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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY and WESTLANDS WATER DISTRICT

Plaintiffs,

v.

SALLY JEWELL, et al.,

Defendants,

and

THE HOOPA VALLEY TRIBE; THE YUROK TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; and INSTITUTE FOR FISHERIES RESOURCES,

CASE NO. 1:13-CV-01232-LJO-GSA

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs' emergency motion seeks to enjoin the release of water to which they have no right, based on a cause of action that they have not plead, based on speculations of harm and injuries to others than themselves.[1] This Court should reject Plaintiffs' motion as it did approximately one year ago, when the Court held, in response to Plaintiffs' motion for a preliminary injunction, that the release of approximately 20,000 acre feet ("AF") of water from the Trinity Dam in response to the risk of a potentially serious fish die-off was in the public interest.[2] ECF No. 91 at 19.

On July 30, 2014, Reclamation determined that, due to projected below-average Chinook salmon escapement and projected flows, it would not institute preventative flow augmentation as it had in 2013, but would instead rely on rigorous fish-health monitoring and, if necessary, emergency releases. Subsequently however, conditions deteriorated significantly. As a result of changed conditions on the Trinity and Klamath Rivers, including high water temperatures, decreased availability of cold water refugia, observed crowding of fish and stressed behavior, and reported algal blooms, the Bureau of Reclamation ("Reclamation") concluded that "emergency flow augmentation action must be taken to prevent and mitigate environmental conditions that pose a substantial risk of harm to important natural, cultural, and historic resources." Decision Memorandum, p. 1, Exhibit A hereto; NEPA Memorandum, Exhibit B hereto

Reclamation has the authority to augment flows in the lower Klamath River to prevent a major fish die-off of 2014 fall run Chinook Salman. Further, in deciding to exercise this authority, Reclamation complied with the emergency regulations promulgated by the Council on Environmental Quality ("CEQ") and the Department of the Interior ("DOI") for compliance with the National Environmental Policy Act ("NEPA"). Thus, Plaintiffs' allegations of NEPA

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[1] Due to the time constraints in responding to Plaintiffs' motions, Federal Defendants were unable to prepare and include tables of contents and authorities with this filing, but can do so if required.

[2] The estimated amount of water to be released at the time of this Court's ruling was high, as only approximately 17.5 TAF was used for this action in 2013. See Fed. Defs.'Answer, ECF No. 103, ¶ 51.

violations should be rejected. In addition, Plaintiffs have failed to provide the requisite notice to challenge the 2014 action under the Endangered Species Act ("ESA"), so the Court must dismiss that claim as well. Moreover, Reclamation has complied with the ESA by examining the effects of its proposed action and whether its action represented an irreversible or irretrievable commitment of resources, and rationally concluded it did not. Finally, the balance of the equities favors implementation of the emergency action challenged in Plaintiffs' motions, and allowing the releases to continue. No injunction should issue.

LEGAL AND FACTUAL BACKGROUND

I. Factual Background

Because merits briefing regarding the claims included in Plaintiffs' Amended Complaint, ECF No. 95, has already been completed, and to reduce duplicative briefing of the relevant background for the August 22, 2014 decision is already before the Court, Federal Defendants incorporate their Memorandum of Points and Authorities in Support of their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 120-1) and their Reply Memorandum (ECF No. 135) by reference as if fully reproduced herein, and Federal Defendants only address those facts uniquely applicable to the August 22, 2014 Decision to augment flows in response to conditions in the lower Klamath River that pose a substantial risk of harm to a large scale fish die off via preventative releases of water ("August 22, 2014 Decision").

On July 30, 2014 Reclamation initially announced that, it would rely on a rigorous fish health monitoring protocol and the fish health trigger as described in the August, 2013 memorandum jointly developed by NOAA Fisheries and the U.S. Fish and Wildlife Service, and not on preventative flows as it had done in previous years. Person Decl., ¶ 8.[3] The monitoring protocol prescribes that if a certain number of Ich cases were confirmed, the flow rate of the lower Klamath River would be doubled for a period of seven days. Id. This decision was based

[3] This memorandum was submitted as Exhibit 11 at the August 20-21, 2013 Hearing on Plaintiffs motion for a preliminary injunction with respect to the 2013 flow augmentation releases and can be resubmitted to the Court if required.

on projected flows and a lower than average projected run adult fall Chinnok salmon returning to the lower Klamath River. Id. at ¶¶ 5-7.

Reclamation's July 30, 2014 decision was immediately scrutinized by a diverse set of groups, including Native American Tribes, the State of California, county governments, members of California's congressional delegation and environmental groups. Id. at ¶ 9. In consideration of this broad set of requests, Reclamation informed the public that any reconsideration of its decision would be based on scientific merit, Accordingly, Reclamation began investigation and discussion with state and federal fishery experts, tribal fishery experts, and consultants to further assess current conditions on the Klamath and, in particular, whether there were pertinent factors unique to the conditions in 2014 that had not been considered in the 2013 memoranda and that required a response different than would be prescribed under that memorandum. Id. Reclamation consulted with Plaintiffs as well regarding the developing situation.

Although low flows had been projected for the lower Klamath River, flows from Klamath River tributaries were extremely low and in some cases are near zero. Reck Decl., ¶¶ 10-12. These flows are lower than what was projected meaning that thermal refugia for fish in the tributaries is extremely limited and fish have been holding in the mainstem of the Klamath. Id. Temperatures in the lower Klamath River have been warmer than forecasted. Id. The effect of the warmer temperatures on the migrating fish is that they hold in the limited thermal refugia available, which contributes to fish crowding and fish stress. Id.

The lower accretions from Klamath River tributaries has contributed to a lower general water quality in the lower Klamath River because the tributaries are generally of better water quality and are colder than water in the mainstem Klamath River. Id. at ¶13. The poor water quality due to higher levels of nutrient rich water has proved conducive to the growth of blue-green algae in the river, which produces microsystin toxins. Id. Although there are no available studies regarding the risk of exposure to this toxin on returning adult salmon, there is evidence that juvenile salmonids and resident fish are more succeptible to bioaccumulation of these toxins

and that if these fish die, they could serve as disease vectors and infect the returning adult salmon. Id. at ¶ 14.

Reclamation also considered the fact that significant numbers of adult fish had begun moving into the lower Klamath River earlier than expected. Id. at ¶ 16. Due to the high temperatures and low flows, these fish have been observed holding in thermal refugias in crowded schools. Id. As explained in the Declaration of Donald Reck:

> Just three weeks ago, on August 1, 2014, the Klamath Fish Health Assessment Team (KFAT) noted that water temperatures in the river were generally between 24 and 26 degrees C and the flow in the lower Klamath River dropped to 2,000 cfs. At the same time, thousands of juvenile Chinook salmon and hundreds of adult steelhead and Chinook salmon were crowded into the Bluff Creek cool water refugia, and possibly more than 1,000 adult steelhead and Chinook salmon were crowded into the Blue Creek cool water refugia. About 25 percent of the juvenile fish at the Pecwan cool water refugia showed signs of illness. Adult salmonids crowded into cool water refugia were observed to be stressed and dark in color.
>
> A week later, on August 8, the KFAT issued a press release stating that they were on high alert for signs of fish mortality, as there had already be observed dead adult salmonids in the mainstem Klamath River. And a week after that, Dr. Joshua Strange, Stillwater Sciences, prepared a memorandum "Update on Flow Forecast for the lower Klamath River and Adult Fish Kill Risk for 2014" that summarizes environmental conditions in the lower Klamath River at that time.

Reck. Decl.¶¶ 20-21 (citing Strange Memorandum, Ex. 3 to Reck. Decl.).

In accordance with the ESA, Reclamation also expressly considered the effects of the proposed releases on ESA-listed species under the jurisdiction of NMFS, including the Southern Oregon/Northern California Coasts ("SONCC") Coho salmon in the Klamath River Basin, and Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, California Central Valley steelhead, and Southern Distinct Population Segment ("DPS") of North American Green Sturgeon. Reck Decl. Ex. 4 at 2. Reclamation explained that the 2002 fish die off included an estimated 344 listed Coho salmon. Id. at 1. Because operation of the Trinity River Division and its potential affects to these species was described in Reclamation's 2008 biological assessment for the long-term operation of the CVP and State Water Project, and because Reclamation is in ongoing ESA consultation with NMFS as it relates to the TRD and its

effects on these species, Reclamation considered whether the proposed releases would violate ESA Section 7(d). Reclamation acknowledged that temperature changes are expected to occur in the Trinity River and lower Klamath River, but that temperature targets are expected to be met. Reclamation further noted that a less than 0.1 [degree Fahrenheit] impact was expected in the upper Sacramento River. Ultimately, Reclamation concluded that the proposed release would comport with NMFS's 2009 biological opinion and would not violate Section 7(d) because the "2014 late-summer flow augmentation releases will continue the status quo as to the listed species in that Reclamation still retains discretion to provide flow and temperature conditions that are consistent with currently anticipated conditions with respect to listed fish." Id. at 2.

Based on these observations of changed conditions, on August 22, 2014, Reclamation decided to implement preventative flow augmentation in the lower Klamath River, on an emergency basis, to alleviate the conditions prevailing which represented a high risk of disease transmission. ("August 22, 2014 Decision"). As the August 22, 2014 Decision Memorandum to Support Emergency Activities for: Emergency Lower Klamath River Flow Augmentation During Late Summer 2014 ("Decision Memorandum") issued by Reclamation explained, flow augmentation would begin on August 23, 2014 and continue through approximately September 14, 2014, and would target a minimum flow of 2,500 cubic feet per second (cfs) in the lower Klamath River. Decision Memorandum, Exhibit A hereto; NEPA Memorandum, Exhibit B hereto. This action includes a one-day pulse flow of 4,000 cfs in the lower Klamath River which would "further improve environmental conditions and encourage fish to disperse from crowded holding areas and continue their spawning migrations." Id. The Decision Memorandum explained that Central Valley Project ("CVP") water users were consulted by Reclamation with respect to the emergency response, and that exports from the Trinity River sub-Basin to the Sacramento basin are not expected to be affected in 2014 as operational decisions were previously made and will not be affected by the emergency response action." Id. The Decision Memorandum also explained that Reclamation, in reaching the decision, Reclamation had "extensively coordinated with the Hoopa Valley and Yurok Tribes, the U.S. Fish and Wildlife Service, NOAA Fisheries, and the California Department of Fish and Wildlife." Id.

II. Legal Standards

A. Standard of Judicial Review for a Preliminary Injunction or a Temporary Restraining Order

"The standard for granting a temporary restraining order is identical to that for a preliminary injunction." Arakaki v. Cayetano, 198 F. Supp. 2d 1165, 1173 (D. Haw. 2002). A preliminary injunction "is a matter of equitable discretion" and is "an extraordinary remedy that may only be awarded upon a clear showing that the [plaintiff] is entitled to such relief." Earth Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010), quoting Winter v. Natural Res. Def. Council, 555 U.S. 7, 24, 32 (2008). As the Supreme Court has held, a plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Winter, 555 U.S. at 19; see also Am. Trucking Assocs. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). If likelihood of success on the merits cannot be demonstrated, a preliminary injunction should be denied even though there may be evidence of irreparable harm. Kandra v. United States, 145 F. Supp. 2d 1192, 1200-01 (D. Or. 2001). Moreover, even where success on the merits is likely or "serious questions" are raised, an injunction "is not a remedy which issues as of course," even in an environmental case. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (citation omitted); Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545–46 (1987). An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted), and does "more than merely allege imminent harm sufficient to establish standing," Associated Gen. Contractors v. Coal. for Econ. Equity, 950 F.2d 1401, 1410 (9th Cir. 1991); Ctr, for Food Safety v. Vilsack, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, … a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it."). Even in the extraordinary case

where a court issues an injunction, the scope of relief should be limited, and relief should be granted only to the extent necessary. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 130, 158-163 (2010).

B. Standard of Review of Agency Interpretations of Statutes

As discussed further herein, Reclamation took the actions challenged by Plaintiffs pursuant to statutory authority which Congress has charged the agency with administering. Pursuant to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) and its progeny, a reviewing court must give deference to an agency's interpretation of a statute which it administers. Under Chevron, a court must first determine whether "Congress has directly spoken to the precise question at issue." Id. at 842-43. Where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. But if Congress did not specifically address the matter, the court "must respect the agency's construction of the statute so long as it is permissible." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000); accord Wash. State Dep't of Game v. ICC, 829 F.2d 877 (9th Cir. 1987). Under this second step in the Chevron analysis, "[t]he sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.'" Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712 (2011) (citing Chevron, 467 U.S. at 843). Even where Congress has not expressly delegated authority to implement particular provisions of a statute, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." United States v. Mead Corp., 533 U.S. 218, 229 (2001) (citation omitted).

C. The National Environmental Policy Act

NEPA was enacted to foster better decision making and informed public participation for actions that affect both people and the natural environment. See 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). To that end, the statute does not mandate particular results, but simply establishes procedural

requirements for assessing the potential environmental impacts of an agency's decisions. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989); Methow Valley, 490 U.S. at 349-50. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action." Methow Valley, 490 U.S. at 351 (footnote omitted).

NEPA directed federal agencies "to the fullest extent possible" and through consultation with CEQ to implement procedures to comply with NEPA and, for "major federal actions significantly affecting the quality of the human environment," to prepare a "detailed statement" regarding the potential environmental impacts of the action. 42 U.S.C. § 4332(2)(B)-(C). CEQ regulations include a provision that address emergency circumstances that prevent federal agencies from fully complying with NEPA's procedural requirements before taking action.[4] The regulation provides as follows:

> Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

40 C.F.R. § 1506.11. Alternative arrangements implemented pursuant to 40 C.F.R. § 1506.11 are not an exemption from NEPA's requirements; instead, they establish an alternative means for complying with the statute. See, e.g., Valley Citizens for a Safe Env't v. Vest, No. 91-30077, 1991 WL 330963, at *6 (D. Mass. May 6, 1991) ("[T]he CEQ and the Air Force have complied with section 1506.11 by making 'alternative arrangements' for procedural compliance with NEPA."); Crosby v. Young, 512 F. Supp. 1363, 1386 (E.D. Mich. 1981) ("CEQ has been delegated the responsibility to implement the procedural requirements of NEPA.").

On May 12, 2010, the CEQ issued additional guidance regarding NEPA compliance in responding to emergencies, which clarifies that agencies should "not delay immediate actions

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[4] CEQ was "established by NEPA with authority to issue regulations interpreting it," and CEQ has promulgated regulations, like this one, setting out steps that agencies must follow. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756-57 (2004); see Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (citing 42 U.S.C. 4344(3)). CEQ's interpretation of NEPA is entitled to "substantial deference." Methow Valley, 490 U.S. at 355-356.

necessary to secure lives and safety of citizens or to protect valuable resources," but should "[c]onsult with CEQ as soon as feasible." May 12, 2010 Guidance, Attach. 1, p. 1, Ex. C hereto (emphasis omitted). If the action is not expected to have "significant" environmental impacts, the CEQ guidance makes clear that the action agency is not required to secure alternative arrangements under 40 C.F.R. § 1506.11 "because the environmental impacts are not expected to be significant;" instead, the agency is directed to "[p]repare a focused, concise EA" addressing the core elements of an EA as found in 40 C.F.R. § 1508.9" which are: "the need for the proposal"; "alternatives as required by NEPA section 102(2)(E)"; "the description of environmental impacts of agency proposed actions and the alternatives"; and, "the list of agencies and persons consulted." Id. at Attach. 1, para. 2.c; Attach. 2 at 1.

The Department of Interior has also promulgated regulations implementing NEPA that address emergency responses. If the "Responsible Official" for an agency determines that "an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation":

> (a) The Responsible Official may take those actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources. When taking such actions, the Responsible Official shall take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical.
>
> (b) The Responsible Official shall document in writing the determination that an emergency exists and describe the responsive action(s) taken at the time the emergency exists. The form of that documentation is within the discretion of the Responsible Official.
>
> (c) If the Responsible Official determines that proposed actions taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are not likely to have significant environmental impacts, the Responsible Official shall document that determination in an environmental assessment and a finding of no significant impact prepared in accordance with this part, unless categorically excluded (see subpart C of this part). If the Responsible Official finds that the nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact, the Responsible Official shall consult with the Office of Environmental Policy and Compliance about alternative arrangements for NEPA compliance. The Assistant Secretary, Policy Management and Budget or his/her designee may grant an alternative

> arrangement. Any alternative arrangement must be documented. Consultation with the Department must be coordinated through the appropriate bureau headquarters.
>
> (c) The Department shall consult with CEQ about alternative arrangements as soon as possible if the Responsible Official determines that proposed actions, taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are likely to have significant environmental impacts. The Responsible Official shall consult with appropriate bureau headquarters and the Department, about alternative arrangements as soon as the Responsible Official determines that the proposed action is likely to have a significant environmental effect. Such alternative arrangements will apply only to the proposed actions necessary to control the immediate impacts of the emergency. Other proposed actions remain subject to NEPA analysis and documentation in accordance with this part.

43 C.F.R. § 46.150. Reclamation's NEPA Handbook also provides guidance with respect to emergency actions, and states that where an emergency exists, "[t]he responsible official may immediately take actions necessary to control an emergency situation and mitigate harm to life, property, or important natural, cultural, or historic resources." NEPA Handbook, 3-17, available at: http://www.usbr.gov/nepa/ (last visited Aug. 26, 2014).

D. The Endangered Species Act.

Plaintiffs essentially take the position that Reclamation was precluded from taking emergency action to prevent a potential fish die off in this instance because it did not take the time for full ESA consultation and compliance. The ESA provides both substantive and procedural requirements designed to carry out its goal of conserving endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(b). Anadromous species, including those at issue here, are under the jurisdiction of NMFS.[5]

ESA Section 7(a)(2) requires federal agencies to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical

[5] The "Secretary" referred to in the ESA may be either the Secretary of Interior or the Secretary of Commerce, depending on the species at issue. 16 U.S.C. § 1532(15). The Secretary of Commerce has jurisdiction over anadromous species, and has delegated his authority to NMFS.

habitat. 16 U.S.C. § 1536(a)(2). "Should the [action] agency find that its proposed action *may* affect a listed species or critical habitat, it must formally or informally consult with [the consulting agency]." San Luis & Delta-Mendota Water Authority v. Jewell 747 F.3d 581, 596 (9th Cir. 2014).

Informal consultation includes "all discussions, correspondence, etc., between the [consulting agency] and the [action] agency … designed to assist the [action] agency in determining whether formal consultation ... is required." 50 C.F.R. § 402.13(a). Informal consultation suffices where the action agency determines that its proposed action "may affect," but "is not likely to adversely affect any listed species or critical habitat," and the consulting agency concurs in writing. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). "Adverse effect" is a term of art meaning effects not "discountable, insignificant, or beneficial." Endangered Species Consultation Handbook, 3-12 (http://fws.gov/endangered/esa-library/#consultations (last visited Agus. 26, 2014)). To determine if a proposed action is likely to adversely affect the species or critical habitat, action agencies may prepare a biological assessment. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(a), (b), 402.01(a), 402.02.

The ESA requires formal consultation only when an agency finds its proposed action is "likely to adversely affect" a listed species or its critical habitat. *Id*. § 402.14(a); San Luis, 747 F.3d at 596. Formal consultation concludes when the consulting agency issues a biological opinion assessing the likelihood of any "jeopardy" to the species and any "destruction or adverse modification" of critical habitat. *Id*. § 402.14(g). The ESA's implementing regulations also set forth circumstances where, after the Section 7 process is completed, the action agency must "reinitiate" consultation, including situations where "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," or "the amount or extent of taking specified in the incidental take statement is exceeded." 50 C.F.R. § 402.16.

If an action agency and consulting agency have initiated or reinitiated consultation in accordance with Section 7(a)(2) of the ESA, Section 7(d) provides additional guidance regarding the activities the action agency may undertake while consultation is ongoing. Section 7(d) of the

ESA states:

> After initiation of consultation required under subsection (a)(2) the Federal agency … shall not make any irreversible or irretrievable commitment o resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d). This section was "enacted to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species." Wash. Toxics Coalition, 413 F.3d at 1034–35. Section 7(d) does not replace the requirements found in section 7(a)(2); rather, it "clarifies" those requirements. Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 n. 14 (9th Cir.1994) (citation omitted).

E. The Administrative Procedure Act

Plaintiffs' claims are reviewed pursuant to the Administrative Procedure Act ("APA"), which imposes a narrow and highly deferential standard of review limited to a determination of whether the agency took final agency action that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A); see Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). An agency action is arbitrary and capricious only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The court's review of the agency's action is limited to the administrative record that was before the agency decision maker. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). In addition, an agency's action is entitled to the presumption of administrative regularity. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 544 (1978). The party bringing an APA case bears the burden of demonstrating that the agency's actions were arbitrary and

capricious. See Comm. to Pres. Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1555 (10th Cir. 1993).

In undertaking this review, the Court should defer to agency technical and scientific expertise. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 610, 618, 620-21 (9th Cir. 2014); United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) When considering environmental impacts under NEPA, agencies are entitled to select their own methodology as long as that methodology is reasonable. See e.g., Balt. Gas & Elec. v. Natural Res. Def. Council, 462 U.S. 87, 100-01 (1983). Accordingly, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378; see also Ecology Ctr. v. Castaneda, 574 F.3d 652, 658-59 (9th Cir. 2009) (noting that deference is particularly appropriate when questions of scientific methodology are involved). Thus, the Court's role is not to weigh conflicting expert opinions or to consider whether the agency employed the best scientific methods, and the fact that Plaintiffs dispute Reclamation's findings and conclusions is not a sufficient basis for the Court to conclude that Reclamation's action was arbitrary and capricious.

ARGUMENT

I. Plaintiffs Are Not Likely to Prevail on the Merits of Their Claims

Plaintiffs are not entitled to an injunction because they have not and cannot show that they are likely to prevail on the merits of their claims. Plaintiffs allege: (1) that Reclamation's August 22, 2014 decision to augment flows in order to prevent a fish die-off violates § 3406(b)(23) of the Central Valley Project Improvement Act ("CVPIA") by exceeding the permanent annual volumes of water established for Trinity River fishery purposes; (2) that the decision violates § 3411(a) of the CVPIA and 43 U.S.C. § 383 by using Central Valley Project ("CVP") water outside the authorized place of use; (3) that Reclamation violated NEPA by taking emergency action pursuant to CEQ and DOI Regulations and because the 2014 action will likely have significant environmental impacts and require the preparation of an EIS; and, (4) that the August 22, 2014 decision violates Section 7 of the ESA because Reclamation failed to consult with NFMS. Plaintiffs have not met their burden

A. Reclamation's August 22, 2014 Decision to Augment Flows Does Not Violate The CVPIA Or NEPA.

1. Plaintiffs' Arguments Misconstrue the CVPIA and Are Without Merit.

Plaintiffs' contention that Reclamation violated § 3406(b)(23) of the CVPIA fails. As Federal Defendants explained in their merits briefing, Reclamation has the authority, and indeed the obligation, to make releases to augment flow in the Lower Klamath River which stems from Trinity River Division Central Valley Project Act of 1955, Pub. L. No. 84-386, 69 Stat. 719 (1955) and nothing in section 36 of the CVPIA suggests that it preempts or supplants the original 1955 authorization for the TRD. ECF Nos. 120-1 at 19-25, 135 at 6-12. Plaintiffs' second argument fares no better. As Federal Defendants explained in their merits briefing, Reclamation is not required to obtain authorization for a change in the place of use under its State permits to make releases "to improve instream conditions for the benefit of aquatic resources." ECF Nos. 120-1 at 26- 28, 135 at 13- 15. Because these arguments regarding the 2013 releases apply with equal force to the 2014 releases made for the same purpose, but under different and unforeseen circumstances, Federal Defendants incorporate their merits briefing as if fully reproduced herein and focus on the Plaintiffs' latest pleading defects and arguments as to alleged NEPA and ESA violations that are unique to the August 22, 2014 decision to augment flows on an emergency basis in order to prevent a large scale fish die-off.

In addition, with respect to Plaintiffs' contention that Reclamation is in violation of § 3411(a) of the CVPIA and 43 U.S.C. § 383, Reclamation has additional documentation from a California State agency regarding its compliance. As explained in the merits briefing, when Reclamation began planning for 2012 augmentation flows, Reclamation sought confirmation from the State Water Board that it did not need the Board's approval to make the fall augmentation releases, and the State Water Board stated that "Reclamation may bypass water without a change approval, and may release water for various purposes that do not require State Water Board approval" including releasing for instream purposes. This year, the North Coast Regional Water Quality Board, a state agency, sent a letter to the Acting Commissioner of Reclamation urging Reclamation to release protective minimum flows to address the critical situation in the lower

Klamath River. See Exhibit D hereto. The State of California has thus has indicated that Reclamation's releases do not violate state law.

In their memorandum, Plaintiffs also misstate the holding of Wild Fish Conservancy v. Jewell, 739 F.3d 791, 799 (9th Cir. 2013). In that case, while the Ninth Circuit ultimately ruled that Wild Fish Conservancy lacked standing to pursue its claim, the court recognized that federal courts should not interfere with the administration of state water law, and thus Wild Fish Conservancy's attempt to override the state's interpretation of state law and exercise of enforcement discretion was improper. Notably, in a footnote, the court distinguished Natural Resources Defense Council v. Patterson, 333 F. Supp. 2d 906 (E.D. Cal. 2004), the case cited by the Conservancy, because the plaintiffs were not seeking relief that conflicted with prior decisions by the State Water Board and thus the case did not raise federalism concerns. Id. at 799, fn. 7.

2. Plaintiffs' motions for a Temporary Restraining Order and Preliminary Injunction exceed the scope of their Amended Complaint.

Plaintiffs' Amended Complaint, ECF No. 95, was filed on October 4, 2013 and included five claims for relief, four of which were addressed to Reclamation's alleged lack of authority with respect to the 2013 releases, alleged lack of compliance with State permitting requirements with respect to the 2013 releases, alleged lack of NEPA compliance with respect to the EA for the 2013 releases, and alleged lack of ESA compliance with respect to the 2013 releases, and one claim asserting that 2012 augmentation releases were arbitrary or capricious. The August 22, 2014 Decision and associated releases are separate and distinct agency actions that are not within the scope of any of the claims asserted in Plaintiffs' Amended Complaint. Thus, Plaintiffs' allegations, in their memorandum in support of their motions for a preliminary injunction and temporary restraining order, that separate and additional NEPA compliance was required prior to the August 22, 2014 Decision and related flow augmentation releases, and the arguments made in Plaintiffs' memorandum regarding the alleged failure to comply with NEPA's emergency regulations are all outside the scope of their pleadings in this case. See ECF No. 151 at 11-16. This is equally glaring with regard to their ESA challenge, as discussed further below. In brief, Plaintiffs contend that the 2014 action is separate "Reclamation

action," that has "key differences," from prior Reclamation actions and required a new round of ESA consultation. Pls. Id. at 1. Thus, Plaintiffs' motion is an improper attempt to raise new claims as an argument in a brief. Accordingly, Plaintiffs' motions for injunctive relief as to the 2014 Decision and associated releases should be denied because these agency actions are not the subject of any of Plaintiffs' claims and thus are outside the scope of the pleadings.

3. The August 22, 2014 Decision and related releases comply with NEPA.

a. **The conditions in the lower Klamath on August 22, 2014 constituted an environmental emergency.**

The unprecedented conditions in the lower Klamath River on August 22, 2014 necessitated emergency action in order to prevent a large scale fish die-off. These conditions included: lower flows, reduced water quality, high temperatures through the first few weeks of August, fish crowding and observed effects of stress on fish, documented columnaris infections, reports of dead fish and the presence of blue-green algae and associated toxins. See Reck Decl. ¶¶ 9-21; Strange Memorandum, Ex. 3 to Reck Decl. The confluence of these conditions and their observed adverse effect on the returning salmon were unforeseen by Reclamation and constitute a true environmental emergency.

Plaintiffs contends that the August 2014 conditions on the lower Klamath River do not constitute an emergency under CEQ and DOI regulations because low flows were projected in advance and because Reclamation has made flow augmentation releases in 2012 and 2013. This contention ignores Reclamation's July 30, 2014 decision not to make flow augmentation releases which considered the projected flows at that time and the lower than average projected escapement. See Person Decl. Moreover it ignores the changed conditions since July 30, 2014, which included lower flows than expected, reduced water quality, high temperatures through the first few weeks of August, fish crowding and observed effects of stress on fish, documented columnaris infections, reports of dead fish and the presence of blue-green algae and associated toxins. While there have been no documented ich infections in fish, all of these conditions contribute substantially to the risk of a large scale infection.

Based on these conditions, Dr. Joshua Strange advised Reclamation that absent augmented flows to alleviate these conditions that the "risk of a fish kill . . .occurring in the lower Klamath River in 2014 as occurred in 2002. . . is more likely than not." Strange Memorandum, p. 7, Exhibit 3 to Reck Decl. Considering the conditions present in August 2014, Reclamation reasonably concluded that reliance on continued fish monitoring and on an emergency doubling of flows as provided under criteria articulated in the 2013 documentation would be insufficient to prevent a fish die-off similar to the die-off that occurred in 2002. Accordingly, Reclamation properly determined that preventative flows were necessary due to urgent and unforeseen circumstances.

Plaintiffs rely on Natural Resources Defense Council, Inc. v. Winter, 518 F.3d 658, 681 (9th Cir. 2008) rev'd on other grounds by, Winter v. Natural Resources Defense Council, Inc. 555 U.S. 7 (2008), where the Ninth Circuit upheld the district court's holding that the Navy's need to continue long-planned, routine training exercises without court ordered mitigation measures did not constitute emergency circumstances under the CEQ Regulations but rather was an emergency of its own making. Winter is simply not analogous to the facts of the instant case. The convergence of factors, all of which significantly increased the likelihood of a large scale fish die-off was not an emergency of Reclamation's own making. The circumstances that Reclamation confronted on August 22, 2014, are more directly analogous the factual circumstances in National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986), where the U.S. Fish & Wildlife Service, confronted with a steady decrease in the population of the California condor, decided to remove the remaining condors from the wild and include them in a breeding program. Id. at 406-07. Because urgent action was needed to protect the condor population from further decreasing, FWS requested that its action be treated as an emergency under the NEPA regulations, and CEQ granted that request. Id. at 408 n.3. The D.C. Circuit upheld CEQ's decision to declare an emergency in that case and to allow alternative arrangements under NEPA. Id. at 408 n.3; see also Crosby v. Young, 512 F. Supp. 1363 (E.D. Mich. 1981) (upholding invocation of the emergency provision to allow the City of Detroit to

pursue an urban development project, which could not have been pursued under the strict time constraints of NEPA, during a period of financial crisis); Valley Citizens for a Safe Env't v. Vest, Civ. A. No. 91-30077-F, 1991 WL 330963 (D. Mass. May 6, 1991) (upholding invocation of emergency regulations to allow the Air Force to conduct flights into and out of Westover Air Force Base on a 24-hour schedule not contemplated by the existing EIS for the base where the flights were needed to transport supplies to troops). Here, Reclamation took action is response to unforeseen emergency conditions on the lower Klamath River. Thus, the regulations and guidance regarding NEPA compliance in emergencies apply and Plaintiffs' arguments fail.

b. Reclamation has complied and continues to comply with CEQ and DOI regulations governing NEPA compliance in an emergency.

Having reasonably determined that an emergency existed on August 22, 2014 and that action was necessary to augment flows in order to respond to the conditions in the lower Klamath River that presented a significant risk of a major fish die-off, Reclamation acted in accordance with CEQ Regulations and Guidance and DOI regulations governing NEPA compliance in such an emergency. Due to the emergency nature of the 2014 releases, Reclamations' NEPA compliance is ongoing.

The 2010 CEQ Guidance regarding Emergency Actions under NEPA instructs agencies confronted with an emergency "**Do not delay** immediate actions necessary to secure lives and safety of citizens or to protect valuable resources." 2010 Guidance at Attach. 1, Ex. C hereto (emphasis in original). DOI regulations regarding "emergency responses" also state that if an agency "determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA" document the agency can first "take those actions necessary to control the immediate impacts of the emergency" in order to mitigate harm to, inter alia, "important natural, cultural, or historic resources." 43 C.F.R. § 46.150(a). This conforms to the principle that NEPA compliance, or inability to comply due to time constraints, should not delay

actions necessary to benefit the environment or, as in this case, to avert a looming environmental disaster. Given the conditions that existed on August 22, 2014, emergency action had to be taken to augment flows in order to prevent a major fish die-off. Reclamation did not violate NEPA in taking that action.

Where an agency has made the determination that emergency action is necessary, DOI regulations require that the agency "take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical" and document, in writing, the agency determination that an emergency exists and the responsive action to be take in response to that emergency. 43 C.F.R. § 46.150(a)-(b). The August 22, 2014 Decision Memorandum complies with this requirement as it succinctly describes the emergency conditions present, documents the determination that an emergency exists, and describes the responsive action to be taken. See Exhibits A and B hereto.

The CEQ Regulations that allow for agencies to consult with the CEQ regarding alternative arrangements for NEPA compliance apply only where the agency has found that action to be taken has "significant environmental impact." See 40 C.F.R. § 1506.11. For actions where the agency does not expect "significant environmental impacts," CEQ guidance instructs that preparation of a "focused, concise EA" is appropriate. 2010 Guidance at Attach. 1, para. 2.c, Ex. C hereto. Reclamation is currently in the process of preparing a "focused, concise EA" as instructed by CEQ Guidance, although preparation of this EA has been delayed due to the need to comply with the Court's orders and to respond to Plaintiffs' motions. See id; Reck Decl. A determination as to the significance of the environmental impacts of the 2014 releases authorized under the August 22, 2014 Decision has not yet been made. In the meantime, Reclamation has notified CEQ of the emergency situation, transmitted the key decision

documents to it as the earliest feasible opportunity, and begun the process of consultation with CEQ regarding further NEPA compliance that may be necessary.

c. In the alternative, because the 2014 Flow Augmentation Releases fall within the originally authorized limits of the Trinity River Diversion of the Central Valley Project, NEPA compliance was not required.

As explained in Federal Defendants' Supplemental Brief, ECF No. 153, filed earlier today and incorporated by reference herein, the flow augmentation releases in the 2013 and 2013 Environmental Assessments fall within the Secretary of Interior's authority to adopt appropriate measures to preserve and protect fish and wildlife within the Trinity/Klamath Basin as a limitation to the TRD's integration with the rest of the CVP. See Pub. L. 84-386, 69 Stat. 719, § 2 (1955) ("1955 Act"). The August 22, 2014 decision was made and the 2014 releases are being made pursuant to that same authority underlying the 2012 and 2013 releases and similarly fall with the authorized limits for the TRD under the 1955 Act. Thus, the court should apply County of Trinity v. Andrus, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977)) and Upper Snake River Chapter Of Trout Unlimited v. Hodel, 921 F.2d 232 (9th Cir. 1990), to this case and hold that NEPA compliance was not required for the 2014 decision and releases for the reasons stated in Federal Defendants' Supplemental Brief.

B. Plaintiffs Are Not Entitled To Relief On Their Endangered Species Act Claim.

Plaintiffs seek emergency relief to stop Reclamation's 2014 augmentation release, which Plaintiffs allege is a "similar" but separate "action," that has "key differences," from prior Reclamation actions. ECF No. 115 at 1. However, this claim – an ESA challenge to the 2014 augmentation release – has never been pled in the Amended Complaint that is before the Court in this action. This alone is fatal to Plaintiffs' ESA related arguments as Plaintiffs cannot obtain relief for a claim that is not before the Court. Even if the current Amended Complaint is liberally construed to encompass such allegations, Plaintiffs have not submitted a notice of an intent to sue Reclamation for this 2014 action, as required by the ESA, and thus, the Court would

jurisdiction over this newly-minted ESA claim. In turn, this jurisdictional defect prevents Plaintiffs from showing any likelihood of success on the merits of the ESA claim, Yet, even if Plaintiffs could overcome this infirmity, they still cannot show a likelihood of success because they have not demonstrated that Reclamation's determination—that the 2014 emergency comports with ESA § 7(d)—was arbitrary, capricious, or otherwise unlawful.

1. **Plaintiffs' Have No Likelihood of Success On The Merits of Their ESA Arguments Because the Court Has No Jurisdiction to Consider Them.**

    a. **The ESA's 60-Day Notice Requirement Is Mandatory And Strictly Construed.**

Congress waived sovereign immunity under the ESA in precise terms: "No action may be commenced under [the ESA citizen suit provision] prior to sixty days after written notice of the violation has been given...." 16 U.S.C. § 1540(g)(2)(A)(i) (emphasis added). This waiver must "be strictly construed, in terms of its scope, in favor of the sovereign," Lane v. Pena, 518 U.S. 187, 192 (1996), and not "enlarged ... beyond what the language requires." Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-686 (1983) (citation omitted). By its plain language, the ESA citizen-suit provision limits the availability of judicial review to claims alleging discrete "violation[s]," 16 U.S.C. § 1540(g)(2)(A)(i), and Ninth Circuit has long applied this provision, and its equivalents, to require notice of each claimed violation. ONRC Action v. Columbia Plywood, 286 F.3d 1137, 1143-44 (9th Cir. 2002).

The 60-day notice requirement is jurisdictional and a failure to strictly comply is an absolute bar to bringing an ESA claim. See Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir.1998). Its purpose is "to put the agencies on notice of a perceived violation of the statute and an intent to sue. When given notice, the agencies have an opportunity to review their actions and take corrective measures if warranted." Id. A court may not use any "flexible or pragmatic" considerations to cure or waive notice defects. Hallstrom, 493 U.S. at 20-21. The Court must instead dismiss the claim until such time as adequate notice is provided and sixty litigation-free days pass. Sw. Ctr., 143 F.3d at 522; Hallstrom, 493 U.S. at 32.

b. **Plaintiffs Failed To Provide Any Notice Of Their Intent To Challenge The 2014 Emergency Action.**

While it is unclear if Plaintiffs have ever strictly complied with the ESA's jurisdictional notice requirement in this case, three things are clear. First, Plaintiffs were aware of their obligation to provide 60-days' notice of each alleged ESA violation before bringing an ESA claim. Here, prior to alleging their ESA cause of action, Plaintiffs submitted a Notice of Intent ("NOI") to sue letter alleging ESA "violations aris[ing] from" Reclamation's decision to "us[e] releases of Central Valley Project ('CVP') water from the Trinity River Division ('TRD') to augment flows in the Lower Klamath River in August and September this year [2013]." AR00437. When they filed their original Complaint less than a month later, Plaintiffs did not include an ESA claim challenging the 2013 augmentation releases. See ECF No. 1. Nor did Plaintiffs base their 2013 TRO—which they likewise filed fewer than 60 days after submitting their NOI—on any alleged ESA violation arising out of the 2013 releases. See ECF No. 14. Instead, Plaintiffs waited more than 60 days after submitting their NOI and then amended their complaint, purporting to add an ESA claim. See ECF No. 95 ¶¶ 81, 102, 104.

Second, Plaintiffs clearly consider the 2014 augmentation release to be a separate Reclamation action for which ESA consultation is required. In their instant motion, Plaintiffs allege that the 2014 emergency action is a separate "Reclamation[] action," with "key differences" from prior actions. ECF No. 151 at 1. They insist that Reclamation was required to separately "initiate consulation with NMFS regarding the 2014 Excess Releases," ECF No. 115 at 18, and allege that Reclamation is violating the ESA based on its alleged failure to initiate consultation on this specific action. Id. at 17-18.

Third, it is clear that Plaintiffs failed to provide Reclamation the requisite notice before challenging the 2014 emergency augmentation action. In fact, while Plaintiffs recognize the need to provide notice for each alleged ESA violation, and contend that the 2014 emergency action is a separate "Reclamation[] action," Plaintiffs provided no notice whatsoever. They simply moved to enjoin the 2014 action and are silent on any possible justification for doing so without

providing the required notice. ECF No. 151 at 17-18. Plaintiffs have thus failed to strictly comply with the jurisdictional prerequisites of the ESA. Sw. Ctr., 143 F.3d at 522; Hallstrom, 493 U.S. at 32.

Federal Defendants anticipate that Plaintiffs will insist that they have complied with the ESA notice requirement because they submitted their July 11, 2013, NOI. That argument would fail. The 2013 NOI only describes alleged ESA "violations aris[ing] … from using releases … in August and September this year [2013]." AR00437. It states that this 2013 action is "unlawful" because, among other things, it "will cause the total volume of releases for fishery purposes in 2013 to exceed the 453,000 acre-foot limit established by the ROD." Id. It is well-established that a notice letter "cannot be used to support later-filed ESA claims that were not mentioned in the letter." W. Watersheds Project v. Kraayenbrink, No. 05-cv-297-E-BLW, 2007 WL 952013, *1 (D. Idaho, Mar. 27, 2007) (citing Sw. Ctr. for Biological Diversity v. Reclamation, 143 F.3d 515, 521-22 (9th Cir. 1998)). Because the proposed 2014 augmentation action was not mentioned in the NOI, it is insufficient.

In fact, the 2013 NOI cannot provide notice of an ESA violation arising from the 2014 emergency action, because, put simply, "one cannot give notice of a violation which has not yet happened." Kern Cnty. Farm Bureau v. Badgley, 2002 WL 34236869, at *13 (E.D. Cal. Oct. 10, 2002). Indeed, Courts have consistently held that such a "pre-violation" notice of a possible future violation, before the specifically-sued-upon violation has actually occurred, "is insufficient to satisfy the ESA's 60–day notice requirement." Friends of Animals v. Ashe, 2014 WL 2812313, *7 (D.D.C. 2014); See, e.g., Moden v. U.S. Fish & Wildlife Service, 281 F.Supp.2d 1193, 1206 (D. Or. 2003) ("[A]t the time plaintiffs provided defendants with notice, the agency had not considered the petition to delist. Therefore, because the agency had not acted on the petition at the time of notice, plaintiffs could not have given the Secretary notice of an unlawful action."); see also Friends of Animals v. Salazar, 670 F. Supp. 2d 7, 13 (D.D.C. 2009) ("When [plaintiff] provided its original [notice letter], however, Defendants had not yet missed the deadline for the twelve-month finding. Thus, admittedly and understandably, Plaintiff did not

notify Defendants of its intent to sue for that particular statutory violation .... [plaintiff]'s failure to provide sixty-days' notice prior to bringing its claims with respect to the 12–month finding means those claims must be dismissed.").

Plaintiffs' failure cannot be excused and their ESA claim must be dismissed. The citizen-suit notice requirements cannot be avoided by employing a flexible or pragmatic construction and the suit must be dismissed if plaintiffs have not strictly complied with the notice requirements. See Hallstrom, 493 U.S. at 26; see also Sw. Ctr., 143 F.3d at 520 (citing numerous cases stating that courts should be strict in their interpretation of the 60-day rule as an absolute bar to suit). While "'a strict construction of the 60-day notice requirement may appear to be inequitable and a waste of judicial resources,' ... it is inescapable that, in this situation, courts 'lack authority to consider the equities.'" Home Builders Ass'n v. U.S. Fish and Wildlife Serv., No. Civ. S-05-0629 WBS-GGH, 2006 WL 3190518 at *10 (Nov. 2, 2006), modified on other grounds, 2007 WL 2012248 (E.D. Cal. Jan. 24, 2007) (quoting Kern County Farm Bureau, No. 02-5376, 2002 WL 34236869 at *8).

2. **Plaintiffs Cannot Show A Likelihood Of Success On The Merits.**

Plaintiffs allege that Reclamation's 2014 augmentation releases violate the ESA because "Reclamation failed to conduct consultation with NMFS regarding the 2014 Excess Releases." Plaintiffs cannot succeed on the merits of this claim. First, as discussed above, the Court lacks jurisdiction over their claim. Plaintiffs themselves insist that the 2014 augmentation releases are a separate proposed action requiring ESA consultation. If that is the case, then a new notice of intent was required, and Plaintiffs failed to provide it. Supra. Yet, even if this failure were excused and the Court considers the merits, Plaintiffs still cannot show that Reclamation acted irrationally in determining that the 2014 emergency action complied with ESA section 7(d).

Judicial review of Plaintiffs' claim is governed by the APA, which requires the Court to uphold an agency decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); U.S.C. § 706 et seq. San Luis, 747 F.3d at 601. This standard applies fully to assessing the likelihood of success on the merits of a

request for a preliminary injunction. Lands Council v. McNair, 537 F.3d 981, 986-87 (9th Cir. 2008). Although the Court's inquiry must be "thorough,"

> the standard of review is highly deferential; the agency's decision is entitled to a presumption of regularity, and [the court] may not substitute [its] judgment for that of the agency. Where the agency has relied on relevant evidence such that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence. Even if the evidence is susceptible of more than one rational interpretation, the court must uphold the agency's findings.

San Luis, 747 F.3d at 601 (internal citations, quotations, alterations omitted); River Runners for Wilderness v. Martin, 593 F.3d 1064, 1067 (9th Cir. 2010) (plaintiff must satisfy a "high threshold" to set aside federal agency action under the APA). And where, as here, an agency's technical expertise is involved, the reviewing court "must be at [its] most deferential." San Luis, 747 F.3d at 618 (citation omitted); see Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (review especially deferential "when the agency is 'making predictions, within its area of special expertise, at the frontiers of science'") (citation omitted); Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) ("[w]hen examining … [a] scientific determination … reviewing court must generally be at its most deferential").

As Federal Defendants explained in our merits briefing, TRD operations are part of the 2008 biological assessment that Reclamation used to initiate consultation on the CVP, and the record shows that consultation is ongoing between Reclamation and NMFS. See ECF No. 135 at 18-23; Reck Decl. Ex. 4 at 2. Section 7(d) authorizes Reclamation to operate the TRD while this consultation is ongoing, as long as it does not represent an irreversible or irretrievable commitment of resources that would foreclose any future reasonable and prudent alternative. 16 U.S.C. § 1536(d). Prior to undertaking the 2014 releases, Reclamation expressly considered the effects of the proposed action on ESA-listed species that are under the jurisdiction of the National Marine Fisheries Service. Reck Decl. Ex. 4 at 2. Reclamation conducted modeling to determine the effects of the action on water temperatures, id. at 1-2, and conclude that while some temperature changes are expected, temperature targets in the Trinity River are expected to be met, and have a "less than 0.1 [degree Fahrenheit]" impact on the upper Sacramento River. Id.

Reclamation further explained that the release "will continue the status quo as to listed species in that Reclamation still retains discretion to provide flow and temperature conditions that are consistent with currently anticipated conditions with respect to the listed fish. Id. at 3. Reclamation also determined that the 2014 action was consistent with NMFS's 2009 biological opinion and reasonable and prudent alternative and explained its rationale for reaching the conclusion. Id. On these bases, Reclamation concluded that the action would not violate ESA section 7(d). Id. The decision is rational and entitled to deference.

In fact, Plaintiffs do not even attempt to show how the 2014 action could run afoul of section 7(d). They again simply disagree that ESA section 7(d) applies because "Reclamation has not initiated consultation … regarding the 2014 Excess Releases." ECF No. 151 at 17-18. As discussed above, if Plaintiffs are correct that the 2014 action is a standalone action requiring consultation, then their claim fails and must be dismissed for lack of notice. If, as the record shows, there is already a biological opinion governing the operation of the CVP, and the opinion considers the export of water out of the TRD, see ECF No. 116 at 10, Plaintiffs' argument likewise fails.

II. Plaintiffs Also Fail To "Clearly Show" With "Substantial Proof" That Imminent Irreparable Harm Is Likely Absent A Preliminary Injunction or Temporary Restraining Order.

An injunction requires the applicant to demonstrate that, without the requested relief, "he is likely to suffer irreparable harm." Winter, 555 U.S. at 20; Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157-158, 162 (2010); see also Conservation Cong., 720 F.3d at 1054 (applying Winter factors in ESA case, including requirement to show irreparable harm is likely absent relief). To obtain an injunction, "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury ...." Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. Cir. 1988); Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1171 n. 6 (9th Cir. 2011). Plaintiffs carry their burden of persuasion through a "clear showing" of "substantial proof." Mazurek v. Armstrong, 520 U.S.

968, 972 (1997). Such harm must be "*likely*, not just possible." Ctr. for Food Safety, 636 F.3d at 1172; see also Monsanto, 561 U.S. at 162.

As the Court recognized in its August 22, 2013 Order, "Plaintiffs hold contractual rights to CVP water that are junior to many other CFP contract holders and subject to diminishment for numerous other reasons, including satisfying needs of species listed under the Endangered Species Act." ECF No. 91. The Court also recognized that even if the estimated 20,000 AF of water were not permitted in 2013, "Plaintiff's ultimate share would be less than that total." Here, Plaintiffs' speculation that they would ultimately receive any of the approximately 25,000 AF of water to be released is just that, speculation. California is facing unprecedented critically dry conditions. As Plaintiffs own briefing acknowledges, Reclamation's decisions regarding the water allocations complained about by Plaintiffs *preceded* the August 22, 2014 Decision that augmented flows were necessary to prevent a large scale fish die-off. Plaintiffs have submitted no evidence that those allocations would change in if the 2014 releases were halted. Plaintiffs similarly submit no evidence, aside from speculation, that if the 2014 releases were halted that they would receive any additional water in 2015 or any time in the future. As we demonstrated in our merits briefing, Plaintiffs alleged harm is only a vague and speculative allusion to the future possibility of impacts to future allocations of water that depend on myriad factors beyond the control of either Federal Defendants or Plaintiffs. ECF No. 135 at 2. The Declaration of Ronald Milligan, submitted herewith, also addresses the impact that any potential injunction issued would have on potential water supplies. See generally Milligan Decl. Even if these allegations were sufficient to clear the absolute minimum Constitutional requirements of standing, they certainly do not clearly show with substantial proof that imminent irreparable harm is is likely.

Plaintiffs also offer the declaration of Dr. Charles Hanson regarding the possibility of harm to a variety of species. Fundamentally, Plaintiffs have no demonstrated interested in protecting these species and thus cannot base a claim of imminent, irreparable harm on harm to them. In any event, his allegations are universally insufficient to warrant emergency relief. See generally Reck Decl. ¶¶ 26-48. For example, Dr. Hanson states that the instream flow schedule for the benefit of fisheries and other aquatic resources on the Trinity River was based, in part, on mimicking a

natural seasonal pattern of instream flows and hydrologic patterns on the river, and suggests that altering late summer flows may adversely impact other aquatic species. Hanson Decl. ¶ 39. The flow schedule developed for the Trinity River Restoration Program did include some features from the natural hydrograph, such as in the spring. But summer base flows are generally higher than natural flows to provide appropriate water temperatures for spring-run Chinook salmon and this was a well-considered decision. Also, a flow of 2,500 cfs in the lower Klamath River is not uncommon in August and September and has occurred between 65-70% of the time in August and between 60-65% of the time in September based on hydrologic data from 1911-2012. Reck. Decl. ¶ 34.

Similarly, Dr. Hanson states that the spiking late summer-early fall flows by 2,800 to 5,600 cfs conflicts with the natural seasonal hydrology within the Trinity River and may result in adverse velocity and/or seasonal water temperature conditions for aquatic species that typically would not experience these unusual managed conditions during this time of year. Hanson Dec. ¶ 39. But Dr. Hanson misrepresents the potential changes in flows that would be experienced in the Trinity River. Reck Decl. ¶ 34. The augmented flow targets are for flows in the lower Klamath, approximately 140 miles below Lewiston Dam. *Id.* While the flow of 5,600 cfs in the lower Klamath River is unnatural during August and September, this flow target would only be used during emergency conditions under the fall flow augmentation plan. *Id.* A flow of 2,800 cfs in the lower Klamath River is not uncommon in August and September and has occurred between 65-70% of the time in August and between 60-65% of the time in September based on hydrologic data from 1911-2012.

Tellingly, Dr. Hanson's opinion that flow augmentation will reduce habitat quality and availability for juvenile coho salmon rearing, Hanson Dec. ¶¶ 43, is unsupported by any evidence. Reck Decl. ¶ 35. In fact, his speculation is contrary to a recent study has found that juvenile coho salmon rearing habitat (suitable depth, velocity and distance to cover) remains relatively constant across a range of flows. Id. Dr. Hanson's claim that the augmented flows may result in an increased risk of redd dewatering and hybridization between spring-run and fall-run Chinook salmon, Dec. ¶¶ 45, 46, is rebutted by the fact that no dewatering of spring-run

Chinook salmon redds was observed after the completion of the 2012 flow augmentation when the Lewiston Reservoir releases were decreased. Reck Decl. ¶ 37. And his concern about hybridization ignores the fact that hybridization has occurred since the construction of the TRD and has reached the point where spring-run and fall-run Chinook are included in a single Evolutionarily Significant Unit. Id. ¶ 38. Dr. Hanson's opinions regarding lamprey are refuted by data, id. ¶¶ 39-40; his opinion about potential effects on western pond turtles, Hanson Decl. ¶ 48, ignores the fact that suitable habitat was reduced by dam construction and flow regulation, Reck Decl. ¶ 41, and that the net effect to available habitats would likely be neutral. Specifically, augmentation flows would result in slightly less advantageous in terms of water temperatures and foraging opportunities, with more edge habitat and basking areas available. Dr. Hanson also ignores the fact that the nesting season would be over, and the nests and juvenile turtles would not be affected, as juveniles over winter in the nests which are typically located up to several hundred meters upland from the river and would not be inundated by the magnitude of augmentation flows in 2013. Dr. Hanson's suggestion that flow augmentation could have adverse effects on yellow-legged frogs, Hanson Dec. ¶ 48, similarly lacks merit, as Mr. Reck thoroughly explains. Reck Decl. ¶¶ 43-46.

Finally, Dr. Hanson's suggestion that flow augmentation could adversely affect listed green sturgeon in the Sacramento River, Hanson Dec. ¶ 5, fails for at least two reasons. First, the only habitat parameter that would potentially be affected would be water temperature. But water temperatures in the Sacramento River are not likely to be substantially affected due to implementation of the planned flow augmentation. Reck Decl. ¶ 47; Reck Decl. Ex. 4. Second, releases to the Sacramento River below Keswick Reservoir are primarily managed for much of the year for temperature control for winter-run Chinook salmon. Water temperatures regimes that could affect growth of juvenile green sturgeon with or without implementing the planned flow augmentation would be the same due to management for winter-run Chinook salmon. Reck Decl. ¶ 48.

With respect to Plaintiffs' concern regarding the effect of the 2014 releases on remaining cold-water reserves and Reclamation operations, Federal Defendants rely on the Declaration of

Ronald Milligan, filed herewith, which explains the effects of the releases on Reclamation's continuing operations.

In sum, it is Plaintiffs' burden to demonstrate that they will suffer irreparable harm absent immediate injunctive relief and their vague allegations of speculative future harm, and unsupported claims of harm to various species that they have no demonstrated interest in, have failed to meet that burden. See Winter, 555 U.S. 7; see also Am. Trucking Assocs, 559 F.3d at 1052.

III. The Balance of Equities and Public Interest Favor Denial of the Requested Injunction

Finally, the Court should not enter an injunction because the balance of equities does not tip in Plaintiffs' favor and an injunction would not be in the public interest. See Winter, 555 U.S. 7; see also Am. Trucking Assocs, 559 F.3d at 1052 (9th Cir. 2009). A preliminary injunction should not be issued if the injunction will "substantially injure other interested parties." Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). In its 2013 Order, the Court noted that there was "no dispute and the record clearly reflect[ed] that the 2002 fish kill had severe impacts on commercial fishing interests, tribal fishing rights, and the ecology, and that another fish kill would likely have similar impacts." ECF No. 91 (citing Declaration of Michael Orcutt, ECF No. 46, Declaration of David Bitts, ECF No. 48-1). It is this same danger confronted in 2013 – a potential major fish die-off—that Reclamation's August 22, 2014 Decision to augment flows is targeted to prevent.

As the Declaration of Don Reck explains, significant numbers of returning adult fish began moving into the lower river earlier than expected and have been observed holding in large, crowded schools for long periods in small thermal refugial areas. Reck Decl. ¶ 16. And conditions have worsened. Only a few weeks ago, more than 1000 adult steelhead and Chinook salmon were crowded into the Blue Creek cool water refugia. About 25 percent of the juvenile fish at the Pecwan cool water refugia showed signs of illness. Adult salmonids crowded into

cool water refugia were observed to be stressed and dark in color. Id. ¶ 20. A week later, the Klamath Fish Health Assessment Team went on high alert for signs of fish mortality, as there had already been observed dead adult salmonids in the mainstem Klamath River. Id. ¶ 21.

In his declaration, Plaintiffs' consultant insists that "there is no assurance" that Reclamation's action will prevent another catastrophic disease outbreak. ECF No. 115 at 20. But, as discussed in the Reck Declaration filed concurrently herewith, Plaintiffs' declaration contains a host of incorrect statements, unsupported speculation, and invalid conclusions. See, e.g., Reck Decl. ¶¶ 26, 27, 28, 30, 32, 33, 34, 35. Nor is it Reclamation's obligation to prove beyond all shadow of doubt that an emergency measure will stave off environmental catastrophe before it acts, especially here. Plaintiffs further ignore the fact that Reclamation's augmentation release, as in the past, is undertaken in part to protect ESA listed coho salmon, which died in significant numbers in the 2002 fish die-off event. AR 52. As the Ninth Circuit has recognized, Congress intended the ESA to "give the benefit of the doubt to the species." Connor v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (citation omitted), and this "'policy of institutionalized caution'" Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1030 (9th Cir. 2011), requires agencies to act even where the science is imperfect. Here it suffices that Reclamation fish scientists, working closely with the expert Federal and State wildlife agencies, have rationally concluded that the data support such a release. As Mr. Reck explains, while it is not possible to quantify the biological benefits of flow augmentation, expected water temperature reductions in the lower Klamath River will result in lower physiological stress in salmon and steelhead and an associated decrease in susceptibility to disease. See Reck Decl. ¶¶ 9-21. At bottom, this Court has already found that the balance of harms weighs in favor of protecting Klamath fish species, and the case law uniformly demonstrates that Plaintiffs' fundamental

interests, which are commercial, cannot be weighed in any remedy involving the ESA. San Luis, 747 F.3d at 593 ("The law prohibits us from making 'such fine utilitarian calculations' to balance the [species'] interests against the interests of the citizens of California.").

The very real danger of a large-scale fish die-off in 2014 if the August 22, 2014 Decision is set aside and the associated preventative releases are enjoined, takes priority over Plaintiffs' speculative and unsupported arguments as to how certain Authority members might receive some additional water if these flows were enjoined, and Plaintiffs incorrect assertions as to harms to ESA listed species. Plaintiffs' memoranda relies heavily on the public interest in agency compliance with Federal law. Here, Reclamation has complied with applicable statutes to the best of its ability in responding to an unprecedented conditions and an unforeseen emergency. The public interest weighs heavily in favor of allowing the 2014 releases to proceed.

CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for Temporary Restraining Order, ECF No. 142, and Plaintiffs' Motion for Preliminary Injunction, ECF No. 143, should be denied.

Respectfully submitted this 26th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2014, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

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