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

<p>CENTER FOR ENVIRONMENTAL SCIENCE, ACCURACY &amp; RELIABILITY, a California public interest organization</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>MARK W. COWIN, In his Official Capacity As Director Of CALIFORNIA DEPARTMENT OF WATER RESOURCES; SALLY JEWELL, Secretary, U.S. Department of the Interior, in her official capacity; DAN ASHE, Director, U.S. Fish and Wildlife Service, in his official capacity; and UNITED STATES FISH AND WILDLIFE SERVICE;</p> <p style="text-align: center;">Defendants.</p>	<p><b>Case No.</b></p> <p><b>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</b></p>
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1. This citizen suit is brought under the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g) and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* The Center for Environmental Science, Accuracy & Reliability (“CESAR”) seeks relief against Mark W. Cowin, in his official capacity as Director of the California Department

1 of Water Resources (“Department”), from constructing and operating an Emergency  
2 Drought Salinity Barrier at West False River in the Bay Delta (“Project”) which violates  
3 Section 9 of the ESA and its implementing regulations; and to require Sally Jewell,  
4 Secretary, U.S. Department of the Interior, in her official capacity, Dan Ashe, Director,  
5 U.S. Fish and Wildlife Service, in his official capacity; and the United States Fish and  
6 Wildlife Service (“Service”) to reinitiate consultation of the 2008 Biological opinion on  
7 the Coordinated Operations of the Central Valley Project (CVP) and State Water Project  
8 (SWP) (2009 BiOp) under Section 402.16 of Title 50 of the Code of Federal Regulations  
9 due to changed circumstances, to wit, the construction and operation of the Project by the  
10 Department. The Project construction activity is causing “take” of delta smelt, both  
11 directly and through harm resulting from the adverse modification of delta smelt critical  
12 habitat. Such “take” requires a federal incidental take permit issued by the Service.  
13 Installation, operation, and removal of the Project in and of itself is a changed  
14 circumstance, changing flows, salinity, and potentially Water Project Operations  
15 throughout the Delta and indeed California.

16 2. Plaintiff Center for Environmental Science, Accuracy & Reliability ("CESAR")  
17 hereby petitions this Court for declaratory and injunctive relief against the Department to  
18 prevent the unlawful construction of the Project, a rock barrier across a 750-foot-wide  
19 channel of the Sacramento-San Joaquin River Delta, at West False River. While the  
20 Department claims the barrier is necessary to protect a relatively small segment of the  
21 State's water users from costs related to saltwater inflow from the ocean, the Project will  
22 increase the salinity of water in those areas of the Delta unprotected by the barrier and  
23 reduce habitat available to delta smelt.

24 3. The Biological Assessments related to emergency drought barriers prepared for  
25 the U.S. Army Corps of Engineers (“Army Corps”) in both 2014 and 2015 acknowledge  
26 adverse effects to the delta smelt, which is listed as threatened under the ESA, in  
27 violation of Sections 4(d) and 9 of the ESA, 16 U.S.C. §1533(d) and 1538(a)(1)(B). The  
28

1 California Department of Fish and Wildlife (“CDFG”) has also found that the  
2 construction, operation and removal of the barrier will result in take of delta smelt.

3 4. The Service has already found that the delta smelt is in jeopardy of extinction and  
4 the current population surveys conducted by the CDFG are showing delta smelt  
5 populations are at their lowest ever (approximately half the previous low).

6 5. The construction of the Project is causing “take” of delta smelt by blocking access  
7 to spawning and rearing habitat up and downstream of the dam; harming or killing adult  
8 and juvenile individuals; modifying and destroying critical habitat; increasing salinity  
9 levels; and disturbing locations which are known to contain populations of smelt by  
10 placing construction equipment and large boulders during construction. Such widespread  
11 and ongoing changes to the conditions of the 2008 BiOp require a reinitiation of  
12 consultation.

13 6. The Project’s construction and the resultant changes to flows and salinities within  
14 the Delta, identified in the 2015 Biological Assessment (“2015 BA”) prepared by the  
15 Army Corps constitute changed circumstances and require that consultation be reinitiated  
16 under 50 CFR 402.16

17 7. The 2008 BiOp clearly and completely lays out a scheme of operation which  
18 conserves delta smelt. Conditions in the delta are the underlying basis for this scheme.  
19 The terms and conditions, the analytical framework, assumptions and final analysis  
20 contained in the 2008 BiOp as written have been confirmed by the 9th Circuit Court of  
21 Appeal. There is no question that the 2008 BiOp as written defines the required  
22 conditions in the Delta, the 2008 BiOp’s physical and operational requirements for the  
23 state and federal water projects are designed to meet those conditions which include the  
24 flows and salinities required for the conservation of delta smelt.

25 8. The 2008 BiOp clearly contemplates several different possibilities for  
26 construction of barriers in the Delta, and clearly states consultation will take place prior  
27 to construction of any such barriers. The temporary barriers were contemplated in the  
28 2008 BiOp, and specific configurations identified in 2014, and 2015, with the final

1 configuration currently under construction. Despite this notice of over 7 years  
2 consultation has not taken place.

3 9. The construction of the Project and the consequences identified in the 2008 BiOp,  
4 the 2014 BA and the 2015 BA constitute changed circumstances and require that  
5 consultation be reinitiated pursuant to 50 CFR 402.16.

6 10. The Service has not issued incidental take permits as required resulting in the  
7 Department violating the absolute prohibitions against take in Section 9 of the ESA by  
8 the Service and the Department.

9 11. Moreover, the Project will take delta smelt both directly and through harm caused  
10 by destroying and adversely modifying its critical habitat in violation of the federal ESA  
11 and its implementing regulations. The Department commenced the Project with the full  
12 knowledge that “take” of delta smelt would occur as stated in the California Department  
13 of Fish and Wildlife incidental take permit. The Department commenced construction  
14 without satisfying the federal requirement that any “take of a delta smelt is subject to  
15 civil and criminal penalties unless an incidental take permit exists under the ESA. To  
16 date, no ESA incidental take permit exists. Despite this, the Department is pushing full-  
17 speed ahead with the Project and began construction on Wednesday, May 7, 2015. In  
18 plain negligence of their statutory duty the Service has failed to enforce the provisions of  
19 the Section 9 and either estop the ongoing ‘take’ or issue an incidental take permit for the  
20 construction -- which is why an immediate injunction and/or stay of the Project is  
21 necessary to preserve the status quo while this litigation is pending.

## 22 **PARTIES**

23 12. Plaintiff CESAR is a nonprofit California corporation. Its mission is to ensure  
24 consistent application of these statutes throughout all industries and sectors and bring  
25 scientific rigor to regulatory decisions undertaken pursuant to environmental statutes, like  
26 the ESA. CESAR’s mission also includes the education of its members and the general  
27 public regarding environmental laws and regulations and their application. CESAR  
28

1 brings this action on its own behalf, on behalf of its members, and on behalf of the  
2 general public and in the public interest.

3 13. CESAR's members have an aesthetic and scientific interest in preserving the  
4 species of the Delta. Additionally, CESAR's members are committed to the consistent  
5 enforcement of all federal and state environmental requirements.

6 14. CESAR's members have aesthetic and professional interests in the delta smelt, as  
7 well as the Delta's ecological integrity. CESAR is a non-profit organization, committed  
8 to consistent and lawful application of the ESA in order to conserve species. CESAR's  
9 members have a scientific interest in the delta smelt, and particularly the delta smelt  
10 given its usefulness as an indicator species for the Delta's overall health. Moreover, at  
11 least one member has conducted and will continue to conduct scientific research on the  
12 smelt and the factors that affect its survival. The Project will harm the delta smelt and  
13 their habitat, thereby injuring members' interests by reducing the delta smelt populations,  
14 and making their observation and study more difficult. The Project, given the critically  
15 low population of delta smelt also will increase the chances of the smelt's extinction,  
16 which would materially prejudice the members' aesthetic and professional interests.

17 15. Moreover, CESAR's members are water consumers with a direct interest in the  
18 continued and uninterrupted supply of water for their agricultural, business, and personal  
19 consumption. Since the Project will increase the salinity of water in those areas of the  
20 Delta unprotected by the rock barriers, members will see their supply of water adversely  
21 affected unless the Project is stopped.

22 16. Defendant Mark Cowin is herein sued in his official capacity as Director of the  
23 California Department of Water Resources, a state agency formed and existing under the  
24 California Water Code. The Department is responsible for management and regulation of  
25 the State's water, and has its principal place of business in the County of Sacramento. The  
26 Department is the proponent and operator of the Project.

27 17. Defendant Sally Jewell is the United States Secretary of the Interior. In that  
28 capacity, Secretary Jewell has supervisory responsibility over the United States Fish and

1 Wildlife Service. The Secretary of the Interior is the federal official vested with  
2 responsibility for properly carrying out the ESA. Defendant Jewell is sued in her official  
3 capacity.

4 18. Defendant Dan Ashe is the Director of the United States Fish and Wildlife  
5 Service. Defendant Ashe is sued in his official capacity.

6 19. Defendant U.S. Fish and Wildlife Service is an agency of the United States and a  
7 subdivision of the Department of the Interior. The Service is responsible for the  
8 administration of the ESA and its implementing regulations as they pertain to  
9 conservation of the delta smelt.

### 10 JURISDICTION AND VENUE

11 20. This Court has jurisdiction over this action pursuant to the ESA citizen suit  
12 provision, 16 U.S.C. § 1540(g) and the Administrative Procedure Act ("APA"), 5 U.S.C.  
13 §§ 701 *et seq.* As required by 16 U.S.C. § 1540(g)(2)(A)(i), plaintiff, CESAR, provided  
14 the defendants notice of the violations described in this complaint by letters dated March  
15 19, 2014 and June 16, 2014. Plaintiff sent the notice to each of the defendants by U.S.  
16 mail. More than 60 days have passed since Defendants received these notices and  
17 Defendants have not responded to the notices. At no time has the Secretary of the  
18 Department of Interior initiated an action related to the Project pursuant to 16 USC  
19 1540(a) and has not brought a criminal action against the party in federal or state court.

20 21. Venue in this district and division is proper under 16 U.S.C. § 1540(g)(3)(A), 28  
21 U.S.C. § 1391 because the Bay Delta and Project are located in this district.

### 22 BACKGROUND

23 22. The Sacramento-San Joaquin River Delta is an expansive inland river delta and  
24 estuary in Northern California. The Delta is a large, open system of channels through  
25 which saltwater intrudes and recedes with the tide. It is formed at the western edge of the  
26 Central Valley by the confluence of the Sacramento and San Joaquin rivers and lies just  
27 east of where the rivers enter Suisun Bay. The total area of the Delta, including both land  
28 and water, is about 1,100 square miles. The U.S. Fish & Wildlife Service issued the 2008

1 BiOp governing operation of the State and Federal water projects (the Water Projects) for  
2 the conservation of delta smelt. The 2008 BiOp is replete with references to the problem  
3 of saline water and its effect on the delta smelt. In the 7 years since publication of the  
4 2008 BiOp, delta smelt populations have continued to decline. The delta smelt is  
5 currently at its lowest historical level, the 2013 population was half the next lowest  
6 measured population level. The entire Delta, including the site of the proposed dam is  
7 designated critical habitat for the species.

8 23. The 2008 BiOp contemplated drought years in development of the operational  
9 criteria imposed on the Projects. Specifically, years 1976 and 1977 whose rainfall levels  
10 were on par with those seen in the current drought, were part of the modeling used to  
11 develop drought operation criteria in the BiOp. The Department was well aware of the  
12 potential problems and in fact, had used barriers similar to the Project barrier in 1976 and  
13 1977. The Department first made its proposal for barriers in early 2014. That initial  
14 proposal was for rock barriers across three different channels at West False River,  
15 Steamboat Slough, and Sutter Slough. The Department claimed that the three barriers,  
16 installed across different parts of the river delta, would help deter the tidal push of  
17 saltwater from San Francisco Bay into the Delta. At that time CESAR provided a 60-day  
18 notice of intent to sue to the Service, the Department and the State Water Resource  
19 Control Board that reinitiation of consultation was in order and that an incidental take  
20 permit was required to proceed with the project. The Department withdrew its proposal.

21 24. In January 2015, pursuant to state law, the Department prepared an Initial  
22 Study/Proposed Mitigated Negative Declaration, which examined and addressed the  
23 environmental impacts of its three-barrier project. The Department initiated a notice-and-  
24 comment period on the Initial Study of the three-barrier project, which closed on March  
25 18, 2015. Simultaneously, the Department proceeded to pursue a permit for the three-  
26 barrier project under Section 404 of the Clean Water Act (“CWA”). The Army Corps  
27 published a notice of the proposed permit and requested public comment. CESAR filed  
28 comments on April 22.

1 25. But on April 17, unknown to the public, the Department had quietly withdrawn its  
2 three-barrier proposal and abandoned its studies. Three days later, on April 20, the  
3 Department contacted the Army Corps about a different project: a single 750-foot wide  
4 rock barrier across West False River in the Delta (the Project). The Department did not  
5 publicly release a description or in any way notice the new Project until April 29, 2015.  
6 The Army Corps publicly noticed the change, but took no comment and provided no  
7 description. A mere five days later, on May 4, 2015, the Department approved the  
8 Project. The Army Corps issued the 404 Permit for the Project on May 5, 2015, after  
9 initiating “emergency consultation” with the Service citing its emergency authority. The  
10 Department commenced construction on May 7, 2015.

11 26. The Department has not obtained all necessary permits for the Project and has  
12 been prosecuting construction since May 7, 2015 without a federal incidental take permit  
13 in violation of Section 9 of the ESA.

14 27. The Department claimed "emergency" circumstances in its application for a  
15 permit under Section 404 of the CWA to the Army Corps. On that basis, the Army Corps  
16 requested “emergency” consultation with the Service. However, the ‘emergency’ is of  
17 the Departments own making and is an inappropriate application of the exemption for  
18 formal consultation. The Service approved the Army Corps permit using its own  
19 emergency authority accepting the argument that an increase in water treatment costs for  
20 the affected areas constituted an emergency under the definition of 50 C.F.R. § 402.05

21 28. The issue of saltwater intrusion into the Delta was acknowledged in the 2008  
22 BiOp. The Project was contemplated in early 2014, consultation was initiated and  
23 abandoned. Had the Department perfected its consultation in 2014, it would have been  
24 available in 2015. However, the Department chose to ignore the eventual need for a  
25 permit and by waiting created what it now refers to as an “emergency”.

26 29. While the Project will protect selected areas of the delta from tidal saltwater  
27 intrusion, there is a finite area into which the tidal water flows. Therefore, protection of  
28 select areas of the delta merely moves the tidal waters into other areas of the Delta

1 thereby increasing those areas' salinity. These increases in salinity caused by the Project  
2 will result in irreparable harm to the delta smelt whose designated critical habitat spans  
3 the entire Delta. Specifically, the Project will result in take of delta smelt due to direct  
4 take, and harm resulting from adverse modification of critical habitat in those areas that  
5 are unprotected by barriers.

6 30. The Department's approval of the Project on May 4 and decision to start  
7 construction on May 6 constitute final agency action.

8 31. The Service's approval of the Army Corps CWA permit for the Project under the  
9 emergency consultation provisions constitutes final agency action.

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15 CAUSE OF ACTION

16 CLAIM FOR RELIEF

17 **PROHIBITED TAKE OF DELTA SMELT AS A RESULT OF CONSTRUCTION**  
18 **AND OPERATION OF BARRIER PROJECT**

19 32. CESAR restates and realleges all preceding paragraphs.

20 33. The ESA defines an "endangered species" as "any species which is in danger of  
21 extinction." Id. § 1532(6). A "threatened species" is one that is likely to become  
22 endangered within the foreseeable future. Id. § 1532(20).

23 34. The ESA and its implementing regulations prohibit any person from "taking" a  
24 threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" as  
25 "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to  
26 engage in any such conduct." Id. § 1532(19).

27 35. The term "harass" is defined as "an intentional or negligent act or omission which  
28 creates the likelihood of injury to wildlife by annoying it to such an extent as to

1 significantly disrupt normal behavioral patterns which include, but are not limited to,  
2 breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. 20. The term “harm” is defined as “an  
3 act which actually kills or injures wildlife, [which] ... may include significant habitat  
4 modification or degradation where it actually kills or injures wildlife by significantly  
5 impairing essential behavioral patterns, including breeding, feeding or sheltering.” Id.

6 36. The ESA take prohibition applies to all “persons.” 16 U.S.C. § 1538(a)(1).

7 The ESA defines a “person” to include:

8 “an individual, corporation, partnership, trust, association, or any other  
9 private entity; or any officer, employee, agent, department, or  
10 instrumentality of the Federal Government, of any State, municipality, or  
11 political subdivision of a State, or of any foreign government; any State,  
12 municipality, or political subdivision of a State; or any other entity subject  
13 to the jurisdiction of the United States.”

14 16 USCS § 1532.

15 37. The Defendants in this case are “persons” as defined by the ESA.

16 38. The ESA citizen suit provision authorizes suits to enforce the ESA and its  
17 implementing regulations against any person who is alleged to be in violation of any

18 39. provision of the ESA or regulations implementing the ESA. 16 U.S.C. § 1540(g).

19 40. Defendants, by constructing and proposing to operate the Project, have violated  
20 and continue to violate the “take” prohibitions in Section 9 of the ESA directly and by  
21 harming delta smelt through destruction and adverse modification of critical habitat  
22 which has caused and continue to cause harm, harassment, injury and death to delta  
23 smelt.

24 41. The “take” of listed species is acknowledged both the in 2014 BA as well as in the  
25 Incidental Take Permit (No. 2081-2014-028-03) issued by the California Department of  
26 Fish and Game (CDFG) for the Project under the California Endangered Species Act. As  
27 impacts of the “taking” of those species, CDFG found that:

28 *“Project activities and their resulting impacts are expected to result in the  
incidental take of individuals of the Covered Species. The activities  
described above that are expected to result in incidental take of  
individuals of the Covered Species include moving and placing rock,*

1 *hydroacoustic impacts from pile driving, river substrate disturbance*  
2 *resulting in loss of natural river substrate, increased turbidity, suspended*  
3 *sediments, localized changes to water quality and circulation patterns*  
4 *affecting fish habitat quality, potential for release of contaminants into the*  
5 *water, upland drilling, installation of sheet pile walls, construction*  
6 *activities, and construction equipment moving materials in the upland*  
7 *areas (Covered Activities).*

8 *Incidental take of individuals of the Covered Species in the form of*  
9 *mortality ("kill") may occur as a result of Covered Activities such as fatal*  
10 *injury, burial, entrapment, increased turbidity, temporary and permanent*  
11 *loss of habitat. Incidental take of individuals of the Covered Species may*  
12 *also occur from the Covered Activities in the form of pursue, catch,*  
13 *capture, or attempt to do so of the Covered Species from deterrence from*  
14 *migratory pathways, increased predation in the vicinity of the barrier,*  
15 *crushing and injury from construction equipment and vehicle strikes in the*  
16 *staging area and other upland areas. The area where authorized take of*  
17 *the Covered Species is expected to occur is West False River.”*

18 42. Defendants are liable for the unlawful take of delta smelt and CESAR is entitled  
19 to an order enjoining defendants from continued take of delta smelt, requiring either  
20 removal of the dam or provision of adequate fish passage.

## 21 **COUNT II**

### 22 **THE SERVICE HAS FAILED TO REINTIATE CONSULTATION**

23 43. CESAR restates and realleges all preceding paragraphs.

24 44. The 2008 BiOp established the flows, salinity levels, and habitat conditions  
25 required to avoid jeopardizing the continued existence of the delta smelt. Alteration of  
26 any or all of the conditions prescribed by the 2008 BiOp will result in significant habitat  
27 modification or degradation in a manner sufficient to constitute “take” under the ESA.  
28 Further, while the State has the authority to make such alterations, they do constitute  
“changed circumstances” referenced in Section 402.16 of the ESA regulations which  
require reinitiation of consultation.

*“Reinitiation of formal consultation is required and shall be requested by  
the Federal agency or by the Service, where discretionary Federal*

1 *involvement or control over the action has been retained or is authorized*  
2 *by law and:*

3 *(a) If the amount or extent of taking specified in the incidental take*  
4 *statement is exceeded;*

5 *(b) If new information reveals effects of the action that may affect Delta*  
6 *smelt or critical habitat in a manner or to an extent not previously*  
7 *considered;*

8 *(c) If the identified action is subsequently modified in a manner that*  
9 *causes an effect to the Delta smelt or critical habitat that was not*  
10 *considered in the biological opinion; ...”*

11 50 CFR 402.16

12 45. On or about January 27, 2015, the Bureau of Reclamation (“BOR”) issued the  
13 “Interim Contingency Plan for February and March Pursuant to Reasonable and Prudent  
14 Alternative (RPA) Action 1.2.3.C of the 2009 Coordinated Long-term Operation of the  
15 Central Valley Project (CVP) and State Water Project (SWP) Biological Opinion (2009  
16 BiOp)”. (“Interim Contingency Plan”) The Interim Contingency Plan was adopted as  
17 part of the Temporary Urgency Change (“TUC) Petition which would serve as a  
18 contingency plan for the months of February and March, 2015. Pursuant to this order, the  
19 Department indicated “Consultation on installation and operation of the barriers will be  
20 conducted on the barriers prior to installation and may require additional adjustments to  
21 D-1641.” The contingency plan failed to consider or address the effects of the  
22 contingency plan on the delta smelt.

23 46. On May 21, 2015 BOR and the Department published a further request for  
24 modification confirming the adverse impacts of construction and operation of the Project  
25 to the delta smelt, finding that:

26 *“...salinities downstream may reach levels that are less suitable for*  
27 *juvenile delta smelt and prevent substantial seaward movement to areas*  
28 *where the marine influence...The proposed modifications will result in*  
*lower outflows that may reduce survival of out-migrating juvenile delta*  
*smelt that are currently in the interior Delta. For example, lower flows*  
*increase migration time and increase exposure to degraded habitats and*  
*predators. For smelt residing in the North Delta, reduced outflow, while*  
*limiting the available habitat and its quality, is not expected to result in*  
*increased risk of entrainment”.*

1 47. In addition to allowing increased ‘take’ of delta smelt whose population is  
2 critically low, the Service’s ultimate failure to consult prior to the construction of the  
3 barriers, and complicity with regard to the delays which manufactured the current  
4 “emergency”, the Service has failed to re-initiate formal consultation at the peril of the  
5 delta smelt.

6  
7 **COUNT IV**

8 **TAKE BY THE SERVICE AS A RESULT OF IMPROPER APPLICATION OF**  
9 **EMERGENCY CONSULTATION PROCEDURE**

10 48. CESAR restates and realleges all preceding paragraphs.

11 49. Under the APA, the Service improperly allowed emergency consultation where  
12 no such emergency existed, resulting in unpermitted “take” of the delta smelt. A  
13 reviewing court may compel agency action where such action is unlawfully withheld or  
14 unreasonably delayed. 5 USC 706(1). The Service has failed to require formal  
15 consultation by the Army Corps on the Project, requiring instead only “emergency”  
16 consultation under 50 CFR 406.5.

17 50. To date, the Service has issued no federal ESA incidental take permit for the  
18 Project. Further, there is no evidence that the Service has conducted a formal  
19 consultation that would lead to an incidental take permit. The Service had ample  
20 opportunity to consider each of the barriers proposed singly or jointly; however, that  
21 consideration never occurred.

22 51. The Service’s emergency consultation provisions apply to situations involving,  
23 “acts of God, disasters, casualties, national defense or security emergencies, etc.” There  
24 was no loss or life or threat to national security at the time of the emergency project  
25 proposal, there is no such threat existing now, and failure to construct the Project will not  
26 lead to any such circumstance.

27 52. By regulation, the definition of “harm” includes failure to act where a person has  
28 a duty to do so in order to avoid or prevent the harm. See Fish and Wildlife Serv.,

1 Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed.  
2 Reg. 54,748, 54,750 (Nov. 4, 1981) (stating in response to comments that “the Service  
3 feels that ‘act’ [in the definition of ‘harm’] is inclusive of either commissions or  
4 omissions which would be prohibited by section 9”).

5 53. The Service’s Director has the responsibility to require formal consultation where  
6 he is aware of an agency action that “may” affect delta smelt. The Service had notice of  
7 the intent to construct barriers in the Delta at the time of the publication of the 2008  
8 BiOp. The 2008 BiOp recognized the potential for adverse modification and “take” of  
9 delta smelt when they noted that consultation would be required for construction of such  
10 barriers (page 119.). The Service had notice of the potential construction of the project as  
11 early as April, 2014. Despite both notice and ample opportunity to conduct formal  
12 consultation, the Service failed to act, instead opting for a last minute “emergency” and  
13 allowing construction to begin despite the peril to the delta smelt.

14 54. The Service approved the Project subject to its “emergency consultation”  
15 procedures despite awareness that the only identified damage to the state was increased  
16 costs for water treatment. Further, the emergency consultation was done despite being  
17 noticed well in advance of the potential construction and in time to conduct a thorough  
18 consultation prior to the initiation of construction.

19  
20 *“Requirement for formal consultation. Each Federal agency shall review*  
21 *its actions at the earliest possible time to determine whether any action*  
22 *may affect Delta smelt or critical habitat. If such a determination is made,*  
23 *formal consultation is required, except as noted in paragraph (b) of this*  
24 *section. The Director may request a Federal agency to enter into*  
25 *consultation if he identifies any action of that agency that may affect Delta*  
26 *smelt or critical habitat and for which there has been no consultation.*  
27 *When such a request is made, the Director shall forward to the Federal*  
28 *agency a written explanation of the basis for the request.”*

50 CFR 402.14

55. The Service violated its regulations with respect to application of emergency  
consultation procedures, which allow for consultation in an “expedited manner” in

1 situations “involving acts of God, disasters, casualties, national defense or security  
2 emergencies, etc.” 50 CFR 402.05. As asserted by the Department, the only imminent  
3 harm that was predicted was the increased cost of water treatment due to increased  
4 salinity in the Delta by saltwater intrusion as a result of the “King Tide” or perigean  
5 spring tide. These tides do not constitute an emergency consistent with the emergency  
6 consultation regulations. King Tides were in fact announced by the National Weather  
7 Service in February, 2015. Justification for construction to begin on an emergency basis  
8 as a result of salt water intrusion from the threat of a King Tide is arbitrary and  
9 capricious.

10 56. Further, the Service has had notice of the potential impact on delta smelt for at  
11 least one year prior to the Army Corps emergency consultation request pursuant to 50  
12 CFR 402.05. This action was anticipated. Additionally, in February, 2015 and April,  
13 2015 the Army Corps indicated that they were intending to initiate ESA consultation in  
14 its public notice related to the Project, stating:

15  
16 *“ENDANGERED SPECIES: The proposed activity may affect Federally-*  
17 *listed endangered or threatened species or their critical habitat. The*  
18 *Corps will initiate consultation with the U.S. Fish and Wildlife Service*  
*and the National Marine Fisheries Service, pursuant to Section 7 of the*  
*Endangered Species Act, as appropriate.”*

19 57. On or about May 4, 2015, with no intervening events that would bring the Project  
20 within the scope of the emergency consultations provisions of 50 CFR 402.05, the Army  
21 Corps received informal approval from the Service and issued the 404 Permit.

22 **WHEREFORE**, plaintiffs request an order from this Court:

23 1. Declaring that defendants have, jointly and severally, violated the Endangered  
24 Species Act, 16 U.S.C. § 1538(a)(1)(G), and 1538(1)(B) by taking delta smelt directly,  
25 and through harm and harassment through adverse modification of critical habitat ;

26 2. Enjoining defendants, jointly and severally, from continuing to construct and  
27 operate the Project in a manner that violates section 9 of the Endangered Species Act and  
28 its implementing regulations, 16 U.S.C. § 1538(a)(1)(G), and 1538(1)(B), because of

