

COPY

E-filing

1 EDMUND G. BROWN JR.  
 Attorney General of California  
 2 J. MATTHEW RODRIQUEZ  
 Chief Assistant Attorney General  
 3 KEN ALEX  
 Senior Assistant Attorney General  
 4 TARA L. MUELLER  
 Deputy Attorney General  
 5 State Bar No. 161536  
 MEGAN ACEVEDO  
 6 Deputy Attorney General  
 State Bar. No. 226604  
 7 Office of the Attorney General  
 1515 Clay Street, Suite 2000  
 8 P.O. Box 70550  
 Oakland, California 94612-0550  
 9 Telephone: (510) 622-2136  
 Facsimile: (510) 622-2270  
 10 E-mail: Tara.Mueller@doj.ca.gov  
 Attorneys for Plaintiff People of the State of  
 11 California, ex rel. Edmund G. Brown Jr., Attorney  
 General

ORIGINAL  
 FILED  
 DEC 29 2008  
 RICHARD W. WIEKING  
 CLERK U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND

12 IN THE UNITED STATES DISTRICT COURT  
 13 FOR THE NOTHERN DISTRICT OF CALIFORNIA

ADR

C08-05775

EMC

17 **PEOPLE OF THE STATE OF**  
 18 **CALIFORNIA, EX REL. EDMUND G.**  
**BROWN JR., ATTORNEY GENERAL,**  
 19 **PLAINTIFF,**  
 20 **v.**  
 21 **DIRK KEMPTHORNE, SECRETARY,**  
 22 **UNITED STATES DEPARTMENT OF**  
**THE INTERIOR; CARLOS GUTIERREZ,**  
 23 **SECRETARY, UNITED STATES**  
**DEPARTMENT OF COMMERCE;**  
 24 **UNITED STATES FISH AND WILDLIFE**  
**SERVICE; AND NATIONAL MARINE**  
 25 **FISHERIES SERVICE,**  
 26 **DEFENDANTS.**

Case No.:  
**COMPLAINT FOR DECLARATORY  
 AND INJUNCTIVE RELIEF**

1 **INTRODUCTION**

2 1. This action, brought on behalf of the People of the State of California, seeks to set  
3 aside regulations promulgated by the Secretary of the Interior, acting by and through the United  
4 States Fish and Wildlife Service ("FWS"), and the Secretary of Commerce, acting by and through  
5 the National Marine Fisheries Service ("NMFS") (collectively, the "Services" or "defendants"),  
6 pursuant to the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. The  
7 regulations amend longstanding existing regulations implementing the section 7 consultation  
8 provisions of the ESA, 16 U.S.C. § 1536. Section 7 ensures federal agency compliance with the  
9 ESA, and the section 7 consultation process is essential to the objective, scientific evaluation and  
10 effective mitigation of the effects of a wide variety of federal activities on endangered and  
11 threatened species and their habitat.

12 2. The new regulations substantially alter the substantive and procedural requirements  
13 for conducting inter-agency consultation under section 7 of the ESA. In doing so, the regulations  
14 violate the letter and spirit of the ESA and numerous binding judicial precedents interpreting the  
15 ESA. The regulations eliminate or short-circuit the section 7 consultation process for many  
16 federal agency actions, restrict the types of effects that must be evaluated and mitigated, and  
17 replace the current statutorily-mandated scientific consultation process with the self-interested  
18 and unscientific decisions of federal agency project proponents and their permittees and licensees.  
19 In sum, the regulations will significantly reduce the number, extent and effectiveness of section 7  
20 consultations under the ESA. This in turn will lead to further imperilment and even possible  
21 extinction of endangered and threatened species and further destruction and adverse modification  
22 of these species' designated critical habitat, contrary to the ESA.

23 3. This action also challenges the adequacy of the Services' environmental assessment  
24 ("EA") prepared for the regulations pursuant to the National Environmental Policy Act  
25 ("NEPA"), 42 U.S.C. § 4332, and their preparation of a finding of no significant impact  
26 ("FONSI") and failure to prepare an environmental impact statement ("EIS") under NEPA.  
27 Finally, this action alleges that the Services' process for promulgating the regulations and  
28 adopting the EA and FONSI violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 552,

1 by failing to: articulate a rational basis for the regulations, provide meaningful public notice and  
2 comment on the regulations and the draft EA, and adequately to respond to public comments on  
3 these documents.

4 4. California will be disproportionately affected by the significant and adverse  
5 environmental effects of the regulations. As of October 2008, California is home to 310 plant and  
6 animal species listed as endangered or threatened under the ESA, more than any other mainland  
7 state. In addition, California has millions of acres of federal public lands, multiple federal water  
8 projects, numerous military bases and facilities and other federal facilities and infrastructure  
9 projects that are subject to section 7 consultation requirements. In addition, countless acres of  
10 non-federal lands and numerous non-federal facilities in California are subject to federal  
11 permitting and licensing requirements – and therefore section 7 consultation requirements -- such  
12 as permitting of dredging and filling activities under section 404 of the federal Clean Water Act  
13 and licensing of hydropower facilities under the Federal Power Act.

14 5. The State of California seeks a declaration that the regulations were illegally  
15 promulgated in violation of the ESA and APA and that the Services' EA and failure to prepare an  
16 EIS violate NEPA and the APA. The State of California also seeks an injunction requiring the  
17 Services vacate and withdraw the regulations.

#### 18 JURISDICTION

19 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the  
20 laws of the United States) and 5 U.S.C. § 701 et seq. ("APA").

21 7. An actual controversy exists between the parties within the meaning of 28 U.S.C. §  
22 2201(a). The Court may grant declaratory relief, injunctive relief, and any additional relief  
23 available, pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706.

24 8. The Services' promulgation of a final rule, final EA and FONSI on December 16,  
25 2008 are final agency actions within the meaning of the APA, 5 U.S.C. §§ 702, 704, and are  
26 therefore judicially reviewable within the meaning of that statute. *Id.*, § 706.

27 //

28



1 Brown Jr., maintain offices within this judicial district in Oakland and San Francisco. Moreover,  
2 three other cases challenging the Services' regulations and environmental review for the  
3 regulations already have been filed in this judicial district. See N.D. Cal. Case Nos. CV 08-5546  
4 MHP, CV 08-5605 MMC and CV 08-5654 SI. Finally, venue is proper in this judicial district  
5 because this is a civil action brought against agencies of the United States and officers and  
6 employees of the United States acting in their official capacities under color of legal authority, no  
7 specific real property is involved in this action and threatened and endangered species that will be  
8 adversely affected by the final rule reside in this judicial district.

9 14. Pursuant to Northern District of California Civil Local Rule 3-2(d), assignment to the  
10 San Francisco Division of this Court is appropriate for the reasons explained in the preceding  
11 paragraph.

#### 12 PARTIES

13 15. Plaintiff People of the State of California bring this action by and through Attorney  
14 General Edmund G. Brown Jr., the chief law enforcement officer of the State. Cal. Const., art. V,  
15 § 13. This challenge is brought pursuant to the Attorney General's independent constitutional,  
16 common law, and statutory authority to file civil actions to represent the people's interests in  
17 protecting the environment and natural resources of the State from pollution, impairment or  
18 destruction. *Id.*; Cal. Gov't Code §§ 12511, 12600-12612; *D'Amico v. Bd. Of Medical*  
19 *Examiners*, 11 Cal. 3d 1 (1974).

20 16. Defendant DIRK KEMPTHORNE, United States Secretary of the Interior, is the  
21 highest ranking official within the U.S. Department of the Interior. The U.S. Department of the  
22 Interior is the federal agency ultimately responsible for administering the ESA with regard to  
23 endangered and threatened terrestrial and freshwater plant and animal species and certain marine  
24 species, for maintaining the lists of all endangered and threatened species, and for compliance  
25 with all other federal laws which the Department of the Interior has authority to implement.  
26 Defendant KEMPTHORNE is sued in his official capacity.



1           22. In the landmark case of *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978),  
2 the United States Supreme Court described the ESA as “the most comprehensive legislation for  
3 the preservation of endangered species ever enacted by any nation. . . . The plain intent of  
4 Congress in enacting this statute was to halt and reverse the trend toward species extinction,  
5 whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every  
6 section of the statute.” *Id.* at 180, 184.

7           23. The Services are charged with listing species as endangered or threatened. A species  
8 is “endangered” if it “is in danger of extinction throughout all or a significant portion of its  
9 range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an endangered  
10 species within the foreseeable future.” 16 U.S.C. § 1532(20).

11           24. When the Services list a species as endangered or threatened, generally they also must  
12 designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). The ESA  
13 defines critical habitat as: “(i) the specific areas within the geographical area occupied by a  
14 species, at the time it is listed in accordance with the [ESA], on which are found those physical or  
15 biological features (I) essential to the conservation of the species and (II) that may require special  
16 management considerations or protection; and (ii) specific areas outside the geographical area  
17 occupied by a species at the time it was listed . . . upon a determination by the Secretary that such  
18 areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A).

19           25. Section 7 of the ESA is one of the primary means Congress established to implement  
20 the overriding conservation purpose of the statute. *TVA v. Hill*, 437 U.S. at 181-185. Section 7  
21 contains substantive as well as procedural requirements – both of which are mandatory. *National*  
22 *Assn. of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2535 (2007); *Thomas v.*  
23 *Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). Substantively, section 7(a)(2) provides in pertinent  
24 part that “[e]ach federal agency shall, in consultation with and with the assistance of the Secretary  
25 [of the Interior or of Commerce], insure that any action authorized, funded or carried out by such  
26 agency . . . is not likely to jeopardize the continued existence of any endangered species or  
27 threatened species or result in the destruction or adverse modification of” any designated critical  
28 habitat for such species. 16 U.S.C. § 1536(a)(2). “To insure” means “to make certain, to secure,

1 to guarantee (some thing, event, etc.)” *National Assn. of Homebuilders*, 127 S. Ct. at 2534. The  
2 statute further provides that “in fulfilling the requirements of this paragraph [§ 7(a)(2)] each  
3 agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

4 26. In *TVA v. Hill*, the Supreme Court held that “the legislative history undergirding § 7  
5 reveals an explicit congressional decision to require agencies to afford first priority to the  
6 declared national policy of saving endangered species,” and to “give endangered species priority  
7 over the ‘primary missions’ of federal agencies.” *TVA v. Hill*, 437 U.S. at 185; see also *id.* at  
8 174, 194. Thus, the substantive mandate of section 7 “applies to every discretionary agency  
9 action regardless of the expense or burden its application might impose.” *National Assn. of*  
10 *Homebuilders*, 127 S. Ct. at 2537.

11 27. Section 7 contains explicit procedures designed to ensure that each federal agency  
12 actually implements the statute’s affirmative command. Section 7(c) provides that: “[t]o facilitate  
13 compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to  
14 any agency action . . . request of the Secretary information whether any species which is listed or  
15 proposed to be listed may be present in the area of such proposed action. If the Secretary advises,  
16 based on the best scientific and commercial data available, that such species may be present, such  
17 agency shall conduct a biological assessment . . . identifying any endangered species or  
18 threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536(c)(1).

19 28. If any such species is likely to be affected by the federal agency action, the agency  
20 must formally consult with the Secretary, who must then prepare a biological opinion “detailing  
21 how the agency action affects the species or its critical habitat” and determining whether the  
22 action is likely to jeopardize the continued existence of any listed species or adversely modify or  
23 destroy any designated critical habitat. 16 U.S.C. § 1536(b)(3)(A). The biological opinion must  
24 include “a summary of the information on which the opinion is based.” *Id.* If jeopardy or  
25 adverse modification is found, the biological opinion must include “reasonable and prudent  
26 alternatives” to the agency action that “can be taken by the federal agency or applicant in  
27 implementing” the action and that the Secretary believes would avoid jeopardy or adverse  
28 modification. *Id.* Finally, the biological opinion must include a written statement (referred to as

1 an “incidental take statement”) specifying the impacts of any incidental taking<sup>1</sup> on the species,  
2 any “reasonable and prudent measures that the [Services] consider[] necessary or appropriate to  
3 minimize such impact,” and the “terms and conditions” that the agency must comply with in  
4 implementing those measures. 16 U.S.C. § 1536(b)(4).

5 29. The Services adopted joint regulations implementing section 7 in 1986. 51 Fed. Reg.  
6 19926 (June 3, 1986). These regulations have not been substantially amended since that time. In  
7 order to implement the basic statutory mandate in section 7(a)(2) of the ESA to avoid jeopardy to  
8 listed species and destruction and adverse modification of critical habitat, the regulations require  
9 federal action agencies to review their actions “at the earliest possible time to determine whether  
10 any action may affect listed species or critical habitat.”<sup>2</sup> 50 C.F.R. § 402.14(a), emphasis added.  
11 This includes requesting information from the relevant Service as to whether any listed species or  
12 critical habitat “may be present” in the action area, and in some circumstances, preparing a  
13 biological assessment of the action. 50 C.F.R. § 402.12.

14 30. If an action “may affect” any listed species or critical habitat, the federal action  
15 agency must either initiate formal consultation with the relevant Service, or alternatively, engage  
16 in informal consultation. 50 C.F.R. §§ 402.13(a), 402.14(a), (b)(1). The existing rules make  
17 clear that “may effect” is an extremely low threshold: “[a]ny possible effect, whether beneficial,  
18 benign, adverse or of an undetermined character, triggers the formal consultation requirement.”  
19 51 Fed. Reg. 19949.

20 31. During the informal consultation process, the federal agency may determine that the  
21 action is not “not likely to adversely affect” listed species or critical habitat, but must first obtain  
22 the Service’s *written* concurrence in this determination in order to proceed with the project. 50  
23 C.F.R. §§ 402.13(a), 402.14(b)(1). If the federal agency has prepared a biological assessment that

24 <sup>1</sup> The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap,  
25 capture or collect or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); see also  
50 C.F.R. §§ 17.3, 222.102 (defining “harass” and “harm” for purposes of “take”).

26 <sup>2</sup> The regulations define “action” broadly as “all activities or programs of any kind  
27 authorized, funded or carried out, in whole or in part, by Federal agencies,” including  
28 promulgation of regulations, granting of permits, licenses, contracts and other entitlements, and  
any other action that directly or indirectly causes changes to land, air and/or water. 50 C.F.R. §  
402.02.

1 reaches a “not likely to adversely affect” conclusion, the agency likewise must obtain the  
2 Service’s written concurrence in order to proceed. 50 C.F.R. § 402.12(j), (k)(1). If the Service  
3 agrees that an action is “not likely to adversely affect” listed species or critical habitat, then no  
4 further consultation is required. 50 C.F.R. §§ 402.12(j), (k)(1), 402.13(a), 402.14(b)(1). In  
5 determining whether to “concur” that the action is not likely to adversely affect listed species or  
6 critical habitat, the Services may “suggest modifications to the action that the Federal agency and  
7 any applicant could implement to avoid the likelihood of adverse effects to listed species or  
8 critical habitat.” 50 C.F.R. § 402.13(b).

9 32. If the Service does not concur in a federal agency’s “not likely to adversely affect”  
10 determination (or the federal agency itself requests formal consultation), the Service must prepare  
11 a formal biological opinion including a detailed analysis, based on the best scientific and  
12 commercial data available, of the direct, indirect and cumulative effects of the action on listed  
13 species and critical habitat. 50 C.F.R. § 402.14(d), (f), (g), (h). The biological opinion also must  
14 include “reasonable and prudent measures” to avoid, minimize or mitigate any identified effects  
15 and, if necessary, “reasonable and prudent alternatives” to avoid jeopardy to listed species or  
16 adverse modification or destruction of critical habitat. 50 C.F.R. § 402.14(g)(8), (h)(3), (i)(1).

17 **B. The National Environmental Policy Act**

18 33. NEPA is this nation’s “basic environmental charter.” 40 C.F.R. § 1500.1(a). NEPA  
19 has a two-fold purpose. First, NEPA is designed to ensure that federal agencies “will have  
20 available, and will carefully consider, detailed information concerning significant environmental  
21 impacts” of their actions before they occur. *Robertson v. Methow Valley Citizens Council*, 490  
22 U.S. 332, 349 (1989); see also 40 C.F.R. § 1500.1(c). Second, NEPA “also guarantees that the  
23 relevant information will be made available to the larger [public] audience that may also play a  
24 role in both the decision-making process and the implementation of that decision.” *Id.*; see also  
25 40 C.F.R. § 1500.1(b).

26 34. NEPA and its implementing regulations require that all federal agencies must prepare  
27 an EIS for all “major federal actions significantly affecting the quality of the human  
28

1 environment.” 42 U.S.C. § 4332(2)(C)(i). A “major federal action includes “new or revised  
2 agency rules [and] regulations.” 40 C.F.R. § 1508.18(a). An EIS must include, inter alia, a  
3 detailed statement of: (1) the environmental effects, including direct, indirect and cumulative  
4 effects, of the proposed action; (2) any adverse environmental effects that cannot be avoided if  
5 the proposed action is implemented; (3) reasonable alternatives to the proposed action; and (4)  
6 mitigation measures to minimize any significant effects identified. 42 U.S.C. § 4332(2)(C); 40  
7 C.F.R. §§ 1508.7, 1508.8, 1502.10, 1502.14, 1502.16.

8 35. The “threshold question in a NEPA case is whether a proposed project will  
9 ‘significantly affect’ the environment, thereby triggering the requirement for an EIS.” *Blue*  
10 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). An agency  
11 may elect to prepare an EA “[a]s a preliminary step . . . to decide whether the environmental  
12 impact of a proposed action is significant enough to warrant preparation of an EIS.” *Id.*, citing 40  
13 C.F.R. § 1508.9(a). An EA must “include brief discussions of the need for the proposal, of  
14 alternatives [to the proposal], of the environmental impacts of the proposed action and  
15 alternatives, and a listing of agencies and persons consulted.” 40 C.F.R. § 1508.9(b). In so  
16 doing, an EA must “provide sufficient evidence and analysis for determining whether to prepare  
17 an environmental impact statement or a finding of no significant impact.” 40 C.F.R. §  
18 1508.9(a)(1). This includes a discussion of cumulative impacts. *Native Ecosystems Council v.*  
19 *Dombeck*, 304 F.3d 886, 895-896 (9th Cir. 2002). “Because the very important decision whether  
20 to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making  
21 process.” *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000).

22 36. If the EA indicates that the federal action may significantly affect the quality of the  
23 human environment, or if “substantial questions are raised” as to whether a proposed federal  
24 agency action may have a significant effect on some human environmental factor, then the agency  
25 must prepare an EIS. 40 C.F.R. § 1501.4(c); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d  
26 549, 562 (9th Cir. 2006). “This is a low standard.” *Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at  
27 462. Thus, in challenging a federal agency’s decision not to prepare an EIS, a “plaintiff need not  
28

1 show that significant effects will in fact occur,” rather; a plaintiff need only raise “substantial  
2 questions whether a project may have a significant effect.” *Id.*

3 37. In evaluating the “significance” of an environmental impact for purposes of  
4 determining whether an EIS is required federal agencies must consider, *inter alia*: (1) “[t]he  
5 degree to which the effects . . . are likely to be highly controversial”; (2) “[t]he degree to which  
6 the possible effects . . . are highly uncertain or involve unique or unknown risks”; (3) “[t]he  
7 degree to which the action may establish a precedent for actions with significant effects or  
8 represents a decision in principle about a future consideration”; (4) whether the action may result  
9 in significant cumulative effects; and (5) “[t]he degree to which the action may adversely affect  
10 an endangered or threatened species or its critical habitat.” 40 C.F.R. § 1508.27(b).

11 38. If, after preparing an EA, the agency determines an EIS is not required, the agency  
12 must provide a “convincing statement of reasons” why the project’s impacts are insignificant and  
13 issue a Finding of No Significant Impact or “FONSI.” 40 C.F.R. §§ 1501.4, 1508.9, 1508.13. An  
14 agency’s decision not to prepare an EIS will be found invalid if the agency has failed to “take a  
15 hard look at the environmental consequences” of its action, the agency’s analysis is not “based on  
16 a consideration of the relevant factors” and/or “the agency fails to supply a convincing statement  
17 of reasons why potential effects are insignificant.” *Metcalf*, 214 F.3d at 1141; *Blue Mts.*  
18 *Biodiversity Project*, 161 F.3d at 1211.

## 19 **FACTUAL AND PROCEDURAL BACKGROUND**

### 20 **A. The Proposed Rule and Draft EA**

21 39. On August 15, 2008, the Services published in the Federal Register the “Proposed  
22 Regulations Amending the Endangered Species Act’s Section 7 Regulations” (“Proposed Rule”).  
23 73 Fed. Reg. 47868, Aug. 15, 2008. Even though the Proposed Rule constitutes the most  
24 significant changes to the ESA’s section 7 implementing regulations in more than 20 years, the  
25 public was initially provided with just 30 days in which to comment. On September 15, 2008 –  
26 the day public comments otherwise would have been due -- in response to numerous objections  
27 by members of the public, the Services agreed to extend the comment period on the Proposed  
28 Rule for 30 additional days.

1           40. The Proposed Rule sets forth numerous significant changes to the ESA's section 7  
2 implementing regulations, 50 C.F.R. Part 402 ("Interagency Cooperation Under the Endangered  
3 Species Act"), nearly all of which ultimately were adopted in the final rule. First, the rule  
4 exempts from section 7 altogether federal agency actions that the federal agency project  
5 proponent itself determines "are not anticipated to result in take," and that meet one or more of  
6 several other specified criteria.

7           41. Specifically, consultation is not required if the federal action agency unilaterally  
8 determines that: (1) the action will have "no effect on a listed species or critical habitat"; (2) the  
9 action is "an insignificant contributor to any effects on a listed species or critical habitat"; or (3)  
10 the effects of the action on listed species or critical habitat "are not capable of being meaningfully  
11 identified or detected," are "wholly beneficial" or are "such that the potential risk of jeopardy to  
12 the listed species or adverse modification or destruction of critical habitat is remote." Proposed  
13 50 C.F.R. § 402.03(b).

14           42. The Proposed Rule allows the federal action agency to make the above  
15 determinations without the Services' review and written concurrence and without conducting any  
16 site-specific analysis or preparing any documentation -- even if listed species and critical habitat  
17 may be present in the action area and may be affected by the agency action. The Proposed Rule  
18 requires consultation only as to those effects that do not meet the foregoing consultation  
19 exemption criteria of proposed section 403.03(b). Proposed 50 C.F.R. § 402.03(c).

20           43. Second, the Proposed Rule provides that the federal action agency may terminate  
21 consultation as to "a number of similar actions, an agency program, or a segment of a  
22 comprehensive plan" if the agency determines, with the Service's concurrence, that the activity is  
23 not likely to adversely affect any listed species or critical habitat. Proposed 50 C.F.R. §  
24 402.13(a).

25           44. Third, of those federal agency actions, components of agency actions and/or effects  
26 that remain subject to the section 7 consultation requirements because they may in fact affect  
27 listed species or critical habitat, the Proposed Rule allows federal action agencies to terminate the  
28 informal consultation process and proceed with the action if the Service has not provided a

1 written concurrence with a federal agency's determination that its action is "not likely to  
2 adversely affect" listed species or critical habitat within sixty days of the date on which the  
3 federal agency requests such concurrence.<sup>3</sup> Proposed 50 C.F.R. §§ 402.13(b), 402.14(b)(1).  
4 Under this aspect of the Proposed Rule, the consultation requirements of section 7(a)(2) are  
5 deemed satisfied – even if there has been no actual "consultation" whatsoever and even if the  
6 action may adversely affect listed species or critical habitat – simply because the specified time  
7 period has passed with no input by the Service.

8 45. Finally, the Proposed Rule significantly narrows the type and extent of indirect and  
9 cumulative effects that must be considered when federal action agencies or the Services are: (1)  
10 determining whether a federal agency action or effect is exempt from section 7 under new section  
11 402.03(b); (2) preparing biological assessments; (3) determining whether an action is not likely to  
12 adversely affect listed species or critical habitat during informal consultation; (4) preparing  
13 biological opinions during formal consultation; (5) determining whether to reinstate consultation;  
14 and (6) undertaking other consultation activities. 50 C.F.R. §§ 402.12, 402.13, 402.14, 402.16.  
15 The Proposed Rule only requires consultation as to those project effects that meet the new,  
16 restrictive definitions of "effects" and "cumulative effects," which will exclude from  
17 consideration by the Services and federal action agencies many adverse impacts on listed species  
18 and critical habitat.

19 46. Specifically, under the Proposed Rule, federal action agencies and the Services only  
20 need to consider indirect effects for which the action is the "essential cause" and that are  
21 "reasonably certain to occur" based on "clear and substantial information." Proposed 50 C.F.R. §  
22 402.02. The Federal Register notice states that "our intent is to clarify that there must be a close  
23 causal connection between the action under consultation and the effect that is being evaluated. . . .  
24 [I]f an effect would occur regardless of the action, then it is not appropriate to require the action  
25 agency to consider it an effect of the action." 73 Fed. Reg. 47870. The requirement that effects  
26 be "reasonably certain to occur" based on "clear and substantial information" is intended "to

27 <sup>3</sup> The Service may extend this period for no more than 60 additional days upon notice to  
28 the federal action agency within the initial 60-day period. Proposed 50 C.F.R. § 402.13(b).

1 make clear that the effect cannot be just speculative and that it must be more than just likely to  
2 occur.” *Id.* Indeed, the Proposed Rule purports to require, in some instances, even “more than a  
3 technical ‘but for’ connection,” and to necessitate a showing that the action is “intended to bring  
4 about the future effects,” a standard that is, practically speaking, impossible to meet. *Id.*

5 47. In addition, the Proposed Rule provides that cumulative effects “do not include future  
6 Federal activities that are physically located within the action area of the particular Federal action  
7 under consideration.” Proposed 50 C.F.R. § 402.02.

8 48. Secretary Kempthorne’s press release concerning the Proposed Rule states that “[b]y  
9 making these changes, we prevent an expansion of the ESA into an inefficient, indirect avenue for  
10 greenhouse gas regulation, a purpose for which the ESA was never intended – and for which it is  
11 ill suited.” The Services’ Federal Register notice announcing the Proposed Rule similarly states  
12 that “[t]hese regulations reinforce the Services’ current view that there is no requirement to  
13 consult on greenhouse gas (GHG) emissions’ contribution to global warming and its associated  
14 impacts on listed species.” 73 Fed. Reg. 47872. The Federal Register notice also indicates that  
15 two further purposes of the Proposed Rule are to eliminate “unnecessary consultations” that are  
16 not an “efficient use of limited resources” and to “simplify the consultation process and make it  
17 less burdensome and time consuming.” *Id.* at 47870-71.

18 49. On October 14, 2008, the California Attorney General, on behalf of plaintiff People,  
19 timely submitted a detailed 17-page comment letter on the Proposed Rule, urging the Services to  
20 withdraw the proposal. The Attorney General’s comment letter states that “the proposed  
21 regulations would violate the ESA and long-standing judicial precedents, lead to further  
22 imperilment of endangered and threatened species and their habitat, and replace the current  
23 scientific consultation process with the self-interested decisions of agency bureaucrats and  
24 political appointees.”

25 50. The letter notes that the Proposed Rule “would effect sweeping changes to the  
26 safeguards essential to the protection of California’s and the nation’s most vulnerable species.  
27 The proposed changes would eliminate or short-circuit the section 7 consultation process for  
28 many federal agency actions, restrict the types of project effects that must be evaluated and

1 mitigated, and replace the Services' scientific review and analysis with the inexpert judgments of  
2 project proponents. If finalized, the regulations will substantially reduce the number and extent  
3 of section 7 consultations under the ESA." The Attorney General further commented that the  
4 Proposed Rule "use[s] the purported need to prevent 'expansion' of the ESA into an avenue for  
5 greenhouse gas regulation as a stalking horse for a wholesale, unauthorized overhaul of the statute  
6 itself."

7 51. In October 2008, the Services prepared a "Draft Environmental Assessment for the  
8 Proposed Modifications to Regulations Implementing Interagency Cooperation Under the  
9 Endangered Species Act" ("Draft EA") regarding the Proposed Rule. The Draft EA purports to  
10 "examine whether the proposed regulatory changes will have any direct, indirect, or cumulative  
11 impacts on the quality of the human environment." Draft EA at 13. However, the document  
12 lacks any credible analysis of the impacts associated with the Proposed Rule. Instead, the EA  
13 concludes, without supporting evidence or analysis, that the Proposed Rule will have no  
14 environmental effects whatsoever. *See e.g., id.* at 16-17. Without exception, each of the sections  
15 of the EA concludes that the proposed changes "will not result in any significant environmental  
16 consequences," individually or collectively. *Id.* at 16, 18, 20, 23, 25. Similarly, the EA makes  
17 the wholly unsupported statement that "while some may believe that one or more of the proposed  
18 regulatory changes will somehow result in substantive changes in the level of species protection,  
19 the Services do not believe this is the case." *Id.* at 13.

20 52. Besides the required "no action" alternative, the Draft EA evaluates only one  
21 alternative to the Proposed Rule. "Alternative C" includes all of the regulatory changes identified  
22 in the Proposed Rule, but "would add an additional role for the Services that might increase  
23 confidence in the action agencies' determinations where they choose to rely on the applicability  
24 provisions of section 402.03(b) without entering informal or formal consultation." Draft EA at  
25 10. The Draft EA also describes three alternatives that were considered but not analyzed. *Id.* at  
26 10-11.

27 53. On October 27, 2008, the Services published a notice in the Federal Register  
28 providing a mere 10 calendar days for public comment on the Draft EA. 73 Fed. Reg. 63667

1 (Oct. 27, 2008). By letter dated November 6, 2008, the California Attorney General, on behalf of  
2 plaintiff People, timely submitted a detailed 13-page comment letter on the Draft EA, stating that  
3 “the analysis and conclusions in the Services’ EA on the proposed regulations are not objective,  
4 reasonable or convincing and do not appear to be made in good faith. Instead, the EA is the  
5 epitome of ‘form over substance’ and is plainly a ‘subterfuge designed to rationalize a decision  
6 already made.’” Accordingly, the letter concludes, the EA fails to take the requisite “hard look”  
7 at the Proposed Rule’s potentially significant environmental effects, fails to analyze the  
8 cumulative effects of and a reasonable range of alternatives to the Proposed Rule, and otherwise  
9 fails to meet NEPA’s requirements. The Attorney General’s comment letter further states that the  
10 Proposed Rule will have numerous significant environmental effects that require preparation of  
11 an EIS.

12 **B. The Final Rule, Final EA and FONSI**

13  
14 54. On December 16, 2008, the Services published a Final Rule amending the ESA’s  
15 section 7 regulations. 73 Fed. Reg. 76272 (Dec. 16, 2008). The Final Rule states that the  
16 Services received approximately 235,000 comments on the Proposed Rule, 215,000 of which the  
17 Services claimed were “form” letters. The Services did not respond separately to the remaining  
18 20,000 comment letters, but instead prepared generic responses to similar points purportedly  
19 raised in the letters. The Final Rule also indicates that the Services had issued a Final EA and  
20 FONSI in reliance on the Draft EA. *Id.* at 76286.

21 55. The Final Rule makes few significant or substantive changes from the Proposed Rule.  
22 The Final Rule slightly revises the section 7 exemption criteria in proposed new 50 C.F.R. §  
23 402.03(b). Instead of exempting actions and effects that are “an insignificant contributor to any  
24 effects on listed species or critical habitat” or “are such that the potential risk of jeopardy to the  
25 listed species or adverse modification or destruction of the critical habitat is remote” (Proposed  
26 50 C.F.R. § 402.03(b)(2) and (b)(3)(iii)), the Final Rule exempts the effects of actions that “are  
27 manifested through global processes and (i) cannot be reliably predicted or measured at the scale  
28 of a listed species’ current range, or (ii) would result at most in an extremely small, insignificant

1 impact on listed species or critical habitat, or (iii) are such that the potential risk of harm to a  
2 listed species or critical habitat is remote.” Id. at § 402.03(b)(2); former (b)(3)(iii) deleted.

3 56. The Final Rule also replaces the word “identified” with “measured” and moves the  
4 word “meaningful” in the exemption criterion in new section 402.03(b)(3)(i). This section now  
5 provides that the effects of the action on a listed species or critical habitat need not be examined if  
6 they “[a]re not capable of being measured or detected in a manner that permits meaningful  
7 evaluation.”

8 57. The Final Rule adds a sentence to new 50 C.F.R. § 402.13(b) regarding time limits  
9 for informal consultation, which reads as follows: “[i]f the Federal agency terminates consultation  
10 at the end of the 60-day period, or if the Service’s extension period expires without a written  
11 statement whether it concurs with a Federal agency’s determination provided for in paragraph (a)  
12 of this section, the consultation provision in section 7(a)(2) is satisfied.” The Final Rule also adds  
13 new subdivision (c) to section 402.13, which allows the Service and Federal agency to agree to  
14 extend the informal consultation period for a specified time.<sup>4</sup>

15 58. Finally, the Final Rule adds a sentence defining “direct effects” as “the immediate  
16 effects of the action [which] are not dependent on the occurrence of any intervening actions for  
17 the impacts to species or critical habitat to occur.” 50 C.F.R. § 402.02. The Final Rule also  
18 clarifies that the “essential cause” requirement only applies to indirect, but not direct, effects.

19 59. Many, if not most, of the federal agency actions and effects that the Final Rule now  
20 excludes from consideration under section 7 previously would have required either: (1) informal  
21 consultation and written concurrence from the Service as to whether the action is “not likely to  
22 adversely affect” listed species and critical habitat, or (2) formal consultation and a biological  
23 opinion from the Service.

#### 24 CLAIMS FOR RELIEF

25 60. For each of the following claims below, plaintiff People incorporates by reference  
26 each and every allegation set forth in this complaint as if set forth in full below.

27 <sup>4</sup> The Final Rule also makes a non-substantive change to section 402.14(b)(1) to track  
28 with the language of section 402.13(b).

**First Claim For Relief  
(Violations Of The ESA And APA)**

1  
2           61. Under governing United States Supreme Court precedent, federal agencies only have  
3 authority to adopt regulations that are based on a permissible and reasonable construction of the  
4 governing statute -- in this case, the ESA. *Chevron U.S.A., Inc. v. Natural Resources Defense*  
5 *Council*, 467 U.S. 837, 842-43 (1984); see also 5 U.S.C. § 706(2)(B). Regulations that are  
6 “manifestly contrary to the statute” are beyond the agency’s authority to adopt and will be found  
7 “in excess of statutory authority jurisdiction, authority, or limitations, or short of statutory right”  
8 and arbitrary, capricious and contrary to law, in violation of the APA. *Chevron*, 467 U.S. at 844;  
9 5 U.S.C. § 706(2)(A), (B).

10           62. In promulgating the Final Rule, defendants exceeded the scope of their authority  
11 under the ESA and adopted regulations that are manifestly contrary to the statute. The Final Rule  
12 is contrary to the substantive and procedural requirements of section 7 of the ESA as well as the  
13 goals and policies of the ESA.

14           63. Specifically, the Final Rule violates: (1) the requirement under section 7(a)(2) that  
15 each federal agency, including the Services, “shall insure” that “any action” that is authorized,  
16 funded or otherwise carried out by that agency is not likely to jeopardize listed species or result in  
17 the destruction or adverse modification of designated critical habitat (16 U.S.C. § 1536(a)(2)); (2)  
18 the requirement that all section 7 determinations be based on the best available science (*id.* and §  
19 1536(c)(1)); (3) the requirement that each federal agency, as to any proposed federal agency  
20 action, must request information from the relevant Service as to whether listed species and  
21 critical habitat may be present in the area of the proposed action (16 U.S.C. §§ 1536(c)(1)) and if  
22 the Service advises that listed species or critical habitat may be present, then further consultation  
23 with the Service regarding the proposed action is mandatory under the statute (16 U.S.C. §§  
24 1536(c)(1), (b)(3)(A)); (4) federal agencies’ duty under section 7(a)(1) to utilize their authorities  
25 in furtherance of the purposes of the ESA by carrying out programs to conserve listed species (16  
26 U.S.C. § 1536(a)(1)); (5) the purposes of the ESA to provide a means and a program for the  
27 conservation of listed species and their habitat (16 U.S.C. § 1531(b)); and (6) the policy of the  
28

1 ESA that all federal agencies shall seek to conserve listed species and shall utilize their authorities  
2 in furtherance of the purposes of the ESA (16 U.S.C. § 1531(c)).

3 64. The Final Rule violates the foregoing substantive and procedural requirements of the  
4 ESA in numerous respects, including but not limited to, the following provisions: (1) exempting  
5 certain types of federal agency actions and effects from section 7 altogether, even if listed species  
6 and critical habitat may be present in the action area and may be adversely affected by the action;  
7 (2) allowing federal agency project proponents, without the Services' written concurrence and  
8 oversight and without any requirement for site-specific analysis or documentation, to determine  
9 for themselves whether an action will have no effect or is not likely to adversely affect listed  
10 species or critical habitat; (3) allowing federal action agencies to arbitrarily and prematurely  
11 terminate informal consultation regardless of whether any consultation has in fact occurred, and  
12 regardless of whether the action may adversely affect listed species and critical habitat; (4)  
13 unlawfully limiting the type and extent of effects that must be considered in the consultation  
14 process, including the wholesale elimination of the effects of increased greenhouse gas emissions,  
15 by arbitrarily narrowing the definitions of "indirect" and "cumulative" effects; (5) unreasonably  
16 imposing a standard of causation for indirect effects and a requirement that effects be "reasonably  
17 certain to occur" based on "clear and substantial information"; and (6) allowing federal action  
18 agencies and the Services unlawfully to piecemeal or segment review of federal agency actions  
19 under section 7 by: (a) requiring consultation only on those effects of the action that do not meet  
20 the consultation exemption criteria of proposed section 403.03(b), (b) allowing a federal action  
21 agency to terminate consultation as to "a number of similar actions, an agency program, or a  
22 segment of a comprehensive plan" if the agency determines, with the Service's concurrence, that  
23 the activity is not likely to adversely affect any listed species or critical habitat; and (c) requiring  
24 consultation as to those effects of the action which meet the new, restrictive definitions of  
25 "effects" and "cumulative effects."

26 65. These provisions of the Final Rule will authorize, without adequate analysis or  
27 mitigation, myriad federal agency actions and project effects that may or will have significant and  
28 adverse direct, indirect and cumulative impacts on listed species and critical habitat, and which

1 may or will result in jeopardy to listed species and/or destruction or adverse modification of  
2 critical habitat, contrary to section 7 and the goals, purposes and policies of the ESA. The Final  
3 Rule also removes critical scientific review and oversight, site-specific analysis and  
4 documentation from the section 7 consultation process, thereby shielding from agency and public  
5 review potentially profound impacts on listed species and critical habitat and precluding federal  
6 action agencies and the Services from relying on the best available science, as required by the  
7 ESA.

8 66. For the foregoing reasons, the Final Rule exceeds the Services' statutory jurisdiction,  
9 authority, or limitations and is short of the Services' statutory right under the ESA, and is also  
10 arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, in violation  
11 of the ESA and 5 U.S.C. § 706(2)(A) and (B).

12 **Second Claim For Relief**  
13 **(Violations Of NEPA and APA: Failure to Prepare an**  
14 **Adequate EA and to Provide for Meaningful Public Review Of Draft EA)**

15 67. An EA must "provide sufficient evidence and analysis for determining whether to  
16 prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. §  
17 1508.9(a)(1).

18 68. The Services' EA purports to "examine whether the proposed regulatory changes will  
19 have any direct, indirect, or cumulative impacts on the quality of the human environment."  
20 However, the document lacks any analysis whatsoever of the impacts associated with the  
21 regulatory changes and does not provide sufficient evidence and analysis for determining whether  
22 to prepare an EIS or FONSI. Instead, the EA concludes, without supporting evidence or  
23 analysis, that the Final Rule will have no environmental effects. Such conclusions, without any  
24 evidentiary support, do not satisfy NEPA. *Oregon Natural Res. Council v. United States Bureau*  
25 *of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006); *Blue Mountains Biodiversity Project*, 161 F.3d  
26 at 1214.

27 69. The EA also is inadequate because it is not based on a consideration of the relevant  
28 factors, fails to take a "hard look" at the environmental effects of the regulatory changes, ignores  
numerous potentially significant environmental effects of the regulations, and fails to supply a

1 convincing statement of reasons why the potential environmental effects of the regulations are  
2 insignificant. The analysis and conclusions in the EA are not objective, reasonable or  
3 convincing, are not made in good faith and are designed to rationalize a pre-determined outcome,  
4 contrary to NEPA. *Blue Mountains Biodiversity Project*, 161 F.3d at 1211-12; *Metcalf*, 214 F.3d  
5 at 1141-42.

6 70. Additionally, the EA is inadequate because it does not analyze cumulative effects and  
7 fails to evaluate a reasonable range of alternatives. *Native Ecosystems Council*, 304 F.3d at 895-  
8 896; *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008); 40 C.F.R. §  
9 1508.9(b).

10 71. Finally, the Services violated NEPA and the APA by providing a wholly inadequate  
11 time period – a mere ten calendar days and eight business days -- for the public to comment on  
12 the Draft EA. 40 C.F.R. § 1501.4(b). The Services also failed respond in a meaningful manner to  
13 many of the comments submitted on the Draft EA, providing only unsupported and conclusory  
14 responses which misstated many of the comments received.

15 72. For these reasons, the Services acted arbitrarily, capriciously and contrary to law,  
16 abused their discretion, and failed to follow the procedures required by law in adopting the Final  
17 EA, in violation of NEPA and 5 U.S.C. § 706(2)(A) and (D).

18 **Third Claim For Relief**  
19 **(Violations of NEPA and APA:**  
20 **Unlawful Reliance on a FONSI and Failure to Prepare an EIS)**

21 73. NEPA requires a federal agency to prepare “a detailed statement on . . . the  
22 environmental impact” of “major Federal actions significantly affecting the quality of the human  
23 environment.” 42 U.S.C. § 4332(2)(C)(i). In the Ninth Circuit, if “substantial questions are  
24 raised” as to whether a proposed federal agency action “may have a significant effect” on the  
25 environment, then the agency must prepare an EIS on the proposed action. *Klamath Siskiyou*  
*Wildlands Ctr.*, 468 F.3d at 562.

26 74. In this case, as the Attorney General’s and other comment letters on the EA  
27 demonstrate, there clearly are “substantial questions,” if not certainties, that the Final Rule will or  
28 may have a significant effect on the quality of the human environment. The Final Rule meets

1 several of the criteria in the NEPA regulations for evaluating the significance of a potential  
2 environmental effect. 40 C.F.R. § 1508.27(b). Specifically: (1) the regulations are highly  
3 controversial because they are the most significant substantive changes to the federal ESA's  
4 implementing regulations in over 20 years, and over 235,000 public comments were received on  
5 the regulations; (2) in limiting the number and extent of section 7 consultations under the federal  
6 ESA, particularly with respect to federal actions with significant greenhouse gas emissions, the  
7 regulations involve unique or unknown risks to listed species and their habitat; (3) the regulations  
8 will establish a negative precedent for evaluating and mitigating the adverse effects of federal  
9 agency actions under the federal ESA; (4) the regulations will have significant cumulative effects;  
10 and (5) the regulations will adversely affect listed species and critical habitat.

11 75. The defendants' adoption of the Final Rule in reliance on an unsupported FONSI and  
12 failure to prepare an EIS on the Proposed Rule constitutes agency action unlawfully or  
13 unreasonably withheld or delayed, and/or is arbitrary, capricious, an abuse of discretion, contrary  
14 to law, and not in accordance with proper procedures, in violation of NEPA and 5 U.S.C. §  
15 706(1) and 706(2)(A) and (D).

16 **Fourth Claim For Relief**  
17 **(Violation of the APA: Failure to Provide a Reasoned**  
18 **Analysis of and Justification for Final Rule)**

19 76. Pursuant to 5 U.S.C. § 706(2) of the APA and controlling case law, a federal agency  
20 must supply a reasoned analysis and justification for proposed regulatory changes that is based on  
21 the evidence before the agency. An agency's failure to do so renders its action arbitrary and  
22 capricious and an abuse of discretion and therefore invalid.

23 77. The Services' stated justifications for, analysis of, and responses to public criticisms  
24 of and comments on the regulatory changes in the Final Rule are not reasonable and are not  
25 supported by and are contrary to the evidence in the record. Examples of the Services' failure to  
26 adequately justify and support their reasons for adopting the Final Rule include, but are not  
27 limited to, the following.

28 78. The Services claim that the Final Rule is required "to reduce the number of  
unnecessary consultations," and yet the Services did not describe what types of consultations, or

1 how many, the Services deem “unnecessary” and the reasons therefor. 73 Fed. Reg. 47871. Nor  
2 did the Services explain how reducing the number of “unnecessary” consultations is consistent  
3 with their own and federal action agencies’ statutory mandates under the ESA.

4 79. The Services also rely on their increased workload as a justification for the Final  
5 Rule, but fail to explain why adopting wholesale exemptions, narrowing the definitions of indirect  
6 and cumulative effects, and allowing for arbitrary and premature termination of informal  
7 consultation is the only reasonable or feasible means of addressing this problem. This failure is  
8 particularly egregious in light of the Services’ clear duties to conserve listed species and their  
9 habitat under the ESA.

10 80. The Services also assert that Federal action agencies have gained “considerable  
11 experience” in implementing the ESA, which would justify allowing these agencies to make their  
12 own determinations as to whether their actions are likely to adversely affect listed species. 73  
13 Fed. Reg. 47868. However, the Services do not provide any evidentiary support or justification  
14 for that assertion, nor do they explain why or document how all federal agencies have the  
15 necessary biological expertise, objectivity, and human and financial resources to make accurate  
16 determinations of adverse effect. Moreover, the Final Rule, in stating that most, but not all,  
17 federal agencies have the requisite expertise, itself belies the Services’ claim.

18 81. Even assuming federal agencies have personnel who are qualified to make  
19 determinations of adverse effect, the Services do not explain how federal agencies’ compliance  
20 with the new rules will be ensured absent any Service oversight or any requirement for federal  
21 agencies to conduct site-specific analysis and document their determinations.

22 82. The Services further state that the regulations are necessary to “reinforce” the  
23 Services’ view “that there is no requirement to consult on greenhouse gas (GHG) emissions’  
24 contribution to global warming and its associated impacts on listed species.” 73 Fed. Reg. 47872.  
25 Yet, the Services do not explain why their view is supported by the ESA, or why a species can be  
26 listed under the ESA due to the impacts of global warming on such species and its habitat, but  
27 federal agencies have no obligation to address their projects’ contribution to these impacts due to  
28 increased greenhouse gas emissions.

1 83. The Final Rule also does not define or explain key phrases and concepts, such as  
2 “global processes,” “remote” risk, or “meaningful evaluation,” nor does it provide criteria or  
3 guidelines for interpretation and application of these phrases and concepts.

4 84. In sum, the Final Rule is not supported by any rationale that is consistent with the  
5 purposes of the ESA, will undermine safeguards for endangered and threatened species, and the  
6 purpose and need for the Final Rule is not coherently or rationally explained in or supported by  
7 the evidence in the rulemaking record and is contradicted by the evidence in the record.

8 85. Accordingly, the Services acted arbitrarily and capriciously and contrary to law and  
9 abused their discretion in adopting the Final Rule, in violation of 5 U.S.C. § 706(2)(A).

10 **Fifth Claim For Relief**  
11 **(Violation of the APA: Failure to Provide Adequate Opportunity**  
12 **for Public Comment and Meaningful Response to Public Comments)**

13 86. The APA requires federal agencies to publish notice of a proposed rule making and  
14 “give interested persons an opportunity to participate in the rule making through submission of  
15 written data, views or arguments.” 5 U.S.C. § 553(b), (c). The agency is required to review and  
16 respond to the public comments submitted. 5 U.S.C. § 553(c).

17 87. The Services failed to satisfy this requirement in two respects. First, the Final Rule  
18 includes a new substantive provision that was not included in the Proposed Rule and on which the  
19 public was not afforded any opportunity to comment. The Final Rule includes a new exemption  
20 from section 7 for the effects of agency actions that federal action agencies determine are  
21 “manifested through global processes” and that meet other specified criteria.

22 88. Second, despite the fact that the Services received approximately 235,000 comments  
23 on the Proposed Rule, many of which were extremely detailed and substantive, the Services  
24 adopted the Final Rule only two months after the close of public comment on the Proposed Rule.  
25 Given this extremely rushed timeframe for responding to public comments, the Services  
26 responded only categorically and did not respond individually to any of the public comments  
27 received, failed to respond at all to many comments concerning the legality and effects of the  
28 Proposed Rule, and responded only in a conclusory and truncated manner to other comments

1 received, with explanations and reasons that are unsupported by both the ESA and the evidence in  
2 the record.

3 89. In so doing, defendants have failed to follow the proper procedures for adopting the  
4 Final Rule and have acted arbitrarily, capriciously, contrary to the manner required by law and  
5 not in accordance with the procedure required by law and have abused their discretion, in  
6 violation of 5 U.S.C. § 553 and 706(2)(A) and (D).

7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiff People respectfully requests that this Court:

9 A. Issue a declaratory judgment that defendants acted in excess of their statutory  
10 authority, jurisdiction, and limitations and short of their statutory right under the ESA in adopting  
11 the Final Rule, in violation of the ESA and 5 U.S.C. § 706(2)(B);

12 B. Issue a declaratory judgment that defendants acted arbitrarily, capriciously and  
13 contrary to law, abused their discretion, and failed to follow the procedure required by law under  
14 the ESA and APA in adopting the Final Rule, in violation of the ESA and 5 U.S.C. § 706(2)(A)  
15 and (D);

16 C. Issue a declaratory judgment that defendants acted arbitrarily, capriciously and  
17 contrary to law, abused their discretion, and failed to follow the procedure required by law under  
18 NEPA and the APA in adopting the Final EA for the Final Rule, violation of NEPA and 5 U.S.C.  
19 § 706(2)(A) and (D);

20 D. Issue a declaratory judgment that defendants unlawfully and unreasonably failed to  
21 prepare an EIS on the Proposed Rule under NEPA, or alternatively acted arbitrarily, capriciously  
22 and contrary to law, abused their discretion, and failed to follow the procedure required by law  
23 under NEPA and the APA in failing to prepare an EIS on the Proposed Rule, in violation of  
24 NEPA and 5 U.S.C. §§ 706(1), 706(2)(A) and (D);

25 E. Issue a mandatory injunction remanding the Final Rule to defendants and  
26 commanding them to immediately vacate and withdraw the Final Rule;

27 //

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- F. Award plaintiff People its costs, expenses and reasonable attorneys' fees; and
- G. Award such other relief as this Court may deem just and proper.

Dated: December 29, 2008

Respectfully Submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
J. MATTHEW RODRIQUEZ  
Chief Assistant Attorney General  
KEN ALEX  
Senior Assistant Attorney General  
MEGAN ACEVEDO  
Deputy Attorney General



TARA L. MUELLER  
Deputy Attorney General  
*Attorneys for Plaintiff People of the State of  
California ex rel. Edmund G. Brown Jr.,  
Attorney General*

OK2008900593  
90101895.doc