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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PACIFIC COAST FEDERATION OF
FISHERMEN’S ASSOCIATIONS, *et al.*,

Plaintiff,

v.

GINA RAIMONDO, *et al.*,

Defendants.

No. 1:20-cv-00431-DAD-EPG

ORDER DENYING WITHOUT
PREJUDICE MOTION FOR LEAVE TO
AMEND ANSWER

(Doc. No. 311)

THE CALIFORNIA NATURAL
RESOURCES AGENCY, *et al.*,

Plaintiffs,

v.

GINA RAIMONDO, *et al.*,

Defendants.

No. 1:20-cv-00426-DAD-EPG

ORDER DENYING WITHOUT
PREJUDICE MOTION FOR LEAVE TO
AMEND ANSWER

(Doc. No. 215)

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1 **INTRODUCTION**

2 Plaintiffs¹ in the above-captioned actions bring closely related claims against the National
3 Marine Fisheries Service (“NMFS”), the U.S. Fish and Wildlife Service (“FWS”), the U.S.
4 Bureau of Reclamation (“Reclamation”), and various official representatives of those agencies
5 (collectively, “Federal Defendants”). (*CNRA*, Doc. No. 51; *PCFFA*, Doc. No. 52.²) Both cases
6 involve challenges to the adoption by NMFS and FWS, respectively, of a pair of “biological
7 opinions” issued in 2019 pursuant to the Endangered Species Act (“ESA”), 16 U.S.C § 1531 *et*
8 *seq.* Those biological opinions address the impact of Reclamation’s updated plan for the long-
9 term operation of the Central Valley Project (“CVP”) and the State Water Project (“SWP”) (the
10 “Proposed Action”) on various ESA-listed species.

11 These cases were stayed for some time to allow Federal Defendants to reinitiate
12 consultation under Section 7 of the ESA regarding the challenged biological opinions and to
13 allow federal and state regulators to engage in a process designed to “reconcile” the Proposed
14 Action as evaluated in the challenged biological opinions with parallel species protection
15 measures imposed by state regulators. (*See* Doc. No. 285.) Federal Defendants formally
16 reinitiated consultation on the challenged biological opinions on September 30, 2021. (Doc. No.
17 293.)

18 Federal Defendants and the State Plaintiffs reached agreement in the context of the *CNRA*
19 case as to how the CVP and SWP should be operated through September 30, 2022 while
20 reinitiated consultation is ongoing. (Doc. No. 296 at 2.) That agreement was initially described
21 in a five-page, proposed “Interim Operations Plan” (“IOP”) attached to a joint status report
22 submitted to this court on October 14, 2021. (Doc. No. 296-1.) The proposal has been refined
23 somewhat in recent weeks, with the current IOP set forth in the form of a proposed order lodged

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25 ¹ Plaintiffs in *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Raimondo*, 1:20-cv-00431-DAD-EPG
26 (*PCFFA*), are a coalition of six environmental organizations (collectively referenced herein as
27 “*PCFFA*”). Plaintiffs in *Cal. Nat. Res. Agency v. Raimondo*, No. 1:20-cv-00426-DAD-EPG
28 (*CNRA*), are the People of the State of California, California’s Natural Resources Agency, and
California’s Environmental Protection Agency (“State Plaintiffs”).

² Hereinafter, unless otherwise noted, the docket references in this order are to the docket
numbers in *PCFFA*.

1 with the court. (Doc. No. 313-1.) Federal Defendants have moved in both related cases for
2 voluntary remand without vacatur of the 2019 biological opinions, and further request that the
3 court impose the IOP as a form of interim injunctive relief. (Doc. No. 313.) If this request were
4 to be granted, the 2019 biological opinions would remain in place, but as modified by the IOP.
5 (*Id.*) State plaintiffs in *CNRA* join in the Federal Defendants’ motion. (*CNRA*, Doc. No. 220.)
6 Plaintiffs in the *PCFFA* case intend to file a motion seeking additional forms of injunctive relief,
7 since it is their position that the IOP is not sufficiently protective of the ESA-listed species at
8 issue. (Doc. Nos. 296 at 3–4; 307.) Defendant intervenors indicate that they intend to oppose any
9 form of relief that would operate to modify the operational parameters set forth in the challenged
10 biological opinions. (Doc. Nos. 296 at 7–18; 307.) The court has set an aggressive briefing
11 schedule, particularly given the complexity of the issues raised, to ensure that the motions
12 pertaining to remand and to the nature and scope of interim injunctive relief will be ripe in
13 January 2022. (Doc. No. 315.)

14 Meanwhile, one set of defendant-intervenors, the State Water Contractors (“SWC”)³, has
15 moved to amend its answer in each of the related cases (Doc. No. 311; *CNRA* Doc. No. 215) to
16 add the following three proposed cross-claims against Federal Defendants:

17 (1) that Reclamation violated the Administrative Procedure Act (“APA”), 5 U.S.C.
18 §§ 701–06, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et*
19 *seq.*, by “approv[ing]” the IOP without subjecting the IOP to appropriate environmental
20 review;

21 (2) that all Federal Defendants violated the APA and ESA § 7(a)(2), 16 U.S.C.
22 § 1536(a)(2), by “approv[ing]” the IOP without engaging in appropriate consultation to
23 ensure that the operational changes embodied in the IOP will not jeopardize the continued
24 existence of ESA-listed species and/or adversely modify their critical habitat; and

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26 ³ SWC alleges that it is a non-profit corporation consisting of 27 public water agencies that
27 provide water to 27 million Californians and 750,000 acres of farmland. (Doc. No. 311-2 at 33.)
28 SWC’s members include the Metropolitan Water District of Southern California, Kern County
 Water Agency, Central Coast Water Agency, and Solano County Water Agency. (*See* Doc. No.
 63-4 at 2.)

1 (3) that all Federal Defendants violated the APA and Section 4004 of the Water
2 Infrastructure Improvements for the Nation (“WIIN”) Act, Pub. L. No. 114-322 (2016), by
3 failing to abide by certain procedures applicable to ESA consultation related to the CVP
4 and SWP.

5 (*See* Doc. No. 311-2 (SWC’s proposed first amended answer).) In conjunction with the motions
6 to amend, SWC has proposed the filing of a motion for summary judgment addressing their cross-
7 claims on December 16, 2021, with the apparent intent to merge that briefing with the schedule
8 the court has set regarding the motion for remand without vacatur and related requests for interim
9 injunctive relief.

10 Federal Defendants oppose SWC’s motions to amend (Doc. No. 318, *CNRA* Doc. No.
11 227), and are joined in opposition by the *PCFFA* plaintiffs (Doc. No. 318) and *CNRA* plaintiffs
12 (*CNRA* Doc. No. 229). Considering the need for an expedited ruling, the court did not authorize
13 the filing of reply briefs. Having carefully considered the motions and oppositions in the context
14 of the entire record, the court will deny the motions to amend without prejudice.

15 ANALYSIS

16 A motion to amend a pleading is governed by Federal Rule of Civil Procedure 15, which
17 provides that the court should grant leave “freely . . . when justice so requires.” Fed. R. Civ. P.
18 15(a)(2). Courts should consider several factors weighing against granting leave to amend,
19 including “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to
20 cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by
21 virtue of allowance of the amendment [and] futility of the amendment[.]” *Foman v. Davis*, 371
22 US 178, 182 (1962). “Of the *Foman* factors, prejudice to the opposing party carries the most
23 weight.” *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Eminence*
24 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)). “Absent prejudice, or a
25 strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule
26 15(a) in favor of granting leave to amend.” *Eminence*, 316 F.3d at 1052. Here, the court
27 discusses only the question of futility in detail because the strength of the showing as to that
28 factor alone justifies denial of amendment here. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th

1 Cir. 2004) (“Futility alone can justify the denial of a motion for leave to amend.”).

2 The first proposed cross-claim is premised upon the allegation that Federal Defendants’
3 “approval” of the IOP violated NEPA because Federal Defendants failed to subject the IOP to the
4 environmental review NEPA requires. Because NEPA does not provide a private right of action,
5 the court’s jurisdiction to hear NEPA claims arises under the APA. *Friends of Roeding Park v.*
6 *City of Fresno*, 848 F. Supp. 2d 1152, 1160 (E.D. Cal. 2012) (“It is well-accepted that . . . NEPA .
7 . . do[es] not create [a] private right[] of action to enforce [its] provisions Plaintiff seeking
8 relief for violations of these statutes must rely upon other authority, such as the [APA].”). The
9 APA in turn includes “a series of procedural requirements litigants must fulfill before bringing
10 suit in federal court.” *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir.
11 2005).

12 The APA authorizes suit by “[a] person suffering legal wrong because of agency action, or
13 adversely affected or aggrieved by agency action within the meaning of a relevant statute.”
14 5 U.S.C. § 702.; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004). Where no other
15 statute provides a private right of action, the “agency action” complained of must be “final
16 agency action.” 5 U.S.C. § 704; *Norton*, 542 U.S. at 62. Agency action” is defined in 5 U.S.C.
17 § 551(13) to include “the whole or a part of an agency rule, order, license, sanction, relief, or the
18 equivalent or denial thereof, or failure to act.” An “agency action” falls under one of “five
19 categories of decisions made or outcomes implemented by an agency-‘agency rule, order, license,
20 sanction [or] relief.’” *Norton*, 542 U.S. at 62 (quoting 5 U.S.C. § 551(13)). As the Supreme
21 Court explained in *Norton*:

22 All of those categories involve circumscribed, discrete agency
23 actions, as their definitions make clear:

- 24 1. “[a rule is] an agency statement of . . . future effect designed to
implement, interpret, or prescribe law or policy;
- 25 2. [an order is] a final disposition . . . in a matter other than rule
26 making;
- 27 3. [a license is] a permit . . . or other form of permission;
- 28 4. [a sanction is] a prohibition . . . or taking [of] other compulsory
or restrictive action; and

1 5. [a relief is] (a) a grant of money, assistance, license, authority,
2 etc., or (b) recognition of a claim, right, immunity, etc., or (c) a
3 taking of other action on the application or petition of, and
4 beneficial to, a person.”

5 *Norton*, 542 U.S. at 62 (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)).

6 For an action to be “final agency action” under the APA, two conditions must be met:

7 1. The action must mark the ‘consummation’ of the agency’s
8 decision making process and must not be of a merely tentative or
9 interlocutory nature, and

10 2. The action must be (a) “one by which rights or obligations have
11 been determined,” or (b) “from which legal consequences flow.”

12 *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Whether an action constitutes a final agency action
13 is premised on the observation that the action has “no direct consequences” and serves “more like
14 a tentative recommendation than a final binding determination.” *Id.* In other words, if the agency
15 action is purely advisory and in no way affects the legal rights of the relevant actors it is not a
16 “final agency action” under the APA. *Id.* In the Ninth Circuit, the core question is whether the
17 agency has completed its decision-making process and whether the result of that process is one
18 that will directly affect the parties. *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977,
19 982 (9th Cir. 2006). There are at least three circumstances in which an agency’s action may be
20 deemed final:

21 1. If the action “amounts to a definitive statement of the agency’s
22 position” or

23 2. If the action “has a direct and immediate effect on the day-to-day
24 operations” of the subject party, or

25 3. If, based on the action, “immediate compliance with the terms is
26 expected.”

27 *Id.* A reviewing court should “focus on the practical and legal effects of the agency action” and
28 should interpret the finality requirement “in a pragmatic and flexible manner.” *Id.*

Here, nothing in the proposed amended answer or elsewhere in the record suggests that
any Federal Defendant has taken any “final agency action” in connection with the IOP. Relevant
to this issue of finality, SWC’s proposed amended answer alleges as follows:

1 On September 27, 2021, counsel for Federal Defendants provided
2 SWC with the IOP (the proposed “interim operations plan” for
Water Year 2022). . . .

3 FWS and NMFS were involved in the development of the IOP. . . .

4 [An] October 1, 2021 Joint Status Report [filed] in PCFFA and
5 CNRA stated that as part of the reconciliation process
6 described in Federal Defendants’ prior filings, Federal Defendants
and the State Plaintiffs developed a plan of operations of the CVP
and SWP through September 30, 2022. . . .

7 Federal Defendants’ position statement in [an October 14, 2021]
8 Joint Status Report stated Federal Defendants and State Plaintiffs
agree that “adoption of the [IOP] is necessary,” and that Federal
9 Defendants would file a motion to adopt the IOP and to stay the
litigation through September 30, 2022 in both cases. . . .

10 On November 4, 2021, Federal Defendants indicated in a Joint
11 Status Report that they were considering making “targeted
12 adjustments to the interim operations plan submitted on October 14,
2021,” but confirmed that they would seek the Court’s approval of
13 a specifically identified plan for interim operations on November
23, 2021. (*Id.* at ¶ 73.)

14 (Doc. No. 311-2, ¶¶ 58, 60, 63, 66, 73 (emphasis added).)

15 These allegations confirm that whatever Federal Defendants have thus far done in
16 connection with the IOP, that conduct likely does not amount to “agency action” at all, and
17 certainly is not “final agency action.” The IOP is a *proposed* management regime being
18 presented to the court for the court’s consideration. Nothing suggests that the IOP is “the whole
19 or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or
20 failure to act,” 5 U.S.C. § 551(13)), as those terms are defined in the statute, *Norton*, 542 U.S. at
21 62 (quoting 5 U.S.C. §§ 551(4), (6), (8), (10), (11)).

22 Even assuming, *arguendo*, that the Federal Defendants’ alleged conduct in connection
23 with the IOP could be considered an “agency action,” and further assuming that the IOP marks
24 the “consummation” of that hypothetical agency action (thereby satisfying the first finality
25 requirement set forth in *Bennett*), the second finality requirement—that the action must be “one
26 by which rights or obligations have been determined,” or “from which legal consequences

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1 flow”— plainly is not alleged, nor could it be.⁴ To the contrary, SWC’s proposed amended
2 answer confirms that the IOP is in the process of being presented to the court for *possible* judicial
3 approval as part of a motion for interim injunctive relief. For these reasons, the first cross-claim
4 premised upon NEPA fails to allege final agency action as required by the APA and therefore
5 amendment to assert such a claim would be futile as presently formulated.

6 The same is true as to the second cross-claim. That claim alleges that Federal Defendants
7 violated the APA and ESA § 7(a)(2) by “approv[ing]” the IOP without engaging in appropriate
8 consultation required under the ESA. First, to the extent SWC is attempting to bring this claim
9 directly under the ESA’s citizen suit provision, they have failed to provide the statutorily required
10 sixty-day notice to Federal Defendants. 16 U.S.C. § 1540(g)(2)(A)(i) (“No action may be
11 commenced [under the ESA’s citizen suit provision] prior to sixty days after written notice of the
12 violation has been given to the Secretary, and to any alleged violator. . . .”); *Klamath-Siskiyou*
13 *Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 647 (9th Cir. 2015) (“A failure to strictly comply
14 with the notice requirement acts as an absolute bar to bringing suit under the ESA.”). To the
15 extent SWC is attempting to bring this claim under the APA, the final agency action requirement
16 again applies. The second cross-claim relies on the same general allegations as the first and again
17 fails to articulate a final agency action. Amendment to assert such a cross-claim would therefore
18 be futile as presently proposed.

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21 ⁴ In *Oregon Natural Desert* the Ninth Circuit did articulate that a final agency action can exist
22 where an action “amounts to a definitive statement of the agency’s position.” 465 F.3d at 982.
23 Superficially, it is possible to apply that language to the present circumstances insofar as Federal
24 Defendants appear to have settled on a version of the IOP for presentation to the court thereby
25 taking a position in this litigation that the IOP is the best form of injunctive relief. But that is not
26 the kind of situation that the court in *Oregon Natural Desert* had in mind. There, the Forest
27 Service argued that its issuance of Annual Operating Instructions (“AOIs”) to grazing permit
28 holders was not an agency action or final for purposes of the APA. *Id.* The Ninth Circuit first
held that an AOI was the equivalent of a license. *Id.* at 982–83. Then, more pertinent here, it
concluded that the issuance of the AOIs was a final agency action because “the initial agency
decisionmaker arrived at a definitive position and put the decision into effect.” *Id.* at 985
(emphasis added). The latter step—putting the decision into effect—is not alleged here. SWC’s
entirely conclusory assertion that Reclamation “approved” the IOP (see, e.g., Doc. No. 311-2,
¶ 87) is insufficient to satisfy that requirement.

1 The third cross-claim arguably requires some additional discussion. That claim alleges
2 that Federal Defendants violated the APA and the WIIN Act, by failing to abide by procedures set
3 forth in WIIN Act § 4004. In pertinent part, § 4004(a) provides:

4 Federal agencies shall cooperate with State and local agencies to
5 resolve water resource issues in concert with conservation of
6 endangered species, in any consultation or reconsultation on the
7 coordinated operations of the Central Valley Project and the State
8 Water Project, the Secretaries of the Interior and Commerce shall
ensure that any public water agency that contracts for the delivery
of water from the Central Valley Project or the State Water Project
that so requests shall—

9 (1) have routine and continuing opportunities to discuss and submit
10 information to the action agency for consideration during the
development of any biological assessment;

11 (2) be informed by the action agency of the schedule for preparation
of a biological assessment;

12 (3) be informed by the consulting agency, the U.S. Fish and
13 Wildlife Service or the National Marine Fisheries Service, of the
14 schedule for preparation of the biological opinion at such time as
the biological assessment is submitted to the consulting agency by
the action agency;

15 (4) receive a copy of any draft biological opinion and have the
16 opportunity to review that document and provide comment to the
consulting agency through the action agency, which comments will
17 be afforded due consideration during the consultation;

18 (5) have the opportunity to confer with the action agency and
19 applicant, if any, about reasonable and prudent alternatives prior to
the action agency or applicant identifying one or more reasonable
20 and prudent alternatives for consideration by the consulting agency;
and

21 (6) where the consulting agency suggests a reasonable and prudent
alternative be informed—

22 (A) how each component of the alternative will contribute to
23 avoiding jeopardy or adverse modification of critical habitat
and the scientific data or information that supports each
24 component of the alternative; and

25 (B) why other proposed alternative actions that would have
26 fewer adverse water supply and economic impacts are
inadequate to avoid jeopardy or adverse modification of
critical habitat

27 Pub. L. No. 114-322, § 4004 (2016).

28 ////

1 The plain language of § 4004 does apply to the present circumstances. The procedural
2 requirements set forth in § 4004(a)(1)–(6) apply only to the circumstances set forth in the opening
3 paragraph, which is specifically limited to “any consultation or reconsultation on the coordinated
4 operations of the Central Valley Project and the State Water Project.” While Federal Defendants
5 have reinitiated consultation on the challenged biological opinions, that re-consultation process is
6 just beginning. The presentation of the IOP to this court is a separate (but related) litigation
7 procedure meant to bridge the gap between the 2019 biological opinions and any revised
8 biological opinions that may result from re-consultation. In addition, the absence of finality
9 discussed above arguably dooms SWC’s proposed WIIN Act cross-claim as well. Just like
10 NEPA, the WIIN Act does not contain a citizen suit provision, and therefore any claims brought
11 thereunder are subject to the APA’s threshold requirements. Without a final agency action, any
12 violations of the procedural requirements set forth in § 4004 are not actionable or justiciable.

13 Having found amendment to assert each one of the proposed cross-claims to be obviously
14 futile, the court will deny SWC’s motions to amend its answers without prejudice to renewal of
15 its motion to amend should circumstances change in the future.

16 The court pauses briefly to note that SWC’s motion to amend appears to have been filed at
17 least in part to obliquely address other, related matters. SWC and other defendant intervenors
18 have elsewhere questioned whether the court may approve a set of interim injunctive relief
19 measures such as those proposed in the IOP where the proposing agency has not subjected those
20 measures to normal environmental review and/or administrative process. (*See* Doc. No. 26 at 9,
21 15 (citing *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) (“[A] district court
22 may not approve a consent decree that ‘conflicts with or violates’ an applicable statute[.]”).)
23 Although the court has not examined this potential issue in detail at this stage of the litigation, it
24 is far from clear that this suggested line of reasoning can, in fact, swim. *See Turtle Island*
25 *Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012) (approving
26 a consent decree despite noncompliance with statutory rulemaking procedural requirements
27 because the decree “merely temporarily restore[d] the *status quo ante* pending new agency action
28 and [did] not promulgate a new substantive rule.”); *see also Nat’l Tr. for Historic Pres. v. Suazo*,

1 No. CV-13-01973-PHX-DGC, 2015 WL 3613850, at *4 (D. Ariz. June 9, 2015) (holding that
2 while certain statutes may limit an agency’s authority to amend or issue a plan “they do not
3 preclude the Court from enjoining activities”).

4 SWC seems particularly concerned about two things. First, SWC has apparently received
5 some indication that Federal Defendants will object to SWC raising an argument based on
6 *Sherman* in the absence of a pleading setting forth underlying statutory violations. The possibility
7 of such an objection has no bearing on the court’s analysis of the futility of the proposed
8 amendment.⁵ Second, SWC notes, correctly, that it is currently subject to a combined page limit
9 alongside the other defendant-intervenors. (*See* Doc. Nos. 311-1 at 11, 315.) To the extent SWC
10 was attempting to use cross-claims as an end-run around the court’s page limits, this again has no
11 bearing on the court’s futility analysis. Put simply, a motion to amend an answer that proposes to
12 add futile claims is not an appropriate (or effective) mechanism to address a parties’ concerns
13 about briefing page limitations imposed by the court. If the parties wish to present an appropriate
14 stipulation to the court on this issue, a modest expansion of the page limits will be entertained to
15 permit the filing of appropriate briefing addressing the court’s equitable authority. If no
16 agreement can be reached, the court will entertain a concise petition for expanded page limits.
17 The parties are forewarned, however, that the court does not—at least at this point—believe it is
18 necessary for SWC to exhaustively brief the merits of its arguments as to why or in what way the
19 Federal Defendants’ have violated NEPA, the ESA, or the WIIN Act by proposing the IOP to the
20 court for approval.

21 **CONCLUSION AND ORDER**

22 For the reasons set forth above, the pending motions for leave to amend (*PCFFA*, Doc.
23 No. 311; *CNRA*, Doc. No. 215) are DENIED WITHOUT PREJUDICE.

24 IT IS SO ORDERED.

25 Dated: December 7, 2021

26 
UNITED STATES DISTRICT JUDGE

27 _____
28 ⁵ The court does note that the concept of judicial estoppel may prevent the Federal Defendants
from advancing certain objections.