Thomas N. Lippe (Bar No. 104640)
LAW OFFICES OF THOMAS N. LIPPE APC
201 Mission St., 12th Floor
San Francisco, California 94105
Tel 415 777-5604 x 1
Fax 415 777-5606
E-mail: lippelaw@sonic.net

Michael R. Lozeau (Bar No. 142893)
Richard T. Drury (Bar No. 163559)
Douglas J. Chermak (Bar No. 233382)
LOZEAU DRURY LLP
410 12th Street, Suite 250
Oakland, California 94607
Tel: (510) 836-4200
Fax: (510) 836-4205
E-mail: michael@lozeaudrury.com
richard@lozeaudrury.com
doug@lozeaudrury.com

Attorneys for Plaintiffs AQUALLIANCE and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE

UNITED STATE DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AQUALLIANCE, a non-profit corporation, and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, a non-profit corporation, Plaintiffs, v. UNITED STATES BUREAU OF RECLAMATION, a federal agency; RICHARD J. WOODLEY, in his official capacity, LOWELL PIMLEY, in his official capacity, and DAVID MURILLO, in his official capacity, Defendants.	Case No. 2:14−CV−01396−MCE−CMK **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Hearing Date: July 10, 2014 Time: 2:00 p.m. Courtroom 7 Judge Morrison C. England, Jr.

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INTRODUCTION AND SUMMARY

Plaintiffs AquAlliance and California Sportfishing Protection Alliance move for a preliminary injunction to enjoin Defendants United States Bureau of Reclamation, Richard J. Woodley, Lowell Pimley, and David Murillo (collectively "Bureau") from approving or carrying out any water transfers encompassed by 2014 San Luis & Delta-Mendota Water Authority Water Transfers Project ("Project"). In April 2014, Defendants issued an Environmental Assessment ("EA") and, on April 22, 2014, approved a Finding of No Significant Impact ("FONSI"), for the Project under the National Environmental Policy Act ("NEPA"). Defendants have failed to acknowledge significant new information – the State Water Resources Control Board's ("SWRCB") May 2, 2014 order slackening critical Sacramento-San Joaquin River Delta ("Delta") standards designed to protect the Delta smelt and other fish that, combined with the Project, will draw the threatened Delta smelt further into the central Delta where they will encounter lethally warm waters or, if they survive that insult, be drawn into the massive Delta water pumps. Additionally, the EA is insufficient under NEPA because, among other deficiencies, it fails to acknowledge that, because of low inflows into and low outflows from the Delta, and high pumping of export water from the Delta (including pumping transfer waters), Delta smelt will be present in the Delta this summer. Based on that fundamental error, the EA does not acknowledge or analyze any impacts to the Delta smelt whatsoever and is arbitrary and capricious.

STATEMENT OF FACTS

The Project. Due to drought in California, the Bureau sharply curtailed water available to federal contractors, including contractors within the San Luis & Delta-Mendota Water Authority ("SLDMWA") service area. For the current 2014 water year (October 1, 2013 through September 30, 2014), the Bureau's initial water allocations to CVP water service contractors are zero (0) percent, and initial allocations to Sacramento River Settlement Contractors and wildlife refuges are seventy-five (75) percent of their contract amounts. 1st RJN, Ex. 7. The Project would make up some of the expected shortfall by providing for water rights holders or contractors north of the Delta to sell water

to SLDMWA's members and transfer the water south. The Project proposes to transfer up to 175,226 acre feet from north of the Delta to water users within the SLDMWA service area based on the current 75 percent allocation of CVP water to the northern California water contractors. 1st RJN, Ex 5, EA, p. 2-2. The Bureau's role is to approve specific transfers sought by sellers of water located north of the Delta and buyers south of the Delta, and to use CVP facilities to convey the water. *Id*., p. 1-2.

The Project is primarily intended to provide water to permanent, as opposed to annual, crops to prevent the loss of these crops. 1st RJN, Ex 5, EA, pp. 1-3, 2-1, 3-22. But in deciding to plant permanent crops, growers/transfer buyers chose to take a significant financial risk if it turned out they could not water their fields. See 1st RJN, Ex 8, p. 24 ["Water availability and quality for the Central Valley continues to be uncertain. Those who rely on the state and federal water projects are aware of this, but those relying on groundwater will soon be facing similar pressures in many areas."] Despite the SLDMWA's reliance on uncertain CVP water deliveries, farmers in that area have dramatically increased the acreage of permanent crops, especially almond trees. *Id*., p. 17 (almond acreage has risen from 720,000 acres in 2009 to 810,000 acres as of 2013). That risk has paid substantial dividends to almond growers over the last decade. *Id*., p. 20 (almond farms quadrupled in value since 2003). Despite the 2009 drought, growers who chose to switch to almonds have done exceedingly well economically over the last five to ten years. *Id*.

Delta smelt. The Ninth Circuit recently summarized the plight of the Delta smelt:

> The delta smelt (*Hypomesus transpacificus*) is a small, two-to-three inch species of fish endemic to the San Francisco Bay/Sacramento–San Joaquin Delta Estuary. [citation] Once an abundant species in the Bay–Delta ecosystem, the delta smelt is now in imminent danger of extinction. In March 1993, the species was listed as threatened under the ESA, and the FWS [U.S. Fish & Wildlife Service] designated the Bay-Delta system a critical habitat for the delta smelt in 1994. ... Yet, over the past decade, the delta smelt population has been decimated even relative to these depleted levels, with a measured decline since 2000 of up to three orders of magnitude below historic lows.... As a consequence, the FWS announced in 2010 that reclassifying the delta smelt from a threatened to an endangered species was warranted but precluded by higher priority listings.

San Luis & Delta-Mendota Water Authority v. Jewell, 747 F.3d 581, 595-96 (9th Cir. 2014) (footnotes and citations omitted) (*Jewell I*) "In 1993, the FWS [U.S. Fish and Wildlife Service] concluded that the delta smelt's population had declined by ninety percent over the previous twenty years.... 58 Fed.Reg. 12,854, 12,855 (Mar. 5, 1993)." *NRDC v. Jewell*, ___ F.3d ___; 2014 U.S. App. LEXIS 7063, p. 8 (9th Cir. 2014) (*en banc*) ("*Jewell II*") "The 2008 delta smelt population was estimated at 1.5% of the 1980 level, 75 Fed.Reg. 17667 (April 7, 2010), and 2009 levels were estimated to be the lowest on record." *Jewell I, supra*, 747 F.3d at 653.

The Effect of Delta Water Exports On Smelt. "The Bureau manages California's Central Valley Project—a series of dams, reservoirs, canals, and pumps that diverts and draws water from the California River Delta. The Central Valley Project delivers approximately seven million acre-feet of water to California water users each year and is one of the largest water storage and distribution systems in the world." *Jewell II,* 2014 U.S. App. LEXIS 7063, pp. 7-8. In its 1993 listing decision, "[t]he FWS further determined that 'Delta water diversions,' including the Central Valley Project, are the most significant 'synergistic cause[ ]' of the decline in the delta smelt population." *Id*.

The Bureau consulted with the FWS under section 7 of the Endangered Species Act regarding the risk that its management of Delta water resources will jeopardize the delta smelt. This consultation resulted in the FWS, in 2008, issuing a Biological Opinion ("BO") for Delta smelt that specified reasonable and prudent alternatives that the Bureau committed to implement. The Ninth Circuit recently held that "Reclamation's adoption and implementation of the BiOp [Biological Opinion] requires the preparation of an EIS" in compliance with NEPA. *Jewell I, supra*, 747 F.3d at 645.

Because of the massive quantities of water diverted from the Sacramento River, the San Joaquin River, and the Delta, increases in water salinity in Suisun Bay, as well as within the Delta, have been a serious problem. *Jewell I*, 747 F.3d at 595. Two related standards have been developed to describe the salinity of the Bay-Delta. *Id*. The first standard is the Low Salinity Zone ("LSZ"). *Id*. The LSZ is the transition point between the freshwater flowing west from the Sacramento and San

Joaquin Rivers and their tributaries and the brackish, estuarine water flowing eastward on the tide from San Francisco Bay and the Pacific Ocean. *See id.* Salinity levels within the LSZ range from 0.5 parts per thousand to six parts per thousand. *Id*. The second salinity standard is known as the "X2," "X" referring to distance and "2" referring to the concentration of salt in the water. X2 represents the point in the Bay-Delta at which the salinity is less than two parts per thousand ("ppt"). *Id*. X2 is expressed as the distance in kilometers east of the Golden Gate Bridge where salinity levels are 2 ppt. *Id*. The regulatory agencies use X2 as a marker for the LSZ as well as a habitat indicator for fish and as a regulatory standard. *Id*.

> X2 is the center point of the LSZ, which is considered suitable spawning habitat for the smelt. X2…depends on delta outflow, which is largely determined by the difference between the total inflow from the Sacramento and San Joaquin Rivers and the total amount of water exported through the Banks and Jones pumping stations, which changes both annually and seasonally. [citation] 'CVP/SWP operations control the position of X2 and therefore are a primary driver of delta smelt habitat suitability.' [citation]. 747 F.3d at 616-17.

Delta smelt spend virtually their entire life in the Delta with occasional periods downstream in Suisun Bay when flows through the Delta are at or above historic averages. 1st RJN, Ex. 1 (BO, pp. 146-150, 191, 200, 229-231). "In the summer months in normal or wet water years, normal Delta outflows keep the LSZ, and the Delta smelt population that lives in the LSZ, in the Western Delta, where water temperatures are suitable for Delta smelt and where they are far from the water export pumps located in the South Delta." Cannon Decl, ¶ 8. "The location of the delta smelt population follows changes in the location of the LSZ which depends primarily on delta outflow." (1st RJN, Ex 1, pp. 146-147 (emphasis added). As USF&WS explains:

> From late spring through fall and early winter, delta smelt are located at the LSZ, which moves depending upon San Francisco Bay–Delta water outflow [citation] Reduced Delta water outflow causes the LSZ to move upstream, which seems to concentrate delta smelt in a smaller area along with other competing planktivorous fishes [citation]. Causes of such reduced outflows include smaller upstream releases from dams, increased water exports from the State and Federal facilities, and upstream water diversions for flooding rice fields [citation]. Low freshwater outflows in the fall have been correlated with a reduced abundance index for young delta smelt the following summer ... Since 1978, delta smelt have become increasingly rare in summer and fall surveys of the San Joaquin region of the San Francisco Bay–Delta [citation]. The primary reason appears to be the comparatively high water clarity

in the region, although high water temperatures are also likely a contributing factor [citation]. 1st RJN, Ex 2, 75 Fed. Reg. 17669. The BO concludes that "water transfers are not expected to have direct entrainment effects to adult delta smelt since the proposed transfer window is a time when delta smelt are distributed in the western Delta." 1st RJN, Ex 1, pp. 230-231.

But when Delta outflow is low due to reduced inflow or increased exports from the CVP and SWP pumps, the location of the LSZ moves eastward into the Delta. Cannon Dec., ¶ 9, 10. The location of the LSZ depends, especially in dry years, on the agencies' implementation of the regulatory standards adopted for the Delta. These regulatory decisions are implemented through SWRCB Order D-1641. 1st RJN, Ex 3. Order D-1641 regulates a number of Delta flow and water quality standards, including inflow, minimum Delta outflow, maximum exports through the pumps, salinity and the location of the LSZ, and the maximum ratio of exports to inflow.

For minimum Delta outflow, D-1641 requires, in "critical water years" such as 2013-2014, a Net Delta Outflow Index ("NDOI") of at least 4,000 cubic feet per second ("cfs") in July and 3,000 cfs in August and September (monthly average). "NDOI = Delta Inflow - Net Delta Consumptive Use – Delta Exports." 1st RJN, Ex. 3, p. 190, Figure 3. The values in this formula are derived from many other specific values, some of which directly measure flow, while others are estimates.

For salinity, Order D-1641 specifies, a "Western Delta Sacramento River" salinity requirement of 2.78 EC at a monitoring point located at Emmaton, California. 1st RJN, Ex. 3, p. 182, Table 2; Lippe Decl. Ex 1, pp. 4-5. The salinity standard of 2.78 EC is about 1.7 ppt (or psu), which is "very close to the expected average location of X2 (2 ppt)" and is "a good indicator of the center of the low-salinity zone that defines young Delta Smelt habitat in the Delta in the transfer period." Cannon Decl., Ex 3, p. 7, notes 3, 4.

For the ratio of Delta inflow (the combined inflow from all the rivers and the Sacramento Regional Treatment Plant flowing into the Delta) to exports, D-1641 provides that maximum exports from July through January not exceed 65 percent of Delta inflow.

On May 2, 2014, at the Bureau's request, the SWRCB issued an order weakening the key D-1641 standards that would apply during the transfer period (July-September) of 2014. 1st RJN, Ex. 4, pp. 12-13; Lippe Decl. Ex 1, p. 4-5. The May 2, 2014 Order relaxes minimum Delta outflow in July from 4,000 cfs to 3,000 cfs, leaving August and September unchanged at 3,000 cfs. *Id*. The May 2, 2014 Order changes the maximum export rate of 65% of Delta inflow for non-transfer water when D-1641 standards are not being met to 1500 cfs. *Id*. The May 2, 2014 Order relaxes the maximum export rate of 65% of Delta inflow by excluding transfer water from the inflow calculation. *Id*. This allows 100% of transfer inflow to be exported. Lastly, the May 2, 2014 Order relaxes the "compliance location" for 2.78 EC maximum salinity by moving it upstream and to the east about 3 miles to Three-mile Slough. *Id*. The effect of these changes is to cause the LSZ to move about 3 miles farther east and upstream, *i.e.*, closer to the CVP and SWP pumps and in the interior of the Delta, than it would have been without the relaxation in standards. Cannon Decl., ¶ 10. The decrease in outflow also significantly increases water temperatures in the LSZ that will already be at near- lethal or lethal levels for smelt. Cannon Decl., ¶ 9-24.

Procedural History and the Project's Effects on Smelt. In March, 2014, the Bureau issued a draft Environmental Assessment (EA) for the transfers under NEPA, with a comment deadline of April 2, 2014. Vlamis Decl., ¶ 2. AquAlliance's April 2, 2014 comments attached Tom Cannon's analysis of temperature induced mortality of smelt in the summer of 2013. Vlamis Decl., ¶ 3, Exs 1, p. 12; Ex 2. Mr. Cannon concludes that:

> (1) low Delta outflows caused the LSZ (and its population of Delta smelt) to move upstream into the Central and Southern Delta, where water temperatures are significantly higher than the Western Delta; (2) releases of warm water from reservoirs upstream of the Delta (primarily Lake Shasta) in late June caused water temperatures in July in the LSZ to reach temperatures lethal to smelt; and (3) as a result, Delta smelt suffered significant mortality.

Vlamis Decl., ¶ 3, Ex 2, pp. 17-19; Cannon Decl. ¶ 8, Ex 2, pp. 17-19.

The Final EA and FONSI, conclude that the transfers will not have a significant effect on smelt because "Special status fish species are generally not in the Delta during the transfer period (July-

September) and effects to these fish species from transferring water during this time frame were considered in the NMFS and USFWS BOs." 1st RJN, Ex 5, p. 3-12; Ex 6, p. 8. The EA reached this conclusion despite the fact that Mr. Cannon's 2013 analysis showed that, in the low flow conditions of the summer of 2013, the LSZ and smelt were in the central and southern Delta and were exposed to lethal water temperatures in July. Vlamis Decl., ¶ 3, Ex 2, pp. 17-19; Cannon Decl. ¶'s 7-9, Ex 2.

On May 30, 2014, after the SWRCB's May 2, 2014 order relaxing standards for the transfer period, Plaintiffs wrote to the Bureau requesting supplemental NEPA review of the transfers in light of these changes, attaching a new (May 2014) report by Mr. Cannon concluding that:

> the 2014 Transfers, in combination with the SWRCB's May 2, 2014 relaxation of standards that govern Delta flow and water quality will exacerbate a similar increase in Delta smelt mortality because, once again: (1) low Delta outflows will cause the LSZ (and its population of Delta smelt) to move upstream into the Central and Southern Delta, where water temperatures are significantly higher than the Western Delta, and where they are more vulnerable to entrainment in the export pumps; (2) releases of warm water for the Transfers from reservoirs upstream of the Delta (primarily Lake Shasta) in the transfer period (July through September) will cause water temperatures in the transfer period in the LSZ to reach temperatures lethal to smelt; (3) will cause or increase reverse OMR flows making it more likely that any surviving smelt will be entrained in the export pumps; and (4) as a result, Delta smelt will suffer significant mortality.

Lippe Decl. ¶ 2, Ex 1, pp. 6-7, Ex 1 thereto, Cannon Decl. ¶ 10, Ex 3. By letter dated May 30, 2014, the Bureau responded to Mr. Cannon's May 2014 report. Cannon Decl. ¶ 12, Ex 5. Mr. Cannon's reply to this response is set forth in his declaration. *Id*., ¶¶ 12 - 24.

On June 10, 2014, Plaintiffs again wrote to the Bureau and requested supplemental NEPA review of the transfers in light of additional new information indicating that the threat to the Delta smelt posed by the transfers and the SWRCB's changes to the standards is much greater than would result from a Net Delta Outflow Index of 3,000 cfs because the actual net Delta outflow in May, as measured by four United States Geological Survey's flow gauges that measures the entire Delta outflow, was an anemic -46 cfs. Lippe Decl. ¶ 3, Ex 2; Cannon Decl. ¶ 11, Ex 4. Mr. Cannon explained that under low outflow conditions, the regulatory agencies use of NDOI to estimate Delta outflow grossly overestimates actual Delta outflow. Lippe Decl. ¶ 3, Ex 2; Cannon Decl. ¶ 11, Ex 4.

Thus, instead of the 3,000 cfs average outflow for July called for in the SWRCB's May 2, 2014 Order relaxing the D-1641 standards, actual outflow are likely to be "close to zero or even negative," with severe consequences for Delta smelt due to even higher temperatures in the LSZ and moving the LSZ closer to the pumps. Lippe Decl. ¶ 3, Ex 2; Cannon Decl. ¶ 11, Ex 4. Indeed, the state Department of Water Resources has been calculating "Net Delta Outflow" ("NDO") by a simple process of summing the flow values measured at four USGS gages covering all routes of Delta outflow. Lippe Decl. ¶ 3, Ex 2, p. 2. Cannon confirms, that when outflows relied on by the EA and FONSI are actually 3,000 cfs off the mark and flowing in the wrong direction, it is certain to wreak havoc on the Delta smelt. Cannon Decl. ¶'s 11-24. To date, the Bureau has given no sign that it intends to conduct any supplemental NEPA review.

STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *See Winter v. NRDC*, 55 U.S. 7, 20 (2008). Where "the balance of hardships tips sharply in the plaintiff's favor[,]" a plaintiff need only demonstrate "that serious questions going to the merits were raised" for a preliminary injunction to issue. *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011). The Court must consider the "balance of harms" by weighing the competing claims of injury and "consider[ing] the effect on each party of the granting or withholding of the requested relief," giving particular regard to the public interest. *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 542 (1987). "[Environmental] injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id*. at 545; *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000). Plaintiff seeks a preliminary injunction enjoining the Bureau from approving water

transfers or transferring water encompassed by the Project to preserve the status quo pending this Court's ruling on Defendants' obligation to comply with NEPA and prepare an EIS. A preliminary injunction is appropriate because water transfers within the Project would cause irreparable harm – including the potential extinction of the threatened Delta smelt – if allowed to proceed. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

LEGAL BACKGROUND

NEPA requires all federal agencies to prepare a "detailed statement," commonly known as an environmental impact statement ("EIS"), that discusses the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). When an agency does not know whether the effects of its action will be "significant," it may prepare an Environmental Assessment ("EA") to help make that determination. 40 C.F.R. § 1501.4(b). An EA is a concise analysis of the need for the proposed action, of alternatives thereto, and of the environmental impacts of both the action and the alternatives. 40 C.F.R. § 1508.9. If the EA indicates that the federal action may significantly affect the quality of the human environment, the agency must prepare an EIS. 40 C.F.R. § 1501.4(c). If the agency decides not to prepare an EIS, it must prepare a finding of no significant impact ("FONSI"), which explains the agency's reasons for its decision. 40 C.F.R. § 1508.13. The federal regulations identify a number of criteria that an agency must consider when determining whether an action may significantly affect the environment. 40 CFR § 1508.27. *See* Complaint, ¶ 25.

NEPA requires agencies to prepare a supplemental EIS ("SEIS") or supplemental EA when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). *See Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998) (an EA must be supplemented in the same manner as an EIS). Courts will uphold an agency decision not to prepare an SEIS only if the agency has fully considered the new information, evaluated its likely impact, and supported its decision with

explanation. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir.1980); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000). Agencies must take a "hard look" at the new information. *North Idaho Community v. U.S. DOT*, 545 F.3d 1147, 1154-55 (9th Cir. 2008); *ONRC Action v. USFS*, 445 F.Supp.2d 1211, 1219 (D. Or. 2006). The duty to prepare an environmental assessment is a continuing duty. *Friends of the Clearwater*, 222 F.3d at 558.

ARGUMENT

I. Plaintiffs Have a Strong Likelihood of Success on the Merits of this Case.

Plaintiffs are likely to prevail on their NEPA claims and certainly raise serious questions going to the merits of those claims. Defendants violated NEPA by failing to prepare a supplemental EA or EIS under NEPA in light of the SWRCB's new May 2, 2014 Order changing key Delta protection standards and in light of recently disclosed data showing that the agencies' estimates of Delta outflow are grossly exaggerated under the current critically dry conditions. Defendants also acted arbitrarily and capriciously when they issued an EA and FONSI that failed to disclose or consider the key fact that the threatened Delta smelt will be present in the LSZ, which low flows and increased pumping will move into the Delta this summer.

A. The SWRCB's order weakening Delta standards and Biologist Cannon's expert review of those changes are significant new circumstances and information.

The SWRCB's changes pave the way for significant impacts to the Delta smelt from the Project's and other water transfers through the Delta. The SWRCB's modification of standards coupled with the additional transfer water flowing through the Delta to the CVP and SWP pumps will cause the location of the LSZ, normally located around the salinity compliance location at Emmaton, to move about three miles eastward into the Delta. Cannon Dec., ¶¶ 10-11, Exs 3 & 4. As a result, smelt will be occupying the LSZ in this mid-Delta location during the transfer period (*i.e.*, July through September). *Id*., ¶¶ 10-11, 23, Exs 3 & 4 Occupying the LSZ in this new location in the transfer period will cause smelt to suffer much higher mortality than they would have without the change in

standards. *Id*. Smelt will be exposed to excessively high water temperatures in the relocated LSZ of 75 degrees and above – levels lethal or near-lethal to Delta smelt – for all or most of July and into August. *Id*., ¶¶ 13, 18, 10. Second, these releases, combined with the export of transfer water at the 1:1 ratio allowed by the SWRCB's May 2, 2014 Order, will cause higher reverse flows near the export pumps, which will entrain greater numbers of Delta smelt than would otherwise occur. *Id*.

Neither the EA nor the FONSI issued in April consider, evaluate, or make any determination regarding the combined impacts of the SWCRB's May 2, 2014 Order and the cumulative water transfers on Delta smelt. The May 2, 2014 Order will clearly result in changes that will cause increased mortality in Delta smelt. This is thus significant new information that requires the preparation of a supplemental EA or EIS. *See* 40 C.F.R. § 1502.9(c)(1)(i)-(ii); *Friends of the Clearwater*, 222 F.3d at 558.

Further additional new information became available in early June, 2014, showing that, rather than the roughly 4,000 cfs of Delta outflow in May that was presumed by the EA to exist at that time pursuant to Order D-1641, USGS gauges measuring the actual Delta outflow showed that outflow was actually negative. The USGS flow data indicates that actual outflow from the Delta during May 2014 was ***-45 cfs***. For that same period the Net Delta Outflow Index ("NDOI") calculated pursuant to SWRCB Order D-1641 estimated Delta outflow at 3,805 cfs. Mr. Cannon confirms this pronounced discrepancy and its implications for the Delta smelt. Cannon Dec., ¶ 11; *Id*., Ex. 4 (actual outflows close to zero or negative have severe consequences for Delta smelt). Mr. Cannon indicates that this discrepancy will continue into July when the transfers are planned to begin. *Id*., ¶ 11, Ex 4. The combination of the Project's increased pumping from the Delta; other transfers and their increased pumping; the SWRCB's relaxation of standards; and, inaccurate flow estimates by the Bureau and others, will drag the LSZ and the helpless Delta smelt further into the warm central Delta, killing many, perhaps all, and exposing the few that may survive to entrainment in the pumps. This significant new information and circumstances require a supplemental EA or EIS. 40 C.F.R. §

1502.9(c)(1)(i)-(ii).

B. The Bureau fails to take a hard look at the new information or directly respond to its significance.

Although Plaintiffs provided the Bureau notice of the significant effect the SWRCB's changes and the proposed transfers would have on the Delta smelt, the Bureau did not reevaluate the analysis or conclusions in the EA. The Bureau did respond to Plaintiffs' May 30, 2014, submittals. Cannon Dec., ¶¶ 12-23. The response refers to statements by two individuals that, rather than taking the hard look required by NEPA, sidestep the issues raised by the SWRCB's changes and Mr. Cannon's expert review.

For example, Ms. Brewster, a hydrologist with the Santa Clara Valley Water District (one of SLDMWA's members), purports to rebut Mr. Cannon's concern that, when the transfers occur, the LSZ and hence the smelt will be exposed to lethal or near-lethal temperatures in the Delta near Three-mile Slough by claiming that the temperatures at Three-mile Slough will be no worse than temperatures three miles upstream at Rio Vista. Cannon Dec., Ex. 5. Neither Ms. Brewster nor the Bureau explain how lethal or near-lethal temperatures at multiple locations in the Delta would make it insignificant for water transfers and Delta management decisions to relocate the LSZ and the smelt into those lethal high temperature areas. Cannon Dec., ¶ 16.

Likewise, Ms. Brewster claims that because the Delta pumps cause much higher reverse flows in typical water years, the reverse flows that would happen from the transfers this summer would be relatively small. *Id*., Ex. 5. Again, Ms. Brewster simply ignores the fact that, unlike in a "typical" year, in critically dry 2014, the LSZ including the threatened population of Delta smelt will be moved into the central Delta to be caught in the grip of this summer's reverse flows. Cannon Dec., ¶ 19. Ms. Brewster again avoids Mr. Cannon's evidence and the new Delta standard's information, claiming in response to the LSZ relocating, that it would remain the same size. *Id*., Ex. 5. She does not dispute that the LSZ, loaded with perhaps the entire Delta smelt population, will move into interior Delta

waters with high temperatures. As Mr. Cannon points out, "[t]his is a red herring, because my opinions are primarily based on the changed *location* of the LSZ, not its smaller areal extent." Cannon Dec., ¶ 21. Creating red herrings and avoiding issues is not the hard look required by NEPA.

The Bureau staff person, Dr. Nieuwenhuyse, concurs with Mr. Cannon that in the coming summer months the LSZ is going to be uninhabitable by smelt due to high temperatures and lack of food. However, Dr. Nieuwenhuyse suggests a novel theory that Delta smelt will give up the habitat identified by USF&WS – the LSZ – and instead find refuge in the Sacramento Deep Water Ship Channel. Cannon Dec., Ex. 5. However, Dr. Nieuwenhuyse's is not supported at all by the USF&WS BO. *Id*., ¶ 23. If Dr. Nieuwenhuyse's conjecture were reasonable, it would be mentioned somewhere in the more than 400-page 2008 BO. *See Jewell I*, 747 F.3d at 592 ("described by the FWS as the most complex biological opinion ever prepared"). Indeed, Dr. Nieuwenhuyse's conjecture, if it was reasonable, that the combined effects of the Project, other water transfers, and the SWRCB changes would trap Delta smelt in the Deep Water Channel would itself constitute new significant information. Cannon Dec., ¶ 24.

The Bureau's strategy of avoiding the new information and sidestepping Mr. Cannon's evidence does not amount to a battle of the experts triggering deference to the agency's expert evidence. Only "when specialists express conflicting views" would an agency be within its discretion "to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Price Rd. Neighborhood Ass'n v. DOT*, 113 F.3d 1505, 1511 (9th Cir. 1997). Here, no contrary views actually responsive to Mr. Cannon's analysis were aired by Ms. Brewster or Dr. Nieuwenhuyse. As a result, the Bureau failed to take a hard look at the implications of the new SWRCB changes and the impact on the Delta smelt of the cumulative water transfers' through the Delta this summer.

C. The Environmental Assessment and FONSI's Conclusion That Delta Smelt Will Not Be Present in the Interior of the Delta is Arbitrary and Capricious

The EA and FONSI do not discuss any impacts to the Delta smelt by the Project because they incorrectly assume the fish are not present in the Delta in July and August. EA, p. 3-12; FONSI, p. 8. Both the EA and FONSI state that "[s]pecial status fish species are generally not in the Delta during the transfer period (July-September) and effects to these fish species from transferring water during this timeframe were considered in the NMFS and USFWS BOs." 1st RJN, Ex. 5, p. 3-12; Ex 6, p. 8). This statement contradicts the 2008 BO which discloses that during the summer, the Delta smelt occupy the LSZ – wherever it is located:

> Delta smelt spawning may occur from mid-winter through spring…During and after a variable period of larval development, the young fish migrate downstream until they reach the low-salinity zone (LSZ) (indexed as X2) where they reside until the following winter (Moyle 2002). The location of the delta smelt population follows changes in the location of the LSZ which depends primarily on delta outflow.

1st RJN, Ex. 1, pp. 146-147. With respect to the summer in particular, the BO states: "Young of the year delta smelt rear in the LSZ from late spring through fall and early winter." *Id*. at p. 150. Mr. Cannon emphasized this very fact to the Bureau in his 2013 analysis which AquAlliance submitted with its comment letter on the EA. Vlamis Decl., ¶ 3, Ex 2, pp. 17-19; Cannon Decl. ¶'s 7-9,, Ex 2, pp. 17-19. Likewise, he also pointed out in 2013 that the LSZ where the Delta smelt reside moves into the central Delta in critical dry years. Cannon Dec., ¶ 9; *Id*., Ex. 2. The SWRCB has now made it crystal clear that, this summer (if it hasn't already done so), the LSZ will move from Suisun Bay eastward into the Delta. And, as the BO states, the Delta smelt will move with the LSZ ***into the Delta***. Therefore, the statement in the Final EA and FONSI that smelt will not be in the Delta from July through September has no rational connection to the facts set forth in the 2008 Biological Opinion. *See also* 40 C.F.R. § 1500.1(b) ("accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"). This error causes the EA and FONSI to ignore impacts of the project on Delta smelt. The EA and FONSI are thus arbitrary and capricious.

An EA will be rejected by the courts where it overlooks a crucial fact and fails to provide the public with the information necessary to review and comment on a proposed action. *See Idaho Sporting Congress*, 137 F.3d at 1151-1152 (rejecting an EA for failing to disclose the presence of a management indicator species – trout – in the project area). By failing to acknowledge the presence of Delta smelt wherever the LSZ is located, including in the Delta during the hot summer months, the Bureau failed to address the serious impacts that will result to the smelt by the Project. *See also Found. for North American Wild Sheep v. USDA*, 681 F.2d 1172, 1178 (9th Cir. 1982) (EA inadequate where it fails to address certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare EIS).

II. Plaintiff Has Demonstrated a Likelihood of Irreparable Injury.

The facts discussed above showing Plaintiffs' likelihood of prevailing on the merits also show the likelihood of irreparable injury. In short, the Delta smelt is on the brink of extinction. Mr. Cannon declares that "[a]ny further stressors such as higher exports from water transfers on the population would significantly increase the already high risk of extinction." Cannon Dec., ¶'s 5, 7, Ex. 3, p. 16. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Idaho Sporting Congress*, 222 F.3d at 569 (quoting *Amoco*, 480 U.S. at 545). The Project's water transfers, coupled with other large water transfers through the Delta will move the LSZ and the Delta smelt into the interior of the Delta where that fragile fish will be decimated by high water temperatures and, assuming any survive the excessive heat, sucked into the massive federal and state pumps and killed. These drastic impacts should have been thoroughly explored by the Bureau in an EIS or, at a minimum, in a non-arbitrary environmental assessment over the course of this past winter. Unfortunately, that did not occur and the Court should enjoin the water transfers pending its ruling on the sufficiency of the EA.

The standard for issuance of a preliminary injunction "requires plaintiffs seeking [the] relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 55 U.S. at 22

(emphasis in the original). The cumulative impacts to the Delta smelt and its habitat are certain to occur if water transfers are allowed to commence. As Biologist Cannon's declaration explains, the transfer coupled with numerous other transfers this summer and the SWRCB's relaxing of standards developed over the years to protect the smelt, could sound the death knell of the Delta smelt. Cannon Dec., ¶'s 13-24. Showing the presence of a likely injury does not require Plaintiffs to show that the Project's water transfers will be the final insult that pushes the Delta smelt into extinction. However, Plaintiff's evidentiary showing that extinction is at stake is more than sufficient to meet their burden of demonstrating a likelihood of irreparable harm.

The SWRCB's recent May 2, 2014 Order admits that its changes to Delta standards standing by themselves, excluding any water transfers, may result in impacts to smelt and other fish will occur. 1st RJN, Ex 4, p.10 ("Although fish and wildlife may be affected by the changes in this Order, the primary effects on fish and wildlife are due to the drought itself. Further, these effects are not unreasonable given the tradeoffs in this third year of a drought with the potential for a continuation of the drought into the future."). Whether the resulting impacts are reasonable would be the very question that the Bureau must consider in light of a supplemental EA or EIS. *See Amoco,* 480 U.S. at 545; *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) ("In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action."); *see also NPCA v. Babbitt,* 241 F.3d 722, 738 & n.18 (9th Cir. 2001) (the harm that NEPA intends to prevent is imposed when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires).

III. The Balance Of Harms Strongly Favors An Injunction.

A. The balance of harms favors Plaintiff.

The Courts have repeatedly held that where "[environmental] injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *See, e.g., Amoco*, 480 U.S. at 545; *Save the Yaak Comm. v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). This

is especially true where an injunction seeks to protect a species listed as endangered or threatened under the ESA. As the Ninth Circuit recently explains in upholding the 2008 BO for the Delta smelt, "[endangered and threatened] species have been "afforded the highest of priorities," by Congress, even if it means "the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds." *Jewell I*, 747 F.3d at 593, quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). The fact that the smelt is listed under ESA "prohibits [the courts] from making 'such fine utilitarian calculations' to balance the smelt's interests against the interests of the citizens of California." *Jewell I*, 747 F.3d at 593, quoting *TVA*, 437 U.S. at 187. In addition to Congress' mandated priority to protect threatened species, substantial procedural violations of NEPA results in the issuance of an injunction, where, as is the case here, injury is more than "sufficiently likely" – the transfers will degrade the Delta smelt's habitat by moving it into the interior of the Delta, raising the temperature of the LSZ to levels likely lethal to smelt, and, should any smelt survive those insults, heighten their risk of entrainment at the pumps.

The Delta smelt has no choice but to follow the LSZ. This is in contrast to numerous choices that water users in the SLDMWA area have had the opportunity to make over the last few decades, knowing full well the volatility of their water supply given their junior water rights status. The FONSI makes clear that the driving need for the Project is to provide irrigation waters for some of the permanent crops, *i.e.*, almond fields, in that area. 1sr RJN, ex 6, p. 2 ("In the absence of water transfers, growers may not have enough water to meet demands, and some permanent crops could be lost"). No government agency or law of nature told growers to rely more and more on permanent crops like almonds in the SLDMWA service area.

A proper balancing of interests cannot equate to guaranteeing private businesses a steady return on their investments. The injunction standard involving a threatened species and public water supplies does not include a notion of insuring almond growers and others who choose to grow water intensive crops in an area of low water availability and volatility, reap the financial benefits of those decisions

for many years, and then, when their gamble to increase their incomes does not pay off for a season or two, have to harm other more important interests simply to protect their chosen investment.

The environmental assessment does not include any projection of how many acres of land within the SLDMWA's service area, that would otherwise be idled, would remain in production this year if the proposed water transfers occur. We are told that normal variations in crop acreage encompass the idling of as much as 20 percent of a local farmland without any long-term impact to local economies. 1st RJN, Ex 5, p. 2-11. Nothing in the environmental assessment suggests that acreage that would be not be idled if water transfers proceed would come close to 20 percent of SLDMWA's 2,100,000-acre service area.

B. Issuing an injunction favors the public interest.

The public interest is a factor that must be considered with "particular regard" when balancing the hardships. *Amoco*, 480 U.S. at 542; *Earth Island Institute v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). "The preservation of our environment, as required by NEPA . . . is clearly in the public interest." *Earth Island*, 442 F.3d at 1147. This public interest in protecting the environment is paramount when an endangered or threatened species is at risk of harm. *Jewell I*, 747 F.3d at 593. Here, the public interest is clearly favored in having Defendants comply with the important requirements of NEPA. *Alliance For The Wild Rockies*, 632 F.3d at 1138 (recognizing "the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs 'comports with the public interest.'" *see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002) (finding that in actions to protect the environment, "the public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships").[1] Although the

[1] Courts routinely impose either no bond or a minimal bond in public interest environmental cases. *See e.g.*, *South Pasadena v. Slater,* 56 F.Supp.2d 1106, 1148 (C.D.Cal. 1999); *People ex rel Van de Kamp v. Tahoe Regional Planning Agency,* 766 F.2d 1319, 1325 (9th Cir. 1985) (anything other than a nominal bond would "effectively close the courthouse door in public interest litigation by imposing a

current drought surely implicates some important public interests to assist local economies that will suffer from the lack of water due to the drought, the largely economic concerns addressed by the Project do not rise to the level of risking the extinction of an entire species or allowing the Bureau to proceed with such a risk without the proper environmental evaluation. *See Alliance For The Wild Rockies*, 632 F.3d at 1138, quoting *Lands Council*, 537 F.3d at 1005 ("Consistent with Amoco Production Company, we have held that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.").

CONCLUSION

The Bureau has failed to recognize the serious impacts of routing another 175,000 acre-feet – over 57 billion gallons of water – through the Delta and pumping that water in addition to already allocated water through the massive pumps in the southern part of the Delta. The extra pumping will further reverse flows in the Delta. The reduced Delta outflow and extra pumping will move the Delta's LSZ and perhaps the entire remaining population of Delta smelt that live within the LSZ during the summer, further east into the interior of the Delta. Those reverse flows and the eastward movement of the LSZ will force the diminutive Delta smelt away from its relatively safe summer habitats in the western part of the Delta and eastern Suisun Bay into the middle of the Delta, where they will suffer high summer water temperatures that are lethal to the Delta smelt, as well as into the massive CVP and SWP pumps themselves. As Plaintiffs' expert declares, the Project, combined with the SWRCB's relaxed Delta outflow standards, low inflows to the Delta, high water temperatures, and greater reverse flows amounts to a perfect storm of trouble for the smelt that may prevent the species from surviving

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burdensome security requirement on plaintiffs who would otherwise have standing"); *Natl Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 2005 U.S. Dist. LEXIS 16656, pp. 7-9 (D. Or. 2005). Given the public interest, environmental nature of Plaintiffs' claim and Plaintiffs' non-profit status and limited resources, Plaintiffs request that the Court not require a bond as a condition of the preliminary injunction.

through this summer. For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining any water transfers encompassed by the Project.

June 13, 2014

Respectfully submitted,

LAW OFFICES OF THOMAS N. LIPPE

/s/ *Thomas N. Lippe* (as authorized 6/13/2014)
Thomas N. Lippe

LOZEAU DRURY LLP

/s/ *Michael R. Lozeau*
Michael R. Lozeau

Attorneys for Plaintiffs AQUALLIANCE AND CALIFORNIA SPORTFISHING PROTECTION ALLIANCE