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STATEMENT OF DECISION

KLAMATH RIVERKEEPER VS. CALIFORNIA DEPARTMENT OF FISH AND GAME

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KLAMATH RIVERKEEPER, QUARTZ VALLEY INDIAN RESERVATION, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, ENVIRONMENTAL PROTECTION INFORMATION CENTER, SIERRA CLUB, NORTHCOAST ENVIRONMENTAL CENTER, and INSTITUTE FOR FISHERIES RESOURCES,

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF FISH AND GAME,

Respondent,

and

SHASTA VALLEY RESOURCE CONSERVATION DISTRICT and SISKIYOU RESOURCE CONSERVATION DISTRICT,

Real Parties in Interest.

Case No. CPF-09-509915

STATEMENT OF DECISION GRANTING WRIT OF MANDATE

Hon. Ernest H. Goldsmith
Department 613

On December 1, 2010, this Petition for Writ of Mandate came on regularly for hearing in Department 613 of the Superior Court of the City and County of San Francisco, the Honorable Ernest H. Goldsmith presiding. Anita E. Ruud of the Office of the Attorney General, appeared on behalf of Respondent California Department of Fish and Game (DFG). Daniel J. O'Hanlon of Kronick, Moskovitz, Tiedemann & Girard appeared on behalf of Real Party in Interest Siskiyou Resource Conservation District. Wendy S. Park and Gregory C. Loarie of Earthjustice appeared on behalf of Petitioner Klamath Riverkeeper. Remaining Petitioners include the Quartz Valley Indian Reservation, the Pacific Coast Federation of Fishermen's Associations, the Environmental Protection Information Center, the Sierra Club, the Northcoast Environmental Center, and the Institute for Fisheries Resources. The Court issued a Tentative Statement of Decision Granting Writ of Mandate on February 25, 2011, to which Respondent had submitted objections.

Having considered all of the pleadings, supporting evidence, argument by counsel, objections, and good cause appearing therefore, the Court hereby GRANTS the Petition for Writ of Mandate.

BACKGROUND

A. The Scott and Shasta River Watershed-wide Permitting Programs

In 2002, the Klamath Basin coho salmon (Coho) was recommended to be listed as threatened under the California Endangered Species Act (CESA). In 2004, the California Fish and Game Commission directed DFG to develop a Recovery Strategy for California Coho Salmon by working with various affected environmental, agricultural, federal, and Native American parties (i.e. stakeholders) in the Scott and Shasta Valley Watershed (the Watershed). On March 30, 2005, the Coho was officially listed as threatened under CESA, thereby prohibiting any take (i.e. killing) of Coho without an Incidental Take Permit (ITP). The Recovery Program then sought to implement a pilot program in the Shasta and Scott River Valleys to facilitate salmon recovery tasks and to assist in bringing agricultural operators in compliance with Fish and Game Code section 1602 (Section 1602) and CESA. This pilot program became the Shasta Valley and Scott River Watershed-Wide Permitting Programs (the Programs), which are the subjects of this litigation.

As with many environmental conflicts in the Western United States, the use of water resources is central to Coho recovery. Coho spawning habitat requires a sufficient volume of low temperature water coursing downstream over an undisturbed streambed. Diversion of this water by agricultural users throughout the Watershed has reduced water volume, thereby reducing the depth and volume of flow, raising water temperature, and disturbing the streambed in many places. This has resulted in insufficient stream flow for Coho to make the upstream migration to spawn. Coho are genetically programmed to swim upstream to their place of origin against a downstream flow of sufficient velocity, volume, and low temperature. Accordingly, diversion of water gives rise to permitting to regulate this diversion of water and the "take" or fish kill that may occur incidental to that diversion.

The Programs are directed primarily at water diversions by agricultural water users who have "water rights", i.e., riparian or appropriative rights, to the rivers and streams coursing through or adjacent to their land. The water is accessed by diversion ditches or channels running to their land. All substantial water diversions are subject to Section 1602, which prohibits diverting, obstructing, or substantially changing water flow unless certain procedures are followed, including a DFG determination that the activity "will not substantially adversely affect an existing fish or wildlife resource" or if it does, ensure that "reasonable measures necessary to protect the resource" are taken. Prior to the listing of Coho as threatened under CESA and the attendant ITP requirements, the main limitation on water diversions was Section 1602, which enforcement alone was insufficient to prevent the decline in Coho population. The Programs ultimately seek to effect Coho recovery by facilitating compliance with Section 1602 through their Streambed Alteration Agreement (SAA) component, and with the strict requirements of CESA through their ITP and monitoring components.

Besides adequate stream flow, Coho spawning also requires streambed spawning gravels with low sediment levels and instream shelters and pools. Agricultural activities such as water diversions and livestock crossings may alter the streambed. Since the regulation of streambed alteration is essential to Coho survival, an important part of the Programs is the SAA system.

Also, the freshwater stage of the Coho life cycle from fertilization to emergence into the ocean saltwater requires a delicate and precise hydrological environment.

Resource Conservation Districts (RCDs) are non-profit public agencies assisting agricultural water users and other members of the public in the Watershed to conserve and restore natural resources. The Programs designate the RCDs to perform overarching mitigation measures for all participants and assist agricultural operators in applying for ITPs and SAAs. Moreover, the RCDs themselves are Program participants who must obtain ITPs and SAAs under which DFG will grant sub-permits.

Pursuant to the California Environmental Quality Act (CEQA) (Pub. Res. Code § 21000 *et seq*), DFG prepared watershed-wide Environmental Impact Reports (EIRs) for the Programs, which contained three components: 1) the SAA permit approval process; 2) the ITP permit approval process; and 3) overall monitoring and mitigation measures. The EIRs analyzed the effects of the watershed-wide ITP and SAA, under which sub-permits would be issued to individual agricultural and regulatory stakeholders in the region. On October 10, 2008, DFG circulated for public comment the draft EIRs for the Programs, including drafts of the proposed watershed-wide ITP, the SAA Master List of Terms and Conditions, and the Monitoring Program. On September 22, 2009, DFG issued a Notice of Determination certifying the EIRs.

B. Procedural History

On October 22, 2009, Petitioners filed their original petition challenging the Programs under CEQA with nine causes of action and naming DFG as respondent. Petitioners include: two fishing interest organizations, the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources; a Native American tribal group from the subject watershed area, the Quartz Valley Indian Reservation; and four environmental organizations, Klamath Riverkeeper, the Environmental Protection Information Center, the Sierra Club, and the Northcoast Environmental Center. On May 26, 2010, Petitioners filed their first amended petition (Petition) adding one CEQA and two CESA causes of action, and adding the Shasta Valley RCD and Siskiyou RCD as real parties in interest. On September 15, 2010, the Court approved the parties'

stipulation that the Shasta Valley RCD will not be required to participate in the litigation due to its financial constraints. On December 1, 2010, the Court denied Respondent's motion to dismiss. On February 25, 2011, the Court issued a Tentative Statement of Decision to which Respondent had submitted objections on March 17, 2011 (Objections).

Of the twelve causes of action contained in the Petition, Petitioners have declined to address the First (project description), Fourth (CEQA mitigation), Fifth[1] (reasonable alternatives), Sixth (cumulative impacts), Seventh (basis of conclusions), and Ninth (substantial changes in condition) causes of action. Accordingly, these six causes of action are waived. Of the five remaining substantive causes of action (not counting the Twelfth (declaratory relief)), the Court finds that the main issues revolve around three causes of action, on which the other two depend:

- Second (environmental setting / baseline), which will determine the Third (significant environmental effects);
- Tenth (CESA mitigation); and
- Eighth (failure to respond to comments / circulate jeopardy analysis for comment), which will determine the Eleventh ('no jeopardy' determination).

DISCUSSION

A. Standard of Review

Challenges to an agency's actions under CEQA are reviewed for a prejudicial abuse of discretion, which requires the court to review the record under a two-prong inquiry: 1) whether substantial evidence supports the agency's decision; and 2) whether the agency failed to proceed in a manner required by law. (Pub. Res. Code §§ 21168, 21168.5.)

An agency's factual determinations are reviewed under the first prong, i.e., whether substantial evidence supports the factual findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a

[1] The Amended Petition erroneously contains two "Fourth" causes of action. The Court will refer to the causes of action sequentially, regardless of the mislabeling starting with the second "Fourth" cause of action.

conclusion, even though other conclusions might also be reached" but does not include, for example, mere "[a]rgument, speculation, unsubstantiated opinion or narrative[.]" (Guidelines, § 15384, subd. (a).)[2] During this inquiry, the court must give substantial deference to the agency's determinations by not reweighing the evidence, but rather resolving all reasonable doubts in the agency's favor. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393.) Accordingly, challengers bear the burden of proving that the agency's factual determinations are legally inadequate and "must lay out evidence favorable to the other side and show why it is lacking. [citation]." (*Defend the Bay v. City of Irvine* (2004) Cal. App. 4th 1261, 1266.) Ultimately, the reviewing court must consider the evidence *as a whole*" even if the evidence is "imperfect in various particulars." (*Laurel Heights*, 47 Cal.3d at 408 (emphasis in original).)

In contrast, an agency's compliance with CEQA's legal requirements is reviewed under the second prong of the abuse of discretion analysis, i.e., whether the agency proceeded in a manner required by law. (*Save Our Peninsula Com. v. Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 118 (citations omitted).) With respect to an EIR, an agency must strictly comply with CEQA's informational requirements in order to proceed in a manner required by law. (*Ibid.*) Nevertheless, an agency's certification of an EIR is presumed correct and challengers bear the burden of proving otherwise. (*Sierra Club v. County of Orange* (2008) 163 Cal. App. 4th 523, 530 (citations omitted).) Moreover, even if portions of the record contain procedural failings, the court must look to the whole record to determine whether the agency substantially complied with CEQA's legal requirements. (See, e.g., *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 945-50 (agency's overall analysis of cumulative impacts was proper despite a procedural failure.)

As applied to an EIR, the overall result of this two-prong inquiry should be to test the EIR's "sufficiency as an informative document." (*Laurel Heights*, 47 Cal.3d at 392 (citation

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[2] All references to the "Guidelines" are to the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.)

omitted).) The EIR is "the primary means" of achieving CEQA's substantive environmental protection goals by ensuring informed decisionmaking and informed public participation. (*Id.* at 392, 404.)

Challenges to certified regulatory programs (Pub. Res. Code § 21080.5) are subject to the same standard of review as CEQA's. (See, e.g., *Ebbetts Pass*, 43 Cal.4th at 944.) Accordingly, this Court will apply the same two-prong inquiry to Petitioners' CESA challenges.

B. Environmental Setting / Baseline

In an EIR, "the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published . . . will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (Guidelines, § 15125(a).) The baseline is not the same as, but is often described synonymously with a "no action" alternative, since the EIR should "compare what will happen if the project is built with what will happen if the site is left alone." (*Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal. App. 4th 683, 707.)

Petitioners argue that the EIRs' baseline improperly included future take authorized by the ITPs, thereby precluding analysis of that take. Petitioners highlight the fact that the Coho were listed as threatened under CESA on March 30, 2005 and that the ITPs would authorize take that otherwise should be prohibited. Thus, they argue, the EIRs fail to consider how this future take will diminish Coho populations beyond the current, already-depleted baseline. Respondent counters by focusing on take by agricultural operators, which were properly included in the baseline. Respondent argues that agricultural operations in the Scott and Shasta Valleys are generally legal and historic activities that have occurred and will continue to occur regardless of the Programs. Thus, Respondent argues, the baseline properly included the effects of agricultural operations, including future take, since there is no indication such operations would suddenly cease apart from the Programs. Against this backdrop of ongoing agricultural operations, Respondent argues, the Programs' sole effects are to streamline the SAA and ITP permitting processes for the RCDs and agricultural operators.

Both parties agree the baseline should reflect the physical conditions as they existed when the EIRs' environmental analysis commenced. (See Guidelines, § 15125(a).) Here, the EIRs established a baseline date of April 28, 2005, when the RCDs' ITP applications were complete, during which time agricultural operations and their attendant take, whether legal or illegal, were ongoing. (AR D76.)[3] While normally these conditions would constitute the baseline and that would be the end of the matter, the situation is different when the occurrence of these activities depends on an agency's responsibility to enforce the law. As discussed below, when a lead agency issues an EIR, it cannot include activities allowed by the agency's complete non-enforcement into the baseline. In the instant case, take of a species listed under CESA is illegal unless allowed by a valid ITP. (Fish & G. Code § 2081.) DFG has a responsibility to enforce CESA regardless of the Programs. Thus, while the baseline may include legal take caused by historic agricultural activities, it should not include illegal take (e.g. take by agricultural operators without an ITP) by assuming DFG's complete non-enforcement.

With respect to prior illegality, regardless of an agency's enforcement duties, the law is unequivocally clear that the baseline include the present effects of this illegality. In *Fat v. County of Sacramento* (2002) 97 Cal. App. 4th 1270, cited by Petitioners and Respondent, an airport had illegally operated without a permit for decades. (*Fat*, 97 Cal. App. 4th at 1274.) When the airport eventually applied for a permit, the County adopted the present condition of the airport, which had since expanded without a permit, as the baseline and declined to prepare an EIR. (*Id.* at 1275.) The Court of Appeal upheld this baseline as complying with the Guidelines, which require that the baseline only consider existing physical conditions at the time of analysis, regardless of their source. (*Id.* at 1277-78.)

However, neither the Guidelines nor case law allows an EIR to set an illusory no-enforcement baseline that absorbs all ongoing illegal actions and ignores the stricter limitations imposed by a new statutory landscape. Although generally the baseline must include the effects of

[3] For ease of reference, citations to the EIR portions of the Administrative Record (AR) will refer only to the Scott River EIR, which is substantially similar to the Shasta River EIR.

prior illegal activity, the situation is different when an agency has a concurrent, present responsibility to remedy that prior illegality. The Court finds the rationale in *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency* (E.D. Cal. 2010) 739 F. Supp. 2d 1260 (*LSLT*), cited by Petitioners, to be applicable to the instant case by illustrating how an agency may not evade enforcement responsibilities by absorbing the effects of its failure to enforce into the baseline.

In *LSLT*, the agency sought to regulate, *inter alia*, the number of authorized buoys on Lake Tahoe in order to improve water quality. (*LSLT*, 739 F. Supp. 2d at 1266.) The EIR's baseline incorporated all existing buoys, including unpermitted ones, which were to either be granted permits or replaced with permitted buoys. (*Id.* at 1273.) However, under its governing statute, the agency was explicitly required to improve environmental quality, which included removing unauthorized buoys. (*Id.* at 1276.) Distinguishing *Fat*, the District Court held the agency's failure to remove the unauthorized buoys was "an action, rather than a perpetuation of the status quo. Put differently, an agency may not escape its duty by ignoring that duty and then presenting the result as a *fait accompli* incorporated into an environmental baseline." (*Ibid.*, citations omitted.)

Although *LSLT* involved an Environmental Impact Statement (EIS) under the National Environmental Policy Act (42 U.S.C. § 4321 *et seq*), its rationale with respect to determining a project's baseline is persuasive when discussing analogous provisions in CEQA. (See *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal. App. 4th 712, 732, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn.6; see also *LSLT*, 739 F. Supp. 2d at 1273-77 (relying in part on CEQA cases).) Despite *LSLT*'s extensive discussion of CEQA cases and their rationale, Respondent argues *LSLT* "expressly rejected any analysis predicated on CEQA's baseline definition, because [*LSLT*] was about the Regional Compact, not CEQA." (Objections, 8:3-4.) However, the District Court in *LSLT* expressly considered CEQA cases because both the Compact (in its EIS requirements) and CEQA (in its EIR requirements) required a baseline analysis, thereby allowing analogous interpretation and application. (*LSLT*, 739 F. Supp. 2d at 1274.)

Respondent cites to cases upholding baselines as long as they reflect actual, present circumstances. However, none of these cases discuss whether a baseline may assume non-enforcement of a newly established regulatory scheme, such as the heightened protection afforded the Coho after it was listed under CESA in 2005. To the extent these cases and Respondent reaffirm that the baseline should reflect present circumstances by simply resting on the text of Section 15125(a) of the Guidelines, which is already indisputably clear, they are unhelpful in determining the more complex question of whether a baseline may assume future non-enforcement. (See, e.g., *id.* at 1275 ("[i]nsofar as *Fat* simply rested on the text of the [CEQA] guideline, *Fat* carries little weight here.").) Thus, the cases cited by Respondent below can be distinguished because the agency's enforcement duties were moot or not at issue.

For example, the Court of Appeal in *Fat* allowed the baseline to include past illegality because the violations not only had a minimal effect on the sparsely populated surroundings, but also because there had been enforcement actions in the past, although parties had disagreed whether such enforcement was proper. (*Fat*, 97 Cal. App. 4th at 1281.) Furthermore, in *Riverwatch v. County of San Diego* (1999) 76 Cal. App. 4th 1428, the Court of Appeal allowed the baseline to include effects of past illegal land disturbances and declined to judge their legality so as not to interfere with enforcement actions currently undertaken by another agency. (*Riverwatch*, 76 Cal. App. 4th at 1452-53.) The rationale of *Riverwatch* does not apply to allegedly illegal take in the Shasta and Scott Valley watersheds, which are not enforced by another agency besides DFG. Another case cited by Respondent, *Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal. App. 4th 357, is also inapposite. In *Eureka Citizens*, neighborhood residents challenged an EIR for a nearby playground for including allegedly "illegal" municipal code and zoning violations into its baseline while the city disagreed and argued construction was not illegal. (*Eureka Citizens*, 147 Cal. App. 4th at 370.) The Court of Appeal declined to use the EIR as a forum to adjudicate whether the prior construction was indeed illegal, which was a decision to be made by the enforcing agency. (*Id.* at 370-71.) (See also, *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48

Cal.4th 310, 321-22 (parties only disputing whether baseline should reflect actual or potential operation of boilers, but no discussion of illegality or enforcement issues); *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, 1194 (parties only disputing whether the baseline should include a description of past harm).)

In the instant case, it appears to the Court that the baseline impermissibly includes take that was illegal after the Coho's listing as a threatened species under CESA on March 30, 2005.[4] The baseline includes this take because they are an effect of the ongoing diversions that are "expected to continue regardless of the Program[s]; that is, they will not be caused by the Program[s]." (AR D1452.) However, this illegal take would be due to presuming DFG's non-enforcement, which constitutes agency "action" that should not be included in the baseline. (See *LSLT*, 739 F. Supp. 2d at 1275 ("What *Fat* did not discuss was the fact that *sub silentio* approval of existing unauthorized activity is in an important sense an agency action.").)

Nevertheless, inclusion of illegal activity into a baseline due to a lack of enforcement is not improper *per se*, as long as other considerations illustrate the agency did not abuse its discretion. (See *Heckler v. Chaney* (1985) 470 U.S. 821, 831 ("an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." (citations omitted).) For example, in *Fat*, the court noted that the agency's "objective, good faith effort to comply with CEQA" and the fact that granting the permit could be "an opportunity to bring the Airport development under some level of County supervision for the first time" after years of dispute militated in favor of moving the permit process forward by allowing a baseline that included prior illegal activity (*Fat*, 97 Cal. App. 4th at 1280-81.) Moreover, the *LSLT* court suggested that "a baseline may reflect damage that has already occurred as a result of illegal activity as well as the agency's present ability and responsibility to limit perpetuation of that harm through enforcement." (*LSLT*, 739 F. Supp. 2d at 1276.)

[4] This illegal take includes those that occurred both *before* the baseline (i.e. the one month period between March 30, 2005, the Coho's listing date, and April 28, 2005, the baseline date) and *after* the baseline. However, this technical distinction does not substantively affect the Court's analysis.

With respect to DFG's enforcement discretion, the Court agrees with Respondent, who emphasizes that DFG is not required to automatically pursue enforcement for all illegalities that occur in its jurisdiction, but has discretion in how it will ultimately fulfill its responsibility to uphold the Fish and Game Code. (See Fish & G. Code § 2055, 2081 subd. (d).) Respondent points out DFG is neither required to nor able to prosecute all illegal take, and has the discretion to pursue both coercive and cooperative enforcement of the Fish and Game Code, which was also recommended by the Coho Recovery Strategy. (Objections, 5:5-7:15.)

The Court recognizes DFG's substantial enforcement discretion and passes no judgment on how DFG must seek to fulfill its statutory responsibilities in the Watershed. However, the Court can and must determine whether the Programs' baseline complies with CEQA and relevant case law. As with most important issues, context is everything. Here, the circumstances that led to the development of the Programs suggest DFG abused its discretion in setting the baseline.

The Court does not dispute the fact that DFG has absolute discretion as to how it will enforce the Fish and Game Code, with or without the Programs. However, the strict informational requirements of CEQA require an accurate baseline from which to conduct a meaningful analysis of significant impacts. Here, the Coho's listing under CESA in 2005 imposed stricter take requirements on stakeholders in the Watershed, and consequently, required DFG to alter its enforcement efforts to meet this stricter standard. For example, in *Fat*, each time the land use plan was amended, the relevant agency acted to bring the airport in compliance. (*Fat*, 97 Cal. App. 4th at 1273-75.) Similarly, in the instant case, a change in the regulatory backdrop (i.e. listing of Coho as threatened) triggered an agency's response (i.e. development of the Programs,) which Respondent argues is DFG's means for bringing agricultural operators and the RCDs into compliance with CEQA and CESA. Unlike the measures to *ensure* legal compliance in *Fat*, however, the Programs essentially *exempt* legal compliance with new prohibitions of illegal take under CESA by setting a baseline that assumes all take that was already illegal prior to CESA's strict prohibitions will continue in its entirety, unaffected by any change in enforcement efforts. While DFG may reserve discretion when and how to enforce CESA, it may not issue EIRs that

adopt baselines assuming DFG will not enforce CESA whatsoever. The fact that the Programs themselves constitute DFG's efforts to bring stakeholders into compliance with CESA does not cure the baselines' assumption that CESA will not be enforced against ongoing illegal diversions outside of the Programs. In reality, the record reflects DFG *will* enforce CESA to some extent by being more likely to bring enforcement actions against agricultural operators who fail to participate in the ostensibly "voluntary" Programs. (AR H1063-67.) Nevertheless, for the purposes of determining adequacy under CEQA, the baselines improperly assume DFG's non-enforcement towards historic, illegal diversions despite the stricter statutory scheme triggered by the Coho's listing in 2005.

As a result, Program participants start with an inadequately scrutinized clean slate that is purged of past illegal take and is more permissive towards future take of a population already depleted by illegal take. Respondent informed the Court that outside of the Programs, DFG would have to regulate agricultural operators under CESA on an "enforcement basis," which would be difficult, if not practically impossible, to substantiate with evidence of an illegal take. Nevertheless, it appears to the Court that Respondent may not only be ignoring its enforcement responsibilities by setting a baseline that accepts illegal take as an inevitable reality, but also set a misleadingly low baseline against which any of the Programs' mitigation efforts would appear favorable.

Accordingly, the Court finds DFG abused its discretion by not analyzing why it included illegal take of Coho since its listing on March 30, 2005 into the EIRs' baseline in contravention of the Guidelines and relevant case law.

C. Significant Environmental Effects

An EIR must identify and study significant environmental effects of a proposed project, including a project's potential to "substantially reduce the number or restrict the range of an endangered, rare or threatened species." (See generally, Pub. Res. Code §§ 21060.5, 21100, 21002.1; Guidelines, §§ 15065(a), (c), 15126.2.) In the instant case, while both parties agree a straightforward take of Coho or destruction of their habitat would constitute a significant

environmental effect, they disagree as to whether the Programs themselves would adversely affect the Coho. Petitioners contend the Programs authorize past and ongoing illegal take and ignore how future take will further jeopardize the Coho's existence. Respondent argues the Programs will bring agricultural operators into compliance with CESA and Section 1602 while implementing recovery tasks that will clearly benefit the Coho, in contrast to the illegal take that has occurred and will continue to occur regardless of the Programs.

The resolution of this cause of action depends on the resolution of the environmental setting issue discussed above. If the baseline improperly includes illegal take, as Petitioners claim, the Programs appear to authorize more take than should normally be allowed by DFG and thus must study in depth whether incidental reduction of Coho would be "substantial" under Section 15065(a), (c) of the Guidelines. However, if the baseline properly includes allegedly illegal take that has been historic, ongoing activities apart from the Programs, as Respondent claims, the Programs would not have any significant effects besides streamlining the SAA and ITP permit approval processes for the RCDs and agricultural operators.

Significant effects would include "take" of Coho, which means to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." (Fish & G. Code § 86.) In the instant case, there must be a causal connection between water diversions, which may or may not kill Coho, and take, which involves the killing or attempted killing of Coho. However, this causation need only be proximate, not actual, under the CEQA Guidelines, which clarify that "significant effects" not only include direct physical changes, but also "reasonably foreseeable indirect physical changes in the environment which may be caused by the project." (Guidelines, § 15064(d); see also Guidelines, § 15378(a) (defining "project" to include actions that lead to a "reasonably foreseeable indirect physical change.").) As discussed above, the Programs adopt a baseline that includes historic water diversions by agricultural operators, some of which are illegal. While water diversions themselves to not constitute "take" of a species, in the case of Coho that need adequate flow volume to survive, the EIRs recognize the causal link between water

diversions and take. For example, the EIRs highlight the impact of agricultural water diversions, which

> [H]ave led to decreased surface flows in the spring and summer months, thereby reducing the amount of instream habitat and locally increasing ambient surface water temperatures. . . . Over time, the persistence of low baseflow volumes can exert an effect over an increasingly larger area, such as adversely affecting the condition of the riparian corridor[.] . . . These effects can be further exacerbated by an increase in the rate of water diversion or extraction. (AR D144.)

As a result, the EIRs acknowledge that "[a]gricultural activities have had effects (direct and indirect) on the geomorphology and water quality of the stream system and contributed to the decrease in the productivity of the Scott River's anadromous fisheries." (AR D126.) Thus, the EIRs show that take of Coho are a foreseeable consequence of water diversions, which is why diversions trigger the need for a permit to cover incidental take (i.e. an ITP) in the first place. However, the EIRs do not analyze the potential for increased take because they set a baseline that includes ongoing legal and illegal agricultural water diversions. As discussed above, DFG abused its discretion in adopting this baseline and precluding meaningful analysis of increased take, which was a foreseeable result of increased water diversions. Accordingly, the Court finds DFG abused its discretion by failing to adequately consider the Programs' significant environmental effects, as required by CEQA.

D. Mitigation Under CESA

Mitigation measures must be feasible and adequately funded. (Fish & G. Code § 2081, subd. (b)(4).) Most importantly, an ITP may not issue unless DFG makes two complementary demonstrations that: 1) "[t]he *impacts* of the authorized take shall be minimized and *fully mitigated*", and 2) "[t]he *measures* required to meet this obligation shall be *roughly proportional* in extent to the impact of the authorized taking on the species." (Fish & G. Code § 2081, subd. (b)(2) (emphases added); see also CESA Guidelines[5], § 783.4, subd. (a).)

[5] All references to the "CESA Guidelines" are to the CESA Guidelines (Cal. Code Regs., tit. 14, § 783.0-787.9.)

Petitioners' main challenge to the EIRs' mitigation measures centers on the ITPs' failure to adequately study the level of take caused by the Programs. Without estimating the level of take, they argue, there is no way to determine whether the proposed mitigation measures will be roughly proportional to or fully mitigate this unspecified take. Respondent points to *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal. App. 4th 1018 (*ECOS*), in which the Court of Appeal concluded a general mitigation ratio between developed and reserved land was proper under CESA because it was difficult to forecast precisely how many animals would be killed by future development. (*ECOS*, 142 Cal. App. 4th at 1040-41.) Similarly, in the instant case, Respondent argues that precise estimations of take are not required, especially when it depends on future participation in a voluntary program and unspecified take of migratory Coho, and that DFG satisfied CESA by determining that the ITPs' mitigation measures would offset any potential take. DFG argues these mitigation measures are qualitatively beneficial, as established by sources such as the Coho Recovery Strategy. (AR H32337-32930.)[6]

The Court finds that the record does not show that the ITPs' mitigation measures are "roughly proportional" to potential take. The Court does not dismiss the qualitative merits of the proposed mitigation measures, but rather questions the sufficiency of these measures relative to take. For example, many of the mitigation measures derive from the Coho Recovery Strategy, which has been found to benefit Coho over time. (See, e.g., AR H36205-36562.) However, while these measures may be qualitatively beneficial, the ITP must ensure they are *sufficiently* beneficial under CESA by being roughly proportional to potential take.

Respondent's reliance on *ECOS* is misplaced. While mitigation measures in *ECOS* did not correlate with a specific number of take, they involved a mitigation ratio between acres of developed land and acres of habitat reserve, which the court held was sufficiently "roughly proportional" to satisfy CESA. (*ECOS*, 142 Cal. App. 4th at 1038-41.) In other words, the

[6] For example, the Coho Recovery Strategy provides many "Range-wide Recommendations" for restoring Coho populations through such measures as acquiring or leasing water for Coho recovery purposes, eliminating fish passage barriers, restoring riparian vegetation, maintaining the quality of spawning gravel, and using off-channel water storage for use during dry periods. (AR H32517-32534.)

mitigation ratio in *ECOS* had a quantitative aspect that allowed the court to determine proportionality. Ultimately, "rough proportionality" requires that both the 'nature' and 'extent' of mitigation adequately correlate to the impacts. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 (interpreting "roughly proportional" in Fifth Amendment Takings context); accord *Envtl. Protection Info. Ctr. v. Cal. Dept. of Forestry and Fire* (2008) 44 Cal.4th 459, 510-11 (applying *Dolan* to CESA mitigation); see also Guidelines, § 15126.4, subd. (a)(4)(B) (applying *Dolan* to CEQA mitigation).) Here, while the mitigation measures may be proportional in 'nature' (e.g. both parties agree fish screens could mitigate take) they are not proportional in 'extent' because they may not necessarily correlate with the level of actual take. Respondent argues the mitigation measures are clearly identified and have specific implementation dates. However, these details only describe the 'nature' of the mitigation effects and not whether they sufficiently mitigate take in 'extent.' The Court cannot identify in the record any meaningful indicia in the mitigation measures illustrating their proportionality with take, as required by CESA.

Despite this lack of proportionality, an agency may defer formulation of specific mitigation measures if it is impractical or impossible to do so at the time the EIR is prepared. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1028-29.) However, the EIR must identify performance criteria against which to evaluate specific mitigation measures in the future. (*Ibid.*; Guidelines, § 15126.4, subd.(a)(1)(B).) Petitioners cite various mitigation measures that are inadequately defined, uncertain future best management practices, and a lack of performance measures for the Monitoring and Adaptive Management Plan (MAMP). Meanwhile, Respondent argues the ITPs mitigation measures identify implementation timelines and other specific limitations, and that the MAMP will ensure the Programs adapt to uncertain future conditions, including the actual level of future take.

However, the Court is not persuaded that estimating future take was infeasible. Even after resolving all reasonable doubts in DFG's favor, the Court finds there is not enough relevant information in the record to make a fair argument that quantifying take was impossible. Petitioners suggested DFG could have estimated future take through various methods. The Court notes DFG

could have ensured that mitigation would correlate with actual take by setting a benchmark with a quantitative aspect, such as the mitigation ratio in *ECOS*. Regardless of the methods DFG chooses to employ within its discretion, Respondent's bare assertion about the uncertainty of the level of participation in the "voluntary" Programs is unsupported. Respondent represented that nearly 90% of the agricultural operators in Shasta Valley have already signed up for the Programs and that failure to join may trigger DFG enforcement actions against some of their existing activities. (See AR H1063-67.) In other words, agricultural operators are free to opt out of the Programs to the extent they are also free to violate existing regulations and incur agency enforcement. Thus, based on Respondent's argument, it appears to the Court that these Programs would essentially establish a new norm for all agricultural operators to follow.

Even assuming it was impractical to determine specific mitigation measures at the time the EIRs were prepared because of unspecified take, the Programs' current measures do not articulate adequate performance criteria for future mitigation activities. The Programs rely on the RCDs' mitigation obligations in order to fully mitigate take incidental to the agricultural operator's and the RCDs' own Covered Activities. (AR D393-405.) As Respondent points out, virtually all of these mitigation activities must be implemented within specific timeframes. (See generally, AR H1579-1587, D385-393.) Notably, however, none of the "Goal and Objectives" of the RCDs' mitigation obligations include fully mitigating take caused by the Programs, but rather refer to improving various Coho habitat conditions in general without establishing any benchmarks for improvement. (See, e.g., AR D382.) The Court finds no connection among these general mitigation measures, the MAMP, and the EIRs' purported overall goal of fully mitigating take.

The Court finds *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal. App. 4th 645, cited by Petitioners, to be analogous and applicable to the instant case. In *San Joaquin Raptor*, the EIR sought to mitigate impacts to special-status species in vernal pools through measures that only stated a "generalized goal of maintaining the integrity of vernal pool habitats...[while] no specific criteria or standard of performance [was] committed to." (*San Joaquin Raptor*, 149 Cal. App. 4th at 670.) The Court of Appeal held the EIR presumed special-

status species would be in or near the vernal pools, proffered mitigation measures and management plans, and yet did not define performance standards. (*Ibid.*) Similarly, in the instant case, the EIRs predict some level of take under the Programs and propose an array of mitigation measures that may be beneficial in improving Coho habitat, such as installation of fish screens and restoration of riparian vegetation that may have some value, yet fail to establish a logical link between these measures and how they will *fully* mitigate take inasmuch as water volume is a critical element of Coho preservation.

Accordingly, the Court finds that DFG abused its discretion in improperly deferring formulation of specific mitigation measures that would fully mitigate take, as required by CESA.

E. Failure to Respond to Comments on Jeopardy Analysis

As part of a certified regulatory program, CESA ITPs are exempt from traditional EIR requirements. (Pub. Res. Code §§ 21080.5; Guidelines, § 15251, subd. (o).) This "exemption", however, does not mean ITPs are wholly separate from the CEQA universe, but rather that they comply with CEQA through alternate means. The certified regulatory program exemption assumes the public agency will undertake an environmental review process equivalent to CEQA's, which should ultimately achieve CEQA's broad policy goals and substantive standards. (See *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal. App. 4th 1392, 1421-22; see also CESA Guidelines, § 783.3 (indicating that the CESA regulations themselves are intended to comply with CEQA).) In essence, an agency must comply with CESA, and in so doing will comply with CEQA, as compliance with the two statutes must be in alignment.

Accordingly, in order to claim this EIR exemption, an agency must "demonstrate strict compliance with its certified regulatory program." (*La Costa Beach Homeowners' Assn. v. Cal. Coastal Com.* (2002) 101 Cal. App. 4th 804, 820 (citation omitted).) Moreover, an agency may not opt out of its own regulatory procedures by preparing an EIR. (*Santa Barbara County Flower and Nursery Growers Assn., Inc. v. County of Santa Barbara* (2004) 121 Cal. App. 4th 864, 874.)

As a threshold matter, the Court recognizes that the jeopardy "analysis" at issue only refers to the analysis that is part of an existing ITP application. (CESA Guidelines, § 783.2, subd. (a)(6)-

(7).) As Respondent points out, "the regulations do provide for circulation for comment of a jeopardy analysis as part of the ITP application submitted by the applicant, but only at that point." (Objections, 11:15-17.) The RCDs submitted their Watershed-wide ITP applications on March 29, 2005. (AR D21.) Thus, 'at this point,' Section 783.2(a)(7) of the CESA Guidelines requires that the application include "[a]n analysis of whether issuance of the incidental take permit would jeopardize the continued existence of a species." While this analysis may be the applicant's solitary endeavor, the CESA Guidelines provide for more flexible and collaborative means to gather information needed for the analysis in an ITP. For example, DFG may consult with the applicant in preparing a permit application to ensure statutory compliance and may meet CESA's informational requirements through analyses "prepared pursuant to state or federal laws other than CESA," such as CEQA. (CESA Guidelines, § 783.2 subd. (b)(i).)

In the instant case, the Programs seek to meet the ITP analysis requirements through the EIRs. (AR D55-56.) Thus, assuming the final EIRs are properly approved, the Programs provide that the "[RCDs] (through the ITP) and Agricultural Operators and DWR (through their sub-permits) *will be authorized* to take coho salmon if such take occurs incidental to conducting a Covered Activity." (AR D53 (emphasis added).) In other words, the time to conduct the jeopardy analysis was during the EIR process, after which the Programs would definitively approve the RCDs' ITP applications, and not at a future date. Notably, the approval process for sub-permits solely entails compliance with conditions already analyzed in the EIRs, under which the master ITPs were issued, and contains no new environmental review. (AR D457.005-009.)

The ITP procedures described in the Programs are found in Section 783.5 of the CESA Guidelines, which requires public review of all ITP applications. Petitioners argue DFG's spring 2009 jeopardy analyses should have been circulated for public comment while Respondent contends CEQA does not require public comment on these analyses, which were draft CESA documents prepared by an outside consultant for DFG's internal consideration. While Respondent is correct in that jeopardy analyses are technically CESA documents not subject to EIR public comment, the alternate procedures for certified regulatory programs require DFG to solicit and

respond to comments on the ITPs' "application *and analysis*." (CESA Guidelines, § 783.5, subds. (d)(2), (4) (emphasis added).) These procedures are intended to determine whether "issuance of the permit would jeopardize the continued existence of the species." (Fish & G. Code § 2081, subd. (c).) In other words, any "analysis" of an ITP application should consider jeopardy to the listed species that triggered the need for an ITP in the first place. Regardless of whether DFG's spring 2009 jeopardy analysis qualifies as the "analysis" mentioned in Section 783.2(a)(7) of the CESA Guidelines, DFG failed to field comments for *any* analysis of whether the ITPs would jeopardize the continued existence of Coho. Thus, DFG failed to comply with its own procedures in Section 783.5 of the CESA Guidelines, consequently failing to comply with CEQA's substantive mandates.

Accordingly, the Court finds DFG abused its discretion by failing to field comments on any analysis of the jeopardy issue, as required by CESA.

F. "No Jeopardy" Determination

CESA articulates several requirements an agency must fulfill before issuing an ITP, including a determination that the permit will not "jeopardize the continued existence of the species." (Fish & G. Code § 2081, subd. (c).) This 'no jeopardy' determination is to be

> [B]ased on the best scientific and other information that is reasonably available, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities. (*Ibid.*; CESA Guidelines, § 783.4, subd. (b).)

In the instant case, the level of potential take and the information that could be generated from circulating a jeopardy analysis for comment are crucial in assessing the threats to and the reasonably foreseeable impacts on a listed species, which are criteria of the jeopardy determination. Thus, the propriety of the 'no jeopardy' determination depends on the resolution of the Tenth (CESA mitigation) and Eighth (failure to respond to comments on jeopardy analysis) causes of action, discussed above.

Since DFG failed to demonstrate proportional mitigation under CESA by not estimating take and failed to circulate any analysis of the jeopardy issue for comment, the Court finds there is not substantial evidence to support a "no jeopardy" determination. Thus, DFG abused its discretion by issuing the ITPs.

CONCLUSION

A. Overview

The Court notes the record reflects DFG's good faith effort to enforce environmental regulations while accounting for economic realities through the Programs. Pursuant to its manifold mandate, DFG endeavored to manage the expectations of multiple stakeholders in the Klamath Basin while grappling with the harsh truth that water is a widely shared yet severely limited resource in the West. All stakeholders involved here at some point encounter Coho, which course through this shared resource. Consequently, the Coho's listing under CESA will impose hardship on water users, especially agricultural operators, some of whom have been diverting water independent of DFG oversight before and after Coho were listed as endangered. In effect, water users have to adjust from an irregularly enforced ITP and SAA setting to a much higher and stricter plateau set by CESA. Understandably, the Programs seek to lessen the shock of this adjustment and make compliance more economically feasible by lowering permitting costs.

However, while DFG may pursue streamlined permitting processes, it may not do so by attenuating the strict directives of CESA. Given that the legislative mandate is to preserve listed species, the environmental analysis should consider all factors that may jeopardize their existence, including their presently reduced population. Water management is the central element of DFG's efforts to effect the survival of the Coho through the Programs. Water management inevitably has an economic component and water usage will increase or decrease in relation to cost. In the case of Coho survival versus agricultural use, no analysis has considered the economic value of the water and the economic value of Coho because there is a legislative mandate to preserve the Coho as a listed endangered species. However, the Programs have a significant fiscal component by offering the incentive of reduced permitting costs while threatening water users with high fees

under the old permitting system or the potential of even higher costs and penalties involved in the enforcement process. As most or all agricultural operators inevitably participate in the Programs, more permits will issue, and Coho are at greater risk. CEQA requires analysis of this foreseeable increase of ITPs while CESA requires full mitigation of the increased take that naturally follows an ITP.

Overall, the more lenient effect of the Programs relates back to DFG's enforcement responsibilities. DFG has pointed out the logistical and practical difficulties in fully enforcing illegal take under CESA. This explains DFG's emphasis in creating a more liberal permitting system even though it will result in higher take of Coho under the rationale that an imperfect regulatory program is preferable to the alternative of not fully enforcing against agricultural operators. Respondent argues as justification for increased take under the Programs, its absolute discretion in enforcing CESA, the difficulty of detecting violations over a large geographical area, and the uncertainty of follow through of prosecution. Nevertheless, the Programs must comply with the mandates of CESA and CEQA, which do not make exceptions for difficulties of enforcement, nor can the Programs wholly relieve Respondent from its statutory enforcement responsibilities.

In adjudicating the instant case, the Court does not and should not seek a particular result. Rather, the Court's primary goal is to protect the public and ensure all legal and legislative mandates are followed by informed public policy makers. The Court may not "substitute [its] judgment for that of the people and their local representatives. [It] can and must, however, scrupulously enforce all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) In enforcing these legislative mandates, the Court must bear in mind that "the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Laurel Heights*, supra, 47 Cal.3d at 390 (citation omitted).)

CEQA's most meaningful impact, however, is as an accountability mechanism to ensure informed decisionmaking and informed public participation. The EIR, such as the ones at issue in the instant case, is

> [A]n environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action. Because the EIR must be certified or rejected by public officials, it is a document of accountability. (*Laurel Heights*, 47 Cal.3d at 392 (citations omitted).)

In the midst of conflicting opinions as to whether the Programs are proper, "[t]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*San Joaquin Raptor*, supra, 149 Cal. App. 4th at 721-22.) Ultimately, the Court must protect the public interest by upholding CEQA, which "protects not only the environment but also informed self-government." (*Laurel Heights*, 47 Cal.3d at 392.)

Despite DFG's good faith efforts and potential hardship to water users, the Court must uphold the legislature's mandate to preserve listed species and conduct environmental review of all foreseeable consequences under CEQA and CESA.

B. Findings

For the foregoing reasons, the Court GRANTS the Petition for Writ of Mandate as to the Second (Failure to Describe the Environmental Setting Properly), Third (Failure to Evaluate Significant Environmental Effects), Eighth (Failure to Respond to Comments), Tenth (Failure to Fully Mitigate Take), and Eleventh (Failure to Ensure that Issuance of the ITP and Sub-permits Will Not Jeopardize the Continued Existence of Coho Salmon) causes of action.

Therefore, let a peremptory writ of mandate issue commanding Respondent to set aside its certification of the Programs' EIRs and any permits issued under the Programs. Respondent is enjoined from implementing the Programs until it has conducted further review, circulation, and certification of an EIR for each project consistent with its obligations under CEQA and CESA.

Petitioners' Twelfth cause of action (Declaratory Relief) is DENIED as duplicative of the relief granted herein. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 248-49.)

Petitioner is ORDERED to prepare a Writ of Mandate consistent with the Court's ruling in this case.

IT IS SO ORDERED.

DATED: April 20, 2011

Ernest H. Goldsmith

HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

Superior Court of California
County of San Francisco

KLAMATH RIVERKEEPER, et al.,

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF FISH AND GAME,

Respondent.

and

SHASTA VALLEY RESOURCE CONSERVATION DISTRICT, et al.

Real Parties in Interest.

Case No.: CPF-09-509915

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Linda Fong, a deputy clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 20, 2011, I served the attached **STATEMENT OF DECISION GRANTING WRIT OF MANDATE** by placing a copy thereof in a sealed envelope, addressed as follows:

Trent W. Orr, Esq.
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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: April 20, 2011

T. MICHAEL YUEN, Clerk

By: _____
Linda Fong, Deputy Clerk