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8 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 FOR THE CITY AND COUNTY OF SAN FRANCISCO

10 KLAMATH RIVERKEEPER, QUARTZ VALLEY) Case No.:
11 INDIAN RESERVATION, PACIFIC COAST)
FEDERATION OF FISHERMEN'S)
12 ASSOCIATIONS, ENVIRONMENTAL) VERIFIED PETITION FOR
PROTECTION INFORMATION CENTER,) WRIT OF MANDATE
13 SIERRA CLUB, NORTHCOAST)
ENVIRONMENTAL CENTER, and INSTITUTE)
14 FOR FISHERIES RESOURCES,)
15)
Petitioners,)
16)
vs.)
17 CALIFORNIA DEPARTMENT OF FISH AND)
GAME,)
18)
Respondent.)
19)
20)

21 **INTRODUCTION**

22 1. Agricultural practices in the upper Klamath basin have devastated coho salmon.
23 Excessive irrigation and dewatering of streams have literally left the fish without sufficient water.
24 Uncontrolled groundwater pumping has deprived fish of indispensable cold water flows. Dams have
25 destroyed habitat and blocked access to former spawning grounds. As a result, coho salmon are now
26 listed as “threatened” under both the federal Endangered Species Act and the California Endangered
27 Species Act (“CESA”).
28

1 7. Consistent with Public Resources Code section 21167(b) and (c), Petitioners timely
2 filed this action within 30 days of the Department's filing of its Notice of Determinations on
3 September 22, 2009.

4 8. Petitioners have provided written notice of their intention to file this petition to the
5 Department pursuant to the requirements of Public Resources Code section 21167.5. (See Exhibit A
6 hereto.)

7 9. Petitioners have served the Attorney General with a copy of this petition along with a
8 notice of its filing, in compliance with Public Resources Code section 21167.7. (See Exhibit B
9 hereto.)

10 10. Petitioners do not have a plain, speedy, or adequate remedy at law because Petitioners
11 and their members will be irreparably harmed by the ensuing environmental damage caused by
12 implementation of the Programs and violations of CEQA.

13 PARTIES

14 11. Petitioner KLAMATH RIVERKEEPER is a non-profit organization based in the
15 Klamath Basin watershed of northern California and southern Oregon. The mission of Klamath
16 Riverkeeper is to restore water quality and fisheries throughout the Klamath watershed, bringing
17 vitality and abundance back to the river and its people. Working closely with Klamath River tribes,
18 fishermen, and recreational groups, Klamath Riverkeeper employs a four-pronged approach in its
19 campaigns and projects consisting of science-informed policy advocacy within existing regulatory
20 processes; a legal strategy; grassroots outreach and education; and scientific needs analysis and
21 water quality monitoring. Klamath Riverkeeper's current projects and campaigns include promoting
22 strong water pollution control plans within the Klamath Basin, working to protect spring and fall
23 chinook salmon, fall coho salmon, and summer steelhead runs and to encourage fish passage at dams
24 across the region, and pursuing an aggressive legal strategy to address the toxic algae problem
25 caused by Klamath River dams.

26 12. Petitioner QUARTZ VALLEY INDIAN RESERVATION is located in the Scott
27 River basin, part of the Klamath River watershed. Currently there are 232 tribal members of both
28 Karuk and Shasta decent. The Tribe works actively in both the Scott and Shasta watersheds in an

1 effort to protect and restore salmonid spawning and rearing habitat; fishing and swimming areas; and
2 other wildlife habitat and cultural needs. The objective of these efforts is to ensure future protection
3 and sustained use of valuable Reservation water resources, protection of public health and welfare,
4 and the enhancement of cultural resources. The Tribe intends to protect and improve watershed
5 health through water quality monitoring, planning and implementation, habitat evaluation, education,
6 and community outreach.

7 13. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS
8 (“PCFFA”) is the largest trade organization of commercial fishing men and women on the west
9 coast. PCFFA is a federation of 15 port associations and marketing associations in California,
10 Oregon, and Washington. Collectively, PCFFA’s members represent over 1,200 commercial fishing
11 families, most of whom are small and mid-sized commercial fishing boat owners and operators.
12 Most of PCFFA’s members derive all or part of their income from the harvesting of Pacific salmon,
13 a valuable business enterprise for the West Coast and California economies. The decline of
14 California’s salmon species has severely impacted PCFFA members in California by limiting
15 commercial harvest opportunities, both through lost production of impaired stocks and because of
16 restrictions imposed on the fishing fleet to protect impaired salmon populations. Habitat losses have
17 cost the west coast salmon fishing industry (including both commercial and recreational
18 components) many thousands of salmon-produced family wage jobs over the last 20 years. These
19 losses are directly related to widespread freshwater habitat destruction and impairment of water
20 quality from human activities such as dam construction, water diversions, agriculture, logging,
21 mining, and grazing. PCFFA has been active for nearly 30 years in efforts to rebuild salmon
22 populations and correct water pollution problems in North Coast streams and rivers, as well as
23 watersheds connected to these rivers, including the Shasta and Scott River watersheds.

24 14. Petitioner ENVIRONMENTAL PROTECTION INFORMATION CENTER
25 (“EPIC”) is a community based, non-profit organization that actively works to protect and restore
26 forests, watersheds, coastal estuaries, and native species in northwest California. EPIC was
27 established in 1977 when local residents came together to successfully end aerial applications of
28 herbicides by industrial logging companies in Humboldt County. EPIC has been at the forefront of

1 environmental protection in northwest California since that time, working to ensure that state and
2 federal agencies follow their mandate to uphold environmental laws and protect endangered
3 species. EPIC uses an integrated, science-based approach that combines public education, citizen
4 advocacy, and strategic litigation to produce needed policy reforms and legal actions to inform the
5 public and advocate for reform. EPIC has a long history of working to protect and restore the
6 Klamath River Watershed, including the Shasta and Scott Rivers.

7 15. Petitioner SIERRA CLUB is a nationwide non-profit conservation organization
8 formed in 1892 with over 750,000 members, approximately 185,000 of whom reside in California.
9 The Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth, to
10 practice and promote responsible uses of the Earth's ecosystems and resources, to educate and
11 enlist humanity in the protection and restoration of the quality of the natural and human
12 environment, and to use all lawful means to carry out those objectives. For many years, the Sierra
13 Club and its members have advocated for the protection of public lands and forest ecosystems
14 throughout California, including the Scott and Shasta River watersheds. The Sierra Club Redwood
15 Chapter has approximately 9,000 members in northwestern California.

16 16. Petitioner NORTHCOAST ENVIRONMENTAL CENTER ("NEC") is a non-profit
17 organization whose mission is to promote understanding of the relations between people and the
18 biosphere and to conserve, protect, and celebrate terrestrial, aquatic, and marine ecosystems of
19 northern California and southern Oregon. Since its establishment in 1971, NEC has worked to
20 conserve the area's biological assets and to stimulate public awareness in securing the future of
21 these natural treasures, which are vital to sustaining physically, economically, and culturally
22 healthy communities. NEC has been at the forefront of every regional environmental struggle for
23 decades, including efforts to protect ancient redwoods, wild rivers, and endangered species.

24 17. Petitioner INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a sister
25 organization of PCFFA. IFR is a nonprofit organization with headquarters in San Francisco,
26 California. Established in 1993 by PCFFA, IFR is responsible for meeting the fishery research and
27 conservation needs of working men and women in the fishing industry by executing PCFFA's
28 expanding habitat protection program. From its inception, IFR has helped fishing men and women

1 in California and the Pacific Northwest address salmon protection and restoration issues, with
2 particular focus on dam, water diversion, and forestry concerns. IFR is an active leader in several
3 restoration programs affecting salmon, including removal of antiquated storage and hydroelectric
4 dams. Protecting and restoring the Klamath River watershed is high on IFR's list of priorities.

5 18. Respondent California Department of Fish and Game is a state agency headquartered
6 in Sacramento charged with conserving, protecting, and managing California's fish, wildlife, and
7 native plant resources for their intrinsic value and their use and enjoyment by the public. The
8 Department's duties include administering and enforcing CESA, as well as Fish and Game Code
9 section 1600 *et seq.*, which governs the issuance of Streambed Alteration Agreements. The
10 Department approved the Scott River and Shasta River Watershed-wide Permitting Programs and is
11 the lead agency for purposes of CEQA.

12 19. Petitioners bring this action on their own behalf and on behalf of their members,
13 employees, and/or supporters who are residents and taxpayers of the State of California. Many of
14 these persons live, work, recreate, and/or travel in the vicinity of the Klamath River watershed.
15 They use, on a continuing and ongoing basis, the resources in and surrounding the Klamath for
16 recreational, cultural, scientific, aesthetic, educational, conservation, and other purposes such as
17 fishing, hiking, wildlife observation, study, contemplation, photography, and general enjoyment of
18 the beauty of the wildlife, land, and other resources in the area. These individuals intend to continue
19 using and enjoying these resources in the future.

20 20. Petitioners' members will suffer concrete injury to their interests described above as a
21 result of the adoption of the Programs at issue in this lawsuit. These harms include the impairment
22 of the cold water fisheries, massive dewatering, and degradation of water quality in the Scott and
23 Shasta River watersheds. Such impacts will harm Petitioners' ability to enjoy and use these
24 resources. These injuries would be redressed by the relief requested in this case.

25 21. Petitioners participated in the administrative processes that culminated in the
26 Department's decision to adopt the Programs through written and oral comments. Petitioners
27 exhausted all their administrative remedies prior to filing this action.

1 **BACKGROUND**

2 **The Scott and Shasta River Watersheds**

3 22. Winding 263 miles from southeastern Oregon through northern California to its
4 mouth at the Pacific Ocean, the Klamath River is California’s second largest river system, draining a
5 basin of approximately 15,600 square miles. Numerous water diversion projects and dams regulate
6 and alter the flow along its mainstem, including four hydroelectric projects and the Klamath Project,
7 which impounds substantial amounts of water for agricultural and urban use.

8 23. Close to the Klamath River’s midpoint in central-northern California, two of its major
9 tributaries, the Scott and Shasta Rivers, join the Klamath’s mainstem. Their watersheds, which lie
10 side-by-side, cover a total area of over 1600 square miles, over one-tenth of the Klamath basin. (See
11 Exhibit C hereto (map identifying the Scott and Shasta watersheds).) Sparsely populated and
12 surrounded by mountains, these watersheds are predominantly rural. Agriculture is a major land-use
13 within both areas. Farm and rangeland surround the Scott River, and much of the Shasta Valley is
14 devoted to agriculture, including the production of livestock and field crops.

15 24. Agriculture has exacted a heavy toll on the Scott and Shasta Rivers and their
16 tributaries. Throughout the summer and fall irrigation season, the mainstem of the Scott River
17 routinely loses its entire natural flow, and many of its tributary streams run dry or drop below
18 ground. Streams and creeks in the Shasta River watershed are similarly routinely dewatered.

19 25. Dewatering results from over-appropriation of water rights by agricultural users;
20 excessive diversions for irrigation, many of which are illegal; unregulated groundwater pumping;
21 lack of enforcement against illegal diversions and unpermitted groundwater pumping; and various
22 state and federal agencies’ dereliction of their public trust and statutory duties to enforce and
23 regulate proper water allocations and/or protect stream flows.

24 26. On the Shasta River, Dwinnell Dam also routinely dewateres the Shasta River and
25 streams below it and negatively impacts water quality above and below the impoundment. Dwinnell
26 Dam impounds the Shasta River’s and its tributaries’ flows into Lake Shastina, which holds a
27 capacity of 50,000 acre feet, much of which is diverted to irrigation. Over time, these excessive
28 diversions have profoundly altered the natural hydrology of the Shasta River.

1 27. Dams, channel straightening (or “channelization,” to prevent flooding and increase
2 land available for farm use) resulting in changed channel morphology, and livestock grazing have
3 also led to depleted oxygen levels, increased nutrient pollution, and higher sedimentation levels in
4 the Shasta and Scott Rivers and their tributaries.

5 28. As a result of drastically reduced flows, water temperatures within the Scott and
6 Shasta watersheds have increased dramatically. These warm conditions are also exacerbated by
7 rampant unregulated groundwater pumping by agricultural operators and irrigation districts which
8 deprives streams of cold baseflows; agricultural return water or “tailwater returns,” which is often
9 considerably warmer when it flows back into streams and rivers; and the loss of riparian vegetation
10 to farming and livestock grazing.

11 29. Both the Scott and Shasta Rivers are listed as “impaired” bodies of water under
12 section 303 of the Clean Water Act. The Scott River is impaired for temperature and sediment, and
13 the Shasta River is impaired for temperature and dissolved oxygen.

14 **Coho Salmon Habitat and Listing**

15 30. The Scott and Shasta Rivers provide habitat for numerous aquatic species, including
16 coho salmon (*Oncorhynchus kisutch*). Coho are one of two naturally occurring salmon species in
17 California and, like all salmonids, are known for their extraordinary “anadromous” migratory life
18 history, which spans three years over hundreds of miles between fresh and salt water. Born in
19 freshwater, they migrate as one year old juveniles to the Pacific Ocean, where they spend the next
20 two years until their arduous upstream return to their native streams as adults, where they spawn and
21 die. Thus, freshwater streams and rivers are essential to this life cycle. Specifically, coho salmon
22 require adequate stream flows, cold water, streamside shade, instream shelter and pools, and access
23 to spawning gravels with a low fine sediment component.

24 31. Unfortunately, human activities including agriculture have degraded or reduced
25 available freshwater habitat for coho, precipitating their decline. Excessive surface water diversions
26 by irrigators have resulted in significantly lowered or dried-up streams and thus substantial habitat
27 loss; stranding and direct killing of fish, due to the rapid dewatering of streams; and entrainment and
28 stranding of fish in irrigation canals and thus removal of coho from their natural habitat. Stream

1 diversions, groundwater pumping, and tailwater returns have led to intolerably warm conditions for
2 coho. Loss of riparian vegetation has exacerbated these warm conditions, as well as eliminated a
3 source for large woody debris, another essential component to coho habitat, which provides instream
4 shelter and creates pools. Dams have blocked access to spawning grounds. Further, dams,
5 channelization, and livestock grazing have resulted in reduced dissolved oxygen levels, as well as
6 higher sediment levels in streams, which can smother coho eggs deposited in streambeds.

7 32. As a result of this significant habitat degradation and loss, in 1997 coho salmon of the
8 Southern Oregon Northern California Coast (“SONCC”) Evolutionary Significant Unit (“ESU”)
9 from Punta Gorda in Humboldt County, California, north to Cape Blanco in southern Oregon, were
10 listed as “threatened” under the federal Endangered Species Act. An ESU is a population that is (1)
11 reproductively isolated from other conspecific population units, and (2) represents an important
12 component of the evolutionary legacy of the species. Two subsequent federal status reviews in 2001
13 and 2005 have since reaffirmed the federal ESA listing, and it continues to be so listed today.

14 33. On August 5, 2004, the California Fish and Game Commission designated SONCC
15 coho salmon ESU populations between Punta Gorda in Humboldt County and the northern border of
16 California as a “threatened” species under CESA, effective as of March 30, 2005. This listing
17 included coho within the Scott and Shasta River watersheds. The listing was based in part on the
18 Department’s determination that agricultural activities, including water diversions, dams, and
19 livestock grazing, had degraded or destroyed coho habitat and even resulted in direct killing of coho,
20 as described above, and thus substantially contributed to the decline of coho salmon in California.

21 34. As a result of this listing under CESA, coho salmon are entitled to certain protections.
22 Perhaps most significantly, once a species is listed under CESA, it is illegal for anyone to “take” the
23 species. (Fish & G. Code § 2080.) The term “take” is broadly defined to include “hunt, pursue,
24 catch, capture, or kill,” or attempt to do any of these things. (Fish & G. Code § 86.) However, the
25 Department may authorize by permit “incidental take” of a listed species if: the take is incidental to
26 an otherwise lawful activity; the impacts of the authorized take are minimized and fully mitigated;
27 the applicant ensures adequate funding to implement the minimization and mitigation measures and
28

1 monitoring of those measures; and issuance of the permit would not jeopardize the continued
2 existence of the species. (Fish & G. Code § 2081 (b), (c).)

3 **The Shasta River and Scott River Watershed-wide Permitting Programs**

4 35. On March 29, 2005, one day before CESA's take prohibition was to take effect, the
5 Siskiyou Resource Conservation District and the Shasta Valley Resource Conservation District
6 (collectively "Districts") each submitted an application to the Department for a permit that would
7 allow take of coho salmon incidental to agricultural activities, including water diversions, water
8 diversion structures, livestock and vehicle stream access and crossings, and livestock grazing, within
9 the Scott and Shasta River watersheds respectively. In short, the Districts sought permission from
10 the Department to continue many of the very activities that led to the coho's listing in the first place.

11 36. Thereafter, the Department developed the Scott River Watershed-wide Permitting
12 Program and the Shasta River Watershed-wide Permitting Program, each consisting of three
13 components, the ITP component, a Streambed Alteration Agreement ("SAA") component, and a
14 monitoring component. According to the Department, the purposes of the Programs are to facilitate
15 compliance by agricultural operators, the Districts, and Department of Water Resources (which is
16 charged with managing and enforcing water allocations under some of the governing water
17 adjudications in the program areas) with CESA and Fish & Game Code section 1600 *et seq.*, by
18 streamlining the process for obtaining take authorization and SAAs for any activity that the Program
19 covers within the program areas, and to implement coho recovery projects. The Programs cover
20 surface water diversions, but do not cover groundwater extraction. The total term of each Program is
21 proposed to be ten years.

22 37. Under the ITP component of the Programs, the Department proposes to issue a
23 watershed-wide ITP to each District allowing take incidental to water diversions (but not
24 groundwater extraction), water diversion structures, livestock and vehicle stream access and
25 crossings, and livestock grazing, among other activities. Once issued, DWR and agricultural
26 operators could apply for sub-permits based upon this umbrella ITP. The Districts would be
27 responsible for mitigation for the take caused by sub-permittees' activities. In turn, the sub-
28 permittees would pay the Districts a fee for costs of administering the Program and would be

1 responsible for “avoidance” and “minimization” measures. Thus, each program proposes an ITP
2 that contains: general conditions applicable to all permittees and sub-permittees; “avoidance and
3 minimization obligations” applicable to the Districts and/or each sub-permittee, except DWR;
4 mitigation obligations applicable only to the Districts; a Monitoring and Adaptive Management
5 Program (“MAMP”); reporting requirements applicable only to the Districts; and special terms and
6 conditions applicable only to DWR.

7 38. Under the SAA component of the Programs, the Department and Districts developed
8 two programmatic documents to streamline processing and review of individual SAAs: (1) a SAA
9 Memorandum of Understanding (“MOU”) between the Department and each District defining their
10 separate roles and responsibilities in administering and implementing SAAs; and (2) a Master List of
11 Terms and Conditions (“MLTC”) dictating general conditions to be included in every SAA, and
12 specific conditions to be incorporated in an SAA depending on the particular covered activities to be
13 authorized.

14 39. Pursuant to Fish & Game Code section 1600 *et seq.*, an SAA is required to
15 substantially divert or obstruct the natural flow of any river or stream; substantially change, or use
16 any material from the bed, channel, or bank of, any river or stream; or deposit or dispose of debris,
17 waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any
18 river or stream.

19 40. On October 20, 2006, the Department issued “Notices of Preparation” announcing its
20 determination that it was required to prepare an EIR for each Program. Under CEQA, if substantial
21 evidence in the record supports a fair argument that a proposed project may cause one or more
22 significant effects, the lead agency for the project must prepare a detailed EIR analyzing the
23 project’s environmental impacts, feasible mitigation measures, and alternatives to the project. (Pub.
24 Res. Code §§ 21080(d), 21100.) In addition to these information-disclosure requirements, CEQA
25 mandates that public agencies refrain from approving projects with significant environmental effects
26 if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those
27 effects. (*Ibid.* at §§ 21002, 21081(a).)

1 41. The Notices attached initial studies supporting its determination that an EIR was
2 required. The Initial Studies indicated that the Projects’ potential impacts on coho salmon and their
3 habitat warranted preparation of an EIR.

4 42. On October 10, 2008, the Department made available separate draft EIRs for the
5 Scott River watershed-wide Permitting Program and the Shasta River Watershed-wide Permitting
6 Program. The draft EIRs attached draft copies of the proposed watershed-wide ITP, the SAA MOU,
7 SAA MLTC, and the MAMP.

8 43. With respect to the baseline, both draft EIRs stated that the conditions existing on the
9 date that the ITP applications were deemed complete, April 28, 2005, constituted the baseline
10 against which the potential environmental impacts of approving and implementing the Programs
11 were measured. This baseline included “historic ongoing activities” that have caused take of coho
12 salmon and continue to do so. The draft EIRs reasoned that these activities were part of the baseline,
13 because they “are expected to continue regardless of the Program; that is, they will not be caused by
14 the Program.” The baseline also included ongoing, illegal activities, including, but not limited to,
15 illegal diversion of surface and interconnected ground water in violation of the various water decrees
16 governing the program area; the unpermitted appropriation of ground waters in violation of state
17 water law; the operation of dams without adequate fishways or flows below the dam, in violation of
18 Fish & Game Code § 5937; and the overallocation of surface waters in violation of state water laws
19 and the Public Trust Doctrine. Numerous commenters, including Petitioners, complained that this
20 baseline was flawed.

21 44. Both draft EIRs also concluded: “Nonetheless, the Program is expected to reduce the
22 environmental impacts caused by historic ongoing activities, and thereby improve existing
23 environmental conditions in the Program Area compared to the baseline.” The Department made
24 this conclusory statement on the unanalyzed assumption that SAAs and ITP sub-permits issued for
25 these historic ongoing activities would require sufficient mitigation, avoidance, and minimization
26 measures for incidental take of coho. In numerous comments, the public demanded to know the
27 basis for this conclusion, including the level of take authorized by the Programs, the effectiveness of
28

1 the ITP's mitigation measures in mitigating that take, and the overall effect of the ITPs on the
2 continued existence of coho salmon.

3 45. In the final EIR's response to these comments, the Department responded only that
4 the EIR would analyze these issues in a separate "jeopardy analysis," required under CESA.
5 However, the response to comments did not indicate when and where this analysis would be
6 performed or how it could be found, and it was not included in the final EIR certified by the
7 Department.

8 46. Finally, commenters, including Petitioners, also complained of the EIR's flawed
9 discussion of the Programs' other significant impacts, proposed mitigation measures, cumulative
10 impacts analysis, and failure to consider feasible alternatives.

11 47. On September 22, 2009, the Department issued a Notice of Determination for both
12 Programs, certifying the EIRs and concluding that the Programs would not have a significant effect
13 on the environment. As of the date of this Petition, the Department has not issued ITPs to the
14 Districts, or SAAs, pursuant to the Programs.

15 **FIRST CAUSE OF ACTION**

16 **(Violation of CEQA –Failure to Describe the Project Properly)**

17 48. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
18 in the preceding paragraphs.

19 49. Pursuant to CEQA and its implementing guidelines, an EIR's project description must
20 describe "[a] statement of the objectives sought by the proposed project," which "should include the
21 underlying purpose of the project." (Cal. Code Regs., tit. 14, § 15124, subd. (b).) "A clearly written
22 statement of objectives will help the lead agency develop a reasonable range of alternatives to
23 evaluate in the EIR and will aid the decision makers in preparing findings or a statement of
24 overriding considerations, if necessary." (*Ibid.*)

25 50. The EIRs for the Programs approved by the Department at issue in this case fail to
26 provide a clear and accurate description of the projects, in violation of CEQA. For example, the
27 EIRs:

- 1 a) Fail to clearly disclose the Programs’ underlying purposes of
2 authorizing incidental take of coho salmon that would otherwise be
3 prohibited.
- 4 b) Mislead and confuse the public as to the Department’s underlying
5 purpose in authorizing incidental take of coho salmon that would
6 otherwise be prohibited, by stating that such take would occur
7 “regardless of the Program[s]”;
- 8 c) Vaguely and improperly describe the Programs as being “intended to
9 facilitate compliance” with CESA and Fish and Game Code § 1600 *et*
10 *seq.*, thereby obscuring the Programs’ underlying purpose to authorize
11 incidental take of coho salmon; and
- 12 d) Improperly confine the Programs’ project description to the
13 implementation of coho salmon recovery projects and mitigation
14 conditions in the proposed ITPs.

15 51. Among other things, the failure to accurately describe the Programs precluded the
16 development of a reasonable range of alternatives to evaluate in the EIR.

17 52. Because the Department failed to clearly and accurately describe the Programs’
18 objectives and underlying purpose, the Department failed to proceed in a manner required by law,
19 and substantial evidence does not support the Department’s findings that the Programs’
20 environmental effects are not significant and/or will be mitigated to less than significant levels.

21 **SECOND CAUSE OF ACTION**

22 **(Violation of CEQA – Failure to Describe the Environmental Setting Properly)**

23 53. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
24 in the preceding paragraphs.

25 54. CEQA and its implementing guidelines require that an EIR “include a description of
26 the physical environmental conditions in the vicinity of the project, as they exist at the time the
27 notice of preparation is published, or if no notice of preparation is published, at the time
28 environmental analysis is commenced, from both a local and regional perspective. This

1 environmental setting will normally constitute the baseline physical conditions by which a lead
2 agency determines whether an impact is significant.” (Cal. Code Regs., tit. 14, § 15125, subd. (a).)

3 55. The Department failed to describe properly the baseline physical environmental
4 conditions in the EIRs for both Programs, such that the Programs’ impacts could be properly
5 understood. The flaws in the EIRs’ baseline include, but are not limited to:

- 6 a) The baseline adopted by the Department arbitrarily and illegally
7 included the occurrence of take incidental to agricultural activities.
8 The baseline should have excluded such activities and associated take,
9 because the purpose of the Programs is to authorize take that would
10 otherwise be unpermitted, and the Department has a duty to enforce
11 against take in the absence of take authorization.
- 12 b) The baseline arbitrarily included illegal activities and conditions that
13 have caused take and other harm to coho salmon. For example, these
14 include, but are not limited to: the illegal diversion of surface water
15 and pumping of groundwater; the operation of dams in violation of
16 Fish and Code section 5937, including the operation of Dwinnell Dam;
17 and the over-appropriation of stream flows under water decrees
18 governing the program areas in violation of state water laws.

19 56. Because the Department used a flawed baseline and otherwise failed to describe the
20 environmental setting properly, the Department failed to proceed in a manner required by law, and
21 substantial evidence does not support the Department’s findings that the Programs’ environmental
22 effects are not significant and/or will be mitigated to less than significant levels.

23 **THIRD CAUSE OF ACTION**

24 **(Violation of CEQA –Failure to Evaluate Significant Environmental Effects)**

25 57. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
26 in the preceding paragraphs.

27 58. CEQA and its implementing guidelines require that an EIR describe the proposed
28 project’s significant environmental effects; each such effect must be revealed and fully analyzed in

1 the EIR, giving due consideration to both short-and long-term effects. (See Pub. Res. Code §§
2 21100(b), 21002.1; Cal. Code Regs., tit. 14, §§15126.2, subd. (a).) Significant effect on the
3 environment refers to substantial, or potentially substantial, adverse changes in physical conditions.
4 (Pub. Res. Code §§ 21060.5, 21100(d).)

5 59. The EIRs for both Programs fail to evaluate the Programs' effects adequately, in
6 violation of CEQA. For example, the EIRs fail to evaluate and disclose:

- 7 a) the Programs' impacts on coho salmon, including the level and extent
8 of take authorized by the ITPs and their effects on the continued
9 existence of coho salmon;
- 10 b) the Programs' impacts on groundwater resources and groundwater
11 extraction, which is expected to increase, given that groundwater
12 extraction will not be covered by the Programs and that it will be
13 relied upon for certain mitigation conditions specified in the ITPs;
- 14 c) the Programs' social and economic impacts, including impacts on
15 subsistence fishing by Indian tribes and on commercial fishing in the
16 vicinity of the Program areas;
- 17 d) the Programs' impacts on other fish species within the Program areas,
18 including Chinook salmon and steelhead.

19 60. Because the EIRs failed to study the Programs' significant environmental effects, the
20 Department failed to proceed in a manner required by law, and substantial evidence does not support
21 the Department's findings that the Programs' environmental effects are not significant and/or will be
22 mitigated to less than significant levels.

23 **FOURTH CAUSE OF ACTION**

24 **(Violation of CEQA – Failure to Consider, Discuss, and Adopt Mitigation Measures 25 to Minimize Significant Environmental Effects)**

26 61. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
27 in the preceding paragraphs.
28

1 62. An EIR must identify feasible mitigation measures in order to substantially lessen or
2 avoid otherwise significant environmental effects. (Pub. Res. Code §§ 21002, 21081 (a); Cal. Code
3 Regs., tit. 14, § 15126.4, subd. (a).) “Formulation of mitigation measures should not be deferred
4 until some future time.” (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1)(B).) CEQA provides that
5 public agencies should not approve projects as proposed if there are feasible alternatives or
6 mitigation measures available to substantially lessen the significant environmental impacts of the
7 project. (Pub. Res. Code §§ 21002, 21081(a).) If the project is changed to incorporate mitigation to
8 mitigate or avoid significant effects on the environment, the public agency shall adopt a reporting or
9 monitoring program for the mitigation adopted. (Pub. Res. Code § 21081.6.)

10 63. The EIRs for both Programs failed to identify and study adequate, feasible mitigation
11 measures to reduce the Programs’ significant environmental impacts, including, but not limited to,
12 the following:

- 13 a) the Programs’ impacts on coho salmon, including the impacts of take
14 authorized by the Programs that were improperly included within the
15 baseline;
- 16 b) the impacts of past and ongoing illegal activities that were improperly
17 included within the baseline;
- 18 c) the Programs’ impacts on groundwater resources and groundwater
19 extraction;
- 20 d) the Programs’ impacts on other fish species, including Chinook
21 salmon and steelhead.

22 64. The formulation of mitigation measures proposed in the EIRs and the ITPs is also
23 improperly deferred under CEQA, or mitigation measures are not sufficiently defined such that their
24 effectiveness and/or feasibility can be evaluated. These include, but are not limited to: a Water Trust
25 Account, alternative stock watering systems, a strategy for critically dry years, grazing plans, a
26 spawning gravel enhancement plan, a tailwater recovery plan, and fish passage at Dwinnell Dam.

1 c) re-adjudication of water rights within the Program areas.

2 70. In addition, the EIR for the Shasta River Watershed-wide Permitting Program
3 arbitrarily rejected the removal of Dwinnell Dam as an infeasible alternative.

4 71. The EIRs thus failed to proceed in a manner required by law, and the Department's
5 failure to adequately study these proposed alternatives lacks the support of substantial evidence.

6 **FIFTH CAUSE OF ACTION**

7 **(Violation of CEQA – Failure to Consider and Discuss Cumulative Impacts)**

8 72. An EIR must discuss the cumulative impacts of a project when the project's
9 incremental effect is "cumulatively considerable." (Pub. Res. Code § 21083(b)(2); Cal. Code Regs.,
10 tit. 14, § 15130, subd. (a).) Cumulatively considerable "means that the incremental effects of an
11 individual project are significant when viewed in connection with the effects of past projects, the
12 effects of other current projects, and the effects of probable future projects." (Pub. Res. Code §
13 21083(b)(2); Cal. Code Regs., tit. 14, § 15065, subd. (a)(3).)

14 73. The EIRs at issue in this case failed to properly study the Programs' cumulative
15 impacts. Among other shortcomings:

16 a) Because the EIRs for both Programs did not consider the take
17 authorized by the Programs to be an effect of the Program, they did not
18 consider the cumulative impacts of such take in connection with the
19 impacts of past, present, and future projects or activities, including but
20 not limited to, prior and ongoing agricultural activities and past,
21 present, and future groundwater extraction.

22 b) The EIRs fail to consider the Programs' cumulative impacts on
23 groundwater extraction in connection with past, present, and future
24 groundwater extraction.

25 74. Because the EIRs failed to study these cumulative impacts, the Department failed to
26 proceed in a manner required by law, and substantial evidence does not support the Department's
27 findings that the Programs' environmental effects are not significant and/or will be mitigated to less
28 than significant levels.

1 **SIXTH CAUSE OF ACTION**

2 **(Violation of CEQA – Failure to Provide Information Upon Which**
3 **Conclusions Are Based)**

4 75. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
5 in the preceding paragraphs.

6 76. CEQA requires that an EIR provide an “analytically complete and coherent
7 explanation” of its conclusions. (See *Vineyard Area Citizens for Responsible Growth v. City of*
8 *Rancho Cordova* (2007) 40 Cal. 4th 412, 439-40.) “The data in an EIR must not only be sufficient
9 in quantity, it must be presented in a manner calculated to adequately inform the public and decision
10 makers, who may not be previously familiar with the details of the project.” (*Ibid.* at 442.)
11 Moreover, an EIR that tiers from a future analysis or that does not properly incorporate or reference
12 a separately performed analysis does not adequately inform the public. (*Ibid.* at 440-41, 443; see
13 also Cal. Code Regs., tit. 14, § 15151 [providing that an EIR should contain “a sufficient degree of
14 analysis to provide decision-makers with information which enables them to make a decision which
15 intelligently takes account of environmental consequences”].)

16 77. The EIRs for both Programs failed to properly inform the public and decision makers
17 of the basis for their conclusions. These failures include, but are not limited to, the following:

- 18 a) The EIRs state without support that the Programs, including the ITPs,
19 will result in a net environmental benefit, with no factual basis for or
20 analysis of the amount of take authorized by the Programs, no analysis
21 of the effectiveness of the mitigation measures proposed in the ITPs in
22 mitigating that take, and no analysis of the Programs’ effects on the
23 continued existence of coho salmon.
- 24 b) To the extent the EIR intended to rely on a future “jeopardy analysis,”
25 or other analysis, to support its conclusions, the EIRs improperly tiered
26 from or deferred such analysis.
- 27
28

1 c) To the extent the EIRs intended to incorporate or tier from any prior
2 analysis performed in a separate document, the EIR failed to properly
3 incorporate or reference that analysis.

4 78. This failure precluded informed decision-making, including the informed comparison
5 of reasonable alternatives to the Programs.

6 79. By failing to properly provide data and analysis in the EIRs to support its
7 conclusions, the Department failed to proceed in a manner required by law, and substantial evidence
8 does not support the EIRs' conclusions that the Programs' impacts are not significant and will be
9 mitigated to less than significant levels.

10 **SEVENTH CAUSE OF ACTION**

11 **(Violation of CEQA – Failure to Respond to Comments)**

12 80. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
13 in the preceding paragraphs.

14 81. CEQA requires that the lead agency evaluate comments on environmental issues
15 raised in the comment period and prepare a written response that describes the disposition of each
16 significant environmental issue that is raised by commenters. (Pub. Res. Code § 21091(d)(1).) “The
17 major environmental issues raised when the lead agency’s position is at variance with
18 recommendations and objections raised in the comments must be addressed in detail giving reasons
19 why specific comments and suggestions were not accepted.” (Cal. Code Regs., tit. 14, § 15088,
20 subd. (c).)

21 82. The Department failed to consider, respond to, and otherwise address numerous
22 comments on the EIR for the Programs at issue in this case. For example, the Department failed to
23 respond to comments urging the agency to:

24 a) adopt a baseline that excludes ongoing take incidental to agricultural
25 activities and illegal ongoing activities and conditions in the Program
26 areas;

- b) study the Programs' impacts on coho salmon, including the impacts of take authorized by the Programs that were improperly included within the baseline;
- c) study the Programs' impacts regarding past and ongoing illegal activities that were improperly included within the baseline;
- d) study the Programs' impacts on groundwater resources and groundwater extraction.

83. By failing to properly respond to comments, the Department failed to proceed in a manner required by law, and substantial evidence does not support its findings that the Programs' impacts are not significant and will be mitigated to less than significant levels.

EIGHTH CAUSE OF ACTION

(Declaratory Relief)

84. Petitioners re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

85. Petitioners contend that the Department's decisions to approve the Scott River Watershed-wide Permitting Program and the Shasta River Watershed-wide Permitting Program was unlawful.

86. The Department contends that its decision to approve the Programs was and is lawful.

87. An actual controversy has arisen and now exists between Petitioners and the Department regarding their respective rights and duties.

88. Petitioners desire a judicial determination and declaration of the parties' respective rights and duties, including a declaration of whether the Department's decision violates the law. Such a declaration is necessary and appropriate at this juncture.

REQUEST FOR RELIEF

Wherefore, Petitioners respectfully request relief as follows:

- 1. A peremptory writ of mandate ordering the Department to vacate and set aside its approval of the Shasta and Scott Rivers Watershed-wide Permitting Programs and associated EIRs;

1 **VERIFICATION**

2 I, Erica Terence, hereby declare:

3 I am an employee with Klamath Riverkeeper. The facts alleged in the above petition and
4 complaint are true to my personal knowledge.

5 I declare under penalty of perjury under the laws of the State of California that the above is
6 true and correct and that this verification is executed on this ____ day of October 2009 at Orleans,
7 California.

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9 _____
10 Erica Terence
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