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16 Family Farm Alliance

17 **UNITED STATES DISTRICT COURT FOR THE**
18 **EASTERN DISTRICT OF CALIFORNIA**

19 FAMILY FARM ALLIANCE, a nonprofit
20 organization;

21 Plaintiff,

22 v.

23 KENNETH LEE SALAZAR, as Secretary
24 of the United States Department of the
25 Interior; UNITED STATES
26 DEPARTMENT OF THE INTERIOR;
27 UNITED STATES FISH AND WILDLIFE
28 SERVICE; ROWAN GOULD, as Acting
Director of the United States Fish and
Wildlife Service, United States Department
of the Interior; RENNE LOHOEFENER, as
Regional Director of the United States Fish
and Wildlife Service, Pacific Southwest
Region, United States Department of the
Interior; RALPH O. MORGENWECK, as
Senior Science Advisor of the United States
Fish and Wildlife Service, United States
Department of the Interior; DANIEL M.
ASHE, as Science Advisor to the Director

Case No.:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1 of the United States Fish and Wildlife
2 Service, United States Department of the
3 Interior

Defendants.

4 Plaintiff Family Farm Alliance (“Alliance”) alleges as follows:

5
6 **I. INTRODUCTION**

7 1. Plaintiff Alliance’s action for declaratory and injunctive relief challenges Defendant
8 UNITED STATES FISH AND WILDLIFE SERVICE’s (“FWS”) December 15, 2008 Final Biological
9 Opinion (“2008 Biological Opinion”) concerning the impact of coordinated operations of the Central
10 Valley Project (“CVP”) and the State Water Project (“SWP”) on the delta smelt (*hypomesus*
11 *transpacificus*), a threatened species listed under the federal Endangered Species Act, 16 U.S.C. §§
12 1531, *et seq.* This action challenges Defendant FWS’s failure to adhere to the rigorous scientific
13 standards required in the 2008 Biological Opinion under the Information Quality Act,¹ (“IQA”), the
14 Office of Management And Budget (“OMB”) Guidelines for Ensuring and Maximizing the Quality,
15 Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452
16 (February 22, 200) (“OMB IQA Guidelines”), as well as the “Information Quality Guidelines” of the
17 U.S. Department of the Interior (67 Fed. Reg. 50687 (Aug. 5, 2002)) (“DOI IQA Guidelines”), and the
18 FWS Information Quality Guidelines (Available at
19 <http://www.fws.gov/informationquality/topics/IQAguidelines-final82307.pdf>) (“FWS IQA
20 Guidelines”) (collectively, the “IQA Guidelines”). The Alliance further challenges failure of named
21 Defendants to correct these failures and comply with their statutory and regulatory obligations as set
22 forth under the IQA and the IQA Guidelines mandating use of the best available scientific data in
23 important decision-making under the ESA.

24 2. This action seeks to have the 2008 Biological Opinion withdrawn from the public
25 domain and remanded back to the FWS for correction in compliance with the mandate for use of the
26 best available scientific data set forth by the ESA under Section 7, 16 U.S.C. § 1536(a)(2), and defined

27
28 ¹ See Treasury and General Government Appropriations Act for FY 2001 (Pub. L. No. 106-554, §515(a), 114
Stat. 2763A-125, 2763A-153 to 2763A-154 (2000)) (codified at 44 U.S.C. § 3516).

1 in the IQA and the IQA Guidelines. This action is filed pursuant to the Administrative Procedure Act
2 (“APA”), 5 U.S.C. §§ 701, *et seq.*, which provides for judicial review of final agency actions such as
3 the 2008 Biological Opinion.

4 3. Congress enacted the IQA out of a concern for the quality of science used in important
5 decision making by federal agencies; the more influential the decision, the higher the quality required.
6 The 2008 Biological Opinion is a “highly influential scientific assessment” because its dissemination
7 “could have a potential impact of more than \$500 million in any year, or is novel, controversial, or
8 precedent-setting or has significant interagency interest” as defined in the Final OMB Information
9 Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) (“Final Bulletin”). The IQA
10 Guidelines and Final Bulletin have been adopted by the FWS and must be used to provide definition
11 and uniformity to the ESA requirement that biological opinions resulting from ESA Section 7
12 consultations must be based on the best available scientific data.

13 4. The FWS failed to comply with the most fundamental requirements of the IQA, the
14 IQA Guidelines, the Final Bulletin, and the ESA regarding the quality, objectivity, utility, and integrity
15 of scientific decision-making by federal agencies in that the 2008 Biological Opinion was based upon
16 assumptions, not data, the methods relied upon were not transparent, the analysis was not
17 reproducible, and the peer review employed was not competent and credible due to lack of
18 independence and expertise.

19 5. As a result of the failure of the Defendants to comply with the IQA, the IQA
20 Guidelines, the Final Bulletin, and the ESA to correct this highly influential scientific assessment,
21 economic and social consequences are already immediate and devastating. As a result of the 2008
22 Biological Opinion, members of the Alliance are facing potential damage to crops in the range of \$23
23 million to \$1 billion. Land is being fallowed due to lack of water. In some cases, farmers are losing
24 permanent crops, such as orchards and vineyards, causing irretrievable losses of their investments in
25 those crops. Alliance members in allied industries are also being damaged, as their livelihoods are
26 dependent on the agricultural economy and are at risk. Because of the doubts regarding water
27 availability created by the errors in the 2008 Biological Opinion, lenders have become less likely to
28 lend to agriculture, magnifying the economic effects. By conservative estimates, some 37,000 workers

1 have been displaced and without work, and local communities are experiencing unemployment rates in
2 the range of 34 to 41%. The Alliance itself is at risk, as it depends on the financial contributions of its
3 members. The impacts visited upon the rural communities reliant on the water supplies affected by the
4 2008 Biological Opinion will multiply as the economies of these communities are destroyed.

5 6. Accordingly, the Alliance brings this action seeking a judicial order requiring the FWS
6 and other Defendants to comply with the mandate for the use of the best available scientific data under
7 the IQA, the IQA Guidelines, the Final Bulletin as well as ESA Section 7, and the strict scientific
8 standards of the IQA Guidelines by withdrawing the 2008 Biological Opinion from the public domain
9 and making corrections under the IQA in order to provide for analysis of CVP and SWP operations
10 consistent with the procedural and substantive requirements of the law. The Alliance further seeks
11 temporary, preliminary and permanent injunctive relief from the ongoing harm to the species, the water
12 users and their communities due to flawed conclusions and measures in the 2008 Biological Opinion
13 that are based on information that is inaccurate, unclear, incomplete, and biased, and conclusions which
14 have not been adequately peer reviewed.

15 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

16 7. Plaintiff Alliance brings this action raising federal questions on behalf of itself and its
17 members under 16 U.S.C. §1536(a)(2) (action arising under the ESA) and 5 U.S.C. §§ 701, *et seq.* (as
18 an APA action to resolve ESA and IQA violations).

19 8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361.

20 9. The 2008 Biological Opinion is subject to judicial review under the APA as it is a final
21 agency decision and the APA waives the sovereign immunity of federal agencies and employees. 5
22 U.S.C. § 702.

23 10. The relief sought is authorized by 28 U.S.C. §§ 2201 and 2202 (declaratory relief), and
24 Rule 65 of the Federal Rules of Civil Procedure (injunctive relief).

25 11. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(2) in the Fresno
26 Division under Local Rule 3-120 as the acts and omissions giving rise to the claims alleged in this
27 complaint have occurred, and will continue to occur, within the boundaries of in the Eastern District of
28 California, and the consequences of these acts and omissions will substantially impact communities and

1 lands situated within the same boundaries, including Stanislaus, Merced, Mariposa, Kern, and Fresno
2 counties. Further, this civil action is brought against agencies of the United States and its officers and
3 employees acting in their official capacities and under the color of legal authority, and at least one
4 member of the Plaintiff organization is located in this judicial district.

5 **III. PARTIES**

6 12. Plaintiff FAMILY FARM ALLIANCE (“Alliance”) brings this action on behalf of itself
7 and its adversely affected members. The Alliance is a non-profit organization which represents
8 numerous members, including family farmers and ranchers in California’s Central Valley, which have
9 water delivered by the CVP and SWP. Its members also include hundreds of other farm-related
10 organizations, including irrigation districts, commodity associations, private water companies,
11 consulting firms, law firms, and farm implement dealers. Three of the 10 directors are from the Central
12 Valley, specifically in Fresno County. Five members of the Alliance’s Advisory Committee are from
13 California. As such, the Alliance and its members are vitally interested in the availability of reliable
14 and affordable irrigation water supplies in the Central Valley. One of the purposes for the formation of
15 the Alliance was to preserve and protect the water supplies available to its members for agricultural
16 purposes. The Alliance is authorized to commence and maintain actions on behalf of itself and its
17 members. If the information in the 2008 Biological Opinion is not corrected, water supplies to water
18 agencies and farmers and other residents of communities in the Central Valley, many of whom are
19 Alliance members, will be significantly reduced. The affected Alliance members will face drastic and
20 potentially permanent reductions in the water they need to live, grow their crops, and run their
21 businesses, and water agencies will have insufficient supplies to satisfy demand.

22 a. Alliance member Earl Perez of Perez Farms in Crows Landing, California
23 (Stanislaus County) grows fruits, vegetables and nuts in areas located in Stanislaus and Fresno
24 counties. Perez Farms’ production depends upon water exported through the Delta. Mr. Perez
25 has no reliable alternative sources of surface water supply. The flawed 2008 Biological
26 Opinion has already resulted in a reduction of the water Mr. Perez depends upon to grow his
27 crops and will continue to cause harm to his crops and business if it is not withdrawn from the
28

1 public domain and corrected to comply with standards set forth by the IQA, the IQA
2 Guidelines, the Final Bulletin and the ESA.

3 b. Alliance member Suzanne Redfern-West is the president of a diversified farming
4 and ranching operation headquartered near Dos Palos, California (Merced County) and grows
5 almonds, prunes, tomatoes, garlic, and onions in areas located in Merced and Fresno counties.
6 Ms. Redfern-West's farm production depends upon water exported through the Delta. Ms.
7 Redfern-West's operations affected by restrictions on Delta exports have no reliable alternative
8 sources of supply. The flawed 2008 Biological Opinion has already resulted in a reduction of
9 the water Ms. Redfern-West depends upon to grow her crops and will continue to cause harm to
10 her crops and business if it is not withdrawn from the public domain and corrected to comply
11 with standards set forth by the IQA, the IQA Guidelines, the Final Bulletin and the ESA.

12 c. Alliance member Tom Teixeira grows almonds, tomatoes and row crops near
13 Dos Palos, California (Merced County). Mr. Teixeira's farm production is dependent upon
14 water exported through the Delta. Mr. Teixeira has no reliable alternative sources of supply of
15 sufficient quantity to sustain productive acreage without fallowing other farm land. The flawed
16 2008 Biological Opinion has resulted in a reduction of the water Mr. Teixeira depends upon to
17 grow and produce his crops and will continue to cause harm to his crops and business if it is not
18 withdrawn from the public domain and corrected to comply with standards set forth by the IQA,
19 the IQA Guidelines, the Final Bulletin and the ESA.

20 d. Alliance member Joe Del Bosque, Jr. is president of Empresas Del Bosque in
21 Firebaugh, California (Fresno County) and grows fruits, vegetables and nuts in areas located in
22 Fresno and Merced counties. Mr. Del Bosque's farm production depends upon water exported
23 through the Delta. Mr. Del Bosque has no reliable alternative sources of supply. The flawed
24 2008 Biological Opinion has already resulted in a reduction of the water Mr. Del Bosque
25 depends upon to grow his crops and will continue to cause harm to his crops and business if it
26 is not withdrawn from the public domain and corrected to comply with standards set forth by the
27 IQA, the IQA Guidelines, the Final Bulletin and the ESA.

1 e. Alliance Board of Directors member Chris Hurd of Circle G Farms in Firebaugh,
2 California (Fresno County) grows almonds in Fresno County. Mr. Hurd's farm production
3 depends upon water exported through the Delta. Mr. Hurd has no reliable alternative sources
4 of supply. The flawed 2008 Biological Opinion has already resulted in a reduction of the water
5 Mr. Hurd depends upon to grow his crops and will continue to cause harm to his crops and
6 business if it is not withdrawn from the public domain and corrected to comply with standards
7 set forth by the IQA, the IQA Guidelines, and the ESA.

8 13. Defendant KENNETH LEE SALAZAR, United States Secretary of the Interior
9 ("Secretary"), is the highest-ranking official within the Department of the Interior ("DOI") and, in that
10 capacity, has ultimate responsibility for the administration and implementation of the ESA with regard
11 to the delta smelt and for compliance with the IQA and all other federal laws applicable to DOI. He is
12 named in his official capacity. Under Section 7(a)(2) of the ESA, the Secretary is required to consult
13 with and assist federal agencies in determining whether proposed federal agency actions will jeopardize
14 the continued existence of threatened or endangered species, or adversely modify the critical habitat of
15 threatened or listed species. After conclusion of formal consultation under Section 7 of the ESA, the
16 Secretary is required to issue a written statement setting forth the Secretary's opinion detailing how the
17 proposed agency action will affect the listed species and its critical habitat. The Secretary has
18 delegated this responsibility to the United States Fish and Wildlife Service ("FWS"). The Secretary has
19 adopted and included the IQA Guidelines in DOI policy and has required the FWS, as the originating
20 office within DOI, to ensure that biological opinions adhere to the IQA Guidelines.

21 14. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR ("DOI") is the
22 federal executive department of the United States government responsible for the management and
23 conservation of most federal land and the administration of programs relating to Native Americans,
24 Alaska Natives, and Native Hawaiians, and to insular areas of the United States.

25 15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is a federal
26 agency within DOI authorized and required by law to protect and manage the fish, wildlife and native
27 plant resources of the United States, including enforcing the ESA. The FWS has been delegated
28 authority by the Secretary of the Interior to implement the ESA for the Sacramento San Joaquin River

1 Delta, including responsibility for making decisions and promulgating regulations, among these issuing
2 biological opinions regarding jeopardy and adverse modification of critical habitat, and the processing
3 of data for such opinions. In addition, the FWS must adhere to the IQA Guidelines and the Final
4 Bulletin regarding peer review in the dissemination of biological opinions.

5 16. Defendant ROWAN GOULD (“Gould”) is the Acting Director of the FWS, and is
6 named in his official capacity. The Acting Director is responsible for the administration of the ESA on
7 behalf of the Secretary of the Interior. The Acting Director has delegated responsibility for correction
8 of biological opinions to the Office of the Science Advisor.

9 17. Defendant RENNE LOHOEFENER (“Lohoefer”) is the Regional Director of the
10 FWS, Pacific Southwest Region, and is named in his official capacity. The Regional Director is
11 responsible, in part, for the administration of the ESA on behalf of the Secretary of the Interior within
12 the Pacific Southwest Region, which includes California. The Regional Director disseminates
13 information to the public that is covered under the IQA, in particular, biological opinions.

14 18. Defendant RALPH O. MORGENWECK (“Morgenweck”) is the Senior Science Advisor
15 of the FWS, and is named in his official capacity as the FWS official responsible for compliance with
16 the FWS IQA Guidelines as well as oversight of the Office of the Science Advisor to ensure
17 compliance. *See* Sections II-9 and V of the FWS IQA Guidelines.

18 19. Defendant DANIEL M. ASHE (“Ashe”) is the Science Advisor to the Director of the
19 FWS, and is named in his official capacity. The Director of the FWS delegated authority to the Office
20 of the Science Advisor to be the official responsible for compliance with the FWS IQA Guidelines. *See*
21 Section II-9 of the FWS IQA Guidelines.

22 20. Defendants KENNETH LEE SALAZAR, UNITED STATES DEPARTMENT OF THE
23 INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, ROWAN GOULD, RENNE
24 LOHOEFENER, RALPH O. MORGENWECK, and DANIEL M. ASHE are collectively referred to
25 herein as “Defendants.”

26 **IV. LEGAL BACKGROUND**

27 21. The IQA was enacted as an amendment to the Paperwork Reduction Act, 44 U.S.C. §§
28 3501 *et seq.*, and mandates that OMB issue government-wide guidelines and each federal agency issue

1 guidelines consistent with OMB's to ensure the "quality, objectivity, utility, and integrity of
2 information" disseminated by federal agencies. In compliance with this congressional directive, OMB
3 issued guidelines to the departments, including DOI, which in turn, issued guidelines to its bureaus,
4 including the FWS, which then issued its own guidelines, the FWS IQA Guidelines. The OMB's IQA
5 Guidelines and Final Bulletin provide the blueprint for the agencies subject to the IQA mandates, and
6 these agencies, including DOI and the FWS, have adopted administrative measures that are primarily
7 procedural in nature, but incorporate *in toto* OMB's substantive requirements as well. The FWS IQA
8 Guidelines are specific to its activities and disseminations, including biological opinions, and state that
9 in order to ensure objectivity of information disseminated, the information will be presented in an
10 "accurate, clear, complete, and unbiased manner."

11 22. The FWS IQA Guidelines specifically state, "The DOI Information Quality Guidelines
12 direct that all information disseminated by the Department must comply with basic standards of quality,
13 thus, these guidelines apply to all information disseminated by the agency with the exceptions noted
14 above. However, only influential information, and its highly influential assessments subset, must meet
15 the stricter elements contained in these guidelines." FWS IQA Guidelines, Section II-4. The FWS IQA
16 Guidelines state that the term "influential, when used in the phrase 'influential scientific, financial, or
17 statistical information,' means that [FWS] can reasonably determine that dissemination of the
18 information will have or does have a clear and substantial impact on important public policy or private
19 sector decisions, and thus, a decision or action to be taken by the Director. ... As a general rule, FWS
20 considers an impact clear and substantial when a specific piece of information or body of information is
21 a principal basis for a FWS position." FWS IQA Guidelines, Section III-10.

22 23. The ESA is a federal statute enacted to conserve endangered and threatened species and
23 the ecosystems upon which they depend. 16 U.S.C. § 1531(b). Once a species is listed as threatened or
24 endangered under the ESA, an array of statutory protections applies. Section 7 of the ESA requires
25 federal agencies to use their legal authorities to promote the conservation purposes of the ESA and to
26 consult with the FWS to ensure that effects of the actions they authorize, fund, or carry out will not
27 jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2). During the consultation,
28 the "action" agency receives a biological opinion or concurrence letter from the FWS addressing the

1 proposed action. In cases where the FWS makes a jeopardy determination, the agency offers
2 “reasonable and prudent alternatives” about how the proposed action could be modified to avoid
3 jeopardy to the listed species. 16 U.S.C. § 1536(b)(3)(A).

4 24. Section 7 of the ESA, among other things, requires the FWS to "use the best scientific
5 and commercial data available" in completing its consultation and rendering an opinion. 16 U.S.C. §
6 1536(a)(2). The purpose of this requirement is to ensure that the ESA is not implemented haphazardly,
7 on the basis of speculation or surmise. While this furthers the goal of species preservation, it also
8 avoids needless economic dislocation produced by agency officials zealously, but unintelligently,
9 pursuing their environmental objectives. Moreover, the ESA explicitly recognizes a concern for
10 economic consequences in various places, including Section 7. Consequently, the commercial interests
11 of an affected Alliance member that might be affected by misapplication of Section 7 are within the
12 protected zone of interests of that section, allowing them to challenge the agency's failure to use the
13 best scientific and commercial data by bringing an APA action.

14 25. A biological opinion is a document which includes: (1) the opinion of the FWS or the
15 National Marine Fisheries Service as to whether or not a federal action is likely to jeopardize the
16 continued existence of listed species, or result in the destruction or adverse modification of designated
17 critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed
18 discussion of the effects of the action on listed species or designated critical habitat. 50 C.F.R §§
19 402.02, 402.14(h); *see also* FWS’s Consultation Handbook – Procedures for Conducting Consultation
20 and Conference Activities under Section 7 of the Endangered Species Act.

21 26. The 2008 Biological Opinion violates the IQA because it is: (a) Inaccurate in that it fails
22 to meet the data standard required by the ESA for decision-making under the IQA as well as the
23 standard under the IQA Guidelines for highly influential scientific assessments; (b) Biased in that it
24 assumes a cause, and performs a post hoc rationalization, ignoring data that demonstrate no important
25 effects on delta smelt due to operation of the CVP and SWP pumps; (c) Incomplete in that it fails to
26 include material data and analysis that rebuts the assumptions which support the biological opinion, and
27 fails to acknowledge the requirement that decisions be based on data under the ESA; (d) Unclear and
28 incomplete in that it fails to acknowledge that the data does not support an assumption that the decline

1 in delta smelt is correlated to the operations of the water project pumps and fails to acknowledge that
2 basic biology of the delta smelt is poorly understood; and (e) Unclear and incomplete in that it fails to
3 acknowledge the required data standard of the ESA in decision-making and instead relies on
4 speculation, assumption, and surmise; (f) Unclear and incomplete in that it fails to provide the required
5 transparency by explaining how unimportant effects of pumping rise to the level of jeopardy.

6 27. The use of the best available scientific and commercial data as defined in the IQA
7 Guidelines is required to assure the quality of the biological, ecological, and other information used in
8 the implementation of the ESA, as it is the policy of the FWS to: “(1) evaluate all scientific and other
9 information used to ensure that it is reliable, credible, and represents the best scientific and commercial
10 data available; (2) gather and impartially evaluate biological, ecological, and other information
11 disputing official positions, decisions, and actions proposed or taken by the Services; (3) document
12 their evaluation of comprehensive, technical information regarding the status and habitat requirements
13 for a species throughout its range, whether it supports or does not support a position being proposed as
14 an official agency position; (4) use primary and original sources of information as the basis for
15 recommendations; (5) retain these sources referenced in the official document as part of the
16 administrative record supporting an action; (6) collect, evaluate, and complete all reviews of
17 biological, ecological, and other relevant information within the schedules established by the Act,
18 appropriate regulations, and applicable policies; and (7) require management-level review of
19 documents developed and drafted by Service biologists to verify and assure the quality of the science
20 used to establish official positions, decisions, and actions taken by the Services during their
21 implementation of the Act.” DOI’s Endangered and Threatened Wildlife and Plants: Notice of
22 Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed.
23 Reg. 34271 (July 1, 1994).

24 V. FACTUAL BACKGROUND

25 28. Pursuant to the procedures set forth in the IQA Guidelines, on December 14, 2008², the
26 Alliance filed its “Request for Correction of Information in the Draft Effects Analysis of the Biological
27

28 ² The final version of the 2008 Biological Opinion was issued on December 15, 2008, but the FWS had
already disseminated a draft version of the document. The differences between the draft and final

1 Opinion on the Continued Long-Term Operations of the Central Valley Project and the State Water
2 Project” (“Correction Request”) with the FWS. The Alliance’s Correction Request alleged that the
3 2008 Biological Opinion disseminated by the FWS failed to comply with the strict scientific standards
4 of the IQA, the IQA Guidelines and the Final Bulletin as it was not based upon the best available
5 scientific data, as required by the ESA.

6 29. The Correction Request contained 25 specific and explicit requests for correction to the
7 2008 Biological Opinion, including but not limited to: requests that assumptions contained in the
8 analysis regarding the decline in delta smelt be replaced with actual data and analysis supporting the
9 assumptions regarding pumping activities; the removal of all statements, assumptions, and assertions
10 which are not supported by the best available scientific data and/or are contradicted by data and
11 analysis and replacement with statements that are supported by data and analysis; the removal of all
12 statements which are predicated on speculation, hypothesis, or supposition rather than data; full
13 disclosure of the degree of uncertainty regarding the cause of the decline of delta smelt; and the
14 acknowledgement of well-supported data which demonstrates that water project pumping operations,
15 including entrainment, have no important effects on abundance of delta smelt.

16 30. On December 23, 2008, Defendant Morgenweck of the FWS sent the Alliance an
17 interim response letter, acknowledging receipt of the Correction Request on December 15, 2008.

18 31. On March 12, 2009, Defendant Morgenweck of the FWS sent the formal FWS response
19 to the Correction Request. Mr. Morgenweck’s correspondence contends that no correction is needed to
20 any of the requests made by the Alliance in its Correction Request. The FWS Letter was unresponsive
21 and dismissive of the Alliance’s myriad ongoing concerns with the flaws in the 2008 Biological
22 Opinion.

23 32. On April 1, 2009, the Alliance appealed the FWS’s denial of the Correction Request (the
24 “Appeal”) pursuant to the IQA Guidelines in an attempt to convince the FWS to correct the 2008
25 Biological Opinion and thereby disseminate an improved document that complies with both the ESA
26 and the IQA.

27
28 versions of the 2008 Biological Opinion are minimal and have no effect on the issues raised in the
Correction Request.

1 33. On April 27, 2009, Defendant Ashe of the FWS sent an interim response letter to the
2 Alliance, acknowledging receipt of the Appeal on April 1, 2009 and advising that the Director
3 (identified in the correspondence as Defendant Gould, the Acting Director) has 60 days to respond to
4 the Appeal, but that due to the “series of complex scientific and legal issues” raised in the Appeal, the
5 final determination may not be completed within that time.

6 34. Pursuant to the FWS IQA Guidelines, the Appeal does not contain any new arguments
7 or information that was not included in the Correction Request. Further, the additional delay by the
8 FWS in responding to the Appeal is in contravention of its own IQA Guidelines and serves only to
9 cause significant additional harm to the Alliance and its affected members.

10 35. On May 18, 2009, the Alliance sent correspondence to Defendant Ashe of the FWS
11 regarding the discovery by another organization that the FWS did not possess certain data sets on which
12 it relied in preparing the 2008 Biological Opinion. This correspondence was sent as further
13 demonstration that the 2008 Biological Opinion was based on improper assumptions and erroneous
14 application of the FWS’s own guidelines and did not represent the best scientific and commercial data
15 available.

16 36. On June 8, 2009, Defendant Ashe responded to the Alliance’s May 18, 2009
17 correspondence wherein he stated the FWS was aware of the importance of the IQA issues raised by the
18 Alliance’s Appeal currently under consideration by the FWS. The June 8, 2009 letter also stated the
19 FWS viewed the Alliance’s May 18, 2009 correspondence as a supplemental request for correction,
20 which is not provided for under the IQA, and would treat it as a revised appeal (which also is not
21 provided for under the IQA), extending the FWS’s time to make a determination on the Alliance’s
22 appeal by another 60 days.

23 37. On June 11, 2009, the Alliance responded to Mr. Ashe’s June 8, 2009 letter disputing
24 the FWS’s classification of the May 18, 2009 letter as a revised appeal and offering to withdraw the
25 letter. The Alliance’s May 18, 2009 correspondence was to advise the FWS that the FWS’s lack of
26 possession of the data sets upon which it based the 2008 Biological Opinion was demonstrative of yet
27 another failure of the FWS to apply the IQA to the 2008 Biological Opinion. This issue is contained
28

1 within the Alliance’s April 1, 2009 Appeal and the May 18, 2009 correspondence did not revise the
2 Appeal, but rather offered further information on previously identified lack of data sets.

3 38. The Alliance has not received a response to its Appeal. The administrative remedies as
4 provided in the IQA, the IQA Guidelines and related agency regulations have been exhausted, and the
5 FWS continues to disseminate the flawed 2008 Biological Opinion.

6 **VI. CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**

8 **(Failure to Comply with the IQA, the IQA Guidelines and Section 7 of the ESA in the**
9 **Preparation and Dissemination of the 2008 Biological Opinion)**

10 39. Plaintiff Alliance re-alleges, and fully incorporates by reference, Paragraphs 1 through
11 38 herein as though fully set forth below, and further alleges as follows:

12 40. The APA provides, “agency action made reviewable by statute and final agency action
13 for which there is no other adequate remedy in court are subject to judicial review.” 5 U.S.C. §704.

14 41. Defendants’ issuance of the 2008 Biological Opinion is a final agency action, and the
15 Plaintiffs have no other adequate remedy at law. Thus, Defendants’ action is reviewable pursuant to
16 the APA.

17 42. Section 706(2) of the APA provides that a reviewing court shall “hold unlawful and set
18 aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of
19 discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction,
20 authority, or limitations, or short of statutory right.” 5 U.S.C. §706(2).

21 43. Defendants promulgated the 2008 Biological Opinion in a manner that is arbitrary,
22 capricious and not in accordance with law, in excess of their statutory jurisdiction and authority, and in
23 violation of the APA, because Defendants failed to base their decisions on the best scientific and
24 commercial data available, and failed to follow the applicable IQA Guidelines and Final Bulletin.

25 44. The 2008 Biological Opinion failed to use the “best scientific and commercial data
26 available” as required by the IQA, IQA Guidelines and Section 7 of the ESA in at least the following
27 ways: By failing to conduct an objective analysis and premising the findings on assumptions; excluding
28 and dismissing other, data-supported analyses of the decline of delta smelt, the results of which indicate

1 that major adverse effects on the population dynamics of delta smelt are caused by factors other than
2 the operations of the CVP and SWP; arbitrarily selecting the data relied upon and disregarding relevant
3 data without explanation, including analyses and comments provided by a peer review panel; basing
4 the analyses on data that was incorrect, incomplete, or otherwise of poor quality, including analyses
5 that were not statistically defensible, that suffered from invalid assumptions, improper transformation
6 of data, and/or which may have relied upon selective or improper use or manipulation of data points;
7 failing to disclose all the data, analyses, or reports relied upon, and relying on key reports, data, and
8 analyses that were and continue to be unavailable for review; and failing to critically analyze and assess
9 the quality (e.g., accuracy, objectivity, reproducibility, and robustness) of the data and reports relied
10 upon in the 2008 Biological Opinion.

11 45. The 2008 Biological Opinion is replete with speculative and conclusory determinations
12 and fails to provide any foundation linking such determinations to actual data or analyses; thus
13 completely fails to provide sufficient data and information as required by the IQA Guidelines to ensure
14 not only the transparency of the data and analysis used to arrive at the conclusion, but also the
15 reproducibility.

16 46. There are numerous research results and data that conflict with and cast doubt upon the
17 assumptions made, the reports relied upon, and the ultimate determinations made in the 2008 Biological
18 Opinion regarding the major driving factors in delta smelt population dynamics and the major causes of
19 population-level effects to delta smelt. Despite the widespread availability of these research results and
20 data and the presentation of them to the FWS in the Correction Request and Appeal, the FWS failed to
21 review, address or provide any basis for the failure to acknowledge this credible scientific data.

22 47. The 2008 Biological Opinion ignores the best scientific and commercial data available
23 which indicates there are much more significant relationships between other factors (such as prey
24 density, ammonia, and water temperature) and delta smelt population abundance as compared to the
25 relationship between CVP or SWP operations and delta smelt population abundance.

26 48. The 2008 Biological Opinion includes references to, and uses as a basis for its findings,
27 data and analyses that is neither published nor peer reviewed, completely ignoring the FWS IQA
28

1 Guidelines that require highly influential scientific assessments to be “transparent and substantially
2 reproducible.”

3 49. The FWS’s failure to utilize the best scientific and commercial data available in
4 promulgating the 2008 Biological Opinion in violation of the IQA, IQA Guidelines and ESA resulted in
5 erroneous determinations and unsupported conclusions that caused, among other things, the imposition
6 of excessive and unlawful restrictions on the joint operations of the CVP and SWP.

7 50. A judicial declaration is necessary and appropriate at this time under the circumstances
8 in order that the Alliance may ascertain its rights and the Defendants’ obligations pursuant to the IQA,
9 IQA Guidelines and the ESA. Unless such a declaration is issued, the Alliance’s affected members will
10 suffer a loss and/or impairment of their rights and property in violation of the law, and Defendants will
11 continue to single-mindedly focus on regulation of the CVP and SWP as the key to delta smelt survival
12 and recovery, and hence fail to investigate or address the actual causes of its decline.

13 51. The Alliance and its affected members have no plain, speedy and adequate remedy in the
14 course of law, and absent immediate judicial intervention, they will suffer irreparable injury.

15 **SECOND CLAIM FOR RELIEF**

16 **(Failure to Timely Respond to the Alliance’s Appeal and/or**

17 **Make Corrections to 2008 Biological Opinion)**

18 52. Plaintiff Alliance re-alleges, and fully incorporates by reference, Paragraphs 1 through
19 51 herein as though fully set forth below, and further alleges as follows:

20 53. Section 706(1) of the APA grants the Court the authority to “compel agency action
21 unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

22 54. The IQA Guidelines mandate the timeline in which the FWS is to provide appropriate
23 responses to a request for correction and an appeal. The FWS’s response to the Alliance’s Correction
24 Request was inadequate in that it did not respond appropriately to the issues raised and was dismissive
25 of the Alliance’s requests for compliance with the IQA.

26 55. Further, the FWS’s lack of timely response to the Appeal constitutes an unlawful delay
27 under the APA as the longer the delay in receiving a biological opinion that is consistent with the
28 requirements of Section 7 of the ESA, the IQA and the IQA Guidelines, the greater the possibility of

1 the harm to users of the affected water supply, including affected Alliance members, that occurs as a
2 result of FWS's flawed 2008 Biological Opinion.

3 56. The Alliance and its affected members have no plain, speedy and adequate remedy in the
4 course of law, and absent immediate judicial intervention, they will suffer irreparable injury.

5 **THIRD CLAIM FOR RELIEF**

6 **(Failure to Conduct the Appropriate Peer Review of the 2008 Biological Opinion)**

7 57. Plaintiff Alliance re-alleges, and fully incorporates by reference, Paragraphs 1 through
8 56 herein as though fully set forth below, and further alleges as follows:

9 58. By failing to conduct the appropriate peer review of a highly influential scientific
10 assessment (the 2008 Biological Opinion) in observance of its own procedural requirements under the
11 IQA Guidelines, Defendants have violated the APA by reaching a finding or conclusion "without
12 observance of procedure required by law." 5 U.S.C. §706 (2)(D).

13 59. The FWS IQA Guidelines provide that *independent* experts who meet the National
14 Academy of Sciences standards for independence shall perform peer review of highly influential
15 scientific assessments. The peer reviewers in the 2008 Biological Opinion fail to meet these
16 requirements.

17 60. As evident from the 2008 Biological Opinion and the FWS's responses to the Alliance's
18 Correction Request, the FWS failed to follow the requirements of their own adopted peer review
19 policy. The peer reviewers of the 2008 Biological Opinion consisted of authors of the papers upon
20 which it was based, their graduate students, recipients of CALFED (a consortium of federal and state
21 agency decision-makers) funding, and participants in working groups examining delta smelt whose
22 work formed the basis of the 2008 Biological Opinion.

23 61. The Alliance and its affected members have no plain, speedy and adequate remedy in the
24 course of law, and absent immediate judicial intervention, they will suffer irreparable injury.

25 **VII. PRAYER FOR RELIEF**

26 For the reasons stated above, Plaintiff Alliance respectfully requests that the Court grant the
27 following relief:
28

