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24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

26 FRIENDS OF THE RIVER, a non-profit
27 corporation, DEFENDERS OF WILDLIFE, a
28 non-profit corporation, and CENTER FOR
29 BIOLOGICAL DIVERSITY, a non-profit
30 corporation,

31 Plaintiffs,

32 v.

33 UNITED STATES ARMY CORPS OF
34 ENGINEERS, and LT. GEN. ROBERT L. VAN
35 ANTWERP, JR., in his official capacity,

36 Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

I. INTRODUCTION

1
2 1. The vegetation on and near the levees constitutes virtually all that remains of the
3 riparian forests in the great Central Valley and certain other parts of the State of California. This
4 case challenges the arbitrary decision of the U.S. Army Corps of Engineers to require the
5 removal of all trees and shrubs on or near all levees in the State. If the Corps' decision stands, it
6 would require the destruction of much of the last 5% of once thriving riparian forests in
7 California's Central Valley which provides essential habitat for the survival of several
8 endangered species, scenic beauty and shade for aesthetic and recreational enjoyment of the
9 rivers by people.

10 2. The Corps adopted a new standard requiring removal of all vegetation from
11 levees without any environmental review, without any consideration of regional differences, and
12 without scientific support. Specifically, despite the enormous environmental impacts of the
13 challenged decision, including numerous significant adverse environmental impacts of, in
14 essence, clear-cutting the surviving remnant of the riparian forests in the Central Valley, the
15 Corps took no steps whatsoever to comply with the National Environmental Policy Act (NEPA),
16 42 U.S.C. § 4321 *et seq.*, This action challenges the Corps' violations of NEPA including the
17 failure to prepare an Environmental Impact Statement (EIS) prior to adopting the decision to
18 requiring removal of all vegetation on levees.

19 3. In addition, although the Corps conceded that removal of vegetation on all of the
20 levees would impact threatened and endangered species, the Corps took no steps whatsoever to
21 comply with the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, which requires that
22 federal agencies consult with wildlife agencies, the U.S. Fish and Wildlife Service ("FWS") or
23 the National Marine Fisheries Service ("NMFS"), whenever an agency action may affect listed
24 species. This action also challenges Corps' violations of the ESA by failing to consult with fish
25 and wildlife agencies to ensure the survival of listed species and protection of designated critical
26 habitat.

27 //

1 **II. JURISDICTION**

2 4. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question), §
3 2201 (declaratory relief), § 2202 (injunctive relief), and 16 U.S.C. § 1540(g) (citizen suit
4 provision). This cause of action arises under the laws of the United States, including the
5 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*; the Endangered
6 Species Act (“ESA”) §§ 1531 *et seq.*; and the Administrative Procedure Act (“APA”), 5 U.S.C.
7 §§ 701 *et seq.*; and implementing regulations established pursuant to these federal statutes. An
8 actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is
9 proper under 28 U.S.C. §§ 2201 & 2202, 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 705 & 706.

10 **III. VENUE**

11 5. Venue is proper under 28 U.S.C. § 1391(e) because a substantial part of the
12 property that is the subject of this action—i.e., the levees—is located in Sacramento, San
13 Joaquin, and Yolo Counties. Moreover, the District Headquarters for defendant U.S. Army
14 Corps of Engineers and the headquarters for plaintiff Friends of the River are located in
15 Sacramento County.

16 **IV. PARTIES**

17 6. Plaintiff FRIENDS OF THE RIVER (“Friends”) was founded in 1973 and is
18 incorporated under the non-profit laws of the State of California, with its principal place of
19 business in Sacramento, California. Friends has more than 5,000 members dedicated to the
20 protection, preservation, and restoration of California’s rivers, streams, watersheds, and aquatic
21 ecosystems. Friends has been involved in activities to protect and restore the Sacramento and
22 San Joaquin Rivers and their tributaries for more than 30 years. Friends’ members and staff
23 include individuals who visit the streams, rivers and riparian areas throughout California,
24 including areas with levees and have recreational, aesthetic, health, and spiritual interests in the
25 scenery, habitats and species affected by the challenged action and intend to continue to do so in
26 the future. Friends’ members and staff regularly use and intend to continue to use the streams
27 and rivers in California for recreation and aesthetic enjoyment including areas with vegetation on

1 and near levees that would have to be removed to comply with the Corps' vegetation removal
2 program. The Corps' vegetation removal program is a detriment to achieving Friends' goals of
3 river and stream protection and restoration in California, injuring its members and staff. The
4 relief sought would redress the injuries to Friends, its members and staff. Many of Friends'
5 members have been, are being, and unless the relief requested herein is granted, will be
6 adversely affected and injured by the actions and threatened actions of Defendants which are the
7 subject of this Complaint.

8 7. Plaintiff DEFENDERS OF WILDLIFE (Defenders) is a national non-profit
9 organization with a field office in Sacramento, California. Defenders is dedicated to the
10 protection of all native wild animals and plants in their natural communities. Defenders has
11 approximately 426,000 members nationwide and more than 69,000 in California. Defenders
12 advocates new approaches to wildlife conservation that will help keep species from becoming
13 endangered, and employs education, litigation, research, legislation and advocacy to defend
14 wildlife and their habitat. Defenders and its members derive scientific, educational, recreational
15 and other benefits from California's rivers, streams, and riparian areas, including the forests,
16 shrubs, and vegetation that provide habitat for birds and wildlife on and near the state's levees.
17 Defenders' members have recreational, aesthetic, educational, and scientific interests in the
18 preservation of California's aquatic ecosystems and riparian forests and the wildlife that depend
19 on these habitats. Defenders' members regularly visit and use California's rivers and streams,
20 including areas with levees affected by the Corps' decision, and intend to do so in the future. The
21 Corps' unlawful decision to require removal of all vegetation from the levees has harmed, and
22 will harm, Defenders and its members, by hindering efforts to protect wildlife and wildlife
23 habitat and reducing the ecological, aesthetic, and recreational value of these areas. The relief
24 sought would redress the injuries of Defenders and its members.

25 8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-
26 profit corporation with offices with offices in San Francisco, Los Angeles, and Joshua Tree,
27 California; Oregon; Arizona; New Mexico; and Washington, D.C. The Center is actively

1 involved in species and habitat protection issues throughout North America, and has over 42,000
2 members including many members who reside and recreate in California. One of the Center's
3 primary missions is to protect and restore habitat and populations of imperiled species
4 throughout western North America. The group's members and staff include individuals who visit
5 the streams, rivers and riparian areas throughout California, including areas with levees and that
6 are affected by levees, and have biological, health, educational, scientific research, spiritual and
7 aesthetic interests in the ecosystems and the species and habitats affected by the decision at issue
8 and intend to continue to do so in the future. The Center members and staff regularly use and
9 intend to continue to use the streams and rivers in California, including areas with levees and
10 that are affected by levees, for observation, research, aesthetic enjoyment, and other recreational,
11 scientific, and educational activities. The Center's members and staff have researched, studied,
12 observed, and sought protection for many imperiled species, including federally listed threatened
13 and endangered species that depend on the rivers and streams and riparian habitat in California.
14 The Center's members and staff have and continue to derive scientific, recreational, educational,
15 conservation, and aesthetic benefits from the continued existence of these imperiled species in
16 the wild and the preservation of the ecosystems upon which they depend. The decision to require
17 removal of all vegetation on levees throughout the State of California is a detriment to achieving
18 the group's goal of protection and restoration, and its members and staff are injured by the
19 decision challenged in this action. These injuries would be redressed by the relief sought.

20 9. This suit is brought by Friends, Defenders and the Center on behalf of themselves
21 and their adversely affected members and staff (collectively "Plaintiffs"). Pursuant to 16 U.S.C.
22 § 1540(g), on August 2, 2010, the Center provided the Defendants with notice of its intent to sue
23 for violations of the Endangered Species Act. On April 19, 2011, Friends and Defenders also
24 provided the prescribed 60-days' notice of intent to sue. The notice requirement is now satisfied.

25 10. Plaintiffs and their members' have used and intend to continue to use the rivers,
26 streams, and riparian areas that will be affected by the decision and as a result Plaintiffs will be
27 directly and adversely affected by the decisions, actions, and failures to act alleged in this

1 Complaint. Those adverse effects include, but are not limited to: (1) disruption of their recreation
2 experiences; (2) reduction and impairment of recreation opportunities; (3) impacts to native
3 plants and wildlife and their habitats; and (4) impacts to riparian areas and water quality. The
4 ongoing injuries caused by Defendants' failure to follow mandatory procedures in before
5 adopting the decision include, but are not limited to, destruction of habitats and loss of wildlife,
6 destruction of native plants, destruction of soil structure and quality, and loss of scientific and
7 recreational opportunities. In addition, Plaintiffs and their members have an interest in ensuring
8 that the Corps complies with all applicable laws, regulations, and procedures pertaining to the
9 preservation and management of rivers, streams and riparian areas in the State of California.

10 11. Plaintiffs and their members use the areas that are affected by the decision for
11 recreational, scientific, educational, and aesthetic purposes and intend to continue to do so in the
12 future. Plaintiffs and their members derive recreational, scientific, educational, and
13 aesthetic benefits from the rivers, streams and riparian areas that will be affected by the decision
14 through fish and wildlife observation, hiking, study, photography, recreational boating and
15 rafting.

16 12. The decision at issue herein requires actions to be taken that will continue to
17 significantly degrade the natural values currently enjoyed by Plaintiffs and their members and
18 creates an actual and imminent infringement of Plaintiffs' interests.

19 13. The decision at issue herein requires actions to be taken that have already and will
20 continue to harm Plaintiffs' interests and that harm is traceable directly to Defendants' actions.

21 14. The conservation, recreational, scientific, educational, aesthetic, and procedural
22 interests of plaintiffs and their respective staff and members described above have been, are
23 being, and, unless the relief prayed for herein is granted, will continue to be adversely affected
24 and irreparably injured by defendants' failure to comply with the laws as described below.
25 Plaintiffs have no adequate remedy at law.

26 15. Because Defendants' actions approving the challenged decision violate several
27 procedural and substantive laws, a favorable decision by this Court will redress the actual and

1 imminent injury to the Plaintiffs.

2 16. Defendant United States Army Corps of Engineers (“Corps”) is an agency of the
3 United States which has been delegated responsibility by the Department of the Army for the
4 construction, operation, and maintenance of levees of the United States. The Corps is an agency
5 within the United States Department of the Army, which in turn is an agency within the United
6 States Department of Defense, all of which are agencies of the United States of America.

7 Defendant Lt. Gen. Robert L. Van Antwerp, Jr., is the U.S. Army Chief of Engineers and Com-
8 manding General of the U.S Army Corps of Engineers (USACE). Lt. General Antwerp is named
9 in his official capacity.

10 **V. FACTS**

11 17. California once had vast riparian forests in the great Central Valley along the
12 Sacramento and San Joaquin Rivers, their tributaries and in the Delta. Since the arrival of
13 Europeans and the beginning of modern development including gold mining in the mid-
14 nineteenth century, intensive agricultural and urban development, and enormous population
15 growth, about 95% of the riparian forests have vanished from the Central Valley. There have
16 also been enormous losses of riparian forest in other parts of the State ranging from the Bay Area
17 to Southern California.

18 18. Rivers in flood may impact agriculture, housing and other human structures and
19 activities. Consequently, a federal-State flood protection system has been developed in the
20 Central Valley composed of many projects including floodways (by-passes), project channels,
21 overflow weirs, and other facilities. The system includes about 1600 miles of federal project
22 levees. There are also levees in other parts of the state.

23 19. The Corps is the federal agency primarily involved in the federal-state flood
24 protection system. The Corps’ program challenged here does not account for regional
25 differences in ecosystems, climate, soils, etc. Many Sacramento River levees were built close
26 together to create high river velocities to scour away tailings from nineteenth century hydraulic
27 mining. Many levees in the Central Valley of California are in essence part of the riverbank. In

1 these areas there is little or no room for riparian forest between the levees and the rivers, and
2 urban and agricultural development have eliminated much of the riparian forests on the landward
3 side of the levees.

4 20. For decades the Corps has allowed, encouraged, and in many situations required
5 the maintenance and planting of trees and shrubs on California levees. Because of the loss of
6 about 95% of the riparian forest in California, the trees and shrubs on and within 15 feet of the
7 levees constitute most of the remnant 5% or so of the riparian forest. This surviving remnant of
8 the riparian forest is of critical importance as vital habitat for fish, birds, and animals including
9 endangered species, as well as for shade, scenic beauty, aesthetics, and recreation enjoyment by
10 residents, drivers, boaters, swimmers, fishermen, motorcyclists, bicyclists, joggers, walkers, bird
11 watchers and other recreational users and nature enthusiasts. For example, enjoyment of the
12 scenic beauty afforded by tree-lined rivers is close, affordable, and open to all including those
13 residents of such cities as Sacramento, West Sacramento, Stockton, Lodi, and Manteca who
14 would find it difficult or impossible to travel to more distant locations to experience natural
15 outdoor scenic beauty.

16 21. The surviving remnant of riparian forests on and near the levees is the present
17 physical environment, the existing status quo, and the existing environmental baseline. In many
18 parts of California, the trees and shrubs have been on and near the levees for decades. The
19 history of federal participation in the flood protection system includes Congressional
20 authorization of the Sacramento River Flood Control Project in 1917. Subsequent authorizations
21 have included American River levees, San Joaquin River Flood Control Projects going back to
22 the 1940's, and numerous other projects since then. Prior to and since the acceptance of the
23 Sacramento River Flood Control system by the State in 1958 there were and are mature trees on
24 and along the levees.

25 22. The Corps for decades allowed retention of, and encouraged planting of, trees and
26 shrubs on Central Valley levees in cooperation with other federal and State agencies including
27

1 the FWS and the California Department of Fish and Game because there is almost no other
2 riverbank or riparian habitat left for endangered species and other wildlife.

3 23. The Corps reversed course in about April 2007, issuing a document entitled
4 “Final Draft White Paper: Treatment of Vegetation within Local Flood-Damage-Reduction
5 Systems” dated April 20, 2007, setting out new policy guidance for a vegetative-free-zone for all
6 levees for which the Corps has responsibility for design, operation, maintenance, inspection or
7 certification. The California Department of Water Resources (DWR) objected to the Corps that
8 the new policy “would constitute a significant shift in the Corps practice in California and would
9 have serious and adverse public safety and environmental consequences.” DWR Letter May 11,
10 2007. DWR also reminded the Corps that “Over the years, the Corps and the State have reached
11 an agreement on how trees and other vegetation can co-exist with public safety function of
12 levees in the Central Valley. This long-lived agreement would now be ignored and set aside by
13 the new, nationwide policy.” *Id.* Other agencies, groups, and individuals also objected to the
14 Corps in writing and demanded that the Corps comply with NEPA by preparing an EIS and
15 comply with the ESA by consulting with fish and wildlife agencies before adopting a policy
16 requiring in essence the clear-cutting of the remaining trees and shrubs on and alongside 1600
17 miles of levees in California.

18 24. Despite the objections, demands, and warnings from State and local agencies as
19 well as from non-governmental organizations and individuals, the Corps on or about April 10,
20 2009, issued Engineering Technical Letter (ETL) 1110-2-571 establishing “Guidelines for
21 Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams,
22 and Appurtenant Structures.” The ETL requires a “vegetation-free zone” corridor along levees
23 including the levee plus 15 feet on each side. *Id.* ¶. 2-2 at p. 2-1. The vegetation-free zone
24 prohibits all vegetation except grass. *Id.* ¶. 2-2(a) at p. 2-1. The ETL requires that “All
25 vegetation not in compliance with this ETL shall be removed.” *Id.* ¶ 5-3(a) at p. 5-1. The ETL
26 imposed a burden on levee operators to seek a “variance” to retain non-compliant vegetation
27 should they wish to do so for environmental purposes. Under the ETL, the existing riparian

1 forest on and alongside California's levees is a non-conforming use that must be removed unless
2 a variance can be obtained. The Corps issued public notice for a new Policy Guidance Letter
3 that adopted a new variance process in February 2010. Process for Requesting a Variance From
4 Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. at 6364 (February 9, 2010). The
5 2010 notice acknowledged that the ETL 1110–2–571 Guidelines establish “mandatory
6 vegetation-management standards for levees.” 75 Fed. Reg. at 6364. The notice states that
7 “[t]his policy guidance letter supersedes the applicable regional variance policy and process . . .
8 and will serve as interim guidance until this process is incorporated into an USACE engineer
9 publication.” 75 Fed. Reg. at 6364. The 2010 notice also provided a deadline of September 30,
10 2010 for all variance applications (for both new and existing variances). 75 Fed. Reg. at 6366.
11 As a result, on its face, the policy guidance letter and notice appeared to invalidate any existing
12 variances as of September 30, 2010, if a new completed application were not filed. The Corps’
13 notice and policy guidance letter required compliance with the ETL.

14 25. The issuance of the ETL was a final agency action and a major federal action
15 requiring the Corps to comply with NEPA prior to issuance and requiring the Corps to comply
16 with the ESA to ensure against jeopardy of listed species and adverse modification of critical
17 habitat by consulting with wildlife agencies prior to issuance.

18 26. Despite the requirements of NEPA, the Corps failed and refused to comply with
19 NEPA prior to issuing the ETL by identifying and analyzing the environmental impacts of
20 removing all the trees and shrubs and by development and consideration of a range of reasonable
21 alternatives as well as the no-action alternative to its proposed action. Such analysis by law was
22 required to have been done in writing in an EIS or at least an EA, but the Corps prepared no such
23 document under NEPA prior to issuing the ETL.

24 27. The Corps also failed and refused to initiate and complete consultation with
25 wildlife agencies, the FWS and NMFS as required by the ESA, 16 U.S.C. § 1536(a)(2), prior to
26 issuing the ETL requiring the removal of levee vegetation providing habitat essential to a
27 number of endangered species. The Corps, like all federal agencies, must comply with the

1 regulations promulgated by the FWS and NMFS, 50 C.F.R. §402.03, which provide that
2 “Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is
3 discretionary Federal involvement or control.”

4 28. The Corps belatedly and tacitly conceded the applicability of NEPA when some
5 10 months after issuing the ETL, it prepared and issued a Draft EA/Finding of No Significant
6 Impact (EA/FONSI) dated February 9, 2010 (Docket Number COE-2010-0007) for the “Policy
7 Guidance Letter – Variance from Vegetation Standards for Levees and Floodwalls” (75 Fed.
8 Reg. at 6364), which proposed to revise the process for requesting variances from the new
9 vegetation standards.

10 29. A number of federal, State, and local agencies as well as non-governmental
11 organizations (NGO’s) and individuals commented in response to the notice and specifically
12 objected to the Draft EA/FONSI. The FWS commented that: “The woody vegetation found on
13 Central Valley levees is a significant portion of the remaining riparian habitat that provides
14 nesting, foraging and cover habitat for migratory birds (including neo-tropical migrants, raptors,
15 and others), overhead cover and shade that moderates water temperatures and energy input to
16 river productivity at all trophic levels. This residual vegetation serves an important ecological
17 role essential to the survival of numerous terrestrial and aquatic animals, and plant species
18 throughout the Central Valley, including those in the Sacramento-San Joaquin Bay-Delta-a
19 region significant to the economy of the State of California. Included are federally listed
20 threatened and endangered species whose survival as well as recovery, is directly or indirectly
21 dependent on riparian habitat. Only about 5 percent of historic riparian habitat remains in the
22 Central Valley, much of which exists on man-made levees.” Comments from FWS Regional
23 Director, Pacific Southwest Region. April 22, 2010 at 4.

24 30. DWR commented that federal- or state-listed endangered or threatened species
25 that could be affected by removal of the levee vegetation include salmonids such as winter-run
26 and spring-run Chinook and Central Valley steelhead, delta smelt, Valley elderberry longhorn
27 beetle, late fall-run Chinook salmon, southern distance population segment of the North

1 American green sturgeon, long-fin smelt, giant garter snake, riparian brush rabbit, Swainson's
2 hawk, and burrowing owl. Comments of the State of California, Department of Water Resources
3 and Department of Fish and Game on the "Process for Requesting a Variance from Vegetation
4 Standards for Levees and Floodwalls" and Associated Draft Environmental Assessment/Finding
5 of No Significant Impact, Docket Number COE-2010-000, April 15, 2010 ("CA DWR/DFG
6 Comments"), Attachment at 12.

7 31. The State Water Resources Control Board commented that "The ecological
8 benefits of riparian vegetation are well documented. Riparian vegetation slows surface water
9 velocities and increases infiltration. Riparian vegetarian filters pollutants and reduces bank
10 erosion and sedimentation. Sediment-laden waters impact municipal water supplies, recreational
11 uses, and conditions for anadromous fish and other aquatic organisms. Riparian vegetation
12 provides cover and shade for aquatic species. Shade reduces water temperatures which is critical
13 for many aquatic species including salmonids." Comments from SWRCB Executive Director,
14 Dorothy Rice, April 23, 2010 at 1-2. The Board staff urged "that an Environmental Impact
15 Statement be prepared for this rule." *Id.* at 2.

16 32. There is substantial public controversy over the issue of whether vegetation has
17 an adverse effect on levee performance in California. Most of the studies that have been done
18 have concluded either that vegetation is compatible with the flood control function of levees or
19 that vegetation actually improves public safety by reducing the potential for levee erosion. CA
20 DWR/DFG Comments, April 15, 2010, Attachment at 7-10.

21 33. DWR commented to the Corps that DWR had estimated the length of levees that
22 are non-complaint with the ETL by analyzing aerial photographs. CA DWR/DFG Comments,
23 April 15, 2010, Attachment at 11. DWR estimated that the cost of complying with the ETL for
24 the 1600 miles of non-compliant project levees would be **\$7.5 billion**. *Id.* DWR pointed out that
25 "These large investments would not address other far more significant levee deficiencies, such as
26 seepage and erosion. . . . As an example, the entire remaining bond funds from Proposition 1E
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1 (Disaster Preparedness and Flood Prevention bond Act of 2006) would need to be redirected to
2 address vegetation management leaving no funding for higher priority risks.” *Id.*

3 34. The ETL makes vegetation removal the default choice. The trees and shrubs are
4 destined for removal with no identification let alone analysis of environmental issues. The
5 “variance” process which was proposed, but has not been formally adopted, does not cure the
6 lack of NEPA and ESA compliance before adopting the ETL. As DWR stated, the proposed
7 variance process is “extremely burdensome and an approved variance will likely prove
8 unattainable for many agencies. As a result, it is reasonably foreseeable that at least some of the
9 managing agencies will simply elect to remove the vegetation without pursuing additional action
10 by the Corps. In that event, under the Corps’ approach, the environmental effects of the Corps’
11 vegetation management program will **never** be considered under NEPA.” (CA DWR/DFG
12 Comments, April 15, 2010, Attachment at 38) (emphasis in original). Relying upon the ETL, the
13 Corps threatens to and will take, require, and permit actions removing vegetation on and near
14 levees in the Central Valley and other parts of California which will destroy the habitat and
15 scenic beauty of the affected rivers without preparing an EA or EIS on the program and without
16 considering alternatives or cumulative impacts based upon the analysis provided by an EA
17 and/or EIS as required by NEPA.

18 35. The Corps threatens to and will take, require, and permit actions removing
19 vegetation on and near levees in the Central Valley and other parts of California which will
20 destroy the habitat along and near streams and rivers without consulting with wildlife agencies as
21 required by the ESA.

22 36. The Corps anti-vegetation standard as described by the White Paper and adopted
23 in the ETL has changed the regulatory and environmental status quo. For example, the
24 Sacramento Area Flood Control Agency (SAFCA) was going to adopt a traditional “fix-in-
25 place” alternative for its 42 mile Natomas Basin perimeter levee system project as of 2006. Little
26 vegetation would have been removed. Because of the Corps’ new standard, SAFCA instead
27 adopted the Adjacent Setback levee alternative in 2007 after the Corps issued the White Paper.

The Corps itself stated in a project specific EIS of October 22, 2010 as well as in other documents that the adjacent levee alternative reduced the need to remove waterside vegetation to comply with Corps guidance but would result in the need for removal of several landside woodland groves and individual trees. About 94 acres of landside woodlands, and 12.5 acres of waterside woodlands have been removed because of the Corps' vegetation removal requirements between 2007 and to date for the Natomas project. About 4055 trees are being removed including about 3000 trees that have already been removed. Some of the trees removed have included Heritage Oaks, which require up to 100 years to reach maturity. The Corps' and SAFCA's project specific EIS's including the Corps' EIS of October 22, 2010 found significant environmental impacts from the tree removals required for the SAFCA project. The Corps and SAFCA confined identification and assessment of cumulative impacts to the immediate area of the Natomas project so that there has never been a programmatic NEPA identification and assessment of the cumulative impacts of the Corps' vegetation removal program. Also, because of the Corps' new vegetation removal requirements and resulting mitigation efforts the SAFCA Natomas project is costing about \$180 million more than originally projected.

16 37. There is an actual controversy between Plaintiffs and Defendants as to whether
17 the Corps' vegetation removal program adopted in the ETL is lawful, or on the other hand is the
18 unlawful product of the Corps having failed to proceed in the manner required by law including
19 the failure to prepare an EIS under NEPA and failure to ensure against jeopardy and adverse
20 modification through consultation and failed to prepare a Biological Assessment as required
21 under the ESA before adopting the ETL.

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VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(NEPA Violations)

38. Paragraphs 1 through 37 are realleged by this reference.

39. NEPA, 42 U.S.C. §§ 4321-4370, is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. NEPA directs federal agencies to take into account the environmental consequences of their proposed actions by requiring agencies prepare and circulate for public review and comment a detailed Environmental Impact Statement (“EIS”) prior to undertaking any major federal action significantly affecting the environment. 42 U.S.C. § 4332(2)(C). If, after preparing an EIS, an agency makes “substantial changes in the proposed action,” the agency must prepare a supplemental EIS (“SEIS”) analyzing the environmental implications of the changes. 40 C.F.R. § 1502.9(c).

40. Unless the environmental consequences of a proposed agency action are so minor that the action can be categorically excluded from consideration in an EIS, an agency must prepare an Environmental Assessment (“EA”) to determine whether the proposed action will have significant environmental impacts requiring preparation of an EIS. 40 C.F.R. § 1501.4. If the agency concludes on the basis of its EA that its action will not have significant impacts on the environment, the agency must document its decision and explain the reasons why the project’s impacts are insignificant in a “finding of no significant impact” (“FONSI”). 40 C.F.R. § 1508.13. Otherwise, the agency must prepare a full EIS.

41. The Corps vegetation removal program as set forth in the ETL would cause numerous significant adverse environmental impacts including direct, indirect, and cumulative ecological, aesthetic, historic, and cultural effects requiring evaluation of these effects by an EIS or at least an EA under NEPA and Council on Environmental Quality (CEQ) regulations, 40 C.F.R. § 1508.8. The environmental impacts of the ETL are significant considering both context and intensity, 40 C.F.R. § 1508. 27, and therefore preparation of an EIS was required. Some significant impacts of the ETL include: the nationwide context of the ETL and its long term

1 effects on riparian area nationwide and throughout California, 40 C.F.R. § 1508.27(a); the
2 intensity of the scientific controversy over removing trees from the levees, 40 C.F.R. §
3 1508.27(b)(4); the cumulative nature of the impacts of removing trees from levee areas around
4 the country and from 1600 miles of levees in California, *id.* § 1508.27(b)(7), the destruction of
5 the last remaining significant scientific, cultural, and historical resources made up by the
6 surviving remnant of riparian habitat, *id.* § 1508.27(b)(8), removal of riparian habitat adversely
7 affecting endangered and threatened species, *id.* § 1508.27(b)(9), and threatening violations of
8 laws including the ESA and NEPA by destruction of the vegetation, *id.* § 1508.27(b)(10).

9 42. The Corps levee vegetation removal program as set forth in the ETL is a major
10 federal action requiring NEPA compliance including preparation of an EA and an EIS under 42
11 U.S.C. § 4332. A NEPA environmental document must be prepared for this new, broad Corps
12 program pursuant to 40 C.F.R. §§ 1502.4, 1508.18(a) and (b), and 1508.23.

13 43. NEPA compliance including EIS preparation must by law take place at the
14 earliest possible time to insure that planning and decisions reflect environmental values. 40
15 C.F.R. §§ 1501.2, 1502.5.

16 44. The Corps has violated NEPA by failing to prepare an EIS or even an EA on the
17 ETL and the vegetation removal program and also by taking action before issuing a “record of
18 decision” in accordance with the NEPA process. 40 C.F.R. § 1506.

19 45. The vegetation removal program and ETL are final agency actions and the
20 decision to adopt the ETL was arbitrary and capricious because, *inter alia*, it was not based
21 upon, guided by, or even accompanied by adequate environmental review in an EA or EIS.

22 46. The Corps has further violated NEPA by *inter alia* improperly segmenting the
23 vegetation management program, by a truncated project description, and by avoiding preparation
24 of the required programmatic EIS to consider such basic and profound issues as:

- 25 (a) The likelihood that the removal of all vegetation from the levees will
26 accomplish the stated goals of effective flood control and whether other
27

1 alternatives or the “no action” alternative could accomplish the same goals
2 as well or better;

3 (b) the environmental impacts of removal of all vegetation from levees on
4 resources including, but not limited to, endangered species and habitats,
5 and water quality, and the costs and benefits of alternatives to vegetation
6 removal;

7 (c) program alternatives ranging from the no action alternative—leaving
8 vegetation in place—to such other alternatives as making decisions on
9 consideration of regional or site-specific factors including the Central
10 Valley situation where most of the surviving riparian forests are on or near
11 the levees;

12 (d) the cumulative impacts of removing the vegetation from levees nationally
13 including Washington State where such removal appears to face similar
14 levels of opposition as is true here in California;

15 (e) the cumulative impacts of removing vegetation from about 1600 miles of
16 levees in California;

17 (f) and whether the costs of vegetation removal together with the costs of any
18 required mitigation measures necessary to reduce the adverse impacts on
19 the environment and endangered species and habitats are so enormous that
20 they point to development and selection of a different alternative for
21 California than vegetation removal.

22 47. The Corps’ *post hoc* issuance of a 3-page draft EA/FONSI related only to the
23 policy guidance letter and variance process is wholly inadequate and does not in any way cure
24 the Corps’ failure to comply with NEPA with respect to the vegetation removal program as a
25 whole. The document contains no environmental analysis whatsoever. The draft EA/FONSI
26 does, however, constitute an admission by the Corps that it has been taking action that requires it
27 to comply with NEPA.

1 would not likely adversely affect ESA-listed species or their critical habitat prior to adopting the
2 vegetation removal program and issuing the ETL which not only may, but will, adversely affect
3 listed species and designated critical habitats. 16 U.S.C. § 1536(a)(2) and 50 C.F.R. §§ 402.11-
4 14.

5 54. Defendants adoption of the vegetation removal program and ETL without
6 initiating and completing the required consultation with FWS or NMFS constitutes agency action
7 not in accordance with law in violation of the APA, 5 U.S.C. §§ 702,704, and 706(a)(2), the
8 ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. §§ 402.11-402.14.

9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiffs request that this Court enter judgment against Defendants as
11 follows:

- 12 A. Declaring, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, that
13 Defendants' vegetation removal program and ETL are not in accordance with the law,
14 specifically: NEPA, 42 U.S.C. § 4332(2)(C); the ESA, 16 U.S.C. § 1536(a)(2); the
15 APA, 5 U.S.C. §§ 702,704, and 706(a)(2); and applicable federal regulations,
16 including 40 C.F.R. § 1501.4, 40 C.F.R. § 1506; and 50 C.F.R. §§ 402.11-402.14.
- 17 B. Ordering Defendants to comply with NEPA.
- 18 C. Ordering Defendants to comply with the ESA to ensure against jeopardy to listed
19 species and adverse modification of critical habitat by initiating and completing
20 formal consultation with the FWS and/or NMFS and preparing a Biological
21 Assessment concerning the impacts of vegetation removal of levees on listed species
22 in California.
- 23 D. Vacating and setting aside ETL 110-2-571 and remanding the levee vegetation
24 management program to Defendants for consideration pursuant to and in compliance
25 with NEPA and the ESA.
- 26 E. Enjoining Defendants from taking any action requiring California State agencies,
27 local agencies, counties, cities or any other levee operators to remove vegetation from

1 levees until the Defendants have prepared an EIS pursuant to NEPA and consulted
2 with federal wildlife agencies and prepared a Biological Assessment pursuant to the
3 ESA.

4 F. Awarding Plaintiffs their costs and reasonable attorney's fees incurred in connection
5 with this dispute, as provided for by the ESA, 16 U.S.C. § 1540(g) and the Equal
6 Access to Justice Act, 28 U.S.C. § 2412.

7 G. Granting any other such relief as the Court deems just and proper.

8
9 Respectfully submitted,

10 Dated: June 20, 2011

/s/ Lisa T. Belenky

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