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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
8

9 SAN LUIS & DELTA-MENDOTA WATER
10 AUTHORITY; WESTLANDS WATER
11 DISTRICT,

12 Plaintiffs,

13 v.

14 KENNETH LEE SALAZAR, as
15 Secretary of the Interior, et
16 al.,

17 Defendants,

18 NATURAL RESOURCES DEFENSE
19 COUNCIL and THE BAY INSTITUTE,

20 Defendant-Intervenors.

1:09-CV-00407 OWW DLB

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
RE PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

21 I. INTRODUCTION

22 This case concerns the United States Fish and Wildlife
23 Service's ("FWS") December 15, 2008 biological opinion ("BiOp" or
24 "2008 BiOp") concerning the impact of coordinated operations of
25 the Central Valley Project ("CVP") and State Water Project
26 ("SWP") on the threatened delta smelt. San Luis & Delta-Mendota
27 Water Authority ("Authority") and Westlands Water District
28 ("Westlands") (collectively "Plaintiffs") move for a preliminary
injunction to enjoin the application of Component 2 of the

1 Reasonable and Prudent Alternative ("RPA") in the BiOp, which
2 imposes certain flow restrictions on CVP operations in the Old
3 and Middle Rivers ("OMR") of the Sacramento-San Joaquin Delta.
4 Doc. 31, filed April. 24, 2009 (Notice of Mot.); Doc. 32 (Mem. in
5 Sup. of Mot.).

6 Plaintiffs' underlying complaint and motion for preliminary
7 injunction raise claims against FWS based on the Endangered
8 Species Act ("ESA") and the National Environmental Policy Act
9 ("NEPA"). Plaintiffs have filed numerous supporting evidentiary
10 declarations. Docs. 34-47, 71, 73-76, 78. Federal Defendants
11 oppose the issuance of an injunction, and filed several
12 evidentiary declarations. Doc. 56. Environmental Intervenors
13 also oppose injunctive relief and filed an opposing evidentiary
14 declaration. Doc. 58. The parties agreed to submit the Motion
15 on the papers following oral argument.

16 Oral argument was heard May 22, 2009. Plaintiffs were
17 represented by Kronick, Moskovitz, Tiedemann & Girard by
18 Daniel J. O'Hanlon, Esq. Federal Defendants, including the
19 Secretary of the Interior Kenneth Lee Salazar, the United States
20 Department of the Interior, FWS, Acting Director of FWS Rowan
21 Gould, Regional Director of FWS Ren Lohofenor, United States
22 Bureau of Reclamation ("Bureau" or "Reclamation"), Acting
23 Commissioner of Reclamation J. William McDonald, and Regional
24 Director Donald Glaser, were represented by James A. Maysonett,
25 Esq., and William J. Shapiro, Esq., Trial Attorneys, Environment
26 and Natural Resources Division, U.S. Department of Justice.
27 Defendant-Intervenors, The Bay Institute and Natural Resources
28 Defense Council ("NRDC") were represented by George M. Torgun,

1 Esq., Katherine Poole, Esq. and Doug Obegi, Esq. After
2 considering all of the briefs, oral argument, and evidence, the
3 following findings of fact and conclusions of law are entered.
4

5 II. BACKGROUND

6 The 2004 Biological Opinion on the effects of the
7 coordinated operations of the CVP and SPW on the delta smelt, a
8 species currently listed as "threatened" under the ESA, was found
9 unlawful in a May 25, 2007 decision, *NRDC v. Kempthorne*, 1:05-CV-
10 1207 ("NRDC"), 506 F. Supp. 2d 322 (E.D. Cal. 2007). See NRDC
11 Doc. 323. After remand and a requested extension of time, on
12 December 15, 2008, FWS issued a new biological opinion ("BiOp" or
13 "2008 BiOp"). See Plaintiffs' Request for Judicial Notice
14 ("PRJN"), Doc. 33, at Ex. A.¹ In the 2008 BiOp, FWS concludes
15 that CVP and SWP operations, as proposed, are "likely to
16

17 ¹ Plaintiffs request that the court take judicial notice
18 of the following: (1) FWS December 15, 2008 biological opinion
19 on proposed coordinated operations of the CVP and SWP, PRJN Ex.
20 A; (2) Proclamation, State of Emergency - Water Shortage,
21 Governor of the State of California, Arnold Schwarzenegger,
22 February 27, 2009, PRJN Ex. B; (3) Executive Order S-06-08,
23 Governor of the State of California, Arnold Schwarzenegger, June
24 4, 2008, PRJN Ex. C; (4) Proclamation, State of Emergency -
25 Central Valley Region, Governor of the State of California,
26 Arnold Schwarzenegger, June 12, 2008, PRJN Ex. D; (5)
27 Proclamation of Existence of a Local Emergency and Request for
28 the Governor to Proclaim a State of Emergency and Request for a
Presidential Declaration and Request for State and Federal
Assistance by the Board of Supervisors, County of Fresno, State
of California, Resolution 09-134, signed April 14, 2009, PRJN Ex.
E. Pursuant to Federal Rule of Evidence 201, these public record
are subject to judicial notice as to their content and existence
but not for the truth of the matters stated therein. Plaintiffs'
request is GRANTED.

1 jeopardize the continued existence of" the delta smelt and
2 "adversely modify" its critical habitat. BiOp at 276-79.
3 Because FWS reached a "jeopardy" conclusion, it adopted a
4 "reasonable and prudent alternative" ("RPA") designed to avoid
5 jeopardy and/or adverse modification. BiOp at 279-85. Component
6 2 of that RPA requires Reclamation and the California Department
7 of Water Resources ("DWR") to operate the Projects to limit
8 negative water flows in OMR during a defined period in the spring
9 to "no more negative than -1,250 to -5,000 [cubic feet per second
10 (cfs)]," ending on June 30, or when water temperature reaches
11 25°C for three consecutive days, whichever is sooner. BiOp at
12 282, 357-68.

13 OMR flow restrictions have been the subject of a previous
14 order. In July 2007, NRDC's motion for a preliminary injunction
15 on OMR flow restrictions was denied. *NRDC*, Doc. 394. In
16 December 2007, after a seven day remedies trial, extensive
17 findings of fact were issued on the effects of negative OMR flows
18 and Reclamation and DWR were ordered, among other things, to
19 "operate the CVP and SWP to achieve a daily average net upstream
20 flow in OMR of between 750 and 5,000 cfs on a seven-day running
21 average" during a defined period in the spring. *NRDC*, Doc. 560
22 at 7; *see also NRDC*, Doc. 561 at 15-20.

23 24 III. FINDINGS OF FACT

25 A. Status of the Species.

26 1. The available, uncontradicted data indicates a
27 precipitous decline (by as much as several orders of magnitude)
28 in the relative abundance of delta smelt since 2000. In

1 previous, related proceedings, the expert witnesses were in
2 agreement that the species is in serious trouble. NRDC, Doc. 561
3 at ¶11.

4 2. More recent evidence shows that the species has
5 declined even further since its status was last reviewed in
6 December 2007. Recent fall mid-water trawl ("FMWT") abundance
7 indices are among the lowest ever recorded. BiOp at 153-156.
8 The 2008 index was 23, the lowest level ever recorded. Doc. 38,
9 First Hanson Decl. at ¶7; Doc. 56-2, Goude Decl. at ¶2. Cay
10 Goude, FWS's Assistant Field Supervisor for the endangered
11 species program in FWS's Sacramento Fish and Wildlife Office,
12 opines that the delta smelt's failure to rebound in 2009 is not
13 surprising because of the smelt's low abundance and the fact that
14 California is in its third consecutive year of dry or critically
15 dry conditions. Goude Decl. at ¶11.

16 3. On March 6, 2009, the California Fish and Game
17 Commission reclassified delta smelt from threatened to endangered
18 under the California Endangered Species Act ("CESA"), finding
19 that the species has "declined significantly since its listing as
20 threatened and the species' abundance is now extremely low."
21 Doc. 59-2, Obegi Decl. at ¶7 & Attch. 6. On July 10, 2008, FWS
22 announced a ninety-day finding that uplisting delta smelt as
23 endangered under the ESA may be warranted. 73 Fed. Reg. 39,639
24 (July 10, 2008).

25
26 B. Development of FWS's December 15, 2008 Biological Opinion.

27 4. On remand from the Court, the Bureau and DWR, with the
28 advice and assistance of Plaintiffs and other water contractors,

1 prepared a biological assessment ("BA") describing the proposed
2 operations for the consultation and evaluating the impact of
3 proposed operations on the smelt. The BA included no measures to
4 protect delta smelt, except for those measures required by the
5 terms and conditions of the Projects' water rights permits and
6 licenses. Obegi Decl. at ¶ 6 & Attch. 5.

7 5. FWS prepared a preliminary draft BiOp that was reviewed
8 by both FWS's internal and an independent peer review team. See
9 BiOp at vi. The final BiOp, issued December 15, 2008, concluded
10 that the operations proposed in the BA would cause jeopardy to
11 the continued existence and recovery of delta smelt and would
12 adversely modify its critical habitat. *Id.* at 276-279. As a
13 result of the jeopardy and adverse modification finding, FWS
14 included a reasonable and prudent alternative ("RPA") designed to
15 avoid jeopardy. *Id.* at 279-85.

16
17 C. The Reasonable and Prudent Alternative.

18 6. The RPA comprises five (5) components. Components 1, 2
19 and 3 establish a range of permissible OMR flows during different
20 times of the winter and spring, with biologically based triggers
21 to begin, suspend, or terminate each component. *Id.* at 279-285;
22 see also BiOp Attch. B.² These components are designed to
23

24 ² Component 4, which requires DWR to implement a program
25 to create or restore habitat in the Delta and Suisun Marsh, is
26 "intended to provide benefits to delta smelt habitat to
27 supplement the benefits resulting from the flow actions"
28 described in Components 1 through 3. BiOp at 283. Component 5
requires the Bureau and DWR to implement a monitoring and
reporting program. *Id.* at 284.

1 prevent entrainment of adults, juveniles, and larvae, as well as
2 to improve flow conditions to allow delta smelt to spawn and rear
3 successfully. *Id.* Once flow restrictions are triggered, FWS
4 establishes the particular flow standard using an adaptive
5 management process which incorporates current delta smelt surveys
6 and sampling (including the FMWT, Spring Kodiak Trawl, 20-mm
7 Survey, and TNS), water quality monitoring (turbidity and flow
8 levels), particle tracking model ("PTM")³ results, recent salvage
9 data, and the advice of the Smelt Working Group ("SWG") and Water
10 Operations Management Team ("WOMT"). *Id.*; see Goude Decl. at ¶7
11 & Ex. F (SWG notes). Plaintiffs' expert's initial suggestion
12 that the adaptive management process places undue weight on PTM
13 results, while ignoring actual delta smelt distribution, First
14 Hanson Decl. at ¶15, is wrong.

15 7. The RPA is designed to avoid jeopardy to the continued
16 existence and recovery of delta smelt and to prevent the adverse
17 modification of critical habitat by:

18 1) preventing/reducing entrainment of delta smelt at
19 Jones and Banks; 2) providing adequate habitat
20 conditions that will allow the adult delta smelt to
21 successfully migrate and spawn in the Bay-Delta; 3)
22 providing adequate habitat conditions that will allow
23 larvae and juvenile smelt to rear; and 4) providing
24 suitable habitat conditions that will allow successful
25 recruitment of juvenile delta smelt to adulthood.

26 BiOp at 279.

27 8. The current motion only seeks to enjoin application of
28 Component 2. Doc. 32 at 5, 13-14. The period for Component 1

27 ³ PTM focuses on the impact of flows upon imaginary
28 particles "injected" into a particular location in the Central
Delta, station 815. BiOp at 366.

1 has expired, and Component 3 will not be implemented this year.
2 *Id.* at 5 n.2. Component 2 is designed to protect larval and
3 juvenile delta smelt from entrainment and to provide adequate
4 flow conditions "so that larval and juvenile delta smelt can
5 successfully rear in the Central Delta and move downstream when
6 appropriate." *BiOp* at 282. It is triggered by one of three
7 events: completion of Component 1; capture of spent delta smelt
8 females in salvage or surveys; or a 3-station average of Delta
9 water temperatures reaching 12°C. *Id.* Component 2 ends when the
10 three-day average of water temperatures at Clifton Court Forebay
11 reaches 25°C, or June 30, whichever event comes first. *Id.* RPA
12 Component 2 requires an OMR flow standard of between -1,250 and
13 -5,000 cfs, on a 14-day running average, with the five-day
14 running average within 25% of the required flow. *Id.*

15 9. The actual OMR flow levels permitted under Component 2
16 in May and June are based on an adaptive process developed in
17 consultation with the SWG⁴ starting in 2007, called
18 "Influence-Exposure-Intensity-Response (IEIR) Analysis," which
19 incorporates salvage data, distributional data from surveys, the
20 location of X2, water temperature data, PTM results, and prior
21 year FMWT data. *Id.* at 358-359, 364-366. "During most
22 conditions, it is expected that maximum negative OMR flows will
23 range between -2000 and -3500. During certain years of higher or
24

25
26 ⁴ The SWG is no longer known as the "delta smelt working
27 group" because it now also routinely considers protections for
28 longfin smelt, another pelagic species that became a state
candidate for listing under the California Endangered Species Act
("CESA") in 2008. See *BiOp* at 30.

1 lower predicted entrainment risk, flow requirements as low as
2 -1,250 or -5,000 will be recommended to the Service by the SWG."
3 *Id.* at 357, fn. 10; see also *id.* at 360, 363. FWS will set
4 negative OMR flows in a range between -1,250 cfs and -5,000 cfs,
5 depending upon whether entrainment risk is deemed "low,"
6 "lesser," or something greater. *Id.* at 359.

7 10. If "available physical and biological real-time
8 monitoring data" indicate a "low-entrainment risk scenario," then
9 OMR flows can be as negative as -5,000 cfs. *Id.* at 358. "Low"
10 entrainment risk is indicated only when "there has been no
11 evidence of delta smelt in the South and Central Delta or larval
12 delta smelt are not yet susceptible to entrainment." *Id.* The
13 BiOp's "high-entrainment risk scenario" arises when any delta
14 smelt have been found in the South and Central Delta from the
15 Spring Kodiak Trawl or the 20 mm survey, or when there is ongoing
16 entrainment at the pumps. BiOp at 358. In these conditions, FWS
17 will be more restrictive than -5,000 cfs. *Id.* at 358-59.

18 11. Component 2 is designed to "minimize the entrainment of
19 larval/juvenile delta smelt in the Central and South Delta."
20 BiOp at 360. "In recent years, the densest concentrations of
21 both spawners and larvae have been recorded in the Cache
22 Slough/Sacramento Deepwater Ship Channel complex in the North
23 Delta." *Id.* at 148. The BiOp provides that "[w]hen the
24 distribution of delta smelt is in the North or North/Central
25 Delta," minimization of take will be accomplished "by holding
26 entrainment to ~1 percent of the individuals utilizing the
27 Central and South Delta (south and east [upstream] of Station
28 815, see Map 2) across a 14-day particle modeling interval." *Id.*

1 at 360. FWS calls this 1% entrainment standard its
2 "protectiveness criterion." *Id.* Under this criterion, FWS will
3 seek to limit entrainment to approximately 1% of the larvae and
4 juveniles at Station 815 in the Central Delta, even if only a
5 small portion of the overall recorded population of larvae and
6 juvenile delta smelt is in the Central and South Delta.

7 12. The BiOp further explains:

8 In circumstances where it is known or suspected that
9 the Central Delta or South Delta is a principal source
10 of emerging larvae, as occurred in WY 2003, OMR
11 restrictions might be calculated using reduction of
12 14-day Station 815 entrainment below 1 percent, or
13 other methods as needed to ensure protection of the
14 larval population in conditions of such severe
15 vulnerability. The Action utilizes OMR restrictions to
achieve the desired end, as OMR flow is a strong
predictor of geographical variation in entrainment risk
in the Central and North Delta.

14 *Id.* (emphasis added).

15 13. In addition to the adaptive management framework
16 provided in the BiOp, the RPA also includes a provision stating
17 that in consecutive dry or critically dry years, CVP/SWP export
18 rates will never be required to drop below -1,500 cfs "in order
19 to allow the CVP/SWP to provide health and safety needs, critical
20 refuge supplies, and obligation[s] to senior water rights
21 holders." BiOp at 296. The BiOp also allows for the
22 reinitiation of consultation under certain circumstances. *Id.* at
23 296-297.

24 14. Since December 15, 2008, FWS and the Bureau have been
25 using the adaptive management framework to implement the BiOp.
26 The SWG has met approximately every week to provide guidance to
27 FWS in setting OMR flow requirements and has based its
28 recommendations on survey, salvage, water quality, and other data

1 sets, in combination with PTM results. See Goude Decl. at ¶7 &
2 Ex. F (SWG notes).

3
4 D. Current Location of Smelt & Entrainment Risk.

5 15. The Spring Kodiak Trawl surveys completed by the
6 California Department of Fish and Game ("DFG") in January,
7 February, March, and April of 2009 reflect the distribution of
8 adult spawning delta smelt. First Hanson Decl. at ¶8. The
9 results of these surveys indicate that, up until May of this
10 year, most of the adult delta smelt spawned in the northern and
11 western reaches of the Delta. *Id.* However, the month of May is
12 historically a period when high numbers of smelt become entrained
13 at the export facilities. Fed. Def. Ex. B (Service Decision May
14 21, 2009). The April 20-24 20 mm survey results found delta
15 smelt at several stations in the Central and South Delta,
16 including stations 705, 815, 910, and 914, while the May 5-8 20
17 mm survey results found delta smelt at stations 901, 815, 705,
18 and 801. Goude Decl., Ex. A; Obegi Decl., Attach. 4. As of May
19 21, 2009, the most recent 20 mm survey again indicates that some
20 delta smelt were caught in the Central Delta. Fed. Def. Ex. B.

21 16. Salvage has also increased: on May 16, 12 delta smelt
22 were salvaged; 24 on May 17; 20 on May 18; 4 on May 19; 28 on May
23 20; and 8 on May 21. Fed. Def. Ex C (Central Valley Operations
24 Office, Delta Smelt and Splittal, May-09). Larvae smaller than
25 20 mm are not counted in these salvage reports. BiOp at 163.

26
27 E. Implementation of Related Actions.

28 17. On February 23, 2009, DFG issued a permit to DWR

1 authorizing the legal take of longfin smelt under CESA. Obegi
2 Decl. at ¶2 & Attch. 1 (ITP permit). That permit imposes OMR
3 flow restrictions to protect juvenile longfin smelt between
4 January and June, which are very similar to those required by
5 FWS's delta smelt BiOp. When triggered, OMR flows must remain
6 between -1,250 and -5,000 cfs, based on "survey data, including
7 all of the distributional and abundance data, and other pertinent
8 biological factors that influence the entrainment risk of larval
9 and juvenile delta smelt." *Id.* (ITP at 10-11). DFG identified
10 likely flow conditions of -2,000 to -5,000 cfs for April and May,
11 and -5,000 cfs for June. *Id.* (ITP at 11). One reason why DFG
12 has not imposed pumping restrictions to protect longfin smelt is
13 that "Current delta smelt advice will be protective of longfin
14 smelt larvae." See Goude Decl., Ex. F (2009 SWG notes from 3/16,
15 3/23, 3/30, 4/6).

16 18. Action by the DWR or DFG is not a concern that need be
17 addressed here due to the protections afforded by the RPA.

18

19 F. Socioeconomic and Environmental Effects of Water Shortage,
20 Drought, and Recession.

21 19. On February 27, 2009, the Governor of California
22 declared a state-wide drought emergency, based on his finding
23 that "conditions of extreme peril to the safety of persons and
24 property exist in California caused by the current and continuing
25 severe drought conditions and water delivery restrictions." PRJN
26 Ex. B. On April 14, 2009, the Fresno County Board of Supervisors
27 adopted a proclamation declaring an emergency and requesting
28 federal and state assistance to address soaring unemployment and

1 shortages of food. According to the proclamation, due to water
2 shortages "thousands of people who once relied on employment in
3 the agricultural sector are now unemployed and struggling to meet
4 their most basic needs, such as providing food for their family."
5 PRJN Ex. E at 2:8-10. The Community Food Bank has inadequate
6 capacity to meet the overwhelming increase in need. *Id.* at
7 2:21-3:2.

8 20. Plaintiffs' members are trying to compensate for these
9 shortages through the use of groundwater. Doc. 36, Diedrich
10 Decl. at ¶¶ 4, 7; Doc. 35, Coburn Decl. at ¶4; Doc. 39, First
11 Harris Decl. at ¶¶ 2-3; Doc. 43, Nelson Decl. at ¶¶ 3, 7; Doc.
12 37, First Freeman Decl. at ¶¶ 7, 11, 12. However, groundwater
13 supplies cannot meet all crop demands, and often contain
14 undesirably high concentrations of salts and minerals. See First
15 Freeman Decl. at ¶12. Pumping of groundwater also entails
16 increased energy usage. *Id.* at ¶17. Without replacement water
17 supplies, many farmers' only other option is to fallow land.
18 Harris Decl. at ¶¶ 4-5; Diedrich Decl. at ¶4; Freeman Decl. at
19 ¶ 11, 12. The water supply situation has resulted in loss of
20 on-farm employment, reduced crop production, destruction of some
21 permanent crops, and may require some farmers to sell their land
22 and abandon farming altogether. Coburn Decl. at ¶¶ 5-7; Allen
23 Decl. at ¶5; Harris Decl. at ¶¶ 7-8; Diedrich Decl. at ¶8.

24 21. Based on the initial 2009 water year zero percent
25 allocation from the CVP by Reclamation, 220,000 to 250,000 acres
26 (of the total 560,000 normally under production) are expected to
27 be fallowed within Westlands this year. Freeman Decl. at ¶¶ 3,
28 11. Substantial land fallowing is expected in other districts

1 that depend upon CVP water deliveries for irrigation. Doc. 43,
2 Nelson Decl. at ¶¶ 10-11; Doc. 40, Harrison Decl. at ¶11.

3 22. Plaintiffs submit the declarations of Robert Silva,
4 Mayor of the City of Mendota, and Marcia Sablan, Mayor of the
5 City of Firebaugh, who describe, from their perspective, the
6 impact of agricultural job losses on their communities. These
7 declarations assert that the current unemployment rate in Mendota
8 and Firebaugh is 40 percent. Silva Decl. at ¶3; Sablan Decl. at
9 ¶4. That reductions in employment and farm and farmworker
10 incomes have resulted in a loss of tax revenue available to fund
11 municipal services, leading to a reduction in staffing of local
12 government. Silva Decl. at ¶4; Sablan Decl. at ¶6. Ms. Sablan
13 believes that if the City of Firebaugh's tax revenues continue to
14 decrease "it is possible that fire and police protection services
15 will be faced with substantial cuts." Sablan Decl. at ¶6.
16 Although the City of Mendota currently has no independent police
17 force, the economic conditions have stalled the City's
18 implementation of plans to start its own police department.
19 Silva Decl. at ¶4

20 23. Local schools are suffering as well. Sablan Decl. at
21 ¶7. Families of displaced farm workers are often forced to
22 combine households resulting in crowded and stressful conditions
23 impacting affected students' academic performance. *Id.*
24 Additionally, as families and students relocate from rural areas
25 due to a lack of employment, the rural school districts lose much
26 needed revenue from the State. *Id.*; see also Hernandez Decl.,
27 Doc. 41.

28 24. Plaintiffs also submit the declaration of Dana Wilkie,

1 the CEO of the Community Food Bank, a non-profit organization
2 that provides food to hungry families in Fresno, Madera, and
3 Kings Counties. Doc. 47. She declares that “[t]he number of
4 people in our service area experiencing food insecurity has
5 recently increased substantially.” *Id.* at ¶6. In response, the
6 Food Bank is endeavoring to increase its distribution of food to
7 needy members of the community to respond to the increasing
8 number of people requiring such assistance. *Id.* at ¶4.

9 25. There is also a possibility that increased reliance
10 upon groundwater will lead to unsustainable overdraft of the
11 groundwater basin and resulting land subsidence, causing damage
12 to wells and water distribution facilities, as well as increased
13 soil salinity and toxicity as a result of applying water with
14 higher salinity and minerals to the soil. Freeman Decl. at
15 ¶¶ 13-16. Increased land fallowing is also known to cause
16 increased dust emissions which degrade air quality. *Id.* at ¶21.

17 26. Environmental Plaintiffs present the declaration of
18 Jeffrey A. Michael, Ph.D., an economist who analyzes data from
19 California’s Employment Development Department regarding recent
20 employment trends in the farm and non-farm sectors around the
21 state. Dr. Michael explains that the San Joaquin Valley, like
22 the rest of the United States, is suffering from the deepest
23 recession since the Great Depression and that the recession is
24 largely caused by foreclosures and the collapse of the real
25 estate market. Doc. 58-2, Michael Decl. at ¶2. California has
26 experienced the largest drop in real estate prices in the nation,
27 and the San Joaquin Valley is experiencing among the highest
28 foreclosure rates in the nation. *Id.* at ¶3. These factors have

1 contributed to widespread unemployment across the state,
2 particularly in non-farm sectors such as the construction and
3 hospitality sectors. *Id.* at ¶¶2-3.

4 27. Dr. Michael opines that employment in the farm sector
5 has fared "relatively well," with farm employment increasing by
6 2.5% across California between March 2008 and March 2009, and
7 increasing in several Valley counties over the same time period,
8 including Fresno (by 3.2%), Kern (by 4.2%) Tulare (by 4.3%), and
9 Stanislaus-Merced-Madera-Kings (by 5.8%). *Id.* at ¶6 & Ex. 3.

10 These increases in farm employment have buffered the overall
11 decline in employment for metropolitan areas such as Fresno and
12 Bakersfield, which are experiencing lower unemployment rates than
13 eight other large metropolitan areas in the State, including Los
14 Angeles, Sacramento, Oakland, Riverside, San Diego, Orange, San
15 Jose, and San Francisco. *Id.* at ¶7 & Ex. 2. Dr. Michael also
16 opines that declining school enrollment and sales tax revenue are
17 being experienced across California and are largely explained by
18 high rates of residential foreclosures and the real estate
19 downturn. *Id.* at ¶9.

20 a. In response to Dr. Michael's declaration,
21 Plaintiffs offer the testimony of Dr. Richard Howitt of the
22 University of California at Davis, an agricultural economics
23 professor, who presents the results of his recent, published
24 research on the predicted impacts of the current drought and
25 fishery related pumping restrictions on the communities of the
26 Central Valley. Doc. 74, Howitt Decl. at ¶2. Dr. Howitt opines
27 that more than 34,000 jobs will be lost in the San Joaquin Valley
28 as a result of the water delivery restrictions, and that most of

1 these job losses will be suffered by farm workers and employees
2 of packing houses and processing plants. *Id.* at ¶5. He further
3 states that these individuals are typically low-income workers
4 with few alternatives for other work. *Id.*

5 b. Dr. Howitt opines that Dr. Michael's declaration
6 is "largely irrelevant to the question of measuring the
7 incremental loss in employment due to water reductions to the
8 Westside of the San Joaquin valley," because, among other things,
9 Dr. Michael used employment data that extends only to the start
10 of the current farm year in March 2009 and therefore cannot
11 project the impacts of cuts in water supply; and the data he used
12 is aggregated over all regions of Fresno County, obscuring
13 relative impacts to the Westside. *Id.* at ¶9.

14 c. In light of Dr. Howitt's undisputed criticisms,
15 Dr. Michael's declaration is only marginally relevant, as it
16 measures economic trends at a "macro" scale.

17
18 G. Predicted Impact of OMR Restrictions on Pumping during Late
19 May and June.

20 28. Under Reclamation's April forecast of operations,
21 released April 21, south-of-Delta CVP water service agricultural
22 contractors are projected to receive a 10% contract allocation,
23 instead of the zero allocation indicated by the March forecast.
24 Snow Decl. at ¶¶ 13-14; Exs. B, C. However, the volume of water
25 actually delivered will depend, at least in part, upon how FWS
26 regulates negative OMR flows from May 18 through June 30. *Id.* at
27 ¶¶ 15-19.

28 29. Reclamation's April 2009 forecast of CVP operations, on

1 which the 10% allocation is based, indicates a CVP export pumping
2 for the period beginning May 18 through May 31 of about 65,000
3 acre-feet. *Id.* at ¶15. The forecast indicates an expected
4 volume of CVP pumping of about 150,000 acre-feet during the month
5 of June. *Id.* Reclamation's forecast further indicates that OMR
6 flows will be at about -3,000 cfs during late May, and -3,900 cfs
7 during June. *Id.* It is undisputed that if the CVP were free to
8 pump water at rates unrestricted by the criteria for negative OMR
9 flows prescribed by the BiOp, the allocation of water for
10 south-of-Delta CVP contractors could be increased by
11 approximately 60,000 acre-feet. *Id.* at ¶16. This is
12 approximately equivalent to an additional 5% allocation. *Id.*

13 30. Relatedly, if FWS restricts OMR flows in late May and
14 June more tightly than the April forecast indicates, the Bureau
15 may not be able deliver the 10% allocation. *Id.* ¶ 18. The 10%
16 allocation depends upon the assumed pumping in late May and June,
17 because, under the current forecast, the CVP pumps will already
18 be at maximum capacity beginning on July 1. *Id.* ¶19. There
19 would be no opportunity to make up for lost May and June pumping
20 using the CVP facility beginning in July. *Id.* Although the SWP
21 pumps can pump CVP water under the "joint point of diversion"
22 provisions of Decision 1641, this procedure is subject to a
23 number of contingencies, including the Bureau having capacity to
24 hold water in storage for pumping after June 30, whether the SWP
25 will have available capacity at the Banks Pumping Plant, and
26 whether the projects would be able to meet water quality
27 requirements. *Id.* at ¶19.

28

1 IV. CONCLUSIONS OF LAW

2 A. Standard of Review.

3 1. In general, the standard for granting a preliminary
4 injunction balances plaintiff's likelihood of success against the
5 relative hardship to the parties. The Ninth Circuit previously
6 recognized two different sets of criteria for preliminary
7 injunctive relief. Under the traditional test, "a plaintiff must
8 show: (1) a strong likelihood of success on the merits, (2) the
9 possibility of irreparable injury to plaintiff if preliminary
10 relief is not granted, (3) a balance of hardships favoring the
11 plaintiff, and (4) advancement of the public interest (in certain
12 cases)." *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007).
13 An "alternative" test required that "a plaintiff demonstrate
14 either a combination of probable success on the merits and the
15 possibility of irreparable injury or that serious questions are
16 raised and the balance of hardships tips sharply in his favor."
17 *Id.* "These two formulations represent[ed] two points on a
18 sliding scale in which the required degree of irreparable harm
19 increases as the probability of success decreases. They [were]
20 not separate tests but rather outer reaches of a single
21 continuum." *Id.*

22 2. The Supreme Court, in *Winter v. NRDC*, --- U.S. ---, 129
23 S. Ct. 365 (2008), rejected the Ninth Circuit's application of
24 that part of the alternative test which permitted an injunction
25 where there was only the "possibility of irreparable injury."
26 *Winter* found this standard "too lenient," and reiterated that its
27 own "frequently reiterated standard requires plaintiffs seeking
28 preliminary injunctive relief to demonstrate that irreparable

1 injury is likely in the absence of an injunction." *Id.* at 375.

2 3. Following *Winter*, the Ninth Circuit revised its
3 preliminary injunction standard:

4 In *Winter*, the [Supreme] Court reversed one of our
5 decisions, which, it determined, upheld a grant of a
6 preliminary injunction by use of a standard that was
7 much too lenient. As the Court explained, an injunction
8 cannot issue merely because it is possible that there
9 will be an irreparable injury to the plaintiff; it must
10 be likely that there will be....

11 The Court [defines] the rule ... as follows:

12 A plaintiff seeking a preliminary injunction must
13 establish that he is likely to succeed on the
14 merits, that he is likely to suffer irreparable
15 harm in the absence of preliminary relief, that
16 the balance of equities tips in his favor, and
17 that an injunction is in the public interest.

18 To the extent that our cases have suggested a lesser
19 standard, they are no longer controlling, or even
20 viable.

21 *Am. Trucking Ass'ns., Inc. v. City of Los Angeles*, 559 F.3d 1046,
22 1042 (9th Cir. 2009) (emphasis added).⁵

23 B. Analysis.

24 1. Likelihood of Success on the Merits.

25 a. Lack of Claims Against Reclamation.

26 4. Plaintiffs request Federal Defendants be enjoined "from
27 limiting pumping at the CVP's Jones pumping plant between now and
28 June 30, 2009 pursuant to the provisions of the BiOp" unless FWS

29 ⁵ Although it does not appear to be an issue in this
30 case, district courts within the Ninth Circuit have suggested
31 that the second prong of the alternative test, which permits
32 injunctive relief where plaintiff is able to show "serious
33 questions going to the merits," survived *Winter*. See *Save
34 Strawberry Canyon v. Dept. of Energy*, --- F. Supp. 2d ---, 2009
35 WL 723836, *13 n.2 (N.D. Cal. 2009).

1 provides further justification for its decisions. See Doc. 48,
2 Prop'd Order, at 2; Draft Hearing Transcript, May 22, 2009, at
3 29-30. Federal Defendants object to the issuance of any
4 injunctive relief against the Bureau because, although Plaintiffs
5 sued Reclamation, they have not alleged any claims against
6 Reclamation. See Complaint, Doc. 1. Plaintiffs name the Bureau
7 as a defendant, Compl. ¶ 18, but do not allege that Reclamation
8 has violated any laws. Instead, their complaint asserts that
9 they have only named Reclamation as a defendant "so that the
10 Court may provide an adequate remedy ... regarding CVP
11 operations...." Compl. at ¶51.

12 5. To enjoin the Bureau, the court must have jurisdiction
13 over the agency, which requires, at a bare minimum, that
14 Plaintiffs bring claims against the Bureau. See *Or. Natural*
15 *Desert Ass'n v. Lohn*, 485 F. Supp. 2d 1190, 1196 (D. Or. 2007),
16 vacated on other grounds, 2007 WL 2377011 (D. Or. June 11, 2007)
17 (denying injunctive relief against an action agency in an ESA
18 case where Plaintiffs "brought suit only against the consulting
19 agencies"). However, the preliminary injunction Plaintiffs seek
20 is directed at how FWS will set OMR flows within the -1,250 to
21 -5,000 cfs range through June 30, or until the water temperatures
22 reach 25°C in Clifton Court Forebay. Plaintiffs rejoin that
23 "[o]nce FWS sets that limitation, Reclamation will presumably
24 comply and pump what water it can consistent with that limitation
25 to fulfill its contractual and other obligations." Doc. 70 at
26 12.

27 6. Component 2's adaptive management process affords the
28 Bureau some say in the setting of OMR flows, but that input is

1 subject to FWS's ultimate authority. Specifically, once FWS
2 receives a recommendation from the SWG that an action should be
3 initiated, changed, suspended, or terminated, FWS "determines
4 whether the proposed action should be implemented, modified, or
5 terminated; and the OMR flow needed to achieve the protection."
6 BiOp at 280. FWS then presents its determination to the WOMET,
7 which is made up of representatives from the Bureau, DWR, FWS,
8 NMFS, and DFG. *Id.* at 28, 280. The WOMET may either "concur with
9 the recommendation or provide a written alternative to the
10 recommendation" to FWS within one calendar day. *Id.* at 280. FWS
11 "shall then make a final determination on the proposed action to
12 be implemented, which shall be documented and posted" on the
13 internet. *Id.* If FWS determines that an OMR flow change is
14 required, the Bureau and DWR "shall adjust operations to manage
15 to the new OMR flow within two days of receipt of [FWS's]
16 determination." *Id.* Because FWS has ultimate control over
17 setting OMR flows, and the Bureau must comply with those
18 recommendations, it is sufficient that Plaintiffs filed suit
19 against and seek to enjoin only FWS's actions.⁶

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⁶ Under the circumstances, any injunction issued in this case will bind the Bureau's implementation of OMR flow restrictions pursuant to Federal Rule of Civil Procedure 65's provision that "persons who are in active concert or participation" with a properly named defendant can be bound by an injunction.

1 2. NEPA Claims Against FWS.

2 a. Does the Issuance of the BiOp Trigger the Need for
3 NEPA Compliance?

4 7. Because the admissibility of evidence of economic harm
5 turns on the viability of the NEPA claim, it is appropriate to
6 first evaluate Plaintiffs' likelihood of success on that claim.
7 Plaintiffs argue that FWS was required to prepare an
8 environmental impact statement ("EIS") in connection with the
9 issuance of the BiOp. It is undisputed that no NEPA document was
10 prepared.

11 8. NEPA requires all federal agencies to prepare an EIS to
12 evaluate the potential environmental consequences of any proposed
13 "major Federal action[] significantly affecting the quality of
14 the human environment" 42 U.S.C. § 4332(C). The preparation of
15 an EIS serves a number of purposes:

16 It ensures that the agency, in reaching its decision,
17 will have available, and will carefully consider,
18 detailed information concerning significant
19 environmental impacts; it also guarantees that the
20 relevant information will be made available to the
21 larger audience that may also play a role in both the
22 decisionmaking process and the implementation of that
23 decision.

24 Simply by focusing the agency's attention on the
25 environmental consequences of a proposed project, NEPA
26 ensures that important effects will not be overlooked
27 or underestimated only to be discovered after resources
28 have been committed or the die otherwise cast.
29 Moreover, the strong precatory language of § 101 of the
30 Act and the requirement that agencies prepare detailed
31 impact statements inevitably bring pressure to bear on
32 agencies "to respond to the needs of environmental
33 quality." 115 Cong. Rec. 40425 (1969) (remarks of Sen.
34 Muskie).

35 Publication of an EIS, both in draft and final form,
36 also serves a larger informational role. It gives the
37 public the assurance that the agency has indeed
38 considered environmental concerns in its decisionmaking
39 process, and, perhaps more significantly, provides a

1 springboard for public comment.

2 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349
3 (1989) (internal citations and quotations omitted).

4 "NEPA does not contain substantive requirements that dictate a
5 particular result; instead, NEPA is aimed at ensuring agencies
6 make informed decisions and 'contemplate the environmental
7 impacts of their actions.'" *Ocean Mammal Inst. v. Gates*, 546 F.
8 Supp. 2d 960, 971 (D. Hi. 2008) (quoting *Idaho Sporting Cong. v.*
9 *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)).

10 9. The Ninth Circuit has held that an agency must prepare
11 an EIS "where there are substantial questions about whether a
12 project may cause significant degradation of the human
13 environment." *Native Ecosystems Council v. U.S. Forest Serv.*,
14 428 F.3d 1233, 1239 (9th Cir. 2005). An agency may choose to
15 prepare an environmental assessment ("EA") to determine whether
16 an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9(b). The EA must
17 identify all reasonably foreseeable impacts, analyze their
18 significance, and address alternatives. 40 C.F.R. §§ 1508.8,
19 1508.9, 1508.27. If, based on the EA, the agency concludes that
20 the proposed actions will not significantly affect the
21 environment, it may issue a Finding of No Significant Impact
22 ("FONSI") and forego completion of an EIS. *Bob Marshall Alliance*
23 *v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R. §
24 1501.4(e).

25 10. Federal regulations implementing NEPA help to define
26 when "major federal actions" take place:

27 Major Federal action includes actions with effects that
28 may be major and which are potentially subject to
Federal control and responsibility. Major reinforces

1 but does not have a meaning independent of
2 significantly ([40 C.F.R.] § 1508.27). Actions include
3 the circumstance where the responsible officials fail
4 to act and that failure to act is reviewable by courts
5 or administrative tribunals under the Administrative
6 Procedure Act or other applicable law as agency action.

7 (a) Actions include new and continuing activities,
8 including projects and programs entirely or partly
9 financed, assisted, conducted, regulated, or
10 approved by federal agencies; new or revised
11 agency rules, regulations, plans, policies, or
12 procedures; and legislative proposals (§§ 1506.8,
13 1508.17). Actions do not include funding
14 assistance solely in the form of general revenue
15 sharing funds, distributed under the State and
16 Local Fiscal Assistance Act of 1972, 31 U.S.C.
17 1221 *et seq.*, with no Federal agency control over
18 the subsequent use of such funds. Actions do not
19 include bringing judicial or administrative civil
20 or criminal enforcement actions.

21 (b) Federal actions tend to fall within one of the
22 following categories:

23 (1) Adoption of official policy, such as
24 rules, regulations, and interpretations
25 adopted pursuant to the Administrative
26 Procedure Act, 5 U.S.C. 551 *et seq.*; treaties
27 and international conventions or agreements;
28 formal documents establishing an agency's
policies which will result in or
substantially alter agency programs.

(2) Adoption of formal plans, such as
official documents prepared or approved by
federal agencies which guide or prescribe
alternative uses of Federal resources, upon
which future agency actions will be based.

(3) Adoption of programs, such as a group of
concerted actions to implement a specific
policy or plan; systematic and connected
agency decisions allocating agency resources
to implement a specific statutory program or
executive directive.

(4) Approval of specific projects, such as
construction or management activities located
in a defined geographic area. Projects
include actions approved by permit or other
regulatory decision as well as federal and
federally assisted activities.

40 C.F.R. § 1508.18 (emphasis added).

1 11. "Whether an action may 'significantly affect' the
2 environment requires consideration of 'context' and 'intensity.'" *Center for Biological Diversity v. Nat'l Highway Traffic Safety*
3 *Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008)
4 (citing 40 C.F.R. § 1508.27). "Context delimits the scope of the
5 agency's action, including the interests affected." *Id.* (citing
6 *Nat'l. Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731
7 (9th Cir. 2001)).
8

9 Intensity refers to the "severity of impact," which
10 includes both beneficial and adverse impacts, "[t]he
11 degree to which the proposed action affects public
12 health or safety," "[t]he degree to which the effects
13 on the quality of the human environment are likely to
14 be highly controversial," "[t]he degree to which the
possible effects on the human environment are highly
uncertain or involve unique or unknown risks," and
"[w]hether the action is related to other actions with
individually insignificant but cumulatively significant
impacts."

15 *Id.* at 1185-86 (citing 40 C.F.R. § 1508.27(b)(2), (4), (5), (7)).
16 If an agency does not prepare an EIS, the reviewing court must
17 "determine whether the responsible agency has 'reasonably
18 concluded' that the project will have no significant adverse
19 environmental consequences." *Upper Snake River Ch. of Trout*
20 *Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990).

21 12. Plaintiffs principally rely on two cases to support
22 their assertion that an EIS was required here: *Westlands v.*
23 *United States*, 850 F. Supp. 1388 (E.D. Cal. 1994) and *Ramsey v.*
24 *Kantor*, 96 F.3d 434 (9th Cir. 1996). The *Westlands* decision
25 denied federal defendants' motion to dismiss water districts'
26 claims that NMFS and the Bureau failed to comply with NEPA by,
27 among other things, not completing an EA or EIS before issuing a
28 biological opinion concerning the effects of coordinated

1 from the suggestions in a biological opinion, and so
2 long as he or she takes "alternative, reasonably
3 adequate steps to insure the continued existence of any
4 endangered or threatened species," no ESA violation
5 occurs. *Id.* at 1193-95; *Pyramid Lake Paiute Tribe of*
6 *Indians v. Department of Navy*, 898 F.2d 1410, 1418 (9th
7 Cir.1990) ("a non-Interior agency is given discretion
8 to decide whether to implement conservation
9 recommendations put forth by the FWS"). The Joint
10 Regulations state:

11 The Service may provide with the biological
12 opinion a statement containing discretionary
13 conservation recommendations. Conservation
14 recommendations are advisory and are not intended
15 to carry any binding legal force.

16 50 C.F.R. § 402.14(j) (1992). 50 C.F.R. § 402.15(a)
17 states:

18 (a) Following the issuance of a biological
19 opinion, the Federal agency shall determine
20 whether and in what manner to proceed with the
21 action in light of its section 7 obligations and
22 the Service's biological opinion.

23 Courts have attempted to define the "point of
24 commitment," at which the filing of an EIS is required,
25 during the planning process of a federal project. See
26 *Sierra Club v. Peterson*, 717 F.2d 1409, 1414
27 (D.C.Cir.1983). "An EIS must be prepared before any
28 irreversible and irretrievable commitment of
resources." *Conner v. Burford*, 848 F.2d 1441, 1446 (9th
Cir.1988), cert. denied 489 U.S. 1012 (1989). 40 C.F.R.
§ 1502.5(a) similarly provides, "For projects directly
undertaken by Federal agencies, the environmental
impact statement shall be prepared at the feasibility
analysis (go/no go) stage and may be supplemented at a
later stage if necessary."

[One of the water agency plaintiffs] points out that
the Environmental Review Procedures, under the National
Oceanic and Atmospheric Administration ("NOAA") Order
No. 216-6, § 6.02.c.2(d), require an EIS for:

Federal plans, studies, or reports prepared by
NOAA that could determine the nature of future
major actions to be undertaken by NOAA or other
federal agencies that would significantly affect
the quality of the human environment.

It is undisputed that the NMFS's actions are subject to
an EIS requirement, if those actions are a "major
federal action significantly affecting the human
environment." Under 40 C.F.R. § 1508.18(b)(2), an

1 activity is a federal action if it "guides," rather
2 than binds, the use of federal resources. CVP water is
3 a federal resource. The Bureau's options were narrow
4 had it declined to follow the NMFS's reasonable and
5 prudent alternatives. See *Tribal Village of Akutan*, 869
6 F.2d at 1193 (agency need not adopt reasonable and
7 prudent alternatives in biological opinion, so long as
8 it complied with ESA Section 7(a)(2) by taking
9 "alternative, reasonably adequate steps to insure the
10 continued existence of any endangered or threatened
11 species"); *Portland Audubon Society v. Endangered*
12 *Species*, 984 F.2d 1534, 1537 (9th Cir.1993) (discusses
13 exemptions from ESA, by application to the Committee
14 under 16 U.S.C. §§ 1536(a)(2), (g)(1)-(2)).

15 The government submits *Bennett v. Plenert*, CV-93-6076,
16 1993 WL 669429 (D.Or.1993), as authority that
17 biological opinions are not binding on federal
18 agencies, and consequently are not major federal
19 actions. But in *Bennett*, the court left open the issue
20 that a biological opinion could constitute a major
21 federal action under NEPA. *Id.* at p. 11, n. 4.
22 Biological opinions are not binding on the Secretary,
23 nor do they invariably require an EIS. The inquiry
24 requires a case by case analysis.

25 *Id.* at 1420-22 (emphasis added) (parallel citations omitted).

26 Applying the required case-by-case approach, because "the
27 biological opinion is part of a systematic and connected set of
28 agency decisions which result in the commitment of substantial
29 federal resources for a statutory program, which resulted in
30 reallocation of over 225,000 acre feet of CVP water under the ESA
31 for salmon protection with the environmental impacts alleged,"
32 the biological opinion was major federal action.

33 13. Here, Federal Defendants argue that if anything
34 constitutes a major federal action, it is the Bureau's
35 implementation of the OMR flow restrictions, not FWS's adoption
36 of the 2008 BiOp itself. Doc. 56 at 20. Federal Defendants
37 argue that FWS's issuance of the BiOp "by itself, is not an
38 irretrievable commitment of resources," and therefore does not
39 trigger NEPA. *Id.* at 17. In theory, the Bureau had the option

1 to reject FWS's RPA, albeit at its own peril under the ESA.
2 However, in reality, the Bureau is implementing the projects in
3 accordance with the RPA under an adaptive management structure
4 that places ultimate control over OMR flows in the FWS. Although
5 the facts of *Westlands* do not exactly parallel the circumstances
6 here, there is a strong likelihood that Plaintiffs will be able
7 to establish that NEPA was triggered by the issuance of the final
8 biological opinion in this case.⁷

9 14. Federal Defendants argue this case is more like Upper
10 Snake River , 921 F.2d at 234, in which the Ninth Circuit
11 "reaffirmed a long-standing principle that a federal action is
12 not 'major' for NEPA purposes where the agency activity does not
13 change the status quo and was inferentially part of routine
14 management action in the operation of the dam." *Westlands*, 850
15 F. Supp. 1415 (citing *Upper Snake River*, 912 F.2d at 234).
16 *Westlands* specifically distinguished *Upper Snake River*,
17 determining that whether or not an EIS was required "will, of
18 necessity, depend heavily upon the unique factual circumstances
19 of each case." *Id.* (citing *Westside Property Owners v.*

20
21 ⁷ Environmental Intervenors also correctly point out that
22 the Ninth Circuit reversed the district court's ruling on a
23 related issue; i.e., federal defendants' contention that an
24 irreconcilable conflict between the CVPIA and NEPA existed.
25 *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 460 (9th Cir. 1994).
26 The Ninth Circuit found that CVPIA §§ 3406(b)(2) and (d)(1)
27 required implementation of the CVPIA "upon enactment." *Id.*
28 After this ruling, Plaintiffs voluntarily dismissed their claim
that NMFS and the Bureau failed to conduct a NEPA review of the
biological opinion concerning CVP impacts on winter-run Chinook
salmon. See *Stockton East Water Dist. v. United States*, 75 Fed.
Cl. 321, 326 (2007). This does not derogate *Westlands'*
substantive NEPA analysis.

1 *Schlesinger*, 597 F.2d 1214, 1224 (9th Cir. 1979)).

2 To some extent, the finding is based on whether the
3 proposed agency action and its environmental effects
4 were within the contemplation of the original project
5 when adopted or approved. See [*Port of Astoria, Or. v.*
6 *Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)]; *Robinswood*
7 *Community Club [v. Volpe]*, 506 F.2d 1366 [(9th Cir.
8 1974)]. The inquiry requires a determination of whether
9 plaintiffs have complained of actions which may cause
10 significant degradation of the human environment.
11 [*City and County of San Francisco v. United States*, 615
12 F.2, 498, 500 (9th Cir. 1980)].

13 *Westlands*, 850 F. Supp. at 1415. "[T]he taking of water for non-
14 agricultural purposes is alleged to have changed the operational
15 requirements of the CVP, imposed new standards for reverse flows
16 in the Western Delta, carryover storage in the Shasta reservoir,
17 and caused closure of the Delta cross-channel. Such actions and
18 the environmental effects alleged are not routine managerial
19 changes." *Id.* at 1421.

20 15. Federal Defendants maintain that, like in *Upper Snake*
21 *River* and unlike in *Westlands*, "Reclamation's continued
22 management of the CVP - even after issuance of the Service's
23 biological opinion - is within historical operating parameters."
24 Doc. 56 at 18. *Upper Snake River*, specifically concerned the
25 Bureau's decision to reduce flows below Palisades Dam and
26 Reservoir. Although it was standard operating procedure since
27 1956 to maintain flows below that dam above 1,000 cfs, during
28 previous dry periods, the average flow had "been lower than 1,000
cfs for 555 days (or 4.75% of the total days in operation)." *Id.*
at 233. Because the challenged flow fluctuations were within
historical operational patterns, no NEPA compliance was required:

The Federal defendants in this case had been operating
the dam for upwards of ten years before the effective
date of the Act. During that period, they have from

1 time to time and depending on the river's flow level,
2 adjusted up or down the volume of water released from
3 the Dam. What they did in prior years and what they
4 were doing during the period under consideration were
5 no more than the routine managerial actions regularly
6 carried on from the outset without change. They are
7 simply operating the facility in the manner intended.
8 In short, they are doing nothing new, nor more
9 extensive, nor other than that contemplated when the
10 project was first operational. Its operation is and has
11 been carried on and the consequences have been no
12 different than those in years past.

13 The plaintiffs point out that flow rates have been
14 significantly below 1,000 cfs for periods of seven days
15 or more only in water years 1977, 1982, and 1988, all
16 years of major drought. They also note that prior to
17 construction of the dam, the lowest recorded flow rate
18 did not fall below 1400 cfs. From these facts, they
19 argue that the Bureau's reduction of the flow below
20 1,000 cfs is not a routine managerial action. However,
21 a particular flow rate will vary over time as changing
22 weather conditions dictate. In particular, low flows
23 are the routine during drought years. What does not
24 change is the Bureau's monitoring and control of the
25 flow rate to ensure that the most practicable
26 conservation of water is achieved in the Minidoka
27 Irrigation Project. Such activity by the Bureau is
28 routine.

Id. at 235-36 (emphasis added).

16 16. Here, unlike in *Upper Snake River*, the OMR restrictions
17 imposed by the 2008 BiOp are not "routine managerial actions
18 regularly carried on from the outset [of the Project] without
19 change." It is undisputed that the OMR flow restrictions of
20 Component 2 have the potential to impose restrictions on the
21 CVP's ability to export water south of the Delta above and beyond
22 that which would result from natural conditions and pre-existing
23 legal regimes. See generally Doc. 46, Snow Decl; Doc. 56-3,
24 Milligan Decl. As was the case in *Westlands*, "the taking of
25 water for non-agricultural purposes is alleged to have changed
26 the operational requirements of the CVP [and] imposed new
27 standards for reverse flows in the Western Delta...." 850 F.

1 Supp. at 1421. Evidence shows that operation at -1250 cfs during
2 the relevant time period will result in a net reduction of water
3 service to Plaintiffs exceeding 200,000 acre feet ("AF"). There
4 is substantial likelihood that Plaintiffs will be able to
5 establish that these changes substantially depart from the type
6 of routine managerial changes that took place prior to the 2008
7 BiOp.

8 17. Plaintiffs also rely on *Ramsey*, which held that NMFS
9 was required to comply with NEPA when it issued a biological
10 opinion and incidental take statement under ESA § 7, permitting
11 state regulators to issue salmon fishing regulations consistent
12 with the take statement. 96 F.3d at 441-445. *Ramsey* found the
13 biological opinion and incidental take statement constituted
14 "major federal action," triggering NEPA compliance, as it was
15 "clear ... both from our cases and from the federal regulations,
16 see 40 C.F.R. § 1508.18, that if a federal permit is a
17 prerequisite for a project with adverse impact on the
18 environment, issuance of that permit does constitute major
19 federal action and the federal agency involved must conduct an EA
20 and possibly an EIS before granting it." *Id.* at 444.

21 18. *Ramsey* then determined:

22 the incidental take statement in this case is
23 functionally equivalent to a permit because the
24 activity in question would, for all practical purposes,
25 be prohibited but for the incidental take statement.
Accordingly, we hold that the issuance of that
statement constitutes major federal action for purposes
of NEPA.

26 *Id.*

27 19. Federal Defendants suggest *Ramsey* has no direct bearing
28 on this case, because, unlike Washington and Oregon, here, the

1 Bureau does not require a section 10 permit to operate the CVP in
2 compliance with the BiOp:

3 Instead, as in the instant case, Section 7 of the ESA
4 provides a procedure whereby federal agencies may
5 obtain an exception to the ESA's 'take' prohibition
6 through the issuance of a biological opinion and
7 incidental take statement; unlike the Section 10
8 context, if NEPA applies at all in the context of
9 Section 7, it applies when the action agency takes some
10 action.... There is no suggestion in Ramsey that NEPA
11 would apply in the instant case, where the take
12 statement authorized merely the activities of federal
13 agencies, and in no way acts like a Section 10 permit
14 for private parties. The highly unusual circumstances
15 in Ramsey render that holding inapplicable to the case
16 at bar.

17 Doc. 56 at 18-19.

18 20. The federal defendants in *Ramsey* argued that there was
19 insufficient federal participation in a state run project to
20 require an EIS. The Appeals Court disagreed: "if a federal
21 permit is a prerequisite for a project with adverse impact on the
22 environment, issuance of that permit does constitute a major
23 federal action...." triggering NEPA. 96 F.3d at 444 (citing
24 *Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986); *Port of*
25 *Astoria v. Hodel*, 595 F.2d 467, 478-79 (9th Cir. 1979)). *Ramsey*
26 held that "the incidental take statement in this case is
27 functionally equivalent to a permit because the activity in
28 question would, for all practical purposes, be prohibited but for
the incidental take statement." *Id.* Because the incidental take
statement was the functional equivalent of a permit, NEPA applied
to the issuance of the biological opinion under *Jones* and *Port of*
Astoria, despite federal defendants' contention that the mere
issuance of an incidental take statement was insufficient federal
participation in a state project. Here, in contrast, the CVP is

1 an entirely federal project, rendering the "functional
2 equivalency" analysis from *Ramsey* largely irrelevant. In a more
3 general sense, *Ramsey* simply stands for the proposition that it
4 may be appropriate to apply NEPA to the issuance of a biological
5 opinion under certain circumstances.

6 21. More directly applicable is 40 C.F.R. § 1508.18(4),
7 which provides that major federal actions include:

8 Approval of specific projects, such as construction or
9 management activities located in a defined geographic
10 area. Projects include actions approved by permit or
11 other regulatory decision as well as federal and
12 federally assisted activities.

13 The BiOp, and specifically Component 2 of the RPA, are management
14 activities located in a defined geographic area that were
15 approved by a regulatory decision.

16 22. Environmental Intervenors and Federal Defendants cite a
17 number of cases for the proposition that *Ramsey* should be limited
18 to its facts. For example, in *Southwest Center for Biological*
19 *Diversity v. Klasse*, 1999 WL 34689321 (E.D. Cal. Apr. 1, 1999),
20 the court considered whether FWS failed to comply with NEPA when
21 it issued a BiOp and incidental take statement after consultation
22 with the Army Corps of Engineers ("Corps") regarding its
23 operation of a dam on the Kern River. The court rejected this
24 argument, finding that plaintiffs' claim was based on an
25 "overbroad interpretation" of *Ramsey*, which "did not intend to
26 require the FWS to file NEPA documents every time it issues an
27 incidental take statement to a federal agency." 1999 WL 34689321
28 at *11. See also *P'ship for a Sustainable Future v. U.S. Fish &*
Wildlife Serv., 2002 WL 33883548 at *7 (M.D. Fla. July 12, 2002)
("As a cooperating agency, the FWS is not required to duplicate

1 the work of the Corps by preparing its own EA or EIS"); *City of*
2 *Santa Clarita v. FWS*, 2006 WL 4743970 at *19 (C.D. Cal. Jan. 20,
3 2006) (finding that ITSs issued by FWS "were not 'major federal
4 action' triggering separate and additional NEPA obligations on
5 the part of the Service"); *Miccosukee Tribe of Indians of Fla. v.*
6 *U.S.*, 430 F. Supp. 2d 1328, 1335 (S.D. Fla. 2006) ("To expect or
7 require FWS to submit its own EIS, in spite of the fact that it
8 was not the action agency and that the Corps had already issued
9 one is nonsensical and an utter waste of government resources").⁸

10
11 23. These cases are not persuasive. In three of the four
12 cases cited, *City of Santa Clarita, Partnership for a Sustainable*
13 *Future*, and *Miccosukee Tribe*, the action agency either had
14 already or was in the process of completing environmental
15 analysis under NEPA. The fourth case, *Klasse*, concerned
16 challenge to the Army Corps of Engineers' modification of
17 operations at Isabella Reservoir. *Klasse* found that the Corps'
18 modifications, like those at issue in *Upper Snake River*, did not

19
20 ⁸ Plaintiffs point to Federal Rule of Appellate Procedure
21 32.1 and Ninth Circuit Rule 36-3, which prohibit citation to
22 unpublished appellate decisions issued prior to January 1, 2007.
23 However, these rules do not address citation to unpublished
24 district court opinions, which are, like published district court
25 opinions, only persuasive authority. See *Carmichael Lodge No.*
26 *2103, Benevolent and Protective Order of Elks of the United*
27 *States of Am. v. Leonard*, 2009 WL 1118896 (E.D. Cal., Apr. 23,
28 2009) (noting that "there is no prohibition in citing
'unpublished' district court opinions (unless a local rule so
provides. They are either persuasive to the case at bar, or they
are not. District court opinions, published or not, do not set
binding precedent for other cases....") (irony of citing
unpublished district court opinion as authority for citing
unpublished district court opinion noted).

1 "deviate[] from [the Corps'] standard management scheme regarding
2 water levels." 1999 WL 34689321 at *11.⁹

3 24. In the final analysis, while the issuance of an
4 incidental take statement does not necessarily require the
5 preparation of an EIS, *Westlands Water Dist. v. United States*
6 *Dep't of the Interior*, 275 F. Supp. 2d 1157, 1221 (E.D. Cal.
7 2002) ("FWS is not required to file NEPA documents every time it
8 issues a biological opinion or an incidental take statement."),
9

10 ⁹ Similarly, federal Defendants cite *Greater Yellowstone*
11 *Coal v. Flowers*, 359 F.3d 1257, 1276 (10th Cir. 2004), for the
12 proposition that *Ramsey* should be limited to its facts. But
13 *Greater Yellowstone* simply cites *Ramsey's* holding, without
14 limiting its reach or scope. Moreover, the issue in *Greater*
15 *Yellowstone* was whether the action agency should have prepared an
16 EIS rather than a FONSI, not whether FWS had any NEPA obligations
17 relative to its issuance of a BiOp. Likewise, *Center for*
18 *Biological Diversity v. Fish and Wildlife Service*, 2005 WL
19 2000928 (N.D. Cal. Aug. 19, 2005) ("CBD"), involved a challenge
20 to a rule issued pursuant to section 4(d) of the ESA, which
21 requires the Secretary to "issue such regulations as he deems
22 necessary and advisable to provide for the conservation of [a]
23 threatened species." 16 U.S.C. § 1533(d). *CBD* summarily
24 dismissed the possibility that a section 4(d) regulation could be
25 subject to NEPA because applying NEPA would "confuse matters by
26 overlaying its own independent matrix" on top of the ESA's
27 statutorily defined factors for determining that a species should
28 be listed as threatened. 2005 WL 2000928 at *12. There is no
parallel set of statutory factors with which NEPA could conflict
in this case. Finally, Federal Defendants cite, *Westlands Water*
District v. United States Department of the Interior, 275 F.
Supp. 2d 1157, 1221 (E.D. Cal. 2002), which involved a
no-jeopardy opinion, in which the court cited *Keasee* with
approval for the proposition that "FWS is not required to file
NEPA documents every time it issues a biological opinion or an
incidental take statement." *Id.* at 1221-22. Nevertheless,
Reclamation and FWS did release an Environmental Impact
Statement/Report, *id.* at 1171, and the Court ultimately ordered
"Interior" to complete a supplemental EIS. *Id.* at 1235.

1 rev'd, aff'd, remanded on other grounds, 376 F.3d 853 (9th Cir.
2 2004), factual circumstances may give rise to NEPA obligations in
3 connection with the issuance of a BiOp/ITS, see *Westlands*, 850 F.
4 Supp. at 1422; *Ramsey*, 96 F.3d at 441-445.

5 25. FWS's RPA is major federal action that has unquestioned
6 ability to inflict great harm to Plaintiffs and the human
7 environment. The federal action is prescribed by FWS and
8 implemented by Reclamation. These agencies' actions are
9 inextricably intertwined. There is a strong likelihood that
10 Plaintiffs will be able to establish that OMR flow restrictions
11 imposed by the 2008 BiOp will have substantial, detrimental,
12 indirect effects on the Plaintiffs, the community, and the human
13 environment. Because FWS ultimately controls OMR flows, there is
14 a strong likelihood that Plaintiffs will prevail on the merits of
15 their NEPA claim under the specific facts of this case.

16
17 b. Federal Defendants' Reliance on *Metropolitan*
18 *Edison is Misplaced.*

19 26. Federal Defendants argue that "as a matter of law, NEPA
20 does not impose requirements for an action that does not, by
21 itself, alter the physical environment," citing *Metropolitan*
22 *Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772
23 (1983). The language from *Metropolitan Edison* to which Federal
24 Defendants refer addressed whether NEPA requires agencies to
25 consider effects on human health, specifically psychological
26 health, as part of the "physical environment." *Id.* at 771. The
27 Supreme Court rejected this argument:

28 To paraphrase the statutory language in light of the
facts of this case, where an agency action

1 significantly affects the quality of the human
2 environment, the agency must evaluate the
3 "environmental impact" and any unavoidable adverse
4 environmental effects of its proposal. The theme of §
5 102 is sounded by the adjective "environmental": NEPA
6 does not require the agency to assess every impact or
7 effect of its proposed action, but only the impact or
8 effect on the environment. If we were to seize the word
9 "environmental" out of its context and give it the
10 broadest possible definition, the words "adverse
11 environmental effects" might embrace virtually any
12 consequence of a governmental action that some one
13 thought "adverse." But we think the context of the
14 statute shows that Congress was talking about the
15 physical environment—the world around us, so to speak.
16 NEPA was designed to promote human welfare by alerting
17 governmental actors to the effect of their proposed
18 actions on the physical environment.

19 *Id.* at 772.

20 27. Whether the OMR flow restrictions set forth in the BiOp
21 significantly affect the physical environment is a question of
22 fact on which *Metropolitan Edison* sheds no light. Plaintiffs
23 have submitted undisputed evidence that shows the OMR
24 restrictions may have significant effects on the physical
25 environment, including land fallowing and increased groundwater
26 use, as well as adverse effects on the water table, soil quality,
27 and air quality.

28 c. Wrong Lead Agency Argument.

29 28. Environmental intervenors argue that Plaintiffs' NEPA
30 claim must fail because FWS, the only named defendant in that
31 claim, is not the appropriate "lead agency" for NEPA purposes.¹⁰

32 ¹⁰ In a related argument Environmental intervenors attempt
33 to further distinguish *Ramsey* based on the fact that, in that
34 case, NMFS both issued and was one of the recipients of the
35 incidental take statement. In this way, the Ninth Circuit noted
36 in a footnote that *Ramsey* was "factually ... unusual." 96 F.3d

1 Where more than one federal agency is involved in an action, the
2 agencies are required to coordinate their efforts and determine a
3 "lead agency" responsible for NEPA compliance. 40 C.F.R. §
4 1501.5(c); see *id.* § 1508.16 (defining "Lead agency"). Other
5 agencies involved are designated as "cooperating agencies." *Id.*
6 § 1501.6; see *id.* § 1508.5 (defining "Cooperating agency"). The
7 lead agency is required to use any environmental analysis from
8 cooperating agencies, which may have jurisdiction by law or
9 expertise in particular areas, in preparing its NEPA documents.
10 § 1501.6.

11 29. Applicable regulations allow agencies to share NEPA
12 responsibility if more than one agency is involved in the same
13 action or a group of related actions. See *Sierra Club v. U.S.*
14 *Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002); 40
15 C.F.R. § 1501.5. Environmental Intervenors correctly point out
16 that, in this case, the Bureau has been designated the "lead
17 Federal agency," at least for the purposes of ESA consultation,
18 concerning coordinated CVP-SWP operations. BiOp at i. The
19 Bureau also prepared the BA regarding impacts of CVP operations
20 on the delta smelt, which is a step often taken as part of an
21 agency's NEPA compliance. See 16 U.S.C. § 1536(c)(1) (BA "may be
22 undertaken as part of a Federal agency's compliance with the
23 requirements of [NEPA] section 102").

24 30. However, FWS nevertheless proceeded as the sole issuing
25

26 at 441 n.11. But, the Ninth Circuit did not assign this unusual
27 factual circumstance any particular weight, other than to note
28 that no party suggested that the agency suffered from a conflict
of interest. *Id.*

1 agency of the BiOp, which contains the RPA and incidental take
2 statement, and proscribed the implementation of the adaptive
3 management process, which constitutes and will involve regulated
4 agency actions, in the absence of NEPA compliance. An agency may
5 not justify, post hoc, its failure to comply with NEPA on the
6 basis that some other agency prepared an environmental assessment
7 in the past or may prepare one in the future. See *Anacostia*
8 *Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 485-486 (D.D.C.
9 1994).

10
11 d. Is Any Requirement to Comply with NEPA Obviated by
12 the Court-Imposed Time Constraints.

13 31. Environmental intervenors argue that "[e]ven if the BO
14 could be considered a major federal action, this Court's previous
15 orders setting a fixed time period for FWS to issue the opinion
16 precluded NEPA compliance." Doc. 58 at 19. The 2004 BiOp was
17 remanded on December 14, 2007, with instructions to complete a
18 new BiOp on or before September 15, 2008. NRDC Doc. 560 at 2.
19 On July 29, 2008, the Federal Defendants informed the Court that
20 "the Service no longer believed that it would be possible to
21 complete a scientifically sound and legally defensible biological
22 opinion by September 15, 2008, and moved to extend the deadline
23 to December 15, 2008." See Doc. 753, Findings of Fact,
24 Conclusions of Law, and Order Granting Federal Defendants' Motion
25 for Extension of Time, at 1-2. DWR joined in that motion. *Id.*
26 at 2. No other party opposed the extension to provide the agency
27 a full year to complete the new BiOp. *Id.* The district court
28 granted Federal Defendants' request for additional time based on

1 Federal Defendants submission that:

2 The consultation between the Bureau of Reclamation
3 ("Reclamation") and the Service on the OCAP will be one
4 of the most complex "in the history of the [Endangered
5 Species Act ('ESA')]." See Declaration of Cay Collette
6 Goude, Docket No. 712-2 (July 29, 2008), ¶ 6.
7 Reclamation's "biological assessment" ("BA") of the
8 effects of these operations itself totals more than
9 1,000 pages. Id. The Service is required by the ESA to
10 review all of the "best scientific and commercial data
11 available," 16 U.S.C. § 1536(a)(2), in preparing this
12 biological opinion, and the statute and its regulations
13 allow the Service 135 days to complete a biological
14 opinion (from the submission and review of the BA). See
15 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e) (allowing
16 90 days for formal consultation and then 45 additional
17 days to write the biological opinion). For these
18 reasons, holding the Service to the current deadline of
19 September 15, 2008 could result in a biological opinion
20 that was not scientifically sound or legally
21 defensible, and thus result in another cycle of remand,
22 interim remedies, and judicial review that would
23 ultimately delay the completion of an adequate
24 biological opinion and tax the resources of the Court,
25 the agencies, and the parties.

26 Id.

27 32. Environmental Intervenors argue that the expedited
28 timeframe for issuance of a new BO precluded compliance with
NEPA. Even recognizing authority in support of this proposition,
see H. Conf. Rep., No. 765, 91st Cong., 1st Sess. (1969),
reprinted in 1969 U.S.C.C.A.N. 2767, 2770 (indicating that NEPA
applies unless "the existing law applicable to such agency's
operations expressly prohibits or makes full compliance with one
of the directives impossible"); *Westlands*, 850 F. Supp. 2d. at
1416-17 (acknowledging the possibility that an evidentiary
showing by Federal Defendants could establish that NEPA
compliance is impossible), Federal Defendants have expressly
declined to invoke this exception here, after direct inquiry in
open court at the hearing on this motion. This exception does

1 not apply. Draft Hearing Transcript, May 22, 2009, at 68-69.

2
3 e. Consequences of Failing to Comply with NEPA.

4 If a full EIS would have been required for the BiOp, FWS
5 and/or the Bureau would have had to evaluate the cumulative and
6 indirect impacts of, and consider a reasonable range of
7 alternatives to the RPA. See *Ctr. for Biological Diversity*, 538
8 F.3d at 1185. NEPA does not dictate the outcome of agency
9 deliberations; "instead, NEPA is aimed at ensuring agencies make
10 informed decisions and contemplate the environmental impacts of
11 their actions." *Ocean Mammal Inst.*, 546 F. Supp. 2d at 971
12 (citing *Idaho Sporting Cong.*, 137 F.3d at 1149).

13
14 3. ESA Claims against FWS.

15 33. The Complaint and motion for preliminary injunction
16 also raise claims under the ESA. Because there is likelihood of
17 success on the NEPA claims, it is unnecessary to evaluate the
18 merit of the ESA claims at this time.

19
20 4. The Requested Injunction.

21 34. Plaintiffs request a limited injunction to prohibit
22 FWS, and those acting in concert or participation with FWS,
23 including the Bureau, from setting or implementing the OMR flow
24 restrictions under BiOp RPA Component 2 unless and until FWS
25 further explains why alternative, less restrictive OMR flows
26
27
28

1 would not adequately protect the delta smelt.¹¹

2 35. Plaintiffs maintain that further explanation is
3 warranted because it is not clear from the BiOp or FWS's
4 subsequent Decisions implementing the adaptive management
5 protocol why flows have been set at the chosen, allegedly over-
6 protective levels, without considering the adverse environmental
7 consequences and irreparable injury this major federal action
8 will cause.

9
10 5. Balance of the Harms.

11 a. Potential Harm to the Species.

12 36. Federal Defendants and Environmental Intervenors
13 maintain that enjoining implementation of the RPA would
14
15
16

17 ¹¹ Environmental Intervenors note that both the delta
18 smelt and longfin smelt are state-listed species under CESA. See
19 14 Cal. Code Regs. § 670.5; Obegi Decl. at ¶8 & Attch. 7. The
20 SWG, which includes DFG staff as members, has repeatedly found
21 that "[c]urrent delta smelt advice will be protective of longfin
22 smelt larvae" and has not imposed additional OMR flow
23 restrictions to protect longfin smelt (or to protect delta smelt,
24 in the event FWS failed to do so). Goude Decl. at ¶4 & Ex. F
25 (2009 SWG notes from 3/16, 3/23, 3/30, 4/6). If implementation
26 of the RPA is enjoined, Environmental Intervenors argue that DFG
27 likely would have a legal obligation to impose OMR flow
28 restrictions to protect delta smelt and longfin smelt under state
law. The nature of the requested injunction largely obviates
this concern, as Plaintiffs merely request that FWS further
justify any OMR flow restrictions under Component 2. To the
extent that the deliberative process engenders any change to the
manner in which FWS implements Component 2, FWS is nevertheless
obliged to ensure that jeopardy and/or adverse modification is
avoided.

1 irreparably harm the species.¹² Federal Defendants argue that,
2 although "[w]e cannot know exactly what effect unlimited pumping
3 would have on the delta smelt this year because it would depend
4 on hydrologic conditions in the Delta and the geographic
5 distribution of the delta smelt population... unless conditions
6 are favorable, it could entrain up to 50% of delta smelt larvae
7 and cause a severe reduction in production, which would have a
8 'substantial' effect on the species." Doc. 56 at 21 (citing BiOp
9 at 164-65).

10 37. FWS's May 21, 2009 Decision regarding Component 2
11 implementation indicates that salvage increased during the week
12 prior and that, at the current rate, salvage "may exceed the
13 Concern Level in the 2008 biological opinion of 299 delta smelt."
14 Fed. Def. Ex. B. FWS further noted that delta smelt are "likely
15 just starting to reach a size that they are more effectively
16 detected at the fish salvage facilities. As the fish get larger,
17 they will be detected more frequently. Also, the end of May is
18 historically a period when high numbers of delta smelt become
19 entrained at the export facilities. Salvage usually starts at
20 the CVP before the SWP also salvages delta smelt. Currently,

21
22 ¹² As a threshold matter, Federal Defendants frame
23 Plaintiffs' proposal as one that would permit "unlimited
24 pumping." Doc. 56 at 20-21. Plaintiffs complain that this "is a
25 straw man argument" insofar as they have not requested "unlimited
26 pumping," because various other legal mandates make truly
27 unlimited pumping out of the question. Doc. 70 at 2. However,
28 it appears that Federal Defendants use the term "unlimited" to
mean a pumping regime that is not constrained by Component 2.
Federal Defendants' argument that "unlimited pumping could cause
irreparable harm to the delta smelt" will be interpreted in this
light.

1 delta smelt have been salvaged at the CVP over the past 4 days.”
2 *Id.*

3 38. The ESA embodies a policy of “institutionalized
4 caution.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194
5 (1978). It is not inappropriate to err on the side of the
6 species when there is substantial uncertainty, and it is
7 reasonable to do so, so long as FWS does not do so arbitrarily or
8 in violation of NEPA, by ignoring irreparable injury from
9 environmental and related harms that will be effectuated by over-
10 zealous reductions of CVP flows. FWS must evaluate and avoid, to
11 the extent practicable, irreparable harm to Plaintiffs resulting
12 from unnecessarily overprotective RPA measures.

13
14 b. Harm to Water Users & Dependent Communities.

15 39. It is undisputed that current conditions are causing
16 economic hardship for water users and the communities upon which
17 they depend. There is also substantial evidence establishing
18 additional, non-economic hardships, involving dislocation of
19 families and related impacts, loss of school and tax revenue,
20 widespread food insecurity, and adverse impacts to groundwater
21 supply and quality, soil quality, and air quality.

22 40. Despite the general economic downturn and/or natural
23 hydrologic conditions, as opposed to the BiOp’s flow constraints,
24 the Westside service areas are almost exclusively farmlands, and
25 farm-related activities support the communities in that region.
26 The absence of water supply directly impairs and harms all of
27 these interests, even if there are concurrent causes. Federal
28 Defendants “cannot control the weather,” and the court “cannot

1 hold [them] responsible for the absence of rain," *Alabama v. U.S.*
2 *Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala.
3 2006), or the effects of economic recession. Here, however,
4 substantial evidence shows that the BiOp and RPA's flow
5 constraints, and specifically Condition 2, if overzealously
6 implemented, will worsen the water shortage, causing increased
7 harm. NEPA required consideration of such agency-caused
8 consequences. Federal Defendants failed to engage in this
9 analysis.

10 a. Information contained within the declaration of
11 Ronald Milligan, Doc. 56-3, the manager of the Bureau's Central
12 Valley Operations Office, indicates that total pumping by the CVP
13 after May 17 would be reduced from 342,000 AF if OMR flows are
14 set at -5000 cfs, to 90,000 AF if OMR flows are set at -1,250.
15 This difference of 252,000 AF is substantial.

16 41. Plaintiffs have shown that irreparable harm will likely
17 occur in the absence of injunctive relief, including loss of
18 water supplies, damage to permanent crops, including orchards and
19 vineyards, crop loss or reduction in crop productivity, job
20 losses, reductions in public school enrollment, limitations on
21 public services, impaired ability to reduce the toxic effects of
22 salt and other minerals in the soil, groundwater overdraft,
23 increased energy consumption, and land fallowing that causes air
24 quality problems

25
26 c. Balance of the Hardships.

27 42. The balance of the harms must be evaluated in light of
28 the nature of the requested injunction. Plaintiffs request, that

1 FWS be required to justify why it sets OMR flows at a
2 particularly restrictive level, instead of at a level that would
3 be less harmful to Plaintiffs' interests as federal contractors.
4 The law does not require FWS to take any action that would
5 imperil the continued survival and jeopardy of the smelt. the
6 requested injunction requires FWS to, on an ad hoc basis,
7 consider the issues it would have evaluated had it engaged in a
8 NEPA review of the BiOp and RPA. Such an injunction will not
9 subject the species to any harm. In this light, the balance of
10 the harms tips strongly in favor of Plaintiffs.

11
12 6. Public Interest.

13 43. The public interest favors granting injunctive relief,
14 as the harms cannot be remedied by monetary compensation, the
15 environmental consequences cannot be avoided or reasonably
16 mitigated, and the damage to the community is now occurring and
17 will continue to be exacerbated.

18
19 V. CONCLUSION AND ORDER.

20 For the reasons set forth above, Plaintiffs' motion for
21 Preliminary Injunction is GRANTED. FWS, its agents, and those
22 acting in active concert or participation with them, are ENJOINED
23 AND RESTRAINED as follows:

24 1. The FWS, its agents, and those acting in active concert
25 or participation with them, are ENJOINED from setting and
26 implementing unnecessarily restrictive OMR flow restrictions
27 under BiOp RPA Component 2 unless and until FWS first considers
28 the harm that these decisions and actions are likely to cause

1 humans, the community, and the environment, during the period
2 through June 30, 2009, or three consecutive days when water
3 temperatures exceed 25°C, whichever first occurs. FWS, an agency
4 with expertise in biology, not economics or sociology, need not
5 independently evaluate and/or weigh the harms to humans, the
6 community, and the environment versus any potential harm to the
7 species. Rather, in light of the likelihood that Plaintiffs will
8 succeed on their claim that the BiOp was unlawfully issued
9 without NEPA compliance and the alternatives analysis such
10 compliance would have required, FWS must explain why alternative,
11 less restrictive OMR flows would not adequately protect the delta
12 smelt, considering location, abundance, entrainment, and all
13 other assessment criteria currently in use, to evaluate risk to
14 the species.

15 2. If FWS, its agents, and those acting in active concert
16 or participation with them, determine that OMR flow restrictions
17 under BiOp RPA Component 2 must be imposed to protect the
18 species, FWS must explain why alternative, less restrictive OMR
19 flows would not adequately protect the delta smelt.

20 3. For each decision setting or implementing OMR flow
21 restrictions under BiOp RPA Component 2, FWS, its agents, and
22 those acting in active concert or participation with them shall
23 provide to the Court, and all parties to this lawsuit, a written
24 statement explaining why alternative, less restrictive OMR flows
25 would not adequately protect the delta smelt. These written
26 explanations shall be provided forthwith through the Court's
27 electronic case filing system and by any additional means FWS
28 desires. Such explanation shall be provided no less frequently

1 than weekly, even if FWS maintains the same OMR flow restriction
2 from one week to the next.

3
4 SO ORDERED

5 Dated: May 29, 2009

6
7 /s/ Oliver W. Wanger
8 Oliver W. Wanger
9 United States District Judge

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