

1
2 UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF CALIFORNIA
4

5 CONSOLIDATED SALMONID CASES

1:09-CV-1053 OWW DLB

6 MEMORANDUM DECISION RE
7 CROSS-MOTIONS FOR SUMMARY
8 JUDGMENT ON NEPA ISSUES
(Docs. 82 & 83).
9
10

11 I. INTRODUCTION

12 These consolidated cases all challenge the June 4, 2009
13 issuance of a biological opinion by the National Marine
14 Fisheries Service ("NMFS"), finding that the coordinated
15 operations of the federal Central Valley Project ("CVP") and
16 State Water Project ("SWP") are likely to jeopardize the
17 continued existence and adversely affect the critical habitat
18 of certain salmonid and other species ("2009 Salmonid BiOp"),
19 as well as the implementation of the terms of that BiOp by the
20 United States Bureau of Reclamation ("Reclamation").¹ Because
21 the 2009 Salmonid BiOp found that planned coordinated Project
22
23

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

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

12
13 On June 4, 2009, Reclamation, which manages the CVP,
14 informed NMFS that it "provisionally accepts the [RPA] while
15 we carefully evaluate the [2009 Salmonid BiOp] and the [RPA]"
16 AR USBR1; *see also* 2009 Salmonid BiOp at 2 (stating that
17 Reclamation informed NMFS that, while Reclamation "may have
18 reservations with portions of the [BiOp] ... it is a package
19 that Reclamation can accept."). Reclamation informed NMFS
20 that it would immediately begin to implement the near-term
21 actions of the RPA, but noted that some long-term actions,
22 such as construction of the Red Bluff Pumping Plant,
23
24

25
26 ² Jeopardy was found as to all of the covered species; adverse
27 habitat modification was found as to the designated critical habitat of
28 winter-run, spring-run, steelhead, and green sturgeon. BiOp at 1-2.

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

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

6
7 Plaintiffs in all of the consolidated cases⁴ move for
8 summary judgment, arguing that issuance and/or implementation
9 of the BiOp/RPA is "major federal action" that will inflict
10 harm on the human environment, and that NMFS and/or
11 Reclamation should have, but did not conduct an environmental
12 assessment ("EA") or prepare an environmental impact statement
13 ("EIS") under the National Environmental Policy Act ("NEPA").
14 Doc. 83. Federal Defendants and Defendant-Intervenors oppose.
15 Docs. 95 & 100. Plaintiffs replied and submitted a supporting
16 declaration. Docs. 115. It is undisputed that no NEPA
17 assessment or documentation was prepared by either NMFS or
18 Reclamation in connection with the issuance, provisional
19 adoption, and/or implementation of the 2009 Salmonid BiOp and
20 RPA.
21

22
23 Defendant-Intervenors cross-move for summary judgment on
24 this claim, arguing that FWS was not required to prepare an
25

26 ⁴ San Luis & Delta Mendota Water Authority ("Authority") and
27 Westlands Water District ("Westlands"); Stockton East Water District
28 ("Stockton"); State Water Contractors ("SWC"); Kern County Water Agency
("KCWA") and Coalition for a Sustainable Delta ("Coalition"); Oakdale
Irrigation District ("Oakdale"), et al.; and Metropolitan Water District
of Southern California ("MWD") (collectively, "Plaintiffs").

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

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

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

18 II. ANALYSIS

19 A. Threshold Issues.

20 1. Requests for Judicial Notice.

21 a. Plaintiffs' Request for Judicial Notice.

22 Plaintiffs request that judicial notice be taken of:

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

1 4) .

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

12 Federal Defendants request judicial notice of:

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

16 These documents are all judicially noticeable public
17 records under Federal Rule of Evidence 201(b), which
18 authorizes judicial notice of a "fact ... not subject to
19 reasonable dispute in that it is either (1) generally known
20 within the territorial jurisdiction of the trial court or (2)
21 capable of accurate and ready determination by resort to
22 sources whose accuracy cannot reasonably be questioned." See
23 *United States v. 14.02 Acres*, 547 F.3d 943, 955 (9th Cir.
24 2008) (judicial notice is proper for records and reports of
25 administrative agencies); *United States v. Howard*, 381 F.3d
26 873, 876 n. 1 (9th Cir. 2004) (taking judicial notice of court
27
28

1 records in another case). However, these records are
2 admissible only for the existence of their content, not for
3 the truth of disputed matters asserted in the documents.
4

5 **B. Burden of Proof.**

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

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

Smelt NEPA Decision at 8-9.

22 **C. Applicable Legal Standards.**

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

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

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

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

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

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

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

1 comment.

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

20 Federal regulations implementing NEPA define major
21 federal action:

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

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

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

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

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

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

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

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

40 C.F.R. § 1508.18.

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

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

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

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

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

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

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

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

4 Smelt NEPA Decision at 9-14.

5 D. Major Federal Action.

6 40 C.F.R. § 1508.18 provides that major⁵ "[f]ederal
7 actions tend to fall within one of the following categories":

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

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

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

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

21 40 C.F.R. § 1508.18. Plaintiffs principally rely on §
22 1508.18(b)(4) as a basis for imposing NEPA obligations on NMFS
23 in this case, arguing that the 2009 Salmonid BiOp is an
24 "[a]pproval of specific projects, such as construction or
25 management activities located in a defined geographic area."
26

27 ⁵ Section 1508.18 provides that the word "major" in the phrase major
28 federal action "reinforces but does not have a meaning independent of" the
term "significantly" in "significantly affecting the human environment."

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

6 1. Ramsey v. Kantor is Distinguishable.

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

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

28 Ramsey determined:

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

Id.

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

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

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

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

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

1 106 at 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 *Id.* at 27-28.⁶ The smelt NEPA decision concluded:

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

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

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

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

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

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

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

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

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

1 599.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18
19 Projects such as the CVP and SWP, constructed prior

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 22-23.

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

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

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

19 *Id.* at ¶9.

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

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

1 of Upper Snake River:

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

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

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

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

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

23 The plaintiffs point out that flow rates have
24 been significantly below 1,000 cfs for periods of
25 seven days or more only in water years 1977,
26 1982, and 1988, all years of major drought. They
27 also note that prior to construction of the dam,
28 the lowest recorded flow rate did not fall below
29 1400 cfs. From these facts, they argue that the
30 Bureau's reduction of the flow below 1,000 cfs is
31 not a routine managerial action. However, a
32 particular flow rate will vary over time as
33 changing weather conditions dictate. In
34 particular, low flows are the routine during
35 drought years. What does not change is the
36 Bureau's monitoring and control of the flow rate
37 to ensure that the most practicable conservation
38 of water is achieved in the Minidoka Irrigation
39 Project. Such activity by the Bureau is routine.

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

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

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

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

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

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

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

- 2
- 3 ○ Second, Action III.1.2 requires Reclamation to
4 release additional water (above the new flow
5 required by Appendix 2-E), if needed, to maintain
6 new, lower minimum temperatures at a specific
7 location in the Stanislaus River. 2009 Salmonid
8 BiOp at 620-21.
 - 9 ○ Third, Action VI.2.1 increases the minimum flow
10 required at Vernalis on the San Joaquin River
11 during the April-May pulse flow (VAMP) period, and
12 directs Reclamation to make releases from Goodwin
13 Reservoir on the Stanislaus River to meet these new
14 flow requirements. 2009 Salmonid BiOp at 641-45.¹¹

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

27 Federal Defendants insist that NEPA compliance is not

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

1 required because the 2009 Salmonid BiOp "does not change the
2 purpose of the CVP, and even after its provisional acceptance,
3 Reclamation continues to operate the CVP within existing law."
4 Doc. 101 at 17. But, this standard does not accurately
5 reflect the relevant authorities. *Upper Snake River*, 921 F.2d
6 at 235, quoting *Trinity County*, 438 F. Supp. at 1388-89,
7 distinguished cases in which Reclamation has "enlarged its
8 capacity to divert water" ... "revised its procedures or
9 standards for releasing into [a river] and the drawdown of
10 reservoirs," (emphasis added), which would trigger NEPA, from
11 those cases in which Reclamation is "simply operating [a
12 project] within the range originally available pursuant to the
13 authorizing statute, in response to changing environmental
14 conditions," which would not trigger NEPA. Here,
15 implementation of the RPA constitutes a non-trivial "revision
16 of procedures or standards" for the operation of the Projects
17 with draconian consequences. *Upper Snake River* and *Trinity*
18 indicate that such revisions do, in fact, trigger NEPA. It is
19 hard to imagine more significant adverse effects to the human
20 environment than were effectuated by implementation of the
21 RPAs.
22
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25 Federal Defendants also argue that whether Reclamation's
26 implementation of the complex RPA will significantly change
27 flows can only be determined based on a review of the facts in
28

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

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

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

10 More pertinently, Federal Defendants and Defendant
11 Intervenors point out that, in 1999, Reclamation prepared a
12 programmatic EIS ("PEIS") addressing the environmental impacts
13 expected from implementation of the CVPIA, including the
14 mandatory 800,000 AF dedication of water to environmental
15 purposes. The CVPIA PEIS evaluated various environmental
16 impacts resulting from reduced surface water supplies,
17 including many of the harms claimed by the Plaintiffs.
18 However, that PEIS was prepared more than ten (10) years ago.
19 Since then, the legal environment has changed considerably.
20 For example, the Ninth Circuit held that Reclamation is not
21 required to count water devoted to ESA uses toward the 800,000
22 AF dedication, *Bay Institute of San Francisco v. United*
23 *States*, 87 Fed. Appx. 637 at 639-40 (9th Cir. 2004), allowing,
24 in some years, significantly more than the originally-intended
25 800,000 AF dedication to environmental purposes. The CVPIA
26
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1 PEIS does not address this changed circumstance, nor does it
2 address how reduced water deliveries might compound the
3 already difficult present adverse economic and environmental
4 conditions in the Central Valley of California. At a bare
5 minimum, reliance on the CVPIA PEIS to comply with NEPA in
6 this case is something that should have been done explicitly
7 by Reclamation in an EA or tiered EIS, neither of which has
8 been undertaken.
9

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

20
21 **E. Significantly Affect the Human Environment.**

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

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

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

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

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

8 Smelt NEPA Decision at 43-44.

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

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

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

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

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

10
11 **F. Miscellaneous Issues.**

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

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

24 2. **The Amicus Brief.**

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

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

16 G. Remedies.

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

1 this juncture.

2
3 **III. CONCLUSION**

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

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

14 **SO ORDERED**

15 Dated: March 5, 2010

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