

1 UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF CALIFORNIA

3	CONSOLIDATED SALMONID CASES	1:09-CV-01053 OWW DLB
4	SAN LUIS & DELTA-MENDOTA	MEMORANDUM DECISION AND ORDER RE PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
5	WATER AUTHORITY, <i>et al.</i> v.	
6	LOCKE, <i>et al.</i>	
7	STOCKTON EAST WATER	
8	DISTRICT, <i>et al.</i> v. NOAA, <i>et</i>	
9	<i>al.</i>	
10	STATE WATER CONTRACTORS v.	
11	LOCKE, <i>et al.</i>	
12	KERN COUNTY WATER AGENCY, <i>et</i>	
13	<i>al.</i> v. UNITED STATES	
14	DEPARTMENT OF COMMERCE, <i>et</i>	
15	<i>al.</i>	
16	OAKDALE IRRIGATION DISTRICT,	
17	<i>et al.</i> v. UNITED STATES	
18	DEPARTMENT OF COMMERCE, <i>et</i>	
19	<i>al.</i>	
20	METROPOLITAN WATER DISTRICT	
21	OF CALIFORNIA v. NATIONAL	
22	MARINE FISHERIES SERVICE, <i>et</i>	
23	<i>al.</i>	

18 Plaintiffs, San Luis & Delta Mendota Water Authority
19 (the "Authority") and Westlands Water District
20 ("Westlands"), move for a Temporary Restraining Order
21 ("TRO") against the implementation of Reasonable and
22 Prudent Alternative ("RPA") Action IV.2.3 set forth in
23 the National Marine Fisheries Service's ("NMFS") June 4,
24 2009 Biological Opinion ("2009 Salmonid BiOp"), which
25 addresses the impacts of the coordinated operations of
26 the federal Central Valley Project ("CVP") and State
27
28

1 Water Project ("SWP") on the Central Valley winter-run
2 and spring-run Chinook salmon, Central Valley steelhead,
3 Southern Distinct Population Segment of Green Sturgeon,
4 and Southern Resident Killer Whales ("Listed Species").
5 Doc. 164, filed Jan. 27, 2010. San Luis and Westlands
6 concurrently filed a motion for preliminary injunction
7 raising additional grounds for enjoining Action IV.2.3.
8 Doc. 164.

9
10 Plaintiffs State Water Contractors; Metropolitan
11 Water District of Southern California; and Kern County
12 Water Agency and Coalition for a Sustainable Delta joined
13 the TRO motion. Docs. 177, 179 & 181. Plaintiffs
14 Oakdale Irrigation District, et al., and Intervenor
15 California Department of Water Resources ("DWR"), the
16 operator of the SWP, filed statements of non-opposition.
17 Docs. 180 & 185. Federal Defendants and Defendant
18 Intervenor Intervenor Intervenor Intervenor Intervenor
19 Intervenor Intervenor Intervenor Intervenor Intervenor
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20 The TRO motion came on for hearing February 2, 2010,
21 on shortened notice, in Courtroom 3 of the above-
22 captioned Court. The parties were represented by
23 counsel, as noted in the record in open court.

25 I. BACKGROUND

26 Plaintiffs seek temporary injunctive relief on the
27 grounds that:
28

1 (1) the 2009 Salmonid BiOp is arbitrary, capricious,
2 and contrary to law because:

3 (a) NMFS allegedly conducted an effects analysis
4 that improperly overstates impacts attributable
5 to the coordinated operations of the CVP and
6 SWP;

7
8 (b) NMFS failed to clearly define or
9 consistently apply a relevant environmental
10 baseline;

11 (c) NMFS failed to distinguish between
12 discretionary and non-discretionary CVP and SWP
13 activities, which overstated the effects of
14 coordinated operations of the Projects;

15 (d) RPA Action IV.2.3 is arbitrary and
16 capricious, because it is without factual or
17 scientific justification and/or is not supported
18 by the best available science; and
19

20 (2) NMFS and the United States Bureau of Reclamation
21 ("Reclamation") failed to comply with the National
22 Environmental Policy Act ("NEPA") in issuing and
23 implementing the 2009 Salmonid BiOp.
24

25 Plaintiffs further claim that the implementation of
26 Action IV.2.3 will cause them continuing irreparable harm
27 and that the public interest and balance of hardships
28

1 favor injunctive relief.

2
3 **II. STANDARDS OF DECISION**

4 **A. Temporary Restraining Order.**

5 Injunctive relief, whether temporary or permanent, is
6 an "extraordinary remedy, never awarded as of right."
7 *Winter v. Natural Resources Defense Council*, 129 S. Ct.
8 365, 376 (2008); *Weinberger v. Romero-Barcelo*, 456 U.S.
9 305, 312 (1982). The standard for relief applicable to a
10 temporary restraining order is the same as for a
11 preliminary injunction. *Stuhlberg Int'l Sales Co., Inc.*
12 *v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.
13 2001).

14
15 Four factors must be established by a preponderance
16 of the evidence to qualify for temporary injunctive
17 relief:

- 18 1. Likelihood of success on the merits;
- 19 2. Likelihood the moving party will suffer
20 irreparable harm absent injunctive relief;
- 21 3. The balance of equities tips in the moving
22 parties' favor; and
- 23 4. An injunction is in the public interest.

24
25 *Winter*, 129 S.Ct. at 374; *Am. Trucking Ass'n v. City of*
26 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

1 **B. Balancing of the Harms in ESA Cases.**

2 The Supreme Court held in *TVA v. Hill*, 437 U.S. 153,
3 194 (1978), that Congress struck the balance in favor of
4 affording endangered species the highest of priorities.
5 In adopting the Endangered Species Act ("ESA"), Congress
6 intended to "halt and reverse the trend toward species'
7 extinction, whatever the cost." *Id.* at 184 (emphasis
8 added). *TVA v. Hill* continues to be viable. See *Nat'l*
9 *Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S.
10 664, 669-71 (2007); see also *United States v. Oakland*
11 *Cannabis Buyers' Co-op.*, 532 U.S. 483, 496-97 (2001);
12 *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543
13 n.9 (1987).

14
15 *Winter* does not modify or discuss the *TVA v. Hill*
16 standard.¹ Although *Winter* altered the Ninth Circuit's
17 general preliminary injunctive relief standard by making
18 that standard more rigorous, *Winter* did not address, let
19 alone change, the Circuit's approach to the balancing of
20 hardships where endangered species and their critical
21 habitat are jeopardized. See *Biodiversity Legal Found.*
22 *v. Badgley*, 309 F.3d 1166, 1169 (9th Cir. 2002) (Congress
23 removed the courts' traditional equitable discretion to
24 balance parties' competing interests in ESA injunction
25
26

27
28 ¹ Although *Winter* involved ESA-listed species, the *Winter*
decision only addressed claims under NEPA.

1 proceedings); *Nat'l Wildlife Fed'n v. Burlington N. R.R.,*
2 *Inc.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994) (same).

3 Two post-*Winter* district court cases declined to
4 balance the equities in evaluating requests for
5 injunctive relief under the ESA, applying *TVA v. Hill's*
6 reasoning. *Oregon Natural Desert Ass'n v. Kimbell*, 2009
7 WL 1663037, at *1 (D. Or. June 15, 2009); *Animal Welfare*
8 *Inst. v. Martin*, 588 F. Supp. 2d 70, 105-106 (D. Me.
9 2008).

11 *TVA v. Hill* and related Ninth Circuit authorities
12 foreclose the district court's traditional discretion to
13 balance equities under the ESA. However, there is no
14 such bar in NEPA injunction proceedings. This case is at
15 the intersection of ESA and NEPA law, requiring
16 consideration of more than the ESA.

18 C. Administrative Procedure Act.

19 The Administrative Procedure Act ("APA") requires
20 Plaintiffs to show that NMFS's action was "arbitrary,
21 capricious, an abuse of discretion, or otherwise not in
22 accordance with law." 5 U.S.C. § 706(2)(A).

24 1. Deference to Agency Expertise.

25 The Court must defer to the agency on matters within
26 the agency's expertise, unless the agency completely
27 failed to address some factor, consideration of which was
28

1 essential to making an informed decision. *Nat'l Wildlife*
2 *Fed'n v. NMFS*, 422 F.3d 782, 798 (9th Cir. 2005). The
3 court "may not substitute its judgment for that of the
4 agency concerning the wisdom or prudence of the agency's
5 action." *River Runners for Wilderness v. Martin*, ---
6 F.3d ---, 2010 WL 337337 *4 (9th Cir. June 10, 2009).
7

8 In conducting an APA review, the court must
9 determine whether the agency's decision is
10 "founded on a rational connection between the
11 facts found and the choices made ... and whether
12 [the agency] has committed a clear error of
13 judgment." *Ariz. Cattle Growers' Ass'n v. U.S.*
14 *Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir.
15 2001). "The [agency's] action ... need be only
16 a reasonable, not the best or most reasonable,
17 decision." *Nat'l Wildlife Fed. v. Burford*, 871
18 F.2d 849, 855 (9th Cir. 1989).

19 *Id.*

20 2. Record Review.

21 A court reviews a biological opinion "based upon the
22 evidence contained in the administrative record."

23 *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1245.

24 Judicial review under the APA must focus on the
25 administrative record already in existence, not some new
26 record made initially in a reviewing court. Parties may
27 not use "post-decision information as a new
28 rationalization either for sustaining or attacking the
agency's decision." *Ass'n of Pac. Fisheries v. EPA*, 615
F.2d 794, 811-12 (9th Cir. 1980).

Exceptions to administrative record review for

1 technical information or expert explanation make such
2 evidence admissible only for limited purposes, and those
3 exceptions are narrowly construed and applied. *Lands*
4 *Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).
5 "Although [any] factual inquiry is to be 'searching and
6 careful' the ultimate standard of review is narrow. The
7 court is not empowered to substitute its judgment for
8 that of the agency." *Asarco, Inc. v. EPA*, 616 F.2d 1153,
9 1159 (9th Cir. 1980). Federal Courts cannot routinely or
10 liberally admit new evidence in an APA review case,
11 because "[w]hen a reviewing court considers evidence that
12 was not before the agency, it inevitably leads the
13 reviewing court to substitute its judgment for that of
14 the agency." *Id.* at 1160.

17 3. Best Available Science.

18 What constitutes the "best" available science
19 implicates core agency judgment and expertise to which
20 Congress requires the courts to defer; a court should be
21 especially wary of overturning such a determination on
22 review. *Baltimore Gas & Elec. Co. v. Nat'l Res. Defense*
23 *Council*, 462 U.S. 87, 103 (1983) (a court must be "at its
24 most deferential" when an agency is "making predictions
25 within its area of special expertise, at the frontiers of
26 science"). An agency has wide discretion to determine
27
28

1 the best scientific and commercial data available for its
2 decision-making. See *S.W. Ctr. for Biological Diversity*
3 *v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n.5 (9th
4 Cir. 1998). A decision about jeopardy must be made based
5 on the best science available at the time of the
6 decision; the agency cannot wait for or promise future
7 studies. See *Ctr. for Biological Diversity v. Rumsfeld*,
8 198 F. Supp. 2d 1139, 1156 (D. Ariz. 2002).

10
11 III. ANALYSIS

12 A. Timely Application for Relief.

13 The Court analyzed and decided Federal Defendants'
14 and Defendant Intervenors' objections to temporary
15 injunctive relief based on lack of timeliness or undue
16 delay pursuant to Eastern District of California Local
17 Rule 65-221(b), and overruled those objections for the
18 reasons stated in open court, which are by this reference
19 incorporated.

20 The essential reason for hearing the TRO motion on
21 shortened time was that unexpected storm events in
22 January and February 2010 have made and are likely to
23 continue to make available a potential source of water
24 that could enhance CVP and SWP supply, but which will be
25 "lost" unless captured within days of the storms'
26 occurrence. This urgency, in view of the harm alleged to
27
28

1 be visited upon all Plaintiffs and the human environment,
2 including job losses, dislocation of farm workers and
3 other residents, lowering of the tax base, and prejudice
4 to community services and schools; land fallowing and
5 probable related adverse effects on air quality;
6 overdrafting of groundwater with resulting land
7 subsidence and adverse effects on water quality; as well
8 as likely rationing of municipal water required for
9 public use, justify the hearing and decision on these
10 motions.
11

12 Defendants also successfully objected to Plaintiffs'
13 attempt to incorporate by reference in the TRO motion,
14 all the voluminous papers filed in support of Plaintiffs'
15 pending motions for preliminary injunction. Based on the
16 short time for a response (three and one-half days,
17 including two weekend days) afforded to Defendants and
18 Defendant-Intervenors, it is unreasonable to expect
19 complete and comprehensive responses to expedited
20 motions, supported by complex legal and factual authority
21 that have been months in and for which preparation
22 continues for a hearing at least 30 days away. The TRO
23 motions can be decided without detailed consideration of
24 the arguments raised only in the preliminary injunction
25 papers.
26
27
28

1 **B. Likelihood of Success on the Merits.**

2 1. **ESA Claims.**

3 Plaintiffs' TRO motion focuses on the argument that
4 they are likely to succeed on their ESA claim that the
5 2009 Salmonid BiOp is arbitrary, capricious, and contrary
6 to law because the bases provided in the record for RPA
7 Action IV.2.3 are without factual or scientific
8 justification and/or are not supported by the best
9 available science.² Action IV.2.3 limits Old and Middle
10 River ("OMR") reverse flows to levels no more negative
11 than -2,500 to -5,000 cubic feet per second ("cfs"),
12 depending on entrainment levels. 2009 Salmonid BiOp at
13 648. The Action begins on January 1, and ends on June 15
14 or when the average daily water temperature at Mosssdale
15 is greater than 72°F (22°C) for one week, whichever occurs
16 first.
17

18
19 Plaintiffs maintain that NMFS based its rationale for
20 imposing this OMR negative flow restriction on outputs
21 from computer model runs utilizing the so-called Particle
22 Tracking Model ("PTM") which models the flow of inert
23 particles as they move within a flowing body of water. A
24 primary source on which the 2009 Salmonid BiOp relies to
25

26 ² Plaintiffs incorporate by reference additional arguments from
27 the preliminary injunction brief concerning the 2009 Salmonid BiOp's
28 effects analysis and baseline description. However, as discussed
above, Federal Defendants and Defendant Intervenors did not have an
adequate opportunity to respond to these incorporated arguments.

1 justify application of the PTM, is a 2008 study by
2 Kimmerer & Nobriga. See AR 00122250. Plaintiffs point
3 to express disclaimers in that study which suggest that
4 PTM is not an ideal method for modeling salmonid smolts,
5 which have "complex behaviors and are strong swimmers."
6 AR 00122263.
7

8 However, Kimmerer and Nobriga conclude that PTM
9 results "should be included in the design and analysis of
10 future studies" of salmon survival rates. *Id.* The 2009
11 Salmonid BiOp states that its analysis of flows and
12 entrainment risk used the output of PTM simulations along
13 with other evidence from salvage data, as well as mark
14 and recapture studies, to reach conclusions about the
15 relationship between reverse flows and entrainment. 2009
16 Salmonid BiOp at 380-81. Plaintiffs' suggestion that
17 NMFS relied exclusively on the PTM studies to justify
18 Action IV.2.3 is directly contradicted by Federal
19 Defendants' expert. See Doc. 190-4, Stuart Decl., at ¶8,
20 who describes other factors considered. On the present
21 record, without further factual development, there is a
22 scientific dispute that prevents the Court substituting
23 its judgment for a finding that NMFS's reliance on the
24 PTM is unlawful, as it was neither clearly erroneous for
25 the PTM to have been utilized, nor was PTM the exclusive
26
27
28

1 justification for Action IV.2.3. Plaintiffs have not yet
2 established a likelihood of success on their ESA claim.³

3
4 2. NEPA Claim.

5 In the Delta Smelt Consolidated Cases, it has been
6 decided that Reclamation, as the action agency, violated
7 NEPA by failing to follow the prescriptions and
8 requirements of NEPA in connection with the
9 implementation of the RPAs prescribed by the 2008 Delta
10 Smelt BiOp. See 1:09-cv-00407, Doc. 399 ("Delta Smelt
11 NEPA Decision"). For reasons stated in the Delta Smelt
12 NEPA Decision and which will be stated in a written
13 decision to be issued in connection with the parallel
14 cross motions for summary judgment on NEPA issues in
15 these Consolidated Salmonid Cases, Reclamation has
16 likewise violated NEPA by its total failure to in any way
17 comply with NEPA in connection with its implementation of
18 the 2009 Salmonid BiOp RPAs.
19
20

21 The United States' failure to comply with NEPA has,
22 at the very least, prevented the required reasonable
23 evaluation, analysis, "hard look at," and disclosure of
24 the costs of implementing the 2009 Salmonid BiOp RPAs to
25 human health and safety, the human environment, and other
26 environments not inhabited by the Listed Species.

27
28 ³ This is not meant to prejudge the disposition of this issue in
future proceedings.

1 C. Irreparable Harm.

2 1. Irreparable Harm to Plaintiffs.

3 The district court may consider a wide range of
4 evidence of harm in a NEPA injunction proceeding. Here,
5 it is undisputed that, as a result of storm events in
6 late January 2010, Action IV.2.3 began to control
7 operations by way of its automatic imposition of a -5000
8 cfs ceiling on reverse OMR flows. Plaintiffs estimate
9 that for every day that Action IV.2.3 controls by
10 imposing a -5000 cfs limit (as opposed to a more
11 restrictive limit based in entrainment triggers),
12 Reclamation's pumping output is reduced by 500 cfs per
13 day (or approximately 27,000 acre-feet of water over a
14 four week period). Doc. 166, Boardman Decl., at ¶16.

15
16 DWR's pumping output is also reduced when Action
17 IV.2.3 is controlling. Doc. 78, Erlewine Decl., at ¶¶ 4-
18 5. Mr. Erlewine estimates that losses to the combined
19 Projects between January 20 and January 26, 2010 exceeded
20 90,000 AF, while combined losses from January 27 through
21 February 5, 2010 may exceed 100,000 AF. *Id.* Although
22 Federal Defendants' note that "it is difficult to
23 quantify the magnitude and duration of this reduction
24 given changing river flows, weather conditions, and
25 possible delta smelt actions," the United States does not
26 attempt to directly refute Plaintiffs' figures. See Doc.

1 190-3, Milligan Decl., at ¶¶ 10-11. Even assuming,
2 arguendo, the estimates provided by Boardman and Erlewine
3 are so excessive that they double actual loss, the
4 figures are still significant.

5 It is undisputed that every acre-foot of pumping that
6 is foregone during this time of year is an acre-foot that
7 does not reach the San Luis Reservoir where it can be
8 stored for future delivery to users during times of peak
9 demand later in the water year.

10 It is recognized that reduced deliveries caused by
11 the 2009 Salmonid BiOp make up only a portion (the
12 parties disagree as to the magnitude) of overall delivery
13 reductions, to which severely dry hydrologic conditions
14 and other legal constraints have and will continue to
15 contribute. However, it is also undisputed that any lost
16 pumping capacity directly attributable to the 2009
17 Salmonid BiOp will contribute to and exacerbate the
18 currently catastrophic situation faced by Plaintiffs,
19 whose farms, businesses, water service areas, and
20 impacted cities and counties, are dependent, some
21 exclusively, upon CVP and/or SWP water deliveries. The
22 impacts overall of reduced deliveries include
23 irretrievable resource losses (permanent crops, fallowed
24 lands, destruction of family and entity farming
25
26
27
28

1 businesses); social disruption and dislocation; as well
2 as environmental harms caused by, among other things,
3 increased groundwater consumption and overdraft, and
4 possible air quality reduction.
5

6 2. Potential Harm to the Listed Species.

7 An injunction should not issue where "enjoining
8 government action allegedly in violation of NEPA might
9 actually jeopardize natural resources." *Save Our*
10 *Ecosystems*, 747 F.2d 1240, 1250 n.16 (9th Cir. 1984).
11 The crux of Plaintiffs' request for relief is their
12 contention that the Listed Species are not now present in
13 the vicinity of the pumps in any significant numbers. As
14 is the endemic condition of these cases, the data is
15 sparse and usually unreliable.
16

17 The government's expert, Mr. Stuart, estimates that
18 for 2009, 4,416, adult winter-run Chinook salmon
19 (including 416 hatchery fish) returned to the streams and
20 rivers of the Central Valley to spawn. Stuart Decl. at
21 ¶3. This represents an increase over the adult
22 escapement estimate of 2,850 fish in the 2008 water year.
23 *Id.* Based on fecundity and sex ratio from the 2008
24 cohort, Mr. Stuart calculated a 2010 water year juvenile
25 production estimate ("JPE") of 1,144,860 juvenile winter-
26 run Chinook. *Id.* Applying the BiOp's 2% Incidental Take
27
28

1 Limit for juvenile winter-run, that limit is 22,897. *Id.*

2 At this time, the government offers no population
3 estimates for spring-run juveniles, steelhead smolts or
4 green sturgeon that are comparable to the winter-run JPE
5 estimates, nor does it provide any quantitative
6 population measure in locations of concern whatsoever.
7

8 According to Reclamation's own salvage records,
9 approximately 920 tagged winter-run and 234 non-tagged
10 winter-run, for a total of 1,154 fish, were salvaged in
11 January 2010. See Doc. 189, Defendant Intervenors'
12 Request for Judicial Notice, Exhibit 3 (Central Valley
13 Operations Office Chinook Salmon Report, January 2010) &
14 Doc. 189-11 (Obeji Decl.). This constitutes
15 approximately five percent (5%) of the total incidental
16 take limit, or approximately one tenth of one percent
17 (0.1%) of the total JPE.⁴
18

19 Mr. Stuart opines that approximately 6.8 percent of
20 all winter-run salvage normally occurs during December;
21 13.9 percent in January; 25.6 percent in February; and 50
22 percent in March; with the remaining 2-3 percent
23

24 ⁴ Plaintiffs' counsel questioned whether winter-run were
25 actually present in salvage at all, suggesting fall and late-fall
26 run Chinook salmon are the only species that could possibly be
27 showing up as tagged fish in salvage. Counsel produced no competent
28 evidence that Reclamation's records are incorrect. Nevertheless,
even assuming that all 1,154 fish counted as winter-run are actually
winter-run, the amount of actual salvage measured in the month of
January is negligible.

1 occurring during April, May and June. Stuart Decl., at
2 ¶4 & Exh. 1b. Rough extrapolating from this information
3 shows that, if 1,154 fish constitute 13.9 percent of the
4 salvage to be expected for the remainder of the year, the
5 total salvage for the year would be approximately 8,300
6 winter-run juveniles, approximately 36% of and well below
7 the Take Limit.
8

9 Less than 1% of spring-run Chinook will have moved
10 through the Delta by the end of February, while
11 approximately 17% of the spring-run population will move
12 through by the end of March (0.1% in January, 0.2% in
13 February, and 17% in March). *Id.* It is highly unlikely
14 that Project pumping operations will have any effect on
15 spring-run through the month of February.
16

17 There are no population estimates for Steelhead, yet
18 Mr. Stuart estimates that 58% of the steelhead population
19 will have moved through the Delta by the end of February
20 as measured by raw loss counts at the facility. This
21 will rise to 90% by the end of March. *Id.* He
22 specifically estimates 37% of the species will move
23 through the Delta in February. *Id.* Salvage and loss of
24 Steelhead prior to the January precipitation event has
25 been very low. See *id.* at ¶6.
26

27 Members of the Southern Distinct Population Segment
28

1 ("SDPS") of North American Green Sturgeon are present
2 within Delta waterways throughout the year. Mr. Stuart
3 estimates that approximately 16% of Green Sturgeon
4 salvage will occur between January and the end of March,
5 with 6% in February followed by 8% in March. *Id.* at ¶5.
6 Salvage is typically higher at the SWP during this
7 period. *Id.* However, there are no finite population
8 data nor any indexed salvage estimates for SDPS Green
9 Sturgeon and the Court cannot find that the requested
10 injunctive relief will threaten that species or its
11 critical habitat.
12

13 As to the Southern Resident Killer Whale, whose
14 preferred prey are Fraser River salmon, there is no
15 evidence that the contemplated injunctive relief, which
16 would operate, at the most, only through February, the
17 period during which a temporary restraining order is
18 authorized by law (28 days) would have any effect on the
19 Orca.
20

21
22 D. Balancing of the Harms/Public Interest.

23 The threat of jeopardy to any of the Listed Species
24 by enjoining the operation of Action IV.2.3 appears
25 minimal under the now-existing conditions. On the other
26 hand, the harm to Plaintiffs is substantial and
27 irreparable, because the storm events that are now
28

1 occurring and predicted to occur in the next few days in
2 San Joaquin/Sacramento watershed will provide potential
3 water supplies for storage in the San Luis Reservoir that
4 cannot be replicated and will not recur.

5
6 **IV. CONCLUSION**

7 If Reclamation had provided the required NEPA
8 analysis, it could have analyzed and evaluated not only
9 the protection of the species and their habitat, but
10 whether less harmful, protective, reasonable and prudent
11 alternatives could have been adopted that also protect
12 humans and the human environment. No consideration was
13 given to measures that were not more protective than
14 necessary and which would have afforded additional water
15 supply to water districts, water users, and communities
16 affected by continuing drought conditions and water
17 shortages.
18

19 The evidence establishes that CVP water not pumped
20 for diversion to the San Luis Unit flows through the
21 Delta and out to the ocean. To preserve, for beneficial
22 use, such water is in the public interest, and protection
23 of human health, safety and the affected communities also
24 serves the public interest. The injury to Plaintiffs is
25 irreparable and a temporary restraining order is
26 justified as the balance of hardships, at this point in
27
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1 time, tips decidedly in Plaintiffs' favor. It is
2 significant that DWR, the co-operator of the Projects,
3 does not oppose this relief.

4 Given Federal Defendants' failure to abide by NEPA's
5 requirement that it take a hard look at the broad array
6 of potential impacts to the environment (human and
7 otherwise) caused by implementation of the 2009 BiOp's
8 RPAs, enjoining implementation of a measure, RPA Action
9 IV.2.3, that is causing irreparable harm to the human
10 environment served by the Plaintiff water agencies is
11 justified, so long as jeopardy to species and their
12 critical habitat and/or adverse modification does not
13 occur.
14

15
16 As time passes and March approaches, according to the
17 Stuart Declaration, more significant potential harm to
18 the species may occur. The storms are occurring now.
19 That water will not otherwise be preserved. The record
20 does not clearly predict how salvage rates may change if
21 negative flows exceed -5,000 cfs in February. As a
22 result, the temporary restraining order, which shall
23 issue shall initially be for a period of fourteen (14)
24 days, subject to a renewal by Plaintiffs upon an
25 affirmative showing that neither the species' nor their
26 critical habitat will be jeopardized by continued
27
28

1 injunction of RPA Action IV.2.3.

2 The Court in enjoining application of RPA Action
3 IV.2.3, otherwise defers to the agency's (Reclamation)
4 discretion to conduct Project operations. This Temporary
5 Restraining Order shall issue without prejudice to
6 Defendants' future showing that conditions have changed
7 relative to jeopardy to the species and their habitat.
8

9 No party has offered comment or evidence on the issue
10 of bond. Because this case involves the management of
11 public resources, wholly under the control of the action
12 agency, Reclamation, and because the injunctive relief is
13 of limited duration, Plaintiffs shall post a bond in the
14 amount of \$5,000 to secure the relief provided by law in
15 the event it is determined injunctive relief was
16 improvidently issued.
17

18 ORDER

19 1. The United States Department of the Interior and
20 its Bureau of Reclamation and the National Marine and
21 Fisheries Service, and all those acting for, under or in
22 concert with them, shall be and are hereby restrained and
23 enjoined from implementing Action IV.2.3 of the the 2009
24 Salmonid Biological Opinion RPA;
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26 2. Plaintiffs shall post a bond in the amount of
27 \$5,000;
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3. This Temporary Restraining Order is issued without prejudice to Defendants' showing changed conditions that threaten jeopardy to the species and their critical habitat.

SO ORDERED
Dated: February 5, 2010

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge