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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BESS BAIR: et al.,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF TRANSPORTATION and MALCOLM DOUGHERTY in his official capacity as Director or the California Department of Transportation,

Defendants.

Case No. 3:14-CV-03422 WHA

DEFENDANTS STATE OF CALIFORNIA AND MALCOLM DOUGHERTY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT UNDER FED.R.CIV.P. 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 8, 2015
Time: 8:00 a.m.
Ctrm.: 8
Judge: William Alsup

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NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 8, 2015, at 8:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 8 of the above-entitled Court, at 450 Golden Gate Avenue, 17th Floor, San Francisco, California, Defendants California Department of Transportation and Malcolm Dougherty (together, "Caltrans") will move to dismiss Plaintiffs' First Amended Complaint in this action against Caltrans pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is based on the following grounds, and on various grounds as more fully set forth in the Memorandum of Points and Authorities filed in support of this motion. Caltrans requests that the Court dismiss Plaintiffs' First Amended Complaint against Caltrans in its entirety pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, this Court lacks jurisdiction to hear any of the Claims for Relief alleged against Caltrans, because the action is not ripe and is moot. Furthermore, the newly-raised Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, and National Environmental Policy Act claims are barred by the statute of limitations and also should be dismissed on this ground.

This motion is based upon this Notice of Motion and Motion to Dismiss, the supporting Memorandum of Points and Authorities filed herewith, and upon such evidence and oral argument as may be presented at a hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' First Amended Complaint should be dismissed for lack of subject matter jurisdiction, as both unripe for review because the environmental process that Plaintiffs challenge is still ongoing and not yet final, and as moot because the agency determination Plaintiffs dispute has been withdrawn and the project they seek to enjoin has already been enjoined. Specifically, the California Department of Transportation ("Caltrans") has rescinded its approval of the Richardson Grove Operational Improvement Project ("Project") and withdrawn its federal Finding of No Significant Impact ("FONSI"), the federal NEPA determination at issue in this action, without which the Project cannot legally proceed. These actions are the result of the state Superior Court Writ issued on October 21, 2014, which decertified the state CEQA environmental document and enjoined Caltrans "from any and all activities related to the Project that could result in change or alteration of the physical environment" until completion of additional environmental analysis as to specified environmental impacts and Project elements, which analysis may affect the federal environmental document, actions or determinations. As a result, there is currently no Project approval in place for the Project; there is no State (CEQA) environmental clearance for the Project; the federal FONSI has been formally withdrawn; and additional environmental review is being undertaken which may affect the previous federal environmental analyses and determinations. In short, there is no "final agency action" triggering jurisdiction over Plaintiffs' claims, and for the same reasons, there are no effective remedies that Plaintiffs can seek by continuing this litigation.

Separate from the above, if dismissal of the entire action is denied, Plaintiffs' claims under the Endangered Species Act ("ESA"), Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), and newly-raised issues under the National Environmental Policy Act ("NEPA") are independently barred under the statute of limitations, as they were untimely filed more than two years after the relevant limitations period expired.

Because there is no final agency action in place and the Project is already legally enjoined from proceeding until completion of further environmental analysis which may affect the federal

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determinations at issue in this action, Plaintiffs' First Amended Complaint should be dismissed in its entirety. Alternatively, if dismissal of the entire action is denied, the Complaint should be dismissed in part as to the time-barred ESA, MSA, and newly-raised NEPA claims.

FACTS AND PROCEDURAL BACKGROUND

The Project and Environmental Review

The Richardson Grove Operational Improvement Project ("Project") would modify the curvature of a 1.1-mile segment of Highway 101 through Richardson Grove State Park in Humboldt County, to allow industry-standard Surface Transportation Assistance Act trucks to travel on the roadway without off-tracking. (First Am. Compl., ECF No. 21 ("FAC") ¶¶ 53, 63, 66.)

On May 18, 2010, pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000, *et seq.*, and Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)"), codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, Caltrans published its joint Final Environmental Impact Report / Environmental Assessment and Programmatic Section 4(f) Evaluation ("Final EA") disclosing and analyzing the potential environmental effects of the Project. (FAC ¶ 94.) Based on the analyses contained in the Final EA, Caltrans determined on May 18, 2010, that the Project would have no significant impact on the environment ("Finding of No Significant Impact," or "FONSI"), and approved the Project. (FAC ¶ 94.)

On December 19, 2011, the Federal Highway Administration published a "Notice of Final Federal Agency Actions on Proposed Highway in California" ("Final EA/FONSI Notice of Limitations") in the Federal Register pursuant to 23 U.S.C. § 139(*l*)(1), providing a time period of 180 days in which claims relating to the EA/FONSI and other approvals could be brought. (Declaration of Stacy Lau, Nov. 19, 2014, "Lau Decl." Ex. 1)[1] The notice explicitly encompassed, but was not limited to, claims under the National Environmental Policy Act, the Endangered Species Act, the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.*, and Section 4(f). (*Id.*) The 180-day period expired on

[1] 23 U.S.C. § 139(*l*), entitled "Efficient environmental reviews in project decisionmaking," has since been amended to set forth a 150-day statute of limitations on claims challenging federal approval of a highway or capital transportation project after publication of notice in the Federal Register.

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1 June 18, 2012. (*Id.*)

2 ***Bair I* Litigation**

3 On September 27, 2010, Plaintiffs filed an action against Caltrans in the matter of *Bair v.*
4 *California Department of Transportation*, Case No. 3:10-CV-04360-WHA ("*Bair I*"), challenging
5 Project approval and the Final EA and making various assertions under NEPA, the Wild and Scenic
6 Rivers Act, and Section 4(f). Plaintiffs' Complaint in *Bair I* did not include any claim under the ESA
7 or MSA, nor did it mention threatened salmon or steelhead trout. (Case No. 3:10-cv-04360-WHA,
8 Compl., ECF No. 1.)

9 The parties filed cross-motions for summary judgment fully briefing all of the claims raised by
10 Plaintiffs. In this Court's Order of April 4, 2012, the Court granted Plaintiffs' motion for summary
11 judgment as to the Project's impacts to redwood trees, as specified in the Order. *Bair v. California*
12 *State Dept. of Transp.*, 867 F.Supp.2d 1058, 1067 (N.D.Ca. 2012). The Court deferred decision as to
13 the other issues raised by Plaintiffs until the next administrative action was taken on the Project. *Id.* at
14 p. 1068.

15 **Supplement to the Final EA**

16 Pursuant to the Court's Order, Caltrans conducted additional surveys and analyses of redwood
17 tree impacts, and on September 18, 2013, issued a Supplement to the Final Environmental Assessment
18 ("Supplement") relating to the court-ordered redwood tree analysis; the updated Supplement also
19 included marbled murrelet bird surveys to show there were none in the area, and a minor change to a
20 barrier rail design. (FAC ¶¶ 109, 111.) Caltrans took public comments on the Supplement from
21 September 21, 2013, to October 21, 2013 (FAC ¶ 113.). Comments pertaining to the issues in the
22 Supplement were evaluated and responses thereto were published on January 23, 2014. (FAC ¶¶ 40,
23 119)

24 On January 24, 2014, Caltrans issued a NEPA/CEQA Re-Validation/Re-Evaluation ("Re-
25 Validation"), finding that upon consideration of the Supplement, the original FONSI remained valid.
26 (FAC ¶ 120.) Other than the specific issues addressed in the Supplement and Re-Validation, there were
27 no changes to the original EA. (FAC ¶ 111). On February 26, 2014, following Caltrans' decision that
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the FONSI remained valid, the Federal Highway Administration published a "Notice of Statute of Limitations on Claims; Notice of Final Federal Agency Actions on Proposed Highway in California" ("Supplement/Re-Validation Notice of Limitations") in the Federal Register. (FAC ¶ 40; Lau Decl., Ex. 2.) The Notice as to the Supplement/Re-Validation set forth a 150-day statute of limitations on claims pursuant to 23 U.S.C. § 139(*l*)(1), which expired on July 28, 2014. (Lau Decl. Ex. 2.)

New Claims in *Bair II* Litigation

On July 28, 2014, the final date set forth in the Supplement/Re-Validation Notice of Limitations, Plaintiffs filed a new Complaint in the current action ("*Bair II*") reasserting claims brought in *Bair I*, on which the Court had deferred adjudication, challenging the Supplement and Re-Validation relating to the new redwood tree analysis, and additionally asserting a new Magnuson-Stevens Act claim and entirely new NEPA issues which related to original, unchanged aspects of the EA but had not been raised in *Bair I*. (Compl. ECF No. 1.) In addition, on October 8, 2014, Plaintiffs filed a First Amended Complaint adding a new Endangered Species Act claim which had not been asserted in *Bair I* or the original *Bair II* Complaint. (FAC ¶¶ 177-183.) The First Amended Complaint thus raises the following new claims, which were not raised during *Bair I*:

- Endangered Species Act
- Magnuson-Stevens Act
- Additional NEPA issues regarding:
  - Effects on listed fish species;
  - Effects to old-growth redwoods due to excavation of lead-contaminated soil;
  - Effects on the forest ecosystem from disturbing the road system;
  - Additional alternatives (FAC 42, 44.)

State Court Writ of Mandate, Decertification of State (CEQA) EIR, Rescission of Project Approval, and Withdrawal of FONSI

Concurrent with *Bair I*, Plaintiffs filed a Petition for Writ of Mandate challenging the approved Project and Final EA / Environmental Impact Statement in State Superior Court based on CEQA on June 17, 2010. The State Superior Court denied the Petition in full, and Plaintiffs appealed the Superior

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Court's decision. Upon review, the appellate court reversed the Superior Court's decision in part, and ordered additional analysis as to redwood tree impacts and aspects of the Project elements relative to mitigation pursuant to CEQA. *Lotus v. Dept. of Transportation* (2014) 223 Cal.App.4th 645, 658.

On June 26, 2014, due to the state court's decision in *Lotus*, Caltrans rescinded its approval of the Project and subsequently publicly posted notice of the rescission to the State Clearinghouse.[2] (Lau Decl. Ex. 3.) On October 21, 2014, the Superior Court, on remand, entered a Judgment and a Writ ordering Caltrans to set aside Project approval and certification of the state environmental document, and enjoining all Project-related activities that could result in change or alteration of the physical environment until Caltrans performs additional environmental analysis as set forth in the *Lotus* opinion. (Lau Decl. Ex. ¶¶ 4, 5.) The writ was perfected and served on Caltrans on November 18, 2014. On November 17, 2014, due to the state court's directive to perform further environmental review, which may affect the existing federal document, actions and/or determinations, Caltrans formally withdrew its federal FONSI and published notice of the withdrawal with the State Clearinghouse. (Lau Decl. Ex. 6.) In addition, though not legally required, on November 19, 2014, Caltrans also submitted its formal rescission of the FONSI to FHWA for posting in the Federal Register. (Lau Decl. Ex. ¶¶ 7, 8.)

Immediately upon Caltrans' decision to withdraw the FONSI, State's Counsel contacted Plaintiffs and requested that they voluntarily dismiss this action as there are no federal or state environmental clearances, no Project approval, and the Project is enjoined. (Lau Decl. Ex. 9.) Plaintiffs declined to do so on the grounds that there was no information as to the rescission of the FONSI being posted in the Federal Register. (Lau Decl. Ex. 12.) Although the posting of the withdrawal notice with the State Clearinghouse was sufficient public notice of the rescission, Caltrans took the additional step of having the rescission of the FONSI submitted for posting in the Federal Register, informed Plaintiffs of the submission, and requested again that Plaintiffs dismiss the action. (Lau Decl. Ex. 13.) Caltrans has not received a response, necessitating this motion.

As the Project now stands, there is no Project approval, no certified CEQA document, no federal

[2] Submission to the State Clearinghouse, a division of the Governor's Office of Planning and Research, is the appropriate method by which to post environmental documents for public review. *See* Cal. Pub. Res. Code §§ 21080.4(a), 21161, 21108(a), and 21082.1.

NEPA finding, determination, or action, additional environmental analysis which may affect the federal document and other environmental determinations and actions is being undertaken, and a state Superior Court injunction prohibits all Project activity that could change or alter the physical environment until that further environmental review is completed.

THIS MOTION TO DISMISS IS PROPER UNDER RULES 12(b)(1) and 12(b)(6)

Caltrans moves to dismiss all of Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

A motion to dismiss on ripeness and mootness grounds pertains to the Court's subject matter jurisdiction and is properly raised in a Rule 12(b)(1) motion to dismiss. Fed.R.Civ.P. 12(b)(1); *see St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Moreover, as the statute of limitations for suits against the federal government operates to narrow the waiver of sovereign immunity, failure to sue the United States within the limitations period operates to deprive the federal courts of jurisdiction. *See Wild Fish Conservancy v. Salazar*, 688 F.Supp.2d 1225, 1237 (E.D.Wa. 2010), citing *United States v. Williams,* 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (other citations omitted).[3] Thus a statute of limitations challenge to claims against the United States is properly brought in a Rule 12(b)(1) motion.

When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001) (abrogated on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S.Ct. 1181, 1186, 175 L.Ed.2d 1029 (2010)). The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994).

In deciding a motion to dismiss for lack of subject matter jurisdiction, the Court may review matters outside the complaint in order to resolve jurisdictional fact issues: a "Rule 12(b)(1) motion can

[3] Pursuant to NEPA delegation, Caltrans stands in the shoes of the United States for purposes of jurisdiction. (FAC ¶¶ 40, 42.)

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attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." *St. Clair v. City of Chico*, 880 F.2d at p. 201 (citations omitted).

Caltrans also brings its motion to dismiss Plaintiffs' time-barred ESA, MSA, and newly-raised NEPA claims under Rule 12(b)(6). Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A statute of limitations defense, such as the one asserted here, is properly raised by a motion to dismiss accompanied by affidavits. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (court not bound by pleadings in deciding motion to dismiss under statute of limitations). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). But while a court must take all allegations of material fact in the complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "[C]onclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins v. Lockyer,* 568 F.3d 1063, 1067 (9th Cir. 2009).

THE FIRST AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

The First Amended Complaint should be dismissed in its entirety because the claims asserted are not justiciable, where absent project approval and a FONSI, there is no final agency action subject to judicial review and no case or controversy that can be adjudicated.

Article III of the United States Constitution requires that parties seeking to invoke the power of federal courts allege an actual case or controversy. *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The doctrines of ripeness and mootness, which are embedded in Article III's "case or controversy" requirement, promote the important principle that courts should only adjudicate

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cases where there is a "genuine need to resolve a real dispute" among the parties, and where the court can grant effective relief. *Western Oil and Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1290 (9th Cir. 1990); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016-1017 (9th Cir. 2012); Wright, Miller, and Cooper, 13A *Federal Practice & Procedure*, § 3532.1 (2d. ed. 1984), at p. 114-115.

An action is unripe when the issues are not sufficiently concrete for judicial resolution. *See Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n,* 659 F.2d 903, 915 (9th Cir.1981), *aff'd sub nom. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). An action is moot when "'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Northwest Environmental Defense Center v. Gordon,* 849 F.2d 1241, 1244 (9th Cir.1988) (quoting *Murphy v. Hunt,* 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam)). The ripeness inquiry asks "whether there yet is any need for the court to act," while the mootness inquiry asks "whether there is anything left for the court to do." Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3532.1 (2d ed. 1984).

As applied to the court's review of agency actions, the purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), *abrogated on other grounds*, *Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The doctrine protects courts from the situation where, "depending on the agency's future actions to revise [a decision] or modify the expected methods of implementation, review … may turn out to have been unnecessary." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

The requirement for a "final agency action for which there is no other adequate remedy in court," set forth by the Administrative Procedure Act ("APA"), is intertwined with the doctrine of ripeness and is a jurisdictional limit on judicial review of this action. 5 U.S.C. § 704; *Sierra Club v.*

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U.S. Army Corps of Engineers, 446 F.3d 808, 813 (8th Cir. 2006); Mandelker §4:28, p. 180. "Agency action" is defined in the APA as including "the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 62, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). Final agency action forming the basis for the court's jurisdiction must mark the consummation of the agency's decisionmaking process and cannot be of a tentative or interlocutory nature; and the action must be one by which rights or obligations have been determined, or from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

As applied to NEPA, it is well-established that agency determinations are not ripe if the agency has not made a final decision on a project, because the NEPA claims can only be evaluated in light a precise and concrete final recommendation.[4] *Sierra Club v. U.S. Army Corps of Engineers*, 481 F.Supp. 397, 399 (S.D.N.Y. 1979), citing *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975); Mandelker, § 4:28, p. 184. In *National Wildlife Federation v. Goldschmidt*, for example, the court found preliminary approval of Final Environmental Impact Statements for two highway sections, conditioned on approval of another highway segment, was not ripe for review, as this approval "clearly is not a signal that construction or land acquisition is about to go forward." 504 F.Supp. 314, 324-27 (D.Conn. 1980); *see also Wyoming Outdoor Council*, *supra*, 165 F.3d 43, 49-50 (D.C.Cir. 1999) (NEPA claim not ripe where leases had not been issued); *Grand Canyon Air Tour Coalition v. F.A.A.*, 154 F.3d 455, 472 (D.C. Cir. 1998) (EA and reevaluation not ripe for review pending finalization of flight routes and corridors); *Eastern Connecticut Citizens Action Group v. Dole*, 638 F.Supp. 1297, 1299-1300 (D.Conn. 1986) (not ripe where Final EIS

[4] This motion is not limited to Plaintiffs' NEPA claims, as all of Plaintiffs' claims are barred as unripe on the grounds that there is no final agency action. Final agency action is required for all of Plaintiffs' claims to be justiciable. Significantly, Plaintiffs brought the NEPA, MSA, and Section 4(f) claims pursuant to the APA (FAC ¶ 175). With respect to Plaintiffs' ESA claim, there are additional grounds that it is not ripe, in that Caltrans has not taken any "action" that "may affect" a listed species or habitat. *See Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 482 (D.C. Cir. 2009) (ESA claim not ripe where agency's completion of first stage of leasing program "does not require any action or infringe on the welfare of animals"); *Wyoming Outdoor Council v. Bosworth*, 284 F.Supp.2d 81, 91-93 (D.D.C. 2003) (ESA claim not ripe where agency's issuance of lease was uncertain to result in surface disturbing activities).

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approved, but permits still needed to be obtained); *Sierra Club*, 481 F.Supp. at p. 399.

Here, there is no Project approval, no FONSI or other NEPA finding, or other final action or federal determination whatsoever on the part of Caltrans establishing that the federal environmental decision-making process on the Project is final or that the case is ripe for adjudication. As previously discussed, judicial review is appropriate only where an agency has made a final decision on a project. Here, on June 26, 2014, Caltrans rescinded its approval of the Project based upon the State Court of Appeal's decision ordering entry of a Writ against Caltrans and requiring additional environmental analysis as to redwood tree impacts and aspects of the project elements relative to mitigation pursuant to CEQA. (Lau Decl. Ex. 3.) This is reflected in the Writ of Mandate issued by the Superior Court on October 21, 2014, ordering rescission of Project approval and de-certification of the CEQA EIR for the Project. (Lau Decl. Ex. 3, 5). Without Project approval, the Project cannot proceed and this case has not "reached that 'critical stage' where an 'irreversible and irretrievable commitment of resources' has occurred that will adversely affect the environment." *Sierra Club v. U.S. Dept. of Energy*, 825 F.Supp.2d 142, 154-55 (D.D.C. 2011) (citations omitted); *see also Center for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009).

In addition, here, not only is there no Project approval, but the FONSI has been rescinded as well, further demonstrating the lack of finality of agency action for adjudication. (Lau Decl. Ex. 6.) The FONSI is the culmination of an agency's NEPA decisionmaking, and is a final agency action for purposes of NEPA review. Mandelker, § 4:28, p. 184; *Sierra Club*, *supra*, 446 F.3d at pp. 815-16. Indeed, NEPA regulations promulgated by the Council for Environmental Quality ("CEQ") provide that judicial review should not occur before an agency has filed a Final EIS or Final FONSI, or takes action that will result in irreparable injury. 40 C.F.R. § 1500.3. In fact, in the absence of a FONSI or other final disposition, courts lack the subject matter jurisdiction to hear a NEPA claim, because the agency has not yet finished its procedural inquiry into the environmental impact of a project. *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007).

On November 17, 2014, following issuance of the Superior Court Writ enjoining the Project based on the *Lotus* decision, and requiring Caltrans to perform further environmental analysis as to old

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growth redwood trees and other elements relative to mitigation, Caltrans withdrew its FONSI In recognition that this additional environmental analysis may affect the previous federal environmental documents and determinations. *Lotus*, *supra*, 223 Cal.App. 4th at 658-59; (Lau Decl. Ex. 6.) The result of this is that there is no final federal environmental determination in place and Caltrans must issue a new federal finding before completing the NEPA process or approving the Project. Further, while this additional analysis is pending, Caltrans is enjoined from any Project-related activity that "could result in change or alteration of the physical environment" until the additional analysis is completed and the parties engage in further state court proceedings on the Writ. (Lau Decl. Ex. 5.)

Dismissal of Plaintiffs' environmental challenge on ripeness grounds in these circumstances is consistent with other dismissals where an agency is undergoing further analysis and where there is no valid final agency decision to be challenged. For instance, in *Klamath Siskiyou Wildlands Center v. U.S. Bureau of Land Management*, 2007 WL 845915*5 (D.Or. Mar. 16, 2007), where the agency withdrew its decision and FONSI for a timber sale, the court found the challenged agency action was not final and dismissed the action in light of the agency's ongoing process of additional analysis and reconsideration in light of present information. The court reasoned that: "Judicial intervention at this stage would interfere with the [agency's] functioning by denying them the opportunity to correct any mistakes in the environmental analysis of the area in question and to apply their expertise in deciding whether to offer the sale. Judicial intervention at this stage would burden the courts with unnecessary lawsuits and could result in piecemeal review…" *Id.* Caltrans is similarly revisiting its environmental analyses here, and piecemeal litigation over a non-existent FONSI is similarly premature and, as such, serves no judicial purpose. *See also, Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 245 (5th Cir. 2006) (where after adopting EA and FONSI, an agency reopened its NEPA process to conduct further study, case not ripe because adjudication at that time would be based on an incomplete administrative record); *Los Alamos Study Group v. U.S. Dept. of Energy,* 794 F.Supp.2d 1216, 1227 (D.N.M. 2011) (case not ripe while Supplemental EIS process was ongoing). Similarly here, the lack of a FONSI marking agency final action and approval, and the ongoing environmental review which may affect the previous environmental determinations, establishes that the case is not ripe for

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1 determination.

2 Moreover, because all Project-related activity that could modify the physical environment has
3 been enjoined until the additional environmental analysis is complete, there is no "concrete" action at
4 this time that could even potentially result in any legal consequences to Plaintiffs. *Abbott*
5 *Laboratories*, *supra*, 387 U.S. at pp. 149-49.

6 Furthermore, a consideration of the other factors relevant to justiciability weighs heavily in
7 favor of dismissal here. In addition to the requirement for a "final agency action," the Supreme Court
8 has recognized three other factors in determining ripeness: (1) whether delayed review would cause
9 hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further
10 administrative action; and (3) whether the courts would benefit from further factual development of
11 the issues presented. *Ohio Forestry Inc. v. Sierra Club*, *supra,* 118 S.Ct. at 1670, *quoting, Abbott*
12 *Laboratories v. Gardner*, 387 U.S. at 149, 87 S.Ct. 1507. All three support dismissal here.

13 First, a delay in review would not cause any hardship to Plaintiffs because another challenge
14 could be filed when the new federal environmental determinations are made and the Project is
15 approved, and more appropriately so, as a final agency action or determination would then have taken
16 place and would properly be at issue. This is "not a case in which delay works at all against the
17 interest of [Plaintiffs]." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412,
18 418 (6th Cir. 2004).

19 Second, judicial review at this time would be prejudicial to Caltrans' agency actions and the
20 environmental processes at issue. It would unduly interfere with the pending environmental review
21 mandated by the state *Lotus* decision, and would force Caltrans to litigate and defend a nonexistent,
22 hypothetical FONSI that has already been withdrawn, based on an administrative record that has been
23 reopened. Law and practicalities dictate that Caltrans complete the environmental analysis ordered by
24 the *Lotus* court, make any resulting new federal determinations as necessary and make a new NEPA
25 finding on the Project without concurrently engaging in litigation over an agency determination that is
26 no longer in place. *See Citizens Against Pellissippi Parkway Extension, supra,* 375 F.3d at p. 416
27 (agency entitled to opportunity to reconsider its decision in light of withdrawn FONSI).

28

Third, engaging in litigation over a decision that Caltrans has not yet made would not only be prejudicial to Caltrans, but also would be an unnecessary and inefficient use of judicial, attorney, party, and public resources. Courts and parties should not engage in litigation, only to find that judicial review was wasteful in light of the agency's future action to revise a decision. *See Ohio Forestry Ass'n*, *supra*, 523 U.S. at p. 736. Here, the environmental review process will result in a new NEPA determination. The interests of the Court and parties are served by avoiding the unnecessary entanglement of all in abstract disagreement over decisions that Caltrans either has not yet made or has withdrawn. *Abbott Laboratories*, *supra*, 387 U.S. at pp. 148-49.

Additionally, for the same reasons that Plaintiffs' case is not ripe, Plaintiffs' claims are moot because there is no effective relief that can be granted through litigation. "A claim is moot if it has lost its character as a present, live controversy." *Grand Canyon Trust*, *supra*, 691 F.3d at p. 1016 (citation omitted). "If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed." *Id*. at pp. 1016-1017. A driving rationale behind the mootness doctrine is to prevent a court from "consum[ing] its limited time, or the means and substance of the parties, by resolving a dispute that is no longer a case or controversy." *U.S. v. R.J. Reynolds Tobacco Co.*, 416 F.Supp. 316, 323 (D.N.J. 1976), and this principle applies here.

Here, the court cannot grant relief sought by Plaintiffs because they already have the relief they seek, namely, the vacation of project approval and the FONSI, without which the Project cannot proceed. These actions have already occurred. The Project approval has been vacated, Caltrans has withdrawn the FONSI, the Project has been enjoined, and additional environmental analysis is being undertaken, with any state and federal environmental determinations and subsequent Project approval to be made in accordance therewith. The government activity which Plaintiffs challenge has "evaporated" and is not justiciable. *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir. 1989); *see also Burton v. Norton*, 308 F.Supp.2d 16, 17-18 (D.D.C. 2004) (NEPA complaint dismised as moot where federal agency had withdrawn the challenged EA and FONSI); *Aluminum Co. of America v. Bonneville Power Admin.*, 56 F.3d 1075, 1078 (dismissing case where challenged Record of Decision had expired); *Northwest Environmental Defense Center v. Allen*, 2007 WL 1746333*2 (D.Or.

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2007) (challenge to a biological opinion moot where the biological opinion had been withdrawn to comply with a Ninth Circuit ruling). Because Caltrans has withdrawn the challenged FONSI and Project approval, and has been enjoined from proceeding with Project-related activities that may modify the environment, there is no longer any effective purpose to the NEPA remedies that Plaintiffs seek. No case or controversy regarding Plaintiffs' NEPA claims exists for review.

In sum, the lack of a FONSI or other NEPA finding means there is no "final agency action" for review, and this along with consideration of the *Ohio Forestry* factors compels dismissal of this entire case.

THE ENDANGERED SPECIES ACT, MAGNUSON-STEVENS ACT, AND NEWLY-RAISED NEPA CLAIMS SHOULD BE DISMISSED AS UNTIMELY.

Even if the entire action is not dismissed as unripe or moot, Plaintiffs' newly-asserted ESA, MSA, and new NEPA claims are all barred by the statute of limitations because they were not brought in the *Bair I* action in 2010, and Plaintiffs are raising them for the first time ***more than two years*** after the applicable statute of limitations had run. The relevant statute of limitations is set forth in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"). Pub.L. No. 109-59, 119 Stat. 1865 § 6002(*l*), (codified at 23 U.S.C. § 139(*l*) (2006)),[5] which at the relevant time provided that all claims "arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway…" are barred unless they are "filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license or approval is final pursuant to the law under which the agency action is taken." 23 U.S.C. § 139(*l*)(1); *see also Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990) ("Publication in the Federal Register is legally sufficient notice to all interested parties regardless of actual knowledge or hardship resulting from ignorance").

Here, the Federal Highway Administration published in the Federal Register the Notice of

[5] SAFETEA-LU has since expired and been replaced by the Moving Ahead for Progress in the 21st Century Act in 2012, which establishes a 150-day statute of limitations for federal claims. 23 U.S.C. § 139(l) (2012). SAFETEA-LU sets forth the relevant statute of limitations here, since that was the law in effect at the time the Final EA/FONSI Notice of Limitations issued.

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Limitations on Claims ("Final EA/FONSI Notice of Limitations") as to Project approval and all other federal agency environmental decisions on the Project on December 19, 2011. (Lau Decl. Ex. 1.) This Notice explicitly stated that, "A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 18, 2012." *Id.* The Notice encompassed claims under all laws under which the agency's actions were taken at that time, including but not limited to NEPA and the ESA, and further encompassed the pertinent agency approvals made as of that date, including certification of the May 2010 Final EA and FONSI. *Id.*

Notwithstanding the above, Plaintiffs now seek to bring an ESA, MSA, and additional claims under NEPA, more than two years after the statute of limitations period expired. These new claims are not among those that this court explicitly left open for review at a later date in its April 4, 2010, opinion, but are raised under entirely distinct statutes and based on different factual allegations. The statute of limitations, which is a condition to the waiver of sovereign immunity, must be strictly construed here, *Native Songbird Care and Conservation v. LaHood*, 2013 WL 3355657 *4 (N.D.Ca. July 2, 2013), citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 94 (1990), and Plaintiffs should not be allowed to bootstrap new, time-barred claims to those that this Court previously left open for review.

1. <u>The Endangered Species Act Claim Is Barred Under The Statute of Limitations.</u>

Plaintiffs' ESA claim is a challenge to Caltrans' determination, disclosed in the May, 2010, Final EA, that the Project would have "No Effect" on coho salmon, Chinook salmon, or Northern California steelhead, and consequently, that consultation with the National Marine Fisheries Service ("NMFS") under the ESA was not required. (FAC 178-183); *See S.W. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447-48 (9th Cir. 1996) (where agency determines action will have no effect on listed species, consultation not required).

As discussed below, this claim is time-barred. Plaintiffs filed it on October 8, 2014, more than two years after the limitations period set forth in the Final EA/FONSI Notice of Limitations had expired on June 18, 2012.

The Final EA/FONSI Notice of Limitations, which explicitly included a time limitation on claims brought under the ESA, set forth the operative deadline here, because the facts allegedly

supporting Plaintiffs' ESA claim accrued with the publication of the Final EA and issuance of the FONSI on May 18, 2010. Specifically, the May 2010 Final EA disclosed the "No Effect" determinations that Plaintiffs now challenge. (Lau Decl. Ex. 14.) Yet Plaintiffs failed to bring their ESA claim until October 8, 2014, more than four years after they had notice of the "No Effect" determinations, and more than two years after the statute of limitations for claims under the ESA set forth in the Final EA/FONSI Notice of Limitations expired. Plaintiffs are time-barred from asserting the ESA claim now.

Moreover, the more recent Supplement and Re-Validation do not operate to re-open the statute of limitations on Plaintiffs' ESA claim which arose from the analyses and determinations in the Final EA and accrued at the time the Final EA was certified. The decision of *Highland Village Parents Group v. United States Federal Highway Administration*, 562 F.Supp.2d 857 (E.D. Tex. 2008) is instructive in this regard. In that case, the court found a challenge to an agency's air toxics analysis, or lack thereof, in its EA to be time-barred. *Id*. at p. 866. The plaintiffs argued that the air toxics issues had been discussed and this reopened by a later agency reevaluation of the EA, and that therefore, their challenge to the EA, which was brought within the statute of limitations pertinent to the reevaluation, was timely. *Id*. at pp. 863-864. However, the court rejected this argument, reasoning that plaintiffs could have attacked the lack of air toxics analysis when the EA was first issued, as the alleged problems with the EA arose well before the EA was adopted. *Id*. at p. 864. The court concluded that plaintiff's challenge to the original EA based on the more recent reevaluation was an attempted end run around the statute of limitations, and that it did not provide a basis for reopening the issues created by the proposed construction project. *Id*.

The rationale and result apply here. The basis of Plaintiffs' ESA challenge was the "No Effect" determination disclosed in the May, 2010, EA and which accrued then. No facts or environmental analysis as to that claim have changed. To the contrary, as Plaintiffs themselves acknowledge, the Supplement and Re-Validation did not raise, discuss, or analyze any facts or issues giving rise to Plaintiffs' ESA claim regarding protected fish species, but focused instead on Caltrans' revised tree analysis and additional information about marbled murrelet birds (FAC ¶¶ 7, 110-112, 118, 119);

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1 therefore, any argument that the more recent January, 2014, Supplement and Re-Validation reopen the
2 time period for challenges to unrelated issues that accrued ***almost four years earlier*** in the May, 2010,
3 Final EA, is, as in *Highland Village*, a bald attempt at an end run around the statute of limitations. As
4 the court in *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997), stated, the position that a later
5 environmental decision reopens the statute of limitations for actions taken by the agency with respect to
6 an earlier EIS and ROD simply "defies logic." *See also Native Songbird Care and Conservation*, 2013
7 WL 3355657 *5*, supra* (no serious question as to the lack of merit to plaintiffs' claim that they could
8 challenge an EIS years after limitations period expired, based on allegation that supplemental EIS
9 should have been prepared). Here, Plaintiffs' claim under the ESA arose directly from the analyses and
10 determinations in the Final 2010 EA. It would be counter to policy and law for the Supplement and Re-
11 Validation to reopen the statute of limitations as to Plaintiffs' unrelated ESA claim or as to any other
12 issues that accrued in the earlier EA/FONSI and remain unchanged and were not the subject of the
13 Supplement and Re-Validation.

14 Nor is there any ongoing agency action to extend the limitations period. In order for such an
15 extension to be appropriate, it is not sufficient for Plaintiffs to merely identify an "ongoing agency
16 action" based on discretionary control or authority; they must identify an ongoing "affirmative act."
17 *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012); *Pacific Rivers*
18 *Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (Land Resource Management Plans represent
19 ongoing agency action, as they establish forest-wide and area-specific standards and guidelines to
20 which future projects must adhere, and set forth criteria for harvesting resources); *Center for Biological*
21 *Diversity v. E.P.A.*, 2013 WL 1729573 *22 (N.D. Ca. Apr. 22, 2013). An ongoing failure to exercise
22 agency discretion is not an "affirmative act." *Western Watersheds Project v. Matejko*, 468 F.3d 1099,
23 1102. Thus, here, the mere continued existence of the "No Effect" determination, and alleged failure to
24 consult, which do not directly trigger, permit, authorize, or otherwise lead to any possible effect on
25 listed species, is not an "affirmative act" sufficient to extend the statute of limitations.

26 Lastly, Plaintiffs failed to file their ESA claim before the deadline set forth in the
27 Supplement/Re-Validation Notice of Limitations lapsed, and in fact did not file their ESA claim until
28

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October 8, 2014, more than two months after the deadline expired. As stated above, the limitations period set forth by the Final EA/FONSI Notice of Limitations, ending on June 18, 2012, bars Plaintiffs' challenge to Caltrans' "No Effect" determination and alleged failure to consult which had already accrued by the time the May, 2010, Final EA was approved. But Plaintiffs even failed to bring their ESA claim within the limitations period for the Supplement/Re-Validation which expired on July 28, 2014. Plaintiffs have thus initiated federal litigation twice to challenge the Project while failing to bring a timely ESA claim within the limitations period for either action. Plaintiffs' ESA claim, asserted for the first time in the First Amended Complaint on October 8, 2014, is time-barred.

2. The Magnuson-Stevens Act Claim Is Barred under Statute of Limitations

Similarly, Plaintiffs' claim under the MSA, that Caltrans should have consulted with NMFS because the Project may adversely affect designated essential fish habitat for coho and Chinook salmon, is time-barred. (FAC ¶¶168-170; *see* 50 C.F.R. § 600.920(a)(1).) Caltrans' determination that the Project would not adversely impact coho salmon or Chinook salmon habitat, which allegedly resulted in a failure to consult with NMFS, was explicitly disclosed in the Natural Environment Study, included as an appendix to, and incorporated in, the May 2010 Final EA. (Lau Decl. Ex. 15.) As with the ESA claim, Plaintiffs failed to bring their MSA claim in the initial *Bair I* litigation, or before the statute of limitations period which expired on June 18, 2010. Plaintiffs' MSA claim is untimely.

3. New Issues Under NEPA Are Barred Under The Statute of Limitations

Lastly, the issues which Plaintiffs raise now, for the first time, under NEPA—*e.g.*, alleged failure to consider Project effects to coho salmon, Chinook salmon, Northern California steelhead as a result of moving a retaining wall as disclosed in the Final EA, failure to consider effects of lead on trees, and failure to consider additional alternatives—are time-barred. Again, as Plaintiffs acknowledge, the later Supplement and Re-Validation did not raise these issues. (FAC ¶¶ 7, 110-112, 118, 119.) Instead, any alleged NEPA deficiencies as to these issues were apparent in, and accrued with, the May, 2010, EA and adoption of the FONSI, and they were and should have been known to Plaintiffs as they based their NEPA challenge in *Bair I* on the entire administrative record for the May, 2010, EA. All of Plaintiffs' additional NEPA claims therefore accrued with the certification of the

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1 Final EA in May 2010, and are barred by the June 28, 2012, limitations date.
2 Furthermore, as with the ESA and MSA claims above, the Supplement and Re-Validation do
3 not re-open the statute of limitations for bringing NEPA claims not addressed or discussed in any way
4 by those documents. As established above, a later environmental document does not provide parties
5 with an end run around the running of the statute of limitations for challenging the issues raised in an
6 earlier document. *See Highland Village Parents Group*, *supra*, 562 F.Supp.2d 857. Plaintiffs could
7 have brought their additional NEPA claims in their *Bair I* challenge to the Final EA and before the
8 statute of limitations on those claims expired on June 18, 2012, and that their failure to do so bars them
9 from raising the issues in the current litigation.
10 **CONCLUSION**
11 For the foregoing reasons, Defendants' motion to dismiss Plaintiffs' entire First Amended
12 Complaint should be granted and, in the alternative, Plaintiffs' First Amended Complaint should be
13 dismissed in part.
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15
16 Dated: November 19, 2014 BEALS, GOSSAGE, BACA, WONG & LAU
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18 By: *<u>/s/ Stacy Lau</u>* ______
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