

Claire Woods, State Bar No. 282348
Michael E. Wall, State Bar No. 170238
Katherine Poole, State Bar No. 195010
Natural Resources Defense Council, Inc.
111 Sutter Street, 21st Floor
San Francisco, CA 94104
Telephone: (415) 875-6100
Fax: (415) 795-4779
Email: cwoods@nrdc.org, mwall@nrdc.org
kpoole@nrdc.org

Attorneys for Plaintiffs

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

GOLDEN GATE SALMON)
ASSOCIATION; NATURAL RESOURCES)
DEFENSE COUNCIL, INC.; DEFENDERS)
OF WILDLIFE; BAY.ORG d/b/a THE BAY)
INSTITUTE,)

Plaintiffs,)

v.)

WILBUR ROSS, in his official capacity as)
Secretary of Commerce; CHRIS OLIVER,)
in his official capacity as Acting)
Administrator for Fisheries at the National)
Oceanic and Atmospheric Administration;)
and NATIONAL MARINE FISHERIES)
SERVICE,)

Defendants.)

COMPLAINT

Administrative Procedure Act Case

Civ. No. _____

INTRODUCTION

1. On June 26, 2017, the National Marine Fisheries Service (Fisheries Service) issued a final biological opinion (Biological Opinion), under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., regarding the California WaterFix project (WaterFix).

1 2. As part of WaterFix, the Bureau of Reclamation (Bureau) and the California
2 Department of Water Resources (DWR) propose to construct three new water intakes on the
3 Sacramento River. Each new intake will be capable of diverting 3,000 cubic feet per second of
4 water. The Bureau and DWR also propose to construct two tunnels, at a depth of 150 feet, which
5 will transport water from the Sacramento River, north of the Sacramento-San Joaquin River
6 Delta (Delta), to existing pumping plants in the South Delta. WaterFix would enable 9,000 cubic
7 feet per second of water to be diverted from the Sacramento River and transported in tunnels
8 underneath the Delta, instead of allowing this water to flow into the Delta.

9 3. WaterFix is the latest in a long line of water diversion projects and policies,
10 including the Central Valley Project (CVP) and the State Water Project (SWP), which have had
11 devastating effects on endangered Sacramento River winter-run Chinook salmon (winter-run
12 Chinook salmon) and threatened Central Valley spring-run Chinook salmon (spring-run Chinook
13 salmon), as well as other threatened and endangered species in the Delta. The CVP and SWP
14 operate a system of dams, canals, and pumping facilities, which annually export an average of
15 4.9 million acre feet of water out of the Delta. The CVP and SWP modify the flow – through
16 water storage, diversions, and routing – of many millions of acre feet more. The CVP and SWP
17 are among the largest water storage and diversion projects in the world, annually managing an
18 average of more than 13 million acre feet of water. The three new water intakes and two tunnels
19 under the Delta would supplement, rather than replace, the CVP’s and SWP’s existing pumping
20 facilities in the South Delta.

21 4. The CVP and SWP have caused substantial harm to the Delta’s ecosystem,
22 causing salinity levels to rise, reducing water flowing through the Delta into San Francisco Bay
23 (Bay), significantly altering natural flow patterns, and causing fish to be entrained and killed in
24 the pumping systems. CVP and SWP operations have been major factors in the decline of the
25 winter-run and spring-run Chinook salmon and their listing under the Endangered Species Act
26 (ESA), 16 U.S.C. § 1531 et seq.

27 5. The construction and operation of WaterFix will significantly degrade
28 environmental conditions in the Delta, harming winter-run and spring-run Chinook salmon and

1 other endangered fish and wildlife. These adverse effects include reduced flows in the
2 Sacramento River, increased salinity levels, reduced turbidity, reduced food supply, increased
3 harmful algal blooms, and loss of habitat, among other harmful impacts on the Delta's already-
4 fragile ecosystem.

5 6. Pursuant to section 7 of the ESA, the Bureau consulted with the Fisheries Service
6 about WaterFix's effect on the winter-run and spring-run Chinook salmon. As part of its
7 consultation obligation, the Fisheries Service issued a Biological Opinion, which concluded
8 WaterFix will neither jeopardize the survival and recovery of the winter-run Chinook salmon and
9 spring-run Chinook salmon, nor cause adverse modification of their designated critical habitat.
10 This conclusion runs contrary to the evidence before the Fisheries Service and relies on unlawful
11 and unsupported assumptions.

12 **PARTIES**

13 7. Plaintiff GOLDEN GATE SALMON ASSOCIATION (Golden Gate Salmon) is a
14 non-profit organization that works to protect and restore California's largest salmon producing
15 habitat in the Central Valley for the communities that rely on salmon as a long-term, sustainable
16 commercial, recreational, and cultural resource. Golden Gate Salmon's members include
17 commercial and recreational salmon fisherman, businesses, restaurants, a tribe,
18 environmentalists, elected officials, and community members that rely on salmon. Golden Gate
19 Salmon's headquarters are located in San Francisco, California. Golden Gate Salmon and its
20 more than 3,500 members have a direct interest in the survival and perpetuation of salmon and
21 other aquatic resources that depend upon Central Valley Rivers, the Delta, the Bay, and its
22 estuary. Most of Golden Gate Salmon's members live in the Bay's watershed, and many rely on
23 this region for their livelihood in the commercial fishing, sportfishing, and boating industries. In
24 addition, many Golden Gate Salmon members regularly visit and use the Bay, its estuary, and the
25 Central Valley rivers that flow into the Bay and its estuary for recreational experiences and
26 aesthetic enjoyment. Golden Gate Salmon regularly participates in administrative proceedings on
27 behalf of its members to protect, enhance, and restore declining populations of Central Valley
28 salmon that depend on Central Valley rivers and the Delta. Golden Gate Salmon has worked

1 collaboratively with government agencies, independent academic experts, water users, and land
2 owners on large-scale ecological restoration programs through the Central Valley Project
3 Improvement Act and other initiatives. Golden Gate Salmon has submitted protests and petitions
4 for reconsideration of revisions to the water quality standards in the Bay-Delta Plan. Since its
5 founding in 2011, Golden Gate Salmon has also submitted written comments to, and testified at,
6 public workshops regarding the need to implement water quality standards for the Bay and Delta,
7 and to update and improve those standards.

8 8. Plaintiff BAY.ORG d/b/a THE BAY INSTITUTE (The Bay Institute) is a non-
9 profit conservation organization, located in San Francisco, dedicated to protecting, restoring, and
10 inspiring conservation of, the ecosystems of the Bay and its watershed. The majority of the Bay
11 Institute's members live around the Bay and its watershed, regularly visit and use the Bay, the
12 Delta and Central Valley rivers, for recreational experience, aesthetic enjoyment, and/or
13 livelihood in the commercial fishing, sportfishing, and boating industries, and have a direct
14 interest in the survival and perpetuation of fish species and other aquatic resources. The Bay
15 Institute regularly participates in administrative and judicial proceedings on behalf of its
16 members to protect, enhance, and restore declining populations of native California fishes,
17 including successful efforts to adopt and implement the historic settlement to restore Chinook
18 salmon to the San Joaquin River below Friant Dam; to list spring-run Chinook salmon under the
19 California Endangered Species Act; and to invalidate and replace an insufficiently protective
20 biological opinion for Chinook salmon under the ESA. The Bay Institute has also worked
21 collaboratively with government agencies, independent academic experts, water users, and
22 landowners to design and implement large-scale ecological restoration programs through the
23 CALFED Bay-Delta Program, the Central Valley Project Improvement Act, and other initiatives,
24 including participation on the Planning Committee for the Bay-Delta Conservation Plan.

25 9. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC) is a
26 non-profit environmental organization with more than 346,000 members nationwide, including
27 more than 66,000 members in California. NRDC has thousands of members in the counties that
28 surround the Delta, including more than 2,900 members in Contra Costa County. NRDC

1 maintains an office in San Francisco, California. NRDC's purpose is to safeguard the Earth: its
2 people, its plants, and animals and the natural systems on which all life depends. The
3 organization works to restore the integrity of the elements that sustain life — air, land, and water
4 — and to defend endangered natural places. For decades, NRDC has advocated extensively for
5 the protection of the nation's waterways and wildlife, including the winter-run and spring-run
6 Chinook salmon. NRDC has brought and intervened in lawsuits designed to ensure that CVP and
7 SWP operations do not jeopardize the continued existence of threatened and endangered fish
8 species or adversely modify those species' critical habitat. NRDC has also long worked to
9 protect the Delta and the fish for which it provides habitat in non-litigation settings.

10 10. Plaintiff DEFENDERS OF WILDLIFE (Defenders) is a non-profit corporation
11 with hundreds of thousands of members across the nation, including tens of thousands of
12 members in California. Defenders is dedicated to preserving wildlife and emphasizing
13 appreciation and protection for all species in their ecological role within the natural environment.
14 Through education, advocacy, litigation, and other efforts, Defenders works to preserve species
15 and the habitats upon which they depend. Defenders has been closely involved in policy and
16 litigation matters associated with water quality and species habitat in the Sacramento River and
17 Delta region since 2000, including litigation and regulatory actions intended to benefit winter-
18 run and spring-run Chinook salmon and their habitat.

19 11. Plaintiffs and their respective members have been and will continue to be actively
20 involved in efforts to protect and restore the Delta and surrounding areas, and the species that
21 rely upon the Delta for habitat. Plaintiffs and their members have written to numerous federal,
22 state, and local agencies and officials to urge increased protection for the species that rely upon
23 the Delta and the rivers that flow into it for habitat.

24 12. Plaintiffs and their members live and/or work in communities near or on the
25 Delta. In addition to advocating for protections for the Delta and its endangered and threatened
26 species, members of the Plaintiff organizations are active participants in the life of the Delta.
27 Individual members of each organization frequently visit the Delta, critical habitat for the winter-
28 run and spring-run Chinook salmon, to use and appreciate the Delta ecosystem.

1 13. Winter-run and spring-run Chinook salmon migrate through the Delta during
2 different periods of their life and depend upon a healthy Delta. Plaintiffs members' use of the
3 Delta for educational and recreational activities, such as hiking, boating, bird watching,
4 swimming, and fishing, will be detrimentally affected by the decline of these species and the
5 corresponding decline in the health of the Delta. Plaintiffs' members regularly derive scientific,
6 educational, and conservation benefit and enjoyment from the existence of the winter-run and
7 spring-run Chinook salmon and will continue to do so by regularly engaging in scientific,
8 education, and conservation activities involving these species. These benefits and enjoyments
9 would increase if the winter-run and spring-run Chinook salmon were to recover from their
10 precarious status of being threatened with extinction.

11 14. The above-described aesthetic, conservation, recreational, scientific, educational,
12 wildlife and fisheries preservation, and other interests of Plaintiffs and their respective members
13 have been, are being, and, unless the relief prayed for herein is granted, will continue to be
14 adversely affected and irreparably injured by the Defendants' arbitrary and capricious issuance
15 of the Biological Opinion. These injuries are actual and concrete and would be redressed by the
16 relief sought herein. Plaintiffs have no adequate remedy at law.

17 15. The Defendants in this action are:

- 18 a. WILBUR ROSS. Mr. Ross is sued in his official capacity as Secretary of
19 Commerce (the Secretary). He is responsible for implementing the ESA for
20 species under the Department of Commerce's jurisdiction and for ensuring
21 that formal consultations and biological opinions required under section 7 of
22 the ESA are completed in accordance with the letter and intent of the law.
- 23 b. CHRIS OLIVER. Mr. Oliver is sued in his official capacity as Acting
24 Administrator for Fisheries at the National Oceanic and Atmospheric
25 Administration. He has been delegated the responsibilities of the Secretary of
26 Commerce described in the preceding paragraph. He is responsible for
27 administering the ESA for species under the Department of Commerce's
28

1 jurisdiction, including reviewing and approving the findings of the Biological
2 Opinion.

3 c. NATIONAL MARINE FISHERIES SERVICE. The Fisheries Service is an
4 agency of the United States Government. The Fisheries Service is responsible
5 for performing consultations under section 7 of the ESA for species under the
6 Department of Commerce's jurisdiction.

7 **JURISDICTION AND VENUE**

8 16. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action
9 arising under the laws of the United States); 16 U.S.C. § 1540(c) (action arising under the
10 Endangered Species Act); and 5 U.S.C. §§ 702(A), 703, and 706 (judicial review of federal
11 agency actions).

12 17. The Secretary has issued the Biological Opinion on the effects of the WaterFix on
13 winter-run and spring-run Chinook salmon pursuant to 16 U.S.C. § 1536(b). Plaintiffs assert that
14 the Biological Opinion is arbitrary and capricious, an abuse of discretion, and not in accordance
15 with law within the meaning of 5 U.S.C. § 706(2). An actual controversy therefore exists
16 between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

17 18. Venue lies in this judicial district under 28 U.S.C. § 1391(e)(1). A substantial part
18 of the events or omissions giving rise to the claim occurred in Contra Costa County, which is in
19 this judicial district. A substantial part of the winter-run Chinook salmon's critical habitat lies in
20 Contra Costa County; a portion of and the southern terminus of the proposed tunnels are in
21 Contra Costa County; and the existing CVP and SWP pumping plants lie in Contra Costa
22 County. Plaintiffs NRDC, The Bay Institute, and Golden Gate Salmon maintain offices within
23 this judicial district. Plaintiffs The Bay Institute and Golden Gate Salmon reside within this
24 judicial district.

25 **INTRADISTRICT ASSIGNMENT**

26 19. This action should be assigned to the San Francisco or Oakland Division pursuant
27 to Civil L.R. 3-2(d) because a substantial portion of the events giving rise to the claim occurred,
28 or will occur, in Contra Costa County.

FACTUAL BACKGROUND

A. *Winter-Run and Spring-Run Chinook salmon*

20. Winter-run Chinook salmon are born in the Sacramento River, below Keswick Dam. Winter-run Chinook salmon population estimates were as high as 120,000 fish in the 1960s, but declined to less than 200 fish during the 1987-1992 drought. Between 2007 and 2013, the population again declined significantly. In 2014 and 2015, the population experienced high mortality due to lethal water temperatures below Keswick Dam. This is the only population of winter-run Chinook salmon in California.

21. Winter-run Chinook salmon exhibit a unique life history pattern. Adults return to spawn in the winter and spring and lay their eggs during the spring and summer months. The eggs develop and hatch into fry over the summer and fall months. The juvenile winter-run Chinook salmon typically begin to migrate down the Sacramento River during the fall. After rearing in the Sacramento River and the Delta, they typically outmigrate to the ocean in the winter and spring, where they typically spend two or more years before returning as adults to migrate through the Bay and Delta, and up the Sacramento River to spawn. Winter-run Chinook salmon adults die after spawning.

22. The Fisheries Service listed the winter-run Chinook salmon as a threatened species under the ESA on August 4, 1989, 58 Fed. Reg. 32065, and elevated its status to endangered on January 4, 1994. 59 Fed. Reg. 440. The Fisheries Service designated critical habitat for winter-run Chinook salmon on June 16, 1993. 58 Fed. Reg. 33212. The winter-run Chinook's critical habitat includes waters of the Sacramento River, the Delta, and the Bay. *Id.* at 33212-213.

23. According to the Fisheries Service, winter-run Chinook salmon are one of the most endangered fish species in the United States. The species has been reduced to a single population that spawns on the Sacramento River, with only a few thousand fish returning each year. Recent data indicates extremely low abundance levels, and the species is approaching extinction.

1 24. Spring-run Chinook salmon currently exist in the Sacramento River, the Feather
2 River, and several tributaries including Mill, Deer, and Butte Creeks. In addition, salmon
3 exhibiting spring-run Chinook salmon life history have been observed in the Tuolumne and
4 Stanislaus rivers in recent years. Spring-run Chinook salmon were historically one of the most
5 abundant salmon run in the Central Valley and on the west coast of the United States. Between
6 the 1880s and 1940s, the Central Valley supported as many as 600,000 spring-run Chinook
7 salmon per year. In 2016 the California Department of Fish and Wildlife estimated only 8,112
8 spring-run Chinook salmon returned to spawn in the Sacramento River, its tributaries, and the
9 Feather River hatchery. Declines in abundance from 2005 to 2016 in Mill Creek and Deer Creek
10 placed those populations at high risk of extirpation.

11 25. According to the Fisheries Service, spring-run Chinook salmon adults typically
12 leave the ocean to begin their migration through the Delta in late January and February,
13 spawning typically occurs in September or October, and fry emerge from November to May. The
14 downstream migration of juvenile spring-run Chinook salmon is highly variable, with some
15 juveniles staying upstream to rear for as long as a year. Peak migration through the Delta occurs
16 from November to May. Spring-run Chinook salmon typically spend several years in the ocean
17 before returning as adults to complete their life cycle.

18 26. The Fisheries Service listed the spring-run Chinook salmon as a threatened
19 species under the ESA on September 6, 1999. 64 Fed. Reg. 50394. It designated critical habitat
20 for the spring-run Chinook salmon on September 2, 2005. 58 Fed. Reg. 52488. The spring-run
21 Chinook salmon's critical habitat includes waters of the Sacramento River, lower Feather River,
22 and Yuba Rivers, as well as Beegum, Battle, Clear, Cottonwood, Antelope, Mill, Deer, Butte,
23 and Big Chico Creeks, and portions of the northern Delta.

24 *B. WaterFix and the Biological Opinion*

25 27. As proposed, the construction and operation of WaterFix will result in
26 environmental degradation of the Delta ecosystem and harm winter-run and spring-run Chinook
27 salmon and other ESA-protected species. Specifically, the administrative record demonstrates
28

1 that winter-run and spring-run Chinook salmon will be adversely affected by the following
2 effects of WaterFix:

- 3 a. Reduced flows in the Sacramento River. By diverting fresh water from the
4 Sacramento River before it reaches the Delta, WaterFix will significantly
5 reduce the survival of juvenile winter-run and spring-run Chinook salmon that
6 are migrating downstream. The models cited in the Biological Opinion
7 indicate that WaterFix will reduce the survival of migrating winter run
8 Chinook salmon. Life cycle modeling cited in the Biological Opinion shows
9 that these reductions in survival could reduce overall abundance by as much
10 as 25 percent. These models also show significant reductions in survival for
11 migrating juvenile spring run Chinook salmon.
- 12 b. Entrainment and impingement. Some juvenile winter-run and spring-run
13 Chinook salmon are likely to be small enough to pass through fish screens and
14 be entrained and killed in the new water intakes. In addition, juvenile winter-
15 run and spring-run Chinook salmon are likely to be impinged on the fish
16 screens, which is likely to result in increased mortality directly due to physical
17 contact with the fish screens, or indirectly due to increased predation on
18 impinged or injured salmon.
- 19 c. Increased predation. Installation of three new intakes in the Sacramento River
20 will significantly increase predation on migrating juvenile winter-run and
21 spring-run Chinook salmon. The new structures in the river will provide cover
22 for predators and increase habitat for non-native predatory species. Reduced
23 flows below the intakes, and decreased channel volume and depth, will
24 increase the amount of time that salmon are exposed to predators and provide
25 habitat conditions that benefit predatory fish. In addition, increased water
26 clarity that is caused by the new water diversions will increase predation on
27 salmon.
- 28

- 1 d. Reduced Delta outflow. WaterFix will reduce the amount of water that flows
2 through the Delta into the Bay (Delta outflow), because of increased
3 diversions from the Sacramento River. Reduced Delta outflow during the
4 winter and spring adversely affects the survival of migrating juvenile winter-
5 run and spring-run Chinook salmon.
- 6 e. Increased water temperature. In combination with the likely effects of climate
7 change, WaterFix is likely to result in adverse water temperatures below
8 Keswick Dam during the critical spawning, egg incubation, and fry rearing
9 seasons. Increased water temperatures are particularly likely during certain
10 dry and critically dry years, as well as during extended droughts.
- 11 f. Increased harmful algal blooms. WaterFix will result in more frequent blooms
12 of the toxic cyanobacteria *Microcystis aeruginosa* (Microcystis) and other
13 harmful algal blooms because of increased water temperatures, reduced rates
14 of flow through the Delta, and lower turbidity. Microcystis generate powerful
15 toxins that can cause direct and indirect effects on winter-run and spring-run
16 Chinook salmon.
- 17 g. Harm from construction. Construction of WaterFix is anticipated to result in
18 significant harm to winter-run and spring-run Chinook salmon, including:
19 acoustic stress from extensive construction activities such as piledriving and
20 barge traffic; increased water pollution, including contaminants; and increased
21 predation.

22 28. The harmful effects of WaterFix described in the preceding paragraph will
23 significantly threaten the continued existence and recovery of winter-run and spring-run Chinook
24 salmon and will impair their designated critical habitat.

25 29. Despite the substantial environmental harm, the Fisheries Service concluded that
26 WaterFix will neither jeopardize the survival and recovery of the winter-run and spring-run
27 Chinook salmon, nor cause adverse modification of their designated critical habitat. The
28 Fisheries Service reached this erroneous conclusion by relying on the implementation of future

1 mitigation measures through adaptive management that have not been specifically identified and
2 that are not reasonably certain to occur. The Fisheries Service acknowledges that WaterFix will
3 result in adverse effects to winter-run and spring-run Chinook salmon and their critical habitat,
4 but it states that those impacts will be adequately mitigated by undefined future actions that the
5 Fisheries Service assumes will be effective. These assumptions are unsupported by the record
6 and unsupported by any analysis by the Fisheries Service. The Biological Opinion fails to
7 identify specific mitigation measures that are certain to be implemented, and does not analyze
8 whether specific future measures will be sufficient to avoid jeopardy to the species or adverse
9 modification of their designated critical habitat.

10 30. The Fisheries Service issued the Biological Opinion without considering the
11 entire impact of the WaterFix project. Specifically, the Biological Opinion analyzed the impact
12 of WaterFix only through the year 2030, even though WaterFix is intended to operate for
13 decades, and the adverse impacts beyond 2030 are foreseeable. In issuing its no-jeopardy
14 Biological Opinion, the Fisheries Service did not address the existing modeling and analysis of
15 the effects of operations of WaterFix through 2070.

16 **STATUTORY AND REGULATORY FRAMEWORK**

17 31. Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems
18 upon which endangered species and threatened species depend may be conserved, [and] to
19 provide a program for the conservation of such endangered species and threatened species . . .”
20 16 U.S.C. § 1531(b).

21 32. The Supreme Court has observed that “[t]he plain intent of Congress in enacting
22 this statute was to halt and reverse the trend toward species extinction, whatever the cost,” and
23 that, under the act, “[it] intended endangered species to be afforded the highest of priorities.”
24 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978).

25 A. *Consultation under the ESA*

26 33. Section 7(a)(2) of the ESA requires that each federal agency, in consultation with
27 the Secretary, ensures that any activity which it authorizes, funds, or carries out is not likely to
28

1 jeopardize the continued existence of any threatened or endangered species or destroy or
2 adversely modify any listed species' critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

3 34. An action would jeopardize a species if it reasonably would be expected to reduce
4 appreciably the likelihood of both the survival and recovery of the species in the wild. 50 C.F.R.
5 § 402.02.

6 35. Following consultation, the Secretary must issue a "biological opinion" in which
7 he determines whether the activity is likely to jeopardize a listed species or adversely affect its
8 critical habitat and provides a summary of the reasons for the biological opinion's conclusion. 16
9 U.S.C. § 1536(b)(3)(A). In formulating his opinion, the Secretary must use the best scientific and
10 commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

11 36. The Secretary has delegated his duties under the ESA to the Fisheries Service. 50
12 C.F.R. § 402.01(b).

13 *B. The Fisheries Service may not rely on measures that are not reasonably specific and*
14 *certain to occur in determining whether WaterFix will jeopardize winter-run and spring-*
15 *run Chinook salmon or adversely affect their critical habitat*

16 37. Under section 7(a)(2) of the ESA, the Fisheries Service must "insure that any
17 action authorized . . . is not likely to jeopardize the continued existence of any endangered or
18 threatened species or result in the destruction or adverse modification of [critical] habitat of such
19 species." 16 U.S.C § 1536(a)(2).

20 38. A biological opinion must include a discussion of "whether the action, taken
21 together with its cumulative effects, is likely to jeopardize [the species]." 50 C.F.R.
22 § 402.14(g)(4). The Fish and Wildlife Service, together with the National Marine Fisheries
23 Service, have defined the "effects of the action" as "the direct and indirect effects . . . on the
24 species or critical habitat." 50 C.F.R. § 402.02. The definition goes on to define indirect effects
25 as "those that are caused by the proposed action and are later in time, but still are reasonably
26 certain to occur." *Id.*

27 39. A biological opinion may consider mitigation measures that are included with the
28 proposed project to assess whether the project will jeopardize the continued existence and

1 recovery of the species or adversely affect its critical habitat. However, any such “[m]itigation
2 measures supporting a biological opinion’s no jeopardy conclusion must be ‘reasonably specific,
3 certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-
4 enforceable obligations; and most important, they must address the threats to the species in a way
5 that satisfies the jeopardy and adverse modification standards.’” *Nat’l Wildlife Fed’n v. Nat’l*
6 *Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1125-26 (D. Or. 2011) (quoting *Ctr. for*
7 *Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002)); *see Ctr. for*
8 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Nat.*
9 *Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350-57 (E.D. Cal. 2007).

10 40. Reliance on the uncertain future mitigation measures to conclude that the project
11 will not jeopardize the species or adversely modify its critical habitat violates section 7(a)(2) of
12 the ESA. Such reliance allows potential jeopardy to winter-run and spring-run Chinook salmon,
13 and destruction or adverse modification of their habitats, without first insuring that adequate
14 measures will be implemented, based on the best available science, to ensure that the action will
15 neither jeopardize the continued existence and recovery of the species nor adversely modify its
16 critical habitat.

17 *C. The Fisheries Service must consider the entire effects of the action*

18 41. Section 7(a)(2) of the ESA and its implementing regulations require the Fisheries
19 Service to “[e]valuate the effects of the action and cumulative effects” and to render its
20 biological opinion “as to whether the action, taken together with cumulative effects, is likely to
21 jeopardize the continued existence of listed species or result in the destruction or adverse
22 modification of critical habitat.” 50 C.F.R. § 402.14(g)(3), (4).

23 42. The “actions” on which section 7 consultation is required must include “all
24 activities or programs of any kind *authorized*, funded or carried out” by any federal agency. 50
25 C.F.R. § 402.02 (emphasis added); *see also id.* at § 402.14(a). “[E]ffects of the action” is defined
26 to include “the direct and indirect effects of an action . . . , together with the effects of other
27 activities that are interrelated or independent.” 50 C.F.R. § 402.02. “Indirect effects” are those
28 effects that are “caused by the proposed action and are later in time, but still reasonably certain to

1 occur.” *Id.* “Interrelated actions” are actions that are “part of a larger action and depend on the
2 larger action for their justification.” *Id.* “Interdependent actions” are actions that “have no
3 independent utility apart from the action under consideration.” *Id.* (brackets omitted) (quoting *N.*
4 *Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980)).

5 43. The ESA requires a biological opinion to analyze the effects of the entire action
6 authorized by the agency, without segmenting the consultation into incremental steps and only
7 considering early stages of a project. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2),
8 requires that a consulting agency consider the “entire agency action” in a consultation that is
9 “coextensive” with the extent and duration of the action. *Conner v. Burford*, 848 F.2d 1441,
10 1453, 1458 (9th Cir. 1988); *see Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521-25 (9th
11 Cir. 2010). The term “agency action” must be defined broadly because “caution can only be
12 exercised if the agency takes a look at all the possible ramifications of the agency action.”
13 *Burford*, 848 F.2d at 1453.

14 44. Failing to analyze the long-term effects of a project that will operate for decades
15 violates the ESA because the agency has failed to ensure that the whole of the action will not
16 jeopardize winter-run and spring-run Chinook salmon, nor adversely modify their critical habitat.

17 **CLAIM FOR RELIEF**

18 **Violation of the Administrative Procedure Act** 19 **(5 U.S.C. § 706)**

20 45. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained
21 in the preceding paragraphs.

22 46. The Secretary’s conclusion, in the Biological Opinion, that WaterFix will not
23 jeopardize the continued existence of the winter-run and spring-run Chinook salmon and will not
24 result in the destruction or adverse modification of their critical habitat is arbitrary, capricious, an
25 abuse of discretion, and not in accordance with law.

26 47. The Biological Opinion improperly relies on uncertain future mitigation measures
27 without adequate evidence that the mitigation measures are reasonably certain to occur and will
28 be effective to address the adverse impacts that have already been identified to insure protection
of the winter-run and spring-run Chinook salmon and their critical habitat.

1 48. The Biological Opinion fails to consider the entire “effects of the action,” thereby
2 significantly underestimating and/or ignoring the effects of the entire agency action. Specifically,
3 the Fisheries Service has analyzed the potential impacts of the construction and operation of
4 WaterFix on the Delta only through the year 2030, even though WaterFix is intended to be
5 operated in the decades that follow, and the adverse impacts of operations of the facility on
6 winter-run and spring-run Chinook salmon in the decades to follow are clearly foreseeable.

7 49. The analysis, reasoning, and conclusion of the Biological Opinion, and the
8 Secretary’s actions described herein, are arbitrary, capricious, an abuse of discretion, not in
9 accordance with law, in excess of statutory authority, and without observance of procedure
10 required by law, in violation of ESA section 7 and its implementing regulations and the standards
11 of the Administrative Procedure Act, 5 U.S.C. § 706.

12 **REQUEST FOR RELIEF**

13 WHEREFORE, Plaintiffs respectfully request that the Court:

- 14 A. Find and declare that the Biological Opinion is arbitrary and capricious, an abuse of
15 discretion, and not in accordance with law, in violation of the Administrative Procedure
16 Act, 5 U.S.C. § 706(2).
- 17 B. Order the Secretary to comply with the law forthwith by withdrawing the Biological
18 Opinion and reinitiating consultation with respect to WaterFix.
- 19 C. Retain jurisdiction over this matter until such time as the Secretary has fully complied
20 with the Court’s order.
- 21 D. Award Plaintiffs their costs of litigation, including reasonable attorney fees.
- 22 E. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

23
24 Respectfully submitted,

25
26 Dated: June 29, 2017

s/ Claire Woods
27 Claire Woods
28 Michael E. Wall
Katherine Poole
Natural Resources Defense Council, Inc.

111 Sutter Street, 21st Floor
San Francisco, California 94104
Telephone: (415) 875-6100
Fax: (415) 795-4779
Email: cwoods@nrdc.org, mwall@nrdc.org
kpoole@nrdc.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28