

1 STUART G. GROSS (#251019)
sgross@gross-law.com
2 **GROSS LAW**
The Embarcadero
3 Pier 9, Suite 100
San Francisco, CA 94111
4 t (415) 671-4628
f (415) 480-6688

JOSEPH W. COTCHETT – (#36324)
jcotchett@cpmlegal.com
PHILIP L. GREGORY – (#95217)
pgregory@cpmlegal.com
PAUL N. MCCLOSKEY (#24541)
pmccloskey@cpmlegal.com
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
t (650) 697-6000
f (650) 697-0577

6 SHARON E. DUGGAN (#105108)
foxsduggan@aol.com
7 **ATTORNEY AT LAW**
8 370 Grand Avenue Suite 5
Oakland, CA 94610
9 t (510) 271-0825
f (510)271-0829

10 *Attorneys for Plaintiffs Ted Souza, Friends Of Del Norte;*
11 *Environmental Protection Information Center;*
12 *Center For Biological Diversity*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16
17 **TED SOUZA, an individual; FRIENDS**
18 **OF DEL NORTE; ENVIRONMENTAL**
19 **PROTECTION INFORMATION**
20 **CENTER, a non-profit corporation;**
21 **CENTER FOR BIOLOGICAL**
22 **DIVERSITY, a non-profit corporation,**

23 **Plaintiffs,**

24 **v.**

25 **CALIFORNIA DEPARTMENT OF**
26 **TRANSPORTATION and MALCOLM**
27 **DOUGHERTY, in his official capacity as**
28 **Director of the State of California**
Department of Transportation,

Defendants.

Case No. 13-cv-4407 (PJH)

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

Date: April 23, 2014
Time: 9:00 a.m.
Ctrm: 3
Judge: Phyllis J. Hamilton

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NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE THAT on April 23, 2014 at 9:00 a.m., or as soon thereafter as can be heard, in Courtroom 3, in the United States District Court for the Northern District of California, located at 1301 Clay Street Oakland, California, before Honorable Phyllis Hamilton, Plaintiffs Ted Souza, Friends of Del Norte, Center for Biological Diversity, and the Environmental Protection Information Center (“Plaintiffs”) will and hereby does move for a preliminary injunction pursuant to Fed. R.Civ. Proc 65. This Motion is based upon this Notice of Motion, Motion, and Memorandum of Points and Authorities, the Declaration of Dr. Christopher Frissell (“Frissell Dec.”), the Declaration of Don Gillespie (“Gillespie Dec.”), the Declaration of Gary Hughes (“Hughes Dec.”), the Declaration of Stuart G. Gross (“Gross Dec.”) and attached exhibits submitted therewith; all pleadings and records on file in this case—including, in particular, Exhibits 3-7 of the Declaration of Stuart G. Gross in Support of Plaintiffs’ Opposition to Defendant Caltrans’ Motion to dismiss, which are, respectively, Volume I of the Final Environmental Impact Report/Environmental Assessment and Section 4(f) Evaluation for the 197/199 Safe STAA Access Project (“Final EA”) (“Final EA (Vol. 1)”), Volume II of the Final EA (“Final EA (Vol. 2)”), Volume III of the Final EA (“Final EA (Vol. 3)”), California Department of Transportation’s (“Caltrans”) Revised Biological Assessment for Impacts to Coho Salmon, Designated Critical Habitat, and Essential Fish Habitat Assessment for 197/199 Safe STAA Access Project, dated March 2012 (“Revised BA”), and National Marine Fisheries Service’s (“NMFS”) letter of concurrence, dated May 7, 2012, issued in response to the Revised BA (“NMFS LOC”)—and such oral argument and evidence allowed by the Court at the hearing.

REQUESTED RELIEF

Plaintiffs seek an order enjoining Caltrans from taking any further work in connection with the 197/199 Safe STAA Access Project that is the subject of this litigation (“Proposed Project”), until Plaintiffs’ claims are resolved on their merits.

ISSUES TO BE DECIDED

Are Plaintiffs entitled to their requested preliminary injunctive relief?

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Caltrans has made clear, work on the Proposed Project that will involve ground-disturbance including cutslope and blasting will begin **as early as May 1, 2014**. *See* Gross Dec., Ex. 1. As shown below, this work will likely cause irreparable, ongoing, and permanent harm to the Southern Oregon Northern California Coast Evolutionary Significant Unit of Coho Salmon (“SONCC coho”) that inhabit the Smith River--which are listed as threatened Endangered Species Act (“ESA”)—their critical habitat in the river designated under the ESA, and given the importance of the Smith River’s population to the species as whole and the population’s extremely perilous condition, this harm would likely be felt as at a species wide level. Nonetheless, both NMFS and Caltrans dramatically failed to meet their respective obligations to assess these and other environmental impacts of the Proposed Project, NMFS under §7 of the ESA, 16 U.S.C. §1536, and Caltrans under the National Environmental Policy Act (“NEPA”), 42 U.S.C §§ 4321 *et seq.* Furthermore, given the likely irreparable harm that the Proposed Project would have on this federally listed species and its designated critical habitat, as well as other ecological resources, the balance of the equities and public interest tip sharply in favor of issuing the requested injunction.

II. BACKGROUND

In Plaintiffs’ Opposition to Caltrans’ Motion to Dismiss, Dkt. 19, at 4-11, and Plaintiffs’ Complaint, Dkt. 1, Plaintiffs provided a detailed discussion of the background of the instant case to which Plaintiffs respectfully direct the Court and hereby incorporate by reference. In summary, the Proposed Project calls for major roadwork to be conducted at seven locations (“Project Locations”) along U.S. Highway 199 (“Rt. 199”) and State Route 197 (“Rt. 197,” collectively with Rt. 199, “Rt. 199/197”) in Del Norte County. More specifically, all of the Project Locations are along the Smith River, and in the case of those on Rt. 199, are in the narrow and windy Smith River Gorge. The Smith River is the last major undammed river in California and is home to numerous natural resources, including several listed species, such as SONCC coho for whom the Smith River is also designated critical habitat.

1 In February 2012, Caltrans issued what is known as a biological assessment initiating
2 the consultation process with NMFS under ESA §7 concerning the Proposed Project’s impacts
3 on SONCC coho and SONCC coho critical habitat (“Original BA”). See Gross Dec. Ex. 2. In
4 March 2012, Caltrans issues a revised biological assessment in which it concluded *inter alia*
5 that the Proposed Project was likely to adversely affect SONCC coho critical habitat. (“Revised
6 BA”). In response, to the Revised BA, on May 7, 2012, NMFS issued a letter of concurrence
7 (“NMFS LOC”), rather than a biological opinion (“BiOp”), improperly terminating the
8 consultation process.

9 On April 10, 2013, Caltrans made a finding of no significant impact (“FONSI”) and
10 issued the Final EA concerning the Proposed Project. On April 24, 2013, the Federal Highway
11 Administration (“FHWA”) , on behalf of Caltrans, issued a Notice of Final Federal Agency
12 Actions, approving the project. Pursuant to a Memorandum of Understanding Between the
13 Federal Highway Administration and Caltrans, the FHWA assigned to, and Caltrans assumed,
14 the delegation of authority, pursuant to 23 U.S.C. § 327, to provide environmental review,
15 consultation, or other such action pertaining to the review or approval the Proposed Project, as
16 required by federal environmental laws, including NEPA, 42 U.S.C. § 4331 et seq., Section 7 of
17 the ESA, 16 U.S.C. § 1536, Section 4(f) of the Department of Transportation Act of 1966,
18 codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, Section 7 of the Wild and Scenic Rivers Act,
19 16 U.S.C. § 1278, and the implementing regulations of these statutes.

20 **III. LEGAL STANDARDS**

21 The Federal Rule of Civil Procedure 65 provides courts the authority to preliminarily
22 enjoin conduct by defendants prior to a full adjudication of the merits of a case. The purpose of
23 a preliminary injunction is “to preserve the status quo with provisional relief until the merits can
24 be sorted out.” *Alliance for the Wild Rockies v. Cottrell* (“AWR I”), 632 F.3d 1127, 1134 (9th
25 Cir. 2011) (internal quotation omitted). In the Ninth Circuit, there exist two general standards
26 for determining whether issuance of a preliminary injunction is appropriate, and another
27 standard specifically applicable to ESA claims.

28 **A. Two General Standards for Issuance of a Preliminary Injunction**

1 The two general standards for issuance of a preliminary injunction are often referred to
 2 as the “likelihood of success on the merits” standard and the “serious questions going to the
 3 merits” standard. *Id.* at 1132 (internal quotation omitted). Under both standards, the party
 4 seeking the preliminary injunction must establish “there is a likelihood of irreparable injury and
 5 that the injunction is in the public interest.” *Id.* at 1135. However, under the “likelihood of
 6 success on the merits” formulation, if the plaintiff satisfies the above two prongs, and shows
 7 that she is likely to succeed on the merits of a claim, she need only show that the balance of the
 8 hardships tips in her favor to be entitled to a preliminary injunction. *See Am. Trucking Assns. v.*
 9 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). On the other hand, under the “serious
 10 questions going to the merits” formulation, a plaintiff is entitled to a preliminary injunction if,
 11 in addition to satisfying the above two prongs, she shows that there are serious questions going
 12 to the merits of a claim and the balance of the hardships tips “sharply towards the plaintiff.”
 13 *AWR I*, 632 F.3d at 1135. In this context, “‘serious questions’ refers to questions which cannot
 14 be resolved one way or the other at the hearing on the injunction and as to which the court
 15 perceives a need to preserve the status quo lest one side prevent resolution of the questions or
 16 execution of any judgment by altering the status quo.” *Philippines v. Marcos*, 862 F.2d 1355,
 17 1362 (9th Cir. 1988) (internal quotations omitted).

18 **B. Standard for Issuance of a Preliminary Injunction Concerning ESA Claims**

19 Where, as here, the underlying claims of the plaintiff seeking preliminary injunctive
 20 relief include an allege violation of the ESA, a third standard applies to a motion for a
 21 preliminary injunction as it relates to that claim. “The traditional preliminary injunction analysis
 22 does not apply to injunctions issued pursuant to the ESA.” *Nat'l Wildlife Fed'n v. Nat'l Marine*
 23 *Fisheries Serv.*, 422 F.3d 782, 793 (“*NWF I*”) (9th Cir. 2005) (citing *Nat'l Wildlife Fed'n v.*
 24 *Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994)).¹ There is no balancing of the

25 _____
 26 ¹ As recently noted by a District of Idaho court, the 9th Circuit, in *Conservation Cong. v. United*
 27 *States Forest Serv.*, 720 F.3d 1048, 1050 (9th Cir. 2013), in its review of a decision denying a
 28 motion for preliminary injunction decision “merely cited *Winter's* injunction test,” but did not
 contain “any express overruling” of the caselaw establishing a different standard applicable to
 preliminary injunction motions in cases alleging ESA violations. *W. Watersheds Project v. U.S.*
Fish & Wildlife Serv., No. 13-0176 (BLW), 2013 U.S. Dist. LEXIS 91555, *11 (D. Idaho June
 26, 2013). Thus, the court concluded “that line of cases is still good law” and applied it the case

1 equities: “In cases involving the ESA, Congress removed from the courts their traditional
 2 equitable discretion in injunction proceedings of balancing the parties’ competing interests.”
 3 *NWF I*, 422 F.3d at 793-794 (quoting *Burlington N*, 23 F.3d at 1510. The reason for this is that
 4 in passing the ESA, Congress determined that “the balance of hardships always tips sharply in
 5 favor of endangered species.” *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996).
 6 Thus, by extension, a plaintiff seeking a preliminary injunction in connection with her ESA
 7 claim should need only show that there exist serious questions the claim rather than meet the
 8 higher standard of a likelihood of success on the merits. *Accord generally AWR I*, 632 F.3d at
 9 1135. However, Ninth Circuit caselaw varies concerning the extent to which (or at all) a
 10 plaintiff alleging a violation of the ESA need make a showing of irreparable harm to be entitled
 11 to a preliminary injunction. *See Alliance for the Wild Rockies v. Krueger* (“*AWR II*”), 950
 12 F.Supp.2d 1196, 1200 (D. Mont. 2013) (surveying the law).

13 One line of cases stand for the proposition that irreparable harm is presumed to exist
 14 when a plaintiff alleges a violation of the ESA, subject to rebuttal by the defendant. *See, e.g.*
 15 *Wash. Toxics*, 413 F.3d at 1035 (“It is not the responsibility of the plaintiffs to prove, nor the
 16 function of the courts to judge, the effect of a proposed action on an endangered species when
 17 proper procedures have not been followed.” (quoting *Thomas v. Peterson*, 753 F.2d 754, 765
 18 (9th Cir. 1985)); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, C-08-1278
 19 EMC, 2011 WL 6813200, at *5 (N.D. Cal. Dec. 28, 2011) (“Irreparable damage is presumed to
 20 flow from a failure properly to evaluate the environmental impact of a major federal action.”)
 21 (quoting *Thomas*, 753 F.2d at 764 and citing *Watersheds Project v. Kraayenbrink*, 632 F.3d
 22 472, 500 (9th Cir. 2011) *cert. denied* 132 S. Ct. 366 (2011) and *Wild Fish Conservancy v.*

23 before it. *Id.* The correctness of this conclusion is further supported by the fact that the 9th
 24 Circuit in *Conservation Cong.* was only called on to determine whether the district court
 25 “abuse[d] its discretion when it determined [the plaintiff] failed to show a likelihood of success
 26 on the merits as to its ESA claim,” *Conservation Cong.*, 720 F.3d at 1050, rather than examine
 27 the entirety of the district court’s preliminary injunction decision. Furthermore, it is relevant to
 28 note that the district court opinion affirmed in *Conservation Congress* applied the above special
 ESA preliminary injunction standard, *Conservation Cong. v. U.S. Forest Serv.*, No. 11-2605,
 2012 U.S. Dist. LEXIS 84943, at *16-17 (E.D.Cal. June 19, 2012), and held “[t]he appropriate
 remedy for violations of the ESA consultation requirements is an injunction pending
 compliance with the ESA.” *Id.* at *17 (quoting *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024,
 1035 (9th Cir. 2005)).

1 *Salazar*, 628 F.3d 513, 532 (9th Cir. 2010)). “In the second line of cases, the Ninth Circuit has
 2 held that the plaintiff—not the agency defendant—bears the initial burden. The plaintiff must
 3 show at the outset that irreparable harm is ‘at least likely’ in order for an injunction to be
 4 issued.” *AWR II*, 950 F. Supp. 2d at 1201. However, these cases recognize that a likely violation
 5 of the ESA, in-and-of-itself, qualifies as likely irreparable harm. *See Burlington N.*, 23 F.3d at
 6 1510 (“The plaintiff must make a showing that a violation of the ESA is at least likely in the
 7 future.”). Finally, a third “burden-shifting” approach has emerged that attempts to
 8 “pragmatically harmonize” these two other approaches. *See, e.g. AWR II*, 950 F. Supp. 2d at
 9 1201.² As demonstrated, Plaintiffs are entitled to preliminary injunction under any standard

10 **IV. ARGUMENT**

11 **A. Any Required Showing of Irreparable Harm Is Satisfied Here**

12 As discussed in Subsection 3 of this Section, NMFS profound failures to meet its ESA
 13 §7 obligations, in-and-of-themselves constitute irreparable harm sufficient to support issuance
 14 of preliminary injunction. However, the evidence also strongly supports conclusion that, absent
 15 the requested injunction, the Smith River’s SONCC coho and its critical habitat would likely
 16 suffer irreparable harm, as would other components of the Smith River’s unique environment.³

17 **1. The Proposed Project is Likely to Cause Irreparable Harm to the 18 Smith River’s Near Extinct SONCC Coho and their Critical Habitat**

19 The Proposed Project is likely to cause irreparable harm to the Smith River’s SONCC
 20 coho or their habitat in three ways; each is sufficient to support a preliminary injunction.

21 ² The burden-shifting approach has three stages: “1. A plaintiff must initially allege a specific
 22 irreparable harm resulting from the ESA violation so that the Court can tailor an injunction to
 23 remedy the specific harm. If the plaintiff does so, then the Court presumes that the challenged
 24 action will cause irreparable harm. 2. The agency can rebut this presumption by showing that
 25 the challenged action will not jeopardize the species or destroy or adversely modify its critical
 26 habitat. 3. If the agency comes forward with evidence that the challenged action will not
 27 jeopardize the species or destroy or adversely modify its critical habitat, then an injunction
 28 should be issued only if the plaintiff produces evidence that such harm is at least likely. If the
 evidence from both sides presents a close question, then the court should err on the side of
 issuing an injunction.” *AWR II*, 950 F. Supp. 2d at 1204.

³ Should the Court choose to apply the *AWR*’s “burden shifting” approach, either of these
 showings would satisfy any obligation of Plaintiffs, in step 3, to rebut any purported showing by
 NMFS or Caltrans, made in step 2, that the Proposed Project would not jeopardize the continued
 existence of SONCC coho or SONCC coho critical habitat. *See AWR II*, 950 F. Supp. 2d at
 1204.

1 a. **Proposed Project Increases the Likelihood the Smith River’s**
 2 **Population of SONCC Coho Will Disappear**

3 “The Supreme Court has instructed us that environmental injury, by its nature, can
 4 seldom be adequately remedied by money damages and is often permanent or at least of long
 5 duration, i.e., irreparable.” *AWR II*, 632 F.3d at 1135 (internal quotations omitted); *see also*
 6 *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). This instruction is
 particularly salient here, given the status of the Smith River’s SONCC coho population.

7 According to NMFS’s Public Draft Recovery Plan for the Southern Oregon Northern
 8 California Coast Evolutionary Significant Unit of Coho Salmon (“*NMFS 2012 SONCC Coho*
 9 *Draft Recovery Plan*”)⁴ (at 15-7)—which, as discussed below, NMFS completely ignored in
 10 performing its role in the ESA §7 consultation process—the Smith River’s SONCC coho
 11 population is defined as “Functionally Independent . . . meaning it was sufficiently large to
 12 be historically viable-in isolation and has demographics and extinction risk that were minimally
 13 influenced by immigrants from adjacent populations.” Another NMFS report on SONCC
 14 Coho—also ignored by NMFS in this process—describes a functionally independent population
 15 of SONCC coho as “one whose population dynamics or extinction risk over a 100-year time
 16 period is not substantially altered by exchanges of individuals with other populations.” *NMFS,*
 17 *Historical Population Structure of Coho Salmon in the Southern Oregon/Northern California*
 18 *Coasts Evolutionary Significant Unit* (June 2006) (“*NMFS 2006 SONCC Coho Population*
 19 *Structure Memo*”), at 8 (internal quotation omitted).⁵ In other words, if SONCC coho in the
 20 Smith River are lost, there is no reasonable possibility of SONCC coho from outside the river
 21 replacing the lost fish. Thus if the SONCC coho population in the Smith River are extirpated,
 22 SONCC coho will be gone from the Smith River forever.

23 The implications of this are significantly increased by other NMFS’ findings in the
 24 *NMFS 2012 SONCC Coho Draft Recovery Plan* (at 15-7)—again ignored here by NMFS—that
 25 the Smith River’s SONCC coho population faces a “high risk of extinction,” in significant part
 26

27 ⁴ Available at [westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/
 28 domains/southern_oregon_northern_california/soncc_plan_draft_2012_entire.pdf](http://westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/southern_oregon_northern_california/soncc_plan_draft_2012_entire.pdf)

⁵ Available at swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-390.pdf

1 because its population numbers have likely dropped below its “depensation threshold (325
2 spawners).” Another NMFS SONCC coho study—again, ignored here by NMFS—explains:

3 [P]opulations that have been severely reduced in number may be subject to
4 demographic processes that result in increased extinction risk. *At very low*
5 *densities, populations can experience a reduction in per capita growth rate*
6 *with declining abundance, a phenomenon referred to as depensation.* Depensation occurs when populations are reduced to very low densities and per
7 capita growth rates decrease as a result of a variety of mechanisms (e.g., failure
8 to find mates and therefore reduced probability of fertilization, failure to saturate
9 predator populations, etc.; (Liermann and Hilborn 2001)). *Depensation results in*
10 *a negative feedback that accelerates a decline toward extinction.*

11 NMFS, *Framework for Assessing Viability of Threatened Coho Salmon in the Southern Oregon/*
12 *Northern California Coast Evolutionary Significant Unit* (Dec. 2008) (“NMFS SONCC Coho
13 *Viability Assessment Framework Memo*”) ⁶ at 35 (emphasis added); *see also NMFS 2012*
14 *SONCC Draft Recovery Plan* at 15-6. In other words, each fish that is lost increases the
15 likelihood of other fish being lost, until the population is wiped out.

16 Dr. Frissell, based on a detailed examination of the Proposed Project and his knowledge
17 and expertise concluded:

18 [T]he Proposed Project . . . is likely to cause significant and irreparable harm to
19 the water quality of the Smith River . . . [and] is likely to cause significant,
20 irreparable harm to salmonid species in the Smith River, including the river’s
21 functionally independent population of threatened SONCC coho.

22 Frissell Dec. ¶ 6.⁷ More specifically, he identifies the following five categories of threats that
23 the Proposed Project poses to “the Smith River’s water quality and thus the survival of its fish
24 populations”: (a) ongoing increased delivery of sediments to the river; (b) increased delivery of
25 toxic contaminants to the river from both increased vehicle accidents on Rt. 199/197 as well as
26 increased amounts of stormwater runoff; (c) near-term increased delivery of toxic contaminants
27 to the river from construction activities; and (d) near-term increased delivery of sediment to the

28 ⁶ Available at swfsc.noaa.gov/publications/TM/SWFSC/NOAA-TM-NMFS-SWFSC-432.pdf

⁷ Given the complexity and technical quality of issues going to the Proposed Project’s potential
impacts on SONCC coho, their critical habitat, other salmonid species, and their critical habitat
in the Smith River, the Court may consider Dr. McBride’s testimony. *See Southwest Center for*
Biological Diversity v. U.S. Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996). It is further
justified in order to determine whether NMFS and Caltrans considered all relevant factors and
explained its decision. *Id.*; *see also generally Kraayenbrink*, 632 F.3d at 497 (allowing
consideration of extra record evidence in ESA citizen suit cases).

1 river because of construction activities. *Id.*, ¶ 7; *see also id.*, ¶¶ 74-84 (discussing these effects on
2 a Proposed Project-wide basis), 87-130 (and on a Project Location-by-Project Location basis).

3 These threats closely align with the limiting factors to SONCC coho survival and
4 recovery in the Smith River identified in the *NMFS 2012 SONCC Draft Recovery Plan*. Among
5 the three most significant, identified by NFMS as the “Key limiting factor[s],” are: (1)
6 “Impaired Estuary/Mainstem Function”; and (2) “Impaired Water Quality.” *NMFS 2012*
7 *SONCC Draft Recovery Plan* at 15-10. Sedimentation is identified as a major ongoing cause of
8 the Impaired Estuary/Mainstem Function limiting factor, *see, e.g., id.* at 15-12, 15-14, and, to a
9 lesser extent, the Impaired Water Quality limiting factor, *see, e.g., id.* at 15-12. The major
10 ongoing cause of the Impaired Water Quality limiting factor is toxic contamination, in
11 particular, of the estuary. *See id.* at 15-12 to 15-13. Moreover, roads, and Rt. 199, in particular,
12 are identified in the recovery plan as a major source of both sedimentation and toxic
13 contamination, *see id.* at 15-12, 15-16 to 15-17, and are, in fact, identified as the number one
14 threat to SONCC coho survival and recovery in the Smith River. *See id.* at 15-16.

15 Furthermore, as Dr. Frissell correctly observed—but both NMFS and Caltrans ignored—
16 the Smith River’s estuary “constitute[s] the natural receiving area for runoff and sediment and
17 other contaminating constituents originating from the Project Locations.” Frissell Dec., ¶ 29.
18 The *NMFS 2012 SONCC Draft Recovery Plan* at 15-11 state concerning the estuary: “The
19 estuary is important to the growth and survival of coho and **any change or loss of access to**
20 **estuarine habitat can severely affect the productivity of the population.**” (emphasis added). It
21 also concluded: “Impaired estuarine function is a high threat to juveniles and smolts in the
22 population.” *Id.* Furthermore, as Dr. Frissell testified, it is well accepted that there is no “safe”
23 level of sediment contamination for salmonid species. Frissell, ¶ 41. Stated positively, the
24 *NMFS 2012 SONCC Draft Recovery Plan* makes clear that the recovery—and thus the survival
25 of SONCC coho in the Smith River, given their position vis-à-vis the depensation threshold—
26 depends fundamentally on *lessening* impacts to the Smith River’s estuary:

27 Coho salmon in the Smith River have declined substantially and are dependent
28 on rearing areas in the lower watershed . . . Recovery of the population will
require enhancing existing juvenile coho salmon habitat and expanding the

1 spatial structure of the population. . . . Therefore, restoration of the Smith River
2 estuary . . . is imperative

3 *NMFS 2012 SONCC Draft Recovery Plan*, at 15-22. However, as Dr. Frissell’s testimony
4 makes clear, the Proposed Project would have exactly the opposite effect: causing a further
5 degradation of the Smith River estuary through increased ongoing delivery of sediment and
6 toxic contamination. Frissell Dec., ¶¶ 7, 74-84, 87-130. His testimony further makes clear that
7 eliminating the sources of these harms once they are created—especially in the case of
8 increased cutslope expanses from which sediment would be continuously delivered—would be
9 impracticable, making the harm it causes not only irreparable but also unstoppable. *Id.*, ¶ 66.

10 In this context, there can seem little dispute that allowing the Proposed Project to go
11 forward would present a likelihood of irreparable harm. The elimination of a functionally
12 independent population of ESA listed wild salmon is about as irreparable could be imagined;
13 and the above discussion more than satisfies any requirement of likelihood at this stage.
14 *Marbled Murrelet*, 83 F.3d at 1066. (“A reasonable certain threat of imminent harm to a
15 protected species is sufficient for issuance of an injunction.”).

16 **b. The Proposed Project Would Likely Adversely Modified**
17 **SONCC Critical Habitat in the Smith River**

18 The foregoing also supports the conclusion that the Proposed Project would likely
19 adversely modify critical habitat for SONCC coho in the Smith River designated under the
20 ESA. The Ninth Circuit has made clear that “in evaluating adverse modification of critical
21 habitat . . . recovery as well as survival impacts” must be considered. *Nat'l Wildlife Fed'n v.*
22 *Nat'l Marine Fisheries Serv.* (“*NWF II*”), 524 F.3d 917, 931 (9th Cir. 2008). More specifically,
23 an adverse modification of designated critical habitat of a listed species occurs if an agency
24 action “appreciably diminish[s] the value of a critical habitat for the species survival or
25 recovery.” *Conservation Cong.*, 720 F.3d at 1057 (internal quotation omitted). Determining
26 whether a critical habit’s value is likely to be appreciably diminished requires one to examine
27 whether the proposed action is likely to “alter[] the primary constituent elements of [the] critical
28 habitat to an extent that appreciably reduces the conservation value of the critical habitat or (2)
otherwise jeopardizing the recovery or survival of [the listed species].” *AWR II*, 950 F. Supp. 2d

1 at 1205 (citing *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d
2 1059, 1069-71 (9th Cir. 2004); *NWF II*, 524F.3d at 931-33)).

3 In designating the Smith River critical habitat for SONCC coho, NMFS identified
4 among the “primary constituent elements” of the habitat that are “essential for the conservation
5 of” SONCC coho: “Freshwater rearing sites with: . . . Water quantity and floodplain
6 connectivity to form and maintain physical habitat conditions and support juvenile growth and
7 mobility; [and] Water quality and forage supporting juvenile development; and . . . Estuarine
8 areas free of obstruction and excessive predation with: . . . water quantity, and salinity
9 conditions supporting juvenile and adult physiological transitions between fresh- and saltwater.”
10 64 Fed. Reg. 24049; 16 C.F.R. § 226.211(c) (emphasis added). As discussed above, the
11 Proposed Project is likely to cause impacts of exactly the type that the NMFS has specifically
12 identified as among the chief on-going sources of degradation to water and habitat quality in
13 rearing and estuarine areas in the Smith River—increased sediment and toxic contaminant
14 delivery. Furthermore, NMFS specifically identified correcting these issues in the Smith River’s
15 “rearing areas in the lower watershed” and “the Smith River estuary” as “imperative” to
16 “recovery of the [Smith River SONCC coho] population.” *NMFS 2012 SONCC Draft Recovery*
17 *Plan*, at 15-22. Thus, exacerbating these issues, as the Proposed Project is likely to do, squarely
18 qualifies as “appreciably diminishing the value of a critical habitat for the species survival or
19 recovery.” *Conservation Cong.*, 720 F.3d at 1057. Indeed, while “[t]he analysis of the effects to
20 critical habitat is a separate and different analysis from that of the effects to the species, and
21 may provide greater regulatory benefits to the recovery of a species than listing alone,” *AWR II*,
22 950 F. Supp. 2d at 1205, n. 4 (internal quotations omitted), here, where the connections between
23 the likely effects of the Proposed Project to SONCC coho critical habitat and SONCC coho’s
24 chances of recovery are so strong, and where the population is so vulnerable that, absent
25 recovery, it faces very low chances of survival, it can be safely concluded that a threat to
26 SONCC coho critical habitat in the Smith River constitutes a threat to SONCC coho survival in
27 the Smith River. Thus, there is more than sufficient grounds for the Court to find any
28

1 requirement of irreparable harm has, on this basis, been satisfied as well.⁸

2 c. **Proposed Project by Threatening the Survival of the Smith**
 3 **River's SONCC Coho Population Is also Likely to Increase**
 4 **Jeopardy to SONCC Coho at a Species Level**

5 The Smith River's SONCC coho population is defined by NMFS as a "core population."
 6 *NMFS 2012 SONCC Draft Recovery Plan*, at 15-7. As a "core population" of SONCC coho, the
 7 Smith River's population is among those the survival of which NMFS has identified as linked to
 8 the overall "viability" of the species as a whole. *Id.* at 2-8. Given this importance to the
 9 specie's overall chances of survival, NMFS further concluded, "[a]s a core population, the
 10 recovery target for the Smith River population is to be at low risk of extinction and have more
 11 than 6,800 spawners annually." *Id.* at 15-7. However, as discussed above, it is currently
 12 estimated that are likely less than 325 spawners in the population, *below less than a 1/20th of*
 13 *this recovery target.* *Id.* at 15-6. Furthermore, as discussed above, there is a likelihood that
 14 impacts from the Proposed Project will, at the very least, impede the recovery of the Smith
 15 River population and, given the population's very low numbers and isolation, result in the
 16 population's extirpation. In light of the dependence that exists between the species viability, as a
 17 whole, and the recovery of the Smith River's population, *see id.*, at 2-8, 15-6, it can safely be
 18 concluded that the likelihood of harm from the Proposed Project to the Smith River's SONCC
 19 coho population identified above translates into a likelihood of harm to SONCC coho, at a
 20 species level. On this basis as well, a finding of a likelihood of irreparable harm is justified. *Cf.*
 21 *Burlington N.*, 23 F.3d at 1511, n. 8 ("a threat of extinction to the species is [not] required
 22 before an injunction may issue under the ESA.").

22 2. **Proposed Project Is also Likely to Cause Other Irreparable Harm**

23 Given the special status of the Smith River's SONCC coho and their critical habitat
 24 focus is appropriately directed there in analyzing the Proposed Project's likelihood to cause
 25 irreparable harm, as Dr. Frissell's Declaration makes clear, all of the salmonid inhabitants of the
 26 Smith River, of which there are several in addition to SONCC coho, are likely to be irreparably

27 _____
 28 ⁸ Indeed, even though, as discussed below, Caltrans' analysis of the Proposed Project's
 environmental impact was woefully inadequate, even it admitted that SONCC coho critical
 habitat was "likely to be adversely affected" by the Proposed Project. Revised BA at iv.

1 harmed absent a preliminary injunction. *See* Frissell Dec. *passim*.

2 **3. NMFS Has Squarely Violated the ESA in its Consultation with**
 3 **Caltrans Concerning the Proposed Project’s Potential Impacts on**
 4 **SONCC Coho and SONCC Coho Critical Habitat, Which**
 5 **Constitutes Irreparable Harm In-And-Of-Itself**

6 While any of the foregoing described likelihoods of irreparable harm more than satisfies
 7 any such required showing, in fact, NMFS profound failure to meet its ESA §7, discussed in
 8 Section III(B)(1) below, in-and-of themselves, constitute an irreparable harm sufficient to
 9 support the issuance of a preliminary injunction, requiring that NFMS meet those obligations
 10 before the Proposed Project go forward. “It is well-settled that a court can enjoin agency action
 11 pending completion of section 7(a)(2) requirements.” *Wash. Toxics*, 413 F.3d at 1034 (citing
 12 *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987); *see also Thomas*, 753 F.2d at 765.
 13 “The Ninth Circuit has repeatedly found that the purpose of consultation under the ESA is to
 14 prevent future substantive violations of the ESA, such that ‘[i]rreparable damage is presumed to
 15 flow from a failure properly to evaluate the environmental impact of a major federal action.’”
 16 *Ctr. for Biological Diversity*, 2011 WL 6813200 at *5 (quoting *Thomas* 753 F.2d at 764).
 17 Therefore, “pending completion of [an] agency's compliance with Section 7's consultation
 18 requirements, ‘[t]he remedy for a substantial procedural violation of the ESA—a violation that
 19 is not technical or de minimis—must therefore be an injunction of the project pending
 20 compliance with the ESA.’” *Id.* (citing *Wash. Toxics*, 413 F.3d a 1034.); *accord generally, e.g.,*
 21 *NWF I*, 422 F.3d at 795-796; *Burlington N.*, 23 F.3d at 1511. As Judge Chen explained—in an
 22 order denying a motion for reconsideration of previous preliminary injunction issued by Judge
 23 Patel— “[o]therwise, ‘[i]f a project is allowed to proceed without substantial compliance with
 24 those procedural requirements, there can be no assurance that a violation of the ESA’s
 25 substantive provisions will not result.’” *Id.* at *5 (quoting *Thomas* 753 F.2d at 764); *see also id.*
 26 (“The Ninth Circuit has continued to apply this rule after *Winter* and *Monsanto*.”).

27 **B. Plaintiffs are Likely to Succeed on the Merits of Their ESA Claim Against**
 28 **NMFS and/or Their NEPA Claim Against Caltrans and Have, at least,**

1 **Raised Serious Question Concerning These Claims**⁹

2 **1. Plaintiffs Are Likely to Prevail on, and Have, at Least, Raised**
 3 **Serious Questions re, on their Claim NMFS Violated ESA §7**

4 “The ESA obligates federal agencies [and their designees] to afford first priority to the
 5 declared national policy of saving endangered species.” *Pac. Coast Fed'n of Fishermen's Ass'ns*
 6 *v. United States Bureau of Reclamation*, 426 F.3d 1082, 1084-1085 (9th Cir 2005) (internal
 7 quotation omitted). And “[t]he heart of the ESA is section 7(a)(2), 16 U.S.C. § 1536(a)(2)[,
 8 which] . . . requires a federal agency to ‘insure that any action authorized, funded, or carried
 9 out’ by the agency ‘is not likely to jeopardize the continued existence of any endangered species
 10 or threatened species or result in the destruction or adverse modification of habitat of such
 11 species.’” *Kraayenbrink*, 632 F.3d at 495(quoting 16 U.S.C. § 1536(a)(2)).

12 The chief mechanism by which this goal is achieved is through what “known as
 13 ‘Section 7’ consultations.” *Gifford*, 378 F.3d at 10673. “For any federal action that may affect a
 14 threatened or endangered species (or its habitat), the agency contemplating the action (the action
 15 agency)[—here, Caltrans—]must consult with the consulting agency[—here, NMFS—]to
 16 ensure that the federal action is not likely to jeopardize ‘the continued existence of’ an
 17 endangered or threatened species and that the federal action will not result in the ‘destruction or
 18 adverse modification” of the designated critical habitat of the listed species.” *Id.* (quoting 16
 19 U.S.C. § 1536(a)(2)).

20 If the action agency . . . determines that its action is “likely to adversely affect” a
 21 protected species [or its critical habitat], it must engage in formal consultation.
 22 Formal consultation requires that the consulting agency. . . issue a biological
 23 opinion determining whether the action is likely to jeopardize the listed species
 24 [or result in the destruction or adverse modification of their critical habitat] and
 25 describing, if necessary, reasonable and prudent alternatives that will avoid a
 26 likelihood of jeopardy [or destruction or adverse modification].

27 *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054, n. 8 (9th Cir. 1994); *see also, e.g.*,
 28 *Conservation Cong.*, 720 F.3d at 1051; *Forest Guardians v. Johanns*, 450 F.3d 455, 457 (9th
 Cir. 2006); *Thomas*, 753 F.2d at 763 (“If the assessment determines that a threatened or

⁹ While Plaintiffs contend that they are also likely to succeed in their other claims against NMFS and Caltrans, due to space constraints, they have chosen to address only their ESA claim against NMFS and their NEPA claim against Caltrans here.

1 endangered species “is likely to be affected,” the agency ***must formally consult*** with the
 2 F&WS. [16 U.S.C.] § 1536(a)(2). The formal consultation results in a ‘biological opinion’
 3 issued by the F&WS. *See* [16 U.S.C.] § 1536(b).” (emphasis added); 50 CFR §§ 402.12,
 4 402.13; 50 CFR § 402 (defining “formal consultation” as “conclud[ing] with the [the consulting
 5 agency’s] issuance of the biological opinion under section 7(b)(3) of the Act.”); *Endangered*
 6 *Species Consultation Handbook: Procedures For Conducting Consultation and Conference*
 7 *Activities Under Section 7 of the Endangered Species Act* (March 1998) (“*NMFS/FWS §7*
 8 *Handbook*”)¹⁰, at xv; 3-3.¹¹ Furthermore, regardless whether the consulting agency ultimately
 9 issues a biological opinion or letter of concurrence it must consider all of the effects of the
 10 action and must “use the best scientific . . . data available” in making its decision. 16 U.S.C. §
 11 1536(a)(2); *see also* 16 U.S.C. §1536(b)(3)(A).

12 “A plaintiffs’ burden in establishing a procedural violation [of the ESA] is to show that
 13 the circumstances triggering the procedural requirement exist, and that the required procedures
 14 have not been followed.” *Thomas*, 753 F.2d at 765. More generally, claims alleging violation of
 15 the ESA, whether brought under the ESA citizen suit provisions or pursuant to the APA are
 16 reviewed under the APA. *Kraayenbrink*, 632 F.3d at 481. Under this standard the Court may set
 17 aside agency action if it was undertaken “without observance of procedure required by law” and
 18 or is arbitrary or capricious. 5 U.S.C. § 706(2)(D). Under this standard, the Court’s “review is
 19 narrow but searching and careful.” *Gifford*, 109 F.3d at 526. This requires the Court “ensure
 20 that [NMFS’] decisions are based on a consideration of relevant factors and . . . assess whether
 21 there has been a clear error of judgment.” *Id.* NMFS further “must state a rational connection

22 ¹⁰ Available at sero.nmfs.noaa.gov/pr/esa/pdf/Sec%207%20Handbook.pdf

23 ¹¹ Language in *Forest Guardians* might appear to suggest, notwithstanding this authority formal
 24 consultation is not *necessarily* triggered by a finding by the action agency that its proposed
 25 action is likely to adversely affect a listed species or critical habitat. *See Forest Guardians*, 450
 26 F.3d at 458. However, on a closer reading, it is clear all the Ninth Circuit held in this regard is
 27 that an action agency can preliminarily determine that its proposed action is likely to adversely
 28 affect a listed species or critical habitat, engage in further informal consultation, and through
 that process determine “that the proposed action would not ***in fact*** have such an effect,” in
 which case, “the agency is not required to engage in formal consultation.” *Id.* (citing 50 CFR §
 402.14) (emphasis added). In other words, the action agency is free to change its conclusion
 during the informal consultation process that its proposed action is likely to adversely affect a
 listed species or critical habitat; however, if it does not, formal consultation is required. *Id.* In
 the instant case, no such change in Caltrans’ conclusion occurred.

1 between the facts found and the decision made.” *Id.* And, “[d]eference is not owed when the
 2 agency has completely failed to address some factor consideration of which was essential to
 3 making an informed decision.” *NWF I*, 422 F.3d at 798 (internal quotations omitted). More
 4 specifically, “[t]he question before [the Court] is not whether, on the merits,” NMFS should
 5 have reached “a jeopardy finding here but whether, as part of the consultation process, [but
 6 rather whether] NMFS . . . conduct[ed] a full analysis of [the Proposed Project’s] risks and their
 7 [survival or recovery] impacts on the [SONCC coho’s] continued existence” and the continued
 8 viability of SONCC coho critical habitat in the river. *Id.* at 933. The answer is no.

9 a. **NMFS Failure to Require Formal Consultation and Issue a**
 10 **BiOp Is a Violation of the ESA §7 in Light of Caltrans’**
 11 **Conclusion that the Proposed Project Was Likely to**
 12 **Adversely Affect Coho Critical Habitat**

13 In its Revised BA, Caltrans in its Revised Coho BA/EFHA, explicitly determined:
 14 “**SONCC coho critical habitat is also likely to be adversely affected**” by the Proposed Action,
 15 Revised BA at iv (emphasis added); and “**The proposed action at PCN-2 is likely to adversely**
 16 **affect SONCC coho critical habitat.**” *id.* at 63 (emphasis added). It is black letter law, that such
 17 finding by the action agency—in this case, Caltrans—**triggers the requirement of formal**
 18 **consultation** between the action agency and the consulting agency—in this case, NMFS—
 19 which concludes with the consulting agency’s issuance a BiOp. *See Pacific Rivers*, 30 F.3d at
 20 1054, n. 8. Notwithstanding this unambiguous law and Caltrans’ explicit determination that the
 21 Proposed Project was “likely to adversely affect SONCC coho critical habitat,” *id.* at 63, NMFS
 22 did not require that Caltrans engage in formal consultation and NMFS did not issue a BiOp.
 23 Instead, NMFS (nonsensically) issued an LOC in which it stated that “NMFS concurs with
 24 Caltrans’ determination that the Project may affect but is not likely to adversely affect SONCC
 25 coho salmon or their critical habitat” and terminated the consultation process, without requiring
 26 that Caltrans engage in formal consultation and without issuing a BiOp. NMFS LOC at 9. The
 27 NMFS LOC, which appears as Appendix P to the Final EA and which is identified by Caltrans
 28 as the final word in the consultation process with NFMS, *see* Final EA (Vol. 1) at 2.3-73, was
 issued in response to the Revised BA, *see* NMFS LOC at 9. Thus, under the law discussed

1 above, formal consultation between NMFS and Caltrans was required, concluding with issuance
 2 by NMFS of a BiOp; and its failure to do so was a clear violation of the ESA §7.¹² Thus,
 3 Plaintiffs are likely to prevail on their ESA claim on this ground. Indeed, to borrow from the
 4 Supreme Court, by way of the Ninth Circuit, ““one would be hard pressed to find a [violation of
 5 a consulting agency’s duties under the ESA §7] any plainer than”” that here by NMFS. *Pac.*
 6 *Rivers*, 30 F.3d at 1054 (quoting *TVA v. Hill*, 437 U.S. 153, 173 (1978)).

7 **b. NMFS Failed to Analyze All the Direct and Indirect Effects of**
 8 **the Proposed Project**

9 Further reflecting the carelessness with which NMFS engaged in its ESA §7 duties, in
 10 reaching its (nonsensical) currence, it dramatically failed to consider all of the effects of the
 11 Proposed Project on either SONCC coho or their critical habitat. 16 U.S.C. §1536(b)(3)(A).

12 “*Effects of the action* refers to the direct and indirect effects of an action on the
 13 species or critical habitat, together with the effects of other activities that are
 14 interrelated or interdependent with that action, that will be added to the
 15 environmental baseline. The environmental baseline includes the past and
 16 present impacts of all Federal, State, or private actions and other human activities
 17 in the action area, the anticipated impacts of all proposed Federal projects in the
 18 action area that have already undergone formal or early section 7 consultation,
 19 and the impact of State or private actions which are contemporaneous with the
 20 consultation in process. Indirect effects are those that are caused by the proposed
 21 action and are later in time, but still are reasonably certain to occur. Interrelated
 22 actions are those that are part of a larger action and depend on the larger action
 23 for their justification. Interdependent actions are those that have no independent
 24 utility apart from the action under consideration.

25 50 CFR § 402.02. Furthermore, the consulting agency must employ a “holistic, aggregate
 26 approach” that examines all of the Proposed Project’s effects together, in context with “the
 27 environmental baseline . . . and current status of the species,” an cannot “segregate” different
 28 portions of its analysis to avoid a determination of adverse effect. *NWF II*, 524 F.3d at 926.

29 NMFS failed to meet these obligations in several significant ways. First, its analysis in
 30 the LOC is exclusively focused on the immediate, direct construction related impacts of the
 31 Proposed Project, which Dr. Frissell identified as the least important here, Frissell Dec., ¶¶ 65-
 32 66; nowhere in the LOC is there any mention—let alone consideration or analysis—of any

33 ¹² Indeed, Caltrans erroneously states in the Final EA (Vol. 1) at 2.3-73 that it engaged in formal
 34 consultation with NFMS, implicitly indicating Caltrans’ recognition that its finding of that the
 35 Proposed Project would “likely adversely affect SONCC coho critical habitat” triggered a
 36 requirement of formal consultation.

1 indirect, long-term, permanent effects of the Proposed Project from, for example, long-term
 2 increases in sediment delivery from increased cutslopes or long-term increases is toxic
 3 contaminant delivery from either increased storm runoff or vehicle accidents. *See* NMFS LOC;
 4 *cf* Frissell Dec.; 50 CFR § 402.02 (“Indirect effects are those that are caused by the proposed
 5 action and are later in time, but still are reasonably certain to occur.”). Second, NMFS
 6 improperly segregated its analysis by Project Location, nowhere analyzing the effects of the
 7 Proposed Project, as a whole, including on the Smith River’s estuary, which NMFS own study
 8 identified as the most critical area of the fish’s designated critical habitat in the Smith River for
 9 SONCC coho recovery and survival, *NMFS 2012 SONCC Draft Recovery Plan* at 15-11, and
 10 which “constitute[s] the natural receiving area for runoff and sediment and other contaminating
 11 constituents originating from the Project Locations.” Frissell Dec., ¶ 29; *cf.* NMFS LOC.¹³
 12 Third, nowhere in the LOC is there *any* discussion of the “the environmental baseline” as to
 13 SONCC Coho in the Smith River, SONCC coho critical habitat in the Smith River, or SONCC
 14 coho as a species. *See* NMFS LOC. *Cf.* *NWF II*, 524 F.3d at 929-930. This omission is
 15 remarkable given the comprehensive information concerning those subjects in the *NMFS 2012*
 16 *SONCC Draft Recovery Plan*, as well as other NMFS materials, and the fact these materials
 17 make it clear, as discussed above, that Smith River’s SONCC coho population is precariously
 18 below its depensation threshold where any adverse impact poses the real possibility of
 19 triggering the populations accelerated decline into disappearance. *See NWF II*, 524 F.3d at 930
 20 (“[A]n agency may not take action that will tip a species from a state of precarious survival into
 21 a state of likely extinction. Likewise, even where baseline conditions already jeopardize a
 22 species, an agency may not take action that deepens the jeopardy by causing additional harm. . .
 23 . This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.”); *see*
 24 *also id.* at 936. Any one of these failings makes NMFS’ issuance of the LOC arbitrary and
 25

26 ¹³ It is relevant to note here that Caltrans has made clear that if it is prevented from doing work
 27 at one of the Project Locations, it cannot do work on any of them. Final EA (Vol. 1), at 1-1.
 28 Thus, while the Proposed Project is properly deemed a single agency action and needs to
 analyzed as such, *see NWF*, 524 F.3d at 926, all of the work at every Project Location, *at least*,
 qualify as “interrelated” and “interdependent” actions that must be analyzed together. *See* 50
 CFR §402.02.

1 capricious, and each individually supports issuance of a preliminary injunction.

2 **c. NMFS Violated its Duty to Use the Best Scientific Data**
 3 **Available in it Analysis of the Proposed Project**

4 NMFS failure to consider the information contained not only in the *NMFS 2012 SONCC*
 5 *Draft Recovery Plan* but also *NMFS SONCC Coho Viability Assessment Framework Memo* and
 6 *NMFS 2006 SONCC Coho Population Structure Memo*—all of which, as discussed in Section
 7 IV(A)(1)(a) above, contain scientific data directly relevant to NMFS analysis here, concerning
 8 not just the degraded baseline condition of SONCC coho and their critical habitat in the river,
 9 but also the nature of the threats faced by them—squarely violated NMFS duty to use the “best
 10 scientific . . . data available” in conducting its analysis. 16 U.S.C. §1536(a)(2). Nowhere in the
 11 NMFS LOC is there any mention of these materials or any of their findings, including without
 12 limitation: that the Smith River’s SONCC coho population was functionally independent and
 13 likely below its depensation threshold, *see NMFS 2012 SONCC Draft Recovery Plan* at 15-7;
 14 that the Smith River’s SONCC coho population was a “core population” meaning that the
 15 survival of the ESU, as whole, was, in part, dependent on the survival of this population, *id.* at
 16 2-8; that the size of the Smith River’s SONCC coho population was likely less than 1/20th the
 17 size it should be to support the continued survival of the ESU, as whole, *id.* at 15-6; that the
 18 among the principle limiting factors to SONCC coho recovery and survival in the Smith River
 19 are degradation of the river’s estuary and lower stem as a result of sedimentation and toxic
 20 contamination, *id.* at 15-12 to 15-13; or that road building and operations constitute the single
 21 greatest to SONCC coho recovery and survival in the river, *id.* at 15-16. NMFS obviously was
 22 aware of this data, it authored them, and, in the case of *NMFS 2012 SONCC Draft Recovery*
 23 *Plan*, it released them only approximately four months before the NMFS LOC was issued. “In
 24 light of the ESA requirement that the agencies use the best scientific and commercial data
 25 available to insure that protected species are not jeopardized, 16 U.S.C. § 1536(a)(2), [NMFS]
 26 cannot ignore available [scientific data]. . . which may indicate potential conflicts between
 27 development and the preservation of protected species.” *Conner v. Burford*, 848 F.2d 1441,
 28 1454 (9th Cir. 1988). However, that is precisely what NMFS did here. *See NMFS LOC* at 11

1 (listing as references for the LOC only the Revised BA and another Caltrans document).

2 **2. Plaintiffs Are Likely to Prevail in their Claim that Caltrans Violated**
 3 **NEPA by Not Preparing and EIS Concerning the Proposed Project**¹⁴

4 NEPA requires the preparation of a detailed environmental impact statement for all
 5 major federal actions “significantly affecting the quality of the human environment.” 42 U.S.C.
 6 § 4332(2)(C). In reviewing an agency’s decision *not* to prepare an EIS pursuant to NEPA—
 7 which is reviewable under the APA and thus may be set aside if taken without following legally
 8 required procedures, 5 U.S.C. § 706(2)(D)—the court must determine whether the agency
 9 “‘reasonably concluded’ that the project will have no significant adverse consequences.” *Save*
 10 *the Yaak Committee v. Block*, 840 F.2d. 714, 722 (9th Cir. 1988) (citation omitted). An EIS is
 11 required if “substantial questions are raised as to whether a project . . . may cause significant
 12 degradation of some human environmental factor.” *Center for Biological Diversity v. Nat’l*
 13 *Highway Traffic Safety Admin.*, 508 F.3d 508, 552 (9th Cir. 2007). Importantly, the significant
 14 effect need not *actually* occur; it is sufficient to trigger the preparation of an EIS if a substantial
 15 question is raised “whether a project may have a significant effect on the environment.” *Blue*
 16 *Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

17 In evaluating whether a proposed action may have a “significant” impact, an agency
 18 should consider both the **context** and **intensity** of the action. **Context** requires evaluation of the
 19 action in consideration of several contexts such as society on a whole (human, national), the
 20 affected region, the affected interests, and the locality. Significance varies with the setting of
 21 the proposed action and both short-term and long-term effects are relevant. 40 C.F.R. §
 22 1508.27(a); *see also Nat’l Parks & Conservation Ass’n. v. Babbitt*, 241 F.3d 722, 730 (9th Cir.
 23 2001). The **intensity** of an action refers to the severity of the impacts, and requires
 24 consideration of ten factors to determine whether an action “significantly” affects the
 25 environment within the meaning of Section 102(2)(c). *See* 40 C.F.R. §1508.27(b)(1)-(10)
 26 (listing factors that “should be considered in evaluating intensity”). A substantial question

27 _____
 28 ¹⁴ Plaintiffs maintain they are also likely to succeed on their claims that the Final EA, itself, and the manner in which Caltrans provided for public comment violated NEPA, but because of space considerations Plaintiffs will limit their focus here to Caltrans’ failure to prepare an EIS.

1 concerning just one of these factors may be sufficient to deem the action significant and require
2 an EIS. *Ocean Advocates v. U. S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2005).

3 Here, the Proposed Project's impacts meet the standard for significance requiring
4 preparation of an EIS because, without limitation, its impacts (1) may adversely affect
5 endangered or threatened species or its habitat, and particularly coho salmon; (2) involve unique
6 geographic characteristics of the Wild and Scenic Smith River and the Smith River National
7 Recreation Area; (3) may affect public health and safety; (4) are highly uncertain and involve
8 highly controversial actions; and (5) are related to other actions and establish a precedent for
9 future actions or represent a decision in principle about a future consideration.

10 **a. Proposed Project's Potential Impacts on Threatened SONCC**
11 **Coho, Their Critical Habitat, and on Other Threatened and**
12 **Endangered Species and their Habit, Require an EIS**

13 An EIS is triggered by the significance factor considering the "degree to which [an
14 action] may adversely affect an endangered or threatened species or its habitat." 40 C.F.R. §
15 1508.27(b)(9). As discussed above in Section IV(A)(1), the Proposed Project is likely to
16 irreparably harm both SONCC coho and SONCC coho critical habitat on an ongoing and
17 permanent basis. Furthermore, as also discussed, Caltrans has admitted that "SONCC coho
18 critical habitat is . . . likely to be adversely affected" by the Proposed Project. Revised BA at iv;
19 *see also id.* at 63. In light of this, Caltrans was required to do an EIS.

20 Furthermore, **in addition to SONCC coho and SONCC coho critical habitat**, reflecting
21 the otherwise pristine and ecologically important wilderness where Caltrans proposes
22 development of its industrial artery, Caltrans identified within the area of the Proposed Project:
23 **forty** Special-Status Vascular Plant Species Known or with Potential to Occur in the Proposed
24 Area of Direct Impact and California Rare Plant Rank 3 and 4 Species Known to Occur in the
25 Proposed Area of Direct Impact, including the endangered McDonald's rock cress, Final EA
26 (Vol. 1) at 2.3-43 to 44; **nineteen** Special-Status Animal Species Assumed Present, including
27 the threatened marbled murrelet, threatened Northern spotted owl, and threatened green
28 sturgeon, *id.* at 2.3-61; and **fifteen** Special-Status Bryophytes, Fungi, and Lichen Species with
Potential to Occur in the Proposed Area of Direct Impact, 2.3-45. In this context, "substantial

1 questions are [unquestionably] raised as to whether the [Proposed] [P]roject . . . may cause
2 significant degradation of some human environmental factor.” *CBD*, 508 F.3d at 552 .

3 **b. Unique Characteristics Requiring An EIS**

4 Caltrans admits the Smith River, along which all of the Project Locations lie “is one of
5 the cleanest and most pristine in California.” Final EA (Vol. 1) in 2.2-8. It further admits:

6 The Smith River is also undammed for its entire length, making it the only major
7 river system in California without dam. Of the 325.4 miles of Wild and Scenic
8 River designation along the Smith River, 78 miles are wild, 31 miles are scenic,
9 and 216.4 miles are classified as recreational.

10 *Id.* at 2.10-25 (emphasis added). Indeed, there is no river in the United States with more miles
11 designated wild and scenic than the Smith River, and it is “considered one of the ‘crown jewels’
12 of the National Wild and Scenic River System.” *Id.* at 1-10. This alone more than meets 40
13 C.F.R. §1508.27(b)(3)’s standard, the latter specifically listing the project location’s “proximity
14 to . . . wild and scenic rivers” as a factor based on which a proposed action is properly deemed
15 to raise questions of significance sufficient to require and EIS

16 However, in addition, the Proposed Project’s location is also indisputably in close
17 “proximity to . . . ecologically critical areas.” 40 C.F.R. §1508.27(b)(3). As discussed, at
18 length above, the Smith River is designated critical habitat for a “core population” of SONCC
19 coho; the Smith River has also been designated as an “Essential Fish Habitat” for both coho and
20 Chinook salmon, under under the Magnuson-Stevens Fishery Conservation and Management
21 Act (“MSA”), 16 U.S.C. §§ 1801 *et seq.* Furthermore, as discussed immediately above, the area
22 of the Proposed Project is home to seventy-five species of concern.

23 In addition, the Rt. 199, where most of the work called for by the Proposed Project
24 would occur, is a designated Scenic Byway, which winds it way through the Smith River
25 National Recreation Area, providing access to the Redwood National and State Parks, one of
26 only two UNESCO World Heritage Sites in California. Final EA (Vol. 1) at 1-11. In addition
27 the work called for on Rt. 197 is in the immediate vicinity of Ruby Van Deventer County Park.
28 *Id.* at 1-10 to 11; *see* 40 C.F.R. §1508.27(b)(3) (“proximity to . . . park lands”).

c. Potential Impacts on Public Health and Safety Require an EIS

1 There are also substantial questions whether the Proposed Project would significantly
2 increase the risk of not only ecologically disastrous, but also deadly, accidents along Rt.
3 199/197, providing a further basis on which preparation of an EIS was necessary. *See* 40 C.F.R.
4 §1508.27(b)(2). While Caltrans claims the Proposed Project is a “safety project,” there are
5 substantial questions whether opening up Rt 199/197 to larger and more truck traffic would
6 have a significant and negative affect on public safety, given the narrow, twisty conditions on
7 Rt. 199/197 that would remain after the Proposed Project, and Caltrans’ decision to not make
8 changes to locations along Rt. 199 known to be the site of frequent accidents. There is a
9 documented history of truck accidents on Rt. 199, including fatalities, with spills of creosote,
10 gasoline, diesel, beer, paint, lumber and hay. *See* Final EA (Vol. 3) at 3.3-54 to 57. There are
11 many tight curves and narrow or no shoulders along Rt. 199 from Hiouchi to Gasquet and
12 beyond, which pose significant safety issues for current traffic, and which would not be
13 addressed. Final EA (Vol. 3), 3.3-12 to 13. However, the Proposed Project would not only
14 result in larger trucks using the route but also increased truck traffic. *See* Final EA (Vol. 1) 2.1-
15 51; Final EA (Vol. 3), 4.2-25 to 26, 4.2-49 to 50. Furthermore, even where the Proposed Project
16 does call for work to be done, significant portions of it would not meet state highway design
17 standards and thus require “exceptions to mandatory design standards,” which are deviations
18 from highway design standards prescribed by Caltrans’ Highway Design Manual. *See* Final EA
19 (Vol. 1) at 1-14, 1-18. In short, the Proposed Project would make it theoretically possible an
20 STAA truck to navigate the twisty and narrow route, but only if the truck made no mistakes,
21 and thread its way precisely through very narrow points, without adequate curve radii, shoulder
22 widths, horizontal clearance, or horizontal and vertical sight stopping distance. This impacts not
23 only safety for the large trucks but the safety of all other roadway users and mandates an EIS.

24 **d. Highly Uncertain Impacts and Significant Controversial**
25 **Action Requires an EIS**

26 The Proposed Project may produce highly uncertain or highly controversial effects, further
27 necessitating preparation of an EIS. 40 C.F.R. § 1508.27(b)(4), (b)(5). “The purpose of an EIS is to
28 obviate the need for speculation by insuring that available data are gathered and analyzed prior to

1 the implementation of the proposed action.” *Babbitt*, 241 F.3d at 731. While it appears likely the
 2 Proposed Project would cause irreparable harm to SONCC coho and their critical habitat, what the
 3 ultimate effect the Proposed Project would have on the Smith River, and on its biological
 4 resources, both in the short and long-term, is uncertain. Furthermore, the Proposed Project was,
 5 and remains, highly controversial, with hundreds of people opposing it, advocating changes, and
 6 urging that Caltrans adhere to safety measures and protect the Smith River and the habitat it
 7 provides. *See* Final EA (Vol. 3), *passim*.

8 e. **Cumulative Impacts and the Potential for Future Action**
 9 **Require an EIS**

10 The 197/199 Project is actually part of a larger effort being pursued by Caltrans to
 11 establish an STAA truck network throughout Northwestern California, of which The 197/199
 12 Project is but one of several components being implemented and/or pursued (“NW California
 13 STAA Network”). *See* Final EA (Vol. 3) at 3.2-18 to 19; 3.2-37, 4.2-2 to 3. Caltrans seeks to
 14 create this network by attempting a series of “fixes” along Rts. 101, 299, and 199/197. These
 15 combined changes would enable STAA access to and from Interstate 5 in Northern California.
 16 Creation of this NW California STAA Network would pose the likelihood of increased STAA
 17 truck traffic on rural Northwestern California routes, including Rt. 199/197 and other
 18 cumulative impacts. *See*, Final EA (Vol. 3), 4.2-25 to 26, 4.2-49 to 50. However, by presenting
 19 components of its NW California STAA Network project in a piecemeal fashion, Caltrans seeks
 20 to evade NEPA scrutiny of those impacts. Preventing this evasion in this Proposed Project and
 21 limiting Caltrans to attempt the same evasive tactics for other components of NW California
 22 STAA Network project justifies requiring an EIS. *See* 40 C.F.R. §1508.27(b)(6)-(7).

23 C. **To the Extent Balancing the Equities Is Appropriate Here, the Equities Tip**
 24 **Sharply in Favor of Issuing a Preliminary Injunction**

25 As discussed above, traditional balancing of the equities is not part of the preliminary
 26 injunction analysis where, as here, the fate of a threatened species or its critical habitat is at
 27 issue. *See, e.g. NWF I*, 422 F.3d at 793. Rather, “the balance of hardships always tips sharply in
 28 favor of endangered species.” *Marbled Murrelet*, 83 F.3d at 1073; *NWF I*, 422 F.3d at 794.
 However, to the extent applicable, the balance is sharply in Plaintiffs’ favor.

D. Issuance of Preliminary Injunction Would Serve the Public Interest

For similar reasons, the public interest would also be served by issuance of the preliminary injunction. “[P]rojects that jeopardize the continued existence of endangered species threaten incalculable harm; accordingly, [Congress] decided that . . . the public interest tip heavily in favor of endangered species.” *Marsh*, 816 F.2d at 1383. More generally, the “careful consideration of environmental impacts before major federal projects go forward” all serve the public interest. *AWR I*, 632 F.3d at 1138. “The public interest is best served by letting [the Smith River and its population of threaten SONCC coho and other inhabitants] thrive a little longer while the merits of their future are evaluated in court,” *Bair v. Cal. State DOT*, No. 10-04360, WHA 2011 U.S. Dist. LEXIS 72295, at *23-24 (N.D. Cal. 2011).

E. No Bond Should Be Required

There is no ground to require Plaintiffs, who are here acting as private attorneys general to ensure that NMFS and Caltrans meet their respective duties under the nation’s environmental laws, to post any more than a nominal bond as a condition of granting the requested relief. *See California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their Motion for Preliminary Injunctive Relief be granted.

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GROSS LAW

/s/ Stuart G. Gross
 STUART G. GROSS (#251019)
 sgross@gross-law.com
 The Embarcadero
 Pier 9, Suite 100
 San Francisco, CA 94111
 t (415) 671-4628
 f (415) 480-6688

*Attorneys for Plaintiffs Ted Souza, Friends
 Of Del Norte; Environmental Protection
 Information Center; Center For Biological
 Diversity*