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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CONSOLIDATED SALMONID CASES

1:09-CV-1053 OWW DLB

MEMORANDUM DECISION RE  
CROSS-MOTIONS FOR SUMMARY  
JUDGMENT ON NEPA ISSUES  
(Docs. 82 & 83).

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I. INTRODUCTION

These consolidated cases all challenge the June 4, 2009 issuance of a biological opinion by the National Marine Fisheries Service ("NMFS"), finding that the coordinated operations of the federal Central Valley Project ("CVP") and State Water Project ("SWP") are likely to jeopardize the continued existence and adversely affect the critical habitat of certain salmonid and other species ("2009 Salmonid BiOp"), as well as the implementation of the terms of that BiOp by the United States Bureau of Reclamation ("Reclamation").<sup>1</sup> Because the 2009 Salmonid BiOp found that planned coordinated Project

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<sup>1</sup> The species addressed by this biological opinion are: (1) endangered Sacramento River winter-run Chinook salmon (*Oncorhynchus tshawytscha*) ("winter-run"); (2) threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*) ("spring-run"); (3) threatened Central Valley steelhead ("CV") (*O. mykiss*); (4) threatened Central California Coast ("CCC") steelhead (*O. mykiss*); (5) threatened Southern Distinct Population Segment ("DPS") of North American green sturgeon (*Acipenser medirostris*) ("Southern DPS of green sturgeon"); and (6) endangered Southern Resident killer whales (*Orcinus orca*) ("Southern Residents") (collectively, the "Listed Species").

1 operations would jeopardize the continued existence of and/or  
2 adversely modify the critical habitat of several of the  
3 species,<sup>2</sup> 2009 Salmonid BiOp at 1-2,<sup>3</sup> NMFS proposed a  
4 Reasonable and Prudent Alternative ("RPA") that imposes a  
5 number of operating restrictions and other measures on the  
6 Projects. The RPA included numerous elements for each of the  
7 various project divisions and associated stressors, which NMFS  
8 concluded "must be implemented in its entirety to avoid  
9 jeopardy and adverse modification." *Id.* at 578. The  
10 description of the RPA comprises approximately 90 pages of the  
11 2009 Salmonid BiOp. *See id.* at 581-671.

13 On June 4, 2009, Reclamation, which manages the CVP,  
14 informed NMFS that it "provisionally accepts the [RPA] while  
15 we carefully evaluate the [2009 Salmonid BiOp] and the [RPA]"  
16 AR USBR1; *see also* 2009 Salmonid BiOp at 2 (stating that  
17 Reclamation informed NMFS that, while Reclamation "may have  
18 reservations with portions of the [BiOp] ... it is a package  
19 that Reclamation can accept."). Reclamation informed NMFS  
20 that it would immediately begin to implement the near-term  
21 actions of the RPA, but noted that some long-term actions,  
22 such as construction of the Red Bluff Pumping Plant,  
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25  
26 <sup>2</sup> Jeopardy was found as to all of the covered species; adverse  
27 habitat modification was found as to the designated critical habitat of  
28 winter-run, spring-run, steelhead, and green sturgeon. BiOp at 1-2.

<sup>3</sup> Although the BiOp is part of the administrative record ("AR"), for ease of reference, its internal page references, rather than AR references, are used.

1 replacement of the Whiskeytown temperature curtain, and fish  
2 passage improvement actions on Battle Creek, required  
3 additional planning. See AR USBR1. Reclamation also  
4 indicated the potential need to reinitiate consultation on  
5 several elements of the RPA. AR USBR2.

6  
7 Plaintiffs in all of the consolidated cases<sup>4</sup> move for  
8 summary judgment, arguing that issuance and/or implementation  
9 of the BiOp/RPA is "major federal action" that will inflict  
10 harm on the human environment, and that NMFS and/or  
11 Reclamation should have, but did not conduct an environmental  
12 assessment ("EA") or prepare an environmental impact statement  
13 ("EIS") under the National Environmental Policy Act ("NEPA").  
14 Doc. 83. Federal Defendants and Defendant-Intervenors oppose.  
15 Docs. 95 & 100. Plaintiffs replied and submitted a supporting  
16 declaration. Docs. 115. It is undisputed that no NEPA  
17 assessment or documentation was prepared by either NMFS or  
18 Reclamation in connection with the issuance, provisional  
19 adoption, and/or implementation of the 2009 Salmonid BiOp and  
20 RPA.  
21

22  
23 Defendant-Intervenors cross-move for summary judgment on  
24 this claim, arguing that FWS was not required to prepare an  
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26 <sup>4</sup> San Luis & Delta Mendota Water Authority ("Authority") and  
27 Westlands Water District ("Westlands"); Stockton East Water District  
28 ("Stockton"); State Water Contractors ("SWC"); Kern County Water Agency  
("KCWA") and Coalition for a Sustainable Delta ("Coalition"); Oakdale  
Irrigation District ("Oakdale"), et al.; and Metropolitan Water District  
of Southern California ("MWD") (collectively, "Plaintiffs").

1 EIS in connection with issuance of the BiOp. Doc. 82-2.  
2 Plaintiffs oppose. Doc. 106. Defendant-Intervenors filed a  
3 reply. Doc. 116.

4 The Pacific Legal Foundation also seeks leave to file an  
5 amicus curiae brief on behalf of the City of Coalinga, Stewart  
6 & Jasper Orchards, Arroyo Farms, LLC, King Pistachio Grove,  
7 and Perez Farms. Doc. 84. Defendant Intervenors filed a  
8 response to that motion and to the brief itself. Doc. 94.

9  
10 The cross-motions came on for hearing on February 9,  
11 2010. Doc. 214. The parties were granted leave to file  
12 supplemental briefs on certain issues. Federal Defendant  
13 submitted a supplemental brief on February 12, 2019. Doc.  
14 222. Defendant Intervenors and Plaintiffs responded on  
15 February 16, 2010. Docs. 224 & 225. The matter was  
16 thereafter submitted for decision.  
17

## 18 II. ANALYSIS

### 19 A. Threshold Issues.

#### 20 1. Requests for Judicial Notice.

##### 21 a. Plaintiffs' Request for Judicial Notice.

22 Plaintiffs request that judicial notice be taken of:

- 23 • The June 4, 2009 Endangered Species Act Section 7  
24 Consultation Biological Opinion and Conference Opinion  
25 on the Long-Term Operations of the Central Valley  
26 Project and States Water Project (Exhibit A to Doc. 83-  
27  
28

1           4) .

- 2           • Excerpts from State Water Resources Control board  
3           Revised Water Right Decision 1641, dated March 15, 2000  
4           (Exhibit B to Doc. 83-4) .  
5  
6           • Two court orders filed in 1982 in *United States v.*  
7           *State of California, et al.*, Case No. 81-4189X, 81-  
8           4309X (Exhibits C and D to Doc. 83-4) .  
9  
10          • A 1982 Operating Plan for New Melones Reservoir, issued  
11          by the Bureau (Exhibit E to Doc. 83-4) .

12          Federal Defendants request judicial notice of:

- 13          • The October 1999 Central Valley Project Improvement Act  
14          Final Programmatic Environmental Impact Statement  
15          (Exhibit A to Doc. 101) .

16          These documents are all judicially noticeable public  
17          records under Federal Rule of Evidence 201(b), which  
18          authorizes judicial notice of a "fact ... not subject to  
19          reasonable dispute in that it is either (1) generally known  
20          within the territorial jurisdiction of the trial court or (2)  
21          capable of accurate and ready determination by resort to  
22          sources whose accuracy cannot reasonably be questioned." See  
23          *United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir.  
24          2008) (judicial notice is proper for records and reports of  
25          administrative agencies); *United States v. Howard*, 381 F.3d  
26          873, 876 n. 1 (9th Cir. 2004) (taking judicial notice of court  
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1 records in another case). However, these records are  
2 admissible only for the existence of their content, not for  
3 the truth of disputed matters asserted in the documents.  
4

5 **B. Burden of Proof.**

6 The burden of proof set forth in the Smelt NEPA decision  
7 is equally applicable here:

8 In the preliminary injunction context, "a plaintiff  
9 seeking a preliminary injunction must establish that  
10 he is likely to succeed on the merits, that he is  
11 likely to suffer irreparable harm in the absence of  
12 preliminary relief, that the balance of equities tips  
13 in his favor, and that an injunction is in the public  
14 interest." *Am. Trucking Assns., Inc. v. City of Los*  
15 *Angeles*, 559 F.3d 1046, 1042 (9th Cir. 2009) (citing  
16 *Winter v. NRDC*, --- U.S. ---, 129 S. Ct. 365  
17 (2008).). Within the likelihood of success on the  
18 merits prong, a court must evaluate each claim  
19 according to applicable legal standards. Here, that  
20 standard, in part, involves an inquiry into whether  
21 "there are substantial questions about whether a  
22 project may cause significant degradation of the  
23 human environment. *Native Ecosystems Council v. U.S.*  
24 *Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005).  
25 For a preliminary injunction, plaintiffs only had to  
26 establish that they are "likely" to meet this burden  
27 under. On summary judgment, plaintiff must actually  
28 prove success by a preponderance of the evidence.

Smelt NEPA Decision at 8-9.

22 **C. Applicable Legal Standards.**

23 The general legal standards applied in the Smelt NEPA  
24 Decision also apply here:

25 Because NEPA contains no separate provision for  
26 judicial review, compliance with NEPA is reviewed  
27 under the Administrative Procedure Act ("APA"), 5  
28 U.S.C. § 706(2)(A); *NW Resource Info. Ctr., Inc. v.*  
*NMFS*, 56 F.3d 1060, 1066 (9th Cir. 1995), provided  
(1) there is final agency action and (2) Plaintiffs

1 can show that they have suffered a legal wrong or  
2 will be adversely affected within the meaning of the  
3 statute, *Northcoast Env'tl Ctr. v. Glickman*, 136 F.3d  
4 660, 668 (9th Cir. 1998). It is undisputed that the  
5 challenged agency action, the issuance of the 2008  
6 smelt BiOp and its RPA, is "final agency action."  
7 See *Bennet v. Spear*, 520 U.S. 154, 161, 178 (1997)  
8 (issuance of biological opinion is "final agency  
9 action"). It is also undisputed that Plaintiffs have  
10 been adversely affected by the issuance of the 2008  
11 smelt BiOp and implementation of its RPA controlling  
12 the Projects' water flows.

13 NEPA requires all federal agencies to prepare an EIS  
14 to evaluate the potential environmental consequences  
15 of any proposed "major Federal action[] significantly  
16 affecting the quality of the human environment." 42  
17 U.S.C. § 4332(C). The preparation of an EIS serves a  
18 number of purposes:

19 It ensures that the agency, in reaching its  
20 decision, will have available, and will carefully  
21 consider, detailed information concerning  
22 significant environmental impacts; it also  
23 guarantees that the relevant information will be  
24 made available to the larger audience that may  
25 also play a role in both the decisionmaking  
26 process and the implementation of that decision.

27 Simply by focusing the agency's attention on the  
28 environmental consequences of a proposed project,  
NEPA ensures that important effects will not be  
overlooked or underestimated only to be  
discovered after resources have been committed or  
the die otherwise cast. Moreover, the strong  
precatory language of § 101 of the Act and the  
requirement that agencies prepare detailed impact  
statements inevitably bring pressure to bear on  
agencies to respond to the needs of environmental  
quality. 115 Cong. Rec. 40425 (1969) (remarks of  
Sen. Muskie).

Publication of an EIS, both in draft and final  
form, also serves a larger informational role. It  
gives the public the assurance that the agency  
has indeed considered environmental concerns in  
its decisionmaking process, and, perhaps more  
significantly, provides a springboard for public

1 comment.

2 *Robertson v. Methow Valley Citizens Council*, 490 U.S.  
3 332, 349 (1989) (internal citations and quotations  
4 omitted). "NEPA does not contain substantive  
5 requirements that dictate a particular result;  
6 instead, NEPA is aimed at ensuring agencies make  
7 informed decisions and contemplate the environmental  
8 impacts of their actions." *Ocean Mammal Inst. v.*  
9 *Gates*, 546 F. Supp. 2d 960, 971 (D. Hi. 2008)  
10 (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d  
11 1146, 1149 (9th Cir. 1998)). "NEPA emphasizes the  
12 importance of coherent and comprehensive up-front  
13 environmental analysis to ensure informed decision  
14 making to the end that the agency will not act on  
15 incomplete information, only to regret its decision  
16 after it is too late to correct." *Ctr. for*  
17 *Biological Diversity v. U.S. Forest Service*, 349 F.3d  
18 1157, 1166 (9th Cir. 2003) (internal citation and  
19 quotations omitted).

20 Federal regulations implementing NEPA define major  
21 federal action:

22 Major Federal action includes actions with  
23 effects that may be major and which are  
24 potentially subject to Federal control and  
25 responsibility. Major reinforces but does not  
26 have a meaning independent of significantly ([40  
27 C.F.R.] § 1508.27). Actions include the  
28 circumstance where the responsible officials fail  
to act and that failure to act is reviewable by  
courts or administrative tribunals under the  
Administrative Procedure Act or other applicable  
law as agency action.

(a) Actions include new and continuing  
activities, including projects and programs  
entirely or partly financed, assisted, conducted,  
regulated, or approved by federal agencies; new  
or revised agency rules, regulations, plans,  
policies, or procedures; and legislative  
proposals (§§ 1506.8, 1508.17). Actions do not  
include funding assistance solely in the form of  
general revenue sharing funds, distributed under  
the State and Local Fiscal Assistance Act of  
1972, 31 U.S.C. 1221 et seq., with no Federal  
agency control over the subsequent use of such



1 funds. Actions do not include bringing judicial  
2 or administrative civil or criminal enforcement  
3 actions.

4 (b) Federal actions tend to fall within one of  
5 the following categories:

6 (1) Adoption of official policy, such as  
7 rules, regulations, and interpretations  
8 adopted pursuant to the Administrative  
9 Procedure Act, 5 U.S.C. 551 et seq.;  
10 treaties and international conventions or  
11 agreements; formal documents establishing an  
12 agency's policies which will result in or  
13 substantially alter agency programs.

14 (2) Adoption of formal plans, such as  
15 official documents prepared or approved by  
16 federal agencies which guide or prescribe  
17 alternative uses of Federal resources, upon  
18 which future agency actions will be based.

19 (3) Adoption of programs, such as a group of  
20 concerted actions to implement a specific  
21 policy or plan; systematic and connected  
22 agency decisions allocating agency resources  
23 to implement a specific statutory program or  
24 executive directive.

25 (4) Approval of specific projects, such as  
26 construction or management activities  
27 located in a defined geographic area.  
28 Projects include actions approved by permit  
or other regulatory decision as well as  
federal and federally assisted activities.

40 C.F.R. § 1508.18.

When an agency takes major federal, the agency must  
prepare an EIS "where there are substantial questions  
about whether a project may cause significant  
degradation of the human environment." *Native  
Ecosystems*, 428 F.3d at 1239. An agency may choose  
to prepare an environmental assessment ("EA") to  
determine whether an EIS is needed. 40 C.F.R. §§  
1501.4, 1508.9(b). The EA must identify all  
reasonably foreseeable impacts, analyze their  
significance, and address alternatives. 40 C.F.R. §§

1 1508.8, 1508.9, 1508.27. If, based on the EA, the  
2 agency concludes that the proposed actions will not  
3 significantly affect the environment, it may issue a  
4 Finding of No Significant Impact ("FONSI") and forego  
5 completion of an EIS. See *Bob Marshall Alliance v.*  
*Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R.  
6 § 1501.4(e).

7 Whether an action may significantly affect the  
8 environment "requires consideration of context and  
9 intensity." *Center for Biological Diversity v. Nat'l*  
*Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185  
10 (9th Cir. 2008) (citing 40 C.F.R. § 1508.27).  
11 "Context delimits the scope of the agency's action,  
12 including the interests affected." *Id.* (quoting  
13 *Nat'l. Parks & Conservation Ass'n v. Babbitt*, 241 F.3d  
14 722, 731 (9th Cir. 2001)).

15 Intensity refers to the "severity of impact,"  
16 which includes both beneficial and adverse  
17 impacts, [t]he degree to which the proposed  
18 action affects public health or safety, [t]he  
19 degree to which the effects on the quality of the  
20 human environment are likely to be highly  
21 controversial, "[t]he degree to which the  
22 possible effects on the human environment are  
23 highly uncertain or involve unique or unknown  
24 risks," and "[w]hether the action is related to  
25 other actions with individually insignificant but  
26 cumulatively significant impacts."

27 *Id.* at 1185-86 (citing 40 C.F.R. § 1508.27(b)(2),  
28 (4), (5), (7)).

29 The parties debate at length the degree of deference  
30 owed to an agency's decision under NEPA. However, in  
31 this case, neither agency made any NEPA-related  
32 decision to which deference is owed. The relevant  
33 standard is "reasonableness," as articulated in *High*  
*Sierra Hikers Ass'n v. Blackwell*:

34 Typically, an agency's decision not to prepare an  
35 EIS is reviewed under the arbitrary and  
36 capricious standard; however, where an agency has  
37 decided that a project does not require an EIS  
38 without first conducting an EA, we review under  
39 the reasonableness standard.

1 390 F.3d 630, 640 (9th Cir. 2004). "Further, when an  
2 agency has taken action without observance of the  
3 procedure required by law, that action will be set  
aside." *Id.* (citations omitted).

4 Smelt NEPA Decision at 9-14.

5 D. Major Federal Action.

6 40 C.F.R. § 1508.18 provides that major<sup>5</sup> "[f]ederal  
7 actions tend to fall within one of the following categories":

8 (1) Adoption of official policy, such as rules,  
9 regulations, and interpretations adopted pursuant to  
10 the Administrative Procedure Act, 5 U.S.C. 551 et  
11 seq.; treaties and international conventions or  
agreements; formal documents establishing an agency's  
policies which will result in or substantially alter  
agency programs.

12 (2) Adoption of formal plans, such as official  
13 documents prepared or approved by federal agencies  
14 which guide or prescribe alternative uses of Federal  
resources, upon which future agency actions will be  
based.

15 (3) Adoption of programs, such as a group of  
16 concerted actions to implement a specific policy or  
17 plan; systematic and connected agency decisions  
allocating agency resources to implement a specific  
statutory program or executive directive.

18 (4) Approval of specific projects, such as  
19 construction or management activities located in a  
20 defined geographic area. Projects include actions  
approved by permit or other regulatory decision as  
well as federal and federally assisted activities.

21 40 C.F.R. § 1508.18. Plaintiffs principally rely on §  
22 1508.18(b)(4) as a basis for imposing NEPA obligations on NMFS  
23 in this case, arguing that the 2009 Salmonid BiOp is an  
24 "[a]pproval of specific projects, such as construction or  
25 management activities located in a defined geographic area."  
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27 <sup>5</sup> Section 1508.18 provides that the word "major" in the phrase major  
28 federal action "reinforces but does not have a meaning independent of" the  
term "significantly" in "significantly affecting the human environment."

1 Doc. 83 at 11. Under this provision, "Projects include  
2 actions approved by permit or other regulatory decision as  
3 well as federal and federally assisted activities." §  
4 1508.18(b)(4).  
5

6 1. Ramsey v. Kantor is Distinguishable.

7 Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996), is the  
8 only decision to have applied 40 C.F.R. § 1508.18(b)(4) to  
9 require NEPA analysis for a biological opinion. The Smelt  
10 NEPA Decision distinguished Ramsey:  
11

12 ...Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996), [I  
13 applied NEPA to the National Marine Fisheries  
14 Service's ("NMFS") issuance of a biological opinion  
15 and incidental take statement ("ITS") under ESA § 7  
16 permitting state regulators to issue salmon fishing  
17 regulations consistent with that take statement. 96  
18 F.3d at 441-445. Ramsey found the biological opinion  
19 and ITS constituted "major federal action,"  
20 triggering NEPA compliance, because it was "clear ...  
21 both from our cases and from the federal regulations,  
22 see 40 C.F.R. § 1508.18, that if a federal permit is  
23 a prerequisite for a project with adverse impact on  
24 the environment, issuance of that permit does  
25 constitute major federal action and the federal  
26 agency involved must conduct an EA and possibly an  
27 EIS before granting it." *Id.* at 444.

28 Ramsey determined:

[T]he incidental take statement in this case is  
functionally equivalent to a permit because the  
activity in question would, for all practical  
purposes, be prohibited but for the incidental  
take statement. Accordingly, we hold that the  
issuance of that statement constitutes major  
federal action for purposes of NEPA.

*Id.*

The Ramsey federal defendants contended that there  
was insufficient federal participation in a state run

1 project to require an EIS. The Appeals Court  
2 disagreed: "if a federal permit is a prerequisite  
3 for a project with adverse impact on the environment,  
4 issuance of that permit does constitute a major  
5 federal action..." triggering NEPA. *Id.* at 444  
6 (internal citations and quotations omitted). *Ramsey*  
7 held that "the incidental take statement in [that]  
8 case is functionally equivalent to a permit because  
9 the activity in question would, for all practical  
10 purposes, be prohibited but for the incidental take  
11 statement." *Id.* Because the ITS was the functional  
12 equivalent of a permit, NEPA applied to the issuance  
13 of the biological opinion, despite federal  
14 defendants' contention that the mere issuance of an  
15 ITS was insufficient federal participation in a state  
16 project.

17 Here, unlike *Ramsey*, the CVP is an entirely federal  
18 project, operated by Reclamation, a federal agency,  
19 rendering *Ramsey's* "functional equivalency" analysis  
20 largely irrelevant. *Ramsey* stands for two important  
21 principles: First, under certain circumstances, a  
22 biological opinion may qualify as a major federal  
23 action for NEPA purposes; second, not every  
24 biological opinion is a major federal action.

25 Smelt NEPA Decision at 16-17 (footnotes omitted) (emphasis  
26 added).

27 Here, in an argument that would have been equally  
28 applicable in the smelt case, but was not raised there,  
29 Plaintiffs suggest that the Smelt NEPA Decision incorrectly  
30 concluded that *Ramsey* is distinguishable because the BiOp  
31 applies not only to operations of the federal CVP, but also to  
32 operations of the SWP, a state-run project. Plaintiffs  
33 maintain "Reclamation should not have to account for the  
34 environmental effects of a biological opinion it did not  
35 produce on a water supply project it does not operate." Doc.

1 106 at 11.

2 But, Plaintiffs ignore the interconnected nature of the  
3 SWP and CVP projects. Reclamation and DWR have, for many  
4 years, operated the projects in a coordinated manner. See  
5 OCAP Biological Assessment ("OCAP BA") at 1-2. The Biological  
6 Assessment ("BA"), prepared by Reclamation, describes the  
7 project for which consultation was being sought as "the  
8 ongoing operations of the CVP and SWP and potential future  
9 actions that are foreseeable to occur within the period  
10 covered by the project description." *Id.* at 1-1. The two  
11 water projects, which are jointly operated by Reclamation and  
12 DWR, share water resources, storage, pumping, and conveyance  
13 facilities to manage and deliver one third of the water supply  
14 for the State of California. Reclamation's BA provided NMFS  
15 with extensive analyses of the effects of coordinated  
16 operation of the CVP and SWP on the Listed Species.  
17

18 For the reasons described below, it is the coordinated  
19 operation of the projects, rather than the proposed  
20 modification of operations offered by the BiOp, that triggers  
21 NEPA. Moreover, although it is ultimately up to the agencies  
22 involved to determine the appropriate lead agency,  
23 Reclamation, as the federal project operator, with extensive  
24 experience evaluating the environmental impacts of water  
25 deliveries, is the more appropriate agency to bear the NEPA  
26  
27  
28

1 burden in this case. To the extent Reclamation lacks  
2 expertise concerning any unique environmental impacts  
3 resulting from reduced SWP water deliveries, DWR can  
4 participate in various ways in the preparation of NEPA  
5 documents. See, e.g., 40 C.F.R. § 1501.5(b) (permitting state  
6 agency to act as co-lead agency).  
7

8 2. Coordinated Project Operations is the Proper Focus of  
9 any NEPA Evaluation.

10 Having concluded that Ramsey stands for the dual  
11 proposition that while "under certain circumstances, a  
12 biological opinion may qualify as a major federal action for  
13 NEPA purposes ... not every biological opinion is a major  
14 federal action," the Smelt NEPA Decision recognized that a key  
15 factor in deciding if a BiOp is major federal action is  
16 whether the BiOp is binding upon the action agency, citing  
17 *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of*  
18 *Reclamation*, 850 F. Supp. 1388, 1422 (E.D. Cal. 1994). The  
19 Smelt NEPA Decision found that, while both agencies bear some  
20 responsibility for imposing the RPAs on the Projects,  
21 Reclamation's implementation of the BiOp in the context of  
22 coordinated Project operations is the more appropriate focus  
23 of the NEPA inquiry:  
24  
25

26 Here, to satisfy its obligations under NEPA,  
27 Reclamation initiated formal consultation and  
28 prepared a BA to describe the proposed action. FWS,  
as the consulting agency, reviewed the BA, disagreed  
with its conclusion, and issued the 2008 BiOp with an

1 RPA. See BiOp i-vi. Reclamation was free to accept  
2 or reject, in whole or in part, FWS's recommendations  
3 and advice prescribed in that RPA. The consultation  
4 regulations state that "the Federal [action] agency  
5 shall determine whether and in what manner to proceed  
6 with the action in light of its section 7 obligations  
7 and the Service's biological opinion." 50 C.F.R. §  
8 402.15(a). [FN 7] However, FWS could not issue the  
9 BiOp without also including an RPA to mitigate  
10 jeopardy. FWS proposed an RPA that called for  
11 actions that commit federal water to smelt  
12 protection. Reclamation was not "bound" to accept  
13 the proposed RPA, but it did so. Resulting  
14 operations reduced 2008-09 water deliveries by  
15 several hundred thousand acre-feet. In this case,  
16 actions speak louder than words.

17 [FN 7: Courts have consistently held that the  
18 action agency retains the ultimate responsibility  
19 for deciding whether, and how, to proceed with  
20 the proposed action after Section 7 consultation.  
21 See, e.g., *Pyramid Lake Paiute Tribe of Indians*  
22 *v. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th  
23 Cir. 1990); *Tribal Village of Akutan v. Hodel*,  
24 869 F.2d 1185, 1193 (9th Cir. 1988) ("[the  
25 action] agency is not required to adopt the  
26 alternatives suggested in the biological  
27 opinion"); *Sierra Club v. Marsh*, 816 F.2d 1376,  
28 1386 (9th Cir. 1987) ("The ESA does not give the  
FWS the power to order other agencies to comply  
with its requests or to veto their decisions.");  
*Westlands*, 850 F. Supp. at 1422 ("Biological  
opinions are not binding on the Secretary");  
*Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359,  
371 (5th Cir. 1976) ("Section 7 does not give [the  
Service] a veto over the actions of other federal  
agencies").]

Plaintiffs argue that [] FWS's issuance of the 2008  
BiOp requires that FWS prepare an EIS, because a BiOp  
has a "powerful coercive effect" on the action  
agency. Doc. 245-2 at 12. On the one hand, if  
Reclamation had disregarded the RPA, the 2008 BiOp  
would not have provided an exemption from the ESA's  
take prohibitions, potentially subjecting the  
operators to civil and criminal liability. 16 U.S.C.  
§§ 1538(a) (prohibiting the "take" of listed  
species); 1536(o)(2) (a taking in compliance with a



1 biological opinion's ITS "shall not be considered to  
2 be a prohibited taking of the species concerned"). [FN  
3 8] However, Federal Defendants argue Reclamation's  
4 departure from the RPA would not necessarily violate  
5 Section 7 of the ESA, if Reclamation took  
6 "alternative, reasonably adequate steps to insure the  
7 continued existence" of listed species. *Tribal  
8 Village of Akutan*, 869 F.2d at 1193. This is  
9 sophistry. Reclamation operated the joint Projects  
10 and managed federal resources (CVP water) in  
11 accordance with the RPA, resulting in a major  
12 revision of 2008-09 coordinated CVP operations and  
13 substantial reallocation of federal resources. The  
14 only reason Reclamation did so was to meet the  
15 mandate of the ESA and the BiOp. Both agencies  
16 participated to some degree in the agency action at  
17 issue here.

18 Smelt NEPA Decision at 23-25 (footnote omitted).

19 Although both agencies participated in imposing  
20 restrictions on project operations, the district court  
21 ultimately concluded that the only NEPA triggering action in  
22 the smelt case was the operation of the projects, not the  
23 issuance of the BiOp, which was required by law as a  
24 consequence of the effects of the coordinated projects'  
25 operations.

26 The appropriate focus is "Project operations," and  
27 Reclamation is the appropriate lead agency.  
28 Reclamation proposed the action (in the form of the  
Operations and Criteria Plan ("OCAP")) to FWS, which  
triggered the preparation of the BiOp. Reclamation  
has the ongoing statutory authority to implement  
project operations as prescribed by the OCAP. See,  
e.g., AR at 10262 (BA at 1-1) ("The Bureau of  
Reclamation (Reclamation) and the California  
Department of Water Resources (DWR) propose to  
operate the Central Valley Project (CVP) and State  
Water Project (SWP) to divert, store, and convey CVP  
and SWP (Project) water consistent with applicable  
law and contractual obligations."); AR at 10263-64

1 (BA at 1-2 - 1-3) (identifying certain laws  
2 authorizing Bureau operation of CVP); AR at 10270-71  
3 (BA at 1-9 - 1-10) (Coordinated Operation Agreement  
4 ("COA") and P.L. 99-546 impose a "Congressional  
5 mandate to Reclamation to operate the CVP in  
6 conjunction with the SWP. FWS's involvement with  
7 regard to future Project operations is limited,  
8 consisting primarily of its obligation to ensure that  
9 those operations do not impair protection and  
10 recovery of threatened and endangered species, an  
11 obligation that it shares with Reclamation. 16  
12 U.S.C. § 1536(a)(2).").

13 *Id.* at 27-28.<sup>6</sup> The smelt NEPA decision concluded:

14 In the final analysis, FWS was asked for its  
15 "opinion" whether Reclamation's operations plans  
16 would jeopardize the smelt. FWS provided that  
17 opinion, as required by law. Reclamation was not  
18 "bound" by the BiOp until it chose to proceed with  
19 the OCAP and implement the RPA. Once Reclamation did  
20 so, operation of the Projects became the relevant  
21 agency "action," and Reclamation, as action agency,  
22 is the more appropriate lead agency under NEPA. The  
23 adaptive management protocol prescribed in the RPA  
24 leaves FWS with the final word on exactly what flow  
25 requirements will be imposed. Reclamation accepted  
26 this arrangement as a constraint upon its operations  
27 when it provisionally accepted the RPA. FWS played a  
28 key role in formulation, planning, and implementation  
of the RPA, with full knowledge that no NEPA  
compliance had been undertaken. This is not a shell  
game in which the agencies may leave the public to  
guess which agency has taken major federal action.

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21 <sup>6</sup> The Smelt NEPA Decision also found that Reclamation "has greater  
22 expertise concerning the alleged adverse environmental effects," and  
23 "routinely examines these and related impacts as the lead or co-lead  
24 agency on NEPA reviews of proposed CVP-SWP operations and frequently has  
25 the ability and authority to propose ways to mitigate these impacts,"  
26 while "FWS has little to no expertise in or authority over many of these  
27 matters." *Id.* at 28-30. Ultimately, as Federal Defendants argue in their  
28 supplemental brief, Doc. 222, the allocation of NEPA responsibilities is  
left to the agencies involved in the first instance. See *Hells Canyon  
Preservation Council v. Jacoby*, 9 F. Supp. 2d 1216, 1241 (D. Or.  
1998) (concluding that "[t]he designation of a lead agency ... is a matter  
committed to agency discretion and ... [there is] nothing in NEPA or the  
regulations suggesting that the courts may overrule the determination by  
the agencies that are involved that one or more of them will be lead  
agency or agencies.").

1           It is a close call whether FWS's issuance of the BiOp  
2           and its RPA under these circumstances is major  
3           federal action under NEPA. This call need not be  
4           made, because Reclamation, the agency with the  
5           ultimate authority to implement the RPA, is ...  
6           joined as a party, whose actions must be evaluated  
7           under NEPA.

8           *Id.* at 31 (emphasis in original).

9           Had there been no other NEPA-triggering action before the  
10          court, it is a close call whether or not the issuance of the  
11          2008 Smelt BiOp itself would have triggered NEPA under *Ramsey*,  
12          which in effect operates as a last resort mechanism when  
13          federal action upon a project would not otherwise require NEPA  
14          compliance. However, because Reclamation is subject to the  
15          jurisdiction of the court and Reclamation's operation of the  
16          projects to allocate substantial federal water resources under  
17          a coordinated operations plan constitutes major federal  
18          action, it was unnecessary to apply *Ramsey* to find that the  
19          issuance of the 2008 Smelt BiOp triggered NEPA.

20          A similar conclusion is warranted here. Reclamation's  
21          operation of the projects to comply with the 2009 Salmondid  
22          BiOp RPAs is major federal action under NEPA. Although both  
23          agencies participated to some degree in imposing the RPAs upon  
24          project operations, the agencies, not the court, are charged  
25          with allocating NEPA responsibilities. The court is simply  
26          required to evaluate whether particular actions are "major  
27          federal actions significantly affecting the human environment"  
28

1 under NEPA. Here, the operation of the projects (i.e. the  
2 implementation of the RPAs as part of overall project  
3 operations), not the issuance of the BiOp, constitutes major  
4 federal action.<sup>7</sup> Ramsey's unique circumstances are not  
5 present here.

6  
7 Plaintiffs' arguments that the 2009 Salmonid BiOp  
8 justifies a different result are unpersuasive. Among other  
9 things, Plaintiffs emphasize that NMFS plays a continuing role  
10 in implementation of the 2009 Salmonid BiOp as a member of the  
11 Water Operations Management Team ("WOMT"), jointly (along with  
12 Reclamation) deciding whether actions recommended by technical  
13 staff are consistent with the RPA, and making "final  
14 determinations" that proposed operational actions are  
15 consistent with ESA obligations. For example, under specified  
16 conditions, Reclamation must consult monthly with NMFS  
17 regarding Keswick releases and submit a projected forecast to  
18 NMFS, which NMFS must review and provide recommendations to  
19 Reclamation. 2009 Salmonid BiOp at 598. Reclamation may seek  
20 relaxation of release restrictions to meet other legal  
21 requirements "with NMFS' concurrence." 2009 Salmonid BiOp at  
22  
23

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24 <sup>7</sup> This conclusion is consistent with NMFS's Consultation Handbook,  
25 which explains that NMFS's role is to assist the federal "action agency"  
26 in evaluating the impacts of proposed actions on the environment and  
27 "integrating the formal consultation process into [the action agency's]  
28 overall environmental compliance." FWS & NMFS Consultation Handbook at 4-  
11. Judicial Notice has previously been taken of this document in the  
related Consolidated Delta Smelt Cases. See *San Luis & Delta-Mendota  
Water Authority v. Salazar*, --- F. Supp. 2d ---, 2009 WL 3428487, \*3 (E.D.  
Cal. Oct. 15, 2009), available at:  
[http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf).

1 599.

2 This is no different than the 2008 Smelt BiOp, where the  
3 adaptive management protocol prescribed in the RPA leaves FWS  
4 with the final word on exactly what flow requirements will be  
5 imposed. Here, as with the 2008 Smelt BiOp, "Reclamation  
6 accepted this arrangement as a constraint upon its operations  
7 when it provisionally accepted the RPA." Similarly, NMFS  
8 played a key role in formulating, planning, and implementing  
9 the RPA. But, this does not change the fact that it is the  
10 operation of the projects by Reclamation, not the issuance of  
11 the BiOp that triggers NEPA. It may well be that Reclamation  
12 as action agency must look to NMFS as the expert consulting  
13 agency for expertise, guidance, and analysis in achieving NEPA  
14 compliance to the extent such knowledge and acumen is  
15 unavailable within Reclamation.  
16  
17

18 Plaintiffs' half-hearted invocation of 40 C.F.R. §  
19 1508.18(b)(2) is unpersuasive. Section 1508.18(b)(2) defines  
20 as major federal action "formal plans ... which guide or  
21 prescribe alternative uses of federal resources, upon which  
22 future agency actions will be based." Plaintiffs suggest that  
23 NMFS's issuance of the BiOp triggers this provision because  
24 the BiOp "tells the CVP/SWP operators how, when, and in what  
25 quantities to use their resources to avoid jeopardizing  
26 species listed under the [ESA]." Doc. 115 at 3. Again, until  
27  
28

1 Reclamation determined that it would provisionally accept the  
2 RPA's, the BiOp was not binding upon Reclamation. NMFS had no  
3 way of knowing whether its recommendations (in the form of  
4 RPAs) would be accepted, accepted in part, or rejected  
5 outright. The BiOp did not "guide" or "prescribe" anything  
6 until it was provisionally accepted. After Reclamation  
7 provisionally committed to implement the RPAs, they became  
8 binding and effective. No party has suggested that NMFS has  
9 the expertise or ability to implement the RPAs on its own. It  
10 would be futile to require NMFS to prepare NEPA documentation  
11 on a set of actions that the action agency is free to  
12 disregard or substantially modify. The major federal action  
13 here is implementation of the RPAs as a part of coordinated  
14 project operations. Because of the nature of the adaptive  
15 management process, both NMFS and the Bureau exert some  
16 control over the implementation process. It is up to the  
17 agencies to determine how to allocate NEPA responsibilities  
18 among themselves and any other federal or state agencies.

19  
20  
21 Plaintiffs' reference in their supplemental brief, Doc.  
22 225, to Appendix A, Section 4.01m of NOAA's NEPA Guidelines is  
23 unpersuasive. Section 4.01m defines "major federal action,"  
24

25 An activity, such as a plan, project or program,  
26 which may be fully or partially funded, regulated,  
27 conducted, or approved by a Federal agency. "Major"  
28 reinforces, but does not have a meaning independent  
of "significantly" as defined in Section 4.01.x. and  
6.01. of this Order. Major actions require

1 preparation of an EA or EIS unless covered by a CE  
2 (40 CFR 1508.18). CEQ's definition of "scope"  
3 regarding the type of actions, the alternatives  
4 considered, and the impacts of the action should be  
5 used to assist determinations of the type of document  
6 (EA or EIS) needed for NEPA compliance (40 CFR  
7 1508.25).

8 Plaintiffs suggest that NMFS's issuance of the 2009 Salmonid  
9 BiOp falls squarely within this definition of "major federal  
10 action" because "NMFS is indisputably regulating the  
11 operations of the [CVP] and [SWP]," and "[u]nder the BiOp NMFS  
12 will conduct adaptive management, [by making] regular and  
13 ongoing decisions determining how the projects operate." Doc.  
14 225 at 2-3 (emphasis added). Plaintiffs overlook the central  
15 focus of section 4.01m, that major federal action is an  
16 "activity, such as a plan, project or program." Here, the  
17 activity is the operation of the projects. NMFS, as  
18 consultant, does regulate that activity, and participates in  
19 controlling conducting project operations under the adaptive  
20 management protocol set forth in the RPA along with  
21 Reclamation, the project operator, but this does not transform  
22 the issuance of the BiOp itself into a NEPA triggering  
23 action.<sup>8</sup>

24 Finally, Plaintiffs cite *Anacostia Watershed Soc. v.*  
25 *Babbitt*, 871 F. Supp. 475, 482 (D.D.C. 1994), which addresses

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26  
27 <sup>8</sup> In *Ramsey*, the activity was not conducted by a federal agency, so  
28 the regulation itself (the biological opinion) constituted major federal  
action. Here, however, where operation of the projects is primarily the  
responsibility of Reclamation, along with DWR, *Ramsey* is distinguishable.

1 whether an agency may rely on the NEPA compliance of another  
2 agency to justify its own non-compliance. In *Anacostia*, the  
3 National Park Service ("NPS"), without performing any NEPA  
4 analysis of its own, transferred jurisdiction over portions of  
5 a National Park to the District of Columbia for development of  
6 a theme park. NPS argued that its own NEPA obligations were  
7 satisfied by past and future NEPA compliance by a federal  
8 planning commission charged with approving development  
9 concepts within the District of Columbia. The district court  
10 rejected this contention, concluding that NPS must take its  
11 own hard look at the environmental impacts. *Id.* at 484.

12  
13 Critically, in *Anacostia*, it was undisputed that the  
14 development project constituted major federal action.  
15  
16 *Anacostia* therefore sheds no light on whether the issuance of  
17 the 2009 Salmonid BiOp, standing alone, constitutes major  
18 federal action. *Anacostia* merely explains that, once a major  
19 federal action is identified, all agencies participating in  
20 that action bear NEPA responsibilities that cannot be absolved  
21 simply because another agency has engaged in the NEPA process.  
22  
23 Likewise, because NMFS plays an integral role in formulating  
24 and requiring implementation of the RPAs as part of overall  
25 project operations, NMFS is not be absolved of responsibility  
26 under NEPA even if Reclamation completed a NEPA review on its  
27 own. However, *Anacostia* does not suggest that NMFS had to be  
28



1 the lead agency in order to satisfy its own NEPA obligations,  
2 given that NMFS could participate in the NEPA process as a  
3 joint lead agency or consulting agency.<sup>9</sup>

4 It is the implementation of the RPAs, as part of overall  
5 project operations, not the issuance of the BiOp, that is the  
6 "major federal action" in this case. Both Reclamation and  
7 NMFS participate in implementing the RPAs. Under NEPA, it is  
8 up to both agencies to allocate their NEPA compliance  
9 responsibilities on remand.<sup>10</sup>

11  
12 3. Implementation of the BiOp and its RPA Effect a  
Significant Change to the Operational Status Quo.

13 Based on the determination that it is Reclamation's  
14 implementation of the BiOp and its RPA, not the issuance of  
15 the BiOp, that is the proper focus of any NEPA inquiry, does  
16 Reclamation's implementation trigger NEPA obligations? The  
17 relevant standards are described in the Smelt NEPA Decision:  
18

19 Projects such as the CVP and SWP, constructed prior

20 <sup>9</sup>Plaintiffs also rely on *Idaho v. ICC*, 35 F. 3d 585 (D.C. Cir. 1994),  
21 which rejected the ICC's contention that it need not comply with NEPA  
22 because it required a private applicant to consult with various federal  
23 and state agencies about specific environmental impacts and retained  
24 jurisdiction to monitor compliance with the consultation requirements,  
25 holding that "[a]n agency cannot delegate its NEPA responsibilities in  
26 this manner...." Here, where no NEPA compliance has been performed at  
27 all, NMFS has yet to attempt to delegate its own NEPA responsibilities  
28 vis-à-vis project operations to another agency.

<sup>10</sup> This is not an endorsement of Defendant Intervenors' argument the  
25 district court lacks authority to enjoin operation of aspects of the RPAs  
26 because NMFS's issuance of the BiOp itself has not been found unlawful.  
27 Defendant Intervenors want to have their cake and eat it too. If, as they  
28 insist, Reclamation has the final word on implementation of the BiOp,  
Reclamation's failure to comply with NEPA empowers this Court to issue  
appropriate injunctive relief against any party acting in concert with  
Reclamation, so long as such injunctive relief does not violate the ESA.

1 to the date on which NEPA became effective, January  
2 1, 1970, are not retroactively subject to NEPA. See  
3 *Upper Snake River Chapter of Trout Unlimited v.*  
4 *Hodel*, 921 F.2d 232, 234 (9th Cir. 1990). "However,  
5 if an ongoing project undergoes changes which  
6 themselves amount to major Federal actions, the  
7 operating agency must prepare an EIS." *Id.* at 234-35  
8 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 363 n.  
9 21 (1979) (explaining that major federal actions  
10 include the "expansion or revision of ongoing  
11 programs")). The critical inquiry is whether the  
12 BiOp causes a change to the operational status quo of  
13 an existing project. *Upper Snake River*, 921 F.2d at  
14 235.

15 *Upper Snake River* concerned Reclamation's decision to  
16 reduce flows below Palisades Dam and Reservoir to  
17 below 1,000 cfs "[d]ue to lack of precipitation ...  
18 to increase water stored for irrigation..." 921  
19 F.2d at 234. Although it had been standard operating  
20 procedure since 1956 to maintain flows below that dam  
21 above 1,000 cfs, during previous dry periods, the  
22 average flow had "been lower than 1,000 cfs for 555  
23 days (or 4.75% of the total days in operation)." *Id.*  
24 at 233. Because the challenged flow fluctuations  
25 were within historic operational patterns, no NEPA  
26 compliance was required:

27 The Federal defendants in this case had been  
28 operating the dam for upwards of ten years before  
the effective date of the Act. During that  
period, they have from time to time and depending  
on the river's flow level, adjusted up or down  
the volume of water released from the Dam. What  
they did in prior years and what they were doing  
during the period under consideration were no  
more than the routine managerial actions  
regularly carried on from the outset without  
change. They are simply operating the facility in  
the manner intended. In short, they are doing  
nothing new, nor more extensive, nor other than  
that contemplated when the project was first  
operational. Its operation is and has been  
carried on and the consequences have been no  
different than those in years past.

The plaintiffs point out that flow rates have  
been significantly below 1,000 cfs for periods of  
seven days or more only in water years 1977,  
1982, and 1988, all years of major drought. They  
also note that prior to construction of the dam,

1 the lowest recorded flow rate did not fall below  
2 1400 cfs. From these facts, they argue that the  
3 Bureau's reduction of the flow below 1,000 cfs is  
4 not a routine managerial action. However, a  
5 particular flow rate will vary over time as  
6 changing weather conditions dictate. In  
7 particular, low flows are the routine during  
8 drought years. What does not change is the  
9 Bureau's monitoring and control of the flow rate  
10 to ensure that the most practicable conservation  
11 of water is achieved in the Minidoka Irrigation  
12 Project. Such activity by the Bureau is routine.

13 *Id.* at 235-36 (emphasis added).

14 *Westlands* specifically distinguished *Upper Snake*  
15 *River*, and reasoned that whether or not an EIS was  
16 required "will, of necessity, depend heavily upon the  
17 unique factual circumstances of each case." 850 F.  
18 Supp. at 1415 (citing *Westside Property Owners v.*  
19 *Schlesinger*, 597 F.2d 1214, 1224 (9th Cir. 1979)).

20 To some extent, the finding is based on whether  
21 the proposed agency action and its environmental  
22 effects were within the contemplation of the  
23 original project when adopted or approved. See  
24 [*Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476  
25 (9th Cir. 1979)]; [*Robinswood Community Club [v.*  
26 *Volpe*], 506 F.2d 1366 [(9th Cir. 1974)]. The  
27 inquiry requires a determination of whether  
28 plaintiffs have complained of actions which may  
cause significant degradation of the human  
environment. [*City and County of San Francisco*  
*v. United States*, 615 F.2d 498, 500 (9th Cir.  
1980)].

*Westlands*, 850 F. Supp. at 1415 [(emphasis added)].  
In *Westlands* "the taking of water for non-  
agricultural purposes [was] alleged to have changed  
the operational requirements of the CVP, imposed new  
standards for reverse flows in the Western Delta,  
carryover storage in the Shasta reservoir, and caused  
closure of the Delta cross-channel. Such actions and  
the environmental effects alleged are not routine  
managerial changes." *Id.* at 1421.

Smelt NEPA Decision at 33-35. This approach was utilized in  
the smelt case as follows:

1 Federal Defendants present the Declaration of Paul  
2 Fujitani, Doc. 290-2, which includes a review of  
3 historic OMR flows and compares those flows to  
4 projected flows under the RPA. Based on Fujitani's  
5 declaration, Federal Defendants argue:

6 As the available historical data show ... average  
7 OMR flows in January have fluctuated from as high  
8 as -3,269 cfs (January 1998) to as low as -8,268  
9 cfs (January 2003). Daily flows vary even more  
10 widely -- for example, in January 1998, daily OMR  
11 flows ranged between 2,810 cfs and -9,530 cfs.  
12 See Ex. 1. The flows set forth in RPA Component  
13 1, Action 2 are within these historic parameters.  
14 Similarly, the historical record shows average  
15 OMR flows in February have fluctuated from as  
16 high as 20,631 cfs (February 1997) to as low as -  
17 9,086 cfs (February 2003). The February flows  
18 set forth in RPA Component 1, Action 2 are also  
19 within these historic parameters.

20 RPA Component 2 provides that under certain  
21 conditions, OMR flows should be maintained  
22 between -1,250 and -5,000 cfs from the date  
23 Component 1 is completed until June 30 (or until  
24 water temperatures at Clifton Court Forebay reach  
25 25 degrees Celsius). The available historic data  
26 shows a wide range of OMR flows between January  
27 and July, and the flow ranges set forth in RPA  
28 Component 2 are within these historic parameters.  
See Ex. 1.

Therefore, even after adopting the OMR flow  
restrictions, Reclamation continues to operate  
the CVP within existing law and the same overall  
flow parameters, as it has done for decades.

*Id.* at 22-23.

Plaintiffs respond with the declaration of Thomas  
Boardman, Doc. 297-2, who opines that, under certain  
scenarios, the RPA constrains export pumping in a  
manner that departs from the status quo ante:

I reviewed historic data and considered how the  
2008 BiOp might affect operations as compared to  
the pre-existing criteria in D-1641. Based upon  
my review of those data, I found, in some  
circumstances, operating the CVP and SWP to meet  
pre-existing D-1641 criteria resulted in OMR  
flows more positive than -1,250 cfs. If those  
circumstances occur, the new OMR criteria in the

1           2008 BiOp would not control. I also found, in  
2           some circumstances, operating the CVP and SWP to  
3           meet the pre-existing D-1641 criteria resulted in  
4           OMR flows within the range specified by FWS  
5           pursuant to the 2008 BiOp. If those  
6           circumstances are presented again, the 2008 BiOp  
7           may control CVP and SWP operations, depending  
8           upon where in the range FWS sets the OMR limit.  
9           In still other circumstances, however, I found  
10          the pre-existing D-1641 criteria allowed OMR  
11          flows more negative than -5,000 cfs, the most  
12          negative flow rate allowed under the 2008 BiOp.  
13          If those circumstances occur, the new operating  
14          criteria in the 2008 BiOp will definitely control  
15          CVP and SWP operations. The changes in CVP and  
16          SWP operations necessary to meet the new  
17          operating criteria in the 2008 BiOp will reduce  
18          availability of the CVP and SWP to supply water.

19           *Id.* at ¶9.

20           Boardman also concluded that "[i]n 2009, limits on  
21           OMR flows imposed by FWS under the 2008 BiOp resulted  
22           in lower rates of CVP and SWP pumping than otherwise  
23           would have been allowed if only the preexisting  
24           criteria in D-1641 controlled." *Id.* at ¶10.  
25           Boardman estimates "that as a result of the 2008 BiOp  
26           limits on OMR flows from mid February to the end of  
27           March and from mid May to the end of June, the Jones  
28           Pumping Plant was unable to pump approximately  
29           390,000 acre-feet of water that it otherwise could  
30           have pumped and provided to water users south of the  
31           Delta, if only the pre-existing criteria in D-1641  
32           controlled." *Id.*

33           Fujitani's and Boardman's conclusions are not  
34           inconsistent. Fujitani concludes that average and  
35           daily OMR flows under the RPA fall within historic  
36           average and daily flow ranges. Boardman opines that,  
37           even though any given post-RPA average or daily OMR  
38           flow figure may fall within historic ranges, under  
39           certain circumstances, pre-RPA constraints would  
40           permit even more negative flows, resulting in even  
41           more export capability. Although Fujitani's  
42           conclusion, that post-RPA operations fall within the  
43           range of historic operating conditions, may comply  
44           with the letter of *Upper Snake River*, the RPA's  
45           operational changes violate the spirit and reasoning

1 of Upper Snake River:

2 This circuit has held that where a proposed  
3 federal action would not change the status quo,  
4 an EIS is not necessary. "An EIS need not discuss  
5 the environmental effects of mere continued  
6 operation of a facility." *Burbank Anti-Noise*  
7 *Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.  
8 1980) (holding EIS unnecessary for federal  
9 financial assistance in purchasing an existing  
10 airport since federal action would not change  
11 status quo), cert. denied, 450 U.S. 965 (1981);  
see also *Committee for Auto Responsibility v.*  
*Solomon*, 603 F.2d 992 (D.C. Cir. 1979) (holding  
government lease of parking area to new parking  
management firm does not trigger EIS requirement  
since area already used for parking so no change  
in status quo).

12 We find the reasoning of the district court in  
13 *County of Trinity v. Andrus* particularly  
14 instructive. In *Trinity* the plaintiffs sought to  
15 enjoin the Bureau from lowering the level of a  
16 reservoir during the drought year of 1977 because  
17 of the potential damage to the fish population in  
18 the reservoir. The court explained that the issue  
19 was "not whether the actions are of sufficient  
20 magnitude to require the preparation of an EIS,  
21 but rather whether NEPA was intended to apply at  
22 all to the continuing operations of completed  
23 facilities." *Id.* at 1388. The court  
24 distinguished the case from cases "when a project  
25 takes place in incremental stages of major  
26 proportions," and from cases where "a revision or  
27 expansion of the original facilities is  
28 contemplated," *id.* Neither of these situations  
applied here, the court observed. Instead,

[t]he Bureau has neither enlarged its  
capacity to divert water from the Trinity  
River nor revised its procedures or  
standards for releases into the Trinity  
River and the drawdown of reservoirs. It is  
simply operating the Division within the  
range originally available pursuant to the  
authorizing statute, in response to changing  
environmental conditions.

1           **Id.** at 1388-89. The court then concluded that  
2 actions taken in operating the system of dams and  
3 reservoirs (in particular, operational responses  
4 in a drought year) were not "major Federal  
5 actions" within the meaning of NEPA.

6           The Federal defendants in this case had been  
7 operating the dam for upwards of ten years before  
8 the effective date of the Act. During that  
9 period, they have from time to time and depending  
10 on the river's flow level, adjusted up or down  
11 the volume of water released from the Dam. What  
12 they did in prior years and what they were doing  
13 during the period under consideration were no  
14 more than the routine managerial actions  
15 regularly carried on from the outset without  
16 change. They are simply operating the facility in  
17 the manner intended. In short, they are doing  
18 nothing new, nor more extensive, nor other than  
19 that contemplated when the project was first  
20 operational. Its operation is and has been  
21 carried on and the consequences have been no  
22 different than those in years past.

23           The plaintiffs point out that flow rates have  
24 been significantly below 1,000 cfs for periods of  
25 seven days or more only in water years 1977,  
26 1982, and 1988, all years of major drought. They  
27 also note that prior to construction of the dam,  
28 the lowest recorded flow rate did not fall below  
1400 cfs. From these facts, they argue that the  
Bureau's reduction of the flow below 1,000 cfs is  
not a routine managerial action. However, a  
particular flow rate will vary over time as  
changing weather conditions dictate. In  
particular, low flows are the routine during  
drought years. What does not change is the  
Bureau's monitoring and control of the flow rate  
to ensure that the most practicable conservation  
of water is achieved in the Minidoka Irrigation  
Project. Such activity by the Bureau is routine.

921 F.2d at 235-36 (emphasis added).

Here, in contrast to the "routine" activities  
described in *Upper Snake River* and *Trinity* (cited in  
*Upper Snake River*), Reclamation's decision to  
implement the RPA is a "revis[ion] [of] its

1 procedures or standards" for operating the Jones  
2 pumping plant and other facilities significantly  
3 affecting OMR flows. This can be determined from the  
4 face of the BiOp and uncontroverted analyses of  
5 public data. Reclamation's and FWS's joint interest  
6 is pellucid: the Projects' water delivery operations  
7 must be materially changed to restrict project water  
8 flows to protect the smelt. Reclamation's  
9 implementation of the BiOp is major federal action  
10 because it substantially alters the status quo in the  
11 Projects' operations.

12 Smelt NEPA Decision at 37-42 (emphasis added; footnotes  
13 omitted).

14 Likewise, implementation of the 2009 Salmonid BiOp is not  
15 a continuation of the status quo. Plaintiffs offer the  
16 following as specific examples of significant changes imposed  
17 by the 2009 Salmonid BiOp:

- 18 • Action IV.2.1 of the BiOp's RPA imposes an entirely new  
19 "inflow to export ratio" on the San Joaquin River's  
20 water flows. 2009 Salmonid BiOp at 641.
- 21 • Actions I.2.2 through I.2.4 establishes new Keswick Dam  
22 release requirements and restrictions. 2009 Salmonid  
23 BiOp at 592-603.
- 24 • Action IV.1.2 requires nearly year-round modification  
25 of DCC gate operations, involving gate closures during  
26 periods when DCC gate operations were previously  
27 unrestricted. 2009 Salmonid BiOp at 635-40.
- 28 • Action IV.2.3 calls for more restrictive OMR flows of -  
2,500 cfs to -5,000 cfs. 2009 Salmonid BiOp at 648-52.
- Three separate actions impose a substantially higher  
fishery flow release schedule on New Melones for the  
purported benefit of steelhead.
  - First, Action III.1.3 requires a set minimum flow  
schedule for the benefit of steelhead by mandating  
the release of between 186,000 to 589,000 acre-feet  
annually, depending on water year type. 2009



1 Salmonid BiOp at 622-23 and Appendix 2-E.

- 2
- 3 ○ Second, Action III.1.2 requires Reclamation to  
4 release additional water (above the new flow  
5 required by Appendix 2-E), if needed, to maintain  
6 new, lower minimum temperatures at a specific  
7 location in the Stanislaus River. 2009 Salmonid  
8 BiOp at 620-21.
  - 9 ○ Third, Action VI.2.1 increases the minimum flow  
10 required at Vernalis on the San Joaquin River  
11 during the April-May pulse flow (VAMP) period, and  
12 directs Reclamation to make releases from Goodwin  
13 Reservoir on the Stanislaus River to meet these new  
14 flow requirements. 2009 Salmonid BiOp at 641-45.<sup>11</sup>

15 Federal Defendants do not concede that all of these  
16 Actions constitute new operational restrictions. For example,  
17 Actions I.2.2.A and I.2.2.B merely provide that Reclamation  
18 will consult with NMFS and other agencies if the end of year  
19 storage at Shasta Reservoir reaches a certain level; they do  
20 not impose any new operational restrictions. See 2009  
21 Salmonid BiOp at 593-95. However, Federal Defendants  
22 "acknowledge that at least Action IV.2.3, which describes OMR  
23 flows between January through June, constitutes a revised  
24 'procedure or standard' for operations, as that term is  
25 interpreted and used in the Court's Delta Smelt Decision."  
26 Doc. 100 at 21.

27 Federal Defendants insist that NEPA compliance is not

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28 <sup>11</sup> Plaintiffs Stockton East Water District, Oakdale Irrigation  
District, and South San Joaquin Irrigation District also contend that  
portions of the 2009 Salmonid BiOp conflict with other court orders, are  
poorly modeled, and are internally inconsistent. See Doc. 83-3 at 17-23.  
These arguments are premature, as they relate to the merits of the 2009  
Salmonid BiOp, not the question application of NEPA.

1 required because the 2009 Salmonid BiOp "does not change the  
2 purpose of the CVP, and even after its provisional acceptance,  
3 Reclamation continues to operate the CVP within existing law."  
4 Doc. 101 at 17. But, this standard does not accurately  
5 reflect the relevant authorities. *Upper Snake River*, 921 F.2d  
6 at 235, quoting *Trinity County*, 438 F. Supp. at 1388-89,  
7 distinguished cases in which Reclamation has "enlarged its  
8 capacity to divert water" ... "revised its procedures or  
9 standards for releasing into [a river] and the drawdown of  
10 reservoirs," (emphasis added), which would trigger NEPA, from  
11 those cases in which Reclamation is "simply operating [a  
12 project] within the range originally available pursuant to the  
13 authorizing statute, in response to changing environmental  
14 conditions," which would not trigger NEPA. Here,  
15 implementation of the RPA constitutes a non-trivial "revision  
16 of procedures or standards" for the operation of the Projects  
17 with draconian consequences. *Upper Snake River* and *Trinity*  
18 indicate that such revisions do, in fact, trigger NEPA. It is  
19 hard to imagine more significant adverse effects to the human  
20 environment than were effectuated by implementation of the  
21 RPAs.  
22  
23  
24

25 Federal Defendants also argue that whether Reclamation's  
26 implementation of the complex RPA will significantly change  
27 flows can only be determined based on a review of the facts in  
28

1 the administrative record, which is not yet complete. Rather  
2 than offer any evidence of the range of historic operating  
3 conditions or how the implementation of the RPA differs from  
4 that range, Plaintiffs rely entirely on NMFS's water loss  
5 estimates in the 2009 Salmonid BiOp. NMFS projects that the  
6 RPA will impact water supplies by reducing water exports 5-7%,  
7 or around 330,000 acre-feet annually on average, over and  
8 above the effect of the restrictions imposed by the 2008 Smelt  
9 BiOp. 2009 Salmonid BiOp at 720. On the Stanislaus, NMFS  
10 estimated that the RPA requirements would decrease deliveries  
11 to OID/SSJID by three percent on average and to Stockton East  
12 and Central by twenty-two percent on average. 2009 Salmonid  
13 BiOp Appendix 5 at 54.

14  
15  
16 Federal Defendants argue that these estimates are not  
17 sufficient to establish that the RPA will significantly change  
18 flows. In support of this proposition, Federal Defendants  
19 principally rely on Central Valley Project Improvement Act  
20 ("CVPIA"), section 3406(b)(2), which requires Reclamation to  
21 "dedicate and manage annually 800,000 acre-feet of Central  
22 Valley Project yield for the primary purpose of implementing  
23 the fish, wildlife, and habitat restoration purposes and  
24 measures authorized by this title...." Pub. L. 102-575, 106  
25 Stat. 4600, 4706 (1992). The 2009 Salmonid BiOp notes that  
26 "[i]f the Secretary of the Interior so chooses, dedication of  
27  
28

1 [CVPIA] b(2) water assets to the RPA actions could completely  
2 or significantly offset the projected water available, in  
3 part, to offset water costs of the RPA." 2009 Salmonid BiOp  
4 at 722. At the outset, CVPIA assets do not "offset" losses at  
5 all. At best, all losses attributable to the 2009 Salmonid  
6 BiOp might be counted toward the 800,000 AF dedication,  
7 reducing Reclamation's ability to use CVPIA assets in other  
8 ways.  
9

10 More pertinently, Federal Defendants and Defendant  
11 Intervenors point out that, in 1999, Reclamation prepared a  
12 programmatic EIS ("PEIS") addressing the environmental impacts  
13 expected from implementation of the CVPIA, including the  
14 mandatory 800,000 AF dedication of water to environmental  
15 purposes. The CVPIA PEIS evaluated various environmental  
16 impacts resulting from reduced surface water supplies,  
17 including many of the harms claimed by the Plaintiffs.  
18 However, that PEIS was prepared more than ten (10) years ago.  
19 Since then, the legal environment has changed considerably.  
20 For example, the Ninth Circuit held that Reclamation is not  
21 required to count water devoted to ESA uses toward the 800,000  
22 AF dedication, *Bay Institute of San Francisco v. United*  
23 *States*, 87 Fed. Appx. 637 at 639-40 (9th Cir. 2004), allowing,  
24 in some years, significantly more than the originally-intended  
25 800,000 AF dedication to environmental purposes. The CVPIA  
26  
27  
28

1 PEIS does not address this changed circumstance, nor does it  
2 address how reduced water deliveries might compound the  
3 already difficult present adverse economic and environmental  
4 conditions in the Central Valley of California. At a bare  
5 minimum, reliance on the CVPIA PEIS to comply with NEPA in  
6 this case is something that should have been done explicitly  
7 by Reclamation in an EA or tiered EIS, neither of which has  
8 been undertaken.  
9

10 At the very least, Action IV.2.3 (OMR Flow Restrictions)  
11 constitutes a significant revision to Reclamations' procedures  
12 or standards for operating the CVP. This can be determined  
13 from the face of the BiOp and undisputed facts, without the  
14 need for a completed administrative record. Under *Upper Snake*  
15 *River and Trinity*, such significant revisions trigger NEPA,  
16 provided the final element -- whether there are substantial  
17 questions about whether a project may significantly effect the  
18 human environment -- is satisfied.  
19

20  
21 E. Significantly Affect the Human Environment.

22 If the "major federal action" component is satisfied, an  
23 agency must prepare an EIS "where there are substantial  
24 questions about whether a project may cause significant  
25 degradation of the human environment." *Native Ecosystems*  
26 *Council*, 428 F.3d at 1239. In the Smelt case, Plaintiffs  
27 accurately maintained that the 2008 Smelt BiOp satisfies this  
28

1 standard because it "reallocates hundreds of thousands of  
2 acre-feet of water annually -- enough water to serve the needs  
3 of millions of people -- from the current reasonable and  
4 beneficial municipal, industrial, agricultural, and other  
5 uses." 1:09-cv-00407, Doc. 245-2 at 22.

6  
7 As is the case here, the administrative record was not  
8 yet fully resolved in the Smelt case and the parties agreed  
9 the NEPA summary judgment motion should be resolved without  
10 reference to the administrative record. The Smelt NEPA  
11 Decision concluded that "certain, dispositive conclusions  
12 [could] be made without looking to the AR":

13  
14 First, it is undisputed that implementation of the  
15 RPA reduced pumping by more than 300,000 AF in the  
16 2008-09 water year. See Boardman Decl., Doc. 297-2  
17 at ¶10. FWS admitted in its Answer to the State  
18 Water Contractors' Complaint that such "reductions in  
19 exports from the Delta" may "place greater demands  
20 upon alternative sources of water, including  
21 groundwater." Doc. 141 at ¶¶ 4, 16. The potential  
22 environmental impact of groundwater overdraft is  
23 beyond reasonable dispute. See, e.g., *NRDC v.*  
24 *Kempthorne*, 2008 WL 5054115, \*27 (E.D. Cal. Nov. 19,  
25 2008) (noting that the final EIS covering renewal of  
26 the Sacramento River Settlement Contracts "predicts  
27 that reversion to the pre-settlement regime would  
28 have potential effects on the environment, because  
the Settlement Contractors would rely more heavily on  
local groundwater, leading to air quality and soil  
erosion problems, as well as impacts to local streams  
and wildlife."); *NRDC v. Kempthorne*, 2007 WL 4462395  
(E.D. Cal. 2007) (acknowledging "[r]isks that will be  
created by implementation of [] interim remedial  
actions" designed to protect smelt "include, but are  
not limited to ... Adverse effects on agriculture  
including, but not limited to, loss of jobs,  
increased groundwater pumping, fallowed land, and  
land subsidence[;] [and] Air pollution resulting from

1 heavier reliance on groundwater pumping and decrease  
2 in surface irrigation...."). This, in and of itself,  
3 raises the kind of "serious questions" about whether  
4 a project may cause significant degradation of the  
5 human environment, requiring NEPA compliance. That  
6 the Bureau must comply with NEPA is established as a  
7 matter of law.

8 Smelt NEPA Decision at 43-44.

9 Here, NMFS concedes that the RPA will materially reduce  
10 water exports by 5-7 percent, or approximately 330,000 AF.  
11 2009 Salmonid BiOp at 720. As with the Smelt NEPA Decision,  
12 that such reductions have the potential to significantly  
13 effect the human environment are beyond dispute. The smelt  
14 reductions have already caused such impacts.

15 As was recently recognized in connection with Plaintiffs'  
16 request for emergency injunctive relief in this case

17 [I]t is also undisputed that any lost pumping  
18 capacity directly attributable to the 2009 Salmonid  
19 BiOp will contribute to and exacerbate the currently  
20 catastrophic situation faced by Plaintiffs, whose  
21 farms, businesses, water service areas, and impacted  
22 cities and counties, are dependent, some exclusively,  
23 upon CVP and/or SWP water deliveries. The impacts  
24 overall of reduced deliveries include irretrievable  
25 resource losses (permanent crops, fallowed lands,  
26 destruction of family and entity farming businesses);  
27 social disruption and dislocation; as well as  
28 environmental harms caused by, among other things,  
increased groundwater consumption and overdraft, and  
possible air quality reduction.

29 Doc. 202 at 15-16. This is not to say that such effects will  
30 definitely occur. Federal Defendants and Defendant  
31 Intervenors may dispute the magnitude of these effects and/or  
32 the causal connection between implementation of the 2009  
33 Salmonid BiOp RPAs and the effects, but there can be no

1 dispute that "there are substantial questions" about whether  
2 coordinated operation of the CVP and SWP under the RPAs "may  
3 cause significant degradation of the human environment."  
4 *Native Ecosystems Council*, 428 F.3d at 1239. No more is  
5 required to trigger NEPA. It was up to the agencies to take  
6 the required "hard look." They did not. Once they satisfy  
7 their NEPA obligations, the course of action ultimately  
8 undertaken is entitled to deference.  
9

10  
11 **F. Miscellaneous Issues.**

12 1. **Will Application of NEPA to the Issuance of the BiOp  
13 Frustrate the Purposes of the ESA?**

14 Defendant Intervenors argue here, as they did in the  
15 Smelt NEPA decision, that application of NEPA to FWS's  
16 issuance of the BiOp will frustrate the purposes of the ESA.  
17 Doc. 82 at 4-5. As in the Smelt case, "[i]t is not necessary  
18 to address this argument because it is not necessary to decide  
19 whether NEPA applies to FWS's issuance of the BiOp. NEPA  
20 applies to Reclamation's acceptance and implementation of the  
21 BiOp and its RPA. This dispute over statutory priority is  
22 premature." Smelt NEPA Decision at 44.  
23

24 2. **The Amicus Brief.**

25 The Pacific Legal Foundation ("PLF") submitted a nineteen  
26 page amicus brief in support of Plaintiffs' motion for summary  
27 judgment, in which they argue that requiring "the United  
28



1 States to engage in the NEPA review process furthers the  
2 statute's purpose of providing a democratic check on  
3 significant federal actions that harm the human environment."  
4 Doc. 84. PLF's extensive policy arguments are unnecessary,  
5 where the plain language of the law imposes an obligation upon  
6 the United States Bureau of Reclamation to comply with NEPA.  
7 *Northern States Power Co. v. United States*, 89 F.3d 1350, 1355  
8 (8th Cir. 1996) (Where the intent of Congress is clear from the  
9 plain language of the statutory provision, "legislative  
10 history and policy arguments are at best interesting, at worst  
11 distracting and misleading, and in neither case  
12 authoritative."). While the amicus brief has been fully  
13 considered, it need not be discussed further.  
14  
15

16 G. Remedies.

17 Plaintiffs address remedies issues in their motion for  
18 summary judgment. As a starting point, an injunction should  
19 not issue where "enjoining government action allegedly in  
20 violation of NEPA might actually jeopardize natural  
21 resources." *Save Our Ecosystems*, 747 F.2d 1240, 1250 n.16  
22 (9th Cir. 1984). The interplay between the NEPA violation and  
23 jeopardy is a complex one that has not yet been properly  
24 briefed. More to the point, preliminary injunction  
25 proceedings are set for hearing on a firm schedule for late  
26 March and early April of this year. No more is required at  
27  
28

1 this juncture.

2  
3 **III. CONCLUSION**

4 For all the reasons stated above, Plaintiffs' are  
5 entitled to summary judgment on their claim against Federal  
6 Defendants that Reclamation's provisional adoption and NMFS  
7 and Reclamation's implementation of the 2009 Salmonid BiOp and  
8 its RPA without preparing any NEPA documentation violated  
9 NEPA.

10 Plaintiffs shall submit a form of order consistent with  
11 this memorandum decision within ten (10) days of electronic  
12 service.  
13

14 **SO ORDERED**

15 Dated: March 5, 2010

16 /s/ Oliver W. Wanger  
17 Oliver W. Wanger  
18 United States District Judge  
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