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UNITED STATES DISTRICT COURT

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.: COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*)

AQUALLIANCE and CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, by and through their counsel, hereby allege:

I. INTRODUCTION.

1. This is an action brought pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, challenging the decision by Defendants UNITED STATES BUREAU OF RECLAMATION ("Bureau"), RICHARD J. WOODLEY, LOWELL PIMLEY, and DAVID MURILLO, each in their official capacities (collectively "Bureau"), approving a project entitled the 2014 San Luis & Delta-Mendota Water Authority Water Transfers ("SLDMWA Project" or "Project") and finding that the Project will not have a significant effect on the quality of the human environment and does not require an environmental impact statement ("EIS") pursuant to NEPA.

2. Beginning in 2009, the Bureau has approved annual programs establishing a process for the Bureau to approve water transfers from water rights holders and water contractors north of the Sacramento-San Joaquin River Delta ("Delta") to buyers south of the Delta. For the summer of 2014 and the SLDMWA Project, the Bureau has approved a potential total transfer of as much as 175,226 acre-feet of water from the Sacramento River watershed, primarily from the Shasta Reservoir, to be released and transported to buyers within the SLDMWA, which encompasses portions of seven counties (San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara) along the western edge of the San Joaquin Valley. The SLDMWA Project is programmatic in scope and does not approve any specific water transfers by any particular water rights holders or buyers. Individual water transfers will have to be submitted to the Bureau for an additional approval before they can be implemented. Plaintiffs believe, and thereupon allege, that as of the time of this filing, no specific transfers from a specified seller to a specified buyer have as yet been submitted or approved by the Bureau. However, the Environmental Assessment ("EA") for the Project indicates that water transfers may begin as early as July 1, 2014. Plaintiffs are informed and believe that the

Bureau will act within days to approve submitted transfer proposals pursuant to the SLDMWA Project.

3. The proposed water transfers will have likely devastating impacts on the Delta smelt, a small fish listed as threatened under the federal Endangered Species Act that spends its entire life in or near the Delta and generally only lives a single year. The Delta smelt is considered the Delta's canary in a coal mine. Its population has plummeted to a small remnant of its historic abundance, in large part due to the management of Delta water resources for purposes of exporting water for irrigation and other purposes. The health of the Delta smelt population is measured by the regulatory agencies by counting fish caught by the California Department of Fish & Wildlife during fall mid-water trawls in the Delta and calculating an abundance index. From 1967 to 2013, the Delta smelt's abundance index has declined by greater than 95 percent. Any one year where management of Delta water resources for export causes additional harm to smelt populations and habitat could obliterate this native fish species.

4. The Bureau has failed to recognize the serious impacts of routing another 175,000 acre-feet through the northern part of 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 the entire flow of the San Joaquin River and other channels in the southern Delta. The extra pumping will be undertaken pursuant to relaxed Delta outflow and salinity requirements allowed by the State Water Resources Control Board ("SWRCB"). These relaxations in standards will move the Delta's Low Salinity Zone ("LSZ"), the Delta smelt's preferred habitat, further east into the interior of the Delta. Those reverse flows and the eastward movement of the LSZ will draw 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, including that area's high summer water temperatures that are lethal to the Delta smelt, as well as into the massive CVP and SWP pumps themselves.

5. On an annual basis since 2007, the Bureau has treated the transport of these vast quantities of water as neutral to the health of the Delta, merely passing through without diminishing the overall quantities of water that flow out of the Delta into Suisun Bay. As a result, the Bureau has chosen to not prepare an EIS for the SLDMWA Transfers, or any other similarly timed Sacramento Valley to San Joaquin Valley transfers. This determination is contrary to the evidence submitted to the Bureau showing that the transfers, when added to the existing Delta water management regime, will significantly exacerbate the existing adverse impacts on smelt. Further, the Bureau has conducted no review under NEPA of new circumstances and new information relating to the SWRCB's relaxation of several water quality and quantity standards governing Delta water management operations, including a 25% reduction in the minimum amount of water that must be allowed to flow out of the Delta to Suisun and San Francisco bays.

II. JURISDICTION AND VENUE

6. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief) and the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

7. Venue is properly vested in Eastern District of California pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to Plaintiffs claims occurred in the Eastern District and Plaintiffs reside in this District and no real property is involved in the action. Pursuant to Local Rule 120, intradistrict venue is proper in Sacramento, California, because the Plaintiffs claims arise within counties listed in Local Rule 120(d).

8. This complaint is timely filed within the applicable statute of limitations.

III. PARTIES

9. Plaintiff AQUALLIANCE is a California Public Benefit Corporation organized to protect waters in the northern Sacramento River's watershed to sustain family farms, communities, creeks and rivers, native flora and fauna, vernal pools, and recreation. AquAlliance has approximately 320 members who rely on Sacramento Valley groundwater for their livelihoods and live, recreate and work in and around waters of the State of California, including the Sacramento River, its tributaries, and the Sacramento-San Joaquin River Delta ("Delta"). AquAlliance's mission is to defend northern California waters and to challenge threats to the hydrologic health of the Sacramento River watershed. AquAlliance is especially focused on confronting the escalating attempts to divert more and more water from the northern Sacramento River hydrologic region to other parts of California.

10. Plaintiff CALIFORNIA SPORTFISHING PROTECTION ALLIANCE ("CSPA"), which is a non-profit public benefit corporation organized under the laws of the State of California with its main office in Stockton, California. CSPA has approximately 2000 members who live, recreate and work in and around waters of the State of California, including the Sacramento River, San Joaquin River, the Delta, Suisun Bay and San Pablo Bay. CSPA is dedicated to the preservation, protection, and defense of the environment, the wildlife and the natural resources of all waters of California. To further these goals, CSPA actively seeks federal and state agency implementation of the Act and other laws and, where necessary, directly initiates enforcement actions on behalf of itself and its members. CSPA has been actively engaged in proceedings relating to the environmental impact of the SWP as well as the federal Central Valley Project.

11. Members of AquAlliance and CSPA reside in the Delta, the Sacramento River valley, and the San Joaquin River valley. AquAlliance's members rely on groundwater and streams for their homes, businesses, recreation, to irrigate crops, and to participate in the economy of the region.

AquAlliance's members play an active role in water planning and protection. CSPA and its members actively participate in water rights and water quality processes, engage in education and organization of the fishing community, conduct restoration efforts, and vigorously enforce environmental laws enacted to protect fisheries, habitat and water quality. CSPA's members reside and own property throughout California as well as in those areas served by the Central Valley and State Water Projects, and use the waters, including groundwater, affected by the SLMWDA Project, for gardening, landscaping, and growing crops. As water contractors begin pumping additional groundwater in order to replace the CVP water they transfer, the SLMWDA Project risks degrading or lowering the groundwater in areas where Plaintiffs' members operate wells or otherwise rely on groundwater to maintain their properties.

12. Members of AquAlliance and CSPA use the Delta, the Sacramento River, and the San Joaquin River to fish, sail, boat, kayak, swim, birdwatch, view wildlife and engage in scientific study, including monitoring activities. AquAlliance's and CSPA's members have enjoyed fishing for salmon and other fish in the Delta, San Francisco Bay, and the Sacramento River watershed, whose numbers and vitality depend on an intact and healthy ecosystem in the Delta, San Francisco Bay, and the Sacramento River watershed. Where elements of that ecosystem are reduced or eliminated, AquAlliance's and CSPA's members' recreational uses and aesthetic enjoyment of those areas are reduced by their awareness of the waterways degradation. As the degradation of the rivers, their tributaries, and the Delta's ecosystem is further exacerbated, Plaintiffs members' catch fewer fish. The catching and killing of Delta smelt and the drastic reductions in their population numbers substantially alter the ecological balance in the Delta and San Francisco Bay and reduce Plaintiffs' members' aesthetic enjoyment of these areas as they are boating and fishing. Thus, the interests of Plaintiffs' members have been, are being, and will continue to be adversely affected by the Bureau's failure to comply with NEPA and the likely dramatic impacts to the Delta smelt and its continued

existence. The relief sought herein will redress the harms to Plaintiffs and their members caused by Defendants' failure to comply with NEPA.

13. AquAlliance, CSPA, and their members and officers, are deeply concerned about the adverse consequences of the Bureau's continuation of water transfers, year after year, with no thorough environmental impact statement that adequately reviews the adverse direct, indirect, and cumulative impacts of the continuing transfers approved and facilitated by the state and federal governments. These proposed transfers will require the use of additional groundwater, increase depletion of Sacramento Valley groundwater basins and streams, and have potentially catastrophic impacts on the endangered Delta smelt. Plaintiffs' members will be injured by the additional water diverted from groundwater basins and resulting stream impacts without adequate environmental analysis. Consequently, AquAlliance and its members would be directly, adversely, and irreparably harmed by the project and its components, as described herein, until and unless this Court provides the relief prayed for in this complaint.

14. Plaintiffs are informed and believe that there are no other parties required to be joined in this action pursuant to Fed. Rules Civ. Pro., Rule 19. Plaintiffs are informed and believe that the Bureau has not approved any water transfers encompassed by the SLDMWA Project. Despite Plaintiffs' extensive efforts to obtain information from the Bureau regarding any proposed water transfers encompassed by the SLDMWA Project, including numerous e-mails and a May 1, 2014 information request pursuant to the Freedom of Information Act, 5 U.S.C. § 552, the Bureau has not disclosed and Plaintiffs are unaware of any contracts approved by the Bureau and other agencies to transfer water encompassed by the SLDMWA Project.

15. Plaintiffs exhausted all of the administrative remedies available from the Defendants. AquAlliance, other agencies, interested groups, and individuals participated in the administrative proceedings leading up to the Bureau's issuance of the final Environmental Assessment and FONSI

by submitting a comment on the draft Environmental Assessment and FONSI during the agency's brief 20-day comment period. In addition to those comments, on May 30, 2014 and June 10, 2014, Plaintiffs sent via e-mail and overnight delivery correspondence addressed to the Bureau informing the agency of Defendants' failure to comply with NEPA, including violating their duty to prepare a supplemental EIS and Plaintiffs' intent to file this lawsuit.

16. Plaintiffs attempted to persuade Defendants that their environmental review did not comply with the requirements of NEPA, to no avail. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law, in that the Bureau's issuance of the final Environmental Assessment and FONSI as well as the agency's imminent approval of numerous water transfers within the SLDMWA Project are not otherwise reviewable in a manner that provides an adequate remedy to cure the Bureau's violations of NEPA. Accordingly, Plaintiffs seek an order of this Court rectifying Defendant's violations of NEPA.

17. Defendant BUREAU OF RECLAMATION is a federal agency that owns and manages the CVP. The Bureau is the agency that prepared the Environmental Assessment for the SLDMWA Project and approved the FONSI for the SLDMWA Project.

18. Defendant RICHARD J. WOODLEY is sued in his official capacity as the Regional Resources Manager of the Bureau's Mid-Pacific Regional Office. Defendant Woodley is the senior official that signed and approved the FONSI for the SLDMWA Project. Plaintiffs are informed and believe that Defendant Woodley is the official that is responsible for approving water transfers encompassed by SLDMWA Project.

19. Defendant LOWELL PIMLEY is the Acting Commissioner of the Bureau of Reclamation. Commissioner Pimley is sued in his official capacity.

20. Defendant DAVID MURILLO is the Regional Director of the Bureau's Mid-Pacific Regional Office. Regional Director Murillo is sued in his official capacity.

IV. LEGAL BACKGROUND

THE NATIONAL ENVIRONMENTAL POLICY ACT

21. "NEPA … makes environmental protection a part of the mandate of every federal agency and department," *Calvert Cliffs' Coord. Com. v. United States*, 440 F.2d 1109, 112 (D.C. Cir. 1971), and is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. § 1500.1(c). The Council on Environmental Quality ("CEQ"), an agency within the Executive Office of the President, has promulgated regulations implementing NEPA. *See* 10 C.F.R. § 1021.103.

22. Among other things, NEPA requires all agencies of the federal government to prepare a "detailed statement" 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). This statement is commonly known as an environmental impact statement ("EIS"). An EIS must describe: (1) the "environmental impact of the proposed action"; (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented"; and (3) any "alternatives to the proposed action." *Id*.

23. A "*Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (emphasis in original). Major federal actions "include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. . . ." 40 C.F.R. § 1508.18(a). One example of a type of major federal action includes "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and

federally assisted activities." 40 C.F.R. § 1508.18(b). The environmental "effects" that must be considered in an EIS include "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). CEQ regulations list a number of factors that an agency must consider in deciding whether to prepare an EIS. 40 C.F.R. § 1508.27.

24. 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.

25. The regulations prepared by the Council on Environmental Quality ("CEQ") implementing NEPA identify a number of criteria that an agency must consider when determining whether an action may significantly affect the environment. 40 CFR § 1508.27. "'Significantly' as used in NEPA requires considerations of both context and intensity." *Id.* "Context … means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action." 40 CFR § 1508.27(a). "Both short- and long-term effects are relevant." *Id.* "Intensity … refers to the severity of impact." 40 CFR § 1508.27(b). The regulation set forth specific criteria to be considered by an agency in order to evaluate intensity, including:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
> (2) The degree to which the proposed action affects public health or safety.

> (3) Unique characteristics of the geographic area such as proximity to … prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
> (8) The degree to which the action … may cause loss or destruction of significant scientific … resources.
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. §1508.27(b)(1)-(10).

26. Once an agency has prepared an EA and issued a FONSI, an agency must supplement its analysis if there 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)(ii); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998) (holding that an EA must be supplemented in the same manner as an EIS); *Or. Natural Res. Council Action v. United States Forest Serv.*, 445 F.Supp.2d 1211, 1219 (D. Or. 2006). The duty to prepare an environmental assessment is a continuing duty and "[w]hen new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance" as to require the preparation of a supplemental EA or EIS. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). There is an obligation to supplement an EA if there remains major federal action to occur and the new information shows that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already

considered. *Or. Natural Res. Council Action*, 445 F.Supp.2d at 1219, citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). A supplemental EA or EIS must be prepared if "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There 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)(i)-(ii). The agency "[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(c)(2). The agency "[s]hall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council." 40 C.F.R. § 1502.9(c)(4).

THE ADMINISTRATIVE PROCEDURE ACT

27. The APA confers a right of judicial review on any person that is adversely affected by agency action. *See* 5. U.S.C. § 702.

28. The APA provides that the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

29. The APA further provides that the reviewing court "shall…hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as findings that are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E).

FACTUAL AND PROCEDURAL BACKGROUND

The Delta, The Central Valley Project, and the Delta Smelt.

30. The Delta is a triangular-shaped area covering approximately 1,100 square miles, interlaced with about 700 miles of waterways winding through numerous islands. Although altered by extensive farming and levee construction, the Delta remains an essential habitat for numerous fish species. Invariably, a significant number of fish species that rely upon the delta for habitat are

threatened with extinction. The main threat to fish habitat and the ecological integrity of the Delta is the diversion of large quantities of water out of the Delta for irrigation and municipal water supplies, including operation of massive water pumps that pump up to 22,800 acre-feet of water from the Delta in any given day.[1] Even as the summer months approach, approximately 2,000 acre-feet of water is being removed from the Delta every day. In addition to being killed in the Delta pumps, fish and their habitat are adversely affected by increased water temperatures, higher concentrations of salt and pollutants resulting from lower river flows, and loss of turbidity due to impoundment of sediment by upstream dams and reservoirs.

31. California's main water distribution facilities are designed around the fact that about 75 percent of the State's annual rainfall occurs in northern California while only 25 percent of the rainfall occurs in the San Joaquin River Valley and areas south of the Delta. As a result, massive facilities have been constructed over the last 80 years in order to collect and store water from the relatively high precipitation areas of northern California and ship that water south to the relatively dry southern areas of the State. The main plumbing necessary to redirect, *i.e.*, divert Sacramento River watershed flows south that would otherwise flow into Suisun Bay and San Francisco Bay is centered on the vast network of channels and islands formed by the confluence of the Sacramento River and the San Joaquin River as well as the estuarine waters forming the eastern edge of the San Francisco Bay estuary.

32. Two linked water diversion systems have been constructed to move water from northern California to the San Joaquin Valley and southern California – the State Water Project ("SWP") and the federal Central Valley Project ("CVP"). The federal CVP stretches from the

[1] An acre-foot equals the amount of water that would cover an acre of land with one foot of water. One acre-foot of water is equal to 326,000 gallons of water. 22,800 acre-feet of water per day is equal to about 7.4 billion gallons of water per day.

Cascade Mountains near Redding south to the Tehachapis near Bakersfield. The system includes the Shasta Dam, completed in 1945, which can store as much as 4,552,000 acre-feet of Sacramento River water. Shasta Dam and its reservoir is one of twenty dams and reservoirs included in the CVP. In addition to the dams and reservoirs, the system includes numerous canals and pumping facilities.

33. Within the Delta, the CVP includes the Delta Cross Channel to intercept water from the Sacramento River water and diverting it south away from Suisun Bay through a series of man-made channels, sloughs, the Mokelumne River, San Joaquin River, Middle River, and, finally, through Old River to the Jones Pumping Plant. The Jones Pumping Plant is located at the southern end of the Delta about 12-miles northwest of Tracy. The Jones Pumping Plant's six 22,500-horsepower motors lift water up 200 feet from the Delta and then for another mile through three 15-foot diameter pipes which discharge the water into the Delta-Mendota Canal. The pumps are capable of sucking up to 8,500 acre-feet of water per day from the Delta.

34. The main canal siphoning water from the Delta is the 117-mile long Delta Mendota Canal. This canal channels CVP water to water contractors on the San Joaquin River and the Mendota Pool, a reservoir located at the confluence of the King and San Joaquin Rivers north of Mendota, California. Some of the water also is diverted to the San Luis Reservoir near Los Banos in Merced County for regulating flows back to the CVP's Delta-Mendota Canal and the SWP's California Aqueduct. Water also is directed through the Pacheco Conduit, from which water then flows through the Santa Clara Conduit to provide water to contractors in Santa Clara County and through the Hollister Conduit to provide water to contractors in San Benito County.

35. The Delta Mendota Canal can deliver up to approximately 3,000,000 acre-feet of water to contractors within the SLDMWA's service area. Eighty-three (83) percent of this water (or about 2,500,000 acre-feet) is for agricultural water contractors. Of the remainder, from about 150,000 to

200,000-acre feet is for municipal and industrial uses, and 250,000 to 300,000 acre-feet is for wildlife habitat.

36. The SLDMWA's 29 members include mostly water and irrigation districts, as well as the City of Tracy. In addition to representing these entities before the relevant regulatory bodies, since the 1990s, the SLDMWA has contracted with the Bureau to maintain and operate key CVP facilities, including the C.W. "Bill" Jones Pumping Plant ("Jones Pumping Plant"), the CVP's Delta pumping plant, and the Mendota Pool.

37. The State Water Project is California's even more ambitious water diversion system to reroute water from northern California and San Francisco Bay south to the San Joaquin Valley and southern California. The SWP includes 34 storage facilities, reservoirs and lakes, 20 pumping plants, and about 701 miles of open canals and pipelines. Relevant to this complaint, the State's main pumps that divert water south is located in close proximity the Jones Pumping Plant. The Harvey O. Banks Pumping Plant ("Banks Pumping Plant") is located on the southern end of the Clifton Court Forebay. Water is pumped from Old River into the Clifton Court Forebay. The Banks Pumping Plant contains eleven (11) massive pumps that lift water 244 feet up from the Forebay and into the California Aqueduct.

38. The Jones Pumping Plant and the Banks Pumping Plant are operated as a joint point of diversion by the Bureau and the California Department of Water Resources ("DWR"). This means that the Bureau can utilize the Banks Pumping Plant to move CVP water into the Delta-Mendota Canal when the capacity of the Jones Pumping Plant is not sufficient to handle the desired flows. Water is transferred from the California Aqueduct to the Delta-Mendota Canal through the Delta-Mendota Canal/California Aqueduct Intertie, connecting the two canals with two 108-inch diameter pipes a few miles south of the Banks Pumping Facility. Water also can be exchanged between the SWP and CVP through the San Luis Reservoir and the adjacent O'Neill Forebay.

39. The Jones Pumping Plant and Banks Pumping Plant together can pump up to 22,600 acre-feet of water per day out of the Delta. The pumps reverse the natural flow of the southern part of the Bay-Delta, especially in the Old, and Middle Rivers (collectively referred to as "OMR"). As a result, fish, especially small fish such as the Delta smelt, are caught in the reversed flow and drawn through the Delta toward the massive pumps. Although both the CVP and SWP have installed fish collection facilities prior to each set of pumps, these facilities have not prevented massive losses of fish killed at the pumps or drawn into areas of the Delta where temperatures or predators prove lethal.

40. The Tracy Fish Collection Facility is located about 2.5 miles upstream of the Jones Pumping Plant on the Old River. The purpose of the Facility is to divert some of the fish as well as debris that are in the water flowing through Old River. The Fish Collection Facility consists of a series of V-shaped bays that are fitted with louvered fish screens that appear similar to venetian blinds. They are not physical barriers to fish but instead operate as behavioral barriers. The spaces between the louvers are big enough for small fish to pass through. However, the louvers create turbulence which approaching fish generally will attempt to avoid by moving along the face of the louvered fish screens to the apex of the V-shaped bays and into by-pass pipes. The by-pass pipes in turn flow to a second set of louvered fish screens that further concentrate fish caught in the system. Predator fish, including white catfish and striped bass, have learned to await their prey at the louvers and are a significant source of take of smelt, salmon, and other species as they are redirected by the louvers. The fish then are funneled into holding tanks. Several times a day, fish in the holding tanks are emptied into trucks fitted with fish tanks and transported to two release locations in the Delta. Many salvaged fish do not survive the salvage process. Upon release, numerous fish are killed by awaiting predators. Some of the released fish also die due to stress or injury that occurs during the

transfer process. In 2008, ecologist Wim Kemmerer estimated that as many as 30 times more Delta smelt are killed by the pumps than are salvaged.

41. A similar fish salvage facility is operated in conjunction with the SWP's Banks Pumping Plant. In addition to the predator fish that prey on smelt and other fish that are concentrated by that facility's louvers, the 31,000 acre Clifton Court Forebay, through which all waters heading to the Banks Pumping Plant must pass, is plagued by massive numbers of predator fish and birds who feast upon salmon and smelt that are dragged into the Forebay's waters. As Delta smelt are drawn into Clifton Court Forebay, the turbulence and high velocity flows disorient the fish, making them highly susceptible to predation by white catfish, striped bass and other predators awaiting them in the Forebay. Predation within the Forebay may kill as many as 94 to 99.9 percent of all Delta smelt entrained in the Forebay.

42. USFWS has found that over a recent 15-year period, more than 110 million fish were salvaged from the Jones and Banks facility. USFWS has indicated that this number underestimates the number of fish that end up being sucked into the pumps. Smaller fish, including Delta smelt, of less than 30 mm (1.2 inches) in size are not collected effectively at the louvers. Such smaller fish, including many juvenile fish or fish larvae, are killed in the pumps. The death of massive numbers of fish by the federal and state pumps are suspected as a significant cause of the ongoing pelagic organism decline or "POD" which refers to the dramatic reduction in numbers since 2009 of four species of fish, including the Delta smelt, that live in the open waters of the upper San Francisco Bay estuary.

43. 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, not only to fish and other aquatic life, but also to municipal, agricultural, and industrial water users. Two related standards have been developed to describe the

salinity of the Bay-Delta. The first standard is the Low Salinity Zone ("LSZ"). 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. Salinity levels within the LSZ range from 0.5 parts per thousand to six parts per thousand. 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"). X2 is expressed as the distance in kilometers east of the Golden Gate Bridge where salinity levels are 2 ppt. The X2 tends to be located towards the middle of the LSZ. The location of the X2 and the LSZ depends upon how much water is flowing into the Delta and how much is being exported at the Federal and state pumping facilities. The regulatory agencies use X2 as a marker for the LSZ as well as a habitat indicator for fish and as a regulatory standard.

44. Water flow and water quality in the Delta are managed by the Bureau and DWR pursuant to a number of regulatory decisions, including the Delta Water Quality Control Plan, two federal Endangered Species Act biological opinions (one from the National Marine Fisheries Service for salmon, steelhead, and sturgeon; the other from the US Fish and Wildlife Service for Delta smelt), and a State Endangered Species Act Incidental Take Permit (ITP) for state listed salmon, steelhead, and smelt (Longfin and Delta smelt).

45. These regulatory decisions are implemented through SWRCB Order D-1641. Order D-1641 regulates a number of Delta flow and water quality standards, including inflow, minimum Delta outflow, maximum exports through the pumps, the location of the X2, and the maximum ratio of exports to inflow.

46. In regard to the minimum Delta outflow to Suisun Bay, D-1641 requires that, during "critical water years", the Net Delta Outflow Index be no less than a monthly average of 4,000 cubic

feet per second ("cfs") during July and no less than a monthly average of 3,000 cfs during August and September. The SWRCB has deemed the current 2014 water year a critical water year. Order D-1641 provides that "NDOI = Delta Inflow - Net Delta Consumptive Use – Delta Exports." Order D-1641, p. 190, Figure 3. Each of these flow values is calculated from a number of more specific values, some of which are direct measurements of flow, and others of which are estimates.

47. The United States Geological Survey ("USGS") maintains a series of four flow monitoring stations at the mouth of the Delta where its channels consolidate and exit into Suisun Bay. Rather than relying on any estimates or indexing of Delta outflow, the USGS gauges measure the actual net outflow from the Delta, referred to as Net Delta Outflow.

48. In regard to salinity, Order D-1641 relies on an electrical conductivity standard as a measure of the salinity level. Order D-1641 requires that, from April 1 through August 15 in a critical water year, electrical conductivity in the Sacramento River at a monitoring point located at Emmaton, California not exceed 2.78 EC.

49. In regard to Delta inflow and maximum exports, D-1641 provides that maximum exports from July through January not exceed 65 percent of Delta inflow. Delta inflow is determined based on combining flows into the Delta from the Sacramento River, the San Joaquin River, the Sacramento Regional Treatment Plant, the Yolo Bypass, Mokelumne River, Cosumnes River, Calaveras River and a number of other smaller sloughs and creeks that flow directly into the Delta.

50. On May 2, 2014, at the request of the Bureau and DWR, the SWRCB's Executive Director issued an order weakening these key D-1641 standards that would apply during July and August of 2014. 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. 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. The May 2, 2014 Order relaxes the maximum export rate of 65% of Delta inflow by excluding transfer water from the inflow calculation. 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.

51. The effect of these changes is to cause the LSZ, normally located around the salinity compliance location at Emmaton, to move about 3 miles farther east and upstream than it would have been without the relaxation in standards. As a result, this summer the lower outflow and relaxed salinity standards will cause the LSZ to be closer to the CVP and SWP pumps in the interior of the Delta and to have higher water temperatures. Also, the export of water in the same amount as transfer water inflow will cause higher reverse flows near the pumps that increase the risk of smelt mortality by entrainment.

The Threatened Delta Smelt

52. Few fish species rely on the Delta more than the Delta smelt. The Delta smelt was first listed as threatened with extinction by the United States Fish & Wildlife Service ("USFWS") in 1993. The California Fish & Game Commission has identified the Delta smelt as endangered with extinction pursuant to the California Endangered Species Act. 14 Cal. Admin. Code § 670.5(a)(2)(A). According to USFWS, significant threats to the Delta smelt's continuing survival include direct entrainments by State and Federal water export facilities; summer and fall increases in salinity; summer and fall increases in water clarity, and; effects from introduced species. USFWS has designated the entire Delta as critical habitat under the federal Endangered Species Act.

53. On April 7, 2010, USF&WS published a determination that reclassifying the Delta smelt from threatened to endangered was warranted. 75 Fed. Reg. 17667 (Apr. 7, 2010). However, USF&WS additionally concluded that completing the reclassification is precluded by other higher priority listing decisions. *Id*. USF&WS assigned the Delta smelt the 2nd highest priority to

reclassify it as endangered based on the agency's finding that the species faces immediate and high magnitude threats from the present or threatened destruction, modification, or curtailment of its habitat; the inadequacy of existing regulatory mechanisms; and other natural or manmade Factors.

54. Delta smelt are small, slender fish about 2 to 3 inches in length at maturity. Delta smelt have a one-year life span. The Delta smelt spend their entire life in the Delta with occasional periods downstream in Suisun Bay when flows through the Delta are at or above historic averages. Their limited range extends from Suisun Bay east to the Delta and into the lower reaches of the Sacramento and San Joaquin Rivers. The smelt's habitat fluctuates within and near the Delta based on the location of the LSZ. In early winter, apparently triggered by first flush of winter precipitation, the Delta smelt migrate from brackish waters into freshwaters of the delta to spawn. Most of the adult smelt die after spawning. In late spring, after the smelt larvae develop for several months, they migrate back downstream until they reach the LSZ where they reside until the following winter. To the extent exports from the Delta increase at the pumps and river flows into and out of the Delta remain low, the location of the LSZ will move eastward into the Delta. The Delta smelt will follow the LSZ.

55. The Delta smelt is currently in the throes of its most precipitous population declines since surveys of this indicator species began in 1967 and teeters on the brink of extinction. In 2012 and 2013, the abundance index for the Delta smelt were 42 and 18 respectively. In order to be deemed recovered, USFWS has found that the Delta smelt must achieve an abundance index equal to or greater than 239 for two out of five years and not fall below 84 for more than two years in a row. The Delta smelt index has only exceeded 239 once in the past twelve years. The Delta smelt index has only exceeded 84 once in the past 12 years, having fallen below 84 for the past two years as well as for seven straight years from 2004 through 2011.

The SLDMWA Project.

56. The now three-year long drought has sharply curtailed the CVP water available to federal contractors, including contractors within the SLDMWA's service area. Water stored in Shasta reservoir is approximately 50 percent of normal levels. For the current 2014 water year (October 1, 2013 through September 30, 2014), the Bureau's initial water allocations to CVP junior water service contractors are zero (0) percent, and allocations to Sacramento River Settlement Contractors and wildlife refuges, though originally estimated at forty (40) percent of their contract amounts, were increased to seventy-five (75) percent on April 18, 2014, after some late spring rains. On January 17, 2014, Governor Edmund G. Brown, Jr. declared a drought state of emergency. On April 25, 2014, the Governor renewed this proclamation. In addition to increased water conservation, water shortage contingency plans, and accelerating funding for water supply projects, the declaration calls for expedited processing of water transfers.

57. The SLDMWA Project seeks to 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. Although SLDMWA would not contract for any water itself, it proposes to identify potential transfer opportunities and negotiate the specific transfer arrangements on behalf of its members. The Bureau's role would not be to arrange for any transfers but rather to review proposed transfers from north of Delta to south and facilitate such transfers using the CVP facilities to convey the water south. The transferred water would be conveyed through the Delta, the Jones and Banks Pumping Plants, and the Delta-Mendota Canal. The Bureau's review and approval of individual transfers would be based on the criteria set forth in the Draft Technical Information for Preparing Water Transfer Proposals prepared by the Bureau and DWR in 2013, state law, the Draft Interim Guidelines for Implementation of the Water Transfer Provisions of the Central Valley

Project Improvement Act, or the Addendum to the 2013 Draft Technical Information for Preparing Water Transfer Proposals.

58. Beginning prior to 2009, many growers in the SLDMWA service area have shifted their crops from annuals including onions, garlic, and tomatoes to higher value permanent crops, most notably almond trees. Unlike the annual crops commonly grown historically in this area which could rebound from a year where water was not available, permanent crops take about five years to begin to turn a profit and require water year-round in order to survive. The SLDMWA is primarily intended to provide water to permanent crops to prevent the long term impacts of allowing these crops to die.

59. The SLDMWA Project proposes to transfer up to 81,813 acre-feet from north of the Delta to water users within the SLDMWA service area assuming that the CVP provides the northern California water contractors 40 percent of their allocations. The SLDMWA Project proposes to transfer up to 175,226 acre feet if 75 percent of the northern California water contractors' allocations are provided by the Bureau, which is the current allocation.

If The Project Is Allowed To Proceed Without Proper NEPA Review It May Push The Delta Smelt Into Extinction.

60. Neither almond trees nor any other crops currently suffering from the drought are threatened with immediate extinction from the drought. Although plaintiffs agree that efforts should be made to assist farmers in weathering the drought, water transfers and other strategies that will likely harm agricultural communities and the environment in the area of origin and risk plummeting a species into extinction should not be allowed to go forward until a full environmental review that identifies measures to guarantee steps toward recovering the endangered Delta smelt and any other adversely affected species as part of any transfers. As proposed without a full EIS, the

proposed dramatic increases in water transfers and resulting water exports at the State and federal pumps threatens to create a perfect storm of threats to the smelt.

61. The SWRCB's modification of D-1641 coupled with the additional transfer water flowing through the Delta to the CVP and SWP pumps will cause the LSZ to move three-miles further into the Delta and towards the pumps than it would have been without the SWRCB's relaxation in standards and the additional hydraulic pull of the transferred water. As a result, smelt will be occupying the LSZ in this mid-Delta location during the transfer period (i.e., July through September). 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. This increased mortality will be proximately caused by higher, lethal water temperatures prevalent in the upstream location of the LSZ, and increased entrainment in the export pumps that are located near the new upstream location of the LSZ.

62. The transfers under relaxed D-1641 will cause increased smelt mortality by way of several effects. The relaxation in the D-1641 outflow standard and salinity standard will cause the LSZ to move into the interior of the Delta and to have higher water temperatures. The transfers will cause the release of relatively high temperature water stored in upstream reservoirs between July and September that will flow through the Delta to and through the new upstream location of the LSZ. This high temperature water will contribute to near lethal and lethal water temperatures where Delta smelt are located in the new mid-Delta LSZ. 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, assuming any survive the higher water temperatures, than would otherwise occur.

The Bureau's Environmental Assessment and Finding of No Significant Impact

63. The SLDMWA Project is the fourth in a series of recent water transfer projects for which the Bureau has found no significant impacts will result and hence has foregone preparing an EIS. In 2009, the Bureau issued a FONSI for the 2009 Drought Water Bank project that allowed up to 600,000 acre-feet of surface water transfers, up to 340,000 acre-feet of groundwater substitution, and significant crop idling. The Bureau approved and facilitated transfers of 79,926 acre-feet in 2009 pursuant to that FONSI. The Bureau issued a FONSI for the two-year 2010-2011 Water Transfer Program sought approval for 200,000 acre-feet of CVP related water as well as 195,910 acre-feet of additional non-CVP transfer water. No actual water transfers were made pursuant to that FONSI. In 2012, the Bureau issued a FONSI for a 1-year water transfer program of 30,000 acre-feet of non-CVP water. On June 21, 2013, the Bureau issued a FONSI for the 2013 Water Transfer Program that sought approval for 37,715 acre-feet of CVP water made available by groundwater substitution, 92,806 acre-feet of non-CVP water from groundwater substitution and, 65,000 acre-feet from reservoir storage. Approximately 29,217 AF were transferred under actions and approvals addressed and cleared by the 2013 FONSI.

64. On December 28, 2010, the Bureau published a Notice Of Intent To Prepare An Environmental Impact Statement/Environmental Impact Report for a "Long Term North to South Water Transfer Program" in the Central Valley. 75 Fed. Reg. 81642 (Dec. 28, 2010). The Bureau held three scoping meetings from January 11 – 13, 2011 to gather in comments on the scope of the EIS. Plaintiff AquAlliance attended the January 11, 2014 scoping meeting and submitted written scoping comments. The Bureau has not issued a draft EIS pursuant to the December 28, 2010 notice.

65. As difficult as the drought is for California's agricultural operations, the agricultural industry makes up a very small portion of California's overall economy. Although agriculture is an

important industry in the SLDMWA service area and the San Joaquin River basin, growing crops comprises less than two (2) percent of industrial output in the San Joaquin River basin. About three (3) percent of personal income within the San Joaquin River basin is derived from growing crops. In 2007, farming within the San Joaquin River basin produced about 21,000 jobs which represented about two (2) percent of employment in the San Joaquin River basin.

66. On March 13, 2014, the Bureau released the draft Environmental Assessment for the SLDMWA Project. The Bureau provided the public a 20-day comment period on the draft assessment.

67. On April 2, 2014, AquAlliance provided timely comments and accompanying supporting documents raising numerous concerns about the sufficiency of the Environmental Assessment.

68. Twelve days later, on April 14, 2014, the Bureau issued the final Environmental Assessment for the SLDMWA Project. Another eight days later, the Bureau issued the FONSI.

69. Both the Final EA and the 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." Final EA, p. 3-12; FONSI, p. 8. This statement contradicts the Biological Opinion prepared by USFWS in 2008 identifying the impacts on the Delta smelts survival as a species from the operations of the CVP and SWP within the Delta. The 2008 Biological Opinion and other evidence provided to the Bureau discloses that smelt live a majority of their life cycle in the Delta, and during the summer, they occupy the LSZ - wherever it is located. Thus, if the LSZ shifts into the Delta because of additional transfers as well as the SWRCB's changes to the D-1641 standards, the smelt will be in the LSZ within the Delta during the summer. Because the Environmental Assessment and FONSI rely on the mistaken assertion that Delta smelt will not be present within the Delta, the

Environmental Assessment and FONSI fail to evaluate or take into account or address the impacts of near lethal and lethal temperatures within the Delta that will be exacerbated by the Project or the likely entrainment of Delta smelt at the CVP and SWP pumps by the proposed transfers during the summer months.

70. The Environmental Assessment assumes that the water that could be transferred as part of the SLDMWA Project would reduce stream flows in nearby surface waters by twelve (12) percent of the amount pumped for transfer. However, comments submitted to the Bureau cite evidence indicating that stream flow losses, based on modeling rather than an assumption, could be as high as 44, 39, and 19 percent of the amount pumped from groundwater for transfer during, respectively, dry, normal, and wet conditions.

71. The Environmental Assessment and FONSI's discussions of the Project's impacts to groundwater is insufficient. In many cases, water contractors desiring to transfer water under the SLDMWA Project will replace their use of CVP water by pumping additional groundwater. The Environmental Assessment and the FONSI entirely defer any meaningful discussion of the likely impacts of additional groundwater pumping and any mitigation discussion to the individual transfer proposals. Although an environmental assessment need not discuss mitigation where it has concluded, based on substantial evidence, that a federal action will not have any significant impacts, the substantial evidence standard is not met by an environmental assessment that points to future potential mitigation measures as the evidence of no impact and then attempts to hide behind the general rule that the assessment need not discuss the mitigation where there are no impacts. This circular reasoning is arbitrary and capricious. The Environmental Assessment and FONSI rely upon mitigations outlined in the Bureau's and DWR's Draft Technical Information for Preparing Water Transfer Proposals (Oct. 2013) ("Draft Information Guidance"). However, the Draft Information Guidance does not provide for mitigation measures upon which the Bureau could determine they

render the negative groundwater and stream flow impacts that may result from the SLDMWA Project so minor that an EIS is not warranted. The mitigations referenced by the Draft Information Guidance only seek to guard against "unreasonable impacts on fish and wildlife and instream uses, and …. unreasonable economic or environmental impact on the area in which the transfer water originates." Draft Information Guidance, p. 25. Thus, rather than provide evidence that the SLDMWA Project will not have any significant environmental effect, the cited mitigation discussion would allow for significant environmental effects as long as the effects are deemed by the water transferors as reasonable.

72. Other large scale water transfers from the Sacramento Valley to areas south of the Delta are proposed. The Environmental Assessment identifies another possible 305,907 acre-feet of transfers within and from the Sacramento Valley. However, the Environmental Assessment does not identify how much water may be transferred this summer from the Sacramento Valley to areas south of the Delta. The Environmental Assessment's cumulative impacts analysis for biological resources then focuses exclusively on impacts associated with the idling rice fields to generate transferable water. The Environmental Assessment does not discuss any potential impacts of the additional transfers of water on the LSZ and the Delta smelt's habitat, and the likely adverse impacts to the smelt from exposure to higher water temperatures and killing of smelt in the CVP and SWP pumps resulting from pumping the transfer water.

73. The SWRCB modified Order D-1641 on May 2, 2014 subsequent to the Bureau's issuance of the final Environmental Assessment and approval of the FONSI. As a result, neither of those documents takes into account the substantive changes to the Delta standards enacted by the SWRCB's May 2, 2014 Order and their exacerbation of the SLDMWA Project's serious adverse impacts on the Delta smelt.

74. On May 30, 2014, Plaintiffs sent a letter to the Defendants forwarding and summarizing an analysis prepared by Fisheries Biologist Thomas Cannon. Mr. Cannon provided expert analysis on the additional significant impacts that will result to the Delta smelt and its critical habitat from the combination of the SLDMWA Project and the SWRCB's changes to the Delta standards.

75. On June 6, 2014, Defendants sent a letter to Plaintiffs in response to their May 30, 2014 letter. Citing consultations with a hydrologist for one of SLDMWA's members – the Santa Clara Valley Water District – and a staff person of the Bureau, Defendants purported to rebut Mr. Cannon's analysis and indicated that the Bureau would not prepare a supplement EA or EIS. Defendants' letter dated June 6, 2014 did not dispute that the SLDMWA Project and the SWRCB's changes to the Delta standards would result in moving the LSZ into the central Delta; did not dispute that temperatures in the relocated area of the LSZ would be at levels lethal to Delta smelt, and; did not dispute that the movement of the LSZ and accompanying smelt into the central Delta would expose those fish that survived the increased water temperatures to a risk of entrainment in the CVP and SWP pumps.

76. On June 10, 2014, Plaintiffs sent a letter to the Defendants forwarding and summarizing an analysis prepared by Mr. Cannon of the actual outflows from the Delta measured by USGS in May 2014. The USGS flow data indicates that actual outflow from the Delta during May 2014 was -45 cfs. For that same period the NDOI calculated pursuant to SWRCB Order D-1641 estimated Delta outflow at 3,805 cfs. This new information indicates a pronounced discrepancy between the predicted flows relied upon by Defendants and the actual outflows occurring from the Delta into Suisun Bay. The NDOI grossly overestimates actual Delta outflow, at least during low flow conditions. Mr. Cannon also provided a comparison of NDOI and the actual Net Delta Outflow

for the month of July 2013. In July of 2013, NDOI was estimated at 5,340 cfs, and Net Delta Outflow was measured by USGS as 1,169 cfs.

77. Because the SWRCB's lowering of the Delta outflow standard to 3,000 cfs coupled with the proposed SLDMWA water transfers already will have a significant adverse effect on Delta smelt, the new information showing that actual Delta outflows will be much lower and perhaps even negative will be significantly more harmful to the smelt because those even lower flows exacerbate the conditions that make transfers and a 3,000 cfs outflow harmful.

FIRST CLAIM FOR RELIEF
(Violation of the National Environmental Policy Act by Failing to Prepare a Supplemental Environmental Assessment or EIS)

78. Plaintiffs hereby incorporate paragraphs 1 through 77 herein as if set forth in full.

79. The SWRCB's relaxation of critical standards necessary to protect the continued existence of Delta smelt subsequent to Defendant's preparation of the Environmental Assessment and FONSI are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" pursuant to 40 C.F.R. § 1502.9(c)(1)(ii). Likewise, the expert assessment prepared by Thomas Cannon, a well respected fisheries expert, documenting the SWRCB's new standards and their exacerbation of the SLDMWA Project's adverse impacts on Delta smelt and its habitat is significant new information relevant to the Project's impacts.

80. In addition, newly obtained information demonstrates that the actual Net Delta Outflow measured by USGS for May 2014 was -45 cfs. During the same period the NDOI calculated pursuant to SWRCB Order D-1641 estimated Delta outflow at 3,805 cfs. This new information demonstrates that Defendants' sole reliance on the NDOI, without regard to the actual Net Delta Outflows occurring during this historically critical water year, must be reconsidered. The likelihood that actual Net Delta Outflows in July will be substantially less in July, coupled with the changes to

the LSZ and entrainment risks that will result from the SLDMWA Project's water transfers and the SWRCB's relaxation of the outflow standard, presents yet another dire risk to the continued survival of the Delta smelt through the upcoming summer.

81. The Bureau has an ongoing duty to consider, evaluate, and make a reasoned determination whether it is of such significance as to require the preparation of a supplemental EA or EIS. Plaintiffs are informed and believe, and thereupon allege, that the numerous transfers encompassed by the SLDMWA Project, although imminent, have not yet occurred and that the new information shows that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered.

82. The Bureau's failure to prepare a supplemental EA or EIS is arbitrary, capricious, an abuse of discretion and contrary to NEPA, including 40 C.F.R. § 1502.9(c)(4), in violation of the Administrative Procedures Act, 5 U.S.C. §§ 500 *et seq*.

SECOND CLAIM FOR RELIEF
(Violation of the National Environmental Policy Act)

83. Plaintiffs hereby incorporate paragraphs 1 through 82 herein as if set forth in full.

84. Defendants failure to prepare an EIS pursuant to NEPA based on a determination that the SLDMWA Project is not a federal action significantly affecting the human environment is in violation of NEPA and its implementing regulations.

85. The SLDMWA Project is a major federal action significantly affecting the human environment within the meaning of 42 U.S.C. § 4332(2)(C) for at least the following reasons:

a. The SLDMWA Project will result in significant impacts to the human environment including impacts to surface waters in the Sacramento Valley and impacts to biological resources within the Delta, in particular to the endangered Delta smelt.

b. The SLDMWA Project "may adversely affect an endangered or threatened species or its [critical] habitat" within the meaning of 40 C.F.R. § 1508.27(b)(9);

c. The SLDMWA Project's effects on the quality of the human environment are highly controversial within the meaning of 40 C.F.R. § 1508.27(b)(4);

d. The SLDMWA Project's effects on local groundwater, streamflow levels, and the Delta smelt are highly uncertain or involve unique or unknown risks to the endangered smelt and to groundwater dependent agricultural communities in the Sacramento River valley within the meaning of 40 C.F.R. § 1508.27(b)(5);

e. The SLDMWA Project "may establish a precedent for future actions with significant effects" within the meaning of 40 C.F.R. § 1508.27(b)(6);

f. The SLDMWA Project is related to other actions with individually insignificant but cumulatively significant impacts within the meaning of 40 C.F.R. § 1508.27(b)(7);

g. The SLDMWA Project may cause loss or destruction of significant scientific … resources, *i.e.*, the extinction of an indicator species for the entire Delta ecosystem, to an extensive degree within the meaning of 40 C.F.R. § 1508.27(b)(8); and

h. The SLDMWA Project threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment within the meaning of 40 C.F.R. § 1508.27(b)(10).

86. Defendants' actions in failing to comply with NEPA are arbitrary, capricious, an abuse of discretion and contrary to law in violation of the Administrative Procedures Act, 5 U.S.C. §§ 500 *et seq.*, and are subject to judicial review thereunder.

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THIRD CLAIM FOR RELIEF
(FONSI and Environmental Assessment are Arbitrary and Capricious)

87. Plaintiffs hereby incorporate paragraphs 1 through 86 herein as if set forth in full.

88. The Final Environmental Assessment and FONSI fail to take a hard look at the SLDMWA Project's potential significant impacts on the Delta smelt and its habitat. The Bureau's assessment and decision fail to acknowledge the presence of the Delta smelt within the interior of the Delta during the summer months in dry conditions when the CVP and SWP pumps are being operated. The Environmental Assessment and FONSI fail to evaluate or take into account or address the impacts of lethal temperatures within the Delta that will be exacerbated by the Project or the likely entrainment of Delta smelt at the CVP and SWP pumps by the proposed transfers during the summer months.

89. The Environmental Assessment and FONSI arbitrarily rely on an assumption that the Project's increase in groundwater pumping would only reduce stream flows in nearby surface waters by twelve (12) percent of the amount pumped for transfer. No data underlying the twelve (12) percent assumption is referenced or identified in the Environmental Assessment or FONSI. In contrast to that uncorroborated assumption, evidence in the record shows that stream flow losses could be as high as 44 percent of the amount pumped from groundwater for transfer during the upcoming dry summer months.

90. The Environmental Assessment and FONSI fail to take a hard look at the SLDMWA Project's impacts to groundwater in those areas where a water transferor replaces transferred water by increasing groundwater pumping. In many cases, water contractors desiring to transfer water under the SLDMWA Project will replace their use of CVP water by pumping additional groundwater. The Environmental Assessment and the FONSI do not adequately discuss the localized impacts of the SLDMWA Project's groundwater impacts, noting the considerable

uncertainty that exists regarding localized impacts. For these impacts, the assessment and FONSI entirely defer any meaningful discussion of the likely impacts of additional groundwater pumping and any mitigation discussion to the individual transfer proposals. Because the future mitigations are also vague, the Environmental Assessment's and FONSI's reliance on those uncertain measures is arbitrary and fails to take hard look at the groundwater impacts near the well locations. The referenced mitigation measures do not provide the Bureau a sufficient basis to determine that the mitigations render the negative groundwater and stream flow impacts that may result from the SLDMWA Project so minor that an EIS is not warranted.

91. The Environmental Assessment and FONSI fail to take a hard look at the SLDMWA Project's cumulative impacts on Delta smelt and its critical habitat. Although identifying other possible water transfers in the region, the Environmental Assessment fails to identify the potential cumulative water transfers from the Sacramento Valley to buyers south of the Delta. The Environmental Assessment does not discuss any potential impacts of the cumulative transfers of water on the LSZ and the Delta smelt's habitat, and the likely adverse impacts to the smelt from exposure to higher water temperatures and killing of smelt in the CVP and SWP pumps resulting from pumping the transfer water.

92. Defendants' actions in failing to comply with NEPA are arbitrary, capricious, an abuse of discretion and contrary to law in violation of the Administrative Procedures Act, 5 U.S.C. §§ 500 *et seq*., and are subject to judicial review thereunder.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Adjudge and declare that significant new circumstances or information has arisen relevant to environmental concerns and bearing on the SLDMWA Project or its impacts requiring the preparation of a supplemental environmental assessment or EIS.

2. Order the Defendants to prepare, circulate and consider a supplemental environmental assessment or EIS necessary to comply with the requirements of NEPA and its implementing regulations.

3. Adjudge and declare that the SLDMWA Project is a major federal action significantly affecting the human environment and that Defendants failure to prepare EIS pursuant to NEPA violates that statute, its implementing regulations and the Administrative Procedures Act.

4. Order the Defendants to prepare, circulate and consider an EIS necessary to comply with the requirements of NEPA and its implementing regulations.

5. In the alternative, adjudge and declare that the Environmental Assessment and FONSI issued for the SLDMWA Project are arbitrary and capricious pursuant to NEPA and the Administrative Procedures Act.

6. Issue an order vacating the Environmental Assessment and the FONSI issued for the SLDMWA Project.

7. Preliminarily and permanently enjoin Defendants from approving any water transfers encompassed by the SLDMWA Project unless and until Defendants comply with the requirements of NEPA.

8. Award Plaintiffs their reasonable attorneys' fees and its costs, expenses and disbursements associated with this action.

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9. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

DATED: June 11, 2014

Respectfully submitted,

LAW OFFICES OF THOMAS N. LIPPE

/s/ Thomas N. Lippe (as authorized on 06/11/2014)
Thomas N. Lippe

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/s/ Michael R. Lozeau
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