may consider "material which is properly  
28 submitted as part of the complaint...." Second, under

1 Fed. R. Evid. 201, a court may take judicial notice of  
2 "matters of public record."

3 *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001)  
4 (internal citations omitted).

5 Plaintiffs respond that extrinsic evidence is admissible  
6 here because the Water Agency Defendants' motion to dismiss  
7 actually is a factual attack on the complaint. Specifically,  
8 Plaintiffs point to Page 4, lines 27-28 of the Water Agency  
9 Defendants' Motion, which states: "Defendant Water agencies  
10 bring a facial attack on subject matter jurisdiction, and join in  
11 the subject matter jurisdiction attacks brought by the other  
12 defendants." Doc. 118-2 at 4 (emphasis provided by Plaintiffs).  
13 Plaintiffs suggest, without identifying any specific arguments in  
14 the other parties' papers, that other Defendants' motions to  
15 dismiss raise factual attacks. They do not. For example,  
16 although several other parties challenge Plaintiffs' standing to  
17 sue, they do so based on the face of the complaint. *See* Doc. 112  
18 (Federal Defendants assert that despite allegations of procedural  
19 injury in the form of the publication of the NOIs and the  
20 decision to conduct scoping prior to issuance of a draft BDCP,  
21 Plaintiffs cannot possibly identify any harm to their concrete  
22 interests that are reasonably probable to result from these  
23 actions, because publication of an NOI and conducting scoping  
24 will not result in the undertaking of a project). The Herrick  
25 and Nomellini declarations simply reiterate, albeit in greater  
26  
27  
28

1 detail, assertions in the complaint (e.g., that the issuance of  
2 the NOIs and the early scoping process make it impossible for  
3 Plaintiffs to meaningfully participate in the NEPA process). The  
4 assertions in the complaint must be accepted as true. The  
5 Herrick and Nomellini declarations, even if admissible, cannot  
6 supplement the complaint.  
7

8 Similarly, several Defendants argue that Plaintiffs' NEPA  
9 claim is not ripe for review, *see, e.g.*, Doc. 112-2 at 17-18,  
10 and/or that Plaintiffs' APA claim must be dismissed because no  
11 "final agency action" has been alleged, *see, e.g., id.* at 12-17.  
12 In response, Plaintiffs argue, relevant to one of the ripeness  
13 factors, that delayed review would cause them hardship, Doc. 157  
14 at 22-23, and, relying on a possible exception to the general  
15 rule that review is only permissible under NEPA upon issuance of  
16 an EIS or related finding, that Plaintiffs will be irreparably  
17 harmed if the NEPA violations are not remedied at an early stage.  
18 The Herrick and Nomellini declarations do not add anything  
19 material to the facts of the complaint. These declarations  
20 merely re-assert that the procedural injury will cause Plaintiffs  
21 hardship because they will be precluded from meaningfully  
22 participating in the NEPA process, and will irreparably harm  
23 Plaintiffs because the process being followed by the agencies may  
24 preclude Plaintiffs from properly informing Defendants of their  
25 concerns. These theories of harm and irreparable injury are more  
26  
27  
28

1 appropriately presented as legal argument. Extrinsic evidence is  
2 unnecessary. Water Agency Defendants' motion to strike the  
3 Herrick and Nomellini declarations is GRANTED.

4 The Water Agency Defendants also object to consideration of  
5 Exhibits 3, 9, 10, 11, 12, 13, and 21, attached to the  
6 Declaration of Glenn C. Hansen in Support of Plaintiffs'  
7 opposition. Docs. 160-64 & 173. Water Agency Defendants object  
8 that these documents are not appropriately considered in the  
9 context of a facial attack under Rule 12(b)(1), nor are they  
10 subject to judicial notice. As to Exhibits 3, 10, and 21, these  
11 correspond to Documents 2, 8, and 16, for which Plaintiffs'  
12 request for judicial notice was GRANTED, which moots these  
13 objections.  
14

15  
16 As to Exhibits 9 (a June 24, 2008 letter from Environmental  
17 Defense Fund, Natural Heritage Institute, The Bay Institute, and  
18 the Nature Conservancy to California Assemblywoman Lois Wolk), 11  
19 (a web page entitled "The Delta: A Water Source for Most  
20 Californians" from The Nature Conservancy's Web Site), 12 (a web  
21 page entitled "Our Approach to Restoring Land, Water & Wildlife"  
22 from the Environmental Defense Fund website), and 13 (a web page  
23 entitled "Transforming How California Uses Water: Protecting the  
24 Sacramento-San Joaquin Bay-Delta, an ecosystem in Crisis" from  
25 the Environmental Defense Fund website), Plaintiffs contend that  
26 these documents are admissible as non-hearsay party admissions,  
27  
28

1 citing Federal Rule of Civil Procedure 801(d)(2)(A) and 901, as  
2 well as *United States v. Traylor*, 656 F.2d 1326, 1332 (9th Cir.  
3 1981). All of these "admissions" appear to relate to Plaintiffs'  
4 theory that the Steering Committee is really a "joint venture"  
5 between all of its members. See Doc. 157 at 7-8. As the motions  
6 to dismiss are resolved on other, justiciability grounds, it is  
7 not necessary to address Plaintiffs' joint venture theory or the  
8 related admissions. The Water Agency's motion to strike  
9 Documents 9 and 11-13 are DENIED AS MOOT.  
10

11  
12 B. Threshold Jurisdictional Issues

13 1. Standing.

14 To maintain an action in federal court, Plaintiffs must have  
15 Article III standing. See *Lujan v. Nat'l Wildlife Fed'n*, 497  
16 U.S. 871, 872 (1990) ("*Lujan v. NWF*"). "[T]o satisfy Article  
17 III's standing requirements, a plaintiff must show (1) [it] has  
18 suffered an 'injury in fact' that is (a) concrete and  
19 particularized and (b) actual or imminent, not conjectural or  
20 hypothetical; (2) the injury is fairly traceable to the  
21 challenged action of the defendant; and (3) it is likely, as  
22 opposed to merely speculative, that the injury will be redressed  
23 by a favorable decision." *Friends of the Earth v. Laidlaw Env'tl.*  
24 *Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). In addition to  
25 the Article III requirements, which are jurisdictional, see  
26 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006), a  
27  
28

1 plaintiff who brings suit under the APA, 5 U.S.C. § 706, must  
2 also establish that it falls within the "zone of interest" of the  
3 statute under which the lawsuit is brought, *see City of Sausalito*  
4 *v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004).

5 The burden of establishing the elements of standing falls  
6 upon the party asserting federal jurisdiction. *Lujan v.*  
7 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("*Lujan v. DOW*").  
8 "[E]ach element of Article III standing 'must be supported in the  
9 same way as any other matter on which the plaintiff bears the  
10 burden of proof, i.e., with the manner and degree of evidence  
11 required at the successive stages of the litigation.'" *Bennett*,  
12 520 U.S. at 167 (quoting *Lujan v. DOW*, 504 U.S. at 561).

13 These requirements are relaxed somewhat where the injury  
14 alleged is procedural. In a "procedural injury" case, the  
15 plaintiff must show that: "(1) the [agency] violated certain  
16 procedural rules; (2) these rules protect a plaintiff's concrete  
17 interests; and (3) it is reasonably probable that the challenged  
18 action will threaten their concrete interests." *Nuclear Info.*  
19 *and Resource Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941,  
20 949 (9th Cir. 2006).

21 A cognizable procedural injury exists when a plaintiff  
22 alleges that a proper EIS has not been prepared under  
23 NEPA when the plaintiff also alleges a "concrete"  
24 interest-such as an aesthetic or recreational interest-  
25 that is threatened by the proposed action.  
26 *City of Sausalito*, 386 F.3d at 1197. The "concrete interest"

1 test has been described "as requiring a 'geographic nexus'  
2 between the individual asserting the claim and the location  
3 suffering an environmental impact." *Ashley Creek Phosphate Co.*  
4 *v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (quoting *Cantrell v.*  
5 *City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)).

6  
7 It is not disputed that Plaintiffs Central and Southern  
8 Delta Water Agencies ("Delta Water Agencies") satisfy the  
9 "geographic nexus" and organizational standing requirements.  
10 *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.  
11 333 (1977), sets forth the requirements for organizational  
12 standing:

13 An association has standing to bring a suit on behalf  
14 of its members when: (a) its members would otherwise  
15 have standing to sue in their own right; (b) the  
16 interests it seeks to protect are germane to the  
17 organization's purpose; and (c) neither the claim  
asserted nor the relief requested requires the  
participation of individual members in the lawsuit.

18 *Id.* at 343.

19 The owners of lands that lie within the Delta Water  
20 Agencies' geographic scope rely on diversions from the Delta for  
21 their water supply, and the potential BDCP action of "reducing  
22 South Delta exports" may negatively impact Delta Water Agencies:

23  
24 Reduction in south Delta exports, marginally increases  
25 salinity in the south and central Delta due to less  
26 dilution of saltier San Joaquin River Inflows and Delta  
27 island discharges, particularly in late summer and  
28 early fall. These increases in salinity would have  
minimal negative effects for covered species, but could  
have negative impacts for agricultural or municipal  
water users who divert from the south Delta if these

1 salinity levels exceed those needed by these uses.  
2 Draft Overview at 32, 34. The interests Plaintiffs seek to  
3 protect in this litigation are germane to the organizations'  
4 purposes. The Delta Water Agencies are political subdivisions of  
5 the State of California, created by the legislature to ensure a  
6 dependable supply of water of suitable quality and acceptable  
7 salinity for the Delta to meet the needs of their constituent  
8 water users. *See Central Delta Water Agency v. United States*,  
9 306 F.3d 938, 945, 951 (9th Cir. 2002). The charters of the two  
10 Delta Water Agencies allow them to commence litigation to further  
11 their goals. *Id.* Finally, no argument has been made that any of  
12 the claims alleged and/or relief sought by the Complaint requires  
13 the participation of individual landowners within Plaintiffs'  
14 areas of operation.  
15  
16

17 However, although necessary, organizational standing is not  
18 sufficient to establish standing in a procedural injury case.  
19 Plaintiffs must still establish that "it is reasonably probable  
20 that the challenged action will threaten their concrete  
21 interests." *Nuclear Info. and Resource Serv*, 457 F.3d at 949.  
22 "[A] free-floating assertion of procedural violation, without a  
23 concrete link to the interest protected by the procedural rules,  
24 does not constitute an injury in fact." *Ashley Creek*, 420 F.3d  
25 at 938. Here, Federal Defendants argue that "plaintiffs cannot  
26 show that it is reasonably probable that the challenged action  
27  
28



1 will threaten their concrete interests. This is because, unlike  
2 most NEPA suits, the action challenged here is not the  
3 preparation (or lack thereof) of an EIS, but only the lead  
4 agencies' decision to publish an NOI and conduct scoping without  
5 first publishing a detailed draft of the BDCP." Doc. 112-2 at  
6 10. There are no prescribed rules or procedures that govern  
7 preparation of the BDCP.  
8

9 The Complaint alleges that because the NOI is insufficiently  
10 detailed, Plaintiffs "cannot determine what impacts the BDCP will  
11 have nor whether it complies with the law." Compl. ¶117(c).  
12 Plaintiffs also allege that the designation of multiple lead  
13 agencies "means that applicants, public officials and the general  
14 public do not know which NEPA procedures apply to the proposed  
15 project and therefore cannot know if the procedures are properly  
16 followed." *Id.* at ¶117(b). But, Plaintiffs do not set forth a  
17 plausible basis for finding that these challenged actions (i.e.,  
18 the failure to issue a sufficiently detailed NOI, and the  
19 designation of multiple lead agencies) are reasonably likely to  
20 harm their concrete interests in the Delta. It is possible that  
21 the BDCP will be developed in such a manner that any perceived  
22 harm to their concrete interests will be eliminated. It is also  
23 possible that no BDCP will be finalized at all. There is no  
24 legal requirement that a BDCP be completed. In this sense, the  
25 challenge is premature.  
26  
27  
28

1 This case is distinguishable from other situations in which  
2 it was "reasonably probable" that a procedural injury under NEPA  
3 would threaten a plaintiff's concrete interests. For example, in  
4 *City of Sausalito*, the plaintiff challenged a completed EIS. The  
5 Ninth Circuit did not require the plaintiff "to demonstrate that  
6 a procedurally proper EIS will necessarily protect [a] concrete  
7 interest...." *Id.* at 1197. Rather, it was enough to allege that  
8 the plan approved by the EIS will result in harm to plaintiff's  
9 concrete interests. *Id.* at 1199. Put another way "if the plan  
10 is not implemented the 'reasonably probable' threat to  
11 [plaintiff's] concrete [] interests will have been removed."  
12 *Id.*; see also *Citizens for Better Forestry v. U.S. Dept of*  
13 *Agriculture*, 341 F.3d 961, 975 (9th Cir. 2003). Here, in  
14 contrast, Plaintiffs have not and cannot allege that the BDCP  
15 will result in any harm, as no BDCP exists. See *Hawaii County*  
16 *Green Party v. Clinton*, 124 F. Supp. 2d 1173 (D. Haw.  
17 2000)("Plaintiff cannot have suffered an injury in fact when  
18 Defendants have not yet taken final action.").

19 Plaintiffs cannot demonstrate standing to bring a procedural  
20 injury claim under NEPA because it is not reasonably probable, at  
21 this early juncture in the process, that their concrete interests  
22 will be harmed. What Plaintiffs in substance seek is to  
23 structure the BDCP process to their liking as to make their input  
24 "more effective." They have not and cannot allege they have been  
25  
26  
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28

1 completely excluded from providing their input in any public  
2 scoping process. Plaintiffs' NEPA claim must be dismissed for  
3 lack of subject matter jurisdiction WITH PREJUDICE AND WITHOUT  
4 LEAVE TO AMEND.

5  
6 2. Ripeness.

7 Alternatively, Defendants argue that Plaintiffs' claims are  
8 not ripe for review. Ripeness has both a constitutional and  
9 prudential requirement designed "to prevent the courts, through  
10 avoidance of premature adjudication, from entangling themselves  
11 in abstract disagreements over administrative policies, and also  
12 to protect the agencies from judicial interference until an  
13 administrative decision has been formalized and its effects felt  
14 in a concrete way by the challenging parties." *Abbott Labs. v.*  
15 *Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*,  
16 *Califano v. Sanders*, 430 U.S. 99 (1977). In determining whether  
17 a case is ripe, a court considers: "(1) whether delayed review  
18 would cause hardship to the plaintiffs; (2) whether judicial  
19 intervention would inappropriately interfere with further  
20 administrative action; and (3) whether the courts would benefit  
21 from further factual development of the issues presented." *Ohio*  
22 *Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

23  
24  
25  
26 a. Hardship.

27 Plaintiffs assert that delayed review would cause them  
28 "hardship" because they would be unable to exercise their

1 procedural rights under NEPA. Doc. 157 at 22. In support of  
2 this assertion, Plaintiffs rely on a quote from *Ohio Forestry*,  
3 523 U.S. at 737, in which the Supreme Court stated that "a person  
4 with standing who is injured by a failure to comply with the NEPA  
5 procedure may complain of that failure at the time the failure  
6 takes place, for the claim can never get riper." This language  
7 must be considered in context. *Ohio Forestry* concerned an  
8 environmental group's challenge to the approval of a Forest  
9 Management Plan ("FMP") for the Wayne National Forest in Ohio.  
10 The Supreme Court held that the challenge to the FMP was not ripe  
11 for review. With respect to the hardship prong, the Court  
12 concluded that to withhold judicial consideration of plaintiffs'  
13 claims would not cause hardship "as this court has come to use  
14 that term" because the provisions of the plan challenged by  
15 plaintiff "do not create adverse effects "of a sort that  
16 traditionally would have qualified as harm," meaning:

17 they do not command anyone to do anything or to refrain  
18 from doing anything; they do not grant, withhold, or  
19 modify any formal legal license, power, or authority;  
20 they do not subject anyone to any civil or criminal  
21 liability; they create no legal rights or obligations.  
22 Thus, for example, the Plan does not give anyone a  
23 legal right to cut trees, nor does it abolish anyone's  
24 legal authority to object to trees being cut.

25 *Id.* at 733. The Court reasoned:

26 Nor have we found that the Plan now inflicts  
27 significant practical harm upon the interests that the  
28 Sierra Club advances—an important consideration in  
light of this Court's modern ripeness cases. *See, e.g.,*  
*Abbott Laboratories, supra*, at 152-154. As we have

1 pointed out, before the Forest Service can permit  
2 logging, it must focus upon a particular site, propose  
3 a specific harvesting method, prepare an environmental  
4 review, permit the public an opportunity to be heard,  
5 and (if challenged) justify the proposal in court.  
6 *Supra*, at 1668-1669. The Sierra Club thus will have  
7 ample opportunity later to bring its legal challenge at  
8 a time when harm is more imminent and more certain. Any  
9 such later challenge might also include a challenge to  
10 the lawfulness of the present Plan if (but only if) the  
11 present Plan then matters, i.e., if the Plan plays a  
12 causal role with respect to the future, then-imminent,  
13 harm from logging. Hence we do not find a strong reason  
14 why the Sierra Club must bring its challenge now in  
15 order to get relief. *Cf. Abbott Laboratories, supra*, at  
16 152.

17 *Id.* at 733-34 (parallel citations omitted).

18 The Court supported its finding that the challenges to the  
19 FMP were not ripe for review by noting that "Congress has not  
20 provided for preimplementation judicial review of forest plans."  
21 *Id.* at 737. The Court reasoned that an FMP, "which through  
22 standards guides future use of forests," does not "resemble an  
23 environmental impact statement prepared pursuant to NEPA." *Id.*

24 That is because in this respect NEPA, unlike the NFMA,  
25 simply guarantees a particular procedure, not a  
26 particular result. Compare 16 U.S.C. § 1604(e)  
27 (requiring that forest plans provide for multiple  
28 coordinated use of forests, including timber and  
wilderness) with 42 U.S.C. § 4332 (requiring that  
agencies prepare environmental impact statements where  
major agency action would significantly affect the  
environment). Hence a person with standing who is  
injured by a failure to comply with the NEPA procedure  
may complain of that failure at the time the failure  
takes place, for the claim can never get ripier.

29 *Id.* (emphasis added).

30 Plaintiffs suggest that this passage means that a violation  
31 of NEPA procedures, at any time during the NEPA process, is

1 automatically ripe for review. This reading of *Ohio Forestry* is  
2 unreasonable and unjustifiably interventionist, as it would  
3 effectively grant any party the right to judicially interfere  
4 with the administrative process without regard to ripeness in any  
5 NEPA procedural injury case. A more reasonable reading of this  
6 language is found in *Sierra Club v. U.S. Army Corps of Engineers*,  
7 446 F.3d 808, 815 (8th Cir. 2006) ("*Sierra Club v. USACE*"),  
8 interpreting this passage to mean that "[t]he Supreme Court has  
9 strongly signaled that an that an agency's decision to issue  
10 either a [Finding of No Significant Impact] or an [EIS] is a  
11 'final agency action' permitting immediate judicial review under  
12 NEPA."<sup>5</sup>  
13  
14

15  
16 <sup>5</sup> Plaintiffs' reliance on *Sierra Club v. USACE* is similarly  
17 misplaced. There, the Army Corps of Engineers issued an  
18 Environmental Assessment ("EA") and Finding of No Significant  
19 Impact ("FONSI"), in lieu of an EIS, for a project to construct a  
20 levee in Jefferson City, Missouri. The government moved to  
21 dismiss environmental plaintiff's NEPA challenge, arguing that  
22 there was no final agency action by the Corps because it had not  
23 yet entered into agreements with the City to construct the levee,  
24 nor had it received funding from Congress for the project. *Id.*  
25 The district court concluded the environmental plaintiffs lacked  
26 standing because no injury was certain to occur until the  
27 relevant agencies took additional steps to finalize a levee  
28 project. *Id.* at 816. The Eighth Circuit reversed, reasoning  
that "[i]njury under NEPA occurs when an agency fails to comply  
with that statute, for example, by failing to issue a required  
environmental impact statement," and concluded, without providing  
any reasoning, that "the NEPA dispute was ripe for judicial  
review when the lawsuit was filed...." *Id.* (citing *Ohio  
Forestry*, 523 U.S. at 737).

Plaintiffs' partially quote this case to argue that under  
NEPA "injury occurs when an agency fails to comply with the  
statute....," but neglect to acknowledge that the remainder of  
this sentence adds the qualification: "for example, by failing

1 Plaintiffs next cite a quote from *Sierra Club v. Marsh*, 714  
2 F. Supp. 539, 590 (D. Maine 1989):

3 The ultimate harm protected by NEPA is harm to the  
4 environment, the risk of bureaucratic commitment may  
5 cause real harm to the environment where, as under  
6 NEPA, the court may not compel the agency to reach a  
7 different result, but may only compel agency  
reconsideration of its earlier decision in light of the  
new information acquired through recourse to the NEPA  
process.

8 *Marsh* entailed an application for a preliminary injunction to bar  
9 the continuation of a construction project. *Id.* at 543. Here,  
10 Plaintiffs apparently contend that the showing of "irreparable  
11 harm" required to obtain a preliminary injunction is equivalent  
12 to the ripeness "hardship" analysis. Even assuming, *arguendo*,  
13 this contention is valid, its application to this case is not.

14 The *Marsh* court found that no irreparable injury would  
15 likely result from initiation of the second phase of the  
16 construction project, and that even if plaintiffs were likely to  
17 succeed on the merits of their NEPA claims, "a likelihood of  
18 irreparable physical harm to the environment would have to be  
19 demonstrated in order to obtain preliminary injunctive relief."  
20 *Id.* at 543. The First Circuit reversed, reasoning that NEPA  
21 "seeks to create a particular bureaucratic decisionmaking  
22 process, ... whereby administrators make important decisions with  
23 an informed awareness of how the decision might significantly  
24

25  
26 to issue a required environmental impact statement." *Id.* at 816.  
27 This case, like *Ohio Forestry*, stands for no more than that a  
28 plaintiff's injury is complete once an agency fails to complete  
an EIS where one is required.

1 affect the environment." *Sierra Club v. Marsh*, 872 F.2d 497 (1st  
2 Cir. 1989). "[I]f any such decision is made without the  
3 information that NEPA seeks to put before the decisionmaker, the  
4 harm that NEPA seeks to prevent occurs." *Id.*

5 [T]he harm at stake is a harm to the environment, but  
6 the harm consists of the added risk to the environment  
7 that takes place when governmental decisionmakers make  
8 up their minds without having before them an analysis  
9 (with prior public comment) of the likely effects of  
10 their decision upon the environment. NEPA's object is  
11 to minimize that risk, the risk of uninformed choice, a  
12 risk that arises in part from the practical fact that  
13 bureaucratic decisionmakers (when the law permits) are  
14 less likely to tear down a nearly completed project  
15 than a barely started project. In *Watt* we simply held  
16 that the district court should take account of the  
17 potentially irreparable nature of this decisionmaking  
18 risk to the environment when considering a request for  
19 preliminary injunction.

20 *Id.* at 500-01 (emphasis in original).

21 On remand, the district court reasoned:

22 A NEPA violation which deprives agency decisionmakers  
23 of an informed awareness of significant environmental  
24 consequences of the challenged action is deemed harmful  
25 to the environment, by virtue of the added risk to the  
26 environment, ... that arises in part from the practical  
27 fact that bureaucratic decisionmakers (when the law  
28 permits) are less likely to tear down a nearly  
completed project than a barely started project.

714 F. Supp. 539 at 546 (internal citations and quotations  
omitted). Critically, in *Marsh*, the environmental review had  
already taken place, approving continued construction on the  
project. The question in *Marsh* was whether continued  
construction should be enjoined while plaintiffs' claim that the  
NEPA process had been inadequate was being litigated. In such a  
case, if a NEPA procedural violation deprives agency



1 decisionmakers of an informed awareness of significant  
2 environmental consequences, such a procedural violation may be  
3 deemed harmful to the environment, "by virtue of the added risk  
4 to the environment, ... that arises in part from the practical  
5 fact that bureaucratic decisionmakers ... are less likely to tear  
6 down a nearly completed project than a barely started project."  
7

8 *Id.*

9 Here, the issue is very different. No project has yet been  
10 formulated, nor can the record possibly reveal whether any NEPA  
11 procedural violation has deprived agency decisionmakers of an  
12 informed awareness of significant environmental consequences.  
13 Plaintiffs suggest that they have suffered "hardship" because  
14 they have been unable to meaningfully comment on the scope of the  
15 EIS/EIR, which resulted in uninformed decision-making in  
16 determining the scope of environmental review. While the  
17 environmental review process is in progress and incomplete, there  
18 is no way to know what the ultimate scope of the environmental  
19 review will be.  
20

21 Plaintiffs also suggest that the "harm cannot be undone  
22 after the EIS has been approved because the decision-makers'  
23 judgment has been biased by the previously completed process."  
24 Doc. 157 at 23. This species of hardship is not recognized in  
25 the law. A very similar argument was rejected in *Muhly v. Espy*,  
26 877 F. Supp. 294, 300 (W.D. Va. 1995), where plaintiffs argued  
27  
28

1 that "omission from the scoping process ... irreparably harmed  
2 them and that additional meetings with agency personnel will be  
3 meaningless." Citing the Ninth Circuit's analogous decision in  
4 *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844  
5 F.2d 588 (9th Cir. 1988), *Muhly* reasoned that, absent allegations  
6 of bad faith on the part of the agency, plaintiffs were not  
7 harmed by omission from the scoping process because plaintiffs  
8 would have ample opportunity to be heard in upcoming meetings and  
9 public comment processes concerning a draft EIS. *Id.* at 301; *see*  
10 *also Bennet Hills Grazing Assoc. v. United States*, 600 F.2d 1308,  
11 1309 (9th Cir. 1979) (request for injunction against agency  
12 proceeding with preparation of final EIS until plaintiffs had  
13 been given ninety days in which to comment on draft EIS not ripe  
14 for review because plaintiffs failed to show that judicial review  
15 after preparation of the FEIS would be inadequate as a matter of  
16 law).

17  
18  
19 The same conclusion is warranted here. Absent an allegation  
20 of bad faith, which is not made, procedural irregularities in the  
21 early stages of the NEPA process cannot result in harm because  
22 Plaintiffs will have additional legally-guaranteed opportunities  
23 to participate. Plaintiffs have not demonstrated hardship.  
24

25 b. Interference with Further Administrative Action.

26 The next ripeness factor concerns whether judicial  
27 intervention would inappropriately interfere with further  
28

1 administrative action. *Ohio Forestry*, 523 U.S. at 733.

2 Defendants maintain that Plaintiffs' judicial intervention into  
3 the NEPA process would prove to be enormously disruptive. Doc.  
4 177 at 3 (Federal Defendant's Reply).

5  
6 The collaborative BDCP effort among the many federal,  
7 state, and local government agencies, water districts,  
8 non-governmental entities, and others is a substantial  
9 undertaking, recognizing the critical need for a  
10 different approach to conserve the many valuable  
11 resources of the Bay-Delta region and the water supply  
12 system that serves much of California and which depends  
13 on restoring a healthy ecosystem. While the two  
14 plaintiff organizations and perhaps others may not  
15 support the initial planning effort, their evident  
16 dissatisfaction does not warrant the type of  
17 extraordinary intervention by the federal judiciary  
18 that the plaintiffs seek to impose.

19 *Id.*

20 Plaintiffs respond, incomprehensibly, that because it is  
21 undisputed that the BDCP has yet to be defined, "judicial review  
22 of the NOI at this stage would ensure that, once the project is  
23 defined, the environmental review process is properly initiated  
24 and the decision-making process properly informed." Doc. 157 at  
25 23. This turns the ripeness doctrine on its head, the purpose of  
26 which is "to prevent the courts, through avoidance of premature  
27 adjudication, from entangling themselves in abstract  
28 disagreements over administrative policies, and also to protect  
the agencies from judicial interference until an administrative  
decision has been formalized and its effects felt in a concrete  
way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-  
49.

Plaintiffs rely on *Citizens for Better Forestry*, 341 F.3d at

1 970-971, 977 (9th Cir. 2003) ("*CBF*"), to support the proposition  
2 that, where procedural statutes are at issue, courts have held  
3 claims to be ripe despite related on-going administrative  
4 processes. In *CBF*, the Ninth Circuit held that a NEPA challenge  
5 to a rule would not interfere with further administrative action,  
6 despite the fact that the agency was working to produce a  
7 replacement rule. *Id.* at 977. But, there, the Ninth Circuit  
8 specifically found that the administrative process "is at a  
9 resting place," because the original rule exists as an optional  
10 protocol for the agency to follow while the new rule is being  
11 developed. *Id.* Here, the administrative process is undisputedly  
12 ongoing and no decision or rule has been made or promulgated.

13 Plaintiffs raise *Trustees for Alaska v. Hodel*, 806 F.2d  
14 1378, 1381 (9th Cir. 1986), as an example of judicial  
15 intervention. The facts of *Trustees for Alaska* are entirely  
16 distinguishable. *Trustees for Alaska* addressed whether a  
17 Legislative Environmental Impact Report ("LEIS") for a  
18 statutorily-required report to Congress should be distributed for  
19 public comment before submission of that Report to Congress. The  
20 Ninth Circuit held that plaintiffs' challenge to the agency's  
21 "clear and final" decision not to provide for presubmission  
22 public review and comment of the completed LEIS was ripe,  
23 otherwise Congress might act on the Report, effectively causing  
24 the plaintiffs to lose their rights to make pre-submission public  
25 comments on the LEIS. *Id.* at 1381; *see also Sierra Club v. U.S.*  
26 *Dept. of Energy*, 287 F.3d 1256, 1263 (10th Cir. 2002)(challenge  
27 to agency decision not to conduct NEPA or ESA analyses before  
28 granting an easement to construct road was ripe, despite fact

1 that construction could not proceed without other approvals).  
2 Here, by contrast, no portion of the BDCP NEPA review process has  
3 yet reached a "clear and final" endpoint.

4 Plaintiffs' also rely on *National Wilderness Institute v.*  
5 *U.S. Army Corps of Engineers*, 2001 U.S. Dist. LEXIS 25930 (D.D.C.  
6 2001). In that case, plaintiffs alleged that the defendant  
7 agencies did not conduct a consultation under the ESA with  
8 respect to the operation of an aqueduct, from which certain  
9 discharges were allegedly harming listed species. *Id.* at \*19.  
10 Defendants there argued that this challenge was not ripe for  
11 review because the Environmental Protection Agency ("EPA") was,  
12 at that time, in the process of issuing a new permit for the  
13 discharges under the Clean Water Act ("CWA"). *Id.* at \*17. The  
14 District of Columbia district court held that although the CWA  
15 permitting process was ongoing, plaintiffs' ESA challenge to the  
16 aqueduct was ripe. *Id.* at \*17-18. Here, Plaintiffs' only  
17 federal claim is based on alleged failure to comply with pre-EIS  
18 NEPA procedures in connection with the development of the BDCP.  
19 Allowing this claim to proceed would unwarrantedly interfere with  
20 ongoing administrative scoping, planning and formulation  
21 activities, which would make it impossible for the agency to  
22 "correct its own mistakes and ... apply its expertise." *Ohio*  
23 *Forestry*, 523 U.S. at 735.

24 This factor weighs against assertion of jurisdiction.

25 c. Benefit from Further Factual Development.

26 The final ripeness factor is whether the courts would  
27 benefit from further factual development of the issues presented.  
28

1 *Ohio Forestry*, 523 U.S. at 733. This factor supports dismissal  
2 where further factual development may provide additional focus,  
3 the agency may revise the plan, or review may ultimately become  
4 unnecessary. *See Ohio Forestry*, 523 U.S. at 736.

5  
6 Plaintiffs maintain that "[t]he NOI is a self-contained  
7 notice that must inherently be based on the factual background  
8 that exists prior to its issuance. Therefore, there is no  
9 further factual background to develop, and the NEPA claims are  
10 ripe for judicial review." Doc. 157 at 24. This overly myopic  
11 view of the ripeness cannot be the law. Here, the planning  
12 process is ongoing and subject to negotiations among many  
13 stakeholders with widely competing interests. The factual record  
14 will benefit in numerous ways from further development in a  
15 dynamic and constantly changing water system where complex  
16 hydrodynamics and ecological considerations are continuously in  
17 flux. Additionally, scientific studies of the impact of Project  
18 operations on threatened species that have precipitated altered  
19 flow and water delivery regimes are ongoing. Moreover, the  
20 agency may (1) issue additional NOIs, updating the public on  
21 developments in the BDCP process; (2) conduct further scoping  
22 meetings; (3) issue a draft BDCP and allow public comment on  
23 that; (4) fundamentally alter or abandon the currently preferred  
24 BDCP alternative; or (5) abandon the project altogether for any  
25 number of reasons. Resolution of Plaintiffs claims is reasonably  
26  
27  
28

1 likely to benefit greatly from further factual development by the  
2 administrative agencies. The Plaintiffs offer no genuine value  
3 to their proposed interference with the planning process, which  
4 has the real potential to obstruct its progress.  
5

6 d. Conclusion Re Ripeness.

7 All three ripeness factors weigh heavily against assertion  
8 of jurisdiction over Plaintiffs' NEPA claim. Plaintiffs' NEPA  
9 claim is, alternatively, DISMISSED WITH PREJUDICE on this ground.  
10

11 3. Sovereign Immunity

12 a. Agency Action.

13 Alternatively, Defendants argue that Plaintiffs' NEPA claim  
14 does not fall within the APA's limited waiver of sovereign  
15 immunity, precluding the exercise of subject matter jurisdiction  
16 over the only federal claim in this case. NEPA contains no  
17 private right of action. *Cetacean Cmty. v. Bush*, 386 F.3d 1169,  
18 1179 (9th Cir. 2004). As a result, NEPA claims must be brought  
19 under the APA, and must fall within the APA's limited waiver of  
20 sovereign immunity. *Id.*; see also *Gallo Cattle Co. v. U.S. Dep't*  
21 *of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (APA provides  
22 limited waiver of sovereign immunity in suits seeking judicial  
23 review of agency action).  
24

25 The APA provides that "[a] person suffering legal wrong  
26 because of agency action, or adversely affected or aggrieved by  
27 agency action within the meaning of a relevant statute, is  
28

1 entitled to judicial review thereof." 5 U.S.C. § 702. To  
2 trigger section 702's waiver, plaintiffs must "identify some  
3 'agency action' that affects [them] in the specified fashion; it  
4 is judicial review 'thereof' to which [they] are entitled."  
5 *Lujan v. NWF*, 497 U.S. at 882.

6  
7 "Agency action" is limited by statute to "the whole or a  
8 part of an agency rule, order, license, sanction, relief, or the  
9 equivalent or denial thereof, or failure to act." 5 U.S.C. §  
10 551(13). A "failure to act" is merely "a failure to take one of  
11 the agency actions (including their equivalents) earlier defined  
12 in § 551(13)." *Norton v. S. Utah Wilderness Alliance*, 542 U.S.  
13 55, 62 (2004) ("*SUWA*"). "All of those categories involve  
14 circumscribed, discrete agency actions, as their definitions make  
15 clear." *Id.*; see 5 U.S.C. §§ 551(4) (defining "rule"), (6)  
16 ("order"), (8) ("license"), 10 ("sanction"), (11) ("relief").  
17 "The only action that can be compelled under the APA is action  
18 legally required." *SUWA*, 542 U.S. at 63 (emphasis in original).  
19 Even where a court is asked to compel agency action, it may only  
20 direct the agency "to take action upon a matter, without  
21 directing how it shall act." *Id.*

22  
23  
24 Here, Plaintiffs seek an order requiring federal defendants  
25 to, among other things, release a draft of the BDCP to the  
26 public, issue a new NOI, and conduct new scoping meetings.  
27 Compl. ¶¶ 140, 149. Plaintiffs cannot dictate the terms or  
28



1 content of any of these documents or meetings. Moreover, none of  
2 the complaint's allegations challenge any of the defined  
3 categories of "agency action" or failure to undertake one of the  
4 forms of agency action, namely the "whole or a part of an agency  
5 rule, order, license, sanction, relief, or the equivalent or  
6 denial thereof...." 5 U.S.C. § 551(13). None of these statutory  
7 types of administrative action has been taken, nor is there any  
8 law requiring the involved agencies to take any such actions.

9  
10 The cases cited by Plaintiffs are distinguishable.

11 *Coalition for Common Sense in Gov't Procurement v. Secretary of*  
12 *Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006),  
13 considered whether a letter issued by the Department of Veteran's  
14 Affairs, requiring manufacturers of drugs covered by the  
15 Department of Defense's ("DOD") health care plan to refund to DOD  
16 the difference between the drugs' wholesale commercial price and  
17 their federal ceiling prices, constituted agency action. The  
18 Federal Circuit concluded that the letter fell within 5 U.S.C.  
19 § 551(4)'s definition of a substantive "rule." *Id.* at 1317.  
20 Likewise, in *Oregon Natural Desert Association v. U.S. Forest*  
21 *Service*, 465 F.3d 977, 983 (9th Cir. 2006), the Ninth Circuit  
22 classified the Forest Service's issuance of "annual operating  
23 instructions" ("AOIs") to permittees who graze livestock on  
24 national forest land as "agency action." Because each AOI was  
25 specifically incorporated into each grazing license, an AOI is  
26  
27  
28

1 "properly understood to be a license for purposes of determining  
2 whether it is an agency action under the APA." *Id.* Here, by  
3 contrast, Plaintiffs point to not one "agency action" enumerated  
4 in § 551 that could plausibly encompass the administrative  
5 proceedings at issue in this case.

6  
7 Plaintiffs repeat citation to *Trustees for Alaska*, 806 F.2d  
8 at 1381, which concerned section 1002(h) of the Alaska National  
9 Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3142(h).  
10 ANILCA requires the Secretary of the Interior to submit a report  
11 to Congress containing: (1) specific information about potential  
12 oil and gas production, as well as fish and wildlife resources  
13 within the coastal plain of the Arctic National Wildlife Refuge  
14 ("ANWR"); and (2) recommendations concerning possible development  
15 of oil and gas within ANWR. *Id.* at 1379. Interior determined  
16 that it needed to prepare a legislative EIS ("LEIS") in  
17 connection with its development of the report, but refused to  
18 provide public review and comment prior to submission of the LEIS  
19 and the report to Congress. *Id.* at 1380. The Ninth Circuit held  
20 that the case was ripe for review under *Abbott Laboratories*, 387  
21 U.S. at 148-49 (1967), insofar as the "disagreement [between the  
22 parties] is concrete.... clear and final," because Interior had  
23 decided not to provide pre-submission public review and comment  
24 and "denial of review at this point may impose substantial  
25 hardship on the [plaintiffs]." *Id.* at 1381. *Trustees for Alaska*

1 did not even consider the APA's "agency action" requirement,  
2 which is distinct from the ripeness inquiry.

3 Because Plaintiffs have not and cannot allege that any APA  
4 "agency action," has been carried out, or that the agencies will  
5 not take any required action, the APA's waiver of sovereign  
6 immunity does not apply and the district court lacks subject  
7 matter jurisdiction over Plaintiffs' NEPA Claim, requiring its  
8 dismissal.  
9

10  
11 b. Final Agency Action.

12 APA section 704 provides:

13 Agency action made reviewable by statute and final  
14 agency action for which there is no other adequate  
15 remedy in a court are subject to judicial review. A  
16 preliminary, procedural, or intermediate agency action  
17 or ruling not directly reviewable is subject to review  
18 on the review of the final agency action. Except as  
19 otherwise expressly required by statute, agency action  
20 otherwise final is final for the purposes of this  
21 section whether or not there has been presented or  
22 determined an application for a declaratory order, for  
23 any form of reconsideration, or, unless the agency  
24 otherwise requires by rule and provides that the action  
25 meanwhile is inoperative, for an appeal to superior  
26 agency authority.

27 Where review is sought "not pursuant to specific authorization in  
28 the substantive statute, but only under the general review  
provisions of the APA, the 'agency action 'agency action' in  
question must be 'final agency action.'" *Lujan v. NWF*, 497 U.S.  
at 882 (quoting 5 U.S.C. § 704). "The APA thus insulates from  
immediate judicial review the agency's preliminary or procedural  
steps." *Western Radio Servs. Co., Inc. v. Glickman*, 123 F.3d  
1189, 1196 (9th Cir. 1997). Section 704 in fact specifically

1 provides that "[a] preliminary, procedural, or intermediate  
2 agency action or ruling not directly reviewable is subject to  
3 review on the review of the final agency action."

4 To be considered "final," the agency action (1) should "mark  
5 the consummation of the agency's decision-making process," and  
6 (2) "be one by which rights or obligations have been determined  
7 or from which legal consequences flow." *Bennett*, 520 U.S. at  
8 177-78 (internal citations and quotations omitted). Both  
9 conditions must be satisfied for agency action to be final. *Id.*  
10 at 178. The Supreme Court has "interpreted the 'finality'  
11 element in a pragmatic way." *FTC v. Standard Oil of Cal.*, 449  
12 U.S. 232, 239 (1980). "The core question is whether the agency  
13 has completed its decisionmaking process, and whether the result  
14 of that process is one that will directly affect the parties."  
15 *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Certain  
16 factors provide indicia of finality, such as whether "the action  
17 amounts to a definitive statement of the agency's position,"  
18 whether the action "has a direct and immediate effect on the day-  
19 to-day operations" of the party seeking review, and whether  
20 "immediate compliance with the terms is expected." *Oregon*  
21 *Natural Desert Ass'n*, 465 F.3d at 982 (internal citations and  
22 quotations omitted). Finality is a jurisdictional requirement.  
23 *Lujan v. NWF*, 497 U.S. at 882; *Ukiah Valley Med. Ctr. v. FTC*, 911  
24 F.2d 261, 264 n.1 (9th Cir. 1990).

1 (1) Consummation of Decision-Making Process.

2 To constitute the consummation of an agency's decision-  
3 making process, the challenged act "must not be of a merely  
4 tentative or interlocutory nature." *Bennett*, 520 U.S. at 178.  
5 The preliminary NEPA steps challenged by Plaintiffs are  
6 inherently "tentative" and interlocutory in nature. The agencies  
7 engaged the public at an early stage to "ensure that the full  
8 range of alternatives and issues related to the development of  
9 the BDCP is identified." 74 Fed. Reg. at 7,260. This is  
10 consistent with the purpose of the scoping process, which is to  
11 "begin[] a meaningful dialogue with members of the public about a  
12 proposed action." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d  
13 1094, 1117 (9th Cir. 2002).  
14

15 An action marks the consummation of an agency's decision-  
16 making process if it constitutes the agency's "last word on the  
17 matter." *Oregon Natural Desert Ass'n*, 465 F.3d at 984. In the  
18 NEPA context, the action must be the agency's "last word on the  
19 project's environmental impact" as a whole. *Friedman Bros. Inv.*  
20 *Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982). The issuance  
21 of a final EIS or a ROD constitutes final agency action. *Sierra*  
22 *Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (citing *Oregon*  
23 *Natural Resources Council v. Harrell*, 52 F.3d 1499, 1504 (9th  
24 Cir. 1995)). In contrast, preliminary decisions, even seemingly  
25 final ones, prior to the issuance of a final environmental  
26  
27  
28

1 documents are insufficient. *See Western Radio Servs.*, 123 F.3d  
2 at 1197 (final agency decision to construct road not final agency  
3 action until EA completed and FONSI issued); *City of San Diego v.*  
4 *Whitman*, 242 F.3d 1097 (9th Cir. 2001)(no final agency action  
5 where agency issued letter rejecting request for agency's opinion  
6 whether certain statutory requirements would apply to a not-yet-  
7 filed application to renew a permit); *Earth Island Institute v.*  
8 *Morse*, 2009 WL 2423478, \*9 (E.D. Cal. 2009)(Regional Forester's  
9 letter directing forest supervisors to ensure forest density does  
10 not exceed "an upper limit" not final agency action because it  
11 gives supervisor complete discretion to decide what upper limit  
12 to use).

14 Plaintiffs maintain that the issuance of the NOI is not  
15 tentative or interlocutory in nature, and does consummate the  
16 agency's decision-making process. Specifically, at oral  
17 argument, Plaintiffs asserted that the issuance of the challenged  
18 NOIs in this case constituted the consummation of the agency's  
19 decision to move forward with the NEPA process before the project  
20 had been developed. In support of this assertion, Plaintiffs  
21 cite *California v. Block*, 690 F.2d 753, 762 (9th Cir. 1982), for  
22 the general proposition that agencies are "obliged to adhere to  
23 the procedures mandated by NEPA." This unsurprising holding has  
24 nothing whatsoever to do with the "final agency action"  
25 requirement.  
26  
27  
28

1 Contrary to Plaintiffs' assertions, the NOI and ongoing  
2 scoping activities are, by their very nature, not the agency's  
3 "last word" on the BDCP. The last word will be the final  
4 adoption of a finite and certain BDCP that is intended to be  
5 implemented. Nor is the decision to designate a particular  
6 combination of agencies as "lead agencies," as that designation  
7 could be changed, actual roles shifted, and/or additional  
8 justification provided for any such decision in the final  
9 document.  
10

11 This conclusion is supported by *Muhly*, 877 F. Supp. at 294,  
12 where property owners claimed they were improperly excluded from  
13 a NEPA scoping process. The agencies had already: (1) decided  
14 that the applicant's proposal called for major federal action,  
15 thereby necessitating the creation of an environmental impact  
16 statement; (2) published an NOI, as well as several revisions to  
17 it; (3) and completed the scoping process and identification of  
18 preliminary alternative. *Id.* at 300. Nevertheless, no final  
19 agency action had taken place because "all of these steps mark  
20 the infancy, not the termination, of the NEPA process." *Id.*  
21

22 This is clear when one considers what remains to be  
23 done. Among the stages left to be completed are: the  
24 issuance of a [draft EIS]; public comment during a  
25 compulsory forty-five day waiting period; and the  
26 issuance of a [final EIS]. All of these stages require  
27 substantial input from the public, during which the  
28 Plaintiffs could conceivably cure any of the defects in  
the NEPA process they believe have taken place so far.

*Muhly*, 877 F. Supp. at 300. It need not be repeated that the

1 BDCP is still undergoing formulation and revision.

2  
3 (2) Determining Rights, Obligations, or Legal  
4 Consequences

5 The second prong of the *Bennett* "final agency action"  
6 inquiry is whether the action is one by which rights or  
7 obligations have been determined or from which legal consequences  
8 flow. 520 U.S. at 178. This test may be satisfied, for example,  
9 by an agency action that "alter[s] the legal regime...." *Id.*  
10 *Bennett* held that the issuance of a Biological Opinion and  
11 accompanying Incidental Take Statement under the ESA altered the  
12 legal regime for the action agency by authorizing take of  
13 endangered species in a manner that was not previously permitted.  
14 *Id.* In contrast, neither the NOI nor the decision to proceed  
15 with multiple lead agencies changes the legal regime governing  
16 agency action.

17  
18 *Bennett's* second prong may also be met if agency action has  
19 a "direct and immediate effect on the day-to-day business' of the  
20 subject party," requiring "immediate compliance with [its]  
21 terms." *F.T.C. v. Standard Oil*, 449 U.S. at 239 (internal  
22 citations and quotations omitted); *Hecia Min. Co. v. EPA*, 12 F.3d  
23 164, 165-66 (9th Cir. 1993). In *Hecia*, the Ninth Circuit found  
24 that the EPA's decision, made pursuant to CWA § 304, to include  
25 certain rivers on a list of a state's navigable waters not  
26 expected to meet water quality standards was not final agency  
27 action. *Id.* at 165. The listing decision "does not have the



1 status of law or a direct and immediate effect on the day to day  
2 business of the complaining party." *Id.* at 165-66. Rather, the  
3 final agency action that would require action on the part of the  
4 plaintiff is the issuance of a CWA permit. *Id.* at 166. The  
5 listing decision was just a preliminary step in the permitting  
6 process. *Id.*

7  
8 Likewise, the issuance of an NOI, the early initiation of  
9 the scoping process, and/or the decision to use multiple lead  
10 agencies does not affect Plaintiffs' daily operations or require  
11 them to do, or refrain from doing, anything in formulating the  
12 BDCP. These are merely preliminary procedures which will lead to  
13 the agency arriving at a final decision. In this way, this case  
14 is more like *National Parks Conservation Ass'n v. Norton*, 324  
15 F.3d 1229, 1238 (11th Cir. 2003), where the Eleventh Circuit held  
16 that the National Park Service had not undertaken final agency  
17 action under the APA in evaluating various options for the  
18 management of Biscayne National Park, because it had "done  
19 nothing beyond establishing a committee to review alternatives[,]  
20 ... formulating management options and submitting those plans for  
21 public comment." *Id.* As a result, "no rights or obligations  
22 have been fixed by its behavior, nor has it taken (or refused to  
23 take) action so as to impose any legal consequence on any party."  
24  
25  
26 *Id.*

1 c. 40 C.F.R. § 1500.3.

2 In arguing that their NEPA claim is reviewable under APA §  
3 704, Plaintiffs point to 40 C.F.R. § 1500.3, a regulation  
4 promulgated by the CEQ, the agency charged with implementing  
5 NEPA. These regulations, overall, are entitled to substantial  
6 deference. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244  
7 (9th Cir. 1984). Section 1500.3 provides, in pertinent part,  
8 that, with respect to regulations implementing NEPA:  
9

10 It is the Council's intention that judicial review of  
11 agency compliance with these regulations not occur  
12 before an agency has filed the final environmental  
13 impact statement, or has made a final finding of no  
14 significant impact (when such a finding will result in  
15 action affecting the environment), or takes action that  
16 will result in irreparable injury. Furthermore, it is  
17 the Council's intention that any trivial violation of  
18 these regulations not give rise to any independent  
19 cause of action.

20 It is undisputed that neither an EIS nor a FONSI has been  
21 prepared in connection with the BDCP. Plaintiffs claim that they  
22 have suffered "irreparable injury" for the same reasons that they  
23 claim "hardship" under the ripeness doctrine (e.g., that issuing  
24 a NOI and conducting scoping prior to identifying the nature of  
25 the project itself deprived them of a meaningful opportunity to  
26 participate in the process). The same result applies.

27 Plaintiffs' exclusive claims of preliminary procedural injury do  
28 not rise to the kind of "hardship" or "irreparable injury"  
necessary to invoke subject matter jurisdiction. *See supra* Part

1 V.B.2.a.<sup>6</sup> Plaintiffs are not entitled by law to direct or  
2 dictate how the administrative formulation and ultimate adoption  
3 of the BDCP is carried out. If there are any infirmities in the  
4 process, Plaintiffs may address any illegality at the appropriate  
5 time, when all administrative actions to create a final BDCP have  
6 occurred.  
7

8 C. State Law Claims/Supplemental Jurisdiction.

9 28 U.S.C. § 1367(a) provides:

10 Except as provided in subsections (b) and (c) or as  
11 expressly provided otherwise by Federal statute, in any  
12 civil action of which the district courts have original  
13 jurisdiction, the district courts shall have  
14 supplemental jurisdiction over all other claims that  
15 are so related to claims in the action within such  
16 original jurisdiction that they form part of the same  
17 case or controversy under Article III of the United  
18 States Constitution. Such supplemental jurisdiction  
19 shall include claims that involve the joinder or  
20 intervention of additional parties.

21 Dismissal of all Federal claims under Rule 12(b)(1) for lack of  
22 subject matter jurisdiction precludes the exercise of  
23 supplemental jurisdiction. *See Herman Family Revocable Trust v.*  
24 *Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001). Here, the only  
25 federal claim under NEPA has been dismissed for lack of subject  
26 matter jurisdiction on standing, ripeness, and sovereign immunity  
27 (based on absence of final agency action) grounds. Supplemental  
28

---

25 <sup>6</sup> Whether, in light of the APA's clear imposition of a "final  
26 agency action requirement, the CEQ can carve out an additional  
27 exception to the "final agency action" requirement that permits  
28 challenges to non-final actions upon a showing of "irreparable  
injury," was not raised by the parties. Nor is it necessary to  
adjudicate that question here, as multiple, alternative grounds  
for dismissal are present.

1 jurisdiction may not be exercised over the Plaintiffs' state law  
2 claims. 28 U.S.C. § 1367(c). A federal court has no interest in  
3 state claims which are derivative of purported federal claims  
4 over which no federal jurisdiction exists.

5  
6 D. Motion to Quash Service.

7 Dismissal with prejudice of this action renders State  
8 Defendants' motion to quash service moot. Doc. 105.

9  
10 VI. CONCLUSION.

11 Defendants' motions to dismiss are GRANTED WITH PREJUDICE  
12 AND WITHOUT LEAVE TO AMEND. Plaintiffs do not have standing to  
13 bring their sole federal claim, arising under NEPA.  
14 Alternatively, Plaintiffs' NEPA claim (1) is not ripe for review,  
15 and (2) does not fall within the APA's limited grant of sovereign  
16 immunity because there has been no final agency action.

17  
18 Defendants shall submit a form of judgment terminating this  
19 action in accordance with this memorandum decision and order  
20 within five days of electronic service.

21  
22 SO ORDERED

23 Dated: September 8, 2009

24 /s/ Oliver W. Wanger  
25 Oliver W. Wanger  
26 United States District Judge