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4 UNITED STATES DISTRICT COURT
5 FOR THE EASTERN DISTRICT OF CALIFORNIA
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7 DELTA SMELT CONSOLIDATED CASES	1:09-CV-407 OWW DLB
8 SAN LUIS & DELTA-MENDOTA WATER 9 AUTHORITY, <i>et al.</i> v. SALAZAR, 10 <i>et al.</i>	MEMORANDUM DECISION DENYING WITHOUT PREJUDICE RENEWED APPLICATION FOR TEMPORARY RESTRAINING ORDER (DOC. 562)
11 STATE WATER CONTRACTORS v. SALAZAR, <i>et al.</i>	
12 COALITION FOR A SUSTAINABLE 13 DELTA, <i>et al.</i> v. UNITED STATES FISH AND WILDLIFE SERVICE, <i>et</i> 14 <i>al.</i>	
15 METROPOLITAN WATER DISTRICT v. UNITED STATES FISH AND WILDLIFE 16 SERVICE, <i>et al.</i>	
17 STEWART & JASPER ORCHARDS <i>et</i> 18 <i>al.</i> v. UNITED STATES FISH AND WILDLIFE SERVICE.	

19 I. INTRODUCTION

20 Plaintiffs, San Luis & Delta Mendota Water Authority (the
21 "Authority") and Westlands Water District ("Westlands"), move for
22 a Temporary Restraining Order ("TRO") against the implementation
23 of Reasonable and Prudent Alternative ("RPA") Component 1, Action
24 2 set forth in the United States Fish and Wildlife Service's
25 ("FWS") December 15, 2008 Biological Opinion, which addresses the
26 impacts of the coordinated operations of the federal Central
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1 Valley Project ("CVP") and State Water Project ("SWP") on the
2 threatened delta smelt (*Hypomesus transpacificus*) ("2008 Smelt
3 BiOp"). Doc. 562, filed Feb. 9, 2010.

4 Plaintiffs State Water Contractors; Metropolitan Water
5 District of Southern California; Kern County Water Agency and
6 Coalition for a Sustainable; Stewart & Jasper Orchards, et al.;
7 and Family Farm Alliance joined the TRO motion. Docs. 571-75.
8 Intervenor California Department of Water Resources ("DWR"), the
9 operator of the SWP, filed a statement of non-opposition. Doc.
10 570.
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12 The motion came on for hearing, on shortened notice, on
13 February 2, 2010. The parties were represented by counsel, as
14 noted in the record.
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16 II. BACKGROUND

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

3 Component 1 (Protection of the Adult Delta Smelt Life Stage)
4 consists of two Actions related to Old and Middle River ("OMR")
5 flows. Action 1, which is designed to protect upmigrating delta
6 smelt, is triggered during low and high entrainment risk periods
7 based on physical and biological monitoring. Action 1 requires
8 OMR flows to be no more negative than -2,000 cubic feet per
9 second ("cfs") on a 14-day average and no more negative than -
10 2,500 cfs for a 5-day running average. *Id. at* 281, 329.

12 At issue in this case is Action 2 of Component 1, which is
13 designed to protect adult delta smelt that have migrated upstream
14 and are residing in the Delta prior to spawning. Action 2 is
15 triggered immediately after Action 1 ends or if recommended by
16 the Smelt Working Group ("SWG"). Flows under Action 2 can be set
17 within a range from -5000 to -1250 cfs, depending on a complex
18 set of biological and environmental parameters. *Id. at* 281-282,
19 352-56.

21 Component 2 (Protection of Larval and Juvenile Delta Smelt),
22 requires OMR flows to remain between -1,250 and -5,000 cfs
23 beginning when Component 1 is completed, when Delta water
24 temperatures reach 12° Celsius, or when a spent female smelt is
25 detected in trawls or at salvage facilities. *Id. at* 282, 357-
26 358. Component 2 remains in place until June 30 or when the
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1 Clifton Court Forebay water temperature reaches 25° Celsius. *Id.*
2 *at* 282, 368.

3 Component 3 (Improve Habitat for Delta Smelt Growth and
4 Rearing) requires sufficient Delta outflow to maintain average
5 mixing point locations of Delta outflow and estuarine water
6 inflow ("X2") from September to December, depending on water year
7 type, in accordance with a specifically described "adaptive
8 management process" overseen by FWS. *Id. at* 282-283, 369.

10 Under Component 4 (Habitat Restoration), DWR is to create or
11 restore 8,000 acres of intertidal and subtidal habitat in the
12 Delta and Suisun Marsh within 10 years. *Id. at* 283-284, 379.

13 Under Component 5 (Monitoring and Reporting), the Projects
14 gather and report information to ensure proper implementation of
15 the RPA actions, achievement of physical results, and evaluation
16 of the effectiveness of the actions on the targeted life stages
17 of delta smelt, so that the actions can be refined, if needed.
18 *Id. at* 284-285, 328, 375, 37.

20 On February 8, 2010, Federal Defendants gave Plaintiffs 48
21 hours notice, required by the Court, that they planned to
22 implement Component 1, Action 2 as of 5:00PM February 10, 2010.¹
23 The SWG recommended that protective measures were necessary in
24 part because, since February 3, a total of 5 delta smelt had been
25 salvaged at the pumps. *See* Doc. 579-3, Smelt Working Group

27 ¹ At the February 10, 2010 hearing, Federal Defendants indicated that
28 Component 1, Action 2 would not be implemented until 7:00 AM on February 11,
2010.

1 Notes, Feb. 8, 2010. (Because the salvage facility only operates
2 for a portion of the day, observed salvage figures are routinely
3 multiplied by four, to achieve an "expanded salvage" number of
4 20.) As of the hearing on this motion, the cumulative expanded
5 salvage for the year stood 24 (or 6 fish). *Id.*

6
7 The total allowable take for the entire water year is 123,
8 meaning that salvage has already reached 20% of the take limit
9 for this year. Although the majority of the SWG recommended that
10 OMR flows be set at -2000 cfs to accommodate water contractors,
11 FWS determined that an adaptive approach could be implemented,
12 pursuant to which OMR flows would initially be limited to no more
13 negative than -4000 cfs. If observed salvage exceeds 1 smelt per
14 day (for an expanded take of 4), flows will be further decreased
15 by 1000 cfs, a process that is to continue until salvage is
16 reduced to no more than 1 smelt per day, flows average no more
17 negative than -1250 cfs, or the SWG makes a revised
18 recommendation. *See* Doc. 579-3, FWS Determination of Actions
19 Required Under Component 1 of the 2008 OCAP Biological Opinion,
20 Feb. 8, 2010.
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23 III. SUMMARY OF PLAINTIFFS' MOTION

24 Plaintiffs seek temporary injunctive relief on the grounds
25 that:

- 26 (1) the district court has already found that the United
27 States Bureau of Reclamation ("Reclamation") failed to
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1 comply with the National Environmental Policy Act ("NEPA")
2 in implementing the 2008 Smelt BiOp RPAs; and.

3 (2) the 2008 Smelt BiOp violates the ESA and is arbitrary,
4 capricious, and contrary to law because:

5 (a) FWS has failed to show that limiting entrainment is
6 necessary to avoid jeopardy, because, among other
7 things, the best available science does not demonstrate
8 a statistically significant connection between
9 entrainment and smelt abundance from year to year, and
10 the smelt are not present in sufficient numbers at or
11 near the pumps to expose them to jeopardy; and

12 (b) the severe OMR flow restrictions in RPA Action 2
13 are unsupported by the data in the 2008 Smelt BiOp.
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16 Plaintiffs further claim that the implementation of
17 Component 1, Action 2 will cause them continuing irreparable harm
18 and that the public interest and balance of hardships favor
19 injunctive relief.
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21 IV. STANDARDS OF DECISION

22 A. Temporary Restraining Order.

23 Injunctive relief, whether temporary or permanent, is an
24 "extraordinary remedy, never awarded as of right." *Winter v.*
25 *Natural Resources Defense Council*, 129 S. Ct. 365, 376 (2008);
26 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The
27 standard for relief applicable to a temporary restraining order
28

1 is the same as for a preliminary injunction. *Stuhlbarg Int'l*
2 *Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7
3 (9th Cir. 2001).

4 Four factors must be established by a preponderance of the
5 evidence to qualify for temporary injunctive relief:

- 6 1. Likelihood of success on the merits;
- 7 2. Likelihood the moving party will suffer irreparable
8 harm absent injunctive relief;
- 9 3. The balance of equities tips in the moving parties'
10 favor; and
- 11 4. An injunction is in the public interest.

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13 *Winter*, 129 S.Ct. at 374; *Am. Trucking Ass'n v. City of Los*
14 *Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

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16 B. Balancing of the Harms in ESA Cases.

17 The Supreme Court held in *TVA v. Hill*, 437 U.S. 153, 194
18 (1978), that Congress struck the balance in favor of affording
19 endangered species the highest of priorities. In adopting the
20 Endangered Species Act ("ESA"), Congress intended to "halt and
21 reverse the trend toward species' extinction, whatever the cost."
22 *Id.* at 184 (emphasis added). *TVA v. Hill* continues to be viable.
23 *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551
24 U.S. 664, 669-71 (2007); *see also United States v. Oakland*
25 *Cannabis Buyers' Co-op.*, 532 U.S. 483, 496-97 (2001); *Amoco Prod.*
26 *Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987).
27
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1 *Winter* does not modify or discuss the *TVA v. Hill* standard.²
2 Although *Winter* altered the Ninth Circuit's general preliminary
3 injunctive relief standard by making that standard more rigorous,
4 *Winter* did not address, let alone change, the Circuit's approach
5 to the balancing of hardships where endangered species and their
6 critical habitat are jeopardized. See *Biodiversity Legal Found.*
7 *v. Badgley*, 309 F.3d 1166, 1169 (9th Cir. 2002) (Congress removed
8 the courts' traditional equitable discretion to balance parties'
9 competing interests in ESA injunction proceedings); *Nat'l*
10 *Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510-11
11 (9th Cir. 1994)(same).

12
13 Two post-*Winter* district court cases declined to balance the
14 equities in evaluating requests for injunctive relief under the
15 ESA, applying *TVA v. Hill's* reasoning. *Oregon Natural Desert*
16 *Ass'n v. Kimbell*, 2009 WL 1663037, at *1 (D. Or. June 15, 2009);
17 *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 105-106 (D.
18 Me. 2008).

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21 ² Although *Winter* involved ESA-listed species, the *Winter* decision did
22 not address any ESA claims. The Stewart & Jasper, et al., Plaintiffs
23 ("Stewart & Jasper") cite *Center for Biological Diversity v. U.S. Forest*
24 *Service*, 2010 WL 334548 (D. Ariz. Jan. 22, 2010), as an example of an ESA case
25 in which *Winter* was applied. That decision cited *Winter* for the general
26 preliminary injunction standard, but did not discuss the Supreme Court and
27 Ninth Circuit authority prohibiting the balancing of harms in ESA cases,
28 perhaps because plaintiffs in that case entirely failed to demonstrate
likelihood of success on their ESA claims. See *id.* at *1 (the court had
"already determined that defendants fully complied with their obligations
under the ESA...."). Stewart & Jasper also cites *Independent Living Center of*
Southern California, Inc. v. Maxwell-Jolly, 572 F.3d 644, 658 (9th Cir. 2009),
which applied *Winter* to a Social Security Act claim. Stewart & Jasper are
correct that *Winter* is not a NEPA-only case. *Winter* has had broad effect on
the application of the injunctive relief standard in non-ESA cases this
Circuit. However, *Jolly* says nothing about whether *Winter* modifies the
parallel line of authority precluding balancing in ESA cases.

1 *TVA v. Hill* and related Ninth Circuit authorities foreclose
2 the district court's traditional discretion to balance equities
3 under the ESA. There is no such bar in NEPA injunction
4 proceedings.

5
6 C. Administrative Procedure Act.

7 The Administrative Procedure Act ("APA") requires Plaintiffs
8 to show that NMFS's action was "arbitrary, capricious, an abuse
9 of discretion, or otherwise not in accordance with law." 5
10 U.S.C. § 706(2)(A).

11
12 1. Deference to Agency Expertise.

13 The Court must defer to the agency on matters within the
14 agency's expertise, unless the agency completely failed to
15 address some factor, consideration of which was essential to
16 making an informed decision. *Nat'l Wildlife Fed'n v. NMFS*, 422
17 F.3d 782, 798 (9th Cir. 2005). The court "may not substitute its
18 judgment for that of the agency concerning the wisdom or prudence
19 of the agency's action." *River Runners for Wilderness v. Martin*,
20 --- F.3d ---, 2010 WL 337337 *4 (9th Cir. June 10, 2009).

21
22 In conducting an APA review, the court must determine
23 whether the agency's decision is "founded on a rational
24 connection between the facts found and the choices made
25 ... and whether [the agency] has committed a clear
26 error of judgment." *Ariz. Cattle Growers' Ass'n v.*
27 *U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir.
28 2001). "The [agency's] action ... need be only a
reasonable, not the best or most reasonable, decision."
Nat'l Wildlife Fed. v. Burford, 871 F.2d 849, 855 (9th
Cir. 1989).

Id.

1 2. Record Review.

2 A court reviews a biological opinion "based upon the
3 evidence contained in the administrative record." *Arizona Cattle*
4 *Growers' Ass'n*, 273 F.3d at 1245. Judicial review under the APA
5 must focus on the administrative record already in existence, not
6 some new record made initially in a reviewing court. Parties may
7 not use "post-decision information as a new rationalization
8 either for sustaining or attacking the agency's decision." *Ass'n*
9 *of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980).

11 Exceptions to administrative record review for technical
12 information or expert explanation make such evidence admissible
13 only for limited purposes, and those exceptions are narrowly
14 construed and applied. *Lands Council v. Powell*, 395 F.3d 1019,
15 1030 (9th Cir. 2005). "Although [any] factual inquiry is to be
16 'searching and careful' the ultimate standard of review is
17 narrow. The court is not empowered to substitute its judgment
18 for that of the agency." *Asarco, Inc. v. EPA*, 616 F.2d 1153,
19 1159 (9th Cir. 1980). Federal Courts cannot routinely or
20 liberally admit new evidence in an APA review case, because
21 "[w]hen a reviewing court considers evidence that was not before
22 the agency, it inevitably leads the reviewing court to substitute
23 its judgment for that of the agency." *Id.* at 1160.

26 3. Best Available Science.

27 What constitutes the "best" available science implicates
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1 core agency judgment and expertise to which Congress requires the
2 courts to defer; a court should be especially wary of overturning
3 such a determination on review. *Baltimore Gas & Elec. Co. v.*
4 *Nat'l Res. Defense Council*, 462 U.S. 87, 103 (1983) (a court must
5 be "at its most deferential" when an agency is "making
6 predictions within its area of special expertise, at the
7 frontiers of science"). An agency has wide discretion to
8 determine the best scientific and commercial data available for
9 its decision-making. *See S.W. Ctr. for Biological Diversity v.*
10 *U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n.5 (9th Cir.
11 1998). A decision about jeopardy must be made based on the best
12 science available at the time of the decision; the agency cannot
13 wait for or promise future studies. *See Ctr. for Biological*
14 *Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1156 (D. Ariz.
15 2002).

18 V. ANALYSIS

19 A. Likelihood of Success on the Merits.

20 1. NEPA Claim.

21 It has already been decided in this case that Reclamation,
22 as the action agency, violated NEPA by failing to follow the
23 prescriptions and requirements of NEPA in connection with the
24 implementation of the RPAs prescribed by the 2008 Delta Smelt
25 BiOp. *See* Doc. 399 ("Delta Smelt NEPA Decision").

26 The United States' failure to comply with NEPA has, at a
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1 minimum, prevented a thorough evaluation, analysis, "hard look
2 at," and disclosure of the costs of implementing the 2008 Smelt
3 BiOp RPAs to human health and safety, the human environment, and
4 other environments not inhabited by the smelt, all of which would
5 have fostered development of the least damaging RPAs in light of
6 catastrophic harm being inflicted on agricultural, municipal, and
7 domestic water users.
8

9 However, the authority of the court to issue an injunction
10 against implementation of the 2008 Smelt BiOp based on a NEPA
11 violation is limited, as injunctive relief is precluded where
12 "enjoining government action allegedly in violation of NEPA might
13 actually jeopardize natural resources." *Save Our Ecosystems*, 747
14 F.2d 1240, 1250 n.16 (9th Cir. 1984). Nor may an injunction
15 issue if it would cause violation of another law, here the ESA.
16

17 2. ESA Claims.

18 Plaintiffs argue that they are likely to succeed on the
19 merits of their ESA claim that the 2008 Smelt BiOp is arbitrary,
20 capricious, and contrary to law because: (a) FWS has failed to
21 show that limiting entrainment is necessary to avoid jeopardy;
22 and (b) the severe OMR flow restrictions in RPA Component 1,
23 Action 2 are unsupported by the data in the 2008 Smelt BiOp.
24 Preliminary Injunction motions concerning these same issues are
25 pending, but have not been heard or decided.
26

27 Action 2 has been triggered in this instance based on
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1 entrainment concerns. Plaintiffs argue that the use of
2 salvage/entrainment as a trigger for imposing pumping
3 restrictions is unjustified because the BiOp is based upon a
4 scientifically unsupportable finding of a relationship between
5 reverse OMR flows and adult salvage. Plaintiffs' expert, Dr.
6 Richard B. Deriso, declares that Component 1, Action 2 prescribes
7 "OMR flow levels based on the BiOp's calculations of the
8 relationship between OMR flows and adult salvage...[as] depicted
9 in Figure B-13," which compares OMR flows to raw salvage numbers.
10 Doc. 396 at ¶27; BiOp at 348). Dr. Deriso opines that because
11 Figure B-13 is based upon raw salvage (i.e., how many individual
12 smelt were salvaged), it fails to provide any information on "the
13 proportion of the total population that is lost to salvage." *Id.*
14 at ¶28. He concludes: "Figure B-13 does not show what effect OMR
15 flows have on the total delta smelt population." *Id.* (emphasis
16 added). Dr. Deriso opines that this failure is critical because
17 "[o]nly by looking at population level effects can it be
18 determined whether salvage is impacting the delta smelt
19 population and its ability to recover." *Id.* at ¶69. Elsewhere in
20 the BiOp, FWS concedes that, for purposes of "relating salvage
21 data to population-level significance," the "total number
22 salvaged at the facilities does not necessarily indicate a
23 negative impact upon the overall delta smelt population." BiOp
24 at 338.

1 To demonstrate the potential impact of the use of raw, as
2 opposed to population-adjusted, salvage numbers, Dr. Deriso
3 performed his own calculations to examine the relationship
4 between OMR flows and the Cumulative Salvage Index, a measure
5 that takes into account relative population size. He concluded,
6 based on this analysis, that increased salvage of adult smelt is
7 correlated to OMR flows only at levels more negative than -6100
8 cfs. *Id.* at ¶¶ 61-65. He also examined the data to determine
9 whether negative OMR flows have any impact on the smelt's
10 population growth rate, and found that "there is no statistical
11 basis to conclude that cumulative salvage has a negative
12 population level effect within the range of cumulative salvage
13 index levels historically observed." *Id.* at ¶73.

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16 However, contrary to Dr. Deriso's opinions, the BiOp
17 concludes that entrainment has had significant population level
18 effects in some years, even though entrainment may not be driving
19 population dynamics every year. BiOp at 158-59 (citing, among
20 other sources, a study by Manly and Chotkowski demonstrating that
21 exports and OMR flows had statistically significant effects on
22 smelt abundance). The BiOp reasoned that high entrainment of
23 adult smelt in some years has played a role in the decline of the
24 species. *Id.* at 173-74. The BiOp also considered evidence
25 demonstrating that the CVP and SWP may disproportionately entrain
26 the most fecund individuals in the population, which may affect
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1 abundance levels more than overall entrainment numbers suggest.
2 *Id.* at 147, 158. Finally, apart from the critiqued Figure B13,
3 the BiOp performed other statistical analyses which indicate
4 changes in salvage values at levels well below -5,000 cfs. *Id.*
5 at 346-351 (discussing piecewise polynomial regression analyses
6 showing a change in salvage values at -1,162 cfs).
7

8 DWR has acknowledged that population level effects may be
9 difficult to detect statistically. *See* AR at 2275, 2277, 2287.
10 In addition, an independent peer review of the BiOp found that
11 the regression analysis FWS used to find a break point in the
12 OMR-salvage relationship was reasonable. AR at 6523.
13

14 Plaintiffs emphasize the fact that pumping restrictions are
15 being imposed on the basis of entrainment of six individual delta
16 smelt. However, the BiOp found that entrainment at the pumps is
17 a small fraction of delta smelt take caused by CVP and SWP
18 operations, which include movement of the Smelt to the Central
19 and South Delta, which is lethal to the species. *See* BO at 278-
20 79; *see also* NRDC v. Kempthorne, 1:05-cv-1207, Doc. 561, Findings
21 of Fact, ¶¶ 18-20, 51. The SWG recognized in 2007 that the delta
22 smelt was "critically imperiled" and that the Projects should
23 seek to achieve "no further entrainment" of delta smelt. *Id.*,
24 Conclusions of Law, ¶11.
25

26 Finally, Plaintiffs assert that the most recent survey data
27 shows that the majority of the smelt are in the Northern and
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1 Western reaches of the Delta, far removed from any risk of
2 entrainment. However, Federal Defendants rejoin that the Delta-
3 wide survey upon which Plaintiffs rely is now approximately four
4 weeks old, Doc. 578 at 5; and current salvage at the pumps
5 "provides conclusive evidence of the presence of delta smelt in
6 the South Delta." Doc. 470, Goude Decl. at ¶18.
7

8 These are significant scientific disputes regarding the
9 relationship between OMR flows and entrainment and between
10 entrainment and smelt population abundance. Federal Defendants
11 and Defendant Intervenors have presented record evidence to
12 dispute each of Plaintiffs' scientific critiques. What
13 constitutes the "best" available science implicates core agency
14 judgment and expertise to which Congress requires the courts to
15 defer; a court should be especially wary of overturning such a
16 determination on review. *Baltimore Gas & Elec. Co.*, 462 U.S. at
17 103 (1983) (a court must be "at its most deferential" when an
18 agency is "making predictions within its area of special
19 expertise, at the frontiers of science"). On the present motion,
20 Plaintiffs have not shown they are likely to succeed on the
21 merits of their ESA claim.
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23
24 In this case, the action agency implementing the BiOp has
25 violated NEPA, but no ESA violation has yet been found; FWS
26 scientists opine that jeopardy to the species and/or adverse
27 modification of its critical habitat is imminent and occurring;
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1 Plaintiffs' experts have not discredited FWS's affirmative
2 finding that implementation of Component 1, Action 2 is necessary
3 to avoid jeopardy and/or adverse modification. The district
4 court is without authority to balance the equities under the
5 extant circumstances. The motion for TRO is DENIED WITHOUT
6 PREJUDICE.
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9 IT IS SO ORDERED.

10 DATED: February 12, 2010.
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12 /s/ Oliver W. Wanger
13 Oliver W. Wanger
14 United States District Judge
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