

May 21, 2012

VIA E-MAIL: [SJRSPRING.SALMON@NOAA.GOV](mailto:SJRSPRING.SALMON@NOAA.GOV)

Protected Resources Division  
National Marine Fisheries Service  
650 Capital Mall, Suite 5-100  
Sacramento, CA 95814



**Re: Comments of State Water Contractors to the Draft Environmental Assessment for 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2011 [sic]**

Dear Sir/Madam:

Thank you for providing the opportunity to comment on the Draft Environmental Assessment for the 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2012 ("EA") to the State Water Contractors, Inc. ("SWC").<sup>1</sup> The SWC is a non-profit association comprised of 27 public agencies from Northern, Central and Southern California that purchase water under contract from the State Water Project, which includes the Oroville Facilities and Feather River Fish Hatchery ("FRFH") on the Feather River. The SWC represents its members in state and federal judicial and regulatory proceedings.

SWC understands that the 10(a)(1)(A) Enhancement of Species Permit Application ("Permit Application") is one step in the process of the reintroduction effort for spring-run Chinook salmon on the San Joaquin River under the San Joaquin River Restoration Program ("SJRRP") as mandated by the stipulated settlement in *NRDC v. Rodgers* ("Stipulated Settlement"),<sup>2</sup> and approved by Congress through the San Joaquin River Restoration Settlement Act, P.L. 111-11 ("SJRRS Act" or "Act"). Under the Act, Central Valley spring-run Chinook salmon ("SRC salmon") are to be reintroduced to the San Joaquin River as an experimental population pursuant to section 10(j) of the Endangered Species Act ("ESA"), provided that the Secretary of Commerce ("Secretary") finds that an ESA section 10(a)(1)(A) permit may be issued that

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**Steven Robbins**  
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Central Coast Water Authority

**General Manager**  
Terry Erlewine

<sup>1</sup>SWC has reviewed the comments prepared by the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition (collectively "Exchange Contractors") to the EA and incorporates herein to these comments the Exchange Contractors' "Overall Comments" numbers 1 (improper review of only part of the proposed action); 2 (improper tiering); 3 (irretrievable commitment of resources); and 4 (segmenting or piecemealing).

<sup>2</sup> Stipulation of Settlement dated September 13, 2006 in *NRDC v. Rodgers*, Case No. CIV. S-88-1658-LKK/GGH, United States District Court, Eastern District of California ("stipulated settlement").

allows the U.S. Fish and Wildlife Service (“USFWS”) to collect SRC salmon for the reintroduction program.<sup>3</sup> The Act requires that the Secretary issue a final rule under ESA section 4(d) governing the incidental take of the reintroduced SRC salmon.<sup>4</sup> Under the terms of the Stipulated Settlement, salmon are to be reintroduced by December 31, 2012<sup>5</sup> and Phase 1 facilities for the protection of salmon are to be completed by December 31, 2013.<sup>6</sup>

In December 2011, UFWS filed its Final § 10(a)(1)(A), Enhancement of Species Permit Application for the Reintroduction of Central Valley Chinook into the San Joaquin River in fulfillment of this requirement. “The overall objective of the proposed action (Reintroduction Program) is to collect and reintroduce multiple life stages of Central Valley ESU spring-run Chinook to develop a naturally-reproducing self-sustaining population of spring-run Chinook in the San Joaquin River.”<sup>7</sup> The 10(a)(1)(A) permit application is “for the collection of surplus Feather River Fish Hatchery (FRFH) spring run Chinook salmon which will be used for broodstock and direct river reintroductions for the SJRRP.”<sup>8</sup>

The EA contains an inadequate analysis of the potential effects of the collection of eggs and juveniles from the FRFH on Feather River SRC salmon and the Central Valley spring-run Chinook salmon Evolutionarily Significant Unit (“ESU”). In Section 4.3.2.1, Feather River Effects, the EA concludes that, since the proposed collection of eggs and juveniles from the FRFH comes from eggs and juveniles that are surplus and “would not have otherwise been cultured and placed into the Feather River”, there is no reduction in the number of hatchery spawned eggs entering the Feather River and, thus, no impact to the spring-run Chinook population on the Feather River or to the ESU.<sup>9</sup> Paired with the discussion on page 3-1 of the EA, it is clear that the conclusion is based on the range of surplus SRC salmon that return to the FRFH annually. What the analysis does not appear to consider is the amount of “surplus” fish that meet the more rigorous collection criteria of the 10(a)(1)(A) permit which includes, among other criteria, a preference for eggs and juveniles that are two-generation spring-run phenotypes.<sup>10</sup>

As acknowledged in the Hatchery and Genetic Management Plan (December 2010) (HGMP), the SRC salmon on the Feather River demonstrate a high level of introgression with fall-run Chinook salmon genes indicating that the Feather River SRC salmon population is significantly hybridized with fall-run Chinook salmon.<sup>11</sup> DWR and the California Department of

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<sup>3</sup> Pub. Law 111-11, § 10011(b)

<sup>4</sup> *Id.*, § 10011(c)

<sup>5</sup> Stipulated Settlement, ¶ 14.

<sup>6</sup> Stipulated Settlement, ¶ 11; *see also* Stipulated Settlement, ¶ 9 stating that “channel and structural improvements listed in Paragraph 11 are necessary to fully achieve the Restoration Goal.”

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, p. 4.

<sup>9</sup> EA, pp. 4-2 – 4-3.

<sup>10</sup> 10(a)(1)(A) permit application, p. 11.

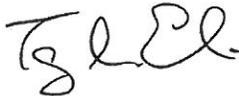
<sup>11</sup> *See* Garza et al. 2008. Genetic population structure of Chinook Salmon (*Oncorhynchus tshawytscha*) in California’s Central Valley. Draft Final Report for CalFed Project “Comprehensive Evaluation of Population Structure and Diversity for Central Valley Chinook Salmon. Copy available at <http://www.yubaaccordrmt.com/Studies%20%20Reports/CVChinDraftFinalReport-Garza.pdf>; *see also* Department of Water Resources. 2009. Hatchery and Genetic Management Plan for the Feather River Hatchery, p. 40 incorporated herein to these comments and available at [nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=15321](http://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=15321).

Fish and Game (“DFG”) are in the process of developing practices to reduce hybridization between spring- and fall-run Chinook salmon. As such, eggs and juveniles sourced from fish expressing a strong spring-run phenotype, and in particular two-generations of spring-run phenotype, are of greater value to the protection and propagation of the spring-run Chinook population on the Feather River. The EA contains no analysis or discussion of the potential impact on the Feather River SRC salmon population or the SRC salmon ESU more generally of the preferential collection of eggs and juveniles from the Feather River Hatchery that are not only designated as spring-run Chinook salmon but exhibit a strong spring-run Chinook salmon phenotype.

Further, in the cumulative impacts analysis section, the EA purports to discuss the cumulative impacts associated with climate change on fish populations of the proposed action. Yet, the EA never actually applies the general discussion of climate change impacts to fish populations in California or specifically to the cumulative impacts on SRC salmon and the ESU.<sup>12</sup> For example, in the study by Moyle et al. (2008) cited in the EA, the authors projected that 65% of the state’s native salmonid species will be extinct within the next 100 years if present trends continue, including SRC salmon which the study concluded has a high likelihood of going extinct possibly even within the next 50 years.<sup>13</sup> The study goes on to state that the “trends indicate that their most likely long-term future in California is extinction” and that “[c]limate change models seem to validate this view.”<sup>14</sup> Though the Moyle et al. (2008) study is referenced by the EA, there is no discussion of its conclusions regarding the risk of extinction of SRC salmon, from a variety of factors including climate change, as a potential cumulative impact in light of climate change trends and the proposed action.

The SWC appreciates this opportunity to comment on the draft EA for the 10(a)(1)(A) Permit Application.

Sincerely yours,



Terry Erlewine  
General Manager

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<sup>12</sup> EA, p. 5-1 – 5-2.

<sup>13</sup> Moyle, Peter et al., 2008. Salmon, steelhead, and trout in California. Status of an emblematic fauna, a report commissioned by California Trout. Center for Watershed Sciences, pp. 177-178.

<sup>14</sup> *Id.*





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May 21, 2012

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**Re: Comments of the San Luis & Delta-Mendota Water Authority regarding the Draft Environmental Assessment for 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2011 [sic]**

Dear Sir/Madam:

Thank you for providing the San Luis & Delta-Mendota Water Authority<sup>1</sup> ("Authority") with an opportunity to comment on the Draft Environmental Assessment for the 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2012<sup>2</sup> ("EA"). The Authority understands that the 10(a)(1)(A) Enhancement of Species Permit Application ("Permit Application") is one step in the process of the reintroduction effort for spring-run Chinook salmon on the San Joaquin River under the San Joaquin River Restoration Program ("SJRRP") as mandated by the stipulated settlement in *NRDC v. Rodgers* ("Stipulated Settlement"),<sup>3</sup> and

<sup>1</sup> The San Luis & Delta-Mendota Water Authority is a joint powers agency based in Los Banos, California. Its members include 30 local public agencies that hold contracts for water supply provided by the Central Valley Project.

<sup>2</sup> The Draft Environmental Assessment is dated April 2011, which appears to be a typographical error since the document was released for review in April 2012.

<sup>3</sup> Stipulation of Settlement dated September 13, 2006 in *NRDC v. Rodgers*, Case No. CIV. S-88-1658-LKK/GGH, United States District Court, Eastern District of California ("stipulated settlement").

approved by Congress through the San Joaquin River Restoration Settlement Act, P.L. 111-11 ("SJRRS Act" or "Act").

The Authority joins in the detailed comments on the EA submitted today by the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition, and incorporates those comments by reference. The Authority has commented previously on other, related aspects of the SJRRP. These comments have addressed the Draft Program Environmental Impact Statement and Environmental Impact Report for the San Joaquin River Restoration Program (letter dated Sept. 21, 2011) and the U.S. Fish and Wildlife Service's September 29, 2010, 10(a)(1)(A) Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River (letter dated Mar. 7, 2011), among other topics. The Authority incorporates those earlier comments as well, and copies are attached to this letter.

The Authority is concerned that NMFS, and the other federal agencies involved, have not yet addressed how they will ensure that the reintroduction of Spring-Run Chinook Salmon (SRCS) to the San Joaquin River does not adversely affect operations of the Jones Pumping Plant located in the south Delta. The EA describes further steps along the path to reintroduction, but meanwhile there is no apparent progress in developing measures to ensure no such impact.

Since the time the Act was passed by Congress, all parties have been aware of the challenge and potential liability that exists with reintroduction of SRCS on the San Joaquin River. The Memorandum of Understanding dated February 26, 2007 entered into among the Third Parties and Reclamation obligates the federal parties to cooperate/coordinate with the Third Parties. The Authority is very concerned that the 4(d) rule will not cover Delta pumping operations and reintroduction will expose diversions at the Jones Pumping Plant to even greater restrictions than exist currently. Yet, no protective measures for increased take in the Delta have even been discussed. To date there has been no discussion, for example, of potential amendments to the biological opinion regarding the impacts of CVP operations on SRCS that would adjust take limits in the Delta to account for any increase in SRCS in the Delta as a result of the SJRRP.

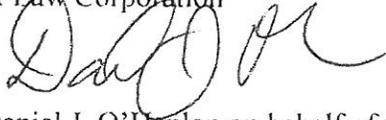
While the draft EA states that SRCS will not be released until the 10(j) designation and 4(d) rule are enacted, in fact, that was not the action applied for by USFWS. The USFWS' 10(a)(1)(A) permit application seeks, among other actions, the reintroduction of SRCS. NMFS has stated on more than one occasion that reintroduction is a foreseeable action. As such, it must be analyzed as part of this EA. NMFS must provide mitigation such that there is no water cost, nor financial cost, to the CVP contractors who depend upon pumping from the Delta as a result of reintroduction. (Act, Sec. 10004.) The draft EA should evaluate alternatives to provide protection to Delta diversions from additional constraints caused by the reintroduction.

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The Authority appreciates this opportunity to comment on the draft EA for the 10(a)(1)(A) Permit Application. The Authority looks forward to working with NMFS and USFWS to develop a program that meets the goals of the legislation in a manner that does not cause adverse impacts to its member agencies and the water users and communities they serve.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Law Corporation

A handwritten signature in black ink, appearing to read "Dan O'Hanlon", written over the printed name below.

Daniel J. O'Hanlon on behalf of the San Luis & Delta-  
Mendota Water Authority

DJO/tw

cc: Dan Nelson, Executive Director, SLDMWA



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Re: **Comments of the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition to the Draft Environmental Assessment for 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2011 [sic]**

Dear Sir/Madam:

Thank you for providing the opportunity to comment on the Draft Environmental Assessment for the 10(a)(1)(A) Enhancement of Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program dated April 2012<sup>1</sup> ("EA") to the San Joaquin River Exchange Contractors Water Authority<sup>2</sup> and the San Joaquin River Resource Management Coalition<sup>3</sup> (hereafter collectively "Exchange Contractors"). The Exchange Contractors understand that the 10(a)(1)(A) Enhancement of Species Permit Application ("Permit Application") is one step in the process of the reintroduction effort for spring-run Chinook salmon on the San Joaquin River under the San Joaquin River Restoration

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<sup>1</sup> The Draft Environmental Assessment is dated April 2011, which appears to be a typographical error since the document was released for review in April 2012.

<sup>2</sup> The San Joaquin River Exchange Contractors Water Authority is a public entity made up of four separate California water entities: Central California Irrigation District; San Luis Canal Company; Firebaugh Canal Water District; and the Columbia Canal Company.

<sup>3</sup> Members of the San Joaquin River Resource Management Coalition include landowners and farmers along the San Joaquin River in the restoration area and water agencies that provide water to the region.

Program (“SJRRP”) as mandated by the stipulated settlement in *NRDC v. Rodgers* (“Stipulated Settlement”),<sup>4</sup> and approved by Congress through the San Joaquin River Restoration Settlement Act, P.L. 111-11 (“SJRRS Act” or “Act”).

Under the Act, Central Valley spring-run Chinook salmon (“SRC salmon”) are to be reintroduced to the San Joaquin River as an experimental population pursuant to section 10(j) of the Endangered Species Act (“ESA”), provided that the Secretary of Commerce (“Secretary”) finds that an ESA section 10(a)(1)(A) permit may be issued that allows the U.S. Fish and Wildlife Service (“USFWS”) to collect SRC salmon for the reintroduction program.<sup>5</sup> The Act requires that the Secretary issue a final rule under ESA section 4(d) governing the incidental take of the reintroduced SRC salmon which shall not impose more than *de minimis* water supply reductions, additional storage releases, or bypass flows on unwilling third parties.<sup>6</sup> The Act also requires that any adverse impacts to third parties be mitigated<sup>7</sup> and that no costs be imposed involuntarily on third parties.<sup>8</sup> Under the terms of the stipulated settlement, salmon are to be reintroduced by December 31, 2012<sup>9</sup> and Phase 1 facilities for the protection of salmon are to be completed by December 31, 2013.<sup>10</sup> As third parties who own or control facilities or property affected by the reintroduction program, the Exchange Contractors expect to actively participate in the development of the SJRRP, including all required permits and rules, such as the 10(a)(1)(A) permit, the 10(j) designation and the final 4(d) Rule.<sup>11</sup>

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<sup>4</sup> Stipulation of Settlement dated September 13, 2006 in *NRDC v. Rodgers*, Case No. CIV. S-88-1658-LKK/GGH, United States District Court, Eastern District of California (“Stipulated Settlement”).

<sup>5</sup> Pub. Law 111-11, § 10011(b).

<sup>6</sup> *Id.*, § 10011(c).

<sup>7</sup> *Id.*, § 10004(d).

<sup>8</sup> *Id.*, § 10009(a)(3).

<sup>9</sup> Stipulated Settlement, ¶ 14.

<sup>10</sup> Stipulated Settlement, ¶ 11(a); *see also* Stipulated Settlement, ¶ 9 stating that “channel and structural improvements listed in Paragraph 11 are necessary to fully achieve the Restoration Goal.”

<sup>11</sup> *See* Preface and Paragraphs B.3, C.3, C.5, C.6 to the Memorandum of Understanding by and among the United States Department of the Interior, Bureau of Reclamation, the San Joaquin River Exchange Contractors Water Authority, the Central California Irrigation District, the Firebaugh Canal Water District, the San Luis Canal Company, the Columbia Canal Company, the Merced Irrigation District, the Turlock Irrigation District, the Modesto Irrigation District, the Oakdale Irrigation District, the South San Joaquin Irrigation District, the San Joaquin Tributaries

As affected third-parties, the Exchange Contractors have been involved in the SJRRP since before the issuance of the stipulated settlement in 2006. The Exchange Contractors previously provided comments, dated March 7, 2011, to the USFWS' draft 10(a)(1)(A) Enhancement of Species Permit Application for the Reintroduction of Central Valley Spring-Run Chinook Salmon into the San Joaquin River dated September 29, 2010 and the Hatchery and Genetic Management Plan dated December 17, 2010 to the National Marine Fisheries Service ("NMFS"), which the Exchange Contractors incorporate herein to these comments and attach hereto. In addition, the Exchange Contractors provided extensive comments, including comments regarding the reintroduction of SRC salmon, to the draft Program Environmental Impact Statement/Environmental Impact Report ("Draft PEIS/EIR") dated April 2011 for the SJRRP, which the Exchange Contractors also incorporate herein to these comments and attach hereto.

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Association, the San Joaquin River Resource Management Coalition, the Westlands Water District, and the San Luis & Delta-Mendota Water Authority Regarding Implementation of the Stipulation of Settlement in Natural Resources Defense Council, et al. v. Kirk Rodgers, et al. dated February 26, 2007 ("MOU"), which the Exchange Contractors incorporate herein to these comments. A copy of this MOU can be found at [http://www.restoresjr.net/program\\_library/02-Program\\_Docs/third\\_parties\\_mou\\_022607.pdf](http://www.restoresjr.net/program_library/02-Program_Docs/third_parties_mou_022607.pdf). See also Paragraph 19(b) of the settlement provides that "The Secretary, with cooperation of the other parties, shall provide appropriate opportunities for input from third parties who have an interest in measures to be undertaken pursuant this Settlement, and for coordination with third parties who own or control facilities or property affected by implementation of such measures. Further, the Secretary, with the cooperation of the other Parties, shall provide appropriate opportunities for public participation regarding implementation of this Settlement." From the juxtaposition of these two sentences, it is clear that that the settlement requires the Secretary to engage with the Exchange Contractors in a more in-depth manner than through the public process required by regulation and the last sentence.

Further, USFWS guidelines on the formulation of special rules for experimental populations, which we understand NMFS intends to follow, require consultation "with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population." 50 C.F.R. § 17.81(d) (emphasis added).

**I. OVERALL COMMENTS**

**1. The EA Evaluates Only Part of the Project Proposed by the USFWS in its 10(a)(1)(A) Permit Application in Violation of NEPA.**

Paragraph 14 of the Stipulated Settlement requires the USFWS to submit a Section 10(a)(1)(A) permit application to NMFS for the reintroduction of spring-run Chinook.<sup>12</sup> In December 2011, USFWS filed its Final § 10(a)(1)(A), Enhancement of Species Permit Application for the Reintroduction of Central Valley Chinook into the San Joaquin River in fulfillment of this requirement. “The overall objective of the proposed action (Reintroduction Program) is to collect and reintroduce multiple life stages of Central Valley ESU spring-run Chinook to develop a naturally-reproducing self-sustaining population of spring-run Chinook in the San Joaquin River.”<sup>13</sup> The 10(a)(1)(A) permit application is “for the collection of surplus Feather River Fish Hatchery (FRFH) spring run Chinook salmon which will be used for broodstock and direct river reintroductions for the SJRRP.”<sup>14</sup>

In its permit application, the USFWS expressly states that the third component of its proposed action “includes the release of donor stock and/or conservation stock to the mainstem of the San Joaquin River.”<sup>15</sup> In support of this component, the permit application describes the activities or methods for the reintroduction of SRC salmon to the San Joaquin River.<sup>16</sup> Instead of analyzing the proposed action for which USFWS submitted the permit application, NMFS impermissibly narrows USFWS’ proposed action in its environmental assessment to exclude activities that would release SRC salmon into the San Joaquin River.<sup>17</sup> In plain language, NMFS states that “[t]his EA will analyze the potential impacts of the proposed action up to the point of releasing fish into the San Joaquin River.”<sup>18</sup>

NEPA requires that an environmental assessment include, among other things, a brief discussion of the *proposed* action and alternatives.<sup>19</sup> It is the nature and scope of the proposed action before the reviewing agency that dictates the range of reasonable alternatives that must be

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<sup>12</sup> 10(a)(1)(A) Permit Application, p. 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, p. 4.

<sup>15</sup> *Id.*, p. 25.

<sup>16</sup> *Id.*, pp. 25-34.

<sup>17</sup> EA, p. 1-3.

<sup>18</sup> *Id.*

<sup>19</sup> 40 C.F.R. § 1508.9.

considered.<sup>20</sup> When it received the final 10(a)(1)(A) permit application, NMFS had two options: conduct an environmental review on the project actually proposed in the 10(a)(1)(A) Permit Application submitted by USFWS or request that USFWS amend the 10(a)(1)(A) Permit Application modifying the proposed action. Instead, NMFS, in the EA, improperly and in violation of NEPA undertook an environmental review of a project different than the one for which the USFWS seeks approval in the 10(a)(1)(A) Permit Application.

## 2. NMFS Improperly Tiers off the Draft PEIS/EIR for the SJRRP.

“Tiering is appropriate when the sequence of statements or analyses is: (a) [f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.”<sup>21</sup> Here, as the EA explains, the Draft PEIS/EIR for the SJRRP “evaluated the potential direct, indirect, and cumulative impacts on the environment at a program level that could result from implementing the Settlement consistent with the Settlement Act.”<sup>22</sup> The Draft PEIS/EIR considered its program-level analysis as the first tier in the NEPA analysis from which future project-level NEPA/CEQA documents could either tier or incorporate by reference general discussions.<sup>23</sup> “As a Programmatic document the Draft PEIS/EIR discusses the reintroduction of spring-run Chinook to the San Joaquin River and the affected environment.”<sup>24</sup> However, the “Draft PEIS/EIR does not specifically analyze the potential impact of specific actions such as the issuance of the 10(a)(1)(A).”<sup>25</sup>

The proposed action under review in the EA is the issuance of a 10(a)(1)(A) permit to USFWS, required by Paragraph 14 to the Stipulated Agreement, authorizing the collection of surplus SRC salmon eggs and juveniles from the Feather River Fish Hatchery (“FRFH”) to

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<sup>20</sup> *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1246-47 (9th Cir. 2005).

<sup>21</sup> 40 C.F.R. § 1508.28(a).

<sup>22</sup> EA, p. 1-2.

<sup>23</sup> Draft PEIS/EIR, pp. 1-9–1-10.

<sup>24</sup> EA, p. 1-2; *see also* Draft PEIS/EIR, p. 2-43 stating that the “Draft PEIS/EIR” identifies potential system effects associated with reintroducing salmon.”

<sup>25</sup> EA, p. 5-2. Instead, the Draft PEIS/EIR anticipated that analysis of the “specific environmental effects related to the reintroduction of spring-run Chinook salmon would be addressed in the subsequent project-specific NEPA analysis, and possibly CEQA analysis, in compliance with an associated Special Rule authorizing the experimental populations.” Draft PEIS/EIR, p. 2-43.

establish broodstock and to initiate releases of SRC salmon to the San Joaquin River.<sup>26</sup> As an environmental review of the project-level impacts of issuing the 10(a)(1)(A) permit, a part of the larger reintroduction of SRC salmon under the SJRRP, the EA tiers off of the program-level environmental analysis of the draft PEIS/EIR. On page 1-2, the EA expressly states that:

[i]nformation from the Draft PEIS/EIR was used in the preparation of this Environmental Assessment (EA) for the discussions of air quality, climate change and the fish populations that currently exist in the San Joaquin River as there could be effected by the proposed action.

Throughout Section 3 on the “Affected Environment,” the EA relies on, incorporates or reproduces discussions from the Draft PEIS/EIR. In Section 3.4.2 on “Water Quality,” the EA relies on the Draft PEIS/EIR’s description of water quality in Reach 1 of the San Joaquin River including its conclusions about factors influencing water quality and its overall conclusions concerning water quality.<sup>27</sup> In Section 3.6.1 on “Air Basins and Attainment Status,” the EA incorporates by reference the Draft PEIS/EIR’s “description of individual pollutants and the regulatory setting.”<sup>28</sup> In Section 3.6.2 on the “Affected Environment and Odors,” the EA reproduces the Draft PEIS/EIR’s discussion on odors.<sup>29</sup> Finally, in Section 3.7 on “Climate Change and Greenhouse Gas Emissions,” the EA relies on the Draft PEIS/EIR’s description and consideration of the environmental setting for climate change and greenhouse gas emissions explaining that “expected climate changes that have the potential to affect implementation and performance of the program were also considered in the PEIS/EIR.”<sup>30</sup> The EA incorporates by reference the Draft PEIS/EIR’s discussion providing a background overview of global climate change and then reproduces sections from the Draft PEIS/EIR regarding trends and associated impacts at the global and state level and an overview of greenhouse gas emissions sources.<sup>31</sup>

The EA also relies on the Draft PEIS/EIR in its analysis of environmental consequences (Section 4). In Section 4.4.2 on potential impacts on air quality of the proposed action, the EA expressly relies on the Draft PEIS/EIR’s conclusion that “the potential of significant odor impacts associated with the construction and operation of the Conservation Facility related to the

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<sup>26</sup> EA, pp. 1-2 – 1-3.

<sup>27</sup> *Id.*, p. 3-7.

<sup>28</sup> *Id.*, p. 3-8.

<sup>29</sup> *Id.*, p. 3-10.

<sup>30</sup> *Id.*, p. 3-10.

<sup>31</sup> *Id.*, pp. 3-11 – 3-12.

hatchery was too speculative for meaningful consideration.”<sup>32</sup> The EA then notes that the impacts of constructing a new hatchery or expanding an existing hatchery would need to be addressed during environmental review of the proposed hatchery further relying on an environmental review that has yet to be performed. Finally, in Section 5 regarding “Cumulative Impacts,” the EA expressly incorporates the analysis of potential cumulative impacts in the Draft PEIS/EIR for proposed restoration projects under the SJRRP stating “Potential Cumulative Impacts were identified for the SJRRP in the Draft PEIS/EIR and they are included here by reference.”<sup>33</sup>

However, the draft PEIS/EIR for the SJRRP, on which the EA relies, has not been certified as final by the Bureau of Reclamation (“Bureau”) or the California Department of Water Resources (“DWR”). The draft PEIS/EIR was released for public comment on April 22, 2011. During the comment period, hundreds of pages of extensive comments were submitted including by the Exchange Contractors. To date, there has been no response by the Bureau or DWR to the comments and no final EIS/EIR for the SJRRP has been certified. As such, the information and discussion contained in the draft PEIS/EIR remains subject to change. Further, a draft EIS has no legal effect and cannot, on its own, serve as the basis for a tier in the EIS process.<sup>34</sup> Once certified as final, it may be appropriate to use the PEIS/EIR as the first tier in the NEPA process when evaluating the impacts of specific projects within the SJRRP.<sup>35</sup> Here, however, NMFS violated NEPA by tiering the EA for the 10(a)(1)(A) Permit Application off of a draft Program Environmental Impact Statement/Environmental Impact Report that has yet to be certified as final.

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<sup>32</sup> *Id.*, p. 4-4.

<sup>33</sup> *Id.*, p. 5-1.

<sup>34</sup> *Conservation Law Foundation v. Federal Highway Administration*, 24 F.3d 1465, 1474-75 (1st Cir. 1994) (stating that a draft EIS “has no legal effect and cannot, by itself, serve as the first tier in the EIS process”). For the same reason, an EIS later invalidated cannot be tiered off of under NEPA. See *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 791 F.Supp.2d 1158, 1164 n.6 (S.D. Ala. 2011) (explaining that an Environmental Assessment cannot be “tiered off” an invalid EIS); *California ex rel. Lockyer v. United States Forest Serv.*, 465 F.Supp.2d 942, 951-53 (N.D. Cal. 2006) (holding that FEIS violated NEPA because it was tiered off an invalid Fire Plan); *Northern Plains Resource Council v. United States Bureau of Land Mgmt.*, 2005 U.S. Dist. LEXIS 25239, \*5-6 (D. Mont. June 6, 2005) (holding that Environmental Assessment did not satisfy NEPA because it was tiered off invalidated FEIS).

<sup>35</sup> Indeed, “[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (Sec. 1508.28).”

### 3. NMFS Has Made an Irretrievable Commitment of Resources in Violation of NEPA.

NEPA requires environmental analysis to be conducted at the earliest possible opportunity.<sup>36</sup> NEPA and CEQ regulations require the assessment of a given environmental impact must occur as soon as that impact is reasonably foreseeable and must take place before an “irretrievable commitment of resources” occurs.<sup>37</sup> Under the regulations implementing NEPA, an agency must prepare an EIS “early enough so that it can serve practically as an important contribution to the decisionmaking process *and will not be used to rationalize or justify decisions already made.*”<sup>38</sup> For more than forty years, the U.S. Court of Appeals for the Ninth Circuit has acknowledged that delay in preparing an EIS may make all parties less flexible: “After major investment of both time and money, it is likely that more environmental harm will be tolerated.”<sup>39</sup> Since the purpose of an EIS is “to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they ‘retain[] a *maximum range of options*’”, toward this end, courts have attempted to define a “‘point of commitment’ at which the filing of an environmental impact statement is required.”<sup>40</sup> NEPA’s requirement that an EIS include a statement of any irreversible and irretrievable commitment of resources “[o]bviously ... only makes sense if the EIS is prepared prior to the commitment of

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<sup>36</sup> 40 C.F.R. § 1501.2.

<sup>37</sup> 42 U.S.C. § 4332(2)(C)(v); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 717-18 (“Looking to the standards set out by [NEPA] regulation and statute, assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made”) (citing 42 U.S.C. § 4332(C)(v); 40 C.F.R. § 1501.2; and 40 C.F.R. §1502.22).

<sup>38</sup> 40 C.F.R. § 1502.5 (emphasis added).

<sup>39</sup> *Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971). See also *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1128 (D.C. Cir. 1971); *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 853 (9th Cir. 1979); *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 471-72 (9th Cir. 1984); *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988); *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 785 (9th Cir. 2006) (“dilatatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review.”); *Te-Moak Tribe of Western Shoshone of Nev. v. United States DOI*, 608 F.3d 592, 609-10 (9th Cir. 2010).

<sup>40</sup> *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) (emphasis added), citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985); *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979); 40 C.F.R. §§ 1501.2, 1502.1, 1502.5(a)).

resources.”<sup>41</sup> That irretrievable commitment of resources has been found to occur when the government surrenders the absolute right to prevent the use of the resources.<sup>42</sup>

The issuance of the 10(a)(1)(A) permit authorizing the USFWS to begin collecting SRC salmon eggs and juveniles to establish broodstock methodologies and to initiate releases of SRC salmon to the San Joaquin River is an irretrievable commitment of resources on two levels. First, all actions taken to implement the SJRRP, including issuance of the 10(a)(1)(A) permit authorizing the USFWS to begin collecting SRC salmon eggs and juveniles, prior to issuance of a final PEIS/EIR for the SJRRP constitute an impermissible commitment of resources.<sup>43</sup> Each action that further implements the SJRRP prior to the issuance of a final PEIS/EIR for the program diminishes the importance of the PEIS/EIR to the decision making process by foreclosing the range of options that can be considered for implementing the SJRRP and making it more likely after the expenditure of time and money that the document will be used to rationalize or justify decisions already made in the implemented projects and that environmental harm, here potentially to a listed species, will be tolerated.

Similarly, on a project level, the EA contemplates the issuance of the 10(a)(1)(A) before NMFS has conducted an environmental review of the potential impacts from the reintroduction of SRC salmon to the San Joaquin River as an experimental population. The EA clearly states that the analysis in the EA for the issuance of a 10(a)(1)(A) permit considers only “the potential impacts of the proposed action up to the point of releasing fish into the San Joaquin River” and that the analysis of the potential impacts of reintroducing SRC salmon to the San Joaquin River will be analyzed in the NEPA analysis for the 10(j) Rule.<sup>44</sup> The issuance of the 10(a)(1)(A) permit authorizing the collection of SRC salmon eggs and juveniles from the FRFH as an initial step in the reintroduction process before an environmental analysis pursuant to NEPA of the reintroduction of SRC salmon to the San Joaquin River has even been conducted also represents an irretrievable commitment of resources.

The EA claims that the pre-release actions are not an irretrievable commitment of resources because the permit to initiate the reintroduction process is a small step with minimal impact “because of the low numbers and surplus fish being used.” This statement is in complete disregard of the fact that time and money will be expended on the collection and propagation of

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<sup>41</sup> *Id.* at n. 13.

<sup>42</sup> *Id.* at 1449.

<sup>43</sup> *See also* the September 21, 2011 Comments of the Exchange Contractors to the Draft PEIS/EIR, pp. 9-14.

<sup>44</sup> EA, p. 1-3.

SRC salmon eggs and juveniles and that the species at issue, Central Valley spring-run Chinook salmon, is listed as threatened under the ESA.

4. **NMFS Has Improperly “Segmented” the Environmental Analysis of the Reintroduction of Spring-Run Chinook Salmon to the San Joaquin River in Violation of NEPA.**

NEPA mandates comprehensive consideration of the effects of all federal actions.<sup>45</sup> “Segmenting” or “piecemealing” larger projects by conducting separate environmental reviews on only certain discrete aspects of the overall project rather than conducting a comprehensive and cumulative environmental review of the project as a whole, is prohibited.<sup>46</sup> Here, the activities authorized by the 10(a)(1)(A) permit are an integral part of the reintroduction of SRC salmon to the San Joaquin River. By its own admission, the 10(a)(1)(A) permit is intended to initiate the process of reintroducing SRC salmon to the San Joaquin River.<sup>47</sup> However, the proposed action under review in the EA “does not include activities that would release spring-run Chinook into the San Joaquin River.”<sup>48</sup> Instead, the EA only analyzes “the potential impacts of the proposed action up to the point of releasing fish into the San Joaquin River” leaving the remainder of the analysis of the potential impacts of reintroducing SRC salmon into the San Joaquin River to the NEPA analysis to be undertaken by NMFS for the issuance of the 10(j) rule.<sup>49</sup> The EA later explains that the potential impacts of release to the San Joaquin River will

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<sup>45</sup> 42 U.S.C. §4332(2)(a).

<sup>46</sup> *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976) (explaining that “[t]o permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact would provide a clear loophole in NEPA.”)

<sup>47</sup> EA, p. 5-3.

<sup>48</sup> *Id.*, p. 1-3.

<sup>49</sup> *Id.*, p. 1-3. A comprehensive review of the potential impacts of the reintroduction of SRC salmon to the San Joaquin River under the SJRRP was clearly contemplated by the draft PEIS/EIR, which stated that the specific environmental effects related to the reintroduction of spring-run Chinook salmon, including activities authorized by the 10(a)(1)(A) permit, would be addressed in the project-specific NEPA analysis in compliance with an associated Special Rule authorizing the experimental population. Draft PEIS/EIR, p. 2-43.

not be analyzed “because at this time any release is not allowed and would be subject to a separate NEPA analysis.”<sup>50</sup>

Under NEPA and its implementing regulations, all connected, cumulative, or related actions must be assessed together for environmental impact.<sup>51</sup> Connected actions must be considered together in order to preclude an agency from impermissibly “dividing a project into several smaller actions, each of which might have an insignificant environmental impact when considered in isolation, but which taken as a whole have a substantial impact.”<sup>52</sup> “Segmentation” of the environmental review is improper when the segmented project has “no independent justification, no life of its own, or is simply illogical when viewed in isolation.”<sup>53</sup> It is not appropriate to defer consideration of cumulative impacts to a future date, because “NEPA requires consideration of the potential impact of an action *before* the action takes place.”<sup>54</sup> NEPA “clearly requires that consideration of the environmental impacts of proposed projects take place before any licensing decision is made. ... After all, once a project begins, the ‘pre-project environment’ becomes a thing of the past. Evaluating the project’s effect on pre-project resources is simply impossible.”<sup>55</sup>

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<sup>50</sup> EA, p. 2-2.

<sup>51</sup> See 40 C.F.R. §§ 1508.23, 1508.25(a)(2).. See also *Klee v. Sierra Club*, 427 U.S. 390, 410 (1976); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002); *Churchill County v. Norton*, 276 F.3d 1060, 1075 (9th Cir. 2004).

<sup>52</sup> *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 579-80 (9th Cir. 1998), citing *Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995) (“NRIC”).

<sup>53</sup> *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004); see also *Hudson River Sloop Clearwater, Inc. v. Dep’t of Navy*, 836 F.2d 760, 763-64 (2d Cir. 1988). By contrast, when each project (e.g., an ongoing salmon transportation program and proposed river flow improvement measures) would have taken place with or without the other and “could exist without the other, although each would benefit from the other's presence”, the projects thus have “independent utility” and need not be considered together in a single EIS. *NRIC*, 56 F.3d at 1068-69 (9th Cir. 1995), citing *Sylvester v. United States Army Corps of Eng’rs*, 884 F.2d 394, 400 (9th Cir. 1989).

<sup>54</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998), citing *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990) (emphasis in original).

<sup>55</sup> *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988).

In *Trout Unlimited v. Morton*, the U.S. Court of Appeals for the Ninth Circuit stated that an EIS must cover all various stages of a project when “the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.”<sup>56</sup> In *Daly v. Volpe*, the Ninth Circuit held that the environmental impacts of a single highway segment may *only* be evaluated separately from those of the rest of the highway if the segment has “independent utility.”<sup>57</sup>

In *Thomas v. Peterson*,<sup>58</sup> a group of plaintiffs sought to prohibit the U.S. Forest Service from constructing a road designed to facilitate timber extraction. The Forest Service developed an EA that discussed only the environmental impacts of the road itself, but did not consider the impacts of the timber sales that the road was designed to facilitate. Subsequently, the Forest Service issued EAs for three separate timber sales. Each EA covered only the effects of a single timber sale – none discussed cumulative impacts of the sales and the road. The Ninth Circuit held that the road construction and timber sales were connected actions that should have been considered together in a single EIS. The Court stated that the Forest Service may not improperly “segment” projects in order to avoid preparing an EIS, and instead must consider related actions in a single EIS: “Not to require this would permit dividing a project’s multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”<sup>59</sup> The court cited *Daly* and then *Trout Unlimited* for the notion that the phrase “independent utility” means utility such that the agency might reasonably consider constructing only the segment in question.<sup>60</sup> Because the timber sales could not proceed without the road, and the road would not have been built but for the timber sales, the two were “inextricably intertwined.”<sup>61</sup> *Thomas* continued as follows:

A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process. ... That purpose requires that the NEPA process be integrated with agency planning “at the earliest possible time,” 40 C.F.R. § 1501.2, and the purpose *cannot be fully served if consideration of the cumulative*

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<sup>56</sup> 509 F.2d 1276, 1285 (9th Cir. 1974).

<sup>57</sup> 514 F.2d 1106, 1110 (9th Cir. 1975).

<sup>58</sup> 753 F.2d 754 (9th Cir. 1985) (“*Thomas*”).

<sup>59</sup> *Id.* at 758.

<sup>60</sup> *Id.* at 759-60.

<sup>61</sup> *Id.* at 759.

*effects of successive, interdependent steps is delayed until the first step has already been taken.*<sup>62</sup>

In *Blue Mountains Biodiversity Project v. Blackwood*,<sup>63</sup> the plaintiffs argued that the Forest Service had failed to consider the cumulative effects of several timber sales in a fire-ravaged portion of the Umatilla National Forest. Following the fire, the Forest Service proposed five logging projects in the same watershed, but performed no assessment of the combined impact of these projects.<sup>64</sup> Importantly, these five projects were to proceed together part of what the Forest Service itself acknowledged was a “coordinated [fire] recovery strategy.”<sup>65</sup> Furthermore, the nature of all five logging projects was known in advance of the preparation of each project’s environmental assessment: all five sales had been disclosed to logging companies, with estimated sale quantities and timelines, before the environmental assessment at issue had even been prepared.<sup>66</sup> The Ninth Circuit found the five potential logging projects were cumulative and had to be evaluated in a single EIS, because they were reasonably foreseeable and “developed as part of a comprehensive forest recovery strategy.”<sup>67</sup>

Here, the issuance of the 10(a)(1)(A) permit authorizing collection of eggs and juveniles from the FRFH is a necessary first step in the reintroduction of SRC salmon to the San Joaquin River. Inextricably intertwined, the collection of eggs and juveniles from the FRFH under the 10(a)(1)(A) permit does not have any independent utility outside the context of the reintroduction of SRC salmon to the San Joaquin River. As the EA expressly states,

[t]he proposed action is to issue a permit under section 10(a)(1)(A) of the ESA to the USFWS, for a period of five years, to collect surplus spring-run Chinook eggs or juveniles from the Feather River Hatchery (FRFH) in order to establish broodstock methodologies and, to allow collection of surplus eggs and/or

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<sup>62</sup> *Id.* at 760 (emphasis added), citing *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc); *Calvert Cliffs’ Coordinating Committee*, 449 F.2d at 1113-1114.

<sup>63</sup> 161 F.3d 1208 (9th Cir. 1998), cert. denied, *Malheur Lumber Co. v. Blue Mountains Biodiversity Project*, 527 U.S. 1003 (1999).

<sup>64</sup> *Id.* at 1214-15.

<sup>65</sup> *Id.* at 1215.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

juveniles from the FRFH to initiate releases of spring-run Chinook to the San Joaquin River.<sup>68</sup>

While the EA briefly mentions that the pre-release actions authorized by the issuance of the 10(a)(1)(A) permit will provide “important information” (EA, p. 5-3) and will also further the goal of recovering listed salmonids in the Central Valley (EA, p. 1-2), the simple truth is that but for the planned reintroduction of SRC salmon to the San Joaquin River mandated by the Settlement Act, there would be no reason to collect SRC salmon eggs and juveniles from the FRFH River to establish broodstock or for release into the San Joaquin River. By artificially dividing the environmental review of the reintroduction of SRC salmon to the San Joaquin River into two parts, pre-release and post-release actions, NMFS has impermissibly and illogically segmented the environmental analysis regarding the reintroduction of SRC salmon to the San Joaquin River in violation of NEPA.

Further, the Department of Interior and NOAA Fisheries have stated that they are pursuing introduction of SRS salmon in the near future making a full and comprehensive environmental review of the reintroduction program prior to any actions being taken critical.<sup>69</sup> They are even apparently planning to move SRC salmon using trap and haul if necessary. As stated in the March 5, 2012 letter from Interior Deputy Secretary Hayes and NOAA Fisheries Under Secretary Lubchenco,

As described above, the parties to the Settlement are evaluating which facilities are required and what other temporary structural and regulatory actions are necessary to complete the initial reintroduction of salmon while the remaining facilities are being constructed. Although these other temporary actions have not been determined at this time, the USFWS and NMFS are considering such actions as trapping and hauling adults around the Mendota Pol, raising juveniles at the California Department of Fish and Game’s (CDFG) planned conservation hatchery and releasing them at various locations above and below Mendota Pool, and take protection for spring-run in the river.”<sup>70</sup>

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<sup>68</sup> EA, pp. 1-2 – 1-3.

<sup>69</sup> See March 5, 2012 letter from Interior Deputy Secretary Hayes and NOAA Fisheries Under Secretary Lubchenco to The Honorable Dennis Cardoza of the U.S. House of Representatives. This March 5, 2012 letter and the August 9, 2011 letter from The Honorable Dennis Cardoza and The Honorable Jim Costa to Interior Deputy Secretary Hayes and NOAA Fisheries Under Secretary Lubchenco are incorporated herein to these comments and attached hereto.

<sup>70</sup> *Id.*, response to Question 1.2.

Unfortunately, instances of improper “segmenting” or “piecemealing” have occurred over and over in the NEPA process for the SJRRP to date with environmental review and implementation of projects prior to a comprehensive environmental review of the SJRRP as a whole being certified and improper segmenting of individual projects. To illustrate this point, the following is a list of NEPA/CEQA documents that have been issued for the SJRRP:

- Reclamation Petitions State Water Resources Control Board for instream flow dedication, change in purpose of use, place of use and points of diversion (Applications 23, 234, 1465 and 5638) in Madera and Fresno Counties - May 18, 2012
- Final Environmental Assessment and Finding of No Significant Impact for the Recirculation of Recaptured Water Year 2012 SJRRP Interim Flows - April 3, 2012
- Draft Recirculation of Recaptured Water Year 2012 SJRRP Interim Flows Environmental Assessment and Draft Finding of No Significant Impact - February 7, 2012
- Draft Environmental Assessment and Proposed Finding of No Significant Impact for the Mendota Dam Sluice Gates Replacement Project - December 2011
- Final Environmental Assessment and Finding of No Significant Impact for Recirculation of Recaptured Water Year 2011 SJRRP Interim Flows - June 17, 2011
- Draft Supplemental Environmental Assessment and Proposed Finding of No Significant Impact for the SJRRP's Water Year 2012 Interim Flows Project - June 14, 2011
- Draft Feasibility Report, Environmental Assessment, and Proposed Finding of No Significant Impact for the Friant-Kern Canal Capacity Restoration Feasibility Study - June 3, 2011
- Draft Program Environmental Impact Statement/Environmental Impact Report - April 22, 2011
- Final Supplemental Environmental Assessment and Finding of No Significant Impact for the SJRRP's Water Year 2011 Interim Flows Project - September 2010
- Draft Annual Technical Report for Spring 2010 Interim Flows - August 6, 2010
- Final Environmental Assessment and signed Finding of No Significant Impact for the Recirculation of Recaptured Water Year 2010 San Joaquin River Restoration Program Interim Flows, July 23, 2010
- Addendum and FONSI to Final EA for Recirculation of Recaptured WY 2010 SJRRP Interim Flows
- Draft Environmental Assessment and Draft Finding of No Significant Impact for the Recirculation of Recaptured 2010 San Joaquin River Restoration Program Interim Flows, June 28, 2010
- Draft Supplemental Environmental Assessment and Proposed Finding of No Significant Impact for the SJRRP's Water Year 2011 Interim Flows Project - June 11, 2010
- Final Water Year 2010 Interim Flows Project Environmental Assessment/Initial Study - September 2009
- Final Environmental Assessment for the Installation and Rehabilitation of Stream Gages on the San Joaquin River, Fresno, Madera, Merced and Stanislaus Counties, California - December 2008

**5. The EA Fails to Adequately Assess the Potential Impacts of Accidental or Volitional Releases of SRC salmon to the San Joaquin River from Incubators and Holding Pens.**

Under the 10(a)(1)(A) permit under review in the EA as the proposed action, eggs and juveniles not intended for broodstock may be placed in incubators or holding pens placed in or adjacent to the San Joaquin River.<sup>71</sup> While the EA makes clear that “[u]ntil such time as the 10(j) rule is in place, no fish collected under this permit or placed in any pens may be released to the San Joaquin River,”<sup>72</sup> the EA entirely fails to conduct any assessment of the potential impacts of either accidental releases or releases due to vandalism of SRC salmon from incubators or net holding pens into the San Joaquin River, which will be protected as a listed species prior to the issuance of the 10(j) rule.<sup>73</sup>

Instead of an assessment or analysis of the potential impacts of accidental releases and vandalism-caused releases in its discussion of environmental consequences (Section 4 of the EA), the EA provides in its discussion of the “Proposed Action/Preferred Alternative” (Section 2 of the EA) that NMFS will impose a permit condition requiring “monitoring of net pens and associated activities that happen in the natural environment to ensure unforeseen adverse impacts are not occurring.”<sup>74</sup> Based on this condition, and other conditions not directly applicable to the incubators and pens, the EA concludes that its permit conditions “would ensure that no spring-run Chinook are released to the San Joaquin River under the SJRRP, until an experimental population can be designated pursuant to section 10(j) of the ESA.”<sup>75</sup> In addition, in Appendix 1 to the EA regarding “Incubator and holding pen types and methods that may be used in implementing the 10(a)(1)(A) permit,” NMFS also mentions factors and facts that could minimize potential vandalism such as the use of instream incubators, placement of incubators close to Friant Dam and the placement of streamside holding tanks in trailers or behind fences, but these are not provided as part of any analysis of environmental effects.<sup>76</sup> Together, these random factors and the one permit condition do not constitute an assessment of the potential

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<sup>71</sup> EA, pp. 1-3 and 2-2.

<sup>72</sup> *Id.*, p. 1-3

<sup>73</sup> *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1028-31 (Agency’s analysis was insufficient because NEPA required consideration of environmental impacts arising from terrorist attack because the possibility of an attack was “not so ‘remote and highly speculative’ as to be beyond NEPA’s requirements.”)

<sup>74</sup> EA, p. 2-2.

<sup>75</sup> *Id.*, p. 2-2.

<sup>76</sup> *Id.*, A-1, A-3 and A-4.

risks from accidental releases and vandalism-caused releases of SRC salmon to the San Joaquin River from the use of incubators or pens adjacent to or within the San Joaquin River.

**6. The EA Fails to Assess the Potential Impacts on Collected Spring-run Chinook Salmon if the Issuance of the 10(j) Rule is Delayed.**

The proposed action is to issue a 10(a)(1)(A) permit authorizing the collection of SRC salmon eggs and juveniles from the FRFH in order to establish broodstock and to initiate releases of spring-run Chinook salmon to the San Joaquin River.<sup>77</sup> The EA indicates that collection under the 10(a)(1)(A) permit would begin upon issuance, but that “[u]ntil such time as the 10(j) rule is in place, no fish collected under this permit or placed in any pens may be released to the San Joaquin River.”<sup>78</sup> In fact, the EA states that the 10(a)(1)(A) permit under the Proposed Action/Preferred Alternative would include an express condition that “no spring-run Chinook will be released to the San Joaquin River unless designated as an experimental population under section 10(j) of the ESA.” (EA, p. 2-2.) What the EA fails to analyze is the potential impact to the SRC salmon collected and propagated under the 10(a)(1)(A) permit if the issuance of the 10(j) rule is delayed for any significant period of time. Without the ability to reintroduce eggs and juveniles to the San Joaquin River, there are no provisions for the disposition or release of the collected or propagated SRC salmon.

**7. The EA Fails to Take Into Account the Inadequate Funding for the Activities Authorized by the 10(a)(1)(A) permit.**

“Construction funding for the Interim Facility and the long-term Conservation Facility is provided by the State of California” both of which are necessary for the collection and propagation activities authorized by the 10(a)(1)(A) permit.<sup>79</sup> While the construction costs for the Conservation Facility will come from the State of California, the O&M costs will be covered by the Bureau of Reclamation.<sup>80</sup> The proposed cost estimate for the Conservation Facility, which is anticipated to be in operation by 2014, is \$14.64 million.<sup>81</sup> According to the 10(a)(1)(A) permit application, the “State has an approved budget allocating the funding and spending authority” for the Conservation Facility.<sup>82</sup> However, while immediate funding may

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<sup>77</sup> *Id.*, p. 1-2.

<sup>78</sup> *Id.*, p. 1-3.

<sup>79</sup> *Id.*, pp. 3-5–3-6.

<sup>80</sup> 10(a)(1)(A) Permit Application, p. 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

arguably be secure, the status could change “owing to past bond sale challenges and an uncertain economy.”<sup>83</sup>

Similarly, as to the federal government, there is a current lack of assured and adequate funding for the SJRRP as a whole. When the SJRRS Act was enacted in 2009, four sources of funds were identified to provide some of the monies needed to carry out the Restoration Program<sup>84</sup> amounting to hundreds of millions of dollars for the necessary channel and structural improvements; to operate the salmon reintroduction program; to prevent damage (via flooding and seepage) to downstream lands and infrastructure (such as those owned by the Exchange Contractors); and to accomplish the goal of “reducing or avoiding an adverse water supply impact” to Friant water users. However, absent additional appropriations, only \$88 million was currently available until October 1, 2019 from the federal government (due to “PayGo” rules) of which \$58 million is already obligated and/or expended, leaving only \$30 million to pay for the SJRRP for the remaining years until 2019.<sup>85</sup> These remaining funds, over the next seven years, are *grossly inadequate* to carry out the fishery and restoration program that was envisioned at the time of the enactment of the Act.<sup>86</sup>

The EA fails to consider the potential impacts to SRC salmon collected from the FRFH if there is not sufficient funding to modify the Interim Facility or construct and operate the larger Conservation Facility.

## II. SPECIFIC COMMENTS

8. Page 1-2. The EA states that “prior to implementation of the restoration program for the San Joaquin River, an analysis of the potential environmental effects was prepared in accordance with the National Environmental Policy Act and the California Environmental Quality Act.” The EA goes on to state that a “Program Environmental Impact Statement/Environmental Impact Report (Draft PEIS/EIR (Reclamation, 2010)) was prepared that evaluated the potential direct, indirect, and cumulative impacts on the

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<sup>83</sup> *Id.*

<sup>84</sup> (1) The annual funds already being paid by Friant dam users to the CVPIA fund – approximately \$10 million each year (\$200 million over 20 years); (2) Funds from the early repayment by Friant users of the capital costs of Friant Dam – approximately \$220 million; (3) State of California bond initiatives – approximately \$200 million (according to 2008 estimates); and (4) Federal appropriations capped at \$250 million with a 50% non-federal cost share.

<sup>85</sup> Powerpoint Presentation of the San Joaquin River Restoration Program dated February 21, 2012, which the Exchange Contractors incorporate herein to these comments and attach hereto.

<sup>86</sup> There is no certainty that additional money will be more available in 2019.

environment at a program level that could result from implementing the Settlement consistent with the Settlement Act.” These statements are incorrect. First, the draft PEIS/EIR was issued in April 2011, not April 2010. To date, a final EIS/EIR for the SJRRP has not been certified. Second, implementation of the SJRRP began prior to preparation of an analysis of the potential environmental effects of the restoration program in violation of NEPA. Examples of such actions to implement the SJRRP include the release of interim flows during Water Years 2010, 2011 and 2012; the recapture and recirculation of these flows to Friant contractors; the drilling of monitoring wells; and the release of fall-run Chinook salmon into the San Joaquin River.

9. Page 1-3. The EA states “[u]ntil such time as the 10(j) rule is in place, no fish collected under this permit or placed in any pens may be released to the San Joaquin River. The 10(j) Rule will require its own NEPA analysis, including an analysis of the potential impacts on the human environment of reintroducing spring-run Chinook into the San Joaquin River.”<sup>87</sup> The EA consistently but incorrectly refers to issuance of a “10(j) rule,” when, in fact, the Act intends the designation of the SRC salmon reintroduced to the San Joaquin River pursuant to section 10(j) of the ESA and the subsequent promulgation of a rule pursuant to section 4(d) of the ESA governing the incidental take of the reintroduced SRC salmon.
10. Pages 4-1–4-2. Sections 4.1 and 4.2 of the EA contains the analysis of environmental consequences on hatchery facilities and water quality associated with the use of the FRFH, the Silverado Fisheries Base near Yountville, California or the Center for Aquatic Biology and Aquaculture (“CABA”) in Davis, California.<sup>88</sup> As background, Section 3.3 states that the Silverado and CABA facilities are proposed to be used to quarantine juveniles and eggs collected from the FRFH.<sup>89</sup> However, the 10(a)(1)(A) Permit Application states that if the FRFH is unable to rear eggs to the juvenile stage that individual fish will be transferred to the Silverado facility for rearing and quarantine.<sup>90</sup> In a later section (Section 5.7 Rearing Facilities), the 10(a)(1)(A) permit application states that “in the event the currently proposed Interim Facility is unavailable for holding fish, the contingency plan is to: (1) focus on the direct transfers to the San Joaquin River (as described elsewhere in this document) without use of the Interim Facility; (2) utilize the Center for Aquatic Biology Aquaculture facility at University of California at Davis or; (3) allow fish to remain at the Feather River Fish Hatchery facilities.” From these pages,

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<sup>87</sup> EA, p. 1-3.

<sup>88</sup> *Id.*, pp. 4-1 – 4-2.

<sup>89</sup> *Id.*, p. 3-5.

<sup>90</sup> 10(a)(1)(A) Permit Application, p. 13.

it appears that under the USFWS' proposed action, Silverado, CABA and the FRFH might be used as backup facilities to rear juvenile SRC salmon for the reintroduction program under the 10(a)(1)(A) permit. Because the EA does not mention the use of these facilities as potential rearing facilities, it is unclear whether the analysis in Sections 4.1 and 4.2 of the EA assess the potential impacts on hatchery operations and water quality of using these facilities for rearing.

11. Pages 4-2–4-3. Instead of actually analyzing the potential effects of the Interim Facility, the Conservation Facility or the use of holding pens in and adjacent to the river on water quality in the San Joaquin River, the EA circularly concludes that the proposed action would not have a significant effect on water quality because the discharge permits issued for the facilities and holding pens would contain permit conditions requiring that discharges from either the facility or holding pens will not adversely affect ambient water quality. Without further evidence or analysis, the EA fails to provide sufficient evidence and analysis for determining whether the proposed action will have a significant impact on water quality in the San Joaquin River.<sup>91</sup>
12. Page 4-3. Section 4.3.2.2 analyzes the effects of the proposed action on the San Joaquin River. Regarding genetic diversity, the EA states “[t]he Permit includes methodology to enhance the genetic diversity of the hatchery crosses collected and to ensure that the crosses are from adults who are second generation phenotypic spring-run Chinook.” While this is the method laid out generally in section 5.2.1 of the 10(a)(1)(A) Permit Application, with regard to collection of juveniles, the permit application also states “[i]f the Program is unable to segregate fish during the egg lifestage, then the Program will collect spring-run juveniles from all available raceways” by random collections “guided by the number of fish in each raceway, the size of the fish, and the number of different families (i.e., crosses) in each raceway.”<sup>92</sup> This methodology does not appear to preferentially select for juveniles who meet the criteria of second generation phenotypic SRC salmon. The EA does not analyze the potential impacts of the collection and use of such juveniles on the population in the program to reintroduce SRC salmon to the San Joaquin River, and in particular as founding broodstock.
13. Page 4-4. There is no evidence or analysis supporting the conclusion that since the emissions of greenhouse gases (“GHG”) for the Proposed Action would be substantially lower than the 25, 000 mtCO<sub>2</sub>e threshold, the impacts to Climate Change from GHG emissions of the Proposed Action would be less than significant.

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<sup>91</sup> 40 C.F.R. § 1508.9.

<sup>92</sup> 10(a)(1)(A) Permit Application, p. 13.

14. Pages 5-1–5-3 (Cumulative Impacts Analysis). NEPA and CEQ regulations require an analysis of cumulative impacts. “Cumulative Impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>93</sup> The EA tiers off of the assessment of the broader programmatic potential cumulative impacts analysis in the Draft PEIS/EIR.<sup>94</sup> However, it provides no analysis of the potential cumulative impacts in light of the USFWS’ actual proposed action as described in the 10(a)(1)(A) Permit Application.<sup>95</sup> Instead, the EA summarily states that “[f]or the most part the potential Cumulative Impacts of the Proposed Action itself would be negligible on spring-run Chinook or on other resources discussed in this document.”<sup>96</sup> For example, it makes no analysis of the cumulative impact on water quality, air quality, fisheries or the San Joaquin River of the proposed action in light of the planned development of Interim Facilities at the San Joaquin State Fish Hatchery and construction and operation of the Conservation Facility on the San Joaquin River.<sup>97</sup>

Similarly, the EA purports to discuss the cumulative impacts on fish populations associated with climate change and the proposed action, but never actually applies the general discussion of climate change impacts to fish populations in California to analyze the cumulative impacts of the proposed action specifically, in particular the cumulative impacts on SRC salmon and the Central Valley spring-run Chinook Evolutionarily Significant Unit (“ESU”).<sup>98</sup> For example, in the study by Moyle et al. (2008) cited in the

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<sup>93</sup> 40 C.F.R. § 1508.7

<sup>94</sup> EA, p. 5-1 (“Potential Cumulative Impacts were identified for the SJRRP in the Draft PEIS/EIR and they are included here by reference.”) and p. 5-2 (“The Draft PEIS/EIR takes a programmatic approach to the discussion of impacts. The Draft PEIS/EIR does not specifically analyze the potential impact of specific actions such as the issuance of the 10(a)(1)(A).”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, p. 5-1.

<sup>97</sup> The California Department of Fish and Game released a Notice of Exemption under the California Environmental Quality for the “Interim Facility at San Joaquin Fish Hatchery – Initial Study” and a Notice of Exemption for the “Modified Phase II of the Interim Conservation Facility.” The Exchange Contractors incorporate both of these Notices of Exemption herein to these comments. Copies of both Notices are available at [http://www.restoresjr.net/program\\_library/02-Program\\_Docs/NOE4InterimHatchery201205.pdf](http://www.restoresjr.net/program_library/02-Program_Docs/NOE4InterimHatchery201205.pdf)

<sup>98</sup> EA, p. 5-1–5-2.

EA, the authors projected that 65% of the state's native salmonid species will be extinct within the next 100 years if present trends continue, including SRC salmon which the study concluded has a high likelihood of going extinct possibly within even the next 50 years.<sup>99</sup> The study goes on to state that the "trends indicate that their most likely long-term future in California is extinction" and that "[c]limate change models seem to validate this view."<sup>100</sup> Though the Moyle et al. (2008) study is referenced by the EA, there is no discussion of its conclusions regarding the risk of extinction of SRC salmon, from a variety of factors including climate change, as a potential cumulative impact in light of climate change trends and the proposed action.

The Exchange Contractors appreciate this opportunity to comment on the draft EA for the 10(a)(1)(A) Permit Application.<sup>101</sup> We look forward to working with NMFS and USFWS to develop a program that meets the goals of the legislation in a manner that does not cause adverse impacts to our customers and landowners.

Sincerely yours, )



Thomas M. Berliner

TMB:br

cc w/out attachments:

San Joaquin River Exchange Contractors Water Authority, Boards of Directors  
San Joaquin River Resource Management Coalition, Board of Directors  
Allen Short, SJTA  
Daniel Nelson, SLDMWA  
Donald P. Glaser, Regional Director, USBR  
Jeffrey Single, DFG

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<sup>99</sup> Moyle, Peter et al., 2008. Salmon, steelhead, and trout in California. Status of an emblematic fauna, a report commissioned by California Trout. Center for Watershed Sciences, pp. 177-178.

<sup>100</sup> *Id.*

<sup>101</sup> The comments submitted by the San Joaquin River Group are incorporated herein.



Friant Water Authority Comments on Draft Environmental Assessment for 10(a)(1)(A), Enhancement of the Species Permit Application for the collection and transport of Spring-Run Chinook for the San Joaquin River Restoration Program

1. Cover Page: Change April 2011 to April 2012
2. Page 1-1, line 22: indicate that the Friant Water Authority has assumed the obligations of FWUA in the Settlement. [FWUA no longer exists.]
3. Page 1-2, lines 24 – 26: This sentence is not accurate. Implementation of the Settlement by the Implementing Agencies began in FY 2007. See the SJRRP 2007 Annual Report ([http://www.restoresjr.net/program\\_library/01-General\\_Outreach/Annual%20Report\\_Final2\\_012808.pdf](http://www.restoresjr.net/program_library/01-General_Outreach/Annual%20Report_Final2_012808.pdf)). To our knowledge, there was no analysis under NEPA or CEQA prior to these initial implementation activities.
4. Page 2-1, lines 13-14 (“...order to establish a viable population by the year 2025 as required by the Settlement.”): The term “viable” is not used in the Settlement to describe the population of spring run Chinook salmon that is to be established. Rather, the Settlement establishes certain parameters (“self-sustaining naturally reproducing” etc.). It is not clear to us whether “viable” and other new terms used in this permit are intended to have the same meaning as the terms the Parties (including NMFS) agreed to when they signed the Settlement. To the extent there is any conflict between what the parties agreed to in the Settlement and what is proposed in the permit, the terms of the Settlement must prevail.
5. Page 5-3, second full paragraph (line numbers are not provided): “...an experimental population designation could lead to improved conditions for fish habitat more quickly because of the incentive for public and private entities to implement the conservation measures during a period of limited take liabilities, when compared to conservation efforts without such a designation.” The use of the terms “conservation measures” and “conservation efforts” should be explained. Those terms do not seem to be used elsewhere in the document.





## **Mill Creek Conservancy**

40652 Highway 36 E  
Mill Creek, CA 96061

April 30, 2012

Elif Fehm-Sullivan  
Protected Resources Division  
National Marine Fisheries Service  
650 Capitol Mall # 5-100  
Sacramento, CA 95814-4706  
SJR [Spring.Salmon@noaa.gov](mailto:Spring.Salmon@noaa.gov)

Subject: Draft Environmental Assessment for revised San Joaquin River Restoration Program

Dear Ms. Fehm-Sullivan,

Thank you for the notification of the May 1, 2012 meeting in Chico and also providing a copy of the Draft Environmental Assessment for revised San Joaquin River Restoration Program. The Mill Creek Conservancy Board of Directors appreciates the ability to provided input on this project program. MCC appreciates that the project has been revised since we commented on the project over a year ago

MCC supports the current proposal to not use Mill Creek spring-run Chinook Salmon for the San Joaquin Restoration Program given the status of the Mill Creek fish and the vastly different environment of San Joaquin River to that of Mill Creek, Tehama County

MCC supports the Alternative # 2 of the recent Draft Environmental Assessment for a 5-year permit to use up to 560 surplus Spring Run eggs/juveniles annually of Feather River Fish Hatchery broodstock and using excess broodstock in incubation boxes or net pens for the restoration project

MCC supports the NMFS condition ensuring than none of these transplanted fish are released into the San Joaquin River until the establishment of a 10(j) rule

MCC encourages NMFS to permit non-lethal sampling of phenotypical adult SR in the SJ over the next 5 years to determine if volitional straying of wild SR stock is occurring and is so, from which genetic sources. This data would aid in future reintroduction discussions.

MCC still encourages the SJRP to secure adequate water flows to support spring-run Chinook Salmon prior to the introduction of any fish

MCC also encourages comprehensive restoration of the San Joaquin riparian area to support the transplanted fish.

Respectfully submitted,

Burt Bundy, President

Cc: Mill Creek Conservancy Board of Directors