



CENTER for BIOLOGICAL DIVERSITY

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Sent via electronic and certified mail

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Re: Sixty-Day Notice of Violations of the Endangered Species Act for Failure to Comply with 2024 Biological Opinion for the Operation of the Central Valley Project and State Water Project.

Dear Officials of the U.S. Bureau of Reclamation,

On behalf of the Center for Biological Diversity, Friends of the River, and San Francisco Baykeeper, we provide notice in accordance with the citizen suit provision of the federal Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), that the U.S. Bureau of Reclamation (“Reclamation”) is in violation of the ESA for failing to comply with the terms and conditions of the Biological Opinion adopted by National Marine Fisheries Service (“NMFS”) in 2024 (“2024 BiOp”) for the operation of the Central Valley Project (“CVP”) with regards to impacts on winter-run Chinook Salmon, California Central Valley Steelhead, and North American Green Sturgeon. *Id.* § 1538(a)(1)(B). Reclamation has operated the CVP in violation of the 2024 BiOp and thus does not have “take” coverage and is jeopardizing these species in violation of Sections 7 and 9 of the ESA. Reclamation must therefore act to remediate the impacts of its violations and to ensure that such violations do not recur.

I. LEGAL BACKGROUND

a. The Federal Endangered Species Act.

In enacting the ESA, Congress intended endangered species to be afforded the highest of priorities. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The ESA’s purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). Under the ESA, conservation means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3). Federal agencies must “utilize their authorities in furtherance of the purposes of” the ESA and carry out “programs for the conservation of endangered species and threatened species.” *Id.* § 1536(a)(1).

To fulfill the ESA, federal agencies are required to engage in Section 7 consultation with the appropriate expert wildlife agency – NMFS and/or the United States Fish & Wildlife Service (“FWS”) – to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined broadly in the ESA’s implementing regulations to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” such as the

promulgation of regulations, the granting of permits, or actions directly or indirectly causing modifications to the land, water, or air. *Id.* § 402.02.

Pursuant to Section 7, each federal agency must review its actions at “the earliest possible time” to determine whether any action “may affect” listed species or their critical habitat in the “action area.” 50 C.F.R. § 402.14(a). If an action agency concludes that the action is “likely to adversely affect” a listed species or its critical habitat, the agency must engage in “formal consultation” with the relevant expert wildlife agency (NMFS or FWS, depending on the species at issue) to meet the ESA’s “no jeopardy” mandate. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. Formal ESA consultation commences with the action agency’s written request for consultation and concludes with the issuance of a “biological opinion.” 50 C.F.R. § 402.14(g)(4). During formal consultation, NMFS and/or FWS and the action agency must evaluate the “effects of the action.” *Id.* § 402.02. The biological opinion states the federal wildlife agency’s opinion as to whether the effects of the action are “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(g)(4). To “jeopardize the continued existence of” a given species means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of [that] listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” *Id.* § 402.02. The determination of whether an activity is likely to jeopardize the continued existence of a species must be based solely on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

Pursuant to ESA Section 9, it is illegal to engage in any activity that “takes” an endangered species absent valid take coverage under ESA Sections 7 or 10. 16 U.S.C. § 1538(a)(1)(B). The term “take” is defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill wildlife, *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995), and is defined in the statute to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(18). Persons subject to the prohibition on take include individuals and corporations, as well as “any officer, employee, agent, department, or instrumentality of the Federal Government... [or] any State.” *Id.* § 1532(13).

If, during Section 7 consultation, the federal wildlife agency (NMFS or FWS) determines that the action is not likely to jeopardize a species, it may issue an incidental take statement (“ITS”). 16 U.S.C. § 1536(b)(4). An ITS must specify the allowed amount or extent of take (which would otherwise be prohibited under Section 9 of the ESA), “reasonable and prudent measures” (“RPMs”) necessary or appropriate to minimize such take, and the “terms and conditions” that must be complied with by the action agency to implement any RPMs. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). When all of the terms and conditions of the ITS and biological opinion are adhered to, the ITS provides “safe harbor” for the action agency, authorizing the specified, limited take of listed species that would otherwise violate Section 9’s prohibition. *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 637 F.3d 259, 261-62 (4th Cir. 2011) (citing 16 U.S.C. § 1536(o)(2)); *see also, Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 990 (D. Or. 2010).

While incidental take can be authorized under Section 7 through the provision of and compliance with an ITS, violations of the terms and conditions of a biological opinion and ITS expose agencies and private actors to take liability. 16 U.S.C. § 1536(o) (“[A]ny taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.”); *Bennett v. Spear*, 520 U.S. 154, 170 (1997); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993). A violation of an ITS’ terms “abrogates the safe harbor provision of the ITS.” *Or. Natural Desert Ass’n*, 716 F. Supp. 2d at 995. Similarly, where agencies do not implement actions contemplated in and required by the relevant biological opinion, they violate the ESA, even where such actions have not otherwise resulted in exceedances of the incidental take limits provided in the pertinent ITS. *Ctr. for Biological Diversity v. United States BLM*, 698 F.3d 1101, 1108-1115 (9th Cir. 2012). Thus, if an applicant or regulatory authority does “not comply with all of the terms of the Biological Opinion, they would not be protected by the Biological Opinion’s safe harbor” and would be subject to take liability. *Dow AgroSciences*, 637 F.3d at 260. This includes the action agency, which disregards an ITS or other mandatory terms of a biological opinion “at its own peril (and that of its employees).” *Bennett*, 520 U.S. at 170.

After the issuance of a biological opinion and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the action agency and the federal wildlife agency must reinitiate formal consultation: “(1) [i]f the amount or extent of taking specified in the incidental take statement is exceeded; (2) [i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) [i]f a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16 (emphasis added). Section 7(d) of the ESA provides that once a federal agency initiates or reinitiates consultation under the ESA, the agency cannot “make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to listed species or adverse modification of critical habitat.

b. The Administrative Procedure Act.

The Administrative Procedure Act (“APA”) governs the procedural requirements for agency decision-making and provides the standard of review for a federal agency’s compliance with the ESA. Under the APA, a “reviewing court shall ... hold unlawful and set aside” agency action, findings, or conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.” 5

U.S.C. § 706. An agency action is arbitrary and capricious under the APA when the agency (1) has relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. FACTUAL BACKGROUND

The CVP and the California-run State Water Project (“SWP”) are “perhaps the two largest and most important water projects in the United States[.]” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014), and together “provide water to more than 25 million agricultural and domestic consumers in central and southern California.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 984 (9th Cir. 2014). The projects also “control the volume of water flowing through the Central Valley’s rivers by prescribing releases from upstream reservoirs, which operate as water storage facilities.” *Id.* San Francisco Bay and the Sacramento-San Joaquin Delta (the “Bay-Delta”) and those rivers (with the Bay-Delta, the “Bay-Delta Watershed”) are “an important habitat for thousands of [] anadromous fish, many of which are endangered.” *Id.* at 980-981. The Delta “is a critically important natural resource for California and the nation. It serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America.” Cal. Water Code § 85002.

Releases from CVP and SWP reservoirs “cool water temperatures, reduce the salinity of the Delta, provide flood control, improve volume for fish habitat and migration, and supply additional water for agricultural use.” *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 984. The primary threatened and endangered species that are affected by CVP and SWP operations include, but are not limited to, winter-run Chinook Salmon (*Oncorhynchus tshawytscha*) and Central Valley spring-run Chinook Salmon (*O.s tshawytscha*), Central Valley Steelhead (*Oncorhynchus mykiss irideus*), North American Green Sturgeon (*Acipenser medirostris*), Longfin Smelt (*Spirinchus thaleichthys*), and Delta Smelt (*Hypomesus transpacificus*). Though these species are all negatively impacted by Reclamation’s operations in the Bay-Delta Watershed, this notice letter addresses only violations related to winter-run Chinook Salmon, Central Valley Steelhead, and North American Green Sturgeon. Each of the species relevant to this notice letter is described below.

Winter-Run Chinook Salmon. Salmon are anadromous fish, meaning that they are born in freshwater rivers, out-migrate to the ocean where they spend much of their adult life, and then return to their natal streams to breed during a season particular to their distinct population segment (or “run”). As a result, there are several different distinct population segments of Chinook Salmon within the Bay-Delta Watershed, depending on when that cohort of salmon migrates upstream to breed. The term “winter-run Chinook Salmon” refers to the Sacramento River winter-run evolutionarily significant unit of Chinook Salmon. Winter-run Chinook Salmon are produced in two ways – either naturally or via the Livingston Stone National Fish Hatchery, and different management standards apply to hatchery-origin fish than to natural-origin fish. Adult winter-run Chinook Salmon typically migrate upstream through the Bay-Delta from

December through July, with the peak migration from January through May, and spawn during spring and summer months in the upper Sacramento River. Emigrating juveniles typically occur in the Bay-Delta primarily in November through early April.

The Shasta Dam blocks winter-run Chinook Salmon from their historical spawning and rearing habitats in the upper Sacramento River and its tributaries. Salmon that had previously spawned upstream of the Shasta Dam have been forced to spawn downstream of the Keswick Dam on the Sacramento River. The cold-water management of the Shasta Dam presently supports a single winter-run Chinook Salmon population below the dam.

NMFS listed winter-run Chinook Salmon as a “threatened” species under the ESA on August 4, 1989, 58 Fed. Reg. 32,065, and raised its status to “endangered” on January 4, 1994. 59 Fed. Reg. 440. The extinction risk for winter-run Chinook Salmon has increased from moderate to high since 2005, in large part due to the operations of the CVP and SWP.

Central Valley Steelhead. Steelhead are another type of salmonid species and are also anadromous. They are born in freshwater rivers, out-migrate to the ocean where they spend much of their adult life, and then return to their natal streams to breed. The term “Central Valley Steelhead” refers to the California Central Valley distinct population segment (“DPS”) of Steelhead, described as inhabiting the Sacramento and San Joaquin Rivers and their tributaries. This population segment is genetically and evolutionarily distinct from Steelhead elsewhere in the world and is uniquely adapted to the Bay-Delta Watershed ecosystem. The majority of Central Valley Steelhead originate in the Sacramento River basin, although a small and particularly important population exists in tributaries to the San Joaquin River. In-migrating adults enter the Bay-Delta from late-August through March, and spawning occurs from December through April. Juvenile smolts typically out-migrate to the ocean from fall to early summer but can be present year-round. In the San Joaquin River, emigration of Steelhead generally occurs from February to June. Unlike Chinook Salmon, some adult Steelhead may successfully migrate back to salt water after spawning and return to spawn in a subsequent year.

NMFS listed the Central Valley Steelhead as “threatened” on March 19, 1998, 65 Fed. Reg. 13,347, and reaffirmed that status on January 5, 2006. 71 Fed. Reg. 834. In large part because of operations of the CVP and SWP and related facilities, Central Valley Steelhead are at a high risk of extinction.

North American Green Sturgeon. North American Green Sturgeon are, like Salmon and Steelhead, anadromous, meaning that they are born in freshwater rivers, out-migrate to the ocean where they spend much of their adult life, and then return to their natal streams to breed and to feed. Unlike Chinook Salmon, though, Green Sturgeon do not die after spawning, and the species is capable of repeated spawning migrations every 2-6 years. Green sturgeon spawn in cool, deep, swift-flowing river reaches over gravel and cobble bottoms. Some adults exit the river rapidly after spawning, but many over-summer in deep pools and leave with the onset of winter rainstorms. Green Sturgeon spend much of their life in marine waters, more so than most other sturgeon species; adults and sub-adults spend many months each year in ocean waters along the coasts of California, Oregon, and Washington. In the summer, Green Sturgeon often enter bays

or brackish estuaries, like the Bay-Delta, to feed. Green Sturgeon can live up to 60 years and grow to be larger than 8 feet, with females growing larger than males.

The southern DPS of North American Green Sturgeon is found in the Sacramento and San Joaquin rivers and the Bay-Delta, and primarily spawns in the upper mainstem of the Sacramento River, although some spawning activity has been documented in the Feather and Yuba rivers. According to NMFS, the primary threats to the southern DPS of North American Green Sturgeon are habitat loss (because most of the reproduction for this DPS takes place in a small segment of the Sacramento River), entrainment (because of CVP and SWP export facilities), and increases in water temperature (because Green Sturgeon eggs and larvae require cold temperatures to develop). As a result, the southern DPS of North American Green Sturgeon was listed as “threatened” under the ESA on April 7, 2006. 71 Fed. Reg. 17,757.

Given the systemic impacts of water withdrawals on these and other protected species, the CVP and SWP have a complex history of ESA consultation. At least one biological opinion (and at times, several) covering the effects of the combined and coordinated CVP/SWP operations on listed species has been in place under the ESA continuously since the 1990s. One of the current, operative biological opinions, and the one that is relevant to the violations raised in this notice letter, is the 2024 BiOp, which was issued by NMFS to Reclamation.

The 2024 BiOp concluded that Reclamation’s operations in the Bay-Delta Watershed will not jeopardize the species covered therein (winter-run Chinook Salmon, spring-run Chinook Salmon, Central Valley Steelhead, and North American Green Sturgeon, among others) and based that determination in significant part on Reclamation’s commitment in the BiOp to specific measures to reduce its impacts on listed species. As relevant here, the 2024 BiOp commits Reclamation to undertaking specific actions in the event that the cumulative loss of hatchery-origin winter-run Chinook Salmon exceeds fifty percent, seventy-five percent, and one-hundred percent of the “annual loss threshold” for that species. The annual loss threshold for hatchery-origin winter-run Chinook Salmon is 0.12 percent of the juvenile production estimate (“JPE”), which is a calculation of the number of juvenile winter-run Chinook Salmon smolt migrating downriver to the Bay-Delta, on their way to the Pacific Ocean. 2024 BiOp at 589-590. Upon exceedance of the 50 percent threshold, Reclamation and DWR are required to reduce export pumping to “maintain a 7-day average [Old and Middle River Index] value of no more negative than -3,500 [cubic-feet-per-second (“cfs”).” *Id.* at 590. Upon exceedance of the 75 percent threshold, Reclamation is required to run the “winter-run Chinook Salmon Machine Learning Model” (“Machine Learning Model”), and if the model predicts that a change in flow in the Old and Middle River channels of the San Joaquin River to no more negative than -2,500 cfs would shift the model output to a prediction of absence of winter-run Chinook Salmon, Reclamation must “restrict South Delta exports to maintain a 7-day average [] value no more negative than the -2,500 cfs for 7 consecutive days.” *Id.* Upon the exceedance of the 100 percent threshold, Reclamation must immediately convene the Salmon Monitoring Team, a technical advisory team that provides information to Reclamation to reduce the adverse effects of Reclamation’s Bay-Delta Watershed operations of the CVP on Chinook Salmon and North American Green Sturgeon, to review recent fish distribution information and operations and provide advice regarding future planned SWP and CVP operations to minimize subsequent loss during that year. *Id.* Reclamation must also “convene an independent peer review panel to review

SWP and CVP operations and the annual loss thresholds” with the goal of identifying “the actions and decisions contributing to the loss trajectory that led to an exceedance of an annual loss threshold, and [to] make recommendations on modifications to SWP and CVP operations, or additional actions to be conducted to stay within the annual loss thresholds in subsequent years.” *Id.*

Likewise, the 2024 BiOp includes an ITS that prescribes take limits for the covered species. *Id.* at 899-900. The incidental take limit for Central Valley Steelhead is 5,294 juveniles in any single year or 2,319 juveniles as a 3-year rolling average. *Id.* at 900. The incidental take limit for the southern DPS of North American Green Sturgeon is 14 individuals in a single year or 5 annually based on a 3-year rolling average. *Id.*

As discussed further below, these thresholds and limitations were exceeded in 2025 and are likely to be exceeded again in the future. Yet, Reclamation did not take the necessary steps under the terms and conditions of the 2024 BiOp to protect affected species.

III. ESA VIOLATIONS

In March, April, and May of 2025, Reclamation operated the CVP in violation of the 2024 BiOp and in such a way as to exceed the “take” limits for winter-run Chinook Salmon and Central Valley Steelhead. Continuing through September, Reclamation operated the CVP in violation of the 2024 BiOp and exceeded the “take” limit for Green Sturgeon. As a result, Reclamation violated Sections 7 and 9 of the ESA and created and/or exacerbated detrimental conditions that may jeopardize winter-run Chinook Salmon, Central Valley Steelhead, and Green Sturgeon.

For example, project operations in March 2025 caused the cumulative loss of hatchery-origin winter-run Chinook Salmon to exceed the 50 percent, 75 percent, and 100 percent loss thresholds in the span of 5 days, from March 18 to March 22. The winter-run Chinook Salmon Machine Learning Model twice projected that a change in flow to no more negative than -2,500 cfs would shift the model output to a prediction of absence of winter-run Chinook Salmon. See U.S. Bureau of Reclamation, *Weekly Fish and Water Operations Outlook: 4/1/2025 – 4/7/2025* (April 1, 2025) (attached hereto as **Exhibit A**); U.S. Bureau of Reclamation, *Salmon Monitoring Team (SaMT) Meeting Notes*, at 4-5 (April 8, 2025) (attached hereto as **Exhibit B**); U.S. Bureau of Reclamation, *Weekly Fish and Water Operations Outlook: 4/8/2025 – 4/14/2025*, at 1 (April 8, 2025) (attached hereto as **Exhibit C**); U.S. Bureau of Reclamation, *Delta Monitoring Workgroup Meeting Notes* (April 8, 2025), at 2 (attached hereto as **Exhibit D**); U.S. Bureau of Reclamation, *Salmon Monitoring Team (SaMT) Meeting Notes*, at 4-5 (March 25, 2025) (attached hereto as **Exhibit E**). Yet, Reclamation failed to maintain a 7-day average of no more than -2,500 cfs for seven consecutive days for the Old and Middle Sacramento River index, as required. 2024 BiOp at 590; U.S. Bureau of Reclamation, Old and Middle River Flow (OMR) Index, available at <https://www.usbr.gov/mp/cvo/> (attached hereto as **Exhibit F**). This violated the 2024 BiOp and therefore Sections 7 and 9 of the ESA. *Ctr. for Biological Diversity*, 698 F.3d at 1108-1115.

In addition, on March 16, 2025, the CVP and SWP exceeded the three-year rolling average incidental take limit for Central Valley Steelhead of 2,319 fish, and by April 9, 2025, the export facilities had already caused the three-year rolling average to exceed 2,400 fish. *See, e.g., Exhibit G* (collecting data on these exceedances from the California Department of Fish and Wildlife). Once that threshold was exceeded, Reclamation's actions in operating the CVP violated the ESA. 2024 BiOp at 900. Any argument that Reclamation may assert suggesting that the 2024 BiOp's 3-year rolling average take limit for Central Valley Steelhead somehow does not apply until 3 years after the issuance of the 2024 BiOp, or by December 2027, is unsupported by the best available science, arbitrary, and inconsistent with the ESA and APA.

Reclamation also violated the incidental take limit for Green Sturgeon. On September 24, 2025, Reclamation exceeded the 2024 BiOp's take limit for Green Sturgeon of 14 individuals in a single year. U.S. Bureau of Reclamation, *Weekly Assessment of CVP and SWP Delta Operations on Green Sturgeon*, at 1 (September 29, 2025) (attached hereto as **Exhibit H**). This too constitutes a violation of the ESA. 2024 BiOp at 900; 16 U.S.C. § 1536(o); *Bennett*, 520 U.S. at 170.

Furthermore, throughout April and May of this year, Reclamation also regularly violated the California State Water Resources Control Board's Decision 1641 ("D-1641"), which sets seasonally-specific minimum flow limits for various compliance points throughout the Bay-Delta. U.S. Bureau of Reclamation, *Report of Exceedance of San Joaquin River at Airport Way Bridge, Vernalis Base Flow Objective - May 2025* (June 27, 2025) (attached hereto as **Exhibit I**). D-1641 is intended to protect and preserve water quality in the Bay-Delta. And the 2024 BiOp presumes that Reclamation will comply with the strictures of D-1641, so the agency's repeated exceedances in this respect only serve to underscore its inability (or unwillingness) to manage its CVP operations in manner that adequately protects fish and other species. *See, e.g.,* 2024 BiOp at 30; *see also* Bureau of Reclamation, *Record of Decision – Long-Term Operation of the Central Valley Project and State Water Project* (December 20, 2024) at 19 ("Reclamation will operate in compliance with all applicable state and Federal laws including those which regulate water quality such as D-1641 and its associated salinity standards.").

The ESA violations discussed above are likely to recur next year, when Chinook Salmon, Steelhead, and Green Sturgeon repeat their annual migrations through the Bay-Delta. Reclamation's operations, as described in the 2024 BiOp and implemented in 2025, were not adequate to avoid exceeding take limits prescribed by NMFS for three ESA-listed species. It is likely that Reclamation will make the same sorts of management decisions that resulted in the above-referenced violations next year and in ensuing years. Reclamation recently announced that it will be operating its Bay-Delta export facilities in such a way as to maximize exports. This proclamation – referred to by Reclamation as "Action 5" – is intended to respond to President Trump's Executive Order directing Reclamation to "maximize" water exports. Emergency Measures To Provide Water Resources in California and Improve Disaster Response in Certain Areas, 90 Fed. Reg. 8747 (Jan. 31, 2025). Action 5 signals Reclamation's intention to export water out of the Bay-Delta to the maximum extent possible, even though such export decisions have resulted in violations of the ESA in the past and are likely to do so in the future.

Reclamation's analysis of the impacts of "Action 5" explain: (1) "Predicted losses of genetic winter-run Chinook salmon under Action 5 would increase (8-32 [percent] dependent on water year type) compared to the 2024 Proposed Action" (U.S. Bureau of Reclamation, *LTO Action 5* (October 2025), at 1-3 [attached hereto as **Exhibit J**]); (2) "The annual estimated proportion of winter-run Chinook salmon salvaged under Action 5 would increase under all water year types compared to the 2024 Proposed Action" (*id.*); (3) "Predicted losses of steelhead under Action 5 would increase slightly in all water years and for all years combined compared to the 2024 Proposed Action with the exception of dry years" (*id.* at 1-5); (4) "Estimated salvage for juvenile steelhead would increase in all water years and for all years combined compared to the 2024 Proposed Action" (*id.*); and (5) "Predicted losses of green sturgeon were increased under Action 5 compared to the 2024 Proposed Action by 20 [percent] in above normal years and 7 [percent] when all years were combined" (*id.* at 1-6).

The fact that Reclamation violated similar provisions of its previous biological opinion in 2024 likewise suggests that the violations discussed *supra* are likely to recur. In 2024, Reclamation exceeded the relevant take limits in the ITS for its previous, 2019 biological opinion for both winter-run Chinook Salmon and Central Valley Steelhead. U.S. Bureau of Reclamation, *Weekly Fish and Water Operations Outlook: 3/26/2024 – 4/1/2024*, at 3 (March 26, 2024) (attached hereto as **Exhibit K**); U.S. Bureau of Reclamation, *Weekly Fish and Water Operations Outlook: 6/18/2024 – 6/24/2024* (June 18, 2024) (attached hereto as **Exhibit L**). This track record of ESA violations is strong evidence that the violations discussed above are likely to recur. Reclamation has been unable (or unwilling) to balance its export portfolio with the strictures of the ESA for years now, and its recent decisions only indicate that it is doubling down on the kinds of decisions that led to its ESA violations in the past. It is therefore likely that Reclamation will violate the ESA next year.

The undersigned organizations cannot wait until after Reclamation repeats the above-referenced violations next year to seek recourse. The impacts associated with Reclamation's conduct occur quickly and once a take limit for an endangered fish is exceeded, those consequences cannot be undone. As noted, Reclamation exceeded the annual loss threshold for hatchery-origin winter-run Chinook Salmon, going from under 50 percent of the threshold to exceeding 100 percent of the threshold, in under a week. Exhibit A at 4. This history of violations requires additional action by Reclamation to mitigate the impacts associated with these violations and to ensure that such violations do not happen again. It also requires reinitiation of consultation because it has become apparent that (a) the terms of the 2024 BiOp are inadequate to prevent exceeding the take limits it specifies, and (b) Reclamation is unable or unwilling to comply with the existing NMFS BiOp's requirements. 50 C.F.R. § 402.16(a). Unless and until Reclamation agrees to additional protective actions to mitigate the impacts of the above-referenced violations and to ensure that these violations do not recur, the undersigned organizations intend to file suit to compel Reclamation to comply with the ESA.

IV. CONCLUSION

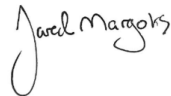
As set forth above, Reclamation has violated the ESA concerning its operation of the CVP and is likely to violate the Act in the future. Reclamation is in violation Section 7(a)(2) of the ESA because it has failed to conform with mandatory actions that were triggered when the

“annual loss threshold” for hatchery-origin winter-run Chinook Salmon was exceeded, the associated Machine Learning Model was run and triggered the need for export reductions, and Reclamation nevertheless failed to reduce its export volumes to the extent required. Since NMFS based its no jeopardy determination in part on Reclamation’s compliance with that mandatory action, Reclamation’s failure to conform to that requirement violates Section 7(a)(2). *Ctr. for Biological Diversity*, 698 F.3d at 1108-1115. Likewise, because Reclamation has exceeded the take limits provided in its ITS for both Central Valley Steelhead and North American Green Sturgeon, it is in violation of ESA Section 9. 16 U.S.C. § 1536(o); *Bennett*, 520 U.S. at 170. And Reclamation is also in violation of controlling regulations since it has “exceeded” the “amount or extent of taking specified” in its ITS. 50 C.F.R. § 402.16. If Reclamation is unwilling to take action within sixty (60) days to mitigate the impact of these violations and to ensure that these violations will not recur, we plan to seek redress through litigation.

Sincerely,



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