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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DELTA SMELT CONSOLIDATED CASES	1:09-CV-00407 OWW DLB
FAMILY FARM ALLIANCE,	1:09-CV-01201 OWW DLB
Plaintiff,	ORDER TO SHOW CAUSE RE
v.	CONSOLIDATION
KENNETH LEE SALAZAR	
Defendant.	

In the course of reviewing the pending motion to compel in *Family Farm Alliance v. Salazar*, 1:09-cv-01201 OWW DLB, set for hearing on December 14, 2009, it is apparent that most of the claims in *Family Farm Alliance*, brought under the Information Quality Act ("IQA") and the Endangered Species Act ("ESA"), substantially overlap with claims challenging the 2008 Biological Opinion ("BiOp") in the *Delta Smelt Consolidated Cases*. The first claim for relief in *Family Farm Alliance* alleges:

The 2008 Biological Opinion failed to use the "best available scientific and commercial data available" as required by the IQA, IQA Guidelines and Section 7 of the ESA in at least the following ways: By failing to conduct an objective analysis and premising the findings on assumptions; excluding and dismissing

1 other, data supported analyses of the decline of the
2 delta smelt, the results of which indicate that major
3 adverse effects on the population dynamics of delta
4 smelt are caused by factors other than the operations
5 of the CVP and SWP; arbitrarily selecting the data
6 relied upon and disregarding relevant data without
7 explanation, including analyses and comments provided
8 by a peer review panel; basing the analyses on data
9 that was incorrect, incomplete, or otherwise of poor
10 quality, including analyses that were not statistically
11 defensible, that suffered from invalid assumptions,
12 improper transformation of data, and/or which may have
13 relied upon selective or improper use or manipulation
14 of data points; failing to disclose all the data,
15 analyses, or reports relied upon, and relying on key
16 reports, data, and analyses that were and continue to
17 be unavailable for review; and failing to critically
18 analyze and assess the quality (e.g., accuracy,
19 objectivity, reproducibility, and robustness) of the
20 data and reports relied upon in the 2008 Biological
21 Opinion.

22 *Family Farm Alliance*, 1:09-cv-1201 OWW DLB, Complaint ("FFAC"),
23 Doc. 1 at ¶44.

24 The first cause of action in *San Luis & Delta-Mendota Water*
25 *Authority et al. v. Salazar et al.*, 1:09-cv-407 OWW DLB, alleges:

26 In fulfilling [the] requirements [of the ESA],
27 Section 7 mandates that "each agency shall use the best
28 scientific and commercial data available." 16 U.S.C. §
1536(a)(2). Section 7's mandate to use the "best
scientific and commercial data available" applies to
FWS Defendants' preparation and issuance of the 2008
Biological Opinion.

San Luis First Amended Complaint ("SLFAC"), Doc. 292, at ¶53.

The SLFAC refers to various information quality standards,
including those promulgated under the IQA, to define the best
available science standard. *See id.* ¶¶ 54-69; *see also id.* ¶¶
70-72 (similar allegations regarding FWS's Scientific Code of

1 Cnduct). The SLFAC's substantive allegations also overlap with
2 those in the FFAC:

3 73. FWS Defendants promulgated the 2008 Biological
4 Opinion in a manner that is arbitrary, capricious and
5 not in accordance with law, in excess of their
6 statutory jurisdiction and authority, and in violation
7 of the APA, because FWS Defendants failed to base their
8 decisions on the best scientific and commercial data
9 available, and failed to follow the applicable FWS
10 Information Standards Policy, DOI Information Quality
11 Guidelines, FWS Information Quality Guidelines, and FWS
12 Scientific Code of Conduct.

13 74. The FWS Defendants failed to comply with the
14 foregoing standards in the 2008 Biological Opinion. The
15 2008 Biological Opinion, including but not limited to
16 the effects analysis, jeopardy and adverse modification
17 determinations, reasonable and prudent measures, and
18 incidental take statement, violated Section 7's "best
19 scientific and commercial data available" mandate and
20 the policies and guidelines interpreting this mandate
21 in at least the following ways:

22 (a) FWS Defendants did not conduct an objective
23 analysis but instead displayed a pervasive bias
24 against the CVP and SWP, which caused Defendants
25 to exclude and dismiss credible analyses whose
26 results indicate that major adverse effects on the
27 population dynamics of delta smelt are caused by
28 factors other than the operations of the CVP and
SWP, and involve relationships and factors other
than those highlighted in the 2008 Biological
Opinion;

(b) FWS Defendants arbitrarily selected the data
they did rely upon and disregarded relevant data
without explanation, including analyses and
comments provided by a peer review panel and by
the Authority and State Water Contractors
submitted to FWS Defendants before promulgation of
the final 2008 Biological Opinion;

(c) FWS Defendants based their analyses on data
that was incorrect, incomplete, or otherwise of
poor quality, including analyses that were not
statistically significant and that suffered from

1 invalid assumptions, improper transformation of
2 data, and improper exclusion of valid data points;

3 (d) FWS Defendants reached conclusions that are
4 internally inconsistent, including relying upon
5 particular reports and analyses as sufficient to
6 support certain conclusions and assumptions in the
7 2008 Biological Opinion, but ignoring or
8 discounting other findings in those same reports
9 and analyses that refute or cast doubt upon the
10 conclusions and assumptions the FWS Defendants
11 relied upon in the 2008 Biological Opinion;

12 (e) FWS Defendants failed to disclose all the
13 data, analyses, or reports that they relied upon,
14 and relied on key reports and analyses that were
15 and are unavailable for review;

16 (f) FWS Defendants failed to critically analyze
17 and assess the quality (e.g., accuracy,
18 objectivity, reproducibility, and robustness) of
19 the data and reports they relied upon;

20 (g) FWS Defendants relied on speculative and
21 conclusory determinations without providing any
22 foundation linking such determinations to actual
23 data or analyses;

24 (h) FWS Defendants failed to properly identify and
25 discuss the numerous assumptions upon which they
26 based their calculations and determinations, and
27 failed to consider or discuss alternative
28 assumptions that are equally valid and
supportable;

(i) FWS Defendants failed to identify and discuss
the risk to the quality and accuracy of the 2008
Biological Opinion as a result of their use of one
or more unsubstantiated assumptions to reach
certain conclusions or make certain calculations;

(j) FWS Defendants failed to discuss and address
numerous research results and data that conflict
with and cast doubt upon the assumptions made, the
reports relied upon, and the ultimate
determinations made in the 2008 Biological Opinion
regarding the major driving factors in delta smelt
population dynamics;

1
2 (k) FWS Defendants failed to disclose numerous
3 research results and data known to them indicating
4 that other factors, not the operations of the CVP
and SWP, are the major causes of population-level
effects to delta smelt;

5 (l) FWS Defendants improperly relied upon loose
6 correlations between certain factors and delta
7 smelt population abundance while at the same time
8 ignoring much stronger linear and multiple-factor
correlations between other factors and delta smelt
population abundance; and

9 (m) FWS Defendants ignored or failed to respond to
10 comments critiquing and questioning the analyses,
11 conclusions, and recommendations in the 2008
Biological Opinion.

12 SLFAC ¶¶ 73-74.

13 *Family Farm Alliance* requests remedial relief:

14 [1] [A] judicial declaration that the 2008 Biological
15 Opinion is arbitrary, capricious, an abuse of
16 discretion, or otherwise not in accordance with law;
17 that the best available scientific data standard and
18 adherence to the mandates of the IQA and ESA require
19 withdrawal of the 2008 Biological Opinion from the
20 public domain and remand to the Defendants for the
21 preparation and issuance of a new biological opinion in
22 a manner based upon the best available scientific data,
23 consistent with the statutory and regulatory
24 requirements of the ESA and the IQA and its
25 implementing Guidelines and Final Bulletin....

26 2. [T]emporary, preliminary and permanent injunctive
27 relief directing the Defendants to continue the
28 operations of the CVP and SWP consistent with the
Court's findings and determinations,
including relief from the pumping restrictions and
other aspects of the reasonable and prudent
alternatives in the 2008 Biological Opinion, pending
the issuance of a corrected biological opinion;

13 *Family Farm Alliance* Prayer for Relief, Doc. 1 at 18. Likewise,
the SLFAC requests:

1 [1] [A] judicial declaration that the 2008 Biological
2 Opinion, and the acceptance and implementation thereof,
3 is arbitrary, capricious, and abuse of discretion, not
4 in accordance with law, and is in excess of statutory
5 jurisdiction, authority or limitations;

6 2. [A]n order remanding the 2008 Biological Opinion to
7 the FWS Defendants without vacatur so that the FWS
8 Defendants may reconsider it based on the Court's
9 findings and rulings, and for preparation of a new
10 biological opinion in a manner consistent with the ESA,
11 NEPA, and other requirements of law;

12 3. [T]emporary, preliminary and permanent injunctive
13 relief directed to the FWS Defendants and Reclamation
14 Defendants to continue CVP operations consistent with
15 the Court's findings and rulings, including relief from
16 the pumping restrictions and other aspects of the
17 reasonable and prudent alternative in the 2008
18 Biological Opinion, pending completion of a new
19 consultation and biological opinion;

20 SLFAC Prayer for Relief, Doc. 292 at 40.

21 *Family Farm Alliance* does raise one unique issue, namely,
22 the Federal Defendants' alleged failure to respond to Plaintiff's
23 IQA appeal within the requisite 60-day window. In all other
24 respects, however, the factual and legal issues raised by *Family*
25 *Farm Alliance* are substantially equivalent to the best available
26 science claims advanced in the other *Delta Smelt Consolidated*
27 *Cases*, raising the prospect that separate adjudication may not
28 serve the interests of judicial economy and efficiency and may
produce inconsistent judgments.

The parties shall show cause in writing on or before
December 18, 2009, why *Family Farm Alliance* should not be
consolidated for some or all purposes with the *Delta Smelt*

1 *Consolidated Cases.* Any responses shall be filed by December 29,
2 2009. A telephonic hearing will be held on January 11, 2010 at
3 11:15 a.m. in Courtroom 3.
4

5 SO ORDERED

6 Dated: December 3, 2009

7 /s/ Oliver W. Wanger
8 Oliver W. Wanger
9 United States District Judge
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