

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ENVIRONMENTAL PROTECTION)
INFORMATION CENTER, et al,)
)
Plaintiffs,)
)
v.)
ANDREA TUTTLE, et al,)
)
Defendants. _____)
)
)
_____)

Case No:00-0713-SC

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS MOTION FOR
PRELIMINARY INJUNCTION

Date: June 23, 2000

Time: 10:00 a.m.

Courtroom: 1

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I think all of us recognize here that CDF is currently operating on a somewhat tenuous legal basis for approving Timber harvest Plans that may result in the take of salmon . . . and all landowners and timber harvest plan operators are similarly resting on a tenuous legal basis for continuing their harvest.

--Andrea Tuttle, Director of the California Department of Forestry (CDF), from testimony before the California Board of Forestry, September 14, 1999 (attached as Exhibit C to Elkins Dec.).

I. INTRODUCTION

California coastal rivers once teemed with coho salmon (*Oncorynchus kisutch*). From the Smith River near the Oregon border to the San Lorenzo River on California's central coast, hundreds of streams supported runs totaling more than a half-million coho. Over the past 150 years, however, human activities have decimated coho populations and the recreational and commercial fisheries these salmon once supported. In an attempt to stave off extinction, the National Marine Fisheries Service (NMFS) in 1997 listed coastal coho as a threatened species under the Endangered Species Act (ESA or the Act), 16 U.S.C.//1531 et seq.

While several factors have contributed to the coho's imperiled condition, scientists widely recognize the loss or degradation of stream habitat due to logging and related activities as the single biggest cause of coho decline. *See* Declaration of Peter B. Moyle, Ph.D. f9. Much of the logging that affects coho takes place on private land, where such activities are regulated by defendant officials of the California Resources Agency, California Department of Forestry, and California Board of Forestry (the Board) under the California Forest Practice Rules (CFPRs or Rules).¹ *See* 14 CCR, Ch. 4-4.5. As plaintiffs (hereinafter collectively referred to as EPIC) demonstrate below, however, the Rules authorize logging operations that result in habitat degradation that kills and injures listed coho.

¹ ¹ In California, most logging occurs on privately owned land. Likewise, most salmon-bearing streams run through private lands. For example, of particular relevance to this lawsuit, approximately 46% of the land containing coho stream habitat for the northern Evolutionarily Significant Unit (ESU) is in private ownership, and more than 90% of central California coast ESU coho habitat is privately owned. 62 Fed. Reg. 24588 (1997); 61 Fed. Reg. 56138(1996). The juxtaposition of salmon habitat and privately held timber land has contributed significantly to the near extinction of coho salmon.

Independent scientists, federal agencies, and even California's own state agencies have been unanimous in concluding, based on detailed and careful analyses, that the Rules are inadequate to protect coho salmon. Section 9 of the ESA, 16 U.S.C. / 1538, prohibits any person from taking coho salmon - directly or indirectly killing or injuring these fish - in northern and central California. NMFS, along with federal courts of appeals in three circuits, have interpreted the ESA's taking restriction to impose legal liability on governmental bodies that indirectly cause takings of protected species by affirmatively permitting activities that kill or injure these species. Here, defendants have unlawfully taken listed coho and are continuing to unlawfully take coho by issuing authorizations under the CFPRs for logging and related activities that cause habitat degradation and consequent death or injury to coho salmon.

As noted below, the ESA provides for at least two mechanisms to enable a party to incidentally take listed species so long as the level of such take is reduced to the extent which allows for the survival and recovery of the species. Many private landowners, local governments, and even states have taken advantage of these statutory mechanisms for balancing the needs of wildlife with economic activities. In contrast, the Board has not sought permission to lawfully authorize activities which take coho, despite numerous invitations to do so by NMFS. Accordingly, plaintiffs respectfully request that this Court grant EPIC's motion for preliminary injunctive relief in accord with the terms outlined in its motion.

II. JURISDICTION AND STANDING

This Court has jurisdiction over the state officials named as defendants in this case. *See Ex Parte Young*, 209 U.S. 123 (1908); *NRDC v. California Department of Transportation*, 96 F.3d 420 (9th Cir. 1996); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. den.*, 119 S. Ct. 81 (1998). Additionally, the affidavits filed herewith demonstrate that plaintiffs in this case satisfy the constitutional requirements for standing. *See* Declarations of Cynthia Elkins, Craig Bell, and Glen Spain.

III. BACKGROUND

A. FACTUAL BACKGROUND

II. Life Cycle Requirements of Coho

Dr. Terry Roelofs details the coastal coho life cycle requirements in the attached declaration. Declaration of Terry Roelofs, Ph.D., at *f*8. To summarize briefly, coho salmon's 3-year life cycle ends when adults die after spawning in riffles or gravel deposits at the downstream end of pools in freshwater rivers and streams. The coho eggs then incubate in gravel nests, emerge as fry, and rear in protected pools or low-velocity riffles. After approximately 15 months, juvenile salmon migrate to the ocean, where they spend two years before returning to their natal coastal watersheds to spawn.

To survive and reproduce, coho require freshwater aquatic ecosystem conditions that fulfill all of their life cycle requirements - from egg, to smolt, to adult stages. Specifically, the attributes of watersheds capable of supporting sustainable coho runs include cool water temperatures, low sedimentation, stream sinuosity and complexity, presence of large woody debris, deep pools that provide good cover and cool water, areas with low-gradient current, silt and sediment-free gravel for laying eggs, a stream free of migration barriers, consistent streamflows without large fluctuations that can de-water redds or substantially erode streambeds and banks, a complex stream food web, and other features that are typically found in streams of high ecological integrity.

2. Coho Salmon Decline in California

Although coho salmon once thrived throughout the rivers and streams of California, coho populations have plummeted as a result of habitat degradation and destruction. Declaration of Peter Moyle, Ph.D., *ff*9-10. From 500,000 salmon in the 1940s, coho populations currently number between 10,000 and 15,000 individuals returning to spawn. Even this estimate of naturally spawning fish is likely overstated because it assumed that all streams for which insufficient data existed still contained coho. *See* Moyle Dec., Ex. C. Many native local stocks are now extinct, and for those populations that still exist, most cannot preserve genetic integrity or maintain self-sustaining native populations without hatchery supplementation. Ex. C at 243-50. Scientists widely recognize the loss of stream habitat as the single biggest cause of the decline of coho salmon. *Id.* at 251.

B. LEGAL BACKGROUND

1. The Endangered Species Act

Congress passed the ESA in 1973, a statute the Supreme Court characterized as the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. *TVA v. Hill*, 437 U.S. 153, 180 (1978). The statute has as its purpose the conservation of not only endangered and threatened species, but also the ecosystems upon which these species depend. *See* 16 U.S.C./1531(b). Of the ESA's legal protections, one of the most significant is its provision prohibiting all persons, including officials of the State of California, from engaging in activities that take listed species. *See* 16 U.S.C./1538(a) (applying take to any person; 16 U.S.C./1532(13) (broad definition of person)).

Congress intended the term take to be broadly construed in favor of protecting listed species. *See TVA v. Hill, supra*, at 184; see also *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988), *citing* S. Rep. No. 93-307, at 7 (1973) (Take is defined... in the broadest possible manner to include every conceivable way in which a person can take or attempt to take any fish or wildlife.) . The statute defines take to include actions that harm listed species. 16 U.S.C./1532(19) . The U.S. Fish and Wildlife Service's (FWS) regulatory definition of harm, in turn, includes death or injury to protected species caused by habitat destruction (*see* 50 C.F.R./17.3) , an interpretation upheld by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995).

NMFS recently promulgated similar administrative regulations which clarify the definition of harm as it applies to anadromous fish, including coho salmon. These regulations define harm as an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering. 50 C.F.R./222.102. NMFS noted that a principal purpose of the new harm rule is to provide clear notification to parties that habitat modification or degradation may harm listed species and, therefore, constitute take under the ESA. 64 Fed. Reg. 60727 at 60730 (1999) . In

implementing this definition of harm, NMFS classifies as a possible taking even the mere viewing of listed salmonids by scientists studying them in their natural habitat. *See* Moyle Dec. *f*32.

a. What constitutes a prohibited take under the ESA?

In *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508 (9th Cir. 1994), the Ninth Circuit addressed the evidentiary showing needed to preliminarily enjoin a party allegedly taking a protected species. The court held that to receive a preliminary injunction NWF must prove that there is a reasonable likelihood of future violations of the ESA... While we do not require that future harm be shown with certainty before an injunction may issue, we do require that a future injury be sufficiently likely. *Id.* at 1511-1512. The court noted that plaintiffs need not demonstrate that the harmful action pose a threat of extinction to the species, but specified that what we require is a definitive threat of future harm to protected species, not mere speculation. *Id.* at 1512 n.8.

In its recent rule defining the term harm under section 9, NMFS also discussed factors involved in demonstrating a taking of protected species, particularly takings of listed fish caused by habitat destruction or degradation. Overall, NMFS noted that a causal link must be established between the habitat modification and the death or injury of listed species. 64 Fed. Reg. 60727, 60730.² NMFS noted that injury to protected species could be shown through field surveys and assessments, population studies, laboratory studies, model-based procedures, information and data in the scientific literature, or expert witness testimony consisting of inferences or opinions pertaining to a given act(s) of habitat modification or degradation. *Id.* at 60728. Further, because it is often difficult to isolate the sources of injury to a listed species, NMFS noted that [a]n action which contributes to injury [to a listed species] can be a take even if it is not the only cause of the injury. *Id.*

More specifically, NMFS noted in its rule-making defining harm that when a migratory species is at issue, significant modification of a listed species habitat may occur even though the species is not present at the time of the impact on habitat. *Id.* at 60727. So long as the

² For the Court's convenience, relevant Federal Register documents are provided attached as Exhibits C-H of the Declaration of Cummings.

habitat modification impairs essential behavioral patterns when members of the species attempt to return to the location, it is significant. *Id.* Referring specifically to anadromous species, NMFS specified that [h]uman-made barriers to adult migration (thermal barriers, other water quality barriers, and physical barriers) that significantly impede spawning success, or result in significantly increased rates of juvenile injury or mortality would be considered by NMFS to be within the NMFS definition of harm under the ESA. *Id.* at 60728.

Finally, the new harm rule provides several examples of types of habitat modifying activities that may cause a significant impairment of the essential behavioral functions of listed anadromous fish. These include actions that remove or alter soil and vegetative structures that are essential to the proper functioning of a listed species habitat, engaging in logging activities that result in substantially increased levels of sediment input into streams, and conducting logging in riparian areas or other areas susceptible to mass wasting and surface erosion. *Id.* at 60730.

b. Limitations on liability for take : Section 10 of the ESA. The ESA s take prohibition is not without exception. Specifically, NMFS or FWS may permit incidental take of listed species under Section 10 of the Act. *See* 16 U.S.C. / 1539(a). Under this section, the Act allows an applicant to request permission to take listed species in the course of an otherwise lawful activity, so long as take is minimized and mitigated in accord with a conservation plan (usually referred to as a habitat conservation plan or HCP) written by the applicant and approved by NMFS or FWS. In recent years, the federal government has particularly encouraged region-wide HCPs and incidental take permits. These broad-scale plans often involve either multiple landowners and/or participation by state or local government entities, and establish a management regime for balancing the needs of listed species with economic or development activities. For example, the city of Bakersfield, CA currently regulates development through a multi-species HCP. *See* 59 Fed. Reg. 29435 (1994). Additionally, the State of Washington s Department of Natural Resources (DNR) recognized that its management activities on state-owned land, particularly timber harvest, could kill or injure listed species. Therefore, DNR developed a management plan for millions of acres of state forests, which it submitted to NMFS for approval. Concluding that DNR s plan minimizes and

mitigates the taking of protected species, NMFS issued a permit which allows incidental take of listed salmon and steelhead resulting from forest management activities carried out according to the plan. *See* 63 Fed.Reg. 42615 (1998). Neither the State of California nor the Board of Forestry have not sought permission from NMFS to incidentally take listed coho.

c. Limitations on liability for take : Section 4(d) of the ESA.

The ESA s take prohibition does not automatically apply to species listed by NMFS as threatened. Once NMFS lists a species as threatened, it must issue protective regulations necessary for conservation of that species; the protective measures in these so-called 4(d) rules may include may include a prohibition of take. *See* 16 U.S.C. / 1533(d). For coho salmon in California, NMFS incorporated Section 9’s take prohibitions into the 4(d) rule for both ESUs. *See* 61 Fed. Reg. 56138, 56147; 62 Fed. Reg. 38479 (1997).

In some cases, NMFS has proposed what it terms exceptions to prohibitions against taking of threatened species. *See* NMFS, The ESA and Local Governments: Information on 4(d) Rules, May 7, 1999, <<http://www.nwr.noaa.gov/1salmon/salmesa/4dguid2.htm>>, Cummings Dec., Exhibit I. Through such an exception, NMFS does not prohibit the takings of threatened species that are caused by actions controlled by an overall regulatory structure or local plan, the standards of which NMFS considers to be, on the whole, consistent with the conservation requirements of the species. For example, NMFS recently proposed to not prohibit the take of threatened salmon and steelhead resulting from implementation of forest management activities within the state of Washington and state road maintenance activities in Oregon; NMFS proposed this take exception because it made an initial determination that the State of Washington and the Oregon Department of Transportation have adopted rules governing logging and road maintenance, respectively, which, while not eliminating all harm to listed fish, will on balance provide a regulatory structure NMFS believes is consistent with efforts to recover the species. *See* 65 Fed. Reg. 170 (2000). In essence, NMFS employs its section 4(d) authority to customize protections for threatened species in deference to state or local regulations that it finds sufficient to conserve the species.

In the proposed 4(d) rule mentioned above, NMFS set forth criteria which in the agency's view are components of a state regulatory scheme for forestry that provides anadromous fish with adequate freshwater habitat protections. *See Id.* at 185-188. According to NMFS, such a timber harvest management regime would include, among others, the following attributes: a) It provides for proper design and maintenance and upgrade of existing, and new forest roads, which is necessary to maintain and improve water quality and instream habitats. ; b) It protects unstable slopes from increased rates and volume of failure delivering coarse and fine sediments to aquatic systems, which can significantly impair fish species life stages. ; c) Requiring riparian conservation zone widths that provide bank stability, litterfall and nutrients, shade, large woody debris, sediment filtering, and microclimate functions in the near and long-term. ; and d) Evaluating the effects of multiple forest practices on the watershed scale through a standardized, repeatable methodology based on the best available science, considering the cumulative effects of forest practices over time, and providing a regulatory basis for precluding or delaying forest practices to prevent actual or potential damage to aquatic habitats that directly or indirectly support anadromous salmonids. *Id.* at 186-187.

Defendants have never asked NMFS to use the process detailed above to exempt forest practices in California, as regulated by the CFPRs, from the ESA's take prohibition.³ Accordingly, NMFS has neither provided nor proposed to provide an exception to take prohibitions for coho in California that applies to timber management activities authorized by defendants pursuant to the CFPRs.

2. Listings of Coho Populations under the Endangered Species Act.

In response to precipitously declining numbers of coho salmon in central and northern California, NMFS decided to invoke the protective measures of the ESA. NMFS listed the central California coast population and the southern Oregon / northern California coast populations of coho salmon as threatened species under the ESA in 1996 and 1997, respectively. *See* 61 Fed. Reg. 56138; 62 Fed. Reg. 24588. NMFS specified that logging, removal of large woody debris, and destruction of

³ However, as noted in section III.B.3, *infra*, California did sign an agreement with NMFS committing the State to improve the Rules in order to better protect anadromous fish. Defendants have largely failed to follow through with such action.

riparian shade canopy constitute activities that adversely affect and potentially take coho salmon. 61 Fed. Reg. at 56147; 62 Fed. Reg. at 24592. NMFS also determined that existing regulatory mechanisms governing timber harvest on non-federal land—namely the CFPRs—were inadequate to protecting the species, and consequently activities such as logging and related activities on state and private land continued to represent a threat to the existence of coho salmon. *See* 64 Fed. Reg. 24049, 24057; 62 Fed. Reg. at 24596.

In its listing determinations, NMFS provided detailed analyses of what it viewed as California's inadequate regulation of logging practices. NMFS criticized the CFPRs for allowing activities within watercourse and lake protection zones (WLPZs) that harm coho habitat, 61 Fed. Reg. at 56141; noted that the CFPRs do not adequately address recruitment of large woody debris, streamside tree retention to ensure bank stability, or canopy retention to maintain proper water temperature, 62 Fed. Reg. at 24596; called monitoring of logging operations under the CFPRs insufficient to determine whether logging damaged coho habitat, 61 Fed. Reg. at 56143; 62 Fed. Reg. at 24596; decried the CFPR exceptions that allow salvage logging without environmental review and monitoring, 61 Fed. Reg. at 56141; and generally criticized the process prescribed by the CFPRs for approving Timber Harvest Plans (THPs). NMFS concluded its evaluation of the substance of the CFPRs by noting that [a]lthough several commenters describe the [CFPRs] as being capable of protecting coho salmon and their ecosystems, little evidence has been provided to support these claims. *Id.* at 56140.

NMFS has repeatedly noted that human-caused factors underlie the threatened extinction of the coho salmon. 64 Fed. Reg. at 24056. Despite NMFS determination that existing state protective measures fail to fulfill coho salmon needs, the California Board of Forestry, the entity responsible for the CFPRs, has been notably reluctant to provide increased protection for coho. For example, when the California Department of Fish and Game proposed listing coho as a state sensitive species, a designation which would have afforded the fish special protection from timber management practices, the Board of Forestry refused to adopt this proposal. 61 Fed. Reg. 56143. Since that time, NMFS has continued to criticize the Board for failing to adequately protect coho salmon and their

habitat from adverse impacts due to logging. Moyle Dec. *ff*26-31; Roelofs Dec. *ff*26,32; Elkins Dec. *ff*7-8.

In 1997, NMFS adopted an interim 4(d) rule - still in effect - that prohibits most take of coho in both listed ESUs in California. *See* 61 Fed. Reg. 56138, 62 Fed. Reg. 38479 (1997). While it exempted takings incidental to certain fisheries and watershed restoration activities, NMFS prohibited other forms of take of coho, including those caused by habitat disturbances as a result of logging. *Id.* at 38483-84. Significantly, in estimating how this take prohibition would affect timberland owners, NMFS assumed that avoiding take would preclude entirely timber harvest within 150 feet of coho-bearing streams. *Id.*

3. Overview of California's Regulation of Private Land Logging Practices.

The State of California regulates logging on private lands within its boundaries under the Z berg- Nejedly Forest Practice Act of 1973 (FPA), 4 P.R.C. ch. 8, // 4511-4628. The California Forest Practice Rules, 14 CCR ch.4-4.5 (1999), implement the FPA. 14 CCR ch. 4, / 896(a). The California Board of Forestry (the Board), a body within the California Department of Forestry and Fire Protection (CDF), promulgates the CFPRs, which CDF administers. Because the overwhelming majority of forest land in central and northern California is privately owned, the CFPRs play the primary role in determining the extent and nature of logging in the region. On average, the CDF approves logging on 285,000 acres of land each year in California, approximately thirty percent of which takes place within the coastal watersheds of northern California. Elkins Dec. *f*9.

Actual logging on California's state and private lands is subject to a permitting process. Private parties may not harvest timber without first obtaining a permit issued by CDF, often taking the form of a Timber Harvest Plan (THP) or Nonindustrial Timber Management Plan (NTMP). Registered Professional Foresters (RPFs) must prepare the THPs and NTMPs, which are then approved or disapproved by the Director of CDF. *See* 14 CCR ch. 4// 896 and 897. The Rules promulgated by the Board also allow salvage logging of up to 10 percent of a forest's volume and other types of logging to occur under exemptions and emergency notices without the preparation of a THP or NTMP. 14 CCR ch. 4// 1038 and 1052.

The CFPRs determine the structure and content of THPs, including decisions on logging systems, operating methods, and procedures (including environmental impact mitigation measures) which the operator will employ in a given harvest. *See* 14 CCR ch. 4, / 897(a). Any site-specific measures a forester may select must conform to the standards contained in the regulations. Thus, it is the substance of the CFPRs that both limits and defines the content of a THP, as well as the impacts of logging conducted under any given THP.

The Director of the CDF retains the ultimate review authority to ensure compliance with the Rules. The standards provided within the CFPRs, however, are the exclusive criteria for reviewing THPs. *See* 14 CCR ch. 4, / 897(c); Pub. Res. Code /4582.75 (the rules adopted by the board shall be the only criteria employed by the director when reviewing timber harvesting plans. . .). Thus, as with the discretion of foresters in preparing THPs, it is the substance of the CFPRs that defines the scope of the Director s review authority.

Once permitted, logging proceeds according to the regulatory sideboards of the CFPR standards, which define operations for the THP. In this manner, the Board officials prescribe, through the regulations, the standards applicable to logging operations on private lands as authorized by the CDF s approval of THPs.

In March 1998, CDF and NMFS entered into a Memorandum of Agreement (MOA) in which the State pledged to 1) conduct a scientific review of the CFPRs, including their implementation and enforcement; 2) make changes in implementation and enforcement of the Rules in accord with the scientific review; 3) make recommendations to the Board for changes to the CFPRs necessary to conserve salmonids. *See* 65 Fed. Reg. 6960 at 6972 (2000). The MOA called for the Board to complete action on the recommended changes by January 2000. *See Id.*

The State has not followed through on key commitments made in the MOA. It did commission a scientific review of the CFPRs, discussed in Section IV.C.2 *infra*, which was highly critical of the CFPRs and made many recommendations for strengthening the Rules to increase protections for fish habitat. However, the Board has thus far failed to amend the Rules to deal with the majority of the CFPRs shortcomings identified by this scientific review. NMFS cited the Board s inaction as a major

factor in its recent decision to propose adding steelhead in northern California to the ESA s threatened species list. *See Id.* at 6961.

While many of the Rules provisions criticized by the science panel remain unchanged, the Board recently adopted modest amendments to portions of the CFPRs in order to provide additional protections for anadromous fish and their habitat. These changes will take effect beginning in July 2000, but the amendments also contain a sunset clause which will cause them to expire on January 1, 2001. After evaluating the modifications to the CFPRs, however, NMFS concluded in a March 30, 2000 letter to the Board that these changes do not go far enough in providing for properly functioning riparian and aquatic habitat. Cummings Dec., Ex. K. The letter also provided as follows: As we have testified in the past, the current California Forest Practice Rules do not adequately protect anadromous salmonids and we have requested that you adopt measures to provide the protections required under the Endangered Species Act.... *Id.*

ARGUMENT

IV. DEFENDANTS ISSUANCE OF PERMITS AND REGULATION OF LOGGING UNDER THE CURRENT CFPRs VIOLATES SECTION 9 OF THE ESA.

In summary, EPIC demonstrates below that actions by the named defendants have resulted, and are likely to continue to result, in the death or injury of listed coho salmon in northern and central California. Both courts and NMFS recognize that the ESA s take prohibition applies to the regulatory actions of state and local governments and regulatory entities. Here, well documented evidence by a variety of federal and California agencies, as well as a broad array of scientific studies and testimony, demonstrate that the Board and CDF permit logging and related activities which result in unlawful takings of coho salmon. Specifically, the CFPRs - as currently written and as amended - affirmatively authorize logging and road-building practices on unstable soils that increase erosion and degrade coho-bearing streams by adding harmful levels of sediment. Logging operations permitted under the current and revised CFPRs also removes important riparian vegetation, thereby causing several adverse impacts on coho-bearing streams, including temperature increases, loss of buffering effects, and impaired migration and juvenile rearing. Finally, the CFPRs also lack a workable system

for considering and preventing adverse cumulative impacts to coho habitat, a shortcoming which the revisions to the Rules did not address. Together, the adverse effects on coho habitat caused by activities affirmatively permitted under the CFPRs cause or contribute to the actual death or injury of listed coho in northern and central California.

A. LEGAL STANDARD FOR PRELIMINARY INJUNCTIONS UNDER THE ESA.

In cases involving the ESA, courts faced with a motion for preliminary injunction do not have the same equitable discretion to balance parties competing interests as they do in other legal situations. *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994). Instead, the court must apply a standard which recognizes that the balance of hardships and the public interest tips heavily in favor of protected species. *Id.*, citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Therefore, to obtain injunctive relief, a plaintiff must show only that a violation of the ESA is at least likely in the future. *Id.* See also *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp 1343 (N.D. Cal. 1995), aff d, 83 F. 3d 1060 (9th Cir. 1996), *cert denied* 519 U.S. 1108 (1997) (granting injunction for illegal taking of marbled murrelets as a result of habitat disturbance caused by timber harvest). As demonstrated below, the CFPRs allow activities that currently violate and are likely to violate ESA Section 9's take prohibition in the future. Therefore, the court should grant plaintiffs request for a preliminary injunction.

B. STATE AND LOCAL AGENCIES HAVE AN OBLIGATION TO ENSURE THAT ACTIVITIES THEY PERMIT DO NOT RESULT IN TAKE .

Three circuit courts of appeals have held that a state or agency may be held liable under Section 9 of the ESA for permitting conduct that causes a taking of a listed species, even though it is the on-the-ground action - logging and related activities in this case - that directly harms the species. See *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231, 1251 (11th Cir. 1998), *cert. den.* 119 S.Ct. 1488 (1999), citing *Defenders of Wildlife v. Administrator, EPA*, 882 F2d 1294 (8th Cir 1989)(recognizing ESA liability where a regulatory entity purports to make lawful an activity that allegedly violates the ESA.); see also *Strahan v. Coxe*, 127 F.3d. 155, 163 (1st Cir. 1997), *cert. den.*, 119 S. Ct. 81 (1998) (We believe that . . . a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions

of the ESA.). Agency officials are liable under section 9 by authorizing activities to proceed in a manner that takes a listed species in violation of the ESA. In other words, but for defendant official s affirmative approval of a class of activities which result in take of a protected species, the take would not occur. *See Strahan*, 127 F.3d at 163.

All of the above-cited cases, like the case now before this court, involved a governmental entity with regulatory control over activities that allegedly led to a take of listed species. In these cases, through the exercise of their authority, the officers of the state or agency issued a permit or regulation that allowed an activity causally linked to takings of a listed species. *See Loggerhead Turtle, supra*, 148 F.3d 1231 (plaintiffs had standing to sue county for violation of section 9 to press claim that county s inadequate regulation of beachfront lighting resulted in a taking of listed sea turtles); *Strahan, supra*, 127 F.3d. 155 (state agency violated section 9 because it licensed private commercial fishing operations likely to harm endangered right whales); *Defenders of Wildlife, supra*, 882 F.2d 1294 (EPA violated section 9 because it registered and effectively authorized the use of a chemical that, when used by farmers, killed listed species). It is particularly important to note that in each of these cases there was no factual evidence or indication that all, or even a large fraction of the actions permitted by the defendant regulatory entities, resulted in a taking of protected species. Rather, these decisions simply concluded that takings had occurred in the past and were likely to occur in the future as a result of the type of activity regulated by the defendants, and that the challenged regulatory schemes were not adequate to prevent such takings.

NMFS, the agency charged by Congress with interpreting and implementing the ESA with respect to anadromous fish, likewise recognizes that regulations issued by state or local governments can constitute a take of protected species if the regulated conduct results in death or injury to listed species. In a guidance document outlining numerous examples of land and water planning and permitting activities typically regulated by state and local governments which are likely to result in take, NMFS emphasized that [a]ny government body authorizing an activity that specifically causes take may be found to be in violation of the section 9 take prohibitions. NMFS Northwest Region, The ESA and Local Governments: Information on 4(d) Rules, May 7, 1999

<http://www.nwr.noaa.gov/1salmon/salmesa/4dguid2.htm>>. Cummings Dec., Ex. I. NMFS first example of the kind of activity that may result in take liability is [d]estroying or altering the habitat of listed salmonids.... *Id.* at 3. Further, in the proposed section 4(d) rules for steelhead mentioned in section III.B.1.c above, NMFS cited the *Strahan* case and noted that ESA listings of anadromous fish have created a great deal of interest among states, counties, and others in adjusting their programs that may affect the listed species to ensure they are consistent with salmonid conservation. 65 Fed. Reg. at 171 (2000). As also noted above, NMFS went on to propose to exempt certain state and local programs from take prohibitions for steelhead which in NMFS view were consistent with the conservation of these fish. *See Id.* at 175-196.

This case presents precisely the sort of situation recognized by both courts and NMFS as appropriate for imposition of take liability on a governmental entity. Accordingly, when defendants use their authority to permit logging and related activities of the sort, where some such actions are likely to result in habitat modification that kills or injures coho salmon, defendants are liable for take of a listed species. Like the state's regulation of fishing operations in *Strahan*, the county's regulation of beachfront lighting in *Loggerhead Turtle*, and EPA's regulation of strychnine poisons in *Defenders of Wildlife*, the defendant California officials determine, through the standards they establish in the CFPRs, both whether and how logging on California's private land will take place. In addition to determining whether logging and related activities may take place at all, the CFPR standards determine the scope of the authorization a THP applicant receives, including the methods and procedures of logging that the applicant may conduct. And as EPIC demonstrates below, logging in a manner consistent with the standards established by the current and amended CFPRs has resulted, and will likely continue to result, in a violation of the ESA by causing habitat degradation and resultant take of listed coho. *See Strahan*, 127 F.3d at 164; *Loggerhead Turtle*, 148 F.3d at 1253 (explaining that unlike other licensing schemes, such as driver's licenses, the violation of the ESA is essentially built into the license/permit and is not caused by the licensed actor's conscious decision to operate beyond the legal limits of their license).

C. DEFENDANTS REGULATION OF FOREST PRACTICES WITHIN CALIFORNIA CAUSES THE UNLAWFUL TAKE OF COHO SALMON

There are few regulatory regimes whose adverse impacts on anadromous fish have been more comprehensively documented than California's CFPRs. On both general and site-specific levels, federal and state agencies, their employees, and independent scientists alike have repeatedly highlighted the shortcomings of the state's forest practices regulations. Additionally, a comparison between regulations applicable to logging activities on federal land and California's significantly weaker forest practices standards clearly reveals that the latter permit activities that result in take of listed coho. Finally, the declarations of four widely respected fisheries biologists and geomorphologists, which accompany EPIC's motion, provide additional evidence that both the existing and amended CFPRs are insufficient to prevent the death or injury of coho salmon as a result of habitat degradation caused by logging and related activities.

1. No Doubt Exists that Timber Harvest and Related Activities Are A Major Cause of Coho Mortality.

In its rule listing as threatened the northern California/southern Oregon ESU of coho, NMFS described the adverse effects of forest practices on coho habitat:

Forestry has degraded coho salmon habitat through removal and disturbance of natural vegetation, disturbance and compaction of soils, construction of roads, and installation of culverts. Timber harvest activities can result in sediment delivered to streams through mass wasting and surface erosion that can elevate the level of fine sediments in spawning gravels and fill the substrate interstices inhabited by invertebrates. Where logging in the riparian areas occurs, inputs of leaf litter, terrestrial insects, and large woody debris to the stream are reduced. Loss of large woody debris, combined with alteration of hydrology and sediment transport, reduces complexity of stream micro- and macrohabitats and causes loss of pools and channel sinuosity. The structure of the biological community may also change. This includes fish assemblages and diversity as well as timing of life history events.

62 Fed Reg. at 24593 (internal citations omitted). Numerous additional scientific studies and agency publications have documented similar impacts to anadromous fish habitat in California as a result of timber management activities. *See* NMFS, Factors for Decline: A Supplement to the Notice of Determination for West Coast Steelhead Under the Endangered Species Act (August 1996) at 13-25 (available on NMFS website at www.nwr.noaa.gov/1salmon/salmesa/pubs/stlhffd.pdf) (citing many scientific and agency publications detailing the adverse effects on salmonids as a result of habitat degradation caused by timber harvest activities). Cummings Dec., Ex. M. While actions other than

those related to logging can also cause negative impacts to coho habitat, forest practices are the major source of the type of habitat degradation discussed above. Moyle Dec., *ff*14,22; Roelofs Dec.*ff*18,25-30. Dr. Peter Moyle and Dr. Terry Roelofs, both among the leading scientific authorities on California coho, describe in their attached declarations how mortality to these fish occur as a result of habitat alterations caused by logging authorized by defendants. Moyle Dec., *ff*15-18,22-31; Roelofs Dec.*ff*25-30.

According to NMFS, in order for habitat destruction to be considered significant for the purposes of fitting within the conduct proscribed by the regulatory definition of harm, habitat modification must be capable of resulting in death or injury to fish or wildlife. 64 Fed. Reg. at 60728. NMFS itself termed habitat modification caused by logging and associated activities significant in both of its rules listing coho in California as a threatened species. See 62 Fed. Reg. at 24592; 61 Fed. Reg. at 56141. Moreover, the information cited above also indicates quite conclusively that logging can lead to significant modification of coho habitat.

2. The CFPRs Are Not Sufficient to Prevent Significant Modification of Coho Habitat.

Given the overwhelming evidence that forest practices in California are capable of significantly altering coho habitat within the meaning of 50 C.F.R. /222.102, the question this Court must address is whether the current and amended CFPRs are adequate to prevent unlawful harm or injury to coho salmon when logging operations are authorized by defendants under the CFPRs. A wealth of available scientific evidence indicates that the answer to this question is a resounding no.

The discussion below provides extensive scientific information that leads to the inescapable conclusion that defendants approve activities which adversely affect coho freshwater habitat and thus result in death or injury to listed coho. A broad array of expert scientists and agencies have concluded on an overall basis that the CFPRs are inadequate to prevent harm to coho. Additionally, independent analysis by the California Department of Fish and Game, as well as one of plaintiffs' experts provides a site-specific example of coho takings caused by habitat impacts resulting from forest management permitted by the CFPRs. Roelofs Dec., *ff*28-30. Finally, a comparison between federal and state forest practices regulations lends further support to plaintiffs' assertion that the CFPRs violate section

9 of the ESA. Moreover, available information shows that the modest - and temporary - amendments to the Rules adopted in March 2000 do not go far enough to ensure that timber harvest activities will no longer result in death or injury to coho. In total, the weight of scientific evidence demonstrates that EPIC is likely to prevail on the merits of its claims.

NMFS has repeatedly outlined inadequacies in the CFPRs. In its rule listing coho in the southern Oregon/northern California ESU, NMFS discussed how current regulatory measures are inadequate to protect coho, concluding:

Specifically, the CFPRs do not adequately address large woody debris recruitment, streamside tree retention to maintain bank stability, and canopy retention standards that assure stream temperatures are properly functioning for all life stages of coho salmon. The current process for approving Timber Harvest plans (THPs) under the CFPRs does not include monitoring of timber harvest operations to determine whether a particular operation damaged habitat and, if so, how it might be mitigated in future THPs.

62 Fed. Reg at 24596. In its listing of the central coast ESU, NMFS found that [w]hile the CFPRs contain measures protective of watercourse and lake protection zones, they allow activities in those zones that are harmful to coho habitat. The CFPRs also contain exceptions that allow salvage without environmental review or monitoring. 61 Fed. Reg. at 56141. More recently, in its February, 2000 proposal to list steelhead in northern California (which occur in essentially the same habitat as coho), NMFS discussed the results of an assessment of the CFPRs that NMFS completed in 1998. That review reached the following conclusions:

[A]lthough the FPRs mandate protection of sensitive resources such as anadromous salmonids, the FPRs and their implementation and enforcement do not accomplish this objective. Specific problems with the FPRs include: (1) protective provisions that are not supported by scientific literature; (2) provisions that are scientifically inadequate to protect salmonids including steelhead; (3) inadequate and ineffective cumulative effects analyses; (4) dependence upon registered professional foresters that may not possess the necessary level of multi-disciplinary technical expertise to develop timber harvest plans (THPs) protective of salmonids; (5) dependence by CDF on other State agencies to review and comment on THPs; (6) failure of CDF to incorporate recommendations from other agencies; and (7) inadequate enforcement due to staffing limitations. NMFS further concluded that until a

comprehensive scientific peer review process was implemented and appropriate changes to the FPRs and the THP approval process were made, properly functioning habitat conditions would not be ensured on non-Federal lands in the Northern California steelhead ESU.

65 Fed Reg. at 6966.

In 1999, NMFS expressly noted that activities authorized under the CFPRs result in take of coho. In authorizing an incidental take permit for timber management activities on land owned by Pacific Lumber⁴, NMFS concluded that "[i]mplementation of THPs under the CFPRs has not consistently provided protection against unauthorized take in relation to Pacific salmonids listed under the Act by the NMFS, such as coho salmon." National Marine Fisheries Service, Biological Opinion on Pacific Lumber Company Habitat Conservation Plan/Sustained Yield Plan for the Headwaters Forest Project, p.393 (February 24, 1999). Moyle Dec., Ex G.

NMFS has also noted that the temporary changes to the CFPRs do not remedy shortcomings in the Rules identified by the agency. As mentioned in section III.B.3, *supra*, NMFS notified the Board in a letter dated March 30, 2000 that the CFPR amendments did not go far enough to resolve NMFS previously expressed concerns. NMFS specifically conveyed its disappointment that the Board of Forestry...failed to take adequate action at the March 15, 2000 Board meeting [at which the amendments were adopted] to protect anadromous salmonids. Cummings Dec., Ex. K. NMFS also criticized the amended rules in a recent decision related to California's coastal non-point water pollution program. Though NMFS and EPA approved the program under the Coastal Zone Act Reauthorization Amendments, the agencies expressly noted that this approval did not relieve the State of its responsibilities under the ESA. Roelofs Dec., Ex. E at 1, 25. Regarding the latter, the NMFS/EPA decision notice provided the following discussion of the amended Rules: NMFS recognized that passage of the rules would not make the FPRs compliant with the Endangered Species Act *Id.* at 24. The federal agencies also provided the Board with advice to enact more far-reaching

⁴ ⁴ If logging and associated activities in compliance with the CFPRs did not result in take of coho and other listed fish, there would have been no reason for Pacific Lumber Co. to obtain an incidental take permit for company operations regulated by the CFPRs. Accordingly, the fact that Pacific Lumber secured an incidental take permit provides a clear indication that activities approved by defendants under the CFPRs result in take of coho and other listed species.

changes: NOAA [National Oceanic and Atmospheric Administration, NMFS parent agency] and EPA encourage the State to adopt new FPRs in order to meet water quality standards and protect anadromous salmon populations.... *Id.* at 25.

Further, NMFS recently sent two documents to the Board which in NMFS view provide guidance to the State's timber management program that will allow for the attainment of healthy, functioning aquatic and riparian ecosystems. Montgomery Dec., Ex. B; Moyle Dec., Ex. H. NMFS noted that it was taking such action in light of the Board's failure to revise the CFPRs, and notified the State that it would use these guidelines in its future reviews of THPs. Moyle Dec., Ex. H. The stark contrasts between the standards set forth in these NMFS documents and those in the current and revised Rules provides further indication of the Rules' many inadequacies.

Other federal and state agencies have also criticized the CFPRs. In 1994, the state of California's Little Hoover Commission concluded that the THP process does not adequately protect the environment. Little Hoover Commission, Timber Harvest Plans: A Flawed Effort to Balance Economic and Environmental Needs (June 1994). See Cummings Dec., Ex. J. The group expressed concern that the CFPRs permitted a significant percentage of timber harvest activities to proceed under emergency notices or exemptions rather than going through the normal THP process. *See Id.* at 52-53. The Commission's report also noted in particular that the Rules' procedures for analyzing cumulative effects is insufficient to allow for assessment of impacts at the watershed level. *See Id.* at v, 54-56. The California State Water Resources Control Board echoed these criticisms in its submission to the Commission. *See Id.* at 55-56. Ultimately, the Commission recommended that the CFPRs be amended to require that "master protection plans" addressing entire watersheds guide timber harvest decision. *Id.* at 63-64.

The federal Environmental Protection Agency (EPA) has similarly voiced concern about cumulative effects of timber harvest pursuant to the CFPRs. In a 1997 letter to the Board of Forestry, EPA wrote that [a]s we have said before, the current Forest Practices Rules (FPRs), and/or the implementation of these rules, does not adequately address cumulative impacts from timber harvesting activities. Cummings Dec., Ex. L.

Scientists have also described serious shortcomings in the CFPRs. The Scientific Review Panel (SRP), a panel of independent scientists assembled to undertake a comprehensive review of the Rules pursuant to the MOA between NMFS and the State of California (*See* III,B,3, *supra*) concluded that the Rules do not ensure protection of anadromous salmonid populations. Scientific Review Panel, Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat, 15 (June 1999). Moyle Dec., Ex. C. The report produced by the SRP provides detailed scientific analysis of numerous shortcomings in the Rules identified by the Panel, as well as recommendations for improving the Rules. *Id.* Like other critiques, the SRP report emphasized shortcomings in the Rules' cumulative effects analysis process, noting that [t]he SRP found that the cumulative effects assessment as currently required under the FPRs does not provide insightful information about which watershed activities may be preventing the recovery of salmonid populations, nor does it provide a decision-making process for addressing such activities on a watershed scale. The SRP believes that this is the primary obstacle to protecting anadromous salmonids under the current system regulating forest practices. *Id.* at 20.

Additionally, at the request of the Speaker Pro Tempore of the California Assembly, Dr. Leslie Reid, a research geologist with the U.S. Forest Service, assessed whether the CFPRs are effective in preventing cumulative watershed impacts. Curry Dec., Ex. B. Dr. Reid answered in the negative, finding the CFPRs insufficient to restrict excess sediment production from logging-related activities, insufficient to provide adequate habitat for fish and wildlife, and not sufficient to prevent pervasive hydrologic changes due to the maintenance of immature vegetation cover over large portions of watersheds. *Id.*

The declarations accompanying this memorandum and motion echo the concerns expressed by other scientists and agencies and provide additional scientific information and conclusions detailing the inadequacies of the CFPRs. Noted geomorphologists Drs. Robert Curry and David Montgomery explain how actions consistent with the CFPRs significantly impact watersheds and stream function throughout the range of listed coho. Additionally, Dr. Peter Moyle, as well as Dr. Terry Roelofs, two of the most widely respected and published scientists with expertise on California coho, offer their

expert opinions on the consequences to these fish resulting from watershed impacts caused by practices in accord with the Rules. Of particular importance, these experts each testify that habitat destruction caused by forest practices consistent with the CFPRs has altered and will continue to alter the habitat of coho salmon in a manner which has and will continue to result in the death or injury of coho salmon.

Dr. Roelofs, in addition to providing information about widespread harm to coho, also discusses the impacts on coho in a specific watershed caused by habitat alterations resulting from extensive timber harvest activities. Roelofs Dec. *ff*28-30. The virtual elimination of coho in Bear Creek constitutes one on-the-ground example of extensive coho mortality as a result of the CFPRs inability to prevent significant modification to coho habitat. A memorandum written by the California Department of Fish and Game, attached to Dr. Roelofs' declaration, provides an analysis of impacts to both coho habitat and coho themselves caused by state-permitted timber harvest in the Bear Creek watershed. The CDFG memo concludes that the specific provisions of the CFPRs designed to protect fish habitat conditions and avoid significant cumulative effects have been inadequate to provide protection for anadromous fish and their habitat including coho salmon. Roelofs Dec., Ex. E.

The temporary amendments to the CFPRs do not ameliorate the vast majority of these scientific criticisms of the Rules. Significantly, the revisions do not even address, much less remedy, major shortcomings of the existing CFPRs. For example, as is evident from the text above, analyses of the Rules invariably point to the woefully inadequate treatment of cumulative effects as one of the principal failings of California's timber harvest regulations. The Board did not address this issue in its Rule revisions. Similarly, the amendments did not provide increased riparian buffers for Class II and III streams, limitations on road construction on unstable areas or during winter months, or limitations on the percentage of a watershed that can be logged in a decade, despite the fact that the SRP specifically recommended that the Rules be improved to increase regulatory protections in each of these areas.

Moreover, the modest changes to the CFPRs do not ensure that timber harvest and associated activities will avoid impacts that result in significant modification of coho habitat. Echoing NMFS

criticisms of the new Rules, the widely-respected experts submitting declarations on behalf of plaintiffs unanimously conclude that the amendments will not prevent habitat degradation and resultant death or injury to coho. Moyle Dec. *ff*18-19,22-25,27,33; Roelofs Dec. *ff*31,34,34; Montgomery Dec.*ff*22,24; Curry Dec. *ff*20,25,27,36,46,47.

Defendants may attempt to argue that the amended Rules, despite their shortcomings, will nonetheless prevent takings of coho because a new provision of the Rules requires the Director of CDF to disapprove any THP which would result in a take of coho. 14 CCR 898.2 (d)(effective July 1, 2000). While the amended CFPRs do indeed contain such a provision, this by itself is incapable of preventing take of coho. As noted above, the Rules substantive standards for controlling timber-related activities are themselves insufficient to prevent take. Even assuming that the Director is prepared to refuse to permit actions which comply with the Rules standards, the Director will often lack the information necessary to support a determination that a given THP will cause or contribute to take of coho, as well as the data and expertise necessary to specify project designs that will avoid take. For example, as discussed in this memorandum and in the accompanying expert declarations, significant degradation to coho habitat often results through the cumulative effects of many individual timber-related actions in a given watershed. Because the amended Rules did not adopt recommendations to institute a meaningful cumulative effects analysis process, personnel reviewing timber harvest plans will lack sufficient information to identify and limit activities that may harm coho. Similarly, Dr. Curry explains how the Rules permit foresters to make important determinations about risks of geologic hazards which they are unqualified to make, meaning that even if the Director were to attempt to disallow harvest activities which could damage a watershed, he or she would lack proper expert advice to do so. *See* Declaration of Dr. Curry at 26.

Finally, a comparison between the CFPRs and standards applicable to timber harvest and related activities on federal land in northern California further demonstrates the high likelihood that actions approved by defendants under the current and revised CFPRs result, and will continue to result, in take of protected coho. As Drs. Moyle and Montgomery note in their declarations, standards applicable to timber management activities on federal land in northern California are substantially

more protective of anadromous fish habitat than those contained in both the existing and amended CFPRs. *See* Moyle Dec. *ff*20-22; Montgomery Dec. *ff*13-14,22-23 (Dr. Moyle was a member of the team that helped design these standards). Despite the relative rigor of these federal standards, NMFS routinely concludes that timber harvest and related activities planned in compliance with these requirements still may cause habitat impacts which result in death or injury to listed anadromous fish. Accordingly, the U.S. Forest Service as a matter of course secures authorization from NMFS to incidentally take listed species prior to approving timber harvest activities within national forests whose streams harbor listed coho. *See* Elkins Dec., Exs. A and B.

Since federal land within coastal watersheds in northern California occurs in similar terrain - and often within the same watersheds - as private timberlands, it is impossible to escape the stark contrast between regulation of timber management by the federal government and by defendants. While federal agencies operating under standards significantly more protective of coho habitat than the CFPRs are nevertheless still careful to secure authority to incidentally take listed coho (and implement additional protective measures to minimize this take), defendants continue to permit logging activities according to weak and universally criticized regulations.⁵ This comparison provides yet another strong indication that timber harvest actions approved by defendants pursuant to the CFPRs significantly alter coho habitat in a manner which kills and injures listed coho. However, unlike federal agencies, state officials have never sought authorization from NMFS to incidentally take coho.

D. SUMMATION

This case presents a relatively uncommon situation in environmental law, namely one in which there is little room for legal or factual dispute. Here, both the agency charged with interpreting and implementing the underlying statute as well as several federal appellate courts are in agreement on the law: State regulators face liability for prohibited takings under the ESA when they affirmatively permit activities which result in death or injury to protected species. Moreover, there is no doubt that

⁵ ⁵ Plaintiffs do not necessarily imply that state timber harvest regulations must be identical to federal standards. While both state officials and federal agencies must avoid unauthorized take of listed species, NMFS could conceivably authorize a different level of incidental take caused by state-permitted activities than it allows for federal actions.

as a factual matter logging and related activities can cause and have caused impacts to the freshwater habitat of coho salmon, which in turn kill or injure these fish. Finally, there is overwhelming evidence from NMFS, independent scientists, and plaintiffs' experts that the CFPRs, in their current form and as temporarily amended, are simply inadequate to prevent harm to coho.

Plaintiffs have met their burden for securing preliminary injunctive relief. The evidence clearly demonstrates that take of coho salmon is likely in the future as a result of habitat degradation caused by at least a portion of the activities authorized by defendants. As the caselaw demonstrates, plaintiffs need not show that every timber harvest action approved by state officials will harm salmon in order to secure injunctive relief; rather, EPIC must show that the CFPRs are insufficient to protect coho against likely future take.

Finally, plaintiffs do not ask this Court to grant some sort of extraordinary relief. As noted above, the State of California has already made a written commitment to NMFS to revise the CFPRs to better protect salmonids, has commissioned and received at least two studies from independent scientists that detail the CFPRs' shortcomings and provide concrete recommendations for improvements, and has taken steps that NMFS characterized as small incremental improvements toward complying with the ESA. However, since the threatened extinction of coho salmon in California and continued sharp words from NMFS have apparently proven insufficient to motivate the State to fully honor its commitment to NMFS and its responsibilities under the ESA, it is now both necessary and appropriate for a court to provide defendants with an added reason to take the actions necessary to secure the future of salmon in California.

IV. CONCLUSION

For the reasons set forth above, plaintiffs respectfully ask this Court to enter an order granting their request for a preliminary injunction under the terms set forth in the accompanying motion and proposed order. Plaintiffs ask this Court to make a preliminary ruling on the legality of both the existing and amended Rules. While the new CFPRs will likely be effective at the time this Court renders a decision on plaintiffs' motion, a ruling which includes the current Rules is important because many timber operations approved under these Rules are ongoing. Moreover, since the amendments to

the CFPRs will expire at the end of this year, a ruling on the existing Rules will continue to have relevance.

Dated: May____, 20000

Respectfully submitted,

Attorneys for Plaintiffs