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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

18 THE DELTA SMELT
19 CONSOLIDATED CASES

20 CASE No. 1:09-cv-407-OWW-DLB

21 **Defendant-Intervenors' Notice of Motion,
22 Motion, and Memorandum In Support of
23 Motion for Stay of Fall X2 Injunction
24 Pending Appeal**

25 Date: September 8, 2011 (proposed)

26 Time: 1:30 p.m. (proposed)

27 Courtroom: 3
28

NOTICE OF MOTION

Please take notice that the following Motion for Stay of Fall X2 Injunction Pending Appeal will be heard by the Honorable Oliver W. Wanger, judge of the United States District Court for the Eastern District of California, on Thursday, September 8, 2011, at 1:30 p.m. (pending approval of the Court) in Courtroom 3, 2500 Tulare Street, Fresno, California.

MOTION FOR STAY PENDING APPEAL

Pursuant to Fed. R. Civ. P. 62(c), Defendant-Intervenors Natural Resources Defense Council and The Bay Institute (collectively, “NRDC”) respectfully ask this Court to stay its injunction of Action 4 of the United States Fish & Wildlife Service’s December 15, 2008 biological opinion (“BiOp”), addressing impacts of the coordinated operations of the Central Valley Project (“CVP”) and State Water Project (“SWP”) on the threatened delta smelt, pending the Ninth Circuit Court of Appeal’s resolution of NRDC’s appeal of this Court’s Order of September 2, 2011 (Doc. 1015). This motion is based on the Memorandum in Support of Motion for Stay of Fall X2 Injunction Pending Appeal, submitted herewith.

As detailed in NRDC’s Memorandum in Support of Motion for Stay of Fall X2 Injunction Pending Appeal, Application for an Order Shortening Time, submitted herewith, and other evidence and materials before the Court, NRDC requests that the Court expedite its determination of this Motion to prevent irreparable harm to the delta smelt and its critical habitat.

**MEMORANDUM IN SUPPORT OF
MOTION FOR STAY OF FALL X2 INJUNCTION PENDING APPEAL**

I. INTRODUCTION

The purpose of a stay pending appeal is to preserve the status quo. *See Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001); *Natural Resources Defense Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); *George v. Sullivan*, 2010 WL 5393675, *2 (E.D. Cal., Dec. 21, 2010). The Court has materially altered the status quo of its final judgment remanding the BiOp without vacatur by enjoining a key aspect of the Reasonable and Prudent Alternative during the remand period. Moreover, the Court's injunction is based on consideration of water supply impacts that will not begin to occur until at least October 15th and likely will not occur after that time. The Court's injunction also imperils the survival and recovery of the delta smelt and adversely modifies its critical habitat. Therefore, NRDC seeks a stay of the Court's order enjoining Action 4 pending the Ninth Circuit's resolution of its appeal of the Court's decision, or at least until October 15th, during which time no party will suffer any adverse impacts from full implementation of Action 4.

II. ARGUMENT

A. The Standard for a Stay Pending Appeal.

With this motion, NRDC concurrently files a Notice of Appeal of the Court's Preliminary Injunction Against Full Implementation of RPA Component 3 (Action 4), entered on September 2, 2011 (Doc. 1015). When an appeal is pending from a decision that grants an injunction, the Court "may suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c).¹ Rule 62(c) is "expressive of a power

¹ NRDC seeks an unsecured stay here. Such a stay is warranted for three primary reasons. First, as explained below, no party is likely to suffer any harm from a stay of the Court's injunction during the pendency of appeal. Second, the Federal Rules "give the district court power to grant unsecured stays." *Bolt v. Merrimack Pharmaceuticals, Inc.*, 2005 WL 2298423, note 2 (E.D. Cal., Sept. 20, 2005) (citations omitted). Third, as non-profit entities with limited resources pursuing public interest litigation, Defendant-Intervenors should not be required to post a bond. *See, e.g., Cal. ex. rel. Van De Kemp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (no bond required where requiring security would effectively deny access to judicial review, especially where Congress has provided for private enforcement of a statute); *Baykeeper v. U.S. Army Corps of Eng'rs*, 2006 WL 2711547, *17 (E.D. Cal. Sept. 20, 2006); *see also* Order re Appt. of FRE 706 Experts at 3 (Doc.

1 inherent in the court to preserve the status quo where, in its sound discretion, the court deems the
 2 circumstances so justify.” *McClatchy Newspapers v. Central Valley Typographical Union No.*
 3 *46*, 686 F.2d 731, 734 (9th Cir. 1982).

4 In the Ninth Circuit, “the standard for evaluating stays pending appeal is similar to that
 5 employed by district courts in deciding whether to grant a preliminary injunction.” *Lopez v.*
 6 *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (citation omitted); *see also Bolt v. Merrimack*
 7 *Pharmaceuticals, Inc.*, 2005 WL 2298423, *2 (E.D. Cal., Sept. 20, 2005). The Supreme Court
 8 recently reiterated the four factors that are traditionally considered when evaluating whether to
 9 issue a stay: “(1) whether the stay applicant has made a strong showing that he is likely to
 10 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)
 11 whether issuance of the stay will substantially injure the other parties interested in the
 12 proceeding; and (4) where the public interest lies.” *Nken v. Holder*, -- U.S. --, 129 S. Ct. 1749,
 13 1761 (2009). “The first two factors are the most critical.” *Id.* In applying *Nken*, the Ninth
 14 Circuit employs a continuum where “a stronger showing of one element may offset a weaker
 15 showing of another,” noting that “stays are typically less coercive and less disruptive than are
 16 injunctions.” *Leiva-Perez v. Holder*, 640 F.3d 962, 964-66 (9th Cir. 2011).

17 Each of these factors weighs in favor of a stay here.

18 **B. A Stay Will Prevent Irreparable Injury to NRDC’s Interests and Avoid**
 19 **Substantial Injury to Other Parties.**

20 **1. Water Supply Impacts from Implementation of Action 4 Are Unlikely.**

21 As the Court found, water year 2011 was a “really good water year.” Doc. 1013 at 89.
 22 The allocation for the SWP was 80 percent, and undisputed evidence shows that the SWP is
 23 likely to export more water from the Delta in water year 2011 than ever before in the history of
 24 the projects. *Id.* “No water supply impacts to CVP are anticipated as a result of implementation
 25 of the Fall X2 Action this year.” *Id.* at 88.
 26

27 394) (recognizing “Defendant Intervenors, as non-profit organizations with limited resources” and imposing only
 28 “nominal” costs on them).

1 The only impact found by the Court was a possible 300,000 acre-feet impact on SWP
2 supplies (depending on future hydrology), which the Court found might impede contractors'
3 ability to replenish groundwater and other storage facilities. *Id.* at 126-27. But this impact will
4 not begin to occur until October 15th, at the earliest. Moreover, the evidence shows that the
5 limited impact found by the Court is, in fact, unlikely to occur. SWP contractors are already
6 filling storage facilities as rapidly as possible, and available storage space is likely to refill with
7 or without the Fall X2 action. Moreover, this impact will be reduced, if not entirely eliminated,
8 once the state side of San Luis Reservoir refills – likely to occur by January of 2012 – at which
9 time additional water supplies would likely become available for storage replenishment.

10 At a minimum, the Court should stay its ruling until October 15th, during which time no
11 party will suffer any harm from implementing the Fall X2 Action.

12 **a. No Water Supply Impacts from Action 4 Will Occur Before October 15th.**

13 As the Court found, the SWP is the only water project that is likely to suffer any water
14 supply impacts at all due to implementing the Fall X2 requirement. Doc. 1013 at 126. However,
15 even those impacts to the SWP would not begin to accrue before October 15th. Until then, SWP
16 operators intend to meet the outflow requirement of Fall X2 through increased releases from
17 upstream reservoirs. *Id.* at 91-92. The impacts associated with reduced reservoir storage, as the
18 Court found, are likely to be recovered over the winter months. *Id.* at 94 (“It is more likely than
19 not that all storage impacts caused by upstream releases north of the Delta will be recovered in
20 2012”), 126 (“any storage losses due to implementation of the Fall X2 Action in 2011 will likely
21 be recovered”). Thus, no water supply impacts are likely to occur before October 15, 2011, and
22 no harm will be suffered as a result of staying the Fall X2 injunction until that time.

23 **b. Continuing Storage Replenishment and Refilling of San Luis Reservoir Will**
24 **Significantly Reduce or Eliminate Export Impacts to the SWP.**

25 **i. SWP Storage Replenishment Will Continue with or Without Fall X2.**

26 The Court found that “even though 2011 has been a ‘really good water year,’ in which much
27 of the storage deficits caused by the 2007-2010 drought have been made up, prudent water
28 management calls for the storage of water in good years to guard against future dry periods.” Doc.

1 1013 at 126-27. In fact, the evidence shows that SWP contractors will continue to replenish storage
2 and pursue “prudent water management” whether or not the Fall X2 Action as called for in the BiOp
3 is implemented. Therefore, the harm found by the Court is misplaced.

4 The uncontroverted evidence shows that, at the end of 2011, Plaintiff Metropolitan Water
5 District of Southern California (“Metropolitan”) is likely to have more water in storage than ever
6 before. *See* 7-28-11 Tr. at 75:18-20 (Mr. Erlewine); Hearing Exhibit 567 at 5 (noting “all time
7 high” storage levels). Metropolitan has been able to completely refill the approximately 1.5
8 million acre-feet of its storage reserves depleted during the 2007-2010 drought period. 7-28-11
9 Tr. at 47:13-16, 59:2-10 (Mr. Erlewine); Erlewine Decl. at ¶ 10 (6-16-11) (Doc. No. 915,
10 Hearing Exhibit 136). Additionally, Metropolitan provided 800,000 AF of groundwater
11 replenishment deliveries to its member agencies in 2011. 7-28-11 Tr. at 59:11-60:2 (Mr.
12 Erlewine). Counsel for Metropolitan conceded that, “It is true we don’t need the water for this
13 year. We probably don’t even need it for next year....” 7-26-11 Tr. at 23 (Mr. Gonzalez). The
14 Court concurred that “Metropolitan’s current storage levels are at historic levels.” Doc. 1013 at
15 127.

16 Similarly, Kern County Water Agency (“KCWA”) is “maximizing groundwater
17 recharge” this year. 7-28-11 Tr. at 84:10-15. Groundwater levels in Kern County rebounded in
18 2010 and have continued to rebound this year. 7-28-11 Tr. at 83:18-21 (Mr. Erlewine).
19 Recharge this year will be significant. 7-28-11 Tr. at 84:5-9 (Mr. Erlewine); *see also id.* at
20 31:18-21. Neither the Bureau of Reclamation nor the Department of Water Resources (“DWR”)
21 have any control over groundwater pumping and groundwater levels in Kern County, *id.* at
22 78:14-79:8 (Erlewine), and groundwater levels in Kern County are also affected by other water
23 users, not only SWP and CVP contractors. *Id.* at 79:13-20 (Mr. Erlewine).

24 Despite this evidence, the Court found, without citation to the record, that “[a] 300,000 AF
25 export impact would reduce SWP Contractors’ ability to put additional water into storage programs
26 to prepare for future dry years,” and that “SWP Contractors have sufficient storage available to take
27 advantage of any additional water that may be delivered if the Fall X2 Action is modified or
28 enjoined.” Doc. 1013 at 127. The record does not support these findings. In fact, the evidence

1 shows that SWP contractors declined to take surplus Article 21 water that DWR made available this
2 year because they had no ability to put the water into storage or to beneficial use. 7-27-11 Tr. at
3 232:23-233:2 (Erlewine). In other words, because SWP contractors are already “maximizing”
4 the amount of water they are putting into storage, they have no capacity left to put additional
5 water into storage and are, therefore, declining deliveries of additional water.

6 The Court’s finding that “it is undisputed that any reductions in deliveries to Metropolitan
7 will reduce its overall ability to store water to prepare for future dry years” is incorrect. *See* Doc.
8 1013 at 128. In fact, the evidence shows that implementing the Fall X2 Action will likely *improve*
9 Metropolitan’s ability to store water by slowing the refill of San Luis Reservoir and minimizing the
10 risk (highlighted by Metropolitan) that it will have to “spill” its 300,000 acre-feet of carryover
11 storage held there. Hearing Exhibit 567 at 4-5b. Metropolitan has completely refilled its own
12 “in-region” storage facilities and has made 800,000 acre-feet of water available to its member
13 agencies this year for groundwater replenishment. Doc. 1013 at 90. The only evidence
14 concerning existing storage space in Metropolitan’s storage portfolio concerns “out-of-region”
15 storage. Doc. 1013 at 90. But, as Mr. Erlewine explained, there are “a lot of constraints” on
16 how Metropolitan can store SWP water in out-of-region storage that “doesn’t make it real usable
17 under all circumstances.” 7-28-11 Tr. at 46-47. There is *no* evidence that Metropolitan could or
18 would utilize SWP deliveries provided pursuant to a Fall X2 injunction to replenish its Colorado
19 River or other out-of-region storage. Indeed, Mr. Erlewine conceded that Metropolitan is
20 reaching the point where it will not have any more ability to put water into storage. 7-28-11 Tr.
21 at 76:19-77:6 (Mr. Erlewine); Ex. 567.

22 Similarly, there is no evidence to support the unattributed finding by the Court that “KCWA
23 will likewise be impacted in its ability to store water for future years.” Doc. 1013 at 128. KCWA is
24 already “maximizing” groundwater recharge, and there is no evidence that it will have the ability to
25 take more water for storage if Fall X2 is enjoined. Doc. 1013 at 91. While the Court cites to Mr.
26 Erlewine’s generic statement that a 10% reduction in SWP contract allocations in 2012 “would affect
27 [SWP contractors’] recharge programs... in a median year,” Doc. 1013 at 94, the more contractor-
28 specific testimony of Mr. Erlewine does not bear out this generic statement. Moreover, the updated

1 estimates provided by Mr. Leahigh belie the underlying assumption that the SWP will suffer a 10%
2 reduction in initial SWP contract allocations in 2012, since he has now reduced his estimated impacts
3 in a median year by approximately one-third. Doc. 1013 at 92-93.

4 Furthermore, the specific impact to KCWA found by the Court as a result of the inflated 10%
5 reduction in initial SWP contract allocations is not supported by the record. The Court found that
6 this 10% reduction would lead to increased groundwater pumping associated with meeting the needs
7 of irrigating permanent crops in KCWA's service area. Doc. 1013 at 95-96. However, the evidence
8 shows that KCWA is likely to receive a 60% contract allocation on average in a median year with all
9 of the requirements of the BiOp in place, including Fall X2. 7-28-11 Tr. at 78:2-4 (Mr. Erlewine).
10 Mr. Erlewine testified that KCWA needs an allocation of about 60 to 70 percent to meet its
11 current water demands. 7-28-11 Tr. at 81:7-11 (Mr. Erlewine). Thus, the evidence does not
12 support a finding that implementing Fall X2 would cause KCWA to lose recharge capability or
13 to be unable to meet the demands of its customers.

14 **ii. Filling of the State Side of San Luis Reservoir Reduces or Eliminates
15 These Impacts.**

16 The evidence also shows that the state side of San Luis Reservoir is likely to refill by
17 January 2012, according to Mr. Leahigh. 7-27-11 Tr. at 239:1-9. Mr. Erlewine confirmed that
18 the impacts attributable to Action 4 would be reduced or eliminated once the state side of San
19 Luis refills. 7-28-11 Tr. at 60:15-22.

20 Indeed, the evidence shows that once San Luis refills, SWP contractors face the
21 possibility of losing any carryover storage held there. Doc. 1013 at 127. For Metropolitan, this
22 amounts to 300,000 acre-feet of carryover storage this year. 7-28-11 Tr. at 49:5-19 (Mr.
23 Erlewine). Metropolitan has concluded that, "Notably, storing water in SWP Carryover Storage
24 is less desirable under current conditions than it has been in other years. This is because
25 conditions on the SWP system should result in higher storage levels in San Luis Reservoir and
26 Lake Oroville, which also leads to an increased chance of higher SWP Table A allocations next
27 year. When this condition is combined with the fact that In-Region surface storage (Diamond
28 Valley Lake and DWR Flexible Storage) is essentially full, it significantly increases the chances

1 that any water stored in SWP Carryover Storage will be lost in early 2012 as San Luis Reservoir
2 reaches its maximum capacity.” Hearing Exhibit 567 at 4-5.

3 Thus, by slowing the refilling of San Luis Reservoir, the Fall X2 Action is likely to help
4 SWP contractors avoid loss of existing water supplies and maximize the amount of water that
5 they can put to beneficial use. Furthermore, while the Court found that “SWP contractors will
6 modify delivery schedules to minimize or eliminate any such losses [in San Luis Reservoir],” as
7 Metropolitan’s statement illustrates, avoiding a “spill” of carryover storage at San Luis requires
8 putting that water somewhere. *Id.* If no storage is available – and the evidence for Metropolitan
9 indicates that at the end of 2011, Metropolitan is likely to have more water in storage than ever
10 before, 7-28-11 Tr. at 75:18-20 (Mr. Erlewine); Hearing Exhibit 567 at 5 (noting “all time high”
11 storage levels) – then Metropolitan faces “significantly increase[d] ... chances that any water
12 stored in SWP Carryover Storage will be lost in early 2012.” Hearing Exhibit 567 at 4-5. The
13 result would be the loss of 300,000 acre-feet of water – the exact same impact that the Court
14 attributes to implementing the Fall X2 Action.

15 **2. Harm to the Delta Smelt and Its Critical Habitat Will Result.**

16 ESA Section 7(a)(2) requires federal action agencies to ensure that actions they authorize,
17 fund, or carry out are not “likely to jeopardize the continued existence” of any endangered or
18 threatened species or “result in the destruction or adverse modification” of its critical habitat. 16
19 U.S.C. § 1536(a)(2). To “jeopardize the continued existence of” means “to engage in an action
20 that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of
21 both the survival and recovery of a listed species in the wild by reducing the reproduction,
22 numbers, or distribution of that species.” 50 C.F.R. § 402.02; *see also Nat’l Wildlife Fed’n v.*
23 *NMFS*, 524 F.3d 917, 931 (9th Cir. 2008) (holding that jeopardy analysis under 50 C.F.R. §
24 402.02 cannot be limited to consideration of likelihood of survival, but rather must also include
25 realistic evaluation of likelihood of recovery as well). The Ninth Circuit has held that an action
26 is “jeopardizing” if it keeps recovery “far out of reach,” even if the species is able to cling to
27 survival. *Id.* The Ninth Circuit has further held that “an agency may not take action that will tip
28

1 a species from a state of precarious survival into a state of likely extinction. Likewise, even
2 where baseline conditions already jeopardize a species, an agency may not take action that
3 deepens the jeopardy by causing additional harm.” *Id.* at 930.

4 The evidence shows that enjoining the Fall X2 Action as prescribed by the Court will
5 increase jeopardy to the delta smelt’s survival and recovery and adversely modify its critical
6 habitat. Action 4 is designed to redistribute the current year’s population of delta smelt down
7 into Suisun Bay, thereby increasing opportunities for feeding and rearing by increasing the
8 ability of individuals to find food and avoid predation. Norris Decl. ¶ 17 (7-1-11) (Hearing
9 Exhibit 502) (Doc. 941). Action 4 is designed to ensure that the centroid of delta smelt
10 distribution coincides with these higher turbidity zones. *Id.* The ability of designated critical
11 habitat to provide for the conservation of the delta smelt is compromised when the low salinity
12 zone is disconnected from biologically productive areas that maximize the species’ opportunity
13 to find and consume prey, such as Grizzly Bay and Suisun Bay and Suisun Marsh areas, which
14 are broader and shallower than the upstream confluence of the Sacramento and San Joaquin
15 rivers. *Id.* ¶ 24; *see also* 7-29-11 Tr. at 108:20-109:4 (Mr. Nobriga).

16 Because the distribution of delta smelt will center on the location of the low salinity zone
17 (as indexed by X2), the relationship of X2 to these other essential features of delta smelt critical
18 habitat is important. Norris Decl. ¶ 24 (7-1-11) (Hearing Exhibit 502) (Doc. 941). These
19 features must coincide to provide the full set of habitat conditions necessary for the species
20 during this important rearing and sexual maturation life stage. *Id.* Action 4 is designed to
21 restore the conservation role of the low salinity zone in the fall by maintaining its location near
22 the highly productive Suisun Marsh and Grizzly Bay areas, during a time that pre-migrating delta
23 smelt are rearing. *Id.*

24 By implementing Action 4 this year, delta smelt produced this spring will be much more
25 likely to survive and reproduce next year, thereby adding to the population overall. *Id.* ¶ 18.
26 This improvement in the population status is *essential* to reverse the species’ downward decline
27 toward extinction. *Id.* (emphasis added). Any survival or recovery benefit that would be derived
28 from this year’s exceptionally wet spring is likely to be lost without the associated benefits of a

1 highly productive fall. *Id.* ¶ 27.

2 Restricting Fall X2 to a position of 79 km as the most westerly point reduces, if not
3 eliminates, this population benefit. The evidence reveals, and the Court found, that the center of
4 the delta smelt population is at the X2 isohaline, with the probability of delta smelt catch
5 declining rapidly as the trawls moved either westward or eastward of that point. Hearing
6 Exhibits 154, 155; *see also* 7-29-11 Tr. at 90:1-24, 92:13-93:14 (Mr. Feyrer). When X2 is at the
7 79 km or 80 km mark, some individual delta smelt can be found at higher salinity areas in Suisun
8 Bay and Grizzly Bay. 7-28-11 Tr. 213:14-19 (Mr. Feyrer). However, just because these areas
9 are not lethal to delta smelt does not mean that the bulk of the population will move there. Many
10 of the sampling stations at the far reaches of the range reported zero percent smelt capture.
11 Hearing Exhibits 154, 155; 7-29-11 Tr. at 90:1-24, 92:13-93:2 (Mr. Feyrer). Thus, 79 km does
12 not allow the bulk of the population to move into Suisun and Grizzly Bays, and fails to ensure a
13 “highly productive fall” to take advantage of the population gains made this spring.

14 **C. NRDC Is Likely to Succeed on the Merits of Its Appeal.**

15 NRDC raised several arguments regarding the merits of Plaintiffs’ requested injunction
16 of the Fall X2 Action in its papers and arguments opposing that motion, and incorporates those
17 arguments by reference here. They include concerns that the Court employed the wrong legal
18 standard when granting its injunction and that the Court lacked jurisdiction to grant the
19 injunction following entry of final judgment that remanded the BiOp without vacatur. At the
20 very least, these issues raise a “fair prospect” of NRDC’s success on the merits of their appeal,
21 satisfying this prong of the requirements for a stay. *Leiva-Perez*, 640 F.3d at 965-68 (citations
22 omitted).

23 **D. A Stay Is in the Public Interest.**

24 As previously explained by Defendant-Intervenors, the Ninth Circuit has held that the
25 balance of hardships and the public interest factors of the preliminary injunction standard “tip[]
26 heavily in favor of protected species.” *Nat’l Wildlife Fed’n v. Burlington N. R.R. Co.*, 23 F.3d
27 1508, 1511 (9th Cir. 1994) (citations omitted); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153,

1 194 (1978) (Congress has “decided the order of priorities” in favor of listed species). Thus, the
2 public interest weighs in favor of granting a stay here.

3 **III. CONCLUSION**

4 For all of these reasons, the Court should stay its injunction of the Fall X2 Action
5 pending NRDC’s appeal of its order, or at least until October 15th.

6
7 DATED: September 6, 2011

Respectfully submitted,

8
9 /s/ George M. Torgun

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