No. _____

In The Supreme Court of the United States

BEAR VALLEY MUTUAL WATER COMPANY, et al.,

Petitioners,

v.

SALLY JEWELL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The provisions of the Endangered Species Act (16 U.S.C. §§1531 et seq. ("ESA")) comprise "comprehensive legislation for the preservation of endangered species." *TVA v. Hill*, 437 U.S. 153, 180 (1978). At the same time, under the broadly applicable provisions of the National Environmental Policy Act (42 U.S.C. §§4321 et seq. ("NEPA")), a detailed review must be performed on every "major Federal action[ ]" with the potential to "significantly affect[ ] the quality of the human environment." *Id*. at §4332(2)(C).

This case involves determinations by the Ninth Circuit first made in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) and reaffirmed in the present case that (1) Congress intended the ESA to "displace" NEPA and (2) the ESA furthers the goals of NEPA, thus rendering unnecessary any NEPA analysis of the environmental effects of a critical habitat designation made under the ESA. The reasoning of the Ninth Circuit in making these determinations was explicitly rejected by the Tenth Circuit in *Catron County Board of Commissioners v. U.S. FWS*, 75 F.3d 1429 (10th Cir. 1996) later reaffirmed in *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002) and by the District Court for the District of Columbia in *Cape Hatteras Access Preservation Alliance v. U.S. DOI*, 344 F.Supp.2d 108 (D.D.C. 2004). The first question presented thus is:

QUESTIONS PRESENTED – Continued

> Whether the provisions of the ESA "displace" the provisions of NEPA or otherwise render NEPA analysis unnecessary, thus eliminating the requirement of environmental review when the Fish and Wildlife Service ("FWS") adopts a designation of "critical habitat" that has the potential to significantly affect the human environment.

In addition, in 1982, Congress amended the ESA for the purpose of "instruct[ing] the Federal Government to work with state and local agencies to resolve water resources issues" arising under the Act. S. Rep. No. 97-418 at 5 (1982). It thus added Section 2(c)(2), which states:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

In a ruling of first impression, the Ninth Circuit determined that Section 2(c)(2) of the ESA "is a non-operative statement of policy" that creates no substantive or enforceable rights. Instead, it determined that the "policy goals" of Section 2(c)(2) are implemented through another section of the ESA that says nothing about cooperation by federal agencies or the resolution of water resources issues. The second question thus presented is:

QUESTIONS PRESENTED – Continued

Whether Section 2(c)(2) of the ESA is a meaningless, non-operative statement of policy that fails to create any substantive or enforceable rights regarding cooperation by FWS with state and local governmental agencies to resolve water resource issues arising from administration of the ESA in concert with conservation of endangered species.

PARTIES TO THE PROCEEDINGS BELOW

The following parties were plaintiffs-appellants below: Bear Valley Mutual Water Company; Big Bear Municipal Water District; City of Redlands; City of Riverside; City of San Bernardino Municipal Water Department; East Valley Water District; Riverside County Flood Control and Water Conservation District; San Bernardino Valley Municipal Water District; San Bernardino Valley Water Conservation District; Western Municipal Water District; West Valley Water District; and Yucaipa Valley Water District.

The following parties were defendants-respondents below: Sally Jewell, as Secretary of the United States Department of Interior; the United States Department of Interior; Daniel M. Ashe, as Director of the United States Fish and Wildlife Service; and the United States Fish and Wildlife Service.

The following parties were intervenors-defendants/respondents below: Center for Biological Diversity; California Trout, Inc.; San Bernardino Audubon Society; and Sierra Club.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioners state the following:

The Big Bear Municipal Water District; the City of Redlands; the City of Riverside; the City of San

CORPORATE DISCLOSURE STATEMENT – Continued

Bernardino Municipal Water Department; the East Valley Water District; the Riverside County Flood Control and Water Conservation District; the San Bernardino Valley Municipal Water District; the San Bernardino Valley Water Conservation District; the Western Municipal Water District; the West Valley Water District; and the Yucaipa Valley Water District are government agencies.

The Bear Valley Mutual Water Company is a mutual water company formed under the laws of the State of California. It has issued common stock to a number of shareholders to provide for water entitlements per share. Ten percent or more of the shares are held by Crafton Water Company, a publicly held company organized under the laws of the State of California.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bear Valley Mutual Water Company; Big Bear Municipal Water District; City of Redlands; City of Riverside; City of San Bernardino Municipal Water Department; East Valley Water District; Riverside County Flood Control and Water Conservation District; San Bernardino Valley Municipal Water District; San Bernardino Valley Water Conservation District; Western Municipal Water District; West Valley Water District; and Yucaipa Valley Water District respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.



OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App.1-38) is reported at 790 F.3d 977 (9th Cir. 2015). The decision of the United States District Court (App.42-133), is reported at 2012 WL 5353353 (C.D. Cal. Oct. 17, 2012).



JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 25, 2015. App.1. No petition for rehearing was

filed.[1] This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

APPLICABLE FEDERAL LAWS

Section 102 of the National Environmental Policy Act, 42 U.S.C. §4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> (2) all agencies of the Federal Government shall –
>
> (C) include in every . . . major Federal action[ ] significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

[1] Petitioners filed a Motion for Hearing En Banc with the Ninth Circuit on June 3, 2013. The motion was denied on March 3, 2014.

> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Section 2(c)(2) of the Endangered Species Act, 16 U.S.C. §1531(c)(2), provides:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

Section 4(b)(2) of the Endangered Species Act, 16 U.S.C. §1533(b)(2), provides in relevant part:

> The Secretary shall designate critical habitat and make revisions thereto . . . on the basis of the best available scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will

result in the extinction of the species concerned.

STATEMENT OF THE CASE

This case is appropriate for the granting of certiorari for two reasons. First, the Ninth Circuit has rendered a decision regarding the applicability of NEPA to the designation of critical habitat by FWS under the ESA that is in conflict with a decision on the same matter by the Tenth Circuit. Second, this case raises an important issue of law concerning the enforceability of mandatory obligations set forth in statutory declarations of policy, generally, and the enforceability of the Federal Government's obligation to cooperate with the States and with local governmental agencies to resolve water resource issues arising in connection with administration of the ESA, in particular. The Ninth Circuit's blanket assessment that declarations of policy "do not create substantive or enforceable rights" (App.19) conflicts with decisions of this Court. Furthermore, the Ninth Circuit's application of this rule to render Section 2(c)(2) unenforceable is an important issue of law that has not been, but should be, settled by this Court.

In its decision below, the Ninth Circuit per Judges Pregerson, Nguyen and Parker,[2] declined to disturb

[2] Judge Barrington D. Parker Jr. of the Second Circuit, sitting by designation, also participated in the decision below.

an earlier ruling of the circuit "that [the] NEPA does not apply to the designation of a critical habitat" under the ESA, holding that, "in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel." (App.38).[3] Pursuant to its earlier ruling in *Douglas County v. Babbitt*, 48 F.3d 1495, 1502-07 (9th Cir. 1995), the court, per Judge Pregerson, had determined, as a matter of law, that the ESA furthers the goals of NEPA, rendering NEPA analysis of a critical habitat designation unnecessary and, further, that Congress intended for the ESA to "displace" NEPA. Accordingly, in the case at bench, the Ninth Circuit declined to consider the NEPA claims of a dozen local water suppliers that FWS's designation of thousands of acres of land bordering the Santa Ana River as critical habitat would dramatically impact the water supplies of several million people reliant on the River and impair the ability of flood control agencies to protect life and property along the River.

Shortly after the Ninth Circuit issued its opinion in *Douglas County*, the Tenth Circuit addressed the issue of NEPA's application to the designation of critical habitat in *Catron County Board of Commissioners v. U.S. FWS*, 75 F.3d 1429 (10th Cir. 1996). Noting

[3] The panel opinion neglected to mention that in light of the circuit rule precluding one panel from overturning the decision of another panel, petitioners herein had moved for a hearing of their appeal, *en banc*. By ruling issued March 3, 2014, the Ninth Circuit denied the motion.

that it was addressing "the precise issue" considered by the Ninth Circuit in *Douglas County*, the Tenth Circuit explicitly declined to follow the earlier ruling:

> We disagree with the [*Douglas County*] panel's reasoning. First, given the focus of the ESA together with the rather cursory directive that the Secretary is to take into account "economic and other relevant impacts," we do not believe that the ESA procedures have displaced NEPA requirements. Secondly, we likewise disagree with the panel that no actual impact flows from the critical habitat designation.

75 F.3d at 1436.

Rejecting the Federal Government's argument that the similarity of the two statutes' procedures evidenced Congress's implicit intent to "displace" NEPA's procedural and informational requirements, the Tenth Circuit stated:

> Together, the ESA requirements for notice and environmental consideration partially fulfill the primary purposes of NEPA, namely, "to inject environmental consideration into the federal agency's decisionmaking. . . ."
>
> Partial fulfillment of NEPA's requirements, however, is not enough. The plain language of NEPA makes clear that "to the fullest extent possible" federal agencies must comply with the act and must prepare an impact statement for all major actions significantly affecting the environment. . . .

> While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure.

75 F.3d at 1437 (citations omitted).

The Tenth Circuit thus held that a critical habitat determination that, itself, results in significant effects upon the human environment, requires analysis under NEPA, a decision subsequently reaffirmed in *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002) and embraced by the D.C. District Court in *Cape Hatteras Access Preservation Alliance v. U.S. DOI*, 344 F.Supp.2d 108 (D.D.C. 2004). The result of these conflicting decisions was concisely stated by the Federal Government in the case at bench:

> [O]utside of the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA . . . in connection with the designating of critical habitat under the [ESA].

75 Fed.Reg. 77962, 78001 (Dec. 14, 2010).

Stated differently, under the patchwork of caselaw that exists as a result of the circuit split furthered by the case at bench, a resident of Denver or Cheyenne or Albuquerque can expect FWS to study the impacts on the human environment when it

proposes to designate critical habitat for an endangered species. A resident of Riverside or San Bernardino on the other hand, cannot, and will be met with opposition by the Federal Government if the same expectation is asserted.

The issues presented by this petition arise in the context of FWS's designation of critical habitat for the Santa Ana sucker, a small, threatened fish species residing in the Santa Ana River in Southern California. The River's watershed is the largest in Southern California and serves as an essential source of locally derived water for roughly five million people who reside within its boundaries. The importance of the River as a water source has grown significantly in light of the severe drought currently afflicting California and in light of efforts by FWS to reduce the import of water to Southern California from other sources including the Sacramento-San Joaquin Delta. *See, e.g.*, *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 948 (2015) and 135 S.Ct. 950 (2015).

On December 14, 2010, FWS adopted a final rule under Section 4 of the ESA designating approximately 7,000 acres of land along the River as critical habitat. 75 Fed.Reg. 77962. The designated land includes dams, water diversion facilities, bridges, wastewater treatment plants, flood control structures, residences and facilities for human recreational activities. *Id*. at 77977-79. In doing so, FWS stated that its designation of critical habitat would require the release of water from upstream facilities "in high quantity and

velocity" (*id*. at 77973) and would permit only "some portion" of current water diversions to be accommodated (*id*. at 77989). App.138. Consistently, the administrative record accompanying the designation contains uncontradicted evidence of significant impacts to the human environment including substantial reductions in locally available water supplies and adverse impacts upon local water rights, local water conservation efforts, flood control activities, and infrastructure. In reliance upon *Douglas County*, FWS analyzed none of these impacts under NEPA.

Nor did FWS "cooperate" with state or local agencies to attempt to "resolve" the water resources issues associated with its proposed critical habitat designation. Instead, FWS relied on the notice and comment provisions of ESA Section 4(b)(5), by first publishing a draft of its proposed designation in the Federal Register (74 Fed.Reg. 65056 (Dec. 9, 2009), *revised by* 75 Fed.Reg. 38441 (July 2, 2010)) and then accepting written comments. The record shows FWS re sisted meeting with representatives of the petitioners (App.141-149) and finally did so only after months of requests and being summoned to a meeting by Senator Diane Feinstein, well after the direction and scope of the eventual critical habitat designation were established. The lack of any "resolution" of water resource issues is confirmed by the expected loss of water, water rights and potential damage to life and property from flooding associated with the critical habitat designation finally adopted.

In its decision, the Ninth Circuit was untroubled by the lack of cooperation demonstrated by FWS. Instead, the court rejected arguments based upon Section 2(c)(2) finding that such arguments:

> [F]ail[ ] as a matter of law because . . . Section 2(c)(2) is a non-operative statement of policy that "does not create an enforceable mandate for some additional procedural step." By its own terms, Section 2(c)(2) is a subsection of the ESA's declaration of purposes and policy. It is well established that such declarations do not create substantive or enforceable rights.

App.19 (citations omitted). The Ninth Circuit's statement of the law conflicts with the jurisprudence of this Court. First, the Ninth Circuit's blanket assertion that statements of policy cannot create enforceable rights is not supported by the sole decision cited by the Ninth Circuit. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) applies only to "whereas" clauses, preambles, or other provisions that precede but are "no part of" an enactment of Congress. Conversely, when mandatory language of duty is set forth in a *statutory* declaration of policy, this Court has unhesitatingly enforced it. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (requiring Secretary of Transportation to comply with "clear and specific directives" set forth in statements of policy in the Department of Transportation Act and Federal-Aid Highway Act),

overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977).

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT REGARDING NEPA'S APPLICATION TO THE DESIGNATION OF CRITICAL HABITAT UNDER THE ESA

The case at bench reinforces the existing circuit split between the Ninth Circuit and the Tenth Circuit related to the applicability of NEPA to the designation of critical habitat. In 1995, in a case of first impression, the Ninth Circuit held that NEPA does not apply to FWS's designation of critical habitat. *Douglas County*, 48 F.3d at 1507. Subsequent cases outside the Ninth Circuit, however, find the opposite. *Catron*, 75 F.3d at 1436; *Middle Rio Grande*, 294 F.3d at 1230; *Cape Hatteras*, 344 F.Supp.2d at 135-36. In light of this circuit split, Petitioners requested that the Ninth Circuit reconsider its previous holding. App.38. The Circuit panel merely responded, however, that *Douglas County* is "the controlling law of [the Ninth] Circuit," and, "in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel." *Id*. Concurrently, the court rejected efforts to hear the issue *en banc*.

FWS complies with NEPA for critical habitat designations in the Tenth Circuit, but, using *Douglas County* as a shield, refuses to do so in the rest of the

United States. 75 Fed.Reg. 78001. Thus, the practical importance of the existing circuit split is that people within the Tenth Circuit receive the benefit of NEPA's "valuable function of bringing the environmental consequences of federal actions to the attention of those empowered to do something about them. . . ." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 786-87 (1976). Residents of states within the Tenth Circuit have a right to be informed of the significant environmental consequences of the designation of critical habitat. They also have the right to demand that FWS take such consequences into consideration and determine if an alternative exists that would avoid some or all of the environmental consequences *before* a habitat area is designated as critical.

The residents of other circuits, however, have no such rights. Instead, because the Government chooses to follow the reasoning of the Ninth Circuit rather than the Tenth, they remain ignorant of the environmental impacts of critical habitat designations, no matter how devastating. Moreover, such impacts are excluded from consideration by the Government in the habitat designation process. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast"). Given Congress's edict that NEPA be complied with "to the fullest extent possible," there is simply no basis for extending these rights to the residents of some parts of the United States while

entirely denying them to those residing elsewhere. 42 U.S.C. §4332.

Petitioners do not contend that an environmental impact statement ("EIS") must be prepared for every critical habitat designation. If there is no potential for a significant impact, no NEPA review is required. However, because it elects to shelter under *Douglas County*, FWS refuses to evaluate *any* effects upon the human environment under NEPA, disclose those effects to the public, or take them into consideration when it designates critical habitat *even if the effects are dire and easily avoidable.* This violates NEPA and Congress's purpose in enacting it. *See Robertson*, 490 U.S. at 348-49.

While the issue of NEPA compliance and the designation of critical habitat itself comes up with some frequency,[4] the practical impacts of *Douglas County* extend beyond the issue of critical habitat. Indeed, the reasoning of the decision is so broad that it effectively exempts from NEPA compliance all federal actions subject to the notice and comment rulemaking procedures of the Administrative Procedure Act ("APA"). *In Re Polar Bear Endangered Species Act Listing*, 818 F.Supp.2d 214, 236-37 (D.D.C. 2011) (noting, under

[4] *See Home Builders Ass'n v. U.S. FWS*, No. S-05-0629, 2006 WL 3190518, at *23-24 (E.D. Cal. Nov. 2, 2006); *Kern Cnty. Farm Bureau v. Badgley*, No. 02-5376, 2004 WL 5363604, at *18 (E.D. Cal. Jan. 12, 2004); *Home Builders Ass'n v. U.S. FWS*, 268 F.Supp.2d 1197, 1233 (E.D. Cal. 2003); *cf. Sw. Ctr. for Biological Diversity v. Rogers*, 950 F.Supp. 278, 280-81 (D. Ariz. 1996).

Douglas County, "any rulemaking properly carried out under the APA would therefore be exempt from NEPA, because the APA always required the opportunity for public comment before finalizing a rule. An exception of such staggering breadth would render NEPA meaningless."). Indeed, FWS and others have already attempted to avoid NEPA based on *Douglas County*'s expansive reasoning. *See id.* (FWS arguing "rules promulgated pursuant to Section 4(d) [of the ESA] are exempt from NEPA review because they are subject to the notice-and-comment rulemaking procedures of the APA. . . ."); *San Luis & Delta-Mendota*, 747 F.3d at 641-55 (intervenor-defendants argued ESA Section 7 actions should be exempt from NEPA), 660-62 (Rawlinson, J., dissenting) (arguing implementation of biological opinions should be exempt from NEPA). Each such attempt violates Congress's mandate that federal agencies shall comply with NEPA's provisions for environmental disclosure "to the fullest extent possible." 42 U.S.C. §4332.

A. NEPA Is an Expansive Statute That Applies to the FWS Absent Congressional Exemption

NEPA is the United States' broadest federal environmental law. Ronald E. Bass, et al., *The NEPA Book* 25 (2d ed. 2001). Rather than focusing narrowly on one environmental issue, NEPA applies the basic policy that "*all* agencies of the United States" must "'use *all* practicable means and measures'" to protect *all* types of "environmental values." *Flint Ridge*, 426

U.S. at 785 (citing 42 U.S.C. §4332(2)(C)) (emphasis added); *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (quoting 42 U.S.C. §4331) (emphasis added).

NEPA's broad purpose and application derive from Congress's mandate that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]" to "the fullest extent possible." 42 U.S.C. §4332. Congress created NEPA's broad mandate in response to federal agencies' repeated tendency to overstress the benefits of their proposed actions while failing to acknowledge or explore environmental costs of the action or less damaging alternative ways of carrying it out. Daniel R. Mandelker, *NEPA Law and Litigation* 1-4 (2d ed. 2010); *see also Catron*, 75 F.3d at 1436-37. To these ends, NEPA requires environmental review be performed of "*every* . . . major federal action[ ]" that may "significantly affect[ ] the quality of the human environment," unless that action has explicitly or implicitly been made exempt from NEPA review by Congress. 42 U.S.C. §4332 (emphasis added); *see also Flint Ridge*, 426 U.S. at 788; Bass, *supra*, at 37-38.

In contrast to NEPA, the ESA is narrow and species-focused. *See TVA*, 437 U.S. 153, 180 (1978) (citing 16 U.S.C. §1531(b)). The ESA contains no explicit mandate exempting FWS's actions from comprehensive NEPA review. *See generally* 16 U.S.C. §§1531-1544. Accordingly, review of the broad array of environmental consequences that could result from

actions taken under the ESA can be avoided by FWS only if Congress made the task implicitly exempt from NEPA compliance.

B. No Implicit NEPA Exemption Applies to the Designation of Critical Habitat

The Supreme Court has recognized a statute as implicitly exempting a federal agency from NEPA compliance only "where a clear and unavoidable conflict in statutory authority exists. . . ." *Flint Ridge*, 426 U.S. at 788. In recognizing this single exemption, this Court reasoned that the purpose of the "fullest extent possible" language is "to make it clear that each agency of the Federal Government shall comply with the directives set out in [NEPA] [u]nless the existing law applicable to such agency's operations *expressly prohibits or makes full compliance with one of the directives impossible.*" *Id.* at 787-88 (citation and quotation marks omitted) (emphasis added).

The circuit courts have subsequently recognized two additional, implicit NEPA exemptions. One is where NEPA review would be a "waste of time." *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 836 (6th Cir. 1981). For example, Congress mandates that FWS "shall" list a species as threatened or endangered if any of five species-specific factors is met. 16 U.S.C. §1533(a), (b). Because no other environmental issue that would be evaluated during NEPA review is allowed to affect the listing decision, the Sixth Circuit found that NEPA review would be a waste of time and

that listing decisions were therefore implicitly exempt from NEPA. *Pacific Legal Foundation*, 657 F.2d at 838. Other circuits agree. *E.g.*, *Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 848 F.2d 256, 263 n.27 (D.C. Cir. 1988).

The other implicit NEPA exemption recognized by the circuits involves "functional equivalency." This exemption has been applied to actions taken by the Environmental Protection Agency ("EPA") where NEPA review would be duplicative. Such duplication has been found to exist in those circumstances where EPA is separately mandated to undertake comprehensive environmental review under some of the statutes it implements, including the Clean Air Act and the Clean Water Act, and where it has a broad mandate to protect the environment generally. *E.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Bass*, *supra*, at 40 (citing EPA functional equivalency cases from five different circuit courts).

None of these recognized implicit exemptions applies to the designation of critical habitat. Regarding the "clear and unavoidable conflict" exemption, there is no conflict between designating critical habitat and reviewing the environmental effects of doing so. Nothing prevents FWS's complying with both NEPA and the ESA, and FWS does so within the Tenth Circuit. 75 Fed.Reg. 78001.

Regarding the implicit "waste of time" exemption, Congress did not limit FWS to considering only

species-specific factors when designating critical habitat. Instead, Congress requires FWS to consider "any . . . relevant impact." 16 U.S.C. §1533(b)(2). Because FWS is authorized to take all relevant environmental issues into consideration, it is hardly a "waste of time" for FWS to do so.

Regarding the "functional equivalency" exemption, FWS's mandate under the ESA is to protect *species*, not the environment generally. *See Catron*, 75 F.3d at 1434. The requirement that FWS take into consideration "economic . . . and other relevant impacts" is not "comprehensive in its field of application" and does not "ensure that [FWS] considers fully, with assistance of meaningful public comment" all environmental issues involved. *Alabama ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 505 (11th Cir. 1990); *Jones v. Gordon*, 621 F.Supp. 7, 13 (D. Alaska 1985) (extending functional equivalency to all federal agencies administering a statute designed to preserve the environment "would considerably weaken NEPA" and conflict with NEPA's mandate to be applied "to the fullest extent possible"); *cf. Anchorage v. United States*, 980 F.2d 1320, 1329 (9th Cir. 1992) (EPA is "the agency charged with protecting the environment"); *Jones*, 621 F.Supp. at 13 (FWS's mandate "far different" than EPA's).

C. The Ninth Circuit's Implicit NEPA Exemption for the Designation of Critical Habitat Improperly Elevates Species Issues Over All Other Environmental Concerns, Flouting Congressional Mandate and Supreme Court Precedent

In neither *Douglas County* nor the case at bench did the Ninth Circuit determine that a recognized implicit NEPA exemption applied to the designation of critical habitat. Instead, in *Douglas County* the Ninth Circuit found that the designation of critical habitat did not have the potential to change the physical environment because it merely maintained existing undeveloped conditions on federal land within the designated area and did not cover state-owned, privately owned, or developed land. 48 F.3d at 1505-06. Under such unique facts, there was no major federal action with the potential to significantly affect the environment, so NEPA was not triggered. *See id.*

Although the Ninth Circuit could have stopped with that determination, it went on to invent not one but two new implicit NEPA exemptions, neither of which has been followed by any other circuit. First, it decided that NEPA analysis generally should not be required for designations of critical habitat because the ESA furthers NEPA's environmental goals. *Id.* at 1506-07. Second, the Ninth Circuit held that the ESA's public notice procedures – which require publication of notice in the Federal Register, actual notice to each affected state, publication in local newspapers of affected areas, and a public hearing (if requested) –

"displaced" NEPA, making NEPA review "superfluous." *Id.* at 1503.

Both the Tenth Circuit and the District Court of the District of Columbia agree that the legal reasoning provided by the Ninth Circuit is inconsistent with the prior holdings of this Court regarding the applicability of NEPA and with the Congressional directive to apply NEPA "to the fullest extent possible." *Catron*, 75 F.3d at 1435-39; *Cape Hatteras*, 344 F.Supp.2d at 133-36. As those courts recognize, the Ninth Circuit's claim that the ESA furthers NEPA's environmental goals (*Douglas County*, 48 F.3d at 1503) is simply incorrect. The ESA furthers only a single environmental goal; i.e., protection of species. Any room for consideration of other environmental issues is secondary to the protection of species. *TVA*, 437 U.S. at 180. Thus, the ESA hardly displaces NEPA's broader requirements. *Catron*, 75 F.3d at 1436. Moreover, the Ninth Circuit's holding is inconsistent with this Court's prior determination that NEPA imposes, "the obligation to consider *every significant aspect of the environmental impact* of a proposed action" (*Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983) (emphasis added)), not just the impact upon the listed species. No comparable obligation exists within the species-oriented ESA.[5] Furthermore,

[5] The ESA's "rather cursory" directive for FWS "to take into account 'economic . . . and other relevant impacts' " with no mention of the environment, does not clearly "displace" NEPA's requirements for consideration of "*every significant aspect of the*

(Continued on following page)

when Congress has intended to exempt from NEPA an action taken by the Government under the ESA, it said so explicitly – as in Section 7 of the ESA regarding exemption decisions made by the so-called "Endangered Species Committee" established by the Act. 16 U.S.C. §1536(k). No similar exemption was adopted by Congress for critical habitat designation.

Simply put, the Ninth Circuit's finding of "displacement" in statutes such as the ESA that comport with NEPA's *notice* requirements but not the vast majority of its *environmental review* requirements would be an "exception of such staggering breadth [that] would render NEPA meaningless" for any action in compliance with the APA. *In Re Polar Bear ESA Listing*, 818 F.Supp.2d at 237; Lori H. Patterson, *NEPA's Stronghold: A Noose for the Endangered Species Act?*, 27 Cumb. L.Rev. 753, 776 (1996-1997) (displacement theory in *Douglas County* "weaken[s] NEPA to the point of nonexistence").

D. The Designation of Critical Habitat in the Case at Bench Significantly Affects the Human Environment; Therefore, NEPA Review Is Required

The Ninth Circuit could have – but did not – decide *Douglas County* simply on the basis that the physical environment "would remain unchanged if

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environmental impact of a proposed project." *Catron*, 75 F.3d at 1436; *Baltimore Gas*, 462 U.S. at 97 (emphasis added).

designated a critical habitat." 48 F.3d at 1506. There is no such factual basis for avoiding NEPA in the case at bench. Instead, the present case is indistinguishable from *Catron*, *Middle Rio Grande*, and *Cape Hatteras*, where property owned privately and by local governmental agencies was designated as critical habitat. There, as here, the affected land included property being used for water supply, important flood control activities necessary for the protection of life and property, and other river maintenance actions that could be impaired or wholly precluded by the designation. *Catron*, 75 F.3d at 1432, 1437-38; *Middle Rio Grande*, 294 F.3d at 1224, 1229; *Cape Hatteras*, 344 F.Supp.2d at 116.

Uncontradicted record evidence demonstrates that significant impacts to the human environment may result from FWS's designation of critical habitat for the Santa Ana sucker, including substantial effects on local water supplies, water rights, water conservation efforts, and environmental justice. Ninth Circuit Excerpts of Record, Volume 3, pp. 493-94, 526, 528, 564-65 (hereafter "3ER:__"). The designation of critical habitat effectively reallocates water in the Santa Ana River away from current municipal, industrial, and other uses, which may place greater demands upon alternative sources, including imported water and groundwater. 3ER:528, 562; *Delta Smelt Consol. Cases*, 686 F.Supp.2d 1026, 1050 (E.D. Cal. 2009). In addition, the critical habitat designation may impede flood control efforts on the Santa Ana River, with an estimated 3 million people and 110,000 acres of land

potentially impacted. 3ER:629-30; *see also* App.152-155. It could also prevent the planned construction or proper use of vital flood control infrastructure. 3ER:611, 629. Unless and until FWS actually complies with NEPA, there is simply no way to know whether there are alternatives to the critical habitat designation that could avoid or lessen these impacts. *See Catron*, 75 F.3d at 1436-37.

E. Uncontradicted Record Evidence Demonstrates That Petitioners Have Standing

Petitioners' standing to raise NEPA claims was challenged in the district court below and at the Ninth Circuit. Neither court found that Petitioners lacked standing. This is not surprising since Petitioners demonstrated, with citation to uncontradicted record evidence, environmental injuries almost identical to those found dispositive in *Catron*, 75 F.3d at 1437-38 and *Middle Rio Grande*, 294 F.3d at 1229.

In NEPA cases, where the plaintiffs are "local agencies" within the vicinity of the project being challenged that are "authorized to develop and enforce environmental standards," they meet the 5 U.S.C. §702 "zone of interests" test and have prudential standing as a matter of law. *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975); *Cal. v. Block*, 690 F.2d 753, 776 (9th Cir. 1982); *Douglas County*, 48 F.3d at 1501 (county has standing to challenge failure to prepare EIS for critical habitat designation because county entitled to comment on an EIS

and has propriety interest in land near designated area); *Rochester v. U.S. Postal Service*, 541 F.2d 967, 972 (2d Cir. 1976) (regional planning board has "standing to seek review of federal projects in variance with the regional plan"); *Conservation Council v. Foehlke*, 435 F.Supp. 775, 786, 790 (M.D.N.C. 1977) (cities near tributaries relied upon for sewerage have standing under NEPA for action affecting tributaries).

Here, Petitioners include several city water suppliers, a county flood control agency, and multiple local water districts with jurisdiction over areas within, near, and affected by FWS's designation of critical habitat for the Santa Ana sucker. 3ER:596 (multiple Petitioners are "charged with supplying water, flood control and energy in the habitat area" being designated); 75 Fed.Reg. 78014-19. Moreover, FWS admitted on the record that Petitioners *would* suffer a loss of water supplies and impairment to their water rights and water management operations. App.138, 156-162 (acknowledging loss of access to local water sources, describing impacts to water management projects). Consistently, the record shows that Petitioner SBVMWD will lose up to 25,800 acre-feet per year ("AFY") of water under the critical habitat designation, that Petitioner City of Riverside will lose up to 15,000 AFY, and that the critical habitat designation will jeopardize flood control efforts necessary to protect life and property. App.152-155, 160, 162. Finally, *all* Petitioners are tasked with protecting the environment and environmental resources under California law. *See* Cal. Water Code §§10910-11, 12854-61;

Cal. Pub. Res. Code §§21000(g), 21001. Accordingly, Petitioners have standing.

II. THIS COURT SHOULD GRANT REVIEW OF THE NINTH CIRCUIT'S ESA SECTION 2(c)(2) HOLDING

In a case of first impression, the Ninth Circuit has rendered Section 2(c)(2) of the ESA meaningless on the basis of the broad and erroneous conclusion that declarations of policy cannot create substantive or enforceable rights – a conclusion that conflicts with decisions of this Court. App.18-22. Section 2(c)(2), which declares plainly that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," was added to the ESA by Congress in 1982 to address concerns over the impact of federal endangered species actions on state and local interests in water resource management and allocation, particularly in the Western United States. The Ninth Circuit has now read this mandatory provision out of the Act and, in doing so, voided Congress's effort to address an important issue of federal and state rights. The decision also threatens the enforceability of other mandatory duties likewise set forth by Congress in statutory declarations of policy.

The Court should grant review of this issue for two reasons. First, the issue of whether statutory declarations of policy can create substantive and enforceable rights is an important question of federal law, and the Ninth Circuit's treatment of this question

conflicts with relevant decisions of this Court. Second, whether Section 2(c)(2) of the ESA has meaning is an important issue of law and public policy which has not been, but should be, settled by this Court.

A. The Ninth Circuit's Ruling That Mandatory Duties Set Forth in Declarations of Policy Are Unenforceable Conflicts With Relevant Decisions of This Court

The decision below is based upon the erroneous legal assertion that "[i]t is well established that [declarations of purpose and policy] do not create substantive or enforceable rights." App.19. This statement of law conflicts with decisions of this and other courts which have enforced rights created by statutory declarations of policy much like Section 2(c)(2). The implications of allowing the decision below to become precedent are significant because many federal acts include mandatory duties placed in statutory declarations of policy, including the Clean Water Act ("CWA"), 33 U.S.C. §1251, the Jury Selection and Service Act of 1968, 28 U.S.C. §1861, the Department of Transportation Act, 49 U.S.C. §303, the Federal-Aid Highway Act, 23 U.S.C. §138(a), the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §1331, the Export-Import Bank Act, 12 U.S.C. §635(b)(1), the African Growth and Opportunity Act, 19 U.S.C. §3704, and the Alaska Native Claims Settlement Act, 43 U.S.C. §1601(c). The erroneous rule of law announced by the Ninth Circuit would render all such statutory duties unenforceable.

The Ninth Circuit purports to support its rule of law with this Court's decision in *Hawaii*, 556 U.S. at 175 (App.19), but this Court's holding in *Hawaii* is neither as broad as the Ninth Circuit suggests, nor does it apply to codified statutory provisions such as Section 2(c)(2). In *Hawaii*, this Court considered "whereas" clauses that preceded the numbered sections of a joint resolution of Congress.[6] The Court held that "whereas" clauses, like preambles, cannot enlarge or confer powers *because they are prefatory* and thus "no[t] part of the act." *Id*. at 175 (citing *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (1889)). In contrast, Section 2(c)(2) is not prefatory at all. Rather, it is a codified provision of the ESA that sets forth a mandatory duty. Because *Hawaii* is the only citation offered by the Ninth Circuit for its blanket assessment that all declarations of policy "do not create . . . enforceable rights," this legal proposition lacks support.

Indeed, the broad rule of law announced by the Ninth Circuit conflicts with the jurisprudence of this Court. Rather than eviscerating statutory declarations of policy that set forth mandatory duties, this Court has a record of recognizing and enforcing such

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[6] Specifically, *Hawaii* addressed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993), which apologized for the United States' role in overthrowing the Hawaiian monarchy. 556 U.S. at 175.

statutory provisions. *See, e.g.*, *Overton Park*, 401 U.S. at 405; *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 622 (1991) (referencing 28 U.S.C. §1861 of the Jury Selection and Service Act, titled "Declaration of policy"); *Test v. United States*, 420 U.S. 28, 30 (1975) (same); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108 (2004) (referring to the "specific instruction" of the CWA in 33 U.S.C. §1251(g)).

In *Overton Park*, this Court considered a challenge brought under Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act. Both statutes, by their own terms, were declarations of policy. *See* App.139-40; 401 U.S. at 405 nn.2-3. Nonetheless, the Court held that the statutes contained "clear and specific directives" that set a "plain and explicit bar." *Id*. at 411. The Court placed great weight on Congress's decision to enact the statutes, explaining that "[i]f the statutes are to have any meaning," the Secretary cannot approve the destruction of parkland unless he or she complies with their mandate. *Id*. at 412-13 (also noting "if Congress intended [other] factors to be on an equal footing with preservation of parkland there would have been no need for the statutes"). The Court remanded for a determination of whether the Secretary had complied. *Id*. at 420.

Many appellate decisions likewise enforce rights set forth in statutory declarations of policy. The D.C. Circuit reviewed the Export-Import Bank's compliance with a statement of "policy" codified in the

Export-Import Bank Act in *Delta Air Lines, Inc. v. Export-Import Bank of the United States*, 718 F.3d 974 (D.C. Cir. 2013). Specifically, petitioner Delta Air Lines argued that the Export-Import Bank violated 12 U.S.C. §635(b)(1)(B) when it failed to consider the effect of approving $3.4 billion in loan guarantees to Air India on U.S. industries and U.S. jobs. §635(b)(1)(B) states:

> It is also the policy of the United States . . . that in authorizing any loan or guarantee, the Board of Directors shall take into account any serious adverse effect of such loan or guarantee on the competitive position of United States industry . . . , and employment in the United States, and shall give particular emphasis to the objective of . . . expanding total United States exports.

Emphasizing Congress's use of the word "shall," the D.C. Circuit held that §635(b)(1)(B) "mandates" consideration of adverse effects on certain U.S. industries or U.S. jobs. 718 F.3d at 977.

The D.C. Circuit similarly reviewed the EPA's compliance with the CWA's codified "declaration of goals and policy" in *NRDC v. U.S. EPA*, 859 F.2d 156, 173-78 (D.C. Cir. 1988). App.136-37. The D.C. Circuit plainly stated the provision, in which Congress uses

the word "shall," constitutes a "requirement."[7] 859 F.2d at 175.

The Eighth Circuit, in a highly relevant case, examined ESA Section 2(c)(1), 16 U.S.C. §1531(c)(1), and held that it "imposes substantial and continuing obligations on federal agencies." *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989). Section 2(c)(1), like Section 2(c)(2), expresses congressional "policy" regarding administration of the ESA, uses the mandatory term "shall," and is codified in the same statute of the same act. The two subsections should be recognized as having the same legal effect.

Consistent with this Court's opinion in *Overton Park*, Section 2(c)(2) also should be recognized as operative, and not rendered meaningless throughout the Ninth Circuit where water resources are of critical importance. If Congress intended for Section 2(c)(2) to merely "announce . . . a general policy goal," as the panel below has declared (App.22), it would have placed Section 2(c)(2) in a preamble or, alternatively, stated the duty permissively. Congress did not. Instead, Congress amended the ESA to add a provision specifically addressing water resource issues.

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[7] Another example from the D.C. Circuit is *13th Regional Corp. v. U.S. DOI*, 654 F.2d 758, 762 (D.C. Cir. 1980) ("we agree with the plaintiff's interpretation of [Section 2(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. §1601(c) ("declaration of policy")] as a peremptory command to the Secretary").

Congress placed the provision in a codified statute and couched it in terms of mandatory duty.

B. This Court Has Not Settled, but Should Settle, Whether Section 2(c)(2) Has Meaning

Although Congress amended the ESA in 1982 to add the directive that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues . . . ," the Ninth Circuit's opinion would eviscerate this duty. Instead, the Ninth Circuit would require FWS to do nothing more than comply with the Section 4 notice and comment requirements of the ESA (16 U.S.C. §1533(b)(5)(A)(ii) and (i)) – requirements which apply whether or not water resource issues are involved. App.21-22. Petitioners submit that the Ninth Circuit's decision conflicts with the plain language and the legislative history of Section 2(c)(2) and renders Congress's enactment of the provision meaningless. This Court should grant certiorari to give effect to Congress's intent when it enacted Section 2(c)(2). *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (it is a court's "duty to give effect, if possible, to every clause and word of a statute. . . .") (citation and quotation marks omitted).

Should the Ninth Circuit's decision stand, state and local agencies will have no opportunity to participate in FWS's decisionmaking process when designating critical habitat until *after a proposed rule has been prepared and issued* even where water resource

conflicts are foreseeable. App.21. Even then, comments submitted by state and local agencies need not be given special consideration during the formulation of the final rule. FWS need only submit a written justification *after the final designation has been adopted* explaining why it is inconsistent with state and local agency comments. *Id*. In contrast, for the reasons that follow, Petitioners maintain that FWS must involve state and local agencies while formulating a rule – i.e., *before a proposed rule is issued* – and must consider water allocations and local water resources expertise when exercising its discretion pursuant to Section 4(b)(2) (16 U.S.C. §1533(b)(2)).

1. Section 2(c)(2) Plainly Requires FWS to Work with State and Local Agencies to Resolve Water Resource Issues in Concert with the Conservation of Endangered Species

Section 2(c)(2) plainly sets forth a mandatory duty. This Court has recognized that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs*., 557 U.S. 167, 175 (2009) (citation and quotation marks omitted). This Court held unanimously in *Bennett v. Spear*, 520 U.S. 154, 172 (1997) that "shall" is "plainly [a term] of obligation rather than discretion." Section 2(c)(2) is just such an obligation, mandating that "Federal agencies *shall* cooperate with State and

local agencies to resolve water resources issues in concert with conservation of endangered species." The fact that Section 2(c)(2) is by its own terms a "declaration of policy" does not signify otherwise. As discussed above, this Court and other United States appellate courts routinely enforce mandatory duties contained in similarly termed declarations of policy, concluding that their language is plainly that of obligation. *See, e.g.*, *Overton Park*, 401 U.S. at 411.

"Cooperate" plainly means more than accepting comments on a proposed rule and giving post-decisional justification for disagreeing with those comments. App.21. The Oxford Dictionary defines "cooperate" as to "act jointly; work towards the same end" or "assist someone." *Cooperate Definition*, Oxford Dictionary, http://www.oxforddictionaries.com/us/definition/american_english/cooperate (last visited Sept. 1, 2015). This interpretation of "cooperate" is supported by FWS's Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities ("Cooperative Policy"). 59 Fed.Reg. 34274 (July 1, 1994). The Cooperative Policy specifies that, with regards to critical habitat designation, "cooperate" means to "[u]tilize the expertise and solicit the information of State agencies *in preparing proposed* and final rules. . . ." *Id*. at 34275 (emphasis added).

In contrast, the notice and comment procedures prescribed by ESA Section 4 invite comment after a proposed rule has been formulated and do not provide for any feedback, let alone discussion, before a final

rule is issued. ESA Section 4 does not enable a state or local agency to work with or assist FWS, or FWS to utilize local expertise. *See Cal. Wilderness Coalition v. U.S. DOE*, 631 F.3d 1072, 1087-89 (9th Cir. 2011) (interpreting lesser "consultation" requirement as requiring more than notice and comment); *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 863-65 (9th Cir. 2003) (same). Simply put, accepting comment *after* a proposed rule is issued does not meet Section 2(c)(2)'s requirement to "cooperate."

2. Legislative History, Including Congress's Historical Deference to State Water Law, Supports the Plain Meaning of Section 2(c)(2)[8]

As this Court has noted, throughout the history of the relationship between the Federal Government and Western States "runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). Section 2(c)(2)'s mandate that federal agencies work with state and local agencies to avoid conflicts with water resources concerns when implementing the ESA, and its placement in a

[8] Given the clarity of the statutory language employed by Congress in Section 2(c)(2), the Court need not look to legislative history. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992); *see also Overton Park*, 401 U.S. at 413 n.29. Here, however, legislative history confirms the plain meaning of the statute.

declaration of policy overarching the Act are in keeping with this thread.

Federal acts throughout our country's history have carved out recognition of state and local jurisdiction over water resource regulation and management. In *California v. United States*, this Court recites the history comprehensively, including numerous acknowledgments by Congress of state and local governments' particular interest and well-developed expertise in matters of water resources. 438 U.S. at 653-79. For example, when considering a provision of the Reclamation Act of 1902 that would recognize state water law and vested water rights acquired thereunder, Senator Clark of Wyoming explained:

> The conditions in each and every State and Territory are different. What would be applicable in one locality is totally and absolutely inapplicable in another. . . . In each and every one of the States and Territories affected, after a long series of experiments, after a due consideration of conditions, there has arisen a set of men who are especially qualified to deal with local conditions. Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities.

Id. at 667 (citation and quotation marks omitted).

Congress has continued to defer to the States with regards to matters of water resources into the

modern area, including in the landmark CWA. In enacting 33 U.S.C. §1251(g) ("CWA Section 101(g)"), Congress explained that "[i]t is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations." *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 721 (1994), quoting 3 Legislative History of the CWA, Ser. No. 95-14, p. 532 (1978).

Against this backdrop, Congress enacted Section 2(c)(2). In the hearings on the 1982 amendments, Congress was presented with testimony warning of the potential for ESA regulation to abrogate state water rights and allocations. *See, e.g.*, *ESA Oversight*: Hearings before the Subcommittee on Environmental Pollution of the S. Committee on Environment and Public Works, 97th Cong. 272 (1981) (presenting two examples of cases where, in FWS's implementation of the ESA, "western water law has been ignored[,] . . . [FWS] has appropriated water and obtained water rights though the [ESA], contrary to the needs of the people in the Western States involved . . . [and] a variety of compacts and other water law concerns [were not considered]."); *ESA Amendments of 1982*: Hearings before the Subcommittee on Environmental Pollution of the S. Committee on Environment and Public Works, 97th Cong. 485 (1982) ("[t]he Western States Water Council strongly urges Congress to specifically address this growing tendency of federal

agencies to use environmental statutes to abrogate states' water laws.").

In fact, a number of organizations specifically suggested that the ESA "contain a provision, similar to Section 101(g) of the [CWA]." 1982 *ESA* Hearings before S. Committee, 97th Cong. 423. In response, Section 2(c)(2) was added to the Senate bill using nearly identical language to the last sentence of CWA Section 101(g). App.137. In its report, the Senate explained that

> the purpose of the amendment is to recognize the individual States' interest and, very often, the regional interest with respect to water allocation. The policy statement contained in this amendment recognizes that most of the potential conflicts between species conservation and water resources development can be avoided through clo[s]e cooperation between local, State and Federal authorities.

S. Rep. No. 97-418 at 25 (1982).

Much was made before the lower courts about the Senate's statement that Section 2(c)(2) "is not intended to and does not change the substantive or procedural requirements of the Act with respect to the conservation of endangered or threatened species." *Id*. However, working with state and local agencies to address water resources does *not* change the pre-existing requirements of the Act. The additional step mandated by Section 2(c)(2) merely provides federal agencies with additional information and expertise

to assist their compliance with those requirements. Indeed, the Senate recognized "most of the potential conflicts between species conservation and water resources development can be avoided through clo[s]e cooperation between local, State and Federal authorities" while still adhering to the preexisting substantive and procedural requirements of the Act with respect to the conservation of species. *Id*.

ESA Section 4(b)(2) requires FWS to consider "relevant impact[s]" of a critical habitat designation, and grants FWS discretion to exclude critical habitat when the benefits of exclusion outweigh the benefits of inclusion. 16 U.S.C. §1533(b)(2). Potential conflicts with water resources are a relevant impact that must be considered and that could support exclusion. Thus, when read *in pari materia* with the rest of the ESA, Section 2(c)(2) supports the preexisting substantive and procedural requirements of the Act with respect to the designation of critical habitat; it does not change them.

3. The Impact of FWS's Failure to Cooperate Here Is Significant

The case at bench illustrates why such limited participation of state and local agencies so late in the decisionmaking process fails to resolve water resource issues in concert with endangered species conservation. The Santa Ana River is a heavily relied upon and allocated water body that is rife with unique water management considerations. The River runs through Southern California's densely populated

San Bernardino, western Riverside and Orange counties where it serves as an essential source of local water to the long-standing agricultural industry and the millions of people who live and work there. App.6. For more than 40 years, Santa Ana River water has been allocated in accordance with interlocking state court decisions in *Orange County Water District v. City of Chino*, No. 117628 (Orange County Super. Ct. 1969) (the "*Orange County* Judgment") and *Western Municipal Water District of Riverside County v. East San Bernardino County Water District*, No. 78426 (Riverside County Super. Ct. 1969) (the "*Western* Judgment"). App.6-7. In 2009, consistent with the terms of these judgments, California's State Water Resources Control Board granted appropriative water rights permits to two of the Petitioners enabling them to divert water captured upstream for beneficial use within their respective service areas – a major step towards improving the reliability of water supplies for the area in the wake of federal regulatory efforts to reduce the export of water from the Sacramento-San Joaquin Delta. App.7; State Water Resources Control Board Decision No. 1649, In Re Applications 31165 and 31370 ("D-1649"). The Santa Ana River is also a flood-prone river once dubbed by the U.S. Army Corps of Engineers as the greatest flood risk west of the Mississippi. Ongoing flood control operations on the Santa Ana River, including the tandem operation of Prado Dam and Seven Oaks Dam, are essential to the safety and well-being of the region. App.6, 152-155.

State and local water agencies are experts in the complex water resource management concerns

inherent to the Santa Ana River. They also hold expertise in matters of local species conservation. In fact, water agencies local to the Santa Ana River have endeavored to implement conservation measures for the benefit of the Santa Ana sucker for decades through two conservation efforts, the Santa Ana Sucker Conservation Program ("SASCP") and the Western Riverside County Multiple Species Habitat Conservation Plan ("MSHCP"). App.7-8.

Yet, rather than seek input from local agencies regarding the designation of critical habitat for the Santa Ana sucker on the Santa Ana River, FWS actively sought to avoid them. In fact, the local water agencies conducted a months-long campaign and required the assistance of Senator Dianne Feinstein before capturing the audience of FWS at meetings in July 2010. App.141-151. Even then, FWS attended the meetings unwillingly and with the caveat that the conversations were to be strictly limited to economic analysis. *Id*. Indeed, by the time FWS met with local agencies, the record demonstrates that FWS already had reached its critical habitat designation decision. *See*, *e.g.*, App.144.

As a result of FWS's failure to cooperate with local agencies early and openly, FWS issued a critical habitat designation that tramples State-issued water rights and allocations and local water resource management efforts. The critical habitat designation for the sucker fails even to acknowledge the state water allocations set forth in the *Orange County* or *Western* Judgments and threatens to negate water rights issued by the State's water board. 75 Fed.Reg. 77989;

App.138, 156-162. In addition, as a result of FWS's failure to cooperate, FWS used, but misapplied, the local agencies' own studies and ignored FWS's assurance in the MSHCP's Implementing Agreement that FWS would not designate critical habitat if feasible, thus compromising the foundation of the MSHCP. 75 Fed.Reg. 77984-88. Indeed, by failing to "cooperate" as Congress required, FWS designated critical habitat in order to achieve conservation that in fact is prohibited by its own No Surprises Rule, 50 C.F.R. §17.32(b)(5)(ii), (iii). *Id*. at 77985. Each and every one of these issues could have been avoided through close cooperation with local agencies.[9]



[9] Each of these failures was raised in detail in Petitioner's briefing before the district court and Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

September 22, 2015

Respectfully submitted,

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No. 12-57297

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

790 F.3d 977*; *2015 U.S. App. LEXIS 10755

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JUDGES: Before: Harry Pregerson, Barrington D. Parker, Jr.*, and Jacqueline H. Nguyen, Circuit Judges.

OPINION BY: Barrington D. Parker, Jr.

OPINION

PARKER, Senior Circuit Judge:

The Santa Ana sucker (*Catostomus santaanae*) is a small freshwater fish native to several California rivers and streams, including the Santa Ana River. In

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* The Honorable Barrington D. Parker, Jr., Senior Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

2000, the United States Fish and Wildlife Service ("FWS"), after being sued by conservation groups, designated the sucker as a "threatened" species pursuant to the Endangered Species Act ("ESA"). In 2004, the FWS promulgated a Final Rule designating particular areas as critical habitat for the sucker. In a subsequent 2005 Final Rule and in a 2009 Proposed Rule, the FWS excluded certain areas covered by local conservation plans from critical habitat designation. But in a 2010 Final Rule, the FWS changed course and designated as critical habitat several thousand acres of land that had previously been excluded.

In August 2011, in response to this change, several municipalities and water districts sued the FWS, the Department of the Interior, and other federal officials, alleging, in essence, that the FWS (1) did not cooperate with the state in resolving water resource issues that arose from the critical habitat designation; (2) acted arbitrarily and capriciously in revising the critical habitat designation to include the previously excluded land; and (3) violated the National Environmental Policy Act ("NEPA") by failing to prepare an environmental impact statement prior to designation. Shortly thereafter, several conservation groups previously involved in the litigation to secure critical habitat designation for the sucker successfully moved to intervene.

The parties cross-moved for summary judgment. In October 2012, the United States District Court for the Central District of California (James V. Selna, J.)

granted defendants summary judgment on all claims. The court held that the FWS satisfied its statutory obligation to cooperate with state agencies, that the critical habitat designation was not arbitrary or capricious, and that any claims under NEPA were barred by this Court's decision in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), which held that the statute does not apply to critical habitat designations. This appeal followed. For the reasons set forth, we AFFIRM the district court's judgment.

BACKGROUND

I. Factual Background

A. The Santa Ana River

Appellants are municipalities and water districts that divert water from the Santa Ana River for various uses and conduct maintenance activities within its watershed. The Santa Ana River travels through southwestern San Bernardino County and Riverside County, continues through Orange County, and flows into the Pacific Ocean between Newport Beach and Huntington Beach. The Santa Ana River is prone to flooding; consequently, two dams – the Prado and the Seven Oaks Dam – work in tandem to assist with flood control. The dams require ongoing maintenance work, some of which may be done in areas designated as critical habitat.

The Santa Ana River also serves as a source of water for its watershed communities. Water rights are allocated to municipalities and water districts

subject to two state court decisions, *Orange County Water District v. City of Chino et al.*, No. 117628 (Super. Ct. Orange County, CA Apr. 17, 1969) and *Western Municipal Water District of Riverside County et al v. East San Bernardino County Water District et al.*, No. 78426 (Super. Ct. Riverside County, CA Apr. 17, 1969). In 2009, the California State Water Board granted the San Bernardino Valley Municipal Water District and the Western Municipal Water District permits to divert additional water captured by the Seven Oaks Dam "for beneficial uses."

B. Local Conservation Plans and Partnerships

In the late 1990s, two coalitions formed to develop conservation plans for the sucker. In 1998, the first coalition, consisting of the FWS, the United States Army Corps of Engineers, the Santa Ana Watershed Project Authority, and various local agencies, including several Appellants in this case, agreed to the Santa Ana Sucker Conservation Plan ("SASCP"). Under the SASCP, the FWS allowed permittees to incidentally "take" (*i.e.*, harm or kill) a limited number of suckers, in exchange for various conservation and mitigation measures. In 1999, a second coalition of 22 parties developed the Western Riverside County Multiple Species Habitat Conservation Plan ("MSHCP"), a regional, multi-jurisdictional plan that encompasses nearly 1.26 million acres and provides participating agencies with a 75 year permit for the incidental taking of 146 protected species, including the sucker,

in exchange for implementing conservation measures. Several Appellants, including the City of Riverside and Riverside County Flood Control, are among the permittees covered by the MSHCP.

In 2004, the MSHCP was formally approved by the FWS. Under the terms of the Implementation Agreement ("MSHCP-IA"), the FWS stipulated that:

> [T]o the maximum extent allowable after public review and comment, in the event that a Critical Habitat determination is made for any Covered Species Adequately Conserved, and unless the [Service] finds that the MSHCP is not being implemented, lands within the boundaries of the MSHCP will not be designated as Critical Habitat.

Although the MSHCP continues to be implemented, the FWS, in the 2010 Final Rule, designated additional critical habitat within the MSHCP. A crucial issue on this appeal is whether, and to what extent, this stipulation binds the FWS's designation decisions.

C. History of Listing and Critical Habitat Designation

1. 1994-2003

Efforts to list the sucker as an endangered species date back to September 1994, when two conservation groups petitioned the FWS to consider the listing. When the FWS did not respond to the petition within the 90 days mandated by statute, the groups

sued to compel a determination. In May 1996, the United States District Court for the Northern District of California found that the FWS violated the ESA and ordered the Service to make a preliminary determination as to the sucker's status. *See Cal. Trout v. Babbitt*, No., Dkt. No. 30 (N.D.Cal. Nov. 7, 1995).

In July 1996, the FWS published a preliminary determination that a listing of the sucker could be warranted, but took no further action. 61 Fed. Reg. 36,021 (July 9, 1996). The district court then ordered the FWS to publish a proposed rule regarding listing, as required by the ESA. In March 1997, the FWS determined that while listing the sucker as endangered or threatened was warranted, other listing actions commanded higher priority. 62 Fed. Reg. 15,872 (Apr. 3, 1997). The conservation groups then filed a new lawsuit in response to which the district court set a schedule for the FWS to publish a proposed and final listing determination.

In April 2000, the FWS released a Final Listing Rule, listing the sucker as a "threatened" species. The FWS noted that the sucker had been eliminated from approximately 75% of its former native range, due to "habitat destruction, natural and human-induced changes in streamflows, urban development and related land-use practices, and the introduction of nonnative competitors and predators." 65 Fed. Reg. 19,686, 19,691 (Apr. 12, 2000). The FWS did not, however, designate critical habitat for the sucker in the 2000 Final Listing Rule on the ground that its "knowledge and understanding of the biological

needs and environmental limitations of the Santa Ana sucker and the primary constituent elements of its habitat are insufficient to determine critical habitat for the fish." *Id.* at 19,696. In such circumstances, the ESA requires the FWS to conduct additional research and issue a final determination of critical habitat no later than two years after the proposed listing rule. 16 U.S.C. § 1533(b)(6)(C)(ii)(II).

The district court supervising the *California Trout* litigation retained jurisdiction to monitor the FWS's compliance with the statutory deadline. After the FWS failed to comply, the conservation groups amended their complaint and moved for summary judgment. The district court found the FWS in violation of the ESA and ordered a final critical habitat designation by February 2004. *Cal. Trout v. Norton*, No. 97-cv-3779, 2003 U.S. Dist. LEXIS 28393, 2003 WL 23413688, at *5 (N.D. Cal. Feb. 26, 2003).

2. 2004 Final and Proposed Rules

In February 2004, the FWS concurrently issued identical proposed and final critical habitat designations. The 2004 Final Rule designated 21,129 acres of critical habitat in three areas: the Santa Ana River (indicated as Unit 1, further divided into subunits 1A and 1B), the San Gabriel River (Unit 2), and the Big Tujunga Creek (Unit 3). The 2004 Final Rule found that the "primary constituent elements" ("PCEs") for the sucker are "a functioning hydrological system that experiences peaks and ebbs in the water volume

and maintains a sand, gravel, and cobble substrate in a mosaic of sandy stream margins, deep water pools, riffles [and] runs; sufficient water volume and quality; and complex, native floral and faunal associations." 69 Fed. Reg. 8,839, 8,843 (Feb. 26, 2004). Although the FWS found that Units 1A and 1B "are not known to be occupied, they are essential for the conservation of the Santa Ana sucker because they provide and transport sediment necessary to maintain the preferred substrates utilized by this fish . . . , convey stream flows and flood waters necessary to maintain habitat conditions for the Santa Ana sucker; and support riparian habitats that protect water quality in the downstream portions of the Santa Ana River occupied by the sucker." *Id.* at 8,844-45 (citations omitted).

Notwithstanding these findings, the FWS exercised its authority under Section 4(b)(2) of the ESA to exclude "essential habitat" that included areas encompassed by the MSHCP and the SASCP. The FWS concluded that "the benefits of excluding essential habitat within the boundaries of" these agreements, such as fostering continuing cooperative spirit with local agencies, educational value, and likely changes in conservation, "outweigh the benefits of including these areas as critical habitat," and that this exclusion "will not result in the extinction of the sucker." *Id.* at 8,846-48.

3. 2005 Final Rule and Subsequent Litigation

Because the 2004 Final Rule had been promulgated without an opportunity for public review and comment in order to comply with the district court's order, the FWS accepted review and comment on the simultaneously released 2004 Proposed Rule, which was ultimately promulgated as a new 2005 Final Rule. The 2005 Final Rule revised the PCEs for the sucker and reduced the designated critical habitat to 8,305 acres. Specifically, all portions of the habitat in the Santa Ana River and its tributaries (Unit 1) were removed from designation because they were no longer considered "essential." However, this change rendered the 2005 Final Rule internally inconsistent, because the rationale for designating certain unoccupied portions of other river systems as essential was the same as the rationale used to reject designation for the units along the Santa Ana River. For example, while unoccupied areas in Unit 3 (the Big Tujunga Creek) were designated as essential because they transported sediment downstream to occupied areas, unoccupied areas in Unit 1A were now deemed "not essential," even though they also transported sediment to downstream occupied areas. Additionally, while certain sections of the 2005 Final Rule state that Units 1A and 1B are not essential, the FWS did not remove other language in the Final Rule that refers to habitat within these units as essential. *See, e.g.*, 70 Fed. Reg. 426, 443 (Jan. 4, 2005) ("[W]e analyzed the impacts of the MSHCP . . . on the Santa

Ana sucker and its essential habitat within the plan boundaries.").

Various conservation groups pressed the FWS on these inconsistencies, raising questions about the integrity of the scientific information used and whether the decision was consistent with appropriate legal standards. In response, the FWS announced in July 2007 that it would review the 2005 Final Rule. In November 2007, the conservation groups again sued the FWS, alleging that the 2005 Final Rule violated the ESA and the Administrative Procedure Act ("APA"), and that the rule making resulted from improper political influence not grounded in reliable science. The parties settled in 2009. The settlement agreement approved by the district court required the FWS to "reconsider its critical habitat designation for the Santa Ana sucker," and to submit a proposed rule by December 2009, with a final rule due by December 2010. *Cal. Trout v. U.S. Fish and Wildlife Serv.*, No. 08-cv-4811, Dkt. No. 41 (C.D. Cal. Jan. 21, 2009).

4. 2009 Proposed Rules and 2010 Final Rules

The FWS released a new proposed rule in December 2009, with a slight revision in July 2010, designating 9,605 acres of habitat from the three river systems, including 1,900 acres of unoccupied habitat from the Santa Ana River that was previously found not essential in the 2005 Rule (identified as new subunit 1A). 74 Fed. Reg. 65,056 (proposed Dec. 9,

2009), *revised by* 75 Fed. Reg. 38,441 (proposed July 2, 2010). The FWS noted that it was considering exercising its discretion to exclude 5,472 acres of designated habitat, consisting of areas within the SASCP and MSHCP (identified as new subunits 1B and 1C).

In connection with the Proposed Rule, the FWS held two open 60-day comment periods, hosted two public hearings in July 2010, and contacted "appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and D[raft] E[conomic] A[nalysis] during these comment periods." 75 Fed. Reg. 77,961, 77,989 (Dec. 14, 2010). The FWS also subjected its rule to peer review, responded to several Congressional inquiries, and met with various stakeholders, including Appellants' representatives. *See id.* at 77,989-94. Various agencies participating in the SASCP and MSHCP, including Appellants, commented extensively on the 2009 Proposed Rule, supporting an exclusion and asking the FWS to adhere to its commitment in the MSHCP-IA to exclude MSHCP land.

In December 2010, the FWS issued its Final Rule. The 2010 Final Rule designated 9,331 acres of critical habitat across the three river systems. The 2010 Final Rule designated habitat closely along the lines of the 2009 Proposed Rules, except that it removed approximately 400 acres from subunit 1A. The 2010 Final Rule designated approximately 1,500 acres of unoccupied habitat in subunit 1A on the ground that these areas are "essential to the conservation

of the species" because they function as pathways to transport storm and stream waters and sediments "necessary to maintain" preferred substrates to occupied portions of the Santa Ana River further downstream. 75 Fed. Reg. at 77,972, 77,978. The FWS also decided not to exclude the areas in subunits 1B and 1C, which included 3,048 acres of land covered by the MSHCP. The FWS found that the benefits of continued exclusion did not outweigh the benefits of inclusion, and declined to exercise its discretion to exclude those areas because of the sucker's conservation status.

II. Procedural History

In August 2011, the plaintiff municipalities and water districts sued the FWS, challenging the 2010 Final Rule on multiple grounds, and requested declaratory and injunctive relief. As relevant to this appeal, the plaintiffs alleged that the FWS (1) failed to cooperate with them to resolve water resource concerns pursuant to Section 2(c)(2) of the ESA (claim 1); (2) designated lands along the Santa Ana River or within the MSHCP in a manner that was arbitrary and capricious, in violation of the ESA and the APA (claims 2 and 4); and (3) violated NEPA by failing to prepare an Environmental Impact Statement (claim 6).[1]

[1] Because Appellants did not address several other claims raised before the district court in their opening brief, we consider

(Continued on following page)

In November 2011, California Trout, Inc., the Center for Biological Diversity, the San Bernardino Audubon Society, and the Sierra Club successfully moved to intervene as defendants. The parties cross-moved for summary judgment and in October 2012, the district court granted defendants summary judgment on all claims. *Bear Valley Mut. Water Co. v. Salazar*, No. 11-cv-1263, 2012 U.S. Dist. LEXIS 4160048, 2012 WL 5353353 (C.D. Cal. Oct. 17, 2012). In sum, the district court concluded that (1) the FWS complied with its statutory obligations to cooperate with state and local authorities and Section 2(c)(2) of the ESA does not impose additional substantive or procedural obligations on federal agencies, *see* 2012 U.S. Dist. LEXIS 160048, [WL] at *9-11; (2) an agency's decision not to exclude areas from critical habitat is a discretionary action not subject to judicial review, *see* 2012 U.S. Dist. LEXIS 160048, [WL] at *14, and the FWS's critical habitat designation was not arbitrary or capricious because it was rationally connected to the best available science, *see* 2012 U.S. Dist. LEXIS 160048, [WL] at *15, 19-34; and (3) any claim under NEPA is barred by *Douglas County, see* 2012 U.S. Dist. LEXIS 160048, [WL] at *37.

The municipalities and water districts appealed and the Pacific Legal Foundation successfully moved

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those claims to be abandoned. *See Christian Legal Soc. Ch. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010).

to appear as amicus curiae in support of Appellants.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARDS OF REVIEW

We review a district court's grant of summary judgment de novo. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). "We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (quotation omitted). "This Court also reviews *de novo* the district court's evaluations of an agency's actions." *San Luis*

[2] The Association of California Water Agencies, State Water Contractors, Metropolitan Water District of Southern California, Main San Gabriel Basin Watermaster, County of Los Angeles, and the Western Riverside County Regional Conservation Authority ("RCA") have also moved for leave to file three separate amicus curiae briefs in support of Appellants. The RCA further requests that this Court take judicial notice of several documents. These motions are opposed by the Intervenors-Appellees. All pending motions for leave to file amicus briefs are hereby granted. RCA's request for this Court to take judicial notice is denied because "judicial review of an agency decision is [generally] limited to the administrative record on which the agency based the challenged decision," and RCA has not shown why the additional materials are "necessary to adequately review" the decision here. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

& Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 991 (9th Cir. 2014).

Claims brought against an agency under the ESA are evaluated under the APA. Pursuant to the APA, an agency decision will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this standard, we will 'sustain an agency action if the agency has articulated a rational connection between the facts found and the conclusions made.'" *San Luis & Delta-Mendota*, 776 F.3d at 994 (quoting *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005)). A federal court may not substitute its judgment for that of the agency. *See, e.g.*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 7, 122 S. Ct. 431, 151 L. Ed. 2d 323 (2001).

ANALYSIS

I. Section 2(c)(2) Does Not Create an Independent Cause of Action

Section 2 of the ESA is entitled "Congressional findings and declarations of purposes and policy." 16 U.S.C. § 1531. Section 2(c) provides:

> (c) Policy
>
> (1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and

> shall utilize their authorities in furtherance of the purposes of this chapter.
>
> (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c). Appellants argue that the FWS violated Section 2(c)(2) because it failed to cooperate with State and local agencies on water resource issues, by, for example, failing to give sufficient weight to the California State Water Board's determination that the issuance of permits for the proposed diversion from the Santa Ana River at Seven Oaks Dam for municipal purposes would have no impact upon public trust resources, including the sucker, and otherwise declining to engage Appellants in negotiating the critical habitat designation.

This argument fails as a matter of law because, as the district court correctly held, Section 2(c)(2) is a non-operative statement of policy that "does not create an enforceable mandate for some additional procedural step." *Bear Valley*, 2012 U.S. Dist. LEXIS 160048, 2012 WL 5353353, at *11. By its own terms, Section 2(c)(2) is a subsection of the ESA's declaration of purposes and policy. It is well established that such declarations do not create substantive or enforceable rights. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175, 129 S. Ct. 1436, 173 L. Ed. 2d 333 (2009) ("[W]here the text of a clause itself indicates that it does not have operative effect. . . . , a court has

no license to make it do what it was not designed to do." (quotation marks and citation omitted)). Although we believe the text is clear, we note that this reading is further supported by the statute's legislative history. When Congress amended the ESA to include Section 2(c)(2) in 1982, the Senate Committee report expressly provided that this provision was "not intended to and does not change the substantive or procedural requirements of the Act." S. Rep. 97-418, at 25-26 (May 26, 1982). We also note that no court has ever construed Section 2(c)(2) to set forth a substantive or procedural requirement.

Appellants claim that this reading renders statutory language superfluous and violates established canons of statutory interpretation. They note that Section 2(c)(2) uses the word "shall," which is typically considered to be a mandate. Appellants contend that the Eighth Circuit's decision in *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989) supports their position. There, the court concluded that the ESA "imposes substantial and continuing obligations on federal agencies," citing Section 2(c)(1), which expresses the policy "that all Federal departments and agencies . . . shall utilize their authorities in furtherance of the purposes of this Act." 882 F.2d at 1299. According to Appellants, if Section 2(c)(1) imposes a "substantial and continuing obligation," then so must Section 2(c)(2). However, the *substantive* provisions enforced by the Eighth Circuit were Sections 7 and 9 of the ESA, which set forth the procedures reflecting the policy statement in Section

2(c)(1). Nothing in *Defenders of Wildlife* establishes or recognizes a free-standing claim based on Section 2(c)(1).

Contrary to what Appellants contend, the policy goals embodied in Section 2(c)(2) are implemented through the substantive and procedural requirements set forth in Section 4, which direct the FWS to "give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon," 16 U.S.C. § 1533(b)(5)(A)(ii), and to provide a "written justification" for any rule that was issued without "adopt[ing] regulations consistent with the [State] agency's comments or petition." 16 U.S.C. § 1533(i). In other words, the procedures set forth in Section 4 outline the scope of "cooperation" required between the FWS and state and local agencies in designating critical habitat. This process is an enhanced level of notice and comment compared to that afforded to the general public through notice in the Federal Register and publication in a newspaper that circulates in the area in which the species is believed to occur. It is undisputed that the FWS complied with Section 4 of the ESA.

Appellants argue that Section 2(c)(2)'s mandate of "cooperation" is not satisfied by Section 4's procedures, and that the provision creates additional obligations where "water resource issues" are involved.

As support for this contention, Appellants cite to *California Wilderness Coalition v. U.S. Department of Energy*, which held that a provision of the Energy Policy Act that required "consultation with affected States" in conducting a study concerning certain transmission corridors issues mandated that the DOE "confer with the affected States before . . . complet[ing]" the study, rather than rely on the statute's notice and comment procedure. 631 F.3d 1072, 1088 (9th Cir. 2011). But as the district court noted, *both* relevant provisions of the Energy Policy Act at issue in *California Wilderness* are substantive and distinct because "the opportunity to comment provision applie[s] to the issuing of a. . . . report based on the congestion study previously subject to consultation." *Bear Valley Mut. Water Co.*, 2012 U.S. Dist. LEXIS 160048, 2012 WL 5353353, at *10. But here, Section 2(c)(2) merely announces a general policy goal that is reflected in the substantive and procedural requirements of Section 4.

Finally, Appellants' citation to legislative history is unavailing. Although Appellants cite some portion of the legislative history which suggests that Congress intended for "most of the potential conflicts between species conservation and water resource development [to] be avoided through close cooperation," this same text later makes explicitly clear that Section 2(c)(2) does not "change the substantive or procedural requirements of the Act." Accordingly, we affirm the district court's grant of summary judgment in favor of Appellees as to claim 1.

II. The Critical Habitat Designation of Land Covered by the MSHCP Was Proper

A. Legal Framework

Section 4(b)(2) requires the FWS to designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). "The determination of what constitutes the 'best scientific data available' belongs to the agency's 'special expertise. . . . When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)).

A critical habitat designation must describe the PCEs, which are the "physical and biological features essential to the conservation of the species and which may require special management considerations or protection." 50 C.F.R. § 424.12(b). The FWS "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat

will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2).

B. Appellants' Challenge to the FWS's Decision Not to Exercise Its Discretion to Exclude Land Covered by the MSHCP Fails

Judicial review of agency decisions under the APA does not apply to an "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). An action is committed to agency discretion where there is no "meaningful standard against which to judge the agency's exercise of discretion." *See Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). Typically, where a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack "a focus for judicial review . . . to determine whether the agency exceeded its statutory powers." *Id.* at 832. Here, the district court found that, to the extent Appellants argued that the FWS violated the ESA and the APA by not exercising its discretion to exclude land covered by the MSHCP, that agency decision is unreviewable because "[t]he statute is written in the permissive," and authorizes the FWS to exclude essential area from a critical habitat designation but does not compel it to do so. *Bear Valley Mut. Water Co.*, 2012 U.S. Dist. LEXIS 160048, 2012 WL 5353353, at *14. For the reasons explained below, we agree with the district court that

an agency's decision not to exclude critical habitat is unreviewable.

Appellants' principle argument is that if there is a manageable standard to review an agency's decision *to exclude*, which all parties agree is subject to review, the same standard can, and should be, used to review an agency's decision *not* to exclude. Their authority for this proposition is the D.C. Circuit's decisions in *Amador County v. Salazar*, 640 F.3d 373, 379-83, 395 U.S. App. D.C. 110 (D.C. Cir. 2011), and *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401-02, 314 U.S. App. D.C. 345 (D.C. Cir. 1995), cases in which the court held that a statute is not made unreviewable by the use of permissive language alone. This argument is unavailing.

In *Amador County*, the D.C. Circuit analyzed a provision of the Indian Gaming Regulatory Act, which states that the Secretary of Commerce "may disapprove a [Tribal-State] compact [entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe] . . . only if such compact violates (i) any provision of this chapter, (ii) any other provision of Federal law . . . , or (iii) the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B). The court found that subsection (d)(8)(B)'s "use of 'may' is best read to limit the circumstances in which disapproval is allowed." *Amador Cnty.*, 640 F.3d at 381. In *Dickson*, the D.C. Circuit analyzed a statute directing that the Army Board for Correction of Military Records "may excuse a failure to file [a request for a correction of military

records] within three years after discovery if it finds it to be in the interest of justice." 68 F.3d at 1399 (quoting 10 U.S.C. § 1552(b)). The court concluded that Congress did not intend "may" to confer complete discretion because "this construction would mean that even if the Board expressly found in a particular case that it was in 'the interest of justice' to grant a waiver, it could still decline to do so." *Id.* at 1402, n.7.

Appellants, however, misunderstand the standard under which a decision to exclude is reviewable. Unlike *Amador County* and *Dickson*, where the government argued that it was not obligated to take any action, the FWS *is* obligated to take an action under Section 4(b)(2), *i.e.*, designate essential habitat as critical. The decision to exclude otherwise essential habitat is thus properly reviewable because it is equivalent to a decision not to designate critical habitat.

But the statute cannot be read to say that the FWS is ever obligated to exclude habitat that it has found to be essential. Such a decision is always discretionary and the statute "provides absolutely no standards that constrain the Service's discretion" not to exclude, unlike the statute reviewed in *Amador County*, which cabined the agency's discretion to disapprove compacts to a set of specified conditions. *See Conservancy of Sw. Fla. v. U.S. Fish and Wildlife Serv.*, 677 F.3d 1073, 1084, n. 16 (11th Cir. 2012) (distinguishing *Amador County* and finding that the use of the word "may" in another section of the ESA precludes the review of an agency's exercise of

discretion); *see also Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002) (holding that where the Board of Immigration is permitted to reopen proceedings in "exceptional circumstances," its decision *not* to reopen a case is unreviewable because there are no "statutory, regulatory, or caselaw definition[s] of 'exceptional circumstances'" and thus no manageable standard to apply on review).[3] Accordingly, we affirm the district court's holding that the FWS's decision not to exclude land covered by the MSHCP is not subject to review.

C. The FWS's Designation of Lands Included in the MSHCP Was Not Arbitrary or Capricious

Even if an agency's decision *not* to exclude is unreviewable, courts undisputedly have the authority

[3] We note that our holding today also comports with every lower court that has addressed this issue to date. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. 05-cv-629, 2006 U.S. Dist. LEXIS 80255, 2006 WL 3190518 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

to review whether the FWS properly *included* an area in a critical habitat designation. This inquiry turns on whether the designation was based on "the best scientific data available," and whether the FWS took into consideration the economic, national security, or any other relevant impacts, of "specifying any particular area as critical habitat," 16 U.S.C. § 1533(b)(2).

Appellants do not argue that the FWS relied on faulty scientific data, or that there is no rational relationship between the facts underlying the determination that the MSHCP lands were essential and the FWS's designation of critical habitat. Rather, Appellants contend that "[b]y executing the MSHCP and its Implementation Agreement, the FWS assured [p]ermittees that it would not designate MSHCP land unless it first found that the plan was not being implemented." According to Appellants, the inclusion of this land in the 2010 Final Rule was a "radical departure from prior precedent and in contravention of assurances provided in the IA," and the FWS's failure to consider the consequences of violating those assurances makes the 2010 Final Rule arbitrary and capricious. We disagree.

The MSHCP-IA states that the FWS will not designate land within the agreement "to the maximum extent allowable after public review and comment." While Appellants read this provision to require that the FWS exercises its discretion under Section 4(b)(2) to exclude MSHCP land unless absolutely barred from doing so under the law, the Federal Appellees respond that the MSHCP-IA does not constitute a

"contractual assurance[ ] that the agency would not designate as critical habitat lands covered by the MSHCP" because "[t]he FWS did not, nor could it, promise to ignore its ESA obligations." Further, the Federal Appellees argue that it would be inappropriate and unlawful for an agency to "commit to the substantive outcome of a future rulemaking in an agreement with a specific group like the MSHCP signatories."

To the extent Appellants believe the MSHCP-IA creates an enforceable guarantee not to designate critical habitat, they are mistaken. Although Appellants raise valid concerns about the permittees' reliance on the FWS's promise not to designate lands "to the maximum extent allowable," the FWS may not relinquish its statutory obligation to designate essential critical habitat by contract with third parties. Nevertheless, Appellants correctly argue that the MSHCP is a "relevant impact" that should have been considered in the process of rulemaking. Contrary to Appellants' assertions, the FWS fully considered the MSHCP as a "relevant impact," and its conclusion that designation of critical habitat was nevertheless warranted is, consequently, permissible.

At the time the 2010 Final Rule was promulgated, the FWS's duty to consider "any other relevant impact" under Section 4(b)(2) required that the Service "identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation," and "consider the probable economic and

other impacts of the designation upon proposed or ongoing activities." 50 C.F.R. § 424.19 (2010), *revised by* 78 Fed. Reg. 53,058 (Aug. 28, 2013).

The FWS fully considered the impact of including the areas covered by the MSHCP (as well as the SASCP) in the 2010 Final Rule, including the potentially deleterious impact on future local cooperation efforts. *See* 75 Fed. Reg. at 77,985-87 ("Rationale for Including the Western Riverside County MSHCP and SAS Conservation Program in This Final Critical Habitat Designation"). Nevertheless, the FWS found that the designation of critical habitat was warranted. Specifically, the FWS noted that "the status of the Santa Ana sucker and the status of its habitat continue to decline throughout the Santa Ana River system," and that because mitigation under the MSHCP is to be implemented over a 75 year period, the continued decline warranted inclusion of essential habitat within the MSHCP area.[4] *Id.* at 77,985. The FWS also noted that designation will provide a significant public educational benefit, and may strengthen

[4] Appellants argue that this conclusion is not supported by the factual record because a large percentage of sucker habitat had already been conserved under the terms of the MSHCP. However, as the RCA admits, "the acquisition of additional conservation land was intended to be a multi-step, gradual process where land is acquired in rough proportionality to development" over the first 25 years of the plan. Thus, the FWS's conclusion that the MSHCP would likely benefit the sucker in the long term, but would not necessarily resolve short-term conservation problems, is not arbitrary and capricious.

other laws in a manner beneficial to the sucker. *Id.* at 77,986.

Appellants contend that the FWS's decision was arbitrary and capricious because the 2010 Final Rule (1) failed to cite or address the specific assurance not to designate critical habitat in the MSHCP-IA, or (2) to explain the decision to reverse the exclusion in the 2004 and 2005 Final Rules. But as Appellants admit, the FWS specifically determined that "'the partnership benefits of exclu[sion] . . . do not outweigh the regulatory and educational benefits afforded . . . as a consequence of designating critical habitat in this area.'" Thus, the 2010 Final Rule fully addresses the impact on conservation plans and local partnerships. Further, the Final Rule explains the changed circumstances requiring designation and articulates the reasons for why the benefits of inclusion outweigh the benefits of exclusion. This is clearly adequate even in the absence of a specific citation to the assurance in the MSHCP-IA.

D. The Designation Does Not Violate the "No Surprises Rule"

Alternatively, Appellants argue that the designation of habitat in areas covered by the MSHCP violates the FWS's "No Surprises Rule." The "No Surprises Rule" provides that once a permit has been issued pursuant to a habitat conservation plan, and assuming that the terms of the underlying plan are being implemented, the permittee "may remain

secure regarding the agreed upon cost of conservation and mitigation." Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8,859, 8,867 (Feb. 23, 1998). In other words, the FWS may not require permittees to pay for additional conservation and mitigation measures absent "unforeseen circumstances." 50 C.F.R. §§ 17.32(b)(5)(ii-iii).

We agree with the district court that, although the FWS cites the possibility of "conservation not currently provided under the plan" as a potential benefit in the critical habitat designation, nothing in the 2010 Final Rule discusses "additional measures by the [MSHCP] permittees in undertaking covered activities," nor does the 2010 Final Rule require the permittees to undertake any additional acts for conservation. *Bear Valley Mut. Water Co.*, 2012 U.S. Dist. LEXIS 160048, 2012 WL 5353353, at *15. Appellants admit that the FWS has not yet imposed such a requirement, but contend that the "additional regulatory benefit" rationale is arbitrary and capricious because it *could* violate the No Surprises Rule in the future. At this juncture, these concerns are speculative. Tellingly, the Appellants can point to no additional conservation or mitigation measures that have been imposed on them. Consequently, based on the record on this appeal, we conclude that the 2010 Final Rule does not violate the No Surprises Rule.

E. Appellants Had Adequate Opportunity to Comment on the FWS's Scientific Citations

Next, the Appellants argue that the FWS committed error by citing to two new studies – SMEA 2009 and Thompson et. al., 2010 – in the 2010 Final Rule to support its conclusion that the status of the sucker and its available habitat have continued to decline. We see no impropriety in the use of those studies.

The ESA's notice and comment procedures require that the public be given an opportunity to provide comments on the contents of a proposed rule. The contents of a proposed rule for a revised habitat designation "shall contain the complete text of the proposed rule, a summary of the data on which the proposal is based (including, as appropriate, citation of pertinent information sources), and shall show the relationship of such data to the rule proposed." 50 C.F.R. § 424.16(b) (effective prior to May 31, 2012). While "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. . . . the public is not entitled to review and comment on every piece of information utilized during rule making. . . . [A]n agency, without reopening the comment period, may use supplementary data . . . that expands on and confirms information contained in the proposed rulemaking . . . so long as no prejudice is shown." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (internal

quotations omitted); *accord Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402 (9th Cir. 1995).

The Federal Appellees correctly contend that the Thompson and SMEA studies simply expand upon and confirm the data used to support two conclusions in the 2009 Proposed Rule – the decline of the sucker and its habitat. Further, the Thompson study was cited in the Proposed Rule in its draft form, and was thus available to the public for comment. While the SMEA study was not available at the time of the Proposed Rule, it was supplementary to the otherwise cited studies, which also found that the sucker and its habitat have declined over time.

Appellants do not challenge the reliability of the studies, but disagree with the FWS's interpretation and use of the studies. Specifically, Appellants argue that the majority of the studies in the 2009 Proposed Rule predate 2004, while the FWS based its decision to designate critical habitat in the 2010 Final Rule on a conclusion, supported by the new studies, that there has been a *continued* decline of the sucker since the MSHCP was finalized in 2004.

Appellants' contention that the FWS used these studies to show decline since 2004 is not correct. Rather, the FWS used these studies to supplement the previous studies which showed the persistent decline of the sucker and its habitat over time. Appellants fail to explain why the pre-2004 studies would not tend to support the conclusion that the habitat continues to decline. More importantly, Appellants do

not explain why the 2009 Proposed Rule's citation to the pre-2004 studies did not put them "on notice" that the decline of the sucker and its habitat were relevant factors in the FWS's decision making process, and did not afford Appellants an opportunity to comment on those issues.

Even if the FWS somehow erred in failing to reopen the comment period after the addition of these two studies, Appellants fail to demonstrate how this error prejudiced them. *See* 5 U.S.C. § 706 (requiring that a court reviewing agency decisions take "due account . . . of the rule of prejudicial error"). Appellants do not challenge the studies' reliability or conclusions or cite to studies supporting alternative findings. Accordingly, we affirm the district court's grant of summary judgment in favor of Appellees on all claims arising out of the designation of critical habitat in areas covered by the MSHCP.

III. The FWS's Designation of Critical Habitat in Unoccupied Areas Was Proper

The ESA authorizes the FWS to designate unoccupied areas "upon a determination by the [Service] that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The implementing regulation further provides that "critical habitat areas outside the geographical area presently occupied by a species" should be designated "only when a designation limited to its present range would

be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

The 2010 Final Rule designated unoccupied habitat in subunit 1A of the Santa Ana River as essential because areas within subunit 1A are the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River. The Final Rule determined that coarse sediment was essential to the sucker because provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus. The Final Rule also determined that Subunit 1A assisted in maintaining water quality and temperature in the occupied reaches of the river. 75 Fed. Reg. at 77,972-73, 77,977-78.

Appellants claim that this justification fails to establish that subunit 1A is essential to the conservation of the species *and* that the designated occupied areas are inadequate to ensure the conservation of the species. Although Appellants consider these to be two separate requirements, they are identical. The ESA requires the FWS to demonstrate that unoccupied area is "essential" for conservation before designating it as critical habitat. The implementing regulation phrases this same requirement in a different way, and states that the FWS must show that the occupied habitat is not adequate for conservation. As the district court properly found, "[i]f certain habitat is essential, it stands to reason that if the [Service] did not designate this habitat, whatever the [Service] otherwise designated would be inadequate. . . . [T]he

regulation provides only elaboration and not an additional requirement or restriction." *Bear Valley Mut. Water Co.*, 2012 U.S. Dist. LEXIS 160048, 2012 WL 5353353, at *22. The Final Rule sufficiently explained why the designation of unoccupied habitat in subunit 1A was essential, and conversely, why designation of solely occupied habitat was inadequate for the conservation of the species.

Appellants further contend that the FWS's justification for designating this unoccupied land was arbitrary and capricious because "uninhabitable source areas do not meet the statutory requirement for critical habitat." There is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is "essential," without further defining that term as "habitable." Finally, Appellants argue that the FWS's reliance on the fact that PCEs exist in the designated unoccupied habitat is contrary to the statute because it is the same test used for occupied habitat. But the 2010 Final Rule does not designate subunit 1A as essential only because it contains PCEs. Rather, the area is designated as essential because it provides "sources of water and coarse sediment. . . . *necessary* to maintain preferred substrate conditions" for the sucker. 75 Fed. Reg. at 77,972-73 (emphasis added). For these reasons, we affirm the district court's grant of summary judgment in favor of Appellees as to all claims pertaining to the designation of unoccupied habitat in subunit 1A.

IV. Appellants' NEPA Claim Fails as a Matter of Law

Finally, Appellants contend that the FWS violated NEPA by failing to prepare an environmental impact statement in connection with its 2010 Final Rule. Any such claim is foreclosed by the controlling law of this Circuit, which holds "that [the] NEPA does not apply to the designation of a critical habitat." *Douglas Cnty.*, 48 F.3d at 1502. Although Appellants ask this Court to revisit and overrule *Douglas County*, "in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel." *Hart v. Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001). Accordingly, we affirm the district court's grant of summary judgment in favor of Appellees on any claim arising under NEPA.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

COUNSEL IDENTIFICATION
ON FINAL PAGE

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

BEAR VALLEY MUTUAL WATER CO., et al., Plaintiffs, v. KENNETH L. SALAZAR, et al., Federal Defendants, CALIFORNIA TROUT, et al. Defendant-Intervenors.	11-CV-01263-JVS(AN) **ORDER AND JUDGMENT** (Filed Oct. 23, 2012)

Based upon Defendants' motion for summary judgment, the oppositions thereto, and it appearing that Defendants' motion for summary judgment should be granted and that Federal Defendants are entitled to a judgment in their favor, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that judgment shall be entered in favor of Federal Defendants, the above-captioned case shall be dismissed, and each party shall bear its own fees and costs.

Dated: This 23d day of October, 2012, in Santa Ana, California.

/s/ James V. Selna
THE HONORABLE
JAMES V. SELNA
United States District Judge

PRESENTED BY:

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CERTIFICATE OF SERVICE

I hereby certify that today, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record for Defendant-Intervenors and for Plaintiffs, the latter having agreed to accept service on behalf of all Plaintiffs in this litigation.

/s/ Andrea Gelatt
ANDREA GELATT

2012 WL 5353353

United States District Court,
C.D. California.

BEAR VALLEY MUTUAL WATER CO.
v.
Kenneth L. SALAZAR, etc.

No. SACV 11-01263-JVS (ANx). | Oct. 17, 2012.

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Proceedings: (IN CHAMBERS) Order re: Motions for Summary Judgment

JAMES V. SELNA, Judge.

Nancy Boehme, Deputy Clerk.

In this matter, the Court is presented with the parties' cross-motions for summary judgment. Plaintiffs Bear Valley Mutual Water Company, Big Bear Municipal Water District, City of Redlands, City of Riverside, City of San Bernardino Municipal Water Department, East Valley Water District, Riverside County Flood Control and Water Conservation District, San Bernardino Valley Municipal Water District, San Bernardino Valley Water Conservation District, Western Municipal Water District, West Valley Water District, and Yucaipa Valley Water District (collectively the "Plaintiffs") move pursuant to Federal Rule of Civil Procedure 56 for summary judgment. (Docket No. 57.) Defendants the Secretary of the Interior (the "Secretary"), the Department of the Interior, and the United States Fish and Wildlife Service ("FWS") (collectively, the "Federal Defendants") also move for summary judgment. (Docket No. 64.) Intervenor defendants California Trout, Center for Biological Diversity, San Bernardino Valley Audobon Society, and the San Gorgonio Chapter of the Sierra Club (collectively, "Intervenor Defendants") join Federal Defendants' motion. (Docket No. 69.) Amicus Curiae Pacific Legal Foundation ("PLF") filed a brief in support of Plaintiffs' motion. (Docket No. 86.) Both motions are opposed. (Docket

Nos. 76, 77, 79.) For the following reasons, the Court GRANTS Federal Defendants' motion and DENIES Plaintiffs' motion.

I. *BACKGROUND*

The present action involves a challenge to the December 14, 2010 Final Rule designating critical habitat for the Santa Ana Sucker (the "Sucker"). On a review of an administrative proceeding – the FWS's rule-making – the Court does not act as a fact finder and takes the factual background from the administrative record. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985).

A. *Santa Ana Sucker and the Santa Ana River*

The Sucker, *catostomus santaanae*, is a small fish native to several Southern California river valleys. Final Rule Determining Threatened Status of Santa Ana Sucker, Administrative Record ("AR") 84:6964, *available at* 65 Fed.Reg. 19686-87 (Apr. 12, 2000) (codified at 17 C.F.R. § 17.11(h)).)[1] These are the Los Angeles, San Gabriel, and Santa Ana river systems.

[1] While the fact that a species is listed as Threatened or Endangered under the Endangered Species Act ("ESA") is codified in the Code of Federal Regulations, the basis for that listing is not. 50 C.F.R. § 17.11(f)(1). Thus, the Court cites to the Federal Register (provided in the Administrative Record) where the basis is published.

(*Id.*) The Santa Ana River ("SAR") forms in the San Bernardino Mountains more than 75 miles inland of the Pacific Ocean. (AR 7:2333.)[2] It travels through southwestern San Bernardino County and Riverside County, continues through Orange County, and flows into the Pacific Ocean between Newport Beach and Huntington Beach. (*Id.*) In 1941, the Prado Dam was built on the SAR for flood control purposes. (*Id.* at 2335.) In 1986, Congress authorized the construction of another dam on the SAR to assist with flood control, the Seven Oaks Dam. (AR 199:17204.) Water conservation was "not an authorized project purpose, but incidental water conservation benefits would be realized as a part of the recommended plan" for the project. (AR 7:1881.) Construction commenced in 1989 and the dam was fully operational in 2002. (AR 199:17206.) Both dams are operated by the United States Army Corps of Engineers ("USACE"). (*Id.*)

The SAR has been subjected to various demands, including those from local agencies for water rights. In 1969, two state court decisions allocated water rights to several of these agencies, *Orange County Water District v. City of Chino et al.*, Case No. 117628 (Super. Ct. Orange County, CA 1969), and *Western Municipal Water District of Riverside County et al. v. East San Bernardino County Water District et al.*,

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[2] The documents making up the administrative record are numbered and the entire record is consecutively paginated. Citations to the administrative record are formatted as "Document # :AR Page #."

Case No. 78426 (Super. Ct. Riverside County, CA 1969). Later, in 2009, at the behest of several local agencies seeking more water from the river, the California State Water Board issued a decision ("D-1649") granting San Bernardino Valley Municipal Water District and Western Municipal Water District certain water right permits to divert water captured by the Seven Oaks Dam. (AR 1630:47632-97.)

B. *Initial Conservation Proceedings and Efforts*

In 1998, multiple agencies formed the Santa Ana Sucker Conservation Team to develop a river-wide approach to conserving the Sucker. (AR 1639:47767-78.) The Team included the FWS, the USACE, the Santa Ana Watershed Project Authority ("SAWPA"), and several local agencies including several plaintiffs. (AR 285:20265.) They developed the Santa Ana Sucker Conservation Plan ("SASCP"), a regional habitat protection program encompassing the SAR and portions of its tributaries. (AR 602:24403.) Its purpose is to promote conservation of the Sucker, while providing the necessary authorization, pursuant to the ESA[3], to allow for the incidental "take"[4] of a limited

[3] 16 U.S.C. §§ 1531 *et seq*.

[4] "Take" of a species under the ESA "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

number of Suckers when the participating agencies undertake covered activities. (AR 207:17564.)

Later, in 1999, another coalition of agencies developed the Western Riverside County Multiple Species Habitat Conservation Plan ("MSHCP"). (AR 190:9710; AR 1012:30553.) The MSHCP is a regional, multi jurisdictional Habitat Conservation Plan encompassing 1.26 million acres and addresses several species found therein, including the Sucker. (AR 1012:30553.) The MSHCP sought and received approval under the ESA § 10(a)(1)(B), allowing for incidental take of several protected species covered by the plan in exchange for implementing conservation measures to protect them. (*Id.*) In 2004, the MSHCP was approved by the FWS and the participants were issued a 75-year Incidental Take Permit ("ITP"). (*Id.*)

In 2000, while the MSHCP was in development, the Sucker was listed as "threatened" under the ESA. (AR 1606:45720; *also available at* Listing Final Rule, 65 Fed.Reg. 19686.) The Final Listing Rule concluded that critical habitat was "not determinable." (*Id.* at 45730.) Specifically, it stated that the FWS's current "knowledge and understanding of the biological needs and environmental limitations of the Santa Ana sucker and the primary constituent elements of its habitat are insufficient to determine critical habitat for the fish." (*Id.*)

C. *Critical Habitat Designation*

Under the ESA and its implementing regulations, when a species is listed as threatened, the Secretary must, to the maximum extent prudent and determinable, designate critical habitat at that time. 16 U.S.C. §§ 1533(a)(3)(A), 1533(b)(6)(C). If the Secretary finds that critical habitat is indeterminable when he or she lists the species, then the FWS must conduct additional research and issue a final determination of critical habitat no later than two years after the proposed listing rule. 16 U.S.C. § 1533(b)(6)(C)(ii). As part of the process of designating critical habitat, the FWS must delineate "primary constituent elements" ("PCEs"). 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. 424.12(b) These are the "physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.*

1. Prompting Litigation

The FWS made its proposed and final listing determination for the Sucker upon court ordered deadlines. *California Trout v. Norton*, 2003 WL 23413688 at *1 (N.D.Cal. Feb.26, 2003). That court also maintained jurisdiction to monitor the FWS's compliance with the statutory deadline for designating critical habitat through the parties' stipulation. *Id.* at *2. When the FWS failed to timely designate critical habitat, the plaintiffs amended the complaint and sought summary judgment to compel the FWS to do so. *Id.*

The court found the FWS in violation of the ESA and ordered it to issue a final critical habitat designation by February 26, 2004. *Id.* at *3.

2. 2004 Final and Proposed Rule

On February 26, 2004, the FWS issued a final rule designating critical habitat for the Sucker without soliciting comments or issuing a prior proposed rule. (AR 207:17556 *also available* at 69 Fed.Reg. 8839 (Feb. 26, 2004).) The FWS stated that it dispensed with the notice and comment procedures and made the rule immediately effective because it had good cause pursuant to the Administrative Procedure Act ("APA")[5] provisions allowing such actions. (*Id.* at 17557.) Namely, the FWS found that it was impracticable and contrary to the public interest to comply with the notice and comment procedures normally required because it was under a court-ordered deadline, enjoined from conducting ESA § 7 consultations for the relevant area, and had lacked the funding to make a proposed designation in time for comment. (*Id.* at 17557-59.) It concurrently issued a proposed rule including the same "Supplementary Information" and incorporating by reference the Final Rule's substance to solicit comments. (AR 208:17579 *also available* at 69 Fed.Reg. 8911 (Feb. 26, 2004).) This rule structure allowed the FWS to meet the court ordered deadline to designate final critical habitat while also

[5] 5 U.S.C. § 500 *et seq.*

initiating the comment process to determine if the 2004 Final Rule should be replaced with a new final rule. (*Id.* at 17580.)

The 2004 Final Rule indicated that subsequent study since the listing of the Sucker had come to fruition and provided new data. (AR 207:17560.) Based on this, the FWS found that critical habitat was now determinable. (*Id.*) It examined the data and found that the PCEs for the Sucker are in part: "(1) A functioning hydrological system that experiences peaks and ebbs in the water volume throughout the year; (2) A mosaic of sand, gravel, cobble, and boulder substrates in a series of riffles, runs, pools and shallow sandy stream margins." (*Id.* at 17561.) Based on this, the FWS designated critical habitat in Los Angeles and San Bernardino Counties while excluding certain "essential habitat" in Riverside and Orange Counties under ESA § 4(b)(2). (*Id.*) The designated habitat was approximately 21,129 total acres. (*Id.*)

The designation, and subsequent designations of critical habitat, have divided the designated area into units and subunits. Units 2 and 3 are the designated areas in the San Gabriel River system and Big Tujunga Creek, respectively. (*Id.* at 17562.) Unit 1 is comprised of all designated areas in the SAR system. (*Id.* at 17561.) Unit 1 is split into subunits, and while the [sic] some subunit names have been re-used (1A, 1B), the associated area does not necessarily correspond to the same area in the earlier rule. In the 2004 Final Rule, Unit 1A consists of the Northern Prado Basin and Unit 1B consists of the Santa Ana Wash and

portions of land along the main stem of the Santa Ana River and several of its tributaries: City Creek, Mill Creek, Chino Creek, and Cucamonga Creek. (*Id.*) The FWS stated that "[w]hile Units 1A and 1B are not known to be occupied, they are essential for the conservation of the Santa Ana sucker because they provide and transport sediment necessary to maintain the preferred substrates utilized by this fish . . . , convey stream flows and flood waters necessary to maintain habitat conditions for the Santa Ana sucker; and support riparian habitats that protect water quality in the downstream portions of the Santa Ana River occupied by the sucker." (*Id.* at 17562.)

The FWS excluded from designation what it considered "essential occupied habitat" along portions of the SAR within the then-current draft MSHCP and the SASCP pursuant to Section 4(b)(2) of the ESA. (*Id.* at 17561.) The FWS analyzed several factors in coming to this decision, including fostering continuing cooperative spirit with agencies, educational value, and likely changes in conservation. (*Id.* at 17564.) In the end, the FWS found that "the benefits of excluding essential habitat within the boundaries of the Western Riverside MSHCP and essential habitat within the area covered by SAS Conservation Program outweigh the benefits of including these areas as critical habitat" and that "[e]xclusion of these areas will not result in the extinction of the sucker." (*Id.* at 17563-64.) Thus, the FWS excluded from designation any lands within Orange County and Riverside County. (*Id.*)

3. 2005 Draft and Final Rule

After two comment periods, peer review, and a public hearing on the 2004 Proposed Rule and two comment periods on the draft economic analysis associated with the 2004 Proposed Rule, the FWS issued a revised final rule designating critical habitat for the Sucker ("2005 Final Rule"). (AR 1611:47004.) This rule revised the PCEs and reduced the designated critical habitat to 8,305 acres. (*Id.* at 1611:47014.) Relevantly, all portions of habitat in the SAR and its tributaries (Unit 1) were no longer designated. (*Id.* at 47016.) This includes the 2004 Final Rule units 1A and 1B along with all the previously excluded area within the MSHCP and SASCP. (*Id.* at 47018-21.)

The Rule stated that it was "excluding" these areas pursuant to ESA § 4(b)(2) or that they were "removed from the revised designation" because they did not warrant being considered essential. (*Id.* at 47005, 470013, 470016.) While it appears that the rule intended to "exclude" the MSHCP and SASCP areas and "remove from designation" the previous 1A and 1B units for no longer being essential, there was some inconsistency on the matter. (AR 272:19682-83 (delineating inconsistencies in the rule); AR 1611:47028 (map showing a Unit 1 with overlap with portions of 2004 Unit 1B marked as "Essential Habitat Excluded From Critical Habitat").) Additionally, the rationale for designating certain unoccupied portions of other river systems was the same as that rejected for designating former units 1A and 1B. (AR 1611:47005, 47015.)

The draft versions of this rule from as late as less than a month prior to publication designated the portions of habitat corresponding for the most part to the 2004 Final Rule subunits 1A and 1B as critical habitat. (AR 269:19548-49, 19613.) It followed the reasoning articulated in the 2004 Final and Proposed Rules for designating these areas. (*Id.* at 19613.)

4. Review of and Litigation Against 2005 Rule

On July 20, 2007, the FWS announced that it would review the 2005 Final Rule because of questions about the integrity of scientific information used and whether the decision was made consistent with appropriate legal standards. (AR 602:24383.) After reviewing the 2005 Final Rule, the FWS determined that revision was necessary. (*Id.*) On November 15, 2007, several conservation organizations filed suit against the FWS alleging the 2005 Final Rule violated the APA and the ESA. (AR 1421:39810.) The claims were based in part on the inconsistencies described above and alleged improper political influence. (*California Trout, Inc., et al v. United States Fish and Wildlife, et al.*, Case No. CV 08-4811 (C.D.Cal) Compl., Docket No. 1.) On January 21, 2009, the court approved the parties' stipulation of settlement. (*Id.*, Order Adopting Stipulated Settlement Agreement, Docket No. 41; AR 1421:39810.) The settlement required the FWS to "re-consider its critical habitat designation for the Santa Ana sucker," to submit a new proposed critical habitat determination

for the Sucker on or before December 1, 2009, and to submit a final determination by December 1, 2010. *Id.*

5. 2009 Proposed Rule and Comment Periods

In December 2009, the FWS issued a proposed rule revising the critical habitat designation for the Sucker and solicited comments and suggestions on it from the public and peer reviewers. (AR 602:24382-83.) The rule specified several specific areas on which it requested information and comments. (*Id.*) The rule proposed to designate 9,605 acres of habitat in total from all three river systems. (*Id.* at 24392.) This included 1,900 acres in new subunit 1A (corresponding to 2004 Final Rule subunit 1B, Santa Ana Wash) that had previously been found not essential in the 2005 Final Rule. (*Id.* at 24393.) It also noted that the Secretary "is considering exercising his discretion under Section 4(b)(2) of the act to exclude 5,472 ac (2,214 ha) in Subunits 1B and 1C (the areas roughly corresponding to that portion of Unit 1 excluded under Section 4(b)(2) in the 2005 Final Rule)." (*Id.* at 24392-93.) The considered exclusion was based on the areas being covered under the SASCP. (*Id.* at 2403-04.) It further proposed to omit from designation some areas that were designated in the 2005 Final Rule. (*Id.* at 24392-93.) The result was a reduction of approximately 14,114, acres in the area considered critical habitat but a net gain of 1,300 acres in designated habitat (from counting as designated the area

that had previously been excluded, despite it still being considered for exclusion under § 4(b)(2)). (*Id.*)

Additionally, the 2009 Proposed Rule indicated that the FWS was preparing a new economic impact analysis. (*Id.* at 24404.) It stated that when completed, the FWS would seek public review and comment on the updated analysis. (*Id.*)

6. 2010 Further Comments and Final Rule

After the initial 60-day comment period on the 2009 Proposed Rule, the FWS published a notice of reopening the comment period and availability of the Draft Economic Analysis ("DEA"). (AR 1421:39810.) In that notice document, the FWS also proposed designating an additional 38 acres. (AR 1615:47109.) In addition to these two comment periods, the FWS also held two public hearings on July 21, 2010 in Corona, CA. (AR 1421:39835.) It also contacted "appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and DEA during these comment periods." (*Id.*)

Then, on December 14, 2010, the FWS published the 2010 Final Rule designating revised critical habitat for the Sucker. (*Id.* at 39808.) In total, the FWS designated approximately 9,331 acres. (*Id.*) It further refined the PCEs, revised its criteria for identifying critical habitat, re-evaluated the Section 4(b)(2) exclusion of habitat, and revised the areas

designated. (*Id.* at 39819-20.) It designated habitat closely along the lines as that proposed in 2009 with the exception of removing a portion of subunit 1A, the portion along the Santa Ana River upstream of the Seven Oaks Dam, and slightly revising subunit 1B. (*Id.* at 39819-20.) Additionally, the 2010 Final Rule concluded that it would not exclude any essential habitat from designation under ESA § 4(b)(2). (*Id.* at 39830-33.) The FWS acknowledged the benefits of exclusion but did not find that they outweighed the benefits of inclusion. (*Id.* at 39833.) Further, it found that even if the exclusion benefits did outweigh the benefits of designation, it would not exercise its discretion to exclude the area regardless because of the conservation status of the Sucker. (*Id.* at 39831.)

C. *The Present Case*

On August 23, 2011, the plaintiff municipalities and water districts filed the present action, challenging the 2010 Final Rule on multiple grounds and requesting various forms of declaratory and equitable relief. (Compl. 81-82, Docket No. 1.) They subsequently filed two amended complaints, and Second Amended Complaint ("SAC") is the currently operative one.

1. Claims Asserted

Plaintiffs assert the following claims

(1) Violation of the ESA §§ 2(c)(2) and 7(a)(2) against all defendants for failing

to cooperate or consult with State and local agencies prior to designating critical habitat.

(2) Violation of the APA, asserted by plaintiffs City of Riverside and the Riverside County Flood Control and Water Conservation District ("Riverside"), against all defendants for the arbitrary and capricious designation of lands within the Western Riverside MSHCP as critical habitat.

(3) Violation of federal law governing operation of the Seven Oaks Dam against all defendants for issuing a final rule that modifies its operation.

(4) Violation of the ESA and APA against all defendants for arbitrarily and capriciously designating critical habitat along the Santa Ana River.

(5) Violation of the ESA and APA against all defendants for issuing a final rule in reliance on an arbitrary and capricious final economic impact analysis.

(6) Violation of the APA and National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) ("NEPA") against all defendants for failing to prepare an Environmental Impact Statement ("EIS") for a major federal action.

(7) Violation of the Freedom of Information Act (5 U.S.C. § 552) ("FOIA") against the FWS for failing to provide a final and

> complete response to certain plaintiffs' FOIA request within the statutory time limit.

(SAC, Docket No. 37.)

On November 21, 2011, Intervenor Defendants moved to intervene, and the Court subsequently granted the motion. (Docket No. 47.) On May 31, 2012, the Court approved the parties stipulation to dismiss the FOIA claim without prejudice. (Docket No. 54.) On June 18, 2012, Plaintiffs and Federal Defendants both moved for summary judgment. (Pls.' Mot. Br. 1, Docket No. 68; Defs.' Mot. Br. 1, Docket No. 66.) The parties move and argue for summary judgment on all six remaining causes of action. (Pls.' Not. of Mot. 1, Docket No. 57; Defs.' Not. of Mot. 2, Docket No. 64.) On the same day, *Amicus Curiae* PLF filed its motion to file an *amicus* brief in support of Plaintiffs' motion for summary judgment. The Court later granted the motion. (Docket No. 83.)

II. *LEGAL STANDARD*

Summary judgment or partial summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" on any claim or portion of a claim. Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A federal agency's compliance with the ESA and NEPA in taking a final agency action is reviewed

under the APA. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir.2012); *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir.2005). Claims under the APA "do not require fact finding on behalf of [the] court . . . , the court's review is limited to the administrative record." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1472 (9th Cir.1974). Thus, these claims are appropriately decided on summary judgment. *Occidental*, 753 F.2d at 769("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.").

Under the APA, a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (D) without observance of procedure required by law." 5 U.S.C. § 706(2). This standard is deferential and narrow, requiring a "high threshold" to set aside agency action. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1068, 1070 (9th Cir.2010). A court must not substitute its judgment for that of the agency, but also must not "rubber-stamp" administrative decisions. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249(2008); *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir.2001). Instead, the action is presumed valid and

affirmed if a reasonable basis exists for the decision. *Nw. Ecosystem Alliance v. FWS*, 475 F.3d 1136, 1140 (9th Cir.2007).

An agency action is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Center for Biological Diversity v. Salazar*, ___ F.3d ___, 2012 WL 3570667 at *4-5 (9th Cir. Aug.21, 2012). In other words, the Court looks to whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Nw. Ecosystem Alliance*, 475 F.3d at 1140 (internal quotation marks omitted).

III. *DISCUSSION*

The Court addresses each of the claims in turn. After examining the relevant statutory provisions for each, the Court analyzes the FWS actions to determine if they are unlawful. The Court finds that Plaintiffs' first cause of action fails because it is premised upon the Federal Defendants' failure to comply with procedural requirements that are not applicable to this agency action. Second, the Court finds that to the extent the second claim is based on the Secretary's decision not to exclude essential habitat under ESA § 4(b)(2), it is an unreviewable act of discretion. To

the extent it is based on an assertion that the designation of these areas (and not the failure to exclude), the claim's asserted ground fails as a matter of law. Next, the Court finds that the third claim, for violations of flood control laws, fails because any alleged conflict is not yet ripe. On the fourth claim, the Court finds that the FWS did not violate the APA by arbitrarily and capriciously designating habitat because all conclusions were rationally connected to the best available science. Additionally, the Court finds that the 2010 Final Rule was not arbitrary and capricious due to reliance on an inconsistent economic analysis. Finally, the Court rejects Plaintiffs' NEPA claim because its requirements do not apply to critical habitat designations.

A. *Violation of the ESA (Claim 1)*

Plaintiffs argue that the 2010 Final Rule was unlawful because Federal Defendants failed to comply with ESA §§ 2(c)(2) and 7(a)(2). (Pls.' Mot. Br. 16.) Namely, that the notice and comment procedures Federal Defendants used are insufficient to constitute the "consultation" and "cooperation" with state and local agencies mandated by those provisions. (*Id.*) The PLF echoes these arguments and further argues that in light of the FWS's overuse of the ESA and disregard for local interests, the ESA should be read to require such consultation and cooperation. (Amicus Br. 12-13.)

Federal Defendants argue that neither of these provisions apply to or create enforceable mandates governing the designation of critical habitat. (Defs.' Mot. Br. 21.) Further, they contend they did "consult" and "cooperate" with state and local agencies. (*Id.* at 22.) Finally, Federal Defendants argue that Plaintiffs lack standing to assert any claim under ESA § 7 because they are not the state. (*Id.* at 29-30.)

The difficulty with Plaintiffs' position is that the detailed provisions of § 4 of the ESA – not the generalized pronouncement in § 2(c)(2) nor the consultations requirements in § 7(a) – control.

1. Statutory Provisions

Section 2 of the ESA is titled "Congressional findings and declaration of purposes and policy." 16 U.S.C. § 1531. It states in part "(c) Policy . . . (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." *Id.*

Section 4 of the ESA, titled "Determination of endangered species and threatened species," lays out specific steps to be taken for listing species and for designating critical habitat. 16 U.S.C. § 1533. In relevant part, it dictates that:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable –

> (I) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A). Further, for "any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall" take several steps to provide sufficient notice to and solicit comment from the public and state and local agencies specifically. 16 U.S.C. 1533(b)(5).

Section 7 of the ESA, titled "Interagency cooperation," lays out the process by which federal agencies taking, funding, or authorizing actions that might jeopardize a protected species or result in negative effects to critical habitat must consult with the Secretary. 16 U.S.C. § 1536. It states in relevant part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action . . . likely to . . . result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical. . . .

16 U.S.C. § 1536(a)(2).

2. Applicability

I. ESA 2(c)(2)

Federal Defendants contend that § 2(c)(2) cannot be the basis for a cause of action against its critical habitat designation because by its words, it does not apply. (Defs.' Mot. Br. 23.) Further, it is only a statement of overall policy behind the statute, not a requirement for a certain procedural action creating a cause of action to enforce it. (*Id.* at 24) This view, they contend, is supported by the legislative history and the numerous cases challenging critical habitat designations. (*Id.*) Plaintiffs respond that § 2(c)(2) is a generally applicable provision, even if it is a policy statement it is still an operative mandate, and to read it as Federal Defendants propose would make the language superfluous. (Pls.' Opp'n Br. 1-2, 6.) Further, they argue the case law and legislative history support their position. (*Id.* at 5-8.)

It is established law that if statutory provisions by their own text indicate they are not operative, a court should not give them such effect. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175, 129 S.Ct. 1436, 173 L.Ed.2d 333 (2009). Such provisions have included "whereas" clauses, so-called "preambles," and "sense of congress" statements. *Id.*; *Yazoo & Mississippi Valley R. Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 33 L.Ed. 302 (1889); *Yang v. California Dept. of Social Services*, 183 F.3d 953, 958 (9th Cir.1999). Though they can be "sometimes relevant to [a court's] determination of whether other mandatory

provisions create private rights of action." *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir.2007).

The Court agrees, that based on the language of the statute and legislative history that § 2(c)(2) is a non-operative statement of general policy. This overall section of the ESA is titled "Congressional findings and declaration of purposes and policy." The specific portion Plaintiffs assert is titled "Policy." When adding this section to the statute, Congress stated only that it was a "statement of congressional policy." S. Rep. 97-418 (May 26, 1982) at 25-26. While it may have also discussed that the purpose of this section was to "recognize the individual States' interest and, very often, the regional interest with respect to water allocation," this does not change the fact that Congress also stated the amendment was "not intended to and does not change the substantive or procedural requirements of the Act." *Id.*

Thus, by its own terms, and in the words of Congress, § 2(c)(2) does not create or modify specific procedural requirements. *See* S. Rep. 97-418 (May 26, 1982) at 25-26. Thus, the Court finds that it is not an operative provision imposing some specific procedural step. Instead, it spells out the policy that Congress intended the statute to accomplish or to be considered in interpreting other portions. As discussed below, this policy is carried through in § 4, where the specific procedures for providing notice to local and state agencies is laid out.

Plaintiffs and the PLF have provided no case applying § 2(c)(2) to mandate an additional procedural step for the designation of critical habitat. The cases they do provide are inapposite or distinguishable. In *Defenders of Wildlife v. Administrator, EPA*, the Eight [sic] Circuit Court of Appeals found that a federal agency, acting pursuant to a different statute, "must still comply with the ESA." 882 F.2d 1294, 1299 (8th Cir.1989). The citizen suit asserted that the EPA's action under this other statute "resulted in unauthorized takings of endangered species." *Id.* at 1300. This "takings issue" was the only claim considered and the court analyzed it based on 16 U.S.C. §§ 1536, 1538. *Id.* These provisions are the ESA § 7 consultation requirements and the § 9 prohibition on "taking" of a protected species. *Id.* Nowhere does the Court find the Eight [sic] Circuit applying a specific mandate from ESA § 2(c)(1), let alone from § 2(c)(2). *Id.* at 1299-1300.

Schaffer Transp. Co. v. United States also does not support Plaintiffs' view of § 2(c)(2). 355 U.S. at 87-88. Plaintiffs argue that the Supreme Court there held that similar language to § 2(c)(2) constitutes a congressional mandate by which administration and enforcement of the overall act of Congress will be measured. (Pls.' Opp'n Br. 5.) However, as Federal Defendants point out, the provision at issue there not only spelled out policy but explicitly stated this statement of policy was "to govern the [agency] in the administration and enforcement of all provisions of the Act. . . ." *Schaffer*, 355 U.S. at 88.

The analysis in *California Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1085 (9th Cir.2011) [hereinafter *CWC*], also does not compel the conclusion that § 2(c)(2) is an operative procedural mandate. Plaintiffs argue that the Ninth Circuit "ruled that 'consultation with affected States,' where required by statute but not defined by Congress, means something more than the invitation of comments from the public." (Pls.' Mot. Br. 16.) However, they fail to appreciate the key contextual points the Ninth Circuit relied on that are not present here. In *CWC*, the panel was analyzing the Energy Policy Act and found a distinctive obligation to consult in light of there being two clearly operative clauses in the same provision, one mandating opportunity to comment, the other stating the Secretary of Energy shall conduct a study of electric transmission congestion "in consultation with affected States." 631 F.3d at 1085 (discussing 16 U.S.C. § 824p(a).) Additionally, the opportunity to comment provision applied to the issuing of a national interest electric transmission corridor ("NIETC") report based on the congestion study previously subject to consultation. 16 U.S.C. § 824p(a). Thus, the court held that just allowing the opportunity to comment was insufficient and that the "consultation" with states for the congestion study must require something other than doing what was required for the subsequent NIETC report. *CWC*, 631 F.3d at 1085. Thus, this case is distinguishable from the statutory framework presented here of a policy statement of general applicability followed by specific

procedural guidelines in a separate section for critical habitat designation.[6]

Accordingly, the Court finds that ESA § 2(c)(2) does not create an enforceable mandate for some additional procedural step. Therefore, the first cause of action fails as a matter of law to the extent it is based on this section.

ii. ESA § 7(a)(2)

The Court similarly finds that § 7(a)(2) of the ESA does not create a cause of action for Plaintiffs against the FWS for its designation of critical habitat. In contrast to § 2(c)(2), this section is operative, but the words of the statute do not create such an action or requirement beyond that already present in § 4.

Federal Defendants argues that by its words, § 7(a)(2) does not create an additional procedural

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[6] Other cases cited by Plaintiffs are equally unconvincing. The holding in *Westlands Water Dist. v. U.S. Dep't of the Interior*, 850 F.Supp. 1388, 1425 (E.D.Cal.1994), that the provision may provide standing to enforce other provisions of the statute does not conflict with finding this provision nonoperative. *See* Orkin, 487 F.3d at 739 (discussing possible relevance of non-operative language in determining private rights under other provisions). Additionally, the holding in *Sierra Club v. City of San Antonio*, is also unhelpful for the question here. *See* 112 F.3d 789, 797 (5th Cir.1997). In that case, the court relied on the statement of policy in supporting its holding that the ESA does not "attempt to preempt all state law related to conservation and the protection of endangered species," and thus the ESA did not suggest "abstention is avoided in cases brought under it." *Id.* at 797-98.

requirement for the FWS to consult with affected states when designating critical habitat. (Defs.' Mot. Br. 25.) The purpose of this section is to force other agencies to consult with it, not to force the FWS to consult with others. (*Id.*) Instead, they contend, § 4 provides the only procedures to be followed in designating critical habitat under the act. (*Id.*) The reference here to the fact critical habitat must be developed in consultation with affected states is a reference to the § 4 procedures. (*Id.*) Federal Defendants also contend that any alleged procedural requirement would be discretionary because the statute only states there should be "consultation as appropriate." (*Id.* at 29.) Additionally, they point to distinctions from Plaintiffs' cited case law. (*Id.* at 28-29.)

The PLF and Plaintiffs argue that to adopt Federal Defendants' (and Intervenor Defendants') construction would render this provision a nullity in violation of principles of statutory construction. (Amicus Br. 9; Pls.' Mot. Br. 18.) The PLF further argues that in light of other instances of the FWS' execution of its ESA responsibilities, it is clear that additional cooperation and consultation with State agencies is needed to avoid improper rule-making. (*Id.* at 13-16.) Plaintiffs argue that Federal Defendants' interpretation of the statute is just wrong and the idea that it is a reference to § 4 which was enacted later is nonsensical. (Pls.' Opp'n Br. 9.)

Starting with the text of the provision, it is clear that the primary purpose is to compel federal agencies to consult with the Secretary prior to taking

actions that could jeopardize listed species or harm designated critical habitat. This does not necessarily mean that the subordinate clause, referencing where the critical habitat comes from, does not create an operative mandate. It could be either a reference to the § 4 notice and comment procedure or a separate mandate that to have effect must mean more than notice and comment.

When first enacted, the only ESA section referencing critical habitat designation was § 7. Endangered Species Act of 1973, Pub.L. No. 96-159, 87 Stat. 892 (Dec. 28, 1973). The pertinent language was largely the same as today, requiring federal agencies taking action that could destroy or modify habitat "determined by the Secretary, after consultation as appropriate with the affected States, to be critical" to consult with the Secretary. *Id.* It remained unchanged through multiple amendments. *See* ESA Amendments of 1978, Pub.L. No. 95-632, 92 Stat. 3752 (Nov. 10, 1978); ESA Appropriation Authorization, Pub.L. No. 96-159, 93 Stat. 1226 (Dec. 28, 1979). The portions of § 4 providing the procedure for designating critical habitat were added in 1982. ESA Amendments of 1982, Pub.L. No. 97-304, 96 Stat. 1411 (Oct. 13, 1982).

Both sides make arguments from this history. As Plaintiffs argue, the language in § 7 could not be a cross-reference to a procedure that was not yet enacted. Nevertheless, § 4 could still be interpreted as a later effort to flesh out the austere and undefined reference to critical habitat designation in § 7.

The Court is in agreement with the latter view. Section 7 also previously provided the only direction for the Secretary to designate any habitat critical. By requiring agencies to consult about destruction of habitat the Secretary designates as critical, it is implied the Secretary must actually do so in some manner. Yet, no one would say that § 7 dictates the Secretary designate additional habitat as critical beyond what is dictated by the criteria in § 4. In the same way, the "consultation as appropriate with affected States" referenced in § 7 was the only statement governing what input the Secretary should take from others in designating habitat critical. Later, when finally spelling out how exactly the Secretary should designate habitat, the statute directs that he or she must provide specific notice to states to allow for comment and hold hearings on request. Thus, the Court finds it is not a separate requirement. So holding does not render § 7 a nullity. It is still operable for its primary purpose. Even the specific passage still operates to identify the habitat § 7 seeks to protect, that which was designated as critical with consultation.

Regardless, the Court finds that even if § 7 referred to consultation as something more or different than the § 4 notice and comment procedures, the statute by its other terms does not require such consultation. Section 7 refers only to consultation "as appropriate." This language indicates a grant of discretion. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 813 (D.C.Cir.2012); *United States*

v. First Nat. Bank of Circle, 732 F.2d 1444, 1449 (9th Cir.1984). Plaintiffs do not argue there was an abuse of discretion in failing to consult, only that there was a failure to do so when it was required. (SAC ¶¶ 100-09.) Additionally, pursuant to 5 U.S.C. § 701, judicial review of agency decisions under the APA does not apply to "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Therefore, the Court finds that Plaintiffs' first cause of action fails as a matter of law under § 7 as well because there is no actionable mandate that has been violated by the FWS. Because there is no claim, the Court does not reach the arguments over whether Plaintiffs have standing or whether Federal Defendants complied with the alleged requirements. Accordingly, the first cause of action fails under both asserted grounds, and the Federal Defendant must be granted judgment.

B. *APA Violation for Designating MSHCP Lands (Claim 2)*

Plaintiffs' second cause of action claims Federal Defendants violated the APA by designating Western Riverside MSHCP lands as critical habitat. (SAC ¶¶ 133-143.) They argue that designating these lands was arbitrary, capricious, and contrary to law for several reasons. (Pls.' Mot. Br. 21-22.) Plaintiffs contend that Federal Defendants failed to provide a clear explanation for their "radical departure" from the previous critical habitat designation that excluded

these areas. (*Id.* at 22.) Additionally, designating this area was contrary to the "No Surprises" rule codified in 50 C.F.R. § 17.32(b)(5) and discussed in the MSHCP plan and implementing agreement (IA). (*Id.* at 23-27.) Finally, designating this area violated certain assurances made by the FWS in the MSHCP IA. (*Id.* at 28.)

Federal Defendants argue that the decision to not exclude essential habitat under § 4(b)(2) is committed to the discretion of the Secretary and is thus not judicially reviewable. (Defs.Mot.Br.33-34.) Even if it was reviewable, they argue that the decision to designate this area was not arbitrary, capricious, or contrary to law. (*Id.* at 33.) Federal Defendants contend that a rational basis was articulated and all proper factors were considered. (*Id.* at 36.) They further argue that the No Surprises rule, the MSHCP plan, and MSHCP IA have not been violated. (*Id.* at 42.) The Intervenor Defendants further argue that to the extent the designation of essential habitat as critical was somehow bargained away by the FWS in the MSHCP plan or IA, the FWS lacked the authority to do so under the law. (Ints.' Opp'n Br. 7.)

1. Relevant Statutory and Agreement Provisions

Pursuant to § 4(b)(2) of the ESA, the FWS must designate critical habitat based on "the best scientific data available and after taking into consideration the economic impact, the impact on national security, and

any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Further:

> [t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id.

In the implementing regulations governing FWS issued permits for activities normally prohibited by the ESA, there is a provision known as the No Surprises rule. 50 C.F.R. § 17.32(b)(5). This regulation governs incidental take permits issued in accordance with a properly implemented conservation plan and applies only to "species adequately covered by the conservation plan." *Id.* When it applies, "additional conservation and mitigation measures" deemed necessary to respond to changed circumstances but not provided for in the plan's operating conservation program will not be required by the FWS Director without consent of the permittee." 50 C.F.R. § 17.32(b)(5)(ii). The Director may require additional measures of a permittee even if the conservation plan is being implemented only if they are found necessary to respond to "unforeseen circumstances." 50 C.F.R. § 17.32(b)(5)(iii)(B). Such circumstances

must be shown by the Director and meet several requirements. 50 C.F.R. § 17.32(b)(5)(iii)(C).

Several passages in the MSHCP plan and IA echo this regulation. (*See* MSHCP Plan § 6.8, AR 190:10507; MSHCP IA § 4.3(C), AR 1679:49010.) Additionally, the MSHCP Plan also states in part "[t]he USFWS agrees that, to the maximum extent allowable after public review and comment, in the event that a Critical Habitat determination is made for any Covered Species Adequately Conserved, and unless the USFWS finds that the MSHCP is not being implemented, lands within the boundaries of the MSHCP shall not be designated as Critical Habitat." (MSHCP Plan § 6.9, AR 190:10508.) In addition, if Critical Habitat is designated within the MSHCP boundaries the No Surprises rule governs, forbidding the mandating of further conservation measures by permittees without unforeseen circumstances being shown. (*Id.*) The IA echoes these provisions as well. (MSHCP IA § 14.10 AR 1679:49046.)

2. Reviewable Decisions

Pursuant to 5 U.S.C. § 701, judicial review of agency decisions under the APA does not apply to an "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Where there is no substantive standard by which a court can review a agency action, that action is committed to agency discretion. *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

The choice not to exclude habitat is not judicially reviewable because it is committed to agency discretion. Here, while Plaintiffs are correct that there is a standard by which to measure when the Secretary may exercise discretion to exclude essential habitat from designation, there is none for choosing not to exclude habitat. The statute is written in the permissive with conditions precedent before such permission is granted. The statute does not say the Secretary shall exclude if, in his or her discretion, the benefits of exclusion outweigh the benefits of inclusion; it only says the Secretary is authorized to do so upon that finding. Thus, given that there is no standard to judge the decision not to exclude, it is committed to agency discretion and not judicially reviewable. *See Homebuilders Ass'n of N. Cal. v. USFWS*, 2006 WL 3190518 at *20 (E.D.Cal. Nov.2, 2006) *modified on other grounds by* 2007 WL 201248 (E.D.Cal. Jan.24, 2007); *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F.Supp.2d 108, 126-27 (D.D.C.2004).

However, the process for determining whether certain areas meet the requisites for critical habitat designation absent an exclusion does have an articulated standard to measure agency decisions against. 16 U.S.C. § 1533(b)(2). Thus, it is judicially reviewable. This comports with the Plaintiffs' position supported by *Bennett v. Spear*, 520 U.S. 154, 171-72, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). (Pls.' Opp'n Br. 16.) They point out that while the final decision over whether to exclude may not be subject to judicial

review, whether the appropriate steps were taken prior to exclusion decisions is reviewable. (*Id.*) Specifically, *Bennett* held that the economic impact of designation and the best available scientific data available must be taken into consideration by the Secretary in arriving at his ultimate decision on designation. 520 U.S. at 172.

3. *Exclusion v. Designation*

Any designation decision based on not excluding habitat is not reviewable. The previous Rules all held the subject area would be designated absent the Secretary's decision to exclude the area after weighing the different benefits.[7] (*See e.g.*, 2004 Final Rule AR 207:17563.) Thus, Plaintiffs' argument that the designation of MSHCP lands as critical habitat was arbitrary and capricious because it was a departure from the 2005 Final Rule without explanation fails as a matter of law. The underlying determination that it meets the requirements to be critical habitat has been unchanged. All that changed was the decision of

[7] At oral argument, Plaintiffs argued that these areas could not be considered excluded from critical habitat designation because they had never been designated in a previous rule. The statute simply does not support this view. The Secretary is required to consider exclusion of lands after determining they meet the other requirements to designate. 16 U.S.C. § 1533(b)(2). Further, if Plaintiffs' position were true, then these areas were withheld from designation in error because the FWS did so on the basis of the exclusion framework every time without having previously designated the area.

whether to exclude otherwise critical habitat from designation. Therefore, the Court examines whether any of Plaintiffs' articulated grounds constitute arbitrary, capricious, or unlawful determination that the habitat was critical.

First, the Court looks to whether the designation can be considered arbitrary and capricious on the bases asserted here. Then it will turn to whether it was somehow otherwise unlawful. Plaintiffs' remaining challenges in this claim go to whether Federal Defendants considered factors Congress did not intend them to or failed to consider an important aspect of the problem in only one possible way. *See Center for Biological Diversity*, 695 F.3d 893, 2012 WL 3570667 at *4-5.[8] The challenges center on whether Federal Defendants' designation was contrary to certain agreements the FWS entered into or the reguatory No Surprises rule. It is possible to argue that meeting one's assurances in conservation plans should be considered an "other relevant impact [ ]" that the FWS was procedurally required to consider in reaching its exclusion decision. 16 U.S.C. § 1533(b)(2). Thus, the argument goes, because the assurances are

[8] In opposition, Plaintiffs argue that the decision to designate MSHCP lands was made without considering the best available scientific data. (Pls.' Opp'n Br. 18-19.) Specifically, they challenge whether they considered the proper data when discussing that Sucker habitat and Population are in decline. (*Id.*) For the reasons discussed in Section III. D. 4. *infra*, the Court has found that these conclusions were made upon the best available scientific data.

not discussed in the 2010 Final Rule, a relevant impact was not considered, meaning an important aspect of the problem was not considered, and therefore it was arbitrary and capricious. However, this argument fails because the Court finds that this element has not yet been found to be such a "relevant impact" and regardless, it was sufficiently considered under the umbrella of partnership benefits the FWS weighed. (*See* AR 1421:39833.) In the exclusion decision, the FWS extensively discusses how excluding these area from designation would result in "significant partnership benefits." (*Id.*) Specifically, it found that exclusion "would help to maintain and strengthen our partnerships with plan participants and also encourage new voluntary partnerships" and recognized the benefit of maintaining of existing partnerships. (*Id.*) Thus, the FWS recognized that not excluding this area could negatively affect maintenance of the MSHCP partnership and considered it. Therefore, there is no failure to consider an important relevant impact. Additionally, the cited assurance provisions are couched in terms of what is permissible by law. Further, the agreements state that exclusion of such territory is likely, but not guaranteed. (MSHCP IA § 14.10 AR 1679:49047.) Thus, it is not clear there is such a direct contravention of the assurances. If these assurances were construed to be so rigid, they may be beyond the FWS's authority since it would excuse the Federal Defendants' congressionally-mandated duty.

Further, Plaintiffs do not attack the rational relationship between the facts underlying the determination that the land was critical habitat and the Federal Defendants' finding. Therefore, the Court finds designating these areas is not arbitrary or capricious. *Id.*

Looking to the No Surprises regulation, the Court also concludes that the designation was not unlawful. This regulation forbids the FWS from requiring the permittees to perform additional conservation activities in conjunction with permitted activities without consent or unforeseen circumstances. Plaintiffs quote a statement from a draft of the 2010 Final Rule as "impos[ing] additional measures on the Permittees." (Pls.' Mot. Br. 28.) It states that "the designation of critical habitat will provide an additional conservation benefit[ ] through the section 7 consultation process that we believe will add to conservation and recovery actions not currently afforded by the plan or program." (*Id.* (quoting 1291:35676-677).) As Federal Defendants point out, this does not necessarily conflict. (Defs. Opp'n Br. 14-15.) Specifically, the statement from the draft rule is not limited to covered actions taken by the permittees. This is even more apparent when looking to the actual 2010 Final Rule. The actual rule does discuss "conservation not currently provided under the plan or program" but only in summary after discussing explicitly several benefits not covered by the MSHCP or SASCP. (AR 1421:39833.) These enumerated benefits include signaling, educational, and consultation on non-covered

activities. (*Id.* at 39831-33.) Thus, it seems clear the 2010 Final Rule is not discussing additional measures by the permittees in undertaking covered activities when it discusses additional conservation. Therefore, there is no clear violation of the No Surprises rule. This is further supported by the FWS's subsequent decision not requiring additional acts for conservation for permitted activities on the basis of the 2010 Final Rule in the MSHCP. (Gelatt Decl. Ex. 1 p. 12, Docket No. 78-1.) The Court therefore finds that it was not unlawful on this basis.

Accordingly, the designation of critical habitat within the MSHCP was not arbitrary, capricious, or unlawful simply because it was within MSHCP lands.

C. *Violation of Flood Control Regulations (Claim 3)*

The third claim for relief contends that Federal Defendants acted unlawfully in issuing the 2010 Final Rule because it violates federal law governing flood control operations for the Seven Oaks Dam. (SAC ¶¶ 134-143.) Plaintiffs argue that in issuing the 2010 Final Rule, Federal Defendants have impermissibly modified Congress's mandate for flood control operations of the Seven Oaks Dam, as reflected in the USACE's operating regulations. (Pls.' Mot. Br. 29, 36.) Additionally, they claim the new revised critical habitat constitutes a reconsideration of the 2002 Biological Opinion the FWS issued on the operation of the Seven Oaks Dam. (*Id.* at 30-31.) Finally, they

argue that in mandating certain flood control operations, the FWS failed to address USACE comments. (*Id.* at 32-35.)

Federal Defendants argue that Plaintiffs' asserted claim fails as a matter of law for several reasons. (Defs.' Mot. Br. 45.) First, Plaintiffs fail to identify any specific congressional mandate or statute that has been violated. (*Id.* at 45-47.) Second, Plaintiffs cannot show any actual mandated change in dam operations that would be violative, and any mandate would be forthcoming and therefore the claim is unripe. (*Id.* at 47-52.) Third, the 2010 Final Rule is not inconsistent with the 2002 Biological Opinion. (*Id.* at 52-53.) Fourth, they did sufficiently address the USACE's comments. (Defs.' Opp'n Br. 23.)

1. Applicable Statutes and Excerpts of the 2010 Final Rule

I. ESA § 7 Consultation Process

After the FWS has designated critical habitat pursuant to § 4 of the ESA, several obligations are triggered. Most relevant, other federal agencies have to consider that habitat in taking "agency action[s]." 16 U.S.C. § 1536(a)(2). Specifically, a federal agency must review its actions to determine if an action "may affect . . . critical habitat." 50 C.F.R. § 402.14(a). If that agency so determines, it must initiate formal or informal consultation with the FWS. *Id.* at §§ 402.13-14. Additionally, the FWS Director can request in writing with explanation that a federal agency enter

into consultation if he identifies an agency action that may affect critical habitat for which no consultation has been conducted. *Id.* at § 402.14(a).

Modifications to agency action can be suggested in informal consultation. *Id.* at § 402.13(b). If as a result of a biological assessment performed by the agency or of informal consultation with the FWS, the acting agency determines with the written concurrence of the FWS director that the action is not likely to adversely affect critical habitat, no formal consultation is required. *Id.* at § 402.14(b). If either the agency of [sic] the FWS determine that it is likely to adversely affect critical habitat, the agencies must engage in formal consultation. *Id.* at §§ 402-13(a), 402.14(a)-(b). In a formal consultation, the resultant biological opinion will state whether the proposed agency action is likely to destroy or adversely modify critical habitat or not. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14. If it finds adverse modification is likely, the FWS must suggest reasonable and prudent alternatives that would avoid it or state that to the best of the FWS's knowledge there are no reasonable and prudent alternatives. 50 C.F.R. § 402.12(h)(3).

ii. Relevant Excerpts of the 2010 Final Rule

While discussing physical and biological features essential to the conservation of the Sucker, the 2010 Final Rule states in part that river "flows to clear out fine sand and silt from suitable spawning substrate

(*i.e.*, gravel and cobble) and flows to transport suitable material from upstream sources for maintenance of spawning substrate are essential to the conservation of Santa Ana sucker." (AR 1421:39814.) It goes on to point to a study (Humphrey *et al.* 2004) that states the critical flow of water in the Santa Ana River to transport gravel and cobbles downstream is 4,000 cubic feet per second ("cfs"). (*Id.*) Meanwhile, lower flows of 500-4,000 cfs are sufficient "to move silt and other fine sediment that accumulates on top of suitable spawning substrates." (*Id.*)

Later, the FWS discusses the criteria used to identify critical habitat in areas outside the geographical area occupied by the Sucker at the time of listing. (*Id.* at 39818.) In that discussion, it states that it:

> determined that the Santa Ana River above Tippecanoe Avenue, Mill Creek, and City Creek are essential for the conservation of the species because they are areas that provide or contain sources of water and coarse sediment (PCE 1) that may be transported downstream and are necessary to maintain preferred substrate (PCE2) in occupied portions in the Santa Ana River. . . . Water released from the [Seven Oaks] Dam is most important when winter storm water is transported downstream in high quantity and velocity."

(*Id.* at 39818-19.)

Finally, in the comments section, the FWS summarizes and responds to comments from the USACE regarding flood control operations. In the 2010 Final Rule the FWS states that the USACE:

> expressed their concern that the critical habitat designation in the Santa Ana River above Seven Oaks Dam, below Prado Dam, and in the upper Prado Dam Basin may impact the ongoing construction, operation, and maintenance of several elements of the Santa Ana River Mainstem Flood Control Project (SARP). The commenter is concerned that the designation of critical habitat would place significant restrictions on the manner in which the operations and management work is performed and potentially affect the lives and property of millions of citizens.

(*Id.* at 39839.) The FWS responded that the only direct effect on activities or operations would be the possible need for a project-specific § 7 consultation, no more. (*Id.* at 39840.) It further points out that the process allows for emergency consultation to expedite measures required to ensure health and safety where formal consultation occurs after actions are taken. (*Id.*) Therefore, it concluded the 2010 Final Rule would not impact operations from § 7 consultations, the only necessary result from the 2010 Final Rule. (*Id.*)

2. Ripeness

The Court finds that the claim fails as a matter of law because there is no ripe violation of flood control laws. Plaintiffs' claim that the FWS, through its 2010 Final Rule designating critical habitat, somehow "attempt[s] to modify Congress' mandate that the Seven Oaks Dam be operated [for flood control]." (SAC ¶ 138.) They point to the 2010 Final Rule discussions quoted above. (SAC ¶ 135; Pls.' Mot. Br. 37; Pls.' Opp'n Br. 25.)

However, the only portion mentioning specific flows that Plaintiffs say conflict with flood control mandated dam flows are speaking to river flows, not dam flows. (AR 1421:39814.) The other portions are too nebulous to be considered a mandate or modification of flood control operations. None of these excerpts or any other portion of the 2010 Final Rule mandate any type of dam operations. Plainly, nowhere in the rule does it state the dam operators must do something. Accordingly, the 2010 Final Rule cannot, in the abstract, conflict with any purported federal flood control mandates.

While Plaintiffs state the Supreme Court has recognized that "the designation of critical habitat results in the necessity of a biological opinion," the designation does not necessarily result in one for every agency action. (Pls.' Opp'n Br. 28 (citing *Bennett v. Spear*, 520 U.S. 154, 158, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)).) The procedure laid out above illustrates this. Additionally, they are correct that a

biological opinion issued by the FWS for a proposed action "has a powerful coercive effect on the action agency." (Pls.' Opp'n Br. 28 (quoting *Bennett*, 520 U.S. at 169).) However, what that coercive effect is, what the alternative methods provided by the FWS are, and whether the FWS will find the action will or will not likely modify critical habitat are all unknown. The USACE and FWS could resolve the matter in consultation. Any conflict between the dictates of the 2010 Final Rule and the operations of the dam has yet to come about. If and when it does, the § 7 consultation process must play out. Only then would the dispute be ripe. This comports with the FWS's response to the USACE's comments on the proposed rule.

The Plaintiffs point to *NRDC v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir.1997), as allowing a more general "programmatic" challenge to an agency action. However, this case is inapposite to the claim presented here. There, the court found a "programmatic challenge to the failure to designate habitat" was ripe. *Id.* at 1124. It stated that "plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan." *Id.* That challenge, however, was to the FWS's decision not to designate critical habitat, and the harm was elimination of § 7 consultations. *Id.* The plaintiffs argued and the court agreed that the FWS improperly found that designating critical habitat was not prudent at the time of listing the species. *Id.* at 1124-26. It found that the FWS misapplied and misinterpreted the

proper meaning of regulations and statutes dictating designation absent imprudence. *Id.* Thus, the challenge was to the FWS's designation decision and process, not to alleged future conflicts or mandates. Not only is the alleged harm in this challenge in the future, so is the alleged conflict or violation of law for the reasons previously stated. All *NRDC* stands for is that the other claims going to the procedure followed in designating habitat in this case are ripe.

The Court grants Federal Defendants judgment as a matter of law on Plaintiffs' third cause of action.[9]

D. *Violation* of the *APA* in *Designating Subunit* 1 *Lands (Claim 4)*

In their fourth claim for relief, Plaintiffs contend that Federal Defendants violated the APA and ESA when designating critical habitat along the SAR for the Sucker in the 2010 Final Rule. (Compl.¶¶ 144-180.) They assert that the designation was arbitrary and capricious in three ways. (*Id.*) They argue that Federal Defendants failed to provide a rational basis for many of their findings, to use the best scientific

[9] Since the Court finds any dispute is unripe, it does not reach whether there is an actual flood control statute or Congressional mandate governing specific flows that the 2010 Final Rule could be in conflict with, whether such a conflict would be considered unlawful, whether the USACE comments on the matter were sufficiently addressed, or whether the 2002 Biological Opinion has been reconsidered.

data to support those findings, and to comply with certain regulatory requirements. (*Id.*)

1. Statutes and Regulations

Under the ESA, critical habitat is defined as:

> (I) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and
>
> (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The Joint ESA implementing regulations echo and further specify how these determinations are made, dictating the FWS begin with determining the PCEs[10] for a species and whether special management considerations or protection are required, then laying out how to do so. 50 C.F.R. § 424.12(b). Once these are determined, the FWS

[10] Physical and biological features essential to conservation of the species.

must designate areas occupied by the species at listing containing these features. *Id.* Then, "[t]he Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

As mentioned earlier, the ESA dictates that a designation of critical habitat should, to the maximum extent prudent and determinable,[11] be designated at the same time a species is listed as threatened or endangered. 16 U.S.C. § 1533(a)(3)(A). Further, the Secretary "may, from time-to-time thereafter as appropriate, revise such designation." *Id.* The regulations specify that existing critical habitat may be revised according to the procedures in this section as new data become available to the Secretary. 50 C.F.R. § 424.12(g). Such designations or revisions must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

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[11] Habitat is indeterminable when "(I) Information sufficient to perform required analyses of the impacts of the designation is lacking" and/or "(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat." 50 C.F.R. 424.12(a)(2).

2. Rational Basis

As stated previously, there must be a rational connection between the facts found and the choices made for an agency action to avoid being found arbitrary and capricious. *Nw. Ecosystem Alliance*, 475 F.3d at 1140. Namely, the explanation should not run "counter to the evidence before the agency or [be] so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Center* for *Biological Diversity*, 695 F.3d 893, 2012 WL 3570667 at *4-5.

Plaintiffs argue that Federal Defendants failed to articulate a rational explanation or basis for several decisions and findings. (SAC ¶¶ 150-56; Pls.' Mot. Br. 38-43, 49, 53.) They argue that several findings are not rationally connected to the facts because they are solely based on the FWS's unsupported belief or speculation. (Pls.' Mot. Br. 49, 53.) Plaintiffs further contend no explanation, rational or otherwise, was provided for several key findings or for departing from the 2005 Final Rule decision not to designate any habitat along the SAR. (*Id.* at 38, 40-43, 54.) Finally, they argue certain explanations are not rational because they are internally inconsistent. (*Id.* at 63.) Federal Defendants and Intervenor Defendants rebut Plaintiffs' asserted flaws and add that the 2005 Final Rule is owed no deference. (Defs. Mot. Br. 56; Ints.' Opp'n Br. 21.)

I. Speculation or Unsupported Belief

Plaintiffs argue that Federal Defendants relied on speculation and unsupported belief to justify designating subunit 1A. (Pls.' Mot. Br. 49, 53.) They point to an email in the record where an FWS employee is discussing her current knowledge and "thought process" in articulating why the results of § 7 consultation for possible jeopardizing of the Sucker and for possible adverse modification of the Sucker's critical habitat would be similar in order to assist the economic analysts. (*See* AR 710: 24867-71.) In discussing her reading of the 2009 Proposed Rule, she states:

> we did not say that the function of 'dry' portions of Unit 1A was to provide sediment; we said storm flows to maintain sediment transport – At this point in time, there is an abundance of sediment in the mainstem (whether it is enough to support PCEs in Unit 1B is one question; whether there are sufficient flows to transport it is anotherwe [sic] can likely attempt to address only the second); but . . . if Mill and/or City creeks were eventually dammed, a significant adverse effect to essential or CH would occur both from changes to storm flows and sediment sources.

(*Id.* at 24870.) Plaintiffs argue that this passage "suggests that Subunit 1A was designated, not on the basis of science, but, on the basis of speculation regarding unsubstantiated future events." (Pls.Mot.Br.50.)

The Court rejects the proposition that this passage in an email exchange shows the 2010 Final Rule was based on speculation. The Plaintiffs provide no case law supporting this contention and the Court notes that it reviews "administrative action on the basis of the agency's stated rationale and findings." *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C.Cir.1984), *aff'd in pertinent part sub. nom*, 760 F.2d 1320, 1321 (D.C.Cir.1985) (en banc), *cert. denied*, 479 U.S. 923, 107 S.Ct. 330, 93 L.Ed.2d 302 (1986). Plaintiffs do not point to how the stated rationale for designating subunit 1A is implicated by this passage. Further, it does not appear speculative. The employee was illustrating why designation was required by pointing to a possible action that would likely require consultation because of its effect. This is not speculation about why the area is critical, it is speculation on how critical habitat could be harmed by future action without designation. The rationale, that storm flows are required, is not based on the occurrence or non-occurrence of damming: this was merely an illustration of the importance of maintaining these sources. Therefore, the Court cannot find that the explanation for designating subunit 1A is speculative and thus not rationally connected to facts on that basis

Plaintiffs also argue the designation is made in part on unsupported belief. (Pls.' Mot. Br. 53.) In *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1092 (9th Cir.2005), the Ninth Circuit held that the assertion of

belief alone is insufficient to sustain an ESA § 7 agency finding. In that case, the Court found the agency's decision that certain phases of a reasonably prudent alternative would not jeopardize the subject endangered species lacked support. *Id.* at 1091-92. The court found that all the provided scientific data in the associated biological opinion asserted that a certain flow was required to prevent jeopardy to the species on a long-term basis but none discussed the proposed short term plan. *Id.* at 1092. That plan called for much lower flows in the initial phases and asserted these flows would also "avoid the likelihood of jeopardy." *Id.* The Court found this statement was unsupported since all the data indicated larger flows were required and did not analyze any type of tiered implementation and its effects. *Id.* In the portions cited by the Plaintiffs, the 2010 Final Rule does appear to assert beliefs, presumptions, and apparent impacts. (Pls.' Mot. Br. 53-54.) The Court examines the context of each to determine if such beliefs or statements underlay the subunit 1A designation and if they are supported.

Plaintiffs first point to the FWS's statements in the 2010 Final Rule that say "we believe the creeks and rivers in [2010 subunit 1A, 2004/05 subunit 1B] provide stream and storm waters (PCE 1) required to transport sediments that are necessary to maintain preferred substrate (PCE 2) conditions." (*Id.* (quoting AR 1421:39821).) However, the quoted portion is a summary of the changes between the 2005 Final Rule and the 2010 Final Rule. (AR 1421:39821.) Later, the

2010 Final Rule provides its reasoning and support in favor of its belief. (*See* AR 1421:39823-24.) It states that it "determined these areas are essential for the conservation of the species because of the process of water and corse sediment transport that they provide." (*Id.* at 39823.) On the next page it lays out its overall reasoning, references other sections with further support, and cites several studies in support, including Kondolf 1997 and Warrick and Rubin 2007, amongst others. (*Id.* at 39824.) Thus, it is not unsupported or standing alone.

Next Plaintiffs point to the statement "[p]resumably there has been a reduction in transported cobble and gravel from the upper [SAR] because periodic high flow events have been controlled by the Seven Oaks Dam" as showing findings were made on unsupported belief. (Pls.' Mot. Br. 53 (citing AR 1421: 39814.) Similar to the previous excerpt, reasoning and supporting citations to studies are provided for this statement but not separated as it was there. Here it is in the previous and subsequent paragraphs. (AR 1421:39814.) It cites a study on the level of flow being connected to sediment transport and speaks to high flow events being controlled by dams, something they were designed to do. (*Id.*)

Finally, Plaintiff quote the rule stating "there appear to be impacts to the [Sucker] and its habitat through alteration of the hydrologic system and the function of the watershed as a whole." This statement is not a statement of unsupported belief standing alone. *See Pacific Coat Fishermans' Ass'ns*, 426 F.3d

at 1092 It is immediately followed by its support, citing and reasoning from Thompson et al. 2010 and Service 2000. (*Id.* at 39816.)

Therefore, the Court finds that Federal Defendants did not fail to provide a rational basis for their findings because of reliance on unsupported belief or speculation.

ii. Lack of Explanation

Plaintiffs next argue that Federal Defendants failed to rationally connect their designation with the facts because certain designations were made without the required explanations. (Pls.' Mot. Br. 38, 40-43.) They first argue that Federal Defendants did not provide an explanation for deviating from the 2005 Final Rule non-designation of subunit 1A. (*Id.* at 54, 57.) Next, Plaintiffs contend that Federal Defendants designated unoccupied habitat as critical without articulating that solely designating occupied habitat would be inadequate or providing an explanation for how such area was essential. (*Id.* at 38, 40-43.)

There is a presumption that an agency's policies will be carried out best if the settled rule is adhered to. *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973). This presumption creates an agency duty "to explain its departure from prior norms." *Id.* Such a duty is generally triggered when a factual determination is directly contradicted by an earlier one in the same context or rescinds a specific rule or applies a

legal standard inconsistently. *Humane Society of U.S. v. Locke*, 626 F.3d 1040, 1051 n. 4 (9th Cir.2010).

Here, the fact that the 2010 Final Rule deviates from the 2005 Final Rule in choosing not to exclude portions of critical habitat within the SASCP or MSHCP has already been addressed under claim 2. *See* Section III. B. *supra*. Further, the Court finds that deviating from the 2005 Final Rule to designate certain unoccupied habitat does not require an explanation, or an explanation was provided. Unoccupied habitat in these same areas was designated in previous rules on the same theory that underlay the designation of certain unoccupied portions of unit 2 in the 2005 Final Rule, and that underlies the 2010 Final Rule designation of unoccupied habitat. (AR 285:20262.) If any rule is inconsistent, it is the 2005 Final Rule. The FWS acknowledged as much in choosing to review the order and in settling the lawsuit against it. *See* Section I.C.4. *supra*. Shifting from a flawed, inconsistent rule either does not require an explanation or the fact it was inconsistent is itself a sufficient explanation. Therefore, the Court finds no rational-basis failure on this grounds [sic].

The Court also finds that Federal Defendants provided an explanation for designating the unoccupied territory it did with the requisite findings rationally connected to facts. As a preliminary matter, the Court addresses the contention that the ESA and the implementing regulations require two separate findings: that the unoccupied territory is essential to conservation and that designation of only occupied

territory would be inadequate for conservation. *See* 16 U.S.C. § 1532(5)(A)(ii); 50 C.F.R. § 424.12.[12] Federal Defendants argue that if something is essential, not having it is necessarily inadequate. Otherwise, it would not be essential. The Court agrees. To be essential is to be absolutely necessary, extremely important, or indispensable. *See Oxford Online English Dictionary, available at*, http://oxforddictionaries.com/definition/english/essential; *Merriam-Webster Online Dictionary, available at*, http://www.merriamwebster.com/dictionary/essential. If certain habitat is essential, it stands to reason that if the Secretary did not designate this habitat, whatever the Secretary otherwise designated would be inadequate. The 2009 Proposed Rule and the 2010 Final Rule show the FWS considered these two statements as two sides of the same coin. (*See* AR 602:24391; 1421:39818.) In discussing the San Gabriel river, it found that occupied areas "are adequate for the conservation of the species." (*Id.*) In the next section discussing the SAR, it speaks to unoccupied areas but this time finds they

[12] The Court notes the statute references territory unoccupied at the time of listing while the regulation references presently unoccupied territory. 16 U.S.C. § 1532(5)(A)(ii); 50 C.F.R. § 424.12. Such a deviation opens a possibility of conflict between the two, in which the statute commands the area be designated because it was occupied at the time of listing and contains PCEs, but the regulation states it should not be designated because it is currently unoccupied and other presently occupied habitat would be adequate to conserve the species. Because the parties agree the subject area is unoccupied under either measure, the Court need not resolve this conflict.

"are essential to the conservation of the species." (*Id.*) Thus, the Court finds that the regulation provides only elaboration and not an additional requirement or restriction.

Additionally, the Court finds there was an explanation provided for finding that the unoccupied habitat designated was essential and a designation without it would be inadequate. (*See* AR 1421: 3981813-14, 18 (discussing PCEs, necessary river flows from upriver locations beyond occupied habitat.) The explanation rationally connects this conclusion with the facts as stated. (*Id.*) The Court is not swayed by the quoted emails provided by Plaintiffs. (*See* Pls.' Mot. Br. 39-40.) They appear to be open discussion about the decision-making process, and the fact that one employee at one time or another did not know something is of little relevance to whether a rationally explained conclusion was reached in the Final Rule. Additionally, these discussions did not pertain to the unoccupied habitat that was actually designated. (*Compare* AR 691:24822 *with* AR 1421:39822.)

Therefore, the Court finds that there is no failure to provide explanations for the decisions pointed to by the Plaintiffs. Accordingly, they do not fail to indicate a rational connection on that basis.

iii. Internal Inconsistency

Plaintiffs next contend that the 2010 Final Rule designation of subunits 1B and 1C is not rationally based because it is internally inconsistent. (Pls.' Mot.

Br. 63.) Specifically, they argue that the rule in one part reasons that "the critical habitat designation will assist in achieving additional conservation not currently provided under [the SASCP or MSHCP]" but then in the accompanying FEA it reasons that "[i]n Riverside County, established mitigation efforts are assumed to be adequate to protect the sucker in areas where take is allowed." (*Id.* (citing AR 1421:39833; 1326:36509).)

However, this argument disregards the context of and limitations in the above-quoted provisions. The Final Rule is speaking to conservation generally, i.e., that the designation of critical habitat in 1B and 1C that includes MSHCP and SASCP lands will lead to additional conservation. (AR 1421:39833.) It mentions regulatory, signaling, and educational conservation benefits specifically. (*Id.*) It mentions projects not covered by the MSHCP and SASCP. (*Id.* at 39832-33.) The cited section of the FEA is from a [sic] the chapter of analysis discussing "Potential Economic Impacts on Development Activities." (AR 1326:36501.) It is one of many chapters describing subsets of economic impacts such as that from "Water Management Activities," "Transportation Activities," "Recreational Activities" and "Mining Activities." (*Id.* at 36441.) In that chapter, in the subsection titled "Per-Acre Costs of Conservation Efforts for Development Activities," the above-quoted statement appears which by its terms is limited to Riverside County and to areas where take is allowed. (*Id.* at 36509.) The previous

and following statements specifically only discuss development activities. (*Id.*)

The Court finds these two passages are not inconsistent because Federal Defendants can rationally conclude additional conservation benefits could result from critical habitat designation in the area while calculating costs on the basis that no additional development associated conservation measures will be required in that area. Therefore, the designation of these lands cannot be considered "unreasoned" in the vein of *Greenpeace v. National Marine Fisheries Service*, 80 F.Supp.2d 1137, 1147 (W.D.Wash.2000) (declining to defer to agency decision where it was not reasoned because the analysis was not co-extensive with the action it was analyzing).

Accordingly, the Court finds none of the asserted arguments show the designation was arbitrary and capricious for failing to show a rational connection between the provided facts and the findings and action.

3. Best Available Science

The "best available science" mandate of the ESA sets a basic standard that prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on. *In re Consolidated Salmonid Cases*, 791 F.Supp.2d 802, 821 (E.D.Cal.2011). What data is considered the best scientific and commercial data is itself an expertise-based decision on which an agency is owed deference.

Miccosukee Tribe of Indians of Florida v. United States, 566 F.3d 1257, 1265 (11th Cir.2009) (articulating this as the "general view"); *San Luis v. Badgley*, 136 F.Supp.2d 1136, 1151 (E.D.Cal.2000) ("An agency has wide latitude to determine what is "the best scientific and commercial data available.").

Thus, if specialists express conflicting views, an agency has discretion to rely on the reasonable opinions of its own qualified experts even if a court might find contrary views more persuasive." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir.2008) (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)). Uncertainty, or the fact that supporting evidence may be "weak," is not fatal to an agency decision. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir.1992); *Nat'l Wildlife Fed'n v. Babbitt*, 128 F.Supp.2d 1274, 1300 (E.D.Cal.2000). The FWS "must utilize the best scientific . . . data available, not the best scientific data possible." *Building Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C.Cir.2001), *cited with approval in Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir.2006); *see also Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 680 (D.D.C.1997) (best available science standard does not require "conclusive evidence," only best science available).

This deference is not unlimited. In, *Tucson Herpetological Society v. Salazar*, 566 F.3d 870, 879 (9th Cir.2009), the court held that an agency may not rely on "ambiguous studies as evidence" to support findings made under the ESA. Where a study explicitly

states a certain holding is inconclusive, a conclusion embracing that holding does not follow from that study. *Id.*; *see also Rock Creek Alliance v. U.S. Fish & Wildlife Service*, 390 F.Supp.2d 993, 1008 (D.Mont.2005) (rejecting section 7 biological opinion's reliance on a disputed scientific report, which explicitly stated its analysis was not applicable to the small populations addressed in the challenged opinion).

Plaintiffs argue that Federal Defendants did not use the best available science data in deciding what areas to designate as critical habitat. (Defs.' Mot. Br. 41-57.) They argue that certain findings or decisions are made with no scientific evidence cited to support them. (*Id.* at 58.) Additionally, Plaintiffs assert that Federal Defendants ignored certain scientific studies contrary to the 2010 Final Rule reasoning and findings. (*Id.*) They also contend that Federal Defendants cited studies in support of findings that were contradicted by the cited study's conclusions. (*Id.* at 42, 43, 45, 47, 61.) Finally, Plaintiffs argue Federal Defendants ignored the State Water Board's, an expert agency's, on-point findings. (*Id.* at 66; Pls.' Opp'n Br. 44.)

Federal Defendants rebut each of these asserted flaws, and point out the high level of discretion they are afforded in determining the best possible science data, and that they are not required to create additional data. (Defs.' Mot. Br. 58-66.)

I. Failure to Support with Science

Plaintiffs argue that the best available science was not used because certain findings were made without scientific support: specifically, Federal Defendants' finding that special management considerations or protections may be required to protect the PCEs located in subunits 1B and 1C.[13] (Pls.' Mot. Br. 58; Pls.' Opp'n Br. 45.) They point to the lack of supporting citations to science data in the "Road Crossings and Bridges" or "Water Quality Degradation" portions of the 2010 Final Rule. (*Id.* at 58-59.)

The requirement to make a designation on the best scientific data available means that the FWS has no affirmative obligation to conduct its own research to supplement existing data. *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1166 n. 4 (9th Cir.2010) (citing *Sw. Ct. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60-61(D.C.Cir.2000)). However, "the absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions, even acknowledging the deference due to

[13] In their complaint, Plaintiffs also pointed to the designation of the portion of the SAR between the Seven Oaks Dam and Tippecanoe Avenue as critical habitat because it was "a primary source of coarse sediment in the upper Santa Ana River watershed." (SAC ¶¶ 159, 161.) They contended this was made without providing any scientific support. (*Id.*) However, they do not address this point in their briefing. (*See* Pls. Mot. Br.; Pls. Opp'n Br.)

agency expertise." *Otay Mesa Property, L.P. v. U.S. Dep't* of *Interior*, 646 F.3d 914, 918 (D.C.Cir.2011)

Special management considerations or protection are defined as "any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species." 50 C.F.R. § 424.02(j). The finding that "PCEs may require special management considerations" is considered a relatively minor legal hurdle. *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F.Supp.2d 1013, 1031 (D.Ariz., 2008), *aff'd*, 606 F.3d 1160 (9th Cir.2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 1471, 179 L.Ed.2d 300 (2011). Excessive specificity is not required. *Id.* Additionally, the requirement for special considerations or protections need not be immediate but can instead be in the future based on possibility. *Cape Hatteras*, 731 F.Supp.2d at 24.

Here the Court finds that Federal Defendants' finding that the PCEs in subunits 1B and 1C require special management considerations or protection is supported by science. In the entire section discussing special management considerations or protection, numerous scientific studies are cited. (AR 1421:39815-17 (citing Ally 2003; Chambers Group 2004, USFS 2007; Thompson et al. 2010; Service 2000; SAWPA 2010; USFS 2009).) Additionally, the showing in even those sections without cited studies is sufficiently reasoned to overcome this low hurdle. They describe possible disturbances to the PCEs in similar detail as that in other sustained findings. *See Cape Hatteras*, 731 F.Supp.2d at 25. Therefore, these findings were

provided scientific support. Accordingly, the designation is not arbitrary or capricious on that basis.

ii. Contradictory Studies

The Plaintiffs contend that Federal Defendants ignored certain scientific studies contrary to their findings and therefore failed to rely on the best possible science. (Pls.' Mot. Br. 48.) Specifically, Federal Defendants underlying reasoning for designating subunit 1A, allegedly to mandate high flows for the Sucker, is contrary to these studies. (*Id.*) Plaintiffs point to Allen 2003, Moyle 2002, Saiki et al. 2007, and Thompson et al. 2010 as scientific studies that show "High Flows Harm Fish" and were ignored by Federal Defendants.[14] (*Id.* (citing AR 1423:40000; AR 1543:44067; AR1578:44789; AR 1643:478877 respectively).) Plaintiffs, however, acknowledge the 2010 Final Rule cites all of these studies, but claim the FWS "ignored their conclusions." (Pls.' Mot. Br. 48.)

The Court notes that where there are contradictory studies, the choice for what is the best science is an agency decision owed deference. No case provided by Plaintiffs indicates some standard by which to determine whether an agency's examination of other contradictory science data was sufficient. Further, they fail to provide any argument on why the above

[14] Plaintiffs also point to D-1649 as another ignored source of scientific data standing for this same proposition. The Court addresses this decision in subsection *iv.* of this section.

studies are the best available science, other than that they contradict the 2010 Final Rule.

Regardless, upon examining the studies, they make no such simplistic finding as "high flows harm fish." Allen 2003 discusses the naturally variable SAR hydrology and the Suckers adaptations to this environment. (AR 1423:39993.) It discusses the natural high flooding events in the SAR and the Sucker's fecundity and spawning habits that allow it to repopulate after such events as long as preferred substrate is abundant. (*Id.*) It further speaks to complete dewatering conditions, their negative impact, and the beneficial impact of increased flows from this starting point. (*Id.* at 39999.) Similarly, Moyle 2002 also speaks to the Sucker's adjustments to the SAR's naturally variable hydrology such that it easily repopulates following floods. (AR 1543:44066-68.) It then speaks about needed spawning substrates and the problematic accumulation of fine sediment, supporting the view that it should be removed. (*Id.*) Saiki et al. 2007 did find higher local current velocities and stream discharges were inversely associated with Sucker population. (AR 1578:44789.) First, local velocity correlation does not mean the periodic high flows cannot be overall beneficial to the Sucker by way of habitat creation and maintenance. Second, as explained in Thompson et al. 2010, considering Saiki et al. 2007 and all the data, it appears increased flow up to a certain amount is beneficial but could be subject to diminishing or negative returns beyond a certain amount. (AR 1643:478877.) Additionally, the

2010 Final Rule does not mandate flows conclusively higher than the purportedly damaging level Plaintiffs point to these studies to support. It states increased flows may help certain sediment environments. (AR 1421:39816, 39818.) Such a statement is not contradictory with the studies. Thus, examining the nuance shows these studies are not in direct contradiction. Further, they do not appear to have been ignored since they also support the conclusion that the Sucker can handle cyclical increased flows and such flows would benefit spawning habitat.

iii. Findings Supported by Studies with Contrary Conclusions

Plaintiffs assert in several places that the 2010 Final Rule is not based on the best available science because it draws conclusions contrary to the studies cited or make findings more definite than the study supports. (Pls.Mot.Br.42, 43, 46, 47, 61.) For the former, the Court analyzes whether the conclusions are in conflict with the cited study conclusions. For the latter point, the Court must look for more than "mere uncertainty," weakness, or imperfection in the evidence. *In re Salmonid Consolidated Cases*, 791 F.Supp.2d at 821; *Greenpeace Action*, 14 F.3d at 1337; *Nat'l Wildlife Fed'n*, 128 F.Supp.2d at 1300. Instead, the Court looks to whether the FWS relied solely on data explicitly stated as uncertain and ambiguous to draw unsupported conclusions. *Tucson Herpetological Soc.*, 566 F.3d at 878-79.

Plaintiffs first attack the FWS's conclusion that City and Mill Creek are *the* remaining significant sources of essential coarse sediment for the SAR mainstem. (Pls.' Mot. Br. 42.) They contend that the study the FWS primarily relied on actually concludes there are five sources of significant sediment and that these two creeks are only small percentages of the significant watershed or sediment yielding area. (*Id.* (citing AR 1513:43495, 98).)

The Court finds that the FWS did not rely solely on Humphrey *et al.* 2004 to draw conclusions contradictory to it, or its explicit conclusions. The study does in fact find City and Mill Creeks are significant sources of sediment. (AR 1513:43495.) Plaintiffs' contention that the percentage of total watershed area or area yielding sediment in some way matters for this determination is belied by the fact some of the largest areas are not designated as significant. (*Id.*) Thus, arguments that the study is contradictory because the area associated with these tributaries comprise only 12 or 25% of those areas are not persuasive. Additionally, the FWS did not rely solely on this study to conclude City and Mill creek are the only sources. Humphrey *et al.* 2004 identified six sources of sediment as significant. (*Id.*) The 2010 Final Rule states that Humphrey *et al.* 2004 "indicates that historically the supper Santa Ana River (above Seven Oaks Dam), City Creek, Plunge Creek, and Mill Creek were significant contributors of corse [sic] sediment to the occupied reach of the Santa Ana River." (AR 1421:39814.) This lists the three uppermost significant sources.

(AR 1513:43504.) The FWS then concludes that Plunge Creek now contains a settling basin and the Seven Oaks Dam has trapped sediment from upstream of it. (AR 1421:39813.) Thus, of the mentioned sources in the previous sentence, these are the only remaining sources. Humphrey *et al.* 2004 itself points to the reduction of historical sediment from the upper SAR. (AR 1513:43498). In actually discussing the criteria for identifying critical habitat, the FWS does not use exclusive language. (AR 1421:39818 (holding City Creek, Mill Creek and the SAR above Tippecanoe but below the Dam are essential "because they are areas that provide or contain sources of water and coarse sediment" not the only areas).) Additionally, the FWS used aerial imagery to determine which tributaries had "large, unimpeded watersheds" to support its choice. (*Id.*)

Federal Defendants also argue that the use of "the" was merely a result of the split analysis for occupied and unoccupied habitat. Thus, City and Mill Creek were the only significant sources left in unoccupied territory, and the other significant sources from Humphrey *et al.* 2004 not limited by recent developments were considered under the occupied analysis or lacked sufficient information to designate. (AR 1421:39840 (discussing Cajon and Lytle Creek).) Therefore, the Court finds that these conclusions are not in direct contravention with Humphrey *et al.* 2004.

Plaintiffs also take issue with Federal Defendants conclusion that subunit 1A provides stream and

storm waters required to transport sediments necessary to maintain preferred substrate throughout the SAR. (Pls.' Mot. Br. 43.) They claim the FWS relied on Thompson et al. 2010 repeatedly but that study indicates a more "murky relationship between high upstream flows and downstream sediment conditions." (*Id.*) However, upon examination of this study the Court finds that it is not so ambiguous that the conclusions the FWS drew from it are unsupported or problematic. The passages cited by Plaintiffs acknowledge the limitations of the study in that there are additional unknown variables in play that affect the substrate variability. (AR 1643:47878.) This does not nullify its conclusion that the Sucker abundance and distribution are influenced by rates of discharge, and that removal of fine sediment was needed. (*Id.* at 47869, 79.) Further, the FWS relied on other studies for the theory of coarse sediment transport. (AR 1421:39814 (citing Humphrey *et al.* 2004; Warrick and Rubin 2007).) Thus, the Court finds that conclusions stated in the 2010 Final Rule are not contradicted by Thompson *et al.* 2010 and do not rely on that study beyond any stated ambiguity in that study.

With regard to the conclusion that dam operations appreciably alter flow of water and coarse sediments in the SAR, Plaintiffs argue that this is contradicted by the Humphrey *et al.* 2004 study. (Pls.' Mot. Br. 45.) Humphrey *et al.* 2004 concluded that current Seven Oaks Dam operations would maintain 90% of the downstream sediment. (AR 1513:43498.) This is a measure of the total sediment transport, not

just sediment through the dam, which the study explicitly acknowledges is reduced by 40%. (*Id.*) Further, Plaintiffs do not point out why a 10% overall reduction is not appreciable. Therefore, the Court does not find Federal Defendants failed to consider the best available science in concluding dam operations reduce sediment flow.

Plaintiffs further argue that the FWS's conclusions that the Sucker's habitat and population are in decline are contradicted by certain science data. (Pls.' Mot. Br. 47, 61.) For habitat decline, they point to Thompson *et al.* 2010 which in various parts describes the SAR environment as variable and fluctuating. (*Id.* at 47 (citing AR 1643:47874.) However, they ignore that the study states "[t]aken together, our quantitative study and qualitative assessments of the Santa Ana River indicate that the amount of river that is occupied by C. santaanae varies annually (Fig.2) but is typically significantly less than the 54.5 km range identified at the time of listing (Fig. 1b; USFWS 2000)," and that "[s]urveys at the 30-km scale indicated that the prevalence of coarse substrate declined in a downstream direction in each year and that the total amount of this habitat type varied annually." This acknowledgment of variability in a naturally variable river system does not make this study so ambiguous that it cannot be relied on for the conclusion that habitat is in decline. Instead it is only possibly uncertain or slightly weak evidence, on which it is not improper to base a decision. Moreover,

a finding of variability does not negate the overall conclusion that there is a decline.

The assertion that the best available science data contradicts the finding of a declining population or is too ambiguous to so conclude is also unpersuasive. (*See* Pls.' Mot. Br. 61.) Plaintiffs contend that at most, the relied upon studies stand for the fact that population is variable. (*Id.*) However, SMEA 2009, one of the relied upon studies clearly finds that "[w]hile there is substantial year-to-year variability in the average fish/mile, there has been a 66.7% reduction in fish density since sampling began in 2001." (AR 1621:47215.) Plaintiffs point to the fact the study states that "[n]either time nor site is significant alone" in trend analysis. (*See id.* at 47216 (finding time variable p-value of 0.101).) The study does find a "highly significant" site by time interaction, meaning there is a significant trend in population over time at each of the three monitoring sites. (*Id.*) The monitoring site furthest up river (Riverside) contained a positive trend over time, while the lower two sites had negative population density trends. (*Id.*) This supports SMEA 2009's conclusion that habitat has degraded over time at the lower two sites, while staying unchanged at the Riverside site. Additionally, in the listed conclusions, SMEA makes the unqualified statement "[t]he average density of suckers in 2009 is the lowest since sampling began." (*Id.* at 47217.)

The fact that the FWS relied on this study in part to conclude "the status of Santa Ana sucker in

the Santa Ana River appears to be declining" is unremarkable. (AR 1421:39810.) This overall conclusion is supported by several points from this study and others, including an echoing statement that although there is year-to-year variability, there has been an overall reduction. (*Id.*; AR 1621:47215). While, the study finds no significant trend for density based on time alone, it has several conclusions supporting the overall point of the paragraph, that status is declining. It supports the Thompson *et al.* 2010 conclusion that habitat downstream is degrading and that such degradation reduces Sucker density there. Additionally, with the overall conclusion that the occupied area of the river is decreasing, the connection to decreasing habitat, and the SMEA 2009 showing of reduced fish densities over time for degrading/decreasing habitat, the study is not in conflict.

Therefore, the Court finds that the FWS did not fail to consider the best available science data in concluding that habitat and sucker population were in decline or any other pointed out conclusion. Therefore, the findings made are not arbitrary or capricious in violation of the APA.

iv. Contradiction with Other Agency Determination

Courts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. *See, e.g.*, *Am. Tunaboat Ass'n v.*

Baldrige, 738 F.2d 1013, 1016-17 (9th Cir.1984). Thus, a court should "reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation." *N. Spotted Owl v. Hodel*, 716 F.Supp. 479, 483 (W.D.Wash.1988) (citing *Am. Tunaboat Ass'n*, 738 F.2d at 1016).

Here, Plaintiffs argue that the FWS's conclusions run counter to the expert agency determination embodied by the D-1649 water rights decision. (Pls.' Mot. Br. 48; Pls.' Opp'n Br. 44.).) Federal Defendants on the other hand, argue that their finding was not in contravention because the issues presented are different. (Defs.' Mot. Br. 66; Defs.' Opp'n Br. 42.) The D-1649 decision explicitly conditions part of its findings on the fact that any entity proposing water conservation is responsible for consulting with resource agencies (e.g. the FWS) as required by law. (AR 1630:47654.) Thus, when the decision states that partial approval of the sights subject to conditions specified in this order will not negatively impact public resources, it is not reaching any conclusion contradictory to the 2010 Final Rule. (*Id.*) It says assuming compliance with FWS consultation requirements, public resources should not be impacted. This makes sense since that is the whole point of the § 7 consultation. Thus, there is no conclusion running counter to another agency decision based on specialized expertise.

Further, the Court finds no spurning of unrebutted expert assertions based solely on conclusory

assertions of agency expertise. As detailed above, numerous studies are relied on in concluding certain flows are required for the conservation of the Sucker that would rebut any alleged contention in D-1649 and provide an alternative explanation. *Contra N. Spotted* Owl, 716 F.Supp. at 483. Therefore, the Court finds there is no reason to deny the FWS deference to its expert decision making on this matter.

5. Regulatory Violations

Plaintiffs also contend that the 2010 Final Rule was improper because Federal Defendants made the designation in violation of two regulations. (Pls.' Mot. Br. 62.) They argue that the Secretary can only revise a critical habitat when new data becomes available, and that did not occur here. (*Id.*) Additionally, Plaintiffs point to 50 C.F.R. § 424.12(a)(2), and claim that, under this standard, critical habitat should have been considered indeterminable. (*Id.* at 63.) In rebuttal, Federal Defendants' argue they are in compliance with these regulations and that the Secretary's authority to revise critical habitat is not limited to the grounds Plaintiffs assert. (Defs.' Mot. Br. 68.)

I. Prerequisite for Revising Critical Habitat

While the regulation Plaintiffs point to does say that a revision can be made when new data is presented, there is no statement that this is the only time the Secretary can revise critical habitat. 50

C.F.R. § 424.12(a). This reading comports with the statute which dictates that the Secretary can revise critical habitat "from time-to-time thereafter as appropriate," which does not seemingly limit the instances upon which such revisions can be made. 16 U.S.C. § 1533(a)(3)(A). Further, several studies relied upon have in fact been completed after 2005, including at least 2 cited by Plaintiffs as the best available science data. (Pls. Mot. Br. 48 (citing Saiki *et al.* 2007; Thompson *et al.* 2010).) The FWS was also compelled to revise critical habitat by stipulated court order. Therefore, Plaintiff cannot establish their entitlement to relief on this record and Federal Defendants deserve judgment as a matter of law.

ii. Sufficiently Determinable

Plaintiffs also contend that the designation of critical habitat was counter to Joint ESA regulations because the available data did not meet the standard required make such a designation determinable. (Pls.' Mot. Br. 63.) The regulations state that critical habitat is not determinable if the available information sufficient to perform required analyses of the impacts of the designation is lacking or the needs of the species are not sufficiently well known to allow identification of areas as critical. 50 C.F.R. 424.12(a)(2). Plaintiffs argue that these standards were not met because FWS employees stated at various times in internal discussions about the rule-making that they did not know or understand certain process. (Pls.' Mot. Br. 63.) They particularly rely on a statement

discussing possible differences in § 7 consultations for a proposed water diversion for either the species' jeopardy or habitat modification risk. (*Id.* at 64 (citing AR 1175:32309.) However, this statement indicates it is considering hypothetical water diversion in the future. (AR 1175:32309.) It makes sense that an answer would not be known for an outcome when the exact facts and timing of a subsequent agency action are not yet known. This flaw should not doom critical habitat to indeterminability or no such designations could be made without performing § 7 consultations on every possible iteration of agency action that could affect the habitat prior to designating it.

This would conflict not only with the general instruction that critical habitat be designated concurrently with listing a species or shortly thereafter but also with the court order instructing the FWS to designate critical habitat after it had originally found it was indeterminable.

The science supports determinability as well. While there are some unknowns or fluctuations in the system, this does not render habitat indeterminable. The PCE decisions are unchallenged, as are the unoccupied locations in which those PCE's are located. Therefore, the Court finds the designation does not violate this regulation and is not unlawful.

6. Unlawful Theory for Unoccupied Habitat

Plaintiffs also attack Federal Defendants' underlying theory supporting the finding that the unoccupied habitat here is essential. (Pls.' Mot. Br. 50; Pls.' Opp'n Br. 33.) They argue that historically, unoccupied territory has been designated on migratory or connecting ranges of habitat between other occupied habitat or for reintroduction. (Pls.' Mot. Br. 53.) They also point to an FWS Director statement of policy stating that typically, unoccupied areas should have significant potential for re-occupation in order to be designated. (*See* AR 310:20953.) They further contend that this theory, the "sediment-conduit" theory, is beyond the scope of the statute and what Congress intended. (Pls.' Opp'n Br. 33-34.) Therefore, regardless of scientific data or agency determinations, this designation of unoccupied territory cannot stand. (*Id.*) However, historical use of the statute does not necessarily mean habitat cannot be found essential to conservation in other ways. Neither does typical use. If it did, it would revise the statute to import the historical or typical use as a limitation.

Plaintiffs also point to the 2010 Final Rule's reliance on the fact that PCEs exist in the designated unoccupied habitat. (Pls.' Mot. Br. 51.) They argue that this rationale is contrary to the statute because it is essentially the same test used for occupied habitat. (*Id.*) However, this is not the theory. Rather, it is that these areas are the primary source of PCEs, not that they just contain PCEs. It is reasoned that if

they are not designated, and something affects these source areas, it would then deprive the occupied habitat of most or all of its PCEs. (AR 1421:39824.) This is not the same test as that for occupied habitat. This concern is unfounded.

7. Insufficient Notice and Opportunity for Certain Studies

In opposition, Plaintiffs have raised the argument that they were given no meaningful opportunity to comment on certain studies the FWS relied on in its 2010 rule-making that were not cited in the 2009 Proposed Rule. (Pls.' Opp'n Br. 50.) Specifically, they state that the FWS "did not identify either Thompson *et al.* 2010 or SMEA 2009 in their proposed Rule, the 2010 NOA [Notice of Availability], or at any other time prior to publishing the Final Rule." (*Id.*)

Under the statute, a proposed rule for comment must "contain the complete text of the proposed rule, a summary of the data on which the proposal is based (including, as appropriate, citation of pertinent information sources), and shall show the relationship of such data to the rule proposed." 50 C.F.R. § 424.16(b). Thus, a rule-making agency "cannot solicit public comments and seek peer review while withholding vital information." *Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090, 1107 (D.Ariz.2003). One cannot "solicit the input of others without providing them with all of the information necessary to make any such input meaningful and informed." *Id.* at

1106-07. Thus, where a certain report is referred to extensively in a final listing rule but was not made available for public comment, the rule violates the APA. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402 (9th Cir.1995). Nevertheless, new information that expands on or confirms existing data, addresses alleged deficiencies in the rule, or is a response to public comments is allowed to be included for the first time in a final rule. *Id.*

Federal Defendants argue that this latter exception is the case here. They contend that Thompson *et al.* 2010 and SMEA 2009 expand and confirm the data and conclusions in the 2010 Final Rule. The points for which these studies are cited, the decline of Sucker habitat and the Sucker itself, were points discussed in the 2009 Proposed Rule. Federal Defendants further argue that the 2009 Proposed Rule clearly indicated the intent to designate on this basis. They also argue that Thompson *et al.* 2010 was available in draft form for comment. Additionally, they assert that both studies were actually produced by groups that include the Plaintiffs, and the FWS received them through the comment process. Therefore, they cannot claim they did not have an opportunity to comment when they themselves had the studies. Finally, Federal Defendants argue that Plaintiffs have not shown prejudice. *Personal Watercraft Industry Ass'n v. Dep't of Commerce*, 48 F.3d 540, 543-44 (D.C.Cir.1995).

I. Thompson et al.

The Court looks first to the Thompson *et al.* 2010 final article. After review, the Court finds that it and the 2009 draft are sufficiently similar that any changes contained in the 2010 final article are no more than supplemental analyses or discussions. (*See* AR 1642:47833; AR 1643:47869.) They are based on the same study with the same data and information. (*Id.*) There are changes in the results and discussion, but none step outside the bounds of supplementation or expansion on the 2009 draft. *See Idaho Farm Bureau Fed'n*, 58 F.3d at 1402-03. Thus, the Federal Defendants were not soliciting comments without providing the necessary information. *Id.*

Plaintiffs argue that the citation to Thompson *et al.* 2009 in the 2009 Proposed Rule was insufficient to put the public on notice that it would be relied on to the same extent, and for the same purpose as it was in the 2010 Final Rule. The 2009 Proposed Rule cites Thompson *et al.* 2009 once, in support of the statement that "[h]abitat assessments conducted between 2006 and 2008 indicated that these substrates fluctuated from 2.6 to 6.0 mi (4.2 to 9.6 km) downstream of the Rialto Drain." (AR 602:24387.) Thus, Plaintiffs contend, they were not on notice that the FWS would cite to the Thompson study in support of its conclusions that the Sucker and its habitat are in decline.

The Court rejects this argument. First, the case law Plaintiffs rely upon does not extend to the situation here; they involve complete failures to provide a

study or information to the public. *Idaho Farm Bureau Fed'n*, 58 F.3d at 1402; *Norton*, 240 F.Supp.2d at 1106. Second, in the list of "References Cited" provided online and referred to in the 2009 Proposed Rule, Thompson *et al.* 2009 is listed by the title "Influence of substrate dynamics on the distribution and abundance of the federally threatened Santa Ana sucker, Catostomus santaanae." (*See* AR 602:24407; AR576:23452, *also available at* http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2009-0072-0050.) This indicates the study has information on abundance and distribution of the Sucker. Third, the 2009 Rule indicated in several places it viewed Sucker habitat as in decline and that this was leading to negative effects on the Sucker. (AR 602:24387-89, 24403.) Thus the public was on notice that the status of the Sucker and its habitat was in play and was provided a list of studies on the Sucker and its habitat, including Thompson *et al.* 2009. Therefore, the Court finds that the public was not deprived of the information in the Thompson *et al.* study. Accordingly, the Court finds it was not deprived of the opportunity to meaningfully comment on the rule on that grounds.

ii. SMEA 2009

The SMEA 2009 report was not available at the time the 2009 Proposed Rule was published. As discussed above, it was cited for the purpose of showing the Sucker and its habitat are in decline. (AR 1421:39810.) To determine if the FWS's reliance upon

this report in the 2010 Final Rule requires overturning of that rule, the Court looks to whether the information provided is supplemental or confirmatory to information in the Proposed Rule or responsive to comments on the Proposed Rule.

The proposed rule discusses the declining habitat and population of the sucker in several places. (*See* AR 602:24383, 24389, 24387-88, 24397, 24403.) Several references are cited in support of the proposition that they are in decline. California Regional Water Quality Control Board 1995 is cited in support of the contention that water flows in the SAR have decreased from the natural state. (*Id.* at 24389.) It does support this, stating "creeks and rivers dried up" and "[o]ver use of the upstream water by extensive recycling had reduced summer flows in the SAR to a trickle." (AR 1479:41456-57.) The 2009 Proposed Rule also states that there has been loss of Sucker habitat in the SAR and that even in the remaining habitat "severe restriction of natural water flows causes impacts to populations of the Santa Ana sucker" while citing to Moyle 2002. (AR 602:24385.) Moyle 2002 does support this statement; it finds that the SAR population of Suckers "is not secure" and that generally the Sucker population is "threatened by elimination or alteration of stream flows." (AR 1543:44068.) Further, it indicates that habitat has been greatly reduced over time from the natural state. (*Id.*) Saiki 2000 is cited to show that at least at one collection point, the Sucker population is likely in decline. (AR 602:24387, 88.) Saiki 2000 does make this point in

comparing its findings to Chadwick & Associates, Inc. 1992 and also provides further supports for the connection of abundance with reduced habitat. (AR 1577:44681, 85, 88.) Finally, OCWD 2009, is cited to support the conclusion that "[t]he Santa Ana sucker is threatened primarily by loss of habitat types necessary to support all life-stages." (AR 602:24403.) OCWD 2009 supports this statement, finding that current habitat conditions may contribute "to reduced growth, fecundity, and survivability of suckers." (AR 1556:44202.)

In light of the cited studies, SMEA 2009, is supplemental or confirmatory to this previous information. The previous information may have fewer data points or less specificity, but the overall contention that Sucker habitat is in decline, and as a result so is the Sucker, is supported. SMEA 2009 supplements this by finding those sample sites with lowered habitat quality had a decreasing trend of Sucker density and provided some indications of overall decreased population. Thus, the further information in SMEA 2009 supplements and works to confirm the 2009 Proposed Rule's conclusions and cited data. There was no deprivation of an opportunity to meaningfully comment. The theory of decline and the FWS's planned action based on that decline was already in play as was certain information on this matter. The public had a meaningful opportunity to comment on the rulemaking finalized in the 2010 Final Rule.

iii. Prejudice

At this point, the Plaintiffs have made their arguments on the two references and whether they support the FWS's conclusions. They do not attack the reliability of the studies themselves nor contend that such an attack is likely from the public. Thus, the studies' own validity is not in question, contrary to the withheld information used in *Idaho Farm Bureau Fed'n* and *Norton*. 58 F.3d at 1042, 240 F.Supp.2d at 1108. Further, the Court has rejected the arguments directed to the proper scientific conclusions of these studies. Plaintiffs do not provide any other grounds for how comments would affect the rule. Thus, consistent with *Idaho Farm Bureau Fed'n and Norton*, under *Personal Watercraft*, the rule would also need not be set aside due to a lack of opportunity to comment on these two references because Plaintiffs have not shown prejudice. *See Personal Watercraft*, 48 F.3d at 544. Accordingly, the Court finds that Federal Defendants did not act arbitrarily, capriciously, or unlawfully on these grounds either.

E. *Violation of the APA for Reliance on Improper Economic Analysis (Claim 5)*

In their fifth claim for relief, Plaintiffs contend Federal Defendants relied upon an arbitrary and capricious economic analysis when making the 2010 Final Rule, thus violating the APA and ESA. (Pls.' Mot. Br. 64.) They contend that the FEA is incompatible with a basic assumption made by the Final

Rule in justifying its designation of critical habitat. Additionally, Plaintiffs assert that the FEA improperly disregarded certain economic impacts in undesignated regions. (*Id.* at 66.) Finally, they argue that the FEA improperly ignored important information on economic impacts. (*Id.* at 70.) Meanwhile, Federal Defendants argue that they considered all appropriate economic impacts, and that portions of this analysis again attempt to seek review of the Secretary's discretionary decision not to exclude on the basis of economic or other factors. (Defs.' Opp'n Br. 54.)

The Court has already addressed the alleged inconsistency between the FEA and the Final Rule's justification for designating certain habitat. See Section III.D.3.*iii supra.* The Court now turns to the alleged failures to consider certain economic impacts or information.

The FWS is required to take into consideration the economic impact of specifying particular areas as critical habitat. 16 U.S.C. § 1533(b)(2). As the Court has already laid out, the final decision on whether to exclude certain habitat from designation on the basis of economic (or other concerns) is not judicially reviewable. *See* Section III.B. *supra.* However, the statute does create a judicially reviewable requirement that the FWS "take into consideration the economic impact" of its decision to designate critical habitat. *Bennett*, 520 U.S. at 172. The FWS must be presumed to have followed regulations and considered required impacts unless rebutted by evidence in the record to

the contrary. *Rock Creek Alliance v. U.S. Fish and Wildlife Serv.*, 663 F.3d 439, 443 (9th Cir.2011).

1. Disregard for Economic Impact of the Designation of Downstream Lands on Upstream Projects

Plaintiffs argue that the FEA improperly disregards the economic impact of the final designation on projects upstream in undesignated areas. (Pls.' Mot. Br. 65.) They point to a supplemental memorandum to the FEA explaining on the one hand that projects in portions of subunit 1A that were removed from designation between the 2009 Proposed Rule, and the 2010 Final Rule could still be economically impacted due to their effects downstream and resultant consultations. (AR 1346:37134.) It then goes on later to state in its analysis of administrative costs that it anticipates four less consultations based on these upstream projects because they are no longer in designated area. (*Id.* at 37137.) Plaintiffs contend that these statements are inconsistent and show that the 2010 Final Rule fails to consider the economic impact of the designation. (Pls.' Mot. Br. 67.)

Defendants rebut by pointing to the 2010 Final Rule itself and assert that the rule considered not only the estimate of impact based on this supplemental memorandum, but also the FEA, which considered these costs as part of its incremental costs, and Plaintiffs' submitted economic impact comments. (Defs.' Mot. Br. 72.)

Federal Defendants are correct in that the FWS discusses these other estimates of economic impact. (AR 1421:39834-35, 39841, 39848-50.) The FEA was described as taking into account subunit 1A project effects as incremental costs. (*Id.* at 39835.) The 2010 Final Rule goes on to state that:

> [e]ven assuming that substantial economic and other impacts will result from the designation of Subunit 1A as discussed in the FEA and in comments submitted on the proposed rule and DEA, given the conservation status of the Santa Ana sucker, we did not exclude this area from critical habitat designation under section 4(b)(2) of the Act.

(*Id.*; *see also* AR 1421:39841 (stating same in response to comment on economic analysis).) Plaintiffs do not provide any standard or case dictating what is required for something to be "considered," other than acceptance of their proposed impact analysis. But, the FWS is owed deference in determining what the best commercial data is. *Miccosukee Tribe*, 566 F.3d at 1265; *San Luis*, 136 F.Supp.2d at 1151. Even without that deference, it is clear Federal Defendants did consider increased incremental impacts proposed in the FEA absent the supplemental memo and by the public in comments. Thus, the Court finds that to the extent economic impact is required to be considered, the FWS clearly does so. It does so on the basis of reasoning or studies that the Court has no reason to question were the best estimate, and on alternative

estimation theories as well. Therefore, this FEA is not flawed on this basis.

2. Failure to Consider Important Information

Additionally, Plaintiffs contend the FEA and 2010 Final Rule fail to consider important information about projects upstream. (Pls.' Mot. Br. 70.) Further, they argue that the FEA improperly eliminates the present base year in its analysis. (*Id.* at 71.) Finally, they argue that the FEA miscalculates the impact of reduced water supplies. (*Id.* at 72.)

These contentions fail to demonstrate the FEA is flawed rising to the level necessary to overcome the deference owed to the FWS determination of economic impact. The exclusion of certain water projects was based on the estimation that there would not be a § 7 federal nexus sufficient to require consultation. (AR 1515:43669, 74.) Plaintiffs contend that this is based on a history of consultation under the 2005 Final Rule, and this is inapt going forward. (Pls.' Mot. Br. 70.) However, the Court finds this estimation is not so flawed as to provide positive evidence that the FWS erred in concluding there was no associated impact. The FWS would appear to be the best possible expert to estimate likelihood of § 7 consultations with the FWS.

The decision to disregard 2010 as the base year was based on the fact the rule would not be effective until 2011. (AR 1421:39808.) Thus, there is no way

the rule could affect what Plaintiffs contend is the "present year," 2010. (Pls.Mot.Br.71.) Additionally, the FWS states it followed the guidance of the Office of Management and Budget ("OMB") in doing so. (Defs.' Mot. Br. 73; OMB, "Circular A-4," September 17, 2003, *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4 ("The beginning point for your stream of estimates should be the year in which the final rule will begin to have effects.").) The Court also finds no flaw on this basis.

Finally, Plaintiffs contend that possible reduced water supplies will yield greater impact than the FEA anticipates because it assumes water can be purchased if local sources are reduced. (Pls.' Mot. Br. 72.) However, they do not demonstrate that this assumption is incorrect, and as Federal Defendants point out, their own experts do the same. (Defs.' Mot. Br. 57.) Further, as previously pointed out, the FWS said that even assuming the economic impacts were as stated by the higher estimates Plaintiffs refer to, it would still reach the same decision. The estimated degree of costs falls into the expertise of the agency in determining the economic impact that it must then consider.

Therefore, the Court does not find the FEA failed to consider important information that would justify the Court finding the FWS failed "take into consideration" the economic impact of its acts in light of the inherently speculative nature of some considerations and the FWS's discretion in determining what the best commercial data is. Accordingly, Federal

Defendants are entitled to judgment as a matter of law on this claim as well.

F. *Violation of the NEPA (Claim 6)*

NEPA requires that, to the fullest extent possible, federal agencies undertaking "major federal action significantly affecting the quality of the human environment" to undertake the environmental impact analysis process. 42 U.S.C. § 4332(C). Plaintiffs argue that the 2010 Final Rule designating critical habitat qualifies as such an action and that Federal Defendants failed to prepare an environmental impact statement or otherwise comply with NEPA. (Pls.' Mot. Br. 74-76.)

However, courts have found some agency actions are not subject to NEPA requirements, and the Ninth Circuit Court of Appeals has explicitly held that critical habitat designations pursuant to § 4 of the ESA are such actions. *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir.1995). Plaintiffs acknowledge this but urge the Court to follow recent case law from the Tenth Circuit Court of Appeals and a District of Columbia District Court holding otherwise. (Pls.' Mot. Br. 73.) Alternatively, they request the "Court's views on the issue" to help facilitate their objective of overturning *Douglas*. (*Id.*)

Federal Defendants argue that they should be granted judgment on this cause of action not only because NEPA does not apply to critical habitat designations, but also because Plaintiffs lack standing.

(Defs.Mot.Br.76-77.) Specifically, because all of their alleged injuries are economic, their concerns fall outside the "zone-of-interest" of NEPA. (*Id.*)

Because there is clearly no claim to be asserted under Ninth Circuit law, the Court does not reach the standing discussion. Additionally, to the extent the Court's "views" are requested, its views are that it is bound by explicit controlling precedent from the Circuit Court of Appeals within which it resides. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, (D.C.Cir.1987) *affirmed*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113. The Court declines the invitation to opine on a decision where the relevant Ninth Circuit holding is clear and finds Federal Defendants are entitled to judgment as a matter of law on this claim. They were not required to comply with NEPA when designating critical habitat for the Sucker.

V. *CONCLUSION*

For the foregoing reasons, the Court GRANTS Federal Defendants' motion and DENIES Plaintiffs' motion.

IT IS SO ORDERED.

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26. WATER POLLUTION
PREVENTION AND CONTROL
RESEARCH AND RELATED PROGRAMS

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.] –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be

developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act [33 USCS §§ 1251 et seq.]. It is the policy of Congress that the States manage the construction grant program under this Act [33 USCS §§ 1251 et seq.] and implement the permit programs under sections 402 and 404 of this Act [33 USCS §§ 1342, 1344]. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal

technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer 33 USCS §§ 1251 et seq. Except as otherwise expressly provided in this Act [33 USCS §§ 1251 et seq.], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act [33 USCS §§ 1251 et seq.].

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any

State under this Act [33 USCS §§ 1251 et seq.] shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing 33 USCS §§ 1251 et seq. It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act [33 USCS §§ 1251 et seq.] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for Santa Ana Sucker

75 Fed. Reg. 77962

DATE: Tuesday, December 14, 2010

ACTION: Final rule.

* * *

Second, although the High End Scenario for incremental costs reported in the DEA and FEA assumes that rights to water in Subunit 1A will be completely eliminated as a result of the critical habitat designation, we anticipate that some portion of the water diversions proposed or currently occurring can be accommodated consistent with the conservation measures necessary for Santa Ana sucker. As a part of the section 7 consultation procedure under the Act, for projects that would likely jeopardize a listed species or adversely modify designated critical habitat of a listed species, we usually are able to identify reasonable and prudent alternatives to avoid these outcomes. In our experience it is highly unlikely that Federal projects would be halted completely as a result of the critical habitat designation.

* * *

Public Law 90-495—Aug. 23, 1968

PRESERVATION OF PARKLANDS

SEC. 18. (a) Section 138 of title 23, United States Code, is amended to read as follows:

"§ 138. Preservation of parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

(b) Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) is amended to read as follows:

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

From: <Amy_Brisendine@fws.gov>
To: LGenova@indecon.com, MEwen@indecon.com, douglas_krofta@fws.gov, Kim_s_turner@fws.gov
Date: 4/20/2010 1:45:57 PM
Subject: Re: Santa Ana sucker meeting

Hi Leslie,

I called you yesterday and left a voice message – I think you were out of the office. Kim Turner and I discussed this yesterday. FWS is not attending this meeting and does not feel that it would be appropriate for IEC to attend. It may be appropriate to be on a conference call, but Kim and I would like to discuss this further with you prior to the meeting. Give us a call when you have a few minutes, thanks!

Amy Brisendine
U.S. Fish and Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Rm. 431b
Arlington, VA 22203
703-358-2005
703-358-1735 fax

"Leslie Genova" <LGenova@indecon.com> 04/13/2010 05:52 PM

To <Amy.Brisendine@fws.gov>
cc <douglas_krofta@fws.gov>, <Kim_s_turner@fws.gov>, "Mark Ewen" <MEwen@indecon.com>
Subject Re: Santa Ana sucker meeting

Hi Amy,

When last we spoke (March 29), it was my understanding that you gave us approval to move ahead with scheduling a meeting with San Bernardino Valley Municipal Water District etc. if we deemed that to be appropriate, and that whether or not the Service would attend would be determined. I spoke to Carlsbad, who said they preferred not to go. I have since made tentative arrangements with SBV MWD to attend a meeting the week of May 3rd. In their words, "folks are mobilizing" on this issue, and they feel strongly that a meeting with us is warranted. They do not wish to provide additional detail to us over the phone, preferring instead to gather a large group together, including their economist, John Husing, to provide information in person. They understand that we will not be able to provide biological information to them at the meeting and that FWS will not attend. It is their hope that they can provide input for our report.

Please let us know if you have concerns about this plan.

Best,
Leslie

.....
.....

Leslie Katz Genova, Senior Associate
Industrial Economics, Inc.
2067 Massachusetts Avenue
Cambridge, MA 02140
617-354-0074
617-354-0463 (fax)

>>> <Amy_Brisendine@fws.gov> 4/13/2010 5:16 PM >>>
Hi Leslie,

Sorry it took me awhile to get back to you on this. No one from the field office is going to attend this meeting. Probably it is best if you call in and explain that you are just trying to gather information for the EA and will not be able to provide information beyond what is already published and out for comment. Let either me or Kim know if you have questions,

-Amy

Amy Brisendine
U.S. Fish and Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Rm. 431b
Arlington, VA 22203
703-358-2005
703-358-1735 fax

----"Leslie Genova" <LGenova@indecon.com> wrote: ----

To: <douglas_krofta@fws.gov>
From: "Leslie Genova" <LGenova@indecon.com>
Date: 03/23/2010 08:50AM
cc: <Amy_Brisendine@fws.gov>,
"Mark Ewen" <MEwen@indecon.com>
Subject: Santa Ana sucker meeting and timeline

Hi Doug,

I've been speaking with lawyers for the San Bernardino Municipal Water District, Western Municipal Water District, and City of Riverside about the Santa Ana sucker, and they have expressed an interest in having an in-person meeting (with the Service as well) to talk about the potential impacts of Santa Ana sucker. These do appear to be the key stakeholders on SAS, as they hold new water rights on the Santa Ana River in a new area being proposed that is also unoccupied, and wrote in a large public comment on the proposed rule. An in-person meeting does seem to make sense, however, this raises two issues: timeline and potentially, budget. Timeline: The lawyers don't think they can gather the group until mid to late April. Our draft is currently due April 15. Possible solutions would be 1) to get as far as we can in the draft and leave a placeholder for any new information gathered at the meeting, or 2) push back the draft date. Budget: We had assumed that this SAS report would be a simple redo of the 2004 analysis, but it turns out that the new and unoccupied unit is raising a number of issues not considered in the 2004 analysis. The meeting does not help the budget. Still, there might be other cost savings down the road, so we aren't asking for funding at this time. We just wanted to put that in your bonnet so you are aware.

If you could weigh in on your thoughts about the meeting and timeline, this would be much appreciated!

Sorry for the long email!

Best,
Leslie

.....
.....

Leslie Katz Genova, Senior Associate
Industrial Economics, Inc.
2067 Massachusetts Avenue
Cambridge, MA 02140
617-354-0074
617-354-0463 (fax)

From: Gary D Frazer
To: Alexandra Pitts@fws.gov
Cc: christine_eustis@fws.gov; Elizabeth Stevens; Matthew Huggler@fws.gov; Michael Fris; Ren Lohoefener; Megan Kelhart
Subject: Re: Increasing interest in Santa Ana Sucker CH and request from Sen. Feinstein's office
Date: 07/20/2010 01:41 PM

Meghan Kelhart is working this and contacted me about the request this morning. I'll cover, along with Meghan and Lora Zimmerman from our Listing Branch. I'm sure Meghan is communicating with Leah.

You're going to owe me for this one. I'm still bearing the scars from the last time I was subjected to a public lashing by the Senator. – GDF

Gary Frazer
Assistant Director for Endangered Species
Phone: (202)208-4646
Fax: (202)208-5618
Email: Gary_Frazer@fws.gov
▼ Alexandra Pitts/SAC/R1/FWS/DOI

Alexandra Pitts/SAC/R1/FWS/DOI

To Gary D Frazer/ARL/R9/FWS/DOI@FWS

cc Michael Fris/SAC/R1/FWS/DOI @FWS, Matthew_Huggler@fws.gov. Elizabeth Stevens/ARL/R9/FWS/DOI, christine_eustis@fws.gov, "Ren Lohoefener" <ren_Lohoefener@fws.gov>

07/20/2010 04:09 PM

Subject Increasing interest in Santa Ana Sucker CH and request from Sen. Feinstein's office

Hi Gary: I received a call from Leah Russin yesterday, which was a follow up from an email request about Santa Ana Sucker CH. I think you might have a vm from Mike Fris about this. The Senator is having a meeting Wednesday 7/21 at 11 in her office in DC with several Water Districts from Southern California and she wants FWS to participate. Later in the call she requested you! As a side note, Ren has a meeting with Mark Limbaugh next week and this is one of the topics. Please let me know if you can attend this meeting and I can let Leah know. Alternately, you can call Leah at 202 224 5416. Please keep me and Matt Huggler posted. Thanks!

Below is some information from CFWO that was sent to Leah late last week.

Critical Habitat

We are still in the proposed rule stage for Santa Ana sucker critical habitat revision. There are public

hearings scheduled for July 21 (next Wed.) in Corona, CA at the Ayres Suites West, Corona Hotel.

The hearings will allow comments on both the proposed revision to critical habitat and the draft economic analysis.

The Service stated in both the 2009 proposed rule and July 2, 2010 publication of the Notice of Availability for the Draft Economic Analysis that we considering excluding areas covered by with the Santa Ana Sucker Conservation Program and/or the Western Riverside County MSHCP. We are specifically soliciting information about how the Conservation Program and the MSHCP will provide for long-term conservation of the Santa Ana sucker. As part of the weighing/balancing of inclusion vs. exclusion of critical habitat we must demonstrate that any areas excluded under 4(b)(2) will not result in the extinction of the species.

Other issues that may come up in the meeting are outlined below:

Reintroduction/Recovery Plan

We do not have a Recovery Plan for the Santa Ana sucker. In our July 2 Notice we have revised the proposed rule to include one additional section (Plunge Creek) above the Santa Ana River. It is not occupied but contains suitable habitat that could serve as **a possible reintroduction site or refugia** for the Santa Ana sucker. We are taking comments on this proposed revision. The change was made in response to scientific comments we received on the

proposed rule that identified this area specifically, but which we had not included in the 2009 proposed rule.

All Water Districts and their respective attorneys that submitted comments on behalf of the various water districts were notified about the Notice of Availability of the draft economic analysis and scheduling of public hearings.

The recent Seven Oaks Dam gate testing that occurred earlier this week is a completely separate issue and is not related to the critical habitat rule.

Also, the salvage of Santa Ana suckers from a portion of Big Tujunga Wash following the Station Fire, is also a completely different issue and Big Tujunga Wash is within Angeles National Forest and should not be an issue for the Orange/Riverside/San Bernardino county water agencies/watermasters, etc.

Alexandra Pitts, Deputy Regional Director
Pacific Southwest Region
(w) 916 414 6484
(c) 916 804 4967
www.fws.gov/cno
To conserve computer memory, please delete previous attachments when responding

---

Calendar Entry ☒ Notify me
Meeting ☐ Mark Private ☐ Pencil In

Subject	GF – Santa Ana Sucker – NA/DK/See body

When	Starts	Tue 07/20/2010	02:00 PM	1 hour
	Ends	Tue 07/20/2010	02:00 PM	

Invitees	Required (to)	Douglas Krofta/ARL/R9/FWS/DOI@FWS, Nicole Alt/ARL/R9/FWS/DOI@FWA

Chair	Gary D. Frazer/ARL/R9/FWS/DOI
	Sent By Robert Barba/ARL/R9/FWS/DOI

Where	Location MIB-3038

Categorize

Description

Dear Mr. Frazer,

The Santa Ana Sucker Task Force, a variety of local agencies that have come together to form a Task Force to combine efforts in support of local projects and concerns, is sending a group of leaders to Washington for meetings on Capitol Hill on July 20th and 21st. They would very much appreciate the opportunity to talk with you regarding the recently announced plans of the US Fish and Wildlife Service to

expand the Critical Habitat Designation of the Santa Ana Sucker. Changes to the Sucker's habitat could pose a serious problem for local agencies as they undertake vitally important projects important to many communities. Attending the meeting on behalf of the Task Force would be:

Stacey Aldstadt, General Manager of the City of San Bernardino Municipal Water Department
Doug Headrick, General Manager of the San Bernardino Valley Municipal Water District
Robert Martin, General Manager of the East Valley Water District
Kevin Milligan, Assistant General Manager of Riverside Public Utilities
John Rossi, General Manager of Western Municipal Water District
Skip Wilson, President of the Board of the East Valley Water District

Additional Task Force leaders may also attend the meeting, as their schedules permit. We will update your office with a complete list of attendees closer to the meeting date. Thank you for your consideration of this request. The Task Force members look forward to briefing you and your staff.

Deborah L. Thomas
Innovative Federal Strategies LLC
511 C Street, NE
Washington, DC 20002
Phone: 202-347-5990
Fax: 202-347-5941
dthomas@innofed.com

[SEAL] **DEPARTMENT OF THE ARMY**
LOS ANGELES DISTRICT CORPS OF ENGINEERS
P.O. BOX 532711
LOS ANGELES, CALIFORNIA 90053-2325

August 2, 2010

REPLY TO
ATTENTION OF

Office of the Chief
Planning Division

U.S. Fish and Wildlife Service
Division of Policy and Directives Management
Public Comments Processing
Attention: FWS-R8-ES-2009-0072
4401 N. Fairfax Drive, Suite 222
Arlington, Virginia 22203

RE: **Santa Ana Sucker Critical Habitat Proposal and Draft Economic Analysis, Docket No. FWS-R8-ES-2009-0072** as referenced in: Federal Register, July 2, 2010 (Volume 75, Number 127), and Draft Economic Analysis of Critical Habitat Designation, June 8, 2010

The U.S. Army Corps of Engineers (USACE) supports the U.S. Fish and Wildlife Service (USFWS) objective of recovering the Santa Ana sucker and protecting its habitat. However, we are concerned that designation of critical habitat both above Seven Oaks Dam and below Prado Dam, and in the upper reaches of Prado Basin, would adversely affect the ongoing construction, operation and maintenance of several elements of the Santa Ana River Mainstem Flood Control Project (SARP). This project includes Seven

Oaks Dam, Prado Dam, bank stabilization at Norco Bluffs (downstream of the I-15 crossing at the upstream limit of Prado Basin), and several bank protection features downstream of Prado Dam. The purpose of the downstream bank protection features is to prevent damage to adjacent homes and infrastructure (including SR-91) during controlled releases of up to 30,000 cfs from Prado Dam. One of these features (Reach 9 Phase 2B) is currently under construction within the Green River Golf Course. Reach 9 Phase 1 consists of two features further downstream, which have already been constructed and are being maintained by Orange County Flood Control District. Other features (including the previously authorized Reach 9 Phase 2A and the newly proposed Reach 9 Phase 3) are scheduled to be constructed in fiscal year 2011.

The U.S. Army Corps of Engineers, Los Angeles District is concerned that the critical habitat designation would affect operation and maintenance (O&M) of Seven Oaks Dam, Prado Dam, and construction and future maintenance of the other SARP features mentioned above. As mentioned in the Economic Analysis, the SARP is designed to protect millions of people and prevent $15 billion in economic losses during a severe flood event in Orange, Riverside and San Bernardino Counties. The designation would restrict the ability of the Corps or its local sponsors in Orange, Riverside, and San Bernardino Counties to complete, operate, or maintain SARP flood control features. The project's flood risk management objectives would be

affected if construction or future maintenance of the bank stabilization and protection features (which are already designed to minimize impacts to Santa Ana suckers) is hindered by requirements for new analysis, prolonging completion of the features, delaying flood control objectives, and increasing costs. Requirements to modify dam operations by diverting less water, modifying the discharge regime, removing less sediment, maintaining water depth and velocities or other potential measures listed in the Economic Analysis would impact flood control project operations and consequently impact the ability of the SARP to provide the authorized level of flood protection,

Designation of critical habitat as currently proposed would also affect O&M responsibilities for *existing* flood control features for the SARP. Critical habitat as proposed would place significant restrictions on the manner in which O&M work is performed. Each of the SARP's project features is an integral component of the flood control system and several miles of levees exist along the Santa Ana River. Any delay in maintenance attributable to the critical habitat designation would potentially put at risk the local agencies' ability to certify levees for the National Flood Insurance Program, leading to increased flood insurance payments for the citizens in the floodplain. This should be addressed in the economic analysis and the costs quantified. The Draft Economic Analysis did not fully capture the potential increased capital improvement and O&M costs that would result from the critical habitat designation. The analysis

should also fully address the potential safety concerns and loss of life or property that could result from potential delays in completion and operation of the SARP at the authorized level of protection.

The USACE requests that the USFWS consider potential repercussions of the proposed expansion of critical habitat on the authorized flood control project and each of its component parts, which affects the lives and property of millions of citizens.

Sincerely,

/s/ Josephine R. Axt
Josephine R. Axt, Ph.D.
Chief, Planning Division

IEc

ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE SANTA ANA SUCKER

Final | October 15, 2010

[LOGO]

prepared for:
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
Arlington, VA 22203

prepared by:
Industrial Economics, Incorporated
2067 Massachusetts Avenue
Cambridge, MA 02140
617/354-0074

INDUSTRIAL ECONOMICS, INCORPORATED

CHAPTER 3 | POTENTIAL ECONOMIC IMPACTS ON WATER MANAGEMENT ACTIVITIES

* * *

3.2 SUMMARY OF IMPACTS TO WATER MANAGEMENT

65. This analysis identifies the significant water management structures and projects within each proposed critical habitat subunit and identifies potential costs related to sucker management at those facilities. Exhibit 3-1 presents the estimated incremental costs to water management activities expected from the critical habitat

designation. These costs are estimated across two scenarios. Under the Low End Scenario, costs comprise anticipated conservation efforts for the species, including anticipated biological monitoring and survey costs, as well as other species protection efforts, primarily in Subunit 1A, which is not considered to be currently occupied by the sucker.[44] The analysis also calculates a High End Scenario, which recognizes that there is some potential for critical habitat to result in a need for water management agencies to divert less water than currently used or planned to be used. Under this scenario, this analysis quantifies the value of water potentially made inaccessible by conservation requirements for sucker critical habitat designation. This scenario focuses on three projects about which stakeholders and public commenters have expressed concern and which the Service has identified as having a higher probability of critical habitat impacts. Note, however, that although the Service has identified these projects as likely to have critical habitat effects, the specific project modifications that will be associated with critical habitat for the sucker are unknown, i.e., a high probability of critical habitat impacts does not necessarily mean that impacts to water access are likely. In particular, the Service states in the Final Rule that it is highly unlikely that complete access to water rights would be restricted as a result of consultation associate with critical habitat designation for the sucker. In addition, with regard to Subunit 1A, the Service states that although projects may be located outside

the currently occupied range of the sucker, they may impact the downstream occupied portions of the Santa Ana River. Thus, it is possible that these projects would incur costs or modifications related to sucker conservation regardless of the critical habitat designation in Subunit 1A. As such, the High End Scenario has the potential to overstate impacts to these projects from sucker critical habitat.

* * *

69. The Service has articulated that, with regard to projects that involve a change in water discharge, possible recommendations to accommodate critical habitat could include, though would not be limited to measures such as, to "not divert or divert less water," "modify the discharge regime" and "require additional measures to offset habitat impacts only (offsite habitat restoration)."[1] As such, impacts to water usage appear possible at some projects following critical habitat designation.

* * *

Supplemental Water Supply Project at Seven Oaks Dam[60]

79. San Bernardino Valley Municipal Water District (Valley District) and Western Municipal Water District of Riverside County (Western), which provide water directly or indirectly to 853,000 municipal customers, receive a portion of their water supply from the Santa Ana River and its tributaries. In October 2009, Valley District and Western obtained appropriative water rights permits from the State of California, (as

set forth in Decision 1649), to divert and store up to 198,317 acre-feet of water per year behind Seven Oaks Dam for beneficial consumptive purposes in the Districts' service areas.[61] The decision explicitly recognizes that the "flow in the Santa Ana River is highly variable" and that the "actual amount of water available" in any given year may be "much less" than 198,317 af.[62] This volume of 198,317 was calculated through modeling by the Districts of a "maximum diversion scenario" for the wettest year of a 39-year base period of study. The same model predicted an average capture of 27,000 acre-feet under that scenario.[63]

* * *

81. While a formal consultation with the USACE has not yet commenced with regard to the Supplemental Water Supply project and the sucker, the Service expects a consultation to occur in the near future.[67] The Service has yet to make any determination about potential conservation efforts that would be recommended as part of this consultation. However, as discussed above, the Service has articulated that, with regard to projects that involve a change in water discharge, possible recommendations to accommodate critical habitat could include, though not be limited to measures such as to "not divert or divert less water," "modify the discharge regime" and "require additional measures to offset habitat impacts only (offsite habitat restoration)."[68] As such, impacts to water usage may be possible at some projects following critical habitat designation. It is also

clear, from the volumes of water cited below and the value of water per acre-foot of replacement water, that, should restrictions on water usage in critical habitat areas occur, substantial impacts to water users would be expected. As discussed above, this analysis assumes that, under the low scenario, the Districts will be required to undertake $1.6 million in conservation efforts associated with this project. Under the High End Scenario, this analysis adopts the Husing methodology and assumes that 25,800 acre-feet of new waters rights would become inaccessible due to critical habitat designation.[69] This volume approximates the average annual volume of water predicted to be captured by these rights (27,000 acre-feet) under Decision 1649.

* * *

City of San Bernardino Water Factory

84. The Husing reports state that the City of San Bernardino "would increase its usable water supply by treating its existing wastewater discharges into the Santa Ana River to produce recycled water that can be made available to local users." The Service reports that the footprint for this project may overlap with other listed species, including the Santa Ana woolystar and least Bell's vireo. For the purposes of this analysis, we assume that this project moves forward, and that conservation efforts to accommodate the sucker are $1.6 million under the low end scenario. Under the high-end scenario, we assume that the project will

lose access to its local water source of approximately 25,500 acre-feet.

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Joint Riverside North Aquifer Storage and Recovery Project

100. The City of Riverside, the City of Colton, Western, and Valley District are engaged in a planning project for a Riverside North Aquifer Storage and Recovery Project that would be adjacent to the Santa Ana River in Subunit 1B.[99] The project would be a conjunctive use project, including construction of groundwater recharge facilities, a community park, and utility upgrades. The purpose of the project is to improve the quality of groundwater in the Riverside and Colton groundwater basins and to create additional groundwater basins along this portion of the Santa Ana River.

101. The City of Riverside pumps water from two groundwater basins, the Bunker Hill Basin and the Riverside Basin. The City operates a Regional Water Quality Control Plant (RWQCP) south of the Santa Ana River, and plans to implement a project that will divert recycled water from the RWQCP to improve its water supply. After several years of negotiations with the California Department of Fish and Game as well as environmental groups, the City has agreed to ongoing monitoring and consultation on the project to address adverse impacts to the sucker.[100] The City authorized "conceptual approval" of a facilities plan for this project in 2008.[101] The Husing reports state that 15,000

acre-feet will be lost due to sucker critical habitat designation associated with this project.[102] The Service assigned a high probability of impacts from critical habitat for sucker to this project. Because the Service did not attempt to estimate the future outcome of any consultation, this analysis assumes that, as with other projects, the project will likely incur $1.6 million in conservation costs related to sucker critical habitat under the Low scenario. Under the High End Scenario, this analysis assumes that the 15,000 acre-feet of water will be lost to use. Costs related to this project are assumed to be incremental. We note, however, that some of these costs, such as the ongoing monitoring, may occur under the baseline even absent critical habitat designation under the negotiated agreement.

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[Footnotes Omitted]