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**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

**COALITION FOR A SUSTAINABLE DELTA
and KERN COUNTY WATER AGENCY,**

Plaintiffs,

v.

**FEDERAL EMERGENCY MANAGEMENT
AGENCY; WILLIAM CRAIG FUGATE,
in his official capacity as Administrator of the
Federal Emergency Management Agency;
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; and JANET
NAPOLITANO, in her official capacity as
Secretary of Homeland Security,**

Defendants.

No. 1:09-cv-02024-LJO-BAM

**SETTLEMENT AGREEMENT
AND [PROPOSED] ORDER**

Plaintiffs, the Coalition for a Sustainable Delta and Kern County Water Agency, and
Defendants, the Federal Emergency Management Agency, *et al.* (collectively “FEMA”), by and
through their undersigned counsel, state as follows:

WHEREAS, FEMA is the federal agency charged with administering the National Flood Insurance Program (“NFIP”), a federal flood insurance program created by Congress in 1968, and amended in 1973 and 1994 (42 U.S.C. §§ 4001, et seq.);

WHEREAS, on June 9, 2010, Plaintiffs filed their Third Amended Complaint (“TAC”) alleging, *inter alia*, that FEMA violated Section 7 of the ESA by not consulting with the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) on the alleged impacts of the NFIP in the Sacramento-San Joaquin Delta on four species listed as threatened under the ESA: Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, and Central Valley steelhead (collectively the "Listed Salmonids") under the purview of NMFS, and the Delta Smelt under the purview of FWS;

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs’ claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs’ TAC;

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

NOW, THEREFORE, the parties hereby stipulate and agree as follows:

1. For purposes of this Settlement Agreement (“Agreement”), the term “Communities” means the portion of the following communities that participate in the NFIP and fall within the Sacramento-San Joaquin Delta as defined in Section 12220 of the California Water Code – Sacramento County, San Joaquin County, Contra Costa County, Solano County, and Yolo County.
2. Within fourteen (14) months of the date this Agreement is filed, and assuming the

Agreement is subsequently approved by Order of the Court , FEMA shall provide the Director of NMFS and the Director of FWS a written request to initiate consultation, pursuant to 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.14 (formal consultation) or 50 C.F.R. § 402.13 (informal consultation), on the impacts of administering the following components of the NFIP in the Communities on the Listed Salmonids (in the case of NMFS) and the Delta Smelt (in the case of FWS)

- (i) FEMA’s implementation of 42 U.S.C. § 4102(c);
- (ii) The mapping of the floodplains and revisions thereof pursuant to 42 U.S.C. § 4101(a)(1), (a)(2); and
- (iii) The implementation of the Community Rating System (“CRS”), 42 U.S.C. § 4022(b)(1).

FEMA’s written request shall include a document, which may at FEMA’s discretion be titled as a biological assessment pursuant to 50 C.F.R. § 402.12, containing the information specified in 50 C.F.R. § 402.14(c)(1) through 402.14(c)(6). FEMA’s agreement to provide the information specified in 50 C.F.R. § 402.14(c)(1) through 402.14(c)(6) does not commit FEMA to engage in formal consultation with either NMFS or FWS pursuant to 50 C.F.R. § 402.14 as opposed to informal consultation pursuant to 50 C.F.R. § 402.13. This Agreement also does not limit the substantive outcome of the required consultation with either NMFS or FWS. To challenge any biological opinion or “not likely to adversely affect” determination from either NMFS or FWS resulting from the consultations initiated pursuant to this Agreement, Plaintiffs will be required to file a separate action.

3. Should NMFS or FWS request additional information from FEMA pursuant to 40 C.F.R. §§ 402.14(c), (d), and/or (f), FEMA shall provide such information, if available, to NMFS or FWS within sixty (60) days, or by such time as NMFS or FWS directs.

4. Nothing in this Agreement shall prohibit FEMA from combining the consultations described in paragraph 2 above with other consultations conducted pursuant to ESA Section 7(a)(2) or from expanding the geographic scope of the consultations described in paragraph 2 to encompass other geographic areas, participating NFIP communities, or “actions” as defined in 50 C.F.R. § 402.02.

5. Within forty-five (45) days of entry of an Order approving this Agreement, FEMA will notify each of the Communities that FEMA will be initiating consultation on the potential impacts of certain aspects of the NFIP on the Listed Salmonids and the Delta Smelt.

6. Defendants agree to pay, and Plaintiffs agree to accept, \$200,000 in full and complete satisfaction of any and all claims, demands, rights, and causes of action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, the Endangered Species Act, 16 U.S.C. § 1540, and/or any other statute and/or common law theory, for all attorney fees and costs incurred by Plaintiffs, individually and/or severally, in the above captioned lawsuit.

7. Defendants’ payment described in Paragraph 6 above will be made by electronic funds transfer to Nossaman LLP.

8. Within ten (10) days of entry of an order approving this Agreement, Plaintiffs will provide Defendants with the following information necessary for Defendants to process the payment described in Paragraph 6 above by electronic funds transfer: the payee’s name, the payee’s address, the payee’s bank account number, the account type, the name of the payee’s bank, the bank routing transit number (“RTN”), and the payee’s tax identification number.

9. Defendants agree to submit all necessary paper work for the processing of the payment described in paragraph 6 above to the appropriate office(s) within ten (10) business days of receiving the information necessary for processing the electronic funds transfer described in Paragraph 8 above.

10. Plaintiffs agree that receipt of the payment described in paragraph 6 above shall operate as a release of any and all claims for attorney fees and costs that Plaintiffs may have against Defendants under any authority with respect to any aspect of this litigation. Plaintiffs further agree that any and all claims Plaintiffs may have for such attorney fees and costs are hereby waived.

11. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including hourly rates, in any future litigation, or continuation of the present action. Further, this Agreement has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

12. Either party may seek to modify the terms of this Agreement for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes the other party has failed to comply with any term or condition of this Agreement, the parties shall use the dispute resolution procedures specified in Paragraph 13 below.

13. This Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by (i) written stipulation between the parties filed with and approved by the Court, or (ii) upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadlines specified in Paragraphs 2-3, or in the event of a dispute

arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice of the claim. The parties agree that they will meet and confer (telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court. In the event that Plaintiffs believe FEMA has failed to comply with a term of this Agreement and has not sought to modify it, Plaintiffs' first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

14. No party shall use this Agreement or the terms herein as evidence that FEMA is required to initiate consultation with NMFS on the impacts of any portion of the NFIP, in any other judicial proceeding involving FEMA's implementation of the NFIP or compliance with the ESA.

15. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that FEMA take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the FEMA by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination.

16. This Agreement is being entered into so as to avoid further litigation of the Plaintiffs' pending lawsuit. Nothing in this Agreement shall be construed to constitute an

admission of any issue of fact, law or liability by any of the parties. Except as expressly provided in this Agreement, none of the parties waives or relinquishes any legal rights, claims or defenses it may have.

17. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that FEMA is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

18. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

19. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

20. The terms of this Agreement shall become effective upon entry of an Order by the Court ratifying the Agreement.

21. Upon approval of this Agreement by the Court, Plaintiffs' Third Amended Complaint shall be dismissed with prejudice.

22. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms, subject to the dispute resolution procedures specified in paragraph 13 above. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

Dated: March 6, 2012 Respectfully submitted,

*/s/ Paul S. Weiland (with permission by
Kevin W. McArdle)*

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[PROPOSED] ORDER

The terms and conditions of the parties' SETTLEMENT AGREEMENT are hereby adopted as an enforceable ORDER of this Court, and this matter is hereby DISMISSED with prejudice.

It is so ordered.

Dated: this _____ day of _____, 2012.

HON. LAWRENCE J. O'NEILL
UNITED STATES DISTRICT JUDGE