

1 NOSSAMAN LLP
2 ROBERT D. THORNTON (SBN 072934)
3 rthornton@nossaman.com
4 PAUL S. WEILAND (SBN 237058) (Counsel for Service)
5 pweiland@nossaman.com
6 AUDREY HUANG (SBN 217622)
7 ahuang@nossaman.com
8 18101 Von Karman Avenue, Suite 1800
9 Irvine, CA 92612-0177
10 Telephone: (949) 833-7800
11 Facsimile: (949) 833-7878

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

14 KERN COUNTY WATER AGENCY
15 AMELIA T. MINABERRIGARAI (SBN 192359)
16 P.O. Box 58
17 Bakersfield, CA 93302-0058
18 Telephone: (661) 634-1400
19 Facsimile: (661) 634-1428

20 Attorney for Plaintiff Kern County Water Agency

21 UNITED STATES DISTRICT COURT
22 EASTERN DISTRICT OF CALIFORNIA

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

25 Plaintiffs,)

26 vs.)

27 UNITED STATES FISH AND WILDLIFE)
28 SERVICE, UNITED STATES DEPARTMENT)
29 OF INTERIOR, KEN SALAZAR, in his official)
30 capacity as Secretary of the United States)
31 Department of Interior, and ROWAN W.)
32 GOULD, in his official capacity as Acting)
33 Director, United States Fish and Wildlife Service,)

34 Defendants.)

35 UNITED STATES BUREAU OF)
36 RECLAMATION and J. WILLIAM)
37 MCDONALD, in his official capacity as Acting)
38 Commissioner, United States Bureau of)
39 Reclamation,)

40 and)

Case No:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

1 CALIFORNIA DEPARTMENT OF WATER)
RESOURCES and LESTER SNOW, in his official)
2 capacity as Director, California Department of)
Water Resources,)
3)

4 Real Parties in Interest.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **JURISDICTION AND VENUE**

2 1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question)
3 and 5 U.S.C. § 703 (actions arising under the Administrative Procedure Act or APA).

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

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

8 **INTRODUCTION**

9 4. This lawsuit seeks declaratory and injunctive relief against the United States Fish and
10 Wildlife Service (“Service”), the United States Department of the Interior (“DOI”), Ken Salazar,
11 Secretary of the DOI, and Rowan W. Gould, Acting Director of the Service (collectively, “Defendants”)
12 related to Defendants’ December 15, 2008 approval of a Biological Opinion (“BiOp”) regarding the
13 effects on the delta smelt of the Operations Criteria and Plan (“OCAP”) developed for the California
14 State Water Project (“SWP”) and the federal Central Valley Project (“CVP”). Defendants issued a
15 biological opinion for virtually the same project in 2005 that was successfully challenged in the case of
16 *Natural Resources Defense Council v. Kempthorne*, E.D. Cal. Case No. 05-1207. Pursuant to orders
17 issued in that case, Defendants were directed to develop a new biological opinion regarding the effect of
18 the OCAP on the delta smelt. The BiOp fails to comply with the Endangered Species Act (“ESA”) and
19 Administrative Procedure Act (“APA”).

20 5. Plaintiffs, the Coalition for a Sustainable Delta (“Coalition”) and Kern County Water
21 Agency (“KCWA”), seek declaratory and injunctive relief requiring Defendants to issue and approve a
22 biological opinion regarding effects of the OCAP on the delta smelt that complies with the requirements
23 of the ESA and APA.

24 **FACTUAL BACKGROUND**

25 6. The Sacramento-San Joaquin Delta (“Delta”) is the largest estuary (coastal area where fresh
26 water from rivers mixes with ocean waters) on the West Coast, comprising more than 738,000 acres.
27 The Delta’s major source of fresh water comes from the Sacramento and San Joaquin Rivers; saltwater
28

1 comes from the Pacific Ocean through San Francisco Bay. Approximately 50 percent of California's
2 average annual streamflow flows to the Delta.

3 7. The health of the Delta is crucial to the water supply of the State of California, as it is critical
4 to operation of both the SWP and CVP, which deliver water to urban, agricultural, and industrial water
5 users throughout the State. Two-thirds of California's residents rely on the Delta for at least a portion of
6 their drinking water. In addition, the SWP and CVP provide water to more than 4 million acres of
7 irrigated farmland in the State, primarily in the San Joaquin Valley. Although the SWP and CVP are
8 distinct water infrastructure facilities operated by the California and federal governments respectively,
9 the SWP and CVP are operated pursuant to a cooperative agreement.

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

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

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

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

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

11 13. The Delta supports more than 750 plant and animal species, including 130 species of fish.
12 The Delta provides important fishery habitat; it supports an estimated 25 percent of all warm-water and
13 anadromous sport-fishing species in the State. Eighty percent of California's commercial fishery species
14 live in, or migrate through, the Delta.

15 14. The Delta also provides habitat for a number of species that are protected by the ESA,
16 including the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon,
17 Central Valley steelhead, the Southern Distinct Population Segment of the North American green
18 sturgeon, and the delta smelt.

19 The delta smelt

20 15. The delta smelt is a small translucent fish with a narrow geographic range, which is limited
21 to low salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule
22 listing the delta smelt as threatened). The delta smelt is the only true native estuarine species found in
23 the Delta. *Id.*

24 16. The Service listed the delta smelt as a threatened species on March 5, 1993. *Id.*

25 17. The Service designated critical habitat for the delta smelt on December 19, 1994. 59 Fed.
26 Reg. 65,256 (Dec. 19, 1994).

27 ///

28 ///

1 18. The delta smelt is one of a number of pelagic organisms that are on the decline in the Delta.
2 “Pelagic organisms live in the ocean or estuaries like the Delta.” Resources Agency et al., Pelagic Fish
3 Action Plan at 4 (March 2007).

4 Delta ecosystem

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

13 20. An independent Blue Ribbon task force appointed by Governor Schwarzenegger
14 acknowledged both the severity of the decline of the Delta and the role of a variety of factors in the
15 decline including invasive species, urban growth, urban and agricultural pollution, and water diversions.
16 California Resources Agency, Delta Vision Strategic Plan at v (October 2008) (stating that the Delta is
17 in an “ecological tailspin”).

18 21. In its Biological Assessment, the United States Bureau of Reclamation (“Bureau of
19 Reclamation”) also identified a number of factors, other than operation of the SWP and CVP, that have
20 substantive harmful effects on delta smelt including predation by non-native recreational fisheries,
21 contaminants, water diversions, reduced habitat quality, and invasive species. U.S. Bureau of
22 Reclamation, Biological Assessment App. V-1 (2008).

23 Operation of SWP and CVP

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

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

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

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

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

18 25. Congress enacted the ESA in order to protect species that “have been so depleted in numbers
19 that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). The ESA was enacted
20 in recognition of the fact that endangered and threatened species provide “esthetic, ecological,
21 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C.
22 § 1531(a)(3).

23 26. The ESA provides protection for endangered and threatened species and their habitats,
24 including the delta smelt. 16 U.S.C. §§ 1536 and 1538.

25 27. Section 7(a)(2) of the ESA requires federal agencies (the “action agency”) to consult with the
26 Service to insure that any action “authorized, funded, or carried out” by such agency is “not likely to
27 jeopardize the continued existence of any endangered species or threatened species or result in the
28 destruction or adverse modification of [designated critical habitat].” 16 U.S.C. § 1536(a)(2).

1 28. The Joint Consultation regulations developed by the Service and National Marine Fisheries
2 Service to implement section 7(a)(2) of the ESA specify that an agency’s duty to consult is triggered
3 whenever it is determined that an agency’s action “may affect” a threatened or endangered species or its
4 critical habitat. 50 C.F.R. § 402.14.

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

10 30. The formal consultation process is initiated when the action agency sends a written request to
11 the Service. As part of the formal consultation, the Service prepares a biological opinion to determine
12 whether the action is likely to jeopardize the continued existence of a listed species. 50 C.F.R.
13 § 402.14(g)(4), (h)(3).

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

16 32. In developing a biological opinion, the Service is obligated to consider the effects of the
17 proposed action together with the environmental baseline when determining whether the action is likely
18 to jeopardize one or more listed species or destroy or adversely modify designated critical habitat of
19 such species. 16 U.S.C. § 1536; 50 C.F.R. § 402.02.

20 33. When preparing a biological opinion, the Service is responsible for, *inter alia*, reviewing all
21 relevant information provided by the action agency or otherwise available, evaluating the status of the
22 listed species and its designated critical habitat, evaluating the effects of the action and cumulative
23 effects on the listed species and its designated critical habitat, and formulating its biological opinion. 50
24 C.F.R. § 402.14(g).

25 34. A biological opinion that is issued under section 7 of the ESA must include a summary of the
26 information on which the opinion is based, a detailed discussion of the effects of the action on the listed
27 species and its designated critical habitat, and the Service’s opinion as to whether the action is likely to
28

1 jeopardize the continued existence of a listed species or result in the destruction or adverse modification
2 of its designated critical habitat. 50 C.F.R. § 402.14(h).

3 35. Any biological opinion that includes a finding of jeopardy or adverse modification of critical
4 habitat must also include reasonable and prudent alternatives (“RPA”) to the proposed action. 50 C.F.R.
5 § 402.14(h)(3). The Joint Consultation regulations define a “reasonable and prudent alternative” as an
6 alternative to the proposed action that (1) can be implemented in a manner consistent with the intended
7 purpose of the action, (2) can be implemented consistent with the scope of the action agency’s legal
8 authority, (3) is economically and technologically feasible, and (4) would avoid the likelihood of
9 jeopardizing the continued existence of listed species and avert the destruction or adverse modification
10 of critical habitat. 50 C.F.R. § 402.02.

11 36. The issuance of a biological opinion is the formal completion of the consultation process
12 required by Section 7 of the ESA. 50 C.F.R. § 402.02.

13 **BACKGROUND REGARDING BIOP FOR OPERATION OF SWP AND CVP**

14 37. Under section 7(a)(2) of the ESA, the Bureau of Reclamation must consult with the Service
15 regarding the effects of the CVP and SWP on the delta smelt in order to operate the CVP and SWP. 16
16 U.S.C. § 1536(a)(2).

17 38. In July 2004, the Service issued the Long-Term Operations Criteria and Plan Biological
18 Opinion (“2004 BiOp”) on the delta smelt related to operation of the SWP and CVP.

19 39. In *Natural Resources Defense Council v. Kempthorne*, a coalition of environmental
20 organizations challenged the 2004 BiOp’s conclusions regarding the effect of CVP and SWP operations
21 on the delta smelt.

22 40. In response to that challenge, the Service issued an amended biological opinion in February
23 2005 (“2005 BiOp”), and the plaintiffs amended their complaint to challenge the amended biological
24 opinion.

25 41. In May 2007, the United States District Court for the Eastern District of California
26 invalidated the 2005 BiOp, however, the Court declined to vacate the 2005 BiOp and ordered the parties
27 to propose modifications to CVP and SWP operations to protect the delta smelt while a new biological
28 opinion was being prepared. On August 31, 2007, the Court issued a decision imposing restrictions on

1 CVP and SWP operations until a new biological opinion could be prepared and directing the Service to
2 prepare a new biological opinion.

3 42. After requesting and receiving an extension of time to do so, Defendants issued the new
4 biological opinion on December 15, 2008.

5 43. The BiOp concludes that the operations of the SWP and CVP proposed in the OCAP “are
6 llikely to jeopardize the continued existence of the delta smelt.” BiOp at 276.

7 44. In addition to finding that proposed SWP and CVP operations are likely to jeopardize the
8 continued existence of the delta smelt, the BiOp concludes that such operations are likely to adversely
9 modify delta smelt critical habitat: “It is the Service’s biological opinion that the coordinated operations
10 of the CVP and SWP, as proposed, are likely to adversely modify delta smelt critical habitat” and “the
11 Service concludes that implementation of the proposed action is likely to prevent delta smelt critical
12 habitat from serving its intended conservation role.” BiOp at 278-279.

13 **PARTIES**

14 45. Plaintiff Coalition for a Sustainable Delta is comprised of agricultural water users and of
15 individuals in the San Joaquin Valley. The Coalition is bringing this action on behalf of itself and its
16 members. The Coalition and its members depend on water from the Delta; the water is essential to their
17 livelihood and economic well-being. In addition to their economic interest in the Delta, the Coalition
18 and its members are dedicated to protecting the Delta and committed to promoting a strategy to ensure
19 its sustainability. The purposes of the Coalition is to advance the interests of its members, namely, (1)
20 to better the conditions of those engaged in agricultural pursuits in the San Joaquin Valley and (2) to
21 ensure a sustainable and reliable water supply by protecting the Delta and promoting a strategy to ensure
22 its sustainability. Bylaws of the Coalition for a Sustainable Delta, a nonprofit mutual benefit
23 corporation, Article I, section 1; Coalition for a Sustainable Delta website,
24 <http://www.sustainabledelta.com/p-about.html>. Participation of individual Coalition members in this
25 litigation is not necessary in light of the claims asserted and relief requested.

26 46. Certain Coalition members have contracts with various agencies for the delivery of SWP and
27 CVP water, and as such, depend on SWP and CVP deliveries from the Delta to the San Joaquin Valley
28 for their water supply. Certain Coalition members have contracts to receive SWP deliveries through

1 2035. These contracts are expected to be extended beyond that date. Thus, the Coalition and its
2 members have a long-term interest in the overall health of the Delta and its ecosystem, which includes
3 the maintenance of viable populations of the delta smelt.

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

17 48. Coalition members visit the Delta and appreciate the Delta ecosystem. Coalition members
18 view, enjoy, and use the Delta ecosystem. Coalition members routinely engage in various recreational
19 activities in the Delta – including boating, fishing, and wildlife viewing – and have concrete plans to
20 continue to do so in the future. Coalition members derive significant use and enjoyment from the
21 aesthetic, recreational, and conservation benefits of the Delta ecosystem, including the delta smelt. The
22 Coalition and its members are deeply concerned about the health of the Delta ecosystem and its evident
23 decline. The decline of the delta smelt has had and continues to have a substantial negative impact on
24 Coalition members, impairing their use and enjoyment of the Delta and the delta smelt. Defendants'
25 violations of the ESA have caused significant harm to the delta smelt and the Delta, which in turn causes
26 significant harm to the Coalition and its members.

27 49. Plaintiff Kern County Water Agency is a public agency that was created in July 1961 by a
28 special act of the California State Legislature and ratified by the electorate of Kern County in September

1 1961. KCWA was granted the primary power to acquire and contract for water supplies for Kern
2 County. KCWA serves as Kern County's local contracting entity for the State Water Project. In 1963,
3 KCWA contracted with DWR for a water supply of up to 998,750 acre-feet of SWP table A water
4 annually. KCWA is a wholesaler of SWP water for both agricultural and municipal and industrial uses.
5 KCWA contracts with 13 individual water districts in Kern County, which supply SWP water directly to
6 water users for agricultural use. KCWA also contracts for the delivery of treated water supplies with
7 water purveyors who supply water directly to residents of the City of Bakersfield and surrounding areas.
8 The service area for KCWA encompasses all the territory within the San Joaquin Valley portion of Kern
9 County. KCWA provides a portion of, and in some cases the entire water supply for approximately
10 719,000 acres of prime farmland, of which approximately 240,000 acres are permanent crops, and for
11 some 500,000 residents of Kern County. Approximately 98 percent of KCWA's water is imported by
12 the SWP. The balance of KCWA's water supply is from high flow Kern River water rights. In terms of
13 contract amount with DWR, KCWA is the second largest SWP contractor. KCWA participates in a
14 wide scope of water management activities related to both surface and groundwater in order to preserve
15 and enhance Kern County's water supply.

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

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

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

1 53. Defendant Department of the Interior is a department of the United States Government,
2 established by statute and charged with administering federal programs under the ESA.

3 54. Defendant Ken Salazar is the current Secretary of the Department of the Interior (“Interior
4 Secretary”). The Interior Secretary is responsible under the ESA for consulting with federal agencies
5 regarding any action authorized, funded, or carried out that may affect the continued existence of any
6 threatened or endangered species, or result in the destruction or adverse modification of critical habitat
7 of any threatened or endangered species.

8 55. Defendant United States Fish and Wildlife Service is an agency under the DOI to which the
9 DOI has delegated its responsibility for administration of the ESA.

10 56. Defendant Rowan W. Gould is Acting Director of the Fish and Wildlife Service, and thus is
11 charged with administration of the ESA.

12 57. Real Party in Interest United States Bureau of Reclamation is an agency under the DOI and
13 is a water management agency that provides drinking water to over 31 million people and irrigation
14 water to over 10 million acres of farmland in the western United States. The Bureau of Reclamation is
15 charged with operation of the CVP.

16 58. Real Party in Interest J. William McDonald is Acting Commissioner of the Bureau of
17 Reclamation, and thus is charged with operation and administration of the CVP.

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

21 60. Real Party in Interest Lester Snow is the Director of DWR, and thus is charged with
22 operation and administration of the SWP.

23 **FIRST CLAIM FOR RELIEF**

24 **(Defendants’ failure to comply with the best scientific and commercial data available requirement**
25 **in violation of the ESA and APA, 16 U.S.C. § 1536(a)(2))**

26 61. Paragraphs 1 through 60 are realleged and incorporated as if fully set forth herein.
27
28

1 62. Under section 7(a)(2) of the ESA, the Bureau must consult with the Service regarding the
2 effects of the CVP and SWP on the delta smelt in order to operate the CVP and SWP pursuant to the
3 OCAP. 16 U.S.C. § 1536(a)(2).

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

11 64. Reliance on suppositions or untested hypotheses constitutes a violation of the ESA because
12 suppositions and untested hypotheses do not constitute available scientific and commercial data. 16
13 U.S.C. § 1536(a)(2).

14 65. Further, when making a determination or recommendation, the Service cannot “disregard
15 scientifically superior evidence.” *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 930 (E.D.N.C.
16 1995).

17 66. And where the Service is aware of the need for a discrete study or analysis to evaluate the
18 presence and vulnerability of the species or the likelihood of an activity that may jeopardize that species,
19 the failure to undertake such study or analysis may constitute a violation of the best scientific and
20 commercial data available requirement. *Roosevelt Campobello Int’l Park Comm’n v. U.S. Env’tl*
21 *Protection Agency*, 684 F.2d 1041, 1052-53 n.9 (1st Cir. 1982).

22 67. Defendants have not used the best available scientific and commercial data in development
23 of the BiOp as required by the ESA. Defendants’ failure to use the best scientific and commercial data
24 available include, but are not limited to, the following specific examples:

25 (a) Defendants acknowledge analyses of scientific and commercial data available that
26 concluded there were no important, statistically significant, year-to-year relationships between delta
27 smelt entrainment and subsequent spawning abundance but they nevertheless conclude that delta smelt
28

1 entrainment at the CVP and SWP export pumps is a sporadically significant influence on population
2 dynamics. BiOp at 210.

3 (b) Defendants fail to identify available scientific and commercial data that support the claim
4 that every day the system is in “balanced conditions,” the CVP and SWP are a primary driver of delta
5 smelt abiotic and biotic habitat suitability, health, and mortality. BiOp at 203.

6 (c) Defendants fail to identify available scientific and commercial data to support the claim
7 that the impact of toxics, in-Delta diversion losses, predation, and other environmental stressors on delta
8 smelt are effects of CVP and SWP export pumping. BiOp at 202.

9 (d) Defendants rely, in part, on an untested hypothesis proposed by Dr. William Bennett to
10 support the conclusion that “entrainment and habitat availability/quality jointly contribute to downward
11 pressure on [delta smelt] spawner recruitment...” BiOp at 158-59, 170.

12 (e) Defendants fail to consider available scientific and commercial data when determining
13 how ongoing climate change is affecting delta smelt. BiOp at 188, 202.

14 (f) Defendants fail to consider available scientific and commercial data when developing
15 Reasonable and Prudent Alternative Component 3, which is purportedly designed to improve habitat
16 conditions in the fall for delta smelt. BiOp at 282-83.

17 68. The failure to use the best available scientific and commercial data in the BiOp violates the
18 ESA. As such, the BiOp should be invalidated and Defendants should be required to undertake a
19 biological opinion that complies with the requirements of the ESA.

20 **SECOND CLAIM FOR RELIEF**

21 **(Defendants’ failure to connect the facts found to the conclusions made in violation of the APA,**
22 **5 U.S.C. § 706)**

23 69. Paragraphs 1 through 68 are realleged and incorporated as if fully set forth herein.

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

26 71. To comply with this requirement, the Service “must examine the relevant data and articulate
27 a satisfactory explanation for its action including a ‘rational connection between the facts found and the
28 choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mutual Auto. Ins. Co.*,

1 463 U.S. 29, 43 (1983) (citation omitted). *Accord Ctr. for Biological Diversity v. Nat'l Highway Traffic*
2 *Safety Admin.*, 538 F.3d 1172, 1202 (9th Cir. 2008).

3 72. “[W]here the agency’s reasoning, although complex, is rational, clear, and complete, [the
4 judiciary] must affirm. Contrarily, where the agency’s reasoning is irrational, unclear, or not supported
5 by the data it purports to interpret, [the judiciary] must disapprove the agency’s action.” *Ctr. for Auto*
6 *Safety v. Peck*, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (Wright, J., dissenting) (internal citations and
7 quotation marks omitted) (cited in *Nw. Coal. for Alternatives to Pesticides v. U.S. Env'tl. Prot. Agency*,
8 544 F.3d 1043, 1052 (9th Cir. 2008)).

9 73. Defendants’ approval of the BiOp violates the APA because Defendants have failed to
10 provide a rational connection between the analyses of the status of the species, environmental baseline,
11 and effects of the action on one hand and the jeopardy and adverse modification determinations on the
12 other hand.

13 74. Additionally, Defendants’ approval of the BiOp violates the APA because Defendants have
14 failed to provide a rational connection between the jeopardy and adverse modification determinations on
15 the one hand and the reasonable and prudent alternative on the other hand.

16 75. The failure to connect the facts found to the conclusions made violates the APA. As such,
17 the BiOp should be invalidated and Defendants should be required to undertake a biological opinion that
18 complies with the requirements of the ESA and APA.

19 **THIRD CLAIM FOR RELIEF**

20 **(Defendants’ failure to adequately analyze the status of the species and environmental baseline in** 21 **violation of the ESA and APA, 16 U.S.C. § 1536; 50 C.F.R. § 402.02)**

22 76. Paragraphs 1 through 75 are realleged and incorporated as if fully set forth herein.

23 77. The purpose of interagency consultation under section 7(a)(2) of the ESA is to insure that the
24 action (that is, operation of the CVP and SWP) is not likely to jeopardize the continued existence of
25 delta smelt or result in the destruction or adverse modification of its designated critical habitat.
26 16 U.S.C. § 1536(a)(2).

27 78. As part of the consultation, the Service must evaluate the current status of the delta smelt and
28 its designated critical habitat. 50 C.F.R. § 402.14(g)(2). In addition, the Service must evaluate the

1 effects of the action on the delta smelt and its designated critical habitat. 50 C.F.R. § 402.14(g)(3).

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

7 79. “The environmental baseline includes the past and present impacts of all Federal, State, or
8 private actions and other human activities in the action area.” 50 C.F.R. § 402.02.

9 80. The Service cannot analyze the effects of the action in a vacuum when it makes a jeopardy or
10 adverse modification determination pursuant to section 7(a)(2) of the ESA; instead, the Service must
11 consider the effects of the action in light of the environmental baseline (that is, in the context in which
12 they are occurring). *Nat’l Wildlife Fed’n v. Idaho*, 524 F.3d 917, 930 (9th Cir. 2008).

13 81. The BiOp fails to analyze adequately the status of the delta smelt and environmental baseline
14 of the species.

15 82. It is, for example, impossible to discern where the Service has drawn the line between the
16 environmental baseline and the effects of the action.

17 83. The failure to analyze adequately the status of the species and environmental baseline
18 violates the ESA. As such, the BiOp should be invalidated and Defendants should be required to
19 undertake a biological opinion that complies with the requirements of the ESA.

20 **FOURTH CLAIM FOR RELIEF**

21 **(Defendants’ failure to adequately analyze the effects of the action in violation of the ESA and**
22 **APA, 16 U.S.C. § 1536(a)(2))**

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

24 85. According to the Joint Consultation regulations, the biological opinion must include a
25 detailed discussion of the effects of the action. 50 C.F.R. § 402.14(h)(2).

26 86. The Joint Consultation regulations define “effects of the action” as “the direct and indirect
27 effects of an action on the species or critical habitat, together with the effects of other activities that are
28

1 interrelated or interdependent with that action that will be added to the environmental baseline.”
2 50 C.F.R. § 402.02.

3 87. If there is not a direct causal connection between an effect on the species or its critical
4 habitat and the action that is the subject of consultation, then that effect is not an effect of the action.
5 *Endangered Species Consultation Handbook* at 4-27; 51 Fed. Reg. 19,926, 19,932 (June 3, 1986)
6 (preamble to final rule establishing the joint consultation regulations).

7 88. The environmental baseline is not part of the effects of the action. *Nat’l Wildlife Fed’n*,
8 524 F.3d at 924 (“‘Effects of the action’ include both direct and indirect effects of an action ‘that *will be*
9 *added to the environmental baseline.*’” (quoting 50 C.F.R. 402.02) (emphasis added)); *see also*
10 *Endangered Species Consultation Handbook* at 4-28 (“The environmental baseline is a ‘snapshot’ of a
11 species’ health at a specified point in time. It does not include the effects of the action under review in
12 the consultation.”).

13 89. The BiOp fails to adequately analyze the effects of the OCAP on the delta smelt. The effects
14 analysis contained in the BiOp focuses on three types of effects: “entrainment of delta smelt, habitat
15 restriction, and entrainment of *Pseudodiaptomus forbesi*, the primary prey of delta smelt during
16 summer-fall.” BiOp at 203. The analyses of these effects use conclusions that have been drawn from
17 biological studies, but misrepresent findings or inappropriately consider the uncertainties associated with
18 the results of those studies, creating substantive flaws in the effects analyses that undermine the validity
19 of the BiOp and violate the ESA and APA.

20 90. Additionally, the BiOp attributes the effects of actions in the environmental baseline to the
21 action that is the subject of consultation. BiOp at 202. The BiOp states that a multitude of factors affect
22 delta smelt including predation, contaminants, introduced species, entrainment, habitat suitability, food
23 supply, aquatic macrophytes, and micosystis and that “[t]he extent to which these factors adversely
24 affect delta smelt is related to hydrodynamic conditions in the Delta, which in turn are controlled to a
25 large extent by CVP and SWP operations.” This statement is inappropriate because it includes
26 unsupported assertions that (1) the adverse effects of the factors are related to hydrodynamic conditions
27 in the Delta and (2) hydrodynamic conditions in the Delta are controlled to a large extent by CVP and
28 SWP operations.

1 91. The failure to adequately analyze the effects of the operation of the SWP and CVP violates
2 the ESA and APA. As such, the BiOp should be invalidated and Defendants should be required to
3 undertake a biological opinion that complies with the requirements of the ESA and APA.

4 **FIFTH CLAIM FOR RELIEF**

5 **(Defendants' failure to comply with the regulatory requirements for specifying a reasonable and**
6 **prudent alternative in violation of the ESA and APA, 16 U.S.C. § 1536(b)(3)(A))**

7 92. Paragraphs 1 through 91 are realleged and incorporated as if fully set forth herein.

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

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

18 95. In formulating RPAs, the Service may propose alternatives that utilize the full range of
19 discretionary authority held by the action agency and may specify a RPA that "involves the maximum
20 exercise of federal agency authority" when necessary to avoid jeopardy to the species. Preamble to the
21 Joint Consultation Regulations, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986).

22 96. When more than one RPA is available to meet the requirements of section 7(b)(3)(A) of the
23 ESA, the Service has broad discretion to choose among them. *Sw. Ctr. for Biological Diversity v. U.S.*
24 *Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).

25 97. The Service does not satisfy the requirements of the ESA for consideration and inclusion of
26 RPAs. For example, the Service fails to consider whether the RPA "can be implemented in a manner
27 consistent with the intended purpose" of the SWP and CVP.
28

1 98. In addition, the Service fails to consider the cost of undertaking the RPA, and therefore does
2 not satisfy the requirement that a RPA be economically feasible.

3 99. The Service also fails to explain how the RPA would avoid the likelihood of jeopardizing the
4 continued existence of delta smelt and avert the destruction or adverse modification of its critical habitat.

5 100. Furthermore, the Service has failed to satisfy the requirements of the APA because more
6 than one RPA is available to meet the requirements of section 7(b)(3)(A) of the ESA, and the Service
7 selected an RPA from among those available that poses greater risks to public health and safety.

8 By choosing an RPA that will cause greater harm to public health and safety than the alternative RPAs,
9 which satisfy the ESA and its implementing regulations, the Service has violated section 706 of the
10 APA.

11 101. The failure to comply with the regulatory requirements for specifying a reasonable and
12 prudent alternative violates the ESA and APA. As such, the BiOp should be invalidated and Defendants
13 should be required to undertake a biological opinion that complies with the requirements of the ESA and
14 APA.

15 **PRAYER FOR RELIEF**

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

- 17 1) Declare that Defendants have violated the ESA and APA;
18 2) Enjoin Defendants from implementing the BiOp;
19 3) Direct Defendants to remedy the violations of the ESA and APA within a reasonable
20 time;
21 4) Retain jurisdiction over this matter until such time as Defendants have fully complied
22 with the requirements of the ESA;

23 //

24 //

25 //

26 //

27 //

28 //

- 1 5) Award plaintiffs their costs of litigation pursuant to the ESA, 16 U.S.C. § 1540(g)(4); and
2 6) Grant plaintiffs such other further relief, including injunctive relief, as the Court may
3 deem just and proper.

4
5 Dated: March 12, 2009

NOSSAMAN LLP
ROBERT D. THORNTON
PAUL S. WEILAND
AUDREY HUANG

6
7
8 By: /s/ PAUL S. WEILAND, ESQ.

9 Attorneys for Plaintiffs Coalition for a Sustainable Delta and
10 Kern County Water

11 KERN COUNTY WATER AGENCY
AMELIA T. MINABERRIGARAI

12
13 By: /s/ AMELIA T. MINABERRIGARAI, ESQ.

14 Attorney for Plaintiff Kern County Water Agency
15
16
17
18
19
20
21
22
23
24
25
26
27
28