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21 UNITED STATES DISTRICT COURT
22 EASTERN DISTRICT OF CALIFORNIA

23 KERN COUNTY WATER AGENCY and
24 COALITION FOR A SUSTAINABLE DELTA

25 Plaintiffs,

26 vs.

27 UNITED STATES DEPARTMENT OF
28 COMMERCE, GARY LOCKE, in his official
capacity as Secretary of the United States
Department of Commerce, NATIONAL
OCEANIC AND ATMOSPHERIC
ADMINISTRATION NATIONAL MARINE
FISHERIES SERVICE, JAMES W. BALSIGER
PH.D., in his official capacity as Acting Assistant
Administrator of the National Oceanic and
Atmospheric Administration National Marine
Fisheries Service,

Defendants.

UNITED STATES BUREAU OF
RECLAMATION and MICHAEL L. CONNOR,
in his official capacity as Commissioner, United
States Bureau of Reclamation,

Case No:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

1
2 and

3 CALIFORNIA DEPARTMENT OF WATER
4 RESOURCES and LESTER SNOW, in his
5 official capacity as Director, California
6 Department of Water Resources,

Real Parties in Interest.

7 **INTRODUCTION**

8 1. This action centers on the Sacramento-San Joaquin Delta (“Delta”), and the coordinated
9 long-term operations of the federal Central Valley Project (“CVP”) and the State of California’s State
10 Water Project (“SWP”), which are two of the world’s largest water projects. Together, these projects
11 deliver water to urban, agricultural, and industrial water users throughout the State and provide water to
12 more than 4 million acres of irrigated farmland in California that in turn sustains tens of billions of
13 dollars in economic activity.

14 2. The Delta is also ecologically significant to California. It supports more than 750 plant and
15 animal species, including 130 fish species. The Delta provides habitat for several species that are
16 protected by the Endangered Species Act (“ESA”), including the Sacramento River winter-run Chinook
17 salmon, the Central Valley spring-run Chinook salmon, the Central Valley steelhead (collectively
18 “salmonids”), and the Southern Distinct Population Segment (“DPS”) of North American green sturgeon
19 (“Southern DPS of green sturgeon” or “green sturgeon”).

20 3. The overall health of the Delta ecosystem, including the health of the salmonids and green
21 sturgeon is in decline due to a multitude of stressors, including land use activities in and around the
22 Delta that lead to contaminated runoff, loss of habitat, and increased sedimentation, degraded water
23 quality due to the presence of pesticides and contamination; predation from and invasion of non-native
24 species, development of shipping channels, development of levees, ammonia discharges from
25 wastewater treatment plants, existence of dams, poor ocean conditions, climate change, and up-stream
26 and in-Delta diversions. However, as evidenced by the biological opinion that NMFS issued on June 4,
27 2009 (“2009 BiOp”), the federal government and NOAA’s National Marine Fisheries Service
28

1 (“NMFS”) have focused their attention on the potential impact to the salmonids and green sturgeon
2 caused by the SWP and the CVP and has largely ignored the effect of other stressors.

3 4. The 2009 BiOp concludes that the proposed long-term operations of the CVP and SWP are
4 likely to jeopardize the continued existence of the salmonids, green sturgeon, and Southern Resident
5 killer whale DPS (“Southern Resident”) (collectively “Listed Species”) and are also likely to destroy or
6 adversely modify the designated critical habitat of the salmonids and the green sturgeon. However, the
7 2009 BiOp (1) fails to use the best scientific and commercial data available, (2) fails to properly analyze
8 the baseline and effects of the action on the Listed Species, and (3) misinterprets the jeopardy standard
9 in violation of the ESA and the Administrative Procedure Act (“APA”). The APA provides that agency
10 action may be set aside if such action is arbitrary, capricious, an abuse of discretion, or otherwise not in
11 accordance with law. 5 U.S.C. § 706. Compounding the problem, NMFS adopted reasonable and
12 prudent alternatives and measures that do not meet applicable regulatory requirements.

13 5. Plaintiffs, Kern County Water Agency (“KCWA”) and the Coalition for a Sustainable Delta
14 (“Coalition”), seek declaratory and injunctive relief requiring NMFS to issue and approve a biological
15 opinion regarding effects of the operations of the CVP and SWP that complies with the requirements of
16 the ESA and APA.

17 **JURISDICTION AND VENUE**

18 6. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question)
19 and 5 U.S.C. § 703 (actions arising under the APA).

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

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

24 **PARTIES**

25 9. Plaintiff KCWA is a public agency that was created in July 1961 by a special act of the
26 California State Legislature and ratified by the electorate of Kern County in September 1961. KCWA
27 was granted the primary power to acquire and contract for water supplies for Kern County. KCWA
28 serves as Kern County’s local contracting entity for the State Water Project. In 1963, KCWA contracted

1 with the California Department of Water Resources (“DWR”) for a water supply of up to 998,750
2 acre-feet of SWP table A water annually. KCWA is a wholesaler of SWP water for both agricultural
3 and municipal and industrial uses. KCWA contracts with 13 individual water districts in Kern County,
4 which supply SWP water directly to water users for agricultural use. KCWA also contracts for the
5 delivery of treated water supplies with water purveyors who supply water directly to residents of the
6 City of Bakersfield and surrounding areas. The service area for KCWA encompasses all the territory
7 within the San Joaquin Valley portion of Kern County. KCWA provides a portion of, and in some cases
8 the entire water supply for approximately 719,000 acres of prime farmland, of which approximately
9 240,000 acres are permanent crops, and for some 500,000 residents of Kern County. Approximately
10 98 percent of KCWA’s water is imported by the SWP. The balance of KCWA’s water supply is from
11 high flow Kern River water rights. In terms of contract amount with DWR, KCWA is the second largest
12 SWP contractor. KCWA participates in a wide scope of water management activities related to both
13 surface and groundwater in order to preserve and enhance Kern County’s water supply.

14 10. Defendants’ actions have significant economic and contractual impacts on KCWA because
15 of its contract with DWR for deliveries of SWP water. KCWA’s contract for delivery of SWP water
16 requires payment for its full contract amount regardless of the amount of water actually delivered in any
17 given year through the SWP.

18 11. KCWA depends on SWP deliveries through the Delta to the San Joaquin Valley for 98
19 percent of its water supply. The continued operation of the SWP is, in turn, dependent on the overall
20 health of the Delta and its ecosystem, which includes the maintenance of viable populations of species
21 living in the Delta and protected by the ESA, including the salmonids.

22 12. Plaintiff Coalition is comprised of individual and agricultural water users and of individuals
23 in the San Joaquin Valley. The Coalition is bringing this action on behalf of itself and its members.
24 The Coalition and its members depend on water from the Sacramento-San Joaquin Delta (the “Delta”);
25 the water is essential to their livelihood and economic well-being. In addition to their economic interest
26 in the Delta, the Coalition and its members are dedicated to protecting the Delta and committed to
27 promoting a strategy to ensure its sustainability. The purpose of the Coalition is to advance the interests
28 of its members, namely, (1) to better the conditions of those engaged in agricultural pursuits in the San

1 Joaquin Valley and (2) to ensure a sustainable and reliable water supply by protecting the Delta and
2 promoting a strategy to ensure its sustainability. Participation of individual Coalition members in this
3 litigation is not necessary in light of the claims asserted and relief requested.

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

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

23 15. Coalition members visit the Delta and appreciate the Delta ecosystem. Coalition members
24 view, enjoy, and use the Delta ecosystem. Coalition members routinely engage in various recreational
25 activities in the Delta – including boating, fishing, and wildlife viewing – and have concrete plans to
26 continue to do so in the future. Coalition members derive significant use and enjoyment from the
27 aesthetic, recreational, and conservation benefits of the Delta ecosystem, including the Listed Species.
28 The Coalition and its members are deeply concerned about the health of the Delta ecosystem and its

1 evident decline. The decline of the salmonids and the Listed Species has had and continues to have a
2 substantial negative impact on Coalition members, impairing their use and enjoyment of the Delta and
3 the Listed Species.

4 16. Defendant Department of Commerce is a department of the United States Government,
5 established by statute and charged by Congress with administering federal programs under the ESA.

6 17. Defendant Gary Locke is the Secretary of the Department of Commerce (“Commerce
7 Secretary”). The Commerce Secretary is responsible under the ESA for consulting with federal agencies
8 regarding any action authorized, funded, or carried out that may affect the continued existence of any
9 threatened or endangered species, or result in the destruction or adverse modification of critical habitat
10 of any threatened or endangered species.

11 18. Defendant NOAA’s National Marine Fisheries Service is the federal agency charged with the
12 management, conservation, and protection of living marine resources within the United States’ exclusive
13 economic zone.

14 19. Defendant James W. Balsiger, Ph.D., is Acting Assistant Administrator of NMFS, and thus
15 is charged with administration of the ESA with respect to living marine resources.

16 20. Real Party in Interest U.S. Bureau of Reclamation (“Reclamation”) is an agency under the
17 Department of Interior and is a water management agency that provides drinking water to over 31
18 million people and irrigation water to over 10 million acres of farmland in the western United States.
19 Reclamation is charged with operation of the CVP.

20 21. Real Party in Interest Michael L. Connor is Commissioner of the Bureau of Reclamation, and
21 thus is charged with operation and administration of the CVP.

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

25 23. Real Party in Interest Lester Snow is the Director of DWR, and thus is charged with
26 operation and administration of the SWP.

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FACTUAL AND LEGAL BACKGROUND

I. The Sacramento-San Joaquin Delta and the Listed Species.

24. The Delta is the largest estuary (i.e., coastal area where freshwater from rivers mixes with ocean waters) on the West Coast. The Delta is a valuable ecosystem and is also crucial to California's economy. The Delta is the center of California's two largest water distribution systems, the SWP and CVP. These projects deliver water to more than half the citizens of California as well as provide water to more than 4 million acres of irrigated farmland in California that in turn sustains tens of billions of dollars in economic activity.

25. The Delta's major source of freshwater comes from the Sacramento and San Joaquin Rivers; saltwater comes from the Pacific Ocean through San Francisco Bay. Approximately 50 percent of California's average annual streamflow flows to the Delta.

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

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

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

29. The overall health of the Delta ecosystem, including the health of the populations of various Delta species, including the salmonids and green sturgeon, is in decline due to a number of stressors. Among the stressors suspected of contributing to this decline are to contaminated runoff, loss of habitat, and increased sedimentation, degraded water quality due to the presence of pesticides and contamination; predation from and invasion of non-native species, development of shipping channels,

1 development of levees, ammonia discharges from wastewater treatment plants, existence of dams, poor
2 ocean conditions, climate change, and up-stream and in-Delta diversions.

3 30. Chinook salmon are anadromous fish that migrate through the Delta to the upper Sacramento
4 River and its tributaries. Anadromous fish spend most of their life in the ocean but must enter
5 freshwater rivers and streams to spawn. Chinook salmon exhibit two generalized freshwater life history
6 types, "stream-type" and "ocean-type." Stream-type Chinook salmon reside in freshwater for a year or
7 more following emergence, whereas "ocean-type" Chinook salmon migrate to the ocean within their
8 first year. The 2009 BiOp addresses two races of Chinook, the Sacramento River winter-run Chinook
9 and the Central Valley spring-run Chinook.

10 31. The Sacramento River winter-run Chinook salmon exhibits both stream and ocean-type life
11 history. Adults enter freshwater in winter or early spring, and delay spawning until spring or early
12 summer. NMFS listed the Sacramento River winter-run Chinook salmon as an endangered species on
13 January 4, 1994. NMFS designated critical habitat for the Sacramento River winter-run Chinook salmon
14 on June 16, 1993.

15 32. The Central Valley spring-run Chinook salmon exhibits both stream-type and ocean-type life
16 history. Adults enter freshwater in the spring, hold over the summer, spawn in the fall, and the juveniles
17 typically spend a year or more in freshwater before emigrating. NMFS listed the Central Valley spring-
18 run Chinook salmon as a threatened species on September 16, 1999. NMFS designated critical habitat
19 for the Central Valley spring-run Chinook salmon on September 2, 2005.

20 33. The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and
21 San Joaquin Rivers and their tributaries. Spawning occurs during winter and spring months in small
22 streams and tributaries in the Delta where cool, well-oxygenated water is available year-round. NMFS
23 listed the Central Valley steelhead as a threatened species on March 19, 1998. NMFS designated critical
24 habitat for the Central Valley steelhead on September 2, 2005.

25 34. The Southern DPS of green sturgeon includes all green sturgeon populations south of the Eel
26 River. The only known spawning population is in the Sacramento River. NMFS listed the Southern
27 DPS of green sturgeon as threatened on June 6, 2006. NMFS proposed critical habitat designation for
28 the Southern DPS of green sturgeon on September 8, 2008.

1 35. The Southern Resident killer whale is found throughout the coastal waters off Washington,
2 Oregon, and Vancouver Island and also travel as far south as central California. NMFS listed the
3 Southern Resident as endangered on November 18, 2005.

4 **II. The 2009 BiOp.**

5 36. In October 2004, NMFS issued its biological opinion on the proposed CVP/SWP operations.
6 (“2004 BiOp”) for the Sacramento River winter-run Chinook salmon, Central Valley spring-run
7 Chinook salmon, and Central Valley steelhead. As a result of litigation challenging the 2004 BiOp, this
8 Court issued an order concluding that the 2004 BiOp was invalid and ordered NMFS to prepare a new
9 biological opinion. *See Pac. Coast Fed’n of Fisherman’s Ass’ns v. Gutierrez*, 2008 U.S. Dist. LEXIS
10 31462 (E.D. Cal. Apr. 16, 2008).

11 37. The 2009 BiOp concludes that the proposed long-term operations of the CVP and SWP are
12 likely to jeopardize the continued existence of the salmonids, Southern DPS of green sturgeon and the
13 Southern Resident. NMFS also concludes that the proposed action is likely to destroy or adversely
14 modify the designated critical habitats of the salmonids and the proposed critical habitat of the Southern
15 DPS of green sturgeon.

16 38. The restrictions imposed by the 2009 BiOp will result in additional operational limitations
17 upon the SWP. As a result of Defendants’ improper actions, failure to use the best available scientific
18 data in developing the 2009 BiOp, failure to comply with other requirements of the ESA as described
19 herein, and failure to comply with NEPA, KCWA and the Coalition’s members will receive significantly
20 less SWP water pursuant to their water supply contracts than they would have received in the absence of
21 the 2009 BiOp.

22 39. However, if the relief requested herein is granted, then Defendants would be enjoined from
23 enforcing the 2009 BiOp’s additional limitations on the delivery of water. And as a consequence,
24 Coalition members would no longer be forced to endure the above-described economic and
25 environmental injuries. Additionally, if NMFS is required to issue and approve a biological opinion
26 regarding the effects of the continued operations of the CVP and SWP that complies with the
27 requirements of the ESA and APA, than additional limitation, if any, imposed by the biological opinion
28 on the delivery of water would be less than those currently mandated by the 2009 BiOp.

1 40. Because the 2009 BiOp largely ignores the effects of numerous stressors on the Listed
2 Species, the reasonable and prudent alternatives adopted by NMFS fail to comply with the ESA.
3 However, if the relief requested herein is granted, then Defendants would be required to issue and
4 approve a biological opinion regarding the effects of the continued operation of the CVP and SWP that
5 complies with the requirements of the ESA and APA. As a consequence of this ESA and
6 APA-compliant biological opinion, reasonable and prudent alternatives would be formulated and
7 adopted that would redress the injuries incurred by plaintiffs.

8 41. Unless plaintiffs' prayer for relief is granted and the 2009 BiOp's restrictions are declared to
9 be invalid, KCWA and the Coalition's economic and environmental interests in SWP water supplies will
10 be adversely affected and irreparably injured by Defendants' unlawful actions.

11 **III. The Endangered Species Act.**

12 42. The ESA was enacted in recognition of the fact that endangered and threatened species
13 provide "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and
14 its people." 16 U.S.C. § 1531(a)(3).

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

17 44. Section 7(a)(2) of the ESA requires federal agencies (the "action agency") to consult with
18 NMFS to ensure that any action "authorized, funded, or carried out" by such agency is "not likely to
19 jeopardize the continued existence of any endangered species or threatened species or result in the
20 destruction or adverse modification of [designated critical] habitat." 16 U.S.C. § 1536(a)(2). This
21 process is known as the section 7 consultation.

22 45. The Joint Consultation Regulations that implement section 7(a)(2) of the ESA specify that an
23 agency's duty to consult is triggered whenever it is determined that an agency's action "may affect" a
24 threatened or endangered species or its critical habitat. 50 C.F.R. § 402.14(a).

25 46. The Joint Consultation Regulations define the scope of agency actions that are subject to
26 consultation as "all activities or programs of any kind authorized, funded, or carried out, in whole or
27 in part, by Federal agencies." 50 C.F.R. § 402.02. This includes the promulgation of regulations,
28

1 the granting of licenses, and actions that directly or indirectly cause modifications to the land, water,
2 or air. 50 C.F.R. § 402.02(b)-(d).

3 47. The formal consultation process is initiated when the action agency sends a written request to
4 NMFS. As part of the formal consultation, NMFS prepares a biological opinion to determine whether
5 the action is likely to jeopardize the continued existence of a listed species or result in the destruction or
6 adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4), (h)(3).

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

9 49. In making a jeopardy determination, NMFS is obligated to consider the effects of the
10 proposed action together with the environmental baseline when determining whether the action is likely
11 to jeopardize one or more listed species or destroy or adversely modify designated critical habitat of
12 such species. 16 U.S.C. § 1536; 50 C.F.R. § 402.02.

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

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

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

1 jeopardizing the continued existence of listed species and avert the destruction or adverse modification
2 of critical habitat. 50 C.F.R. § 402.02.

3 53. The issuance of a biological opinion is the formal completion of the consultation process
4 required by section 7 of the ESA. 50 C.F.R. § 402.14(l).

5 54. Under section 7(a)(2) of the ESA, Reclamation must consult with NMFS regarding the
6 effects of the CVP and SWP on the Listed Species in order to continue the operations of the CVP and
7 SWP. 16 U.S.C. § 1536(a)(2).

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

14 56. Reliance on suppositions or untested hypotheses constitutes a violation of the ESA because
15 suppositions and untested hypotheses do not constitute available scientific and commercial data.
16 Further, when making a determination or recommendation, NMFS cannot “disregard scientifically
17 superior evidence.” *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 930 (E.D.N.C. 1995).

18 57. Federal agencies are required to obtain and to use quantitative information when it is feasible
19 to do so. *Roosevelt Campobello Int’l Park Comm’n v. U.S. Env’tl. Protection Agency*, 684 F.2d 1041,
20 1052-53 & n.9 (1st Cir. 1982).

21 58. Pursuant to the ESA’s best scientific data requirement, NMFS must provide detailed,
22 repeatable analysis of the information and “spell out the agency’s scientific assumptions, uncertainties,
23 and judgments, as well as those matters that the agency accepts as valid knowledge.” Sheila Jasanoff,
24 *Science at the Bar: Law, Science, and Technology in America* 73 (Harvard University Press 1995).
25 NMFS must do more than just summarize baseline data and its hypotheses regarding effects on the
26 Listed Species.

27 59. The Joint Consultation Regulations require that NMFS document a clear logic chain that
28 connects the available data, relevant scientific literature, and other relevant information to the agency’s

1 biological opinion regarding the environmental baseline, effects of the proposed action, and other
2 regulatory findings in the biological opinion. Without such a logic chain, the 2009 BiOp cannot be
3 viewed as having been informed by the best scientific data available. *See e.g., Nat'l Ass'n of Home*
4 *Builders v. Norton*, 340 F.3d at 849.

5 60. Another essential component of the best scientific data requirement is that the information
6 utilized in the preparation of the biological opinion be transparent and be made available for public
7 scrutiny. In many instances throughout the 2009 BiOp where competing or contradictory information
8 exists, NMFS did not describe how or why it chose to select and rely upon certain information in
9 support of conclusions that it has drawn and why the competing information was disregarded.

10 61. The Joint Consultation Regulations require that in the course of consultation, NMFS evaluate
11 the current status of the listed species, evaluate the effects of the action and cumulative effects on the
12 listed species, and formulate its biological opinion as to whether the action, taken together with
13 cumulative effects, is likely to jeopardize the continued existence of the listed species. 50 C.F.R.
14 § 402.14(g). The biological opinion must include a “detailed discussion of the effects of the action on
15 the listed species.” *Id.* § 402.14(h)2).

16 62. To comply with this requirement, NMFS “must examine the relevant data and articulate a
17 satisfactory explanation for its action including a ‘rational connection between the facts found and the
18 choice made.’” *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
19 (1983) (citation omitted); *accord Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*,
20 538 F.3d 1172, 1202 (9th Cir. 2008).

21 63. “[W]here the agency’s reasoning, although complex, is rational, clear, and complete, [the
22 judiciary] must affirm. Contrarily, where the agency’s reasoning is irrational, unclear, or not supported
23 by the data it purports to interpret, [the judiciary] must disapprove the agency’s action.” *Ctr. for Auto*
24 *Safety v. Peck*, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting) (internal citations and
25 quotation marks omitted) (cited in *Nw. Coal. for Alternatives to Pesticides v. U.S. Env'tl. Prot. Agency*,
26 544 F.3d 1043, 1052 (9th Cir. 2008)).

27 64. The purpose of interagency consultation under section 7(a)(2) of the ESA is to insure that the
28 action (that is, operation of the CVP and SWP) is not likely to jeopardize the continued existence of the

1 species listed as threatened or endangered under the ESA or result in the destruction or adverse
2 modification of their designated critical habitat. 16 U.S.C. § 1536(a)(2).

3 65. The Joint Consultation Regulations define the term “action” broadly and state that the
4 regulations apply “to all actions in which there is discretionary Federal involvement or control.”
5 50 C.F.R. §§ 402.02, 402.03.

6 66. As part of the consultation, NMFS must evaluate the current status of the Listed Species and
7 where applicable, their designated critical habitat. 50 C.F.R. § 402.14(g)(2). NMFS is thus required to
8 describe and analyze the environmental baseline. “The environmental baseline includes the past and
9 present impacts of all Federal, State, or private actions and other human activities in the action area, the
10 anticipated impacts of all proposed Federal projects in the action area that have already undergone
11 formal or early consultation, and the impact of State or private actions which are contemporaneous with
12 the consultation in process.” 50 C.F.R. § 402.02.

13 67. In addition, NMFS must evaluate the effects of the action on the Listed Species and, where
14 applicable, their designated critical habitat. 50 C.F.R. § 402.14(g)(3). The effects of the action
15 encompass “the direct and indirect effects of an action on the species or critical habitat, together with the
16 effects of other activities that are interrelated or interdependent with that action that will be added to the
17 environmental baseline.” *Id.* § 402.02. If there is not a direct causal connection between an effect on
18 the species or its critical habitat and the action that is the subject of consultation, then that effect is not
19 an effect of the action. U.S. Fish & Wildlife Serv. & Nat’l marine Fisheries Serv., *Endangered Species*
20 *Consultation Handbook* 4-25 to 4-27 (1998) (“*Endangered Species Consultation Handbook*”); 51 Fed.
21 Reg. 19,926, 19,932 (June 3, 1986) (preamble to final rule establishing the joint consultation
22 regulations); *Miccosukee Tribe v. U.S.*, 2009 U.S. App. LEXIS 9715 (11th Cir. May 5, 2009)
23 (*Endangered Species Consultation Handbook* given *Chevron* deference).

24 68. The environmental baseline is not part of the effects of the action. *Nat’l Wildlife Fed’n*,
25 524 F.3d 917, 924 (9th Cir. 2008) (“‘Effects of the action’ include both direct and indirect effects of an
26 action ‘that will be added to the environmental baseline.’” (quoting 50 C.F.R. § 402.02) (emphasis
27 added)); *see also Endangered Species Consultation Handbook, supra*, at 4-22 (“The environmental
28 baseline is a ‘snapshot’ of a species’ health at a specified point in time. It does not include the effects of

1 the action under review in the consultation.”). NMFS is thus required to describe and analyze both the
2 effects of the action and the environmental baseline.

3 69. NMFS cannot analyze the effects of the action in a vacuum when it makes a jeopardy or
4 adverse modification determination pursuant to section 7(a)(2) of the ESA; instead, NMFS must
5 consider the effects of the action in light of the environmental baseline (that is, in the context in which
6 they are occurring). *Nat’l Wildlife Fed’n*, 524 F.3d at 930. But NMFS cannot conflate the effects of the
7 action and the environmental baseline; the effects of the action are separate from, and in addition to, the
8 environmental baseline. *Id.* At 924.

9 70. Where, as here, NMFS makes a determination that the proposed action would violate section
10 7(a)(2), NMFS must suggest reasonable and prudent alternatives that would not violate section 7(a)(2)
11 and that can be taken by the action agency or applicant in implementing the proposed action. The
12 purpose of such alternatives is to avoid a violation attributable to the action; the alternatives need not
13 improve the status of the species vis-à-vis the environmental baseline.

14 71. The ESA mandates that upon conclusion of the section 7(a)(2) consultation process, the
15 Secretary must provide the action agency with “a written statement setting forth the Secretary’s opinion,
16 and a summary of the information on which the opinion is based, detailing how the agency action affects
17 the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A).

18 72. NMFS is required to “[e]valuate the effects of the action and cumulative effects on the listed
19 species or critical habitat” and to “[f]ormulate its biological opinion as to whether the action, taken
20 together with cumulative effects, is likely to jeopardize the continued existence of listed species or result
21 in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g).

22 73. The Joint Consultation Regulations define “effects of the action” as “the direct and indirect
23 effects of an action on the species or critical habitat, together with the effects of other activities that are
24 interrelated or interdependent with that action that will be added to the environmental baseline.” *Id.* §
25 402.02.

26 74. The Joint Consultation Regulations define the environmental baseline as “the past and
27 present impacts of all Federal, State, or private actions in the action area, the anticipated impacts of all
28 proposed Federal projects in the action area that have already undergone formal or early section 7

1 consultation, and the impact of State or private actions which are contemporaneous with the consultation
2 in process.” *Id.*

3 75. The effects of the action are separate from and in addition to, the environmental baseline.
4 *Nat’l Wildlife Fed’n*, 524 F.3d at 924.

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

7 **FIRST CLAIM FOR RELIEF**

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

10 77. Paragraphs 1 through 76 are realleged and incorporated as if fully set forth herein.

11 78. Defendants failed to use the best available scientific and commercial data in development of
12 the 2009 BiOp as required by the ESA. Defendants’ failure to use the best scientific and commercial
13 data available includes, but is not limited to, the following specific examples.

14 (a). The 2009 BiOp fails to use available modeling that describes the full life cycle of the
15 winter-run Chinook. Specifically, Defendants did not use the Interactive Object Oriented Salmon
16 Simulation (“IOS”) model, which was recommended by the CALFED Science Review Panel. One
17 component of the IOS model provides a prediction of Delta salmon mortality as a function of inflow,
18 exports and other factors. The IOS model is based on peer reviewed literature and other available
19 information and provides a robust tool for exploring and quantifying water project operation effects on
20 salmon survival and migration through the Delta.

21 (b). Defendants selected the data they relied upon in an arbitrary manner and did not explain
22 why they disregarded certain relevant data and analyses. For example, the 2009 BiOp disregards
23 available acoustic tagging data and studies regarding the migration and survival patterns of juvenile
24 salmonids in the Central Valley.

25 (c). The 2009 BiOp often relies upon qualitative information when quantitative information is
26 available.

27 (d). The 2009 BiOp bases its characterization of the environmental baseline and its analysis
28 of effects of the action on the Southern DPS of green sturgeon on viability parameters that were

1 developed specifically for salmonids, a species with a vastly different life cycle than the green sturgeon.
2 The 2009 BiOp merely states that it believes that the concepts and viability parameters stated for the
3 salmonids can also be applied to the Southern DPS of green sturgeon, but does not identify any scientific
4 information to support using a framework developed for salmonids as a basis for analyzing the Southern
5 DPS of green sturgeon.

6 (e). The 2009 BiOp fails to consider available scientific and commercial data suggesting there
7 is little evidence of any association between exports and salmon survival. For example, the 2009 BiOp
8 states that “[i]f the Delta Cross Channel gates are opened . . . a significantly greater proportion of . . .
9 juvenile fish will be diverted into the central Delta.” 2009 BiOp at 406. This statement ignores the
10 availability of quantitative data, including but not limited to the minimal effect exports have on tidally
11 neutral flow conditions in Delta salmon migration corridors, and also ignores analyses indicating that
12 opening the Delta Cross Channels decreases salmon survival only marginally.

13 (f). The 2009 BiOp excludes a number of populations of Central Valley spring-run Chinook
14 salmon in its assessment of the Evolutionary Significant Unit (“ESU”) viability, but includes these same
15 populations when describing how the CVP and SWP will affect the survival and recovery of the same
16 ESU.

17 (g). The 2009 BiOp applies hatchery mortality data to naturally spawned salmon, despite
18 NMFS’ acknowledgment of a large body of evidence suggesting that hatchery-raised salmon smolts
19 suffer greater mortality in the wild than do naturally produced smolts. The 2009 BiOp also did not
20 analyze or assess data from coded wire tagging of Central Valley natural-origin Chinook salmon that
21 suggests natural smolts may be at least 80% less likely than hatchery fish to be entrained at south Delta
22 export facilities.

23 79. The failure to use the best available scientific and commercial data in the 2009 BiOp violates
24 the ESA and is arbitrary, capricious, and abuse of discretion, not in accordance with the law in violation
25 of the APA. As such, the 2009 BiOp should be invalidated and NMFS should be required to undertake a
26 biological opinion that complies with the requirements of the ESA and APA.

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SECOND CLAIM FOR RELIEF

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

80. Paragraphs 1 through 79 are realleged and incorporated as if fully set forth herein.

81. NMFS' approval of the 2009 BiOp violates the ESA and APA because NMFS has failed to provide a rational connection between the analyses of the status of the species, environmental baseline, and effects of the action on one hand and the jeopardy and adverse modification determinations on the other hand.

82. The failure to connect the facts found to the conclusions is a violation of the ESA and is arbitrary, capricious and not in accordance with the law in violation of the APA. As such, the 2009 BiOp should be invalidated and NMFS should be required to undertake a biological opinion that complies with the requirements of the ESA and APA.

THIRD CLAIM FOR RELIEF

Failure to Adequately Analyze the Environmental Baseline and Effects of the Action in Violation of the ESA and APA

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

84. The 2009 BiOp fails to analyze adequately the environmental baseline and the effects of the action on the Listed Species and their designated critical habitat. It is, for example, impossible to conduct a rigorous analysis of the effect of the action on the Listed Species because the 2009 BiOp fails to provide even a cursory quantification of the impacts to the baseline of the many stressors identified.

85. The 2009 BiOp identifies many stressors that are impacting the salmonid population and makes clear that the currently depressed condition of the salmonids is substantively attributable to impacts from stressors that are included in baseline environmental conditions. For example, the 2009 BiOp lists habitat blockage from existing dams and diversions, increased sedimentation and other effects from land use activities, development of levees, habitat destruction and modification due to dredging of river channels, poor water quality due to agricultural runoff contaminated with pesticides, oil, grease, and other contaminants, ammonia discharges from wastewater treatment plants, among others as stressors that are contributing to the current condition of the Delta and the salmonids. However, the 2009 BiOp fails to provide any analysis to quantify the impacts from these stressors or to differentiate

1 the effects of these stressors from the effects of the action. The 2009 BiOp also identifies these same
2 stressors as effecting the green sturgeon, but fails to provide any analysis regarding their impacts on the
3 green sturgeon or to differentiate them from the effects of the action. Likewise, the 2009 BiOp
4 identifies stressors that are contributing to the current condition of the Southern Resident, including oil
5 spills, contaminants, and sound and vessel effects. Therefore, the 2009 BiOp does not differentiate
6 between the baseline and the effects of the action and does not establish a proper baseline for the Listed
7 Species.

8 86. The 2009 BiOp fails to differentiate between the discretionary and nondiscretionary project
9 operations and simply “assumed that all CVP and SWP operations are subject to the discretion of the
10 project agencies, and thus, that all effects of future operations are effects of the proposed action.” 2009
11 BiOp at 60. Therefore, the 2009 BiOp fails to properly differentiate between the effects that are solely
12 attributable to the project and those effects that are a result of the environmental baseline.

13 87. The 2009 BiOp attributes effects of actions in the environmental baseline to the actions that
14 are the subject of consultation. For example, the 2009 BiOp stresses the fact that CVP dams currently
15 block access to habitat areas behind the dams, thereby limiting the diversity of habitat assumed to be
16 needed if salmonids are to recover. However, this restraint is due to the existence of the CVP and SWP
17 dams, not their operation. Thus, this limiting factor is not attributable to the proposed CVP and SWP
18 operations, and is therefore not an “effect” of the proposed activity.

19 88. The 2009 BiOp fails to identify the additional, separate effects that the project has on the
20 Listed Species beyond the environmental baseline. The failure to adequately analyze the environmental
21 baseline and effects of the action on the Listed Species and designated critical habitat violates the ESA
22 and APA. As such, the 2009 BiOp should be invalidated and NMFS should be required to undertake a
23 biological opinion that complies with the requirements of the ESA and APA.

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FOURTH CLAIM FOR RELIEF

Invalid Application of the Jeopardy Standard in Violation of the ESA and APA

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

90. The 2009 BiOp’s framework for its jeopardy determinations violate the ESA and APA as follows: (1) in making jeopardy determinations with respect to the salmonids and the Southern DPS of green sturgeon, the defendants utilize a framework and approach that was developed for *recovery* of the species rather than an approach aimed at the survival of the species; and (2) defendants failed to use the best available science in setting the framework for the jeopardy determinations for the salmonids, the Southern DPS of green sturgeon, and the Southern Resident killer whales and is therefore arbitrary and capricious.

91. An action agency in consultation with NMFS must insure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species...” 16 U.S.C. § 1536(a)(2).

92. “Jeopardize the continued existence of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

93. While “jeopardy” includes both the concepts of “survival” and “recovery,” recovery planning and section 7 consultation are still separate and distinct regulatory programs and processes. *See National Wildlife Fed’n*, 524 F.3d at 936 (holding the recovery component of jeopardy “simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.”). The obligation to evaluate “recovery” is limited to an evaluation of whether the proposed agency action will block or impair the recovery of the listed species. *See id.*

94. The recovery planning process is separate and distinct from the section 7 consultation process. The plain text of the ESA, which imposes a separate obligation on NMFS to prepare and implement recovery plans, makes clear that Congress understood that the recovery obligations imposed

1 by the ESA are separate and distinct from the obligation of federal agencies to insure that their actions
2 are not likely to jeopardize the continued existence of threatened and endangered species.

3 95. The 2009 BiOp applies an invalid jeopardy standard because it “equates a listed species’
4 probability or risk of extinction with the likelihood of both the survival and recovery of the species in
5 the wild for purposes of conducting jeopardy analyses under section 7(a)(2) of the ESA.” 2009 BiOp
6 at 42. In making its jeopardy determination, NMFS relied upon work that is focused on recovery of the
7 salmonids – the draft recovery plan for the listed Central Valley salmon and steelhead species
8 (“Recovery Plan”) and an article that is the product of the technical recovery team that is developing the
9 Recovery Plan, Steven T. Lindley, *Framework for Assessing Viability of Threatened and Endangered*
10 *Chinook Salmon and Steelhead in the Sacramento-San Joaquin Basin*, 5 *San Francisco Estuary and*
11 *Watershed Science* (February 2007) (“Lindley (2007)”). 2009 BiOp at 43. Lindley (2007) establishes
12 “risk” categories for extinction, ranging from low to high. Lindley (2007) “assume[s] that a 5% risk of
13 extinction in 100 years is an acceptably low extinction risk for populations.” Lindley (2007) at 3.
14 NMFS then uses these risk categories as a basis for making its effects analysis/jeopardy determination –
15 thereby interpreting jeopardy in terms of recovery of the species.

16 96. The 2009 BiOp also fails to use the best available science in its jeopardy analysis for the
17 salmonids. An example of this failure is NMFS’ inconsistent application of an extinction risk standard.
18 The 2009 BiOp uses the risk categories for extinction that are based on a 100-year extinction risk.
19 NMFS rejected using a 100-year standard in its May 2008 Supplemental Comprehensive Analysis of the
20 Federal Columbia River Power System and Mainstem Effects of the Upper Snake and Other Tributary
21 Actions (“Columbia River Analysis”). In that analysis, NMFS used a 24-year extinction risk and
22 explained that “[i]t has been well-documented that extinction risk increases with longer time horizons,
23 with the probability of extinction ‘approaching 100% for all species if the period is long enough’”
24 Columbia River Analysis at 7-18. In the Columbia River Analysis, NMFS cites to an example in which
25 a healthy population of spring Chinook was found to have a low likelihood of extinction over 24 and 48
26 years and a high likelihood of extinction over 100 years, which NMFS stated suggests that even healthy
27 salmon stocks may appear to have a high likelihood of extinction under a 100-year extinction risk. *Id.*
28 The Columbia River Analysis also noted that “[i]t has been well-documented that the precision of the

1 risk estimate decreases with longer time horizons” and that scientific information estimates that “reliable
2 estimates of extinction risk may only be possible when the number of base period observations is 5-10
3 times greater than the number of years in the time horizon.” *Id.*

4 97. The Columbia River Analysis used a 24-year time period because it is more than twice that
5 of most of the proposed actions. NMFS explained that the purpose of the extinction risk is to inform the
6 ability of the species to survive while actions to promote recovery of the species are implemented under
7 the proposed action, which is why a period twice that of the proposed actions is appropriate. Here, the
8 proposed action is operation of the CVP/SWP until 2030. 2009 BiOp at 579. Therefore, in light of the
9 approach taken by NMFS just one year earlier, a more appropriate extinction risk would be 42 years.

10 98. Thus, the 2009 BiOp conflates the “survival” and “recovery” analysis into an analysis of
11 recovery alone, which does not comply with the analytical approach enunciated by the Ninth Circuit or
12 the requirements of the ESA.

13 99. The 2009 BiOp’s reliance upon a 100-year extinction risk is arbitrary and capricious.
14 As discussed above, the use of a 100-year risk extinction does not provide a reliable risk extinction
15 estimate and using such along time horizon increases the extinction risk, even for healthy populations
16 and does not comply with the ESA’s “best scientific data available” requirement.

17 100. Therefore the 2009 BiOp violated both the ESA and the APA in applying the jeopardy
18 standard and making a jeopardy determination.

19 **FIFTH CLAIM FOR RELIEF**

20 **NMFS’ Analysis of the Effects of the Action and Jeopardy and Adverse Modification**
21 **Determinations regarding the Southern DPS of Green Sturgeon Violates the ESA and APA.**

22 101. Paragraphs 1 through 76 are realleged and incorporated as if fully set forth herein.

23 102. The 2009 BiOp improperly identifies and analyzes the effects of the proposed action on
24 the Southern DPS of green sturgeon. Examples of the 2009 BiOp’s invalid identification and analysis
25 include, but are not limited to the following examples:

26 (a). The 2009 BiOp improperly includes within the effects of the action the environmental
27 baseline. The wholly improper orientation of the 2009 BiOp is perhaps best revealed in Section 9.7.2
28 Baseline Stress Regime on Southern DPS of Green Sturgeon Excluding CVP/SWP Effects, which

1 identifies just two baseline stressors: exposure to contaminants and fishing activities. 2009 BiOp
2 at 559.

3 (b). The 2009 BiOp makes unsupported assumptions about project impacts and their
4 magnitude to the Southern DPS of the green sturgeon. For example, the 2009 BiOp finds predation at
5 the Red Bluff Diversion Dam (“RBDD”) a “high” magnitude stressor with a “high” degree of evidence.
6 2009 BiOp at 563, tbl.9-14. Yet mortality of juvenile green sturgeon emigrating past RBDD has not
7 been estimated. *Id.*

8 (c). The 2009 BiOp fails to provide an assessment of the environmental baseline for the
9 Southern DPS of the Green Sturgeon in the action area. The 2009 BiOp attempts to extend the
10 evaluation of the stressors affecting the salmonids to the green sturgeon. 2009 BiOp at 134 - 158. In so
11 doing, NMFS ignores best available science by basing its baseline and effects of the action analysis for
12 the green sturgeon on the viability framework developed for salmonids without regard to fundamental
13 differences in the green sturgeon’s life history and population dynamics.

14 (d). The 2009 BiOp reaches its jeopardy determination for green sturgeon based on
15 unsupported assumptions about the species’ status and threats and qualitative evaluation despite the
16 availability of a quantitative population model that can be used to inform interpretations of available
17 data. *See Beamesderfer et al., Use of Life History Information in a Population Model for Sacramento*
18 *Green Sturgeon*, 79 *Envtl. Fish Biology* 315 (2007).

19 (e). The 2009 BiOp fails to evaluate the environmental baseline with regard to the green
20 sturgeon’s critical habitat, and therefore fails to provide an adequate analysis of the project effects on the
21 species’ critical habitat. The 2009 BiOp’s assumption that an evaluation of salmon habitat conditions is
22 a proxy for an analysis of the status of green sturgeon critical habitat ignores significant life history
23 differences between the species, and confounds the analysis of the project’s effects on critical habitat.

24 (f). The 2009 BiOp makes internally inconsistent statements. For example, Table 9-14 states
25 that mortality caused by passing under the 18-inch opening under the gates at the Red Bluff Diversion
26 Dam contributes to the magnitude of the stressor on the species. 2009 BiOp at 561 tbl.9-14. But
27 previous text provides, “Current and future gate closures will maintain a minimum of 12 inches of
28 clearance below the gates to allow passage of adult sturgeon beneath the gates *without impingement.*”

1 *Id.* at 559 (emphasis added). The 2009 BiOp also includes contradictory statements regarding the
2 suitability of habitat below the RBDD for spawning: “[The] relative success of these downstream
3 spawning events compared to the success of spawning events occurring upstream of RBDD *are*
4 *unknown*.” *Id.* at 560 (emphasis added). And yet, “[f]ish forced to spawn below RBDD are believed to
5 have a lower rate of spawning success compared to those fish that spawn above the RDBB.” *Id.*

6 (g). Although the 2009 BiOp catalogues other stressors on the green sturgeon, such as poor
7 water quality, effects of deep channel dredging, land use activities and contaminated run-off, and other
8 stressors, the 2009 BiOp does not quantify the effects of these stressors on the green sturgeon separate
9 and distinct from the effects of the proposed action.

10 103. NMFS’ failure to adequately identify and analyze the effects of the CVP and SWP with
11 respect to the Southern DPS of green sturgeon and the jeopardy and adverse modification
12 determinations violate the ESA and are arbitrary, capricious, and not in accordance with the law in
13 violation of the APA.

14 **SIXTH CLAIM FOR RELIEF**

15 **NMFS’ Analysis of the Effects of the Action and Jeopardy Determination regarding the Southern** 16 **Resident Killer Whale Violates the ESA and APA.**

17 104. Paragraphs 1 through 76 are realleged and incorporated as if fully set forth herein.

18 105. The analysis of the environmental baseline and effects of the action on the Southern
19 Resident is flawed. Examples of the 2009 BiOp’s inadequate analyses include, but are not limited to,
20 the following examples:

21 (a). The 2009 BiOp overinflates the Southern Resident’s dietary requirements for Chinook
22 salmon when the population is in coastal waters contrary to direct scientific evidence showing that the
23 Southern Resident regularly consumes other salmon species. 2009 BiOp at 163, 217-18.

24 (b). NMFS plainly acknowledges that the Southern Resident’s diet is far more varied:
25 “the total abundance of all salmon and other potential prey species is *orders of magnitude* larger than the
26 total abundance of Chinook salmon” 2009 BiOp at 218 (emphasis added). Yet incredibly, the jeopardy
27 determination is based solely on the potential long-term loss of winter-run and spring-run Chinook and
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1 the uncertainty whether such losses could be replaced by hatchery Chinook stocks. 2009 BiOp at
2 573-74.

3 (c). The 2009 BiOp explains that “[o]ur analysis of effects on Southern Residents follows
4 from the salmon analysis on listed Chinook salmon in this Opinion....” 2009 BiOp at 439. In other
5 words, the BiOp bootstraps a jeopardy determination for the Southern Residents based on an analysis
6 that does not meet the legal standards required under the ESA and the APA.

7 106. The 2009 BiOp makes unsupported conclusions about the project’s potential population-
8 level effects on the Southern Residents. For example, despite acknowledging the absence of scientific
9 evidence linking changes in killer whale abundance to local areas or changes in specific salmon stock
10 groups, the 2009 BiOp concludes that loss of Central Valley Chinook ESUs would have adverse
11 population-level effects on the Southern Resident. 2009 BiOp at 165, 440.

12 107. Although the 2009 BiOp provides records documenting the Southern Resident’s
13 occurrences in coastal waters throughout their range – including California, calculations quantifying the
14 Southern Resident’s annual requirements for Chinook across their coastal range, population estimates
15 for Chinook throughout the Southern Resident’s coastal and inland range, and information about river of
16 origin prey consumed, it does not provide or even attempt to provide a quantitative evaluation of project
17 effects on the Southern Resident: “NMFS evaluated effects on the Southern Residents qualitatively.”
18 2009 BiOp at 440.

19 108. Although the 2009 BiOp catalogues other stressors on the Southern Resident, such as
20 reduced size of prey, contaminants in prey, sound and vessel effects, and oil spills, the 2009 BiOp does
21 not quantify the effects of these stressors on the Southern Resident or attempt to separate their effects
22 apart from the effects of the proposed action.

23 109. NMFS’ failure to adequately analyze the effects of the CVP and SWP with respect to the
24 Southern Resident and the jeopardy determination violates the ESA and are arbitrary, capricious, and
25 not in accordance with the law in violation of the APA.

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SEVENTH CLAIM FOR RELIEF

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

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

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

112. The Joint Consultation Regulations define a “reasonable and prudent alternative” as an alternative to the proposed action that (1) can be implemented in a manner consistent with the intended purpose of the action, (2) can be implemented consistent with the scope of the action agency’s legal authority, (3) is economically and technologically feasible, and (4) would avoid the likelihood of jeopardizing the continued existence of listed species and avert the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02.

113. The facts and analysis relevant to the determination of whether an RPA meets the requirements of the Joint Consultation Regulations must appear on the face of the biological opinion and cannot be inferred. *See, e.g., Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004).

114. NMFS did not satisfy the requirements of the ESA for consideration and inclusion of RPAs. For example, NMFS fails to consider and document in the 2009 BiOp whether the RPA “can be implemented in a manner consistent with the intended purpose” of the SWP and CVP.

115. NMFS failed to adequately analyze and explain how measures in the RPAs will avoid jeopardy or adverse modification of critical habitat of the Listed Species. For example, the 2009 BiOp does not explain how implementation of the RPA will avoid jeopardy for the Southern Resident.

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1 116. NMFS failed to consider the cost of undertaking the RPA or whether more economically
2 feasible alternative exist and therefore the 2009 BiOp does not satisfy the requirement that an RPA be
3 economically feasible.

4 117. The 2009 BiOp fails to show that NMFS undertook the required analysis of whether the
5 RPA satisfies the requirements of the ESA and Joint Consultation Regulations.

6 118. The failure to comply with the regulatory requirements for specifying a reasonable and
7 prudent alternative violates the ESA and APA. As such, the 2009 BiOp should be invalidated and
8 Defendants should be required to undertake a biological opinion that complies with the requirements of
9 the ESA and APA.

10 **EIGHTH CLAIM FOR RELIEF**

11 **Failure to Comply with the Requirements of the National Environmental Policy Act in Violation**
12 **of the APA**

13 119. Paragraphs 1 through 76 are realleged and incorporated as if fully set forth herein.

14 120. The National Environmental Policy Act (“NEPA”) requires federal agencies undertaking
15 a “major federal action” to analyze the environmental effects of that action. 42 U.S.C. § 4332(C).

16 121. When a major federal action is likely to a significant effect on the human environment,
17 the federal agency has the obligation to prepare an environmental impact statement that analyzes those
18 effects and provides a meaningful opportunity for the public to comment. 42 U.S.C. § 4332(C).

19 122. NMFS is a federal agency subject to NEPA. *See* 42 U.S.C. § 4332(2).

20 123. The 2009 BiOp, including the RPAs, incidental take statement, and reasonable and
21 prudent measures, is a major federal action significantly affecting the quality of the human environment.
22 *See* 42 U.S.C. § 4332(2)(C). Major federal actions include the “[a]doption of formal plans, such as
23 official documents prepared or approved by federal agencies which guide or prescribe alternative uses of
24 Federal resources, upon which future agency actions will be based;” and “[a]pproval of specific projects,
25 such as construction or management activities located in a defined geographic area. Projects include
26 actions approved by permit or other regulatory decision as well as federal and federally assisted
27 activities.” 40 C.F.R. § 1508.18(b)(2), (4).

1 124. Defendants' issuance of the 2009 BiOp constitutes a major federal action because, among
2 other reasons:

3 (a). In the 2009 BiOp, the Defendants prescribe an RPA, to be implemented by
4 Reclamation, under which NMFS estimates an average of approximately 330,000 acre-feet of CVP and
5 SWP water would be reserved for uses other than those proposed under the Operations Criteria and Plan.
6 CVP water is a federal resource. *Westlands Water Dist. v. United States Dep't of Interior*, 850 F. Supp.
7 1388, 1422 (E.D. Cal. 1994). The operation of the SWP is also the subject of the section 7 consultation
8 since, under the terms of the Coordinated Operations Agreement applicable to both the CVP and SWP,
9 project operations are coordinated for purposes of export operations in the Delta. Thus, the issuance of
10 the 2009 BiOp constitutes the adoption of "official documents prepared or approved by a federal agency
11 which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be
12 based." 40 C.F.R. § 1508.18(b)(2); *see also Westlands Water Dist.*, 350 F. Supp. at 1422 (determining
13 that a biological opinion would constitute a major federal action where it resulted in the commitment of
14 225,000 acre feet of CVP water under the ESA for salmon protection).

15 (b). The 2009 BiOp was adopted as part of a series of interconnected agency actions
16 that implement section 7 of the ESA and ultimately require the use of a NMFS-estimated 330,000 acre-
17 feet of CVP and SWP water for the critical habitat at issue in the 2009 BiOp. Thus, the adoption of the
18 2009 BiOp and prescription of RPA actions constitute "systematic and connected agency decisions
19 allocating agency resources to implement a specific statutory program." 40 C.F.R. § 1508.18(b)(3).

20 (c). The 2009 BiOp, RPA and incidental take statement serve to mandate certain
21 management activities to be performed by the CVP and SWP in the Sacramento and San Joaquin River
22 basins. Thus, the BiOp effectively approves "management activities located in a defined geographic
23 area." 40 C.F.R. § 1508.18(b)(4).

24 (d). The 2009 BiOp prescribes an RPA that would require the SWP and CVP to
25 operate beyond routine managerial changes. Federal actions that require the operation of existing
26 projects outside the scope of routine managerial changes are major federal actions. *See Upper Snake*
27 *River v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990); *see also County of Trinity v. Andrus*, 438 F. Supp.
28 1368, 1388 (N.D. Cal. 1977). RPA Action IV.2.1 "San Joaquin River Inflow to Export Ratio" requires

1 the CVP and SWP to operate their pumps at rates that will reduce the quantity of water exported by an
2 NMFS-estimated average of 330,000 acre-feet per year “over and above export curtailments associated
3 with the [USFWS BiOp for delta smelt],” constituting a major departure from the ordinary range of
4 routine operations. 2009 BiOp at 580, 641-644.

5 (e). “[I]f a federal permit is a prerequisite for a project with adverse impact on the
6 environment, issuance of that permit does constitute major federal action.” *Ramsey v. Kantor*, 96 F.3d
7 434, 444 (9th Cir. 1996). The 2009 BiOp is the functional equivalent of a permit because, as a practical
8 matter, Reclamation and DWR would not be permitted to proceed with CVP/SWP operations but for the
9 incidental take statement contained in the 2009 BiOp. *Id.*

10 125. The 2009 BiOp, including the RPAs, incidental take statement, and reasonable and
11 prudent measures, will have significant environmental effects for many reasons, including, but not
12 limited to the following:

13 (a). The 2009 BiOp will result in a substantial loss of water to human and human
14 activities by reallocating hundreds of thousands of acre-feet of water annually away from reasonable and
15 beneficial uses reliant upon the SWP, including drinking and other potable uses, municipal and
16 industrial uses, and agricultural uses. However, the 2009 BiOp does not discuss the probable direct and
17 indirect environmental and other impacts of such decreased water availability.

18 (b). The decreased amount of water available to the SWP and CVP will result in a
19 decreased ability to store such water in reservoirs for consumptive uses and otherwise prepare for dry
20 years and emergencies, but the 2009 BiOp does not contain any discussion of the probable direct and
21 indirect environmental and other impacts of such decreased water availability.

22 (c). The 2009 BiOp will indirectly, but foreseeably lead to a variety of effects on the
23 human environment, including, but limited to:

24 i. the fallowing of annual crops and loss of permanent crops on thousands of
25 acres of highly productive farmland;

26 ii. significantly increased groundwater pumping and concomitant declining
27 groundwater levels throughout vast areas of California which will in turn lead to a host of significant
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1 impacts to the human environment, including increased energy consumption and land subsidence,
2 damage to levees, roads, water systems, sewer system, buildings and other improvements; and

3 iii. the likelihood of drastically reduced water and food supplies for resident
4 and migratory wildlife.

5 (d). The loss of SWP water caused by implementation of the 2009 BiOp will
6 contribute to public safety hazards due to the compromised ability to ensure adequate flows in the event
7 of wildlife outbreaks, a large seismic event, major Delta levee failure, and other catastrophic
8 occurrences.

9 (e). The fallowing of agricultural land will lead to soil erosion, wind-borne particles
10 causing air quality impacts, and public health impacts.

11 (f). The loss of SWP water caused by implementation of the 2009 BiOp will
12 compromise water quality and quantity throughout the SWP service area, potentially leading to salt
13 water intrusion into coastal groundwater basins and elsewhere, as well as the loss of high quality SWP
14 water used for blending with lower quality water for water recycling projects to meet water quality
15 standards for the recharge of water to existing groundwater basins.

16 126. Project impacts, including but not limited to those discussed above, will be exacerbated
17 due to the cumulative impact of the ongoing drought and previously imposed constraints on the
18 operations of the CVP and SWP.

19 127. Defendants failed to undertake any environmental review or analysis as required by
20 NEPA. Defendants failed to prepare an environmental impacts statement or other environmental
21 document prior to adopting the final 2009 BiOp.

22 128. Plaintiffs have been adversely affected and aggrieved by Defendants failure to comply
23 with NEPA. This failure will result in significantly increased potential for land subsidence resulting in
24 an enhanced potential for soil compaction and loss of recharge capability as well as damaged levees,
25 bridges, aqueducts, buildings, wells, and other improvements relied upon by plaintiffs. Furthermore,
26 implementation of the 2009 BiOp will result in significant impacts to other protected species because
27 water currently used for the benefit of those other species will be reallocated to maintain flows
28 purportedly for the benefit of the salmonids and green sturgeon.

1 129. Defendants failure to comply with NEPA is arbitrary, capricious, and not in accordance
2 with the law in violation of the APA.

3 **PRAYER FOR RELIEF**

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

- 5 1) Declare that Defendants have violated the ESA, NEPA and APA;
- 6 2) Enjoin Defendants from implementing the 2009 BiOp;
- 7 3) Direct Defendants to remedy the violations of the ESA, NEPA and APA within a
8 reasonable time;
- 9 4) Retain jurisdiction over this matter until such time as Defendants have fully complied
10 with the requirements of the ESA and NEPA;
- 11 5) Award plaintiffs their costs of litigation pursuant to the ESA, 16 U.S.C. § 1536(g)(4) and
12 the Equal Access to Justice, 5 U.S.C. § 504; and
- 13 6) Grant plaintiffs such other further relief, including injunctive relief, as the Court may
14 deem just and proper.

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16 Dated: August 26, 2009

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AUDREY HUANG

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19 By: /s/ Paul S. Weiland

Attorneys for Plaintiffs Kern County Water Agency and
Coalition for a Sustainable Delta

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21 Dated: August 26, 2009

KERN COUNTY WATER AGENCY
AMELIA T. MINABERRIGARAI

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23
24 By: /s/ Amelia T. Minaberrigarai

Attorney for Plaintiff Kern County Water Agency