

ORIGINAL
FILED

2013 JUN 20 P 2:45

RICHARD W. WICKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JCS

1 Christopher A. Sproul (Bar No. 126398)
2 Jodene Isaacs (Bar No. 226895)
3 Environmental Advocates
4 5135 Anza Street
5 San Francisco, California 94121
6 Telephone: (415) 533-3376, (510) 847-3467
7 Facsimile: (415) 358-5695
8 Email: csproul@enviroadvocates.com, jisaacs@enviroadvocates.com

6 Michael A. Costa (Bar No. 219416)
7 3848 Sacramento St. #2
8 San Francisco, CA 94118
9 Telephone: (415) 342-0042
10 Email: mike@ocefoundation.org

11 Attorneys for Plaintiffs
12 OUR CHILDREN 'S EARTH FOUNDATION and
13 ECOLOGICAL RIGHTS FOUNDATION

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

15 OUR CHILDREN 'S EARTH FOUNDATION,
16 non-profit corporation, and ECOLOGICAL
17 RIGHTS FOUNDATION, a non-profit corporation,

18 Plaintiffs,

19 v.

20 U.S. ENVIRONMENTAL PROTECTION
21 AGENCY, BOB PERCIASEPE, Acting
22 Administrator, JARED BLUMENTHAL, Regional
23 Administrator U.S. Environmental Protection
24 Agency Region 9, NATIONAL MARINE
25 FISHERIES SERVICE, REBECCA BLANK, as
26 Acting Secretary of Commerce, RODNEY
27 MCINNIS, as Regional Administrator of the
28 National Marine Fisheries Service Southwest
Region, U.S. DEPARTMENT OF THE
INTERIOR, KEN SALAZAR, as Secretary of the
Department of the Interior, REN LOHOEFENER
as Regional Administrator of the United States
Fish and Wildlife Service Pacific Southwest
Region,

Civil Case No.: **CV 13 2857**

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

CLEAN WATER ACT, ENDANGERED
SPECIES ACT, AND
ADMINISTRATIVE PROCEDURE ACT
CASE

2 Our Children's Earth Foundation ("OCE") and Ecological Rights Foundation ("ERF")
3 (collectively, "Plaintiffs") allege as follows:
4

5 **INTRODUCTION**

6 1. Plaintiffs bring this action under section 505(a)(2) of the Clean Water Act ("CWA"), 33
7 U.S.C. § 1365(a)(2), and the under section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. §
8 1540(g)(1)(A). The CWA authorizes citizens to bring civil actions against the Administrator of the
9 Environmental Protection Agency ("EPA") for any alleged a failure of the Administrator to perform any
10 act of duty under the CWA which is not discretionary. 33 U.S.C. § 1365(a)(2). The ESA authorizes
11 citizens to bring civil actions against any federal agencies for failure to comply with procedure set forth
12 in ESA section 7 as well as ESA section 9 which prohibits unlawful "take" of a federally listed
13 threatened or endangered species. 16 U.S.C. §§ 1536(a), 1538(a)(1)(B). Plaintiffs also bring a claim
14 under the Administrative Procedure Act ("APA") provisions that permit aggrieved parties to seek
15 judicial review of federal agency actions unreasonably delayed. 5 U.S.C. § 706(1).

16 2. Plaintiffs seek relief from conduct by Defendants EPA, Acting Administrator of EPA Bob
17 Perciasepe, and Regional Administrator of EPA Region 9 Jared Blumenthal (collectively "the EPA
18 Defendants") for violations under the CWA and ESA relating to the failure to comply with the
19 Reasonable Terms and Conditions set forth in the March 24, 2000 Biological Opinion ("BiOp") issued
20 by Defendants National Marine Fisheries Service and the U.S. Fish and Wildlife Service ("the
21 Services") relating to EPA issuance of toxic water quality criteria for the State of California.
22 Specifically, Plaintiffs allege that the EPA Defendants failed to promulgate several WQC within a 90
23 day period of proposing them pursuant CWA section 304(c)(4), 33 U.S.C. § 1313(c)(4), and 40 C.F.R. §
24 131.22(c). Plaintiffs further allege that the EPA Defendants' failure to act also violates the requirements
25 of ESA section 7(a)(2)'s duty of consultation, 16 U.S.C. § 1536(a)(2) and ESA section 9's prohibition
26 upon the unlawful take of threatened and endangered species, 16 U.S.C. § 1538(a)(1)(B).

27 3. Plaintiffs allege that Defendants National Marine Fisheries Service, Acting Secretary of the
28 Commerce Rebecca Blank, and NMFS Regional Administrator Rodney McInnis, (collectively

1 “NMFS”); United States Fish and Wildlife Service, Secretary of the Interior Ken Salazar, and USFWS
2 Regional Administrator Ren Lohofener (collectively "USFWS") (NMFS and USFWS are hereinafter
3 collectively referred to as “the Resource Agency Defendants”) have violated and are in violation of ESA
4 section 7 due to their failure to reinitiate consultation with EPA as required by ESA section 7, 16 U.S.C.
5 § 1536(a)(2).

6 **JURISDICTION**

7 4. This Court has subject matter jurisdiction over the CWA and ESA claims set forth in this
8 Complaint pursuant to 28 U.S.C. § 1331 (an action for declaratory, injunctive, and other relief arising
9 under the Constitution and laws of the United States) because this case involves a civil action arising
10 under the laws of the United States, specifically CWA section 505(a)(2), 33 U.S.C. § 1365(a)(2), and
11 ESA section 11(g), 16 U.S.C. § 1540(g)(1). Both of these citizen suits provisions grant jurisdiction to
12 this Court for violations arising under the respective Acts.

13 5. This Court also has subject matter jurisdiction over the claim brought pursuant to the APA,
14 specifically 5 U.S.C. § 702, which authorizes any person aggrieved by an agency action under a relevant
15 statute to seek judicial review; and 5 U.S.C. § 706, which authorizes a reviewing court to compel an
16 agency to take an action that has been unlawfully withheld or unreasonably delayed, and to set aside
17 agency actions that are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
18 accordance with law.

19 6. On March 4, 2013, Plaintiffs provided advance notice of the EPA Defendants' violation of the
20 CWA and ESA, and of Plaintiffs' intention to file suit against the EPA Defendants pursuant to 33 U.S.C.
21 § 1365(b) and 16 U.S.C. § 1540(g)(2)(A)(i), as well as to the United States Attorney General. On March
22 4, 2013 Plaintiffs also provided sixty days advance notice of the Resource Agency Defendants' violation
23 of the ESA, and of Plaintiffs' intention to file suit against the Resource Agency Defendants pursuant to
24 16 U.S.C. § 1540(g)(2)(A)(i), as well as to the United States Attorney General. This notice is attached to
25 this complaint as Exhibit 1 and fully incorporated herein. More than 60 days have elapsed since
26 Plaintiffs provided this advance notice.
27
28

1 such as steelhead, salmon, and sturgeon throughout the San Francisco Bay Delta, California's inland
2 rivers and streams, and coastal waters. OCE's members also include avid birdwatchers who visit San
3 Francisco Bay and coastal areas near San Francisco for opportunities to see species such as the
4 California Clapper Rail, Marbled Murrelet, least tern, and Western Snowy Plover among others. OCE's
5 members also enjoy observing other wildlife in San Francisco Bay and other California waters,
6 including marine mammals (that among other prey feed on anadromous fish). OCE's members'
7 enjoyment of California waters for body contact water sports and other forms of recreation is diminished
8 due to the pollution of these waters. These members' enjoyment of wildlife observation (including bird
9 watching and observation of anadromous fish), aesthetic enjoyment, educational study, and spiritual
10 contemplation is further also reduced due to the pollution of these waters which reduces the abundance
11 of wildlife, renders the waters less aesthetically pleasing, and is an insult to OCE's members' convictions
12 that preservation of these waters and the wildlife that depend on these waters is a spiritual imperative.
13 OCE's members would also like to enjoy fishing for all species of steelhead, salmon and sturgeon in
14 California if these fish were abundant. These members' enjoyment of fishing for anadromous fish is
15 greatly impaired, however, one, because of the overall diminished numbers of anadromous fish in
16 California in part due to pollution impacts and two, some anadromous fish species in California are
17 listed under the ESA as threatened and thus cannot be fished for. OCE's members would also enjoy
18 consuming fish and seafood from the San Francisco Bay Delta and other inland rivers and streams and
19 coastal waters of California but cannot do so because they are concerned about toxic pollutants in fish
20 tissue. These members continue to hope for survival and recovery of anadromous fish and other wildlife
21 in the San Francisco Bay Delta and throughout California's waters that provide habitat for such species.
22 OCE's members believe that EPA's ongoing delay in issuing or revising the water quality criteria and
23 implement the other measures discussed below has resulted in diminished water quality in waters
24 throughout California which in turn causes diminishment in their enjoyment of wildlife observation,
25 aesthetic appreciation, educational study, and spiritual contemplation in and of these waters. This
26 decline in water quality has had and is continuing to have negative impacts on the health and well being
27 of anadromous fish and other aquatic dependent species that OCE members would like to enjoy as
28

1 resources for fishing, wildlife observation, aesthetic appreciation, educational study, and spiritual
2 contemplation.

3 12. ERF is a non-profit organized under the laws of the State of California. To further its
4 environmental advocacy goals, ERF actively seeks federal and state agency implementation of state and
5 federal water quality related laws. ERF's members include residents of Humboldt County and the San
6 Francisco Bay-Delta area who use the waters throughout California for fishing, body contact water
7 sports and other forms of recreation, wildlife observation, aesthetic enjoyment, educational study, and
8 spiritual contemplation. ERF's members also include avid birdwatchers who visit San Francisco Bay and
9 Humboldt Bay for opportunities to see species such as the California Clapper Rail, Marbled Murrelet,
10 least tern, and Western Snowy Plover among others. ERF's members particularly enjoy recreational,
11 educational, and/or spiritual pursuits related to the observation, study and contemplation of anadromous
12 fish migration, including species such as steelhead, salmon, and sturgeon throughout Humboldt Bay, the
13 San Francisco Bay Delta, and other of California's inland rivers and streams, and coastal waters. ERF's
14 members also include avid birdwatchers who visit San Francisco Bay and Humboldt Bay for
15 opportunities to see species such as the California Clapper Rail, Marbled Murrelet, and Western Snowy
16 Plover among others. ERF's members also enjoy observing other wildlife in Humboldt Bay, San
17 Francisco Bay and other California waters, including marine mammals (that among other things feed on
18 anadromous fish).

19 13. ERF's members' enjoyment of California waters for body contact water sports and other forms
20 of recreation is diminished due to the pollution of these waters. These members' enjoyment of wildlife
21 observation (including bird watching and observation of anadromous fish and marine mammals),
22 aesthetic enjoyment, educational study, and spiritual contemplation is further also reduced due to the
23 pollution of these waters which reduces the abundance of wildlife, renders the waters less aesthetically
24 pleasing, and is an insult to ERF's members' convictions that preservation of these waters and the
25 wildlife that depend on these waters is a spiritual imperative. ERF's members would also like to enjoy
26 fishing in California for all species of steelhead, salmon and sturgeon if these fish were abundant. These
27 members' enjoyment of fishing for anadromous fish is greatly impaired, however, one, because of the
28 overall diminished numbers of anadromous fish in California in part due to pollution impacts and two,

1 some anadromous fish species in California are listed under the ESA as threatened and thus not available
2 for fishing. ERF's members would also enjoy consuming fish and seafood from Humboldt Bay and the
3 San Francisco Bay Delta and other inland rivers and streams and coastal waters of California but cannot
4 do so because they are concerned about toxic pollutants in fish tissue. These members continue to hope
5 for survival and recovery of anadromous fish and other wildlife in Humboldt Bay and the San Francisco
6 Bay Delta and throughout California's waters that provide habitat for such species.

7 14. ERF's members believe that EPA's ongoing delay in issuing or revising the water quality
8 criteria and implement the other measures discussed below has resulted in diminished water quality in
9 waters throughout California which in turn causes diminishment in their enjoyment of wildlife
10 observation, aesthetic appreciation, educational study, and spiritual contemplation. This decline in water
11 quality has had and is continuing to have negative impacts on the health and well being of anadromous
12 fish and other aquatic dependent species that ERF members would like to enjoy as a resource for fishing,
13 wildlife observation, aesthetic appreciation, educational study, and spiritual contemplation.

14 15. Defendant United States Environmental Protection Agency is the agency of the United States
15 Government responsible for administering and implementing the CWA and other federal environmental
16 laws, and it is a federal agency within the meaning of 16 U.S.C. § 1456.

17 16. Defendant Bob Perciasepe, Acting Administrator of the US EPA, is charged under 33 U.S.C. §
18 1313(d)(2) with the oversight of EPA decisions and actions affecting California's submissions of water
19 quality standards, and he is sued in his official capacity only. If ordered by the Court, Mr. Perciasepe has
20 the authority and ability to remedy the harm inflicted by the EPA Defendants' actions.

21 17. Defendant Jared Blumenfeld, Regional Administrator of EPA Region 9, is responsible for the
22 oversight of EPA decisions and actions affecting California's submissions of water quality standards,
23 and he is sued in his official capacity only. If ordered by the Court, Mr. Blumenfeld has the authority
24 and ability to remedy the harm inflicted by the EPA Defendants' actions.

25 18. Defendant NMFS, a branch of the National Oceanic and Atmospheric Administration, a
26 division of the Department of Commerce, is the agency of the United States Government responsible for
27 administering and implementing the ESA for anadromous fisheries and generally is responsible for the
28 stewardship of the nation's living marine resources and their habitat.

1 19. Defendant Rebecca Blank, Acting Secretary of Commerce, is the Secretary within the meaning
2 of 16 U.S.C. §§ 1540(g)(1)(C) and 1532(15) and she is sued in her official capacity only. If ordered by
3 the Court, Ms. Blank has the authority and ability to remedy the harm inflicted by NMFS's actions.

4 20. Defendant Rodney McInnis, Regional Administrator of NMFS Southwest Region has been
5 delegated certain authority granted to the Secretary under the ESA within the Southwest Region, and is
6 sued in his official capacity only. If ordered by the Court, Mr. McInnis has the authority and ability to
7 remedy the harm inflicted by NMFS's actions.

8 21. Defendant USFWS, a division of the Department of Interior, is the agency of the United States
9 Government responsible for administering and implementing most species protected by the ESA.

10 22. Defendant Ken Salazar, Secretary of Interior, is the Secretary within the meaning of 16 U.S.C.
11 sections 1540(g)(1)(C) and 1532(15), and he is sued in his official capacity only. If ordered by the
12 Court, Mr. Salazar has the authority and ability to remedy the harm inflicted by the USFWS's actions.

13 23. Defendant Ren Lohofener, Regional Director Pacific Southwest Region Southwest Region
14 USFWS has been delegated certain authority granted to the Secretary under the ESA, and he is sued in
15 his official capacity only. If ordered by the Court, Mr. Lohofener has the authority and ability to
16 remedy the harm inflicted by USFWS's actions.

17 **STATUTORY BACKGROUND**

18 **Clean Water Act**

19 24. The CWA requires every state must adopt, periodically update, and submit to EPA proposed
20 water quality standards ("WQS") applicable to waters in that state. *See* 33 U.S.C. § 1313(a)-(c). WQS
21 consist of designated uses, i.e., the beneficial uses to which waters are put, and water quality criteria,
22 i.e., the maximum levels of pollutants that a water body can have and still sustain designated uses. 33
23 U.S.C. § 1313(c). Under CWA section 303(c)(2)(B), states must adopt numeric water quality criteria for
24 the priority toxic pollutants listed under CWA section 307(a) if those pollutants could be reasonably
25 expected to interfere with the designated uses of a state's waters. 33 U.S.C. §§ 1313(c)(2)(B), 1317(a),
26 The CWA imposes a strict schedule pursuant to which EPA must approve or disapprove proposed WQS,
27 and articulates specific steps EPA must take if it either disapproves those standards or undertakes action
28 to promulgate WQS when the states fail to act. CWA section 304(a), 33 U.S.C. 1314(a), requires EPA to

1 publish what are also known as "water quality criteria," but unlike water quality criteria promulgated
2 pursuant to CWA section 303, CWA section 304 water quality criteria are only national guidance that
3 have no binding legal effect and are to be used by the states and EPA in promulgating the legally
4 binding statewide water quality criteria under CWA section 303.

5 **Endangered Species Act**

6 25. The ESA was enacted to provide a means to conserve threatened and endangered species and
7 to conserve the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). In addition, the ESA
8 calls for all federal agencies to use their authority to seek to conserve threatened and endangered
9 species. 16 U.S.C. § 1531(c).

10 26. To accomplish these goals, the ESA requires that each federal agency ("action agency") insure
11 that any action authorized, funded, or carried out by such agency does not jeopardize the continued
12 existence of a threatened or endangered species or result in the destruction or adverse modification of
13 habitat that the Secretary has determined to be critical for such species. 16 U.S.C. § 1536(a)(2). In
14 furtherance of that goal, the ESA requires that each Federal agency shall consult with the National
15 Marine Fisheries Service ("consulting agency") for marine and anadromous species on any action which
16 is likely to result in jeopardy or destruction or adverse modification of critical habitat, using the best
17 scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b); 50 C.F.R. §
18 223. To this end, the action agency may provide the consulting agency with a Biological Assessment
19 outlining the action and the effects of that action on the species. 16 U.S.C. § 1536(c); 50 C.F.R. §
20 402.12.

21 27. After consultation has ended, the consulting agency shall provide the action agency with a
22 written statement, known as a biological opinion, which must set forth the consulting agency's opinion,
23 and the information upon which that opinion is based, and detail how the action will affect the species or
24 its critical habitat. 16 U.S.C. § 1536(b)(3)(A). In arriving at its biological opinion, the consulting
25 agency, using the best scientific and commercial data available, must review all relevant information
26 provided by the action agency, evaluate the current status of the species, evaluate the effects of the
27 action and the cumulative effects on the species or critical habitat, and formulate its opinion as to
28

1 whether the action, taken together with cumulative effects will jeopardize the continued existence of the
2 species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g)(1-4, 8).

3 28. If the consulting agency finds that the action will likely jeopardize the species or adversely
4 modify critical habitat, the consulting agency shall suggest reasonable and prudent alternatives that it
5 believes would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A). If there are no
6 reasonable and prudent alternatives that will avoid such jeopardy or adverse modification, the action
7 agency cannot continue with the action unless it obtains an exemption as specified in ESA section
8 7(a)(2). 16 U.S.C. § 1536(a)(2).

9 29. If the action or reasonable and prudent alternative to the action will result in a take of a listed
10 species, but the consulting agency concludes that the incidental taking of threatened or endangered
11 species as a result of the action or alternative will not result in jeopardy of the species or adverse
12 modification of its critical habitat, then the Secretary may issue an Incidental Take Statement (“ITS”) for
13 that take. 16 U.S.C. § 1536(b)(4). The ITS shall set forth the impact of the incidental take on the species,
14 the reasonable and prudent measures the consulting agency considers necessary or appropriate to
15 minimize such impact, and the terms and conditions that the action agency must take to comply with the
16 reasonable and prudent measures. 16 U.S.C. § 1536(b)(4).

17 30. As long as the action agency complies with the terms of the ITS, the agency is protected from
18 liability under ESA section 9. 16 U.S.C. §§ 1538, 1536(a)(2). However, if an agency does not abide by
19 the terms of the ITS, both the consulting and action agencies have a responsibility to reinitiate
20 consultation. 50 C.F.R. § 402.16.

21 **FACTUAL BACKGROUND**

22 31. In April 1991, California adopted the water quality criteria component of WQS for priority
23 toxic pollutants pursuant to CWA section 303(c) in the State's water quality control plans ("Basin
24 Plans"). 33 U.S.C. 1313(c). However, a California State court ordered California to rescind these water
25 quality control plans in 1994. Due to California's inability to set WQS for toxic pollutants in a timely
26 manner, EPA first published the proposed California Toxics Rule (“CTR”) on August 5, 1997 setting
27 water quality criteria for 126 toxic priority pollutants in California's rivers, lakes, enclosed bays, and
28 estuaries.

1 32. EPA determined that promulgation of the CTR was necessary for the State of California to
2 meet the requirements of CWA section 303(c)(2)(B). 33 U.S.C. § 1313(c)(2)(B), *see also* 62 Fed. Reg.
3 42160 (August 5, 1997). The preamble to the proposed CTR explains that this finding was based on the
4 fact that the water quality criteria adopted by the State had been rescinded, thus leaving California
5 without applicable water quality criteria for numerous toxic pollutants for an extended period. *Id.* The
6 State Water Resources Control Board ("State Board") and California Regional Water Quality Control
7 Boards ("Regional Boards") needed the criteria set forth in the CTR to have water quality standards to
8 use in permit writing, identification of impaired waters, and the development of Total Maximum Daily
9 Loads among other requirements under CWA section 303(c)(2)(B) and (d). 33 U.S.C. §§ 1313(c)(2)(B),
10 (d). The final CTR, published on May 18, 2000, reiterated EPA's authority to promulgate WQS for
11 California and EPA's determination that the CTR's numeric water quality criteria were necessary to
12 protect human health and the environment in California. *See* 65 Fed. Reg. 31682 (May 18, 2000).
13 Although EPA proposed certain water quality criteria for selenium and mercury in its proposed CTR in
14 1997, EPA's final CTR reserved these criteria for future action.

15 33. Between 1997 and 1999, EPA and the Services engaged in an extensive ESA section 7
16 consultation on EPA's proposed CTR which resulted in numerous modifications to the proposed water
17 quality criteria that were necessary to prevent the CTR from causing jeopardy to ESA-listed species.
18 EPA submitted its final proposed modifications to the CTR on December 16, 1999. On March 24, 2000,
19 the Services completed the BiOp on the CTR which directed EPA to undertake several Reasonable and
20 Prudent Measures ("RPMs") so as to avoid the Services concluding in the BiOp that the CTR is
21 jeopardizing the survival and recovery of ESA-listed species (" a Jeopardy Determination"). The RPMs
22 related to water quality criteria for selenium, mercury, pentachlorophenol, and cadmium and to the
23 CTR's formula based dissolved metals water quality criteria.

24 **Selenium RPMs**

25 34. The BiOp explained that in bird species, selenium poisoning may lead to gross embryo
26 deformities, winter stress syndrome, depressed resistance to disease due to depressed immune system
27 function, reduced juvenile growth and survival rates, mass wasting, loss of feathers (alopecia), embryo
28 death, and altered hepatic enzyme function. Based on their dietary habits, dependence on the aquatic

1 ecosystem, and their limited distribution, the Services indicated that the above impacts are likely to
2 adversely affect the California clapper rail, California least tern, light-footed clapper rail, and the Yuma
3 clapper rail, among other bird species. The BiOp also found that salmonid species (including Chinook
4 and Coho salmon and steelhead trout, among others) are very sensitive to selenium bioaccumulation and
5 exhibit toxic symptoms even when tissue concentrations of selenium are quite low. The BiOp
6 determined that adverse impacts from selenium were likely to adversely affect the aforementioned
7 salmonid species, which are found throughout the San Francisco Bay Delta, North Coast and Southern
8 California. The BiOp further identified numerous other species of fish, mammals, reptiles and
9 amphibians that will suffer adverse impacts from selenium exposure at the levels authorized by the CTR.
10 The BiOp's list, on page 224, is hereby incorporated by reference--as well as the BiOp's discussion of
11 evidence supporting the Services' conclusions concerning the impacts of EPA's actions on these species
12 (quoting this material in full herein is unnecessary as EPA and the Services are in possession of the
13 BiOp and fully aware of its contents).

14 35. The Services warned EPA that EPA's selenium water quality criteria would only be adequate if
15 they were low enough to protect aquatic food chains from excessive bioaccumulation. The Services
16 indicated that the selenium chronic criterion should be no more than 2 ug/L and explained that levels
17 as low as 0.2 ug/L would be needed to protect specific species in water bodies where the food chain is
18 already contaminated with selenium.

19 36. The BiOp included an Incidental Take Statement ("ITS") with Reasonable and Prudent
20 Measures and Terms and Conditions (collectively, "RPMs") that required EPA to take the following
21 actions: (1) not promulgate EPA's previously proposed selenium acute aquatic criterion,¹ (2) revise
22 EPA's recommended CWA section 304(a) acute and chronic aquatic life criteria for selenium by January
23 2002, (3) propose revised acute and chronic selenium water quality criteria which would be protective of
24 ESA-listed species in California by January of 2003, (4) if EPA's proposed acute or chronic criterion for
25

26 ¹ Aquatic criterion/criteria refer to the level of pollutant concentrations that must not be exceeded to
27 secure water quality needed by aquatic wildlife.

1 selenium in California is less stringent than the criteria suggested by the Services (< 2 g/L), provide the
2 Services with a biological evaluation/assessment ("BE/BA") and request formal ESA section 7
3 consultation with the Services on the revised criteria by January 2003. EPA's "BE/BA" on the revised
4 criteria must specifically address semi-aquatic wildlife species; (5), promulgate final acute and chronic
5 criteria for selenium in California no later than June 2004, (6) provide the Services with semi-annual
6 reports regarding the status of EPA's revision of the selenium criteria and accompanying draft BE/BA
7 associated with the revision, (7) identify water bodies in California where selenium criteria necessary to
8 protect ESA-listed species are not met (selenium-impaired water bodies), and annually submit to the
9 Services a list of NPDES permits due for review to allow the Services and EPA to identify any potential
10 for adverse effects on ESA-listed species and/or their habitats. EPA must provide a list of selenium-
11 impaired water bodies to the Services and conduct its first NPDES permit review by October 2000. EPA
12 must thereafter annually submit to the Services a list of NPDES permits due for review to allow the
13 Services and EPA to identify any potential for adverse effects on listed species and/or their habitats; and
14 (8) coordinate with the Services on any NPDES permits containing limits for selenium that the Services
15 (or EPA) identify as having potential for adverse effects on ESA-listed species and/or their habitat in
16 accordance with procedures agreed to by the Agencies in the draft Memorandum of Agreement ("draft
17 MOA") published in the Federal Register at 64 Fed. Reg. 2755 (January 15, 1999).

18 37. EPA has failed to comply with all but the first of these RPM for selenium. EPA did refrain
19 from promulgating in the CTR EPA's previously proposed selenium acute aquatic criterion. However,
20 EPA failed to revise EPA's recommended CWA section 304(a) acute and chronic aquatic life criteria for
21 selenium by January 2002. EPA proposed a national ambient water quality criterion for selenium in
22 2004 pursuant to CWA section 304(a), but EPA has never finalized that criterion. EPA has also never
23 proposed revised acute and chronic aquatic life water quality criteria for selenium which would be
24 protective of ESA-listed species in California. EPA has never provided the Services with a BE/BA on
25 actions related to adoption of new and revised selenium criteria and has never requested formal ESA
26 section 7 consultation with the Services on the revised criteria. EPA has not promulgated revised final
27 acute and chronic aquatic life criteria for selenium in California. EPA has been working on CWA
28 section 303 water quality criteria for selenium applicable to the San Francisco Bay-Delta region and has

1 taken some initial steps in developing selenium criteria for California, but progress has been extremely
2 slow given that it has been nearly nine years since EPA issued any formal proposals for a selenium
3 criterion. EPA has not set a deadline for promulgation of selenium water quality criteria for the Bay-
4 Delta. Further, EPA has set no target date for the development of selenium acute and chronic aquatic life
5 water quality criteria that will be applicable to the rest of California. Although EPA initially complied
6 with the Services reporting and permit review RPMs on an intermittent basis, EPA has continuously
7 violated these reporting and permit review RPMs since 2006; EPA has submitted no status or
8 monitoring reports to the Services with respect to the agency's progress on promulgating CWA section
9 303 selenium water quality criteria since 2006 and has not conducted the NPDES permit reviews
10 required by the RPM.

11 **Mercury RPMs**

12 38. In the BiOp, the Services asked EPA to withhold promulgation of EPA's proposed mercury
13 criteria in the CTR because the Services concluded that EPA's proposed mercury criteria were likely to
14 adversely impact numerous threatened and endangered bird, fish, reptile, amphibian, and mammal
15 species. In birds, acute methyl-mercury poisoning can result in reduced food intake leading to weight
16 loss, progressive weakness in wings and legs, difficulty flying, walking, standing, plus an inability to
17 coordinate muscle movements and impaired hearing. The Services noted in the BiOp that effects of
18 mercury on avian reproduction are likely occurring in San Francisco Bay populations of birds, including
19 the least tern and California clapper rail, as well as the light-footed clapper rail.

20 39. The BiOp found that mercury and methyl-mercury have numerous impacts on fish including
21 adverse changes to behavior, growth, histology, reproduction, development, and survival. Due to the
22 current concentrations of mercury in a number of California water bodies, the BiOp determined that the
23 following listed or proposed fish species are being adversely impacted by mercury at the levels
24 permitted by the CTR: all runs and ESUs² of Coho and Chinook salmon and steelhead trout, Little Kern

26 ² ESU stands for Evolutionarily Significant Unit, and it is a population of organisms that is considered
27 distinct for purposes of conservation. A population (or group of populations) will be considered
28

1 Golden trout, Paiute cutthroat trout, Lahontan cutthroat trout, bonytail chub, unarmored threespine
2 stickleback, shortnose sucker, Lost River sucker and the Sacramento splittail.

3 40. The BiOp further identified numerous other species of fish, mammals, reptiles and amphibians,
4 and invertebrates that will suffer adverse impacts from mercury exposure at the levels authorized by the
5 CTR. The BiOp's list, on pages 225-26, is hereby incorporated by reference--as well as the BiOp's
6 discussion of evidence supporting the Services' conclusions concerning the impacts of EPA's actions on
7 these species (quoting this material in full herein is unnecessary as EPA and the Services are in
8 possession of the BiOp and fully aware of its contents).

9 41. The BiOp included RPMs requiring EPA to take the following actions with respect to EPA's
10 mercury criteria: (1) refrain from promulgating the proposed freshwater and saltwater acute and chronic
11 aquatic life criteria for mercury in the final CTR, (2), promulgate a human health criterion of 50 ng/l or
12 51 ng/l mercury, but only where no more restrictive federally-approved water quality criteria are now in
13 place (i.e., in certain locations outside of San Francisco Bay), (3) revise its recommended CWA section
14 304(a) human health criteria for mercury by January 2002 to levels sufficient to protect ESA-listed
15 aquatic and aquatic dependent wildlife species. If the revised criteria are less stringent than the range of
16 criteria concentrations suggested by the BiOp (< 2.0 ng/L as total Hg or equivalent methylmercury
17 concentration as determined by site specific data) to protect ESA-listed species or the EPA's mercury
18 report to Congress concerning piscivorous wildlife values, EPA must provide the Services with a
19 BE/BA and request ESA section 7 formal consultation on the revised criteria by the time of the proposal,
20 (4) promulgate a revised human health CWA section 303 criterion for mercury in California by January
21 2003--the revised criterion should be protective of ESA-listed aquatic and aquatic-dependent species ,
22 (5) commencing June 30, 2000, provide the Services with semi-annual reports regarding the status of
23 EPA's revision of its mercury criteria and/or any draft Biological Assessment or Biological Evaluation
24 ("BA/BE") associated with the revision. EPA must further invite scientists from the Services to jointly

25
26 "distinct" and hence a "species" for purposes of the ESA if it represents an ESU of the biological
27 species.

1 evaluate with EPA whether EPA's human health criterion for mercury is also protective of fish and
2 wildlife; (6) by October 2000, identify water bodies in California where mercury criteria necessary to
3 protect ESA-listed species are not met and submit to the Services a list of NPDES permits due for
4 review to allow the Services and EPA to identify any potential for adverse effects on ESA-listed species
5 and/or their habitats and thereafter annually submit to the Services such a list of NPDES permits, and (7)
6 coordinate with the Services on issuance of any NPDES permits containing limits for mercury for
7 discharges that the Services (or EPA) identify as having potential for adverse effects on ESA-listed
8 species and/or their habitat in accordance with procedures agreed to by the agencies in the draft MOA.

9 42. EPA complied with the first two of these mercury RPMs. EPA also revised its CWA section
10 304(a) human health criterion for mercury in 2001, but did not set its criterion at the Services'
11 recommended levels of < 2.0 ng/L as total Hg or equivalent methylmercury concentration as determined
12 by site specific data. EPA instead set its criterion at a fish tissue concentration level that does not
13 directly indicate a permissible water concentration of mercury, and the Services' scientists and other
14 experts have found this fish tissue level approach to be insufficiently protective of ESA-listed species.
15 EPA has largely failed to comply with the remainder of the mercury-related RPMs. EPA has failed to
16 propose and finalize a revised CWA section 303 human health mercury water quality criterion for
17 California and has taken no other action to adopt CWA section 303 water quality criteria for mercury
18 that would be protective of ESA-listed species. EPA did provide the Services with some reports
19 regarding the status of EPA's revision of its mercury criteria, but, on information and belief, stopped
20 providing such reports in 2001. EPA has never provided the Services with any draft or final BA/BE
21 associated with adoption of new or revised mercury criteria. EPA has never invited scientists from the
22 Services to jointly evaluate with EPA whether EPA's human health criterion for mercury is also
23 protective of fish and wildlife. EPA has not provided the Services with a list of water bodies in
24 California where mercury criteria necessary to protect ESA-listed species are not met (at least not since
25 2002) and has not submitted to the Services a list of NPDES permits due for review since 2002. Since
26 2002 (and perhaps earlier), EPA has not coordinated with the Services on issuance of any NPDES
27 permits containing limits for mercury for discharges that have potential for adverse effects on ESA-
28 listed species and/or their habitat.

1 43. EPA claims that the State Board has decided to take the lead on the development of methyl-
2 mercury criteria based in part on EPA's CWA section 304(a) national criterion, but the State Board
3 continues to fail to take action on promulgating mercury water quality criteria-- which ironically is what
4 led to the promulgation of the CTR in the first place. Although the State Board proposed its
5 "Alternatives for Human and Wildlife Health Objectives for Mercury" five years ago, the State Board
6 has failed to take additional action since that time. Further, EPA did not reinitiate ESA section 7
7 consultation with the Services after deciding to abdicate the promulgation of mercury criteria for
8 California or the remaining RPMs pertaining to mercury set forth in the BiOp.

9 **Pentachlorophenol RPMs**

10 44. As discussed in the BiOp, numerous scientific studies have demonstrated that commercial
11 grade pentachlorophenol ("PCP") adversely affects the reproduction, early life stage survival, growth,
12 and/or behavior of salmonids at concentrations at or below the water quality criteria levels that EPA
13 promulgated in the CTR. In the BiOp, the Services found that EPA did not consider the cumulative and
14 interactive effects of commercial grade PCP toxicity through the critical life-cycle of salmonids, under
15 conditions of elevated temperatures, or reduced dissolved oxygen in developing the PCP criteria. The
16 Services also noted that EPA failed to consider bioconcentration of PCP or its impurities into aquatic
17 organisms and subsequent ingestion by wildlife in promulgating the PCP criteria. The Services stated
18 that the data existing at the time of the BiOp was issued supports a conclusion that a chronic PCP
19 criterion of between 0.2 to 2.0 ug/L PCP would be protective of early life stage ESA-listed salmonid
20 species.

21 45. The BiOp further identified numerous other species of fish that will suffer adverse impacts
22 from PCP exposure at the levels authorized by the CTR. The BiOp's list, on page 226, is hereby
23 incorporated by reference--as well as the BiOp's discussion of evidence supporting the Services'
24 conclusions concerning the impacts of EPA's actions on these species (quoting this material in full
25 herein is unnecessary as EPA and the Services are in possession of the BiOp and fully aware of its
26 contents).

27 46. In response to their concerns over the CTR's PCP water quality criteria, the Services included
28 in the BiOp RPMs requiring EPA to take the following actions with respect to these criteria: (1) by

1 March of 2001 review, and if necessary, revise its CWA section 304(a) chronic aquatic life criterion for
2 PCP sufficient to protect ESA-listed species and/or their critical habitats. In reviewing this criterion,
3 EPA must generate new information on PCP regarding the toxicity of commercial grade PCP and the
4 interaction of temperature and dissolved oxygen on sublethal acute and chronic toxicity to early life
5 stage salmonids, by, *inter alia*, performing toxicity tests on at least one anadromous fish species and
6 producing data on chronic toxicity of PCP to ESA-listed species; (2) if as a result of these new studies
7 EPA revises its CWA section 304(a) chronic aquatic life criterion, propose a revised CWA section 303
8 PCP criterion for California by March 2002. If EPA's revised PCP CWA section 303 criterion is less
9 stringent than the range of criterion concentrations suggested by the Services to protect ESA-listed
10 species (0.2 to 2.0 ug/L at pH of 7.8) or if EPA determines that a PCP criterion revision is not necessary,
11 EPA must provide the Services with a BE/BA and a request for formal ESA section 7 consultation by
12 March 2002; (3) If EPA proposes a revised PCP criterion by March 2002, EPA must promulgate a final
13 PCP criterion as soon as possible, but no later than 18 months, after proposal, (4) provide the Services
14 with semi-annual reports concerning the status of EPA's review of the PCP chronic aquatic life criterion
15 and any draft BA/BE associated with the review, (5) identify to the Services the water bodies into which
16 there are discharges of PCP authorized by NPDES permits and where there are Comprehensive
17 Environmental Response, Compensation, and Liability Act ("CERCLA") and Resource Conservation
18 and Reclamation Act ("RCRA") sites that potentially contribute PCP to surface waters. By October
19 2000, EPA must also review information concerning PCP discharges to determine the potential for the
20 discharge to impact ESA-listed species and/or critical habitats. In this review, EPA must give priority to
21 review data for fresh water bodies within the range of ESA-listed salmonids that currently lack a
22 municipal ("MUN") designation as specified in the Regional Boards' Basin Plans; and (6) If EPA
23 identifies PCP discharges that have the potential to adversely affect ESA-listed species and/or critical
24 habitat, work with the Services and the State of California to address the potential effects to these
25 species, including by imposing stricter NPDES permit limits on PCP discharges.

26 47. EPA has failed to comply with any of these BiOp's PCP RPMs. In 2004, EPA first informed
27 the Services that it would not be revising either the CWA section 304(a) or section 303(c) PCP criterion.
28 The Services replied to EPA and questioned this determination, further pointing out that EPA had failed

1 to comply with the BiOp's requirement to generate new research on PCP toxicity. In response, EPA
2 pointed out that some of the literature EPA staff had reviewed was generated after the date of the BiOp,
3 but EPA did not respond to the Services' point that EPA itself had not performed the research directed
4 by the BiOp on the chronic sub-lethal toxicity of commercial grade PCP, and the interaction of
5 temperature and dissolved oxygen on PCP toxicity, to protect early life-stage salmonids. In 2007, EPA
6 informed the Services that EPA would not be revising the CWA section 303(c) PCP water quality
7 criteria applicable to California, and that the State and Regional Boards would instead determine where
8 conditions of low dissolved oxygen and high temperatures exist in the State and adopt the appropriate
9 PCP water quality criteria during the next triennial review of each Regional Board Basin Plan.

10 48. Before making this determination in 2007, EPA again failed to generate *new* information on
11 the toxicity of commercial grade PCP under the environmental conditions specified in the BiOp and
12 further urged by the Services in November 2004. Further, EPA also failed to reinitiate consultation with
13 the Services when it determined that it would not revise the PCP criteria even though the BiOp clearly
14 instructed EPA to reinitiate consultation under these circumstances. Finally, based on information and
15 belief, EPA has not complied with the BiOp's requirements to review PCP discharges authorized by
16 NPDES permits or associated with CERCLA or RCRA sites, to determine the potential for PCP
17 discharges to impact ESA-listed species and/or ESA-designated critical habitats. EPA has also not taken
18 any steps to reduce the impacts of such discharges, including imposing more stringent PCP limits in
19 NPDES permits. EPA has provided no semi-annual reports or other information regarding PCP
20 permitted discharges to the Services after 2006.

21 **Cadmium RPMs**

22 49. The Services concluded in the BiOp that salmonid species are particularly sensitive to
23 cadmium, and even low concentrations of cadmium have been shown to reduce growth, survival, and
24 fecundity in many salmonid species. In the BiOp, the Services determined that all ESUs and runs of
25 Coho and Chinook salmon and steelhead trout, Lahontan cutthroat trout, Paiute cutthroat trout, Little
26 Kern golden trout, along with the unarmored threespine stickleback are likely to be adversely affected
27 by concentrations of cadmium at or below the criteria in the CTR.

1 50. In response to their concerns over the CTR's cadmium water quality criteria, the Services
2 included in the BiOp RPMs requiring EPA to take the following actions with respect to these criteria:
3 (1) by no later than January 2001, revise the CWA section 304(a) chronic aquatic life criterion for
4 cadmium such that it will be protective of salmonids and sticklebacks, and by January 2002, propose a
5 revised CWA section 303 chronic aquatic life criterion for cadmium for California, and then promulgate
6 a final CWA section 303 chronic aquatic life criterion as soon as possible, but no later than 18 months,
7 after proposal; (2) if EPA's revised cadmium criterion is less stringent than the range of protective
8 criteria concentrations proposed by the Services in the BiOp (0.096 ug/L to 0.180 µg/L), EPA must
9 provide the Services with a BE/BA and request for formal ESA section 7 consultation on the revised
10 criterion by the time of the proposal, (3) provide the Services with semi-annual reports regarding the
11 status of EPA's revision of the cadmium chronic aquatic life criterion and any draft BE/BA associated
12 with the revision, (4) continue to consult with the Services under ESA section 7 on revisions to WQS for
13 cadmium contained in Basin Plans submitted by California to EPA under CWA section 303 and
14 affecting waters of California containing ESA-listed species and/or their habitats, (5) submit to the
15 Services a list of NPDES permits due for review that authorize cadmium discharges and RCRA and
16 CERCLA sites where cadmium discharges are a concern. EPA, in cooperation with the Services, must
17 review these discharges to identify any potential for adverse effects on ESA-listed species and/or their
18 habitats. EPA will coordinate with the Services on any permits that the Services or EPA identify as
19 authorizing discharges that have the potential for adverse effects on ESA-listed species and/or their
20 habitats. By December 2000, EPA must identify all cadmium discharges from point sources and
21 cadmium-contaminated RCRA or CERCLA sites in California that may affect ESA-listed species and
22 provide a corresponding report to the Services by December 31, 2000; (6) if EPA identifies cadmium
23 discharges that have the potential to adversely affect ESA-listed species and/or critical habitat, EPA
24 must work with the Services and the State of California to address the potential effects to the species,
25 including, where appropriate, imposing more stringent limits in NPDES permits on cadmium discharges.

26 51. EPA has largely failed to comply with the RPMs for cadmium and take action to adopt water
27 quality criteria for cadmium that are protective of designated beneficial uses of California's waters.
28 Although EPA revised its national recommended CWA section 304(a) human health criterion for

1 cadmium in 2001, EPA has failed to propose and finalize a cadmium CWA section 303 human health
2 water quality criterion for California. EPA has further failed to revise the existing water quality criteria
3 for cadmium in the CTR to levels that are protective of ESA-listed species. Thus, California still lacks
4 statewide CWA section 303 water quality criteria for cadmium that are protective of ESA-listed species
5 and human health. EPA also claims that the State Board has decided to take the lead on the
6 promulgation of the cadmium criteria, but the State Board continues to fail to take action on adopting
7 cadmium water quality criteria. The State Board proposed initial scoping on the adoption of hardness-
8 based equations for freshwater cadmium objectives derived by the United States Geological Survey and
9 EPA's 304(a) criteria in 2008, but the State Board has failed to follow through on completing this
10 adoption. Further, EPA did not reinstate ESA section 7 consultation with the Services after deciding to
11 abdicate its requirement to promulgate the new and revised CWA section 303(c) cadmium criteria.
12 Based on information and belief, EPA has also failed to comply with the other cadmium RPMs in the
13 BiOp. Since 2006, EPA has not provided the Services with semi-annual reports regarding the status of
14 EPA's revision of the cadmium chronic aquatic life criterion and any draft BE/BA associated with the
15 revision. EPA has not consulted with the Services under ESA section 7 on revisions to water quality
16 standards for cadmium contained in Basin Plans submitted by California to EPA under CWA section
17 303 and affecting waters of California containing ESA-listed species and/or their habitats. EPA has not
18 submitted to the Services a list of NPDES permits due for review that authorize cadmium discharges and
19 RCRA and CERCLA sites where cadmium discharges are a concern. EPA has also not, in cooperation
20 with the Services, reviewed these discharges to identify any potential for adverse effects on ESA-listed
21 species and/or their habitats. EPA has not coordinated with the Services on any NPDES permits that the
22 Services or EPA identify as authorizing discharges that have the potential for adverse effects on ESA-
23 listed species and/or their habitat. EPA has not identified all cadmium discharges from point sources and
24 cadmium-contaminated RCRA or CERCLA sites in California that may affect ESA-listed species and
25 provided a corresponding report to the Services. EPA has not worked with the Services and the State of
26 California to reduce the potential effects to ESA-listed species from cadmium discharges, including,
27 where appropriate, imposing more stringent limits in NPDES permits on cadmium discharges.

28 **Dissolved Metals RPMs**

1 52. In the CTR, EPA promulgated water quality criteria for dissolved levels of the metals arsenic,
2 cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, and zinc. However, these criteria
3 for metals are "formula-based," meaning that when the State Board or Regional Boards implement the
4 criteria for these metals to a given water body, they have to consider site-specific data about that water
5 body and input it into a formula to generate the final numeric water quality criteria that are then used, for
6 example, to set effluent limitations in NPDES permits. In the BiOp, the Services found the formula-
7 based method used by EPA in promulgating the water quality criteria for the metals listed above does
8 not sufficiently consider the environmental fate, transport, and transformations of these metals in natural
9 environments.

10 53. The BiOp found that the CTR criteria for these metals as adjusted by the CTR's formula would
11 adversely affect all ESUs and runs of Coho and Chinook salmon and steelhead trout if the
12 concentrations of particulate and/or dissolved metals were at or below those that were applied using
13 EPA's existing implementation guidance. Further, the Services determined that numerous species of
14 reptiles and amphibians including the California red-legged frog, San Francisco garter snake, and
15 virtually all species of fairy shrimp (found in Central Valley vernal pools) are impacted by the
16 potentially improper implementation of the dissolved metals criteria into NPDES permits. The BiOp's
17 list of ESA-listed species that will be adversely impacted from exposures to pollutants authorized by the
18 CTR's approach to metals criteria is on page 226-27 and is hereby incorporated by reference--as well as
19 the BiOp's discussion of evidence supporting the Services' conclusions concerning the impacts of EPA's
20 actions on these species (quoting this material in full herein is unnecessary as EPA and the Services are
21 in possession of the BiOp and fully aware of its contents).

22 54. In response to their concerns over the CTR's formula-based dissolved metals water quality
23 criteria, the Services included in the BiOp RPMs requiring EPA to take the following actions with
24 respect to these criteria: **(1)** by December of 2000, in cooperation with the Services, develop sediment
25 criteria guidelines for cadmium, copper, lead, nickel and zinc, and by December of 2002, for chromium
26 and silver. After completing the sediment guidance for cadmium, copper, lead, nickel and zinc, EPA
27 must, in cooperation with the Services, draft implementation guidelines for California to protect ESA-
28 listed species and critical habitat in California. Commencing in June 2000, EPA must submit semi-

1 annual reports to the Services on the status of sediment guideline development; **(2)** before the end of
2 2000, in cooperation with the Services, issue two clarifications to the Interim Guidance on the
3 Determination and Use of Water-Effects Ratios for Metals concerning the use of calcium-to-magnesium
4 ratios in laboratory water and the proper acclimation of test organisms prior to testing in applying water-
5 effects ratios (WERS). EPA must also allow the use of WERS only when the site specific LC50 (i.e., the
6 "Lethal Concentration 50%," meaning the concentration of effluent causing 50% mortality in tested
7 organisms) and the laboratory LC50 are significantly different using a 95% confidence interval; **(3)** by
8 June of 2003, develop, in cooperation with the Services, a revised criteria calculation model based on
9 best available science for deriving aquatic life criteria on the basis of hardness (calcium and
10 magnesium), pH, alkalinity, and dissolved organic carbon (DOC) for metals. EPA must develop this
11 model in conjunction with certain additional RPMs labeled as "Other Actions" and further discussed
12 below. Commencing in June 2000, EPA must submit semi-annual reports to the Services on the status of
13 the development of the revised criteria calculations model for metals; **(4)** whenever California's State
14 Board or Regional Boards use site specific translators (i.e., the ratio of dissolved metal to total
15 recoverable metal in the receiving water downstream from a discharge) to set effluent limits in NPDES
16 permits and ESA-listed species or critical habitat is present downstream from the discharge in issue
17 where a State developed translator will be used and the conditions listed below exist, EPA must work, in
18 cooperation with the Services and the State of California, to use available ecological safeguards to
19 ensure protection of ESA-listed species and/or critical habitat. Ecological safeguards include: (a)
20 sediment guidelines; (b) biocriteria; (c) bioassessment; (d) effluent and ambient toxicity testing; or (e)
21 residue-based criteria in shellfish. The conditions requiring this use of ecosystem safeguards are: (i) a
22 water body is listed as impaired on the CWA section 303(d) list due to elevated metal concentrations in
23 sediment, fish, shellfish or wildlife; or, (ii) a water body receives mine drainage; or, (iii) where
24 particulate metals compose a 50% or greater component of the total metal measured in a downstream
25 water body in which a permitted discharge (subject to translator method selection) is proposed and the
26 dissolved fraction is equal to or within 75% of the water quality criteria; **(5)** Whenever an ESA-listed
27 species is present downstream from a discharge where the State Board or Regional Boards will use a site
28 specific translator to set NPDES permit effluent limits, work with the State Board or Regional Boards to

1 ensure that appropriate information to calculate the site specific translator is obtained and used,
2 including: (1) ambient and effluent acute and chronic toxicity data; (2) bioassessment data; and/or (3) an
3 analysis of the potential effects of the metals using sediment guidelines, biocriteria and residue-based
4 criteria for shellfish to the extent such guidelines and criteria exist and are applicable to the receiving
5 water body; (6) Review, in cooperation with the Services, NPDES permitted discharges of metals and
6 associated monitoring data and permit limits, to determine the potential for the discharges to impact
7 ESA-listed species and/or critical habitats. If discharges of metals are identified that have the potential to
8 adversely affect ESA-listed species and/or critical habitat, EPA must work with the Services and the
9 State of California to address these adverse impacts in accordance with procedures agreed to by the
10 agencies in the draft MOA. Among other options to resolve the issue, the EPA may make NPDES
11 permit limits for these discharges more stringent.

12 55. EPA has failed to comply with most of these RPMs. Although EPA did eventually develop
13 sediment criteria guidelines for cadmium, copper, lead, nickel, zinc, chromium, and silver, EPA failed to
14 draft and finalize implementation guidelines for California to protect ESA-listed species and ESA
15 designated critical habitat in California. Instead, EPA indicated that it would wait for the State Board to
16 develop this guidance instead of completing it as the BiOp directed EPA to do.

17 56. EPA also decided not to revise the Interim Guidance on the Determination and Use of Water-
18 Effect Ratios for Metals as required by the BiOp. On information and belief, Plaintiffs allege that EPA
19 also failed to complete the remainder of the metals-related RPMs in the BiOp discussed above. Thus,
20 EPA has not developed, in cooperation with the Services, a revised criteria calculation model for metals
21 based on best available science. Since at least 2006, EPA has failed to submit semi-annual reports to the
22 Services on the status of the development of the revised criteria calculations model for metals. EPA has
23 not worked with the Services to evaluate all pertinent permit limits in NPDES permits issued by
24 California's State Board or Regional Boards to ensure that limits set using site specific translators are
25 protective of ESA-listed species and that appropriate information was used to set the limits. EPA has not
26 reviewed, in cooperation with the Services, NPDES permitted discharges of metals and associated
27 monitoring data and permit limits, to determine the potential for the discharges to impact ESA-listed
28 species and/or species' critical habitats.

1 **Other Actions**

2 57. The BiOp imposed an additional two general RPMs that the BiOp labeled as "Other Actions."
3 These required EPA to take the following actions: (1) initiate a process to develop a national
4 methodology to derive site-specific criteria to protect ESA-listed species in accordance with the draft
5 MOA and (2) work with the State of California pursuant to CWA section 303(d) to promote and develop
6 strategies (including the adoption of Total Maximum Daily Loads, "TMDLs") to identify sources of
7 selenium and mercury contamination to the impaired water bodies where ESA- listed species exist, and
8 use existing authorities and resources to identify, promote, and implement measures to reduce selenium
9 and/or mercury loading into their habitat (e.g., San Joaquin River, Salton Sea, Cache Creek, Lake
10 Nacimiento, Sacramento - San Joaquin Delta etc.). Information available to Plaintiffs indicate that EPA
11 has not fully complied with either of these RPMs. EPA has not adopted the required national
12 methodology for protection of ESA-listed species required by the first of these RPM. While the several
13 Regional Boards have promulgated several TMDLs for mercury and selenium, EPA has also not secured
14 the adoption of TMDLs for selenium and/or mercury loading into the habitat referred to in the BiOp
15 (e.g., Salton Sea, Lake Nacimiento, or the Sacramento - San Joaquin Delta).

16 **Conservation Recommendations**

17 58. The BiOp points out that ESA section 7(a)(1) directs Federal agencies to utilize their
18 authorities to further the ESA's purposes by carrying out conservation programs for the benefit of
19 endangered and threatened species. 16 U.S.C. § 1536(a)(1). The BiOp lists several actions that EPA
20 should take to meet this ESA section 7(a)(1) duty, including the following: (1) The EPA should
21 quantify the toxic effects of selenium and mercury individually and in combination to listed reptiles and
22 amphibians using appropriate surrogate species. Research should include the most toxic forms of
23 selenium and mercury and include full life cycle exposure protocols including dietary routes of exposure
24 and maternal transfer as a route of embryonic exposure; (2) The EPA should conduct research on
25 mercury residues in amphibian tissues which would allow prediction of adverse effects from mercury
26 residues found in field collected frogs; (3) The EPA should consider developing a tissue based criteria
27 for mercury and selenium protective of reproduction of aquatic dependent species of fish and wildlife in
28 California; (4) The EPA should, in cooperation with the Service and USGS, conduct research on the

1 toxic effects of selenium and mercury, individually and in combination, to the reproduction of fish-
2 eating birds using appropriate surrogate species. Research should include the most toxic forms of
3 selenium and mercury and include sensitive life stages and exposure protocols that include dietary routes
4 of exposure to females and maternal transfer as a route of embryonic exposure; (5) The EPA in
5 conjunction with the San Francisco Bay Regional Water Quality Control Board and Central Valley
6 Regional Water Quality Control Board should assess the influx, fate, and transport of mercury into the
7 San Francisco Bay Estuary to facilitate the development of mercury control strategies; (6) The EPA
8 should conduct toxicity tests in waters where particulate concentrations are great and dissolved metal
9 concentrations are low. These studies should ideally include a dietary exposure component (*in situ*
10 studies) to determine the effects of these discharges on the growth, survival, and reproduction on listed
11 fishes and crustaceans.

12 59. Information available to Plaintiffs indicates that EPA has not fully implemented any of these
13 actions and mostly has ignored the Services' recommendations concerning these actions.

14 **FIRST CLAIM FOR RELIEF**
15 **Violation of the CWA**
16 **33 U.S.C. § 1365(a)(2)**

17 **EPA Defendants Have a Mandatory Duty to Issue Selenium and Mercury WQC**

18 60. Plaintiffs reassert and reallege paragraphs 1 through 60 above.

19 61. The CWA imposes a strict, mandatory schedule pursuant to which EPA must approve or
20 disapprove proposed WQS. In particular, CWA section 303(c)(4) requires EPA to act promptly when the
21 agency has determined that a revised or new WQS is necessary and promulgate a final WQS within
22 ninety days of proposing a given WQS unless the State has already adopted a WQS in accord with the
23 requirements of the CWA. 33 U.S.C. § 1313(c)(4). When taking action pursuant to CWA section
24 303(c)(4), the EPA "is subject to the same policies, procedures, analyses, and public participation
25 requirements established for States in [the EPA] regulations." 40 C.F.R. § 131.22(c).

26 62. EPA proposed a maximum freshwater aquatic life criterion and human health water quality
27 criteria components of WQS for selenium and maximum and chronic freshwater and saltwater aquatic
28 life criteria for mercury for California on August 5, 1997, but more than 15 years have passed without

1 EPA finalizing those water quality criteria. Although EPA promulgated a national ambient water quality
2 criteria for mercury in 2001 (and proposed a national selenium water quality criteria in 2004) pursuant to
3 CWA section 304(a), EPA's national criteria are simply guidance, have no binding legal effect, and are
4 not a substitute for promulgating legally binding water quality criteria pursuant to CWA section 303(c).

5 63. Given that the State of California still has not adopted its own WQS for selenium or mercury to
6 date, EPA is required to follow the timeline set forth in 33 U.S. C. § 1313(c)(4) for final promulgation of
7 maximum aquatic life freshwater criterion and human health water quality criteria for selenium and
8 maximum and chronic freshwater and saltwater aquatic life criteria for mercury. EPA has clearly failed
9 to either act "promptly" or publish revised or new water quality criteria for these parameters within 90
10 days of initially proposing them. EPA's ongoing inaction has caused the State of California to go without
11 numeric water quality criteria for these priority toxic pollutants as required by the CWA.

12 64. By thus failing to act, the EPA Defendants violated its mandatory CWA duties to "promptly"
13 promulgate necessary water quality criteria or issue final criteria within ninety days of publishing
14 proposed criteria contrary to CWA section 303(c)(4), 33 U.S.C. § 1313(c)(4).

15
16 **SECOND CLAIM FOR RELIEF**
17 **Violation of the ESA section 9**
18 **16 U.S.C. § 1538(a)(1)(B)**

19
20 **EPA Defendants Have Violated ESA Section 9**

21 65. Plaintiffs reassert and reallege paragraphs 1 through 64 above.

22 66. EPA's prolonged delay in complying with the RPMs contradicts the requirements of the BiOp
23 and the presumptions in the ITS on which the Services based their decision to issue a "No Jeopardy"
24 opinion, i.e., a biological opinion finding that the CTR would not jeopardize the survival and recovery
25 of ESA-listed species. In particular, by failing to adopt certain CWA section 303(c) criteria for
26 selenium or mercury and revised PCP, cadmium, and formula based dissolved metals criteria that are
27 protective of ESA-listed species, EPA is causing the taking of ESA-listed species in violation of ESA
28 section 9. 16 U.S.C. § 1538(a)(1)(B). Take of a listed species means, *inter alia*, to harass, harm, kill,
trap or capture the species. 16 U.S.C. § 1532(19). Taking further includes causing significant habitat
modification or degradation which actually kills or injures fish or wildlife by significantly impairing

1 essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.
2 50 C.F.R. § 222.102. A regulatory agency such as EPA causes take when it authorizes activity that
3 results in the death or injury to a member of an ESA-listed species or significant habitat modification or
4 degradation which kills or injures a member of the species or significantly impairs essential behavioral
5 patterns of the species. *E.g., Defenders of Wildlife v. Env'tl. Prot. Agency*, 882 F.2d 1294, 1301 (8th Cir.
6 1989); *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1005 (D. Or. 2010); *Loggerhead*
7 *Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995).

8 67. EPA's delay and non-compliance with all of the required RPMs is causing significant habitat
9 modification or degradation that impairs behavioral patterns, including spawning, rearing, migrating,
10 feeding, and sheltering. CWA section 301(b)(1)(C) requires that all NPDES permits issued to
11 discharges of pollutants include effluent limitations sufficient to meet applicable WQS. 33 U.S.C. §
12 1311(b)(1)(C). By failing to adopt water quality criteria components of WQS for mercury, selenium,
13 cadmium, and PCP and formula for translation of water quality criteria for metals into NPDES permit
14 limits for metals that are sufficiently stringent to protect ESA-listed species, EPA has effectively
15 authorized issuance of NPDES permits which in turn authorize the discharge of these pollutants at
16 levels that will kill or injure ESA-listed species **and** which modifies or degrades the habitat of ESA-
17 listed species in a fashion that kills or injures or significantly impairs essential behavioral patterns of
18 ESA-listed species. In addition, EPA's failure to monitor the issuance of NPDES permits authorizing
19 the discharge of these pollutants has led to the issuance of NPDES permits with insufficiently stringent
20 limits needed to protect ESA-listed species--and thus has effectively authorized the discharge of
21 pollutants at levels that will kill, injure or otherwise harm ESA-listed species and harm ESA-designated
22 critical habitat.

23 68. The Services' conclusions in the BiOp that the CTR would not cause jeopardy if EPA were to
24 comply with the RPMs in the BiOp underscore that EPA's adherence to these RPMs is needed to avoid
25 take of ESA-listed species: (1) adverse effects associated with the modified proposed action will be
26 sufficiently minimized by NPDES permit evaluation and early coordination and consultation with the
27 Services on all other CWA programs subject to section 7 consultation; (2) the time frames and
28 procedural commitments proposed by EPA in their December 16, 1999 letter provide assurance that

1 future criteria will be adequately protective of listed species and critical habitat; and (3) that EPA will
2 promulgate new water quality criteria in a manner that will provide protection to listed species and/or
3 critical habitat. *See* BiOp at page 220-221. The ITS portion of the BiOp specifies that if EPA fails to
4 meet the RPMs set out in the BiOp, the level of anticipated take allowed for in the ITS will be
5 exceeded. Because EPA failed to complete all the RPMs as set forth in the BiOp, resulting in the lack
6 of statewide water quality criteria for selenium, mercury, PCP, cadmium, and other metals that are
7 protective of ESA-listed species, the lack of guidance and implementation actions related to dissolved
8 metals criteria needed to ensure protection of ESA-listed species as required by the BiOp, and the
9 absence of other measures needed to protect ESA-listed species as described in this Complaint above,
10 EPA has taken itself out of the safe harbor the BiOp provided. Without any take protection under ESA
11 section 7, EPA's failure to promulgate water quality criteria and review and work on issuance of
12 appropriate NPDES permits referred to in this Complaint and in the BiOp is in violation of ESA section
13 9, which commands that it is unlawful for any person to take any ESA-listed species. 16 U.S.C. §
14 1538(a)(1)(B). EPA's failures in promulgating these water quality criteria and working to secure more
15 stringent NPDES permits, by leading to inadequate regulatory restrictions on the discharge of the
16 relevant toxic pollutants and thus exposures to these toxic pollutants at elevated levels, is causing the
17 take of the ESA-listed species set out in Table 3 set forth at pages 242-44 of the BiOp.

18 69. Therefore, EPA Defendants have and continue to violate ESA section 9 as a result of its failure
19 to comply with the RPMs in the ITS. 16 U.S.C. § 1538(a)(1)(B).

20
21 **THIRD CLAIM FOR RELIEF**
22 **Violation of ESA section 7 (a)(1) and (a)(2) by EPA Defendants**
23 **16 U.S.C. § 1536(a)(1), (2)**

24 **EPA Defendants Have Violated ESA Section 7(a)(1) and (a)(2)**

25 70. Plaintiffs reassert and reallege paragraphs 1 through 69 above.

26 71. Section 7 of the ESA imposes on EPA substantive duties that are independent of its duty to
27 avoid unlawful take of species prohibited by ESA section 9 or its procedural duties under ESA section
28 7 to consult with the Services on actions that will likely affect ESA-listed species. 16 U.S.C. §§ 1536,
1538(a)(1)(B). Specifically, ESA section 7(a)(1) imposes on EPA a duty to use its authorities to further

1 the ESA's purposes by carrying out conservation programs for the benefit of ESA-listed species. 16
2 U.S.C. § 1536(a)(1). ESA section 7(a)(2) imposes on EPA a duty to EPA to insure that its actions are
3 not likely to jeopardize the continued existence of any ESA-listed species or result in the destruction or
4 adverse modification of habitat of such species. 16 U.S.C. § 1536(a)(2).

5 72. In the BiOp, the Services provided formal guidance concerning what EPA needs to do to fulfill
6 its ESA section 7(a)(1) duties as the BiOp listed several Conservation Recommendations that the
7 Services expressly identified as measures EPA should implement to fulfill its ESA section 7(a)(1)
8 duties. However, EPA has failed to implement the BiOp's Conservation Recommendations or otherwise
9 used its authorities to further the ESA's purposes by carrying out conservation programs (including but
10 not limited to the measures specified as RPMs in the BiOp) for the benefit of ESA-listed species and
11 has thus violated and is on-going violation of ESA section 7(a)(1). Most notably, the entire substantive
12 thrust of the BiOp was that EPA should issue in California more stringent CWA section 303 water
13 quality criteria and secure more stringent NPDES permit limits for the discharge of selenium, mercury,
14 PCP, cadmium, and certain dissolved metals than reflected in the approach authorized by the CTR.
15 Thirteen years later, EPA has entirely failed to implement this mandate in any respect. The CTR
16 remains in its same unduly lax state as before the BiOp was issued, the State of California has not
17 promulgated its own more stringent water quality criteria, and EPA has not required any NPDES
18 permits to have more stringent limits on selenium, mercury, PCP, cadmium, and certain dissolved
19 metals than authorized by the CTR. Such a total abdication of meeting its responsibility to implement
20 conservation programs to benefit ESA-listed species constitutes a failure to comply with ESA section
21 7(a)(1). 16 U.S.C. § 1536(a)(1).

22 73. In the BiOp and related documents, the Services expressly indicated that the CTR as currently
23 framed was jeopardizing the survival and recovery of numerous ESA-listed species in California. The
24 Services only issued a "no jeopardy" biological opinion to EPA based on express EPA commitments to
25 amend the CTR and adopt more stringent water quality criteria and perform numerous other steps
26 toward securing more effective control of the discharge of toxics into California waters. As discussed at
27 length above, however, EPA has failed to implement the RPMs that the Services expressly found were
28 needed for EPA's action in adopting the CTR not to jeopardize ESA-listed species or adversely modify

1 such species' habitat. Accordingly, in failing to comply with the RPMs, EPA has necessarily failed to
2 insure that its actions in issuing the CTR are not likely to jeopardize the continued existence of any
3 ESA-listed species or result in the destruction or adverse modification of habitat of such species in
4 violation of ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2). EPA is further in violation of ESA section
5 7(a)(2) by not implementing the BiOp's Conservation Recommendations or otherwise taking effective
6 action to ensure that its actions are not jeopardizing ESA-listed species and has thus violated and is on-
7 going violation of ESA section 7(a)(2). *Id.*

8 74. By thus failing to act as described above, the EPA Defendants have violated ESA requirements
9 and its mandatory ESA duties and is subject to citizen suit enforcement litigation under ESA section
10 11(g), 16 U.S.C. § 1540(g).

11 **FOURTH CLAIM FOR RELIEF**
12 **Violation of ESA section 7(a)(2)**
13 **16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16**

14 **EPA Defendants Failure to Reinitiate Consultation Violates ESA Section 7(a)(2)**

15 75. Plaintiffs reassert and reallege paragraphs 1 through 74 above.

16 76. ESA regulations and the BiOp require both the consulting and action agency to reinitiate
17 formal consultation when: (1), the amount or extent of take specified in the ITS is exceeded, (2) when
18 new information reveals effects of the action that may affect listed species or critical habitat in a way
19 not previously considered, or (3) when a new species is listed that may be affected by the identified
20 action. 50 C.F.R. § 402.16. These circumstances presently exist and have so for months or even years
21 and yet the EPA Defendants have not reinitiated consultation as required by either the BiOp or 50
22 C.F.R. § 402.16. EPA's duty to reinitiated consultation was triggered when EPA altered and/or
23 abandoned the RPMs pertaining to³ selenium, mercury, PCP, cadmium and dissolved metals. In
24 addition, the Services' listing of new aquatic species in California under the ESA also triggered EPA's
25 obligation to reinitiate consultation.

26 _____
27 ³ *I.e.*, all RPMs listed in the BiOp under the heading for the BiOp's analysis of these parameters.
28

1 77. As described above, EPA has failed to comply with the BiOp's RPMs pertaining to criteria for
2 selenium, mercury, PCP, cadmium, and dissolved metals. In particular, EPA has failed to (a) propose
3 and finalize certain selenium criteria for California and complete all the selenium related RPMs set
4 forth in the BiOp, (b) propose certain mercury criteria for California and complete all the mercury
5 related RPMs set forth in the BiOp, (c) failed to promulgate the revised CWA section 304(a) criteria for
6 cadmium in California and complete all the cadmium related RPMs set forth in the BiOp, (d) failed to
7 complete the research associated with PCP and comply with all the PCP related RPMs set forth in the
8 BiOp, and (e) failed to issue the implementation on the sediment criteria guidelines and revised WER
9 and hardness guidance documents as required and complete all of the RPMs labeled "Other Actions" as
10 directed by the BiOp. Instead of complying with the RPMs associated to each criterion, EPA has
11 instead changed the scope of its actions dramatically from the course set forth in the BiOp.

12 78. EPA's action with respect to selenium has been greatly altered from the proposed action
13 described in the BiOp. EPA decided to bifurcate the promulgation of these criteria, with plans to issue
14 criteria for the San Francisco Bay Delta possibly within the next two years and at a future unknown
15 date promulgate selenium criteria applicable to the rest of the state. EPA has proceeded to work
16 informally with the Services on the development of a selenium criteria for San Francisco Bay and the
17 rest of California, but this work has transpired without EPA providing a BE/BA to the Services, any
18 formal amendment to the BiOp and ITS, or any other ESA section 7 consultation.

19 79. With respect to PCP, EPA decided not to revise its recommended CWA section 304(a) chronic
20 aquatic life criterion. However, EPA made this determination without having completed the BiOp's
21 requirement to "generate new information on the toxicity of commercial grade PCP and the interaction
22 of temperature and dissolved oxygen on sublethal acute and chronic toxicity to early life stage
23 salmonids." These tests were to include at least one anadromous species and produce data on chronic
24 toxicity of PCP to listed species. In coming to its conclusion that the existing criterion was protective of
25 ESA-listed species, EPA basically reviewed the same pre-2000 literature that the agency had previously
26 reviewed and refused to generate any new data testing the specifications set forth in the BiOp. EPA
27 wrote to the State Board in 2007 and essentially pushed the responsibility of promulgating the Services
28 recommended criteria for PCP onto the State.

1 80. With respect to the mercury, cadmium, and the formula based dissolved metals criteria, EPA
2 appears to have determined that complete compliance with all the BiOp's RPMs is unnecessary.
3 Instead, EPA informally and without the benefit of any public process, has decided to wait and see if
4 the State Board takes action with respect to promulgating a statewide mercury and cadmium criterion
5 and implement guidelines on the use of EPA's sediment criteria to protect ESA-listed species in
6 California. These changes to the proposed action not only contradict the BiOp's directive to reinitiate
7 consultation if the criterion are not issued or revised in line with the recommendations of the BiOp -
8 they also violate ESA section 7's duty to reinitiate consultation. 16 U.S.C. § 1536(a)(2). Further, EPA's
9 decision to turn promulgation of the criteria or guidance documents over to the State Board, which
10 showed itself incapable of issuing its own WQS after several years of inaction thus necessitating EPA
11 to step in and promulgate the CTR, is not only imprudent but a clear violation of the agency's duties
12 under the ESA. EPA is hereby put on notice of these violations as described above.

13 81. EPA further failed to reinitiate consultation despite new information on various ESA-listed
14 species affected by the CTR's proposed or adopted selenium, mercury, PCP, cadmium, and formula
15 based dissolved metals criteria. NMFS listed several new species of anadromous fish as threatened
16 under the ESA in 2005 and 2006 and USFWS has added other aquatic dependent species to the list of
17 ESA-protected species since the BiOp's issuance that obviously could not have been included in the
18 consideration of the March 2000 BiOp. (The newly listed aquatic dependent species include the Green
19 sturgeon – southern distinct population segment ("DPS"), Chinook salmon-Winter-run, Chinook
20 salmon-California coastal Evolutionarily Significant Unit ("ESU"), Chinook salmon-Spring-run, Coho
21 salmon-Central California Coast ESU, Coho salmon-Southern Oregon/Northern California ESU,
22 Steelhead-Central California Coast DPS, Steelhead-South/Central California Coast DPS, Steelhead-
23 Southern California DPS, and the Steelhead-Central Valley DPS). Despite these new listings, EPA did
24 not reinitiate consultation on its selenium, mercury, PCP, cadmium, and formula based dissolved
25 metals criteria. Furthermore, although the BiOp included review of the CTR's effects on several
26 proposed threatened or endangered ("PT" or "PE") species, the Services clearly stated that the BiOp
27 could "be converted to a biological opinion for those species/critical habitats, provided EPA formally
28 requests such a conversion and the reinitiation criteria at 50 CFR § 402.16 do not apply." (These PT

1 and PE species include the Northern California ESU of the steelhead trout (PT), Santa Ana sucker
2 (Catostomus santaanae) (PT), the Southern California Distinct Population Segment of the Mountain
3 Yellow-legged Frog (Rana muscosa)(PE), and the Santa Barbara County Distinct Population Segment
4 of the California Tiger Salamander (Ambystoma californiense) (PE), and critical habitat for the
5 Tidewater goby.) The BiOp also indicates that there will be no incidental take for the PT or PE species,
6 until the species are listed and the conference opinion is adopted as the biological opinion. Based on
7 information and belief, EPA has not formally requested the BiOp apply to the PT or PE species, nor has
8 EPA reinitiated consultation due to the listing of several threatened or endangered salmonids in 2005
9 and 2006 and listing of other species.

10 82. Thus, by failing to reinitiate ESA section 7 consultation despite the occurrences of the events
11 discussed above that triggered a legal obligation to reinitiate such consultation, the EPA Defendants
12 have violated their duties imposed by 16 U.S.C. § 1538(a)(2) and 50 C.F.R. § 402.16.

13 **FIFTH CLAIM FOR RELIEF**

14 **Violation of ESA section 7 (a)(2)**

15 **16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16**

16 **The Resource Agency Defendants Failure to Reinitiate Consultation**
17 **Violates ESA Section 7(a)(2)**

18 83. Plaintiffs reassert and reallege paragraphs 1 through 82 above.

19 84. ESA regulations and the BiOp require the consulting agencies to reinitiate formal consultation
20 when: (1), the amount or extent of take specified in the ITS is exceeded, (2) when new information
21 reveals effects of the action that may affect listed species or critical habitat in a way not previously
22 considered, or (3) when a new species is listed that may be affected by the identified action. 50 C.F.R. §
23 402.16. These circumstances presently exist and have so for months or even years and yet the Resource
24 Agency Defendants have not reinitiated consultation as required by either the BiOp or 50 C.F.R. §
25 402.16. Specifically, the Services duty to reinitiate consultation was triggered when EPA altered and/or
26
27
28

1 abandoned the RPMs pertaining to⁴ selenium, mercury, PCP, cadmium, dissolved metals, and measures
2 labeled in the BiOp as "Other Actions." In addition, the Services' listing of new aquatic species in
3 California under the ESA also triggered their obligation to reinitiate consultation.

4 85. As described above, EPA has failed to comply with the BiOp's RPMs pertaining to⁵ water
5 quality criteria for selenium, mercury, PCP, cadmium, and dissolved metals. In particular, EPA has
6 failed to (a) propose and finalize certain selenium criteria for California and complete all the selenium
7 related RPMs set forth in the BiOp, (b) propose certain mercury criteria for California and complete all
8 the mercury related RPMs set forth in the BiOp, (c) failed to promulgate the revised CWA section
9 304(a) criteria for cadmium in California and complete all the cadmium related RPMs set forth in the
10 BiOp, (d) failed to complete the research associated with PCP and comply with all the PCP related
11 RPMs set forth in the BiOp, and (e) failed to issue the implementation on the sediment criteria
12 guidelines and revised WER and hardness guidance documents as required and complete all of the
13 other RPMs as discussed herein (including those labeled "Other Actions") as directed by the BiOp.
14 Instead of complying with the RPMs associated to each criterion, EPA has instead changed the scope of
15 its actions dramatically from the course set forth in the BiOp.

16 86. EPA's action with respect to selenium has been greatly altered from the proposed action
17 described in the BiOp. EPA decided to bifurcate the promulgation of these criteria, with plans to issue
18 criteria for the San Francisco Bay Delta possibly within the next two years and at a future unknown
19 date promulgate selenium criteria applicable to the rest of the state. EPA has proceeded to work
20 informally with the Services on the development of a selenium criteria for San Francisco Bay and the
21 rest of California, but this work has transpired without EPA providing a BE/BA to the Services, any
22 formal amendment to the BiOp and ITS, or any other ESA section 7 consultation. This change in the
23 scope of action triggered the Resource Agency Defendants' duty to reinitiate consultation.

26 ⁴ *I.e.*, all RPMs listed in the BiOp under the heading for the BiOp's analysis of these parameters.

27 ⁵ *I.e.*, all RPMs listed in the BiOp under the heading for the BiOp's analysis of these parameters.

1 87. With respect to PCP, EPA decided not to revise its recommended CWA section 304(a) chronic
2 aquatic life criterion. However, EPA made this determination without having completed the BiOp's
3 requirement to "generate new information on the toxicity of commercial grade PCP and the interaction
4 of temperature and dissolved oxygen on sublethal acute and chronic toxicity to early life stage
5 salmonids." These tests were to include at least one anadromous species and produce data on chronic
6 toxicity of PCP to listed species. In coming to its conclusion that the existing criterion was protective of
7 ESA-listed species, EPA basically reviewed the same pre-2000 literature that the agency had previously
8 reviewed and refused to generate any new data testing the specifications set forth in the BiOp. EPA
9 wrote to the State Board in 2007 and essentially pushed the responsibility of promulgating the Services
10 recommended criteria for PCP onto the State. The Resource Agencies should have reinitiated
11 consultation in the face of EPA's flat refusal to comply with the RPM applicable to PCP.

12 88. With respect to the mercury, cadmium, and the formula based dissolved metals criteria, EPA
13 appears to have determined that complete compliance with all the BiOp's RPMs is unnecessary.
14 Instead, EPA informally and without the benefit of any public process, has decided to wait and see if
15 the State Board takes action with respect to promulgating a statewide mercury and cadmium criterion
16 and implement guidelines on the use of EPA's sediment criteria to protect ESA-listed species in
17 California. These changes to the proposed action not only contradict the BiOp's directive to reinitiate
18 consultation if the criterion are not issued or revised in line with the recommendations of the BiOp -
19 they also violate the Resource Agency Defendants' ESA section 7 duty to reinitiate consultation. 16
20 U.S.C. § 1536(a)(2).

21 89. The Resource Agency Defendants further failed to reinitiate consultation despite new
22 information on various ESA-listed species affected by the CTR's proposed or adopted selenium,
23 mercury, PCP, cadmium, and formula based dissolved metals criteria. As discussed above, NMFS
24 listed several new species of anadromous fish as threatened under the ESA in 2005 and 2006 and
25 USFWS has added other aquatic dependent species to the list of ESA-protected species since the
26 BiOp's issuance that obviously could not have been included in the consideration of the March 2000
27 BiOp.
28

1 90. Thus, by failing to reinitiate ESA section 7 consultation despite the occurrences of the events
2 discussed above that triggered a legal obligation to reinitiate such consultation, the Resource Agency
3 Defendants have violated their duties imposed by 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.16.

4 **SIXTH CLAIM FOR RELIEF**

5 Violation of Administrative Procedure Act
6 5 U.S.C. § 706(1)

7 **EPA Defendants' Failure to Promulgate the Selenium and Mercury WQC Constitutes
8 Unreasonable Delay under the APA**

9 91. Plaintiffs reassert and reallege paragraphs 1 through 90 above.

10 92. The Administrative Procedure Act ("APA") provides this Court with jurisdiction to compel
11 agency action unlawfully withheld or unreasonably delayed. EPA's ongoing failure to comply with its
12 obligation under the BiOp and ESA to promulgate the selenium and mercury water quality criteria
13 described above constitutes agency action unreasonably delayed in violation of the APA, 5 U.S.C.
14 sections 706(1).

15 93. EPA stated in a formal letter (dated December 16, 1999) to the Services indicating that as part
16 of the agencies' ESA section 7 consultation, EPA was committing to revise its CWA section 303 acute
17 and chronic aquatic life criteria for selenium. EPA further indicated in this letter its commitment to
18 revise its CWA section 303 human health criterion for mercury. EPA thus indicated that, in agreement
19 with the Services, it had found that EPA needed to promulgate appropriately stringent water quality
20 criteria for these parameters. Protection of such aquatic species are part of the designated uses of the
21 waters that these species inhabit. CWA section 303(c) requires WQS to include water quality criteria
22 sufficiently stringent to protect designated uses. Thus, EPA has effectively acknowledged that the CTR
23 is insufficiently stringent to protect the designated uses of California waters and that revised more
24 stringent water quality criteria is needed to comply with the CWA.

25 94. CWA section 303(c)(4) requires EPA to promptly adopt final revised water quality criteria
26 whenever EPA finds that new or revised water quality criteria are needed to comply with the CWA. 33
27 U.S.C. § 1313(c)(4). EPA has not acted promptly to adopt new water quality criteria for selenium and
28 mercury, as it has been more than 15 years since EPA effectively found that revised water quality

1 criteria for these pollutants are needed, but EPA has not adopted revised water quality criteria for these
2 pollutants. EPA's failure to issue the required WQC discussed above constitutes agency action
3 unreasonably delayed in violation of the APA, 5 U.S.C. § 706(1).

4 95. Plaintiffs are therefore entitled to injunctive relief pursuant to the APA, 5 U.S.C. § 706(1),
5 ordering EPA to issue appropriate WQC for selenium and mercury by a deadline set by this Court.

6 **REMEDY**

7 96. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course of law, other than
8 the relief sought in this Complaint, because there is no other mechanism for compelling the EPA
9 Defendants to comply with its mandatory duties under the CWA and ESA or the Services to take the
10 required action under the ESA.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs seek the following relief:

13 a. A declaratory judgment establishing that the EPA Defendants have violated their mandatory
14 duty under the CWA section 303(c)(4), 33 U.S.C. § 1313(c)(4), to act promptly and promulgate WQC
15 for selenium and mercury within 90 days after proposing them;

16 b. An injunction ordering EPA to issue the selenium and mercury WQC by a deadline set by
17 this Court;

18 c. A declaratory judgment establishing that the EPA Defendants are in violation of ESA section
19 9, 16 U.S.C. § 1538(a)(1)(B), by perpetrating “take” for failure to comply with the RPMs in the BiOp
20 set forth above;

21 d. A declaratory judgment establishing that the EPA Defendants are in violation of ESA
22 section 7(a)(1), 16 U.S.C. § 1536(a)(1), by failing to implement the Conservation Recommendations
23 and completing other actions that are effective for securing the conservation of the Threatened and
24 Endangered Species affected by the EPA's promulgation of the CTR;

25 e. A declaratory judgment establishing that the EPA Defendants are in violation of ESA
26 section 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to reinitiate consultation contrary to the terms of the
27 BiOp and 50 C.F.R. § 402.16;

1 f. An injunction ordering NMFS and USFWS to reinitiate consultation with EPA pursuant to
2 50 C.F.R. section 402.16;

3 g. A declaratory judgment establishing that the Resource Agency Defendants are in violation
4 of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), by failing to reinitiate consultation contrary to the
5 terms of the BiOp and 50 C.F.R. § 402.16;

6 h. An injunction ordering NMFS and USFWS to reinitiate consultation with EPA pursuant to
7 50 C.F.R. section 402.16;

8 i. An injunction pursuant to the APA, 5 U.S.C. section 706(1) ordering EPA Defendants to take
9 action to issue the selenium and mercury WQC in accord with CWA section 303;

10 j. An award of attorneys fees and costs to the Plaintiffs pursuant to 33 U.S.C. § 1365(c), 16
11 U.S.C. § 1540(g)(4), and/or 5 U.S.C. § 504(a); and

12 k. Such other and further relief as this Court deems just and proper.
13
14

15 Respectfully Submitted,

16 Dated: June 20, 2013

17
18 By: *Christopher a. sproul*

19 _____
20 Christopher Sproul
21 Jodene Isaacs
22 Environmental Advocates
23 Counsel for Plaintiffs
24 Our Children's Earth Foundation and
25 Ecological Rights Foundation
26
27
28