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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

BAY.ORG d/b/a THE BAY INSTITUTE;)
NATURAL RESOURCES DEFENSE)
COUNCIL, INC.; DEFENDERS OF)
WILDLIFE,)

Plaintiffs,)

v.)

COMPLAINT

RYAN ZINKE, in his official capacity as)
Secretary of the Interior; GREG)
SHEEHAN, in his official capacity as)
Acting Director, U.S. Fish and Wildlife)
Service; and U.S. FISH AND WILDLIFE)
SERVICE,)

Administrative Procedure Act Case

Civ. No. _____

Defendants.)

INTRODUCTION

1. On June 26, 2017, the U.S. Fish and Wildlife Service (Fish and Wildlife Service) issued a final biological opinion (Biological Opinion), under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., regarding the California WaterFix project (WaterFix).

1 2. As part of WaterFix, the Bureau of Reclamation (Bureau) and the California
2 Department of Water Resources (DWR) propose to construct three new water intakes on the
3 Sacramento River. Each new intake will be capable of diverting 3,000 cubic feet per second of
4 water. The Bureau and DWR also propose to construct two tunnels, at a depth of 150 feet, which
5 will transport water from the Sacramento River, north of the Sacramento-San Joaquin River
6 Delta (Delta), to existing pumping plants in the South Delta. WaterFix would enable 9,000 cubic
7 feet per second of water to be diverted from the Sacramento River and transported in tunnels
8 underneath the Delta, instead of allowing this water to flow into the Delta.

9 3. WaterFix is the latest in a long line of water diversion projects and policies,
10 including the Central Valley Project (CVP) and the State Water Project (SWP), which have had
11 devastating effects on Delta Smelt and other threatened and endangered species in the Delta. The
12 CVP and SWP operate a system of dams, canals, and pumping facilities, which annually export
13 an average of 4.9 million acre feet of water out of the Delta. The CVP and SWP modify the flow
14 – through water storage, diversions, and routing – of many millions of acre feet more. The CVP
15 and SWP are among the largest water storage and diversion projects in the world, annually
16 managing an average of more than 13 million acre feet of water. The three new water intakes and
17 two tunnels under the Delta would supplement, rather than replace, the CVP's and SWP's
18 existing pumping facilities in the South Delta.

19 4. The CVP and SWP have caused substantial harm to Delta Smelt and to the
20 Delta's ecosystem, causing salinity levels to rise, reducing water flowing through the Delta into
21 San Francisco Bay (Bay), significantly altering natural flow patterns, and causing fish to be
22 entrained and killed in the pumping systems. CVP and SWP operations have been major factors
23 in the Delta Smelt's decline and its listing under the ESA.

24 5. The construction and operation of WaterFix will significantly degrade
25 environmental conditions in the Delta, harming Delta Smelt and other endangered fish and
26 wildlife. These adverse effects include increased salinity levels, reduced turbidity, reduced food
27 supply, increased harmful algal blooms, and loss of habitat, among other harmful impacts on the
28 Delta's already-fragile ecosystem.

1 people, its plants and animals, and the natural systems on which all life depends. The
2 organization works to restore the integrity of the elements that sustain life — air, land, and water
3 — and to defend endangered natural places. For decades, NRDC has advocated extensively for
4 the protection of the nation’s waterways and wildlife, including the Delta Smelt. NRDC has
5 brought and intervened in lawsuits designed to ensure that CVP and SWP operations do not
6 jeopardize the continued existence of threatened and endangered fish species or adversely
7 modify those species’ critical habitat. NRDC has also long worked to protect the Delta and the
8 fish for which it provides habitat in non-litigation settings.

9 9. Plaintiff DEFENDERS OF WILDLIFE (Defenders) is a non-profit corporation
10 with hundreds of thousands of members across the nation, including tens of thousands of
11 members in California. Defenders is dedicated to preserving wildlife and emphasizing
12 appreciation and protection for all species in their ecological role within the natural environment.
13 Through education, advocacy, litigation, and other efforts, Defenders works to preserve species
14 and the habitats upon which they depend. Defenders has been closely involved in policy and
15 litigation matters associated with water quality and species habitat in the Sacramento River and
16 Delta region since 2000, including litigation and regulatory actions intended to benefit Delta
17 Smelt and their habitat.

18 10. Plaintiffs and their respective members have been and will continue to be actively
19 involved in efforts to protect and restore the Delta and surrounding areas, and the species that
20 rely upon the Delta for habitat. Plaintiffs and their members have written to numerous federal,
21 state, and local agencies and officials to urge increased protection for the species that rely upon
22 the Delta and the rivers that flow into it for habitat.

23 11. Plaintiffs and their members live and/or work in communities near or on the
24 Delta. In addition to advocating for protections for the Delta and its endangered and threatened
25 species, members of the Plaintiffs are active participants in the life of the Delta. Individual
26 members of each organization frequently visit the Delta, critical habitat for the Delta Smelt, to
27 use and appreciate the Delta ecosystem.

28

1 12. The productivity, distribution, abundance, and diversity of Delta Smelt is
2 indicative of environmental conditions in the Delta. Plaintiffs members' use of the Delta for
3 educational and recreational activities, such as hiking, boating, bird watching, swimming, and
4 fishing, will be detrimentally affected by the decline of the Delta Smelt and the corresponding
5 decline in the health of the Delta. Plaintiffs' members regularly derive scientific, educational,
6 spiritual, and conservation benefit and enjoyment from the existence of the Delta Smelt and will
7 continue to do so by regularly engaging in scientific, education, and conservation activities
8 involving the Delta Smelt. These benefits and enjoyments would increase if the Delta Smelt were
9 to recover from its precarious status of being threatened with extinction.

10 13. The above-described aesthetic, conservation, recreational, scientific, educational,
11 wildlife and fisheries preservation, and other interests of Plaintiffs and their respective members
12 have been, are being, and, unless the relief prayed for herein is granted, will continue to be
13 adversely affected and irreparably injured by the Defendants' arbitrary and capricious issuance
14 of the Biological Opinion. These injuries are actual and concrete and would be redressed by the
15 relief sought herein. Plaintiffs have no adequate remedy at law.

16 14. The Defendants in this action are:

- 17 a. RYAN ZINKE. Mr. Zinke is sued in his official capacity as Secretary of the
18 Interior (the Secretary). He is responsible for implementing the ESA for
19 species under the Department of Interior's jurisdiction and for ensuring that
20 formal consultations and biological opinions required under section 7 of the
21 ESA are completed in accordance with the letter and intent of the law.
- 22 b. GREG SHEEHAN. Mr. Sheehan is sued in his official capacity as Acting
23 Director of the Fish and Wildlife Service. He has been delegated the
24 responsibilities of the Secretary of Interior described in the preceding
25 paragraph. He is responsible for administering the ESA for species under the
26 Department of Interior's jurisdiction, including reviewing and approving the
27 findings of the Biological Opinion.

1 c. FISH AND WILDLIFE SERVICE. The Fish and Wildlife Service is an
2 agency of the United States Government. The Fish and Wildlife Service is
3 responsible for performing consultations under section 7 of the ESA for
4 species under the Department of Interior's jurisdiction.

5 **JURISDICTION AND VENUE**

6 15. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action
7 arising under the laws of the United States); 16 U.S.C. § 1540(c) (action arising under the
8 Endangered Species Act); and 5 U.S.C. §§ 702, 703, and 706 (judicial review of federal agency
9 actions).

10 16. The Secretary has issued the Biological Opinion on the effects of the WaterFix on
11 Delta Smelt pursuant to 16 U.S.C. § 1536(b). Plaintiffs assert that the Biological Opinion is
12 arbitrary and capricious, an abuse of discretion, and not in accordance with law within the
13 meaning of 5 U.S.C. § 706(2)(A). An actual controversy therefore exists between the parties
14 within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

15 17. Venue lies in this judicial district under 28 U.S.C. § 1391(e)(1). A substantial part
16 of the events or omissions giving rise to the claim occurred in Contra Costa County, which is in
17 this judicial district. A substantial part of the Delta Smelt's critical habitat lies in Contra Costa
18 County; a portion of and the southern terminus of the proposed tunnels are in Contra Costa
19 County; and the existing CVP and SWP pumping plants lie in Contra Costa County. Plaintiffs
20 The Bay Institute and NRDC maintain offices within this judicial district. Plaintiff The Bay
21 Institute resides in this judicial district.

22 **INTRADISTRICT ASSIGNMENT**

23 18. This action should be assigned to the San Francisco or Oakland Division pursuant
24 to Civil L.R. 3-2(d) because a substantial portion of the events giving rise to the claim occurred,
25 or will occur, in Contra Costa County.

FACTUAL BACKGROUND

A. *Delta Smelt*

19. The Delta Smelt is a small fish that averages 2.5 inches in length. The Bay-Delta is home to the only Delta Smelt population on Earth. Delta Smelt are found predominantly in the Delta and the northern parts of the Bay estuary. Delta Smelt live for most of their life span in the Delta's low-salinity zone where saline and fresh waters mix, but they migrate upstream into freshwater to spawn. Most Delta Smelt reproduce after one year. As a result, Delta Smelt are extremely sensitive to disturbances in their reproductive or larval nursery habitats.

20. The amount and the quality of Delta Smelt habitat has declined dramatically due to the CVP and SWP's water storage, diversion, and export operations. As fresh water is stored, diverted, or exported, the low-salinity zone shifts upstream from large, shallow habitats, found in Suisun Bay, to narrow, deep river channels of the Delta. Those channels provide less suitable habitat than open water environments for Delta Smelt rearing. This impact to the habitat of the Delta Smelt is compounded by the high levels of mortality that can be caused by the CVP and SWP's export pumps.

21. The Fish and Wildlife Service listed the Delta Smelt as a threatened species under the ESA on March 5, 1993. 58 Fed. Reg. 12,854 (1993). It designated critical habitat for the Delta Smelt on December 19, 1994. 59 Fed. Reg. 65,256 (1994). The Delta Smelt's critical habitat includes all waters and submerged lands within the Delta, including portions of the Sacramento and San Joaquin Rivers. *Id.* at 65,260.

22. Today, Delta Smelt are closer to extinction than when they were listed as threatened. Operations of the CVP and SWP in recent years have resulted in high Delta Smelt mortality, lower survival, and record low abundance. Delta Smelt populations will continue to decline, and may soon become extinct, under the status quo.

B. *WaterFix and the Biological Opinion*

23. As proposed, the construction and operation of WaterFix will result in environmental degradation of the Bay-Delta ecosystem and harm Delta Smelt and other ESA-

1 protected species. Specifically, the administrative record demonstrates that Delta Smelt will be
2 adversely affected by the following impacts of WaterFix:

- 3 a. Increased salinity. By diverting fresh water from the Sacramento River before
4 it reaches the Delta, WaterFix will allow salt water to travel further upstream
5 into the Delta, infiltrating the Delta Smelt's habitat, including habitat in
6 Contra Costa County. Delta Smelt are sensitive to salinity. They generally
7 spawn in freshwater habitats; larvae rear in freshwater habitats as they
8 gradually migrate towards the estuary's low salinity zone, which is centered
9 around the two parts per thousand isolahline. Juveniles typically rear in the
10 less saline end of the low salinity zone (though they may rear entirely in
11 freshwater habitats). Thus, upstream movement of the low salinity zone
12 caused by increased diversion of fresh water is likely to constrict and degrade
13 the habitat of Delta Smelt, reduce survival and geographic distribution, and
14 increasing the risk of extinction.
- 15 b. Reduced Delta outflow. WaterFix will reduce the amount of water that flows
16 through the Delta into the Bay (Delta outflow), because of increased
17 diversions. Reduced Delta outflow adversely affects Delta Smelt survival and
18 abundance. Increased Delta outflow during certain months and years is
19 necessary to prevent the extinction of Delta Smelt.
- 20 c. Increased water temperature. In combination with the likely effects of climate
21 change, WaterFix is likely to result in increased water temperatures in the
22 Delta. As water temperatures rise, the size of Delta Smelt decreases and
23 mortality rates increase.
- 24 d. Decreased turbidity. Diverting water from the Sacramento River would
25 remove a critical source of suspended sediment flow into the Delta. Delta
26 Smelt rely on turbid waters to provide cover to avoid predators. WaterFix is
27 likely to remove a significant amount of the suspended sediment that would
28

1 otherwise flow into the Delta, increasing water clarity, thereby harming Delta
2 Smelt.

- 3 e. Loss of habitat. WaterFix is likely to prevent Delta Smelt from occupying
4 portions of designated critical habitat upstream of the new water intakes, as
5 fish are unable to migrate past the barriers created by the new intakes.
- 6 f. Increased harmful algal blooms. WaterFix will result in more frequent blooms
7 of the toxic cyanobacteria *Microcystis aeruginosa* (Microcystis) and other
8 harmful algal blooms because of increased water temperatures, reduced rates
9 of flow through the Delta, and lower turbidity. Microcystis generate powerful
10 toxins that can cause direct mortality of Delta Smelt and harmful indirect
11 effects.
- 12 g. Decreased food supply. Water exports entrain phytoplankton and zooplankton,
13 which are the base of the food web supporting Delta Smelt. Changes in flow
14 patterns can also reduce the amount of phytoplankton and zooplankton in the
15 estuarine food web. Additionally, Microcystis and other toxins are likely to
16 reduce food supplies for Delta Smelt. Reductions in food supply are likely to
17 adversely affect the survival and abundance of Delta Smelt.
- 18 h. Increased contaminants. Construction and operation of WaterFix is anticipated
19 to result in increases in water pollution, including contaminants that can harm
20 Delta Smelt.

21 24. The loss and constriction of habitat proposed under WaterFix and other adverse
22 effects on the Delta described in the preceding paragraph significantly threaten the existence of
23 Delta Smelt and the ability of the species to recover and persist in the Bay-Delta ecosystem at
24 abundance levels higher than current record-lows.

25 25. Despite the substantial environmental harm, the Fish and Wildlife Service
26 concluded that WaterFix will neither jeopardize the survival and recovery of the Delta Smelt, nor
27 cause adverse modification of its designated critical habitat. The Fish and Wildlife Service
28 reached this erroneous conclusion by ignoring the best available science and relying on

1 mitigation measures that have not been specifically identified and that are not reasonably certain
2 to occur. The Fish and Wildlife Service acknowledges that WaterFix will result in adverse
3 effects to Delta Smelt and its critical habitat, but it assumes that those impacts will be adequately
4 mitigated by undefined future actions consistent with Guiding Principles. However, the Guiding
5 Principles are vague, unenforceable, and internally contradictory, and Fish and Wildlife Service
6 has failed to analyze whether they would be effective. These assumptions are unsupported by the
7 record and unsupported by analysis by the Fish and Wildlife Service. The Biological Opinion
8 fails to identify specific mitigation measures that are certain to be implemented, and does not
9 analyze whether specific future measures will be sufficient to result in the project avoiding
10 jeopardy to the species or adverse modification of its designated critical habitat.

11 26. The Fish and Wildlife Service issued the Biological Opinion without considering
12 the entire impact of the WaterFix project. Specifically, the Biological Opinion analyzed the
13 impact of WaterFix only through the year 2030, even though WaterFix is intended to operate for
14 decades, and the adverse impacts beyond 2030 are foreseeable. In issuing its no-jeopardy
15 Biological Opinion, the Fish and Wildlife Service also did not adequately consider the existing
16 modeling and analysis of the effects of operations of WaterFix through 2070.

17 27. The Fish and Wildlife Service issued the Biological Opinion without considering
18 the best available scientific information. Specifically, the Fish and Wildlife Service ignored its
19 own scientific information and data on the impact of Delta outflow on the abundance,
20 distribution, and survival of Delta Smelt. In addition, the Fish and Wildlife Service failed to
21 adequately consider the adverse effects of the reductions in turbidity on Delta Smelt and the
22 infeasibility of mitigating reductions in turbidity caused by WaterFix. Finally, the Fish and
23 Wildlife Service overstated the potential ecological benefit of tidal marsh habitat restoration for
24 Delta Smelt.

25 **STATUTORY AND REGULATORY FRAMEWORK**

26 28. Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems
27 upon which endangered species and threatened species depend may be conserved, [and] to
28

1 provide a program for the conservation of such endangered species and threatened species . . .”
2 16 U.S.C. § 1531(b).

3 29. The Supreme Court has observed that “[t]he plain intent of Congress in enacting
4 this statute was to halt and reverse the trend toward species extinction, whatever the cost,” and
5 that, under the act, “[it] intended endangered species to be afforded the highest of priorities.”
6 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978).

7 *A. Consultation under the ESA*

8 30. Section 7(a)(2) of the ESA requires that each federal agency, in consultation with
9 the Secretary, ensures that any activity which it authorizes, funds, or carries out is not likely to
10 jeopardize the continued existence of any threatened or endangered species or destroy or
11 adversely modify any listed species’ critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

12 31. An action would jeopardize a species if it reasonably would be expected to reduce
13 appreciably the likelihood of both the survival and recovery of the species in the wild. 50 C.F.R.
14 § 402.02.

15 32. Following consultation, the Secretary must issue a “biological opinion” in which
16 he determines whether the activity is likely to jeopardize a listed species or adversely affect its
17 critical habitat and provides a summary of the reasons for the biological opinion’s conclusion. 16
18 U.S.C. § 1536(b)(3)(A). In formulating his opinion, the Secretary must use the best scientific and
19 commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

20 33. The Secretary has delegated his duties under the ESA to the Fish and Wildlife
21 Service. 50 C.F.R. § 402.01(b).

22 *B. The Fish and Wildlife Service may not rely on measures that are not reasonably specific*
23 *and certain to occur in determining whether WaterFix will jeopardize Delta Smelt or*
24 *adversely affect its critical habitat*

25 34. Under section 7(a)(2) of the ESA, the Fish and Wildlife Service must “insure that
26 any action authorized . . . is not likely to jeopardize the continued existence of any endangered or
27 threatened species or result in the destruction or adverse modification of [critical] habitat of such
28 species.” 16 U.S.C § 1536(a)(2).

1 35. A biological opinion must include a discussion of “whether the action, taken
2 together with its cumulative effects, is likely to jeopardize [the species].” 50 C.F.R.
3 § 402.14(g)(4). The Fish and Wildlife Service has defined the “effects of the action” as “the
4 direct and indirect effects . . . on the species or critical habitat.” 50 C.F.R. § 402.02. The
5 definition goes on to define indirect effects as “those that are caused by the proposed action and
6 are later in time, but still are reasonably certain to occur.” *Id.*

7 36. A biological opinion may consider mitigation measures that are included with the
8 proposed project to assess whether the project will jeopardize the continued existence and
9 recovery of the species or adversely affect its critical habitat. However, any such “[m]itigation
10 measures supporting a biological opinion’s no jeopardy conclusion must be ‘reasonably specific,
11 certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-
12 enforceable obligations; and most important, they must address the threats to the species in a way
13 that satisfies the jeopardy and adverse modification standards.’” *Nat’l Wildlife Fed’n v. Nat’l*
14 *Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1125-26 (D. Or. 2011) (quoting *Ctr. for*
15 *Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002)); *see Ctr. for*
16 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Nat.*
17 *Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007).

18 37. Reliance on uncertain future mitigation measures to conclude that the project will
19 not jeopardize the species or adversely modify its critical habitat violates section 7(a)(2) of the
20 ESA. The vague, undefined, and internally contradictory Guiding Principles do not “address the
21 threat to the species in a way that satisfies the jeopardy and adverse modification standards,”
22 among other requirements. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d
23 1117, 1125-26 (D. Or. 2011) (quoting *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d
24 1139, 1152 (D. Ariz. 2002)). Such reliance allows potential jeopardy to Delta Smelt, and
25 destruction or adverse modification of Delta Smelt habitat, without first insuring that adequate
26 measures can and will be implemented, based on the best available science, to ensure that the
27 action will neither jeopardize the continued existence and recovery of the species nor adversely
28 modify its critical habitat.

1 C. *The Fish and Wildlife Service must consider the entire effects of the action*

2 38. Section 7(a)(2) of the ESA and its implementing regulations require the Fish and
3 Wildlife Service to “[e]valuate the effects of the action and cumulative effects” and to render its
4 biological opinion “as to whether the action, taken together with cumulative effects, is likely to
5 jeopardize the continued existence of listed species or result in the destruction or adverse
6 modification of critical habitat.” 50 C.F.R. § 402.14(g)(3), (4).

7 39. The “actions” on which section 7 consultation is required include “all activities or
8 programs of any kind *authorized*, funded or carried out” by any federal agency. 50 C.F.R.
9 § 402.02 (emphasis added); *see also id.* § 402.14(a). The Fish and Wildlife Service’s regulations
10 further define the phrase “effects of the action” to include “the direct and indirect effects of an
11 action . . . , together with the effects of other activities that are interrelated or independent.” 50
12 C.F.R. § 402.02. “Indirect effects” are those effects that are “caused by the proposed action and
13 are later in time, but still reasonably certain to occur.” *Id.* “Interrelated actions” are actions that
14 are “part of a larger action and depend on the larger action for their justification.” *Id.*
15 “Interdependent actions” are actions that “have no independent utility apart from the action
16 under consideration.” *Id.*

17 40. The ESA requires a biological opinion to analyze the effects of the entire action
18 authorized by the agency, without segmenting the consultation into incremental steps and only
19 considering early stages of a project. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2),
20 requires that a consulting agency consider the “entire agency action” in a consultation that is
21 “coextensive” with the extent and duration of the action. *Conner v. Burford*, 848 F.2d 1441,
22 1453, 1458 (9th Cir. 1988); *see Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521-25 (9th
23 Cir. 2010). The term “agency action” must be defined broadly because “caution can only be
24 exercised if the agency takes a look at all the possible ramifications of the agency action.”
25 *Burford*, 848 F.2d at 1453 (brackets omitted) (quoting *N. Slope Borough v. Andrus*, 642 F.2d
26 589, 608 (D.C. Cir. 1980)).

1 41. Failing to analyze the long-term effects of a project that will operate for decades
2 violates the ESA because the agency has failed to ensure that the whole of the action will not
3 jeopardize Delta Smelt nor adversely modify its critical habitat.

4 *D. The Fish and Wildlife Service must consider best available science*

5 42. Section 7(a)(2) of the ESA requires the Fish and Wildlife Service to consider the
6 “the best scientific and commercial data available” in performing a consultation under section 7
7 of the ESA.

8 **CLAIM FOR RELIEF**
9 **Violation of the Administrative Procedure Act**
10 **(5 U.S.C. § 706)**

11 43. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained
12 in the preceding paragraphs.

13 44. The Secretary’s conclusion, in the Biological Opinion, that WaterFix will not
14 jeopardize the continued existence of the Delta Smelt and will not result in the destruction or
15 adverse modification of the critical habitat of Delta Smelt is arbitrary, capricious, an abuse of
16 discretion, and not in accordance with law.

17 45. The Biological Opinion improperly relies on uncertain future mitigation measures
18 without adequate evidence that the mitigation measures are reasonably certain to occur and will
19 be effective to address the adverse impacts that have already been identified, and without
20 identifying concrete actions sufficient to insure protection of the Delta Smelt and its critical
21 habitat.

22 46. The Biological Opinion fails to define the agency action or to consider the entire
23 “effects of the action,” thereby significantly underestimating and/or ignoring the effects of the
24 entire agency action. Specifically, the Fish and Wildlife Service has analyzed the potential
25 impacts of the construction and operation of WaterFix on the Delta only through the year 2030,
26 even though WaterFix is intended to be operated in the decades that follow, and the adverse
27 impacts of operations of the facility on Delta Smelt in the decades to follow are clearly
28 foreseeable.

Dated: June 29, 2017

s/ Claire Woods
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CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Bay.org d/b/a The Bay Institute; Natural Resources Defense Council, Inc.; and Defenders of Wildlife

(b) County of Residence of First Listed Plaintiff San Francisco (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Claire Woods, Michael E. Wall, Katherine Poole
Natural Resources Defense Council, Inc.
111 Sutter Street, Fl. 21, San Francisco, California 94104 415-875-6100

DEFENDANTS

Ryan Zinke, in his official capacity as Secretary of Interior; Greg Sheehan, in his official capacity as Acting Director of USFWS; and U.S. Fish and Wildlife Service.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

U.S. Department of Justice, Environment and Natural Resources Division

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
X 2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- X 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Claim under the Administrative Procedure Act, 5 U.S.C. sec. 706, for failure to comply with Endangered Species Act, 16 U.S.C. sec. 1531.

Brief description of cause:

Defendants issued an arbitrary and capricious biological opinion, which concluded that the California WaterFix project will neither jeopardize Delta Smelt, nor cause adverse modification of its critical habitat.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes X No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 06/29/2017

SIGNATURE OF ATTORNEY OF RECORD

s/ Claire Woods

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.