JAN HASSELMAN (WSB #29107)
[Admitted Pro Hac Vice]
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Facsimile: (206) 343-1526
jhasselman@earthjustice.org

TRENT W. ORR (CSB #77656)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111-4608
Telephone: (415) 217-2000
Facsimile: (415) 217-2040
torr@earthjustice.org

Attorneys for Defendant-Intervenors Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

THE HONORABLE LAWRENCE J. O'NEILL
THE HONORABLE GARY S. AUSTIN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; WESTLANDS WATER DISTRICT, Plaintiffs, v. SALLY JEWEL *et al.*, Defendants. and THE HOOPA VALLEY TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES and YUROK TRIBE, Defendant-Intervenors.	Case No. 13-1232-LJO-GSA PCFFA'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT Courtroom: TBD Hearing Date: TBD Time: TBD

INTRODUCTION

Defendant-intervenors, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (collectively, "PCFFA"), respectfully submit this reply brief in support of their motion for summary judgment. For the reasons discussed herein, plaintiffs have failed to demonstrate either a violation of NEPA, or a violation of the ESA, and as such their motion for summary judgment must be denied and PCFFA's motion granted.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A VIOLATION OF NEPA

A. Plaintiffs Should Not Be Permitted to Prevent Emergency Water Releases Through NEPA.

Plaintiffs never acknowledge the core fact of their NEPA argument: that the outcome they seek—preparation of a full environmental impact statement on a short-term, one-time emergency release of water—is essentially impossible. By the time enough predictive information is available about both the size of the pending adult salmon run and the amount of downstream flow, the decision as to whether augmented flows are needed must be made within a few months. For example, the first indication in the record that the Bureau would need to take additional action in 2013 occurred in late April. AR 27 (letter from Pacific Fishery Management Council). The first analysis by the Bureau on what additional volumes could be needed was not made until early June, AR 23, and the Regional Administrator was briefed for the first time in late June. AR 20. The Bureau managed to offer an opportunity for the public to comment, and prepared an "environmental assessment" outlining potential environmental impacts, in the short time before flows were scheduled to begin in August.

There can be no reasonable dispute that under these circumstances it would be impossible to prepare a full EIS, as demanded by plaintiffs, prior to the initiation of the flow augmentation. *Kandra v. U.S.,* 145 F. Supp. 2d 1192, 1205 (D. Or. 2001). But that, of course, is precisely the outcome that plaintiffs seek: to prevent the flow augmentation from going forward, through the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

use of any legal tool or argument they can muster, in hopes that some of that water will be made available to them in the future. Their professed concern for frogs, turtles, and the climate impacts of lost hydropower is a thin cover for their true objective of preventing the Bureau from taking this type of critically important emergency action.

While plaintiffs may have a somewhat more legitimate concern with respect to potential impacts on future water supply, they have never explained precisely what it is that should be in the EIS that isn't already fully disclosed in the EA. AR 2. The EA notes that there would be no supply impact for 2013 (which appears to be undisputed), and that the impact for 2014 was subject to a number of variables that were, at the time, unknowable. AR 2 at 13. The EA concluded that, depending on those variables, there may be no effect on water resources at all, or that there may be some reduction in the water available. Plaintiffs, like everyone else, were given an opportunity to comment on this. AR 70. Plaintiffs never identify, specifically, what additional analysis a full EIS could possibly provide, nor did they explain how additional speculation about potential outcomes might influence the Bureau's decision. The Bureau notified the public, provided an opportunity for comment, weighed the competing concerns, and made their decision. No additional purpose would have been served by an EIS, nor would one have been possible in light of the timing of such an emergency response.

Plaintiffs don't seek to further the purposes of NEPA, they seek to deploy it as "an obstructionist tactic" to prevent, rather than promote, environmental protection. *San Luis & Delta Mendota Water Auth. v. Jewell*, No .11-15871 (Mar. 13, 2014), slip op. at 140-44. This Court should decline the invitation to misuse NEPA in this way.

B. NEPA Is Inapplicable to The Bureau's Short Term Flow Plan.

PCFFA devoted the bulk of its brief explaining why NEPA does not apply to the 2013 water releases because it constitutes ongoing management of a pre-NEPA water project. Dkt. 116, at 1-6. As PCFFA explained, the Bureau historically has released additional water

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

from the Trinity Reservoir above Trinity ROD parameters, at various volumes, for various lengths of time, and for different purposes. What was contemplated in 2013 was no different in kind from these past practices, and well within the range of the project's authorized operating parameters. As PCFFA explained at some length, in those situations, NEPA simply doesn't apply. *Id*.

Surprisingly, plaintiffs decline to respond to this extensive argument, except for a dismissive footnote saying, without explanation, that they "reject" it. Dkt. 125 at 24 n.11. But the fact that the government has not made the argument, whatever its reasons, does not mean that the argument is waived or inapplicable. Cases like *Upper Snake River* and *County of Trinity* involve the threshold question of whether NEPA applies in the first instance: they held that operation of pre-NEPA projects within certain parameters are simply not "major federal actions" subject to NEPA. *See Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990); *Cnty. of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977). This is a legal question about NEPA's threshold applicability that needs to be resolved, irrespective of the Bureau's position, because without a "major federal action" the Court lacks jurisdiction over plaintiffs' claim.[1]

It is not uncommon for federal agencies to comply with NEPA voluntarily, i.e., in situations where it is not legally required, in order to promote good government, public engagement, or other objectives. NEPA's implementing regulations specifically contemplate as much, giving agencies authority to prepare an environmental impact statement "at any time" to

[1] As all parties agree, jurisdiction to review plaintiffs' NEPA claim is provided by the Administrative Procedure Act, 5 U.S.C. § 701 et seq. In order for there to be jurisdiction under the APA, the Court needs a "final agency action." A final agency action, in turn, must mark the consummation of the agency's decisionmaking process, and it must be one by which "rights or obligations have been determined" or from which "legal consequences will flow." *Bennett v. Spear,* 529 U.S. 154, 177-78 (1997). While the Bureau did prepare an EA in this instance, it was not obligated to do so by NEPA for the reasons discussed in PCFFA's brief. Accordingly, while the EA may be a useful guidance document or public engagement tool, it is not a "final agency action" that supplies jurisdiction to a reviewing Court.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

assist in agency planning. 40 C.F.R. § 1501.3(b). Indeed, the U.S. Environmental Protection Agency has an explicit policy on the voluntary preparation of NEPA documentation, which reads as follows:

> EPA may undertake voluntary preparation of EAs and EISs under programs where it is not legally required to prepare such documents, where such voluntary documents can be beneficial in addressing Agency actions. Voluntary NEPA documentation can be particularly useful in situations where other federal agencies are preparing NEPA documentation for related actions, where NEPA's well-understood and long-standing procedures provide an opportunity for increased public understanding and involvement, and where the NEPA process can facilitate analysis of environmental impacts. Accordingly, the Agency has determined that, while it is not legally bound to do so by NEPA, EPA may voluntarily prepare EAs and, as appropriate, EISs in connection with certain EPA actions. The voluntary preparation of these documents in no way legally subjects the Agency to NEPA's requirements.

63 Fed. Reg. 58045-02 (Oct. 29, 1998). But a voluntary NEPA document does not give rise to legal claims for violation of NEPA.

In sum, a full EIS is only required where a "major federal action" results in "significant" environmental impacts. Neither condition is met here. Plaintiffs' failure to respond to PCFFA's arguments regarding NEPA's threshold applicability is fatal to its NEPA arguments. Summary judgment for PCFFA is appropriate.

II. PLAINTIFFS HAVE NOT SHOWN A VIOLATION OF THE ENDANGERED SPECIES ACT

As with its NEPA claims, plaintiffs seek to advance legal arguments regarding standards intended to protect imperiled species in ways that were never intended—specifically, to *prevent* actions meant to *protect those very species*. PCFFA agrees that the protections of the ESA are significant and that they need to be strictly enforced to meet the law's substantive prohibition on agency actions that jeopardize listed species. Indeed, PCFFA has on many occasions enforced these standards, including in the Klamath Basin. *See, e.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation*, 139 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining irrigation deliveries from the Klamath Project pending completion of ESA consultation). All of plaintiffs'

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

rhetoric and all their strained reading of regulatory minutiae cannot obscure the fact that this case is missing an essential element: an actual problem for listed species. The 2013 water releases were made for one, and only one, purpose: to prevent another massive fish kill on the lower Klamath affecting both listed and unlisted species. Plaintiffs do not seek to enforce the ESA in order to protect any endangered species, nor would the remedy they seek address any of their actual concerns. Instead, they seek to use the ESA as a cudgel to prevent the Bureau from taking important emergency actions to protect wildlife. Applying the ESA to prevent such an action, as plaintiffs seek, is an unprecedented application of the law.

Plaintiffs alleged ESA concerns fall into two categories: first, that the Bureau failed to consult with NMFS on the impacts of the flow augmentation on Southern Oregon/Northern California Coast ("SONCC") coho, and second, that it failed to consult on its impacts to out-of-basin salmonids in the Central Valley. Neither claim has merit.

First, plaintiffs do not dispute that the Bureau's 2013 action was intended in part to benefit SONCC coho. Nor do they make any effort to explain how a written concurrence from NMFS as to this undisputed fact would address any problem or concern they have, even though such correspondence from past years is in the record. AR 61. Moreover, the Bureau has explained that it is currently in consultation with NMFS on effects to the SONCC coho, based on its 2008 BA, and is still awaiting a biological opinion from NMFS. AR 53. Plaintiffs complain that there is no "evidence" of this but seem to have overlooked the fact that PCFFA attached the 2009 Central Valley Salmonid Biological Opinion ("2009 BiOp") to its last brief, which confirmed that releases from the Trinity River were part of the proposed action under review. *See* PCFFA Opposition, Dkt. 116 at 10. As both the Bureau and PCFFA have explained, § 7(d) of the ESA authorizes the Bureau to operate its projects while consultation is ongoing. *Id*. at 9-10. Plaintiffs make no effort at all to explain why § 7(d) is inapplicable to authorize the Bureau to operate the Trinity Reservoir to protect the basin's fisheries while consultation is underway.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Plaintiffs' alleged concerns with respect to ESA consultation on Central Valley salmon fare no better. Plaintiffs appear to concede that the 2009 BiOp constitutes the Bureau's ESA compliance for Central Valley salmonids, including operations of the Trinity Reservoir. They also recognize that Judge Wanger remanded the 2009 BiOp to address certain flaws, and do not dispute that they are involved in that complex, ongoing remand process and have been advocates for taking steps that have resulted in that process moving more slowly than contemplated. *See* Dkt. 116 at 11 n.7 (discussing BiOp remand process). Instead, they promote a formalistic argument under which, in their view, the Bureau is not in consultation unless it can point to a single piece of paper stamped "initiation of consultation."[2] This elevation of form over substance borders on absurd. There is simply no dispute that the Bureau and NMFS are currently working on a new biological opinion that covers the impacts of Trinity operations on Central Valley species. There is no dispute that ESA § 7(d) authorizes the Bureau to operate the project while this consultation is ongoing. Plaintiffs focus on a perceived lack of documentation that is not supported by either the facts or the ESA's regulatory requirements falls far short of demonstrating any violation of the ESA.

Plaintiffs' final grievance appears to be that the 2008 biological assessment did not forecast precisely the additional release of water for fisheries purposes in 2013. Dkt. 125 at 36. Leaving aside the question of how the Bureau would have been expected to predict the future in the way that plaintiffs prefer, plaintiffs do not dispute that the 2009 BiOp looked at impacts of the storage and delivery of the Trinity Dam generally, including unplanned actions that are outside of the Trinity ROD releases, like "safety of dams" releases. Dkt. 117(1), Ex. 1 at 72

[2] Plaintiffs previously seemed to believe that initiation of consultation required a formal biological assessment ("BA"). The Bureau explained how such a view would be mistaken, since a BA is only mandatory in certain situations not present here. Dkt. 120-1 at 40 (citing 50 C.F.R. § 402.12(b)). Plaintiffs now seek some alternative documentation signifying the start of a consultation that everyone agrees is already well underway, but are unable to explain what it is they think is required and why it should be considered important.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

(2009 BiOp); Ex. 114(1), Ex. 1 at 2-28 (2008 BA). They can point to no requirement under the law that a biological assessment on a complex hydropower project must predict every potential operating scenario, including unexpected emergency conditions. In any event, Trinity operations are plainly part of the consultation underway, and § 7(d) authorizes the Bureau to operate the projects in the interim as long as there is no irreversible or irretrievable commitment of resources. Plaintiffs make no effort to demonstrate that this standard has not been met. Plaintiffs' ESA claims should be rejected in their entirety.

CONCLUSION

For the foregoing reasons, PCFFA respectfully requests that the Court grant its motion for summary judgment and deny plaintiffs' motion.

Respectfully submitted this 15th day of May, 2013.

s/ Jan Hasselman
JAN HASSELMAN (WSB #29107)
[Admitted Pro Hac Vice]
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Telephone: (206) 343-7340
Facsimile: (206) 343-1526
jhasselman@earthjustice.org

TRENT W. ORR (CSB #77656)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111-4608
Telephone: (415) 217-2000
Facsimile: (415) 217-2040
torr@earthjustice.org

Attorneys for Defendant-Intervenors Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources