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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **AQUALLIANCE, a non-profit corporation, and**
7 **CALIFORNIA SPORTFISHING PROTECTION**
8 **ALLIANCE, a non-profit corporation,**

9 **Plaintiffs,**

10 **v.**

11 **UNITED STATES BUREAU OF**
12 **RECLAMATION, a federal agency; RICHARD J.**
13 **WOODLEY, in his official capacity; LOWELL**
14 **PIMLEY, in his official capacity; and DAVID**
15 **MURILLO, in his official capacity,**

16 **Defendants,**

17 **SAN LUIS & DELTA-MENDOTA WATER**
18 **AUTHORITY, et al.,**

19 **Defendant-Intervenors.**

20 **Case No. 1:14-CV-000945-LJO-BAM**

21 **MEMORANDUM DECISION AND**
22 **ORDER DENYING MOTION FOR**
23 **PRELIMINARY INJUNCTION**
24 **(DOC. 7)**

25 **I. INTRODUCTION**

26 Plaintiffs AquAlliance and the California Sportfishing Protection Alliance (“Plaintiffs”), both non-profit environmental organizations, bring this lawsuit against the United States Bureau of Reclamation (“Reclamation” or “the Bureau”), as well as various federal officers¹ (collectively, “Federal Defendants”), alleging that the Bureau violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, by approving the “2014 San Luis & Delta-Mendota Water Authority Water Transfer Project” (the “2014 Transfer Project”), which would permit water rights holders or contractors north of the Sacramento-San Joaquin Delta (“Delta”) to sell water to members of the San Luis & Delta-

¹ The Complaint also names in their official capacities Richard Woodley, Regional Resources Manager of the Bureau’s Mid-Pacific Regional Office; Lowell Pimley, Acting Commissioner of the Bureau; and David Murillo, Regional Director of the Bureau’s Mid-Pacific Regional Office. Doc. 1, Compl., at ¶¶ 18-20.

1 Mendota Water Authority (“SLDMWA”), whose members then would make use of the water in areas
2 that lie south of the Delta. Doc. 1 (“Compl.”) at ¶ 57. The Bureau’s role would be to review any
3 proposed transfers and facilitate those transfers by conveying the water through the Delta by way of the
4 Jones and Banks Pumping Plants and the Delta-Mendota Canal. *Id.*

5 In April 2014, the Bureau issued an Environmental Assessment (“EA”) and approved a Finding
6 of No Significant Impact (“FONSI”) for the 2014 Transfer Project under NEPA, 42 U.S.C. § 4321, *et*
7 *seq.* Among other things, the EA and FONSI state that “[s]pecial status fish species,” such as the Delta
8 smelt, “are generally not in the Delta during the transfer period (July-September) and effects to these
9 fish species from transferring water during this timeframe were considered in the [National Marine
10 Fisheries Service and U.S. Fish and Wildlife Service Biological Opinions].” Declaration of Kaylee Allen
11 (“Allen Decl.”), Doc. 33-1, Ex. 2 (“Final EA”) at 3-13; Allen Decl., Ex. 3 (“FONSI”) at 8.²

12 Plaintiffs allege that the Bureau’s approval of the 2014 Transfer Project violated NEPA in two
13 ways.³ First, Plaintiffs assert that the Final EA and FONSI’s conclusion that Delta smelt will not be
14 present in the interior Delta is arbitrary and capricious because it fails to acknowledge that, due to
15 hydrologic conditions and pumping practices, the low-salinity zone (“LSZ”), in which Delta smelt
16 normally reside during the relevant time of the year, will move into the central Delta this year. Doc. 8 at
17 14. Plaintiffs also assert that the Bureau should have prepared a supplemental EA to take into
18 consideration “significant new information” that ostensibly emerged after the issuance of the EA,
19 namely (1) the May 2, 2014 State Water Resources Control Board (“SWRCB”) order that relaxed Delta
20 water quality standards; and (2) an analysis performed by Plaintiffs’ expert, Tom Cannon, that purports
21 to show that the method used to estimate Delta outflow for management purposes underestimates actual
22 Delta outflow. *Id.* at 11.

23 This case was originally filed in the Sacramento Division of the Eastern District of California,
24

25 ² The EA and FONSI are attached to the Allen Declaration as Exhibits 2 and 3, respectively. For ease of reference, whenever
the Court refers to either document herein, it will use the internal page references provided in the original documents.

26 ³ The Complaint raises several other NEPA claims. But, given that Plaintiffs do not raise those claims in the present motion,
they will not be discussed herein.

1 but was transferred to the undersigned in the Fresno Division pursuant to Local Rule 123 (Related
2 Cases). Doc. 24. On June 23, 2014, the Court granted the unopposed petition for intervention of
3 SLDMWA and Westlands Water District, one of SLDMWA's member water districts (collectively,
4 "Defendant-Intervenors"). Doc. 31.

5 Before the Court is Plaintiffs' motion for a preliminary injunction that would bar Federal
6 Defendants from approving or carrying out any water transfers under the 2014 Transfer Project. Doc. 8.
7 Although Plaintiffs' motion was not filed until June 13, 2014, in light of the allegation that transfers are
8 scheduled to take place between July 1, 2014 and September 30, 2014, Plaintiffs' motion to shorten time
9 was granted and a hearing was set for July 10, 2014. *See* Docs. 14 & 22. Federal Defendants and
10 Defendant Intervenors filed oppositions on June 27, 2014. *See* Docs. 33 & 48. Plaintiffs filed a reply on
11 July 3, 2014. Doc. 64. On July 7, 2014, the Court requested supplemental briefing on several discrete
12 legal issues and vacated the July 10 hearing. Doc. 71. The parties responded to the Court's request on
13 July 9, 2014. Docs. 72-74. Having reviewed the entire record, the Court finds this matter suitable for
14 decision on the papers pursuant to Local Rule 230(g). As set forth below, the Court finds that Plaintiffs
15 are not likely to succeed on the merits of the NEPA claims presented and that, therefore, the pending
16 motion for a preliminary injunction must be DENIED.

17 **II. STANDARD OF DECISION**

18 In order to secure injunctive relief prior to a full adjudication on the merits, a plaintiff must show
19 "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
20 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public
21 interest." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is "an
22 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such
23 relief." *Id.* at 22.

24 The Ninth Circuit follows a "sliding scale" approach to preliminary injunctions. *See Alliance for*
25 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Under this approach, a weaker
26 showing as to the likelihood of success on the merits may be offset by a stronger showing with respect

1 to the balance of the equities. *Id.* at 1131-32. For example, if the moving party is unable to establish a
2 likelihood of success on the merits, preliminary injunctive relief may still be had if the movant can show
3 that (1) there are at least “serious questions” going to the merits; (2) the balance of the hardships tips
4 “sharply” in its favor; and (3) the other factors listed in *Winter* (*i.e.*, irreparable harm and in the public
5 interest) are satisfied. *Id.* at 1135. “Serious questions” in the context of preliminary injunctive relief are
6 those that are “substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus
7 for more deliberative investigation.” *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir.
8 1988) (citation and internal quotation marks omitted). They do not need to “promise a certainty of
9 success, nor even present a probability of success, but must involve a fair chance of success on the
10 merits.” *Id.* (citation and internal quotation marks omitted).

11 **III. BACKGROUND**⁴

12 The Central Valley Project (“CVP”) and the State Water Project (“SWP”), “operated
13 respectively by [Reclamation] and the State of California, are perhaps the two largest and most
14 important water projects in the United States.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747
15 F.3d 581, 592 (9th Cir. 2014) (“*San Luis v. Jewell*”). “These combined projects supply water originating
16 in northern California to more than 20,000,000 agricultural and domestic consumers in central and
17 southern California.” *Id.* As part of CVP operations, Reclamation releases water stored in CVP
18 reservoirs in northern California, which then flows down the Sacramento River to the Delta. *Id.* at 594.
19 Pumping plants in the southern region of the Delta then divert water through the Delta-Mendota Canal
20

21 ⁴ Normally, judicial review of agency action is limited to the administrative record (“AR”). 5 U.S.C. § 706 (directing the
22 court to “review the whole record or those parts of it cited by a party”); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729,
23 743–44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review ... to the agency decision
24 based on the record the agency presents to the reviewing court.”). At this preliminary stage, the AR has yet to be certified.
25 So, in describing the background of this case, the Court has relied primarily upon judicially noticeable official agency
26 documents. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (a court may take judicial notice of “matters
of public record”); *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 732 (N.D. Cal. 2011) (“It is well
established that records, reports, and other documents on file with administrative agencies... are judicially noticeable.”). In
addition, the Court has referenced a limited number of declarations that provide background information on the highly
technical material at issue in this case. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 573 (9th Cir. 1998)
“([T]he court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency’s
action where such evidence is necessary as background to determine the sufficiency of the agency’s consideration.”) (internal
citation and quotation omitted).

1 and other facilities to various users, including members of SLDMWA.⁵

2 As a condition of Reclamation's operation of CVP facilities in the Delta, Reclamation must
3 comply with SWRCB Decision 1641 ("D-1641"). *See Pac. Coast Fed'n of Fishermen's Assoc'ns v.*
4 *Gutierrez*, 606 F. Supp. 2d 1122, 1133 (E.D. Cal. 2008). D-1641 implements the Bay Delta Water
5 Quality Control Plan through modifications to the CVP, SWP, and other water rights permits. *See*
6 *generally* Allen Decl., Ex. 12 (hereinafter cited only as "D-1641"). D-1641 affects operations of the
7 CVP by regulating salinity levels in the Delta, setting minimum Delta outflow requirements, and
8 regulating export rates of the federal and state water projects. *Id.*

9 Reclamation provides CVP water to users through different types of contracts provided for under
10 Reclamation Law. *See Tehama-Colusa Canal Auth. v. U.S. Dep't of the Interior*, 721 F.3d 1086, 1091
11 (9th Cir. 2013) (summarizing the types and priorities of contracts within the CVP). Because of the
12 extreme drought conditions in California, this water year Reclamation anticipates delivering to
13 Sacramento River Settlement Contractors 75% of their contract supplies, and 0% of contract supplies to
14 south-of-Delta water service contractors, including SLDMWA. Final EA 1-3; Decl. of Richard Woodley
15 ("Woodley Decl."), Doc. 47, at ¶ 6.

16 **A. Delta Smelt.**

17 The Delta is "the lone habitat for the delta smelt, a threatened species under the Endangered
18 Species Act." *San Luis v. Jewell*, 747 F.3d at 592. It is undisputed that the delta smelt is in "imminent
19 danger of extinction." *Id.* at 595-96. "The 2008 delta smelt population was estimated at 1.5% of [its]
20 1980 level ... and 2009 levels were estimated to be the lowest on record." *Id.* at 596 n. 4.

21 "In 2008, Reclamation requested a biological opinion [{"2008 BiOp"}] from the U.S. Fish and
22 Wildlife Service [{"FWS"}], in accord with the [Endangered Species Act ("ESA")], on whether its
23 continued operations would jeopardize the smelt." *Id.* at 592. In its 2008 BiOp, FWS informed

25 ⁵ Reclamation operates the Jones Pumping plant, while the California Department of Water Resources ("DWR") operates the
26 Banks Pumping plant as part of the SWP. *San Luis v. Jewell*, 747 F.3d at 594-95. The federal and state agencies coordinate
operations. *See San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, 905 F. Supp. 2d 1158, 1164 (E.D. Cal.
2012).

1 Reclamation that continued, long-term CVP operations would jeopardize the continued existence of the
2 delta smelt, but proposed a multi-component “reasonable and prudent alternative” (“RPA”) that would
3 avoid jeopardy, which Reclamation has adopted and is implementing. *Id.*; Allen Decl., Ex. 4 (2008
4 BiOp) at 294-300.⁶

5 The 2008 BiOp references as relevant to CVP impacts upon delta smelt two related measures of
6 describing salinity in the Delta. *San Luis v. Jewell*, 747 F.3d at 595 (citing 2008 BiOp at 147). The first
7 standard is the LSZ, which “is the transition point between the freshwater of the inland rivers and
8 brackish water flowing eastward from San Francisco Bay and the Pacific Ocean, and includes water
9 ranging in salinity from 0.5 parts per thousand to six parts per thousand.” *Id.* (citing 2008 BiOp at 191).
10 The second standard, “X2,” represents the point in the Delta where the average daily salinity at the
11 bottom of the water column is two parts per thousand. *Id.* “The LSZ, which encompasses a larger region
12 of the []Delta, is generally centered around X2.... The agencies use X2 as a marker for the LSZ as well
13 as a habitat indicator for fish and as a regulatory standard.” *Id.*

14 The 2008 BiOp⁷ found that X2 generally tracks the “center point of the LSZ, which is considered
15 suitable spawning habitat for the smelt.” *Id.* at 616 (citing 2008 BiOp at 236). In 2010, FWS further
16 explained:

17 From late spring through fall and early winter, delta smelt are located at
18 the LSZ, which moves depending upon San Francisco Bay-Delta water
19 outflow [citation]. Reduced Delta water outflow causes the LSZ to move
20 upstream, which seems to concentrate delta smelt in a smaller area along
21 with other competing planktivorous fishes [citation]. Causes of such
22 reduced outflows include smaller upstream releases from dams, increased
23 water exports from the State and Federal facilities, and upstream water
24 diversions for flooding rice fields [citation]. Low freshwater outflows in
25 the fall have been correlated with a reduced abundance index for young
26 delta smelt the following summer [citation].

23 ⁶ The Court will also use the 2008 BiOp’s own internal page references.

24 ⁷ The 2008 BiOp was upheld in its entirety by the Ninth Circuit. *San Luis v. Jewell*, 747 F.3d at 616-34 (petition for rehearing
25 en banc pending). While litigation over the 2008 BiOp is ongoing, the BiOp has not been vacated: “[a]bsent lawful
26 modifications, the CVP and SWP are required to operate in compliance with the existing RPAs.” *In re Consol. Delta Smelt
Cases*, 2013 WL 1455592, at *9 (E.D. Cal. Apr. 9, 2013). Reclamation is also currently in the process of developing an
Environmental Impact Statement (“EIS”) under NEPA “evaluating the effects of its adoption and implementation of the
BiOp’s RPAs.” *San Luis v. Jewell*, 747 F.3d at 642.

1 Delta smelt are also believed to require relatively turbid (not clear) waters
2 to capture prey and avoid predators [citation]. Increased water clarity
3 during the summer and fall has been shown to be negatively correlated
4 with subsequent summer delta smelt abundance indices [citation]. Since
5 1978, delta smelt have become increasingly rare in summer and fall
6 surveys of the San Joaquin region of the San Francisco Bay-Delta
7 [citation]. The primary reason appears to be the comparatively high water
8 clarity in the region, although high water temperatures are also likely a
9 contributing factor [citation]. The increased water clarity in delta smelt
10 rearing habitat is attributed to the interruption of sediment transport by
11 upstream dams [citation] and the spread of the exotic invasive water plant
12 [citation], which traps suspended sediments [citation].

13 75 Fed. Reg. 17,667-01, 17,669 (Apr. 7, 2010).

14 **B. SWRCB Winter/Spring Temporary Urgency Change Orders.**

15 This Court recently recognized the historic nature of drought conditions facing Californians in
16 2014:

17 There is no dispute that California is in the midst of an historic, extreme
18 drought. In early May 2014, the California Department of Water
19 Resources (“DWR”) projected hydrologic conditions in both the
20 Sacramento Valley and the San Joaquin Valley will be Critically Dry for
21 Water Year 2014. On January 17, 2014, the Governor of California issued
22 a drought emergency proclamation, followed by a second proclamation on
23 April 25, 2014. In light of the current conditions, the [SWRCB] issued
24 several Temporary Urgency Change Orders to the CVP and SWP (“the
25 Projects”), temporarily modifying implementation of [] D-1641, which
26 regulates salinity levels in the Delta by requiring minimum outflow
requirements and regulating exports by the Projects. Among other things,
the State Water Board’s Temporary Urgency Change Orders require the
Projects to take measures to maintain upstream storage, including reducing
Delta outflow requirements and reducing allowable exports. *Id.* Among
other things, relevant federal and state agencies collaborated to develop
the [CVP] and [SWP] Drought Operations Forecast (“Drought Operations
Plan”) in order to meet requirements placed on the Projects by the State
Water Board and to meet requirements under the [ESA].

27 *Friant Water Auth. v. Jewell*, 2014 WL 2197993, ___ F. Supp. 2d ___, at *7 (E.D. Cal. May 27, 2014)

28 (internal citations omitted).

29 Relevant to this case, the SWRCB’s first TUC Order of the year, issued on January 31, 2014,
30 modified the minimum Delta outflow levels to allow for a Net Delta Outflow Index (“NDOI”) of no less
31 than 3,000 cubic feet per second (“cfs”) in February, and “restricted exports in the Delta at the SWP and
32

1 CVP pumping facilities to health and safety needs of no more than 1,500 cfs, with the exception of
2 transfers.” *See* Allen Decl., Ex. 20 at 2. Because compliance with the unmodified requirements of
3 D-1641 is assumed in the 2008 BiOp, in conjunction with each TUC petition and in order to ensure
4 compliance with the ESA, Reclamation sought concurrence from FWS that there would be no additional
5 adverse effects on delta smelt or its critical habitat due to the requested changes to D-164 beyond the
6 effects recognized in the 2008 BiOp. *See* Declaration of Ren Lohofener (“Lohofener Decl.”), Doc. 47-
7 2, at ¶¶ 6-7. The first of these concurrence requests occurred in conjunction with the January TUC
8 petition. In a memorandum dated January 31, 2014, FWS concurred that the January 31 proposed
9 modifications to D-1641, including the transfer exemption to outflow, would not cause any additional
10 adverse effects on delta smelt or its critical habitat beyond those already analyzed in the 2008 BiOp. *Id.*
11 at ¶ 6; Allen Decl., Ex. 25 at 2.

12 Although the proposed departure from D-1641 was not anticipated in the
13 Project Description of the BiOp, or the modeling in the biological
14 assessment, the proposed relaxation, based on the provisions provided in
15 the TUC Petition and existing hydrologic and biological conditions for the
16 month of February appear to be within the range of effects previously
17 analyzed in the 2008 BiOp. Therefore, the Service concurs with
18 Reclamation’s determination that the proposed modifications will have no
19 additional adverse effects on delta smelt or its critical habitat. As
20 described on p 280 of the BiOp, we will continue to utilize the adaptive
21 process on a weekly basis to proactively meet the biological needs of the
22 delta smelt within the constraints of the critically dry water year
23 conditions.

19 In the petition, Reclamation and DWR have proposed to convene a team
20 of managers from Reclamation, DWR, SWRCB, California Department of
21 Fish and Wildlife (DFW), National Marine Fisheries Service (NMFS), and
22 the Service in order to coordinate management of water supplies and
23 protection of natural resources during the course of the declared drought
24 emergency.

22 During any period in which Reclamation and DWR are operating the
23 Projects under a temporary change order, there will be close coordination
24 on current and projected operations on a weekly basis through existing
25 meetings (Smelt Working Group, Delta Conditions Team, Water
26 Operations Management Team, etc.). The Service will continue to make
weekly determinations under our RPA actions (to include consideration of
operations pursuant to a temporary change order) regarding whether
changes in operations are necessary to protect listed fish species....

1 Allen Decl., Ex. 25 at 2 (emphasis added). FWS concurred with other TUC Orders and other drought-
2 related operational changes for the first part of the year on February 28 and March 14. *See* Allen Decl.,
3 Exs. 10 & 21.

4 **C. Reclamation's Long-Term Water Transfer Planning & NEPA Compliance.**

5 In recent years Reclamation has reviewed and approved numerous short-term plans that facilitate
6 the voluntary transfer of water from willing sellers north of the Delta to willing buyers south of the Delta
7 who may be experiencing water shortages. *See* Allen Decl., Ex. 5 at 5, Ex. 2 at 23; Woodley Decl. at ¶ 3.
8 “Such transfers are used more often in dry years when water supplies are limited and there is greater
9 capacity at CVP facilities to convey water across the [Delta] through the export facilities because of the
10 limited availability of CVP water supplies.” Woodley Decl. at ¶ 2. On January 17, 2014, and April 25,
11 2014, the Governor of California issued Emergency Drought Proclamations emphasizing the importance
12 of transfers as a tool to be used during drought conditions. *See* Allen Decl., Ex. 11. Reclamation is
13 currently preparing an Environmental Impact Statement (“EIS”) under NEPA that would cover potential
14 future water transfers for a period of up to 10 years, and anticipates releasing a draft to the public in
15 September 2014. Woodley Decl. at ¶ 12.

16 **D. 2014 Water Transfer Project & Draft EA.**

17 SLDMWA members are among the CVP contractors located south of the Delta who will
18 experience severe shortages of water this year and have been seeking potential transfers of water. *See*
19 Final EA at 1-2. Accordingly, the 2014 Transfer Project proposes “the transfer of water in contract year
20 2014 to Participating Members of the SLDMWA.” *Id.* at 2-1. Reclamation’s role in those transfers will
21 be to approve and facilitate the transfer through use of federal facilities. *See id.* at 1-2.

22 In order to evaluate the potential environmental effects of Reclamation’s “proposed action”
23 approving and facilitating of the transfer of up to 175,226 AF of water in 2014, and to determine
24 whether the proposed action would result in significant environmental impacts, Reclamation prepared
25 and released a Draft Environmental Assessment (“Draft EA”) on March 13, 2014 for public comment.

26 *See* Allen Decl., Ex. 1. The Draft EA states:

1 Water transfers would slightly increase river flows downstream of the
2 point of diversion relative to the No Action Alternative during the transfer
3 period. Reclamation is consulting frequently with USFWS and NMFS on
4 CVP and SWP operations relative to the [BiOps] and special status fish
species in the Delta. Special status fish species would not be affected by
the Proposed Action beyond those impacts considered by the BOs and
current consultations with NMFS and USFWS.

5 *Id.* at 15. The Draft EA also mentions the fact that on January 31, 2004 the SWRCB approved a
6 Temporary Urgency Change (“TUC”) Order that relaxed certain Delta regulatory requirements governed
7 by D-1641 and states that Reclamation will operate to the TUC Order as it may be amended and as
8 necessary to address critically dry conditions. *Id.*

9 **E. Plaintiffs’ Comments on the Draft EA.**

10 On April 2, 2014, AquAlliance, through counsel Thomas Lippe and member Barbara Vlamis,
11 submitted comments on the EA. Mr. Lippe’s comments related to air quality impacts. Allen Decl., Ex. 2
12 at 115-21. Ms. Vlamis’s comments referenced an analysis by Thomas Cannon entitled “Summer 2013:
13 The demise of Delta smelt under D-1641 Delta Water Quality Standards,” and stated:

14 On page 3-13, the EA/IS continues its discussion to support the finding of
15 Less Than Significant Impact for, “[a]ny species identified as a candidate,
16 sensitive, or special status species in local or regional plans, policies, or
17 regulations, or by the California Department of Fish and wildlife or U.S.
18 Fish and Wildlife Service,” with NMFS excluded as noted above (p.3-11).
19 The EA/IS concludes that, “The incremental effects of transfers on special
20 status fish species in the Delta from water transfers would be less than
21 significant.” What data and analysis support this conclusion and where is
22 the material found? Analysis conducted by Thomas Cannon contradicts
the Less Than Significant Impact finding with disturbing results from the
summer of 2013. His research reveals that summer water transfers are
devastating, especially in dry years when the low salinity zone is in the
western Delta and smelt are stuck within the Delta and threatened by
warm water, which has been made available for transfer by either
fallowing or groundwater substitution, and predators[.]

22 *Id.* at 134 (emphasis added) (footnote omitted).

23 Reclamation responded to both of those submissions in its Final EA. *See id.* at 165-67, 175.
24 Specifically, in response to Ms. Vlamis’s comment, the EA cited to FWS’s 2008 BiOp for the
25 proposition that delta smelt are not near the pumps in the summer months and would not be affected by
26 transfers, stating:

1 Water transfers are a small portion of total Project deliveries during the
2 summer months. Resource agencies, including USFWS and NMFS,
3 evaluated the effects of water transfers in the Biological Opinions and
4 placed limitations on transfers during the July – September period to
5 reduce potential effects. The agencies found that transfers would not affect
6 special status fish species given these constraints. The cited paper by
7 Thomas Cannon does not specifically mention water transfers at all
8 throughout the document. USFWS evaluated impacts to Delta smelt in the
9 Biological Opinions and concluded that smelt are not near the pumps in
10 the summer months and would not be affected by water transfers.

11 *Id.* at 175.

12 **F. Reclamation’s Consultation with FWS Regarding Transfers.**

13 In accordance with its obligations under Section 7 of the ESA, 16 U.S.C. § 1536, on March 26,
14 2014, Reclamation requested consultation with FWS on the potential effects of 2014 transfers on listed
15 species and their designated critical habitats. *See* Allen Decl., Ex. 6 at 1. On April 17, 2014,
16 Reclamation provided an amended Biological Assessment (“BA”)⁸ that included the latest information
17 on drought planning and water allocations. *See* Allen Decl., Ex. 5 at 11 (discussing the operational
18 parameters, including the January 31 TUC Order as may be amended).

19 The starting point for this consultation was the 2008 BiOp, which discussed the potential effects
20 of transferring up to 600,000 AF of water in “critical” and “dry” years, and anticipated that transfers
21 would be limited to the months of July through September, when “delta smelt are rarely present in the
22 Delta[.]” 2008 BiOp at 229. Among the five RPA components included in the 2008 BiOp, Components
23 1 and 2 limit reverse flows in Old and Middle Rivers (“OMR”) caused by the Jones and Banks pumping
24 plants in order to “to reduce entrainment of pre-spawning adult delta smelt during December to March
25 by controlling OMR flows during vulnerable periods” and “improve flow conditions in the Central and
26

⁸ Section 7(c) of the ESA mandates the preparation of a BA when a listed species may be present in a project area. 16 U.S.C. § 1536(c). A BA is a condition precedent for the eventual issuance of a biological opinion, if a biological opinion is needed. *See* 50 C.F.R. § 402.12(k)(2) (2006) (stating, inter alia, that a biological assessment may be used in “(I) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion”). If, as a result of preparing a BA, the action agency concludes that the proposed action is likely to adversely affect listed species or appreciably modify critical habitat, then formal consultation under the ESA is required. *See* 50 C.F.R. § 402.14. If listed species are present and likely to be affected by the described action, the consulting agency must prepare a formal biological opinion, which details how the action will affect the listed species and whether the proposed action is likely to “jeopardize” the species or adversely destroy or modify critical habitat. 50 C.F.R. § 402.14(h).

1 South Delta so that larval and juvenile delta smelt can successfully rear in the Central Delta and move
2 downstream[,]” respectively. *Id.* at 280. The RPA does not limit reverse flows between July and
3 September, *id.* at 280-85, in part because smelt are not thought to be able to transit that part of the delta
4 in the summer because the temperatures are too high. *See id.* at 364 (“As temperatures rise, trawl data
5 continue to show no fish in the Central and South Delta, and salvage does not occur, OMR flows will be
6 allowed to become as negative as -5,000 cfs. When temperature rises and turbidity drops to levels likely
7 to be inimical to delta smelt (> 25°C, turbidity <12 NTU), no further restrictions are needed as long as
8 salvage remains at or close to zero.”); *see also id.* at 151, 282, 358.

9 In a memorandum dated April 21, 2014, FWS determined that the effects of the 2014 Transfer
10 Project summarized in the amended BA were covered by the consultation on the 2008 BiOp and that no
11 additional adverse effects to delta smelt or designated critical habitat, or increased incidental take as a
12 result of the 2014 transfers were anticipated to occur. *See Allen Decl.*, Ex. 6 at 2.

13 **G. Final EA on 2014 Transfer Project.**

14 Following receipt of the April 21, 2014 concurrence memorandum from FWS, Reclamation
15 issued a Final EA and FONSI on April 22, 2014, determining, among other things, that the incremental
16 effects of the subject water transfers on special status fish species in the Delta, including delta smelt,
17 would be less than significant. FONSI at 9. The Final EA states:

18 The Proposed Action would result in increased conveyance [of water] through the
19 Delta during the transfer period (July through September, unless it shifts based on
20 feedback from NMFS and USFWS). Special status fish species are generally not
21 in the Delta during the transfer period (July-September) and effects to these fish
22 species from transferring water during this timeframe were considered in the
[National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service
(FWS) Biological Opinions]. Transfers would slightly increase inflow into the
Delta, but would not change outflow conditions as compared to the No Action
Alternative. The incremental effects of transfers on special status fish species in
the Delta from water transfers would be less than significant.

23 Final EA at 3-13 (emphasis added).

24 The EA/FONSI did not directly approve any water transfers. After issuing the FONSI,
25 Reclamation began to receive written transfer requests and written proposals from the willing sellers for
26 approval, which it is currently reviewing. *See Woodley Decl.* at ¶¶ 8-9. As of July 3, 2014, Reclamation

1 anticipated approving four such transfers by as early as July 7, 2014. Second Declaration of Ronald
2 Milligan, Doc. 67-1, at ¶ 2. Upon approval, Reclamation will begin adjusting CVP operations to make
3 deliveries pursuant to the transfer agreements. *Id.* at ¶ 4. Shortly after commencement of transfer
4 operations, Reclamation anticipates transfers will account for approximately 100 cfs of total CVP
5 exports. *Id.* at ¶ 5. As more transfers are approved, transfers are anticipated to account for up to 300 cfs
6 of exports at Jones Pumping Plant later in July through September. *Id.*

7 **H. The Drought Operations Plan, May 2, 2014 SWRCB TUC Order, and FWS Review.**

8 On April 8, 2014, state and federal agencies issued a Drought Operations Plan (“DOP”) and
9 Operational Forecast. *See* Declaration of Ronald Milligan, Doc. 47-1, at ¶ 13; Allen Decl., Ex. 7 at 3.
10 The DOP outlined proposed operations for April and May, and two possible operational scenarios for
11 June through November, varying the deployment of physical barriers in the Delta. *See* Lohofener Decl.
12 at ¶ 7; Allen Decl., Ex. 7 at 81. The DOP mentions that transfers may take place, but notes that increased
13 pumping rates that may be necessitated by the transfers were not included in the description of the DOP.
14 Allen Decl., Ex. 7 at 15. Reclamation transmitted this DOP and Operational Forecast, along with a
15 biological assessment of the effects of implementing the DOP, to FWS on April 8, 2014, again seeking
16 concurrence that drought response actions proposed by Reclamation and DWR in the DOP would result
17 in no additional adverse effects to delta smelt or its critical habitat for the remainder of Water Year 2014
18 beyond those analyzed in the 2008 BiOp. *Id.* at 1. By memo dated April 8, 2014, FWS concurred with
19 Reclamation’s determination that the proposed modifications for April and May would have no
20 additional adverse effects on delta smelt or its critical habitat, but requested additional information
21 before making a determination for June onward. *See* Lohofener Decl. at ¶ 7; Allen Decl., Ex. 8 at 8.

22 On April 29, Reclamation and DWR applied to the SWRCB for a further modification of the
23 TUC Order. *See* Allen Decl., Ex. 20 at 1. Reclamation proposed to extend the modified 3,000 cfs NDOI
24 requirement that had already been applied to February, March, and April into May and July. *Id.* at 2-3.

25 On May 1, 2014, Reclamation transmitted a memorandum and additional information to FWS
26 regarding the DOP. *See* Lohofener Decl. ¶ 8; Allen Decl., Ex. 9. This information clarified that

1 operations in June through November would be implemented as described in the DOP's scenario that
2 did not include any physical delta barriers. Allen Decl., Ex. 9 at 1, 3. It also assumed approval by the
3 SWRCB of a TUC Order that would extend the modified 3,000 cfs NDOI requirement into May and
4 July. *Id.* at 4. Risks to smelt from the modifications were discussed, including potential habitat
5 constraints due to the upstream tidal excursion of higher salinity water, *id.* at 6-7, and the potential for
6 additional entrainment at the pumps, *id.* at 10. The memorandum also contained real-time data from
7 April 2014 showing "that the majority of the adult population" were then located in the Sacramento
8 Deep Water Shipping Cannel, "outside of the influence of the export facilities." *Id.* at 11, 13-14. The
9 report acknowledged that a limited distribution of smelt larvae were being entrained at the pumps, but
10 explained these individuals would be lost to the population regardless of pumping because of the high
11 temperature "off-ramp" to RPA Action 3 at the end of June, *id.* at 12, 15, and in any event, "Delta
12 Smelt[, including juveniles,] do not use the South Delta as habitat during the [summer and fall] months."
13 *Id.* at 15.

14 In a May 1, 2014 response memorandum, FWS concurred with Reclamation that the proposed
15 modifications for June through November, including a minimum monthly NDOI of 3,000 cfs for the
16 month of July, and a change in the Salinity Standard compliance location to Three Mile Slough, would
17 have no additional adverse effects on delta smelt or its critical habitat beyond those previously analyzed
18 in the 2008 BiOp. *See* Lohofener Decl. at ¶ 8; Allen Decl., Ex. 10 at 3-4. On May 2, 2014, the SWRCB
19 issued its amended TUC Order adopting the changes Reclamation and DWR had proposed. Allen Decl.,
20 Ex. 20 at 1.

21 **I. Plaintiffs' Request for Supplemental NEPA Review.**

22 On May 30, 2014, Plaintiffs, through counsel, sent Reclamation a letter requesting supplemental
23 NEPA review of the 2014 Transfer Project. Doc. 10, Ex. 1. The letter asserted that the SWRCB May 2,
24 2014 TUC Order constituted "changed circumstances" requiring a supplemental EA. *Id.* at 1. In
25 addition, the letter pointed to a "Review of Summer 2014 Water Transfers Federal Environmental
26 Assessment, Report by Tom Cannon, May 29, 2014," in support of the assertion that the SWRCB's May

1 2, 2014 TUC Order would cause the LSZ to shift further to the east, thereby exposing delta smelt to
2 adverse conditions and higher mortality. *Id.* at 6-7. The letter asserted that Tom Cannon's May 29, 2014
3 Report, constituted "new information" not previously analyzed in the April 22, 2014, FONSI. *Id.* at 1.

4 Reclamation solicited two expert biologists in the field to review Mr. Cannon's May 29 Report.
5 Allen Decl., Ex. 26 at 1. Those two experts concurred that the concerns outlined in Mr. Cannon's May
6 29 Report were without merit. Ms. Frances Brewster opined, in pertinent part:

7 [The] arguments make no sense to me.

8 1. They claim there will be higher mortality due to higher temperatures at
9 3-mile slough than at Emmation. That claim is not supported by the data. I
10 compared temps at Emmation with those at Rio Vista for 7/1/2013 through
11 10/2/2013 (the transfer window). Rio vista is considerably further
upstream than 3-mile slough, but the 3-mile slough station doesn't have a
temp sensor. The average difference in temperature is 0.5 degrees F... That
difference in temperature is insignificant....

12 2. They claim there will be increased entrainment of young-of-the-year
13 due to higher reverse flows. The BiOps have no OMR requirements during
14 the transfer window and in a typical year OMRs can be upwards of -8000
15 cfs.... There is no BiOp OMR requirements [sic] during the transfer
window timeframe because entrainment risk is so low based on historic
data.

16 *Id.* at 1. Dr. Erwin Van Nieuwenhuysen agreed:

17 I read Tom Cannon's report and Frances Brewster's comments and agree
18 with Frances' assessment. I don't think that Tom's concerns about
19 increased entrainment are warranted given how low OMR flows are
20 expected to be and his concerns about increased water temperature and
21 reduced turbidity and foodweb productivity are also off the mark. As
22 frances points out, the area of the [LSZ] will not change appreciably and
23 the temperature difference between Emmation and Rio Vista is negligible.
24 Under these low flow conditions, turbidity in the LSZ is mostly a function
25 of wind induced sediment resuspension rather than flow. Similarly, I
26 would not expect the proposed water transfers to have any discernible
effect on the LSZ foodweb. Most of the smelt population now resides in
the Sacramento Deepwater ship channel upstream of Cache Slough. The
ship channel offers relatively high food supplies for smelt and is thermally
stratified during July-Oct. Our data indicate that temperature in the lower
half of the water column (below six meters) remains below 23 C during
summer-fall. The ship channel is thus a temperature refuge for over-
summering fish. By contrast, unless management actions are taken to
stimulate a fall phytoplankton bloom in the lower Sacramento River, the
LSZ during the water transfer period is likely to remain relatively food-
poor with water temperatures at or near the 25 C threshold. I do not think

the proposed transfer would increase the likelihood of delta smelt extinction.

Id. at 2. Based on these comments, Reclamation determined that the impacts of the information provided were already covered in the existing EA and that no changes were warranted. *Id.* at 3.

On June 10, 2014, Plaintiffs' counsel again wrote Reclamation pointing to a second report by Mr. Cannon purporting to show that NDOI "grossly overestimates actual Delta outflow." Doc. 10, Ex. 2 at 3. Plaintiffs again asserted this report constituted new information requiring supplemental NEPA analysis. *Id.* Plaintiffs filed this lawsuit the next day, on June 11, 2014. Doc. 1.

IV. DISCUSSION

A. Likelihood of Success on the Merits.

1. Applicable Legal Standards.

a. NEPA.

"NEPA is our 'basic national charter for protection of the environment.'" *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1). "Although NEPA does not impose any substantive requirements on federal agencies, it does impose procedural requirements." *N. Idaho Cmty. Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). "Through these procedural requirements, NEPA seeks to make certain that agencies will have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger public audience." *Id.* (internal citations and quotations omitted).

NEPA does not explicitly provide for a private right of action. Therefore, claims alleging that a federal agency acted contrary to NEPA must be brought under and are governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* See *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 573 (9th Cir. 1998).

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b. APA Deference Applied to Analyzing Likelihood of Success on the Merits in the Context of Injunctive Relief.

In assessing the likelihood of success on the merits in a case such as this, where all claims are governed by the APA, 5 U.S.C. § 701, *et seq.*, the court applies the deferential arbitrary and capricious standard of review. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008). Under the APA, reviewing courts may reverse agency action only if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Courts should defer to the agency on matters within the agency’s expertise unless the agency completely failed to address a factor that was essential to making an informed decision. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). A court “may not substitute its judgment for that of the agency concerning the wisdom or prudence of [the agency’s] action.” *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). As the Ninth Circuit continued in *River Runners*:

In conducting an APA review, the court must determine whether the agency’s decision is “founded on a rational connection between the facts found and the choices made ... and whether [the agency] has committed a clear error of judgment.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir. 2001). “The [agency’s] action ... need only be a reasonable, not the best or most reasonable, decision.” *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

Id. at 1070.

Reviewing courts must be at their “most deferential” when an agency makes predictions, “within its area of special expertise, at the frontiers of science.” *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 103 (1983). In particular, an agency’s “scientific methodology is owed substantial deference.” *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004). The deferential nature of a court’s inquiry into the merits is not altered at the preliminary injunction stage. *Ranchers Cattlemen Action Legal Fund v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005) (finding that, in granting a preliminary injunction, “the district court

committed legal error by failing to respect the agency’s judgment and expertise”).⁹

“The deference accorded an agency’s scientific or technical expertise is not unlimited.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001). Deference is not owed if “the agency has completely failed to address some factor consideration of which was essential to making an informed decision,” *id.*, and courts are not required to defer to an agency conclusion that runs counter to that of other agencies or other individuals with specialized expertise in a particular technical area. *See, e.g., Am. Tunaboat Ass’n v. Baldrige*, 738 F.2d 1013, 1016-17 (9th Cir. 1984) (agency decision under the Marine Mammal Protection Act was not supported by substantial evidence because agency ignored data that was product of “many years’ effort by trained research personnel”).

2. Plaintiffs’ Challenges to the Content of the EA.

Plaintiffs allege that Reclamation’s Final EA and FONSI are arbitrary and capricious because both documents “incorrectly assume the fish are not present in the Delta in July and August” and that this assumption contradicts the 2008 BiOp’s explanation of the LSZ and its connection to delta smelt distribution. Doc. 8 at 14-15.

a. Federal Defendants’ Threshold Objections.

(1) Waiver.

Federal Defendants¹⁰ argue that Plaintiffs have waived this challenge to the EA/FONSI by failing to raise it during the administrative process. Doc. 33 at 13-14. The applicable standard is well established. The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). In the NEPA context, this means that a plaintiff “must structure [its] participation so that it ... alerts the agency [of its]

⁹ Although a court’s analysis of likelihood of success in the context of an injunctive relief request is governed by the deferential APA’s arbitrary and capricious standard, *see Ranchers Cattlemen*, 415 F.3d at 1093, a court does not always owe deference to federal agencies’ positions concerning irreparable harm, balance of hardships, or public interest. In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011), decided in the context of a motion for a post-judgment permanent injunction, the Ninth Circuit held that a district court “abused its discretion by deferring to agency views concerning the equitable prerequisites of an injunction.” The Ninth Circuit reasoned that “[e]cology is not a field within the unique expertise of the federal government,” and remanded for analysis “without deference” to the agency’s experts “simply because of their relationships with the agency.” *Id.* If government experts “were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable.” *Id.*

¹⁰ Defendant Intervenors have joined in all the merits arguments of Federal Defendants. *See* Doc. 48 at 4.

1 positions and contentions, in order to allow the agency to give the issue[s] meaningful consideration.”
2 *Id.* (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004)). The purpose of the
3 exhaustion requirement is to avoid premature claims and to ensure the agency is given “a chance to
4 bring its expertise to bear to resolve a claim.” *Id.* “[A] claimant need not raise an issue using precise
5 legal formulations, as long as enough clarity is provided that the decision maker understands the issue
6 raised.” *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (internal quotation and citation
7 omitted). Accordingly, “alerting the agency in general terms will be enough if the agency has been given
8 a chance to bring its expertise to bear to resolve the claim.” *Id.* If a plaintiff fails to meet exhaustion
9 requirements, its claim is waived. *See Pub. Citizen*, 541 U.S. at 764–65. Comments submitted by third
10 parties may form the basis of a NEPA lawsuit, so long as the comments brought sufficient attention to
11 the issue. *Pac. Coast Fed’n of Fishermen’s Associations v. U.S. Dep’t of Interior*, 2014 WL 496906,
12 *10, __ F. Supp. 2d __ (E.D. Cal. Feb. 6, 2014).

13 AquAlliance, through counsel Thomas Lippe and Executive Director Barbara Vlamis, submitted
14 comments on the EA. Federal Defendants correctly point out that Mr. Lippe’s comments are exclusively
15 focused on air quality impacts of the proposed transfers. *See Allen Decl.*, Ex. 2 at 115-21, Doc. 133.
16 However, as Federal Defendants acknowledge, Ms. Vlamis’s comments referenced Thomas Cannon’s
17 2013 analysis of the impacts of summer water transfers on delta smelt, stating:

18 Analysis conducted by Thomas Cannon contradicts the Less Than
19 Significant Impact finding with disturbing results from the summer of
20 2013. His research reveals that summer water transfers are devastating,
21 especially in dry years when the low salinity zone is in the western Delta
and smelt are stuck within the Delta and threatened by warm water, which
has been made available for transfer by either fallowing or groundwater
substitution, and predators[.]

22 *Allen Decl.*, Ex 2 at 134 (emphasis added) (footnote omitted).

23 Federal Defendants do not in fact argue that this comment failed to give the agency enough
24 notice of the challenge now before the Court. In fact, Federal Defendants admit they responded to the
25 comment. *See Doc. 33* at 5 (citing *Allen Decl.*, Ex. 2 at 1165-67). What Federal Defendants do assert is
26 that no commentator ever challenged the 2008 BiOp’s premise that delta smelt are generally not in the

1 Delta during the proposed transfer period. *Id.* at 5. This is technically true. Plaintiffs do not actually
2 contradict the assertion that delta smelt are “generally” not in the Delta during the transfer period. But,
3 Ms. Vlamis’s letter clearly does assert that in dry years, such as this one, delta smelt are “stuck within
4 the Delta and threatened by warm water.” Allen Decl., Ex 2 at 134. The issue may not have been raised
5 using “precise legal formulations” but it has not been waived. Plaintiffs claim will rise or fall on the
6 merits in the form Plaintiffs give it.

7 **(2) Federal Defendants’ Argument that Plaintiffs’ “Challenge to the BiOp**
8 **Must Be Brought Pursuant to the ESA.”**

9 Federal Defendants second threshold objection is confusing but warrants some discussion. They
10 assert:

11 Plaintiffs’ argument that the LSZ analysis in the 2008 BiOp and the smelt
12 distribution assumptions in the EA/FONSI are in tension fails to
13 acknowledge that [FWS] considered potential water transfers between July
14 through September in the 2008 BiOp and concluded such transfers would
15 not adversely affect delta smelt because “Delta smelt are rarely present in
16 the Delta in these months.”

17 Doc. 33 at 14. Reclamation relies upon the 2008 BiOp in its EA. Federal Defendants argue that if
18 Plaintiffs wants to challenge the 2008 BiOp’s characterization of delta smelt distribution during summer
19 months, they must do so through a direct challenge to the 2008 BiOp under the ESA. *Id.* No ESA
20 challenge has been presented in this lawsuit and FWS is not a party to this suit. Moreover, the substance
21 of the 2008 BiOp has been upheld by the Ninth Circuit. *See San Luis v. Jewell*, 747 F.3d at 616-34.

22 It is unclear whether Federal Defendants imply by their argument that Plaintiffs’ NEPA
23 challenge is somehow faulty because Plaintiffs have not brought a simultaneous challenge to the BiOp.
24 Federal Defendants do not cite and the Court cannot locate any authority for the proposition that a party
25 cannot bring a NEPA challenge to a NEPA document simply because that NEPA document relies upon
26 reasoning in an ESA document without simultaneously challenging that ESA document. As such, the
lack of a parallel ESA challenge is not a procedural bar to Plaintiffs’ NEPA suit. The extent to which
Reclamation may rely upon the 2008 ESA BiOp to support its NEPA document is discussed below.

b. The Merits of Plaintiffs' EA Challenge.¹¹

NEPA requires federal agencies to analyze the potential environmental impacts of any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). When an agency takes major federal action, the agency must prepare an EIS “where there are substantial questions about whether a project may cause significant degradation of the human environment.” *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005).

An agency may choose to prepare an EA to determine whether an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9(b). An EA is meant to be a “concise public document ... that serves to,” among other things “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” 40 C.F.R. § 1508.9(a)(1); *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988). Based on the EA, the agency “may conclude that the action will not significantly affect the environment and issue a [FONSI].” *Bob Marshall*, 852 F.2d at 1225 (citing 40 C.F.R. § 1508.13). An EA “need not conform to all the requirements of an EIS, [but] it must be sufficient to establish the reasonableness of the decision not to prepare an EIS.” *Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008) (quotations and alteration omitted).

The purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the [] environment. Such a task is impossible, and never-ending. The purpose of the EA is simply to create a workable public document that briefly provides evidence and analysis for an agency’s finding regarding an environmental impact.

Tri-Valley CAREs v. U.S. Dep’t of Energy, 671 F.3d 1113, 1129 (9th Cir. 2012). The EA must only “provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.” *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012)

¹¹ For the purpose of analyzing this merits challenge to the EA, the Court has considered documents that appear likely to become part of the AR, namely, official NEPA and ESA documents produced before the EA issued, including comments (with attachments) submitted by Plaintiffs to Federal Defendants. The Court has, in an abundance of caution, not considered any of the expert declarations submitted in this case, having been provided with no briefing on the question of whether any such declarations would be admissible as to this merits issue.

1 (internal citation and quotation omitted). A court must “defer to agency decisions so long as those
2 conclusions are supported by studies [] the agency deems reliable.” *Id.* (internal citation and quotation
3 omitted).

4 Here, Plaintiffs take issue with the EA’s assumption that “[s]pecial status fish species,” such as
5 the delta smelt, “are generally not in the Delta during the transfer period.” There is nothing inaccurate,
6 *per se*, about this statement. The 2008 BiOp concurs that delta smelt are “rarely” in the Delta during the
7 transfer period. 2008 BiOp at 229. What Plaintiffs really protest is the fact that the EA assumes that this
8 general statement applies in this uniquely dry year, during which Plaintiffs maintain delta smelt in fact
9 will be present in the Delta. Plaintiffs maintain that the Bureau’s EA is insufficient because it fails to
10 acknowledge this fact and therefore fails to acknowledge potentially significant impacts that will result
11 from the smelt being present in the Delta. Specifically, Plaintiffs’ comments on the Draft EA suggest
12 that in dry years the smelt will be “stuck within the Delta and threatened by warm water.”¹²

13 The EA first addresses impacts on “special status species” like the delta smelt in its explanation
14 of conditions that will persist in the absence of the 2014 Transfer Project under the “No Action
15 Alternative”:

16 Continued dry hydrologic conditions could affect special status fish
17 species by reducing inflow to the Delta that could affect the ability of
18 Reclamation and DWR to meet the operational requirements of the NMFS
19 and USFWS BOs and D1641. CVP and SWP operations in the Delta will
20 be managed adaptively to meet environmental and water quality standards
21 that are put in place throughout the water year. Reclamation is consulting
22 frequently with NMFS and USFWS on CVP and SWP operations relative
to the BOs and special status fish species in the Delta. Reclamation and
DWR submitted, and the SWRCB granted a temporary urgency change
(TUC) petition on January 31, 2014. The SWRCB relaxed some salinity
and outflow criteria in the Delta in response to extremely low storage
levels, and amendments to the TUC may be necessary as conditions
warrant.

23 Final EA at 3-12. The Final EA then addresses, generally, the impact of the proposed transfers on
24 _____

25 ¹² Relative to the EA’s assertion that delta smelt are generally not present in the Delta during the transfer period, Plaintiffs’
26 comment letter only suggested that this would expose delta smelt to dangerously high temperatures. Therefore, this is the
only assertion of harm the Court will evaluate in this section. Other harms ostensibly related to “being stuck in within the
Delta” mentioned in the papers, such as harm to delta smelt food sources, have not been exhausted, so will not be discussed.

1 special status species:

2 The Proposed Action would result in increased conveyance [of water]
3 through the Delta during the transfer period (July through September,
4 unless it shifts based on feedback from NMFS and USFWS). Special
5 status fish species are generally not in the Delta during the transfer period
6 (July-September) and effects to these fish species from transferring water
7 during this timeframe were considered in the [National Marine Fisheries
8 Service (NMFS) and U.S. Fish and Wildlife Service (FWS) Biological
9 Opinions]. Transfers would slightly increase inflow into the Delta, but
10 would not change outflow conditions as compared to the No Action
11 Alternative. The incremental effects of transfers on special status fish
12 species in the Delta from water transfers would be less than significant.

8 *Id.* at 3-13. The Final EA also addresses Plaintiffs’ specific comment as follows:

9 Water transfers are a small portion of total Project deliveries during the
10 summer months. Resource agencies, including USFWS and NMFS,
11 evaluated the effects of water transfers in the Biological Opinions and
12 placed limitations on transfers during the July – September period to
13 reduce potential effects. The agencies found that transfers would not affect
14 special status fish species given these constraints. The cited paper by
15 Thomas Cannon does not specifically mention water transfers at all
16 throughout the document. USFWS evaluated impacts to Delta smelt in the
17 Biological Opinions and concluded that smelt are not near the pumps in
18 the summer months and would not be affected by water transfers.

14 Allen Decl, Ex. 2 at 175.

15 Although the reasoning in the EA itself is brief and summary in nature, it is permissible for
16 Reclamation to incorporate by reference the reasoning contained the 2008 BiOp, an ESA document. *See*
17 *Nw. Env’tl. Def. Ctr. v. Nat’l Marine Fisheries Serv.*, 647 F. Supp. 2d 1221, 1247 (D. Or. 2009). As
18 mentioned above, the 2008 BiOp discussed the potential effects of transferring up to 600,000 AF of
19 water in “critical” and “dry” years, and anticipated that transfers would be limited to the months of July
20 through September, when “delta smelt are rarely present in the Delta[.]” 2008 BiOp at 229. The 2008
21 BiOp also indicates “the location of the delta smelt population follows changes in the location of the
22 LSZ.” *Id.* at 147. Plaintiffs assert that these two assertions are inherently inconsistent because: (1) the
23 LSZ is drawn into the Delta during low flow periods; and (2) if the delta smelt follow the LSZ, they too
24 must be drawn into the Delta during low flow periods, where they will be exposed to, among other
25 things, lethal temperature conditions.
26

1 As to the first of these assertions, the report by Tom Cannon referenced in Plaintiffs' comments
2 on the Draft EA opines that in low flow conditions observed in 2013, the LSZ was drawn into the Delta
3 in mid to late July. First Declaration of Tom Cannon ("First Cannon Decl."), Doc. 9, Ex. 2, at 17.
4 Federal Defendants do not appear to dispute this assertion. *See* Doc. 33 at 16, 20 (citing Allen Decl., Ex.
5 9 for the proposition that D-164 may shift X2 eastward, which could shift the center of the LSZ).¹³

6 The second of Plaintiffs' assertions is disputed. Cannon insists that the smelt will move with the
7 LSZ into the Delta. For example, although his report acknowledges that, at least in 2013, no smelt were
8 salvaged in July (*i.e.*, no smelt were collected at the pumping plants' fish screens), Cannon opines that
9 this is because "[n]o smelt were able to survive passage to the South Delta export salvage facilities
10 because of lethal water temperatures in the Central and South Delta." First Cannon Decl, Ex. 2 at 17-18.
11 In contrast, the 2008 BiOp concludes that the delta smelt population simply does not follow the LSZ into
12 the Central and South Delta during the transfer period. Among the five RPA components included in the
13 2008 BiOp, Components 1 and 2 limit OMR reverse in order to "to reduce entrainment of pre-spawning
14 adult delta smelt during December to March by controlling OMR flows during vulnerable periods" and
15 "improve flow conditions in the Central and South Delta so that larval and juvenile delta smelt can
16 successfully rear in the Central Delta and move downstream[.]" respectively. 2008 BiOp at 282. The
17 RPA does not limit reverse flows between July and September, *id.* 280-85, in part because smelt are not
18 thought to be able to transit that part of the Delta in the summer because the temperatures are too high.
19 2008 BiOp at 151 ("warmer temperatures >25°C restrict distribution more than colder water
20 temperatures"), 358 (setting temperature "offramp" for spring OMR restrictions), 364 ("As temperatures
21 rise, trawl data continue to show no fish in the Central and South Delta, and salvage does not occur,
22 OMR flows will be allowed to become as negative as -5,000 cfs. When temperature rises and turbidity
23 drops to levels likely to be inimical to delta smelt (> 25°C, turbidity <12 NTU), no further restrictions
24 are needed as long as salvage remains at or close to zero."). FWS reaffirmed this reasoning in its April

25
26 ¹³ The Court notes that the Parties variously describe regions within the Delta, including the "western Delta," "central Delta,"
and "southern Delta," without carefully defining those regional boundaries.

1 21, 2014 concurrence memorandum, which found the effects of the 2014 Transfer Project were
2 encompassed by the analysis in the 2008 BiOp and concluded that no additional adverse effects to delta
3 smelt or designated critical habitat were anticipated to occur. *See* Allen Decl., Ex. 6 at 2.¹⁴

4 This amounts to a dispute between Plaintiffs' chosen expert, Tom Cannon, and FWS, the agency
5 with relevant expertise in the impacts of water project operation on the delta smelt.¹⁵ In such a
6 circumstance, the court must defer to the expert agency's determinations. For example, in *Greenpeace*
7 *Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992), the National Marine Fisheries Service
8 ("NMFS") approved a plan to regulate fishing in an area populated by the Stellar sea lion. While
9 Greenpeace's evidence demonstrated that there was uncertainty as to how the fishing would affect the
10 sea lion and that NMFS did not prove harm to the sea lion was impossible, the Ninth Circuit refused to
11 set aside NMFS's decision because to do so would require the Court to decide that the views of
12 Greenpeace's experts have more merit than those of NMFS. *Id.* at 1333. In *Greenpeace*, the Ninth
13 Circuit relied upon *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985), which
14 upheld a decision by FWS not to prepare an EIS in connection with the issuance of a permit allowing
15 some development in an area occupied by and endangered butterfly species. In response to plaintiff's
16 argument that FWS based its decision on faulty data, the Ninth Circuit held that "NEPA does not require
17 that we decide whether an [environmental assessment] is based on the best scientific methodology
18 available, nor does NEPA require us to resolve disagreements among various scientists as to
19 methodology." *Id.* at 986.

20 *Greenpeace* and a long line of cases, including *San Luis v. Jewell*, 747 F.3d 581, emphasize that

21
22 ¹⁴ Federal Defendants and Defendant Intervenors' experts opine that a large portion of the delta smelt population is located
23 north of the Delta, in the Sacramento Deep Water Shipping Channel, which may act as a refuge for delta smelt from some of
24 the harsher conditions within the Delta. Federal Defendants' and Defendant Intervenors' experts rely, at least in part, on this
25 population to argue that the project will not harm delta smelt. Because the Final EA, the 2008 BiOp, nor any document
26 presented to the Court as having been before the agency at the time the Final EA issued mentions this theory, the Court has
not considered it in its analysis of the sufficiency of the EA. Nonetheless, the 2008 BiOp clearly concludes that the smelt do
not follow the LSZ into the interior Delta during the summer because temperatures are too high there. The 2008 BiOp's
conclusions have been upheld by the Ninth Circuit and the Court does consider the 2008 BiOp's conclusions here.

¹⁵ Plaintiffs argue that in this case there are no agency expert opinions in the record to which the court could defer, pointing
to Federal Defendants' extra-record expert declarations. As discussed above, the Court has not considered these declarations
and is deferring only to FWS's analyses of the impacts of project operations and the 2014 Transfer Project on delta smelt.
Reclamation is entitled to rely on FWS's expertise.

1 a court should defer to agency experts. A court “may not substitute its judgment for that of the agency
2 concerning the wisdom or prudence of [the agency’s] action.” *River Runners*, 593 F.3d at 1070.

3 In conducting an APA review, the court must determine whether the
4 agency’s decision is “founded on a rational connection between the facts
5 found and the choices made ... and whether [the agency] has committed a
6 clear error of judgment.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish &
Wildlife*, 273 F.3d 1229, 1243 (9th Cir. 2001). “The [agency’s] action ...
need only be a reasonable, not the best or most reasonable, decision.”
Nat’l Wildlife Fed’n v. Burford, 871 F.2d 849, 855 (9th Cir. 1989).

7 *Id.* at 1070. A court must “defer to agency decisions so long as those conclusions are supported by
8 studies [] the agency deems reliable.” *Native Ecosystems*, 697 F.3d at 1053 (internal citation and
9 quotation omitted).

10 Here, as described above, FWS has determined in the 2008 BiOp that delta smelt do not follow
11 the LSZ into the interior Delta during the transfer period. The 2008 BiOp has been subject to extensive
12 scrutiny and ultimately was upheld by the Ninth Circuit. The Court must defer to FWS’s opinion in the
13 2008 BiOp. The Court expresses no opinion as to the relative strength of Tom Cannon’s theory that
14 smelt do not pass through areas of high temperature to the salvage facilities (one place where they can
15 be counted) because they are killed along the way. The Court only finds that the expert agency disagrees
16 with Cannon’s theory and that the Court must defer to the agency.

17 Yet, the 2008 BiOp is an ESA, not a NEPA, document. As Plaintiffs point out, NEPA and the
18 ESA have different standards: an EIS is required under NEPA “where there are substantial questions
19 about whether a project may cause significant degradation of the human environment,” while the ESA
20 requires evaluation of whether a project will “jeopardize the continued existence of” a listed species or
21 “adversely modify” that species’ critical habitat. *See* Doc. 65 at 3-4.

22 A finding of “no jeopardy” under the ESA indicates that an activity will
23 not jeopardize the continued existence of an entire species, however, a
24 FONSI must be based on a review of the potential for significant
impact[s], including impact[s] short of extinction. Clearly, there can be a
significant impact on a species even if its existence is not jeopardized.

25 *Nw. Env’tl. Def. Ctr.*, 647 F. Supp. 2d at 1247. (internal citations and quotations omitted). Nevertheless,
26 an ESA document can be helpful in determining whether the degree of impact to a species will be

1 significant under NEPA. *See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir.
2 2006) (approving of EA that relied upon FWS “no jeopardy” BiOp regarding northern spotted owl to
3 conclude that “[w]hile the Selected Alternative may affect habitat and has the potential to affect
4 individual northern spotted owls, it will not be significant under [NEPA].”). Here, Reclamation is
5 relying on the 2008 BiOp for the general proposition that during the transfer period, even if the LSZ is
6 drawn into an area where temperatures are dangerously high, delta smelt do not follow the LSZ under
7 such circumstances. Moreover, Reclamation relied on FWS’s April 21, 2014 concurrence determination
8 regarding the 2014 Transfer project, in which FWS concluded no additional adverse effects to delta
9 smelt or designated critical habitat, or increased incidental take as a result of the 2014 transfers were
10 anticipated to occur. *See* Allen Decl., Ex. 6 at 2. If the 2014 Transfer Project will not cause any
11 “additional adverse effects,” the Court cannot fathom how it could cause a “significant” impact, nor how
12 there could be “substantial questions” regarding the presence of a significant impact. This conclusion is
13 bolstered by the further conclusion in the EA that “[w]ater transfers are a small portion of total Project
14 deliveries during the summer months.” Allen Decl., Ex. 2 at 175. Moreover, the Cannon report relied on
15 by Plaintiffs in their comments upon the Draft EA makes absolutely no specific mention of water
16 transfers, thereby failing to address the relative contribution of water transfers to the conditions Cannon
17 observed in 2013.

18 Plaintiffs argue that the EA should be rejected because it failed to provide the public with the
19 information necessary to review and comment on the 2014 Transfer Project. An EA is meant to be a
20 “concise public document ... that serves to,” among other things “[b]riefly provide sufficient evidence
21 and analysis for determining whether to prepare an environmental impact statement or a finding of no
22 significant impact.” 40 C.F.R. § 1508.9(a)(1). An EA must provide the public with sufficient
23 environmental information, considered in the totality of circumstances, to permit members of the public
24 to weigh in with their views and thus inform the agency decision-making process. *Bering Strait Citizens*
25 *for Responsible Res. Dev. v. U.S. Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008). An EA is
26 “unacceptable” if it is “indecipherable to the public.” *Klamath-Siskiyou Wildlands Ctr. v. Bureau of*

1 *Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004). As noted above, standing alone, the EA does not
2 provide enough detail to the public regarding impacts to the smelt. However, the EA appropriately
3 incorporated by reference the 2008 BiOp, which contains sufficient support for the EA's conclusions
4 that the 2014 Transfer Project will not have significant impacts on the smelt.

5 Plaintiffs make much of the fact that some of the assumptions that underpinned the 2008 BiOp
6 have changed. Among other things, the SWRCB's TUC Orders relaxed D-1641 water quality standards
7 in light of the current drought. But, the Bureau sought the opinion of FWS on the impacts to smelt of
8 every D-1641 modification. In each case, FWS concurred that none of these changes will cause
9 "additional adverse effects on delta smelt" beyond that which was evaluated in the 2008 BiOp. Although
10 these further consultations are not explicitly mentioned in the EA, the EA does note that "[b]ecause of
11 the extremely dry conditions, Reclamation is consulting frequently with [FWS] on CVP and SWP
12 operations relative to the [2008 BiOp] and special status fish species in the Delta" and indicates that the
13 "current operational parameters applicable to conveyance of transfer water include the [SWRCB
14 TUC] Petition approved on January 31, 2014, as may be amended." Final EA at 2-4. Documents
15 pertaining to Reclamation's consultations with FWS about the TUC Order are publicly available on
16 Reclamation's website.¹⁶ Therefore, the Final EA references publicly available documentation of FWS's
17 conclusions that additional changes to the operational parameters would not cause any additional harm
18 to the smelt.

19 An EA may be invalidated where it "fails to address certain crucial factors, consideration of
20 which is essential to a truly informed decision whether or not to prepare an EIS." *In Def. of Animals,*
21 *Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep't of Interior*, 751 F.3d 1054, 1072 (9th Cir.
22 2014). But this is not a circumstance in which the agency has failed to consider a crucial factor. In
23 *Foundation for the North American Wild Sheep v. U.S. Department of Agriculture* ("USDA"), 681 F.2d
24 1172, 1174-75, 1178-80 (9th Cir. 1982), the USDA issued an EA approving the reconstruction of two
25

26 ¹⁶ See http://www.usbr.gov/mp/BayDeltaOffice/Documents/Current_Implementation/index.html (last visited July 11, 2014).

1 mining access roads through an area occupied by one of the few remaining herds of desert bighorn
2 sheep. Among other things, the EA failed to estimate the amount of traffic expected on the road or
3 consider the fact that the road passed close to a “mineral lick” used by the bighorn. *Id.* at 1178-79. “The
4 absence of this crucial information render[ed] a decision regarding the sheep’s reaction to the traffic on
5 [the road] ... is necessarily uninformed.” *Id.* at 1181.

6 Here, Plaintiffs contend that the EA failed to examine a “crucial factor” in that it failed to
7 consider that smelt were likely to be drawn into areas of the Delta where high temperatures could cause
8 them adverse harm. As discussed above, the EA, by incorporating the 2008 BiOp, did in fact address
9 this issue and disagreed with Plaintiffs’ contention. The EA could have made its reliance on the 2008
10 BiOp for this point more explicit and clear, but NEPA does not require perfection. The Final EA was
11 intelligible on the subject and did not fail to examine a “crucial factor.” Moreover, while the EA could
12 have been improved, its discussion was not so insufficient as to “frustrate NEPA’s goal of ensuring that
13 relevant information is available to the wider audience participating in agency decision-making.”
14 *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 527 (9th Cir. 1994).

15 **3. Plaintiffs’ Demand for a Supplemental EA.**

16 Plaintiffs also argue that Reclamation acted unlawfully by refusing to supplement the EA and
17 FONSI in light of (1) the SWRCB’s May 2, 2014 TUC Order relaxing Delta water quality standards;
18 and (2) an analysis performed by Tom Cannon and presented to Reclamation in a June 10, 2014 letter
19 that purports to demonstrate that the methodology used by the Bureau to measure Delta outflow (a key
20 component to estimating where the LSZ will be and how much export pumping is permissible) grossly
21 overestimates actual delta outflow.

22 **a. Applicable Legal Standard.**

23 Agencies are required to supplement an existing EA only where there are “substantial changes to
24 the proposed action” or “significant new circumstances or information” relevant to environmental
25 concerns. 40 C.F.R. § 1502.9(c)(1)(i)-(ii); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372
26

1 (1989).

2 The supplement requirement is triggered by “new circumstances” when the
 3 underlying project significantly changes. *See, e.g., Klamath Siskiyou Wildlands*
 4 *Ctr.*, 468 F.3d at 561 (decision that substantially changed resource management
 5 plan requires supplemental EIS); *N. Idaho Cmty. Action Network v. U.S. Dep’t of*
 6 *Transp.*, 545 F.3d 1147, 1152, 1157 (9th Cir. 2008) (per curiam) (changes to
 7 highway proposal in response to comments too minor to require supplement).

8 Significant “new information” typically involves intervening information. *See,*
 9 *e.g., Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 935, 937–38 (9th Cir.
 10 2010) (revelation of 1900 acres of nesting habitat in project area, discovered after
 11 Forest Service’s Environmental Assessment stated that there were no known
 12 nesting grounds in area, triggered supplemental environmental assessment)....

13 *Greer Coal., Inc. v. U.S. Forest Serv.*, 470 F. App’x 630, 633-34 (9th Cir. 2012).

14 “[A]n agency need not supplement an EIS every time new information comes to light after the
 15 EIS is finalized” because to so hold “would render agency decisionmaking intractable, always awaiting
 16 updated information only to find the new information outdated by the time a decision is made.” *Marsh*,
 17 490 U.S. at 373. Rather, the agency must apply a “rule of reason” that looks to “the value of the new
 18 information to the still pending decisionmaking process.” *Id.* at 374. To trigger a supplemental EIS, the
 19 changes or new information must present “a seriously different picture of the likely environmental
 20 harms stemming from the proposed action.” *Airport Communities Coal. v. Graves*, 280 F. Supp. 2d
 21 1207, 1218 (W.D. Wash. 2003) (quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).
 22 Moreover, an agency’s decision not to prepare a supplemental EIS will not be overturned absent a “clear
 23 error of judgment.” *Marsh*, 490 U.S. at 377–78 (internal citation and quotation omitted).

24 **b. The SWRCB’s May 2 TUC Order.**

25 The May 2, 2014 TUC Order was just one in a line of TUC Orders issued this year, making
 26 incremental changes to the D-1641 standards. Reclamation consulted with FWS every time any such
 changes were proposed. On May 1, after some back and forth between the agencies, FWS issued a
 concurrence memorandum, indicating that the proposed changes to D-1641 would not cause any
 additional adverse effects on delta smelt or critical habitat. In light of the Court’s conclusions on the
 merits of Plaintiffs’ challenge to the EA, this Concurrence eliminates the possibility that the May 2,
 2014 TUC Order presents “a seriously different picture of the likely environmental harms stemming

1 from the proposed action.”

2 **c. Tom Cannon’s Analysis of the Method Used to Measure Delta Outflow.**

3 Plaintiffs also offer an analysis prepared by Tom Cannon on or about June 9, 2014, which
4 compares the Net Delta Outflow Index (“NDOI”), the methodology prescribed by the SWRCB to
5 measure Delta outflow for regulatory purposes, against US Geological Survey measurements of actual
6 Net Delta Outflow (“NDO”). Doc. 10, Ex. 6. After comparing NDOI against NDO for July 2013 and
7 May 2014, Cannon concluded that NDOI “grossly overestimates” Delta outflow. *Id.* For example, while
8 the NDOI estimated outflow at 3505 cfs in May 2014, USGS flow data indicates actual outflow was -45
9 cfs. *Id.*

10 Federal Defendants argue that this is not new information because SWRCB has been using
11 NDOI to regulate Delta flows for 14 years and Plaintiffs had access to information (shown by the fact
12 that Cannon’s comparison used 2013 data) from which he could have made his comparisons well before
13 the EA comment deadline passed. *See Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1464 (9th Cir. 1984)
14 (holding plaintiffs’ supplementation claim had “little merit” when the information they alleged was
15 “new” was in fact available prior to the release of the NEPA document).

16 Cannon maintains that the discrepancy between NDOI and NDO is an “emerging concern” in the
17 field. In his reply declaration, he indicates that the issue was discussed at a May 5, 2014 workshop of the
18 Delta Stewardship Council, which produced the following report/summary:

19 During his workshop presentation, MacWilliams raised the issue of
20 inaccuracies in the NDOI estimates during low flows, expressing concerns
21 similar to those alluded to by Jassby 20 years ago. He indicated the NDOI
22 estimates during fall 2013 were more than double the USGS measured
23 outflows and that, based on measured data for salinity intrusion and X2,
24 the NDOI estimates appeared to be clearly incorrect. The average
25 measured Delta outflow during fall 2013 was approximately 2,000 cfs,
26 which failed to meet the Board’s minimum outflow requirement of 3,000
to 3,500 cfs for fall months of a critically dry year. This issue may be a
concern for the Board if NDOI estimates are found to consistently
overestimate the measured outflows during the summer and fall months of
future years. It is logical to ask why the measured outflows (rather than
NDOI) aren’t used for the specific outflow standards during the July-to-
January period, and also why they aren’t used as the alternative flow

1 compliance option in the springtime X2 standard. Also, does the
2 availability of the measured outflows now remove any concern that Jassby
3 et al. (1995) had regarding uncertainty in using outflow as the predictor
4 variable during low flows? For the USGS estimates to be used as an
5 outflow standard, several problems will need to be addressed, including
6 gaps (missing data, especially during gage servicing), availability, short-
7 term variability (because of the spring-neap tidal cycle and meteorological
8 influences), and negative values (during periods when the Delta is filling).
9 Although a precise estimate of the accuracy of the measured outflows is
10 not known, the measured values should be more accurate than the NDOI
11 as long as the four monitoring stations used in the calculations are
12 operating properly.

13 Reply Declaration of Tom Cannon, Doc. 62, at ¶ 22. Cannon then declares that “[a]fter learning of this
14 developing issue, I ran the numbers for May of 2014 (this data [] was not available before the Bureau’s
15 April 22, 2014 FONSI), and found strong confirmation that NDOI seriously overestimates actual Delta
16 outflow as measured by NDO in the currently very dry conditions.” *Id.* at ¶ 23. But, the report above
17 indicates that these concerns are not at all new, citing 20-year old report. The fact that Cannon was not
18 aware of the issue until after the May 5, 2014 workshop does not make it new information.

19 Moreover, as the quotation from the Delta Stewardship Council workshop indicates, there are
20 reasons why NDOI is used over NDO. Among other things, the extreme changes in flow direction at the
21 four NDO measuring points due to tidal shifts (300,000 – 400,000 cfs per day) magnifies gauge errors,
22 while the NDOI metric is considered more reliable and reproducible. Moreover, the SWRCB mandates
23 that Reclamation use NDOI when complying with D-1641. An agency is afforded considerable
24 discretion in its choice of methodology in such circumstances. *See San Luis v. Jewell*, 747 F.3d at 618-
25 19, 626-27 (reversing several instances in which the district court found the agency utilized an
26 inappropriate measuring/calculating methodology, including one instance in which the methodological
choice was thought to have potentially overestimated the movement of X2).

B. Conclusion Re: Likelihood of Success on the Merits.

27 The Court concludes that Plaintiffs are not likely to succeed on either of the NEPA claims
28 discussed above. Nor do Plaintiffs’ arguments present “serious questions” going to the merits, as such
29 questions are those that are “substantial, difficult, and doubtful, as to make them a fair ground for

1 litigation and thus for more deliberative investigation.” *Marcos*, 862 F.2d at 1362. “Serious questions”
2 do not need to “promise a certainty of success, nor even present a probability of success, but must
3 involve a fair chance of success on the merits.” *Id.* (citation and internal quotation marks omitted). Even
4 with respect to the challenge to the content of the EA, Plaintiffs do not present a “fair chance of success
5 on the merits” because their dispute boils down to a disagreement with an expert agency as to the
6 likelihood that the 2014 Transfer Project will draw smelt into areas of the Delta where they will be
7 subject to dangerously high temperatures. This Court must defer to the agency on such matters. It is
8 therefore unnecessary to discuss the presented evidence pertaining to the balance of the harms.

9 **V. CONCLUSION AND ORDER**

10 For the reasons set forth above, Plaintiffs’ motion for preliminary injunction is DENIED.

11
12 IT IS SO ORDERED.

13 Dated: July 11, 2014

/s/ Lawrence J. O’Neill
UNITED STATES DISTRICT JUDGE