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7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

<p>11 CENTER FOR ENVIRONMENTAL 12 SCIENCE, ACCURACY & 13 RELIABILITY, a California public 14 interest organization</p> <p>15 Plaintiff,</p> <p>16 v.</p> <p>17 MARK W. COWIN, In his Official 18 Capacity As Director Of CALIFORNIA 19 DEPARTMENT OF 20 WATER RESOURCES; SALLY 21 JEWELL, Secretary, U.S. Department of 22 the Interior, in her official capacity; DAN 23 ASHE, Director, U.S. Fish and Wildlife 24 Service, in his official capacity; and 25 UNITED STATES FISH AND 26 WILDLIFE SERVICE;</p> <p>27 Defendants.</p>	<p>Case No.</p> <p>MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION</p>
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28 **MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, Plaintiff the Center for Environmental Science,
Accuracy & Reliability ("CESAR) hereby moves the Court to issue a Temporary

1 Restraining Order and Preliminary Injunction requiring Defendants Mark W. Cowin, in
2 his official capacity as Director of the California Department of Water Resources
3 (“Department”) and the U.S. Fish and Wildlife Service (“Service”) as required under the
4 Endangered Species Act (“ESA”).

5 In support of this motion, plaintiff relies upon the attached memorandum of points
6 and authorities. A proposed order is attached.

7 The plaintiffs have expended time and effort to ascertain the facts of the current
8 procedural posture of the emergency drought barriers project (“Project”). This effort
9 commenced on May 5, 2015 and continues to date. At the time of the issuance of a 404
10 permit pursuant to section 404 of the Clean Water Act (“404 Permit”) by the Army Corps
11 related to the Project, CESAR requested information related to compliance with
12 consultation under the federal Endangered Species Act. At that time, the Army Corps
13 refused to provide any information regarding the 404 Permit for the Project, including a
14 copy of the permit or any information on consultation or incidental take permit(s)
15 associated with the Project, insisting that a formal request for information be filed under
16 the Freedom of Information Act (“FOIA”). CESAR was unable to access any of the
17 public information on the Project until after filing suit in State Court, challenging the
18 suspension of the California Environmental Quality Act. Documents produced on May 8,
19 2015 included copies of the Army Corps 404 Permit, but no information regarding any
20 type of consultation under the ESA. On May 25, 2015, CESAR received additional
21 documents in response to a FOIA filed prior the emergency permit application. No
22 information in the FOIA substantiated a claim of consultation with the Service.
23 Nevertheless, CESAR, in an abundance of caution proceeded to explore other potential
24 avenues for evidence of consultation. Finally, we have been unable to identify any
25 evidence that consultation took place or that an incidental take permit was issued.

26 Notice to Defendants has been provided pursuant to local rules.

27 **ORAL ARGUMENT REQUESTED.**

28 Respectfully submitted,

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2 **MEMORANDUM OF POINTS AND AUTHORITIES**
3 **IN SUPPORT OF PLAINTIFF’S MOTION FOR**
4 **TEMPORARY RESTRAINING ORDER AND**
5 **PRELIMINARY INJUNCTION**

6 Plaintiff the Center for Environmetnal Science, Accuracy & Reliability (“CESAR”)
7 submits the following memorandum of points and authorities in support of CESAR’s
8 motion for a temporary restraining order and preliminary injunction.
9

10 **INTRODUCTION**

11 Despite awareness of the necessity of consultation prior to installation of the West
12 False River barrier (the Project), the Department, due to its own delay created the current
13 “emergency” which it claims in its application for emergency approval of the required
14 Clean Water Act Permit under section 404. On the basis of this application the U.S
15 Army Corps of Engineers (“the Army Corps”) initiated “emergency” consultation with
16 the U.S. Fish and Wildlife Service (“the Service”), citing an “emergency” as a basis for
17 its failure to formally consult on the project. In fact, the Department on several occasions
18 initiated the project, requested public comment, and then withdrew the proposal, even
19 though there was a good probability it would eventually be required by the Department at
20 some point during the drought.

21 The Department obtained a permit pursuant to section 404 of the Clean Water
22 Act, (the Permit) from the Army Corps for construction of the Project in the West False
23 River. The permit was issued under the Army Corps emergency authorities.
24 Construction commenced on Wednesday, May 7, 2015. In their request for a permit, the
25 Department claimed "emergency" circumstances, even though the problem of saltwater
26 intrusion into the delta has been publically known, including by the Department, since as
27 early as 2008 when the 2008 and 2009 Biological Opinions (respectively “2008 BiOp”
28 and “2009 BiOp”) were issued and in the years of the drought the problem was

1 recognized more immediately by the Governor's Executive Orders on the drought.
2 Nevertheless, through their own dilatory behavior, the Department delayed finalizing
3 both their decision and their request for federal permits until they were unable to
4 complete the normal process.

5 The Dam in the Sacramento-San Joaquin Delta ("Delta") will only protect
6 selected areas of the Delta from tidal saltwater intrusion. Because there is a finite area
7 into which the tidal water flows, protection of select areas of the Delta merely moves the
8 tidal waters into other areas of the Delta thereby increasing those areas' salinity. This is
9 confirmed by the Department's own documents.

10 The Project will result in irreparable harm to listed species, including the delta
11 smelt, a threatened species whose designated critical habitat spans the entire Delta.
12 Specifically, the construction and operation of the Project will result in "take" by killing
13 individuals of the species and increased salinity as well as significant degradation or
14 destruction of the listed species' critical habitat in those areas that are unprotected by
15 Project.

16 The increase in salinity will, pursuant to the 2008 BiOp, require additional
17 releases of already limited storage water from the dams in order to offset the increased
18 salinity in other parts of the Delta and maintain the critical habitat that is being adversely
19 affected. Such releases will deplete reserves necessary for maintenance of the species
20 during the continuing drought as well as exacerbate the existing statewide water
21 shortages for the millions of Californians who rely on water from the state and federal
22 water projects. In the worst case scenario, the releases could eliminate any storage
23 available for use outside the Delta and result in even more cities and farms running out of
24 water completely.

25 An email dated May 1, 2015, from the Service to the Army Corps approving the
26 issuance of a permit under section 404 of the Clean Water Act for the Barrier Project
27 after only "informal" consultation constitute final agency action.

28

FACTUAL BACKGROUND

1 On April 18, 2014, the Department issued a press release announcing the intent to
2 begin construction on several salinity barriers for emergency drought control.

3 On March 25, 2014 the Department requested that the Army Corps issue a permit
4 under Section 404 of the Clean Water Act.

5 In June 2014, CESAR sent a notice of intent to sue the Department and State
6 Board for violation of section 9 of the ESA by not reinitiating consultation as required by
7 law.

8 In January, 2015 pursuant to the California Environmental Quality Act (CEQA),
9 the Department prepared an Initial Study/Proposed Mitigated Negative Declaration,
10 which purported to examine and address the environmental impacts of its three-barrier
11 project. The Department initiated a notice-and-comment period on the Initial Study of the
12 three-barrier project, which closed on March 18, 2015. This scope of this declaration
13 considered the installation of three barriers, including the West False River barrier.
14 However, it did not consider the installation of only the West False River Barrier. Each
15 of the proposed dams have an effect on salinities and flows in the Delta. Those effects
16 vary by the placement and number of dams installed. Simply removing one or two
17 completely changes the salinity profiles and flow profiles within the Delta and the critical
18 habitat. In January, 2015 the Department submitted the three barrier plan to the Army
19 Corps.

20 On January 26, 2015 the Department issued a press release related to the possible
21 need for three salinity control barriers.

22 On February 27, 2015, the Army Corps published notice for comments related to
23 an application by the Department for a Clean Water Act (CWA) permit under section 404
24 on the three barriers proposed by the Department. This noticed stated that the permit was
25 being processed under normal procedures, however, the notice also included the
26 statement that if conditions changed the application may be elevated to emergency.
27
28

1 Applicant has provided no alternatives. The Army Corps did find that the proposed
2 activity “(M)ay affect listed and endangered species or their critical habitat.”

3 On March 10, 2015, Paul A. Marshall, Chief, Bay-Delta Office for the
4 Department clearly stated at page 3 of his letter that “The biological review analyses of
5 the potential effects of the operational changes will be used by Reclamation to reinitiate
6 Section 7 consultations necessary to implement the operational changes.”

7 On April 1, 2015, the Army Corps initiated formal consultation with the Service
8 related to the issuance of a 404 permit for the three barriers project and then subsequently
9 withdrew the request.

10 On April 7, 2015 the Army Corps published a public notice for comments with a
11 proposal for three barriers. The Army Corps noted that the activity “may affect listed
12 species, may adversely affect essential fish habitat”.

13 On April 13, 2015 the Army Corps published its Biological assessment (BA)
14 related to the project which concluded that the project would have adverse effects on all
15 aquatic species. The BA references a Programmatic Consultation. This Programmatic
16 Consultation does not meet the consultation requirements of the ESA and further states
17 that formal consultation will be conducted before construction of the barriers.

18 On April 17, 2015, with no notice to the public, the Department withdrew its
19 three-barrier proposal and abandoned its studies. Three days later, on April 20, 2015 the
20 Department announced a different project: It would install a rock barrier across one, 750-
21 foot-wide channel of the delta at West False River. The Army Corps comment period for
22 the Department’s proposal was still current, no notice was issued to the public that the
23 proposal was withdrawn, and CESAR commented on the last proposal on April 22, 2015.

24 On April 21, 2015 the Army Corps initiated formal consultation with the Service
25 related to the West False River single barrier project. The April 21, 2015 letter from the
26 Army Corps states that “based upon the available information, (we) have determined that
27
28

1 the action may affect and is likely to adversely affect the federally listed Delta
2 Smelt...and critical habitat for the Delta Smelt”.¹ Further, this letter states:

3 “Formal consultation concludes within 90 days after it has been initiated,
4 unless extended. If you believe an extension is warranted, this office must
5 agree and then you must submit to the permit applicant before the close of
6 the 90 days a written statement describing (1) the reasons why a longer
7 period is required, (2) the information that is required to complete the
8 consultation and (3) the estimated date on which the consultation will be
9 completed. Within 45 days after concluding formal consultation, you will
10 deliver a biological opinion to this office and the permit applicant.”²

11 On April 24, 2015 the Army Corps issued a notice amending the previous Public
12 Notice published on April 7, 2015 and evaluating a permit application to construct the
13 Emergency Drought Barriers project as a single barrier as a result of the Department
14 having removed the two northern barriers in Miner Slough and Steamboat Slough from
15 the proposed project. The notice provided no provision for notice and comment despite
16 the regulatory requirements that the Army Corps provide as much notice and comment as
17 possible even for emergency actions.

18 On April 29, 2015 the Department released a description of the new project.

19 On May 4, 2015 the existing 404 permit was signed by the Army Corps and the
20 Department, this permit was not issued under any of the previous assessments and was
21 not issued after the formal consultation was completed. Instead, the May 4, 2015 permit
22 was issued under the Army Corps “emergency regulations” and under the Service
23 “emergency consultation” regulations which both provide for emergency processes for
24 natural disasters and other similar “acts of God”.

25 The emergency identified by the Department and accepted by the Corps is an
26 economic emergency. The Department complains that the costs for treating water in
27 selected Bay Area Counties will be too high. There is no evidence that there will be a

28 ¹ April 21, 2015 Correspondence from ACOE Deputy Chief, Regulatory Division to Ms. Kim
Turner, U.S. Fish and Wildlife Service.

² Id, pg. 6

1 loss of water, or that the treatment is infeasible. The Army Corps has accepted this
2 economic emergency as a basis for allowing construction of a dam in the critical habitat
3 of a number of species without an incidental take permit. The Service has allowed this
4 construction to occur, despite the absence of an incidental take permit, even one issued
5 under emergency regulations.

6 The Department construction must be stopped until the take occurring, in
7 violation of Section 9 is either permitted under the provisions of the ESA or halted.

8 9 **LEGAL STANDARDS**

10 CESAR seeks a temporary restraining order and a preliminary injunction. “The
11 same standard applies to both temporary restraining orders and to preliminary
12 injunctions.”

13 **a. TRO and Preliminary Injunction Test Under the ESA**

14 In most cases, a party is entitled to a preliminary injunction after clearly
15 demonstrating the following elements: (1) a likelihood of success on the merits and the
16 possibility of irreparable injury or (2) sufficiently serious questions going to the merits to
17 make them a fair ground for litigation. The court uses a balancing of the hardships which
18 provides for a grant of preliminary injunction if the tipping decidedly in favor of the party
19 seeking relief.

20 This is not the test for injunctions under the ESA. In *TVA v. Hill*, 437 U.S. 153,
21 173, 193-95, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978), the Supreme Court held that
22 Congress had explicitly foreclosed the exercise of traditional equitable discretion by
23 courts faced with a violation of section 7 of the ESA. *Sierra Club v. Marsh*, 816 F.2d
24 1376, 1382-83 (9th Cir. 1987).

25 “If a project is allowed to proceed without substantial compliance with those
26 procedural requirements, there can be no assurance that a violation of the ESA's
27 substantive provisions will not result. The latter, of course, is impermissible.” *Sierra Club*
28 *v. Marsh, supra*, 1384 (9th Cir. 1987).

1 This Court must determine whether the Department is violating a substantive or
2 procedural provision of the ESA and whether injury to the delta smelt is likely and
3 irreparable; if so, CESAR is entitled to an injunction. *United States v. Glenn-Colusa*
4 *Irrigation Dist.*, 788 F. Supp. 1126, 1132 (E.D. Cal. 1992).

5
6 **ARGUMENT**

7 CESAR is entitled to a temporary restraining order and a preliminary injunction
8 prohibiting the Department from continuing construction of salinity barriers in the Bay
9 Delta. CESAR is likely to prevail on the merits, and certain to suffer irreparable injury if
10 this motion is not granted. The Court must act now to prevent irreparable injury to
11 CESAR, the public and the critically low populations of delta smelt. The prospect of
12 harm to the Department is low if the motion is granted, and the public interest in
13 conservation of listed species strongly favors CESAR's motion.

14 CESAR's lawsuit asks this Court to prevent the continued "take" of delta smelt
15 and adverse modification of delta smelt critical habitat.

16 **a. Applicable Provisions of the ESA**

17 The ESA prohibits any person from "taking" an endangered species. 16 U.S.C. §
18 1538(a)(1)(B). The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound,
19 kill, trap, capture, or collect or attempt to engage in any such conduct." Id. § 1532(19).

20 The Act defines the term "take" very broadly to include "harass, harm, pursue,
21 hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such
22 conduct." Id. § 1532(19).

23 The term "harass" is defined as "an intentional or negligent act or omission which
24 creates the likelihood of injury to wildlife by annoying it to such an extent as to
25 significantly disrupt normal behavioral patterns which include, but are not limited to,
26 breeding, feeding, or sheltering." 50 C.F.R. § 17.3. 20. The term "harm" is defined as "an
27 act which actually kills or injures wildlife, [which] ... may include significant habitat
28 modification or degradation where it actually kills or injures wildlife by significantly

1 impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*
2 The prohibition against “take” has been extended to wildlife listed as “threatened”. 50
3 C.F.R. 17.31(a).

4 The Department and the Army Corps have admitted that the proposed barrier in
5 the West False River will ‘take’ protected species, destroy or adversely modify critical
6 habitat and destroy essential fish habitat. The ESA allows such take only in the pursuit of
7 otherwise legal activities and under the authority of an incidental take permit issued
8 under Section 7 of the ESA.

9 Section 7(a)(2) of the ESA requires federal agencies to consult with the Service to
10 ensure that any action authorized, funded or carried out by the agency is not likely to
11 jeopardize the continued existence of any endangered species or threatened species or
12 result in destruction or adverse modification of critical habitat for such species. 16 U.S.C.
13 § 1536(a)(2). The statute and its implementing regulations establish a framework for
14 assessing the impacts of a proposed activity on listed species. 16 U.S.C. § 1536; 50
15 C.F.R. § 402.

16 An agency proposing an action must first determine whether the action "may
17 affect" species listed as endangered or threatened under the ESA. 50 C.F.R. § 402.14(a).
18 If the agency determines that the proposed action *may* affect listed species, formal
19 consultation with the Service is required except in certain instances. *Id.* The relevant
20 exceptions allow an action agency to forego formal consultation if, as a result of the
21 preparation of a biological assessment under section 402.12 or as a result of informal
22 consultation with the Service under section 402.13, the Federal agency determines, with
23 the written concurrence of the Director, that the proposed action is not likely to adversely
24 affect any listed species or critical habitat. 50 C.F.R. § 402.14(b)(1); *Forest Serv. Emples.*
25 *v. United States Forest Serv.*, 726 F. Supp. 2d 1195, 1218-19 (D. Mont. 2010).

26 Formal consultation means that the Service must prepare a biological opinion in
27 which the Service advises a federal agency as to whether the proposed action, whether
28 alone or cumulatively with other actions, is likely to jeopardize the continued existence of

1 any listed species or is likely to result in the destruction or adverse modification of any
2 critical habitat. 50 C.F.R. § 402.14(h)(3). In its biological opinion, the Service "must state
3 a rational connection between the facts found and the decision made." *Gifford Pinchot*
4 *Task Force v. United States Fish and Wildlife Service*, 378 F.3d 1059, 1065 (9th Cir.
5 2004). If the Service determines that a proposed action is likely to result in jeopardy or
6 loss of critical habitat, the Service must set forth reasonable and prudent alternatives to
7 the action, if any. 16 U.S.C. § 1536(b)(3)(A). If the Service determines that a proposed
8 action will result in incidental take of listed species but that the action and associated
9 incidental take will not violate the ESA Section 7 jeopardy standard, the Service must
10 attach an incidental take statement to the biological opinion. 16 U.S.C. § 1536(b)(4); 50
11 C.F.R. 402.14(i)(1). The incidental take statement sets forth the predicted impact to listed
12 species, the reasonable and prudent measures that are necessary to minimize take, and the
13 terms and conditions for the implementation of those measures. *Id.* If the action agency
14 complies with the terms and conditions of the incidental take statement, the expected take
15 is exempted from the take prohibition set forth in ESA Section 9. 16 U.S.C. §
16 1538(a)(1)(B); 16 U.S.C. § 1536(o)(2).

17 The Secretary may permit a taking of a protected species "if such taking is
18 incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16
19 U.S.C. § 1539(a)(1)(B). The application for such an incidental take permit must contain a
20 conservation plan that specifies:

- 21 (i) the impact which will likely result from such taking;
- 22 (ii) the steps the applicant will take to minimize and mitigate such impacts
23 and the funding that will be available to implement such steps;
- 24 (iii) what alternative actions to such taking the applicant considered and
25 the reasons why such alternatives are not being utilized; and
- 26 (iv) such other measures that the Secretary may require as being necessary
or appropriate for purposes of the plan.

16 U.S.C. § 1539(a)(2)(A).

27 If the Secretary finds the plan satisfactory after opportunity for public comment,
28 and determines that the taking will not appreciably reduce the likelihood of the survival

1 and recovery of the species in the wild, the Secretary shall issue the permit on the terms
2 and conditions deemed appropriate. *Id.*

3 Violation of the ESA's prohibition on takings is subject to civil and criminal
4 penalties. 16 U.S.C. § 1540(a) and (b). Moreover, the ESA specifically provides for
5 injunctive relief: "the Attorney General of the United States may seek to enjoin any
6 person who is alleged to be in violation of any provision of this chapter or regulation
7 issued under authority thereof." 16 U.S.C. § 1540(e)(6); see also *United States v. Glenn-*
8 *Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1004-132 (E.D. Cal. 1992).

9 With regard to actions over which the federal agency remains in control or with
10 which the federal agency has discretionary involvement, re-initiation of formal
11 consultation is required in the following instances:

12
13 *(a) If the amount or extent of taking specified in the incidental take*
statement is exceeded;

14 *(b) If new information reveals effects of the action that may affect listed*
species or critical habitat in a manner or to an extent not previously
15 *considered;*

16 *(c) If the identified action is subsequently modified in a manner that*
causes an effect to the listed species or critical habitat that was not
17 *considered in the biological opinion; or*

18 *(d) If a new species is listed or critical habitat designated that may be*
affected by the identified action.

19 50 C.F.R. § 402.16.

20
21 There is limited authority to bypass the formal consultation requirements under 50
22 C.F.R. § 402.05, which provides that informal consultation may be conducted where
23 "emergency circumstances mandate the need to consult in an expedited manner" so long
24 as the Director "determines to be consistent with the requirements of sections 7(a)-(d) of
25 the Act." However, this provision was limited in its application to "situations involving
26 acts of God, disasters, casualties, national defense or security emergencies, etc." 50 CFR
27 § 402.05. The circumstances and justifications for the emergency provided by the
28 Department cite economic costs associated with water treatment in selected urban

1 counties. The drought in California has been in place for at least 2 years and the dams
2 under consideration for at least 18 months.

3 The Service has failed to properly execute the procedural requirements of its own
4 emergency consultation procedures as outlined in the consultation guidance. Further the
5 Service has accepted economic arguments as an emergency, these circumstances do not
6 fit the commonly accepted definition of an emergency. Therefore under the citizen suit
7 provision of the ESA, CESAR seeks to ensure that the provisions of the ESA requiring an
8 incidental take permit be the only avenue for legal be enforced, and that the Department
9 be enjoined from further take and destruction of critical habitat of the delta smelt and
10 other listed species resulting from construction of a dam in the Delta.

11
12 **CESAR Is Entitled to a Temporary Restraining Order and a Preliminary
Injunction Requiring the Cessation of Construction on the Barrier**

13 CESAR's primary claim in this lawsuit is straightforward: construction of the
14 barrier is causing "take" of delta smelt. This "take" is a result of the mis-application of
15 "emergency consultation" provisions by the Service under the ESA. Each agency
16 involved has conceded in their assessments of the project that this action "may affect and
17 is likely to adversely affect the federally listed delta smelt", and potentially other listed
18 species. Further, both the Service and the Department are aware of the likelihood of
19 direct "take" by injury to individual members of the species as a result of the construction
20 activities.

21
22 **a. There is No Adequate Remedy at Law.**

23 If this TRO is not issued, the end result will likely be the extinction of the Delta
24 smelt. Clearly, there is no adequate remedy at law that would reverse the extinction of
25 the Delta smelt after they are already extinct.

26 The Supreme Court has indicated that the "language, history, and structure" of the
27 Endangered Species Act "indicates beyond doubt that Congress intended endangered
28 species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174, 98 S. Ct.

1 2279, 57 L. Ed. 2d 117 (1978). Congress "foreclosed the exercise of traditional equitable
2 discretion by courts" faced with a taking under the ESA. *Sierra Club v. Marsh*, 816 F.2d
3 1376, 1383 (9th Cir. 1987). "Environmental injury, by its nature, can seldom be
4 adequately remedied by money damages and is often permanent or at least of long
5 duration, i.e. irreparable. If such injury is sufficiently likely "an injunction will issue.
6 *Amoco Production Co. v. People of the Village of Gambell*, 480 U.S. 531, 546, 94 L. Ed.
7 2d 542, 107 S. Ct. 1396 (1987). Congress has decided that any possible expense and
8 inconvenience to the public cannot equal the potential loss from extinction. *Sierra Club*,
9 *supra*, at 1386 n. 13.

10 Here, there is little doubt given the BA explicitly states that the action "may affect
11 and is likely to adversely affect the federally listed Delta Smelt and critical habitat for the
12 Delta Smelt". The justification provided for in the April 20, 2015 the Department
13 "Request for Emergency Procedures and Modified ESA Consultation" ("Request for
14 Modified Consultation") is that:

15 *"due to California's severe drought conditions and the high uncertainty of*
16 *Delta water quality conditions this summer. The Department's recent*
17 *water quality modeling forecasts predict increasing Delta salinity from*
18 *sea water intrusion in the coming months that necessitate taking*
19 *immediate action to construct a Drought Barrier at West False River to*
avoid an emergency situation of unacceptable hazard to life, significant
property loss, and economic hardship."

20 The Request for Modified Consultation states that the "emergency" exists
21 because, despite the drought experienced for the past four years, the Department had
22 relied upon predictions by meteorologists which indicated that "significant rain and
23 snow" events would occur. To interpret the Department's failure to make provision for
24 California's water quality, in the likely event that the four year drought continued, as an
25 "emergency" within the meaning of the law and consistent with the ESA is absurdity.
26 Within the context of the regulation, clearly this is not the type of situation where such an
27 emergency exists.
28

1 This is further supported by the U.S. Supreme Court which defined "Act of God"
2 as a "loss happening in spite of all human effort and sagacity." *The Majestic*, 166 U.S.
3 375, 41 L. Ed. 1039, 17 S. Ct. 597 (1897).

4 Traditionally, a defense related to an "act(s) of God" has been widely defined as:
5 "any accident, due directly and exclusively to natural causes without human intervention,
6 *which by no amount of foresight, pains, or care, reasonably to have been expected could*
7 *have been prevented;*" and/or "a disturbance . . . of such unanticipated force and severity
8 as would fairly preclude charging . . . [Defendants] with responsibility for damage
9 occasioned by the [Defendants'] failure to guard against..." (emphasis added). *Skandia*
10 *Ins. Co. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1239 (S.D. Ala. 2001).

11 Clearly, given the prior attempts to install the barriers in the Delta, the length and
12 severity of the drought, and ability of the Department, with very little foresight to meet
13 the procedural requirements of the ESA, the current predicament related to salinity
14 control and the associated increased cost to meet water quality standards does not rise to
15 the level anticipated by the emergency consultation provisions.

16 The Department's Request for Modified Consultation purports to meet the
17 emergency consultation criteria in order to meet "essential health and human safety
18 needs". However, the only reference to those safety needs as it relates to salinity control
19 is the interest in preventing increased costs for water treatment. The Department
20 references "excessive sea water intrusion and prevent an emergency situation for Delta
21 water users this summer". There are two possible interpretations of Delta water users,
22 recreational user and water users. The Department makes no mention of any significant
23 safety concern for recreational users even though the Delta is an active area for
24 recreation. The Department mentions the economic costs to those water users affected by
25 the influx of salt water from the San Francisco Bay but fails to provide any but the most
26 speculative basis for health and human safety.

27 Given the enormous potential for environmental harm, and the unlikely result of
28 anything other than economic harm to the State, CESAR has no other adequate remedy at

1 law and this Court may properly enjoin the Defendants’ activities.

2
3 **b. Irreparable Injury Will Occur.**

4 The Department has failed to comply with basic procedural requirements of the
5 ESA intended to protect against activities that will result in “take” of listed species. This
6 is acknowledged both the in BA as well as in the Incidental Take Permit (No. 2081-2014-
7 028-03) issued by the California Department of Fish and Game (“CDFG”) related to take
8 of species listed under the California Endangered Species Act. As impacts of the
9 “taking” of those species, CDFG found that:

10 *“Project activities and their resulting impacts are expected to result in the*
11 *incidental take of individuals of the Covered Species. The activities*
12 *described above that are expected to result in incidental take of*
13 *individuals of the Covered Species include moving and placing rock,*
14 *hydroacoustic impacts from pile driving, river substrate disturbance*
15 *resulting in loss of natural river substrate, increased turbidity, suspended*
16 *sediments, localized changes to water quality and circulation patterns*
17 *affecting fish habitat quality, potential for release of contaminants into the*
18 *water, upland drilling, installation of sheetpile walls, construction*
19 *activities, and construction equipment moving materials in the upland*
20 *areas (Covered Activities).*

21 *Incidental take of individuals of the Covered Species in the form of*
22 *mortality ("kill") may occur as a result of Covered Activities such as fatal*
23 *injury, burial, entrapment, increased turbidity, temporary and permanent*
24 *loss of habitat. Incidental take of individuals of the Covered Species may*
25 *also occur from the Covered Activities in the form of pursue, catch,*
26 *capture, or attempt to do so of the Covered Species from deterrence from*
27 *migratory pathways, increased predation in the vicinity of the barrier,*
28 *crushing and injury from construction equipment and vehicle strikes in the*
staging area and other upland areas. The area where authorized take of
the Covered Species is expected to occur is West False River.”

CDFG conducts regular population surveys for Delta smelt. The following
information was reported on the CDFG website as population results for the 2015 Kodiak
Trawl Surveys:

Survey 1	January 12-15, 2015	
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		21 smelt (7 males, 13 females, 1 undetermined), including 4 at Station # 809
Survey 2	February 9-12, 2015	72 smelt (32 males, 40 females), including 10 at Station # 809, and 1 female at Station # 902
Survey 3	March 9-12, 2015	6 smelt (2 males, 4 females)
Survey 4	April 6-9, 2015	1 smelt (1 male)
Survey 5	May 4-7	8 smelt (1 male, 4 females, 3 undetermined)

Due to the method used for the Kodiak trawl data (a surface trawl only, and where the boat can go safely, typically mid-channel), there is no certainty that delta smelt will remain where they are caught during a survey. Additionally, several of the sites where delta smelt were found are within a very close proximity the West False River barrier construction site. Given the current low results of population surveys, the species is clearly already in danger of extinction. The Service has already found that the Delta smelt is in jeopardy of extinction, the current surveys are showing delta smelt populations are at their lowest ever (approximately half the previous low). Increased take of smelt must be assessed by the Service and determined whether or not it is sustainable. Any take of this miniscule population, raises the specter of extinction.

The ESA's primary goal is to prevent the extinction of imperiled plant and animal life, and secondly, to recover and maintain those populations by removing or lessening threats to their survival.

The threat of extinction of the Delta smelt is immediate and there is no other available remedy.

CONCLUSION

1 The Department and the Service have taken and continuing take actions are
2 “likely to adversely affect” Delta Smelt populations without an incidental take permit as
3 required by law.

4 In order to protect the Delta Smelt, which are teetering on the brink of extinction,
5 from the continued impacts of the construction and operation of a dam in their critical
6 habitat, this Court should enjoin all construction activities until issuance of an incidental
7 take permit and re-initiation of consultation with the Service is complete.

8 **WAIVER OF BOND REQUESTED**

9 In the Second, Sixth, Ninth, and Tenth Circuits appellate courts have found that
10 the trial judge has discretion to waive the bond requirement entirely. CESAR is a non-
11 profit public interest organization with limited resources. This action is brought in the
12 public interest of conservation of a threatened species. On that basis, CESAR is
13 requesting waiver of the bond under Fed. R. Civ. P 65. Courts have routinely waived or
14 provided only for a nominal bond in environmental cases. *See People ex rel. Van de*
15 *Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th Cir. 1985) (no bond
16 required for nonprofit environmental citizens group challenging regional planning
17 agency); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (bond
18 reduced from \$4,500,000 to \$1,000 in NEPA suit involving expansion of San Francisco
19 Airport); *Viavant v. Trans-Delta Oil & Gas Co.*, 7 ERC 1423, 1426 (10th Cir. 1974)
20 (\$100 bond in NEPA case); *Alabama v. Corps of Engineers*, 411 F.Supp. 1261, 12 ERC
21 1888 (N.D. Ala. 1976) (security of one dollar); *Wisconsin Heritages, Inc. v. Harris*,
22 (security bond waived in NEPA case); *Libeu v. Johnson*, 195 Cal.3d 517, 240 Cal. Rptr.
23 776 (1st Dist. Ct. App. 1987) (trial court had power to impose nominal bond in
24 environmental case notwithstanding nonindigency of plaintiff).

REQUEST FOR RELIEF

1
2
3 **WHEREFORE**, Plaintiff the Center for Environmental Science, Accuracy &
4 Reliability (“CESAR) hereby requests that the Court issue a Temporary Restraining Order
5 and Preliminary Injunction requiring Defendants Mark W. Cowin, in his official capacity
6 as Director of the California Department of Water Resources and the U.S. Fish and
7 Wildlife Service as required under the Endangered Species Act and for such other and
8 further relief as may deem just and proper.

9
10
11 DATED: June 10, 2015

/s/ Leah R. Zabel

12 By: Leah R. Zabel,
13 Attorney for Plaintiff,
14 CENTER FOR ENVIRONMENTAL
15 SCIENCE, ACCURACY & RELIABILITY