

1 NOSSAMAN LLP
ROBERT D. THORNTON (SBN 072934)
2 rthornton@nossaman.com
PAUL S. WEILAND (SBN 237058) (Counsel for Service)
3 pweiland@nossaman.com
MELISSA A. POOLE (SBN 235283)
4 mpoole@nossaman.com
18101 Von Karman Avenue, Suite 1800
5 Irvine, CA 92612-0177
Telephone: (949) 833-7800
6 Facsimile: (949) 833-7878

7 Attorneys for Plaintiffs Coalition for a Sustainable Delta, Belridge Water
Storage District, Berrenda Mesa Water District, Lost Hills Water District,
8 Wheeler Ridge-Maricopa Water Storage District, and Dee Dillon

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11
12 COALITION FOR A SUSTAINABLE DELTA,) Case No: 1:08-CV-00397-OWW-GSA
BELRIDGE WATER STORAGE DISTRICT,)
13 BERRENDA MESA WATER DISTRICT, LOST) FIRST AMENDED COMPLAINT FOR
HILLS WATER DISTRICT, WHEELER RIDGE-) DECLARATORY AND INJUNCTIVE RELIEF
14 MARICOPA WATER STORAGE DISTRICT,)
AND DEE DILLON,)
15)
16 Plaintiffs,)
17 vs.)
18 DONALD KOCH, in his official capacity as)
Director of the California Department of Fish and)
Game,)
19 Defendant.)
20)
21 CENTRAL DELTA WATER AGENCY, et)
al.,)
22 Defendant-Intervenors,)
23)
24 CALIFORNIA SPORTFISHING PROTECTION)
ALLIANCE, et al.,)
25 Defendant-Intervenors)
26)
27)
28)

JURISDICTION AND VENUE

1
2 1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
3 question) and 16 U.S.C. § 1540(c) and (g) (actions arising under the Endangered Species Act or
4 ESA).

5 2. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.
6 As such, this Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and
7 2202.

8 3. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) (an ESA-citizen suit
9 may be brought in the District where the violation occurs) and 28 U.S.C. § 1391(b) (suit may be
10 brought in the District where a substantial part of the activities that are the subject of the action are
11 situated).

12 4. Pursuant to 16 U.S.C. § 1540(g), plaintiffs provided defendant and the Secretary of the
13 Interior with 60 days' notice of the violations contained herein. *See* Exhibit A, attached hereto. This
14 notice was sent to defendant on October 25, 2007. Defendant has not taken adequate action to
15 remedy the violations set forth in that notice of violations and alleged herein.

16 **INTRODUCTION**

17 5. This lawsuit seeks to cure continuing and unlawful harm, injury, and death to fish species
18 native to the Sacramento-San Joaquin Delta (“the Delta”) and listed as threatened or endangered
19 under the Endangered Species Act, including the Sacramento River winter-run chinook salmon,
20 Central Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt, due to the
21 conduct of the California Department of Fish and Game (“CDFG” or the “Department”), including
22 specifically the enforcement of sport-fishing regulations, which were promulgated and are now being
23 enforced in order to manage and maintain the non-native striped bass population in the Delta.

24 **FACTUAL BACKGROUND**

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

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

3 7. The health of the Delta is crucial to the water supply of the State of California, as it is a
4 critical link in both the State Water Project ("SWP") and Central Valley Project ("CVP"), which
5 deliver water to urban, agricultural, and industrial water users throughout the State. Two-thirds of
6 California's residents (an estimated 23 million people) rely on the Delta for at least a portion of their
7 drinking water. In addition, the SWP and CVP provide water to more than 4 million acres of irrigated
8 farmland in the State, primarily in the San Joaquin Valley.

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

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

16 10. Of the Delta's 738,000 acres, roughly two-thirds support agriculture. More than 500,000
17 acres of the Delta currently are in agricultural production. Thus, the Delta also serves as a drainage
18 area for vast areas of agricultural land.

19 11. The Delta supports more than 750 plant and animal species, including 130 species of fish.
20 The Delta serves as an important fishery habitat; it supports an estimated 25 percent of all warm water
21 and anadromous sport-fishing species, and 80 percent of California's commercial fishery species live
22 in, or migrate through, the Delta.

23 The Listed Species

24 12. The Delta also provides habitat for a number of species that are protected by the
25 Endangered Species Act ("ESA"), including the Sacramento winter-run chinook salmon, Central
26 Valley spring-run chinook salmon, Central Valley steelhead, and delta smelt (collectively, the "Listed
27 Species").
28

1 13. The Sacramento River winter-run chinook salmon is an anadromous fish that migrates
2 through the Delta to the upper Sacramento River from December to May. Anadromous fish spend
3 most of their life in the ocean but must enter fresh water rivers and streams to spawn. The National
4 Marine Fisheries Service (“NMFS”) listed the Sacramento River winter-run chinook salmon as an
5 endangered species on January 4, 1994. 59 Fed. Reg. 440 (Jan. 4, 1994). NMFS designated critical
6 habitat for the Sacramento River winter-run chinook salmon on June 16, 1993. 58 Fed. Reg. 33,212
7 (June 16, 1993).

8 14. The Central Valley spring-run chinook salmon is an anadromous fish that migrates
9 through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley
10 spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394
11 (Sept. 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon
12 on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

13 15. The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San
14 Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the
15 distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow
16 trout permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened
17 species on March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS designated critical habitat
18 for the Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

19 16. The delta smelt is a small translucent fish with a narrow geographic range limited to low
20 salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing
21 the delta smelt as threatened). The delta smelt is the only true native estuarine species found in the
22 Delta. *Id.* The Fish and Wildlife Service (“FWS”) listed the delta smelt as a threatened species on
23 March 5, 1993. 58 Fed. Reg. at 12,854. FWS designated critical habitat for the delta smelt on
24 December 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994).

25 Striped Bass

26 17. The Delta is the most invaded estuary in the world. Robert F. Service, *Environmental*
27 *Restoration: Delta Blues, California Style*, 317 Science 442 (2007).

28 18. The striped bass population in the Delta is an invasive, non-native population.

1 19. The striped bass was introduced to the Delta in the late 19th century. Matthew L.
2 Nobriga & Frederick Feyrer, *Shallow-Water Piscivore-Prey Dynamics in California's Sacramento-*
3 *San Joaquin Delta*, 5(2) San Francisco Estuary & Watershed Science 1, 4 (2007).

4 20. According to estimates, the striped bass population in the Delta has fluctuated from a low
5 of approximately 600,000 to a high of 3,000,000.

6 21. Today, the striped bass is the most broadly distributed and abundant large piscivorous
7 fish in the Delta. Nobriga & Feyrer, *supra* ¶ 19, at 4.

8 22. The striped bass is a voracious feeder. Daniel Merriman, *Notes on the Life History of the*
9 *Striped Bass (Roccus lineatus)*, Copeia 15 (1937); Peter B. Moyle, *Conservation of Native Freshwater*
10 *Fishes in the Mediterranean-type Climate of California, USA: A review*, 72(2) Biological
11 Conservation 271, 272 (1995).

12 23. Striped bass prey on the Listed Species and other fish species native to the Delta.

13 24. Striped bass mature at four to five years of age and can live 30 years or longer. Wim J.
14 Kimmerer et al., *Analysis of an estuarine striped bass (Morone saxatilis) population: influence of*
15 *density dependent mortality between metamorphosis and Recruitment*, 57 Canadian Journal of
16 Fisheries and Aquatic Sciences 478 (2000).

17 25. Striped bass are typically found in turbid, open-water habitats, which also support native,
18 listed fishes such as chinook salmon and delta smelt. U.S. Bureau of Reclamation, *Central Valley*
19 *Project and State Water Project Operations Criteria and Plan Biological Assessment* (2008).

20 26. Striped bass are the most significant predator of chinook salmon and delta smelt.
21 Nobriga & Feyrer, *supra* ¶ 19, at 9.

22 27. Striped bass predation of the Listed Species has a significant, adverse population-level
23 effect on the survival and recovery of such species. E.g., Randall Baxter et al, *Interagency Ecological*
24 *Program 2008 Work Plan to Evaluate the Decline of Pelagic Species in the Upper San Francisco*
25 *Estuary* 13 (2008); U.S. Fish & Wildlife Service, *Recovery Plan for the Sacramento/San Joaquin*
26 *Delta Native Fishes* at 23 (Nov. 1996).

27 28. CDFG estimates that at a population of 765,000 adults, striped bass consume three
28 percent of the threatened Central Valley spring-run chinook salmon population annually. California

1 Department of Fish and Game, *Conservation Plan for the Striped Bass Management Program* at 26,
2 App. E (Nov. 12, 1999).

3 29. CDFG estimates that at a population of 765,000 adults, striped bass consume six percent
4 of the Sacramento River winter-run chinook salmon population annually. California Department of
5 Fish and Game, *supra* ¶ 28 at 26, App. E.

6 30. A published empirical study indicates that the CDFG underestimated the impacts of
7 striped bass predation on Sacramento River winter-run chinook salmon. The study concludes that
8 striped bass consume nine percent of winter-run chinook salmon outmigrants. Steven T. Lindley &
9 Michael S. Mohr, *Modeling the effect of striped bass (Morone saxatilis) on the population viability of*
10 *Sacramento River winter-run chinook salmon (Oncorhynchus tshawyscha)*, 101 Fishery Bulletin 321,
11 328 (2003).

12 31. CDFG estimates that at a population of 765,000 adults, striped bass consume 5.3 percent
13 of the delta smelt population annually. California Department of Fish and Game, *supra* ¶ 28 at 32,
14 App. E.

15 Factors Contributing to the Decline of the Listed Species

16 32. The overall health of the Delta ecosystem, including the health of the populations of
17 various species in the Delta, is in decline due to a number of factors, including introduction of
18 invasive and predatory species into the Delta ecosystem, degradation of water quality due to urban
19 and agricultural runoff to Delta waterways, water exports from the Delta that are necessary to support
20 the needs of growing human populations in the Delta, the Bay Area, the San Joaquin Valley, and
21 southern California, climate change, and other factors.

22 33. Some special interests have attributed many of the problems in the Delta, including the
23 decline in the health of species such as the delta smelt, to the pumps that provide water to the SWP
24 and CVP systems. These systems export water to millions of urban and agricultural users throughout
25 the State, including users in the Bay Area and other parts of Northern California.

26 34. But there are many other factors that are significant contributors to the decline in the
27 Delta ecosystem, including predation of the Listed Species by the non-native striped bass.
28

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

10 36. According to the most recent peer-reviewed, empirical research regarding the effects of
11 the pumps, delta smelt larval, juvenile, and pre-spawning adult mortality at the pumps accounts for
12 between zero and 40 percent of the population. In other words, it is unknown whether the pumps
13 have no population-level effects, small population-level effects, or large population-level effects at
14 these life stages. Kimmerer, *supra* ¶ 35 at 24.

15 37. According to the most recent peer-reviewed, empirical research regarding the effects of
16 the pumps, adult delta smelt mortality at the pumps accounts for between one and 50 percent of the
17 population; this estimate includes a potential upward bias in its upper value. *Id.* at 1. In other words,
18 it is unknown whether the pumps have *de minimis* population-level effects, small population-level
19 effects, or large population-level effects at this life stage.

20 38. According to the most recent peer-reviewed, empirical research regarding the effects of
21 the pumps, chinook salmon mortality at the pumps accounts for between approximately one and 20
22 percent of the population. *Id.* at 19, Figure 10. In other words, it is unknown whether the pumps have
23 *de minimis* population-level effects, small population-level effects, or large population-level effects.

24 39. According to the most recent peer-reviewed, empirical research regarding the effects of
25 the pumps, losses of chinook salmon due to the pumps are less than losses attributable to fishing. *Id.*
26 at 24.

1 40. The most recent peer-reviewed, empirical research regarding the effects of the pumps is
2 based on a number of assumptions that are untested and that skew the estimates of the effects of the
3 pumps upward. *Id.*

4 The Role of the Commission and Department in the Decline of the Listed Species

5 41. Article 4, section 20 of the California Constitution states that “[t]he Legislature may
6 delegate to the [California Fish and Game Commission (‘Commission’ or ‘CFGC’)] such powers
7 relating to the protection and propagation of fish and game as the Legislature sees fit.”

8 42. Section 200 of the California Fish and Game Code delegates to the Commission “the
9 power to regulate the taking or possession of birds, mammals, fish, amphibia, and reptiles to the
10 extent and in the manner prescribed in this article.” Cal. Fish & Game Code § 200.

11 43. Section 203 of the California Fish and Game Code provides the Commission with the
12 regulatory authority to establish seasons, bag limits, and methods of take for sport fish, including the
13 striped bass. *Id.* § 203.

14 44. CFGC adopts sport-fishing regulations biennially.

15 45. Current sport-fishing regulations bar sports fisherman from taking striped bass less than
16 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18
17 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit. 14, § 5.75.

18 46. CDFG is responsible for enforcing sport-fishing regulations including through the
19 appointment of deputies. Cal. Fish & Game Code §§ 850-53; California Department of Fish and
20 Game, *supra* ¶ 27 at 43.

21 47. In the early 1980s, the sports fishing industry successfully lobbied the State of California
22 to enact legislation that created a striped bass fishing stamp to generate funds to support the non-
23 native striped bass population in the Delta. *Striped Bass Restoration and Management Plan for the*
24 *Sacramento – San Joaquin Estuary Phase I* at 6 (Sept. 1989) (hereinafter “*Striped Bass Restoration*
25 *and Management Plan*”).

26 48. CDFG used funds from the striped bass fishing stamp to raise striped bass in hatcheries
27 and to stock the Delta with more than 5.5 million striped bass. *Id.*

28

1 49. The funds from the stamp program also were used to prepare the *Striped Bass*
2 *Restoration and Management Plan*, which represents what CDFG believes should be done to restore
3 the striped bass population to levels of more than three million adult fish. *Id.* at 1.

4 50. In 1996, CFGC adopted a striped bass policy. Consistent with the CDFG *Striped Bass*
5 *Restoration and Management Plan*, the *CFGC Striped Bass Policy* establishes a long-term striped
6 bass restoration goal of 3,000,000 adult striped bass in the Delta. *See CFGC Striped Bass Policy*.
7 The *CFGC Striped Bass Policy* also requires CDFG to stabilize and restore the striped bass fishery in
8 the Delta.

9 51. Around the same time that CFGC adopted the *CFGC Striped Bass Policy*, CDFG began
10 work on a conservation plan for activities associated with management of the striped bass population
11 in the Delta. *See Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental*
12 *Take Permit to the California Department of Fish and Game for Activities under the Striped Bass*
13 *Management Program* at 1 (National Marine Fisheries Service, June 23, 2000). The purpose of the
14 *Conservation Plan for the Striped Bass Management Program* was to obtain authorization from
15 NMFS and FWS for take of ESA-listed species “that may result from implementation of its Striped
16 Bass Management Program.” California Department of Fish and Game, *supra* ¶ 28 at 2.

17 52. NMFS and FWS both issued incidental take permits for the Striped Bass Management
18 Program on June 23, 2000. *Federal Fisheries Permit No. 1257* (National Marine Fisheries Service,
19 June 23, 2000); *Federal Fish and Wildlife Permit No. TE028154-0* (Fish and Wildlife Service, June
20 23, 2000). The incidental take permits authorized take of, *inter alia*, the endangered Sacramento
21 River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened
22 Central Valley steelhead, and threatened delta smelt.

23 53. The *Conservation Plan for the Striped Bass Management Program* described activities
24 covered by the incidental take permits as: stocking of striped bass in the Delta at numbers sufficient to
25 stabilize and maintain a population of 712,000 adults; possible recommendations to the CFGC for
26 changes to striped bass fishing regulations to reach and maintain the target population level; and
27 striped bass monitoring. *See California Department of Fish and Game, supra* ¶ 28 at 2.

28

1 54. The incidental take permits issued by NMFS and FWS for the *Conservation Plan for the*
2 *Striped Bass Management Program* expired on December 31, 2004 and December 30, 2004,
3 respectively. The incidental take permits did not provide take coverage for the striped bass fishing
4 regulations already in place as of the date of issuance of those permits.

5 55. The sport-fishing regulations, consistent with CDFG's *Striped Bass Restoration and*
6 *Management Plan*, operate to protect and increase the non-native striped bass population in the Delta
7 by prohibiting sports fisherman from taking striped bass less than 18 inches in length and prohibiting
8 sports fisherman from taking more than two striped bass in excess of 18 inches in length. Code Regs.
9 tit 14, § 5.75. By increasing the striped bass population, the striped bass sport-fishing regulations and
10 programs increase striped bass predation of the Listed Species.

11 56. As a result of implementation and enforcement of striped bass sport-fishing regulations
12 and programs, as described above, defendant has taken the Listed Species in violation of the ESA.
13 *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002).

14 57. Specifically, defendant has enforced and continues to enforce the striped bass sport-
15 fishing regulations, which maintain an artificially high population of striped bass in the Delta, thereby
16 artificially increasing striped bass predation of Listed Species, thereby harming the populations of the
17 Listed Species and the Delta ecosystem.

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

19 58. Congress enacted the ESA in order to protect species that "have been so depleted in
20 numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). The ESA
21 was enacted in response to a growing public concern about the extinction or near extinction of a
22 number of populations of animal and plant species, and in recognition of the fact that such species
23 provide "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation
24 and its people." 16 U.S.C. § 1531(a)(3).

25 59. The ESA provides protection for endangered and threatened species and their habitats,
26 including the Listed Species. 16 U.S.C. §§ 1536; 1538. Specifically, section 9(a)(1)(B) of the ESA
27 prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). The ESA expressly
28 provides that the FWS and NMFS (hereinafter individually, the "Wildlife Agency" and collectively,

1 the “Wildlife Agencies”) can extend the take prohibition of Section 9(a)(1)(b) to threatened species.
2 16 U.S.C. § 1533(d).

3 60. The ESA broadly defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill,
4 capture or collect, or to attempt to engage in such conduct.” 16 U.S.C. § 1532(19). The Wildlife
5 Agencies define “harm” to mean “an act which actually kills or injures wildlife. Such act may include
6 significant habitat modification or degradation where it actually kills or injures wildlife by
7 significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50
8 C.F.R. §§ 17.3, 222.102. “Harassment” is defined by the Wildlife Agencies as “an intentional or
9 negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an
10 extent as to significantly disrupt normal behavioral patterns which include, but are not limited to,
11 breeding, feeding, or sheltering.” 50 C.F.R. §§ 17.3, 222.102.

12 61. The ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B).
13 The Sacramento River winter-run chinook salmon is listed as an endangered species. 59 Fed. Reg.
14 440 (Jan. 4, 1994).

15 62. The ESA expressly provides that the Wildlife Agencies can extend the take prohibition of
16 Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies have by
17 regulation extended the take prohibition to the threatened delta smelt, Central Valley spring-run
18 chinook salmon, and Central Valley steelhead. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b),
19 223.203(a).

20 63. A governmental entity can be liable for illegal take of listed species in violation of
21 section 9 of the ESA where such take springs from the exercise of regulatory authority by that
22 governmental entity. *E.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii*
23 *Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

24 64. Under section 7(a)(2) of the Endangered Species Act, the Bureau of Reclamation must
25 consult with the FWS and NMFS regarding the effects of the CVP and SWP on the Listed Species in
26 order to operate the CVP and SWP. 16 U.S.C. § 1536(a)(2). As part of the consultation, the FWS
27 and NMFS are obligated by the ESA to consider the effects of the CVP and SWP together with the
28 environmental baseline when determining whether the CVP and SWP jeopardize one or more listed

1 species or destroy or adversely modify designated critical habitat of such species. 16 U.S.C. § 1536;
2 50 C.F.R. § 402.02.

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

5 66. “The proper baseline analysis is not the proportional share of responsibility the federal
6 agency bears for the decline in the species, but what jeopardy might result from the agency’s
7 proposed actions in the present and future human and natural contexts.” *Pac. Coast Federation of*
8 *Fishermen’s Assoc. v. United States Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005).

9 67. “[W]here baseline conditions already jeopardize a species, an agency may not take action
10 that deepens the jeopardy by causing additional harm.” *Nat’l Wildlife Federation v. Nat’l Marine*
11 *Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

12 PARTIES

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

25 69. Coalition members have contracts with various agencies for the delivery of SWP water,
26 and as such, depend on SWP deliveries from the Delta to the San Joaquin Valley for their water
27 supply. Coalition members have contracts to receive SWP deliveries through 2035. These contracts
28 are expected to be extended beyond that date. Thus, Coalition members have a long-term interest in

1 the overall health of the Delta and its ecosystem, which includes the maintenance of viable
2 populations of the Listed Species.

3 70. Availability of water for delivery via the SWP is subject to the interagency consultation
4 requirements contained in section 7(a)(2) of the ESA. When consulting regarding proposed water
5 deliveries, the Wildlife Agencies must assess the effects of the environmental baseline on the Listed
6 Species together with the effects of such proposed deliveries and determine whether in combination
7 the baseline and proposed deliveries fulfill the interagency consultation requirements. In 2007, this
8 Court ruled that FWS failed to comply with the interagency consultation requirements and ordered
9 FWS to reduce deliveries of SWP water to parties with water contracts, such as the Coalition
10 members, to protect the delta smelt. *NRDC v. Kempthorne*, 2007 U.S. Dist. LEXIS 48261 (E.D. Cal.
11 2007). Additional restrictions on delivery of SWP water to parties with water contracts have been
12 requested and could be imposed to protect the Sacramento River winter-run chinook salmon, Central
13 Valley spring-run chinook salmon, and Central Valley steelhead. Furthermore, the long-term
14 availability of water for future SWP deliveries will continue to be impaired so long as the striped bass
15 regulations, which artificially suppress the population of the Listed Species thereby degrading their
16 baseline status, remain in effect. Thus, defendant's ESA violations have in the past impaired water
17 availability and deliveries, could in the near-term contribute to additional reductions in water
18 availability and deliveries in light of a pending request with this Court, and will in the future continue
19 to impede water availability and deliveries.

20 71. Defendant's ESA violations have significant economic and contractual impacts on
21 members of the Coalition because of their contracts with DWR for deliveries of SWP water. They
22 also threaten the livelihood of Coalition members. Certain Coalition members' contracts for delivery
23 of SWP water require payment for their full contractual entitlement regardless of the amount of water
24 actually delivered in any given year through the SWP. Further, because Coalition members require
25 water for irrigation of their crops, reduced deliveries of surface water through the SWP is likely to
26 result in increased reliance on groundwater for irrigation supplies, which will result in overdraft of the
27 groundwater basins that underlie the lands of Coalition members. In sum, because the defendant has
28 reduced the populations of the Listed Species by violating the ESA, it has reduced water availability

1 and SWP water deliveries to members of the Coalition. Reduced water availability and reduced
2 deliveries of SWP water have an economic impact on members of the Coalition because they do not
3 receive their full SWP entitlement even though they are required to pay for that full contractual
4 entitlement, and because they must develop other sources of water for irrigation of their crops or
5 forego irrigation altogether thus impacting their livelihood. Thus, Coalition members have been, and
6 will continue to be, harmed by defendant's violations of the ESA.

7 72. Coalition members visit the Delta and appreciate the Delta ecosystem. Coalition
8 members view, enjoy, and use the Delta ecosystem. Coalition members routinely engage in various
9 recreational activities in the Delta – including boating, fishing, and wildlife viewing – and have
10 concrete plans to continue to do so in the future. Coalition members derive significant use and
11 enjoyment from the aesthetic, recreational, and conservation benefits of the Delta ecosystem,
12 including the Listed Species. Coalition members have fished for various species of fishes in the
13 Delta, including salmon. The Coalition and its members are deeply concerned about the health of the
14 Delta ecosystem and its evident decline. The decline of the Listed Species has had and continues to
15 have a substantial negative impact on Coalition members, impairing their use and enjoyment of the
16 Delta and the Listed Species by, among other things, impairing the ability of Coalition members to
17 fish for and view salmon and other native species. Additionally, the decline of native species in the
18 Delta ecosystem, such as the delta smelt, and the proliferation of invasive non-native predatory
19 species, such as striped bass, in that same system impair the natural functioning of the Delta
20 ecosystem. The decline of native species, proliferation of invasive species, and impaired function of
21 the Delta ecosystem adversely impacts Coalition members' use and enjoyment of the Delta ecosystem
22 and Listed Species. Defendant's violations of the ESA have caused significant harm to the Listed
23 Species and the Delta, which in turn causes significant harm to the Coalition and its members.

24 73. Plaintiff Belridge Water Storage District ("BWSD") is a California Water Storage
25 District, organized and existing under and by virtue of the provisions of Division 14 of the California
26 Water Code. The BWSD provides SWP water to land within its boundaries through a contract with
27 the Kern County Water Agency ("KCWA"). The BWSD depends on SWP deliveries from the Delta
28 to the San Joaquin Valley for its water supply. The continued operation of the SWP is, in turn,

1 dependent on the overall health of the Delta and its ecosystem, which includes the maintenance of
2 viable populations of species living in the Delta and protected by the ESA, including the Listed
3 Species.

4 74. The illegal and unmitigated take of the Listed Species by defendant injures the BWSD
5 because it reduces the population of the Listed Species thereby worsening their baseline status, all of
6 which must be taken into account by FWS and NMFS when they determine whether proposed SWP
7 exports from the Delta comply with the ESA. Defendant's ESA violations have injured BWSD by
8 leading to a reduction in water availability and in water deliveries in the past. Such violations will
9 continue to injure BWSD, as they will reduce the water available for delivery and reduce the amount
10 of actual water deliveries. In sum, because the defendant has contributed to the decline of populations
11 of the Listed Species by violating the ESA, it has contributed to the reduction in SWP water available
12 and delivered to BWSD, both of which have significant, adverse economic impacts on BWSD. Thus,
13 BWSD has been, and will continue to be, harmed by defendant's violations of the ESA.

14 75. Plaintiff Berrenda Mesa Water District ("BMWD") is a California Water District,
15 organized and existing under and by virtue of the provisions of Division 13 of the California Water
16 Code. The BMWD encompasses approximately 55,000 acres. The BMWD provides SWP water to
17 land within its boundaries through a contract with KCWA. The BMWD depends on SWP deliveries
18 from the Delta to the San Joaquin Valley for its water supply. The continued operation of the SWP is,
19 in turn, dependent on the overall health of the Delta and its ecosystem, which includes the
20 maintenance of viable populations of species living in the Delta and protected by the ESA, such as the
21 Listed Species.

22 76. The illegal and unmitigated take of the Listed Species by defendant injures the BMWD
23 because it reduces the population of the Listed Species thereby worsening their baseline status, all of
24 which must be taken into account by FWS and NMFS when they determine whether proposed SWP
25 exports from the Delta comply with the ESA. Defendant's ESA violations have injured BMWD by
26 leading to a reduction in water availability and in water deliveries in the past. Such violations will
27 continue to injure BMWD, as they will reduce the water available for delivery and reduce the amount
28 of actual water deliveries. In sum, because the defendant has contributed to the decline of populations

1 of the Listed Species by violating the ESA, it has contributed to the reduction in SWP water available
2 and delivered to BMWD, both of which have significant, adverse economic impacts on BMWD.
3 Thus, BMWD has been, and will continue to be, harmed by defendant's violations of the ESA.

4 77. Plaintiff Lost Hills Water District ("LHWD") is a California Water District, organized
5 and existing under and by virtue of Division 13 of the California Water Code, for the purpose of
6 providing irrigation water from the SWP to land within the District through a contract with KCWA.
7 The LHWD contains approximately 72,183 acres in the northwest portion of Kern County. The
8 LHWD depends on SWP deliveries from the Delta to the San Joaquin Valley for its water supply.
9 The continued operation of the SWP is, in turn, dependent on the overall health of the Delta and its
10 ecosystem, which includes the maintenance of viable populations of species living in the Delta and
11 protected by the ESA, such as the Listed Species.

12 78. The illegal and unmitigated take of the Listed Species by defendant injures the LHWD
13 because it reduces the population of the Listed Species thereby worsening their baseline status, all of
14 which must be taken into account by FWS and NMFS when they determine whether proposed SWP
15 exports from the Delta comply with the ESA. Defendant's ESA violations have injured LHWD by
16 leading to a reduction in water availability and in water deliveries in the past. Such violations will
17 continue to injure LHWD, as they will reduce the water available for delivery and reduce the amount
18 of actual water deliveries. In sum, because the defendant has contributed to the decline of populations
19 of the Listed Species by violating the ESA, it has contributed to the reduction in SWP water available
20 and delivered to LHWD, both of which have significant, adverse economic impacts on LHWD. Thus,
21 LHWD has been, and will continue to be, harmed by defendant's violations of the ESA.

22 79. Plaintiff Wheeler-Ridge Maricopa Water Storage District ("WRMWS") is a California
23 Water Storage District, organized and existing by virtue of Division 14 of the California Water Code
24 for the purpose of securing a surface water supply for agricultural water purposes from the SWP
25 through a contract with KCWA. The WRMWS encompasses approximately 147,000 acres of land
26 in Kern County at the extreme southern end of the San Joaquin Valley south of Bakersfield. The
27 WRMWS depends on SWP deliveries from the Delta to the San Joaquin Valley for their water
28 supply. The continued operation of the SWP is, in turn, dependent on the overall health of the Delta

1 and its ecosystem, which includes the maintenance of viable populations of species living in the Delta
2 and protected by the ESA, such as the Listed Species.

3 80. The illegal and unmitigated take of the Listed Species by defendant injures the
4 WRMWSD because it reduces the population of the Listed Species thereby worsening their baseline
5 status, all of which must be taken into account by FWS and NMFS when they determine whether
6 proposed SWP exports from the Delta comply with the ESA. Defendant's ESA violations have
7 injured WRMWSD by leading to a reduction in water availability and in water deliveries in the past.
8 Such violations will continue to injure WRMWSD, as they will reduce the water available for
9 delivery and reduce the amount of actual water deliveries. In sum, because the defendant has
10 contributed to the decline of populations of the Listed Species by violating the ESA, it has contributed
11 to the reduction in SWP water available and delivered to WRMWSD, both of which have significant,
12 adverse economic impacts on WRMWSD. Thus, WRMWSD has been, and will continue to be,
13 harmed by defendant's violations of the ESA.

14 81. In the last seven years, Plaintiff Dee Dillon – who is a member of the Coalition – has
15 visited the Delta with his family approximately 200 times to appreciate the natural environment, to
16 escape from the urban environment, and to engage in various recreational and conservation activities.
17 These activities include recreational boating, swimming, fishing, kayaking, and wildlife viewing in
18 the Delta. Mr. Dillon is an avid fisherman, and during his trips to the Delta he has fished for salmon
19 as well as other species of fish. Mr. Dillon also enjoys photographing the Delta's wildlife and
20 viewing the Delta's salmon runs. For most of his adult life, Mr. Dillon has engaged in boating and
21 fishing activities, in both the ocean and inland waters, and it is his view that the Delta provides a
22 freshwater boating, recreating, and wildlife viewing experience that is different than any other in the
23 western United States. Because Mr. Dillon derives significant use and enjoyment from the aesthetic,
24 recreational, and conservation interests of the Delta ecosystem, including the Listed Species, Mr.
25 Dillon is deeply concerned about the health of the Delta ecosystem and its evident decline, which he
26 has personally witnessed over the last seven years. Mr. Dillon has definite plans to continue visiting
27 the Delta to engage in the activities described above. But the decline of the Listed Species has had
28 and continues to have a substantial negative impact on Mr. Dillon, impairing his use and enjoyment of

1 the Delta and the Listed Species by, among other things, impairing the ability of Mr. Dillon to fish for
2 and view salmon and other native species. Defendant's violations of the ESA have caused significant
3 harm to the Delta, which in turn cause significant harm to Mr. Dillon, as they impair Mr. Dillon's use
4 and enjoyment of the Delta's aesthetic, recreational, and conservation benefits.

5 82. CDFG is responsible for enforcing sport-fishing regulations, including the striped bass
6 regulations. Cal. Fish & Game Code §§ 850-53; *Conservation Plan for the Striped Bass Management*
7 *Program* at 43. Defendant Donald Koch is Director of the CDFG; he is sued in his official capacity
8 as director of CDFG. Defendant is a "person" within the meaning of the ESA.

9 83. Violations of the ESA by defendant, including the take of the Listed Species, threaten
10 deliveries of SWP water to BWSD, BMWD, CWD, LHWD, and WRMWSD ("Water District
11 Plaintiffs") and to the Coalition.

12 84. In addition, the violations of the ESA by defendant have reduced SWP water that is
13 available and delivered from the Delta to the Coalition and the Water District Plaintiffs. Thus, the
14 Coalition and the Water District Plaintiffs have, and will continue to be, harmed by defendant's
15 violations of the ESA.

16 85. Defendant's violations of the ESA also harm the aesthetic, recreational, and conservation
17 interests of the Coalition and its members – including Mr. Dillon – in the Delta, including but not
18 limited to, their interest in the protection of the Listed Species.

19 **PLAINTIFFS' INJURIES ARE LIKELY TO BE REDRESSED**

20 86. It is illegal to take the Listed Species. 16 U.S.C. §§ 1538(a)(1)(B); 1533(d).

21 87. Under section 7(a)(2) of the Endangered Species Act, the Bureau of Reclamation must
22 consult with the FWS and NMFS regarding the effects of the CVP and SWP on Listed Species in
23 order to operate the CVP and SWP. 16 U.S.C. § 1536(a)(2).

24 88. As part of the consultation under the ESA, the FWS and NMFS must consider the effects
25 of the CVP and SWP together with the environmental baseline when determining whether the CVP
26 and SWP jeopardize one or more listed species or destroy or adversely modify designated critical
27 habitat of such species. 16 U.S.C. § 1536; 50 C.F.R. § 402.02. The Wildlife Agencies have no
28 discretion to ignore the environmental baseline or changes thereto.

1 89. The environmental baseline for each of the Listed Species is highly degraded as a result
2 of a number of factors, including predation by non-native striped bass.

3 90. The jeopardy and adverse modification determinations by the FWS and NMFS cannot be
4 based on piecemeal evaluations of incremental actions above the baseline. *Pacific Coast Federation*
5 *of Fishermen's Assoc. v. Gutierrez*, Case No. 06-245 at 32 (E.D. Cal. July 18, 2008) (Findings of Fact
6 and Conclusions of Law). Thus, these determinations must take into account the totality of the
7 impacts on the Listed Species.

8 Redress of the Coalition's Injuries

9 91. If the relief requested herein is granted, then there will be fewer striped bass in the Delta.

10 92. A reduction in the number of striped bass in the Delta will result in less predation by
11 striped bass on the Listed Species.

12 93. Reduced predation by the non-native striped bass on the Listed Species will increase the
13 numbers of Listed Species in the Delta and therefore result in an improved Delta ecosystem and
14 environmental baseline for the Listed Species.

15 94. Furthermore, if the relief requested herein is granted and the baseline for the Listed
16 Species is improved, then such information must be taken into account by FWS and NMFS when they
17 determine whether proposed SWP exports from the Delta (including exports that benefit plaintiffs) are
18 in compliance with the ESA. The Wildlife Agencies do not have discretion to ignore such
19 information.

20 95. If the relief requested herein is granted, then CDFG would need to seek a permit under
21 Section 10 of the ESA, 16 U.S.C. § 1539, to enforce the striped bass sport-fishing regulations.
22 Among other things, Section 10 of the ESA requires an applicant to develop, submit, and implement a
23 conservation plan that minimizes and mitigates the impacts of a taking to the maximum extent
24 practicable and ensures that any taking will not appreciably reduce the likelihood of the survival and
25 recovery of the species. 16 U.S.C. § 1539(a)(2)(A)-(B). Thus, if the relief requested herein is
26 granted, then the defendant, instead of the Coalition and other regulated parties, would be required to
27 mitigate for the take of the Listed Species resulting from the striped bass sport-fishing regulations.
28

1 96. The existence of other factors that contribute to the harm the Coalition complains of is
2 not a basis for denying standing. *Ocean Advocates v. United States Army Corps of Engineers*, 402
3 F.3d 846, 860 (9th Cir. 2004).

4 97. If the relief requested herein is granted, then harm to the aesthetic, conservation, and
5 recreational interests of the Coalition and its members in the Delta will be eliminated or significantly
6 reduced because the health of the overall Delta ecosystem will improve, particularly the health and
7 continued viability of the Listed Species.

8 98. If the relief requested herein is granted, then the economic and environmental harm to the
9 Coalition and its members will be eliminated or significantly reduced – for example, there will be an
10 increase in native fish to view and fish for – thus redressing the Coalition’s injuries caused by
11 defendant.

12 Redress of the Water District Plaintiffs’ Injuries

13 99. If the relief requested herein is granted, then there will be fewer striped bass in the Delta.

14 100. A reduction in the number of striped bass in the Delta will result in less predation by
15 striped bass on the Listed Species.

16 101. Reduced predation by the non-native striped bass on the Listed Species will increase the
17 numbers of Listed Species in the Delta and therefore result in an improved Delta ecosystem and
18 environmental baseline for the Listed Species.

19 102. Furthermore, if the relief requested herein is granted and the baseline for the Listed
20 Species is improved, then such information must be taken into account by FWS and NMFS when they
21 determine whether proposed SWP exports from the Delta (including exports that benefit plaintiffs) are
22 in compliance with the ESA. The Wildlife Agencies do not have discretion to ignore such
23 information.

24 103. If the relief requested herein is granted, then CDFG would need to seek a permit under
25 Section 10 of the ESA, 16 U.S.C. § 1539, to enforce the striped bass sport-fishing regulations.
26 Among other things, Section 10 of the ESA requires an applicant to develop, submit, and implement a
27 conservation plan that minimizes and mitigates the impacts of a taking to the maximum extent
28 practicable and ensures that any taking will not appreciably reduce the likelihood of the survival and

1 recovery of the species. 16 U.S.C. § 1539(a)(2)(A)-(B). Thus, if the relief requested herein is
2 granted, then the defendant, instead of the Water District Plaintiffs and other regulated parties, would
3 be required to mitigate for the take of the Listed Species resulting from the striped bass sport-fishing
4 regulations.

5 104. If the relief requested herein is granted, then the economic harm to the Water District
6 Plaintiffs will be eliminated or significantly reduced, thus redressing the Water District Plaintiffs'
7 injuries caused by defendant.

8 105. The existence of other factors that contribute to the harm the Water District Plaintiffs
9 complain of is not a basis for denying standing. *Ocean Advocates v. United States Army Corps of*
10 *Engineers*, 402 F.3d 846, 860 (9th Cir. 2004).

11 Redress of Mr. Dillon's Injuries

12 106. If the relief requested herein is granted, then there will be fewer striped bass in the Delta.

13 107. A reduction in the number of striped bass in the Delta will result in less predation by
14 striped bass on the Listed Species.

15 108. Reduced predation by the non-native striped bass on the Listed Species will increase the
16 numbers of Listed Species in the Delta and therefore result in an improved Delta ecosystem.

17 109. If the relief requested herein is granted, then harm to the aesthetic, conservation, and
18 recreational interests of Mr. Dillon in the Delta will be eliminated or significantly reduced because the
19 health of the overall Delta ecosystem will improve, particularly the health and continued viability of
20 the Listed Species.

21 110. If the relief requested herein is granted, then the environmental and aesthetic harm to Mr.
22 Dillon will be eliminated or significantly reduced – for example, there will be an increase in native
23 fish to view and fish for – thus redressing Mr. Dillon's injuries caused by defendant.

24 **FIRST CLAIM FOR RELIEF**

25 **(Defendant's Unlawful Take of Sacramento River Winter-Run Chinook Salmon,**

26 **16 U.S.C. § 1538(a)(1)(B))**

27 111. Paragraphs 1 through 110 are realleged and incorporated as if fully set forth herein.

28 112. The Sacramento River winter-run chinook salmon is listed as an endangered species.

1 113. The ESA prohibits all take of all ESA-listed species, even of a single individual of the
2 species. *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D.
3 Fla. 1995); 16 U.S.C. § 1538.

4 114. Current sport-fishing regulations bar sports fisherman from taking striped bass less than
5 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18
6 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. These
7 sport-fishing regulations operate to protect and increase the non-native striped bass population in the
8 Delta.

9 115. By enforcing regulations to protect and increase the non-native striped bass population,
10 defendant is taking the Listed Species in violation of section 9 of the ESA.

11 116. A governmental entity can be liable for illegal take of protected species in violation of
12 section 9 where such take springs from the exercise of regulatory authority by that governmental
13 entity. *E.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land*
14 *and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

15 117. The illegal take of Sacramento River winter-run chinook salmon by the defendant has
16 occurred ever since the time of listing of that species, including the period when the *Conservation*
17 *Plan for the Striped Bass Management Program* and associated incidental take permits were effective
18 (*i.e.*, June 2000 to December 2004).

19 118. On information and belief, unless enjoined defendant will continue to violate the ESA, as
20 described above.

21 119. In light of the defendant's failure to comply with the ESA, and the significant likelihood
22 of repeated violations in the future, the defendant must be permanently enjoined from implementing
23 or enforcing the striped bass sport-fishing regulations. If defendant is not so enjoined, plaintiffs will
24 suffer irreparable injury for which there is no adequate remedy at law.

25 120. Further, because an actual controversy exists between plaintiffs on the one hand and
26 defendant on the other regarding the ESA and defendant's enforcement of the striped bass sport-
27 fishing regulations – specifically, plaintiffs contend and defendant denies that defendant's
28

1 enforcement of the striped bass sport-fishing regulations both violate the ESA and injure plaintiffs –
2 plaintiffs are entitled to and hereby seek a declaration that defendant has violated the ESA.

3 **SECOND CLAIM FOR RELIEF**

4 **(Defendant’s Unlawful Take of Central Valley Spring-Run Chinook Salmon,**

5 **16 U.S.C. § 1538(a)(1)(B))**

6 121. Paragraphs 1 through 110 are realleged and incorporated as if fully set forth herein.

7 122. The Central Valley spring-run chinook salmon is listed as a threatened species.

8 123. The ESA prohibits all take of protected species, even of a single individual of the species.

9 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995);

10 16 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take
11 prohibition of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies
12 have by regulation extended the take prohibition to the threatened Central Valley spring-run chinook
13 salmon. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

14 124. Current sport-fishing regulations bar sports fisherman from taking striped bass less than
15 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18
16 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. These
17 sport-fishing regulations operate to protect and increase the non-native striped bass population in the
18 Delta.

19 125. By enforcing regulations to protect and increase the non-native striped bass population,
20 defendant is taking the Listed Species in violation of section 9 of the ESA.

21 126. A governmental entity can be liable for illegal take of protected species in violation of
22 section 9 where such take springs from the exercise of regulatory authority by that governmental
23 entity. *E.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land*
24 *and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

25 127. The illegal take of Central Valley spring-run chinook salmon by defendant has occurred
26 ever since the time of listing of that species, including the period when the *Conservation Plan for the*
27 *Striped Bass Management Program* and associated incidental take permits were effective (*i.e.*, June
28 2000 to December 2004).

1 128. On information and belief, unless enjoined defendant will continue to violate the ESA, as
2 described above.

3 129. In light of the defendant's failure to comply with the ESA, and the significant likelihood
4 of repeated violations in the future, the defendant must be permanently enjoined from implementing
5 or enforcing the striped bass sport-fishing regulations. If defendant is not so enjoined, plaintiffs will
6 suffer irreparable injury for which there is no adequate remedy at law.

7 130. Further, because an actual controversy exists between plaintiffs on the one hand and
8 defendant on the other regarding the ESA and defendant's enforcement of the striped bass sport-
9 fishing regulations – specifically, plaintiffs contend and defendant denies that defendant's
10 enforcement of the striped bass sport-fishing regulations both violate the ESA and injure plaintiffs –
11 plaintiffs are entitled to and hereby seek a declaration that defendant has violated the ESA.

12 **THIRD CLAIM FOR RELIEF**

13 **(Defendant's Unlawful Take of Central Valley Steelhead,**

14 **16 U.S.C. § 1538(a)(1)(B))**

15 131. Paragraphs 1 through 110 are realleged and incorporated as if fully set forth herein.

16 132. The Central Valley steelhead is listed as a threatened species.

17 133. The ESA prohibits all take of protected species, even of a single individual of the species.
18 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995);
19 16 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take
20 prohibition of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies
21 have by regulation extended the take prohibition to the threatened Central Valley steelhead. 50
22 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

23 134. Current sport-fishing regulations bar sports fisherman from taking striped bass less than
24 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18
25 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. These
26 sport-fishing regulations operate to protect and increase the non-native striped bass population in the
27 Delta.
28

1 135. By enforcing regulations to protect and increase the non-native striped bass population,
2 defendant is taking the Listed Species in violation of section 9 of the ESA; a governmental entity can
3 be liable for illegal take of protected species in violation of section 9 where such take springs from the
4 exercise of regulatory authority by that governmental entity. *E.g., Strahan v. Coxe*, 127 F.3d 155, 163
5 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th
6 Cir. 1981).

7 136. The illegal take of Central Valley steelhead by defendant has occurred ever since the time
8 of listing of that species, including the period when the *Conservation Plan for the Striped Bass*
9 *Management Program* and associated incidental take permits were effective (*i.e.*, June 2000 to
10 December 2004).

11 137. On information and belief, unless enjoined defendant will continue to violate the ESA, as
12 described above.

13 138. In light of the defendant's failure to comply with the ESA, and the significant likelihood
14 of repeated violations in the future, the defendant must be permanently enjoined from implementing
15 or enforcing the striped bass sport-fishing regulations. If defendant is not so enjoined, plaintiffs will
16 suffer irreparable injury for which there is no adequate remedy at law.

17 139. Further, because an actual controversy exists between plaintiffs on the one hand and
18 defendant on the other regarding the ESA and defendant's enforcement of the striped bass sport-
19 fishing regulations – specifically, plaintiffs contend and defendant denies that defendant's
20 enforcement of the striped bass sport-fishing regulations both violate the ESA and injure plaintiffs –
21 plaintiffs are entitled to and hereby seek a declaration that defendant has violated the ESA.

22 **FOURTH CLAIM FOR RELIEF**

23 **(Defendant's Unlawful Take of Delta Smelt,**

24 **16 U.S.C. § 1538(a)(1)(B))**

25 140. Paragraphs 1 through 110 are realleged and incorporated as if fully set forth herein.

26 141. The delta smelt is listed as a threatened species.

27 142. The ESA prohibits all take of protected species, even of a single individual of the species.
28 *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995);

1 16 U.S.C. § 1538. The ESA expressly provides that the Wildlife Agencies can extend the take
2 prohibition of Section 9(a)(1)(b) to threatened species. 16 U.S.C. § 1533(d). The Wildlife Agencies
3 have by regulation extended the take prohibition to the threatened delta smelt. 50 C.F.R. §§ 17.21(c),
4 17.31(a), 222.301(b), 223.203(a).

5 143. Current sport-fishing regulations bar sports fisherman from taking striped bass less than
6 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18
7 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. These
8 sport-fishing regulations operate to protect and increase the non-native striped bass population in the
9 Delta.

10 144. By enforcing regulations to protect and increase the non-native striped bass population,
11 defendant is taking the Listed Species in violation of section 9 of the ESA; a governmental entity can
12 be liable for illegal take of protected species in violation of section 9 where such take springs from the
13 exercise of regulatory authority by that governmental entity. *E.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163
14 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th
15 Cir. 1981).

16 145. The illegal take of delta smelt by defendant has occurred ever since the time of listing of
17 that species, including the period when the *Conservation Plan for the Striped Bass Management*
18 *Program* and associated incidental take permits were effective (*i.e.*, June 2000 to December 2004).

19 146. On information and belief, unless enjoined defendant will continue to violate the ESA, as
20 described above.

21 147. In light of the defendant's failure to comply with the ESA, and the significant likelihood
22 of repeated violations in the future, the defendant must be permanently enjoined from implementing
23 or enforcing the striped bass sport-fishing regulations. If defendant is not so enjoined, plaintiffs will
24 suffer irreparable injury for which there is no adequate remedy at law.

25 148. Further, because an actual controversy exists between plaintiffs on the one hand and
26 defendant on the other regarding the ESA and defendant's enforcement of the striped bass sport-
27 fishing regulations – specifically, plaintiffs contend and defendant denies that defendant's
28

1 enforcement of the striped bass sport-fishing regulations both violate the ESA and injure plaintiffs –
2 plaintiffs are entitled to and hereby seek a declaration that defendant has violated the ESA.

3 **PRAYER FOR RELIEF**

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

- 5 1) Declare that defendant has violated the ESA;
- 6 2) Enjoin defendant from enforcing the existing striped bass sport-fishing regulations until
7 such time as the defendant, CDFG, or CFGC obtains take authorization covering those regulations under
8 the ESA or CFGC rescinds those regulations;
- 9 3) Direct defendant to remedy its violations of the ESA within a reasonable time;
- 10 4) Retain jurisdiction over this matter until such time as defendant has fully complied with
11 the requirements of the ESA;
- 12 5) Award plaintiffs their costs of litigation pursuant to the ESA, 16 U.S.C. § 1540(g)(4); and
- 13 6) Grant plaintiffs such other further relief, including injunctive relief, as the Court may
14 deem just and proper.

15
16 Dated: August 22, 2008

NOSSAMAN LLP
ROBERT D. THORNTON
PAUL S. WEILAND
MELISSA A. POOLE

17
18
19 By: /s/ PAUL S. WEILAND, ESQ.

20 Attorneys for Plaintiffs Coalition for a Sustainable Delta,
21 Belridge Water Storage District, Berrenda Mesa Water
22 District, Lost Hills Water District, Wheeler Ridge-Maricopa
23 Water Storage District, and Dee Dillon
24
25
26
27
28

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

18101 VON KARMAN AVENUE, SUITE 1800
IRVINE, CALIFORNIA 92612-0177
(949) 833-7800 TEL (949) 833-7878 FAX
www.nossaman.com

PAUL S WEILAND
pweiland@nossaman.com

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VIA U.S. MAIL

Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
Mailstop 61
1401 Constitution Ave., NW
Washington, D.C. 20230

John Carlson, Jr.
Executive Director
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

Richard Rogers
President
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

Jim Kellog
Member
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

Dale Hall
Director
U.S. Fish & Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

Conrad C. Lautenbacher, Jr.
Administrator
National Oceanic and Atmospheric
Administration
14th Street & Constitution Avenue, NW
Washington, D.C. 20230

John McCamman
Interim Director
Department of Fish & Game
1416 Ninth Street
Sacramento, CA 95814

Cindy Gustafson
Vice President
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

Michael Sutton
Member
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

Re: Notice of Intent to Sue for Violations of the Endangered Species Act

To Whom it May Concern:

On behalf of Coalition for a Sustainable Delta ("Coalition"), Beldridge Water Storage District, Berrenda Mesa Water District, Cawelo Water District, Lost Hills Water District,

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Wheeler Ridge-Maricopa Water Storage District, and Mr. Dee Dillon, I write to provide you notice pursuant to section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(2)(A), that the California Fish and Game Commission (“CFG”) and California Department of Fish and Game (“CDFG”) (collectively, the “Agencies”) have violated and continue to violate the ESA by failing to comply with the prohibition on “take” of listed species in the ESA and its implementing regulations, 16 U.S.C. §§ 1533(d), 1538(a)(1)(B); 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a). The Coalition, Belridge Water Storage District, Berrenda Mesa Water District, Cawelo Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and Mr. Dillon are concerned about the harm caused to the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt due to the Agencies’ sport fishing regulations, which were promulgated and are enforced in order to manage and maintain the non-native striped bass population in the Sacramento-San Joaquin Delta (hereinafter, “the Delta”).

I. Factual background

A. The Affected Listed Species

1. Sacramento River winter-run chinook salmon

The Sacramento River winter-run chinook salmon is an anadromous fish that migrates through the Delta to the upper Sacramento River from December to May. Anadromous fish spend most of their life in the ocean but must enter fresh water rivers and streams to spawn. The National Marine Fisheries Service (“NMFS”) listed the Sacramento River winter-run chinook salmon as an endangered species on January 4, 1994. 59 Fed. Reg. 440 (Jan. 4, 1994). NMFS designated critical habitat for the Sacramento River winter-run chinook salmon on June 16, 1993. 58 Fed. Reg. 33,212 (June 16, 1993).

2. Central Valley spring-run chinook salmon

The Central Valley spring-run chinook salmon is an anadromous fish that migrates through the Delta to the upper Sacramento River from March to July. NMFS listed the Central Valley spring-run chinook salmon as a threatened species on September 16, 1999. 64 Fed. Reg. 50,394 (Sept. 16, 1999). NMFS designated critical habitat for the Central Valley spring-run chinook salmon on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

3. Central Valley steelhead

The Central Valley steelhead is a coastal steelhead that occupies the Sacramento and San Joaquin Rivers and their tributaries. Steelhead and rainbow trout are the same species; the distinguishing characteristic between these fish is that steelhead are anadromous whereas rainbow trout permanently reside in freshwater. NMFS listed the Central Valley steelhead as a threatened species on March 19, 1998. 63 Fed. Reg. 13,347 (March 19, 1998). NMFS

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designated critical habitat for the Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488 (Sept. 2, 2005).

4. The Delta Smelt

The delta smelt is small translucent fish with a narrow geographic range limited to low salinity and freshwater habitats of the Delta. 58 Fed. Reg. 12,854 (March 5, 1993) (final rule listing the delta smelt as threatened). The delta smelt is “the only true native estuarine species found in the Delta.” *Id.* The delta smelt is one of a number of pelagic organisms that are in decline in the Delta. “Pelagic organisms live in the ocean or estuaries like the Delta.” Resources Agency et al., Pelagic Fish Action Plan at 4 (March 2007). The sources of the pelagic organism decline are manifold and poorly understood. *Id.* at 10 (identifying numerous contributors to the decline of the Delta’s health and indicating that more research is essential to evaluate those contributors). The Fish and Wildlife Service (“FWS”) listed the delta smelt as a threatened species on March 5, 1993. 58 Fed. Reg. at 12,854. FWS designated critical habitat for the delta smelt on December 19, 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994).

B. *The Agencies’ Sport Fishing Regulations*

The striped bass is a fish species that is not native to the Delta and was introduced into the area in the late 19th century. According to estimates, the striped bass population in the Delta has fluctuated from a low of approximately 600,000 to a high of 3,000,000. Striped bass adversely affect ESA-listed species, including the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt, that migrate through (in the case of the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead) or reside in (in the case of the delta smelt) and are native to the Delta. Adverse effects on fish are the result of striped bass predation of listed fish species.

In the early 1980s, the sports fishing industry successfully lobbied the State of California to enact legislation that created a striped bass fishing stamp to generate funds to support the non-native striped bass population in the Delta. Striped Bass Restoration and Management Plan for the Sacramento – San Joaquin Estuary Phase I at 6 (Sept. 1989). Among other things, the funds were used to raise striped bass in hatcheries and stock the Delta with more than 5.5 million striped bass. *Id.* The funds also were used to prepare the Striped Bass Restoration and Management Plan. *Id.* at 7.

In 1996, CFGC adopted a striped bass policy that required CDFG to stabilize and restore the striped bass fishery in the Delta. *See CFGC Striped Bass Policy*, available at <http://www.fgc.ca.gov/html/p2fish.html#STRIPED>. Consistent with the Striped Bass Restoration and Management Plan, the CFGC striped bass policy establishes a long-term striped bass restoration goal of 3,000,000. *See id.*

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Around the same time that CFGC adopted its striped bass policy, CDFG began work on a conservation plan for activities associated with management of striped bass in the Delta. See Biological and Conference Opinion: Issuance of a Section 10(a)(1)(B) Incidental Take Permit to the California Department of Fish and Game for Activities under the Striped Bass Management Program at 1 (National Marine Fisheries Service, June 23, 2000). The purpose of the Conservation Plan for the California Department of Fish and Game Striped Bass Management Program was to obtain authorization from NMFS and FWS for take of listed species “that may result from implementation of its Striped Bass Management Program.” Conservation Plan for the Striped Bass Management Program at 2 (Nov. 12, 1999). NMFS and FWS both issued incidental take permits (hereinafter “take permits”) for the Striped Bass Management Program on June 23, 2000. Federal Fisheries Permit No. 1257 (National Marine Fisheries Service, June 23, 2000); Federal Fish and Wildlife Permit No. TE028154-0 (Fish and Wildlife Service, June 23, 2000). The take permits authorize take of, *inter alia*, the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook salmon, threatened Central Valley steelhead, and threatened delta smelt.

The Conservation Plan for the Striped Bass Management Program described the covered activities as: stocking of striped bass in the Delta at numbers sufficient to stabilize and maintain a population of 712,000 adults; possible recommendations to the CFGC for changes to striped bass fishing regulations to reach and maintain the target population level; and striped bass monitoring. See Conservation Plan for the Striped Bass Management Program at 2. The take permits issued by NMFS and FWS for the Conservation Plan for the Striped Bass Management Program expired on December 31, 2004 and December 30, 2004, respectively.

Under California law, CFGC has regulatory authority to establish seasons, bag limits, and methods of take for sport fish including the striped bass. Cal. Fish & Game Code § 203. CFGC adopts sport fishing regulations biennially. Current sport fishing regulations bar sports fisherman from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18 inches in length (with certain exceptions outside the Delta). Cal. Code Regs. tit 14, § 5.75. CDFG is responsible for enforcing those regulations including through the appointment of deputies. Cal. Fish & Game Code §§ 850-53; Conservation Plan for the Striped Bass Management Program at 43.

CDFG estimates that at a population of 765,000 adults, striped bass consume 6 percent of the Sacramento River winter-run chinook salmon population and 3 percent of the threatened Central Valley spring-run chinook salmon population. Conservation Plan for the Striped Bass Management Program at 26, App. E. In its Proposed Recovery Plan for the Sacramento River winter-run chinook salmon, NMFS identified the Striped Bass Management Program as one of a number of factors affecting the species. NMFS Proposed Recovery Plan for the Sacramento River Winter-run Chinook Salmon at III-77 to III-82 (Aug. 1997). NMFS notes that striped bass prey upon juvenile salmon. *Id.* at III-80. Likewise, in its 2007 Recovery Outline for the Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead, NMFS identifies predation including predation by striped bass, as a threat to Sacramento River winter-run chinook salmon and Central Valley spring-run chinook

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salmon. 2007 Recovery Outline for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead at 21, 25 (May 2007). The 2007 Recovery Outline states that predation rates do not account for the large decline observed in West Coast steelhead populations but may significantly influence local steelhead populations. *Id.* at 29.

CDFG estimates that at a population of 765,000 adults, striped bass consume 5.3 percent of the delta smelt population annually. Conservation Plan for the California Department of Fish and Game Striped Bass Management Program at 32, App. E. In its final rule listing the delta smelt, the FWS opines that “the introduced striped bass may have caused an increase in predation on all size classes of the delta smelt.” 58 Fed. Reg. 12,854, 12,860 (March 5, 1993). Furthermore, the FWS Recovery Plan for the delta smelt states that, due to predation, “it is quite possible that at low population levels interactions with [striped bass] could prevent recovery.” Recovery Plan for the Sacramento/San Joaquin Delta Native Fishes at 23 (Nov. 1996).

II. Legal Violations of the Endangered Species Act

The Agencies have violated and continue to violate the ESA’s take prohibition. Section 9(a)(1)(B) of the ESA prohibits the take of endangered fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (stating, in part, that “with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... take any such species within the United States or the territorial sea of the United States”). The ESA expressly provides that FWS and NMFS can extend this take prohibition to threatened species, such as the delta smelt. 16 U.S.C. § 1533(d) (“The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife...”). And FWS and NMFS have by regulation extended the take prohibition to the threatened delta smelt, Central Valley spring-run chinook salmon, and Central Valley steelhead. 50 C.F.R. §§ 17.21(c), 17.31(a), 222.301(b), 223.203(a).

Through adoption and enforcement of striped bass sport fishing regulations that maintain the population of non-native striped bass in the Delta, the Agencies violated and continue to violate the ESA’s take prohibition. “Any taking and every taking – even of a single individual of the species – is prohibited by the Act.” *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M. D. Fla. 1995) (citing 16 U.S.C. § 1538, emphasis omitted). “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. *Id.* at § 1532(19). FWS and the NMFS have defined “harm” to include “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

There is strong evidence that striped bass prey upon juvenile salmon and steelhead as well as delta smelt. In fact, as mentioned above, CDFG has estimated that striped bass consume

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more than five percent of the total delta smelt population, six percent of the Sacramento River winter-run chinook salmon population, and three percent of the threatened Central Valley spring-run chinook salmon population annually. Even using conservative population estimates for these listed species, striped bass predation results in the take of a significant number of protected fish. For example, assuming a Central Valley spring-run chinook salmon population of 50,000 juveniles and assuming that CDFG is correct in estimating that striped bass consume 3 percent of that population, such predation accounts for “take” of over 1500 Central Valley spring-run chinook salmon annually. The illegal take of listed fish species by the Agencies has occurred ever since the time of listing of those species including the period when the Conservation Plan for the Striped Bass Management Program and associated take permits were effective (*i.e.*, June 2000 to December 2004). The Conservation Plan for the Striped Bass Management Program by its own terms did not provide take coverage for the *existing* striped bass fishing regulations. In any event, *the take permits expired more than two-and-one-half years ago.*

The Agencies’ sport fishing regulations operate to protect and increase the non-native striped bass population in the Delta because they bar sports fisherman from taking striped bass less than 18 inches in length and bar sports fisherman from taking more than two striped bass in excess of 18 inches in length. This is consistent with CFGC’s goal of increasing the striped bass population in the Delta to 3,000,000 and with CDFG’s Striped Bass Restoration and Management Plan. By enacting and enforcing regulations to protect and increase the non-native striped bass population, the Agencies are taking listed species in violation of section 9 of the ESA. There is substantial precedent holding that a governmental entity can be liable for illegal take of listed species in violation of section 9 where such take springs from the exercise of regulatory authority by that governmental entity. *E.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997); *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981).

This case is analogous to *Palila*. Plaintiffs in that case argued that the State of Hawaii violated section 9 of the ESA through the implementation of game management policies to maintain herds of feral sheep and feral goats in an area that is habitat for the ESA-listed endangered Palila (a bird species). These policies included manipulation of public hunting seasons. *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985, 989 (D. Hawaii 1979). The Ninth Circuit stated in its holding that the feral sheep and goats degrade the Palila’s habitat due to their feeding and bedding behaviors. 639 F.2d at 496. The Ninth Circuit held that “[t]he state violated the Endangered Species Act by maintaining feral sheep and goats in the Palila’s habitat.” *Id.* at 498. Both here and in *Palila* the state implemented specific policies to maintain populations of non-native species that, in turn, threaten species listed under the ESA. And in both cases, the state acted in violation of the ESA.

III. Conclusion

The Agencies have violated and continue to violate the ESA by taking the endangered Sacramento River winter-run chinook salmon, threatened Central Valley spring-run chinook

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salmon, threatened Central Valley steelhead, and threatened delta smelt. These illegal actions have contributed to the decline of these listed fish species in the Delta.

Very truly yours,



Paul S. Weiland
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

PSW/lhh