

1 John P. Rose (SBN 285819)
2 Aruna Prabhala (SBN 323737)
3 John Buse (SBN 163156)
4 CENTER FOR BIOLOGICAL DIVERSITY
5 1212 Broadway, Suite 800, Oakland, CA 94612
6 Tel: 510-844-7100
7 Fax: 510-844-7150
8 Email: jrose@biologicaldiversity.org
9 aprabhala@biologicaldiversity.org
10 jbuse@biologicaldiversity.org

11 Ross A. Middlemiss (SBN 323737)
12 GROSS & KLEIN LLP
13 The Embarcadero
14 Pier 9, Suite 100
15 San Francisco, CA 94111
16 Tel: 415-671-4628
17 Fax: 415-480-6688
18 rmiddlemiss@grosskleinlaw.com

19 Attorney for Plaintiffs AquAlliance and Center for Biological Diversity

20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

22 AQUALLIANCE; and CENTER FOR
23 BIOLOGICAL DIVERSITY,

24 Plaintiffs,

25 v.

26 U.S. FISH AND WILDLIFE SERVICE; U.S.
27 ARMY CORPS OF ENGINEERS; COLONEL
28 JAMES HANDURA, in his official capacity as
District Commander of the U.S. Army Corps of
Engineers; and DEB HAALAND, in her official
capacity as Secretary of the Interior.

Defendants,

and

EPICK HOMES, INC. and BRUCE ROAD
ASSOCIATES, LP,

Defendant-Intervenors.

Case No. 2:21-CV-01527-TLN-DMC

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Date: December 15, 2022

Time: 2:00 p.m.

Courtroom: 2, 15th floor

Judge: Hon. Troy L. Nunley

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 PLEASE TAKE NOTICE THAT on December 15, 2022, at 2:00 p.m., in Courtroom 2,
3 Fifteenth Floor of the Robert T. Matsui United States Courthouse, 501 I Steet, Sacramento, CA,
4 95814, before the Honorable Troy T. Nunley, United States District Judge for the Eastern
5 District of California, Plaintiffs AquAlliance and Center for Biological Diversity will move and
6 hereby do move for summary judgment with respect to all claims for relief in Plaintiffs'
7 Complaint for Declaratory and Injunctive Relief filed on August 25, 2021, ECF No. 1.

8 Plaintiffs seek summary judgment under Rule 56 of the Federal Rules of Civil Procedure
9 against Defendants United States Fish and Wildlife Service and United States Army Corps of
10 Engineers for their approval of the Stonegate Development Project in violation of the
11 Endangered Species Act, Clean Water Act, National Environmental Policy Act, and the
12 Administrative Procedure Act. 33 U.S.C. § 1251 et seq.; 16 U.S.C. § 1531 et seq.; 42 U.S.C. §
13 4332; 16 U.S.C. § 470 et seq.; 5 U.S.C. § 706.

14 This Motion is based on this Notice; the attached Memorandum of Points and
15 Authorities; the concurrently filed Declarations of Barbara Vlamis, Elizabeth Devereaux, and
16 Ross Middlemiss; all pleadings and papers filed in this action to date; matters of which the Court
17 may be requested to take judicial notice; and any other oral or documentary evidence that may be
18 presented at or before the hearing on this motion.

19
20 Dated: July 5, 2022

CENTER FOR BIOLOGICAL DIVERSITY

21 /s/ John P. Rose

22 John P. Rose
23 Aruna Prabhala
24 John Buse

25 Attorneys for Plaintiffs AquAlliance and Center for
26 Biological Diversity
27
28

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..... 8

II. FACTUAL AND PROCEDURAL BACKGROUND 9

III. STANDARD OF REVIEW 11

IV. ARGUMENT..... 13

 A. The Corps and Service are Violating the Endangered Species Act..... 13

 1. The Biological Opinion’s “No Jeopardy” Finding is Arbitrary and Capricious 15

 a. The Service Failed to Properly Analyze the Environmental Baseline for Meadowfoam 16

 b. The Service Failed to Analyze Climate Change Impacts on the Listed Vernal Pool Species 19

 c. The Service contradicted its previous approach to meadowfoam impact analysis and mitigation without justification or explanation..... 21

 d. The Service improperly ignored its own guidance and permitted impacts in excess of limitations set forth in the vernal pool Recovery Plan..... 24

 B. The Corps Violated the ESA by Failing to Consult with the Service Regarding Giant Garter Snake 25

 C. The Corps Issued a Section 404 Permit for the Project in Violation of the Clean Water Act. 28

 1. The Corps Failed to Adopt the Least Environmentally Damaging Practicable Alternative as Required by the Clean Water Act. 29

 D. The Corps Violated the National Environmental Policy Act by Failing to Prepare an Environmental Impact Statement. 33

V. PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT. 37

VI. CONCLUSION..... 38

TABLE OF AUTHORITIES

Cases

Alameda Water & Sanitation Dist. v. Reilly, 930 F.Supp.486 (D. Colo. 1996) 29

Alaska v. Lubchenco, 723 F.3d 1043 (9th Cir. 2013) 13

Appalachian Voices v. U.S. Dept. of Interior, 25 F.4th 259 (4th Cir. 2022) 16, 18, 19, 20, 21

Baykeeper v. U.S. Army Corps of Eng'rs, No. CIV. S-06-1908 FCD/GGH, 2006 U.S. Dist. LEXIS 67483 (E.D. Cal. Sept. 20, 2006) 36

Bennet v. Spear, 520 U.S. 154 (1997) 13

Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938 (9th Cir. 2008) 29

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998) 11

Bowsher v. Synar, 478 U.S. 714 (1986)..... 37

Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072 (9th Cir. 2011) 33

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 12

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988)..... 13, 21

Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020)..... 25

Ctr. for Biological Diversity v. EPA, 90 F.Supp.3d 1177 (W.D. Wash. 2015) 32

Ctr. for Biological Diversity v. Mattis, 868 F.3d 803 (9th Cir. 2017)..... 37

Earth Island Inst. v. Elliott, 290 F.Supp.3d 1102 (E.D. Cal. 2017)..... 12

Env't. Def. Ctr. v. Bureau of Ocean Energy Mgmt., No. 19-55526, 2022 U.S. App. LEXIS 15343 (9th Cir. June 3, 2022)..... 33

Friends of Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) 31

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000) 37

Friends of the Mahoning River v. U.S. Army Corps of Eng'rs, No. 4:19CV2771, 2021 U.S. Dist. LEXIS 171537 (N.D. Ohio, Sep. 9, 2021) 32

Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257 (10th Cir. 2004)..... 36

Karuk Tribe of California v. U.S. Forest Serv., 681 F.3d 1006 (9th Cir. 2012)..... 26, 28

Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002) 37

Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv., 373 F.Supp.2d 1069 (E.D. Cal. 2004)..... 35, 36

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 12

Nat. Res. Def. Council, Inc. v. EPA, 966 F.2d 1292 (9th Cir. 1992) 37

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007)..... 13

1 *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) 36

2 *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917

3 (9th Cir. 2008) 12, 13, 15, 21, 25

4 *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 132 F.Supp.2d 876 (D. Or. 2001)..... 12

5 *Nebraska v. Wyoming*, 507 U.S. 584 (1993)..... 11

6 *Nw. Env't. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668 (9th Cir. 2007)..... 21

7 *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005) 12, 32, 33, 34

8 *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F.Supp.2d 1122

9 (E.D. Cal. 2008)..... 20

10 *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082

11 (9th Cir. 2005) 15

12 *S. Yuba River Citizens League v. Na'l Marine Fisheries Serv.*, 723 F.Supp.2d 1247 (E.D. Cal.

13 2010)..... 19

14 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)..... 12

15 *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971 (9th Cir. 2014) 13, 16

16 *Sec'y of the Int. v. California*, 464 U.S. 312 (1984) 37

17 *Sierra Club v. Strock*, 495 F.Supp.2d 1188 (S.D. Fla. 2007) 32

18 *Sierra Club v. Van Antwerp*, 709 F.Supp.2d 1254 (S.D. Fla. 2009)..... 31

19 *Swan View Coalition v. Weber*, 52 F.Supp.3d 1133 (D. Mont. 2014)..... 14

20 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)..... 13

21 *Turtle Island Restoration Network v. U.S. Dept't of Commerce*, 878 F.3d 725

22 (9th Cir. 2017) 21

23 *Utahns for Better Transp. v. U.S. Dep't. of Transp.*, 305 F.3d 1152 (10th Cir. 2002)..... 29, 31, 32

24 *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2010)... 12, 14, 17, 19, 24, 25, 26

25

26

27

28

Statutes

5 U.S.C. § 706(2) 14, 32

5 U.S.C. § 706(2)(A)..... 11

5 U.S.C. § 706(2)(D)..... 12

16 U.S.C. § 1536(a)(2)..... 13, 14, 20, 26

16 U.S.C. § 1536(d) 15, 28

33 U.S.C. § 1251(a) 28

33 U.S.C. § 1311(a) 28

33 U.S.C. § 1344(a)-(c)..... 28

1	33 U.S.C. § 1344(b)	28
2	42 U.S.C. § 4321	33
3	42 U.S.C. § 4332(2)(C)	33
4	42 U.S.C. § 4332(2)(C)(i), (ii)	33
5	5 U.S.C. § 706(1)	12
6	Regulations	
7	40 C.F.R. § 1500.1(a)	33
8	40 C.F.R. § 1502.1	33
9	40 C.F.R. § 1502.3	33
10	40 C.F.R. § 1508.27	37
11	40 C.F.R. § 1508.27(a)	35
12	40 C.F.R. § 230.10(a)	28
13	40 C.F.R. § 230.10(a)(2)	28
14	40 C.F.R. § 230.10(a)(3)	29, 31, 32
15	40 C.F.R. § 230.3(m)	31, 32
16	40 C.F.R. § 230.3(q-1)	29
17	40 C.F.R. § 230.91(c)(2)	29
18	40 C.F.R. §230.10(a)	29
19	40 C.F.R. Ch. 1, Subch. H, Pt. 230	28
20	50 C.F.R. § 402 et seq.	14
21	50 C.F.R. § 402.02	13, 16, 26
22	50 C.F.R. § 402.02(d)	16
23	50 C.F.R. § 402.12(k)	14
24	50 C.F.R. § 402.14(a)	14
25	50 C.F.R. § 402.14(d)	13
26	50 C.F.R. § 402.14(g)	15
27	50 C.F.R. § 402.14(g)(1)	20
28	50 C.F.R. § 402.14(g)(1)-(3)	14
	50 C.F.R. § 402.14(g)(4)	16
	50 C.F.R. § 402.14(h)	14
	50 C.F.R. § 402.14(i)	14
	51 Fed. Reg. 19,926, 19,949 (June 3, 1986)	14, 26
	71 Fed. Reg. 11441	24

1 Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336
2 (Dec. 24, 1980) 32

3 **Rules**

4 Fed. R. Civ. P. 56(c) 11

5 **Other**

6 Kneitel, J. M., *Inundation timing, more than duration, affects the community structure of*
7 *California vernal pool mesocosms*, 732 HYDROBIOLOGIA, 71-72, 79-81 (2014) 19, 20
8 Montrone et al., *Climate change impacts on vernal pool hydrology and vegetation in northern*
9 *California*, 574 JOURNAL OF HYDROLOGY 1003, 1003-04 (2019) 19, 20, 21
10 U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation*
11 *Handbook 4-22 (1998)* 16

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action filed by Plaintiffs AquAlliance and Center for Biological Diversity and (collectively, “Plaintiffs”) challenges the federal government’s approval and permitting of the proposed Stonegate Development Project (“Project” or “Stonegate Project”) within the City of Chico. The Project—a proposed 314-acre multi-use development with 423 single-family residences, 13.4 acres of multi-family dwellings and 36.6 acres of commercial uses that would result in the loss of nearly half of the 20.19 acres of wetlands on the Project site—would have profound and irreversible environmental consequences, particularly for seasonal wetlands known as vernal pools that are found on the Project site, and on the endangered and threatened species that rely on these vernal pools. The vernal pool habitats on and around the Project site are well known in Butte County, and local advocates, residents and government agencies have all identified the value of this area in sustaining listed species, particularly the rare Butte County meadowfoam and declining vernal pool fairy shrimp and vernal pool tadpole shrimp.

The U.S. Fish and Wildlife Service (“Service”) violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”) by issuing a biological opinion that is arbitrary and capricious and did not make a rational connection between the facts found in the record and the conclusion that the Project would not jeopardize the Butte County meadowfoam, vernal pool fairy shrimp, and vernal pool tadpole shrimp. In addition, the United States Army Corps of Engineers (“Corps”) violated section 7 of the ESA by failing to consult with the Service regarding the Project’s effects on the giant garter snake. The Corps also violated the Clean Water Act (“CWA”) by issuing a 404 Permit for the Project that did not require selection of the least environmentally damaging practicable alternative, or “LEDPA.” Finally, the Corps violated the National Environmental Policy Act (“NEPA”) by failing to prepare an environmental impact statement for the Project, despite the substantial evidence in the record that the Project would have a significant effect on the environment.

Plaintiffs therefore move for summary judgment pursuant to Federal Rule of Civil Procedure Rule 56, and request that the Court set aside the Biological Opinion, Section 404

1 Permit, and enjoin implementation of the Project pending completion of a legally adequate
2 Biological Opinion, NEPA analysis, and CWA analysis.

3 **II. FACTUAL AND PROCEDURAL BACKGROUND**

4 The Stonegate Project is proposed on a 314-acre site located on both the east and west of
5 Bruce Road and north of the Skyway in southern Chico, Butte County, California. Corps
6 383:006801-006805. The mixed-use development project would include 423 single-family
7 residential lots, 13.4 acres of multi-family residential land uses, 36.6 acres of commercial land
8 uses, 5.4 acres of storm water facilities, 3.5 acres of park, and a 137-acre open space preserve.
9 Corps 383:006801-006805.

10 The biological communities on the Project site are dominated by annual grassland, with a
11 row of valley oak occurring along a drainage located on the eastern portion of the site. Corps
12 35:000348. Vernal pool complexes—pools and swales that form during the rainy season and dry
13 out during the summer and fall months—are spread throughout the annual grassland landscape.
14 Corps 35:000348. These aquatic features are known to support ESA-listed species, including the
15 endangered Butte County meadowfoam (“meadowfoam”), the threatened vernal pool fairy
16 shrimp, and the endangered vernal pool tadpole shrimp. Corps 35:000348. The Project site also
17 supports other threatened species such as the giant garter snake. Service 00075; 001743; 002276;
18 002279-80.

19 The Project would permanently destroy 9.14 acres of wetlands, 45% of the total 20.19
20 acres of jurisdictional waters on the Project site. Corps 35:000365 & 35:000348. The impacted
21 areas include 5.92 acres of seasonal wetlands and 2.85 acres of vernal pools, among other aquatic
22 features. Corps 35:000348. Overall, California has lost 90% of wetland acreage that was present
23 in the late 18th century. Corps 102:001586. Only 10% of historic vernal pool habitat is still
24 viable in California, and what remains is threatened by urban sprawl development, agricultural
25 expansion, and climate change. Corps 102:001586.

26 On March 10, 2017, the Corps issued a public notice for the Project, followed by a
27 revised public notice on September 7, 2018. Corps 383:006801-6805; 131:006801-006805.
28 Plaintiff AquAlliance submitted comments in response to both notices, on April 10, 2017 and on
October 9, 2018. Corps 102:001559-001567; Corps 362: 006751-006757. AquAlliance’s

1 comments raised concerns about the Project’s impacts on vernal pool habitat onsite, with
2 particular emphasis on impacts to the meadowfoam, vernal pool fairy shrimp and vernal pool
3 tadpole shrimp. Corps 102:001559-001567; AquAlliance also raised concerns that the proposed
4 mitigation—an onsite wetland preserve—would actually be two small preserves separated by the
5 diversion channel, which would make them more susceptible to edge effects and thus decrease
6 their conservation value and habitat functionality. Corps 102:001565-001566. The AquAlliance
7 letters requested a public hearing on the Project, advised the Corps that it must prepare an
8 environmental impact statement that includes an adequate list of reasonable alternatives in order
9 to comply with NEPA, and requested notification once the NEPA process had been completed.
10 Corps 102:001576-001578.

11 On March 13, 2017, the Service submitted comments regarding the Project to the City of
12 Chico and copied the letter to the Corps. Service 000022-000026. The Service stated that
13 comments originally made in a November 24, 2015 letter concerning a previous iteration of the
14 Project remain unchanged. Service 000022-000026. The Service expressed its position that even
15 partial development of the property could preclude recovery of listed species that rely on the
16 vernal pools on the Project site because they would be “significantly and adversely impacted by
17 edge effects of the proposed development.” Service 000025.

18 On May 5, 2017, the California Department of Fish and Wildlife (“CDFW”) submitted
19 comments in response to the public notice for the Project. Corps 351:006702-6707. CDFW
20 acknowledged the Project’s potential to significantly impact state-listed species, such as Butte
21 County meadowfoam, and that an Incidental Take Permit may be required. Corps 351:006703-
22 6704. CDFW also noted the meadowfoam on the Project site is genetically distinct from existing
23 populations north and south of Chico, and that inbreeding and further population reductions
24 could result from the loss of meadowfoam on the Project site. Corps 351:006703-6704. CDFW
25 concluded that the Project as proposed would result in significant impacts to the environment and
26 recommended the preparation of an environmental impact statement. 351:006706.

27 On April 6, 2017, the U.S. Environmental Protection Agency (“EPA”) provided
28 comments on the Project. In its comments, the EPA expressed concerns about the Project’s
impacts to vernal pool habitat onsite, which the EPA considers Aquatic Resources of National
Plaintiffs’ Motion for Summary Judgment

1 Importance or “ARNI.” Corps 214:004202-004225. The EPA concluded that the Project as
2 proposed did not represent the least environmentally damaging practicable alternative, or
3 LEDPA. Corps 214:004202. The EPA specifically requested that an alternative that limited
4 Project development to the parcel west of Bruce Road be included in the Corps’ alternatives
5 analysis. Corps 310:006326.

6 Because the Project is likely to adversely affect listed species, the Corps requested the
7 initiation of formal consultation with the Service on the Project on July 17, 2018. Corps
8 248:005320-005322. The Service issued the Biological Opinion for the Project on March 4,
9 2019. Corps 239:004317-004343. An amended Biological Opinion was issued December 18,
10 2019, which addressed revisions to the on-site preserve boundary that excluded the Butte Creek
11 Diversion Channel from the on-site preserve. Service 000819-000843. A second amended
12 Biological Opinion (BO, 08ESMF00-2016-F-0236-3) was issued on January 23, 2020, to address
13 typographic errors. Service 000851-000875.

14 August 5, 2020, the Corps issued its Memorandum for Record for the Project (“ROD”),
15 which constitutes the “Environmental Assessment, 404(b)(1) Guidelines Evaluation, as
16 applicable, Public Interest Review, and Statement of findings for the subject application. Corps
17 35:000347-000658.

18 **III. STANDARD OF REVIEW**

19 Summary judgment should be granted when “there is no genuine issue as to any material
20 fact ... and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c);
21 *see also Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). In determining whether to grant
22 summary judgment regarding a final agency action, courts must determine if the action was
23 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Blue*
24 *Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting the
25 APA, 5 U.S.C. § 706(2)(A)). Under this standard, a court must invalidate an agency action if it
26 determines that “the agency has relied on factors which Congress has not intended it to consider,
27 entirely failed to consider an important aspect of the problem, offered an explanation for its
28 decision that runs counter to the evidence before the agency, or is so implausible that it could not

1 be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs.*
2 *Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

3 Critical to the reviewing court’s inquiry under the APA is whether “there is ‘a rational
4 connection between the facts found and the conclusions made’ in support of the agency’s
5 action.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2010) (citation
6 omitted). To make that determination, the court “must consider whether the decision was based
7 on a consideration of the relevant factors and whether there has been a clear error of judgment.”
8 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting
9 *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). In short, the court
10 “must engage in a careful, searching review to ensure that the agency has made a rational
11 analysis and decision on the record before it.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries*
12 *Serv.*, 524 F.3d 917, 927 (9th Cir. 2008). Similarly, the reviewing court “must not rubber-stamp .
13 . . administrative decisions that [courts deem] inconsistent with a statutory mandate or that
14 frustrate the congressional policy underlying a statute.” *Ocean Advocs. v. U.S. Army Corps of*
15 *Eng’rs*, 402 F.3d 846, 859 (9th Cir. 2005) (internal citations and quotations omitted).

16 Agency action taken without required consultation under the ESA, CWA, or NEPA must
17 be set aside as without observance of procedure required by law. 5 U.S.C. § 706(2)(D).
18 Alternatively, the APA provides that a court may compel agency action “unlawfully withheld”
19 within the meaning of § 706(1) of the APA. 5 U.S.C. § 706(1). Plaintiffs’ claims brought under
20 the ESA, CWA, NEPA, and APA are reviewable under the standard of review provided in the
21 APA. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011)
22 (holding that the APA’s standard of review applies to ESA citizen suit claims against a federal
23 agency); *Nat’l Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 132 F.Supp.2d 876, 889 (D. Or.
24 2001) (noting APA standard of review for Corps’ actions pursuant to the CWA); *Earth Island*
25 *Inst. v. Elliott*, 290 F.Supp.3d 1102, 1112 (E.D. Cal. 2017) (noting agency compliance with
26 NEPA is reviewed under APA).

1 **IV. ARGUMENT**

2 **A. The Corps and Service are Violating the Endangered Species Act**

3 The ESA aims “to protect and conserve endangered and threatened species and their
4 habitats.” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 651 (2007). The
5 legislative history of the ESA “reveals an explicit congressional decision to require agencies to
6 afford first priority to the declared national policy of saving endangered species.” *Tenn. Valley*
7 *Auth. v. Hill*, 437 U.S. 153, 185 (1978). The ESA aims “not just to ensure survival, but to ensure
8 that the species recovers to the point that it can be delisted.” *Alaska v. Lubchenco*, 723 F.3d
9 1043, 1054 (9th Cir. 2013), *as amended on denial of reh’g and reh’g en banc* (Oct. 16, 2013)
10 (citations omitted). “The plain intent...was to halt and reverse the trend toward species
11 extinction, whatever the cost.” *Tenn. Valley Auth.*, 437 U.S. at 184.

12 The ESA therefore prohibits agencies from engaging in any action “likely to jeopardize
13 the continued existence of any endangered species or threatened species.” 16 U.S.C. §1536(a)(2).
14 To jeopardize means “to engage in an action that reasonably would be expected, directly or
15 indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed
16 species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50
17 C.F.R. § 402.02; *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930
18 (9th Cir. 2008). Specifically, ESA Section 7 and its implementing regulations set forth a detailed
19 consultation process that agencies must follow before they take actions that “may affect” listed
20 species. 50 C.F.R. § 402.02. In fulfilling Section 7, agencies must “use the best scientific and
21 commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). The purpose of this
22 “best available science” mandate is to “prevent an agency from basing its action on speculation
23 and surmise.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir.
24 2014) (citing *Bennet v. Spear*, 520 U.S. 154, 176 (1997)). Failure to rely on the best available
25 science undermines the ESA’s purpose to conserve listed species. *See Conner v. Burford*, 848
26 F.2d 1441, 1454 (9th Cir. 1988) (“FWS cannot ignore available biological information ... which
27 may indicate potential conflicts between development and the preservation of protected
28 species....To hold otherwise would eviscerate Congress’ intent to ‘give the benefit of the doubt
to the species.’”) (citations omitted).

1 Pursuant to Section 7, if the action agency concludes in a “biological assessment” that a
2 proposed action is “not likely to adversely affect” listed species—and the Service lawfully
3 concurs in writing—then the process is concluded; however, if the action agency’s determination
4 or the Service’s concurrence violates the substantive or procedural mandates of this section and
5 the associated regulations, it must be set aside. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402 et
6 seq.; 5 U.S.C. § 706(2). If the action agency concludes that an action is “likely to adversely
7 affect” listed species, it must enter “formal consultation” with the Service. 50 C.F.R.
8 §§ 402.12(k), 402.14(a). The threshold for triggering formal consultation is “very low.” *See*
9 *Swan View Coalition v. Weber*, 52 F.Supp.3d 1133, 1145 (D. Mont. 2014); 51 Fed. Reg. 19,926,
10 19,949 (June 3, 1986).

11 Formal consultation concludes with the Service’s issuance of a biological opinion. A
12 biological opinion must (1) review all relevant information, (2) evaluate the current status of the
13 listed species, and (3) evaluate the effects of the action and cumulative effects on the listed
14 species. 50 C.F.R. § 402.14(g)(1)-(3), (h); 16 U.S.C. § 1536(a)(2). If FWS determines the
15 activity will not jeopardize the continued existence of any listed species, it may allow the
16 “incidental take” of such species. That occurs only pursuant to a valid Incidental Take Statement
17 (“ITS”), which must set enforceable limits on take and provide reasonable and prudent measures
18 to minimize impacts to listed species. 50 C.F.R. § 402.14(i).

19 In the case of the Stonegate Project, the Service violated the ESA and APA by issuing a
20 biological opinion that is arbitrary and capricious, as it failed to make a rational connection
21 between the facts found in the record and the conclusion that the project would not jeopardize the
22 fairy shrimp, tadpole shrimp, or meadowfoam. *See Kraayenbrink*, 632 F.3d at 481 (“Critical to
23 [the court’s] inquiry is whether there is ‘a rational connection between the facts found and the
24 conclusions made’ in support of the agency’s action.”). The biological opinion is also invalid
25 because the Project’s conservation measures are inadequate to ensure Project construction
26 activities and the resulting loss of habitat won’t jeopardize these listed species. As such, the
27 Service’s Biological Opinion is invalid, and the Corps may not rely on the invalid biological
28 opinion to comply with its duties under the ESA. Therefore, the Court should declare that the
Biological Opinion is unlawful, vacate the opinion, and remand the matter back to the Service.

1 Furthermore, the Corps failed to initiate consultation to consider the Project’s adverse
2 effects on the giant garter snake (“GGS”), even though the Project certainly “may affect” the
3 species given its presence in the affected area and the existence of suitable aquatic and upland
4 habitat within the Project site that would be adversely affected by construction activities. Until
5 that consultation is completed, the Corps is prohibited from making “any irreversible or
6 irretrievable commitment or resources with respect to the agency action which has the effect of
7 foreclosing the formulation or implementation of any reasonable prudent alternative measures.”
8 16 U.S.C. § 1536(d).

9 **1. The Biological Opinion’s “No Jeopardy” Finding is Arbitrary and Capricious**

10 The determination of whether a project would jeopardize the continued existence of listed
11 species does not occur in a vacuum but must instead consider the “agency’s proposed actions in
12 the present and future human and natural contexts.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v.*
13 *U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005). Failure to properly consider
14 the environmental context when assessing an action’s impacts can lead to the gradual destruction
15 of a species, one seemingly minor cut at a time. *See Nat’l Wildlife Fed’n*, 524 F.3d at 929-30.
16 Such a “slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Id.* at 930.
17 Accordingly, the ESA requires the Service to evaluate four different categories of information:
18 (1) the current status of the listed species; (2) the “environmental baseline”; (3) the cumulative
19 effects of non-federal action; and (4) the effects of the agency action. 50 C.F.R. § 402.14(g).
20 Failure to satisfy any of the analytical prongs required under the ESA renders a biological
21 opinion arbitrary and capricious.

22 The Service’ biological opinion suffers from multiple fatal defects. While the biological
23 opinion broadly discusses population-wide threats to the listed vernal pool species—such as
24 urbanization, grazing, pollution and spread of invasive species—the opinion fails to describe
25 how those threats affect occupied habitat within the action area. The barebones baseline analysis
26 is further plagued by a lack of meaningful discussion of how climate change is impacting, and
27 will continue to impact, the listed species in the action area and on a population-wide scale. The
28 opinion further fails to consider the Project’s impacts in the context of population-wide
vulnerability due to climate change. A valid jeopardy determination must be based upon an

1 accurate baseline assessment, including past, present and ongoing impacts on affected species,
2 and analysis of how a Project's effects, when added to the baseline, ultimately affect a species'
3 survival and recovery. *See Appalachian Voices v. U.S. Dept. of Interior*, 25 F.4th 259, 269-71
4 (4th Cir. 2022). The Stonegate biological opinion fails at each step of the equation, and the "no
5 jeopardy" determination is therefore arbitrary and capricious in violation of the ESA.

6 **a. The Service Failed to Properly Analyze the Environmental Baseline for**
7 **Meadowfoam**

8 The Service cannot accurately determine whether the Stonegate Project will jeopardize
9 the continued existence of the listed vernal pool species on the Project site without properly
10 establishing the baseline – that is, accurately describing the species' current condition and the
11 ongoing risks they face. The environmental baseline must include "the past and present impacts
12 of all Federal, State, or private actions and other human activities in the action area" and "the
13 impact of State or private actions which are contemporaneous with the consultation in process."
14 50 C.F.R. § 402.02(d). The biological opinion's baseline analysis is meant to provide a
15 "snapshot" of a species' health at a specified point in time. *See San Luis & Delta-Mendota Water*
16 *Auth.*, 776 F.3d at 1008; Service 004566. "This 'snapshot folds in the effects of past and ongoing
17 human and natural factors leading to the current status of the species,' as well as an analysis of
18 the local ecosystem and the species habitat in the action area." *Appalachian Voices*, 25 F.4th 259
19 at 270, (citing U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species*
20 *Consultation Handbook* 4-22 (1998) at 4-22).

21 The Service must therefore base its ultimate jeopardy determination for the Project
22 concerning meadowfoam on how overall population health will look, given the current status of
23 the species, after the destruction of 22 percent, 1.13 acres, of the Project site's occupied habitat
24 including the loss of a genetically unique subpopulation. With only 21 remaining meadowfoam
25 populations of unknown size in Butte County, and noted threats driving decline in those
26 populations, a detailed analysis is all-the-more vital for the Service to meet its duty to provide a
27 full and complete baseline on which to base the jeopardy determination. *See* 50 C.F.R. §§
28 402.02, 402.14(g)(4). However, the Service's flawed meadowfoam baseline analysis undermines
its no jeopardy determination by providing inadequate qualitative and quantitative descriptions

1 of the condition of the action area populations, while completely failing to assess how climate
2 change is impacting the populations within the action area and the species as a whole. The
3 Service’s analysis is therefore arbitrary and capricious because it failed to provide “a rational
4 connection between the facts found and the conclusions made.” *Kraayenbrink*, 632 F.3d at 481
5 (quotations omitted).

6 Indeed, the Service’s single-page baseline analysis for meadowfoam fails to provide
7 even the basic snapshot of meadowfoam health within the action area that the ESA requires,
8 instead offering unclear and seemingly contradictory accounts of the quantity of meadowfoam
9 plants present on the Project site. For example, the biological opinion references several surveys
10 dating as far back as 1988, but ends up quoting the biological assessment’s purported conclusion,
11 apparently based on surveys undertaken between 2016-2018, that there are 16,542 individual
12 plants occupying 5.14 acres in the Project area. Service 00866, 002567. However, the biological
13 assessment does not provide the information claimed by the biological opinion. The biological
14 assessment references the WRA 2018 survey’s finding of 5.14 acres of occupied habitat (Service
15 00071), before presenting 2016 survey results that found 4,303 plants on the project site (Service
16 00104; 00059). It is therefore unclear if the biological opinion’s determination that there are
17 16,542 individual plants is the sum of the different individual survey totals, an average, or the
18 actual number of unique individual plants the Service believes are on the site. *See* Service
19 002567 (“An estimated 16,542 individuals of Butte County meadowfoam ... were observed in
20 the Study Area *over several surveys* by WRA and Foothill Associates.”) (emphasis added).

21 Regardless, the Service clearly made a glaring error by basing its jeopardy analysis on the
22 presence of 16,542 individual plants on the Project site. Not only did the 2016 survey identify
23 only 4,303 plants in the Project site, Service 000104, but the highest single-year survey result
24 prior to 2018 was 10,200 plants observed in 2008,¹ while 2002 surveys found only 950
25 individual plants. Service 002558. The Service simply could not have made a reasonable
26 determination of the potential for jeopardy when its analysis of the baseline status of the species
27 was entirely erroneous. And even setting aside the apparent confusion in the Service’s baseline

28 _____
¹ The 2011 Sloop et al study contained survey data from 2008, that found a total of 2,017 individual plants on the project site. (Service 002023).

1 analysis, the available survey counts demonstrate high population variability over time. This
2 variability, and the threats faced by the few remaining meadowfoam populations, highlight the
3 critical importance of an accurate baseline analysis of the population within the action area. The
4 Service’s jeopardy opinion is based, in part, on what it concludes is a low impact when compared
5 to existing populations outside the action area. *See* Service 000870-71. This conclusion,
6 however, is built on a foundation of shaky, incomplete data, and is thus arbitrary and capricious.

7 Strikingly, the Service’s 2020 biological opinion offers almost no further analysis
8 specific to the current condition of the meadowfoam populations within the action area. Rather, it
9 only discusses threats to meadowfoam generally. For example, it describes the vernal pool
10 grassland habitat on site as relatively intact, but still suffering from fragmentation and
11 degradation similar to other nearby parcels in eastern Chico, without further site-specific
12 analysis. Service 00866. The biological opinion then references the 2011 Sloop et al. study,
13 which identified the four distinct meadowfoam populations within the action area, three on the
14 project site and one within the Doe Mill Preserve. Service 00866 (citing Service 002019-31).
15 Critically, the Sloop study only discussed population-wide trends, not the condition of the action
16 area population. Service 002019; 002027-28; 00863. The Sloop study found low genetic
17 diversity within existing populations, and low or nonexistent rates of gene flow between
18 populations, making the species susceptible to inbreeding depression and chance extirpation
19 from random events. *See* Service 002019; 002027-28; 00863. However, the study did not provide
20 a qualitative assessment of the current condition of populations within the action area in light of
21 the myriad afflictions threatening the species²—and even if it did, any conclusions from that
22 2011 study would be outdated. The biological opinion therefore never provides a site-specific
23 analysis of the current state of meadowfoam on the project site. Merely noting generalized
24 population-wide threats does not constitute an adequate baseline analysis from which the action’s
25 impacts can be analyzed. *See Appalachian Voices*, 25 F.4th 259, 272 (finding that “vaguely
26 referring to the ‘destruction and modification of habitat’ within the action area, without

27 ² Meadowfoam faces threats of “land conversion to urban development, habitat loss and
28 fragmentation, impacts from surrounding land use, adjacent road widening, competition with
nonnative plant species, potential changes to hydrology, introduction of pesticides and
herbicides, off-road vehicles, stochastic extinction, and other human activities.” Service 000860.

1 explaining the specific causes or extent of this local degradation, leaves us guessing at what the
2 baseline condition for the logperch might actually be”).

3 In sum, the Service failed to provide an accurate account of the health and trajectory of
4 the meadowfoam populations on the Project site. Without a thorough baseline evaluation,
5 including site-specific population trends based on quantitative and qualitative assessment that
6 incorporates current and future population stressors, the jeopardy opinion regarding
7 meadowfoam is arbitrary, capricious, and invalid.

8 **b. The Service Failed to Analyze Climate Change Impacts on the Listed Vernal**
9 **Pool Species**

10 The impacts of climate change are an inescapable part of the environmental context in
11 which the Project’s impacts must be assessed, yet the Service fails to even mention climate
12 change in the biological opinion. *See Appalachian Voices*, 25 F.4th 259, 271 (“It is clear,
13 however, that climate change typically must form part of the analysis in some way.”) (citing *S.*
14 *Yuba River Citizens League v. Na’l Marine Fisheries Serv.*, 723 F.Supp.2d 1247, 1274 (E.D. Cal.
15 2010)). The listed species at issue here are uniquely adapted to vernal pools and other ephemeral
16 aquatic habitats, the quality and persistence of which is highly susceptible to changes in
17 precipitation and temperature.³ A recent study of vernal pool vegetation found that warmer
18 climate conditions will lead to reduced hydroperiods (i.e., how long a vernal pool is inundated),
19 which will likely lead to a decline in vernal pool specialist species.⁴ Vernal pool species are also
20 impacted by when inundation occurs, as different species traits are better suited to early, and
21 some to late, timed pool inundation.⁵ The Sloop et al. study, cited heavily by the Service in the
22 biological opinion, noted the risk climate change poses to small, genetically isolated populations

23 _____
24 ³ Montrone et al., *Climate change impacts on vernal pool hydrology and vegetation in northern*
25 *California*, 574 JOURNAL OF HYDROLOGY 1003, 1003-04 (2019). This article is attached as
26 Exhibit A to the Declaration of Ross A. Middlemiss ISO Plaintiffs’ Motion for Summary
27 Judgment. Plaintiffs include this evidence to support their claim that the Service ignored
28 available scientific evidence when making its jeopardy determination. Such a claim is not bound
to the administrative record. *See Kraayenbrink*, 632 F.3d at 497-98.

⁴ *See id.*, Montrone et al. 2019 at 1003-04, 1012.

⁵ Kneitel, J. M., *Inundation timing, more than duration, affects the community structure of*
California vernal pool mesocosms, 732 HYDROBIOLOGIA, 71-72, 79-81 (2014). This article is
attached as Exhibit B to the Declaration of Ross A. Middlemiss ISO Plaintiffs’ Motion for
Summary Judgment.

1 of meadowfoam. *See* Service 002027-28. Indeed, this shows that climate change not only
2 adversely affects vernal pool species, but that it is already jeopardizing the continued existence
3 of species such as meadowfoam, which is exacerbated by habitat loss through developments such
4 as the Project. However, the Service failed to incorporate a discussion of these threats into any
5 part of its jeopardy analysis.

6 The Service's failure to consider the effects of climate change infects multiple aspects of
7 the biological opinion. Indeed, it undermines both the environmental baseline and the analysis of
8 the effects of the action. Accurate assessments of the current condition of affected populations,
9 and the magnitude of the Project's effects in relation to remaining populations, are both
10 calculations that require the incorporation of climate change. *See Pac. Coast Fed'n of*
11 *Fishermen's Ass'ns v. Gutierrez*, 606 F.Supp.2d 1122, 1184 (E.D. Cal. 2008) (invalidating a
12 biological opinion for failing to consider the increasing effects of climate change by relying "on
13 past hydrology and temperature models" that assumed constant environmental conditions).
14 Specifically regarding meadowfoam, shifts in magnitude, duration and timing of rainfall, coupled
15 with variable temperatures could have significant negative impacts on the existence of already
16 declining meadowfoam populations. *See* Corps 008452 (the Service's draft Eastgate Biological
17 Opinion stating that increased meadowfoam mortality can occur in both very wet and every dry
18 years). These hydrologic and climatic shifts will increase because of climate change, and will
19 continue impacting the survival and recovery of meadowfoam and the listed vernal pool shrimp
20 species.⁶

21 The Service's failure to consider climate change constitutes a failure to rely on the best
22 available science, as the ESA requires, and renders the biological opinion arbitrary and
23 capricious. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(1); *see Appalachian Voices*, 25 F.4th
24 259, 269-70 ("These [regulations] are not passive directives; rather, the Fish and Wildlife
25 Service 'must seek out and consider all existing scientific data relevant to the decision it is tasked
26 with making.'") (citations omitted). The Service ignored readily available evidence that the
27 vernal pool species at issue here are reliant on complex hydrologic conditions that are highly
28

⁶ *Supra* fn 3, Montrone et al. at. 1004 ; *supra* fn. 5, Kneitel at 80-81.

1 susceptible to climate change and are already suffering its effects.⁷ Absent an analysis of climate
2 change, the Service’s opinion cannot have fully considered the status and impacts to vernal pool
3 species, and the resulting determination “eviscerate[s] Congress’ intent to ‘give the benefit of the
4 doubt to the species.’” *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (internal citations
5 omitted). Indeed, biological opinions have been repeatedly invalidated for not providing
6 sufficient analysis of the ongoing effects of climate change. *See Turtle Island Restoration*
7 *Network v. U.S. Dept’t of Commerce*, 878 F.3d 725, 737 (9th Cir. 2017); *see also Nat’l Wildlife*
8 *Fed’n*, 524 F.3d at 930 (“Likewise, even where baseline conditions already jeopardize a species,
9 an agency may not take action that deepens the jeopardy by causing additional harm”). Since
10 vernal pool species such as meadowfoam are already “speeding toward the extinction cliff,” the
11 Service may not allow the Project to step on the gas pedal by failing to consider the ongoing and
12 future effects of climate change on the species. *Appalachian Voices*, 25 F.4th at 279.

13 In sum, since the Service’s “no jeopardy” determination relies on the continued health
14 and function of the vernal pool populations that will remain after Project implementation, the
15 failure to account for how climate change has and will continue to impact those populations
16 renders its jeopardy determination arbitrary and capricious.

17 **c. The Service contradicted its previous approach to meadowfoam impact**
18 **analysis and mitigation without justification or explanation**

19 As set forth above, the Service failed to accurately quantify and assess the environmental
20 baseline and the Project’s effects on listed species that are being decimated by climate change,
21 undermining the validity of the biological opinion’s jeopardy determination. The Service’s
22 biological opinion is also arbitrary and capricious because it ignored a previous finding regarding
23 meadowfoam that shows the Project *would jeopardize* the species, and without explanation
24 departed from well-established mitigation that the Service previously established as necessary to
25 protect the continued existence of the species. By departing from its previously held positions
26 without justification or reasoned explanation, the Service’s actions concerning Stonegate were
27 arbitrary and capricious. *See Nw. Env’t. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668,
28 687-88 (9th Cir. 2007) (stating that “an agency changing its course must supply a reasoned

⁷ *Supra* fn 3, Montrone et al. at. 1004, 1012.

1 analysis indicating that prior policies and standards are being deliberately changed, not casually
2 ignored”) (internal quotation marks omitted)).

3 First, the Service’s “no jeopardy” determination for meadowfoam is inconsistent with the
4 Service’s prior determination for the same species under similar circumstances. In 2002, the
5 Service issued a draft biological opinion for the Corps’ consideration of a CWA section 404
6 permit for the Eastgate development project in southeast Chico. Corps 008445-71.⁸ The Eastgate
7 project proposed a mixed-use development on a 194-acre site approximately one mile north of
8 the Stonegate site. Corps 008447. The Eastgate project site contained 9.7 acres of occupied
9 meadowfoam habitat, and the proposed development would have permanently impacted 3.2
10 acres of the occupied habitat, approximately 33% of the population. Corps 008459. In the 2002
11 draft biological opinion, the Service described the current threats to meadowfoam populations
12 and found that due to the “critically endangered status of the meadowfoam and the importance of
13 each population to the survival and recovery of this species, preservation of existing habitat,
14 ideally with management for viable populations, is essential to its conservation.” Corps 008442.
15 The Service’s draft biological opinion concluded that the Eastgate project would jeopardize the
16 continued survival and recovery of the meadowfoam. Corps 008442.

17 The impacts to meadowfoam from the Stonegate Project would be similar to those of the
18 Eastgate Project, yet the Service’s determinations for these projects were completely
19 inconsistent. The Stonegate Project would directly impact 1.13 acres of meadowfoam habitat,
20 which is 22% of the occupied habitat within the Stonegate Project site. Service 000855.⁹ Yet, the
21 Service issued a “no jeopardy” determination for Stonegate, even though it previously found that
22 the “preservation of existing habitat” is “essential” to meadowfoam conservation, Corps 008442,
23 and that the loss of a similar percentage of the population at the Eastgate site would jeopardize
24 the species.

25 Moreover, the plight of meadowfoam has not gotten better since the Service reviewed the
26 Eastgate project in 2002. As set forth above, the evidence—including the Sloop study that the

27 ⁸ The Corps cited the Eastgate opinion to justify its rejection of Off-Site Alternative 3, which
28 overlapped the former Eastgate site, based on the risk of meadowfoam impacts. Corps 000368.

⁹ The Stonegate biological opinion states the project would directly affect 20% of the occupied
habitat (Service 000868), but impacts to 1.13 acres amounts to 21.98% of the total of 5.14 acres.

1 Service itself relied on, Service 002027-28—suggests that climate change continues to pose a
2 significant risk to small, genetically isolated populations of meadowfoam, and that vernal pool
3 species are in decline. Indeed, the Service acknowledges that meadowfoam continues to
4 experience negative impacts from development, and there is less meadowfoam now than there
5 was in 2007. Service 000860, 000865. Therefore, nothing has changed since the Service’s review
6 of the Eastgate project that would suggest a different outcome here is warranted. In fact, the 2002
7 draft biological opinion for Eastgate finding that the project *would* jeopardize meadowfoam
8 actually discussed the Stonegate property as a future threat to meadowfoam, and in describing
9 threats to the species’ survival posed by urban development and hydrological alterations, noted
10 the “proposed Schmidbauer residential development project would eliminate a portion of the Doe
11 Mill/Bruce Road population and likely indirectly affect the remainder of that population[.]”
12 Service 008454.¹⁰

13 Given the similarities of the two projects in location, scope of impacts and the importance
14 of each population to meadowfoam survival, the Service’s determination that the Stonegate
15 Project will not jeopardize the species is arbitrary and capricious, especially considering the
16 ongoing loss of vernal pool habitat and the Service’s statements regarding the impacts the
17 Eastgate project would have had on the continued viability of meadowfoam.

18 Second, the Project only mitigates the impacts to meadowfoam at a 4:1 preservation ratio
19 for direct impacts to the species, Service 000855, which stands in stark contrast to several
20 previous Service-reviewed projects in Chico that required a 19:1 preservation ratio for direct
21 impacts to meadowfoam, Service 000942, 000897-98, 001748.¹¹ For example, the 2007 Meriam
22 Park biological opinion, for a project within a quarter mile of the Project, required 19:1
23 preservation for impacts to 0.46 acres of meadowfoam. Service 001748. The 19:1 ratio derives
24 from the Recovery Plan’s conclusion that 95% of existing occupied meadowfoam habitat needs
25 to be preserved to facilitate the species’ recovery. *See* Corps 000514. Given the importance of
26 this mitigation standard, the significant deviation allowed for the Stonegate Project warrants

27 ¹⁰ The “Schmidbauer residential development” references a previous iteration of the Stonegate
28 Project.

¹¹ Other projects, such as the 2006 Cohasset Road widening project, have been required to
mitigate direct meadowfoam impacts at a ratio of 10:1. Service 001687-98.

1 justification. Yet the Service failed to explain why the Stonegate Project was treated different
2 than previous projects where a 19:1 preservation was required, or how a 4:1 ratio could be
3 sufficient given the Service's prior determination that a 19:1 mitigation ratio was necessary to
4 prevent jeopardy. The Service's shift from past practice, without adequate explanation,
5 demonstrates an arbitrary and capricious disconnect between fact and conclusion. *W. Watersheds*
6 *Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011) (citation omitted).

7 **d. The Service improperly ignored its own guidance and permitted impacts in**
8 **excess of limitations set forth in the vernal pool Recovery Plan**

9 The Service's 2005 Recovery Plan¹² for vernal pool species in California established
10 habitat preservation targets for supporting vernal pool species' continued survival and recovery
11 within designated core areas. Service 000863-64. The Recovery Plan calls for 85% of vernal
12 pool fairy shrimp habitat, and 95% of vernal pool tadpole shrimp and meadowfoam habitat to be
13 preserved within the Doe Mill core area, which is where the Project is located. Service 000863-
14 64. The Project, however, misses both marks, preserving only 20% of vernal pool shrimp habitat,
15 Service 000867, and only approximately 80% of the meadowfoam habitat on the Project site,
16 Service 000868. The Service was urged by CDFW to adhere to the preservation targets, but those
17 comments were ignored. Corps 000351. The Service's failure to comply with the specific
18 protections it previously identified as necessary to ensure the continued existence of these vernal
19 pool species is the very definition of arbitrary and capricious agency action.

20 Instead, the biological opinion references the Recovery Plan's discussion of alternative
21 routes to preservation via "site-specific planning methods," as implied justification for deviating
22 from the preservation targets set forth in the Recovery Plan. Service 000864. But the Project
23 does not provide for concrete site-specific methods for protecting vernal pool species. Rather, it
24 contains vague and unenforceable conservation measures, undermining the Service's
25 determination that the species' survival and recovery can be achieved despite the Service's
26 failure to comply with its own guidance set forth in the Recovery Plan.

27
28 ¹² The Recovery plan is referenced throughout the biological opinion and record as being dated
2005. The Recovery Plan document is dated 12/01/2005, but the Recovery Plan was published in
the Federal Register on 3/7/2006. See 71 Fed. Reg. 11441.

1 It is well-settled that “[m]itigation measures relied upon in a biological opinion must
2 constitute a ‘clear, definite commitment of resources,’ and be ‘under agency control or otherwise
3 reasonably certain to occur.’” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th
4 Cir. 2020) (citing *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 & n.17
5 (9th Cir. 2008)). The Project’s primary conservation measure for meadowfoam is the transfer of
6 meadowfoam seeds from the western parcel to create 1.35 acres of “new” occupied habitat in the
7 onsite preserve. Service 000859; Corps 248:004388. However, this mitigation is not “certain to
8 occur.” *Bernhardt*, 982 F.3d at 743. The biological opinion allows the Applicant to simply
9 choose not to implement the onsite establishment, since the applicant has complete discretion to
10 select an alternative form such as the purchase of mitigation bank credits or buying another
11 meadowfoam-occupied property, but it never analyzes whether these alternatives are actually
12 available or to what extent they would mitigate the actual impacts of the Project. *See* Service
13 000859. There is ultimately no requirement that meadowfoam habitat be reestablished and the
14 Service’s reliance on this choose-your-own-adventure of conservation measures is untenable and
15 does not meet the ESA’s strict requirement for binding mitigation measures to ensure against
16 jeopardy. *Bernhardt*, 982 F.3d at 743 (“Binding mitigation measures cannot refer only to
17 generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action
18 agency’s plan to offset the environmental damage caused by the project.”).

19 In sum, the Service acknowledges the Project will adversely affect listed species and yet
20 fails to meet the Recovery Plan’s goals for those species. The biological opinion downplays
21 those impacts by pointing to the Project’s conservation measures, but those measures are
22 inadequate and unenforceable. The biological opinion’s underestimation of Project effects on the
23 listed species, combined with the incomplete baseline analysis and lack of climate change
24 discussion, renders the no jeopardy conclusion arbitrary and capricious and in violation of the
25 ESA.

26 **B. The Corps Violated the ESA by Failing to Consult with the Service**
27 **Regarding Giant Garter Snake**

28 Section 7 consultation is the “heart of the ESA,” *Kraayenbrink*, 632 F.3d at 495, and
therefore the Corps’ failure to consult with the Service on the Project’s direct and indirect effects

1 on the threatened giant garter snake (“GGS”) is a clear and egregious violation of one of the
2 ESA’s most vital safeguards for imperiled species. *See Karuk Tribe of California v. U.S. Forest*
3 *Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc) (observing that compliance with ESA’s
4 procedural requirements is critical to effectuating its substantive protections). Pursuant to the
5 Service’s regulations, agencies must consult for any agency action that “may affect” listed
6 species, 50 C.F.R. § 402.02, which is a “low” threshold. *See Kraayenbrink*, 632 F.3d at 496
7 (formal consultation is triggered by “[a]ny possible effect, whether beneficial, benign, adverse,
8 or of an undetermined character” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).
9 Contrary to the Corps’ abbreviated and conclusory discussion, the record establishes that GGS
10 habitat exists within the Project site. Service 00075; 001743; 002276; 002279-80. Furthermore,
11 two previous projects in the vicinity of the action area have required consultation regarding
12 GGS, and in both cases the resulting biological opinions found GGS would be adversely
13 affected. Service 001743; 000896. Consultation with the Service was therefore required to ensure
14 the Project would not jeopardize the continued existence and recovery of GGS. 16 U.S.C. §
15 1536(a)(2).

16 There can be no doubt that GGS habitat exists on the Project site, which contains sloughs
17 with emergent bankside vegetation, such as tule clumps, that provide cover from predators and
18 thermoregulation sites, as well as upland habitat adjacent to aquatic habitat for thermoregulation,
19 shelter and winter refugia. Service 008152. Indeed, the Corps acknowledges that suitable habitat
20 for GGS is present within the action area, and survey photos indicate abundant cattail and other
21 vegetative cover associated with the freshwater marsh features, Service 002276, 002524, which
22 is a noted habitat type for GGS, Corps 008151-52. However, the Corps erroneously dismisses
23 any potential effect on the species, and thereby declined to consult. Corps 00038-39.

24 But the Corps failed to acknowledge that past projects in the immediate vicinity of the
25 action area have presumed GGS to be present and found potential adverse effects warranting
26 mitigation, Service 000896, 001743, and it is important to note that GGS have been observed
27 using burrows up to 50 meters away from its aquatic habitat during the summer months. Service
28 008152. For example, the Corps previously consulted with the Service regarding the 2007 State
Route 32 Widening Project (“SR-32”) in Southeastern Chico. Service 000888. The Service

1 concluded the SR-32 project would affect both aquatic and upland habitat of GGS because of
2 work in and around Dead Horse Slough. Service 000896. The Service found that “[t]he snake is
3 assumed to occur in Dead Horse Slough, and because the presence of suitable habitat, the
4 Service believes that the snake is reasonably certain to occur within the proposed project’s action
5 area” that adverse effects on GGS were likely. *Id.* The SR-32 project site is approximately 1.2
6 miles north of the Stonegate project site following Bruce Road. *See* Service 005073.

7 Likewise, the Corps consulted in 2006 on the Meriam Park Development Project
8 (“Meriam Park”), Service 001743, which is located directly adjacent to the Stonegate Project,
9 located at the northeast corner of the Bruce Road and East 20th Street intersection. The Service
10 concluded the Meriam Park project would adversely affect GGS by impacting Little Chico Creek
11 and adjacent upland habitat. Service 001743. The Stonegate biological assessment did not
12 mention either of these projects during its brief discussion of GGS, *see* Service 000039, even
13 though the GGS habitat for the Meriam Park and SR-32 projects is hydrologically connected to
14 the aquatic habitat within the Stonegate Project site. Service 00075 (showing Dead Horse Slough
15 by SR-32 and Little Chico Creek by Meriam Park are hydrologically connected to the Butte
16 Creek diversion channel that flows through the Stonegate Project site).

17 The Stonegate BA provides exactly one paragraph of site-specific GGS analysis, but it
18 ignores the presence of GGS on adjacent projects and is therefore entirely mistaken when it
19 claims, without support, an absence of occurrences within five miles of the action area. Corps
20 00039. Indeed, a GGS was sighted during a SR-32 site visit in close proximity to Dead Horse
21 Slough, and all parts of the SR-32 project site are within five miles of the Stonegate Project site,
22 undermining the Corps’ “no effect” determination. Service 000896, Corps 246:005035. Thus
23 while the Corps attempts to dismiss the viability of the marsh habitat on the Project site as GGS
24 habitat by claiming it is not near other suitable habitat or corridors to connect it with such
25 suitable habitat, Service 00039, this fails to account for the presence of GGS habitat in Little
26 Chico Creek and Dead Horse Slough that is connected to the Project site via the Butte Creek
27 diversion canal, Service nor does it account for the fact that GGS are known to travel distances
28 up to 800 meters in a day moving between habitats and in search of food.

1 In sum, the Corps' conclusion was devoid of a rational connection to the relevant facts
2 concerning the likelihood of the Project affecting GGS, rendering the decision to forgo
3 consultation unreasonable and in violation of the ESA. *See Karuk Tribe of California v. U.S.*
4 *Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (“[A]ctions that have any chance of affecting
5 listed species or critical habitat—even if it is later determined that the actions are ‘not likely’
6 U.S.C. § 13 to do so—require at least some consultation under the ESA”). The evidence
7 demonstrates the Stonegate Project “may affect” GGS, and the Corps is therefore required to
8 engage in Section 7 consultation with the Service concerning GGS before making any
9 “irreversible or irretrievable commitment of resources” with regards to the project. 16 U.S.C. §
10 1536(d).

11 **C. The Corps Issued a Section 404 Permit for the Project in Violation of the**
12 **Clean Water Act.**

13 The goal of the Clean Water Act is to “restore and maintain the chemical, physical, and
14 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, the Act
15 prohibits the discharge of pollutants into navigable waters of the United States without a permit.
16 33 U.S.C. § 1311(a). For discharges of dredged or fill material, permits are issued by the Corps
17 with oversight by EPA. 33 U.S.C. § 1344(a)-(c). When it reviews an application for a permit to
18 discharge dredged or fill material (a “Section 404 permit”), the Corps must follow binding
19 guidelines set out in regulations promulgated by EPA in consultation with the Corps (the
20 “404(b)(1) Guidelines” or “Guidelines”). 33 U.S.C. § 1344(b); 40 C.F.R. Ch. 1, Subch. H, Pt.
21 230.

22 The Guidelines strictly prohibit the issuance of a Section 404 permit if there is a
23 “practicable alternative to the proposed discharge which would have less adverse impact on the
24 aquatic ecosystem” and which “does not have other significant adverse environmental
25 consequences.” 40 C.F.R. § 230.10(a). An alternative is “practicable” if “it is available and
26 capable of being done after taking into consideration cost, existing technology, and logistics in
27 light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). Where the activity associated with
28 the discharge is proposed for a “special aquatic site” (including wetlands) and is not “water
dependent,” the Guidelines create a presumption that less damaging practicable alternatives are

1 available, unless “clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3); § 230.3(q-1)
2 (definition of “special aquatic sites”). Accordingly, the Guidelines prohibit the Corps from
3 permitting anything other than the least environmentally damaging practicable alternative, or
4 “LEDPA.” 40 C.F.R. §230.10(a); *Utahns for Better Transp. v. U.S. Dep’t. of Transp.*, 305 F.3d
5 1152, 1188-89 (10th Cir. 2002) (“[i]f such an alternative exists ... then the [Clean Water Act]
6 compels that the alternative be considered and selected unless proven impracticable”). The
7 applicant bears the burden of proving that no practicable alternative exists. *Id.* at 1163; *see also*
8 *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng’rs*, 524 F.3d 938,
9 955 (9th Cir. 2008) (Corps must analyze alternatives to the proposed discharge and “select the
10 least environmentally damaging practicable alternative.”)

11 Avoidance must be prioritized over measures to minimize or mitigate impacts; that is,
12 prior to considering the value of compensatory mitigation for a permitted action, the Corps must
13 determine that the action’s environmental effects have been avoided to the extent practicable. 40
14 C.F.R. § 230.91(c)(2); *see Alameda Water & Sanitation Dist. v. Reilly*, 930 F.Supp.486, 492 (D.
15 Colo. 1996) (upholding EPA’s approach prioritizing avoidance over minimization and mitigation
16 and EPA’s rejection of the use of compensatory mitigation to buy down the level of
17 environmental impact when comparing alternatives).

18 **1. The Corps Failed to Adopt the Least Environmentally Damaging Practicable**
19 **Alternative as Required by the Clean Water Act.**

20 Despite the clear requirements of the CWA, the Project’s Section 404 Permit does not
21 comply with the requirement that the Corps only approve the permit if the activity presents the
22 least environmentally damaging practicable alternative, or “LEDPA.” The Project would
23 permanently destroy 45% of the total 20.19 acres of jurisdictional waters on the Project site,
24 including 5.92 acres of seasonal wetlands and 2.85 acres of vernal pools, among other aquatic
25 features. Corps 35:000365 & 35:000348. According to the EPA, the wetlands and pools on the
26 site are Aquatic Resources of National Importance or “ARNI” and the “project as currently
27 proposed” presents “significant and unacceptable impacts” to those resources. Corps
28 310:006327; *see also* Corps 35:000352-53 & 349:006695-96 (noting same); 419:007089 (noting

1 that Project fails to comply with the Guidelines and may result “substantial and unacceptable
2 impacts to ARNIs”).

3 The record is clear that the alternative approved by the Corps was not the LEDPA.
4 Indeed, the record shows that the EPA repeatedly informed the Corps of less damaging
5 alternatives that would have limited development to the parcel West of Bruce Road (the “Bruce
6 Road Alternative”), thereby significantly reducing the environmental impacts of the Project:

7 Based on the information provided by USACE and the applicant, the overall project
8 purpose is to construct a mixed use, mixed density, development to include residential
9 and commercial development and supporting infrastructure in the City of Chico, Butte
10 County, California. **It remains EPA’s view that this can be practicably accomplished
through only developing the approximately 50-acre parcel west of Bruce Road, and
avoiding all aquatic resources east of Bruce Road.**

11 Corps 310:006326-27, emphasis added. The EPA therefore informed the Corps that “the
12 applicant has not developed a reasonable range of on-site alternatives to the proposed project”
13 and that “EPA views the submitted alternatives information as insufficient to determine the least
14 environmentally damaging practicable alternative (LEDPA).” Corps 310:006327.

15 Despite the conclusions of the EPA, the Corps inappropriately rejected the Bruce Road
16 Alternative by focusing on extraneous goals outside the project purpose, such as not “activat[ing]
17 the Bruce Road corridor,” and meeting housing plans included in the City of Chico’s general
18 plan. Corps 35:000369. Yet, these goals are not included in the purpose and need for the project
19 as identified by the Corps and the applicant, and therefore provide no basis on which to reject
20 that alternative under the Guidelines. Instead, the “overall project purpose” as outlined in the
21 ROD is to “construct a medium-scale mixed-use development in northwest Butte County,
22 California.” Corps 35:000350; *see also* Corps 301:006009. The “purpose and need” statement
23 explains that “[t]he applicant has identified the purpose of the Stonegate project is to implement
24 a balanced mixed use, infill development inclusive of residences, commercial development, a
25 park and bicycle path, while relying on existing and currently planned infrastructure, and
26 conserving aquatic and terrestrial habitat.” Corps 35:000350. It is therefore arbitrary and
27 capricious for the Corps to assert that the purpose includes “activation” of the Bruce Road
28 Corridor or to meet the City of Chico’s housing plans, and thereby ignore alternatives that would
otherwise be required by the plain language of the Guidelines. Consistent with the EPA’s

1 guidance, the Corps was required to deny the permit because an available alternative with less
2 environmental impact was available that would still fulfill the project purpose of constructing a
3 medium-scale mixed-use development in the same location.

4 The Corps also inappropriately rejected the Bruce Road Alternative on the basis of cost,
5 without providing adequate evidence supporting its rejection. More specifically, the ROD rejects
6 Alternative 1 because the Defendant-Intervenor estimated a 19 percent increase in the cost per
7 developable acre from \$256,266 to \$305,034, claiming that with this increase, the “sale of
8 residential lots would not cover the costs of construction.” Corps 35:000369; *see also* Corps
9 301:006026-006027. However, the ROD does not provide data explaining or analyzing the
10 projected cost of construction as compared to the projected sale prices, and/or how a 19 percent
11 increase in the development cost per acre would render the homes unsellable. Defendant-
12 Intervenor’s consultant similarly wrote that the cost per residential unit and cost per square foot
13 would “exceed[] regional prices” and therefore adversely effect the competitiveness of the
14 development. Corps 303:006145. Yet, it remains unclear what the regional prices are that will be
15 exceeded, or by what amount. The Corps is not permitted to simply accept the applicants’ claims
16 on these critical issues. *See Friends of Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986) (Corps
17 may base permit decision on information provided by applicant but “nonetheless had an
18 obligation to independently verify the information supplied to it.”); *see also Sierra Club v. Van*
19 *Antwerp*, 709 F.Supp.2d 1254, 1267 (S.D. Fla. 2009) (holding that the Corps had violated the
20 CWA because it “is clear from the record that the Corps uncritically accepted the miners’
21 assertions” regarding siting of project).

22 Under the CWA, far more is required from the Corps before moving forward with a
23 Project that will destroy wetlands or Aquatic Resources of National Importance. More
24 specifically, because the proposed Project would impact wetlands and is *not* water dependent, the
25 Corps must overcome the presumption that less damaging alternatives are available, unless
26 clearly demonstrated otherwise. *See* 40 C.F.R. § 230.10(a)(3); § 230.3(m). The Corps therefore
27 had the burden of *proving* that the Bruce Road Alternative is impracticable, yet it failed to do so.
28 Whether features of a proposal would make it more “desirable” is not relevant. *See Utahns for*
Better Transp., 305 F.3d at 1188-89 (“The CWA test is not [] whether features of a proposal
Plaintiffs’ Motion for Summary Judgment Page 31

1 would make a more desirable project. Rather the Applicant and the [Corps] are obligated to
2 determine the feasibility of the least environmentally damaging alternatives that serve the basic
3 project purpose.”) The Corps and Defendant-Intervenors did not meet their clear burden under
4 the Guidelines and the regurgitation in the ROD of Defendant-Intervenors’ assertions of
5 infeasibility based on cost are insufficient to overcome the presumption in 404 that is a predicate
6 for permit approval. *See* 40 C.F.R. § 230.10(a)(3); § 230.3(m); *Utahns for Better Transp., supra*,
7 305 F.3d at 1188-89. As noted by the EPA, “[a]lternatives cannot be excluded on the basis of
8 cost simply because development costs (per-developable-acre or total) exceed those of the
9 proposed project.” Corps 310:006327. Yet that is precisely what occurred here, in clear violation
10 of CWA section 404.

11 Moreover, even if the ROD *had* included a reasoned explanation regarding the economic
12 impacts of Alternative 1 as compared to Defendant-Intervenors’ preferred alternative, “[t]he
13 mere fact that an alternative may cost somewhat more does not necessarily mean it is not
14 practicable.” Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed.
15 Reg. 85,336, 85,339 (Dec. 24, 1980). Likewise, “Any asserted ‘need’ by an applicant that a
16 project must be profitable should be afforded ‘little or no weight.’” *Friends of the Mahoning*
17 *River v. U.S. Army Corps of Eng’rs*, No. 4:19CV2771, 2021 U.S. Dist. LEXIS 171537 at *9
18 (N.D. Ohio, Sep. 9, 2021) (quoting *Sierra Club v. Strock*, 495 F.Supp.2d 1188, 1278 (S.D. Fla.
19 2007)).

20 In short, the Corps’ threadbare analysis rejecting the Bruce Road Alternative did not
21 properly apply CWA regulations and should not be granted any deference by this Court. *See*
22 *Ocean Advocs., supra*, 402 F.3d at 859 (reviewing court must not rubber-stamp administrative
23 decisions inconsistent with statutory mandate). Instead, the Court should afford deference to the
24 EPA’s expertise and analysis recommending the Bruce Road Alternative as the LEDPA. *See Ctr.*
25 *for Biological Diversity v. EPA*, 90 F.Supp.3d 1177, 1212 (W.D. Wash. 2015) (noting that EPA’s
26 “decision regarding the evaluation of complex scientific data that lies within the agency’s
27 technical expertise is entitled to deference”). The Corps’ decision to issue the 404 Permit for the
28 Project was arbitrary and capricious and an abuse of discretion. *See* 5 U.S.C. § 706(2).

1 **D. The Corps Violated the National Environmental Policy Act by Failing to**
2 **Prepare an Environmental Impact Statement.**

3 NEPA is “our basic national charter for protection of the environment.” 40 C.F.R. §
4 1500.1(a). NEPA’s goals are to (1) “prevent or eliminate damage to the environment and
5 biosphere,” (2) “stimulate the health and welfare” of all people, and (3) “encourage productive
6 and enjoyable harmony between [hu]man[kind] and [the] environment.” 42 U.S.C. § 4321. To
7 accomplish these goals, NEPA requires all federal agencies to prepare a “detailed statement” for
8 any “major Federal actions significantly affecting the quality of the human environment.” 42
9 U.S.C. § 4332(2)(C). This statement—known as an environmental impact statement or “EIS”—
10 must describe the environmental impacts of the proposed action. *Id.* § 4332(2)(C)(i), (ii). The
11 EIS is an “action-forcing device” that ensures NEPA’s goals “are infused into the ongoing
12 programs and actions” of the federal government. 40 C.F.R. § 1502.1.

13 To determine whether a proposed action significantly effects the environment and an EIS
14 is required, the lead agency may first prepare an environmental assessment or “EA.” 40 C.F.R. §
15 1502.3; *see Env’t. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, No. 19-55526, 2022 U.S. App.
16 LEXIS 15343 at *55 (9th Cir. June 3, 2022) (“EA is inadequate both because the agencies failed
17 to take the requisite ‘hard look’”). NEPA does not require *certainty* that a project will
18 significantly effect the environment in order for an EIS to be necessary; NEPA requires
19 preparation of an EIS if there are “substantial questions” raised as to whether the proposed
20 project *may* have a “significant” effect on the environment. *Ocean Advocs. v. U.S. Army Corps of*
21 *Eng’rs*, 402 F.3d 846, 864-865 (9th Cir. 2004). Whether an effect on the environment is
22 considered “significant” depends upon its context as well as intensity, which concerns the
23 “severity of the impact.” *Id.* at 865. Factors determining the severity of the impact include the
24 “unique characteristics of the geographic area, including proximity to an ecologically sensitive
25 area[.]” among others. *Id.* NEPA presents a “low standard” that is permissive of challenging the
26 failure to prepare an EIS. *See Env’t. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, No. 19-55526,
27 2022 U.S. App. LEXIS 15343 at *55 (9th Cir. June 3, 2022) (citing *Cal. Wilderness Coal. v. U.S.*
28 *Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011)).

1 Applying these precedents here, there are clearly “substantial questions” regarding
2 whether the Project will have a significant effect on the environment. As discussed in section
3 (IV)(C)(1) above, the EPA concluded that the project as proposed would result in “significant
4 and unacceptable impacts” to Aquatic Resources of National Importance. Corps 310:006327;
5 Corps 35:000352-53 & 349:006695-96; 419:007089. CDFW concluded that “the proposed
6 Project *will* have potentially significant impacts to State- and federally-listed species and
7 sensitive habitats.” Corps 351:006703 (emphasis added). CDFW also warned of impacts to
8 sensitive species such as the western spadefoot toad, western pond turtle, meadowfoam, and
9 western burrowing owl, among other species and habitats. Corps 351:006702-006707. The
10 Service likewise concluded that the Project “may affect, and is likely to adversely affect the fairy
11 shrimp, the tadpole shrimp, and the meadowfoam.” Service 000851. Even the City of Chico
12 concluded that the project required preparation of an environmental impact report under the
13 California Environmental Quality Act (“CEQA”)—the state-equivalent to NEPA—in order to
14 analyze the Project’s potentially significant effects. *See* Corps 346:006687-006688 (City of
15 Chico noting that it had prepared a draft environmental impact report pursuant to CEQA to
16 assess potential environmental effects, and that the Project would result in significant,
17 cumulative, and unavoidable project impacts related to greenhouse gas emissions). The local
18 Audubon Society warned of impacts of the Project to sensitive species of birds. Service 003192-
19 003194. At a minimum, the conclusions of *three separate agencies* as well as other organizations
20 that the Project has the potential to result in significant effects raises a “substantial question”
21 whether the proposed project *may* have a “significant” effect on the environment. *See Ocean*
22 *Advocs., supra*, 402 F.3d at 864-865. As such, an EIS is required.

23 The “intensity” factors outlined in case law and NEPA regulations further militate in
24 favor of preparation of an EIS. Here, the Project would not simply occur in “*proximity* to an
25 ecologically sensitive area”—it would *cause permanent impacts* to an ecologically sensitive area.
26 *See Ocean Advocs., supra*, 402 F.3d at 865 (emphasis added). As noted above, the EPA
27 concluded that the Project area contains Aquatic Resources of National Importance that would be
28 adversely affected by the project. Corps 214: 004202-004225. Likewise, the Service noted that
the Project area is designated as the “highest priority” zone for preservation of the meadowfoam,
Plaintiffs’ Motion for Summary Judgment

1 as set forth in the Service’s Recovery Plan for Vernal Pool Ecosystems of California and
2 Southern Oregon, and the project would extirpate one of the last remaining meadowfoam
3 communities. Service 000025.

4 Another second “intensity” factor in determining whether an EIS is required is the
5 “degree to which the action may adversely affect an endangered or threatened species or its
6 habitat” listed under the ESA. *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373
7 F.Supp.2d 1069, 1079 (E.D. Cal. 2004) (citing 40 C.F.R. § 1508.27(a)). In *Klamath-Siskiyou*
8 *Wildlands Ctr.*, the Court concluded that a determination by the Service that a project “will
9 affect, is likely to adversely affect” the Northern Spotted Owl was sufficient on its own to
10 “suggest[] the need for an EIS.” 373 F.Supp.2d at 1080. Here, the Service has similarly issued a
11 “may affect, and is likely to adversely affect” determination for the fairy shrimp, the tadpole
12 shrimp, and meadowfoam. Service 000851. This determination alone warrants preparation of an
13 EIS.

14 Moreover, a third “intensity” factor at issue here is the “degree to which the effects on the
15 quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(a).
16 Here, there is ample evidence in the record that the Project is highly controversial. Numerous
17 community members, agencies, and organizations called out the Project’s serious impacts and
18 requested a hearing on the Project. *See, e.g.*, Corps 360:006743-006747 (community member
19 outlining impacts of Project and requesting a hearing); Corps 361:006748-006750 (Butte
20 Environmental Council warning Project would eliminate 80 percent of vernal pools and
21 requesting a hearing for the local community); Corps 102:001559-001582 (AquAlliance letter
22 outlining the decades-old controversy surrounding proposed development on the Project site and
23 requesting a public hearing).

24 Despite the clear evidence that there is a “substantial question” that the Project may have
25 a significant effect on the environment—indeed, evidence that the project *would* have a
26 significant environmental impact—the Corps did not prepare an EIS as NEPA requires. Instead,
27 the ROD and environmental assessment issued by the Corps concluded that “this permit action
28 will not have a significant impact on the quality of the human environment [and] [t]herefore, an

1 environmental impact statement will not be required.” Corps 35:000397. This conclusion is
2 clearly arbitrary and capricious

3 Indeed, when a federal agency issues such a “finding of no significant impact” or
4 “FONSI,” it must include “a convincing statement of reasons” demonstrating that the project’s
5 impacts are insignificant. *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722 (9th Cir.
6 2001). The Corps has not, and could not, do so here. For example, the ROD does not offer a
7 convincing statement of reasons demonstrating the Project’s impacts on listed species are
8 insignificant. Instead, the ROD assumes that because the Service concluded that the Project
9 would not “not jeopardize the existence” of the meadowfoam and other listed species, then the
10 Project would merely have a “minor long term effect on threatened and endangered species.”
11 Corps 35:000373. Yet, a finding of jeopardy is not a prerequisite for preparation of an EIS. *See*
12 *Klamath-Siskiyou Wildlands Ctr., supra*, 373 F.Supp.2d at 1080 (citing *Greater Yellowstone*
13 *Coal. v. Flowers*, 359 F.3d 1257, 1275-1276 (10th Cir. 2004) (finding the Service’s conclusion
14 that construction of housing development and golf course would not likely jeopardize the
15 continued existence of the bald eagle was not determinative of the need to prepare an EIS for the
16 project); *see also Baykeeper v. U.S. Army Corps of Eng’rs*, No. CIV. S-06-1908 FCD/GGH,
17 2006 U.S. Dist. LEXIS 67483 (E.D. Cal. Sept. 20, 2006) (following *Klamath-Siskiyou Wildlands*
18 *Ctr.* in concluding that there was a likelihood that the Corps violated NEPA in failing to prepare
19 an EIS). Here, the “likely to adversely affect” determination for several species shows that an
20 EIS is warranted.

21 The ROD also fails to offer a convincing statement of reasons demonstrating that the
22 Project’s impacts on wetlands are insignificant. Instead, the ROD asserts, without analysis, that
23 the permanent loss of 8.76 acres of wetlands—including 3.03 acres of depressional seasonal
24 wetlands, 2.85 acres of vernal pools and 2.88 acres of riverine seasonal wetlands—would merely
25 constitute a “minor effect (long term).” Corps 35:000373-000374. The ROD’s characterization
26 of this loss of wetlands as “minor” does not make it so, particularly in light of the EPA’s and
27 conclusions to the contrary. *See* Corps 310:006327; 419:007089. Nor does the ROD’s conclusion
28 account for the reality that California has already lost 90% of wetland acreage that was present in
the late 18th century, and only 10 percent of historic vernal pool habitat is still viable. Corps

1 102:001586. The Project is related to other urban development proposals that have slowly caused
2 these massive cumulative losses to California wetlands. In such circumstances, NEPA favors
3 preparation of an EIS where “the action is related to other actions with individually insignificant
4 but cumulatively significant impacts.” 40 C.F.R. § 1508.27. In any event, the Corps offers no
5 convincing statement of reasons explaining why the Project’s impacts on wetlands and other
6 resources are not significant.

7 In conclusion, NEPA requires that federal agencies like the Corps take a “hard look” at
8 the environmental consequences of their actions. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d
9 1062, 1066 (9th Cir. 2002). In failing to prepare an EIS for the Project, the Corps violated NEPA
10 and neglected to take a hard look at the consequences of approving the Project.

11 **V. PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT.**

12 Plaintiffs—two nonprofit conservation groups—bring this lawsuit on behalf of their
13 members, who are harmed by the Corps’ and Service’s actions as described herein and whose
14 harms would be redressed if Plaintiffs’ suit is successful. *See Ctr. for Biological Diversity v.*
15 *Mattis*, 868 F.3d 803, 817 (9th Cir. 2017); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs.*
16 *(TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292,
17 1299 (9th Cir. 1992); see generally Declaration of Barbara Vlamis at ¶¶ 1-25; Declaration of
18 Elizabeth Devereaux at ¶¶ 1-18.

19 Plaintiffs also have standing to bring suit on their members’ behalf because these
20 members would have standing to sue in their own right, the interests at stake are germane to the
21 organizations’ public interest purposes, and neither the claims asserted nor the relief requested
22 requires the participation of individual members in the lawsuit. *Friends of the Earth*, 528 U.S. at
23 181. Moreover, when there are multiple plaintiffs asserting the same claim and one of them has
24 standing, courts “need not consider the standing issue” as to the remaining plaintiffs. *See*
25 *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); see also *Sec’y of the Int. v. California*, 464 U.S.
26 312, 319 n.3 (1984) (similar).

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

VI. CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court find in their favor and GRANT this Motion for Summary Judgment.

Dated: July 5, 2022

CENTER FOR BIOLOGICAL DIVERSITY

/s/ John P. Rose

John P. Rose
Aruna Prabhala
John Buse

Attorneys for Plaintiffs AquAlliance and Center for
Biological Diversity

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I electronically filed PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; DECLARATION OF BARBARA VLAMIS; DECLARATION OF ELIZABETH DEVEREAUX; AND DECLARATION OF ROSS MIDDLEMISS with the Clerk of Court using the ECF system, which will automatically send email notification to the attorneys of record.

/s/ John P. Rose

JOHN P. ROSE