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22 *Attorneys for Plaintiffs*

23 **IN THE UNITED STATES DISTRICT COURT**
 24 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

25 FRIENDS OF THE RIVER, DEFENDERS OF
 26 WILDLIFE, and CENTER FOR BIOLOGICAL
 27 DIVERSITY,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
 ENGINEERS, et al.,

Defendants.

Case No. 2:11-cv-01650-JAM -JFM

**STIPULATION AND ORDER OF
 VOLUNTARY DISMISSAL
 WITHOUT PREJUDICE**

1 Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, the Parties
2 hereto stipulate through counsel to dismissal of this case as follows:

3 1. Plaintiffs filed this case on June 20, 2011[Doc. 1], and filed a first amended complaint
4 on October 10, 2011[Doc. 25]. Specifically, Plaintiffs' First Amended Complaint for Declaratory
5 and Injunctive Relief challenges policies allegedly adopted by the United States Army Corps of
6 Engineers ("Corps") and consists of an Administrative Procedure Act ("APA") claim for
7 violations of the National Environmental Policy Act ("NEPA"), an APA claim for violations of
8 the Endangered Species Act ("ESA"), and an APA claim for failure to follow rulemaking
9 procedures. Specifically, Plaintiffs' claims relate to several alleged actions by the Corps
10 including: the issuance by the Corps of Engineering Technical Letter ("ETL") 1110-2-571 on or
11 about April 10, 2009, establishing "Guidelines for Landscape Planting and Vegetation
12 Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures"; issuance
13 of a draft Policy Guidance Letter ("PGL") that adopted a new variance process in February 2010,
14 entitled "Process for Requesting a Variance From Vegetation Standards for Levees and
15 Floodwalls," 75 Fed. Reg. 6364 (Feb. 9, 2010); and the Corps' reliance on a document entitled
16 "Final Draft White Paper: Treatment of Vegetation within Local Flood-Damage-Reduction
17 Systems" dated April 20, 2007. Plaintiffs allege that the Corps violated NEPA by failing to
18 prepare an Environmental Impact Statement (EIS), violated the ESA by failing to ensure against
19 jeopardy through consultations with the National Marine Fisheries Service and the United States
20 Fish and Wildlife Service, and violated APA rulemaking provisions in adopting a policy
21 prohibiting vegetation on levees.

22 2. On October 21, 2010, Defendants filed a Motion to Dismiss all claims pursuant to Fed.
23 Rule Civ. Pro. 12(b)(1) [Doc. 26], Plaintiffs opposed the motion [Doc. 47], and this Court denied
24 Defendants' motion to dismiss on April 27, 2012 [Doc. 55].

25 3. On or about April 30, 2014, the Corps issued a new ETL, ETL 1110-2-583,
26 establishing "Guidelines for Landscape Planting and Vegetation Management at Levees,
27 Floodwalls, Embankment Dams, and Appurtenant Structures."

1 4. In June 2014, Congress enacted into law and the President signed the Water Resources
2 Reform and Development Act of 2014 (“WRRDA”), including § 3013, P.L. 113-121, 128 Stat.
3 1193, 1284-86 [a true and correct copy of WRRDA § 3013 is attached hereto as Attachment A].
4 WRRDA § 3013 requires the Secretary of the Army to, among other things, “carry out a
5 comprehensive review of the guidelines [Corps of Engineers policy guidelines for management
6 of vegetation on levees] in order to determine whether current Federal policy relating to levee
7 vegetation is appropriate for all regions of the United States.” Section 3013(c) sets forth specific
8 factors that the Secretary “shall consider” in carrying out the review. Section 3013(f) requires
9 that not later than 18 months after the date of enactment of WRRDA the Secretary shall “revise
10 the guidelines based on the results of the review. . .” Section 3013(g) mandates that “Until the
11 date on which revisions to the guidelines are adopted in accordance with subsection (f), the
12 Secretary shall not require the removal of existing vegetation as a condition or requirement for
13 any approval or funding of a project, or any other action, unless the specific vegetation has been
14 demonstrated to present an unacceptable safety risk.”

15 5. The guidelines that must be reviewed by the Secretary pursuant to WRRDA Section
16 3013 include, but may not be limited to, the draft Policy Guidance Letter entitled “Process for
17 Requesting a Variance from Vegetation Standards for Levees and Floodwalls” (77 Fed. Reg.
18 9637 (Feb. 17, 2012)), ETL 1110-2-571, and the successor policy ETL 1110-2-583. This review
19 would by extension address the policy recommendations made in the draft final White Paper as
20 far as those recommendations pertain to the Rehabilitation Program’s implementation of the
21 vegetation guidelines, thereby encompassing the documents challenged by the Plaintiffs in this
22 action.

23 6. The Corps will proceed to conduct the review of the guidelines and take the actions
24 required by WRRDA § 3013. In accordance with § 3013(g) until the date on which revisions to
25 the guidelines are adopted, the Corps will not require the removal of existing vegetation as a
26 condition or requirement for any approval or funding of a project, or any other action, unless the
27 specific vegetation has been demonstrated to present an unacceptable safety risk. Accordingly,

1 the Parties agree that the claims set forth in Plaintiffs' Complaint need not be resolved by this
2 Court at this time.

3 7. The parties have also resolved by letter agreement(s), Defendants' December 11, 2013
4 assertion of an inadvertent release of documents subject to a claim of privilege or protection as
5 trial protection materials.

6 8. The parties agree that nothing in this dismissal without prejudice shall limit any of the
7 plaintiffs' rights to challenge past, present, and/or future actions or decisions by the U.S. Army
8 Corps of Engineers regarding vegetation management on levees including, but not limited to, any
9 guidelines, rules, engineering technical letters, variance policies, or similar documents issued by
10 the U.S. Army Corps of Engineers regarding vegetation management on levees, or any individual
11 authorizations or permits issued by the U.S. Army Corps of Engineers regarding vegetation
12 management on levees, any environmental review conducted by the U.S. Army Corps of
13 Engineers related to vegetation on levees, any Endangered Species Act consultation or lack
14 thereof by the U.S. Army Corps of Engineers, or any future biological opinions or concurrences
15 issued by U.S. Fish and Wildlife Service or the National Marine Fisheries Service to the U.S.
16 Army Corps of Engineers related to vegetation on levees, or to limit Defendants' defenses
17 thereto.

18 9. All parties shall bear their own costs and attorneys' fees.

19 THEREFORE, pursuant to Federal Rule of Civil Procedure 41(a), the undersigned parties
20 hereby stipulate to the voluntary dismissal without prejudice of all claims in Plaintiffs' first
21 amended complaint.

22
23 Dated: September 11, 2014

/s/ E. Robert Wright

E. Robert Wright (CA Bar No 51861)

Senior Counsel

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1 Dated: September 11, 2014

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7 Dated: September 11, 2014

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14 Dated: September 11, 2014

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Good cause appearing therefore, IT IS ORDERED that this case is dismissed without prejudice.

DATED: September 11, 2014

/s/ John A. Mendez
United States District Judge