

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
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5
6 The Consolidated Delta Smelt Cases
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1:09-CV-00407 OWW DLB
1:09-cv-00480-OWW-GSA
1:09-cv-00422-OWW-GSA
1:09-cv-00631-OWW-DLB
1:09-cv-00892-OWW-DLB

8 FINDINGS OF FACT AND
9 CONCLUSIONS OF LAW RE
10 PLAINTIFFS' REQUEST FOR
11 INJUNCTIVE RELIEF AGAINST
IMPLEMENTATION OF RPA
COMPONENT 3 (Action 4) (Doc.
900)

12
13 I. INTRODUCTION

14 Plaintiffs State Water Contractors ("SWC"), Metropolitan Water
15 District of Southern California ("MWD" or "Metropolitan"), Kern
16 County Water Agency ("KCWA") and Coalition for a Sustainable Delta
17 ("Coalition"), San Luis & Delta Mendota Water Authority (the
18 "Authority") and Westlands Water District ("Westlands") (collectively
19 herein "Plaintiffs"), seek an injunction prohibiting the
20 implementation of Reasonable and Prudent Alternative ("RPA")
21 Component 3, Action 4 (the "Fall X2 Action") set forth in the United
22 States Fish and Wildlife Service's ("FWS") December 15, 2008,
23 biological opinion ("BiOp"), which addresses the impacts of the
24 coordinated operations of the federal Central Valley Project ("CVP")
25 and State Water Project ("SWP") on the threatened delta smelt
26 (*Hypomesus transpacificus*). Doc. 900. The California Department of
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1 Water Resources ("DWR" or "Plaintiff Intervenors") joined in
2 Plaintiffs' motion. Doc. 905. Federal Defendants and Defendant
3 Intervenors opposed. Doc. 948. An evidentiary hearing on the motion
4 was held on July 26, 27, 28, and 29, 2011. Docs. 998-1001. The
5 parties were represented by counsel, as identified on the record.
6

7 Plaintiffs and Defendants submitted independent, lengthy
8 proposed findings of fact and conclusions of law. Docs. 1004 & 1005.
9 DWR and Plaintiffs also submitted notices of disapproval of
10 Defendants' proposed findings of fact and conclusions of law. Docs.
11 1008 & 1009.

12 After consideration of the testimony of the witnesses, the
13 exhibits received in evidence, the written briefs of the parties,
14 oral arguments, and the parties' proposed findings of fact and
15 conclusions of law, the following findings of fact and conclusions of
16 law concerning the motion for injunctive relief are entered.
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18 To the extent any of the findings of fact may be interpreted as
19 a conclusion of law or any conclusion of law may be interpreted as a
20 finding of fact, it is so intended.
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22 II. BACKGROUND

23 A. The Challenged Action.

24 The 2008 Smelt BiOp, prepared pursuant to Section 7 of the
25 Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), concluded
26 that "the coordinated operations of the CVP and SWP, as proposed, are
27 likely to jeopardize the continued existence of the delta smelt" and
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1 "adversely modify delta smelt critical habitat." Ex. 1¹ ("BiOp") at
2 276-78. As required by law, the BiOp includes the RPA designed to
3 allow the projects to continue operating without causing jeopardy to
4 the species or adverse modification to its critical habitat. *Id.* at
5 279-85. The RPA includes various operational components designed to
6 reduce entrainment of smelt during critical times of the year by
7 controlling exports out of and water flows into the Delta. *Id.*

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9 At issue in this case is Component 3 (Action 4), which is
10 designed to improve habitat for delta smelt growth and rearing, and
11 requires sufficient Delta outflow to maintain a monthly average
12 location of two parts per thousand salinity ("X2") no greater (more
13 eastward) than 74 kilometers from the Golden Gate Bridge in "wet"
14 water years and 81 kilometers from the Golden Gate Bridge in "above
15 normal" water years. *Id.* at 282-83, 369. The average monthly
16 location of X2 in the fall must be maintained in September and
17 October (in November, the Fall X2 Action requires the Projects to
18 adjust their upstream reservoir releases to prevent the storage of
19 inflow) in accordance with an "adaptive management process" to be
20 overseen by FWS. *Id.* at 282-83. The estimated cost to water users
21 is 670,000 acre feet ("AF") of water if 2012 is a critically dry or
22 dry year, or 300,000 AF if 2010 is a below normal or above normal
23 year.
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27 ¹ All hearing exhibits, whether offered by Plaintiffs or Defendants, will be
28 referenced generally as "Exhibit" ("Ex."). The exhibits were sequentially numbered
so that no parties' exhibits overlap with those of any other party. The biological
opinion, admitted as Exhibit 1, will be referenced as "BiOp."

1 B. Relevant Prior Rulings.

2 A December 14, 2010 Memorandum Decision Re Cross Motions for
3 Summary Judgment ("12/14/10 MSJ Decision"), Doc. 757, *San Luis &*
4 *Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855 (E.D.
5 Cal.), rejected some of Plaintiffs' challenges to the BiOp's
6 rationale for the Fall X2 action, but found that the BiOp's X2
7 analysis was flawed in two critical respects. The rationale for the
8 action rested in large part on a comparison of runs from two
9 different computer models for Project operations, Calsim II and
10 Dayflow. The Decision found that, in the absence of calibration of
11 the two models, which was not performed, "the Calsim II to Dayflow
12 comparison has the potential to introduce significant, if not
13 overwhelming, bias to the analysis that the BiOp nowhere discussed or
14 corrected." *Id.* at 922. The X2 action was remanded to the agency
15 for further consideration of the implications of this error to the
16 BiOp's findings. *Id.* at 913.

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19 The Decision further held that the BiOp violated the
20 Administrative Procedure Act's ("APA") requirement that FWS "examine
21 the relevant data and articulate a satisfactory explanation for its
22 action including a rational connection between the facts found and
23 the choice made," *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*
24 *Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as well as FWS's own
25 Consultation Handbook implementing the ESA, which requires "a
26 thorough explanation of how each component of the [RPA] is essential
27
28

1 to avoid jeopardy and/or adverse modification," ESA Handbook at 4-43,
2 because the BiOp "fail[ed] to explain why it is essential to maintain
3 X2 at 74 km and 81 km respectively, as opposed to any other specific
4 location." *Id.* at 922-23. The practical result of the X2 Action is
5 to allow large volumes of Project water to escape into the ocean.

6
7 A June 24, 2011 memorandum decision addressed Federal
8 Defendants' and Defendant Intervenors' objection that this Court
9 lacked jurisdiction to consider Plaintiffs' request for injunctive
10 relief because an appeal was pending on related issues. Relying on
11 *Natural Resources Defense Council v. Southwest Marine Inc.*, 242 F.3d
12 1163, 1164 (9th Cir. 2001), for the governing standard, the June 24,
13 2011 Decision found that *Southwest Marine* stands generally for the
14 following propositions:

15
16 (1) A district court may act to preserve the status quo
while an appeal is pending.

17
18 (2) The status quo is measured at the time the appeal is
filed.

19
20 (3) The district court may only act to effectuate the
underlying purposes of the original judgment and may not
21 materially alter the status of the appeal or change the
core questions before the appellate panel.

22
23 (4) It is impermissible to alter the status of the case on
appeal by taking further action that cannot be undone by
24 the appeal. In other words, the district court's post-
25 appeal action must be grounded upon an issue that will
receive a full and fair hearing before the appellate panel,
26 leaving the burdened party's substantial rights unaffected
if a reversal is issued.

27 Doc. 930 at 8. These principles apply to this case in the following
28 way:

1 The first step is to determine the status quo. Federal
2 Defendants point out that the BiOp and its RPA has been
3 remanded but not vacated. Therefore, they argue that the
4 status quo is operation of the projects pursuant to the RPA
5 (including the Fall X2 Action) as described in the BiOp.
6 This position is a material distortion of the record and
7 cannot be adopted for two reasons. First, Plaintiffs
8 indicated their intent to move for injunctive relief
9 against the Fall X2 Action long before Final Judgment was
10 entered or the appeal was filed. Defendants strenuously
11 resisted immediate injunctive proceedings on the Fall X2
12 Action when a hearing was requested by Plaintiffs, on the
13 ground that, at the time, it was not clear whether the
14 Bureau would implement the Fall X2 Action during the 2010-
15 2011 water year; i.e., it was premature for the district
16 court to entertain an application for injunctive relief
17 before it was certain the Fall X2 Action would be
18 implemented based on this water year's hydrology.

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Second, the 12/14/2010 Decision found the X2 Action was unlawful and unjustified on several grounds. This Fall X2 Action is unprecedented and had never before been implemented. Remand was ordered with the Court's understanding that any future unlawful action in Project operations would be the subject of provisional remedy proceedings. In remanding without vacature, the Court understood that, as has been the case throughout the over five years of active litigation over the Delta Smelt, as operational issues arise, the parties may seek and have sought provisional remedies during periods of remand of biological opinions to the Agency. The parties that sought remand without vacatur never disclosed they intended to argue that a remand without vacatur insulated CVP operations from judicial review during an appeal.

The disputed Fall X2 Action has never been triggered. The status quo as of the filing of the appeal on April 7, 2011 is that the implementation of the Fall X2 Action is an unprecedented possibility, which is projected to take one million acre feet of water from lawful users, and that Plaintiffs would have the opportunity to move to enjoin the Action if its implementation was reasonably certain.

The next inquiry is whether acting upon Plaintiffs' request for injunctive relief would effectuate the underlying purposes of the original judgment. The answer is unquestionably yes. The judgment found the Fall X2 Action was unlawful in a critical respect, namely that the

1 unprecedented specific water prescription imposed, which
2 requires huge amounts of Project yield, was unjustified by
3 the record. Permitting the Action to be implemented
4 without even considering the totality of its on-the-ground
5 consequences would undermine the purposes of the judgment
6 and the obligation of a court sitting in equity to protect
7 all competing human interests, health, and safety, not only
8 the species.

9 The district court may not materially alter the status of
10 the appeal, change the core questions before the appellate
11 panel, and/or take further actions that cannot be undone by
12 the appeal. Defendants argue that that Plaintiffs' merits
13 brief rehashes issues already decided in the 12/14/2010
14 Decision. A preliminary review of the opening merits
15 brief, Doc. 990, reveals that there is considerable overlap
16 between the arguments there advanced and those addressed in
17 the 12/14/10 Decision. *Southwest Marine* and related cases
18 prohibit the district court from reconsidering issues
19 already ruled upon, as this would impermissibly create a
20 "moving target" for the appeal. See *Britton v. Co-op*
21 *Banking Group*, 916 F.2d 1405, 1412 (9th Cir.
22 1990) (discussing the example of *McClatchy Newspapers*, in
23 which the district court's modification of an order
24 "reflected a change in the result of the very issue on
25 appeal; if allowed to stand, the appeals court would be
26 dealing with a moving target if it ruled on the revised
27 order or, alternatively, its ruling would be obsolete if it
28 ruled on the 'old' order").

 However, the procedural posture of the cross-motions for
summary judgment is distinct from a request for injunctive
relief. The 12/14/2010 Decision ruled in favor of
Plaintiffs and found the Fall X2 Action unlawful.
Consideration of whether injunctive relief is required to
prevent new, never imposed, operational prescriptions which
may cause irreparable injury will not revisit or in any way
modify the final judgment. Nor does the pending appeal
preclude consideration of the strength of the scientific
bases for the X2 Action in deciding a request for equitable
relief. Considering whether the scientific rationale for
an action is weak is legally distinct from finding that the
agency violated the APA in advancing such a rationale.

*Hoffman for and on Behalf of N.L.R.B. v. Beer Drivers and
Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir.
1976), explains that the general rule that an appeal to the
circuit court deprives the district court of jurisdiction

1 as to matters involved in the appeal "is not a creature of
2 statute and is not absolute in character."

3 It is our opinion that the rule should not be applied
4 in those cases where the district court, as here, has
5 a continuing duty to maintain a status quo, and where,
6 as the days pass, new facts are created by the parties
7 and the maintenance of the status quo requires new
8 action.

9 *Id.* at 1276. This is such a case. New facts are
10 constantly being created by environmental conditions and
11 continuing operating requirements of the Projects. Such
12 requirements may change hourly. Maintenance of the status
13 quo may require changes to Project operations. The appeal
14 does not remove the district court's jurisdiction over the
15 BiOp's remand to the Agency and the ongoing operation of a
16 federal Reclamation project.

17 *Id.* at 8-12.

18 The hearing on Plaintiffs' motion for injunctive relief was
19 confirmed, four days of testimony was taken, and proposed findings
20 have been submitted.

21 III. SUMMARY OF MOTION

22 Plaintiffs and DWR request injunctive relief on the following
23 grounds:

- 24 • Federal Defendants intend to implement the Fall X2 Action
25 beginning on September 1, despite the Court's determination
26 that FWS acted arbitrarily and capriciously, and failed to
27 use the best available science when it developed the Fall
28 X2 Action. Plaintiffs assert that enjoining Federal
Defendants' attempt to do so is an appropriate remedy to
enforce this Court's Orders and Judgments and to maintain
the status quo.

1 • Plaintiffs have already succeeded on the merits of their
2 ESA and National Environmental Policy Act ("NEPA") claims,
3 and the balance of hardships and public interest support
4 the requested injunction. Plaintiffs will suffer
5 irreparable harm from the significant amount of water that
6 will be lost if Federal Defendants impose the Fall X2
7 Action this year. By contrast, the best available
8 scientific data do not show that the location of X2 bears a
9 rational relationship to the subsequent abundance of delta
10 smelt, or is necessary to avoid adverse modification to its
11 critical habitat. To the contrary, the best available
12 scientific data show that enjoining the Fall X2 Action will
13 not jeopardize the species or adversely modify its critical
14 habitat.
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17 IV. STANDARD OF DECISION

18 A. General Injunctive Relief Requirements.

19 Injunctive relief, whether temporary or permanent, is an
20 "extraordinary remedy, never awarded as of right." *Winter v. Natural*
21 *Resources Defense Council*, 555 U.S. 7, 24 (2008). The standard test
22 for injunctive relief requires establishment of four factors by a
23 preponderance of the evidence:
24

- 25 1. Likelihood of success on the merits;
- 26 2. Likelihood the moving party will suffer irreparable harm
27 absent injunctive relief;
- 28

1 3. The balance of equities tips in the moving parties' favor;
2 and

3 4. An injunction is in the public interest.

4 *Winter*, 555 U.S. at 20; *Am. Trucking Ass'n v. City of Los Angeles*,
5 559 F.3d 1046, 1052 (9th Cir. 2009).

6 Here, however, Plaintiffs seek post-judgment injunctive relief,
7 after they prevailed in the lawsuit, which is governed by a modified
8 standard that requires a plaintiff establish:
9

10 (1) that it has suffered an irreparable injury;

11 (2) that remedies available at law, such as monetary
12 damages, are inadequate to compensate for that injury;

13 (3) that, considering the balance of hardships between the
14 plaintiff and defendant, a remedy in equity is warranted;
15 and

16 (4) that the public interest would not be disserved by a
17 permanent injunction.

18 *Sierra Forest Legacy v. Sherman*, --- F.3d ---, 2011 WL 2041149, *16
19 (9th Cir. 2001) (citing *eBay Inc. v. MercExchange*, L.L.C., 547 U.S.
20 388, 391 (2006)).

21 B. Scope of Review; Deference to Agency Action.

22 In an injunctive relief proceeding, even in an APA case, a court
23 is not limited to a review of the record. *E.g.*, *Nat'l Parks &*
24 *Conservation Assn. v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001)
25 (Ninth Circuit considered evidence of species impacts not before the
26 district court); *Ctr. for Biological Diversity v. Wagner*, 2009 WL
27 2176049, *6 (D. Or. 2009) ("[e]xtra-record evidence may also be
28

1 considered in relation to a request for injunctive relief"); *N.*
2 *Plains Resource Council v. Bureau of Land Mgmt.*, 2005 U.S. Dist.
3 LEXIS 25238, *3-*4 (D. Mont. 2005) (district court held an
4 evidentiary hearing with witnesses and exhibits on the appropriate
5 scope of injunctive relief pending completion of the remand), *aff'd*,
6 *N. Cheyenne Tribe v. Norton*, 503 F.3d 836 (9th Cir. 2007); *Natural*
7 *Res. Def. Council v. Norton*, 2007 WL 14283, *5 (E.D. Cal. Jan 3,
8 2007) ("post-decisional information might be relevant in the context
9 of a motion for interim injunctive relief").

11 In reviewing a claim brought under the ESA and/or APA, a court
12 must defer to a federal administrative agency's reasoned opinions
13 within its field of expertise. This deferential standard has been
14 articulated numerous times in these consolidated cases, *see, e.g.*,
15 12/14/2010 MSJ Decision, *San Luis v. Salazar*, 760 F. Supp. 2d at 869-
16 70, and is incorporated by reference. However, in a post-judgment
17 injunctive relief proceeding, a court is not bound by the same
18 deferential standard. The Ninth Circuit reasoned in *Sierra Forest*
19 *Legacy*:

21 Although the federal government is undoubtedly permitted to
22 follow its own experts when making a decision, federal
23 experts are not always entitled to deference outside of
24 administrative action....

25 ... It is reasonable that courts would defer to particular
26 experts when the government has unique expertise, in fields
27 such as national security or the internal functioning of
28 the military. However, *Winter* applied no such deference
concerning the possibility that sonar testing would
irreparably harm whales. *See id.* at 383-84. Ecology is not
a field within the unique expertise of the federal

1 government.

2 If the federal government's experts were always entitled to
3 deference concerning the equities of an injunction, relief
4 against federal government policies would be nearly
5 unattainable, as government experts will likely attest that
6 the public interest favors the federal government's
7 preferred policy, regardless of procedural failures.

8 --- F.3d ---, 2011 WL 2041149, *18-*19 (citations omitted). The
9 government cannot hide behind and is not entitled to deference in
10 this *de novo* injunctive relief proceeding.

11 V. FINDINGS OF FACT

12 A. The Agency Action.

13 1. The agency action is the coordinated operation of the CVP
14 and SWP, pursuant to an Agreement for the Coordinated Operation of
15 the two projects ("COA").

16 2. According to the Rivers and Harbors Act of 1937, the dams
17 and reservoirs of the CVP "shall be used, first, for river
18 regulation, improvement of navigation and flood control; second, for
19 irrigation and domestic uses; and, third, for power." 50 Stat. 844,
20 850 (Aug. 26, 1937).

21 3. The CVP was reauthorized in 1992 through the Central Valley
22 Improvement Act ("CVPIA"), which modified the 1937 Act and added
23 mitigation, protection, and restoration of fish and wildlife as co-
24 equal project purposes. Pub. L. 102-575 § 3402, 106 Stat. 4600, 4706
25 (1992). One of the stated purposes of the CVPIA is to address
26 impacts of the CVP on fish and wildlife. *Id.* at § 3406(a). The
27 CVPIA made environmental protection and water deliveries co-purposes.
28

1 B. Facts Relevant to NEPA Claim.

2 4. It is undisputed that neither FWS nor Reclamation engaged
3 in any NEPA analysis in connection with preparation or implementation
4 of the 2008 Smelt BiOp. This has been found unlawful.

5 5. It is also undisputed that on November 13, 2009, the Court
6 entered an Order granting San Luis Plaintiffs' motion for summary
7 judgment on their claim that Federal Defendants violated NEPA when
8 they implemented the 2008 Smelt BiOp without conducting the required
9 NEPA analysis. Doc. 399.

10 6. Federal Defendants did not engage in a systematic
11 consideration of impacts to the human environment and/or
12 consideration of alternatives that took into account those impacts,
13 ordinarily performed as part of a NEPA review.

14 C. Wet Conditions in 2011 Will Trigger Implementation of Fall X2.

15 7. The 2011 water year is classified as a wet year. Ex. 301,
16 Leahigh Decl. at ¶ 12. Wet and above normal water years trigger
17 implementation of the Fall X2 Action, which requires that X2 be
18 maintained at a monthly average position of not greater than 74 km
19 (in wet years) or 81 km (in above normal years) eastward of the
20 Golden Gate Bridge. BiOp at 282-83.

21 8. While the Fall X2 Action is not formally triggered until
22 September 1, the Projects would need to alter their reservoir release
23 patterns as early as the second week in August to ensure that the 74
24 km requirement could be met in September. Ex. 301, Leahigh Decl. at
25

1 ¶ 21; 7/28/11 Tr. at 196:23-197:3 (Milligan).

2 9. FWS and the Bureau have announced that they will implement
3 the Fall X2 action starting in September 2011.
4

5 D. Status of the Species.

6 (1) Abundance Trends.

7 10. The delta smelt was listed as a threatened species under
8 the ESA on March 5, 1993. 58 Fed. Reg. 12,584 (March 5, 1993).
9 Critical habitat was designated for the delta smelt on December 19,
10 1994. 59 Fed. Reg. 65,256 (Dec. 19, 1994). FWS recently determined
11 that delta smelt warranted uplisting from threatened to endangered,
12 but that the action was currently precluded by higher priority
13 listing actions. 75 Fed. Reg. 17,667 (Apr. 7, 2010).
14

15 11. The most recent Fall Midwater Trawl ("FMWT") data
16 available, from 2010, show an index value of 29. Ex. 503. Although
17 this is an increase over the 2009 value of 17, it is still well below
18 the lowest pre-2003 value of approximately 100, as are the other six
19 of the past seven years. *Id.*

20 12. The 2011 Summer Towntnet Survey ("STS") indicated a slight
21 improvement over the previous year's index value (up to 2.2 from
22 0.8). Ex. 507 at 2.²
23

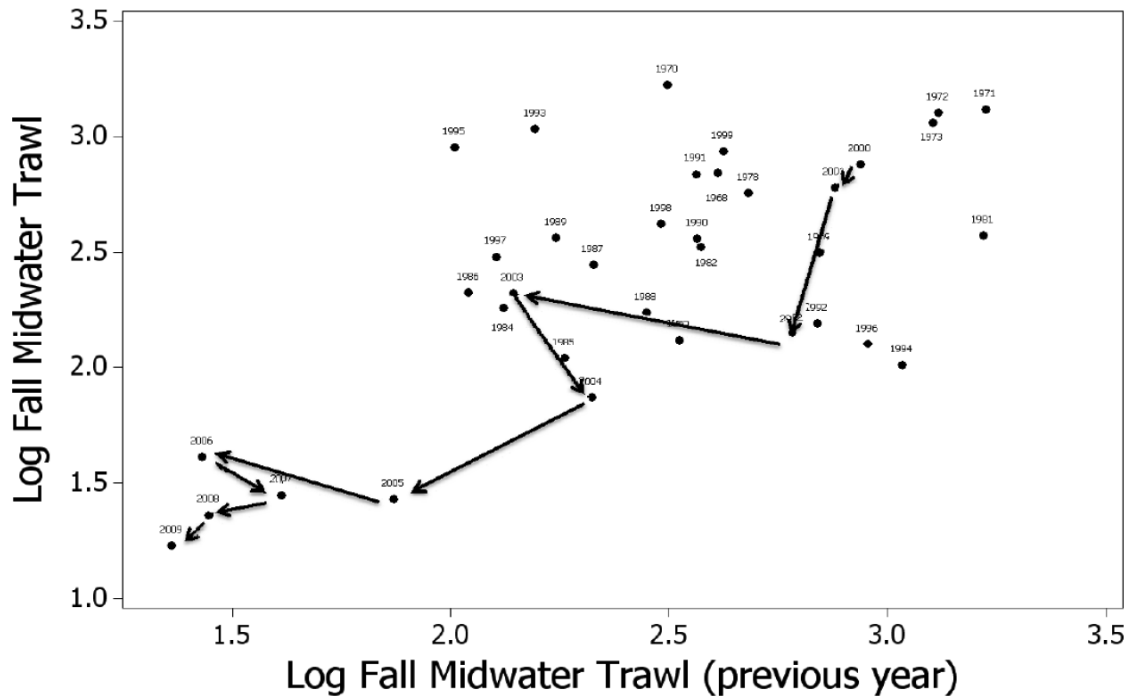
24
25 ² Plaintiffs argue the Fall X2 action is unnecessary because this slightly improved
26 STS index followed a fall in which X2 was located at 83-84km. See 7-28-11 Tr. at
27 217:10-12 (Feyrer). This argument is misplaced for several reasons. First, it is
28 not yet known whether the fall 2011 index value will show improved abundance
relative to the fall index value from last year. Second, this year's STS index
value of 2.2 is still near the historic low, and is the seventh year in a row with
an index value at or near the historic low. Ex. 507 at 2. Third, the Bureau's Mr.
Feyrer testified that an unusually wet winter and spring, which translated into a

1 13. Plaintiffs suggest that this index value is artificially
2 low because it does not account for nearly 60% of the estimated
3 Delta-wide population found at the Cache Slough, Sacramento Deepwater
4 Fish Channel, and Liberty Island areas ("Cache Slough Complex"),
5 which were not included in the annual survey used to calculate the
6 index. However, even if the index accounted for this additional
7 population, no party contends that the delta smelt should not be
8 listed under the ESA.
9

10 14. Evidence presented at the hearing suggests that the estuary
11 does not support as many delta smelt as it once did. 7-29-11 Tr. at
12 105:4-14 (Nobriga). This may be because the "compensatory density-
13 dependence" that historically enabled juvenile abundance to rebound
14 from low adult numbers no longer exists. Ex. 505, Nobriga Decl. at ¶
15 20. Thus, now, if adult numbers or adult fecundity decline, juvenile
16 production will also decline. *Id.* (citing Kimmerer (2011)). Because
17 juvenile carrying capacity has declined, juvenile production hits a
18 "ceiling" at a lower abundance than it once did. *Id.* This limits
19 adult abundance and possibly fecundity, which cycles around and
20 limits the abundance of the next generation of juveniles. *Id.*
21

22 15. Exhibit 504 demonstrates an abrupt change in population
23 dynamics starting in the early 2000s:
24

25
26
27 long spawning window, despite the easterly location of X2 last fall, combined with
28 the fact that the Projects detected virtually no entrainment of delta smelt this
Spring were likely responsible for this uptick in the STS index. 7-28-11 Tr. at
106:4-107:2.



Scatterplot of the log-transformed FMWT index versus the following year's log-transformed FMWT index. The abrupt change in population trend starting in the early 2000s, which moves toward the origin, indicates that the risk of extinction to delta smelt has increased.

16. The movement of the arrow toward the origin of the axes indicates that the risk of extinction to delta smelt has increased. Once the arrow reaches the origin, it indicates that no delta smelt are detected in any of the fish sampling trawls. 7-28-11 Tr. at 104:4-11 (Feyrer).

(2) Critical Habitat.

17. The delta smelt's designated critical habitat is composed of four primary constituent elements ("PCEs") that the BiOp found were significantly degraded by normal CVP and SWP project operations in the Fall. 7-29-11 Tr. at 178:12-179:13 (Norris); see also BiOp at

1 190-202, 239-244.

2 18. More specifically, the PCEs essential to the conservation
3 of the delta smelt are physical habitat, water, river flow, and
4 salinity concentrations required to maintain delta smelt habitat for
5 spawning, larval and juvenile transport, rearing, and adult
6 migration. Ex. 502, Norris Decl. at ¶ 22; *see also* BiOp at 190-202,
7 239-244.
8

9 19. The BiOp found that these PCEs are not located at all
10 places within the delta smelt's designated critical habitat at all
11 times. 7-29-11 Tr. at 177:16-20 (Norris). This is significant
12 because features of delta smelt critical habitat may exist
13 independently throughout the designation, but they only meet their
14 intended conservation purpose when they coincide in space and during
15 the life stage for which those features are required. *Id.* at 178:12-
16 179:3 (Norris).
17

18 20. Under the ESA, the adverse modification threshold is
19 exceeded when the proposed action will adversely affect the critical
20 habitat's PCEs, or their management, in a manner likely to
21 appreciably diminish or preclude the role of the designated critical
22 habitat in the conservation of the species. Ex. 502, Norris Decl. at
23 ¶ 20.
24

25 21. The BiOp found that the proposed continued operations of
26 the CVP and SWP would adversely modify the delta smelt's critical
27 habitat by preventing it from serving its intended conservation role
28

1 by degrading its PCEs and by limiting the co-occurrence of the PCEs
2 at appropriate places and times. *Id.* at ¶ 23.

3
4 (3) Relationship of the Delta Smelt Population to X2.

5 22. Salinities in the Delta are typically measured as parts per
6 thousand (ppt) or practical salinity units (psu), which are
7 equivalent measures. 7/28/11 Tr. at 182:11-15 (Feyrer). The term
8 "X2" refers to a salinity of 2 ppt or 2 psu. "Ocean salinity is
9 usually around 33 psu." Ex. 578, Nobriga and Herbold (2009)), at 19.

10 23. Delta smelt are believed to typically reside in the low
11 salinity zone³. Ex. 501, internal Exhibit B. Laboratory studies
12 indicate that delta smelt are physiologically capable of tolerating
13 salinities up to 19 psu, at which point, the salinity level becomes
14 lethal. Tr. 7/28/11 at 182:24-183:8 (Feyrer). Nobriga and Herbold
15 state: "In captivity, delta smelt can tolerate salinities as high as
16 10 psu for extended periods (Swanson et al 2000) but long-term
17 monitoring shows that most juvenile delta smelt reside where specific
18 conductance is about 1,000-10,000 microsiemens per centimeter, (about
19 0.6-6.0 psu)." Ex. 578, Nobriga and Herbold (2009)), at 19.

20
21
22 24. When X2 is at 79km or 80km, some individual delta smelt can

23 ³ The "low salinity zone" (LSZ) is the area of brackish water in the Delta where
24 inflowing seawater mixes with outflowing freshwater. Some described the LSZ as
25 being the area where salinity ranges from 0.5 to 10 practical salinity units ("psu"
26 which is the same as parts per thousand "ppt"). See Ex. 9, MacNally (2010), at
27 1419 ("[y]oung delta smelt move downstream in early summer and remain in the low-
28 salinity zone (0.5-10 [on the practical salinity scale]) until they migrate for
spawning."); see also Ex. 10, Thomson (2010), at 1433. Others define the LSZ as the
area where salinities range between 0.5 to 6 ppt. Ex. 501, Feyrer Decl. at ¶ 23
("low salinity zone is defined to include a range of salinities from approximately
0.5 to 6 ppt, [citing articles]."); 7/28/11 Tr at 107:3-9 (Feyrer). The LSZ moves
up and down in the estuary both daily, with changing tidal conditions, and
seasonally, with changes in rates of Delta outflow. *Id.* at 107:23-108:4 (Feyrer).

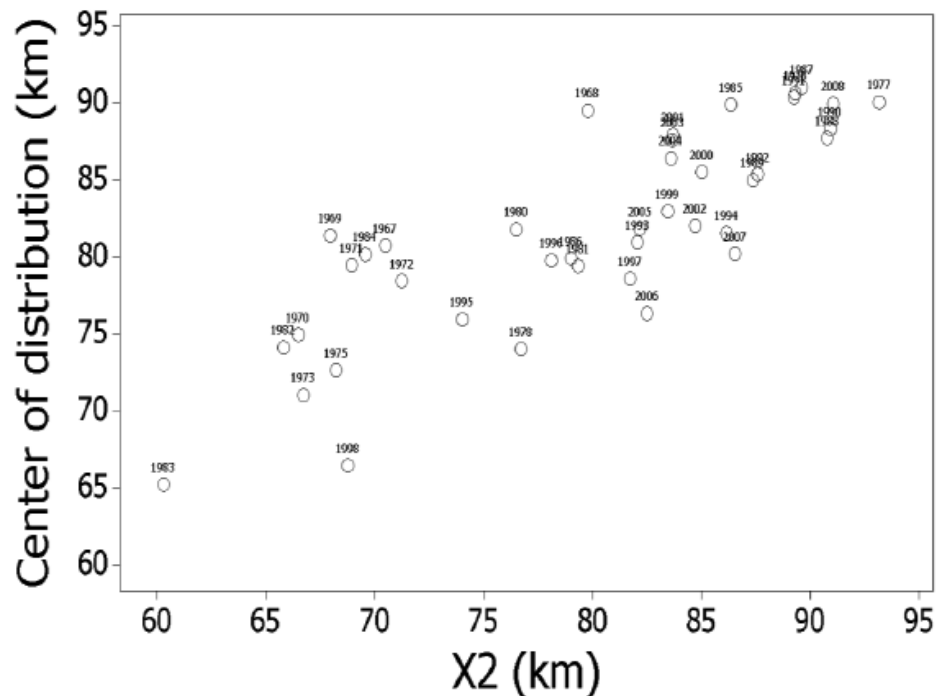
1 be found at higher salinity areas in Suisun Bay and Grizzly Bay. 7-
2 28-11 Tr. at 213:14-19 (Feyrer). Mr. Feyrer also acknowledged that
3 delta smelt can live their lives entirely in freshwater. Tr. 7/28/11
4 at 179:8-10.

5 25. Although delta smelt occupy a range of salinity and water
6 clarity levels, the probability of observing a delta smelt is
7 greatest at low salinities, centering on about 2 psu, and at
8 relatively high levels of turbidity. Ex. 501, Feyrer Decl. ¶ 9; see
9 also Ex. 586, Feyrer et al. (2007) ("Feyrer (2007)"), at 7 (AR 18272)
10 (Figure 4(c)). According to Mr. Feyrer most delta smelt are
11 typically caught in salinities between zero (freshwater) and 7 psu.
12 7/28/11 Tr. 186:17-187:9. Dr. Hanson testified that most delta smelt
13 typically occupy areas between zero (freshwater) and "about 7 or 8
14 parts per thousand." 7/27/11 Tr. at 19:23-20:6. The probability of
15 observing a delta smelt decreases as salinity increases above X2. 7-
16 29-11 Tr. at 83:7-84:3 (Feyrer).

17 26. Several published studies, including Sommer *et al.* (2011)
18 have demonstrated that the center of delta smelt distribution is at
19 approximately the two parts per thousand isohaline, except during
20 winter and spring for migration and spawning in freshwater. Ex. 501,
21 internal Exhibit B.

22 27. This phenomenon is displayed graphically in the figure
23 below, Figure 1 in Mr. Feyrer's declaration, which displays the
24 empirically measured center of delta smelt distribution plotted
25
26
27
28

1 against the location of X2, in a tight-fitting relationship:
2
3



13
14
15 *Figure 1. Center of delta smelt distribution plotted against X2.*

16
17 Ex. 501, Feyrer Decl. at ¶ 9.

18 28. Dr. Hanson stated that he did not disagree with this figure
19 or that delta smelt distribution centers on X2. 7-27-11 Tr. at 79:1-
20 2. However, he noted that the "centroid" or "center of distribution"
21 is not necessarily the area of greatest concentration, but rather is
22 an index representing a weighted middle point based upon overall
23 distribution. 7-27-11 Tr. at 29:13-17. For example, the "centroid"
24 of the United States -- or the center of human distribution in the
25 country -- might be Iowa, but that does not mean that the centroid is
26 the area of greatest concentration. See *id.* at 29:18-21 (Hanson).
27
28

1 Dr. Hanson opined: "there are other facets of the distribution that
2 need to be taken into account in order to interpret whether that's a
3 meaningful metric." *Id.* at 29:24-30:1.

4 29. Dr. Hanson testified about a related issue: whether Fall X2
5 is related to the geographic distribution of delta smelt. He
6 examined whether (1) when X2 is located between 70km and 75 km, the
7 geographic distribution of smelt will expand; and (2)
8 correspondingly, when X2 moves east into the narrower channels of the
9 Sacramento River, the geographic distribution of smelt will contract.
10 7-27-11 Tr. at 10:11-25, 11:15-16 (Hanson); Ex. 103, figure depicting
11 experimental inquiry. He also examined whether there was a
12 relationship between the surface area of appropriate smelt abiotic
13 habitat and smelt distribution. *Id.*

14 30. Dr. Hanson concluded the range of smelt distribution shifts
15 further downstream when X2 is located further to the west and shifts
16 further upstream when X2 is located to the east. 7-27-11 Tr. at
17 27:12-15 (Hanson). This range encompasses a broad geographic area
18 spanning approximately 40 kilometers from Suisun Bay and Grizzly Bay
19 in the west, to the Cache Slough Complex upstream to the north,
20 regardless of the location of X2 in the fall or the extent of the
21 "habitat area" depicted in Figure B-17 in the BiOp. 7-27-11 Tr. at
22 27:15-21 (Hanson); Ex. 102; 7-29-11 Tr. at 43:7-46:24 (Feyrer); Ex.
23 154, 155. Dr. Hanson concluded that moving the location of X2
24 westerly in fall months does not increase the area of habitat
25
26
27
28

1 utilized by delta smelt. 7-27-11 Tr. at 27:22-28:6 (Hanson).

2 31. Defendants criticize Dr. Hanson's analysis in a number of
3 ways:

4 (a) According to Dr. Norris, one of the asserted purposes
5 of the Fall X2 Action is to locate the centroid of the delta smelt
6 population within the more productive areas of the estuary. Ex. 502,
7 Norris Decl. at ¶ 24. Although Dr. Hanson's distribution maps did
8 visually depict the relative number of smelt caught at each station,
9 Ex. 100, Hanson Decl., Internal Exhibits 1a-e, Dr. Hanson's
10 measurements of the breadth of smelt distribution looked only at the
11 range of sites at which the mere presence of delta smelt was detected
12 in survey data, and did not weight the catch in any way to account
13 for the relative number of smelt caught at each station.
14
15

16 (b) Defendants also assert that Dr. Hanson's analysis is
17 flawed because it is based on a comparison of disparate data sets.
18 Specifically, Dr. Hanson compared FMWT data showing the location of
19 smelt captures in the estuary to data showing a two-month average
20 location of X2. 7-27-11 Tr. at 81:12-82:17. This comparison is of
21 little utility in determining the relationship between smelt
22 distribution and the location of X2 because using a two-month average
23 location of X2 does not account for the location of X2 at the precise
24 moment the smelt were captured. *Id.* at 82:15-17. Indeed, Dr. Hanson
25 could not rule out the possibility that the smelt were located at X2
26
27
28

1 at the time they were captured. *Id.* at 81:25-83:18.⁴

2 (c) Defendants also maintain that Dr. Hanson formed a
3 substantial portion of his opinion regarding the Fall X2 Action based
4 on a small and unrepresentative subset of the available data. Ex.
5 501, Feyrer Decl. at ¶ 25. Specifically, Dr. Hanson states that he
6 used data from 1990, 1996, 2002, 2003, 2005, 2006 and 2008. Ex. 100,
7 Hanson Decl. at ¶ 20. This is only a handful of the 43 years of
8 available data. Although Dr. Hanson states in a footnote that
9 "[t]hese years were selected as examples of the geographic
10 distribution of smelt under various hydrologic conditions," *id.* at 14
11 n.3, Defendants argue they do not represent relevant hydrological
12 conditions. FWS only prescribed the Fall X2 Action to be implemented
13 following springs classified as either wet or above normal. For
14 unknown reasons, the seven years of data that Dr. Hanson chose "as
15 examples of the geographic distribution of smelt under various
16 hydrologic conditions," *id.*, included only a single example following
17 a wet spring (1996) and a single example following an above normal
18 spring (2006). Ex. 501, Feyrer Decl. at ¶ 25. In fact, of the 43
19 years of data available, 23 are years which follow a wet or above
20 normal spring. *Id.* It is also unexplained why Dr. Hanson excluded
21 91% (21 of 23 years) of data points are appropriate.
22
23
24

25 (d) At best, Dr. Hanson's work on smelt distribution is
26

27 ⁴ Plaintiffs' notice of disapproval cites 7-27-11 Tr. at 82:2-83:3 as evidence that
28 Dr. Hanson did consider the location of X2 on the day the smelt were captured.
Those pages say no such thing and in fact reveal that Dr. Hanson admitted this
could be done but that he did not do so.

1 valuable only to demonstrate that the breadth (in kilometers spanned)
2 of smelt distribution does not shift dramatically as X2 shifts. It
3 does not address how either the centroid or the majority of the smelt
4 population moves with X2.

5 32. The 12/14/10 MSJ Decision found that X2 can rationally be
6 used as a surrogate for delta smelt habitat. *San Luis v. Salazar*,
7 760 F. Supp. 2d at 918 (holding that "when all the disputed X2
8 studies are considered, X2 has a measurable effect on smelt abiotic
9 habitat"); *id.* at 918 n.32 ("while X2 does not explain everything, it
10 explains enough to consider X2 a proxy for critical habitat and to
11 structure management prescriptions around X2").

12 33. The 2009 independent peer review conducted under the
13 Information Quality Act ("IQA") determined that "hydrological events
14 and actions that alter the [fall] X2 location directly *impact*
15 suitable delta smelt abiotic habitat." Ex. 580 at 14. The IQA peer
16 reviewers "strongly concur[red] with the USFWS's use of X2 as an
17 index for identifying delta smelt abiotic habitat," finding that the
18 "X2 index is extremely well supported and scientifically valid" and
19 that "few ecological indices are as robust and well studied as X2."
20 *Id.* In addition, DWR's own scientist, Dr. Ted Sommer, and others
21 reiterated in a published and peer-reviewed journal article in 2011
22 that the "pre-migration distribution [of delta smelt] occurs in the
23 low-salinity zone of the estuary as illustrated by the *strong*
24 *association* between fish distribution and X2 during fall." Ex. 501,
25
26
27
28

1 Feyrer Delc., Internal Exhibit B, at 8 of 17.

2
3 E. Federal Defendants' Scientific Justification for the Fall X2
4 Action.

5 (1) Fall X2 Action and the Habitat Needs of the Smelt.

6 34. It is undisputed that during the fall, delta smelt are
7 maturing pre-adults. They "live in the western portion of the
8 estuary typically centered on the low salinity zone. That's the time
9 of the year where they're growing and maturing into adulthood and
10 preparing for their upstream migration for spawning." 7-28-11 Tr. at
11 110:17-21 (Feyrer). During this time, they "need enough food, enough
12 calories to be able to grow, mature and start to produce eggs and to
13 survive and make their way upstream and spawn again." *Id.* at 110:24-
14 111:2 (Feyrer). If delta smelt do not eat enough prey and obtain
15 sufficient caloric intake during this period, the species' overall
16 reproduction could be impaired, and individual delta smelt "could
17 produce less or fewer eggs or it might not even be able to reproduce
18 at all." *Id.* at 111:3-12 (Feyrer). All else being equal, a female
19 delta smelt that obtains more calories (prey) will grow larger and
20 produce more eggs than a female delta smelt that obtains insufficient
21 calories. *Id.* at 112:5-10 (Feyrer).

22
23 35. Mr. Feyrer opined that if delta smelt have access to more
24 space, they will have more opportunity to encounter and consume prey
25 than in an area where their habitat is more physically constricted.
26 *Id.* at 112:11-17 (Feyrer). He further opined that delta smelt have
27 increased opportunity to encounter and eat prey west of the
28

1 confluence of the Sacramento and San Joaquin rivers, and less
2 opportunity to encounter and eat prey at or east of the confluence.
3 *Id.* at 111:18-112:4 (Feyrer).⁵

4 36. The Fall X2 Action is designed to redistribute the current
5 year's population of delta smelt into Suisun Bay, thereby increasing
6 opportunities for feeding and rearing by increasing the ability of
7 individuals to find food and avoid predation. Ex. 502, Norris Decl.
8 at ¶ 17. Specifically, the Action, which requires increased Delta
9 outflow, is designed to influence the spatial distribution of delta
10 smelt so that it will overlap with biologically productive regions
11 like Suisun Marsh, increasing opportunities for feeding and growth.
12 *Id.* This repositioning is also designed to enhance the ability of
13 pre-spawning delta smelt to escape predation because predation risk
14 is lower in more turbid waters. *Id.*

15
16
17 37. FWS concluded that the ability of designated critical
18 habitat to provide for the conservation of the delta smelt is
19 compromised when the low salinity zone is disconnected from
20 biologically productive areas that maximize the species' opportunity
21 to find and consume prey, such as Grizzly Bay and Suisun Bay and
22 Suisun Marsh areas, which are broader and shallower than the upstream
23

24 ⁵ Plaintiffs' object that these opinions are not based on data, but purely on the
25 suppositions of Mr. Feyrer, whose work never considered food availability or
26 analyzed whether altering the location of X2 would increase opportunities for delta
27 smelt to encounter prey. Mr. Nobriga's work does provide limited support for Mr.
28 Feyrer's conclusion by demonstrating the far western delta is the most biologically
productive, with the Suisun area being slightly less productive but still more
productive than areas east of the confluence. Nonetheless, Smelt abundance was
highest in Suisun, where abiotic factors coincided with biological productivity.
See Nobriga Decl. at ¶ 21.

1 confluence of the Sacramento and San Joaquin rivers. *Id.* at ¶ 24;
2 *see also* 7-29-11 Tr. at 108:20-109:4 (Nobriga).

3 38. FWS also concluded that when the low salinity zone is
4 upstream of the confluence, turbidity is lower than in the Grizzly
5 Bay and Suisun Bay and Suisun Marsh areas, making it more difficult
6 for delta smelt to avoid predation. Ex. 502, Norris Decl. at ¶ 24.
7

8 (2) The Delta Smelt Habitat Index.

9 39. To support the above-described conclusions regarding the
10 Fall X2 ation, the BiOp relies almost exclusively on work by a Bureau
11 of Reclamation scientist, Frederick Feyrer:.
12

13 40. The 12/14/10 MSJ Decision described the Feyrer's 2007 paper
14 relied upon in the BiOp.

15 [T]he BiOp's reli[ed] on a 2007 Canadian Journal of
16 Fisheries and Aquatic Sciences paper by Feyrer, Nobriga,
17 and Sommer, three scientists then working for Plaintiff
18 DWR, entitled, "Multidecadal trends for three declining
19 fish species: habitat patterns and mechanisms in the San
20 Francisco Estuary, California, USA." AR 018266-77. That
21 paper used a generalized additive model to assess the
22 relationship between changes in environmental quality for
23 delta smelt (particularly salinity and turbidity) and the
24 abundance of delta smelt. *Id.*

25 The paper demonstrated that a statistically significant
26 relationship existed between salinity and turbidity in the
27 fall months and the abundance of juvenile delta smelt the
28 following summer for the period of 1987-2004. *Id.* This
time period was chosen because it corresponded to the
invasion of the *Corbula amurensis* clam which has resulted
in significant ecological changes to the Delta. AR 018270.
The results demonstrated that 63 percent of sampling
stations showed statistically significant declines in
environmental quality in the fall, with the western and
southeastern regions of the Delta suffering the most
substantial long term declines in habitat quality, while
the area at the confluence of the Sacramento and San

1 Joaquin Rivers least affected by the changes in fall
2 habitat quality. *Id.*

3 The Feyrer (2007) analysis uses the results of a 2005 study
4 by William Bennett published in the Journal of San
5 Francisco Estuary and Watershed Science, which concluded:
6 "Factors defining the carrying capacity for juvenile delta
7 smelt are unknown, but may include a shrinking volume of
8 physically suitable habitat combined with a high density of
9 competing planktivorous fishes during late summer and
10 fall." AR 017004.

11 The BA acknowledged the results of this 2007 study,
12 including the conclusion that fall habitat conditions have
13 population level effects:

14 Based on a 36-year record of concurrent midwater trawl
15 and water quality sampling, there has been a long-term
16 decline in fall habitat environmental quality for
17 delta smelt (Feyrer et al. 2007). The long-term
18 environmental quality declines for delta smelt are
19 defined by a lowered probability of occurrence in
20 samples based on changes in specific conductance and
21 Secchi depth. Notably, delta smelt environmental
22 quality declined recently coinciding with the POD
23 (Figure 7-8). The greatest changes in environmental
24 quality occurred in Suisun Bay and the San Joaquin
25 River upstream of Three Mile Slough and southern Delta
26 (Figure 7-9). There is evidence that these habitat
27 changes have had population-level consequences for
28 delta smelt. The inclusion of specific conductance
and Secchi depth in the delta smelt stock-recruit
relationship described above improved the fit of the
model, suggesting adult numbers and their habitat
conditions exert important influences on recruitment.

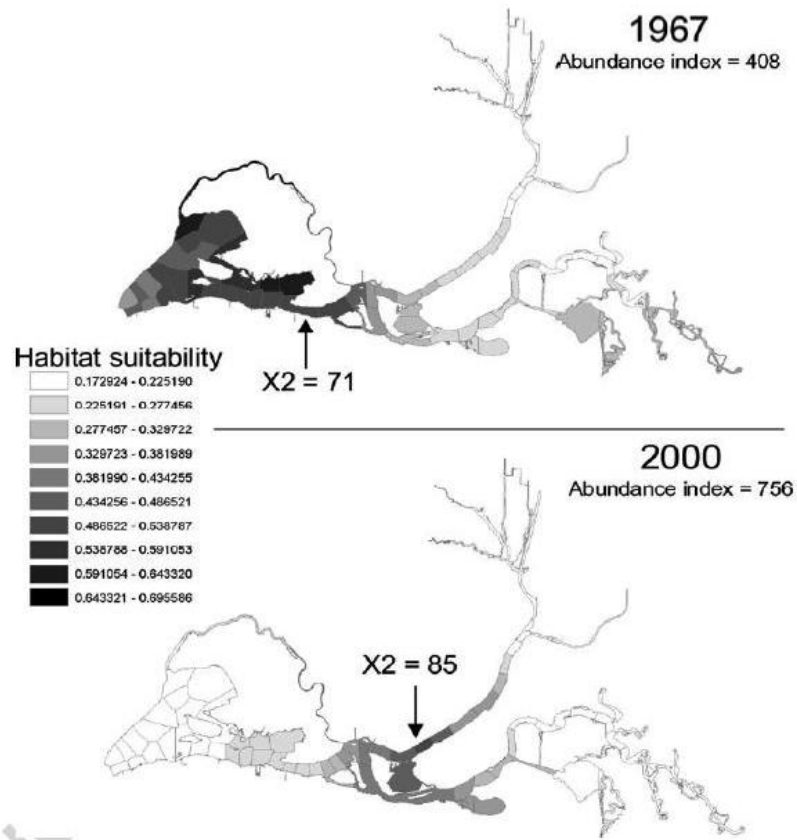
AR 010626; *see also* AR 10628-29 (reproducing maps and
graphics showing habitat declines and geographic
distribution of declines from Feyrer (2007)).

The conclusions in Feyrer (2007) were also recognized in
the January 2008 report on the Pelagic Organism Decline by
the Interagency Ecological Program, which reached nearly
identical conclusions about the effects of declining fall
habitat quality on delta smelt abundance. *See* AR 016938,
016954, 016957.

San Luis v. Salazar, 760 F. Supp. 2d at 915-16.

A 2011 paper published in the Journal of Estuaries & Coasts,
Feyrer et al. (2011) ("Feyrer (2011)"), built upon this and other

1 previous work by Feyrer. Using FMWT survey data, Feyrer (2011)
 2 developed an abiotic habitat index, which incorporates both quantity
 3 and quality of abiotic habitat. Ex. 501, Feyrer Decl. at ¶ 10; see
 4 also Ex. 7, Feyrer (2011). The index represents the surface area of
 5 the estuary standardized for salinity and water clarity conditions
 6 that are favored by delta smelt. Ex. 501, Feyrer Decl. at ¶ 10. The
 7 index represents the statistically-computed probability of observing
 8 a delta smelt at the observed salinity and water transparency
 9 conditions. *Id.* The habitat index is represented in the following
 10 figure:
 11 figure:



27 Figure 3. Spatial distribution of delta smelt habitat suitability for years in which X2 was either
 28 below (1967) or above (2000) the confluence of the Sacramento and San Joaquin Rivers.
 Abundance index is from the fall midwater trawl survey.

1 Ex. 501, Feyrer Decl. at ¶¶ 12-13.

2 41. In this image, "[t]he darker the shading means the higher
3 suitability or the better it is for delta smelt." 7-28-11 Tr. at
4 122:2-3 (Feyrer). When the nominal location of X2 lies at 85 km,
5 most of Suisun Bay and its turbid subsidiary bays, and biologically
6 important parts of Suisun Marsh, are poorly suitable habitat
7 according to the habitat index. Ex. 501, Feyrer Decl. at ¶¶ 12-13.
8 The figure also shows that quality and quantity of delta smelt
9 habitat increases as X2 moves westward toward Suisun Bay and Grizzly
10 Bay. *Id.*

11 42. When explaining the image and the study's findings, Mr.
12 Feyrer testified that "when X2 is located upstream of the confluence
13 there, the habitat space for delta smelt and the habitat quality is
14 much more restrictive compared to when X2 is to the west of the
15 confluence. And when X2 is located west of the confluence, that
16 opens up the low salinity zone and delta smelt habitat to those broad
17 shoals in Suisun Bay and other areas, so there's just a lot more and
18 a lot more suitable habitat for delta smelt." 7-28-11 Tr. at 122:9-
19 16 (emphasis added).

20 43. The authors of Feyrer (2011) utilized fish catch data,
21 salinity data, and turbidity data that were taken at the same place
22 and time. See 7-28-11 Tr. at 115:12-18 (Feyrer). The study found
23 "substantial decline in that habitat index over time." *Id.* at
24 120:10-11 (Feyrer); see also Ex. 7, Feyrer (2011), at 8
25
26
27
28

1 ("deterioration of habitat represents a major issue for delta smelt
2 because of its vulnerability to extinction").⁶

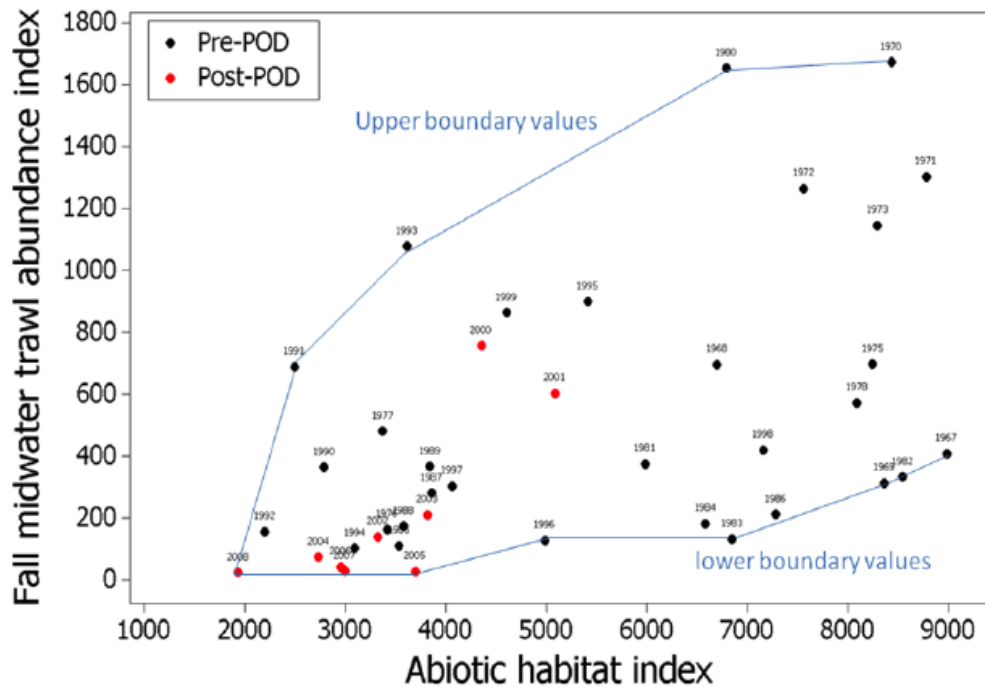
3
4 (3) Link Between Habitat Index and Delta Smelt Abundance
5 Described in Feyrer Papers.

6 44. Feyrer (2007) concluded that incorporating abiotic habitat
7 covariates into a basic stock-recruit model linking the abundance of
8 sub adult delta smelt (as measured in the FMWT) to juvenile
9 production (as measured in the STS) improved the fit of the model.
10 Ex 586 at 6 (AR 18271) (Feyrer (2007)); see also Ex. 501, Feyrer
11 Decl. at ¶ 17. Models that included the abiotic habitat variables
12 accounted for approximately 20% more of the variance in the data set
13 than those without the abiotic habitat variables (r-squared values
14 improved from 0.39 to 0.59). *Id.*

15 45. Using FMWT fish catch and water quality data, Feyrer (2011)
16 demonstrated a relationship between the abiotic habitat index and the
17 delta smelt abundance index. Ex. 501, Feyrer Decl. at ¶ 18; 7-28-11
18 Tr. at 116:10-18. Feyrer (2011) concluded that "the habitat index
19 was significantly positively correlated with the delta smelt
20 abundance index..." 7-28-11 Tr. at 127:5-9. Mr. Feyrer presented
21 the following figure, adapted from Feyrer (2011), to demonstrate the
22 relationship between the abiotic habitat index and the FMWT abundance
23

24
25 ⁶ Plaintiffs dispute whether Feyrer (2011) considered all relevant smelt habitat,
26 specifically whether Feyrer's habitat index analysis included habitat in the Cache
27 Slough Sacramento Deepwater Ship Channel, and Liberty Island areas. Assuming,
28 arguendo, that Feyrer (2001) did not take these areas into consideration, this
would reduce the "denominator" of the habitat index. Ex. 4, Burnham Reply Decl. at
¶ 16. Including these areas would reduce the percent decline in the index observed
over time. *Id.* Feyrer's testimony suggest that these areas may in fact have been
included in his habitat index. 7-29-11 Tr. at 33:4-35:8 (Feyrer).

1 index.



14 *Figure 5. Delta smelt abiotic habitat index plotted against the Fall midwater trawl abundance*
15 *index for the same year. Blue lines connecting the high and low boundary values were hand-*
16 *drawn. Pre-POD period is 1967-1999. Post-POD period is 2000-2008. Figure is adapted from*
17 *Feyrer et al. (2011).*

17 Ex. 501, Feyrer Decl. at 11.

18 46. Mr. Feyrer opined: "the pattern of these data strongly
19 suggests that although there is substantial variability in the
20 relationship between the abiotic habitat index and the abundance
21 index, there appears to be an upper limit to abundance that is an
22 increasing function of abiotic habitat. A classic interpretation of
23 these data is that delta smelt reach their population carrying
24 capacity as a function of available habitat." *Id.* at ¶ 18.

26 47. However, both Dr. Deriso and Dr. Burnham opined that this
27 correlation is meaningless, because the analysis in Feyrer (2011)
28

1 uses the same FMWT data on both axes, making some correlation
2 inevitable. 7-29-11 Tr. at 207:8-208:9 (Burnham) ("There's the fall
3 midwater trawl data underlying both axes ... And when you use the
4 same data for things you then computed on both axes, it induces some
5 degree of statistical correlation."). Mr. Nobriga agreed that any
6 correlation between the habitat index and the FMWT would be
7 "inherently circular because abundance and presence-absence are
8 correlated," but further explained that Feyrer (2011) took this into
9 account yet nevertheless reaffirmed the conclusion that the habitat
10 index was significantly correlated with the FMWT. Ex. 505, Nobriga
11 Decl. at ¶ 11. Mr. Nobriga does not explain how this correction was
12 made.
13

14 48. These are legitimate criticisms and devalue the habitat
15 index to an extent that cannot be determined with certainty.
16

17 (4) Other Criticisms of Feyrer's Work.

18 49. Plaintiffs argue that Feyrer's habitat index and the
19 results of his research are flawed in several other ways.
20

21 a. Consideration of Statistical Uncertainty.

22 50. Plaintiffs argue that Feyrer's analysis fails to
23 appropriately account for uncertainty. In its 2010 review of the
24 available science supporting the Fall X2 Action, the NRC concluded:
25

26 The controversy about the action arises from the poor and
27 sometimes confounding relationship between indirect
28 measures of delta smelt populations (indices) and X2. The
weak statistical relationship between the location of X2
and the size of smelt populations makes the justification

1 for this action difficult to understand. In addition,
2 although the position of X2 is correlated with the
3 distribution
4 of salinity and turbidity regimes (Feyrer et al., 2007),
5 the relationship of that distribution and smelt abundance
6 indices is unclear. The X2 action is conceptually sound in
7 that to the degree that habitat for smelt limits their
8 abundance, the provision of more or better habitat would be
9 helpful. The examination of uncertainty in the derivation
10 of the details of this action lacks rigor. The action is
11 based on a series of linked statistical analyses (e.g., the
12 relationship of presence/absence data to environmental
13 variables, the relationship of environmental variables to
14 habitat, the relationship of habitat to X2, the
15 relationship of X2 to smelt abundance), with each step
16 being uncertain. The relationships are correlative with
17 substantial variance being left unexplained at each step.

18 Ex. 12, NRC Report, at 53; 7-29-11 Tr. at 22:22-23:21 (Feyrer). Dr.
19 Burnham agreed with the NRC and testified that it was "scientifically
20 improper" for Mr. Feyrer to chain the results of multiple modeling
21 efforts together without accounting statistically for the error
22 introduced at each step. Ex. 2, Burnham Decl. at ¶ 22. According to
23 Dr. Burnham, because Mr. Feyrer provided no analysis of the
24 statistical uncertainty at each step of his habitat index, by the
25 final step of his analysis it is impossible to assess the reliability
26 of the correlations. 7-26-11 Tr. at 167:7-168:4 (Burnham).
27 Defendants failed to adequately address this critique with
28 countervailing competent scientific or mathematical analysis.

29 b. Feyrer Analyses Limited to Abiotic Factors Only.

30 51. Plaintiffs next argue that the Habitat Index is inherently
31 flawed because the index considered only two abiotic habitat
32 variables specific conductance (salinity) and Secchi depth
33

1 (turbidity). Ex. 7, Feyrer (2011) at 124; 7-29-11 Tr. at 7:8-13
2 (Feyrer).

3 52. Mr. Feyrer freely acknowledged that his work was limited to
4 an examination of abiotic habitat factors, in part because of the
5 absence of food supply data taken concurrently with the fish sampling
6 trawls. See Hearing Ex. 7, Feyrer (2011) at 124; Ex. 586, Feyrer
7 (2007), at 9-10 (AR 18274-75); Ex 505, Nobriga Decl. ¶ 12; 7-28-11
8 Tr. at 117:4-118:14, 120:22-121:5 (Feyrer). Where the habitat index
9 is so heavily relied upon for management purposes, this is an
10 unjustified exclusion.
11

12 53. In Feyrer (2007), which served as the basis for the
13 "habitat index" analysis, the authors concede that "[b]iotic
14 variables, most notably competition, predation and food availability,
15 could have also played a major role in controlling the distribution
16 of the [delta smelt, striped bass, and threadfin shad]." 7-28-11 Tr.
17 at 246:3-14 (Feyrer). Mr. Feyrer further conceded that his analysis
18 in Feyrer (2011) was "limited" because it only considered two abiotic
19 variables in its analysis of "suitable" smelt habitat. 7-29-11 Tr.
20 at 7:19-24. He agreed that a full and appropriate definition of
21 "habitat" should take into consideration more than just abiotic
22 conditions and that "[a]biotic habitat is a component of habitat."
23 7-28-11 Tr. at 244:17-21.⁷
24
25

26
27 ⁷ It was suggested by Mr. Feyrer that consideration of abiotic habitat alone was
28 sufficient because "[a]biotic habitat factors are the underlying foundation that
determines where an organism can live and reproduce." Ex. 501, Feyrer Decl. at ¶
13. Likewise, Mr. Nobriga testified that a paper he published in 2005 demonstrates

1 54. The Feyrer (2007) and Feyrer (2011) studies provide some
2 evidence of an association between delta smelt abundance and summer
3 and fall abiotic habitat conditions. However, analyses utilizing the
4 habitat index only explain a portion of the environmental influences
5 on smelt abundance.

6
7 55. The Feyrer testimony revealed limitations of the habitat
8 index, which are not satisfactorily explained. The extent to which
9 this diminishes the efficacy of that index is significant,
10 particularly in light of the magnitude of effect implementing the
11 Fall X2 Action has on Plaintiffs. The disconnect between the weak
12 scientific justification and the strong practical impact is
13 corroborated by DWR's opposition to the X2 Action.

14
15 c. Failure to Separate Salinity from Turbidity.

16 56. Feyrer (2011) concluded that the habitat index variables of
17 salinity and turbidity explain 25 percent of the variation in delta
18 smelt abundance. 7-29-11 Tr. at 73: 5-16 (Feyrer). However, Mr.
19 Feyrer acknowledged that the analysis in Feyrer (2011) does not
20 provide a basis for calculating the proportion of the variation in
21 the delta smelt abundance index attributable to salinity as a stand-
22 alone variable. *Id.* at 74:16-75:2.

23
24 57. This adds an additional layer of uncertainty when using
25 Feyrer's results to justify imposition of the Fall X2 Action. If

26 that "physical aspects have to be appropriate for delta smelt in order for the
27 biological productivity [of habitat] to matter." Ex. 505, Nobriga Decl. at ¶ 21.
28 But, that abiotic factors are the "underlying foundation" for or are necessary to
smelt survival and reproduction does not necessarily render them more important
than biotic factors. Defendants presented no evidence to suggest such priority.

1 turbidity is the dominant factor, how will controlling X2 accomplish
2 anything? This is not explored or explained.

3
4 d. Failure to Consider Smelt Populations Residing in the
Cache Slough Complex.

5 58. The latest STS found that 60 percent of the total smelt
6 catch came from areas upstream of the confluence of the Sacramento
7 and San Joaquin Rivers, specifically in the Cache Slough Complex.
8 Ex. 521, Hanson Decl., App. B at 1. This is an area of freshwater or
9 low salinity that is unaffected by the location of X2. 7-27-11 Tr.
10 at 39:5-11 (Hanson).
11

12 59. These findings call into question the current understanding
13 of smelt biology. For example, the Interagency Ecological Program's
14 December 6, 2010, Pelagic Organism Decline Work Plan and Synthesis of
15 Results raised questions about the current conceptual model for delta
16 smelt population dynamics:
17

18 The delta smelt has been considered semi-anadromous, but in
19 recent years investigations centered on its northern Delta
20 spawning and early rearing areas have detected delta smelt
21 year-round, leading to the idea that these putative
22 "resident" individuals might represent alternative life
23 history contingents (Sommer et al. 2009, Sommer et al in
24 review). The southern end of the Yolo Bypass, including
25 Liberty Island, Cache Slough, and the Sacramento deep water
26 ship channel are known to support delta smelt spawning and
27 rearing (see Bennett 2005). During 2003-2005 the USFWS
28 collected delta smelt during monthly sampling activities
throughout the year, not just during spring time,
suggesting that delta smelt were using this relatively
shallow, flooded island habitat throughout their entire
life cycle (USFWS unpublished data). Similarly, extensions
of the 20-mm Survey, TNS [Tow Net Survey] and FMWT surveys
into the Sacramento deepwater ship channel caught delta
smelt consistently from June through October, the warmest
months of the year (CDFG unpublished data). Like the
"core" rearing habitat of delta smelt near the Sacramento-
San Joaquin River confluence, Liberty Island and adjacent

1 deeper habitats in the Ship Channel and Cache Slough are
2 very turbid and have very little SAV [submerged aquatic
3 vegetation] (Nobriga et al. 2005, Lehman et al. 2010, CDFG
4 unpublished data). However, Liberty Island is somewhat
5 warmer during the summer than the river confluence (Nobriga
6 et al 2005) and may prove to be a challenging habitat for
7 rearing. The following conceptual model applies only to
8 the traditional view of delta smelt as a semi-anadromous
9 species. We are currently evaluating how to integrate
10 these observations into our conceptual model (T. Sommer,
11 DWR, unpublished data)."

12 Ex. 501, Feyrer Decl., Internal Exhibit C (Baxter, et al.,
13 *Interagency Ecological Program 2010 Pelagic Organism Decline Work*
14 *Plan and Synthesis of Results* (Dec. 6, 2010)) at 55-56.

15 60. The Cache Slough Complex was not included in the STS until
16 2009 and 2011. 7-27-11 Tr. at 35:7-37:11 (Hanson); *See also* Ex. 106.
17 Consequently, Feyrer's 2007 and 2008 analyses, which only utilized
18 FMWT data up until 2004 and 2006 respectively, *see* Ex 586, Feyrer
19 (2007), at 724 ; Ex. 6, Feyrer et al. (2008) ("Feyrer (2008)"), at 6
20 (AR 018283), and could not possibly have considered data of a
21 substantial delta smelt population in the freshwater upstream areas
22 in the Cache Slough Complex. Feyrer (2011) used only FMWT data up
23 until 2008, Ex. 7, Feyrer (2011), at 141, so it too did not consider
24 any evidence of a substantial population of delta smelt in Cache
25 Slough that is unaffected by downstream shifts in the location of
26 Fall X2.

27 61. Plaintiffs criticize Mr. Feyrer's work for excluding these
28 areas from his habitat index analysis. Some evidence suggests Mr.
Feyrer's calculation of the habitat index did include Cache slough
and the Sacramento Deepwater Ship Channel. 7-28-11 Tr. at 124:15-20

1 (Feyrer) (testifying that the maps depicting the habitat index did
2 encompass these areas).⁸ However, on cross-examination, Mr. Feyrer
3 admitted that the core stations he used to develop the habitat index
4 were all downstream of Cache Slough, Liberty Island, and the
5 Sacramento Deepwater Ship Channel. Tr. 7-29-11 at 36:6-37:15. This
6 inconsistent testimony cannot support the absolute limits for X2 the
7 current RPA establishes.
8

9 62. Even assuming the habitat index excluded these upstream
10 areas, Mr. Feyrer opined that including them "would simply add a
11 constant number of units to the habitat index, which would not affect
12 the shape of the X2-habitat index relationship." Ex. 510, Feyrer
13 Decl. at ¶ 16. He admitted, however, that additional units would
14 shift the curve to the right. 7-29-11 Tr. at 33:24-34:1; Exs.
15 102(a), 153. This is highly relevant to the reliability of the
16 justification provided for the specific 74 km X2 standard to be
17 imposed this Fall.
18

19
20 e. Life Cycle Modeling.

21 63. Plaintiffs' also criticize Feyrer's work and the BiOp's
22 reliance on it on the ground that Feyrer's results are contradicted
23 by several recent papers evaluating smelt population dynamics through
24 the use of life-cycle models. Life-cycle modeling is a special type
25 of population dynamics modeling that considers the survival and
26

27 ⁸ At the time he prepared the relevant charts Liberty Island (which is actually no
28 longer an island at all, but rather a recently flooded area) was not in existence.
12-28-11 Tr. at 124:14-17.

1 reproduction of species over time. 7-26-11 Tr. at 169:16-170:6
2 (Burnham).

3 64. It is undisputed that life-cycle modeling is the best
4 method for determining the effect of an environmental variable on the
5 population dynamics of a species. See *San Luis v. Salazar*, 760 F.
6 Supp. 2d at 885 (finding it "undisputed that application of a
7 quantitative life-cycle model is the preferred scientific
8 methodology" for determining the effects of a stressor on the
9 population of a species like the delta smelt); *id.* ("life-cycle
10 modeling is standard practice in the field of fisheries biology").
11

12 65. Feyrer (2007) states that the development of life-cycle
13 models for the delta smelt was "likely to better quantify the
14 relative importance of water quality on their population dynamics."
15 Ex. 586, Feyrer (2007), at 731 (AR 018274). Mr. Feyrer also admitted
16 that the use of a quantitative life-cycle model "would definitely
17 help us reduce the amount of uncertainty" in the RPA, 7-29-11 Tr. at
18 17:25-18:10 (Feyrer), and that "well constructed life-cycle models
19 can definitely ... improve our understanding of the delta smelt
20 population dynamics." 7-28-11 Tr. at 219:12-16 (Feyrer).
21

22 66. Despite the recognized need for a quantitative life-cycle
23 model to analyze the effect of the location of X2 and other
24 environmental variables on the population of the delta smelt, "it is
25 undisputed that an appropriate life-cycle model had not been
26 developed at the time the BiOp issued" in 2008. See *San Luis v.*
27
28

1 *Salazar*, 760 F. Supp. 2d at 885. The Court previously found that
2 "FWS had the time and ability to prepare the necessary life-cycle
3 model. FWS made a conscious choice not to use expertise available
4 within the agency to develop one." *Id.* This is evidence of agency
5 intransigence. The court has repeatedly found that the agency's
6 "lack of data" apologetic is the premise for the agency to do what it
7 chooses without addressing Plaintiffs' objections.
8

9 67. Dr. Norris, the ESA regulator charged with determining
10 whether there is a likelihood of jeopardy or adverse modification of
11 critical habitat, testified that a life cycle model is not *per se* the
12 best available science under ESA Section 7(a)(2). 7-29-11 Tr. at
13 182:4-186:6. She opined that a life cycle model is not automatically
14 considered to be a credible resource, but rather must be evaluated
15 for credibility based on the assumptions that went into it, the
16 questions that were being asked, the data that were used, how the
17 results were derived and what conclusions were drawn from those
18 results. *Id.* at 186:7-16. Dr. Norris further explained that it is
19 unlikely that any one life cycle model ever would be considered
20 definitive or conclusive evidence that forecloses other evidence.
21 *Id.* at 186:17-22.
22

23 68. Dr. Norris observed that scientific understanding with
24 regard to the delta smelt is never static, and new information
25 frequently is developed after a BiOp has been prepared. *Id.* at
26 186:23-187:6. For instance, Dr. Norris testified that Dr. Ken
27
28

1 Newman, of FWS's Stockton, California office, currently is working on
2 a delta smelt life cycle model that will have several unique
3 features, including spatial variability throughout the Delta, as well
4 as temporal variability. *Id.* at 182:18-183:13. Dr. Newman's model
5 also will include the full data set for the Fall Midwater Trawl,
6 which is fairly extensive and expanded over what has been done
7 previously. *Id.*

9
10 (1) Feyrer (2008) Life Cycle Modeling Effort.

11 69. The BiOp relied in part on a 2008 manuscript, Feyrer
12 (2008), which utilized a life-cycle model to evaluate the
13 relationship between the location of X2 and delta smelt abundance.
14 BiOp at 236. The December 14, 2010 MSJ Decision summarized the paper
15 as follows:

16 [Feyrer (2008)] expanded upon the 2007 research, used
17 statistical analyses, including both Ricker and Beverton-
18 Holt type models, to compare Fall X2, habitat area for and
19 subsequent abundance of delta smelt. *Id.* Like Feyrer
20 (2007), it concluded that fall habitat quality had a
21 statistically significant effect on subsequent delta smelt
22 abundance, determining that the model incorporating prior
23 abundance and X2 accounted for 66 percent of the
24 variability in subsequent abundance. *Id.* The authors
25 identified a number of reasons why the location and extent
26 of fall habitat affected subsequent abundance:

27 First, positioning X2 seaward during autumn provides a
28 larger habitat area which presumably lessens the
likelihood of density-dependent effects (e.g., food
availability) on the delta smelt population. For
example, food availability during autumn for adult
haddock (*Melanogrammus aeglefinus*) likely improves
juvenile recruitment the following year (Friedland et
al. 2008). Second, a more confined distribution may
increase the probability of stochastic events that
increase mortality rates of adults. For delta smelt,
this includes both predation, as well as anthropogenic

1 effects such as contaminants or water diversion loss
2 (Sommer et al. 2007).

3 AR 018293. The study concluded: "Comparing the first ten
4 years of the time series to the last ten years, the amount
5 of suitable abiotic habitat for delta smelt during autumn
6 has decreased anywhere from 28% to 78%, based upon the
7 least and most restrictive habitat definitions,
8 respectively." AR 018293-94.

9 *San Luis v. Salazar*, 760 F. Supp. 2d at 917.

10 70. Responding to Dr. Deriso's critique at that time that the
11 Feyrer (2008) model inappropriately made use of a linear additive
12 model, rather than a multiplicative model, the MSJ Decision concluded
13 this critique "raise[d] a scientific dispute among experts," and
14 noted that peer reviewers did not recommend exclusion of the model
15 and broadly supported the Fall X2 action based in part upon the
16 model. *Id.* at 922.

17 71. The Feyrer (2008) manuscript, which was cited in the BiOp,
18 was ultimately published as Feyrer (2011), Ex. 7, but with a narrowed
19 focus on the habitat index, and leaving the draft life cycle model
20 contained in the 2008 manuscript for later, to be incorporated into a
21 different effort where that could be the sole focus. 7-28-11 Tr. at
22 135:14-136:15 (Feyrer).⁹

23 72. Plaintiffs argue that the Feyrer (2008) model suffered from

24 ⁹ Plaintiffs suggest that the omission of the draft life cycle model from the
25 final publication in 2011 undermines the value of the conclusions in Feyrer (2008).
26 The fact that the authors of Feyrer (2008) removed the draft life cycle model from
27 the manuscript prior to submitting it for publication in 2010, see Ex. 501, Feyrer
28 Decl. at ¶ 19, does not mean that FWS's reliance on the manuscript (including its
many other parts) in developing the 2008 BiOp was arbitrary and capricious. The
draft life cycle model was removed so that it could be the focus of a separate
effort, and because the Feyrer (2011) article ultimately took on a different focus,
namely, the creation of the abiotic habitat index. 7-28-11 Tr. at 135:14-136:15
(Feyrer).

1 significant structural problems. Specifically, the model predicted
2 negative smelt abundance as often as 54% of the time under certain
3 scenarios. 7/28/11 Tr. at 251:15-252:23 (Feyrer); *see also* Ex. 6,
4 Feyrer 2008, at 12 (AR 018289).

5
6 73. In his testimony, Mr. Feyrer stated that the negative
7 abundance values might possibly represent an extinction scenario
8 rather than a flaw in the model. 7-29-11 Tr. at 88:6-25 (Feyrer).
9 However, contrary to this testimony, Feyrer (2008) considered this
10 possibility and dismissed it. Ex. 6, Feyrer 2008, at 12 (AR 018289)
11 ("[O]ne could make an argument that the frequency of times that such
12 an event occurred was a prediction of the probability of extinction.
13 ... However, the probability of negative abundances was largely a
14 function of uncertainty in the parameter values as increasing the
15 initial number of adult fish in the fall, even to 1,000, did not
16 noticeably affect the probabilities."). This disassembling calls Mr.
17 Feyrer's credibility into question. His scientific objectivity is
18 compromised by inconsistency.
19

20 74. The Feyrer (2008) life cycle model concluded that fall
21 habitat quality had a statistically significant effect on subsequent
22 delta smelt abundance and determining that the model incorporating
23 prior abundance and X2 accounted for 66 percent of the variability in
24 subsequent abundance. The model and its application were imperfect.
25 They represent relevant but scientifically compromised findings
26 regarding the relationship of Fall X2 to smelt abundance.
27
28

1 (2) Overview of Other Life-Cycle Modeling Efforts.

2 75. Since the BiOp was published in December 2008, the body of
3 scientific information on delta smelt has grown. Three additional
4 life-cycle models have been developed by Maunder & Deriso (2011), Mac
5 Nally et al. (2010) ("Mac Nally (2010)"), and Thomson et al. (2010)
6 ("Thomson (2010)"). Each is the subject of an article published in a
7 peer-reviewed scientific journal. Exs. 8, 9 & 10.
8

9 76. The Maunder & Deriso (2011) model is a state-space
10 multistage life-cycle model that analyzes delta smelt populations at
11 every life stage using data from multiple seasonal surveys of delta
12 smelt abundance. 7-26-11 Tr. at 46:2-15 (Deriso). The state-space
13 model approach is capable of utilizing an array of surveys, which
14 allows for more closely tailored testing of environmental factors
15 within a particular life stage. *Id.* at 46:23-47:1 (Deriso).
16

17 77. Thomson (2010) endorsed the statistical approach taken in
18 the Maunder & Deriso (2011) model, stating "[a]nother area of future
19 work that may clarify mechanisms is to fit process models that
20 include multiple life history stages of the fish species using data
21 available from surveys that complement data from autumn midwater
22 trawl surveys used here ... A life history model that linked the
23 abundances of each life stage would provide a more continuous picture
24 of the delta smelt population and would capitalize more fully on
25 available data." Ex. 10, Thomson (2010), at 1446.
26

27 78. Similarly, Mac Nally (2010) recommended the statistical
28

1 approach taken in the Maunder & Deriso (2011) model: "A broader
2 life-history model with a more general state-space approach to
3 modeling the pelagic species decline should be more informative."

4 Exh. 9, Mac Nally (2010), at 1427.

5 79. The Maunder & Deriso (2011) model was structured so that it
6 could perform hypothesis testing about candidate environmental
7 factors to determine if they were important in accounting for changes
8 to the population growth rate. 7-26-11 Tr. at 47:23-48:2 (Deriso).

9 80. The Maunder & Deriso (2011) model found that three kinds of
10 environmental factors were important: food abundance in spring as
11 measured by the zooplankton index, spring water temperature, and fall
12 predation index. In addition, density dependence was significant.
13 *Id.* at 48:11-17 (Deriso).

14 81. The Mac Nally (2010) model, which was co-authored by Mr.
15 Feyrer, used a different statistical technique called multivariate
16 autoregressive modeling to determine the effects of 54 different
17 environmental covariates. 7/28/11 Tr. 220:18-20 (Feyrer); Ex. 9, Mac
18 Nally (2010).

19 82. The Thomson (2010) model, which was also co-authored by Mr.
20 Feyrer, used another statistical technique, Bayesian change point
21 analysis, to determine the effect of a number of covariates on delta
22 smelt abundance. 7-28-11 Tr. at 220:15-17 (Feyrer); Ex. 10, Thomson
23 (2010).

24 83. Each of the published life-cycle models used different data
25
26
27
28

1 sets, different covariates, and different modeling approaches. 7-26-
2 11 Tr. at 134:4-11 (Deriso); Ex. 501, Feyrer Decl. at ¶ 21.

3 84. Using different modeling approaches, data sets, and
4 covariates, all three of the published life-cycle models came to the
5 conclusion that the location of X2 in the fall does not have a
6 statistically significant effect on delta smelt abundance. 7-26-11
7 Tr. at 134:4-11 (Deriso); 7/29/11, 18:14-21 (Feyrer); 7/29/11,
8 121:11-14 (Nobriga). Federal Defendants' expert Mr. Nobriga
9 admitted, based on the three published models, that the 40 years of
10 historical data do not support a correlation between the location of
11 X2 in the fall and delta smelt abundance: "I think that in terms of
12 the historical data, that the three models probably indicate there's
13 - that you're not going to find a correlation out of the historical
14 data." 7-29-11 Tr. at 141:5-15.

15
16
17 85. However, all three life-cycle models also came to different
18 conclusions regarding which factors affect delta smelt abundance.
19 Ex. 501, Feyrer Decl. at ¶ 21; *see also* Ex. 505, Nobriga Decl.,
20 Internal Exhibit B (chart comparing life cycle models). This
21 suggests that there is no one single factor that affects delta smelt
22 abundance, and there is no single paper, model, or analysis that is
23 the final word on what factors affect the smelt. There is
24 substantial disagreement among scientists about the relative
25 importance of various factors. Additionally, the relative importance
26 of factors differs both within and among years. *See* Ex. 501, Feyrer
27
28

1 Decl. at ¶ 21 (citing Bennett and Moyle (1996); Bennett (2005);
2 Sommer *et al.* (2007); Baxter *et al.* (2010)).

3 86. Model results "depend very strongly on how the model is set
4 up and what covariates are considered." Ex. 505, Nobriga Decl. at ¶
5 23. Since covariates affect the result, it is therefore "extremely
6 important that the covariates (i.e., the model inputs) accurately
7 characterize what they purport to characterize - and that they
8 reflect the best use of available scientific and monitoring
9 information." *Id.* at ¶ 25. The scientific disagreement over which
10 covariates should be considered does not justify ignoring the results
11 of these life cycle models.
12

13
14 (3) Specific Critiques of the Maunder & Deriso
15 Approach.

16 87. Dr. Deriso testified in detail about the results of the
17 life cycle he developed with Dr. Maunder. Defendants offer numerous
18 reasons why the Maunder & Deriso model should not be afforded
19 definitive weight here.

20 88. Defendants first assert that both the Feyrer (2011)
21 analysis and the Maunder & Deriso life-cycle model produced similarly
22 powerful results, namely that they both "account for approximately
23 the same percentage of variation in the FMWT." 7-28-11 Tr. at
24 127:13-129:11 (Feyrer) (basing his testimony on Dr. Deriso's previous
25 testimony that the Maunder/Deriso model only explains 24% of the
26 variation in adult delta smelt abundance, leaving unexplained 76% of
27 the variation which must be caused by some other factor or factors.
28

1 7-26-11 Tr. at 119:13-120:2 (Deriso)); *see also* Ex. 3, Deriso Decl.,
2 Internal Attachment A, at 13 of 49.

3 89. Plaintiffs argue in their Disapproval that this is
4 comparing apples to oranges. The 24% figure to which Dr. Deriso
5 referred was taken from the "Adult" column of Table 7 of Deriso &
6 Maunder (2011), which represents the period of the delta smelt life
7 cycle from the FMWT to the spring 10mm survey. Doc. 1009 ¶ 63. This
8 apparently does not represent the variation in the FMWT in the same
9 way as Feyrer (2011) measured. Rather, Plaintiffs assert the more
10 appropriate figure is 43%, taken from the "Juvenile" column of Table
11 7, which represents the period of the delta smelt life cycle from
12 juveniles to adults in the STS to the FMWT, "in other words the
13 changes in population level that result in the FMWT measurement."
14 Id. But, Plaintiffs failed to present any evidence demonstrating
15 that this is a better form of comparison. More importantly, this
16 explanation highlights the fact that the two types of modeling
17 compared by Mr. Feyrer are not necessarily equivalent. Dr. Burnham
18 explained that comparison of two R-squared values is improper,
19 because the underlying analyses are entirely different. Tr. 7-29-11
20 at 208:19-210:13. This further inconsistency raises additional
21 questions about reliability of Feyrer's final opinion reflected by
22 the Fall X2 RPA
23
24
25

26 90. Dr. Deriso generally acknowledged that the Maunder & Deriso
27 model is merely "a start towards answering the complicated question
28

1 regarding the Delta." 7-26-11 Tr. at 123:11-13 (Deriso); Ex. 5,
2 Deriso Reply Decl. at ¶ 27. Dr. Deriso admitted that his "model is
3 not the final word on the delta smelt, it can undoubtedly be
4 improved." 7-26-11 Tr. at 123:3-6; Ex. 5, Deriso Reply Decl. at ¶
5 27.
6

7 91. Defendants further complain that Dr. Deriso's model is a
8 generic life-cycle model that is merely illustrated in his manuscript
9 by application to delta smelt. 7-26-11 Tr. at 86:25-87:5 (Deriso).
10 His model does not reflect delta smelt biology other than being
11 designed for an annual species with various abundance measurements
12 during the year. 7-26-11 Tr. at 88 (Deriso). It was not developed
13 with fish biologists or ecologists with extensive experience in the
14 Delta. 7-26-11 Tr. at 124 (Deriso). However, Dr. Deriso explained
15 that the Maunder & Deriso (2011) model was tailored to the specific
16 life stages of the delta smelt. 7-26-11 Tr. at 88:6-20.
17

18 92. Defendants also criticize the Maunder & Deriso (2011) model
19 for failing to analyze prey abundance or turbidity.
20

21 (a) Dr. Deriso admitted that prey abundance is a key factor
22 affecting survival. 7-26-11 Tr. at 64:17-19; *see also* 7-26-11 Tr. at
23 133:24-34:3. Yet, his model specifically excluded consideration of
24 prey density in the fall, 7-26-11 Tr. at 104:10-12 (Deriso), despite
25 the fact that "[n]ative and non-native zooplankton abundances are
26 known to be enhanced in the western portion of the Delta during the
27 fall," Ex. 4, Burnham Decl., Internal Attachment A (Delta Science
28

1 Program Review Panel Summary Report Re: Draft Plan for Adaptive
2 Management of Fall Outflow for Delta Smelt Protection and Water
3 Supply Reliability), at 36 of 49. This is an unjustified
4 rationalization that weakens applicability of the Maunder & Deriso
5 life cycle model.

6
7 (b) Dr. Hanson concurs "that as habitat moves further down
8 into the Suisun Bay area there would be zooplankton availability as a
9 food resource. And under that circumstance, you would expect that
10 the delta smelt would have greater opportunities for foraging when
11 they were located further downstream in the Suisun Bay area." 7-27-
12 11 Tr. at 9:-13.

13 (c) Similarly, Dr. Deriso did not test the effect of
14 turbidity on delta smelt in the fall. As explained in Reclamation's
15 2011 Fall X2 draft adaptive management plan, "turbidity at X2 is
16 higher when X2 overlaps Suisun Bay than when it's in the river
17 channels east of the [Sacramento-San Joaquin] confluence" and that
18 "higher turbidity is expected to reduce predation rates on delta
19 smelt." Ex. 501, Internal Exhibit A, at 25 of 48. Dr. Hanson
20 agreed: "as habitat area moves further down into the Suisun Bay area,
21 ... it's an area that characteristically has higher turbidities. You
22 might expect that those higher turbidities would result in a
23 reduction in the vulnerability of delta smelt to visual predators
24 such as striped bass. That would reduce predation mortality and
25 increase delta smelt survival." 7-27-11 Tr. at 9:1-7.

1 (d) While Dr. Deriso did find that predation in the fall is
2 a significant factor affecting smelt abundance, 7-26-11 Tr. at
3 107:14-20, he failed to include a turbidity variable in his fall X2
4 analysis that would measure whether increased turbidity would reduce
5 the negative effect of fall predation, 7-26-11 Tr. at 108:12-17.

6
7 (e) Although prey abundance and turbidity were not
8 directly tested in the Maunder & Deriso analysis, Plaintiffs point
9 out that Defendants' theories are dependent upon the assumption that
10 moving the location of X2 will redistribute smelt into areas where,
11 in part because turbidity and prey abundance are favorable to the
12 smelt, their abundance will increase. Dr. Deriso tested whether the
13 location of X2 is correlated to changes in smelt abundance and found
14 no correlation.¹⁰

15
16 93. There is also a dispute over whether the data inputs Dr.
17 Deriso used were appropriate. To illustrate his model, Dr. Deriso
18 chose to use covariates developed by Dr. Manly and Dr. B.J. Miller,
19 rather than raw IEP data employed by the Thomson and Mac Nally
20 models. See Ex. 5, Deriso Reply Delc., at ¶ 25. Dr. Deriso
21 concluded that this data, which refined the raw data to represent
22 actual smelt habitat locations and conditions, would produce more
23 accurate and useful results than the raw data. *Id.* This was a
24

25
26 ¹⁰ Defendants also criticize Dr. Deriso's work because the data set used by Dr.
27 Deriso in his published manuscript excluded salinity altogether as a factor
28 affecting delta smelt. 7-26-11 Tr. at 102:18-20 (Deriso). But, Dr. Deriso
performed a separate analysis of X2 using his life cycle model, from which he
concluded that the location of X2 in the fall has no effect on delta smelt
abundance. Ex. 3, Deriso Decl. at ¶¶ 23-31.

1 reasonable exercise of scientific judgment.

2 94. Additionally, Dr. Deriso's life cycle model uses a food
3 supply variable based on zooplankton data that are collected at fewer
4 and different stations from the fish sampling trawl, and at different
5 times. Ex. 505, Nobriga Decl. ¶¶ 13, 32-33. This approach could
6 "potentially bias the data" because both delta smelt and zooplankton
7 can move quickly, either passively on currents, or under their own
8 volition in response to local hydrodynamics. 7-29-11 Tr. at 119:19-
9 120:5 (Nobriga); see also Ex. 303, Nobriga Decl. ¶ 13; see also *id.* ¶
10 32 ("the key is to use concurrently collected data because the
11 predator (delta smelt) and its prey (calanoid copepods) are always
12 moving - both due to hydrodynamics and their own swimming
13 behaviors"); 7-29-11 Tr. at 112:3-13 (Nobriga). Yet, on cross-
14 examination, Mr. Nobriga admitted that there is no prey data
15 collected concurrently with the FMWT. Tr. 7-29-11 at 133:14-134:9.
16 This reduces the reliability of the data used.

17 95. Finally, Defendants assert that Dr. Deriso's model is
18 flawed because it "does not reflect the current population status of
19 the delta smelt." Doc. 1004, Defendant's Proposed Findings of Fact #
20 177. Specifically, Defendants point out that Dr. Deriso's model
21 found strong evidence for density dependence for survival from
22 juvenile delta smelt to adults. 7-26-11 Tr. at 110:3-5. Dr. Deriso
23 acknowledges that this finding of a density dependent relationship is
24 "heavily influenced" by three consecutive years of data from 1976-
25
26
27
28

1 1978, *id.* at 112:9-13, and that the juvenile-to-adult life stage of
2 delta smelt is currently density independent, *id.* at 113. Defendants
3 complain that, despite the current, density independent pattern, Dr.
4 Deriso's model was specifically designed "to evaluate population
5 impacts in the presence of density dependence." Ex. 3, Deriso Decl.,
6 Internal Attachment A, at 26 of 48.
7

8 96. Plaintiffs rejoin that this entire line of reasoning is
9 misleading because the Ricker-type model that underlies the Maunder &
10 Deriso (2011) model operates accurately to predict survival rates
11 that are density independent at very low population levels, Doc.
12 1009, Disapprovals at 75, but Plaintiffs cite nothing in the record
13 to support this assertion.
14

15 97. Overall, Defendants critiques of Dr. Deriso's work do not
16 undermine its essential value as a peer-reviewed life cycle model
17 that concludes there is no correlation between the position of X2 and
18 delta smelt abundance.
19

20 f. Comparison of the Life Cycle Modeling Results.

21 98. Plaintiffs assert that the Mac Nally, Thomson, and Maunder
22 & Deriso models should be given definitive weight because these three
23 life-cycle models agree that the location of Fall X2 has no effect on
24 delta smelt abundance. But, the evidence suggests that none of these
25 models are universally accurate. Each approach asks different
26 questions using different tools and inputs, and each result has its
27 strengths and weaknesses. This is a classic scientific dispute.
28

1 99. These competing scientific results compared against one
2 another do not produce a certain paradigm. They are all considered
3 in the final balancing of the equities. The one clear conclusion
4 that can be drawn from this dispute is that the Feyrer papers are
5 neither definitive nor dispositive, and do not provide the level of
6 confidence on which such unprecedented action should be based. They
7 provide some evidence for the Fall X2 Action that is undermined and
8 contradicted by the three most recent life cycle modeling efforts.¹¹

10
11 F. Dr. Hanson's Testimony.

12 100. Plaintiffs' expert, Dr. Charles Hanson, a fish biologist,
13 testified at length about his own independent investigation into the
14 biological support for the Fall X2 Action. He first examined the
15 purported relationship between the monthly average location of X2 in
16 the Fall and the subsequent abundance of delta smelt. After
17 examining the relevant scientific literature, Dr. Hanson identified
18 four mechanisms by which movement of the location of X2 could
19 possibly affect the population dynamics of delta smelt: (1) that X2
20 has an impact on the geographic distribution of delta smelt in the
21

22 ¹¹ Federal Defendants assert generally that reliance on statistical applications
23 and modeling computations are not a complete substitute for local biological and
24 ecological knowledge. For example, recent work by Kimmerer indicates that losses
25 of delta smelt to export pumping can be nearly undetectable with regression
26 analysis yet have a very significant population-level effect. Feyrer Decl. ¶ 20
27 (7-1-11) (Hearing Exhibit 501) (citing Kimmerer (2011)) (Doc. 944). While Kimmerer
28 may provide support for finding an effect despite statistical insignificance under
the circumstances analyzed in his paper for losses of smelt to export pumping, no
such analysis has been presented here regarding the impact of Fall X2 on smelt
abundance. FWS cannot simply assume that the location of X2 affects smelt
population dynamics. Record evidence is necessary. Here, such evidence is in the
form of statistical analyses. The Fall X2 action must rise or fall on that
information.

1 fall; (2) that X2 effects survival of pre-spawning delta smelt in the
2 fall; (3) that X2 affects reproduction of delta smelt the following
3 spring; and/or (4) that X2 affects delta smelt food availability. 7-
4 27-11 Tr. at 8:13-9:16, 9:20-25 (Hanson); *see also* 7-26-11 Tr. at
5 234:18-235:1 (Hanson).

6
7 101. The results of Dr. Hanson's inquiry into the effect of Fall
8 X2 on smelt geographic distribution were discussed above at Findings
9 of Fact ## 28-31. Bvt5

10
11 (1) Relationship Between Fall X2 and Delta Smelt Survival.

12 102. Dr. Hanson examined whether there was a relationship
13 between the position of Fall X2 and delta smelt survival. He did so
14 by developing a survival index derived from FMWT survey data. 7-27-
15 11 Tr. at 43:19-44:12, 44:20-21 (Hanson); Exhs. 108A, 109.¹² The
16 survival index was mapped against the corresponding X2 location
17 derived from Dr. Hutton's work. 7-27-11 Tr. at 46:9-10 (Hanson); Ex.
18 109.

19 //

20 //

21 //

22 //

23 //

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25
26 ¹² Using DFG's estimates of delta smelt abundance for September, October, November,
27 and December from the FMWT surveys, Dr. Hanson developed a survival index that
28 plotted the change in abundance over the seasonal period, with the slope of the
resulting regression serving as an index of the survival rate. 7-27-11 Tr. at
45:21-46:8 (Hanson).

Annual slopes (ln) of FMWT monthly indexes vs month during September-December, and average X2 position during September-October.

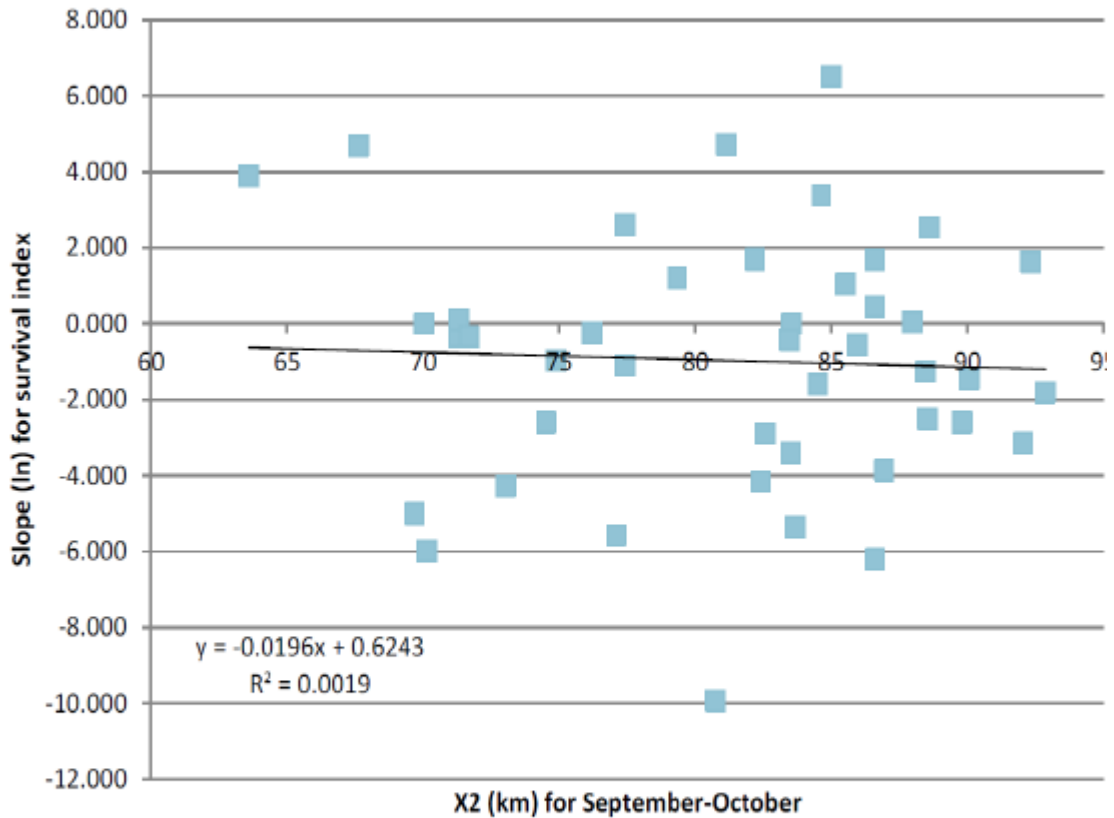


Figure 7. Estimated survival of delta smelt collected in the CDFG FMWT and September-October X2 location.

Ex. 100, Hanson Decl. at 19. When actual FMWT data were thus arrayed, they demonstrated that no relationship exists between the survival of delta smelt in the fall and the corresponding location of X2 in September and October. 7-27-11 Tr. at 46:13-47:14, 50:14-16, 52:5-19; Ex. 109.

103. Dr. Hanson also evaluated the location of X2 in the fall and delta smelt survival using data from a paper authored by Dr. Ken Newman of FWS that attempted to correct for sampling inefficiencies

1 in the FMWT data and reached exactly the same conclusion, namely that
2 there is no evidence of a statistically significant relationship
3 between delta smelt survival estimates using the "corrected" FMWT
4 data and either the September or October location of X2 or the
5 "habitat area," as estimated in Figure B-17 of the BiOp. 7-27-11 Tr.
6 at 52:16-19, 52:20-53:3 (Hanson); Ex. 102.
7

8 104. Defendants assert Dr. Hanson's opinion with regard to the
9 relationship between Fall X2 and delta smelt survival is subject to
10 criticism because it is based on an analysis of data that included
11 significant sampling bias. Specifically, Dr. Hanson used individual
12 regression lines -- each of which were based on only four data points
13 -- that included positive survival for delta smelt in the fall,
14 something that is biologically impossible. 7-27-11 Tr. at 88:15-
15 90:19; *see also* 7-26-11 Tr. at 182:23-184:17 (Dr. Burnham confirming
16 his understanding that data points presented by Dr. Hanson in Figure
17 7 represented an increase in survival for delta smelt between the
18 months of September and December, something that was "biologically
19 impossible" if you "took [Figure 7] as truth," while explaining that
20 uncertainty in the estimates may be responsible for the increase).
21 Dr. Hanson admitted that he used this data for his analysis and made
22 no effort to correct for the bias. 7-27-11 Tr. at 90:15-91:7.
23 However, he also explained that such data points are caused by
24 variability and uncertainty inherent in the fishery sampling process.
25 7-27-11 Tr. 48:14-50:3. The same data points were used by Mr. Feyrer
26
27
28

1 in his analyses. 7-27-11 Tr. 50:22-23 (Hanson). This admitted bias
2 weakens Dr. Hanson's study.

3
4 (2) Relationship Between Fall X2 and Delta Smelt Reproductive
5 Success.

6 105. Dr. Hanson then tested the BiOp's assertion that fall X2
7 location and the size of the zone characterized by FWS as "habitat
8 area" might affect delta smelt reproduction -- i.e., when X2 is
9 located further upstream and the delta smelt "habitat area" is
10 supposedly smaller, delta smelt reproduction per adult should be
11 reduced, and when the delta smelt "habitat area" is located
12 downstream in Suisun Bay and the available "habitat area" is
13 supposedly larger, food availability, fecundity, and other factors
14 result in a higher rate of juvenile smelt production per adult. 7-
15 27-11 Tr. at 53:21-54:6 (Hanson); Ex. 110A.

16 106. Using data from the California Department of Fish and Game
17 ("CDFG") 20 Millimeter Survey for the larval stage and STS for the
18 juvenile stage of delta smelt, Dr. Hanson created a normalized
19 dataset by dividing juvenile abundance in the spring by the FMWT
20 index of adult delta smelt abundance from the prior fall. 7-27-11
21 Tr. at 54:23-55:16, 4:7-12 (Hanson). The resulting reproduction
22 ratio can be plotted as a function of either "habitat area" based on
23 data from Figure B-17 in the BiOp, Ex. 111, or the location of X2 in
24 the fall based on analyses performed by Dr. Hutton, Ex. 112A; see
25 also 7-27-11 Tr. at 55:16-57:14 (Hanson). Doing so demonstrates that
26 reproduction per adult in the spring is independent of the location
27
28

1 of X2 the prior fall. 7-27-11 Tr. at 4:12-13; 57:5-6, 57:10-13
2 (Hanson); Ex. 112A. Moreover, there is no significant relationship
3 between the area referred to by FWS as the "habitat area" and the
4 subsequent reproduction of per adult the following spring. 7-27-11
5 Tr. at 56:7-10, 57:10-13 (Hanson); Ex. 111.

7 (3) Relationship Between Fall X2 and Food Availability.

8 107. Dr. Hanson also analyzed the assumed relationship between
9 the average monthly location of X2 in the fall and the availability
10 of zooplankton, the principal food resource for delta smelt. To do
11 so, he tested whether, when X2 is located downstream in Suisun Bay
12 and, according to Federal Defendants, the "habitat area" is greater,
13 more zooplankton are available, and when X2 moves further upstream,
14 whether zooplankton availability is reduced. 7-27-11 Tr. at 59:10-21
15 (Hanson); Exh. 114A.

17 108. After examining DFG data collected since 1972 at various
18 locations within the estuary, in combination with data from the FMWT
19 surveys on *Eurytemora* and *Pseudodiaptomus* (zooplankton species that
20 are substantive components of the delta smelt diet), Dr. Hanson found
21 there is no relationship between zooplankton densities in the fall
22 and the location of X2 in the fall. 7-27-11 Tr. at 4:14-16, 5:1-6,
23 60:7-9, 60:24-25, 61:13-16 (Hanson); Ex. 115. Instead, zooplankton
24 densities were independent of the average monthly location of X2 in
25 the fall, and the location of X2 provided little information about
26 the variability inherent in zooplankton densities. 7-27-11 Tr. at
27
28

1 61:13-20, 63:12-13 (Hanson); Ex. 115.

2 109. Overall, Dr. Hanson's analyses lend support to the findings
3 of the three most recent life-cycle models, Thomson, Mac Nally, and
4 Maunder & Deriso, all of which concluded that Fall X2 had no
5 relationship to delta smelt survival.
6

7 G. Effect of Project Operations on the Position of X2.

8 110. The BiOp concludes that "there has been a long-term shift
9 upstream" in the location of X2 during the fall. See, e.g., BiOp at
10 236. The BiOp reasons:

11 The effects of project operations outlined above on X2
12 during the fall months have considerably altered the
13 hydrodynamics of the estuary in two important ways other
14 than which have already been described. First, the long-
15 term upstream shift in fall X2 has created a situation
16 where all fall seasons regardless of WY type now resemble
17 dry or critical years (Figure E-27). In other words, all
18 fall seasons have now been converted into uniform, low flow
19 periods. Second, the effects have also manifested in a
20 divergence between X2 during fall and X2 during the
21 previous spring (April-July spring averaging period), and
22 the modeling studies indicate this condition will persist
23 in the future (Figure E-28).

24 Combined, these effects of project operations on X2 will
25 have significant adverse direct and indirect effects on
26 delta smelt. Directly, these changes will substantially
27 decrease the amount of suitable abiotic habitat for delta
28 smelt, which in turn has the possibility of affecting delta
smelt abundance through the compensatory density-dependant
mechanisms outlined above. Because current abundance
estimates are at such historic low levels, compensatory
density-dependence can be a serious threat to delta smelt
despite the fact that the population may not be perceived
to be habitat limited. It is clear from published research
that delta smelt has become increasingly habitat limited
over time and that this has contributed to the population
declining to record-low abundance levels (Bennett 2005;
Baxter et al. 2008; Feyrer et al. 2007, 2008; Nobriga et
al. 2008). Therefore, the continued loss and constriction
of habitat proposed under future project operations
significantly threatens the ability of a self-sustaining
delta smelt population to recover and persist in the
Estuary at abundance levels higher than the current record-

1 lows.

2 *Id.* at 237. This is part of the rationale for imposition of the Fall
3 X2 Action.

4 111. The BiOp reached this conclusion after analyzing historic
5 trends in the movement of X2 between 1967 and 2007. BiOp 271; 7-27-
6 11 Tr. at 154:20-156:7. This analysis revealed an easterly shift of
7 17 km over that time period in the Fall. It also revealed a
8 considerable reduction in the variability of X2 in the fall. *Id.*
9 The accuracy of the BiOp's analysis of this data set is undisputed.
10

11 112. Plaintiffs, through the testimony of Dr. Paul Hutton,
12 challenge the choice of time frame (1967 - 2007) analyzed in the
13 BiOp, suggesting instead that a more appropriate analysis would
14 consider all available historic data, which dates back to 1930. 7-
15 27-11 Tr. at 153:3-13. Dr. Hutton organized his data into two time
16 periods: pre-project (1930-1967) and post-project (1968-2010). He
17 then compared pre- and post-project average position of X2 and the
18 variability (as measured by standard deviation). Hutton's
19 alternative reveals a far more modest rate of change in the average
20 location of X2, on the order of about 0.01 kilometers per decade,
21 over an eight- as opposed to a four-decade measuring period. 7-27-11
22 Tr. at 118:4-5, 14-18; 120:21-121:2; Ex. 119, Hutton Decl. at ¶¶ 2,
23 4; Ex. 121. In September, Hutton's analysis indicates X2 has
24 actually moved 6.5 to the *west*. 7-27-11 Tr. at 121:6-12, 124:13-16;
25 125:17-19; Ex. 122. Dr. Hutton's analysis also demonstrated an
26
27
28

1 increase, rather than a decrease, in variability in the position of
2 X2. 7-27-11 Tr. at 129:18-24; Ex. 123.

3 113. Dr. Hutton also specifically examined the movement of Fall
4 X2 in wet and above normal years, as those are the years targeted for
5 action under the Fall X2 action. In wet years, for example, the full
6 DAYFLOW record shows that the average X2 position decreased (i.e.,
7 moved westerly) in the post-Project period (1968-2010) compared to
8 the pre-Project period (1930-1967) in all of the post-Project fall
9 months (September, October and November). In above normal years, the
10 average X2 position decreased in September, but increased in post-
11 Project October and November. Ex. 119, Hutton Decl. at ¶ 8.

12 114. Hutton opines that the difference between his results and
13 those in the BiOp may be explained by the fact that the beginning
14 point of the BiOp's Fall X2 analysis, 1967, occurred during a period
15 of sustained below average Fall X2 resulting from an unusually wet
16 period. But, Dr. Hutton's choice of 1930 as the starting point only
17 creates a different kind of bias. His analysis begins with years
18 from the Dust Bowl era, a period of severe drought that spanned the
19 years 1928-1934. 7-27-11 Tr. at 162:4-16.

20 115. That there was data available for the period from 1930-1967
21 does not necessarily mean FWS acted arbitrarily by not including
22 those years in its analysis. The year 1967 coincided with the first
23 year CDFG collected smelt abundance survey information via the FMWT,
24 making 1967 a non-arbitrary starting point for the BiOp's evaluation.
25
26
27
28

1 7-27-11 Tr. at 12:14-15 (Hanson).

2 116. The BiOp was not alone in its conclusion that X2 shifted
3 upstream as a result of project operations. A peer reviewed,
4 published journal article that was co-authored by a DWR engineer
5 concluded that Fall X2 had shifted upstream in the past ten to twenty
6 years as a result of increased pumping by the SWP and CVP. Ex. 1001;
7 7-27-11 Tr. at 178-183. The State Water Resources Control Board
8 ("SWRCB") also concluded that fall outflow had declined since 1987,
9 and had declined further since 2000, which they found was,
10 "consistent with the observation of Feyrer et al 2007 that fall X2
11 has moved upstream and this has reduced the amount of available
12 habitat for smelt in fall." 7-27-11 Tr. at 173:10-176:2.

13
14 117. Even if the data running back to 1930 is considered, Dr.
15 Hutton's approach is not necessarily the only way to analyze that
16 larger dataset. Mr. Feyrer opined that Dr. Hutton's analyses are
17 "simply not appropriate to address the question of how project
18 operations affect fall X2 as described in the BiOp. It was simply
19 not possible for Dr. Hutton to have observed the effects in question
20 with the way he organized the data." Ex. 501, Feyrer Decl. at ¶ 31.
21 Feyrer advocates dividing the larger post-project period employed by
22 Dr. Hutton (1968-2010) into two separate post-project periods (1968-
23 1999 and 2000-2009). *Id.* at ¶ 32. This is necessary because of
24 significant operational changes that occurred to the projects in the
25 year 2000, most importantly, the completion of the 800,000 AF Diamond
26
27
28

1 Valley reservoir, which began filling in 1999 and completed filling
 2 in 2003. 7-27-11 Tr. at 164:6-19; 7-28-11 Tr. at 55:8-11. The
 3 action under examination in the BiOp is the current operation of the
 4 projects, which occur under parameters that most closely resemble
 5 this post-2000 period, rather than the entire period from 1968 on.
 6 See 7-28-11 Tr. at 149:10-12 (Feyrer).
 7

8 118. Dividing the post-project period in two in this manner, Mr.
 9 Feyrer re-analyzed the entire 81-year data set in a series of charts.
 10 As illustrated in Figure 9 from Mr. Feyrer's Declaration, presented
 11 below, since 2000, exports have increased substantially compared to
 12 both pre-project and pre-2000 project levels, in both above normal
 13 and wet years. See Ex. 501, Feyrer Decl. at ¶ 36.
 14

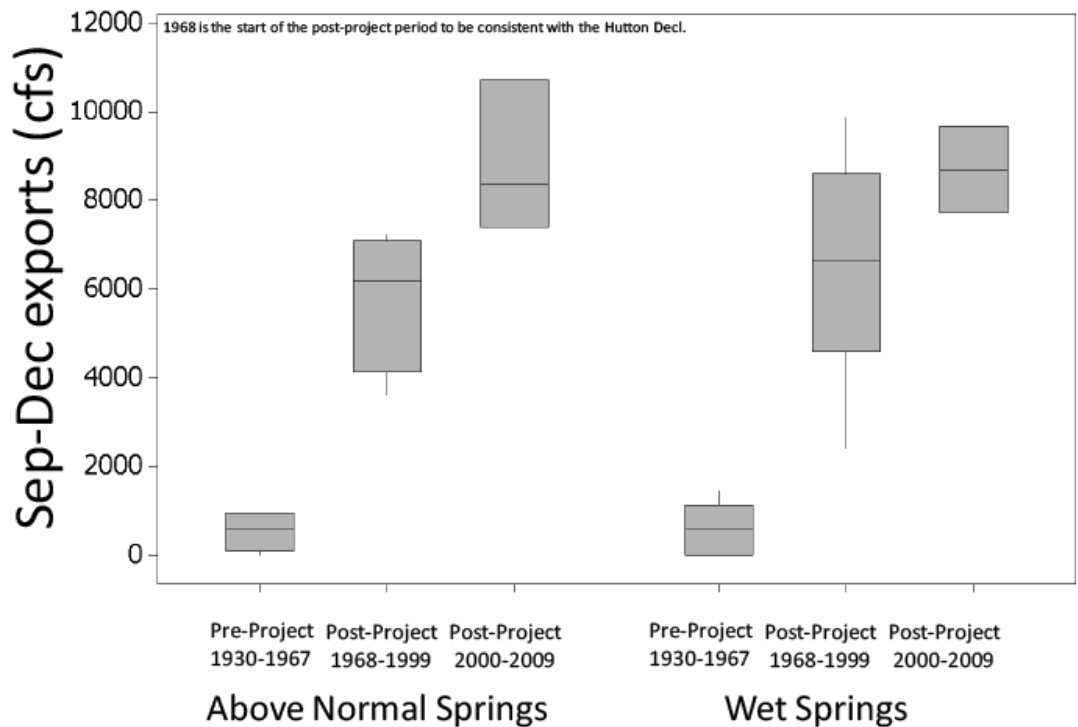


Figure 9. Box plots of exports for three time periods following above normal and wet springs.

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119. According to Mr. Feyrer's analysis, outflow has likewise been reduced and rendered less variable post 2000, as compared to both pre-2000 and pre-project levels:

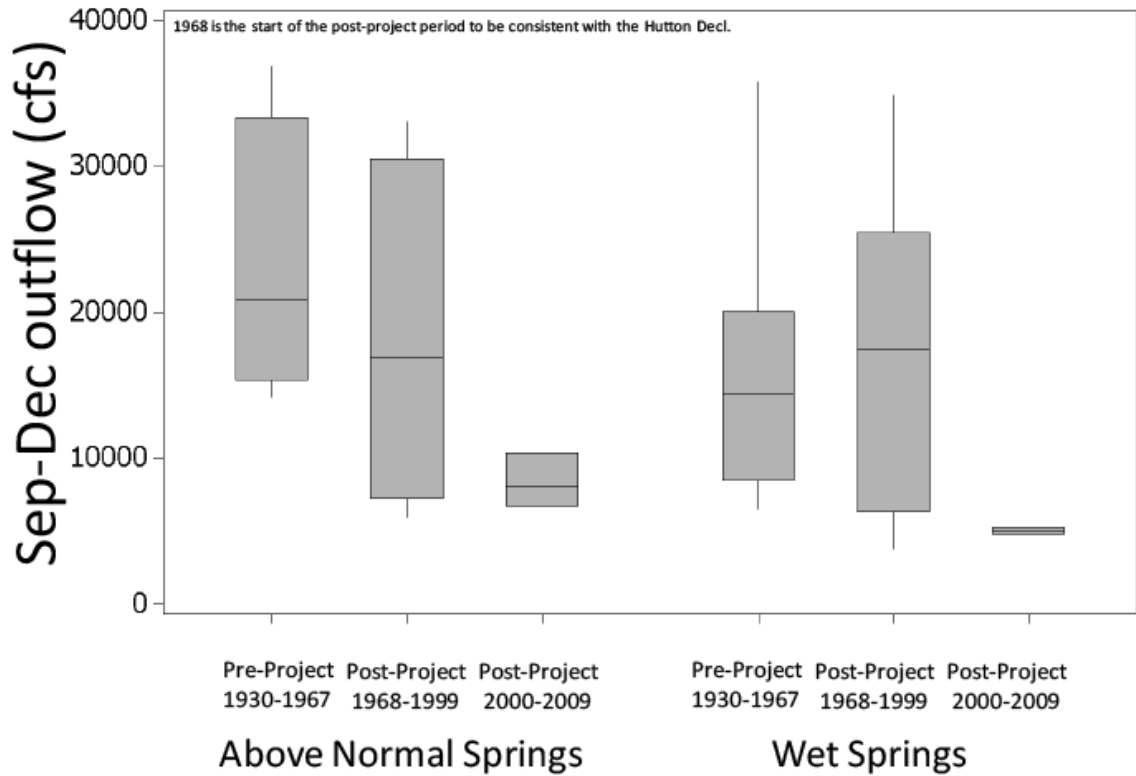
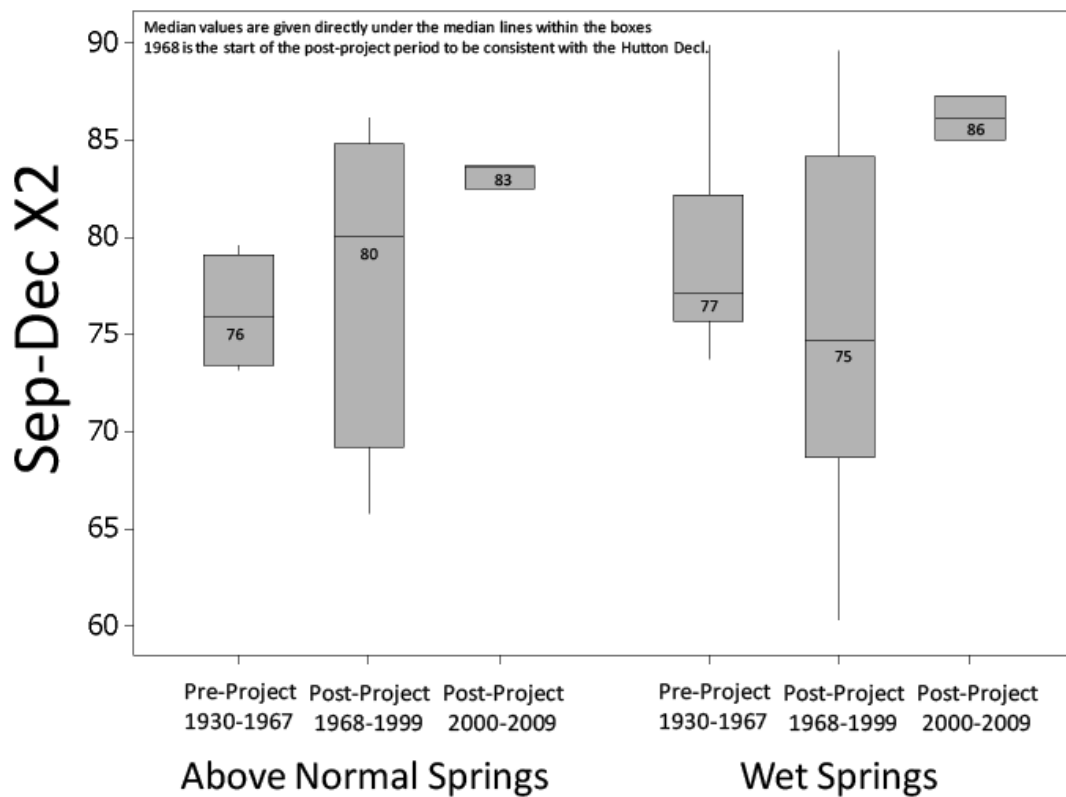


Figure 8. Box plots of Delta outflow for three time periods following above normal and wet springs.

Ex. 501, Feyrer Decl. at 21.

120. The post-2000 period reveals a shift in X2.

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15 *Figure 11. Box plots of X2 for three time periods following above normal and wet springs.*

16 *Id.* at 24.

17 121. Mr. Feyrer's evaluation of the trends in the location of X2
18 from 1930 forward is also subject to criticism. Plaintiffs argue
19 that his post-2000 period (2000-2009) is made up of only ten years,
20 which is insufficient to identify factors that drive variations in
21 Delta salinity and Delta outflow. 7-27-11 Tr. at 148:10-18; Ex. 120,
22 Hutton Reply Decl. at ¶ 7. More specifically, this period contains
23 only one wet year, making it difficult, if not impossible, to draw
24 conclusions about trends in wet years. 7-27-11 Tr. at 148:5-9;
25 149:14-19; Ex. 120, Hutton Reply Decl. at ¶ 6. Enright and
26 Culberson, respected researchers in the field of hydrology, recommend
27
28

1 evaluating variation in Delta outflow and salinity based on a minimum
2 of 20 to 25 years, not 10 years, in order to ensure consideration of
3 lower frequency changes in climatic conditions. 7-27-11 Tr. at
4 148:13-18; Ex. 120, Hutton Reply Decl. at ¶ 7.

5
6 122. In addition, rather than presenting DAYFLOW data on a
7 month-by-month basis, Mr. Feyrer examined a four-month (September
8 through December) average, even though there is no Fall X2 Action in
9 December. 7-27-11 Tr. at 148:23-149:4; Ex. 120, Hutton Reply Decl.
10 at ¶ 8b. The four-month average is also inappropriate because the
11 Fall X2 Action itself is defined differently for the months of
12 September and October than it is for the month of November. 7-27-11
13 Tr. at 149:5-13; BiOp 282-283.

14
15 123. Again, the record reveals that there is serious dispute
16 over the appropriate way to evaluate the impact of project operations
17 on the position of X2. There is no unequivocally "correct" answer,
18 although there is partial merit to Mr. Feyrer's opinion that Dr.
19 Hutton's breakdown of the analysis into two large time periods, pre-
20 1967 and post-1967, fails to address the key question at issue in the
21 biological opinion, what is the predicted current impact of the
22 proposed action. It is undisputed that the proposed action describes
23 project operations markedly different from operations in the 1960s,
24 1970s and 1980s.

25
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1 H. Federal Defendants' Rationale for the Specific 74 km and 81 km
2 Markers for Action 4.¹³

3 124. FWS initially proposed tying the required fall X2 location
4 to the location of the previous spring X2, with the fall X2 location
5 allowed to be no more than 15 km upstream of the previous spring X2
6 location. *See, e.g.,* AR 006514 (peer review); *see also* AR 009455-57
7 (notes from initial meeting at which 10km-difference standard was
8 proposed). An independent peer review criticized this approach as
9 "not well supported by the analyses presented." AR 006526. It was
10 also criticized by Plaintiff DWR, which instead "suggest[ed] that
11 keeping fall X2 downstream of about 80 km may increase the area of
12 habitat." AR 006994. DWR also argued that monitoring compliance
13 with a variable fall X2 position would be impractical, especially
14 when compared with using existing monitoring locations. *See* AR
15 007003 ("[I]t it would be difficult to measure an X2 at 85 km,
16 whereas it would be much easier to measure at Collinsville (81 km)
17").

18
19 125. In response to these comments, FWS revised the proposed
20
21

22
23 ¹³ Ironically, Plaintiffs object to Defendants presenting a scientific
24 justification for the 74 km and 81 km markers on the ground that, because the
25 12/14/11 MSJ Decision found that the BiOp contained no such justification, any
26 contrary finding here amounts to a request to "alter or amend its final judgment,"
27 which is improper given that the MSJ ruling is on appeal. Plaintiffs' objection is
28 baseless. At the summary judgment stage, the district court was required to
evaluate whether, based on the administrative record, the agency had articulated a
sufficient basis for the use of these markers. Here, the court is determining
anew, based on a record not limited by the APA, whether it makes sense to impose
the RPA utilizing these markers. The information presented by Defendants is
necessary to this determination. Plaintiffs have also been permitted to
significantly expand the evidence presented.

1 fall X2 location, setting it at fixed points of 75km (in wet years)¹⁴
2 and 80km (in above-normal years). AR 006399 (December 4, 2008 draft
3 RPA). These locations were later slightly refined to 74 km and 81
4 km. See BiOp at 282. These locations happen to correspond with
5 existing salinity monitoring sites located at Chipps Island and
6 Collinsville, respectively, and are thus familiar compliance points.
7 AR 018798; see also AR 010295 (mapping in August 2008 Biological
8 Assessment).

10 126. The 74 km and 81 km fall X2 locations are also correlated
11 to the outflow water quality objectives for fish and wildlife
12 beneficial uses required by SWRCB Decision 1641 ("D-1641"), which
13 generally requires a minimum daily outflow of 7,100 cfs or that X2
14 should be located at or downstream of Collinsville (81 km), or Chipps
15 Island (74 km) under certain higher inflow conditions, from February
16 into June. See D-1641 at 184-86, 191.¹⁵

18 127. That the 74 km and 81 km points correspond to existing
19 monitoring stations and/or D-1641 compliance points does nothing to
20 establish that maintaining Fall X2 at those locations is necessary to
21 the survival and recovery of the species.

22 128. Defendants maintain that selection of these specific
23

24 ¹⁴ Defendants cite AR 013820 for the proposition that the 75km location was "based
25 on regression relationship," presumably to suggest that the 75km location was
26 chosen for a scientific reason based on statistical analysis. But, another record
27 citation offered by Defendants, AR 014227, as "explaining regressive analysis" in
28 fact reveals that the "regression model" referenced is the formula used to estimate
the X2 position based on hydrologic inputs and has nothing to do with the biology
of the smelt or the impact of X2 on population dynamics.

¹⁵ Available at <http://www.waterrights.ca.gov/Decisions/D1641rev.pdf> (last visited August 29, 2011).

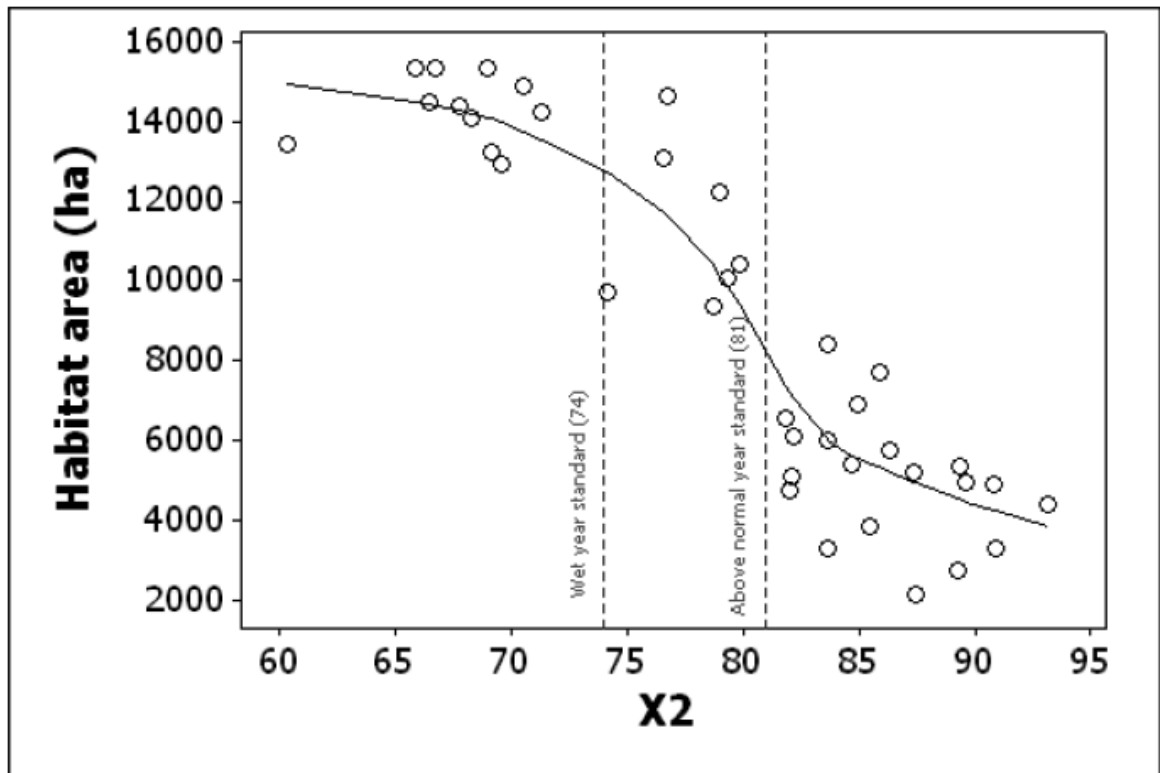
1 locations is independently supported by biological evidence presented
2 in the BiOp. As discussed above, the BiOp relies heavily on studies
3 that have "found a statistical association between fall X2 and the
4 production of young delta smelt during the following year." BiOp
5 372. The BiOp also examined the impact of Project Operations on the
6 position of X2, and concluded that the impact was most significant in
7 wet and above-normal years. *Id.*; see also AR 006984 (excerpt from
8 draft BiOp displaying historic differences between fall X2 and spring
9 X2 by year type). Accordingly, the Fall X2 Action targeted only
10 these water year types, reasoning "actions in these years are more
11 likely to benefit delta smelt." AR 006615, 006732.

12
13 129. As a first step in determining the specific distance-based
14 outflow requirements for the Fall X2 Action, FWS determined, using
15 historical DAYFLOW data, that the median 1967-2007 fall X2 location
16 was 79 km upstream of the Golden Gate Bridge. BiOp at 235. As
17 discussed above, the BiOp concluded that the average fall X2 location
18 has exhibited a long-term increasing (*i.e.*, moving upstream) trend,
19 and this is especially so since the year 2000. BiOp at 236. In
20 particular, the average fall X2 location during the years following
21 the Delta's Pelagic Organism Decline (2000-2005) was several
22 kilometers upstream when compared to the pre-Pelagic Organism Decline
23 years (1995-1999). BiOp at 179.

24
25
26 130. The second step of FWS's evaluation of historical fall X2
27 data was to estimate the total surface area of suitable habitat
28

1 corresponding to a given year's fall X2 location. See *id.* at 235
2 (describing methodology). The results of that analysis are presented
3 in the BiOp at page 374 in Figure B-17.

4 **Figure B-17. Relationship between X2 and habitat area for delta smelt during fall,**
5 **with standard shown for wet and above normal years.**



19 In this figure, the plotted points represent the amount of abiotic
20 habitat index available when X2 is placed at certain kilometer
21 distances. The line among the points is a "LOESS smooth" fitted to
22 the graph with statistical software. As Mr. Feyrer explained at the
23 hearing in response to the Court's question, discussing this figure,

24
25 ... some of the discussions we had internally at
26 Reclamation while we were preparing the adaptive management
27 plan and taking our own evaluation of whether or not 74 and
28 81 would be justified was, in fact, looking at the
potential water cost in moving X2. And what we discussed in
the plan is that, as you can see in this relationship here,
there's really two tiers of habitat in this relationship.

1 You have the lower tier, which is essentially 80 and above
2 at X2, and then you have that steep portion of the
3 relationship, and then essentially from about 74 or so up
4 is that upper tier. And with respect to the 74 value, 74 is
5 pretty much -- it's right about near the asymptote of that
6 curve. It's pretty much as far to the right as you can get
7 to get habitat area -- the habitat index up into that upper
8 tier at the least amount of water cost with respect to
9 moving X2.

10 So in other words, you could provide a lot more X2 movement
11 to the west all the way out to 60, but you're not going to
12 get a whole lot more of the habitat index. So to get up
13 into that upper habitat tier, 74 is pretty far to the right
14 on that area. You could look at this in terms of -- you
15 could argue that you could push 74 further out to the west,
16 but you're not going to get really any more habitat
17 benefit. And likewise, with the above normal year standard
18 81, 81 is pretty much near the bottom of the ascending limb
19 of that curve. And that's about the minimum point where you
20 get out of that lower tier of habitat conditions.

21 7-29-11 Tr. at 28:13-29:15.

22 131. In Figure B-17, the largest degree of change (steepest
23 portion of the curve) in the habitat index occurs at X2 values
24 approximately between 85km and 70km, with less change beyond those
25 values. Ex. 501, Feyrer Decl. at ¶ 12. Feyrer opined that, across
26 this 15-km range of X2, habitat suitability increases approximately
27 two-fold. *Id.* The 74 km and 81 km markers approximate the ascending
28 and descending asymptotes of the curve displayed in Figure B-17.
Assuming this graph accurately represents habitat availability, the
significance of this is that moving X2 further westward than 74 km in
wet years is not likely to yield substantially greater benefits to
delta smelt than keeping it at 74 km. Likewise, if you maintain X2
above 80 in the river channels, the center of the delta smelt
population is aligned with severely degraded abiotic habitat
conditions. This change in habitat is due largely to geography.

1 *Id.*; see also 7-28-11 Tr. at 125:19-126:9 (Feyrer).

2 132. The National Research Council's report reviewing the BiOp's
3 RPA reported that the lowest smelt abundances all occurred when the
4 habitat-area index was less than 6,000 hectares, which could mean
5 that, while it is not the only cause of smelt population collapses,
6 "reduced habitat area is a necessary condition for the worst
7 population collapses." Ex. 12 at 53; AR 018153 (Reclamation
8 observing that "delta smelt abundance is generally reduced when X2 is
9 located upstream of Chipps Island [(74 km)]," that "when X2 is
10 downstream of this point [abundance] increases in at least some of
11 the years"); AR 010052 (OCAP BA noting that analyses of historical
12 data indicate that habitat conditions are relatively poor and
13 contribute to delta smelt producing fewer offspring in years when X2
14 is located above Collinsville (81 km) during Fall). Plaintiffs'
15 witness Dr. Hanson testified that, according to Figure B-17, when X2
16 is at 74 km, the result is roughly 13,000 hectares, or 30,000 acres,
17 of habitat in the salinity range preferred by delta smelt. 7-27-11
18 Tr. at 7:7-19.

19
20
21 133. Mr. Feyrer admitted that adding additional habitat units to
22 represent the Cache Slough complex might shift this entire curve to
23 the right, likewise shifting the location of the asymptotes up. Exs.
24 102a, 153. The exact impact of any such shift has not been
25 calculated by any party. Nor is it clear whether any shift would
26 change the reasoning described in the NRC Report, as a revised graph
27
28

1 would simply have revealed that the lowest smelt abundance occurred
2 when the habitat index was less than some number above 6,000
3 hectares.

4 134. Mr. Feyrer suggested that the most significant gains in
5 habitat area occur when X2 is located upstream of kilometer 80, above
6 which the river channels become smaller with significantly less
7 habitat area. He said:
8

9 That gets back to some of what I explained earlier. And
10 it's -- it's really nothing more than a function of the
11 geography of the estuary. When the X2 is located
12 downstream of approximately 80, downstream [of] the
13 confluence of the Sacramento San Joaquin rivers, X2 and low
14 salinity zones are in those vast large shallow base, those
15 shoals of Suisun Bay, Grizzly Bay, Honker Bay, and so
16 there's a lot of area there. That's why the habitat index
17 is bigger. And then when you move upstream, above 80,
18 approximately and up into the river channels, those river
19 channels obviously are a lot smaller, lot less area there.
20 And so the habitat index is therefore smaller.

21 7-29-11 Tr. at 125:23-126:9.

22 135. According to Federal Defendants' analyses of historical
23 Fall X2 position, the 74 km and 81 km locations corresponded with
24 actual fall X2 locations in wet and above-normal years prior to the
25 POD, which began in 2000. See *id.* at 369 ("This will help return
26 ecological conditions of the estuary to that which occurred in the
27 late 1990s when smelt populations were much larger."); *id.* at 179
28 ("X2 ... during fall in the years following the POD (2000-2005) was
several km upstream compared to that for the pre-pod years (1995-
1999)").

136. As discussed above, Federal Defendants' method of
evaluating the movement of X2 is subject to considerable criticism.

1 This location rationale is corroborated by Table 2 of Dr. Hutton's
 2 June 20, 2011 declaration, which shows that the 74 km marker for wet
 3 years corresponds with the average X2 location for all post-project
 4 wet years, from 1968 to 2010. Similarly, the 81 km marker for above
 5 normal years corresponds with the average X2 location for all post-
 6 project above normal years.
 7

8 **Table 2.** X2 Average Position by Fall Month for Various Time Periods in Wet and Above Normal Years
 9

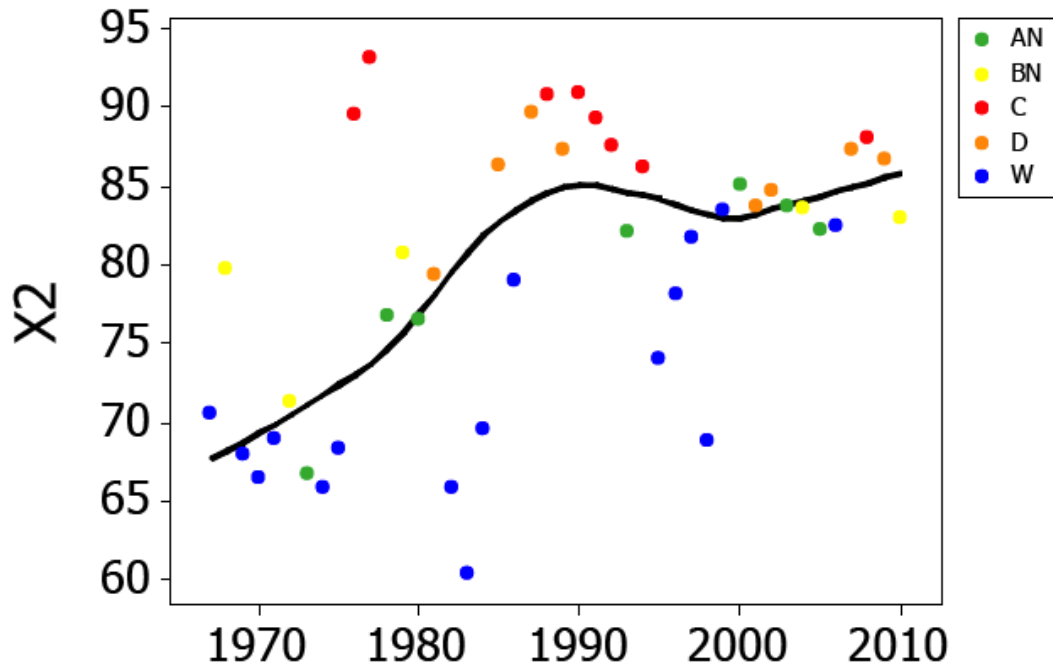
	All Years	Pre vs. Post-Projects			Feyrer et al. (2007)		
Month	1930-2010	1930-1967	1968-2010	Δ	1968-1986	1987-2004	Δ
Wet Years (km)							
September	75.6	78.2	73.8	-4.4	71.6	76.9	5.3
October	75.4	76.1	74.9	-1.2	71.1	79.9	8.8
November	72.7	72.8	72.6	-0.2	68.5	77.5	9.0
Above Normal Years (km)							
September	81.5	82.7	80.8	-1.9	78.1	83.7	5.6
October	80.0	78.0	81.2	3.2	77.2	84.3	7.1
November	77.0	73.5	78.9	5.4	73.1	83.0	9.9

16 Ex. 119, Hutton Decl. at 6; Ex. 124 (reproducing Table 2); *see also*
 17 7-28-11 Tr. at 154:11-155:25 (Feyrer) (post-project averages in Dr.
 18 Hutton's table correspond with 74 km and 81 km markers in Action 4 in
 19 the RPA).
 20

21 137. This figure demonstrates that the average position of X2
 22 from 1968-2010 in wet and above normal years corresponds to the 74 km
 23 and 81 km compliance points, respectively.

24 138. According to Federal Defendants' analyses of X2
 25 variability, the 74 km and 81 km points also restore inter-annual
 26 variability in fall outflow to historical conditions. Historically,
 27 there was natural variability in the location of fall X2 to match the
 28

1 type of water year experienced that year. This is depicted in the
2 following plot:



15 *Figure 12. Time series of fall X2 since 1967. Water year types represent the preceding spring.*
16 *A LOESS smooth is fitted to the data.*

18 Ex. 501, Feyrer Decl. ¶ 40, Fig. 12 (displaying loss of X2
19 variability between dry (red/orange) and wet (green/blue) years);
20 BiOp at 273 (similar plot); 7-28-11 Tr. at 152:8-154:10 (Feyrer).

21 139. In other words, according to Federal Defendants' analysis
22 of X2 variability, a wet year would naturally result in fall X2 being
23 located relatively further downstream than its location in a dry
24 year. See Ex. 501, Feyrer Decl. ¶ 40, Fig. 12; Ex. 501, Internal
25 Exhibit 1 (Reclamation Draft Plan) at 13-14.

27 140. The BiOp concludes that "[t]he persistence of this
28

1 significant hydrologic change to the estuary threatens the recovery
2 and persistence of delta smelt." BiOp at 374; Ex. 501, Internal
3 Exhibit 1 (Reclamation Draft Plan) at 16 (concluding that "[i]t seems
4 clear that outflow affects the quality and extent of abiotic smelt
5 habitat. It also seems clear that restoring lost abiotic habitat
6 availability is likely to produce subsequent abundance benefits to
7 delta smelt, probably by raising the carrying capacity.").

9 141. By setting the required fall X2 locations at 74 km and 81
10 km, FWS sought to reduce the intensity of this divergence and its
11 consequent harms to both critical habitat and delta smelt persistence
12 and recovery, by "restoring flow variability to the Delta environment
13 so that smelt populations can recover through allowing these
14 essential periods of population rebound." BiOp at 375.

16 142. That the 74 km and 81 km points are related to historical
17 average positions of X2 and arguably restore inter-annual variability
18 renders them non-arbitrary, but does not provide biological support
19 for their imposition, particularly in light of the highly disputed
20 evidence to support a link between X2 and smelt abundance and the
21 high water costs required to maintain X2 at these positions.

23 I. Adaptive Management Plan.

24 143. The BiOp describes the Fall X2 Action as being "subject to
25 adaptive management," whereby the Action may be modified as
26 additional scientific information is gathered:

27 The objective of this component is to improve fall habitat
28 for delta smelt through increasing Delta outflow during

1 fall. Increase in fall habitat quality and quantity will
2 both benefit delta smelt.

3 Subject to adaptive management as described below and in
4 Action 4 in Attachment B, during September and October in
5 years when the preceeding precipitation and runoff period
6 was wet or above normal as defined by the Sacramento Basin
7 40-30-30 index, Reclamation and DWR shall provide
8 sufficient Delta outflow to maintain monthly average X2 no
9 greater (more eastward) than 74 km (from the Golden Gate)
10 in Wet WYs and 81 km in Above Normal WYs. The monthly X2
11 target will be separately achieved for the months of
12 September and October. During any November when the
13 preceding water year was wet or above normal as defined by
14 the Sacramento Basin 40-30-30 index, all inflow into
15 CVP/SWP reservoirs in the Sacramento Basin shall be added
16 to reservoir releases in November to provide an additional
17 increment of outflow from the Delta to augment Delta
18 outflow up to the fall X2 of 74 km for Wet WYs or 81 km for
19 Above Normal WYs, respectively. In the event there is an
20 increase in storage during any November this action
21 applies, the increase in reservoir storage shall be
22 released in December to augment the December outflow
23 requirements in SWRCB D-1641.

24 Given the nature of this Action and to align its management
25 more closely with the general plan described by the
26 independent review team and developed by Walters (1997),
27 the Service shall oversee and direct the implementation of
28 a formal adaptive management process. The adaptive
management process shall include the elements as described
in Attachment B. This adaptive management program shall be
reviewed and approved by the Service in addition to other
studies that are required for delta smelt. In accordance
with the adaptive management plan, the Service will review
new scientific information when provided and may make
changes to the action when the best available scientific
information warrants. For example, there may be other ways
to achieve the biological goals of this action, such as a
Delta outflow target, that will be evaluated as part of the
study. This action may be modified by the Service
consistent with the intention of this action based on
information provided by the adaptive management program in
consideration of the needs of other listed species. Other
CVP/SWP obligations may also be considered.

24 The adaptive management program shall have specific
25 implementation deadlines. The creation of the delta smelt
26 habitat study group, initial habitat conceptual model
27 review, formulation of performance measures, implementation
28 of performance evaluation, and peer review of the
performance measures and evaluation that are described in
steps (1) through (3) of Attachment B shall be completed
before September 2009. Additional studies addressing
elements of the habitat conceptual model shall be

1 formulated as soon as possible, promptly implemented, and
2 reported as soon as complete.

3 The Service shall conduct a comprehensive review of the
4 outcomes of the Action and the effectiveness of the
5 adaptive management program ten years from the signing of
6 the biological opinion, or sooner if circumstances warrant.
7 This review shall entail an independent peer review of the
8 Action. The purposes of the review shall be to evaluate the
9 overall benefits of the Action and to evaluate the
10 effectiveness of the adaptive management program. At the
11 end of 10 years or sooner, this action, based on the peer
12 review and Service determination as to its efficacy shall
13 either be continued, modified or terminated.

14 BiOp at 282-83.

15 144. On June 6, 2011, Reclamation released a document entitled
16 "Draft Plan: Adaptive Management of Fall Outflow for Delta Smelt
17 Protection and Water Supply Reliability" (Hearing Exhibit 501 at 33-
18 79) ("Reclamation Draft Plan"). The purpose of this document was for
19 Reclamation to

20 review[] the basic rationale provided in the BiOp,
21 bringing to bear information that has become available
22 since the BiOp was completed. New information includes the
23 2010 POD synthesis, some published studies bearing directly
24 on outflow effects and other issues, commentaries from
25 several review panels, complaints about the RPA that were
26 raised by the State and Federal water contractors in
27 letters and in litigation, and commentaries by DWR and NRDC
28 that were provided to us in May 2011. The main questions
Reclamation asks in this review are the following. What
kind of action seems appropriate, given the present array
of available information?

Ex. 501, Internal Exhibit 1 (Reclamation Draft Plan) at 6.

145. In conducting this review, Reclamation examined: "(1) delta
smelt habitat; (2) X2 as a surrogate for delta smelt habitat; (3)
evidence for associations between habitat and abundance; (4) project
effects on Delta hydrology, X2 and delta smelt habitat; and (5) the

1 specific X2 action prescribed in the BiOp." *Id.* at 6-7.

2 146. Reclamation found that "[w]hile it is true that a complete
3 description of habitat includes physical, chemical, and relevant
4 biological characteristics, suitable physical and chemical
5 characteristics are often necessary preconditions for suitability.
6 The LSZ is not quite the rocky intertidal zone, but the power of
7 salinity and turbidity to reliably predict where fish will be found
8 during the fall months indicates that these variables are useful
9 descriptors of habitat." *Id.* at 11. Reclamation thus concluded that
10 "[b]iotic factors, including food supply, that characterize an area
11 become an important issue only after abiotic conditions are such that
12 smelt can reside in the area without incurring excessive
13 physiological costs or other detrimental effects." *Id.*

14
15
16 147. In examining "Project effects on Delta hydrology, X2, and
17 delta smelt habitat," Reclamation, as the operator of the CVP,
18 concluded:

19 Average X2 is largely determined by water project
20 operations before winter storms begin in the fall. Since
21 1967, average fall X2 has moved upstream (Figure 7). In the
22 last decade of the post-reservoir era there was substantial
23 interannual variation in fall conditions. After wetter
24 springs, there were often flood control releases in the
25 fall months that moved X2 downstream for weeks. In the POD
26 era very little interannual variation has been observed in
27 the fall, and fall outflow conditions resemble what
28 formerly occurred after drier springs regardless of actual
spring hydrology.

Id. at 13.

148. Reclamation also concluded that "[s]ince 1967, the upstream

1 shift in X2 has resulted in a decline in the average delta smelt
2 abiotic habitat index, with the effect most pronounced in wet or
3 above normal years (Figure 8; Feyrer (2010) calculates 78%). This
4 decline in delta smelt habitat has coincided with the long-term
5 decline in delta smelt abundance (Feyrer 2010)." *Id.* at 14.

7 149. The BiOp requires Action 4 to "mitigate the effects of X2
8 encroachment upstream in current and proposed action operations, and
9 provide suitable habitat area for delta smelt." BiOp at 373. In
10 addressing the question "how to achieve [that] mitigation,"
11 Reclamation found that "[i]t has been demonstrated in both the BiOp
12 and the discussion above that project operations have affected
13 average X2 during the fall (September-December). A closer
14 examination of the data using Kendall trend tests reveals that there
15 are significant negative trends in X2 for September, October, and
16 November but not December in both wet and above normal years." *Id.*
17 at 15.

19 150. With respect to the specific 74 km and 81 km markers,
20 Reclamation further found:

21 Feyrer et al.'s habitat index (Figure 4) reveals two
22 habitat tiers: a high habitat tier corresponding to X2 at
23 approximately 74 km or downstream, and a low tier for X2 at
24 approximately 86 km or upstream. The curve is empirical and
25 these figures are approximate. That there are tiers is a
26 consequence of geography (Feyrer et al. 2007). The high
27 habitat tier corresponds to X2 opening into Suisun Bay,
28 with the low tier corresponding to X2 in the more
constrained river channels upstream. During most of the
post-reservoir era, average X2 fell in the high habitat
tier in falls after many wet and above-normal springs. This
has not been the case in the Pelagic Organism Decline era.

1 Feyrer *et al.*'s results suggest that reaching the high
2 habitat tier (X2 at 74 km or less) approximately doubles
3 the expected abiotic habitat index above POD-era values.
4 Because the loss of high-tier habitat represents the
5 biggest fall outflow change since the end of the post-
6 reservoir era, an outflow action that restores it in the
7 years that used to have it appears to us to be justified
8 and very likely to produce habitat and subsequent abundance
9 benefits. The use of an 81 km target for falls after above-
10 normal years provides about 50% more of the abiotic habitat
11 benefits than maintaining X2 at 86 km, and at present
12 represents a reasonable intermediate action to restore late
13 post-reservoir era conditions and variability.

14 *Id.* at 16.

15 151. Reclamation thus concluded that "[i]t seems clear that
16 outflow affects the quality and extent of abiotic smelt habitat. It
17 also seems clear that restoring lost abiotic habitat availability is
18 likely to produce subsequent-abundance benefits to delta smelt,
19 probably by raising the carrying capacity. Consequently, we conclude
20 that the biological rationale for the 2008 RPA action is sound." *Id.*

21 152. The Reclamation Draft Plan also describes several monitoring and
22 study efforts to be undertaken by Reclamation as part of the adaptive
23 management requirements for Action 4 as set forth in the BiOp. *See,*
24 *e.g.,* BiOp at 375 ("The Service will require that Action 4 be
25 implemented with an adaptive management program to provide for
26 learning and improvement of the action over time. The adaptive
27 management program will include commissioning studies to clarify the
28 mechanism underlying the effects of fall habitat on the delta smelt
population"). The goal of these monitoring and study projects is
that, "[b]y laying out a framework for rigorous, science-based

1 adaptive management, we hope the plan will enable us to learn what we
2 need to know about the effects of Fall outflow, so that the most
3 appropriate conservation action can be identified and implemented at
4 lowest possible water cost." Ex. 501, Internal Exhibit 1
5 (Reclamation Draft Plan) at 2. .

6
7 153. Reclamation submitted the Draft Plan to an independent peer
8 review panel for feedback. Ex. 210. The review panel criticized the
9 draft adaptive management plan and made 17 primary recommendations
10 regarding the plan. *Id.* at 3-5. The panel strongly urged
11 Reclamation and other agencies to formulate an explicit work plan
12 capable of evaluating changes in the health and condition of delta
13 smelt in response to X2 manipulation. *Id.* at 4. The panel found
14 that the draft plan was "woefully deficient on the details regarding
15 the project's most important dependent variables," and that the
16 question facing Reclamation is that "[i]n the absence of reliable
17 abundance data, how will health and condition of the [delta smelt]
18 population be evaluated?" *Id.* at 20; 7-28-11 Tr. at 237:4-11. The
19 panel also had "serious reservations" about the successful
20 implementation of the adaptive management plan because of concern
21 regarding (1) explicit clarity of the hydrologic manipulation of the
22 system to achieve the X2 criteria, and (2) explicit clarity of the
23 key independent and dependent variables that will be evaluated to
24 document success of the experimental manipulation. Ex. 210 at 23; 7-
25 28-11 Tr. at 237:12-25.

1 154. The peer review panel did not criticize the need for, or
2 the rationale behind, Action 4 itself, but rather, the studies that
3 Reclamation is planning to undertake during and after Action 4 to
4 measure its effectiveness. 7-29-11 Tr. at 85:7-86:25 (Feyrer). The
5 peer review panel also found that the implementation of Action 4 "in
6 a wet year represents a rare opportunity for a quantum leap in our
7 fundamental understanding of Delta processes. This will help stake
8 holders develop a common knowledge of key linkages between enhancing
9 outflow, rate of export flows and the benefits to the biological
10 resources and have profound implications to the future management of
11 the Delta." Ex. 210 at 5.

12
13 155. On August 10, 2011, Reclamation completed its revised
14 adaptive management plan for this year's Fall X2 Action. See Doc.
15 1002 ("Revised Plan"). The Revised Plan includes revisions from the
16 draft plan in response to comments received from the independent peer
17 reviewers of the draft plan and others, including agency scientists
18 and policymakers, academics, stakeholders, and managers of the
19 Interagency Ecological Program. *Id.*, Attachment 1 at 2 (transmittal
20 letter from Reclamation to FWS).

21
22 156. The Revised Plan concludes:

23
24 It seems clear that outflow affects the quality and extent
25 of abiotic smelt habitat. It also seems clear that
26 restoring lost abiotic habitat availability is likely to
27 produce subsequent-abundance benefits to delta smelt,
28 probably by raising the carrying capacity. We are also
left with important unanswered questions that bear on the
management of fall outflow. What are the key underlying
ecological mechanisms that link outflow to delta smelt
abundance, and how important and manageable is each link?

1 How does fall outflow fit in with other drivers of delta
2 smelt abundance? Are there more water-efficient ways to
3 provide the necessary benefits?

4 Revised Plan at 16. "By adopting a more aggressive, active approach,
5 Reclamation hopes to achieve more rapid learning - thereby finding
6 the best and most efficient action faster - while alleviating adverse
7 modification of delta smelt critical habitat and avoiding jeopardy."

8 *Id.* at 1.

9 157. Specifically, Reclamation's Revised Plan focuses on
10 monitoring and assessing a wide array of measurable variables to
11 compare with projected outcomes. Table 1 in the Revised Plan
12 describes these predictions and associated monitoring and studies
13 with particularity. *Id.* at 55. The final plan includes a detailed
14 discussion of how monitoring, studies, and analysis and modeling will
15 occur. *Id.* at 57-74. The Revised Plan also includes quantitative
16 models to assess the effects of the Fall X2 Action, including process
17 equations for the growth, survival and movement of delta smelt in the
18 Fall. *Id.* at 89-96. "[B]ecause of the broad agency interest in [the
19 adaptive management plan] and its complexity," the multi-agency,
20 multi-disciplinary Interagency Ecological Program will be in charge
21 of conducting monitoring and analyses." *Id.*, Attachment 1 at 3.
22 "The IEP has established expertise in long-term Delta ecosystem
23 monitoring and investigation, including the Pelagic Organism Decline
24 studies." *Id.*

25 158. The Revised Plan anticipates significantly better habitat
26 conditions and delta smelt responses from locating Fall X2 at 74 km
27 28

1 as opposed to further upstream at 81 km or 85 km. Revised Plan at
2 55, Table 1. Among other things, Reclamation predicts higher delta
3 smelt growth, survival and fecundity in the fall, and better health
4 and conditions in the fall for delta smelt when Fall X2 is at 74 km
5 as opposed to 81 km. Locating Fall X2 at 74 km this year will also
6 provide much more vital scientific knowledge to guide recovery and
7 restoration efforts in the future. As Reclamation explains:
8

9 Because we have observed an almost unbroken string of low-
10 outflow Falls since 2000, it is clear that the most
11 informative Fall outflow action in 2011 would be a high-
12 outflow action. With 2011 now officially designated as a
13 "wet" year, we recommend that the Fall 2011 action should
14 be the 74 km "wet"-year action described in the 2008 RPA.

15 *Id.* at 26.

16 159. The fact that Reclamation is following an adaptive
17 management approach does not somehow render Action 4 speculative,
18 uncertain, or arbitrary and capricious. Action 4 is not an
19 impermissible "experiment," as Plaintiffs argue, simply because more
20 favorable water conditions have triggered it this fall for the first
21 time and the Defendant agencies are attempting to measure its effects
22 and learn as much scientific knowledge from it as they can.

23 160. Plaintiffs emphasize that the Revised Plan admits that
24 "many uncertainties regarding the mechanisms that link delta smelt
25 responses to outflow conditions and the position of the LSZ remain."
26 Doc. 1002, Attachment 2, part 2, p. 51. As Dr. Norris explained,
27 while the underlying *mechanisms* that drive the relationship between
28 fall outflow and smelt abundance are not well understood, that is

1 irrelevant for management purposes, because, in her opinion, "[t]he
2 relationship itself is well established." 7-29-11 Tr. at 174:19-
3 175:20. It is the underlying *mechanisms* that Reclamation's Draft
4 Plan seeks to better understand.

5
6 161. Neither the Draft nor the Revised Adaptive Management Plans
7 add anything to the dispute here. Reclamation says it will assure
8 more intensive study and reiterates its position that there is
9 support for the Fall X2 Action as it is currently drafted, ignoring
10 and without specifically addressing any of the criticisms raised by
11 Plaintiffs here. The Plans acknowledge, as they must, that
12 substantial uncertainty remains regarding the mechanisms that link
13 smelt abundance to X2. The issue presented is whether there is in
14 fact a link between X2 and abundance, a question that must be
15 answered based on the record now before the court.
16

17 J. Irreparable Harm.

18 (1) Water Supply Impacts.

19 a. No Impacts to the CVP.

20 162. No water supply impacts to CVP are anticipated as a result
21 of implementation of the Fall X2 Action this year. Ex. 303; 7-28-11
22 Tr. at 199:23-200:9 (Milligan) ("So for September/October, we don't
23 believe that implementing the action, as we currently understand it
24 in those two months, would reduce CVP exports or supplies in any
25 way."); *id.* at 202:2-5 (Milligan). Counsel for the federal
26 contractor Plaintiffs conceded that "CVP exports will not be impacted
27
28

1 unless the Bureau of Reclamation forecast is wrong and the Delta
2 inflows are lower than projected." 7-26-11 Tr. at 31 (Sims); see
3 also Ex. 200, Snow Decl. at 2:16-17 (admitting that "there will not
4 likely be an impact to CVP water supplies from implementation of RPA
5 Component 3 this year."); see also *id.* at ¶ 15 ("I do not expect a
6 reduction in CVP water supplies next year from implementation of RPA
7 Component 3").
8

9 b. Impacts to SWP.

10 163. California recently emerged from a three-year drought
11 (2007-2010), Erlewine Decl. (Doc. 983) at ¶ 13, leaving considerable
12 deficits in storage, see *id.* at ¶ 14. Prudent water management calls
13 for storing water in wet years as a buffer against inevitable dry
14 years. 7-28-11 Tr. 18:7-17, 72:5-13; 81:14-20.
15

16 164. Water year 2011 was a "really good water year." 7-28-11
17 Tr. at 63:16 (Erlewine). The allocation for the SWP was 80 percent,
18 the highest allocation since 2006. 7-27-11 Tr. at 206:23 (Leahigh);
19 *id.* at 232:5-12. Undisputed evidence showed that the SWP is likely
20 to export more water from the Delta in water year 2011 than ever
21 before in the history of the projects. 7-28-11 Tr. at 211:20-212:5
22 (Milligan).
23

24 165. In 2011, in addition to the 80% Table A allocation for SWP
25 contractors, 400,000 AF of surplus (also known as "interruptible")
26 water supply under Article 21 was delivered to the SWP contractors.
27 7-27-11 Tr. at 232:20-233:2 (Leahigh).
28

1 166. MWD received at least 180,000 AF of Article 21 water. Ex.
2 567 at 3; 7-27-11 Tr. 233:17-21 (Leahigh). With this Article 21
3 water, Metropolitan received the equivalent of 90% of their Table A
4 contract allocation amounts. 7-27-11 Tr. at 234:8-11 (Leahigh).

5 167. In addition to its Table A allocation of 80%, Plaintiff
6 Kern County Water Agency ("KCWA") received Article 21 water, and as a
7 result arguably received the equivalent of 100% of their Table A
8 contract allocation amounts. *Id.* at 234:12-235:6 (Leahigh).

9 168. Much, but not all, of the storage depleted in drought years
10 has been replenished. At the end of 2011, Metropolitan is likely to
11 have more water in storage than ever before. See 7-28-11 Tr. at
12 75:18-20 (Erlewine); Ex. 567 at 5 (noting "all time high" storage
13 levels). Metropolitan has been able to completely refill the
14 approximately 1.5 million AF of its "in-region" storage reserves
15 depleted during the 2007-2010 drought period. 7-28-11 Tr. at 47:13-
16 16, 59:2-10 (Erlewine); Ex. 136, Erlewine Decl. at ¶ 10.

17 Metropolitan has enough available reserve capacity in its out-of-
18 region storage to put additional water to beneficial use. 7-28-11 at
19 47:17-49:4 (Erlewine). Metropolitan provided 800,000 AF of
20 groundwater replenishment deliveries to its member agencies in 2011.
21 *Id.* at 59:11-60:2 (Erlewine).

22 169. During the drought, Metropolitan used three-quarters, or
23 one and a half million AF, of its storage reserves. *Id.* at 47:9-12
24 (Erlewine).

1 170. Kern County Water Agency is "maximizing" groundwater
2 recharge this year. *Id.* at 84:10-15 (Erlewine). Groundwater levels
3 in Kern County rebounded in 2010 and have continued to rebound. *Id.*
4 at 83:18-21 (Erlewine). Recharge this year will be significant. *Id.*
5 at 84:5-9 (Erlewine); *see also id.* at 31:18-21.

6
7 171. Metropolitan will not have to access its storage next year
8 if its SWP allocation exceeds 50%. *Id.* at 77:22-78:1 (Erlewine).
9 Based upon the 2009 Reliability Report, the average SWP allocation is
10 60%. *Id.* at 78:2-4 (Erlewine). Kern County needs an allocation of
11 about 60 to 70 percent to meet its current water demands. *Id.* at
12 81:7-11 (Erlewine).

13
14 a. Likely Impact of Implementation of the Fall X2 Action
15 in 2011 to the SWP.

16 172. The outflow requirement to maintain X2 at an average of 74
17 km can be met by increased upstream releases or decreased exports.
18 7-27-11 Tr. at 204:6-9 (Leahigh). The preferred method of meeting
19 outflow requirements is increased upstream releases because there is
20 an opportunity to recover these impacts during the winter. *Id.* at
21 204:10-205:1 (Leahigh).

22 173. Notwithstanding this preference, DWR is effectively
23 constrained from relying exclusively on reservoir releases to meet
24 the Fall X2 Action requirements for the October 15 to November 30,
25 2011 period by virtue of a 1983 agreement ("1983 Agreement") between
26 DWR and the California Department of Fish and Game ("DFG") relating
27 to DWR's Federal Energy Regulatory Commission license regarding the
28

1 operation of Oroville Dam. Ex. 301, Leahigh Decl. ¶ 17. The 1983
2 Agreement effectively restricts the volume of releases that can be
3 made from Lake Oroville to the Feather River from October 15 to
4 November 30. 7-27-11 Tr. at 205:6-13 (Leahigh); Ex. 301, Leahigh
5 Decl. at ¶ 17. In order to manage the SWP to meet the Fall X2 Action
6 requirements, the 1983 Agreement would compel the SWP to reduce
7 exports during the October 15 to November 30 period, rather than
8 making storage releases. 7-27-11 Tr. at 205:11-20 (Leahigh).

10 174. The final SWP allocation decision for 2011 has already been
11 made, and therefore, an injunction will not change the 2011 Table A
12 allocation. *Id.* at 207:5-8, 208:11-15 (Leahigh); 7-28-11 Tr. at
13 14:22-15-4 (Erlewine).

15 175. Mr. Leahigh testified at the hearing that the maximum
16 potential water impact to SWP from the implementation of the Fall X2
17 Action is 850,000 AF, assuming 2012 is a dry year. 7-27-11 Tr. at
18 211:18-212:7 (Leahigh). Of this potential impact, 410,000 AF is
19 attributable to a reduction in exports and 440,000 AF is attributable
20 to increased releases from upstream storage. Ex. 301, Leahigh Decl.
21 at ¶¶ 18-19.

22 176. This figure was calculated based upon DWR's May 1 Bulletin
23 120 Forecast and Water Supply Index. Since then, precipitation in
24 the northern Sierra Nevada in June was 320% of the monthly average.
25 7-27-11 Tr. at 230:15-18 (Leahigh); Ex. 302, Leahigh Reply Decl. at ¶
26 12. Additionally, the 850,000 AF impact figure was calculated based
27
28

1 upon assumptions of operations prior to the July 21, 2011 Reclamation
2 Memorandum, which clarifies November operations. Mr. Erlewine stated
3 that operations in accordance with the memorandum would lessen
4 impacts. 7-28-11 Tr. at 57:2-7 (Erlewine).

5
6 177. After the hearing, at the behest of the Court, Mr. Leahigh
7 filed a supplemental declaration, revising his estimates of impact to
8 reflect up-to date hydrology, storage conditions, and the July 21,
9 2011 Reclamation Memorandum. Doc. 1006, Second Supplemental Leahigh
10 Decl. at ¶¶ 6-8. His updated estimate indicates that implementation
11 of the Fall X2 Action in 2011 will cause:

12 (a) 370,000 AF of storage impact, with a 75% probability of
13 recovery in 2012. *Id.* at ¶ 7(a); *see also* 7-27-11 Tr.
14 211:9-11 (Leahigh) (In a median water year, no impacts to
15 upstream storage are expected).

16
17 (b) 300,000 AF of export impact, with a probable
18 elimination of these impacts in wet years. Doc. 1006,
19 Second Suppl. Leahigh Decl. ¶ 7(b).

20
21 178. Reflecting the fact that storage impacts are unlikely
22 unless drier conditions prevail, Mr. Leahigh summarizes his revised
23 analysis as follows:

24 (a) 670,000 AF of impacts to SWP deliveries in 2012 if 2012
25 is a critically dry or dry year;

26 (b) 300,000 AF of impact to SWP deliveries in 2012 if 2012
27 is a below normal or above normal year;

1 (c) little to no impact to SWP deliveries in 2012 if 2012
2 is a wet year.

3 *Id.* at ¶8.¹⁶

4 179. It is more likely than not that all storage impacts caused
5 by upstream releases north of the Delta will be recovered in 2012.
6 7-27-11 Tr. at 230:19-21 (Leahigh).

7 180. Likewise, it is more likely than not that at least a
8 300,000 AF impact to SWP deliveries in 2012 will occur, as only in a
9 wet year will less impact occur.
10

11 b. Impact of Export Reductions on SWP Contractors.

12 181. If 2012 is a year with median hydrology, the export
13 reductions resulting from imposition of the Fall X2 Action will
14 adversely affect the ability of State Water Contractor member
15 agencies to recharge depleted groundwater basins and, potentially,
16 their ability to deliver water directly in 2012. 7-28-11 Tr. at
17 16:3-13 (Erlewine). At the hearing it was estimated that if the Fall
18 X2 Action is imposed and 2012 is a median year, the resulting export
19 reductions would equate to a 10% reduction in SWP Table A water
20 deliveries. *Id.* at 19:4-10 (Erlewine). Subsequent estimates suggest
21
22
23

24 ¹⁶ Defendants emphasize that SWP contractors already received more surplus water
25 this year than they could possibly lose as a result of export impacts from the Fall
26 X2 Action. In 2011, in addition to the 80% Table A allocation, 400,000 AF of
27 Article 21 water was delivered to SWP contractors, which is approximately equal to
28 the total estimated export reductions that might result from the Fall X2 Action.
7-27-11 Tr. at 232:20-233:2 (Mr. Leahigh); 7-28-11 Tr. at 65:15-66:3 (Mr.
Erlewine). Defendants maintain that this will offset any water supply impact from
the Fall X2 Action. This ignores the fact that SWP Contractors are contractually
entitled to surplus water when it is available for delivery. Ex. 137, Erlewine
Reply. Decl. at ¶ 7.

1 the impact would be smaller than originally anticipated. See
2 generally Doc. 1006, Second Suppl. Leahigh Decl.

3 182. KCWA receives roughly one quarter of total SWP Table A
4 water deliveries. 7-28-11 Tr. at 19:12-14 (Erlewine). A 10%
5 reduction in SWP deliveries in 2012 will equate to a loss of
6 approximately 100,000 AF to KCWA. *Id.* at 19:12-14 (Erlewine).
7 100,000 AF of water is sufficient to irrigate 35,000 acres of
8 permanent crops based on average water duties, or is sufficient to
9 supply half a million urban water users for a year. *Id.* at 40:17-
10 41:2 (Erlewine). KCWA's water supply impacts will increase to
11 200,000 acre feet if 2012 is a dry year. *Id.* at 42:8-11 (Erlewine).
12 Mr, Leahigh's subsequent estimates suggest the impact will not be as
13 significant as originally anticipated, but will nevertheless be
14 substantial.
15

16
17 183. Because much of the agricultural acreage within Kern County
18 is planted with permanent trees and vines which must always be
19 watered, most of the water demand by users within KCWA remains at the
20 same or similar levels regardless of the availability of SWP water.
21 *Id.* at 21:13-16, 22:9-13, 24:2-16 (Erlewine); Ex. 136, Erlewine Decl.
22 at ¶¶ 18, 19. As a result, a loss to KCWA of a certain volume of SWP
23 deliveries in 2012 is likely to result in an equal volume of
24 groundwater being pumped from the KCWA portion of the San Joaquin
25 Valley Groundwater Basin that otherwise would not be extracted. 7-
26 28-11 Tr. at 24:13-16. Some areas of KCWA, particularly areas on the
27
28

1 west side of its service area, do not have access to usable
2 groundwater and thus rely heavily upon SWP water. *Id.* at 22:19-
3 23:16.

4 184. An SWP water supply loss and the resultant additional
5 groundwater pumping undertaken to make up for that loss, may also
6 prevent KCWA from being able to recharge its groundwater reserves.
7 *Id.* at 19:15-23; *see also* Exs. 138-141 (Kern Water Bank hydrographs);
8 Exs. 142-144 (Kern County groundwater levels, 2007, 2010, 2011).
9 Continued recharge of available storage space, and SWP deliveries,
10 are needed to return groundwater to the levels necessary to survive
11 future droughts. Ex. 136, Erlewine Decl. at ¶ 19. If 2012 is a dry
12 year, KCWA would lose not only its recharge capability, but also the
13 ability to deliver directly to its customers SWP supplies sufficient
14 to prevent them from needing to extract further volumes of
15 groundwater. *See* 7-28-11 Tr. at 42:1-7 (Erlewine).
16

17 185. At the end of 2006, the last wet year prior to the current
18 year, the SWP had significant amounts of water in storage, including
19 approximately 900,000 AF in San Luis Reservoir and more than 3
20 million AF in Lake Oroville. *Id.* at 16:14-24 (Erlewine). Individual
21 contractors also had significant amounts of water in their own,
22 separate storage facilities, with Metropolitan having approximately 2
23 million acre feet of water in storage available for its use and Kern
24 County Water Agency's Kern Water Bank at high levels. *Id.* at 16:25-
25 17:4 (Erlewine); Exs. 138-141 (Kern Water Bank hydrographs); Exs. 142
26
27
28

1 (Kern County groundwater levels 2007). During the 2007-2010 drought,
2 a substantial volume of SWP storage was depleted and a number of
3 extraordinary measures were imposed, including demand reduction
4 measures, water transfers from other areas, and other water
5 management activities. 7-28-11 Tr. at 17:5-8, 19-22 (Erlewine); *cf.*
6 Exs. 142, 143 (Kern County groundwater levels 2007 and 2010).
7

8 186. Farmers in the San Joaquin Valley were aided in their
9 ability to withstand the adverse effects of water shortages during
10 2007 through 2010 because they were able to receive and store surplus
11 water during wet years. Ex. 271, Mettler Decl. at ¶ 3; Ex. 270,
12 Stiefvater Decl. at ¶ 4. Specifically, when SWP water supplies were
13 insufficient to meet their operational needs, farmers purchased
14 supplemental water from local groundwater wells, groundwater storage
15 banks, and other sources. *Id.* The availability of this stored water
16 is the only reason farmers were able sustain their crops during
17 recent drought periods. *Id.* During the 2006 to 2010 period, the
18 disproportionate harm suffered by some CVP water users in the Central
19 Valley, relative to many SWP water users, was largely due to
20 insufficient local CVP water storage. Ex. 136, Erlewine Decl. at ¶
21 23.
22

23
24 187. This is the nature of a conjunctively managed water supply.
25 Groundwater is only available as supply in dry years if it is
26 recharged in wet ones.

27 188. At least two other water contractors in the San Joaquin
28

1 Valley, Tulare Lake Basin Water Storage District and Dudley Ridge
2 Water District, are also particularly dependent on SWP exports
3 because they do not generally overlie usable groundwater basins in
4 their service areas. 7-28-11 Tr. at 44:17-45:2; Ex. 136, Erlewine
5 Decl. at ¶ 21. The impacts to these and other agricultural districts
6 in the San Joaquin Valley that use SWP water would be similar to
7 those of Kern County Water Agency. 7-28-11 Tr. at 44:4-16.

8
9 189. Metropolitan, the largest SWP contractor, holds
10 approximately half of the entitlement to the SWP's total Table A
11 water amount, equating to about 2 million AF of water. *Id.* at 18:22-
12 19:14; Ex. 136, Erlewine Decl. at ¶ 6. If Metropolitan loses 10% of
13 its SWP allocation in 2012 as a result of implementation of the Fall
14 X2 Action, it will suffer SWP delivery reductions of approximately
15 200,000 acre feet. 7-28-11 Tr. at 47:25-48:22. This loss would
16 reduce Metropolitan's ability to put additional water into its
17 storage programs to prepare for future dry years. Ex. 136, Erlewine
18 Decl. at ¶ 12.

19
20
21 c. Is There Sufficient Storage Capacity for SWP
22 Contractors to Take Advantage of Increased Exports if
Fall X2 Action is Enjoined or Modified?

23 190. Federal Defendants suggest that potential export impacts to
24 the SWP as a result of the Fall X2 Action are likely to be lessened
25 or eliminated, because the SWP may not have storage capacity
26 available south of the Delta to store additional exports. Water
27 storage in San Luis Reservoir is expected to be at least 1.2 million
28

1 AF at the end of the summer. Ex. 563. Storage in San Luis Reservoir
2 this year is higher than the historic average. *Id.*; 7-27-11 Tr. at
3 237:22-24 (Leahigh). Given the "high storages that we see now" in
4 San Luis Reservoir, there is a "fair probability" that the SWP will
5 fill its share of San Luis Reservoir in the next six months, or by
6 the end of January, 2012. *Id.* at 239:1-9 (Leahigh). Increased
7 exports this fall would increase storage levels in San Luis
8 Reservoir, which could increase the likelihood that the reservoir
9 will fill. *Id.* at 240:23-25. If the state share of storage in San
10 Luis Reservoir fills, that would reduce the impact of Action 4. 7-
11 28-11 Tr. at 60:15-22 (Erlewine). Oroville storage is also nearly
12 full. Ex. 584 at 6 of 6.

13
14
15 191. Metropolitan is already carrying over about 300,000 AF of
16 its Table A allocation in San Luis Reservoir this year that could be
17 risk of being lost if San Luis refills. 7-28-11 Tr. at 49:5-19
18 (Erlewine). Metropolitan concluded:

19 Notably, storing water in SWP Carryover Storage is less
20 desirable under current conditions than it has been in
21 other years. This is because conditions on the SWP system
22 should result in higher storage levels in San Luis
23 Reservoir and Lake Oroville, which also leads to an
24 increased chance of higher SWP Table A allocations next
25 year. When this condition is combined with the fact that
26 In-Region surface storage (Diamond Valley Lake and DWR
27 Flexible Storage) is essentially full, it significantly
28 increases the chances that any water stored in SWP
29 Carryover Storage will be lost in early 2012 as San Luis
30 Reservoir reaches its maximum capacity.

31 Ex. 567 at 4-5.

32 192. Nonetheless, SWP Member agencies attempt to manage

1 deliveries to avoid loss of carryover storage. 7-27-11 Tr. 239:10-
2 17. While Metropolitan has been able to refill a portion of its
3 reserves during 2011, it has remaining capacity to store or otherwise
4 beneficially use the water it will lose if the Fall X2 Action is
5 implemented. 7-28-11 Tr. at 47:13-49:4. Moreover, even in the
6 highly unlikely event Metropolitan is unable to utilize further SWP
7 water supplies, those supplies would be made available to other SWP
8 contractors. If, for example, 100,000 AF is made available as
9 Article 21 water as a result of Metropolitan's not taking its Table A
10 entitlement, KCWA has sufficient capacity to take and beneficially
11 use all of that water by placing it into groundwater storage. *Id.* at
12 50:21-52:4 (Erlewine). KCWA has sufficient recharge capacity and
13 capability to place more than 100,000 acre feet of additional SWP
14 supplies into storage in 2011-2012, if such further water supplies
15 are made available as a result of not implementing the Fall X2
16 Action. *Id.* at 41:3-17 (Erlewine).

19 193. Defendants offer no alternative estimates of the likely
20 loss of carryover storage and the impact such losses would have on
21 the estimates of water loss caused by the Fall X2 action. Evidence
22 presented by Plaintiffs suggests that except in the unlikely event
23 that 2012 is a very wet year, the State Water Contractors have the
24 ability to either beneficially use or store SWP water deliveries they
25 will otherwise lose if the Fall X2 Action is implemented.
26
27
28

1 (2) Environmental Impacts to Plaintiffs.

2 194. In addition to the direct impact of reduced groundwater
3 levels associated with implementation of the Fall X2 Action, if KCWA,
4 its Member Units and individual farmers within their service areas
5 are compelled to rely upon groundwater to make up any shortfall in
6 SWP water deliveries, the additional pumping will result in increased
7 energy usage due to the increased pumping lifts needed to access
8 deeper groundwater. 7-28-11 Tr. at 24:13-16, 43:7-15 (Erlewine)

9 195. Implementation of the Fall X2 Action may also result in
10 water quality impacts associated with declining groundwater levels.
11 *Id.* at 8:22-9:7 (Erlewine); Ex. 136, Erlewine Decl. at ¶ 22. In Kern
12 County, for example, large areas of saline, poor quality groundwater
13 are adjacent to usable, higher quality groundwater. 7-28-11 Tr. at
14 9:2-4 (Erlewine). Drawing down groundwater levels in the areas with
15 good-quality groundwater will potentially cause the poor-quality
16 groundwater to be intermixed with good-quality water, leading to
17 significant groundwater quality impacts. *Id.* at 8:22-9:7 (Erlewine).
18 Shortage of water supplies could also lead to subsidence, Ex. 136,
19 Erlewine Decl. at ¶ 24, but there is no evidence that subsidence is
20 likely to occur as a result of the imposition of the Fall X2 action
21 this year.

22 196. However, the likelihood of some of the alleged
23 environmental impacts is unclear. Plaintiffs allege future
24 environmental impacts based upon the dual assumptions of a current
25
26
27
28

1 loss of the ability to replenish groundwater or other storage
2 reserves and below normal hydrology over the next several years.
3 *See, e.g., id.* at ¶ 24 ("if next year or multiple subsequent years
4 are below normal, dry, or critically dry, the loss now of the ability
5 to replenish groundwater or store water for future dry years during
6 times of water abundance will likely result in fallowed land, loss of
7 permanent crops, worsened groundwater overdraft, and other serious
8 environmental and economic impacts"). However, future hydrology is
9 unknown. *Id.* at ¶¶ 12, 24; *see also* 7-27-11 Tr. at 226:19-23
10 (Leahigh) (acknowledging that the fact that this year's June
11 hydrologic conditions were 320% of normal demonstrates that
12 hydrologic conditions fluctuate).

13
14
15 (3) Lack of Access to Credit.

16 197. It is undisputed that water supply uncertainties interfere
17 with farmers' abilities to secure financing. Ex. 270, Stiefvater
18 Decl. at ¶ 9; Ex. 270, Mettler Decl. at ¶ 4. Lenders will not lend
19 on the basis of SWP water alone, and demand additional and
20 substantial sources of supplemental water. Ex. 270, Stiefvater Decl.
21 at ¶ 9. Continued SWP shortages require depletion of supplemental
22 water supplies such as local groundwater and water banking projects.
23 Ex. 270, Mettler Decl. at ¶ 4. The depletion of these supplies
24 adversely affects farmers' abilities to obtain adequate financing and
25 continue their farming operations. *Id.* Water supply constraints and
26 increased payments for supplemental water interfere with farmers'
27
28

1 cash flows, affect hiring decisions, strain liquidity, and create
2 difficulties in meeting payroll obligations. Ex. 270, Stiefvater
3 Decl. at ¶ 7; Ex. 270, Mettler Decl. at ¶ 3.

4 198. However, given that 2011 was such a good water year and
5 that groundwater deficits have been able to substantially recharge,
6 the evidence is insufficient to establish that credit access problems
7 are likely to occur in the near future as a result of the
8 implementation of the Fall X2 action.

9
10 199. This is also arguably a purely economic harm that may not
11 be considered in the balance of the harms under the ESA.

12
13 (4) Employment other Sociological Impacts.

14 200. Previous testimony before this Court established that water
15 supply losses can be linked to employment losses and related
16 sociological impacts, including hunger and increased crime.
17 *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1055-56 (E.D.
18 Cal. 2010) (May 27, 2010 ruling on Plaintiff's motion for emergency
19 injunctive relief against imposition of Component 2 in that dry
20 year).

21
22 201. In the context of the present motion for injunctive relief,
23 Plaintiffs present the declarations of Dr. David Sunding to support a
24 finding that such impacts will result from imposition of the Fall X2
25 Action this year. Exs. 204 & 205. Dr. Sunding, an economist with
26 expertise in water resources, bases his opinions on employment trends
27 from 2001 to 2009 and concludes that the 2009 delivery reduction
28

1 resulting from imposition of the BiOp's RPA resulted in the loss of
2 9,091 jobs in the San Joaquin Valley, relative to the year 2005. *Id.*
3 at ¶ 3. He admits that his research did not isolate the mechanism by
4 which the reduced deliveries caused job losses, but he surmises that
5 reduced water deliveries resulted in less acreage under production,
6 which in turn resulted in fewer jobs. *Id.* at ¶ 24. Dr. Sunding was
7 able to demonstrate that the 2009 delivery reductions did in fact
8 result in reduced acreage under production. *Id.* at ¶ 26.

10 202. Dr. Sunding did not attempt to opine as to the employment
11 impact from imposing Fall X2 this year, an admittedly wet year in
12 which exports are at historic levels and groundwater and surface
13 storage is being replenished at historic rates. While it is safe to
14 say that if reduced deliveries do occur in 2012 or subsequent years
15 as a result of implementation of Fall X2 this year, some employment
16 impact will occur, it is impossible to estimate the magnitude of any
17 such impact with any certainty

19
20 (5) Modifying the Fall X2 Action will Substantially Decrease
21 Water Supply Impacts.

22 203. Maintaining an X2 position in the Delta that is more
23 easterly (upstream) than the 74 kilometer location required by the
24 Fall X2 Action will result in less water cost to the Projects.

25 (a) In his Second Supplemental Declaration, Mr. Leahigh
26 states that, if X2 were positioned at kilometer 79 during the months
27 of September and October 2011, and up to kilometer 79 in November
28 2011, the estimated water supply impacts to the SWP in 2012 would be

1 reduced by 550,000 acre feet if 2012 is a critically dry year or by
2 210,000 acre feet in most other water year types, compared with the
3 impacts of locating X2 at kilometer 74. Doc. 1006 at ¶ 14. That is,
4 if X2 were positioned at kilometer 79, the SWP would experience water
5 supply impacts in 2012 of 120,000 acre feet if 2012 is a critically
6 dry year, or 90,000 acre feet in most other water year types, rather
7 than the 670,000 acre feet (2012 critically dry or dry year) to
8 300,000 acre feet (most other water year types) of impacts, if X2 is
9 located at kilometer 74. *Id.* at ¶ 11.

11 (b) Alternatively, if X2 were positioned at kilometer 80,
12 the estimated water supply impacts to the SWP in 2012 would be
13 reduced by 590,000 acre feet if 2012 is a critically dry or dry year,
14 or by 220,000 acre feet in most other water year types, compared with
15 the impacts of locating X2 at kilometer 74. *Id.* at ¶ 15. That is,
16 if X2 were positioned at kilometer 80, the SWP would experience water
17 supply impacts of 80,000 acre feet in 2012 in most water year types,
18 rather than the 670,000 acre feet of impacts in critically dry and
19 dry years, or 300,000 acre feet in most other water year types, if X2
20 is located at kilometer 74. *Id.* at ¶ 13.

23 K. Consistency Determination

24 204. The SWP has obtained a consistency determination from CDFG,
25 pursuant to the California Endangered Species Act ("CESA"), which
26 authorizes the take of delta smelt by the SWP, "provided DWR
27 implements the Project as described in the BO, and complies with the
28

1 measures, RPAs and other conditions described in the BO." Ex. 1004,
2 Doc. 474-2

3 2. The consistency determination further states the BiOp's RPA
4 "must be implemented and adhered to." *Id.* The Fall X2 Action is one
5 of the components of the RPA that is identified in the consistency
6 determination. *Id.*

7
8 3. The incidental take permit that contains this consistency
9 determination contains a clause that permits DWR to request a new
10 consistency determination in the event the BiOp's RPA is modified.
11 How the California Department of Fish & Game would respond to such a
12 request is unknown. 7-29-11 Tr. at 268:1-10 (Mr. Lee).

13
14
15 VI. CONCLUSIONS OF LAW

16 A. Jurisdiction.

17 1. Jurisdiction exists under 28 U.S.C. § 1331 (Federal
18 Question), as this case arises under the ESA, 16 U.S.C. § 1536 *et*
19 *seq.*, NEPA, 42 U.S.C. § 4331 *et seq.*, and the APA, 5 U.S.C. § 702 *et*
20 *seq.*

21
22 B. Evidentiary Disputes.

23 (1) Plaintiffs' Objection to Defendants' Request for Judicial
24 Notice.

25 2. Plaintiffs object to certain documents relied upon by
26 Defendants in their Proposed Findings, for which Defendants request
27 judicial notice. These documents are:

- 1 • Doc. 945-15 (Letter from Director of CDFG);
- 2 • Doc. 945-16, Ex. 541 (CDFG Report);
- 3 • Doc. 945-17, Ex. 542 (Report of the Independent Workshop
- 4 Panel on Salmonid Integrated Life Cycle Models);
- 5 • Doc. 945-18, Ex. 547 (CDFG Comments on BDCP EA).

6
7 As none of these documents have been relied upon in this decision,
8 the objection is moot.

9
10 (2) Motion to Strike.

11 3. At the outset of the evidentiary hearing, the district
12 court denied Defendants' motion to strike, Doc. 947: (1) materials
13 that pertain to issues already litigated, which Defendants had
14 challenged on law of the case grounds; (2) materials discussing
15 economic harm, which Defendants had challenged as not properly before
16 the Court under the ESA; (3) extra-record and post-decisional
17 materials, which Defendants had moved to strike on the ground that
18 such material may not be considered under the APA standard of review;
19 and (4) materials presented by Plaintiffs for the first time in this
20 motion that could have been raised during the summary judgment stage.
21 7-26-11 Tr. at 4:2-11:18. Specific rulings were made on the record.
22 *Id.* Those rulings are incorporated by this reference.

23
24 4. The Court also permitted all parties to raise further
25 objections on a question-by-question basis during the hearing, and
26 noted Defendants' standing objections to the testimony of witnesses
27 who would testify by declaration only pursuant to the parties'
28

1 stipulation. *Id.* at 11:6-12:17. Defendants now request rulings on
2 specific objections, presumably on the ground that they were not
3 previously addressed.
4

5 a. Declaration of Terry Erlewine.

6 5. Defendants propose to strike paragraphs 11-13, 24-25, and
7 lines 5-8 of Paragraph 20 of the initial Erlewine Declaration (Ex.
8 136), on the ground that these paragraphs concern environmental
9 impacts that result from groundwater overdraft as well as impacts to
10 air quality, from subsidence, and related matters about which Mr.
11 Erlewine has no expertise or credentials. However, Mr. Erlewine has
12 personal knowledge of the operations, Table A contract amounts, and
13 storage facilities of MWD, as well as groundwater levels, energy use,
14 water quality and other environmental impacts experienced in the SWP
15 service area as a result of reduced SWP deliveries, particularly in
16 Kern County. 7-28-11 Tr. at 7:7-9:13, 20:3-25, 42:23-43:15. This
17 objection is OVERRULED.
18

19 6. Defendants propose that Paragraphs 3 to 5 of Mr. Erlewine's
20 initial declaration (Ex. 136) be stricken. Defendants do not offer a
21 separate justification for striking these paragraphs, which relate
22 exclusively to SWP water supply impacts associated with
23 implementation of the Fall X2 Action. Defendants concede that Mr.
24 Erlewine has been qualified as an expert witness regarding SWP
25 operations. Doc. 1004, Defendants' Proposed Findings, ¶ 256. This
26 objection is OVERRULED.
27
28

1 b. Declarations of Jeffrey Mettler and Rod Stiefvater.

2 7. Plaintiffs have offered the testimony of two farmers, both
3 of whom provide evidence of economic harms associated with potential
4 water supply reductions from the implementation of the Fall X2
5 Action. See Declaration of Rod Stiefvater (Ex. 270); Declaration of
6 Jeffrey R. Mettler (Ex. 271). Neither Mr. Stiefvater nor Mr. Mettler
7 has been qualified as an expert in CVP or SWP operations or
8 economics. Defendants argue that both offer opinion testimony based
9 on scientific, technical, or other specialized knowledge that is not
10 permitted under Federal Rule of Evidence 701. See *United States v.*
11 *Durham*, 464 F.3d 976, 982 (9th Cir. 2006) (finding that "opinion
12 testimony of lay witnesses must be predicated upon concrete facts
13 within their own observation and recollection - that is facts
14 perceived from their own senses, as distinguished from their opinions
15 or conclusions drawn from such facts") (internal quotations and
16 citation omitted).

17 8. As an example, Defendants argue that Mr. Stiefvater's
18 opinion that his existing 80% SWP allocation is in danger of being
19 reduced by 10% is a speculative harm that no party is alleging in
20 this case. See Ex. 270 at ¶ 6. Mr. Mettler states that "[i]n 2010,
21 the SWP allocation was sufficient for my crop needs, but the cost of
22 this supply was substantially higher than if a higher SWP allocation
23 was available." Ex. 271 at ¶ 3. Defendants maintain Mr. Mettler and
24 Mr. Stiefvater offer no basis for these opinions, and therefore the
25
26
27
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1 opinions are barred by Federal Rule of Evidence 701.

2 9. Similar arguments have been rejected numerous times in
3 these consolidated cases. *See, e.g., San Luis & Delta-Mendota Water*
4 *Auth. v. Salazar*, 2009 WL 1516798, *3-*6 (E.D. Cal. May 29, 2009).
5 Here, Mrs. Mettler and Stiefvater are farmers personally familiar
6 with the water allocations their farms receive and the cost increases
7 that will likely occur if water supplies are decreased. Personal
8 knowledge acquired through management and operation of one's
9 business, as well as experience in the industry, provides a
10 foundation for lay testimony and opinion about the economic aspects
11 of one's own business, general practices in the industry, and how
12 one's business actions might change under different circumstances.
13 *United States v. Hill*, 643 F.3d 807, 840-42 (11th Cir. 2011)
14 (permitting officer or employee of a corporation to offer lay opinion
15 testimony about industry standards and pricing); *Eckelkamp v. Beste*,
16 315 F.3d 863, 872 (8th Cir. 2002) (perceptions based on industry
17 experience provide foundation for lay testimony); *National Hispanic*
18 *Circus v. Rex Trucking*, 414 F.3d 546, 551-52 (5th Cir. 2005)
19 (corporate manager permitted to testify about matters related to
20 business expertise).

21 10. Mr. Mettler's and Mr. Stiefvater's observations regarding
22 past and prospective reduced water allocations, and the effects of
23 such reductions, are lay opinions; they are opinions or inferences
24 "predicated upon concrete facts within their own observation and
25
26
27
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1 recollection." Defendants' objections are OVERRULED. The nature of
2 their experience goes to the weight their lay testimony will be
3 afforded vis-à-vis other, expert witness testimony.
4

5 c. Declaration Dr. David L. Sunding.

6 11. Defendants' reiterate a previously-articulated objection to
7 the Declarations of Dr. David L. Sunding, which was offered facially
8 "to respond to" the Declaration of Cameron Speir filed in the
9 *Consolidated Salmonid Cases*, 1:09-cv-1053 OWW (Doc. 563), regarding
10 "employment trends in the San Joaquin Valley from 2001 to 2009." Ex.
11 204, Sunding Decl. at ¶ 2. Defendants object that, because the Speir
12 declaration was not introduced by Defendants in any injunctive relief
13 proceeding in this case and is not properly before the Court on this
14 motion, Dr. Sunding's declaration is not relevant here. This
15 elevates form over substance. While Dr. Sunding may have been
16 "responding to" this earlier Declaration in an intellectual sense, he
17 offers independent evidence that stands alone.
18

19 12. Defendants also object that, because Dr. Sunding's
20 declaration addresses employment trends in the San Joaquin Valley
21 from 2001 through 2009, his opinions are not relevant to the question
22 of Plaintiffs' allegations regarding the likelihood of irreparable
23 harm from implementation of Action 4 in 2011. This goes to weight
24 not admissibility. "'Relevant evidence' means evidence having any
25 tendency to make the existence of any fact that is of consequence to
26 the determination of the action more probable or less probable than
27
28

1 it would be without the evidence." Fed. R. Evid. 401. Dr. Sunding's
2 opinions has some tendency to confirm a relationship between reduced
3 water deliveries and unemployment, as well as serving to explain the
4 costs of groundwater depletion and the fact that groundwater pumping
5 is not a sustainable solution to long-term reductions in water
6 availability. That his opinions focus on data from 2001-2009 and
7 examine the impacts of reduced deliveries during a time of water
8 shortage, rather than plenty, go to weight, not admissibility. This
9 objection is OVERRULED.
10

11
12 C. Threshold Issue: Does the CDFG Consistency Determination Render
Redressability (A Standing Requirement) Speculative?

13 13. Defendants argue that Plaintiffs lack standing to bring
14 this motion for injunctive relief because Plaintiffs cannot establish
15 redressability, one of the elements of standing. Plaintiffs bear the
16 burden of proving that it is "likely, as opposed to merely
17 speculative, that the injury will be redressed by a favorable
18 decision." *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs.*
19 *(TOC), Inc.*, 528 U.S. 167, 181 (2000).
20

21 14. Specifically, Defendants point to the CDFG Consistency
22 Determination, which authorizes the take of delta smelt by the SWP
23 under CESA, so long as "the Project as described in the BO, and
24 complies with the measures, RPAs and other conditions described in
25 the BO." Ex. 1004, Doc. 474-2. Defendants argue that Plaintiffs
26 have provided no evidence that CDFG is likely to issue a revised
27 consistency determination if this Court were to grant Plaintiffs'
28

1 requested injunction. The CESA incidental take permit that contains
2 this consistency determination contains a clause that permits DWR to
3 request a new consistency determination in the event the BiOp's RPA
4 is modified, but it is not known how CDFG would respond to such a
5 request. The State Water Contractors filed a separate challenge to
6 CDFG's incorporation of the RPA provisions into the state incidental
7 take permit. 7-28-11 Tr. at 87:25-88:11 (Erlewine). The parties to
8 that lawsuit stipulated to stay further proceedings pending the
9 outcome of this case. See 7-29-11 Tr. at 198:21-196:3.

11 15. Where redress of a plaintiff's harms depends on independent
12 decisions of governmental entities not a party to the pending
13 lawsuit, standing does not exist. See *Lujan v. Defenders of*
14 *Wildlife*, 504 U.S. 555, 568-71 (1992) (plaintiffs had no standing to
15 challenge regulation interpreting ESA § 7(a)(2) as being limited in
16 geographic scope to projects undertaken in the United States and the
17 high seas; redressability was speculative because agencies funding
18 projects overseas were not parties to the case and maintained the
19 challenged regulation was not binding upon them, therefore requested
20 relief (termination of funding until consultation) was not likely to
21 result from successful lawsuit). "There is no redressability, and
22 thus no standing, where ... any prospective benefits depend on an
23 independent actor who retains 'broad and legitimate discretion the
24 courts cannot presume either to control or to predict.'" *Glanton ex*
25 *rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123,
26
27
28

1 1125 (9th Cir. 2006) (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605,
2 615 (1989)). In *Glanton*, for example, the “[p]laintiffs claim[ed]
3 that, if their suit [was] successful” in proving that the defendant,
4 a pharmacy benefit manager, charged their health plans too much for
5 prescription drugs, “the plans’ drug costs [would] decrease, and that
6 the plans might then reduce contributions or co-payments.” *Id.* But
7 the Ninth Circuit found no standing, explaining that “nothing would
8 force [the health plans] to” pass any savings down to the plaintiffs
9 and that the plans “would be free” to keep the savings for
10 themselves. *Id.*

12 16. This is arguably a procedural injury case in which certain
13 aspects of the redressability requirements are relaxed.

15 A showing of procedural injury lessens a plaintiff’s burden
16 on the last two prongs of the Article III standing inquiry,
17 causation and redressability. Plaintiffs alleging
18 procedural injury must show only that they have a
19 procedural right that, if exercised, could protect their
20 concrete interests.

19 *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226
20 (9th Cir. 2008) (emphasis in original) (internal citations and
21 quotations omitted).

22 17. However, nothing in the procedural injury standing
23 jurisprudence relaxes the rule that redress cannot depend on
24 independent decisions of governmental entities not a party to the
25 pending lawsuit. See *Nuclear Info. Res. Serv. v. Nuclear Regulatory*
26 *Comm’n*, 457 F.3d 941, 955 (9th Cir. 2006) (“*NIRS*”). In *NIRS*, the
27 plaintiffs challenged the NRC’s decision to revise regulations
28

1 governing exemption standards for the transportation of radioactive
2 material. Plaintiffs alleged that NRC failed to comply with its
3 procedural obligations under NEPA. NRC objected that the plaintiffs'
4 procedural injuries were not redressable because the Department of
5 Transportation ("DOT") had promulgated identical exemption standards
6 that would be unaffected by the lawsuit. The Ninth Circuit agreed
7 with NRC and held that plaintiffs lacked standing:
8

9 The parties agreed at oral argument that NRC licensees are
10 required to follow DOT's regulations for the transportation
11 of nuclear material.... Thus, even if we were to set aside
12 the current NRC rule and remand to NRC with instructions
13 that it prepare an EIS, nothing requires DOT to revisit its
14 identical exemption standards, which govern the universe of
15 NRC licensees.... [T]he DOT rule would control even if the
16 NRC rule was wiped off the books. And the DOT regulation is
17 not before us. We cannot see how an order remanding to NRC
18 would remedy the asserted injury from the ... exemption
19 standards because DOT would be under no obligation to
20 reconsider its own, identical rule.

21 *NIRS*, 457 F.3d at 955.

22 18. Redressability may be shown if "a causal relation [ship] is
23 'probable' ..., even if the chain cannot be definitively
24 established." *Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 867 (9th Cir.
25 2003); *see also Coalition v. Koch*, 2009 WL 2151842, at *13 n. 6 (E.D.
26 Cal. Jul. 16, 2009) ("So long as there is evidence that the third
27 party, whether possessing a four-chambered heart or not, will behave
28 in a predictable manner, the causal chain is not necessarily rendered
'tenuous' for the purposes of the standing analysis."); *see also*
Loggerhead Turtle v. County Council, 148 F.3d 1231, 1247 (11th
Cir.1998) ("standing is not defeated merely because the alleged

1 injury can be fairly traced to the actions of both parties and non-
2 parties" (citing *Lujan*, 504 U.S. at 560)).

3 19. A related redressability issue was addressed in connection
4 with a challenge to CDFG's sportfishing regulations designed to
5 protect the Delta's striped bass population. Plaintiffs in that case
6 claimed that protecting striped bass, known predators of delta smelt,
7 constituted unlawful "take" of delta smelt, which in turn impacted
8 smelt abundance and caused Plaintiffs harm from water supply impacts
9 resulting from same 2008 Smelt BiOp RPA's challenged in this lawsuit.
10 *Coalition for a Sustainable Delta v. Carlson*, 2008 WL 2899725 (E.D.
11 Cal. July 24, 2008). Redress of that harm was found to be
12 speculative:
13

14 [E]ven if [plaintiff] were to prevail in this case, its
15 injury would not necessarily be redressed. If the
16 regulations were invalidated, even if the striped bass
17 population were reduced to a level that measurably
18 protected salmonid species on which they prey, there are
19 other predators (the pikeminnow) and other causes:
20 operation of the Projects, toxics, in-Delta diverters,
21 alien invasive species, all of which contribute to the
22 species' jeopardy. The present Delta smelt and salmonids
23 jeopardy findings are based on drought conditions and
24 Project operations, as primary causes. The extent to which
25 all other cooperative causes will continue to operate is
26 unknown. There remains total uncertainty whether reduction
27 in the threat of some predators will have more than minimal
28 effect on the protected species.

24 *Id.* at *10.

25 20. The present situation is distinguishable. Here, Plaintiffs
26 directly challenge imposition of one of the RPA Actions on the ground
27 that it is scientifically unjustified. They have partially prevailed
28

1 on the merits of this challenge. CDFG has issued a consistency
2 determination that incorporates the reasoning of the BiOp and its
3 RPA:

4 The Central Valley and California Delta system ... supports
5 populations of delta smelt, which is distinguished as a
6 threatened species under both the federal ESA and the
7 California Endangered Species Act (CESA) (Fish & G. Code, §
8 2050 et seq.). Flow disruption, loss of habitat, and
9 entrainment caused by Project related water export and
10 management activities result in incidental take of delta
11 smelt.

12 Because the Project has the potential to take a species
13 listed under ESA, the USBR, on behalf of DWR, consulted
14 with the USFWS under Section 7 of the ESA. On December 15,
15 2008, USFWS issued a Biological Opinion (Ref. No. 81420-
16 2008-F-1481-5), which includes an incidental take statement
17 (hereafter, the BO). The BO describes the Project,
18 including conservation measures developed to minimize
19 impacts to delta smelt, and sets forth measures to mitigate
20 any remaining impacts to delta smelt and its habitat. The
21 measures in the BO include one "Reasonable and Prudent
22 Alternative" with five components (RPAs) which must be
23 implemented and adhered to. The RPA actions are to be
24 implemented using an adaptive approach with specific
25 defined constraints. The BO includes a detailed description
26 of the adaptive process, its framework, and the rationale
27 for each of the RPA components. On June 17, 2009, the
28 Director of the Department of Fish and Game (DFG) received
correspondence from Lester A. Snow, Director of DWR,
requesting a determination from DFG that the BO and its
incidental take statement are consistent with CESA pursuant
to Fish and Game Code Section 2080.1.

22 DETERMINATION

23 DFG has determined that the BO, including all RPA
24 requirements and the related incidental take statement, is
25 consistent with CESA because the mitigation measures
26 therein meet the conditions set forth in Fish and Game Code
27 section 2081, subdivisions (b) and (c), for DFG to
28 authorize incidental take of CESA listed species. This
determination is limited to only those actions specifically
identified and analyzed in the December 15, 2008 BO.
Specifically, DFG finds that take of delta smelt will be

1 incidental to an otherwise lawful activity (i.e., SWP
2 operations); the measures and RPAs identified in the BO to
3 modify flow requirements and restore habitat will minimize
4 and fully mitigate the impacts of the taking of delta
5 smelt; and the Project, with the pre- scribed measures and
6 RPAs in place, will not jeopardize the continued existence
7 of the species. The avoidance, minimization, and mitigation
8 measures in the BO include, but are not limited to, the
9 following:

7 Minimization and Mitigation Measures

8 Avoidance and Minimization Actions: The BO requires SWP
9 operational actions which are expected to provide flow
10 conditions that reduce entrainment of delta smelt and
11 retain necessary outflow and habitat to support all its
12 life stages. Specific flow modification requirements are
13 presented in RPA Components 1 and 2, including the
14 information necessary to determine delta smelt risk. The
15 requirements include a defined real time scientific
16 evaluation process to develop timely flow augmentations to
17 avoid situations that increase delta smelt risk.

18 Mitigation Measures: The BO includes two actions to
19 increase the area of suitable delta smelt habitat in the
20 estuary: 1) *Delta outflow augmentation in the fall*
21 *following wet and above normal water years and,* 2)
22 restoration of at least 8,000 acres of intertidal and
23 associated subtidal habitat in the Delta and Suisun Marsh.

24 Reporting and Monitoring Actions: Conditions of the BO and
25 respective RPAs require DWR to develop and follow specific
26 monitoring programs to adaptively evaluate specific flow
27 requirements and action triggers to achieve the RPA
28 objectives. Participation in (including DFG among others),
review of, and reporting requirements for these processes
are all a condition of and detailed within the BO and RPAs.
The BO outlines a monitoring and reporting process to
determine specific operational actions set forth in RPA
Components 1 and 2. RPA Components 3 and 4 include similar
requirements for the design, monitoring, and adaptive
management of fall flow actions to improve delta smelt
habitat, as well as the implementation of required habitat
restoration actions. RPA Component 5 ensures that
information is gathered and reported appropriately.

1 Based on this consistency determination, DWR does not need
2 to obtain authorization from DFG under CESA for incidental
3 take of delta smelt that occurs in connection with the
4 Project, provided DWR implements the Project as described
5 in the BO, and complies with the measures, RPAs and other
6 conditions described in the BO. However, if the Project as
7 described in the BO, including the mitigation measures
8 therein, changes after the date of the BO, or if the USFWS
amends or replaces the BO, including any of the RPAs, DWR
will need to obtain from DFG a new consistency
determination (in accordance with Fish and Game Code
section 2080.1) or a separate incidental take permit (in
accordance with Fish and Game Code section 2081).

9 Ex. 1004 at 1300-301. This Consistency Determination is made under
10 the authority of California Fish and Game Code § 2081, which sets
11 forth the requirements for obtaining a take permit under CESA.
12 Although these requirements are not identical to those of the ESA,
13 e.g., § 2081 requires that take be "minimized and fully mitigated,"
14 a federal judicial finding that an RPA is scientifically unjustified
15 significantly undermines the basis for the Consistency Determination.
16 This is sufficient for purposes of standing. The principles of
17 judicial economy would not be served if Plaintiffs were required to
18 prosecute both cases simultaneously in parallel cases in order to
19 obtain evidence from the state court that a parallel injunction would
20 likely result from a federal injunction against the Fall X2 action.
21 Adopting Defendants' rule would effectively bar standing in many
22 cases involving species dually listed under the ESA and parallel
23 state statutes, contrary to Congressional intent that ESA challenges
24 be subject to broad judicial review. See 16 U.S.C. § 1540(g).
25
26
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1 D. Success on the Merits.

2 (1) Success on NEPA Claims.

3 21. Plaintiffs have already succeeded on their NEPA claim. See
4 Doc. 399.

5 22. NEPA insures that federal agencies "make informed decisions
6 and 'contemplate the environmental impacts of [their] actions.'" *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 971 (D. Hi. 2008)
7
8 (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th
9 Cir. 1998)).

10 23. "NEPA emphasizes the importance of coherent and
11 comprehensive up-front environmental analysis to insure informed
12 decision-making to the end that the agency will not act on incomplete
13 information, only to regret its decision after it is too late to
14 correct." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349
15 F.3d 1157, 1166 (9th Cir. 2003).
16
17

18 24. Federal Defendants' violations of NEPA prevented the
19 required reasonable evaluation, analysis, "hard look at," and
20 disclosure of the harms of implementing the 2008 Smelt BiOp RPA
21 Actions to human health and safety, the human environment, and other
22 environmental values.
23

24 (2) Success on the ESA Claim Regarding the Fall X2 Action.

25 25. The 12/14/10 MSJ Decision rejected some of Plaintiffs'
26 challenges to the BiOp's rationale for the Fall X2 action, but found
27 that the BiOp's X2 analysis was flawed in two critical respects. *San*
28

1 *Luis v. Salazar*, 760 F. Supp. 2d at 922. The MSJ Decision
2 marginally upheld the BiOp's reliance on the Feyrer (2007) and Feyrer
3 (2008) studies as justification for imposing some controls on Fall
4 X2, but found that the BiOp "fail[ed] to explain why it is essential
5 to maintain X2 at 74 km and 81 km respectively, as opposed to any
6 other specific location." *Id.* at 922-23.
7

8 E. Requirements for Injunctive Relief.

9 26. In order to establish entitlement to injunctive relief,
10 Plaintiffs must establish:

11 (1) that [they will] suffer[] an irreparable injury;

12 (2) that remedies available at law, such as monetary
13 damages, are inadequate to compensate for that injury;

14 (3) that, considering the balance of hardships between the
15 plaintiff and defendant, a remedy in equity is warranted;
16 and

17 (4) that the public interest would not be disserved by a
18 permanent injunction.

19 *Sierra Forest Legacy*, --- F.3d ---, 2011 WL 2041149 at *16.

20 (1) Irreparable Harm.

21 a. General Requirements for Proving Irreparable Harm.

22 27. Plaintiffs bear the burden of showing that "irreparable
23 injury is likely in the absence of an injunction." *Winter*, 555 U.S.
24 at 22. Attenuated, conjectural, or speculative injuries will not
25 suffice. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674-
26 75 (9th Cir. 1988) (finding that declarations which merely speculate
27 about imminent threat of harm are insufficient for purposes of
28

1 injunctive relief).

2 28. The Court of Appeals recently confirmed that the likelihood
3 of irreparable harm -- as opposed to the mere possibility of it --
4 remains an unyielding threshold requirement prior to the issuance of
5 injunctive relief. *Alliance for the Wild Rockies v. Cottrell*, 632
6 F.3d 1127, 1131 (9th Cir. 2011). Although the *Alliance for the Wild*
7 *Rockies* panel affirmed other parts of the "sliding scale" approach
8 not reached in *Winter* and not at issue here, the panel also confirmed
9 the irreducible requirement that "under *Winter*, plaintiffs must
10 establish that irreparable harm is likely, not just possible." *Id.*
11 Under controlling Supreme Court and Ninth Circuit precedent, a
12 district court need not reach the remaining factors of the injunctive
13 relief test if a moving party has not shown that irreparable harm is
14 likely.
15

16
17 29. In general, "the test for determining if equitable relief
18 is appropriate is whether an injunction is necessary to effectuate
19 the congressional purpose behind the statute." *Biodiversity Legal*
20 *Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002).

21
22 30. In addition, before any injunctive relief can issue,
23 Plaintiffs must also show that the relief they seek is "narrowly
24 tailored" to remedy the specific violations at issue and is not
25 likely to result in irreparable harm to an ESA-listed species. *Nat'l*
26 *Wildlife Fed'n v. NMFS*, 422 F.3d 782, 796, 800 (9th Cir. 2005); *see*
27 *also Pac. Coast Fed'n of Fisherman's Ass'ns v. Gutierrez*, 606 F.
28

1 Supp. 2d 1195, 1203 (E.D. Cal. 2008) (noting that during periods of
2 interim relief in ESA context "only 'non jeopardizing' actions may
3 continue"); *Natural Res. Def. Council v. Kempthorne*, 2007 WL 4462395,
4 at *21 (E.D. Cal. Dec. 14, 2007) (holding that "[a]ny interim
5 remedial prescriptions must (1) not cause jeopardy ... [or]; (2)
6 adversely modify its critical habitat").
7

8 b. Injunctive Relief in ESA Cases.

9 31. Previous rulings in this case have discussed the balancing
10 of the equities in ESA and NEPA cases:
11

12 The Supreme Court held in *TVA v. Hill*, 437 U.S. 153, 194
13 (1978), that Congress struck the balance in favor of
14 affording endangered species the highest of priorities. In
15 adopting the ESA, Congress intended to "halt and reverse
16 the trend toward species' extinction, whatever the cost."
17 *Id.* at 184 (emphasis added). *TVA v. Hill* continues to be
18 viable. See *Home Builders*, 551 U.S. at 669-71; see also
19 *Oakland Cannabis Buyers' Co-op.*, 532 U.S. 496-97; *Amoco*
20 *Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9
21 (1987).

22 *Winter* does not modify or discuss the *TVA v. Hill* standard.
23 Although *Winter* altered the Ninth Circuit's general
24 preliminary injunctive relief standard by making that
25 standard more rigorous, *Winter* did not address, nor change,
26 the approach to the balancing of economic hardships where
27 endangered species and their critical habitat are
28 jeopardized. See *Biodiversity Legal Found. v. Badgley*, 309
F.3d 1166, 1169 (9th Cir. 2002) (Congress removed the
courts' traditional equitable discretion to balance
parties' competing interests in ESA injunction
proceedings); *Nat'l Wildlife Fed'n v. Burlington N. R.R.,*
Inc., 23 F.3d 1508, 1510-11 (9th Cir. 1994) (same).

Prior decisions involving the coordinated projects'
operations found that *TVA v. Hill* and related Ninth Circuit
authorities foreclose the district court's traditional
discretion to balance economic equities under the ESA.
There is no such bar in NEPA injunction proceedings.

1 Plaintiffs have advanced a human welfare exception and
2 contend that unlike any of the prior cases, this case
3 juxtaposes species' survival against human welfare,
4 requiring a balancing of the BiOp's threats of harm to
5 humans, health, safety, and protection of affected
6 communities. No case, including *TVA v. Hill*, which
7 concerned the competing economic interest in the operation
8 of a hydro-electric project and prohibited federal courts
9 from balancing the loss of funds spent on that project
10 against the loss of an endangered species, expressly
11 addresses whether the ESA precludes balancing of harms to
12 humans and the human environment under the circumstances
13 presented here.

14 This case involves both harm to threatened species and to
15 humans and their environment. Congress has not nor does
16 *TVA v. Hill* elevate species protection over the health and
17 safety of humans.

18 *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d at 1068-69.

19 32. *TVA v. Hill* itself involved more than just pure economic
20 interests. The Supreme Court's description of the project at issue
21 in that case includes non-economic human interests on both sides of
22 the equation:

23 In this area of the Little Tennessee River the Tennessee
24 Valley Authority, a wholly owned public corporation of the
25 United States, began constructing the Tellico Dam and
26 Reservoir Project in 1967, shortly after Congress
27 appropriated initial funds for its development. Tellico is
28 a multipurpose regional development project designed
29 principally to stimulate shoreline development, generate
30 sufficient electric current to heat 20,000 homes, and
31 provide flatwater recreation and flood control, as well as
32 improve economic conditions in "an area characterized by
33 underutilization of human resources and outmigration of
34 young people." Hearings on Public Works for Power and
35 Energy Research Appropriation Bill, 1977, before a
36 Subcommittee of the House Committee on Appropriations, 94th
37 Cong., 2d Sess., pt. 5, p. 261 (1976). Of particular
38 relevance to this case is one aspect of the project, a dam
39 which TVA determined to place on the Little Tennessee, a
40 short distance from where the river's waters meet with the
41 Big Tennessee. When fully operational, the dam would

1 impound water covering some 16,500 acres-much of which
2 represents valuable and productive farmland-thereby
3 converting the river's shallow, fast-flowing waters into a
4 deep reservoir over 30 miles in length.

5 *TVA v. Hill*, 437 U.S. at 157. But, the Supreme Court never discussed
6 how these non-economic impacts factored into the balance of the
7 equities, perhaps because the impact of enjoining Tellico's
8 construction was to prevent benefits that would flow from the
9 construction of the dam. Here, by contrast, it is alleged that
10 imposition of the Fall X2 Action will affirmatively harm human
11 communities through the reduction of water supplies and by reducing
12 water supply security in future years. If such harms cannot be
13 considered in the balance in an ESA case, it is difficult to envision
14 how a resource-dependent plaintiff would ever obtain injunctive
15 relief in an ESA case.

16 33. Even if an injunction may not issue under the ESA based on
17 economic harm, there is no such restriction in a NEPA case. A court
18 may not issue an injunction under NEPA that would cause a violation
19 of other statutory requirements, such as those found in section 7 of
20 the ESA. See *United States v. Oakland Cannabis Buyers' Coop.*, 532
21 U.S. 483, 497 (2001) ("A district court cannot, for example, override
22 Congress' policy choice, articulated in a statute, as to what
23 behavior should be prohibited."). Nor should an injunction issue
24 under NEPA when enjoining government action would result in more harm
25 to the environment than denying injunctive relief. See *Save Our*
26 *Ecosystems v. Clarke*, 747 F.2d 1240, 1250 (9th Cir. 1984); *Am.*

1 *Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983)
2 (holding public interest does not favor granting an injunction where
3 "government action allegedly in violation of NEPA might actually
4 jeopardize natural resources"); *Alpine Lakes Prot. Soc'y v.*
5 *Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975) (denying injunctive
6 relief in NEPA case where more harm could occur to forest from
7 disease if injunction was granted). However, where the evidence
8 indicates that the ESA will not be violated by injunctive relief
9 issued under NEPA, the presence of a NEPA claim permits consideration
10 of economic harm evidence.
11

12
13 c. Showing of Irreparable Harm.

14 34. Although the showing of irreparable harm made here is
15 subject to uncertainty, it is not "speculative."

16 35. The CVP will likely not experience any water supply impact
17 as a result of the Fall X2 Action. However, it is more likely than
18 not that SWP Contractors will suffer some water supply impact in 2012
19 if the Fall X2 Action is implemented starting in September 2011.
20

21 36. Mr. Leahigh's most up-to-date estimates, which incorporate
22 recent conditions, indicate that any storage losses due to
23 implementation of the Fall X2 Action in 2011 will likely be
24 recovered. However, it is more likely than not that the SWP will
25 suffer a 300,000 AF export impact, as only in a wet year would this
26 impact be reduced or eliminated.
27

28 37. Even though 2011 has been a "really good water year," in

1 which much of the storage deficits caused by the 2007-2010 drought
2 have been made up, prudent water management calls for the storage of
3 water in good years to guard against future dry periods. SWP
4 Contractors fared relatively well, as compared to CVP Contractors,
5 during the last drought period, largely due to local surface and
6 groundwater storage reserves.
7

8 38. A 300,000 AF export impact would reduce SWP Contractors'
9 ability to put additional water into storage programs to prepare for
10 future dry years. SWP Contractors have sufficient storage available
11 to take advantage of any additional water that may be delivered if
12 the Fall X2 Action is modified or enjoined. Although the impact of
13 reduced deliveries resulting from the Fall X2 Action may be delayed,
14 this does not render them "speculative."
15

16 39. Although it is likely that San Luis Reservoir will fill
17 this year, which has the potential to cause SWP Contractors to lose
18 SWP Carryover storage held there, the record suggests that the SWP
19 Contractors will modify delivery schedules to minimize or eliminate
20 any such losses.
21

22 40. Metropolitan, the largest SWP Contractor, which serves
23 primarily domestic users in Southern California, holds approximately
24 half of the total SWP Table A entitlement. Because Metropolitan's
25 current storage levels are at historic levels, it is unlikely that
26 Metropolitan will be required to reduce deliveries to its member
27 agencies in 2012 as a result of any reduced exports in 2011 due to
28

1 the Fall X2 Action. However, it is undisputed that any reductions in
2 deliveries to Metropolitan will reduce its overall ability to store
3 water to prepare for future dry years. Reduced water supply
4 reliability for domestic uses in the service area of the largest SWP
5 Contractor is not a purely economic harm.

6
7 41. KCWA will likewise be impacted in its ability to store
8 water for future years. Due to cropping patterns (predominantly
9 permanent trees and vines) in KCWA service areas, a loss of a given
10 volume of water to KCWA is likely to result in an equal volume of
11 water being pumped from the KCWA portion of the San Joaquin Valley
12 Groundwater basin that otherwise would not be extracted.

13
14 42. In addition to affecting the SWP Contractors' ability to
15 store water for future dry periods, reduced exports resulting from
16 the Fall X2 Action will directly impact the environment by making it
17 more difficult for Contractors to recharge historically depleted
18 groundwater basins. This can have resulting impacts to groundwater
19 quality. As users draw down groundwater levels, this increases the
20 likelihood that they will have to rely on poor quality groundwater.
21 Increased groundwater pumping will also likely result in increased
22 energy use.

23
24 43. Evidence gathered during the recent drought period, ending
25 in 2010, suggests that water supply reductions have resulting
26 economic impacts to the agricultural industry, by reducing the
27 ability of farmers to access credit and provide employment. Reduced
28

1 employment has the potential to adversely impact agricultural
2 communities. However, the evidence does not clearly demonstrate the
3 extent to which implementation of the Fall X2 Action in 2011 will
4 cause such economic and sociological impacts in the foreseeable
5 future.

6
7 44. Modifying the Fall X2 Action will substantially decrease
8 the water supply impact of the action.

9 (a) Positioning X2 at kilometer 79, as opposed to kilometer 74,
10 would have a likely water supply impact of 90,000 AF, reducing
11 the impact by 210,000 AF in most water year types.

12 (b) Positioning X2 at kilometer 80, as compared to kilometer
13 74, would have a likely water supply impact of 80,000 AF,
14 reducing the impact by 220,000 AF in most water year types.

15
16 (2) Monetary Compensation Inadequate.

17 45. No party has addressed the issue of whether monetary
18 compensation could adequately compensate Plaintiffs for the harm they
19 may suffer as a result of the Fall X2 Action. It has never been
20 suggested that Federal Defendants could be subject to money damages
21 for any harm imposed by implementation of an action required by an
22 ESA biological opinion. *See, e.g., O'Neill v. United States*, 50 F.3d
23 677, 682-87 (9th Cir. 1995) (finding language in CVP water service
24 contracts absolves federal government of liability for reduced water
25 deliveries). There are no claims in this lawsuit that could even
26 arguably subject the State of California to monetary damages.
27
28

1 (3) Balancing of the Equities.

2 46. According to the recently-decided *Sierra Forest Legacy*, in
3 a post-judgment injunctive relief proceeding, a court is not bound by
4 the deferential standard applicable in APA cases:

5 Although the federal government is undoubtedly permitted to
6 follow its own experts when making a decision, federal
7 experts are not always entitled to deference outside of
8 administrative action....

9 ... It is reasonable that courts would defer to particular
10 experts when the government has unique expertise, in fields
11 such as national security or the internal functioning of
12 the military. However, *Winter* applied no such deference
13 concerning the possibility that sonar testing would
14 irreparably harm whales. *See id.* at 383-84. Ecology is not
15 a field within the unique expertise of the federal
16 government.

17 If the federal government's experts were always entitled to
18 deference concerning the equities of an injunction, relief
19 against federal government policies would be nearly
20 unattainable, as government experts will likely attest that
21 the public interest favors the federal government's
22 preferred policy, regardless of procedural failures.

23 --- F.3d ---, 2011 WL 2041149, *18-*19 (citations omitted).

24 47. Therefore, the Court must independently weigh the evidence
25 to determine whether, on balance, the record justifies imposing the
26 Fall X2 Action.

27 48. The smelt has been listed as a threatened species under the
28 ESA, and FWS has determined that uplisting to endangered status is
"warranted but precluded" by other, higher-priority listing
activities.

 49. Although abundance indices have shown slight improvements
since 2009, the species is still imperiled. Abundance indices are

1 still at or near historic lows. The species' overall situation is
2 not altered by the discovery in recent years of "new" populations of
3 delta smelt in the Cache Slough Complex.

4 50. Although smelt occupy a wide range of salinities, the
5 movement of the "centroid" (i.e., the center of the distribution) of
6 the delta smelt population is correlated with the movement of X2.
7 While the breadth (i.e., overall spread of the population from east
8 to west) of the distribution does not appear to change as X2 shifts,
9 X2 is a reliable proxy for the center of the smelt population.

10 51. The Fall X2 Action is designed to address a purported shift
11 to the east of the average location of X2, as well as a decrease in
12 the variability of the average position of X2. The BiOp concludes,
13 based on a review of data from 1967 forward, that these changes were
14 caused by project operations. Plaintiffs' argue that an analysis of
15 a broader set of data, starting in 1930, demonstrates that no
16 easterly shift has occurred and variability has in fact increased
17 over time. However, Defendants' alternative analyses of the longer
18 data set indicate that Plaintiffs' results are not dispositive.

19 52. The Fall X2 Action is also designed to redistribute the
20 centroid of the smelt population into Suisun Bay, a more biologically
21 productive and turbid area of the Delta in which smelt are likely to
22 have increased opportunities to feed, rear, and shelter.

23 53. To support moving X2 (and therefore the centroid of the
24 smelt population) to Suisun Bay, the BiOp, as well as subsequent
25
26
27
28

1 analyses issued by Federal Defendants, relies almost exclusively on
2 Mr. Feyrer's work to develop an abiotic habitat index, which
3 evaluates the availability of suitable abiotic habitat in various
4 locations of the Delta according to the position of X2. Based on
5 this work, the BiOp concluded that, as X2 shifts to the west, greater
6 areas of suitable habitat become available to the smelt.
7

8 54. This trend is depicted in Figure B-17, which shows an "s"
9 shaped curve, with two asymptotes at approximately 74 kilometers and
10 81 kilometers. These asymptotes represent the outer boundaries of
11 the part of the curve that changes most rapidly, suggesting that
12 gains and losses in habitat area occur less rapidly outside these
13 bounds. These bounds correspond to the Fall X2 Action's 74 km and 81
14 km requirements in wet and above normal years.
15

16 55. Mr. Feyrer and his co-authors found a statistically
17 significant correlation between the habitat index in the Fall and the
18 subsequent year's FMWT. Specifically, Feyrer (2011) found that the
19 habitat index variables of salinity and turbidity explain 25% of the
20 variation in delta smelt abundance.
21

22 56. These results are the subject of considerable, legitimate
23 criticism, on the following grounds: (1) the analysis used data from
24 the FMWT in both axes, thereby guaranteeing some form of statistical
25 significance; (2) the authors' failed to account for statistical
26 uncertainty throughout their analyses; and (3) the admitted
27 limitation of the analysis to abiotic factors only.
28

1 57. In addition, the recent discovery of relatively large smelt
2 populations outside the areas that were the primary focus of Feyrer's
3 work suggest that additional units of habitat may need to be added to
4 the "s" shaped curve depicted in Figure B-17. This may shift the
5 asymptotes of the curve slightly to the right, which could justify
6 different kilometer requirements for the Fall X2 Action.
7

8 58. The Feyrer (2011) analysis of the relationship between the
9 habitat index and abundance, as well as its precursor Feyrer (2007),
10 did not utilize life cycle modeling, a methodologically superior way
11 to quantitatively measure the impact of one environmental variable on
12 a species population growth. The Feyrer (2008) manuscript employed a
13 life cycle model to evaluate whether the habitat index was correlated
14 with abundance, and concluded that the fall habitat index had a
15 statistically significant impact on subsequent smelt abundance. This
16 life cycle model was omitted from the published version of that
17 manuscript, which became Feyrer (2011).
18

19 59. Plaintiffs presented the results of three subsequent life
20 cycle modeling efforts. Although all three life cycle models
21 employed different methods and data sets, all concluded that the
22 position of X2 in the fall was not related to subsequent delta smelt
23 abundance. All found different combinations of other factors drove
24 abundance the following year. For example, the Maunder & Deriso
25 model concluded that food abundance in spring, spring water
26 temperature, and fall predation are important factors.
27
28

1 60. While each model, and in particular the Maunder & Deriso
2 model that was the focus of Plaintiffs' presentation, have
3 weaknesses, the overall trend in this research cannot be ignored.
4 These three recent statistical approaches do not demonstrate a link
5 between the position of X2 and delta smelt population growth.
6

7 61. The results of the three recent life cycle models find some
8 corroboration in the work of Dr. Hanson, who found no relationship
9 between Fall X2 and delta smelt survival in the fall, reproductive
10 success the following year, or food availability.

11 62. Overall, the record reveals no support for a direct link
12 between X2 and smelt abundance. There is some support for the BiOp's
13 conclusion that the habitat index is correlated with smelt abundance,
14 but the overall value of this finding is undermined by, among other
15 things, the fact that it considers only abiotic habitat factors.
16

17 63. The record also reveals almost no biological support for
18 the use of the 74 km and 81 km markers for the Fall X2 Action. While
19 those locations correspond with existing monitoring stations, this is
20 not biological support for requiring X2 to be positioned at these
21 locations.
22

23 64. The locations also correspond with the asymptotes of the
24 curve depicted in Figure B-17, suggesting that 74 km is the western
25 edge beyond which the increase in habitat surface area begins to
26 slow. This is not a reasonable biological justification for
27 positioning X2 at 74 km either.
28

1 (a) First, while this curve generally reflects the
2 geography of the delta and the fact that more habitat (measured by
3 surface area) is available to the smelt as X2 moves westward, the
4 exact position of the curve may need to be revised to account for
5 additional habitat that appears to exist in the Cache Slough Complex.
6 Moving the curve will change the location of the asymptotes.
7

8 (b) Second, Defendants do not explain why it is important
9 to push X2 to the asymptote. Pushing it beyond 74 km may not achieve
10 much, but this does not justify 74 km per se, as opposed to 75 km or
11 76 km. These are not just academic debates. The record indicates
12 that every kilometer that X2 must be pushed to the west requires
13 substantial amounts of water.
14

15 65. Finally, Defendants' suggestion that a 74 km requirement is
16 justified because that represents the average of where X2 was located
17 historically in wet years is not persuasive. The lack of a
18 correlation between the position of X2 and the species' abundance
19 suggests that other factors, besides the location of X2 are
20 controlling the species' abundance today. Particularly in the
21 absence of NEPA compliance, the costs of returning habitat to pre-
22 Project conditions must be considered.¹⁷
23

24
25 ¹⁷ The ESA contains independent requirements that FWS evaluate whether Project
26 operations are likely to (1) jeopardize the continued existence and recovery of the
27 species and/or (2) adversely modify the species critical habitat. The adverse
28 modification threshold is exceeded when the proposed action adversely affects the
critical habitat's PCEs, or their management, in a manner likely to appreciably
diminish or preclude the role of the designated critical habitat in the
conservation of the species. Defendants argue that the Fall X2 Action should be
upheld because it independently addresses adverse modification of critical habitat.

1 66. There is some record support, however, for not permitting
2 X2 to shift east of the confluence of the Sacramento San Joaquin
3 Rivers. It is undisputed that because of the geography of the
4 estuary, if X2 is located upstream of the confluence, the habitat
5 index decreases dramatically. The National Research Council's report
6 reviewing the BiOp's RPA reported that the lowest smelt abundances
7 all occurred when the habitat-area index was less than 6,000
8 hectares, which could mean that, while it is not the only cause of
9 smelt population collapses, "reduced habitat area is a necessary
10 condition for the worst population collapses." Ex. 12 at 53. Mr.
11 Feyrer suggests that 80 km is a reasonable demarcation line above
12 which the habitat is "a lot smaller." 7-29-11 Tr. at 125:23-126:9.

13
14
15 67. While the evidence for imposing any form of X2 control this
16 fall is not strong, the imperiled status of the species cautions
17 against entirely abandoning the Fall X2 Action.

18 68. In addition, the balance of the harms shifts dramatically
19 if the Fall X2 Action is modified. As discussed above:

20 (a) Positioning X2 at kilometer 79, as opposed to kilometer 74,
21 would have a likely water supply impact of 90,000 AF, reducing
22 the impact by 210,000 AF in most water year types.

23 (b) Positioning X2 at kilometer 80, as compared to kilometer
24 74, would have a likely water supply impact of 80,000 AF,
25 reducing the impact by 220,000 AF in most water year types.
26

27 But, the BiOp provides no independent critical habitat justification for requiring
28 X2 to be maintained at 74 km in wet years.

1 (4) Public Interest.

2 69. It is undeniable that "that CVP water not pumped for
3 diversion to the San Luis Unit flows through the Delta and out to the
4 ocean." *San Luis & Delta-Mendota Water Auth. v. Locke*, 2010 W.L.
5 500455, *8 (E.D. Cal. Feb. 5, 2010). Preservation of such water for
6 beneficial use "is in the public interest, and protection of human
7 health, safety and the affected communities also serves the public
8 interest." *Id.*

9
10 70. The public interest is also implicated in this case because
11 the actions sought to be enjoined are ones that are taken by the
12 United States government in its responsibility to implement and to
13 enforce the ESA and NEPA, both of which are public interest statutes
14

15 VII. CONCLUSION

16 1. Plaintiffs have succeeded on the merits of their NEPA
17 claim.

18 (a) NEPA requires that the responsible agency take a hard
19 look at the environmental consequences of its actions, *Robertson v.*
20 *Methow Valley Citizen's Counsel*, 490 U.S. 332, 350 (1989), obligating
21 federal agencies to prepare an environmental impact statement ("EIS")
22 for all "major federal actions significantly affecting the quality of
23 the human environment." 42 U.S.C. § 4332(2)(C). This has not been
24 done.
25

26 (b) Federal Defendants are required to evaluate the impact
27 of the coordinated operations of the CVP and SWP, which constitutes
28

1 major federal action. The evidence establishes significant
2 detrimental effects visited on the quality of the human environment
3 by implementation of the BiOp's RPA Actions, which impose substantial
4 restrictions on the water supply to California, solely to protect the
5 delta smelt.

6
7 (c) Where required, an EIS is intended to disclose
8 environmental effects of a proposed action and consider alternative
9 courses of action. *Id.* Here, by erroneously by-passing NEPA,
10 Federal Defendants completely abdicated their responsibility to
11 consider reasonable alternatives to the Fall X2 Action that would not
12 only protect the species, but would also minimize the adverse impact
13 on humans and the human environment. The result is the issuance and
14 implementation of a one-sided, single purpose RPA that inflicts
15 drastic consequences on California water users, a situation NEPA
16 prohibits.
17

18 2. Plaintiffs have also succeeded in part on the merits of
19 their ESA challenge to the Fall X2 Action. This required de novo
20 review of the available evidence to determine if equity permits
21 injunctive relief:

22 (a) Plaintiffs have established the likelihood of
23 irreparable harm. Imposition of the Fall X2 Action as it is
24 currently planned will likely cause a negative 300,000 AF water
25 supply impact to SWP contractors. This will impact long-term water
26 supply reliability for both domestic and agricultural users. There
27
28

1 will be further impacts to groundwater recharge programs, with
2 resulting direct environmental impacts to groundwater levels,
3 groundwater quality, and energy use. Water supply reductions will
4 cause economic impacts to farmers and may have socioeconomic impacts
5 on agricultural communities, although the magnitude of any such
6 economic and/or socioeconomic impacts given the "very good" water
7 year in 2011 is unclear.
8

9 (b) The scientific evidence in support of imposing any Fall
10 X2 action is manifestly equivocal. There is essentially no
11 biological evidence to support the necessity of the specific 74 km
12 requirement set to be triggered in this "wet" water year. The
13 agencies still "don't get it." They continue to believe their "right
14 to be mistaken" excuses precise and competent scientific analysis for
15 actions they know will wreak havoc on California's water supply.
16

17 (c) In balancing hardships, the record arguably supports a
18 requirement that X2 not be allowed to shift east of the confluence of
19 the Sacramento San Joaquin Rivers. Positioning X2 at 80 km or 79 km
20 accomplishes this goal. It also serves the population data
21 collection objective of the Action's adaptive management plan. The
22 competing balance is the continuing imperiled status of the protected
23 species, which counsels against doing nothing at all.
24

25 (d) Limiting the Fall X2 Action will significantly reduce
26 the water supply impact. Positioning X2 at kilometer 79 will have a
27 probable water supply impact of 90,000 AF, reducing the impact by
28

1 210,000 AF. Positioning X2 at kilometer 80 would equate to a
2 probable water supply impact of 80,000 AF, reducing the impact by
3 220,000 AF in most water year types.

4 (e) Balancing the imperiled status of the species, the
5 equivocal and highly disputed support for the X2 action, and the even
6 weaker and unjustified support for positioning X2 at 74 km, against
7 the substantial and damaging water supply impact of doing so,
8 limiting the X2 position to 80 km or 79 km achieves equity. Between
9 these two targets, assuming the truth of Federal Defendants'
10 scientific theories, positioning X2 at 79 km will provide substantial
11 additional protection above and beyond an 80 km X2 for a relatively
12 insignificant additional water cost of 10,000 AF. This is only 5 km
13 further upstream than the BiOp's wet year requirements, yet imposes a
14 far less draconian water supply cost.

15
16
17 The BiOp's Fall X2 Action shall be enjoined to prevent
18 implementation of the 74 km X2 target. No Fall X2 action setting the
19 X2 target west of 79 km shall be implemented. All other requirements
20 of the Action, including the timing of the Action and the mechanisms
21 for its measurement, shall remain unchanged.

22
23 Plaintiffs shall submit a form of injunction consistent with
24 these findings of fact and conclusions of law within five days
25 following electronic service.

26 SO ORDERED

27 Dated: August 31, 2011

28 /s/ Oliver W. Wanger
United States District Judge