

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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DELTA SMELT CONSOLIDATED CASES	1:09-CV-00407 OWW DLB
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, <i>et al.</i> v. SALAZAR, <i>et al.</i> (1:09-cv-00407 OWW DLB)	1:09-cv-00480-OWW-GSA 1:09-cv-00422-OWW-GSA 1:09-cv-00631-OWW-DLB 1:09-cv-00892-OWW-DLB
STATE WATER CONTRACTORS v. SALAZAR, <i>et al.</i> (1:09-cv-00480-OWW-GSA)	Partially consolidated with: 1:09-cv-01201-OWW-DLB
COALITION FOR A SUSTAINABLE DELTA, <i>et al.</i> v. UNITED STATES FISH AND WILDLIFE SERVICE, <i>et al.</i> (1:09-cv-00422-OWW-GSA)	MEMORANDUM DECISION RE FEDERAL DEFENDANTS' MOTION TO AMEND THE JUDGMENT OR IN THE ALTERNATIVE FOR A STAY PENDING APPEAL (DOC. 856)
METROPOLITAN WATER DISTRICT v. UNITED STATES FISH AND WILDLIFE SERVICE, <i>et al.</i> (1:09-cv-00631-OWW-DLB)	
STEWART & JASPER ORCHARDS, <i>et al.</i> v. UNITED STATES FISH AND WILDLIFE SERVICE (1:09-cv-00892-OWW-DLB)	
FAMILY FARM ALLIANCE v. SALAZAR, <i>et al.</i> (1:09-CV-01201-OWW-DLB)	

I. INTRODUCTION

On March 29, 2011, Final Judgment was entered on all remaining claims in this case. The 2008 Delta Smelt Biological Opinion ("BiOp"), its Reasonable and Prudent Alternative ("RPA"), and Reclamation's December 2008 Provisional Acceptance of the RPA were remanded without vacatur with the following instructions:

1. USFWS shall complete by October 1, 2011 a new delta smelt Biological Opinion consistent with the Court's December 14, 2010 Memorandum Opinion, with the exception of making express written findings in either the BiOp or the Administrative Record as to the first

1 three factors of the four-part regulatory definition of  
2 an RPA in 50 C.F.R. § 402.02, which shall be completed  
3 by November 30, 2011.

4 2. Reclamation shall complete review of the RPA in  
5 accordance with NEPA by December 15, 2011.

6 Doc. 851 at 3.

7 On April 8, 2011, Federal Defendants moved to alter or amend  
8 the judgment, or in the alternative for a stay pending appeal, on  
9 the ground that the new BiOp, RPA, and NEPA compliance could not  
10 be completed within the time limits prescribed. Doc. 856.

11 Federal Defendants filed a proposed amended judgment, which  
12 alters the existing deadlines to extend completion of the entire  
13 remand process 30 months from October 1, 2011. Doc. 856-2.

14 Federal Defendants also filed the Declarations of Susan Fry and  
15 Jennifer Norris. Docs. 857 & 858. San Luis & Delta Mendota  
16 Water Authority and Westlands Water District; Metropolitan Water  
17 District of Southern California; State Water Contractors;  
18 Coalition for a Sustainable Delta and Kern County Water Agency;  
19 Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio  
20 Grove; and the Family Farm Alliance (collectively, "Plaintiffs")  
21 oppose the specific terms of Federal Defendants' proposed amended  
22 judgment, instead proposing their own 20-month remand schedule.

23 Docs. 864 & 864-1. Plaintiffs also filed the declarations of  
24 James Snow and Susan Hootkins. Docs. 866 & 867. Plaintiff-in-  
25 Intervention, the California Department of Water Resources  
26 ("DWR"), partially joins Plaintiffs' opposition, and does not  
27  
28

1 oppose a remand lasting between 20 and 30 months. Doc. 865.  
2 Federal Defendants replied. Doc. 868. Defendant Intervenors  
3 filed an objection to Plaintiffs' request to now set an interim  
4 remedies hearing in August 2011. Doc. 869.

5 Federal Defendants' request to have their motion heard on  
6 shortened time was granted. See Docs. 859, 860. A hearing was  
7 originally set for April 22, 2011, but was continued by agreement  
8 of the parties to April 27, 2011, Doc. 862, when the matter was  
9 heard.  
10

11  
12 II. DISCUSSION

13 A. Motion to Alter/Amend Judgment.

14 1. Standard.

15 A motion to alter or amend the judgment is timely if filed  
16 within twenty-eight days of the entry of judgment. Fed. R. Civ.  
17 P. 59(e). The district court "has considerable discretion when  
18 considering a motion to amend a judgment." *Turner v. Burlington*  
19 *N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citing  
20 Fed. R. Civ. P. 59(e)). Although Rule 59(e) itself does not  
21 state the grounds on which relief may be granted, the Court of  
22 Appeals has established that altering or amending the judgment is  
23 proper where "the district court: (1) is presented with newly  
24 discovered evidence, (2) committed clear error or the initial  
25 decision was manifestly unjust, or (3) if there is an intervening  
26 change in controlling law." *Circuit City Stores. v. Mantor*, 417  
27  
28

1 F.3d 1060, 1064 (9th Cir. 2005). The district court has subject  
2 matter jurisdiction to consider a timely motion under Rule 59(e)  
3 even where such motion is filed subsequent to a notice of appeal.  
4 *Tripati v. Henman*, 845 F.2d 205 (9th Cir. 1988). The filing of a  
5 Rule 59(e) motion suspends the operation of a notice of appeal  
6 until it is resolved, at which point the notice of appeal becomes  
7 effective. See Fed. R. App. P. 4(A)(4)(B)(i).  
8

9 2. Application.

10 Federal Defendants maintain that it is not feasible to  
11 complete by the end of 2011 a new BiOp, RPA analysis, and NEPA  
12 review to satisfy the December 14, 2010 memorandum decision  
13 ("December 2010 MSJ Decision"). Federal Defendants emphasize  
14 that no party proposed such a compressed schedule.  
15

16 a) Interpretation of the December 2010 MSJ Decision.

17 Federal Defendants' motion to amend the judgment is premised  
18 on their interpretation of the December 2010 MSJ Decision.  
19 According to Federal Defendants' interpretation, the Court has  
20 ordered the completion of several "time- and resource-intensive  
21 harm and feasibility analyses," including:  
22

23 (a) developing "alternatives" to the Reasonable and  
24 Prudent Alternative that the Service deems necessary to  
25 avoid jeopardy and adverse modification; (b) measuring  
26 and addressing water supply needs beyond the species;  
27 (c) accounting for competing demands for water from the  
28 Projects, including but not limited to the requirements  
of Cal. Water Code § 275, Cal. Const. art. X, § 2, and  
Section 8 of the Reclamation Act of 1902, 43 U.S.C. §  
383; and (d) making express written findings in either

1 the BiOp or the Administrative Record as to the first  
2 three factors of the four-part regulatory definition of  
an RPA in 50 C.F.R. § 402.02.

3 Doc. 856-1 at 6. Subparagraph (a) accurately reflects the prior  
4 holding that Reclamation violated NEPA by failing to effect any  
5 NEPA compliance prior to adopting and implementing the 2008 Smelt  
6 BiOp. *See generally* Doc. 399. Subparagraph (d) accurately  
7 recognizes the ruling that FWS acted unlawfully by failing to  
8 include written findings in either the BiOp or the AR concerning  
9 the first three factors of the four-part regulatory definition of  
10 an RPA in 50 C.F.R. § 402.02.  
11

12 As to subparagraphs (b) and (c), Federal Defendants' offer  
13 selectively incomplete portions of the December 2010 MSJ Decision  
14 that do not accurately reflect the entirety of the language or  
15 the intent of the decision. The relevant passages from the  
16 Decision cited by Federal Defendants in support of these  
17 additional "requirements" are found at pages 96, 194 n.47, 195,  
18 200, and 218-19. The quoted language from page 96 follows a  
19 lengthy discussion of FWS's failure to explain why it compared  
20 data from two non-comparable models to quantitatively justify  
21 remedial measures designed to address a shift of X2 purportedly  
22 caused by Project operations:  
23  
24

25 This is of particular concern because DWR, a joint  
26 operator of the projects communicated its scientific  
27 and operational concerns based on known available  
28 science. DWR and Reclamation have legal obligations to  
allocate water supply reasonably and responsibly, not  
solely to save the species. As discussed [] below at

1 Part VII.B, FWS's focus on its responsibilities to the  
2 species appears to have caused it to ignore its own  
3 regulations' obligations to consider impacts to the  
4 overall water supply and additional uses. The potential  
impacts of inaccurate quantitative analyses in the BiOp  
cannot be understated.

5 Doc. 757 at 96 (emphasis added). The emphasized text was not  
6 intended to and did not order that FWS balance economic and water  
7 supply costs against those of the species. Rather, the agency  
8 acted unlawfully because it failed to adequately explain its  
9 decision to compare non-comparable data sets as part of its  
10 quantitative justification for remedial actions. The agency did  
11 not articulate or employ an "institutionalized caution" rationale  
12 to justify setting specific RPA targets at levels more protective  
13 than those which are absolutely necessary. The December 2010 MSJ  
14 Decision did not address whether it would have been appropriate  
15 to incorporate such a rationale into the justification for those  
16 remedial actions.

17  
18 Federal Defendants cite portions of the December 2010 MSJ  
19 Decision focusing on the specific requirements of 50 C.F.R. §  
20 402.02, including the requirement that any RPA be consistent with  
21 the intended purpose of the action:  
22

23 The specific requirements of the X2 action are another  
24 example of how the record fails to address the  
25 "consistency with the intended purpose of the action,"  
26 and is "within the scope of the ... agency's authority  
27 and jurisdiction." 50 C.F.R. § 402.02. Because of  
28 competing demands for water from the Projects, combined  
with a limited supply, one purpose of the Projects is  
to ensure that that water use and allocation be  
carefully managed, and to also ensure that water is put

1 to a beneficial use and not wasted. This purpose is, in  
2 fact, required by California law, Cal. Const. art. X, §  
3 2; Cal. Water Code § 275, and imposed upon federal  
4 project operations by virtue of Section 8 of the  
5 Reclamation act of 1902. 43 U.S.C. § 383. The Projects  
6 will have to expend hundreds of thousands of acre feet  
7 of water to maintain X2 as far seaward as Component 3  
8 requires. Miller Decl., Doc. 400, at ¶¶ 67-73. Less  
9 water would be required if X2 did not need to be pushed  
10 so far downstream—water would then be available for  
11 other uses. Yet nothing in the BiOp or the record  
12 explains why it is essential that X2 be moved seaward  
13 to the degree required by Component 3 in order to  
14 protect the smelt and its habitat.

15 Doc. 757 at 194 n.47. Page 195 continues:

16 Even if, *arguendo*, the RPA is consistent with the  
17 multiple purposes of the action and the agency's  
18 statutory authority, and is economically and  
19 technologically feasible to implement, the APA  
20 requires, and the public is entitled under the law to  
21 receive, some exposition in the record of why the  
22 agency concluded (if it did so at all) that all four  
23 regulatory requirements for a valid RPA were satisfied.  
24 The RPA Actions manifestly interdict the water supply  
25 for domestic human consumption and agricultural use for  
26 over twenty million people who depend on the Projects  
27 for their water supply. "Trust us" is not acceptable.  
28 FWS has shown no inclination to fully and honestly  
address water supply needs beyond the species, despite  
the fact that its own regulation requires such  
consideration.

How the appropriation of water for the RPA Actions, to  
the exclusion of implementing less harmful  
alternatives, is required for species survival is not  
explained. The appropriate remedy for such a failure to  
explain is remand to the agency.

While the "institutionalized caution" interpretation of the ESA  
might justify some movement of X2 seaward of FWS's best estimate  
of what is "necessary" for the species survival, the APA requires  
FWS to justify its actions with the best available science. The

1 failures identified in the BiOp do not concern application of the  
2 precautionary principle, because FWS does not articulate  
3 "institutionalized caution" or the precautionary principle as  
4 rationales for its specific actions. Nor does the December 2010  
5 MSJ Decision prevent FWS from articulating a basis for its  
6 actions that includes a precautionary approach. Rather, the  
7 December 2010 MSJ Decision points out that FWS entirely failed to  
8 comply with its own regulatory requirements in 50 C.F.R. §  
9 402.02, compliance with which should have triggered evaluation of  
10 whether or not moving X2 downstream to the extent required by the  
11 RPA was justified. The significant impacts upon the water supply  
12 serve to emphasize the practical consequences of FWS's failure.  
13 The exact meaning and scope of the requirements in section 402.02  
14 that FWS ensure that the RPA "can be implemented in a manner  
15 consistent with the intended purpose of the action ... can be  
16 implemented consistent with the scope of the Federal agency's  
17 legal authority and jurisdiction ... [and] is economically and  
18 technologically feasible," was not decided by the December 2010  
19 MSJ Decision.<sup>1</sup>

22 Federal Defendants also cite pages 199-200 of the December  
23 2010 MSJ Decision, presumably to emphasize the following  
24 paragraph:  
25

26 Stewart & Jasper's contention that FWS's reserved to

27 <sup>1</sup> These issues are more explicitly raised by the pending cross motions in the  
28 Consolidated Salmonid Cases, which have yet to be decided.



1           itself "an ongoing power of oversight, as well as a  
2           power to dictate new and different pumping  
3           restrictions," assumes that neither Reclamation, as  
4           action agency, nor DWR, as co-operator, have the  
5           ability to not comply with the RPA. Doc. 697 at 87.  
6           Reclamation is not legally compelled to blindly follow  
7           FWS's pronouncements. Reclamation retains the authority  
8           to reject the RPA at any time, subject to its  
          obligation to reinitiate consultation. Although FWS has  
          not yet demonstrated a willingness or capability to  
          protect interests other than the species, it cannot be  
          assumed that Reclamation will not lawfully discharge  
          its statutory water supply responsibilities.

9           (Emphasis added.) This comment imposes no practical burdens upon  
10          Federal Defendants at all.

11           Finally, Federal Defendants cite pages 218-219 from the  
12          Conclusion:

13                           It cannot be disputed that the law entitles the delta  
14                           smelt to ESA protection. It is significant that the co-  
15                           operator of the Projects, DWR, in its endeavors to  
16                           protect a substantial part of the State's water supply,  
17                           opposes as unjustified and based on bad science some of  
18                           the RPA Actions. It is equally significant that despite  
19                           the harm visited on California water users, FWS has  
20                           failed to provide lawful explanations for the apparent  
21                           overappropriation of project water supplies for species  
22                           protection. In view of the legislative failure to  
23                           provide the means to assure an adequate water supply  
24                           for both the humans and the species dependent on the  
25                           Delta, the public cannot afford sloppy science and uni-  
26                           directional prescriptions that ignore California's  
27                           water needs. A court is bound by the law. Resource  
28                           allocation and establishing legislative priorities  
                         protecting the environment are the prerogatives of  
                         other branches of government. The law alone cannot  
                         afford protection to all the competing interests at  
                         stake in these cases.

          This passage summarizes earlier findings and imposes no further  
burdens on Federal Defendants.

          Federal Defendants' argument is that the December 2010 MSJ

1 Decision requires FWS to "balance" the needs of the species  
2 against economic interest. No such requirement exists. What the  
3 Court did hold was that the additional analyses required on  
4 remand by both agencies are substantial. The BiOp and its RPA  
5 are unlawful under the ESA and need to be remanded. Further, the  
6 action agency's failure to comply with NEPA's requirements  
7 requires an analysis of water supply impacts that demands  
8 cooperation of Project operators and the action agency.  
9

10  
11 b) Justification for 30-Month Proposed Schedule.

12 Federal Defendants now propose that the best way to complete  
13 remand is to permit FWS to develop the required analyses in  
14 consultation with Reclamation and concurrently with Reclamation's  
15 NEPA process. It is not disputed that Reclamation, the action  
16 agency, not FWS, has the expertise to evaluate water supply  
17 impacts and related effects. Federal Defendants assert that  
18 concurrent preparation of the revised BiOp and the NEPA document  
19 will enhance the quality of the end product. Specifically,  
20 Defendants now propose that remand, including certification of a  
21 new BiOp, completion of NEPA analysis, and satisfaction of all  
22 the other requirements of the Court's December 14, 2010  
23 Memorandum Opinion, will take until May 1, 2014.  
24

25 Federal Defendants' rationale for this deadline is as follows:

- 26
- 27 • A draft BiOp and RPA can be completed by October 1, 2011;
  - 28 • Completion of an EIS is expected to take 30 months following

1 formulation of the draft RPA. *See generally* Fry  
2 Declaration. Doc. 857.

- 3
- 4 • The procedures of NEPA are rigorous: The Agency must  
5 develop a list of issues to be analyzed and submit those to  
6 the public for "scoping" comments, which usually involves  
7 numerous public meetings. Reclamation anticipates it could  
8 draft and publish the NOI within 9 months of receiving the  
9 draft RPA. *Id.* at ¶ 11.
  - 10 • Then, the agency must complete a Draft EIS and submit that  
11 to other federal agencies and the public comment. Even for  
12 far less complex projects, this can take years to complete.  
13 Reclamation anticipates issuing a draft EIS approximately 17  
14 months after receiving the draft RPA. *Id.* at ¶ 13.
  - 15 • The agency must then respond to any comments by modifying  
16 alternatives, developing and evaluating new alternatives,  
17 correcting errors and or explaining why comments do not  
18 warrant further response. 40 C.F.R. § 1503.4. Only then  
19 may an agency prepare a final EIS. 40 C.F.R. § 1502.9.  
20 NEPA then requires a 30-90 day period for additional public  
21 comment. 40 C.F.R. § 1506.10(b)-(d).
  - 22 • Finally, NEPA requires Reclamation to issue a final record  
23 of decision ("ROD") stating the agency's decision,  
24 identifying alternatives considered and stating all  
25 practicable means to avoid or minimize environmental harm.  
26  
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1 Reclamation anticipates it could issue a ROD no earlier than  
2 30 months from the issuance of the RPA. Fry Decl. at ¶ 14.

3 Federal Defendants proposed schedule has FWS producing a  
4 draft BiOp consistent with the December 2010 MSJ Decision by  
5 October 1, 2011, and provides that FWS and Reclamation will  
6 cooperate during the NEPA review process to produce the  
7 information necessary to complete the remaining tasks, including  
8 preparation of additional analyses required by 50 C.F.R. § 402.02  
9 and NEPA review. Within one month after Reclamation completes  
10 its NEPA review, FWS will complete the remaining tasks.  
11

12 Plaintiffs argue that 30 months is unreasonable and present  
13 the declaration of Susan G. Hootkins, a senior consultant at  
14 ENTRIX, an environmental consulting firm with considerable NEPA  
15 compliance experience, including on projects for Reclamation.  
16 She states that Federal Defendants' timeframe is "not aggressive  
17 and provides more time than legally or reasonably necessary ...  
18 principally because it includes over estimates of the time needed  
19 to complete some of the basic steps in the NEPA process." Doc.  
20 867 at ¶ 7. She opines that 10 months can reasonably be shaved  
21 off the 30 month estimate. *Id.* at ¶ 16.<sup>2</sup> Plaintiffs also cite  
22 numerous cases in which the NEPA process was expedited by a court  
23 order. *See* Doc. 864 at 13. It is unquestioned that all parties  
24  
25

26  
27 <sup>2</sup> Federal Defendants correctly point out that Plaintiffs' alternative 20-month  
28 schedule is not properly before the court because Plaintiffs did not  
separately move to amend the judgment.

1 and the water-consuming public urgently require and deserve some  
2 degree of predictability. The longer the work remains  
3 uncompleted, the greater the dislocation to all.

4 The agencies, not the Court, are in the best position to  
5 determine how long it will take them to complete these required  
6 processes. A court cannot tell the agencies how to allocate  
7 resources on remand, nor how to accomplish the required tasks.  
8 Plaintiffs' declarant is unfamiliar with agency operations,  
9 budgets, staffing, expertise and resources. Federal Defendants'  
10 own declarant, Susan Fry, is familiar with these matters and has  
11 opined that a 30-month schedule is the absolute minimum time  
12 necessary to complete all the work. She anticipates considerable  
13 public interest in these issues, which will preclude the  
14 accelerated timetable Plaintiffs recommend. Plaintiffs'  
15 declarant also assumes Reclamation could begin the NEPA process  
16 on May 2, which is not possible given the condition precedent,  
17 issuance of a draft BiOp and RPA, will not be completed until  
18 October 1, 2011.

19  
20  
21 Federal Defendants have demonstrated that the existing Final  
22 Judgment would cause manifest injustice, as it would require FWS  
23 and Reclamation to complete their duties on remand in a time  
24 frame impossible for them to achieve. Federal Defendants'  
25 schedule delays completion of a new BiOp, which extends  
26 uncertainty and increases the likelihood that court intervention  
27  
28

1 in annual water allocations will be necessary. However,  
2 Plaintiffs' suggestion that a deadline of December 2012 should be  
3 chosen with the understanding that Federal Defendants could apply  
4 for an extension if needed does not permit Federal Defendants to  
5 proceed with remand in an orderly manner.

6  
7 Federal Defendants' motion to amend the judgment is GRANTED,  
8 but the deadline will be modified to require completion of a  
9 final BiOp, RPA, and NEPA review by December 1, 2013. This is  
10 approximately 32 months from now, 36 months following the  
11 December 2010 MSJ Decision, and prior to the water season in  
12 which supply restrictions have historically been imposed to  
13 protect the species.

14  
15 B. Motion for Stay Pending Appeal.

16 As an alternative to an amended judgment, Federal Defendants  
17 move for a stay pending appeal. Federal Defendants represented  
18 in open court that they do not prefer and would withdraw their  
19 motion for a stay if the motion to amend is granted to permit a  
20 complete and lawful BiOp, RPA, and NEPA process to be  
21 accomplished. It is unnecessary to address the alternative  
22 motion for a stay.

23  
24 C. Additional Requests for Correction.<sup>3</sup>

25  
26 <sup>3</sup> These additional requests are to correct the Final Judgment to accurately  
27 reflect success on the merits. A court may correct a clerical mistake of this  
28 nature on its own, with or without notice. See Fed. R. Civ. P. 60. Normally,  
leave of the appellate court would be required if the correction is made while

1           1.    State Water Contractors' Request.

2           State Water Contractors ("SWC") also request that Paragraph  
3 C of the Final Judgment be amended to reflect that they prevailed  
4 on their Fifth claim for relief, which alleged among other things  
5 that Federal Defendants violated the Endangered Species Act  
6 ("ESA") and 50 C.F.R. § 402.02 by failing to determine whether  
7 the RPA could be implemented consistently with the scope of DWR's  
8 legal authority and jurisdiction. *See State Water Contractors v.*  
9 *Salazar, et al.*, 1:09-cv-00480 OWW GSA, Doc. 1 at 34-36. This  
10 claim, which narrowly focuses on the RPA's consistency with DWR's  
11 legal authority, was not squarely addressed by the December 2010  
12 MSJ Decision. SWC points to page 194 n.47, which states:

13  
14                   The specific requirements of the X2 action are another  
15 example of how the record fails to address the  
16 "consisten[]tcy with the intended purpose of the  
17 action," and is "within the scope of the ... agency's  
18 authority and jurisdiction." 50 C.F.R. § 402.02.  
19 Because of competing demands for water from the  
20 Projects, combined with a limited supply, one purpose  
21 of the Projects is to ensure that that water use and  
22 allocation be carefully managed, and to also ensure  
23 that water is put to a beneficial use and not wasted.  
24 This purpose is, in fact, required by California law,  
25 Cal. Const. art. X, § 2; Cal. Water Code § 275, and  
26 imposed upon federal project operations by virtue of  
Section 8 of the Reclamation act of 1902. 43 U.S.C. §  
383. The Projects will have to expend hundreds of  
thousands of acre feet of water to maintain X2 as far  
seaward as Component 3 requires. Miller Decl., Doc.  
400, at ¶¶ 67-73. Less water would be required if X2  
did not need to be pushed so far downstream—water would  
then be available for other uses. Yet nothing in the  
BiOp or the record explains why it is essential that X2  
be moved seaward to the degree required by Component 3  
in order to protect the smelt and its habitat.

an appeal is pending, *id.*, but, as discussed above, the filing of a Rule 59(e)  
motion suspends the operation of a notice of appeal until it is resolved, *see*  
Fed. R. App. P. 4(A)(4)(B)(i).

1 Doc. 757 at 194 n.47. This footnote discussed 50 C.F.R. §  
2 402.02, which provides:

3  
4 Reasonable and prudent alternatives refer to  
5 alternative actions identified during formal  
6 consultation that can be implemented in a manner  
7 consistent with the intended purpose of the action,  
8 that can be implemented consistent with the scope of  
9 the Federal agency's legal authority and jurisdiction,  
10 that is [sic] economically and technologically  
11 feasible, and that the Director believes would avoid  
12 the likelihood of jeopardizing the continued existence  
13 of listed species or resulting in the destruction or  
14 adverse modification of critical habitat.

15 50 C.F.R. § 402.02 (emphasis added). The regulation plainly  
16 restricts itself to consistency with the federal agency's legal  
17 authority and jurisdiction. Footnote 47 discussed provisions of  
18 California law because those are "imposed upon federal project  
19 operations by virtue of Section 8 of the Reclamation act of 1902.  
20 43 U.S.C. § 383." No authority has been presented suggesting  
21 that this regulation should be extended to impose a requirement  
22 that the RPA be consistent with a state agency's legal authority  
23 and jurisdiction. SWC did not prevail on its fifth claim for  
24 relief. Its motion to amend the judgment is DENIED.

25  
26 2. Coalition for a Sustainable Delta & Kern County Water  
27 Agency's Request.

28 Coalition for a Sustainable Delta ("Coalition") and Kern  
County Water Agency ("KCWA") separately request that Paragraph C  
of the Final Judgment be amended to reflect that they prevailed  
on their Third claim for relief, which alleged Federal Defendants  
failed to adequately analyze the status of the species and the



1 environmental baseline in the BiOp in violation of the ESA and  
2 Administrative Procedure Act. *See Coalition for a Sustainable*  
3 *Delta, et al. v. U.S. Dept. of the Interior, et al.*, 1:09-cv-  
4 00422 OWW GSA, Doc. 23, at 22-23. The December 2010 MSJ Decision  
5 found a number of errors in the BiOp's baseline analysis of  
6 "other stressors" on the smelt. *See Doc. 757 at 146-155.* These  
7 findings result in the Coalition's and KCWA's success on their  
8 Third Claim. The Amended Final Judgment shall be corrected to  
9 reflect this success.  
10

### 11 III. CONCLUSION

12 Federal Defendants' implicit contention that water supply  
13 impacts of the OCAP cannot be considered under the ESA is a total  
14 abdication of NEPA's requirement to evaluate the impacts of the  
15 RPA on humans. Federal Defendants cannot avoid this  
16 responsibility by isolating the ESA issues.  
17

18 The remand schedule must be revised. Federal Defendants'  
19 have demonstrated that the existing deadline for completion of  
20 remand is infeasible. They say they need 30 months. The Court  
21 would prefer to see the work done in 24 months. Federal  
22 Defendants' request to amend the judgment is GRANTED, with the  
23 slight modification discussed above. A draft BiOp shall be  
24 completed on or before October 1, 2011, and a final BiOp and RPA,  
25 as well as the required NEPA analysis, shall be completed by  
26 December 1, 2013.  
27  
28

1 Plaintiffs' alternative 20-month proposal is not properly  
2 before the court and does not reflect a realistic commencement  
3 date or an enforceable process, given limited agency resources.

4 SWC's motion to correct the Final Judgment is DENIED.

5 The Coalition's and KCWA's motion to correct the Final  
6 Judgment is GRANTED.

7  
8 Federal Defendants shall submit a proposed Amended Final  
9 Judgment consistent with this memorandum decision within five (5)  
10 days following electronic service of this decision.

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SO ORDERED

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Dated: May 4, 2010

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/s/ Oliver W. Wanger  
United States District Judge

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