

1 Christopher A. Sproul (Bar No. 126398)  
2 Jodene Isaacs (Bar No. 226895)  
3 Environmental Advocates  
4 5135 Anza Street  
5 San Francisco, California 94121  
6 Telephone: (415) 533-3376, (510) 847-3467  
7 Facsimile: (415) 358-5695  
8 Email: [csproul@enviroadvocates.com](mailto:csproul@enviroadvocates.com), [jisaacs@enviroadvocates.com](mailto:jisaacs@enviroadvocates.com)

6 Michael A. Costa (Bar No. 219416)  
7 3848 Sacramento St. #2  
8 San Francisco, CA 94118  
9 Telephone: (415) 342-0042  
10 Email: [mike@ocefoundation.org](mailto:mike@ocefoundation.org)

9 Attorneys for Plaintiffs  
10 OUR CHILDREN 'S EARTH FOUNDATION and  
11 ECOLOGICAL RIGHTS FOUNDATION

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

14 OUR CHILDREN 'S EARTH FOUNDATION,  
15 non-profit corporation, and ECOLOGICAL  
16 RIGHTS FOUNDATION, a non-profit corporation,

17 Plaintiffs,

18 v.

19 NATIONAL MARINE FISHERIES SERVICE,  
20 PENNY PRITZKER, as Secretary of Commerce,  
21 RODNEY MCINNIS, as Regional Administrator  
22 of the National Marine Fisheries Service Southwest  
23 Region,

24 Defendants.

Civil Case No.: \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

ADMINISTRATIVE PROCEDURE  
ACT AND FREEDOM OF  
INFORMATION ACT CASE

1 Our Children's Earth Foundation ("OCE") and Ecological Rights Foundation ("ERF")  
2 (collectively, "Plaintiffs") allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs bring this action under the Administrative Procedure Act ("APA") provisions that  
5 permit aggrieved parties to seek judicial review of federal agency actions that are arbitrary, capricious,  
6 an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(a). Plaintiffs further  
7 bring this action under the Freedom of Information Act ("FOIA") which allows an aggrieved party to  
8 seek relief when documents are unlawfully withheld, and authorizes a reviewing court to enjoin the  
9 agency from withholding records and to order the production of any agency records improperly withheld  
10 from the complainant. 5 U.S.C. § 552(a)(4)(B). Plaintiffs seek relief for FOIA violations due to NMFS's  
11 failure to release information within statutory time limits and its faulty adherence to a pattern and  
12 practice of not conducting a search for all documents in its possession that are responsive to FOIA  
13 requests and timely releasing such documents.

14 2. Plaintiffs allege that Defendants National Marine Fisheries Service, Acting Secretary of the  
15 Commerce Rebecca Blank, and NMFS Regional Administrator Rodney McInnis, (collectively "NMFS")  
16 have violated and are in violation of APA 706(2)(a) for arbitrarily and capriciously issuing the April 21,  
17 2008 Biological Opinion ("BiOp") to the U.S. Army Corps of Engineers ("the Corps") related to the  
18 Corps' issuance of a Clean Water Act permit to Leland Stanford Junior University's ("Stanford") related  
19 to the upgrade of two water diversion facilities and dubbed the Steelhead Habitat Enhancement Project  
20 ("SHEP") (hereinafter "BiOp" or "SHEP BiOp"). The SHEP BiOp is attached as Exhibit 1 to this  
21 Complaint. Plaintiffs allege that the jeopardy analysis in the BiOp was arbitrary and capricious for  
22 numerous reasons. These reasons include NMFS's failure to consider in its jeopardy analysis the  
23 interrelated and cumulative adverse impacts from the structures and operations authorized by the SHEP  
24 BiOp in conjunction with Stanford's upstream water diversions in the San Francisquito Creek watershed  
25 and structures maintained by Stanford in the watershed. These diversions and structures impede natural  
26 flows in the watershed's creeks and block migration of Central California Coast steelhead ("CCC  
27 steelhead"). NMFS improperly limited the action area to the stream segments downstream of the water

1 diversion facilities, and thus, NMFS's environmental baseline and cumulative effects analyses failed to  
2 consider all the pertinent activities that should have been viewed as the action in issue in analyzing the  
3 "effects of the action." 50 C.F.R. § 402.02. In addition, the BiOp's incidental take statement ("ITS")  
4 authorizing the take of CCC steelhead caused by Stanford's increased water diversions is arbitrary and  
5 capricious. Among other flaws, NMFS failed to analyze the impacts the proposed activities would have  
6 on recovery of CCC steelhead and its critical habitat.

### 7 JURISDICTION

8 3. This Court has subject matter jurisdiction over the claims brought pursuant to the APA,  
9 specifically 5 U.S.C. § 702, which authorizes any person aggrieved by an agency action under a relevant  
10 statute to seek judicial review; and 5 U.S.C. § 706, which authorizes a reviewing court to hold unlawful  
11 and set aside agency actions that are found to be arbitrary, capricious, an abuse of discretion, or  
12 otherwise not in accordance with law.

13 4. This Court has subject matter jurisdiction over the FOIA claims under 5 U.S.C. section  
14 552(a)(4)(B), which allows an aggrieved party to seek relief when documents are unlawfully withheld,  
15 and authorizes a reviewing court to enjoin the agency from withholding records and to order the  
16 production of any agency records improperly withheld from the complainant. Plaintiffs' members visit  
17 the San Francisquito Creek watershed for wildlife viewing, scientific observation, educational study,  
18 aesthetic enjoyment, spiritual contemplation, cultural fulfillment, and recreation. As a result of the acts  
19 and omissions of NMFS alleged herein, Plaintiffs' members have suffered and will continue to suffer  
20 injuries to their aesthetic, environmental, educational, spiritual, and economic interests in enjoying and  
21 using the San Francisquito Creek and its tributaries. Plaintiffs believe that NMFS's flawed jeopardy  
22 analysis has caused and will in the future continue to cause impairment the ecosystem of the San  
23 Francisquito Creek watershed, and as a result, Plaintiffs' members' use of the area is impaired and  
24 diminished, including their enjoyment of CCC steelhead, a threatened species listed under the  
25 Endangered Species Act ("ESA").

26 5. This Court has personal jurisdiction over NMFS and the named parties, all of which are  
27 agencies or officials of the federal government and operating within the United States.

**VENUE**

1  
2 6. Venue in the United States District for the Northern District of California is proper under 28  
3 U.S.C. section 1391(e) because the actions under review by NMFS in the BiOp are located within the  
4 Northern District. In addition, OCE's business office is located in San Francisco as is OCE and ERF's  
5 counsel. ERF's business office is located in Garberville, California, which is within the Northern  
6 District. Many members of ERF and OCE injured by the Defendants' actions also reside in San  
7 Francisco, San Mateo, and Santa Clara Counties. For purposes of the FOIA claims, venue is proper  
8 under 5 U.S.C. section 552(a)(4)(B) because the complainants have their principal place of business in  
9 the Northern District, and the records sought by complainants are most likely situated in the NMFS  
10 office located at 777 Sonoma Avenue, Santa Rosa, California--which is located within the Northern  
11 District.

**INTRADISTRICT ASSIGNMENT**

12  
13 7. Intradistrict assignment of this matter to San Francisco Division of the Court is appropriate  
14 pursuant to Civil Local Rule 3-2(e) because a substantial part of the events or omissions giving rise to  
15 the claims in this case occurred in San Mateo County and a substantial part of the property that is the  
16 subject of this action is situated in San Mateo County. In addition, the Plaintiffs reside in San Francisco  
17 County and the documents sought by Plaintiffs' FOIA claims are likely located in Sonoma County.

**THE PARTIES**

18  
19 8. Our Children's Earth ("OCE") is a non-profit corporation dedicated to protecting the  
20 environment, including the San Francisco Bay Area, based in San Francisco, California. OCE promotes  
21 public awareness of domestic and international environmental impacts through information  
22 dissemination, education, and private enforcement of environmental protection statutes. OCE  
23 enforcement cases aim to achieve public access to government information, ensure proper  
24 implementation of environmental statutes and permitting, and enjoin illegal violations.

25 9. OCE has an active membership of people from all over the United States with a majority of its  
26 members residing in San Francisco Bay Area. OCE members use San Francisquito Creek and San  
27 Francisco Bay for recreation, wildlife observation and study (including observation of CCC steelhead,

1 and attempted observation of California red-legged frog, and San Francisco garter snake), aesthetic  
2 enjoyment, and spiritual renewal. OCE members particularly enjoy as recreational, educational, and/or  
3 spiritual pursuits observing, studying and contemplating the migration of anadromous fish in San  
4 Francisquito Creek in San Francisco Bay, including CCC steelhead. These members' enjoyment of CCC  
5 steelhead on San Francisquito Creek and San Francisco Bay is being substantially diminished by the  
6 dramatic decline in the numbers and health of CCC steelhead on these waterways due to the adverse  
7 impacts of Stanford's diversions of water from San Francisquito Creek watershed. These members  
8 continue to hope for survival and recovery of CCC steelhead on these waterways. However, the current  
9 statewide drought has OCE's members especially concerned about CCC steelhead's continued existence  
10 in the San Francisquito watershed. Additionally, these members' enjoyment of observation of California  
11 red legged frogs, and San Francisco garter snakes in the San Francisquito watershed is being  
12 substantially diminished by the decline in the numbers and health of these species in the watershed due  
13 to the adverse impacts of Stanford's facilities and operations located within the San Francisquito Creek  
14 watershed.

15 10. Ecological Rights Foundation ("ERF") is a non-profit, public benefit corporation, organized  
16 under the laws of the State of California, devoted to furthering the rights of all people to a clean,  
17 healthful and biologically diverse environment. To further its environmental advocacy goals, ERF  
18 actively seeks federal and state agency implementation of state and federal water quality related laws,  
19 and as necessary, directly initiates enforcement actions on behalf of itself and its members. ERF's  
20 members use San Francisquito Creek and San Francisco Bay for recreation, wildlife observation and  
21 study (including observation of CCC steelhead, and attempted observation of California red-legged frog,  
22 and San Francisco garter snake), aesthetic enjoyment, and spiritual renewal. ERF members particularly  
23 enjoy as a recreational, educational, and/or spiritual pursuit observing, studying and contemplating the  
24 migration of anadromous fish in San Francisquito Creek and San Francisco Bay, including CCC  
25 steelhead. These members' enjoyment of CCC steelhead on San Francisquito Creek and San Francisco  
26 Bay is being substantially diminished by the dramatic decline in the numbers and health of CCC  
27 steelhead on these waterways due to the adverse impacts of diversions of water from the San

1 Francisquito Creek watershed. These members continue to hope for survival and recovery of CCC  
2 steelhead on these waterways. However, the current statewide drought has ERF's members especially  
3 concerned about CCC steelhead's continued existence in the San Francisquito watershed. Additionally,  
4 these members' enjoyment of observation of California red legged frogs, and San Francisco garter  
5 snakes in San Francisquito watershed is being substantially diminished by the decline in the numbers  
6 and health of these species in the watershed due to the adverse impacts of Stanford's facilities and  
7 operations located within the San Francisquito Creek watershed.

8 11. Plaintiffs have further been harmed by NMFS's failure to provide documents lawfully  
9 requested under FOIA that would provide the Plaintiffs with information concerning the adverse impacts  
10 on CCC steelhead from Stanford's facilities and operations.

11 12. As a result of the acts and omissions of NMFS alleged herein, Plaintiffs' members have  
12 suffered and will continue to suffer injuries to their aesthetic, environmental, educational, spiritual, and  
13 economic interests in enjoying and using San Francisquito Creek and San Francisco Bay.

14 13. Defendant NMFS, a branch of the National Oceanic and Atmospheric Administration, a  
15 division of the Department of Commerce, is the agency of the United States Government responsible for  
16 administering and implementing the ESA for anadromous fisheries and generally is responsible for the  
17 stewardship of the nation's living marine resources and their habitat.

18 14. Defendant Penny Pritzker, Secretary of Commerce, is the Secretary within the meaning of 16  
19 U.S.C. §§ 1540(g)(1)(C) and 1532(15) and she is sued in her official capacity only. If ordered by the  
20 Court, Ms. Pritzker has the authority and ability to remedy the harm inflicted by NMFS's actions.

21 15. Defendant Rodney McInnis, Regional Administrator of NMFS Southwest Region has been  
22 delegated certain authority granted to the Secretary under the ESA within the Southwest Region, and is  
23 sued in his official capacity only. If ordered by the Court, Mr. McInnis has the authority and ability to  
24 remedy the harm inflicted by NMFS's actions.

**STATUTORY BACKGROUND****Endangered Species Act**

16. The ESA was enacted to provide a means to conserve threatened and endangered species and to conserve the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). In addition, the ESA calls for all federal agencies to use their authority to seek to conserve threatened and endangered species. 16 U.S.C. § 1531(c).

17. To accomplish these goals, the ESA requires that each federal agency (“action agency”) insure that any action authorized, funded, or carried out by such agency does not jeopardize the continued existence (by jeopardizing either the survival or recovery) of a threatened or endangered species or result in the destruction or adverse modification of habitat that the Secretary has determined to be critical for such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. In furtherance of that goal, the ESA requires that each Federal agency shall consult with the National Marine Fisheries Service (“consulting agency”) for marine and anadromous species on any action which is likely to result in jeopardy or destruction or adverse modification of critical habitat, using the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.01(b); 50 C.F.R. § 223. To this end, the action agency may provide the consulting agency with a Biological Assessment outlining the action and the effects of that action on the species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12.

18. After consultation has ended, the consulting agency shall provide the action agency with a written statement, known as a biological opinion, which must set forth the consulting agency’s opinion, and the information upon which that opinion is based, and detail how the action will affect the species or its critical habitat. 16 U.S.C. § 1536(b)(3)(A). In arriving at its biological opinion, the consulting agency, using the best scientific and commercial data available, must review all relevant information provided by the action agency, evaluate the current status of the species, evaluate the effects of the action and the cumulative effects on the species or critical habitat, and formulate its opinion as to whether the action, taken together with cumulative effects will jeopardize the continued existence of the species or adversely modify its critical habitat. 50 C.F.R. § 402.14(g)(1-4, 8).

1 19. If the consulting agency finds that the action will likely jeopardize the species or adversely  
2 modify critical habitat, the consulting agency shall suggest reasonable and prudent alternatives that it  
3 believes would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A). If there are no  
4 reasonable and prudent alternatives that will avoid such jeopardy or adverse modification, the action  
5 agency cannot continue with the action unless it obtains an exemption as specified in ESA section  
6 7(a)(2). 16 U.S.C. § 1536(a)(2).

7 20. If the action or reasonable and prudent alternative to the action will result in a take of a listed  
8 species, but the consulting agency concludes that the incidental taking of threatened or endangered  
9 species as a result of the action or alternative will not cause jeopardy to the species or adverse  
10 modification of its critical habitat, then the Secretary may issue an Incidental Take Statement (“ITS”) for  
11 that take. 16 U.S.C. § 1536(b)(4). The ITS shall set forth the impact of the incidental take on the species,  
12 the reasonable and prudent measures the consulting agency considers necessary or appropriate to  
13 minimize such impact, and the terms and conditions that the action agency must take to comply with the  
14 reasonable and prudent measures. 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i). When a numerical  
15 limit on take cannot be practically obtained, the incidental take statement may require the maintenance  
16 of certain ecological conditions as a proxy for a numerical limit on take of the species. These so called  
17 “ecological surrogates,” however, must be reasonably linked to the take of the protected species that will  
18 be caused by the project and be reasonably designed to limiting take to an acceptable level. *Ariz. Cattle*  
19 *Growers’ Ass’n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1249-51 (9th Cir. 2001). Additionally,  
20 these ecological surrogates must be sufficiently specific so that they provide a clear standard for  
21 determining when the authorized level of take has been exceeded. *Id.*

22 21. Both the consulting and action agencies have a responsibility to reinitiate consultation when  
23 any of the following conditions occur: (a) the amount or extent of taking specified in the incidental take  
24 statement is exceeded; (b) if new information reveals effects of the action that may affect listed species  
25 or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is  
26 subsequently modified in a manner that causes an effect to the listed species or critical habitat that was  
27



1 not considered in the biological opinion; or (d) if a new species is listed or critical habitat designated that  
2 may be affected by the identified action. 50 C.F.R. § 402.16.

3 22. Agency action may be set aside by a court "if the agency has relied on factors which Congress  
4 has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an  
5 explanation for its decision that runs counter to the evidence before the agency, or is so implausible that  
6 it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs.*  
7 *Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43(1983). Thus, biological opinions which  
8 fail to consider all relevant factors, fail to consider an important aspect of the problem presented, fail to  
9 explain its conclusions satisfactorily, or fail to demonstrate a rational connection between the facts  
10 found and the choice made are likewise arbitrary and capricious under the APA.

### 11 **Freedom of Information Act**

12 23. The Freedom of Information Act requires that an agency, upon any request for records, shall  
13 make the records available promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination  
14 whether to comply with a request within twenty (20) business days after the receipt of the request and  
15 shall immediately notify the party making the request of such determination, the reasons for the  
16 determination, and the party's right to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the  
17 agency may extend the time for response, for no more than ten (10) days, by written notice to the party,  
18 specifying the reasons for the extension and the date on which the determination is expected to be sent. 5  
19 U.S.C. § 552(a)(6)(A)(i). Alternatively, if the agency cannot respond within the time limits, it can notify  
20 the requesting party and allow that party an opportunity to limit the scope of the request so that the  
21 agency may respond within the time limits or an alternative time frame. 5 U.S.C. § 552(a)(6)(A)(ii). If  
22 an agency does not respond within the time limits, a party will be deemed to have exhausted its  
23 administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

**FACTUAL BACKGROUND**

**April 21, 2008 SHEP BiOp**

24. Stanford's application to the Corps for a CWA Section 404 permit triggered the Corps' duty to consult with NMFS pursuant to ESA section 7. Consultation between the Corps and NMFS culminated in NMFS's issuance of the BiOp at issue in this Complaint. Stanford needed the CWA permit to complete modifications to the San Francisquito Creek Pump Station in San Francisquito Creek<sup>1</sup>, and the Los Trancos Creek Fish Ladder and Diversion Structure in Los Trancos Creek ("Los Trancos Diversion"). In addition to these upgrades, Stanford's project also involved increasing the storage capacity of Felt Reservoir, an offstream reservoir near the Los Trancos Diversion that receives water from Stanford's three water diversions. Because Felt Reservoir had silted in, Stanford proposed excavating approximately 150,000 cubic yards of accumulated sediment to return the Reservoir to its historic capacity. The facilities constituting the SHEP are all located on Stanford property. Stanford undertook the improvements to the San Francisquito Pump Station and the Los Trancos Diversion principally to allow Stanford to increase the capacity of water diverted from San Francisquito and Los Trancos Creeks. The SHEP also improved Stanford's existing poorly operating fish passage facilities. Stanford paradoxically coined the project the 'Steelhead Habitat Enhancement Project' presumably to portray the project as beneficial to CCC steelhead and downplay the adverse impacts of the water diversions associated with this project.

25. NMFS issued the SHEP BiOp on April 21, 2008. The SHEP BiOp defined the project addressed by the BiOp as including Stanford's construction of improvements to the Los Trancos Diversion, the San Francisquito Creek Pump Station, and Felt Reservoir and Stanford's continued use of these facilities to divert and store water from Los Trancos and San Francisquito Creek to augment

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<sup>1</sup> There are three main tributaries to San Francisquito Creek: Corte Madera Creek, Bear Creek, and Los Trancos Creek. San Francisquito Creek flows about 12 miles from the confluence of Bear and Corte Madera Creeks to San Francisco Bay.

1 Stanford's water supply.<sup>2</sup> In addition, the SHEP BiOp assessed the ongoing operation of the Los  
2 Trancos and San Francisquito water diversions according to an operations plan ("Operations Plan") that  
3 Stanford, the California Department of Fish and Wildlife, and NMFS had negotiated two years earlier.  
4 This Operations Plan specified certain amount of bypass flow in Los Trancos and San Francisquito  
5 Creeks that must be met before Stanford could divert specified volumes of water.

6 26. NMFS concluded that the construction activities associated with the pump station and  
7 diversion upgrades were not likely to jeopardize the continued existence of CCC steelhead or result in  
8 the destruction or adverse modification of CCC steelhead's critical habitat. NMFS also determined that  
9 the excavation of Felt Reservoir would not jeopardize CCC steelhead or its critical habitat since fish  
10 cannot physically reach the Reservoir and thus it is not part of their critical habitat. However, because  
11 the construction associated with the water facility upgrades would result in take of some CCC  
12 steelhead, the BiOp included an Incidental Take Statement ("ITS") which authorized the take of  
13 approximately 180 juvenile steelhead during the construction activities..

14 27. NMFS found that implementation of the SHEP would cause incidental take of juvenile and  
15 smolt CCC steelhead. NMFS provided a specific estimate of take associated with Stanford's  
16 construction of improvements to the Los Trancos Diversion and the San Francisquito Pump Station.  
17 NMFS estimated that 80 juvenile fish might be incidentally taken in association with the Los Trancos  
18 Diversion construction and 100 juveniles might be incidentally taken in association with the San  
19 Francisquito Pump Station construction. NMFS further stated that these numbers represented no more  
20 than two percent of the juvenile steelhead present in the SHEP project areas. However, NMFS  
21 indicated that the best scientific and commercial data available were not sufficient to enable the agency  
22 to estimate a specific amount of incidental take of steelhead that Stanford's ongoing operation of the  
23

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24 <sup>2</sup> In particular, the physical improvements entailed reconfiguring of the Los Trancos Diversion Facility  
25 with mechanized flow-regulating gates for the flume, replacement of the Los Trancos Facility's Alaskan  
26 Steeppass fish ladder with a step-pool and weir facility, and replacement/modernization of the  
27 Los Trancos fish screen, adding a surface intake screen and an additional 4 cubic feet per second ("cfs")  
pump to the San Francisquito Creek Pump Station, and excavate accumulated sediment in Felt Reservoir  
to restore its original capacity.

1 SHEP and associated diversions of water from Los Trancos and San Francisquito Creek would cause.  
2 In particular, NMFS explained that the precise number of steelhead take could not be determined  
3 because: "(1) the number of adult steelhead that may be migrating and spawning in San Francisquito  
4 and Los Trancos creeks in each year is unknown; (2) the precise number of juvenile steel head rearing  
5 below Stanford's intakes is unknown; and (3) the precise number of outmigrating smolts from the  
6 watershed is unknown." *See* BiOp at page 40.

7 28. Despite this admitted lack of information regarding the size of the CCC steelhead population  
8 and life stages in San Francisquito Creek and inability to estimate steelhead take from on-going  
9 operation of the SHEP, NMFS determined that Stanford's implementation of its Operation Plan and  
10 water diversions in accordance with the plan was not likely to jeopardize the continued existence of  
11 CCC steelhead or result in the destruction or adverse modification of its critical habitat. NMFS further  
12 determined that the water quality and habitat conditions for various steelhead life stages that would  
13 result from implementation of the Operations Plan shall serve as an "ecological surrogate" for  
14 anticipated amount of incidental take associated with the on-going operation of Stanford's Los Trancos  
15 Diversion and San Francisquito Pump Station. Thus, the negotiated Operations Plan is both a  
16 component of the overall project action addressed in the SHEP BiOp as well as the ecological surrogate  
17 for the measure of allowable take in the ITS.

18 29. In addition, the ITS provided that the water diversions authorized in the Operations Plan would  
19 change in the event that Bonde Weir were removed from San Francisquito Creek in the future. As  
20 specified in the Operations Plan, when San Francisquito Creek is flowing between 30 to 40 cubic feet  
21 per second ("cfs") and 41 to 46 cfs, Stanford is permitted to divert 0 cfs and 6 cfs, respectively.

22 However, a footnote in this table indicates that Stanford will be permitted to divert an additional 8 cfs  
23 over the those amounts, (i.e., 8 cfs and 14 cfs, respectively) if "Bonde Weir is modified to successfully  
24 and efficiently pass adult steel head at flows of 16 to 100 cfs." The BiOp indicated that there were  
25 preliminary design plans for the alteration of Bonde Weir that proposed modifying the structure in a  
26 manner that will allow for upstream passage during San Francisquito Creek flows as low as 5 cfs.

27 Although the ITS allows Stanford to divert more water when flows are between 30 and 46 cfs, there is

1 no protocol or reporting mechanism specified in the ITS that ensures that the preliminary designs had  
2 been implemented before the change in diversion would be permitted.

3 30. The SHEP BiOp defined the action area associated with the proposed SHEP as two contiguous  
4 stream segments: first, the approximately 2.3 miles of Los Trancos Creek extending from Los Trancos  
5 Diversion facility downstream to the confluence with San Francisquito Creek and second, the  
6 approximately 8.3 miles of San Francisquito Creek extending from the confluence with Los Trancos  
7 Creek downstream to San Francisco Bay. Based on this narrow definition of the action area, the SHEP  
8 BiOp failed to consider impacts of the SHEP on CCC steelhead that are able to migrate past the water  
9 diversion points into the critical habitat upstream of the Los Trancos Diversion and upstream of the San  
10 Francisquito and Los Trancos Creek confluence. Similarly, the SHEP BiOp failed to consider  
11 interrelationships of impacts from upstream diversions and Searsville Dam and impacts of the SHEP on  
12 CCC steelhead.

### 13 **Stanford's Lake Water System and Other Permit Applications**

14 31. Searsville Dam is located on Stanford property in the San Francisco Bay Area. Searsville Dam  
15 impounds water from Corte Madera Creek and other upstream tributaries (part of the San Francisquito  
16 Creek watershed), forming a reservoir known as Searsville Reservoir. In many months of the year,  
17 Searsville Dam effectively blocks essentially all flow into the reach of Corte Madera Creek below the  
18 Dam. Additionally, Stanford diverts water from Searsville Reservoir to its water supply system  
19 (volumes diverted in recent years have ranged from about 350 to 436 acre feet). During the course of  
20 NMFS consultation on the impacts of the SHEP, Stanford built another water diversion facility in 2004  
21 on San Francisquito Creek upstream of Los Trancos Creek. The facility is known as the Searsville  
22 Booster Pump Station. A 16 inch pipeline extending from Searsville Dam conveys water to the  
23 Searsville Booster Pump Station which is located approximately 2 miles below Searsville Reservoir on  
24 the bank of San Francisquito Creek. The Searsville Booster Pump Station increased Stanford's ability to  
25 divert water from Searsville Reservoir/Corte Madera Creek because it allows water from Searsville  
26 Reservoir to be transported to Felt Reservoir and distributed to various points on campus. Thus, in  
27 addition to being a significant component of Stanford's overall water diversions, Searsville Dam and

1 Reservoir operations are directly interrelated to the operations of Felt Reservoir. As discussed above,  
2 the excavation of Felt Reservoir to restore the original capacity which had silted in was one of the  
3 elements of the SHEP. Stanford has referred to all of these facilities collectively, i.e., Searsville Dam  
4 and Reservoir, San Francisquito Pump Station, Los Trancos diversion, and Felt Reservoir, as  
5 comprising its "Lake Water System."

6 32. Bear Creek is located upstream of the confluence of San Francisquito Creek and Corte Madera  
7 Creek and also provides critical habitat for CCC steelhead. Because of its perennial flow, Bear Creek  
8 provides quality habitat for juvenile steelhead year round. There are two water diversion facilities  
9 located in the Bear Creek watershed. The California Water Service diverts up to 12.4 cubic feet per  
10 second ("cfs") of streamflow year-round from its Upper Diversion Dam located on Bear Gulch, a  
11 tributary to Bear Creek. The California Water Service further diverts up to 4.7 cfs from its Station 3  
12 Pumping Plant on the main stem of Bear Creek during the winter and spring. SHEP BiOp at page 22-  
13 23. NMFS reported that under low flow conditions, the operation of these two California Water Service  
14 facilities could reduce streamflow volumes arriving to San Francisquito Creek below Searsville Dam.  
15 *Id.*

16 33. After the issuance of the BiOp in 2008, Stanford submitted an application to NMFS and the  
17 U.S. Fish and Wildlife Service ("USFWS") for an incidental take permit ("ITP") under ESA section 10.  
18 Stanford originally requested in its application that the ITP provide incidental take authorization for all  
19 remaining facility operation and maintenance activities on Stanford's lands as well as academic  
20 activities, recreational activities, equestrian activities, agricultural activities, commercial and  
21 institutional activities, Conservation Program activities, future development, water diversion, and water  
22 storage operations. Stanford's ITP application originally included all of Stanford's Lake Water System  
23 described above, including Searsville Dam and Reservoir. However, in 2011, Stanford requested that  
24 NMFS and USFWS consider Stanford's application to no longer include a request for incidental take  
25 authorization for any take of listed species caused by Searsville Reservoir, Searsville Dam, an intake  
26 structure, piping system, and the inline booster pump (collectively, "Searsville Facilities"). Despite the  
27 fact that Stanford's diversions of water from Searsville Reservoir and related infrastructure is a

1 significant component of Stanford's overall water diversion and storage, NMFS issued a Final  
2 Environmental Impact Statement and Draft Biological Opinion on October 22, 2012 ("2012 Draft  
3 BiOp") that analyzed the impacts of the above activities but excluded proposed authorization of any  
4 take that may be associated with the Searsville Facilities. However, the draft BiOp discussed the  
5 operations at Searsville Dam and Reservoir at length as part of the Cumulative Impacts/Environmental  
6 Baseline analysis for the proposed ITP.

### 7 **Steelhead in the San Francisquito Creek Watershed**

8 34. The San Francisquito Creek watershed CCC steelhead population represents one of only a few  
9 known remaining runs in South San Francisco Bay. NMFS, 2012 Draft BiOp at 38. CCC steelhead are  
10 found in San Francisquito Creek, Los Trancos Creek, Bear Creek, and lower Corte Madera Creek  
11 below Searsville Dam. *Id.* Because the mainstem of San Francisquito Creek provides access between  
12 the headwaters of the watershed and San Francisco Bay, NMFS determined the creek is essential for  
13 the immigration of steelhead adults and the emigration of smolts. *Id.* NMFS reports that spawning and  
14 rearing habitat for steelhead are present in Los Trancos Creek, San Francisquito Creek (from the  
15 confluence with Bear Creek to Junipero Serra Boulevard), and Bear Creek. *Id.*

16 35. Upstream and downstream movements of steelhead in the San Francisquito Creek watershed  
17 are limited by seasonal low stream flow conditions and man-made barriers. *Id.* at 40. Because smolt  
18 outmigration coincides with the time period where stream flows in the watershed begin to decline  
19 rapidly, this makes their downstream migration past man-made structures and through reaches with a  
20 highly impermeable stream bed difficult. *Id.* Adult steelhead upstream migration is also limited when  
21 flow conditions in the creek are sufficiently low, a problem exacerbated by the presence of man-made  
22 passage impediments in San Francisquito Creek. *Id.*

23 36. In particular, Bonde Weir located at creek mile 4 had been a significant barrier to steelhead  
24 passage. However, as anticipated in the SHEP BiOp, Bonde Weir was removed in the fall of 2013.  
25 Whereas Stanford had been prohibited from diverting water from the San Francisquito Creek Pump  
26 Station during periods of flow between 34 and 41 cubic feet per second when Bonde Weir was in  
27

1 existence, that prohibition was lifted from the Operations Plan upon the completion of the Bonde Weir  
2 removal.

3 37. Other significant man-made passage impediments in San Francisquito Creek are Stanford's  
4 non-operating Lagunita Diversion Dam structure at river mile 7.5, and a concrete road crossing at river  
5 mile 11.6 in the Jasper Ridge Biological Preserve ("Jasper Ridge Road Crossing"). 2012 Draft BiOp at  
6 40. The 2012 Draft BiOp found that the Lagunita Diversion Dam impedes the passage of fish at certain  
7 flows and can completely block steelhead passage at lower flow conditions because the existing fish  
8 ladder on the structure does not adequately pass steelhead upstream and does not meet NMFS's fish  
9 passage guidelines. *Id.* at 15. In 2006, Stanford studied potential steelhead passage improvements, and  
10 concluded that removing the entire Lagunita Diversion Dam structure and restoring the channel to a  
11 more natural configuration would best improve fish passage for adult and juvenile steelhead. *Id.*  
12 However, Stanford has not commenced implementing such a project and has made no binding  
13 commitments to do so.

14 38. The most significant barrier in the San Francisquito Creek watershed is Stanford's Searsville  
15 Dam on lower Corte Madera Creek. *Id.* at 40. Searsville Dam is a complete barrier to the upstream  
16 migration of adult steelhead, and NMFS estimates that about one-third of the San Francisquito  
17 watershed is not available to steelhead due to the barrier created by Searsville Dam. *Id.* Since it was  
18 built in 1892, Searsville Dam and Reservoir has reduced gravel recruitment and altered stream flow to  
19 downstream reaches of the watershed. *Id.* at 41. Steelhead habitat in lower Corte Madera Creek and San  
20 Francisquito Creek has been impacted by Searsville Dam by retaining sediment. *Id.* This has caused a  
21 gradual alteration of the creek bed, particularly in lower Corte Madera Creek, to channel  
22 geomorphology and creek bed substrate that are degraded for steelhead habitat. *Id.*

### 23 **Freedom of Information Act Requests**

24 39. On May 6, 2013, Plaintiffs OCE and ERF sent a FOIA request to NMFS's Southwest Region,  
25 for documents pertaining to the impacts of Stanford's water diversion on listed species found within the  
26 San Francisquito watershed, including CCC Steelhead, the San Francisco garter snake, and California  
27 red-legged frog (hereinafter "Request #2013-000912" or "the May 6, 2013 request"). Among other



1 documents, Plaintiffs requested documents pertaining to any ESA section 7 consultation for any of  
2 Stanford's water diversions as well as documents relating to Stanford's application for an ESA section  
3 10 permit.

4 40. On May 8, 2013, Plaintiffs received a letter acknowledging the receipt of May 6, 2013 request,  
5 On June 6, 2013, Plaintiffs received first set of documents responsive to the May 6, 2013 request, and a  
6 request for an extension of time to make a determination on the request, in which NMFS indicated a  
7 final response would be provided "no later than September 6, 2013."

8 41. Almost six months later on October 28, 2103, Plaintiffs received from NMFS a second set of  
9 documents responsive to the May 6, 2013 FOIA request, and NMFS indicated a final response would  
10 be provided "on or before December 13, 2013."

11 42. On February 28, 2014, Plaintiffs received from NMFS a third set of documents responsive to  
12 the May 6, 2013 FOIA request. NMFS indicated that this was not, however, the agency's final response  
13 and that NMFS anticipated sending a final response to the May 6, 2013 FOIA request on or before  
14 March 31, 2014.

15 43. On December 16, 2013 Plaintiffs OCE and ERF sent an additional FOIA request to NMFS  
16 (hereinafter "Request #2104-000272" or "the December 16, 2013 request"). Plaintiffs also specifically  
17 requested that NMFS provide any documents that were responsive to the May 6, 2013 and which had  
18 been generated after May 6, 2013 to be provided with the other documents responsive to the December  
19 16, 2013 request.

20 44. On December 17, 2013, Plaintiffs received a letter from NMFS acknowledging the receipt of  
21 December 13, 2013 request. On January 17, 2014, Plaintiffs received a letter from NMFS stating that  
22 the agency hoped to complete its final response to Request #2104-000272 "no later than February 28,  
23 2014." As of today's date, NMFS has failed to complete its final response to the December 16, 2013  
24 FOIA request.

25 45. On January 22, 2014, Plaintiffs OCE and ERF sent a third FOIA request to NMFS for  
26 documents pertaining to interim measures that Stanford may be implementing to mitigate the impacts  
27 of Searsville Dam and Reservoir on CCC steelhead in the San Francisquito Creek watershed

1 (hereinafter "Request #2014-000426"). In a letter dated February 28, 2014, NMFS responded that there  
2 was only one document responsive to Request #2104-000426. The one document that was provided  
3 was a letter to NMFS that commented on another letter, from Stanford University to NMFS dated  
4 December 9, 2013. Stanford's December 9, 2013 letter to NMFS was not included as a responsive  
5 document even though it is obviously within the scope of Plaintiffs' Request #2104-000426.

6 46. Although NMFS's February 28, 2014 letter indicated it completed the agency's response to  
7 Request #2014-000426, the letter did not notify the Plaintiffs of their right to appeal the determination  
8 pursuant to 5 U.S.C. § 552(a)(6)(A)(i).

9 47. NMFS protracted delay in responding to Request #2013-000912 and Request #2104-000272 is  
10 part of a pattern and practice of NMFS's improperly delaying its responses to FOIA requests. NMFS  
11 has delayed its responses to other FOIA requests submitted by Our Children's Earth Foundation,  
12 including FOIA Request # DOC-NOAA-2013-00163 for documents related to Hatchery Genetics  
13 Management Plans ("HGMPs") for artificial propagation programs involving anadromous fish species  
14 (including, but not limited to, salmon and steelhead) occurring at ten identified anadromous fish  
15 hatchery facilities located in California. NMFS has further substantially delayed its responses to FOIA  
16 requests submitted by other nonprofit environmental groups (including but not limited to the requests  
17 submitted by the South Yuba River Citizens League to NMFS addressed by *South Yuba River Citizens*  
18 *League, et al., v. National Marine Fisheries Service, et al.*, (Dkt. No. S-06-2845 LKK/JFM, E.D. Cal.  
19 June 20, 2008).

20 48. In responding to FOIA requests, NMFS has a pattern and practice of performing a series of  
21 piecemeal searches for documents responsive to FOIA requests delayed over several months time,  
22 rather than conducting a single, complete, and timely search for documents as required to comply with  
23 FOIA's statutory deadline to provide complete responses to FOIA requests within twenty days. 5  
24 U.S.C. § 552(a)(6)(A)(i). In addition, NMFS has a pattern and practice of violating FOIA by failing to  
25 complete a search for all documents in its possession at the time it conducts the search for responsive  
26 documents. Instead, when NMFS routinely conducts its series of piecemeal searches for FOIA  
27 documents in the subsequent searches it looks only for documents in its possession as of the date it

1 received a FOIA request—not the date it is conducting each of its searches. As a result of this practice,  
 2 NMFS typically fails to produce documents that are up to date with the date in time that NMFS  
 3 produces its final response, making it frequently essentially impossible to find out current information  
 4 concerning NMFS's activities.

5 **FIRST CLAIM FOR RELIEF**

6 **Violation of the APA**

7 **5 U.S.C. §§ 706(2)**

8 **Request for Declaratory Relief and Injunction to Compel NMFS to Set Aside the SHEP BiOp**

9 49. Plaintiffs reassert and reallege paragraphs 1 through 48 above.

10 50. On April 21, 2008, NMFS issued the SHEP BiOp to the Corps for the SHEP. ESA section  
 11 7(a)(2) requires that NMFS use the best scientific and commercial data available when consulting with  
 12 an action agency, and detail how the agency action will affect listed species and their critical habitat. 16  
 13 U.S.C. § 1536(a)(2), (b)(3)(A). In particular, NMFS regulations require that NMFS evaluate the current  
 14 status of the listed species or critical habitat, the effects of the action and cumulative effects on the  
 15 listed species or critical habitat. 50 C.F.R. § 402.14 (g)(2), (3). NMFS's and USFWS's ESA Handbook<sup>3</sup>  
 16 explains that the ESA jeopardy determination turns on four considerations: "(1) the status of the  
 17 species, (2) the environmental baseline, (3) all effects of the proposed action, and (4) the cumulative  
 18 effects of other anticipated actions." ESA Handbook 4-37. As further described in the ensuing  
 19 paragraphs below, the SHEP BiOp failed to consider important information relevant to these four  
 20 considerations and to reach conclusions concerning these four considerations that were consistent with  
 21 the information available to NMFS. In thus failing to consider important aspects of the problem at hand  
 22 and to reach conclusions consistent with the relevant information available to the agency, NMFS's  
 23  
 24

25 <sup>3</sup> U.S. Fish & Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation  
 26 Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the  
 27 Endangered Species Act, March 1998, available at  
[http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf)

1 SHEP BiOp decision was arbitrary and capricious. NMFS's SHEP BiOp decision was further contrary  
2 to law in failing to comply with ESA section 7 and 50 C.F.R. § 402.14(g) and (h).

### 3 **Lack of Rational Connection between Facts Found and Conclusions Made**

4 51. First, the SHEP BiOp is arbitrary and capricious because it fails to show a rational connection  
5 between the facts found and the conclusions reached. The SHEP BiOp concludes that the SHEP will  
6 not jeopardize the survival of CCC steelhead and that the take authorized by the SHEP BiOp ITS will  
7 not harm CCC steelhead without offering a rational basis for these conclusions. The SHEP's Operation  
8 Plan as authorized by the ITS allows Stanford to divert substantial volumes of water from Los Trancos  
9 and San Francisquito Creeks in amounts that vary with changing flow conditions in these creeks. The  
10 conclusion that these water diversions will have minimal effect on the CCC steelhead population in the  
11 San Francisquito Creek watershed is contradicted by the facts and studies recited by the SHEP BiOp.  
12 The BiOp recites very detailed factual information, well supported by studies, that artificially reducing  
13 flow by water diversions in streams that have very limited natural flow to begin with has very  
14 significant adverse impact on steelhead. For example, the BiOp acknowledges that "it is well  
15 documented that streamflow affects the travel rates of migrating [steelhead] smolts. . . Moreover,  
16 delays in the rate of downstream movement [of steelhead smolts] can influence smolt survival. Cada *et*  
17 *al.* (1994) concluded that relevant studies '*generally supported the premise that increased flow lead to*  
18 *increased smolt survival.*' (italics original). SHEP BiOp at page 29. The BiOp also acknowledges that  
19 studies well document that steelhead spawning and egg incubation conditions are significantly  
20 influenced by stream flows, that higher stream flows typically provide improved conditions for  
21 steelhead spawning and egg incubation, and that steelhead typically spawn in water depths of  
22 approximately 0.8 feet (meaning flows must be sufficient to create such water depths). The BiOp  
23 further acknowledges that studies have established that streamflow rates affect the amount of cover for  
24 steelhead and the fish's susceptibility to predation. The BiOp fails to follow the logic of its own factual  
25 recitation in the studies it relies upon to identify the predictable adverse impacts on steelhead of the  
26 water diversions the BiOp authorizes. For example, the BiOp contains no analysis of whether water  
27 depths will fall below the 0.8 feet acquired by steelhead for spawning in the pertinent reaches of Los

1 Trancos and San Francisquito Creek as a result of the water diversions authorized by the Operation  
2 Plan.

3 52. The SHEP BiOp is further arbitrary and capricious in its conclusions concerning the effects on  
4 CCC steelhead from the water diversions authorized by the Operation Plan and the reasonable and  
5 prudent measures and terms and conditions appropriate to address these effects. The SHEP BiOp  
6 concludes that maintaining a 2 cfs base flow in December and 5 cfs base flow from January through  
7 April 1 in Los Trancos Creek below the Los Trancos Diversion and a 5 cfs base flow in San  
8 Francisquito Creek below the San Francisquito Creek Pump Station will provide "adequate conditions"  
9 for steelhead and will "adequately" protect and conserve steelhead habitat downstream of these water  
10 diversions. SHEP BiOp at 36, 42. The BiOp further concludes that the bypass flows mandated by the  
11 Operation Plan "are expected to provide suitable conditions for adult [steelhead] upstream migration,  
12 spawning, egg incubation, juvenile rearing, and smolt outmigration. While the project will divert some  
13 flows from these creeks, these diversions are anticipated to have negligible and discountable impacts on  
14 PCEs [primary constituent elements] of designated critical habitat on Los Trancos and San Francisquito  
15 Creeks for CCC steelhead in the action area." *Id.* at 38. Finally, the BiOp concludes that the long-term  
16 impacts of the Operation Plan "are beneficial to CCC steelhead and designated critical habitat by  
17 largely eliminating the impacts of Stanford's water diversions on stream flows important to ensuring  
18 listed salmonids can complete their life history cycle." *Id.* at 38-39. The BiOp justifies imposing the  
19 Operation Plan as essentially the only long-term reasonable and prudent measure and related term and  
20 condition based on these findings. However, these findings are not supported and instead are  
21 contradicted by other factual findings in the SHEP BiOp and in the administrative record, rendering the  
22 SHEP BiOp and the ITS arbitrary and capricious and contrary to law, as discussed in the paragraphs  
23 below.

24 53. The SHEP BiOp has effectively found that Stanford's existing water diversion practices at the  
25 San Francisquito Creek Pump Station and Los Trancos Diversion points are perpetuating take of CCC  
26 steelhead--take which was unauthorized at the time. In concluding that the Operation Plan will be  
27 "beneficial to CCC steelhead and designated critical habitat," the SHEP BiOp has essentially

1 irrationally concluded that authorizing take of the species to continue at a lesser level than the take that  
2 had formerly had been unlawful constitutes a benefit to a listed species (the equivalent of contending  
3 that authorizing a hunting operation to shoot 50 protected grizzly bears is a beneficial program for the  
4 bears when the same operation had previously been shooting 100 grizzly bears per year illegally). In so  
5 doing, the SHEP BiOp has improperly treated Stanford's prior unlawful water diversion activity to be  
6 regulated by the ITS as part of the environmental baseline, rather than as the activity to be regulated.

7 54. It is irrational for the SHEP BiOp to find that the Operation Plan provides merely "adequate"  
8 flow levels in San Francisquito Creek and Los Trancos Creek to allow for some survival of juvenile  
9 steelhead and some spawning, incubation, rearing, and smolt passage downstream and then to conclude  
10 that the Operation Plan will have negligible and discountable impacts on steelhead critical habitat and  
11 will "largely eliminate" the impact of Stanford's water diversions on steelhead. Even if the base flows  
12 called for in the Operation Plan are sufficient minimal flow levels to allow for some survival of  
13 juvenile steelhead and some spawning, incubation, rearing, and smolt passage downstream, this is not a  
14 rational basis to conclude that the Operation Plan will have negligible impacts on steelhead critical  
15 habitat or will largely eliminate impacts on steelhead, especially when the evidence in the record and  
16 analysis in the SHEP BiOp indicates that water diversions that substantially reduce the flow in these  
17 creeks are expected to have very significant adverse impacts on CCC steelhead.

18 55. To reach valid conclusions concerning the impact of the Operation Plan on CCC steelhead, the  
19 SHEP BiOp should have compared the level of juvenile steelhead survival and steelhead spawning,  
20 incubation, rearing, and smolt passage that would occur naturally in the streams without the water  
21 diversions authorized by the BiOp (rather than instead comparing how steelhead are faring *with the*  
22 *level of diversions done by Stanford prior to the Operation Plan* versus how they will do when the  
23 diversions are reduced to the levels called for in the Operation Plan). This proper comparison would, as  
24 the BiOp's recitation of the pertinent facts and pertinent studies indicate, show that the impacts of the  
25 water diversions are quite substantial in reducing the level of juvenile steelhead survival and steelhead  
26 spawning, incubation, rearing, and smolt passage downstream in Los Trancos and San Francisquito  
27 Creeks. Furthermore, the BiOp's consideration of how Stanford's water diversions may affect adult

1 steelhead migration within Los Trancos and San Francisquito Creeks improperly omitted analysis of  
2 the effect of Stanford's water diversions on reducing attraction flows, i.e., the flows in San Francisquito  
3 Creek sufficient to cue adult steelhead in San Francisco Bay to find and migrate into San Francisquito  
4 Creek. Such additional analysis would further reveal substantial adverse impacts on steelhead from the  
5 water diversions authorized by the Operation Plan.

6 56. Further, the SHEP BiOp presents an inconsistent analysis as to the population of CCC  
7 steelhead in the project area. On the one hand, NMFS identifies that no more than 2% of the CCC  
8 steelhead population in the project area will be taken as a result of the construction activities. However,  
9 NMFS later excuses its failure to provide a take number associated with the ongoing Operations Plan  
10 due to uncertainty as to the size of the CCC steelhead population in the San Francisquito Creek  
11 watershed. The BiOp thus offers no analysis as to what percentage of the CCC steelhead population  
12 will be taken or might be taken by the Operation Plan. The SHEP BiOp also lacks any analysis of the  
13 significance of the San Francisquito Creek watershed CCC steelhead population for its role in  
14 sustaining a San Francisco Bay population of CCC steelhead and in advancing the diversity of  
15 populations necessary for CCC steelhead's overall viability (likelihood of survival). In failing to  
16 analyze these considerations, the BiOp was contrary to the legal requirements of 50 C.F.R. § 402.14.  
17 Furthermore, without analyzing these considerations, NMFS lacked a rational basis to conclude that the  
18 SHEP would not jeopardize the survival or recovery of CCC steelhead.

### 19 **Project Area Improperly Defined**

20 57. Second, the SHEP BiOp is arbitrary and capricious because NMFS failed to properly define the  
21 project area based on consideration of all direct and indirect effects of the proposed agency action. This  
22 failure was contrary to law because consideration of all direct and indirect effects of the proposed  
23 agency action is required by ESA section 7 and 50 C.F.R. §§ 402.02, 402.14(g)(3), (h)(2). The BiOp  
24 incorrectly identified the project area as the contiguous reach of Los Trancos Creek below the  
25 Diversion and Fish Ladder and San Francisquito Creek from the confluence with Los Trancos Creek  
26 down to San Francisco Bay. The action area defined in the BiOp should have included the reach of San  
27 Francisquito Creek above the confluence with Los Trancos Creek, Corte Madera Creek (to Searsville

1 Dam) and Bear Creek. Searsville Dam, Searsville Reservoir and the Searsville Booster Pump are  
2 physically and operationally interconnected with Stanford's Felt Reservoir capacity restoration. As  
3 noted, Stanford uses the Searsville Booster Pump to convey water impounded behind Searsville Dam in  
4 Searsville Reservoir to Felt Reservoir; Stanford's installation of the Booster Pump and the Felt  
5 Reservoir capacity expansion projects were carried out as an interrelated whole. Accordingly, the action  
6 area should have been defined to include Searsville Dam, Searsville Reservoir, and the Searsville  
7 Booster Pump as areas operationally related to the Felt Reservoir component of the SHEP.  
8 Furthermore, while Stanford's increased water diversions from Los Trancos and San Francisquito  
9 Creeks specified by the Operations Plan alters downstream flows in these creeks, the SHEP BiOp  
10 shortsightedly neglects to analyze how Stanford's diversions of water from the Los Trancos Diversion  
11 and the San Francisquito Pump Station are affecting the ability of CCC steelhead to successfully  
12 migrate upstream of these diversions and utilize these areas for spawning, rearing, feeding, and refuge.  
13 Specifically, the SHEP BiOp does not analyze how the stress of reduced water flow in Los Trancos  
14 Creek and San Francisquito Creek caused by the SHEP are reducing the ability of CCC steelhead to  
15 withstand the additional stresses associated with degradation of their upstream habitat in San  
16 Francisquito and Corte Madera Creeks caused by Stanford's maintenance and operation of Searsville  
17 Dam and Reservoir, the Jasper Ridge Road Crossing, and diversions of water from Bear Creek among  
18 other facilities and activities. By limiting the geographic extent of the proposed action to areas  
19 downstream of the San Francisquito Creek Pump Station in the Los Trancos Diversion instead of the  
20 broader watershed affected by Stanford's actions interrelated to the SHEP and other actions affecting  
21 CCC steelhead in the watershed, the SHEP BiOp is arbitrary and capricious and contrary to law.

### 22 **Environmental Baseline Improperly Analyzed**

23 58. Third, the SHEP BiOp is arbitrary and capricious because NMFS failed to properly analyze the  
24 environmental baseline. This failure was contrary to law because proper analysis of the environmental  
25 baseline is required by ESA section 7 and 50 C.F.R. § 402.14(g), (h). Establishing the proper  
26 environmental baseline is necessary to identify the present status of the affected species and its critical  
27 habitat so as to then be able to analyze the effects on the species and its critical habitat that will be



1 perpetuated by the action in issue. ESA Handbook at 4-22. The baseline is supposed to include any  
2 State, tribal, local, and private actions already affecting the species or that will occur  
3 contemporaneously with the consultation in progress. *Id.* Although the existence of Searsville Dam and  
4 Reservoir is briefly mentioned in the environmental baseline section of the BiOp, NMFS failed to  
5 conduct any analysis that considered the impacts of the Searsville Facilities on CCC steelhead.  
6 Likewise, although the BiOp mentioned the existence of other water diversions on Bear Creek which  
7 have the potential to reduce flows in San Francisquito Creek, the BiOp didn't specifically analyze the  
8 impact those diversions have on CCC steelhead as part of the baseline analysis. In addition, the  
9 Lagunita Diversion Dam should have been considered in the environmental baseline analysis as it is an  
10 ongoing limiting factor that impairs CCC steelhead from migrating to upstream habitat or outmigrating  
11 to San Francisco Bay, particularly when flows in San Francisquito Creek are reduced by natural causes,  
12 Stanford's water diversions, or the combination of the two. Because Searsville Dam and Reservoir, the  
13 Bear Creek diversions, and the Lagunita Diversion Dam are "ongoing private activit[ies]" affecting the  
14 critical habitat in the project area, NMFS should have considered the impacts from these activities on  
15 CCC steelhead and critical habitat as part of the environmental baseline analysis.

#### 16 **Failure to Consider Cumulative Effects**

17 59. Fourth, the SHEP BiOp is arbitrary and capricious because in making its no jeopardy and no  
18 adverse modification determination, NMFS failed to consider the cumulative effects of the SHEP BiOp  
19 together with the effects of many other facilities and actions in the San Francisquito Creek watershed  
20 that are posing obvious risks to CCC steelhead. This failure is contrary to law because consideration of  
21 cumulative impacts is required by ESA section 7 and 50 C.F.R. § 402.14(g)(3), (h). Specifically, NMFS  
22 failed to consider the impacts caused by Searsville Dam and Reservoir on CCC steelhead or its critical  
23 habitat. As documented by NMFS in its 2012 Draft BiOp, the ongoing operation and maintenance of  
24 Searsville Dam and Reservoir significantly impacts Corte Madera Creek downstream of Searsville  
25 Dam. Further, Searsville Dam completely blocks the migration of steelhead into the upper Corte  
26 Madera Creek watershed, which NMFS estimates to contain between 8 and 10 miles of suitable critical  
27 habitat for CCC steelhead. 2012 Draft BiOp at 40-41. Similarly, although the SHEP BiOp mentioned

1 the existence of the Bear Creek watershed diversions and the potential impact on San Francisquito  
2 Creek during low flow periods, these diversions should have been considered as cumulative effects  
3 analysis. It was arbitrary and capricious for NMFS to determine that there were no cumulative effects to  
4 consider in its jeopardy determination given the existence of other flow diversions in the watershed.  
5 Furthermore, NMFS neglected to determine the impact of the Operations Plan in relation to the  
6 Lagunita Diversion Dam which is located downstream from the San Francisquito Pump Station. There  
7 was ample documentation at the time the BiOp was drafted that the Lagunita Diversion Dam blocks  
8 CCC steelhead from migrating upstream under certain flow conditions. Thus, the impacts of the  
9 Operations Plan should have specifically addressed the interactive effect of the increased diversions  
10 proposed in the Operations Plan with the Lagunita Diversion Dam in determining the effects of the  
11 action. Because the Operations Plan authorizes artificial diversions of water from Los Trancos and San  
12 Francisquito Creeks, implementation of the Operations Plan has the effect of making the poorly  
13 functioning fish ladder at the Lagunita Diversion Dam non-operational on more days each year than it  
14 would be without authorization of these diversions. However, the SHEP BiOp includes no analysis of  
15 how the Operations Plan together with the continued existence of this structure affects CCC steelhead,  
16 particularly with respect to the increased pumping from San Francisquito Pump Station that is  
17 permitted after the removal of Bonde Weir.

### 18 **Failure to Consider Recovery of the Species**

19 60. Fifth, the SHEP BiOp is arbitrary and capricious because NMFS failed to consider in the BiOp  
20 whether the Operations Plan would jeopardize not just the survival of CCC steelhead, but the recovery  
21 of the species as well. This is contrary to law because consideration of the recovery of CCC steelhead is  
22 required by ESA section 7(a)(2) and 50 C.F.R. § 402.02. For example, the SHEP BiOp recites study  
23 evidence that 1 cfs flow in Los Trancos Creek "is sufficient to sustain juvenile steelhead and provide  
24 for marginal downstream movements by smolts." SHEP BiOp at page 30-31. On this basis, the SHEP  
25 BiOp ITS authorizes Stanford to divert water at the Los Trancos Diversion to the point of reducing  
26 streamflow to a 2 cfs bypass flow for the month of December, rationalizing this is "twice the rate  
27 judged as sustaining" by the study relied upon. NMFS's choice of 2 cfs is arbitrary and not tied to any

1 analysis of the specific effects of a 2 cfs flow regime. Moreover, aiming for flows that are merely  
2 "sustaining" of CCC steelhead, plus some margin of safety for levels of flow that are "sustaining," the  
3 apparent rationale for choosing a 2 cfs flow regime, is contrary to NMFS's legal obligations to ensure  
4 that authorized take does not interfere with recovery of ESA-listed species.

#### 5 **Failure to Adequately Specify Take**

6 61. Sixth, the SHEP BiOp is arbitrary and capricious because the ITS failed to adequately specify  
7 the extent of taking of the species that is expected to occur and allowed to occur due to implementation  
8 of the Operations Plan under the different flow regimes specified by the Operations Plan. Instead of  
9 specifying a certain number of individual fish that Stanford make take as a result of ongoing operation  
10 of the Los Trancos Diversion and San Francisquito Pump Station, NMFS included an ecological  
11 surrogate condition in the form of a flow diversion schedule that prohibits Stanford's water diversions  
12 at certain times but allows a ramping up of diversion rates in concert with specific creek flow regimes.  
13 This ecological surrogate is both contrary to law and arbitrary and capricious because NMFS failed to  
14 identify the amount of take of CCC steelhead that will result if this ecological surrogate is complied  
15 with, or analyze how that level of take will impact the species (either locally or throughout its habitat).

#### 16 **Automatic Increases to Ecological Surrogate Improper**

17 62. Seventh, the SHEP BiOp is both arbitrary and capricious and contrary to law for allowing an  
18 automatic change to the ITS and increased water diversions by Stanford without any showing that  
19 Bonde Weir removal was conducted in accordance with preliminary designs and that the area formerly  
20 occupied by the weir is in fact now passable by CCC steelhead at levels theorized in the BiOp (5 cfs).  
21 The SHEP BiOp is further arbitrary and capricious and contrary to law for allowing these automatic  
22 changes to the ITS without analysis of how the increased water diversions authorized for Stanford upon  
23 removal of Bonde Weir will affect the San Francisquito Creek watershed CCC steelhead population in  
24 other ways besides the effect of these diversions on fish passage past the Bonde Weir area, including  
25 the following: fish passage past other constraining points below San Francisquito Pump Station and the  
26 Los Trancos Diversion, development and persistence of attraction flows that will bring CCC steelhead  
27

1 into San Francisquito Creek from San Francisco Bay, and transport of favorable substrate and creation  
2 of favorable channel geomorphology in San Francisquito Creek.

3 **Failure to Adequately Analyze Climate Change**

4 63. Eighth, the SHEP BiOp is arbitrary and capricious and contrary to law because it omits any  
5 meaningful analysis of how the likely effects of climate change or prolonged drought will combine  
6 with the impacts of Stanford's water diversions under the Operations Plan to adversely impact CCC  
7 steelhead in the San Francisquito Creek watershed. The SHEP BiOp's merely acknowledges in cursory  
8 fashion that climate change generally threatens CCC steelhead throughout its range. This does not meet  
9 NMFS's duties in terms of identifying and considering reasonably foreseeable cumulative impacts of  
10 climate change on the steelhead population within the action area. To meet these duties, the SHEP  
11 BiOp should have included analysis specific to the San Francisquito Creek watershed action area of  
12 how climate change and/or prolonged drought could combine with the effects of implementation of the  
13 Operations Plan would adversely impact CCC steelhead.

14 64. For all of the above reasons, in issuing the BiOp, NMFS has violated the ESA and has acted in  
15 a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation  
16 of the APA, 5 U.S.C. § 706(2).

17  
18 **SECOND CLAIM FOR RELIEF**  
19 **Violation of the FOIA**  
20 **5 U.S.C. §§ 552(a)**

21 **Request for Declaratory Relief and Injunction to Compel NMFS to Produce Requested  
22 Records**

23 65. Plaintiffs reassert and reallege paragraphs 1 through 64 above.

24 66. Defendant NMFS has failed to provide Plaintiffs with a final determination meeting the  
25 requirements of 5 U.S.C § 552(a)(6)(A)(i) for Plaintiffs' FOIA Request #2013-000912 and Request  
26 #2104-000272.

27 67. NMFS has violated and remains in on-going violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i), by  
failing to timely and lawfully respond to Plaintiffs' FOIA Request #2013-000912 and Request #2104-

1 000272. 5 U.S.C. § 552(a)(6)(A)(i) required NMFS to provide all requested documents, other than  
2 those within narrowly defined specific statutory exemptions, within twenty days. Many, if not all, of  
3 the documents requested by FOIA Request #2013-000912 and Request #2104-000272 are outside of  
4 these statutory exemptions and NMFS has no basis not to have provided them. NMFS could at most  
5 extend its twenty day deadline for providing the documents by ten additional days. 5 U.S.C. §  
6 552(a)(6)(A)(i, ii). More than thirty days have passed since Plaintiffs provided NMFS with its May 6,  
7 2013 and December 16, 2013 FOIA request. Plaintiffs have constructively exhausted their  
8 administrative remedies given NMFS's failure to provide a final response to Plaintiffs' Request #2013-  
9 000912 and Request #2104-000272 within FOIA's statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

10 **THIRD CLAIM FOR RELIEF**  
11 **Violation of the FOIA**  
12 **5 U.S.C. §§ 552(a)**

13 **Request for Declaratory Relief and Injunction to Compel**  
14 **NMFS to Produce Requested Records**

15 68. Plaintiffs reassert and reallege paragraphs 1 through 67 above.

16 69. Defendant NMFS has a pattern and practice of improperly delaying its response to FOIA  
17 requests as reflected in its substantial delay in responding to Plaintiffs' FOIA requests and requests  
18 submitted by other nonprofit environmental groups (including but not limited to the requests submitted  
19 by the South Yuba River Citizens League to NMFS addressed by *South Yuba River Citizens League, et*  
20 *al., v. National Marine Fisheries Service, et al.*, 2008 WL 2523819 (Dkt. No. S-06-2845 LKK/JFM,  
21 E.D. Cal. June 20, 2008). NMFS has a pattern and practice of performing a series of piecemeal searches  
22 for documents responsive to FOIA requests delayed over several months time, rather than conducting a  
23 single, complete, and timely search for documents as required to comply with FOIA's statutory  
24 deadline to provide complete responses to FOIA requests within twenty days. 5 U.S.C. §  
25 552(a)(6)(A)(i). In addition, NMFS has a pattern and practice of violating FOIA by failing to complete  
26 a search for all documents in its possession at the time it conducts its search for responsive documents.  
27 Instead, NMFS routinely conducts a series of piecemeal searches for FOIA documents and in its later

1 searches looks only for documents in its possession as of the date it received a FOIA request—not the  
2 date it is conducting each of its searches.

3 70. NMFS has violated and remains in on-going violation of FOIA by adhering to a pattern and  
4 practice of failing to conduct complete and timely searches for documents and lawfully respond to  
5 FOIA Requests within FOIA’s statutory deadlines. In addition, NMFS is failing to comply with  
6 Department of Commerce regulations set forth at 15 C.F.R. section 4.5(a) in searching for all  
7 documents responsive to a FOIA request that are in NMFS’s possession at the time it commences its  
8 search. Alternatively, in adhering to 15 C.F.R. section 4.5(a), NMFS is failing to comply with FOIA’s  
9 predominating statutory dictates by searching for all documents in its possession at the time it conducts  
10 its search.

11 71. NMFS's pattern and practice of responding to FOIA requests necessarily causes many types of  
12 relevant documents to be released to requesters only after considerable delay and in some cases  
13 completely precludes members of the public from obtaining documents and the information they  
14 contain when the information is still relevant.

15  
16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs seek the following relief:

18 a. A declaratory judgment pursuant to 5 U.S.C. sections 706(1) and (2) that NMFS violated the  
19 ESA by issuing an invalid biological opinion for the SHEP;

20 b. An injunction pursuant to 5 U.S.C. sections 706(1) and (2) ordering NMFS to withdraw the  
21 SHEP BiOp, reinstate consultation with the Corps concerning the SHEP, and reissue a new biological  
22 opinion addressing the SHEP and interrelated activities;

23 c. A declaratory judgment pursuant to 5 U.S.C. section 552 that NMFS violated FOIA by  
24 failing to produce the requested agency records responsive to Plaintiffs' May 6, 2013 and December  
25 16, 2013 FOIA requests in accordance with the statutory deadline, and that NMFS continues to violate  
26 FOIA by a pattern and practice of illegally withholding documents that are not subject to a lawful  
27 FOIA exemption set forth at 5 U.S.C. section 552(b);

1 d. An injunction pursuant to 5 U.S.C. section 552(a)(4)(B) ordering NMFS to immediately  
2 provide Plaintiffs with all documents responsive to their May 6, 2013 and December 16, 2103 FOIA  
3 requests. An injunction pursuant to 5 U.S.C. section 552(a)(4)(B) ordering NMFS to cease its unlawful  
4 pattern and practice of delaying response to FOIA requests and failing to conduct adequate searches  
5 for documents responsive to FOIA requests;

6 f. An award of attorneys fees and costs to the Plaintiffs pursuant to 5 U.S.C. § 504(a), and/or 5  
7 U.S.C. § 552(a)(4)(E); and

8 g. Such other and further relief as this Court deems just and proper.

9 **DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

10 Based on Plaintiffs' knowledge to date, pursuant to Civil Local Rule 3-16, the undersigned  
11 certifies that, as of this date, other than the named parties, there is no such interest to report.

12  
13 Respectfully Submitted,

14 Dated: March 11, 2014

15  
16 By: *Christopher a. sproul*

17 \_\_\_\_\_  
18 Christopher Sproul  
19 Jodene Isaacs  
20 Environmental Advocates  
21 Counsel for Plaintiffs  
22 Our Children's Earth Foundation and  
23 Ecological Rights Foundation  
24  
25  
26  
27