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18
19 IN THE UNITED STATES DISTRICT COURT
20 FOR THE NORTHERN DISTRICT OF CALIFORNIA

21 CALIFORNIA NATIVE PLANT)
22 SOCIETY, DEFENDERS OF WILDLIFE,)
23 and BUTTE ENVIRONMENTAL)
24 COUNCIL,)

25 Plaintiffs,)

26 v.)

27 UNITED STATES ENVIRONMENTAL)
28 PROTECTION AGENCY, UNITED)
29 STATES FISH AND WILDLIFE)
30 AGENCY, and UNITED STATES ARMY)
31 CORPS OF ENGINEERS,)

32 Defendants.)

Case No. C06-3604 MJJ

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

Date: Nov. 21, 2006
Time: 9:00 a.m.
Courtroom: 11, 19th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. BACKGROUND 4

 A. California’s Vernal Pools and the Mather Core Recovery Unit 4

 B. Statutory Obligations Triggered By Federal Development Approval 7

 1. The Clean Water Act 8

 2. The Endangered Species Act 8

 3. The National Environmental Policy Act 9

 C. The Development and Contents of the *Conservation Strategy* 10

 D. Federal Defendants’ Reliance on the *Conservation Strategy* 13

III. ARGUMENT 18

 A. Standard of Review 18

 B. Plaintiffs Are Likely to Prevail on the Merits 18

 1. Federal Defendants Violated NEPA in Adopting the *Conservation Strategy* and Continue to Violate NEPA in Relying Upon It for Individual Development Project Approvals. 19

 a. The *Conservation Strategy* Constitutes “Major Federal Action” Subject to NEPA 19

 b. Failure to Prepare a NEPA Analysis for the *Conservation Strategy* Prevented Proper Evaluation of Cumulative Impacts and Consideration of a Reasonable Range of Alternatives 21

 2. Federal Defendants Violated the ESA in Adopting the *Conservation Strategy* and Issuing Subsequent Individual Project Biological Opinions. 25

 a. The *Conservation Strategy* Constitutes “Agency Action” Subject to ESA Consultation Requirements 25

 b. The Biological Opinions Issued for Nine Separate Projects in the Sunrise Douglas Community Planning Area Do Not Incorporate the Best Available Science. 27

 C. Absent the Interim Injunctive Relief that Plaintiffs Request, There Will Be Irreparable Environmental Harm to the Remaining Vernal Pool Habitat and Listed Species at the Six Federally Authorized Individual Development Project Sites Where Some Viable Habitat Still Remains. 29

IV. CONCLUSION 32

TABLE OF AUTHORITIES

FEDERAL CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 30

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) 23

Churchill County v. Gale A. Norton, 276 F.3d 1060 (9th Cir. 2001) 23

City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990) 22

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) 26, 27

Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291 (9th Cir. 2003) 18, 30

Earth Island Institute v. U.S. Forest Service, 442 F.3d 1147 (9th Cir. 2006) 18

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Environmental Protection Information Center v. U.S. Forest Service,
2003 WL 22283969 (N.D. Cal. Sept. 05, 2003) 21

Forest Service Employees for Environmental Ethics v. United States Forest Service,
397 F. Supp. 2d 1241 (D. Mont. 2005) 19

Fund for Animals v. Babbitt, 930 F. Supp. 96 (D.D.C. 1995) 28

Hall v. Norton, 266 F.3d 969 (9th Cir. 2001) 19

High Sierra Hikers Association v. Blackwell, 390 F.3d 630 (9th Cir. 2004) 30, 31

Ka Makani O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955 (9th Cir. 2002) 19

Kern v. United States Bureau of Land Management, 284 F.3d 1062 (9th Cir.2002) 21, 22

Klamath-Siskiyou Wildlands Center v. Bureau of Land Management,
387 F.3d 989 (9th Cir. 2004) 23

Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000) 9

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999) 22

National Parks & Conservation Association v. Babbitt, 241 F.3d 722 (9th Cir. 2001) 9

Natural Resources Defense Council v. Houston, 146 F.3d 1118 (9th Cir. 1998) 25

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir. 1998) 22

Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005) 23

Pacific Coast Federal of Fishermen's Association v. U.S. Bureau of Reclamation,
138 F. Supp. 2d 1228 (N.D. Cal. 2001) 27

1 *Pacific Coast Federal of Fishermen's Associations v. U.S. Bureau of Reclamation,*
 426 F.3d 1082 (9th Cir. 2005) 26
 2
 3 *Pacific Rivers Council v. Thomas,* 30 F.3d 1050 (9th Cir. 1994) 8, 19, 25
 4 *People of Cal. ex rel. Lockyer v. U.S. Forest Service,* 2005 WL 1630020
 (N.D. Cal. July 11, 2005) 21
 5 *Port of Astoria v. Hodel,* 595 F.2d 467 (9th Cir. 1979) 21
 6 *Resources Limited, Inc. v. Robertson,* 35 F.3d 1300 (9th Cir. 1994) 27
 7 *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989) 10
 8 *Sierra Club v. Marsh,* 816 F.2d 1376 (9th Cir. 1987) 26
 9 *Tennessee Valley Authority ("TVA") v. Hill,* 437 U.S. 153 (1978) 26
 10 *Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985) 9, 26, 30
 11 *Turtle Island Restoration Network v. National Marine Fisheries Service,*
 340 F.3d 969 (9th Cir. 2003) 25
 12
 13 *Wash. Toxics Coalition v. EPA,* 413 F.3d 1024 (9th Cir. 2005) 31

14 **FEDERAL STATUTES**

15 Administrative Procedure Act, 5 U.S.C. § 706(2) 19
 16 Clean Water Act ("CWA"), 33 U.S.C. § 1344 1
 17 Endangered Species Act ("ESA"), 5 U.S.C. § 1531 *et seq* 1
 18 National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq* 2
 19 16 U.S.C. § 1531(b) 26
 20 16 U.S.C. § 1533(f)(1) 28
 21 16 U.S.C. § 1536(a)(2) 8, 9, 29
 22 16 U.S.C. § 1536(b)(3) 8
 23 16 U.S.C. § 1536(b)(3)(A) 29
 24 16 U.S.C. § 1536(b)(4) 9
 25 16 U.S.C. § 1536(h) 9
 26 16 U.S.C. § 1540(g)(1)(A) 19
 27 33 U.S.C. § 1344(1) 7
 28

1 33 U.S.C. § 1344(c) 7

2 42 U.S.C. § 4321 9

3 42 U.S.C. § 4332(2) 24

4 42 U.S.C. § 4332(C) 9

5

6 **FEDERAL REGULATIONS**

7 40 C.F.R. § 230.10(a) 8

8 40 C.F.R. § 230.10(d) 8

9 40 C.F.R. § 1502.1-1502.25 9

10 40 C.F.R. § 1502.5 9

11 40 C.F.R. § 1508.7 22

12 40 C.F.R. § 1508.18(B) 21

13 40 C.F.R. § 1508.18(B)(2)-(3) 19

14 40 C.F.R. § 1508.25(a)(2) 22

15 50 C.F.R. § 402.02 8, 23, 25

16 50 C.F.R. § 402.03 25

17 50 C.F.R. § 402.12(g) 23

18 50 C.F.R. § 402.14(g)(8) 29

19 50 C.F.R. § 402.15(g)-(h) 8

20 59 Fed. Reg. 48,136, 48,136-138 (Sept. 19, 1994) 3

21 59 Fed. Reg. at 48,136, 48,138 4

22 62 Fed. Reg. 14,338 (Mar. 26, 1997) 4

23 **MISCELLANEOUS**

24 John Muir, *The Mountains of California* 4

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I. INTRODUCTION

1
2 By this motion, Plaintiffs California Native Plant Society, Defenders of Wildlife, and
3 Butte Environmental Council seek a preliminary injunction to protect some of the last and best
4 remaining vernal pool habitat in California's Central Valley from imminent and irreparable
5 destruction over the next several weeks. Vernal pools – seasonal wetlands that are home to a rich
6 array of endemic species and wildflowers, several of which are now listed as endangered or
7 threatened – once carpeted the state's Central Valley. Somewhere between 80 and 90 percent of
8 historic vernal pool habitat has now been permanently lost to ranching, farming, and, of most
9 immediate concern, sprawling urban development. At risk in this case is a large, contiguous
10 swath of high-quality vernal pool habitat in an area now known as the Sunrise-Douglas
11 Community Planning Area ("Plan Area"), just east of Sacramento. The vernal pools located
12 within the Plan Area are noted for the remarkable diversity of species that inhabit them. For this
13 reason, the *Recovery Plan for Vernal Pool Ecosystems in California and Southern Oregon*
14 ("*Recovery Plan*"), issued by Defendant U.S. Fish and Wildlife Service ("FWS"), calls for the
15 preservation of most of the remaining vernal pool habitat within the Plan Area.¹
16

17 Notwithstanding this fact, FWS recently issued at least nine "Biological Opinions" for a
18 series of contiguous, but individual development projects within the Plan Area that cumulatively
19 authorize the destruction of more vernal pool habitat than the *Recovery Plan* allows for this area.
20 These Biological Opinions and their accompanying "Incidental take Statements" effectively
21 shield individual developers from legal liability under the Endangered Species Act ("ESA"), 5
22 U.S.C. § 1531 *et seq.*, for the "take" of listed vernal pool species and, therefore, constitute a
23 federal "green light" for the fill and permanent destruction of this irreplaceable habitat. Relying
24 on the FWS approvals, Defendants U.S. Army Corps of Engineers ("Corps") and U.S.
25

26
27 ¹ Relevant excerpts of the *Recovery Plan* are filed concurrently herewith in Exhibit A to
28 the Declaration of Craig H. Segall ("Segall Decl."). All further exhibit citations in this
memorandum refer to corresponding exhibits attached to the Segall Decl.

1 Environmental Protection Agency (“EPA”) have now issued so-called “dredge and fill” permits
2 under section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, for six of these
3 development projects and are poised to issue three more over the next few weeks or months.
4 Once final CWA section 404 approvals are received, landowners can irreparably destroy the
5 affected vernal pool habitat within a matter of days as they grade the property for construction.

6 Federal Defendants’ permitting strategy for the Plan Area is legally defective because
7 both the Biological Opinions issued by FWS and the subsequent Corps/EPA dredge and fill
8 permits (as well as the accompanying “Findings of No Significant Impact”) expressly rely for
9 their conclusions on the agencies’ document *A Conceptual-Level Strategy for Avoiding,*
10 *Minimizing, & Preserving Aquatic Resource Habitat in the Sunrise-Douglas Community Plan*
11 *Area* (“*Conservation Strategy*”). FWS, EPA, and the Corps finalized the *Conservation Strategy*
12 in June 2004 at the behest of Plan Area developers and local politicians. This three-page
13 document consists of a map and two pages of guiding “principles and standards” for future build-
14 out of the Plan Area. See Exhibit B. All three Federal Defendants will approve – and in some
15 cases already have approved – any project within the Plan Area that complies with the
16 *Conservation Strategy*, even though the strategy document itself was never subject to any
17 environmental review as mandated by the National Environmental Policy Act (“NEPA”), 42
18 U.S.C. § 4321 *et seq.*, any biological consultation as mandated by the ESA, or any other public
19 disclosure, review, or comment process. By essentially tiering their individual project decisions
20 to an areawide strategy that has not undergone scientific or public scrutiny, Federal Defendants
21 not only skirted the letter and intent of the nation’s bedrock environmental laws, but also closed
22 their ears and minds to valuable scientific input from some of California’s leading vernal pool
23 experts.
24

25
26 The consequences of the federal agencies’ legal violations are not trivial. For instance, by
27 failing to prepare a NEPA analysis for the *Conservation Strategy* itself, and instead relying on the
28 unanalyzed strategy to make Findings of No Significant Impact for each individual project,

1 Federal Defendants have failed to evaluate the overall cumulative impacts of implementing the
2 *Conservation Strategy*. Equally important, they have failed to consider, or subject to public
3 review, potential alternative conservation approaches or strategies for the Plan Area. These
4 considerations lie at the very heart of NEPA. Moreover, as Plaintiffs explain in more detail
5 below, the vernal pool habitat destruction allowed by the *Conservation Strategy* is inconsistent
6 with the current *Recovery Plan*, which constitutes the best available science for the survival and
7 recovery of vernal pool species. Accordingly, individual Biological Opinions and accompanying
8 Incidental Take Statements that rely on the *Conservation Strategy*, rather than the *Recovery Plan*,
9 for their “no jeopardy” determinations are legally and scientifically flawed.
10

11 If not enjoined, Federal Defendants’ approvals will allow individual developers to move
12 forward immediately with the truly irreparable destruction of much of the remaining vernal pool
13 habitat within the Plan Area, upon which several endangered and threatened species depend for
14 their survival. With their federal approvals in hand, developers can and will commence the
15 necessary earthmoving work this season, long before this case can be tried on the merits. Once
16 the area’s unique, interconnected wetlands are destroyed, they cannot be effectively restored.
17

18 Given Plaintiffs’ likelihood of success on the merits and the imminent, irreversible harm
19 that very likely will occur before the merits of this case can be heard, Plaintiffs respectfully
20 request that the Court grant this motion for preliminary injunction. Plaintiffs understand that the
21 habitat at issue here has already been destroyed for three of the nine projects for which federal
22 approvals have been issued. Accordingly, to preserve the *status quo* pending resolution of the
23 merits, this motion seeks to enjoin (1) the issuance of any additional federal permits or approvals
24 in reliance on the *Conservation Strategy* and (2) any further groundbreaking, earthmoving or
25 other on-the-ground activity that may affect vernal pool habitat for the following six projects, as
26 described in more detail below, which have been authorized by Federal Defendants in reliance on
27 the *Conservation Strategy*: Douglas Road 98, Douglas Road 103, Grantline 208, Arista del Sol,
28 Anatolia IV, and Sunridge Village J.

II. BACKGROUND

A. California's Vernal Pools and the Mather Core Recovery Unit

The vernal pools at issue in this case are home to a variety of rare and endemic species, including four animal and plant species listed as either “threatened” or “endangered” under the ESA:

- The vernal pool fairy shrimp (*Branchinecta lynchi*), listed as “threatened” under the ESA, lives exclusively in vernal pools and is “ecologically dependent” on natural seasonal fluctuations in undisturbed vernal pool habitat. The vernal pool fairy shrimp a delicate animal that swims upside down in the water column, kicking its elegant feathery legs to filter food from the water. The species generally occurs at “low population densities” and is “never the numerically dominant” species. Only 32 known populations exist. 59 Fed. Reg. 48,136, 48,136-138 (Sept. 19, 1994), attached as Exhibit C.
- The vernal pool tadpole shrimp (*Lepidurus packardi*), listed as “endangered” under the ESA, also is ecologically dependent on vernal pool habitat. In contrast to the fairy shrimp, the vernal pool tadpole shrimp is a burly bottom dweller, with its head covered by a large semi-circular carapace that lends it a “tadpole” appearance. Only 18 populations are known. 59 Fed. Reg. at 48,136, 48,138, attached at Exhibit C.
- The slender Orcutt grass (*Orcuttia tenuis*), listed as a “threatened” species under the ESA, is a rare native grass that flowers in May in the Central Valley. 62 Fed. Reg. 14,338 (Mar. 26, 1997), attached as Exhibit D; Exhibit A at II-82
- The Sacramento Orcutt grass (*Orcuttia viscida*), listed as “endangered” under the ESA, is even more uncommon. Exhibit D. It is possible to see this dense, blue-green native grass in the wild only in Southeastern Sacramento County. Exhibit A at II-88. The densest surviving population – 70 percent of the remaining occupied habitat – is literally across the road from the Plan Area. *Id.* The *Recovery Plan* mandates that the area be preserved for the species. *Id.* at III-99.

At least three of these species were once common across the Central Valley. Indeed, when John Muir saw the great Central Valley of California, it seemed to him “the most beautiful [landscape] I have ever beheld.” John Muir, *The Mountains of California* at 4. It was “level and flowery, like a lake of pure sunshine.” *Id.* The flowers grew along the banks of a vast system of vernal pools, small seasonal wetlands that once blanketed the floor of the valley.

Today, the area’s unique and irreplaceable vernal pools – and their endemic species – have all but vanished. A victim of widespread urbanization, farming and other forms of development, vernal pool habitat has suffered a decline of 80 to 90 percent from its pre-

1 settlement abundance. Exhibit A at I-1. Between 1972 and 1993, over 30,000 acres – or more
2 than 36 percent – of vernal pool grasslands in Sacramento County alone were destroyed.
3 Declaration of Carol W. Witham (“Witham Decl.”) at ¶ 14. According to FWS, “[t]he loss,
4 fragmentation and isolation of functional vernal pool ecosystems has threatened the continued
5 existence of [ESA] listed species and species of concern” and “is the greatest threat to the
6 survival and recovery” of these species. Exhibit A at I-14. Most pressing, both the shrimp and
7 the grass species are threatened by habitat loss and fragmentation caused by “urban
8 development.” *Id.* at II-84, II-91, II-191, II-209. Remaining populations of the vernal pool fairy
9 shrimp are considerably more fragmented and isolated than in pre-agricultural times. *Id.* at II-
10 192. Similarly, the vernal pool tadpole shrimp’s distribution “has been greatly reduced from
11 historic times as a result of widespread destruction and degradation of its vernal pool habitat.” *Id.*
12 at II-204. As a result, “vernal pool tadpole shrimp are uncommon even where vernal pool
13 habitats occur.” *Id.* Slender Orcutt grass also faces a “continuing threat” from urbanization near
14 Sacramento. *Id.* at 11-84. And Sacramento Orcutt grass is directly threatened by urbanization in
15 the “Rancho Cordova area,” which includes the area at issue here. *Id.* at II-91.

17 Faced with these growing threats, in October 2004, FWS produced a draft *Recovery Plan*,
18 which was finalized in December 2005 and issued to the public in March 2006. The *Recovery*
19 *Plan* identifies continuing threats to these endangered species and ways to protect and recover
20 remaining population areas. It seeks to “stabilize and protect populations so further declines in
21 species status and range are halted.” Exhibit A at III-2. To combat continued habitat loss and
22 fragmentation, the plan recommends protecting “larger blocks of land . . . to provide for greater
23 species and physical diversities, less vulnerability of the species populations to outside
24 influences, [and] connectivity through land with natural habitat or compatible uses.” *Id.* at III-4.
25 While “[a]ll habitat occupied by featured taxa is important for recovery” and conservation, the
26 *Recovery Plan* identifies certain “core areas” which are “the specific sites necessary to recover
27 these endangered or threatened species.” *Id.* at III-5-6. FWS believes that these core areas
28

1 “should be the initial focus of protection measures.” *Id.*²

2 One of the core recovery areas identified by the *Recovery Plan* is the Mather Core
3 Recovery Unit in southeastern Sacramento County, which substantially overlaps with the Sunrise
4 Douglas Community Planning Area.³ *See* Exhibit A at III-68, III-85. The Mather Core Recovery
5 Unit encompasses one of the largest remaining blocks of high quality habitat in Sacramento
6 County. *See* Declaration of Michael G. Barbour (“Barbour Decl.”) at ¶ 6. Its preservation is
7 particularly important because all listed species occupying the area are threatened by “continued
8 extensive urban development” in southeastern Sacramento County. Exhibit A at II-84, II-91, II-
9 191, II-209. Indeed, the largest number of remaining occurrences of both listed shrimp species
10 occurs in southeastern Sacramento County. *Id.* at II-194, II-206.

12 For these reasons, the *Recovery Plan* provides that 85 percent of suitable vernal pool
13 habitat for vernal pool fairy shrimp and 95 percent of vernal pool habitat for vernal pool tadpole
14 shrimp be preserved within the Mather Core Recovery Unit. Exhibit A at III-104 – III-105.
15 Similarly, the plan provides that 95 percent of slender Orcutt grass and Sacramento Orcutt grass
16 habitat should be preserved within the Mather Core Recovery Unit. *Id.* at III-99. Protection of
17 Sacramento Orcutt grass is particularly pressing because it grows only in “the Southeastern
18 Sacramento Vernal Pool Region and has always been restricted to Sacramento County.” *Id.* at II-
19 88 (references omitted).

20 Despite the scientific conclusions of the *Recovery Plan*, Federal Defendants’
21 *Conservation Strategy* authorizes development of 13 percent of the Mather Core Recovery Unit.
22 Witham Decl. at ¶ 16. Worse still, the *Conservation Strategy* allows development in some of the
23

24 ² Because no full biological survey has ever been conducted for the Sunrise Douglas area,
25 its vernal pools may contain populations of other endangered species in addition to those
26 discussed above. *See* Witham Decl. at ¶12. The focus of this motion, however, is on the four
ESA-listed species described above.

27 ³ The Sunrise Douglas Community Planning Area is a 6,024-acre area that overlaps with
28 5,298 acres of the larger, 23,430-acre Mather Core Recovery Unit. *See* Barbour Decl. at ¶ 7;
Witham Decl. at Figure 2.

1 most important and sensitive vernal pool habitat. *Id.* at ¶ 10 (diversity of vernal pool shapes,
2 sizes, and hydroperiods in this area is strongly correlated to high species diversity and high level
3 of ecosystem supporting function); Barbour Decl. at ¶ 6 (vernal pools in this area are more dense
4 and contribute more landscape cover per acre than is the case in most Central Valley counties).
5 Moreover, areas designated for preservation in the *Conservation Strategy* are designed in
6 violation of basic conservation biology principles and, for the most part, preserve intermittent
7 streams rather than rare vernal pools. Witham Decl. at ¶ 15.

8
9 Moreover, preserving the pools and their dependant endangered and threatened species
10 requires also protecting surrounding upland areas. Vernal pools are biologically and
11 hydrologically tied to the upland matrix, and some key species are dependent on both the pools
12 and the surrounding grasslands. Witham Decl. at ¶ 13. For instance, the native bees that
13 pollinate vernal pool plants have very limited flight ranges; as a result, destruction of upland
14 habitat immediately around a pool will cut off pollinators from the pool, thereby adversely
15 affecting vernal pool ecosystems. Declaration of Robbin W. Thorp (“Thorp Decl.”) at ¶ 9. The
16 basic hydrology of the pools is similarly dependent on maintaining the lands around them.
17 Witham Decl. ¶ 15. Because vernal pool species are finely adapted to distinctive cycles of
18 drought and submersion, alterations of this cycle, which will also act to change water chemistry,
19 can radically alter species composition. *Id.* at ¶ 13 (noting that vernal pools are “physically and
20 hydrologically interdependent”). Damage can also occur in less subtle ways, as chemical and
21 sediment run-off from upland development, along with invasive species brought in by the new
22 residents, enter the pools. *Id.* at ¶ 15. Thus, the *Conservation Strategy*, which permits more
23 upland development than allowed in the *Recovery Plan*, as well as development in places that are
24 particularly sensitive, is likely to have considerable impact on the environment.

25
26 **B. Statutory Obligations Triggered By Federal Development Approval.**

27 Given the existence and biological importance of the hydrologically-interconnected
28 vernal pool wetlands in the Sunrise Douglas area and the ESA-listed species that occupy them,

1 Federal Defendants must satisfy important legal obligations under three different federal
2 environmental laws before they lawfully can authorize development and destruction of these
3 resources.

4 **1. The Clean Water Act.**

5 First, before developers can fill and pave over vernal pool wetlands, they must obtain a
6 “dredge and fill” discharge permit from the Corps pursuant to section 404(a) of the CWA. 33
7 U.S.C. § 1344(1). Although the Corps has initial authority to issue such permits, EPA is the
8 federal agency with ultimate responsibility for implementing the CWA and has review and veto
9 authority over all section 404 permits. *Id.* at 1344(c) (EPA Administrator may deny permits
10 where discharge “will have an unacceptable adverse effect on municipal water supplies, shellfish
11 beds and fishery areas . . . , wildlife, or recreational areas.”). EPA commonly refers to this
12 oversight responsibility as the “elevation” of section 404 permits. Under EPA’s implementing
13 guidelines, no section 404 permit may be issued “if there is a practicable alternative to the
14 proposed discharge which would have less adverse impact on the aquatic ecosystem” or where
15 the permit “jeopardizes the continued existence of species listed as endangered or threatened”
16 under the ESA. 40 C.F.R. § 230.10(a), (b). Moreover, no section 404 activity may be permitted
17 “unless appropriate and practicable steps have been taken which will minimize potential adverse
18 impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d).

20 **2. The Endangered Species Act.**

21 Second, section 7(a)(2) of the ESA requires that “[e]ach Federal agency shall, in
22 consultation with and with the assistance of the Secretary, insure that any action authorized,
23 funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency
24 action’) is not likely to jeopardize the continued existence of any endangered species or
25 threatened species.” 16 U.S.C. § 1536(a)(2). Agency “action” for purposes of triggering section
26 7 consultation requirements is broadly defined to include “all activities or programs of any kind
27 authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States.”
28

1 50 C.F.R. § 402.02. *See also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir.
2 1994) (recognizing that Congress intended “agency action” to be interpreted broadly, admitting
3 of not exceptions). Thus, the Corps’ issuance of section 404 permits in the Sunrise Douglas area
4 requires ESA consultation with the Secretary, whose consultation authority is delegated to FWS.

5 This consultation process lies at the heart of the ESA’s procedural protections, which
6 Congress designed to “ensure compliance with [the statute’s] substantive provisions.” *Thomas v.*
7 *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). It culminates in the issuance of a written opinion by
8 the Secretary, and a summary of the information on which the opinion is based, “detailing how
9 the agency action affects the species” and making a determination of whether the action will
10 “jeopardize” the continued existence of the listed species. *Id.* § 1536(b)(3). In making this
11 determination, the Secretary must use the best available scientific information. *Id.* § 1536(a)(2);
12 50 C.F.R. § 402.15(g)-(h). Where the Biological Opinion concludes that the action will not
13 jeopardize a listed species, it must include an Incidental Take Statement that specifies the impact
14 of the authorized “take,” provides reasonable and prudent measures necessary to minimize
15 impacts, and sets forth terms and conditions that must be followed. 16 U.S.C. § 1536(b)(4).

17 **3. The National Environmental Policy Act.**

18 Finally, issuance of a section 404 permit is a “major federal action significantly affecting
19 the quality of the human environment” and, therefore, requires that the action agency comply
20 with the environmental review requirements of NEPA. 42 U.S.C. § 4332(C). NEPA is intended
21 “to promote efforts which will prevent or eliminate damage to the environmental and biosphere”
22 and “to enrich the understanding of the ecological systems and natural resources important to the
23 Nation.” *Id.* § 4321. To accomplish this goal, federal agencies must prepare an “environmental
24 impact statement” (or “EIS”) when a proposed action will have a significance effect on the
25 environment. *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir.
26 2001). If no significant impacts may occur, the agency must prepare a “Finding of No
27 Significant Impact” (or “FONSI”) accompanied by a “convincing statement of reasons to explain
28

1 why a project's impacts are insignificant." *Id.*; *Metcalfe v. Daley*, 214 F.3d 1135, 1142 (9th Cir.
2 2000). Among other things, an EIS must consider, disclose and evaluate (1) direct, indirect, and
3 cumulative impacts and (2) reasonable alternatives and mitigation measures that may eliminate
4 or reduce the impacts of the proposed action. 40 C.F.R. § 1502.1-1502.25. This information
5 must be disseminated "early enough so that it can serve practically as an important contribution
6 to the decisionmaking process and will not be used to rationalize or justify decisions already
7 made." *Id.* at § 1502.5. NEPA thereby "ensures that the agency, in reaching its decision, will
8 have available, and will carefully consider, detailed information concerning significant
9 environmental impacts; it also guarantees that the relevant information will be made available to
10 the larger audience that may also play a role in both the decisionmaking process and the
11 implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,
12 349 (1989).

14 **C. The Development and Contents of the Conservation Strategy.**

15 Recognizing that the proposed destruction of vernal pool habitat within the Plan Area is
16 subject to the foregoing federal authorizations, Federal Defendants developed the *Conservation*
17 *Strategy* to address development impacts. Discussions regarding the *Conservation Strategy*
18 began in March 2004 when "Congressman Doug Ose initiated meetings with the Federal
19 Agencies [EPA, Corps, and FWS], local agencies, and the landowners/developer representatives
20 to facilitate resolution of the issues that arose in earlier negotiations over the area." Exhibit E at
21 3. *See also* Exhibit F at 2-3. These meetings were intended to "develop a conceptual strategy
22 that would meet the requirements of the Federal Agencies [sic] respective statutes." Exhibit E at
23 3. The "regulated parties" were to "work cooperatively with the Federal agencies to explore
24 mechanisms to accommodate the agencies' obligations to comply fully with pertinent federal
25 laws and regulations" that would achieve a "proper and workable balance" between development
26 and preservation. *Id.* The ensuing discussion led to the issuance of the three-agency joint
27 *Conservation Strategy* in June 2004. *Id.*

1 The *Conservation Strategy* lists, with minimal explanation, ten general principles and
2 standards to guide development, running the gamut from “Maintain natural (existing) watershed
3 integrity and flows to downstream reaches” to “Locate compatible land uses next to preserves,”
4 and “Recognize the realities and constraints placed on construction design due to infrastructure
5 and market-driven forces.” Exhibit B. The accompanying map delineates the boundaries for
6 certain “Preserve Areas.” *Id.* The document explains that:

7
8 To meet the goals of ESA and the Clean Water Act, the Agencies arrived at the
9 boundaries of the ‘Preserve Areas’ based on best professional judgment and a limited
10 amount of information regarding regional and site-specific biological and
11 hydrogeomorphology while recognizing that development is planned in the area. . . .
The mapped boundaries are the smallest that would be acceptable to the Agencies and are
predicated on ten principles and standards that would be followed by developers and
planners as each element of the overall development proceeds.

12 The conceptual level strategy should be used by developers and planners to design and
13 plan projects in the SDCPA. The Agencies will use the strategy to aid in the review of
14 proposed development and evaluate the probable individual and cumulative effects on
aquatic resources and sensitive species.

15 *Id.*

16 The three-page *Conservation Strategy* does not contain or incorporate any evaluation or
17 analysis of direct, indirect or cumulative effects on vernal pool habitat or species. Nor does it
18 mention the *Recovery Plan*, a key scientific document being drafted by FWS at the very same
19 time that the strategy was negotiated. Indeed, the *Conservation Strategy* shows no recognition
20 whatsoever of the critical fact that the vernal pools slated for development in the Sunrise Douglas
21 Community Planning Area sit smack in the middle of the important Mather Core Recovery Unit.
22 *See* Witham Decl. at Figure 1. Finally, the document fails to explain why these particular
23 principles and standards were selected as the driving criteria or how they will adequately protect
24 the listed species and their habitat.

25 Plaintiff organizations California Native Plant Society, Defenders of Wildlife, and Butte
26 Environmental Council, each deeply involved in vernal pool conservation efforts in the region,
27 were not invited to participate in these key discussions, nor were key independent scientific
28

1 experts who have been studying Sacramento area vernal pools for decades. Witham Decl. at ¶
2 11. Indeed, there was no public process whatsoever in connection with the development and
3 execution of the *Conservation Strategy*. Its development was initiated, negotiated, and
4 completed entirely behind closed doors between agency representatives and a single set of
5 stakeholders – the handful of directly affected local developer interests. *Id.*; Exhibit E at 3.

6 Subsequent correspondence between the developers’ attorneys and federal agency
7 participants confirms the parties’ mutual understanding that the *Conservation Strategy* will be
8 used to design development projects and will form the basis for future agency permits and
9 approvals. An October 12, 2004 letter from legal counsel for “a number of corporations and
10 individuals” with development interests in the Plan Area addressed to all three federal agency
11 participants memorializes the “understandings reached” during negotiations over the
12 *Conservation Strategy*. Exhibit F at 1. This letter explains how, in the developers’ view, future
13 permitting will proceed and rely on the *Conservation Strategy* for projects within the so-called
14 “SunRidge Specific Plan” portion of the larger Sunrise Douglas Community Planning Area.⁴

16 Each of the applicants intends to provide (or has provided) to the Corps, EPA, and the
17 Service information that demonstrates that its proposed project has been modified to be
18 consistent with the Conceptual Level On-site Avoidance Strategy and the September
19 2004 Map, includes appropriate compensatory mitigation, complies with the Section
20 404(b)(1) Guidelines, and does not require an environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”). (The justification for not requiring an EIS may be folded into the Section 404(b)(1) Alternatives Analysis). The mitigation ratios for individual projects may vary from those in the Strategy depending on the location and quality of the habitat that will be preserved, enhanced or created. We anticipate that the applicants will join forces to provide an analysis of Regional Alternatives Information that focuses on regional and sub-regional issues including cumulative and indirect impacts. The agencies agree that the applicants can rely on this analysis for their individual applications along with an analysis of conformity to the Conceptual Level On-Site Avoidance Strategy and the September 2004 map to demonstrate compliance with the Section 404(b)(1) Guidelines.

26 ⁴ Somewhat confusingly, the 6,042-acre Sunrise Douglas Community Planning Area is
27 divided into three sub-areas – the SunRidge Specific Plan Area, the SunCreek Specific Plan
28 Area, and the area covered by the prior Anatolia I-III set of projects. As discussed below, the projects for which final federal approvals are most imminent, and over which Plaintiffs have the most immediate concern, all fall within the SunRidge Specific Plan Area.

1 Subject to your review of these materials, and assuming that you determine that
2 submissions conform to the Conceptual Level On-Site Avoidance Strategy, including
3 appropriate mitigation, we understand that EPA will remove its option to elevate these
4 permits under the Section 404(q) Memorandum of Understanding, that the Service will
5 issue no-jeopardy biological opinions in a timely manner for each project and that the
Corps will prepare an individual record of decision for each application, will make a
finding of no significant impact (“FONSI”) under NEPA for each application and will
issue the required permit in due course.

6 Exhibit F at 4-5.

7 The federal agencies concurred in this understanding. *See* Exhibits G and H. For
8 instance, in her response letter, the Associate Water Division Director for EPA Region IX notes
9 the agency’s prior agreement not to elevate section 404 permits for higher review and states that
10 “I can reaffirm our prior commitment to you and the other landowners, provided the projects
11 comply with a reasonable degree of variability with the federal agencies’ Conceptual Strategy
12 and associated preserve map, and are in compliance with § 404(b)(1) Guidelines.” Exhibit H at
13 1. Indeed, the Region IX EPA Administrator himself explained to the Corps District Engineer
14 that “[s]hould the Corps implement the [*Conservation Strategy*], we will not request a higher-
15 level of review of your agency’s permit decisions for these projects and additional projects
16 processed for this planning area.” Exhibit V at 2. The Corps likewise responded to the
17 developers’ memorialization with an acknowledgment that “[t]he Strategy and September 2004
18 Map will assist the Sacramento District (“District”) in making final permit decisions, in
19 particular for those projects in Sun Ridge.” Exhibit G at 1.

21 **D. Reliance on the Conservation Strategy by the Federal Agencies.**

22 For its part, FWS incorporated this same understanding into the Biological Opinions and
23 Incidental Take Statements that it began issuing shortly after the *Conservation Strategy* was
24 finalized. For instance, the first of these, issued on December 9, 2004, covered the so-called
25 “North Douglas” Project. This project proposes to develop a 129-acre site into 680 single family
26 homes, destroying 1.552 acres of vernal pools, 0.443 acres of seasonal wetlands, 0.444 acres of
27 seasonal wetland swales, and 0.154 acres of seasonal marsh; in addition, at least 0.791 acres of
28

1 pools and wetlands will be indirectly impacted. Exhibit E at 4-5. The Biological Opinion
2 expressly incorporates the *Conservation Strategy*, providing that “our biological opinion on this
3 proposed project (North Douglas Project) is based on application and full implementation of the
4 Federal agencies conservation strategy outlined in [the *Conservation Strategy*] on all future
5 projects in the [Sunrise Douglas Community Planning Area].” *Id.* at 8. After discussing at
6 considerable length the highly imperiled, indeed dire, status of vernal pool species and the
7 importance of conserving what habitat remains within Sacramento County to protect the
8 population from extirpation, *id.* at 11-19, the Biological Opinion abruptly changes course,
9 concluding that “it is the Service’s biological opinion that the proposed North Douglas Project,
10 as proposed, is not likely to jeopardize the continued existence of the vernal pool fairy shrimp
11 and the vernal pool tadpole shrimp *because* the planned compensation and the Conceptual-Level
12 Strategy for Avoiding, Minimizing, & Preserving Aquatic Resource Habitat in the Sunrise-
13 Douglas Community Plan Area will offset impacts to the listed species and their habitat.” *Id.* at
14 19 (emphasis added). The attached Incidental Take Statement authorizing the destruction of
15 vernal pool habitat under the ESA is expressly conditioned on compliance with the *Conservation*
16 *Strategy*. *Id.* at 21.

17
18 The Corps’ subsequent approval of the North Douglas Project then piggy-backs on the
19 Biological Opinion and itself relies extensively on the *Conservation Strategy*. The Corps’
20 Environmental Assessment, FONSI, and final Decision Document for the North Douglas Project
21 explains that the *Conservation Strategy* was designed to minimize individual project effects and
22 that as part of the *Conservation Strategy*, the Corps “addressed its approach to NEPA
23 compliance” by requesting that the permit applicants prepare an analysis of potential cumulative
24 impacts and an evaluation of the practicability of different preserve designs.” Exhibit I at 4. The
25 Corps then incorporated the applicants’ “Alternatives Information Document” into its final
26 decision. *Id.* at 5. That applicants’ non-public analysis “discussed the multi-agency Conceptual
27 Strategy as it applies to the project. The applicant’s alternatives analysis discussed the project
28

1 within the framework of the ten principles and standards discussed in the Conceptual Strategy,
2 and analyzed its level of compliance with the principles and the associated preserve map created
3 for the entire Specific Plan area.” *Id.* at 7. *See also id.* at 13 (noting that proposed mitigation and
4 the Corps’ selected alternative are consistent with the *Conservation Strategy*).

5 Similarly, although the North Douglas EA/FONSI acknowledges that the project, when
6 considered together with the other pending developments, “could have potentially significant
7 cumulative effects” on vernal pool habitat, the Corps concludes that the *Conservation Strategy*
8 will ameliorate any such impacts completely. *Id.* at 18-19. In particular, the Environmental
9 Assessment states that the *Conservation Strategy* “will avoid cumulatively significant impacts to
10 jurisdictional wetlands and vernal pools within the Specific Plan area” and that the *Conservation*
11 *Strategy*, together with past mitigation for the Anatolia Project, “will assure that adverse effects
12 to jurisdictional wetland and vernal pool areas are not cumulatively significant.” *Id.* at 19. Thus,
13 based on (1) FWS’s biological opinion for the project (which, in turn, is based on the
14 *Conservation Strategy*), (2) the applicant’s analysis of onsite alternatives consistent with the
15 *Conservation Strategy* – notably not alternatives to the *Conservation Strategy* – and (3) a finding
16 that the project’s cumulative impacts were reduced to insignificance by compliance with that
17 *Conservation Strategy*, the Corps issued a FONSI and granted a CWA section 404 permit for the
18 North Douglas development. Also in reliance on the *Conservation Strategy*, EPA elected not to
19 elevate the section 404 permit decision, as it previously had agreed. *Id.* at 5.

20
21 The “green light” given to the North Douglas Projects in reliance on the *Conservation*
22 *Strategy* is by no means the end of the story. In the intervening months, FWS has issued at least
23 eight additional Biological Opinions and Incidental Take Statements for projects within the
24 SunRidge portion of the Sunrise Douglas Community Planning Area (and, therefore, also within
25 the Mather Core Recovery Unit) in reliance on the strategy.⁵ These include:

26
27
28 ⁵ In addition to these nine Sunridge Specific Plan area projects, (1) the massive Anatolia I-III set of projects on the western boundary of the Sunrise Douglas Community Planning Area,

- 1 1. **Montelena/Sunridge Ranch Project.** This project proposes development of 250
2 acres into over 1,000 housing units and will destroy 9.119 acres of vernal pool
3 habitat. Exhibit S at 2. The Biological Opinion “is based on application and full
4 implementation” of the *Conservation Strategy*, *id.* at 3, and the accompanying
5 Incidental Take Statement is conditioned on compliance with the strategy. *Id.* at
6 17. The Corps’ section 404 permit was expressly conditioned on compliance with
7 the *Conservation Strategy*. Exhibit J at 2.⁶ Like the North Douglas Project, the
8 Montelena/Sunridge Ranch Project moved forward quickly after the section 404
9 permit was issued, and the affected vernal pool habitat was irreparably destroyed
10 within a matter of days. Witham Decl. at ¶ 18.
- 11 2. **Sunridge Park/Riverwest Project.** This project covers 243.2 acres and will
12 destroy 1.80 acres of habitat for endangered vernal pool crustaceans, including
13 1.33 acres of vernal pools, and will indirectly affect an additional 1.58 acres of
14 vernal pool habitat. Exhibit K at 5, 8. The Biological Opinion is “based on
15 application and full implementation of the Federal agencies conservation strategy
16 outlined in this document and map, on all future projects in the SDCPA.” *Id.* at
17 4. The Incidental Take Statement is also conditioned on the *Conservation*
18 *Strategy*. *Id.* at 26. Substantial work on this site moved forward even before a
19 CWA section 404 permit was issued. Plaintiffs learned on October 13 that the
20 section 404 permit for this project was issued on September 28, 2006.
21 Declaration of Deborah A. Sivas (“Sivas Decl.”) at ¶ 3. Based on compliance
22 with the *Conservation Strategy*, EPA determined that the project is acceptable
23 (and, therefore, will not elevate the section 404 permit for higher level review).
24 *See* Exhibit U. It now appears that all vernal pool habitat on the project site has
25 been destroyed. Witham Decl. at ¶ 20.
- 26 3. **Douglas Road 98 Project.** This project will result in construction of at least 483
27 houses across 105 acres of land, directly affecting 3.70 acres of vernal pools.
28 Exhibit R at 4. The Biological Opinion explains that the *Conservation Strategy*
document and preserve map “outline our strategies” for the region and “provide a
framework for development proposals.” *Id.* at 2. Incidental take is conditioned
on compliance with the *Conservation Strategy*. *Id.* at 16. Plaintiffs learned on
October 13 that the section 404 permit for this project was issued on June 1, 2006.
Sivas Decl. at ¶ 3.

which resulted in destruction of 27 acres of vernal pool habitat, is almost complete, (2) the ongoing Sunridge Specific Plan Road Widening infrastructure project will destroy 0.191 acres of vernal pools and adversely affect another 0.333 acres (Exhibit L at 14), and (3) substantial additional development within the SunCreek Specific Plan, on the southern portion of the larger Plan Area, is anticipated in the near future and also will tier to the *Conservation Strategy* (Exhibit F at 5-6).

⁶ Exhibit S contains the actual section 404 permit language. To date, Plaintiffs have not yet been able to obtain the Environmental Assessment/FONSI/Decision Document for this project or for the three additional section 404 permits that apparently have now been issued for the Sunridge Park/Riverwest, Douglas Road 98, and Anatolia IV Projects.

- 1 4. **Anatolia IV Project.** This project will directly destroy at least 1.36 acres of
2 vernal pools. Exhibit P at 5. The Biological Opinion is “based on application and
3 full implementation of the” *Conservation Strategy, id.* at 4, and the Incidental
4 Take Statement is expressly conditioned on compliance with the strategy. *Id.* at
5 19. Plaintiffs learned on October 13 that the section 404 permit for this project
6 was issued on October 2, 2006. Sivas Decl. at ¶ 3.
- 7 5. **Sunridge Village J Project.** The project will add another 346 houses on 81
8 acres, adversely affecting 2.49 acres of vernal pool habitat. Exhibit Q at 4-5.
9 Like the others, the biological opinion for this project is “based on application and
10 full implementation” of the *Conservation Strategy, id.* at 3, and the incidental take
11 statement is expressly conditioned on compliance with the strategy. *Id.* at 22.
12 Plaintiffs learned on October 13 that the section 404 permit for this project has
13 been “proffered” but not yet signed. Sivas Decl. at ¶ 3. There is now
14 earthmoving equipment on the project site. Witham Decl. at ¶ 20.
- 15 6. **Grantline 208 Project.** This 209-acre housing development will result in the
16 filling and destruction of 5.55 acres of vernal pool habitat occupied by both the
17 vernal pool fairy shrimp and the vernal pool tadpole shrimp. Exhibit N at 1, 5-6.
18 Like the prior Biological Opinions, this one is expressly “based on application and
19 full implementation of the” *Conservation Strategy, id.* at 4, and the accompanying
20 Incidental Take Statement is expressly conditioned on compliance with the
21 strategy. *Id.* at 24. Plaintiffs learned on October 13 that the section 404 permit
22 for this project will likely be issued within the next one to two weeks. Sivas Decl.
23 at ¶ 3.
- 24 7. **Douglas Road 103 Project.** This project will grade and develop a 106.4-acre
25 area of mixed wetlands and grasslands, in the process destroying 1.97 acres of
26 vernal pool crustacean habitat and affecting an additional 2.91 acres of the same
27 habitat. Exhibit M at 4. The Biological Opinion for the project explains that
28 mitigation ratios and strategy for this lost habitat were established by “the
 conservation strategy agreed to by the agencies and landowners within the
 SunRidge Specific Plan Area” – that is, the *Conservation Strategy, Id.* at 6. The
 Biological Opinion acknowledges that the proposed preservation does not come
 close to meeting the recovery goals and preservation ratios of the *Recovery Plan,*
 id. at 13, 15, but nevertheless makes a “no jeopardy” determination. The
 Incidental Take Statement for the project is expressly conditioned on compliance
 with the *Conservation Strategy, Id.* at 19. Plaintiffs learned on October 13 that
 the section 404 permit for this project will likely be issued within the next month.
 Sivas Decl. at ¶ 3.
8. **Arista del Sol Project.** This project will replace grasslands and wetlands with
 133.5 acres of residential development, destroying 10.53 acres of vernal pool
 crustacean habitat and indirectly affecting an additional 1.44 acres, potentially
 affecting nine federally-listed species. Exhibit O at 6, 19. Again, the Biological
 Opinion “is based on application and full implementation of the” *Conservation*
 Strategy, id. at 4, and the Incidental Take Statement is expressly conditioned on
 compliance with the strategy. *Id.* at 25. Plaintiffs learned on October 13 that the
 section 404 permit for this project will likely be issued within the next two to
 three months. Sivas Decl. at ¶ 3.

1 For the six development projects that have now received CWA section 404 permits from
 2 the Corps, EPA obviously did not “elevate” them for higher review, and there is no reason to
 3 believe that either the Corps or EPA will change course for the three remaining section 404
 4 permits currently pending for development within the Sunridge Specific Plan portion of the Plan
 5 Area.⁷ There is every reason to believe, however, that the permittees will move quickly, as they
 6 have done in the past, to complete the authorized destruction of irreplaceable vernal pool habitat
 7 in short order. Witham Decl. at ¶ 18.

8 III. ARGUMENT

9 A. Standard of Review.

10 In the Ninth Circuit, a court may evaluate and grant a motion for a preliminary injunction
 11 under one of two standards. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1158
 12 (9th Cir. 2006) (“*Earth Island II*”); *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291,
 13 1297 (9th Cir. 2003) (“*Earth Island I*”). Traditionally, a plaintiff must show: “(1) a strong
 14 likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiff if
 15 preliminary relief is not granted; (3) a balance of hardships favoring the plaintiff; and (4)
 16 advancement of the public interest (in certain cases).” *Earth Island I*, 351 F.3d at 1297. Under
 17 the more modern test, a plaintiff must “demonstrate *either* a combination of probable success on
 18 the merits and the possibility of irreparable harm or that serious questions are raised and the
 19 balance of hardships tips sharply in the plaintiff’s favor.” *Earth Island II*, 442 F.3d at 1158
 20 (emphasis in original). As explained below, given the irreparable nature of the potential
 21 environmental harm, the likelihood that it will occur in the absence of injunctive relief, and the
 22
 23
 24

25
 26 ⁷ Unlike some other federal agencies, the Corps does not circulate draft Environmental
 27 Assessments for proposed section 404 permits for public review. Instead, the Corps issues a
 28 brief public notice of the proposed permit, accepts comments, and then grants the final permit at
 the same time that it issues the Environmental Assessment, FONSI, and Decision Document for
 the permit. Thus, the public has virtually no opportunity to comment on the adequacy of the
 Corps’ environmental review for the permit.

1 serious legal questions raised by Federal Defendants' conduct, Plaintiffs satisfy any version of
 2 the applicable preliminary injunction test.

3 **B. Plaintiffs Are Likely to Prevail on the Merits.**

4 As the foregoing discussion makes clear, developers within the Sunrise Douglas
 5 Community Planning Area have shaped their project designs in accordance with the
 6 *Conservation Strategy*, and Federal Defendants have expressly relied on the *Conceptual Strategy*
 7 to review and evaluate vernal pool impacts and ultimately to approve individual development
 8 projects. As such, the *Conservation Strategy* itself should have been, but was not, the subject to
 9 environmental review under both NEPA and the ESA consultation process. Federal Defendants'
 10 failure to satisfy these legal requirements was thus inconsistent with law and actionable under the
 11 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and the ESA citizen suit provisions, 16
 12 U.S.C. § 1540(g)(1)(A).⁸

14 **1. Federal Defendants Violated NEPA in Adopting the *Conservation Strategy*
 15 and Continue to Violate NEPA in Relying Upon It for Individual
 16 Development Project Approvals.**

17 **a. The *Conservation Strategy* Constitutes "Major Federal Action"
 18 Subject to NEPA.**

19 Given the pivotal nature of the *Conservation Strategy* in Federal Defendants'
 20 decisionmaking process, that document constitutes a major federal action subject to the
 21 requirements of NEPA. Major federal actions triggering NEPA include "formal plans . . . upon
 22 which future agency actions will be based" and "programs, such as a group of concerted actions
 23 to implement a specific policy or plan; [or] systematic and connected agency decisions allocating

24
 25 ⁸ To the extent that Federal Defendants' claim they decided not to subject the
 26 *Conservation Strategy* to NEPA review or ESA consultation, that decision itself constitutes final
 27 agency action subject to judicial review. *See Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001)
 28 (agency decision "not to prepare an EIS is a final agency action"); *Forest Service Employees for
 Environmental Ethics v. United States Forest Service*, 397 F. Supp. 2d 1241, 1248 (D. Mont.
 2005) ("an agency's decision that NEPA is inapplicable is itself a final agency action"); *Pacific
 Rivers Council v. Thomas*, 30 F.3d 1050, 1052-53 (9th Cir. 1994) (affirming district court
 decision requiring Forest Service to initiate consultation on programmatic plans).

1 agency resources to implement a specific statutory program or executive directive.” 40 C.F.R.
2 1508.18(B)(2)-(3). The federal agencies’ failure to undertake NEPA review for the *Conservation*
3 *Strategy* was, therefore, unreasonable and unlawful. *See Ka Makani O Kohala Ohana Inc. v.*
4 *Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) (court reviewing failure to prepare EIS applies a
5 “reasonableness” standard).

6 As the foregoing facts demonstrate, the *Conservation Strategy* was the culmination of
7 months of negotiations between Federal Defendants and development interests and is intended to
8 be a blueprint for future development in the Sunrise Douglas Community Planning Area. *See*
9 *e.g.*, Exhibits F, G and H. Compliance with the *Conservation Strategy* ensures that a developer
10 will secure all federal approvals for a Sunrise Douglas project within the Mather Core Recovery
11 Unit. FWS has relied on full implementation of the *Conservation Strategy* as the basis for its
12 Biological Opinions regarding vernal pool impacts, “no jeopardy” determinations, and Incidental
13 Take Statements in connection with at least nine different development projects in the Plan Area.
14 *See* Exhibits E, K, M, N, O, P, Q, R, and S. Although each of these Biological Opinions
15 describes in detail the highly imperiled status of listed vernal pool species and the significant
16 population impacts of further loss and fragmentation of their scant remaining habitat, the
17 accompanying Incidental Take Statement in each case authorizes further habitat destruction on
18 the express condition that the development complies with the *Conservation Strategy*.
19

20 Moreover, for the first project permitted under CWA section 404 following finalization of
21 the *Conservation Strategy* – the North Douglas Project – the Corps relied on FWS’s Biological
22 Opinion/Incidental Take Statement to evaluate vernal pool impacts and also built its own
23 environmental analysis under NEPA and the CWA on the underlying *Conservation Strategy*. For
24 instance, the project-level environment review document for the North Douglas Project did not
25 undertake an actual cumulative impacts analysis for the dozen or more development projects
26 under consideration, but instead concluded that the *Conservation Strategy* “results in avoidance
27 of adverse cumulative impacts” and that adherence to the strategy’s principles and standards
28

1 “will avoid cumulatively significant impacts to jurisdictional wetlands and vernal pools.”
2 Exhibit I at 19. In essence, the site-specific NEPA analysis tiers back to the broader
3 *Conservation Strategy*, even though the strategy itself was never subject to NEPA review or
4 public scrutiny. Although Plaintiffs have not yet obtained the project-specific NEPA documents
5 for the five additional projects that have received final section 404 permits since North Douglas,
6 all of the agency correspondence indicates that the Corps and EPA will rely and have relied on
7 the *Conservation Strategy* to evaluate environmental impacts for every single one of them. Thus,
8 compliance with the terms of the *Conservation Strategy* is a significant, if not in fact a
9 dispositive, factor in the agencies’ evaluation and decisionmaking process.
10

11 In short, the *Conservation Strategy* is a major federal action upon which Federal
12 Defendants now routinely rely in making other agency decisions that allow development and is,
13 therefore, subject to NEPA. *See e.g.*, 40 C.F.R. § 1508.18(B); *Kern v. United States Bureau of*
14 *Land Management*, 284 F.3d 1062, 1072 (9th Cir. 2002) (agency guidance in a regional
15 management plan required preparation of EIS); *Environmental Defense Fund v. Andrus*, 596 F.2d
16 848, 851-52 (9th Cir.1979) (regional plan for marketing water, upon which future water contracts
17 would be based, required preparation of EIS); *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th
18 Cir. 1979) (“long-range regional policy with definite goals and fixed roles for participants”
19 required preparation of EIS); *Environmental Protection Information Center v. U.S. Forest*
20 *Service*, 2003 WL 22283969 (N.D. Cal. Sept. 05, 2003) (NO. C-02-2708 JCS) (fire management
21 planning document triggers NEPA); *People of Cal. ex rel. Lockyer v. U.S. Forest Service*, 2005
22 WL 1630020 (N.D. Cal. July 11, 2005) (NO. C 04-02588 CRB) (same). As the Ninth Circuit
23 explained in *Port of Astoria*, “as far as the record shows, [the agency] has no intention of
24 abandoning its . . . policy” and “is prepared to execute contracts” pursuant to it; accordingly, the
25 NEPA analysis “should occur at an early stage when alternative courses of action are still
26 possible and environmental damage can be mitigated.” 595 F.2d at 478. Exactly the same can be
27 said of the *Conservation Strategy* at issue in this case.
28

1 **b. Failure to Prepare a NEPA Analysis for the *Conservation Strategy***
2 **Prevented Proper Evaluation of Cumulative Impacts and**
3 **Consideration of a Reasonable Range of Alternatives.**

4 By expressly relying on and tiering back to the unreviewed and unanalyzed *Conservation*
5 *Strategy* when it evaluates the environmental impacts for each individual development project in
6 the Sunrise Douglas area, the Corps fails to consider the two most critical NEPA concerns:
7 cumulative impacts and reasonable alternatives.

8 **(i) Cumulative Impacts.** Where “several actions have a cumulative . . . environmental
9 effect, this consequence must be considered in an EIS.” *City of Tenakee Springs v. Clough*, 915
10 F.2d 1308, 1312 (9th Cir. 1990). A “cumulative impact” is “the impact on the environment
11 which result from the incremental impact of the action when added to other past, present and
12 reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. *See also id.* § 1508.25(a)(2). To
13 satisfy NEPA, an EIS must include a “useful analysis” describing cumulative impacts in
14 “sufficient detail to be ‘useful to the decisionmaker in deciding whether, or how, to alter the
15 program to lessen cumulative impacts.’” *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177
16 F.3d 800, 810 (9th Cir. 1999). “The cumulative impact analysis must be more than perfunctory.”
17 *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2002). “To ‘consider’
18 cumulative effects, some quantified or detailed information is requirement. Without such
19 information, neither the courts nor the public . . . can be assured that [the agency] provided the
20 hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*,
21 137 F.3d 1372, 1378-79 (9th Cir. 1998). For this reason, “[i]t is not appropriate to defer
22 consideration of cumulative impacts to a future date when meaningful consideration can be given
23 now.” *Kern v. BLM*, 284 F.3d at 1075.

24 By failing to complete a NEPA analysis for the *Conservation Strategy*, Federal
25 Defendants did precisely what the Ninth Circuit warned against in *Kern*. They failed to assess
26 the cumulative impacts of implementing the strategy’s vernal pool take and preservation plan
27 across the Sunrise Douglas Community Planning Area. Then, when the Corps got around to the
28

1 first project permitted under the *Conservation Strategy*, the site-specific NEPA review omitted
2 any areawide cumulative impacts analysis and, instead, concluded that implementation of the
3 *Conservation Strategy* would avoid significant cumulative impacts. Exhibit I at 18-19. Yet there
4 has never been a cumulative effects analysis prepared for the *Conservation Strategy*, nor have the
5 public or independent scientific experts ever had a formal opportunity to comment on the
6 cumulative effects of the strategy. This omission is particularly troubling given the strategy's
7 inconsistency with the *Recovery Plan*, which calls for preservation of 95 percent of the remaining
8 Mather Core Recovery Unit vernal pool habitat when over 13 percent of that habitat will be
9 destroyed under the *Conservation Strategy*. Witham Decl. at ¶ 16.

11 In effect, Defendants unlawfully attempted to avoid a discussion of the potentially
12 significant cumulative impacts from the *Conservation Strategy* by improperly breaking the
13 NEPA analysis into smaller, project-specific components. *See, e.g., Klamath-Siskiyou Wildlands*
14 *Center v. Bureau of Land Management*, 387 F.3d 989, 994 (9th Cir. 2004) (total acreage affected
15 by multiple projects subject to cumulative impacts analysis); *Churchill County v. Gale A. Norton*,
16 276 F. 3d 1060, 1072 (9th Cir. 2001) (agency cannot “escape the existence of a comprehensive
17 program with cumulative environmental impacts by disingenuously describing it as only an
18 amalgamation of unrelated smaller projects” and analyzing those projects in a piece-meal
19 fashion); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir.
20 1998) (separate study that did not assess impacts of logging several thousand acres and building
21 several miles of roads from several projects “does not substitute for a meaningful cumulative
22 impacts analysis of the actual logging projects”). Given the paucity of a cumulative impacts
23 analysis for the *Conservation Strategy* as a whole, Plaintiffs are likely to succeed on the merits of
24 their claim. *See, e.g., Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868 (9th
25 Cir. 2005) (“If the Corps’ determination of cumulative impact is fully informed and well
26 considered, we should defer to that finding. On the other hand, we ‘need not forgive a clear error
27 in judgment.’”).

1 **Alternatives.** In addition, NEPA requires a “detailed statement” of “alternatives to the
2 proposed action.” 42 U.S.C. § 4332(2)(C). To fulfill its intended role of “sharply defining the
3 issue and providing a clear basis for choice among options by the decisionmaker and the public,”
4 a NEPA document must “[r]igorously explore and objectively evaluate all reasonable
5 alternatives.” 40 C.F.R. § 1502.14(a). *See also Muckleshoot Indian Tribe*, 177 F.3d at 812-13
6 (failure to consider adequate range of alternatives violates NEPA). Here, however, in its very
7 first environmental assessment after the adoption of the *Conservation Strategy*, the Corps
8 confined its “alternatives analysis . . . within the framework of the ten principles and standards
9 discussed in the Conceptual Strategy, and analyzed [the project’s] level of compliance with the
10 principles and the associated preserve map created for the entire Specific Plan area.” Exhibit I at
11 7.⁹ The drafters’ correspondence memorializing their “understanding” of the *Conservation*
12 *Strategy* explains that the so-called “alternatives” analysis for each project will follow this same
13 unlawful process of tiering back to a document that has not yet received NEPA scrutiny.
14 Exhibits F at 4-5, G, and H. The government thus avoided any discussion of whether the
15 *Conservation Strategy* itself was the best alternative for the development or preservation of the
16 region.
17

18 By confining their alternatives analysis within the narrow bounds of the *Conservation*
19 *Strategy*, Federal Defendants ignored significant conservation concerns that might have
20 generated different land use patterns. The strategy nowhere contemplates that largescale
21 development of this type may be inappropriate for this extraordinarily rare and sensitive area.
22 Nor does it explain why, consistent with Federal Defendants’ statutory mandates, the boundaries
23

24
25 ⁹ In this Environmental Assessment for the North Douglas Project, the Corps
26 incorporates by reference a so-called “Alternatives Information Document” prepared by the
27 consultant for seven of the Sunrise Douglas proposed developments. *See* Exhibit I at 7. Not only
28 is this analysis cabined within the contours of the *Conservation Strategy* – as opposed to
identifying alternatives to that strategy – but the document itself did not undergo the kind of
public review and comment that lies at the heart of NEPA. It cannot, therefore, substitute for full
and open NEPA compliance by the Corps.

1 of the preserve areas “are the smallest that would be acceptable to the Agencies.” Ex. B at 1.
2 Independent scientists were never invited to comment on the preserve design which, in fact,
3 violates “the most basic tenants of conservation biology.” Witham Decl. at ¶ 15. Conservation
4 biologists generally urge that preserves be designed with a minimal amount of “edge” – the
5 contact region between the preserve and unreserved regions – because the edge area is likely to
6 be disturbed by conflicting land uses outside of the preserve. *Id.* Yet, the preserves in the
7 Strategy are generally long and narrow, maximizing edge. Barbour Decl. at ¶ 8. As a result, over
8 a third of the 2,207 acres of preserves in the *Conservation Strategy* will be degraded by edge
9 effects. *Id.* Moreover, the *Conservation Strategy* does not properly account for the long-term
10 dependence of vernal pool habitat on protection of surrounding grassland. Thorp Decl. at ¶ 11.
11 Because the Strategy was developed with no public comment and no consideration of other
12 alternatives, these objections could never be raised, and the Corps has never had to address or
13 respond to them. Had a proper public process been conducted, Plaintiffs could and would have
14 proposed a different preserve design. Witham Decl. at ¶ 15. For these reasons, Plaintiffs are
15 likely to succeed on the merits of this claim, as well.

17 **2. Federal Defendants Violated the ESA in Adopting the *Conservation Strategy***
18 **and Issuing Subsequent Individual Project Biological Opinions.**

19 **a. The *Conservation Strategy* Constitutes “Agency Action” Subject to**
20 **ESA Consultation Requirements.**

21 The ESA section 7 consultation requirements apply to all “actions” where the acting
22 agency has the ability to impose protections that inure to the benefit of listed species. *See* 16
23 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03; *Turtle Island Restoration Network v. National Marine*
24 *Fisheries Service*, 340 F.3d 969, 974 (9th Cir. 2003). The term “action” is defined by regulation
25 to mean “*all activities or programs of any kind authorized, funded, or carried out, in whole or in*
26 *part, by Federal agencies in the United States or upon the high seas. Examples include, but are*
27 *not limited to: (a) actions intended to conserve listed species or their habitat; (b) the*
28 *promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-*

1 way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the
2 land, water, or air.” 50 C.F.R. § 402.02 (emphasis added). In determining whether section 7
3 applies, courts should broadly construe the term “agency action.” *Natural Resources Defense*
4 *Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998); *Pacific Rivers Council*, 30 F.3d at
5 1054-55. Federal Defendants’ activities in developing a strategy to conserve vernal pool species
6 and agreeing with private applicants to apply the resulting *Conservation Strategy* to the review
7 and evaluation of individual development projects constitutes an “action” that “may affect” listed
8 species. It, therefore, plainly triggers section 7 consultation.

9
10 Section 7 consultation on a management strategy that will guide development of one of
11 the most important remaining habitat areas for several listed species is entirely consistent with
12 the purposes and goals of the ESA. As the U.S. Supreme Court has explained, the ESA is “the
13 most comprehensive legislation for the preservation of endangered species ever enacted by any
14 nation.” *Tennessee Valley Auth. (“TVA”) v. Hill*, 437 U.S. 153, 180 (1978). The Act’s purpose
15 is “to provide a means whereby the ecosystems upon which endangered species and threatened
16 species depend may be conserved” and “to provide a program for the conservation of such
17 endangered and threatened species.” 16 U.S.C. § 1531(b). “[T]he plain intent of Congress in
18 enacting this statute was to halt and reserve the trend toward species extinction, whatever the
19 cost. This is reflected not only in the stated policies of the Act, but in literally every section of
20 the statute.” *TVA v. Hill*, 437 U.S. at 184. By enacting the ESA, Congress made “an explicit . . .
21 decision to require agencies to afford first priority to the declared national policy of saving
22 endangered species . . . [and the Act] reveals a conscious decision by Congress to give
23 endangered species priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. *See*
24 *also Pacific Coast Fed. of Fishermen’s Associations v. U.S. Bureau of Reclamation*, 426 F.3d
25 1082, 1084-85 (9th Cir. 2005) (ESA “obligates federal agencies ‘to afford first priority to the
26 declared national policy of saving endangered species’”); *Conner v. Burford*, 848 F.2d at 1454
27 (Congress intended that agencies “give the benefit of the doubt to the species”).
28

1 Although procedural, section 7 consultation is the backbone to implementing
2 congressional intent behind the ESA. “The ESA’s procedural requirements call for a systematic
3 determination of the effects of a federal project on endangered species. If a project is allowed to
4 proceed without substantial compliance with those procedural requirements, there can be no
5 assurance that a violation of the ESA’s substantive provisions will not result.” *Thomas v.*
6 *Peterson*, 753 F.2d at 764 (citing *TVA v. Hill*, 437 U.S. 153). *See also Sierra Club v. Marsh*, 816
7 F.2d 1376, 1384 (9th Cir. 1987) (“Only by requiring substantial compliance with the act’s
8 procedures can we effectuate” congressional intent to protect species); *Conner v. Burford*, 848
9 F.2d at 1455. Thus, compliance with the basic procedural requirements of section 7 is critical to
10 fulfilling the ESA’s protective purposes: “The strict substantive provisions of the ESA justify
11 *more* stringent enforcement of its procedural requirements, because the procedural requirements
12 are designed to ensure compliance with the substantive provisions.” *Pacific Coast Fed. of*
13 *Fishermen’s Association v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242 (N.D. Cal.
14 2001).

15
16 Allowing an action to go forward in the absence of procedural compliance risks
17 jeopardizing endangered or threatened species and, therefore, is “impermissible.” *Pacific Coast*
18 *Fed. of Fishermen’s Association*, 138 F. Supp. 2d at 1242. Accordingly, Plaintiffs are likely to
19 succeed on the merits of this claim.

20
21 **b. The Biological Opinions Issued for Nine Separate Projects in the**
22 **Sunrise Douglas Community Planning Area Do Not Incorporate the**
23 **Best Available Science.**

24 In addition to Federal Defendants’ unlawful failure to consult on the *Conservation*
25 *Strategy* itself, the nine Biological Opinions issued for individual development projects in the
26 Sunrise Douglas Community Planning Area are legally defective because they do not incorporate
27 the best available science. For the same reason, the Corps’ and EPA’s reliance on them in the
28

1 section 404 permitting process is arbitrary and capricious.¹⁰ *See Resources Limited, Inc. V.*
2 *Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (consultation alone does not satisfy action
3 agency’s ESA obligations; agency’s decision to rely on a biological opinion must not be arbitrary
4 and capricious).

5 In particular, all nine Biological Opinions rely upon and incorporate a *Conservation*
6 *Strategy* that is at odds with the best available science contained in the *Recovery Plan*. “Once a
7 species is listed as threatened or endangered, [FWS] ‘must do more than merely avoid the
8 elimination of [the] protected species. It must bring these species back from the brink so that
9 they may be removed from the protected class . . .’” *Fund for Animals v. Babbitt*, 930 F. Supp 96,
10 102 (D.D.C. 1995). Thus, the ESA requires FWS to “develop and implement” recovery plans
11 “for the conservation and survival” of listed species. 16 U.S.C. § 1533(f)(1). “Any such plan is
12 supposed to be a basic road map for recovery, *i.e.*, the process that stops or reverses decline of a
13 species and neutralizes threats to its existence.” *Fund for Animals v. Babbitt*, 930 F. Supp at 103
14 (citing May 1990 Policy and Guidelines for Planning and Coordinating Recovery of Endangered
15 and Threatened Species).

17 Here, FWS developed the *Recovery Plan* for Central Valley vernal pool species
18 concurrently with its negotiations over the *Conservation Strategy* and issued the near-final form
19 plan before any of the nine Biological Opinions were completed. Despite this fact, the
20 *Conservation Strategy* entirely ignores the goals and recommendations of the *Recovery Plan* and,
21 if implemented as presently drafted, will blatantly violate its directives. For instance, the
22 *Recovery Plan* calls for the preservation of 95 percent of the Mather Core Recovery Unit, yet
23 build-out of the Sunrise Douglas Community Planning Area alone, in the middle of the Mather
24 Core Recovery Unit, will destroy 13 percent of the recovery unit and indirectly affect another 3
25

26
27 ¹⁰ Because the individual administrative records for the Biological Opinions and CWA
28 section 404 permits have not yet been produced, Plaintiffs focus, for purposes of this motion for
interim emergency relief, on just one of many legal defects in those approvals, without waiving
their ability to address other ESA flaws at summary judgment or trial on the merits.

1 percent. *See* Witham Decl. at ¶ 16. Rather than adhere to the best and latest scientific
2 information and recommendations in the *Recovery Plan*, the subsequent Biological Opinions
3 adopted the alternative *Conservation Strategy* provisions without question, discussion, or
4 analysis of the *Recovery Plan*. In fact, the only Biological Opinion that even mentions the
5 *Recovery Plan* concedes that the preservation measures embodied in the *Conservation Strategy*
6 (and therefore incorporated into the Biological Opinions) do not come close to the conservation
7 goals set forth in the plan:

8
9 [T]he compensation measures to offset direct effects resulting from the proposed project
10 do not achieve the recovery goal for listed vernal pool species in the region. To do so, the
11 project proponent would need to preserve, at a minimum, 11.82 acres to achieve an 85
12 percent rate of preservation of this diminishing habitat . . . To achieve a 95 percent rate
of vernal pool habitat preservation, the project proponent would need to preserve at least
37.43 acres of vernal pool habitat in the region . . . Regardless, the proposed project does
not approach these levels of habitat preservation.

13 . . .

14 Again, the proposed project does not achieve the recovery goal for listed species in the
15 region. To compensate for indirect effects, the project proponent would need to preserve,
16 at a minimum, 17.46 acres to achieve an 85 percent rate of preservation of this
17 diminishing habitat . . . To achieve a 95 percent rate of vernal pool habitat preservation,
the project proponent would need to preserve at least 55.29 acres of vernal pool habitat in
the region . . . Regardless, the proposed project does not achieve these levels of habitat
preservation.

18 Exhibit M at 13, 15. Instead of preserving 37 acres to offset direct impacts and 55 additional
19 acres to offset indirect impacts, the imminent Douglas Road 103 Project will preserve only 2.77
20 acres of pools onsite and 6.19 to 12.38 acres at an offsite location. *Id.* at 13. Moreover, none of
21 the biological opinions discuss the importance of the Mather Core Recovery Unit to the overall
22 survival and recovery of the listed vernal pool species.

23
24 Thus, the nine issued Biological Opinions and corresponding Incidental Take Statement
25 authorizations – and the six subsequent Corps permits that rely upon them – do not incorporate
26 or utilize the best scientific information available, as unequivocally required by section 7
27 consultation provisions. 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8). For
28 this additional reason, Plaintiffs are likely to succeed on the merits of their claim. *See*

1 *Heartwood Inc. v. U.S. Forest Service*, 380 F.3d 428, 436 (8th Cir. 2004) (agencies must “seek
 2 out and consider all existing scientific evidence relevant to the decision at hand. They cannot
 3 ignore existing data”).

4 **C. Absent the Interim Injunctive Relief that Plaintiffs Request, There Will Be**
 5 **Irreparable Environmental Harm to the Remaining Vernal Pool Habitat and Listed**
 6 **Species at the Six Federally Authorized Individual Development Project Sites Where**
 6 **Some Viable Habitat Still Remains.**

7 If any situation warrants injunctive relief, this one does. There is no serious question that,
 8 absent an injunction pending resolution of the merits, most if not all of the important, high
 9 quality vernal pool habitat and dependent endangered and threatened species at issue here will
 10 likely be destroyed or irreparably degraded. Witham Decl. at ¶ 18. Without an injunction, the
 11 developers who procured the *Conservation Strategy* are free to move forward as soon as their
 12 various permits are issued, and Federal Defendants’ continued issuance of additional permits
 13 over the next several weeks will only magnify this ongoing harm. Specifically, Plaintiffs request
 14 that the Court enjoin (1) the issuance of any additional federal permits or approvals in reliance on
 15 the *Conservation Strategy* and (2) any further groundbreaking, earthmoving or other on-the-
 16 ground activity that may affect vernal pool habitat for the following six projects authorized by
 17 Federal Defendants in reliance on the *Conservation Strategy*: Douglas Road 98, Douglas Road
 18 103, Grantline 208, Arista del Sol, Anatolia IV, and Sunridge Village.¹¹

20 “[T]he bases for injunctive relief are irreparable injury and inadequacy of legal remedies.”
 21 *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). Because “[e]nvironmental
 22 injury, by its nature, can seldom be adequately remedied by money damages and is often
 23 permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely,
 24 therefore, the balance of harms will usually favor the issuance of an injunction to protect the
 25

26
 27 ¹¹ Because Plaintiffs understand that no viable vernal pool habitat remains any longer on
 28 the North Douglas, Montelena/Sunridge Ranch, and Sunridge Park/Riverwest sites, they are not
 at this time seeking interim injunctive relief as to construction of these projects, although they do
 not waive their right to seek permanent injunctive relief, such as additional habitat mitigation.

1 environment.” *Id.* “The irreparable injury question in this case, therefore, turns on the likelihood
2 of that injury occurring.” *Earth Island I*, 351 F.3d at 1299.

3 Moreover, the Ninth Circuit routinely concludes that NEPA and ESA violations warrant
4 injunctive relief. In addition to on-the-ground injury, NEPA violations cause irreparable harm
5 directly through the resulting damage to the environmental decisionmaking process. *High Sierra*
6 *Hikers Ass’n v. Blackwell*, 390 F. 3d 630, 642 (9th Cir. 2004) (citing *Thomas v. Peterson*, 753
7 F.2d at 764). “While an injunction does not automatically issue upon a finding that an agency
8 violated NEPA, ‘the presence of strong NEPA claims gives rise to more liberal standards for
9 granting an injunction.’” *Id.* (quoting *American Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 965
10 (9th Cir.1983)). Similarly, where the agency has unlawfully failed to consult under section 7 of
11 the ESA, resulting in a “substantial procedural violation of the ESA . . . , the remedy must be an
12 injunction” pending compliance. *High Sierra Hikers Ass’n*, 390 F. 3d at 642. *See also Wash.*
13 *Toxics Coalition v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005) (citing *Thomas v. Peterson* for this
14 principle).
15

16 Here, the six projects that have now been fully permitted by Federal Defendants will
17 permanently destroy 14 percent and indirectly impact an additional 1 percent of the vernal pool
18 grassland habitat in the Sunrise-Douglas Community Planning Area. Witham Decl. at ¶ 20. The
19 three additional projects awaiting final federal approval will destroy an additional 6 percent and
20 indirectly impact nearly 2 percent of the vernal pool grassland habitat in the same Plan Area.
21 Witham Decl. at ¶ 21. Altogether, the nine project cumulatively will destroy 20 percent of the
22 vernal pool grassland habitat within the Sunrise Douglas area and 13 percent of the land within
23 the critical Mather Core Recovery Unit -- well in excess of the 5 percent recommended in the
24 science-based *Recovery Plan*. Witham Decl. at ¶ 18.
25

26 Plaintiffs have thus demonstrated that they are likely to succeed on the merits of their
27 claims or, at the very least, that their claims raise serious legal questions about the agencies’
28 conduct in this case, and that irreparable injury to Plaintiffs’ interests and the listed species they

1 seek to protect is imminent. Federal Defendants should not be allowed to deprive Plaintiffs of
2 meaningful relief in this case by authorizing the very environmental injury of which Plaintiffs
3 complain while they the agencies prepare the record and the parties brief their arguments.
4 Plaintiffs' attempts to negotiate a standstill with Defendants that would preserve the *status quo* of
5 the remaining vernal pool habitat in the Plan Area have been unsuccessful. See Sivas Decl. at ¶
6 3. Pending a full hearing on the merits, therefore, the public interest and the equities of this
7 situation warrant temporary injunctive relief.
8

9 **IV. CONCLUSION**

10 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this
11 Motion for Preliminary Injunction and enjoin any further reliance by Defendants on the
12 *Conservation Strategy*, as well as all federal authorizations or permits based on the *Conservation*
13 *Strategy* authorizing activities that still may affect listed species, pending resolution of the merits
14 of Plaintiffs' claims.

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Respectfully submitted,

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