TODD KIM, Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

S. JAY GOVINDAN, Acting Section Chief
BRIDGET K. MCNEIL, Assistant Section Chief
KAMELA A. CASCHETTE, Trial Attorney
Wildlife & Marine Resources Section
PAUL CAINTIC, Trial Attorney
Environmental Defense Section
150 M St. NE, Washington, D.C. 20002
Tel: (202) 305-0340 (Caschette); Tel: (202) 514-2593 (Caintic)

DEVON LEHMAN MCCUNE, Senior Attorney
Natural Resources Section
999 18th Street, South Terrace, Suite 370, Denver, CO 80202
Tel: (303) 844-1487

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AQUALLIANCE and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE; U.S. ARMY CORPS OF ENGINEERS; COLONEL CHAD W. CALDWELL, in his official capacity as District Commander of the U.S. Army Corps of Engineers; and DEBRA HAALAND, in her official capacity as Secretary of the Interior,

Federal Defendants,

and

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

Defendant-Intervenors.

Case No. 2:21-cv-01527-DAD-DMC

FEDERAL DEFENDANTS' NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: December 15, 2022
Time: 2:00 p.m.
Courtroom: Zoom
Judge: Hon. Dale A. Drozd

NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE THAT on December 15, 2022, at 2:00 p.m. over Zoom, before the Honorable Dale A. Drozd, United States District Judge for the Eastern District of California, Federal Defendants U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers; Colonel Chad W. Caldwell, in his official capacity as District Commander of the U.S. Army Corps of Engineers; and Debra Haaland, in her official capacity as Secretary of the Department of the Interior will cross-move and hereby do cross-move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure against Plaintiffs AquAlliance and the Center for Biological Diversity on all claims for relief in Plaintiffs' Complaint for Declaratory and Injunctive Relief filed on August 25, 2021, ECF No. 1.

DATED: August 26, 2022

Respectfully submitted,

TODD KIM
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

S. JAY GOVINDAN, Acting Section Chief
BRIDGET K. MCNEIL, Assistant Section Chief
/s/ Kamela A. Caschette
KAMELA A. CASCHETTE, Trial Attorney
Wildlife & Marine Resources Section
Tel: (202) 305-0340
Kamela.Caschette@usdoj.gov

/s/ Paul Caintic
PAUL CAINTIC, Trial Attorney
Environmental Defense Section
Tel: (202) 514-2593
Paul.Caintic@usdoj.gov

/s/ Devon Lehman McCune
DEVON LEHMAN MCCUNE, Trial Attorney
Natural Resources Section
Tel: (303) 844-1487
Devon.McCune@usdoj.gov

Attorneys for Federal Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Stonegate Project ("Stonegate Project" or "Project") is a proposed private mixed-use development project within the City of Chico, California that is intended to help address the City's housing shortage. Because development involves fill of waters of the United States, a permit under Section 404 of the Clean Water Act is required. In assessing the request for that permit, the U.S. Army Corps of Engineers ("Corps") and the U.S Fish and Wildlife Service ("FWS") performed years-long environmental reviews of the Project to ensure it complied with the requirements of the Endangered Species Act ("ESA"), National Environmental Policy Act ("NEPA"), and Clean Water Act ("CWA"). The agencies thoroughly considered the effects of the proposed federal action associated with the Project on federally listed species, the aquatic ecosystem, and water quality, among other factors, and reasonably determined that the Project complies with the relevant environmental statutes. In particular, the agencies found that the Project's proposals to create a permanent, managed 132-acre preserve and to also compensate for the loss of waters of the United States and ESA-listed species through the purchase of conservation credits sufficiently mitigate the Project's anticipated effects.

Plaintiffs claim that the thorough environmental analyses performed by the agencies were arbitrary and capricious. In making their arguments, Plaintiffs reveal a fundamental misunderstanding of the facts here and the records supporting the agencies' determinations. Plaintiffs claim that the Project's mitigation efforts insufficiently protect ESA-listed species, but never acknowledge the Project's creation of the 132-acre preserve that will permanently provide for their protection and management. Plaintiffs also conflate two Project alternatives in the Corps' CWA analysis, and they criticize the Corps' rejection of one alternative while only citing the Corps' reasoning about the other. And Plaintiffs focus on comments or objections to early versions of the Project, while ignoring the fact that the Project was modified to avoid and minimize many of the initially projected impacts and increase mitigation.

Plaintiffs fail to carry their burden of showing that the actions of FWS or the Corps were

arbitrary and capricious. Thus, the Court should deny Plaintiffs' motion for summary judgment and grant summary judgment to Federal Defendants on all claims.

BACKGROUND

I. Legal Background

A. Endangered Species Act

FWS and the National Marine Fisheries Service administer the ESA on behalf of the Department of the Interior and Department of Commerce respectively. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b).[1] ESA Section 7 requires federal agencies to ensure that their activities are not likely to jeopardize the continued existence of listed endangered or threatened species or adversely modify those species' critical habitats. 16 U.S.C. § 1536(a)(2). If the agency proposing to take action ("action agency") determines that its actions will have "no effect" on a listed species or critical habitat, the action agency need not consult on that species. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc). Formal consultation is required unless the action agency determines, with the consulting agency's written concurrence, that the proposed action is "not likely to adversely affect" a listed species or critical habitat. 50 C.F.R. §§ 402.14(b)(1), 402.13(a). If formal consultation is required, the consulting agency will prepare a biological opinion stating whether the proposed action "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4).

Section 9 of the ESA sets forth protections for endangered species, providing different protections for fish and wildlife than for plants. Section 9(a)(1) prohibits the "take" of any endangered fish or wildlife.[2] 16 U.S.C. § 1538(a)(1)(B). Section 9 does not prohibit take of plants but makes it unlawful to:

[1] Generally, FWS has jurisdiction over terrestrial and resident aquatic species. The National Marine Fisheries Service generally has jurisdiction over marine and anadromous species. FWS is the consulting agency for the biological opinion prepared in this case.

[2] The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

> remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State[.]

16 U.S.C. § 1538(a)(2)(B); *see Cal. Native Plant Soc'y v. Norton*, No. 01-cv-1742 DMS (JMA), 2004 WL 1118537, at *2 (S.D. Cal. Feb. 10, 2004) (The ESA "does not prohibit take of plant species"). If a biological opinion concludes that an action avoids jeopardy and adverse modification and that the incidental taking of endangered or threatened fish and wildlife species will not violate Section 7(a)(2), the consulting agency issues an Incidental Take Statement. *Id.* § 1536(b)(4). An Incidental Take Statement specifies the impact of the incidental taking on the listed species, establishes reasonable and prudent measures that are necessary or appropriate to minimize the amount or extent of incidental take, and states the terms and conditions with which the action agency must comply. *Id.* § 1536(b)(4)(C)(i)-(iv); 50 C.F.R. § 402.14(i). Any taking in compliance with the terms and conditions of the Incidental Take Statement is exempt from the general take prohibition in Section 9. 16 U.S.C. § 1536(b)(4)(iv), (o)(2). Because Section 9 does not prohibit take of plants, FWS does not issue an Incidental Take Statement for plant species on which it consults.

B. Clean Water Act

The CWA prohibits discharges into waters of the United States without a permit. 33 U.S.C. § 1311(a). The Corps issues permits for discharges of dredged or fill material under Section 404 of the CWA ("404 Permits"). 33 U.S.C. § 1344(a)-(c). When doing so, the Corps follows guidelines promulgated by EPA (the "404(b)(1) Guidelines" or "Guidelines"). 33 U.S.C. § 1344(b). The Guidelines prohibit the Corps from issuing a 404 permit for a project "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). This means that the Corps must consider multiple alternatives and select the least damaging practicable alternative ("LEDPA"). An alternative is "practicable" if "it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). The Guidelines presume that less damaging

practicable alternatives are available when a proposed project is not "water dependent"—that is, where it does not require access or proximity to an aquatic area to fulfill its basic purpose. *Id.* § 230.10(a)(3).

C. NEPA

"NEPA is at its heart a procedural statute and requires federal agencies to take a 'hard look' at the environmental consequences of their actions." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 872 (9th Cir. 2022) (quoting *Kern Cnty. v. BLM*, 284 F.3d 1062, 1066 (9th Cir. 2002)). NEPA requires that an agency prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." *Id.*; 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3.[3] If a proposed action's impacts are not likely to have a significant impact on the human environment, the agency can prepare instead an Environmental Assessment ("EA"), which is a "concise, public document" that "[s]hall include brief discussions of the need for the proposal, of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9. "The NEPA review process concludes in one of two ways: (1) the agency determines through an EA that a proposed action will not have a significant impact on the environment and issues a [Finding of No Significant Impact ("FONSI")], or (2) the agency determines that the action will have a significant impact and issues an EIS and record of decision." *Env't Def. Ctr.*, 36 F.4th at 868 (citations omitted). "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)). The Court reviews the agency's decision not to prepare an EIS under the "arbitrary and capricious" standard, considering "whether the responsible agency has reasonably concluded that the project will have no significant adverse environmental consequences." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

[3] The Council on Environmental Quality issued new implementing regulations for NEPA in 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). Because the challenged administrative actions were subject to previous regulations, *see* 40 C.F.R. § 1506.13 (2020), all citations herein are to the version of the regulations in effect at the time of the relevant decisions, 40 C.F.R. Part 1500 (2019).

II. Factual and Procedural Background

A. The Stonegate Project

The developer sought the permit in connection with the Stonegate Project, a proposed mixed-use development project in northwest Butte County, California, within the City of Chico. The Project area is about 314 acres, with 132 of those acres dedicated to the creation of an open-space preserve ("the Preserve"). Corps 35:000347. At full build-out, the Project would include, among other things, 423 single-family residential lots, 13.4 acres of multi-family residential land use, and 36.6 acres of commercial land development. *Id*. The Project is intended to help address the housing shortage in the City of Chico, which the 2018 Camp Fire exacerbated by displacing individuals living in towns east of the city. Corps 35:000350. Bruce Road Associates submitted a CWA Section 404 application for the Project to the Corps on February 22, 2017, seeking to permanently impact 9.14 acres of wetlands, including "5.92 acres of seasonal wetlands, 2.85 acres of vernal pools, 0.30 acre of ditch/canal, and 0.07 acre of excavated pit, and indirect effect to 0.02 acre of vernal pools. Corps 35:000347.[4]

The Corps issued a public notice about the Project on March 10, 2017, and a revised public notice on September 7, 2018, informing interested parties about the permit application and seeking public comment. Corps 383:006801; Corps 131:001705. On August 5, 2020, the Corps issued a Memorandum for Record that constituted the EA, 404(b)(1) Guidelines Evaluation (as applicable) Public Interest Review, and Statement of Findings for the permit application. Corps 35:000347-58.

During its evaluation of environmental impacts, the Corps conducted an alternatives analysis under NEPA and the 404(b)(1) Guidelines. The Corps considered a no-action alternative, as required by NEPA, five on-site alternatives, and three off-site alternatives that were eliminated from further consideration. Corps 35:000367-70. The Corps found that the proposed Project and four on-site alternatives would be practicable, but that three of these alternatives "would result in other adverse environmental effects or would not result in a significant reduction in effects to the aquatic environment." Corps 35:000371. On-Site Alternative 5 was identified as the LEDPA and the

[4] FWS and the Corps each lodged an administrative record in support of their determinations. *See* ECF Nos. 14, 19. This brief refers to FWS's record as "FWS 00XXXX," and the Corps' record as "Corps XX:00XXXX."

environmentally preferred alternative because it avoided development east of the Butte Creek Diversion Channel, thus preserving additional areas in the southern portion of the Preserve. 35:000371. In its application of the Section 404(b)(1) Guidelines, the Corps determined that there are no practicable alternatives that did not involve special aquatic sites, and that On-Site Alternative 5 did not have other significant environmental consequences. Corps 35:000371.

The Corps considered the Project's potential effects on the environment, including on the aquatic ecosystem, special aquatic sites, and water quality. Corps 35:000372-84. The Memorandum for Record also contains a cumulative impacts analysis. Corps 35:000385-87.

The Corps submitted a Biological Assessment to FWS on July 17, 2018, which included the Corps' determination that the Project would have no effect on the federally listed giant garter snake ("GGS") and initiated formal consultation with FWS on the Project's effects on three federally listed species under Section 7 of the ESA. Corps 250:005391-534; FWS 000030-173; *see* Corps 252:005541. FWS issued its final Biological Opinion ("BiOp") and Incidental Take Statement on January 23, 2020, concluding that the Project was not likely to jeopardize the three listed species. FWS 000851-75.[5] The Corps concluded that, with measures taken to avoid and minimize impacts and compensatory mitigation, there would be no net loss of waters of the United States and no significant impact on the quality of the human environment. Corps 35:000387, 000397. Development will be limited to within one watershed on the western part of the property and will stop at a watershed break to preserve and limit indirect effects to the site's eastern drainage and its associated watershed. Corps 35:000347. The 132-acre permanent Preserve will protect 10.65 acres of waters of the United States and will be managed according to a long-term management plan approved by the Corps and FWS. *Id.*; Corps 141:001757. The Project will create the 132-acre Preserve by combining the existing 14.76-acre Doe Mill Schmidbauer Meadowfoam Preserve with 117.3 acres of adjoining open space and recording a conservation easement granted to an FWS-approved nonprofit organization. FWS 000858, 000869.

[5] FWS originally issued a BiOp on March 4, 2019. FWS 000766-FWS 000792. The Corps reinitiated consultation in June 2019 based on a revision to the proposed Project, FWS 000794-FWS 000796, and FWS issued an amended BiOp on December 18, 2019, FWS 000819-FWS 000843. The final BiOp correcting typographical errors was issued in January 2020. FWS 000851-FWS 000875.

To compensate for the acres of waters of the United States that will be lost, the developer will purchase 12.22 seasonal wetland creation credits at the Colusa Basin Mitigation Bank and 4.28 vernal pool establishment credits at the Meridian Ranch Mitigation Bank. Corps 35:000348. The Corps issued the Section 404 Permit on January 11, 2021. Corps 6:000002-11.

B. The Vernal Pool Species

The Corps initiated formal consultation under ESA Section 7 with FWS on the Project's impacts on three listed species found in the Project area: vernal pool fairy shrimp (*Branchinecta lynchi*), vernal pool tadpole shrimp (*Lepidurus packardi*), and Butte County meadowfoam (*Limnanthes floccose* ssp. *Californica*) (collectively, "Vernal Pool Species").[6] Corps 250:005541-43. The fairy shrimp is a small freshwater crustacean endemic to vernal pool or vernal-pool-like habitats in California and southern Oregon. FWS 001774. The tadpole shrimp is also a small freshwater crustacean found in ephemeral habitats such as vernal pools across California's Central Valley. FWS 001848-49. FWS listed the fairy shrimp and tadpole shrimp as endangered in 1994, 59 Fed. Reg. 48,136 (Sept. 19, 1994), and conducted a comprehensive evaluation of both species' status in two five-year reviews issued in 2007, FWS 001770-845; FWS 001846-95.[7] Butte County meadowfoam is an annual plant found entirely within vernal swales[8] and vernal pools in Butte County, California. FWS 001899. FWS listed the meadowfoam as endangered in 1992, 57 Fed Reg. 24,192 (June 8, 1992), and issued a five-year review for the species in 2008, FWS 001896-924.

In 2005, FWS issued a recovery plan for vernal pool ecosystems in California and southern Oregon covering 33 species, including the Vernal Pool Species ("Recovery Plan"). FWS 000998-

[6] The Corps also found the Project was not likely to adversely affect two ESA-listed species managed by the National Marine Fisheries Service: the Central Valley spring-run Chinook salmon and northern California distinct population segment of steelhead. Corps 248:005320. The National Marine Fisheries Service concurred with the Corps' finding. Corps 247:005318-19.

[7] "FWS is required to 'conduct, at least once every five years, a review of all species' protected under the ESA and to 'determine on the basis of such review whether' the listing status of protected species should be changed." *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 794 (9th Cir. 2008) (quoting 16 U.S.C. § 1533(c)(2)).

[8] A swale is a marshy depression between ridges.

1630.[9] The Recovery Plan is a non-binding, flexible document that provides a "road map" for species conservation. *Ctr. for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1267 (D. Mont. 2020); *see Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1114 n.8 (9th Cir. 2015) (the ESA "does not mandate compliance with recovery plans for endangered species"). In the Recovery Plan, FWS stated that the "over-arching recovery strategy for species in this recovery plan is habitat protection and management." FWS 001007. The Recovery Plan also identifies various vernal pool habitat "Core Areas" that FWS found should be the initial focus of protection measures for endangered or threatened species, including the Doe Mill Core Area which encompasses the Project. FWS 000862; FWS 001291-92.

C. Procedural Background

Plaintiffs filed this lawsuit on August 25, 2021. ECF No. 1. Count 1 alleges that FWS violated the ESA and Administrative Procedure Act ("APA") by failing to fully consider the impacts the Project would have on listed species in the BiOp. *Id.* ¶¶ 139-48. Count 2 alleges that FWS violated the ESA and APA by issuing a BiOp that departed without justification from previous agency positions. *Id.* ¶¶ 149-52. Count 3 alleges that FWS and the Corps violated the ESA by failing to consult about the effects of the Project on GGS. *Id.* ¶¶ 153-57. Count 4 alleges that the Corps violated NEPA by performing an inadequate environmental analysis and failing to prepare an environmental impact statement. *Id.* ¶¶ 158-66. Count 5 alleges that the Corps violated the CWA because the action approved by the Section 404 Permit is not the least environmentally damaging practicable alternative. *Id.* ¶¶ 167-77.

The Court entered an order allowing Defendant-Intervenors to intervene. ECF No. 16. Federal Defendants lodged the Administrative Record on February 11, 2022. ECF No. 14. After engaging in negotiations about the contents of the Administrative Record with Plaintiffs, Federal Defendants lodged a supplement to the Administrative Record on April 15, 2022. ECF No. 19.

[9] The Recovery Plan was issued in December 2005, and a notice of availability of the Recovery Plan was published in the Federal Register in March 2006. *See* ECF No. 30 at 24 n.12.

STANDARD OF REVIEW

The Ninth Circuit has endorsed the use of summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure for review of agency actions under the APA. *See, e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994) (discussing the standards of review under both the APA and Fed. R. Civ. P. 56). Because this case is brought under the judicial review provisions of the APA, the agency is the fact finder, and there can be no genuine issues of material fact. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). When reviewing agency action, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *City & Cnty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (citation omitted); *see also Nw. Motorcycle Ass'n*, 18 F.3d at 1472 ("[T]he court's review is limited to the administrative record.").

The ESA, NEPA, and CWA do not supply a separate standard of review, thus the APA standard of review applies for claims under these statutes. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, a court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). This standard is "highly deferential" and requires a reviewing court to consider only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Jewell*, 747 F.3d at 601 (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). To survive judicial review, the agency "need only articulate a rational connection between the facts it has found and its conclusions." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 561 (9th Cir. 2000). And "[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Alaska Dep't of Env't Conservation v. E.P.A.*, 540 U.S. 461, 597 (2004) (internal quotation marks omitted); *see also S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1256 (E.D. Cal. 2013) ("[T]he court's function is to determine whether or not . . . the evidence

in the administrative record permitted the agency to make the decision it did."). The party challenging the agency's action has the burden of proving that the agency's determination was arbitrary and capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

ARGUMENT

I. The Court Should Grant Summary Judgment for Federal Defendants on the Endangered Species Act Claims in Counts 1, 2, and 3 of the Complaint.

The agencies' determinations about the effects of permitting the Project on the Vernal Pool Species and GGS were reasonable and complied with the ESA and APA. FWS used the best scientific and commercial data available to evaluate the Project's effects on the Vernal Pool Species in the BiOp before concluding that authorizing the Project would not jeopardize the species. Similarly, the Corps rationally determined that the Project would have "no effect" on the GGS and thus that the Corps was not required to engage in ESA Section 7 consultation for this species. Plaintiffs have not shown that the actions of FWS or the Corps were arbitrary and capricious. Thus, the Court should grant summary judgment to Federal Defendants on the ESA claims set forth in Counts 1, 2, and 3.

A. The Biological Opinion Is Rational and Complied with the ESA and the APA.

FWS reasonably concluded that issuing a Section 404 Permit for the Project was not likely to jeopardize the Vernal Pool Species using the best scientific and commercial data available. During formal consultation on the Project, the ESA required FWS to analyze whether permitting the proposed Project is "likely to jeopardize the continued existence of" a listed species. 16 U.S.C. § 1536(a)(2). A jeopardy determination requires an appreciable reduction in "the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. FWS is owed substantial deference in determining its approach because "the ESA does not prescribe how the jeopardy prong is to be determined." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066-67 (9th Cir. 2004). Although ESA Section 7 requires FWS to use the "best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), this requirement "merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Kern Cnty. Farm Bureau v. Allen*,

450 F.3d 1072, 1080 (9th Cir. 2006) (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)). Courts afford significant deference to FWS's finding of what constitutes the "best available science." *See Jewell*, 747 F.3d at 602 ("The determination of what constitutes the 'best scientific data available' belongs to the agency's 'special expertise . . . . When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.'" (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983))).

FWS used the best available science and data to analyze the effects of the proposed Project on the Vernal Pool Species, including the effects of the Preserve, and reasonably concluded that permitting the Project will not preclude recovery or reduce the likelihood of survival of any of the species. To reach this conclusion, FWS first considered the status of the Vernal Pool Species generally, including effects the species could face from climate change. FWS 000859-65; *see* FWS 001814-15; FWS 001880-81; FWS 001916. The BiOp next analyzed the environmental baseline in the Project's action area.[10] As part of its environmental baseline analysis, FWS examined the data available on the Vernal Pool Species in the action area, the overall condition of the action area, and the action area's hydrology. FWS 000865-67.

The BiOp then examined the effects of the Project on the Vernal Pool Species as well as the conservation measures proposed by the developer. For fairy and tadpole shrimp, FWS found that the Project would directly and indirectly affect 8.79 acres of their habitat. FWS 000867. But FWS also found that the 132-acre Preserve and another preserve in the area would collectively result in perpetual preservation and management of 20% of the shrimps' habitat within the Doe Mill Core Area. FWS 000867. The BiOp further considered the developer's commitment to provide 15.48 acres of additional compensatory habitat in the form of permanent dedication and funding of the Preserve and conservation credits. FWS 000867-68. FWS anticipates that the compensatory habitat will minimize the Project's anticipated incidental take of the shrimp species. *Id.* FWS found that the 15.48 acres of

[10] An environmental baseline analyzes the past and present impacts of Federal, State, or private actions; anticipated impacts of proposed Federal projects that have already undergone consultation; and contemporaneous State or private actions. 50 C.F.R. § 402.02.

compensatory habitat will provide habitat "commensurate with or better than habitat lost as a result of the [P]roject" and, separately, that the Preserve will help maintain the shrimps' geographic distribution and genetic representation. FWS 000868.

For meadowfoam, FWS found that the Project would affect 1.13 acres of occupied habitat but provide permanent protection and funded conservation management of the species through the 132-acre Preserve. *Id.* The BiOp recognized that the Preserve will protect the portions of the action area with "the most dense and abundant amounts of occupied [meadowfoam] habitat." FWS 000869. While acknowledging that one of the meadowfoam populations in the area would be lost to development, the BiOp noted that the population's genetic information would be preserved through seed bank storage and by potentially moving the seed to the Preserve to try to expand the amount of habitat occupied by this plant species in that area. FWS 000868. The BiOp emphasized the importance of the Preserve and the management actions committed to by the developer for eliminating or ameliorating threats like habitat fragmentation and alteration to all of the Vernal Pool Species. FWS 000869.

After considering all these factors, FWS reasonably concluded that issuing the Section 404 Permit for the Project is not likely to jeopardize any of the Vernal Pool Species. FWS 000870. FWS found that the design of the permanent, fully-funded, and managed Preserve will "ensure sufficient associated uplands to provide biological and physical support to aquatic habitat ecosystem function" thus ensuring that a "fully functional vernal pool landscape remains in the proposed preserve." *Id.* FWS expects the major benefits of this Preserve and the other conservation steps proposed by the developer to mitigate the Project's effects on the species as well as many of the other threats they face. *See* FWS 000870-71. Based on this analysis, FWS found that the Project would not preclude recovery or reduce the likelihood of survival of any of the Vernal Pool Species, but would ameliorate many threats that affect them. *See* FWS 000871.

In sum, the BiOp's analysis of the Project's effects on the Vernal Pool Species and conclusion that permitting it would not jeopardize them complied with the ESA. FWS used the best available science in reaching its conclusions, and the Court should defer to the agency's well-reasoned analysis.

As discussed below, Plaintiffs' arguments to the contrary cannot displace this conclusion.[11]

1. The Biological Opinion Reasonably Analyzed the Effects of the Stonegate Project on Butte County Meadowfoam.

FWS reasonably concluded in the BiOp that permitting the Project was not likely to jeopardize meadowfoam by assessing the baseline of the species in the Project's action area, the effects of development, and the effects of mitigation. Plaintiffs mischaracterize FWS's determination about meadowfoam and fail to show that FWS's analysis was arbitrary and capricious.

a. The Biological Opinion Sufficiently Analyzed the Environmental Baseline of Meadowfoam in the Project Area.

FWS thoroughly appraised the environmental baseline for meadowfoam in the Project's action area using the best available science. FWS analyzes the environmental baseline to ground its consideration of "the effects of its actions 'within the context of other existing human activities that impact the listed species.'" *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (citation omitted). Here, the BiOp addressed the following pre-Project characteristics of the action area for meadowfoam: amount of suitable habitat, survey history, site-specific genetic information, patterns of hydrology, and overall condition of the site. FWS 000865-67. Plaintiffs ignore FWS's analysis and instead incorrectly contend that, aside from survey data—which Plaintiffs mischaracterize as "contradictory"—the BiOp "only discusses threats to meadowfoam generally." ECF No. 30 at 17-19. Plaintiffs are wrong for two reasons.

First, Plaintiffs' arguments about meadowfoam population numbers fundamentally misunderstand how FWS used the meadowfoam survey information when analyzing the effects of the Project. *Id.* at 17-18. Meadowfoam population sizes naturally vary over time as part of the species' life history. FWS 000866; *see* FWS 001909 (meadowfoam five-year review stating "[s]eed dormancy is likely the cause of population fluctuations of up to two orders of magnitude between years"). Because of this variability, FWS did not rely on assessing a change in the species' numbers in finding

[11] To the extent Claims 1 and 2 allege violations of the ESA's citizen-suit provision, the Court should grant summary judgment to Federal Defendants on those claims. As the Supreme Court has held, the BiOp can only be challenged under the APA, not via an ESA citizen-suit claim. *Bennett v. Spear*, 520 U.S. 154, 171, 173-75 (1997).

that the Project was not likely to jeopardize meadowfoam. *See* FWS000866. Instead, the BiOp recognized meadowfoam's population fluctuations but noted that the survey information showed the 5.14 acres where the species concentrated in the action area over the years. *Id.* The BiOp further noted that the species was concentrated in four locations in the action area and that each area had unique genetic characteristics. *Id*. In other words, four different populations of meadowfoam occupy the action area. *Id.* FWS's no-jeopardy finding was based in part on preserving the genetic material from the one meadowfoam population that it found the Project would adversely affect. FWS 000870 (discussing that the Project will "further protect the genetic range of this species"). FWS provided a "basic snapshot" of meadowfoam in the action area by fully explaining the agency's use of surveys to identify the location of the meadowfoam populations there, rather than simply relying on the widely variable abundance information in the surveys. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014) (quotation omitted). This species location data properly provided a basis for FWS's determination that issuing a Section 404 permit for the Project was not likely to jeopardize meadowfoam. *See* FWS 000870.[12]

Second, despite clear record evidence to the contrary, Plaintiffs contend that the meadowfoam abundance information was the only information specific to the action area considered in the BiOp. ECF No. 30 at 18-19. This is inaccurate. Along with the meadowfoam distribution and genetic information discussed above, the BiOp's environmental baseline section discussed the Project's overall site condition. FWS 000866. This discussion included that meadowfoam populations occur around a road intersection near the action area, which suggests those occurrences were likely one large population before the construction of the roads. *Id.* The baseline also discusses the action area's hydrology. FWS 000866-67. Finally, FWS stated in the environmental baseline section that while the vernal pool grasslands on the property "are fragmented and in some cases somewhat degraded," the

[12] Despite Plaintiffs' contentions, the BiOp and its supporting record accurately characterized the available population data for meadowfoam. The BiOp noted that "[a]s expected for this species, the population size and extent has been found to vary over time." FWS 000866. The survey data referenced by Plaintiffs reflects this variance. ECF No. 30 at 17-18. And because FWS did not rely on population numbers when drawing its conclusions about the Project, Plaintiffs' argument about the clarity of the population estimate from the 2016 to 2018 survey results is inconsequential.

site "still contains some of [the] best remaining intact vernal pool crustacean and Butte County meadowfoam habitat" in the area. *Id.*

To the extent that Plaintiffs contend that FWS's consideration of all the above information still was not sufficient, the Court should disregard such an argument. The ESA required FWS to consider the best *available* scientific information and data in the BiOp. FWS did not need to conduct new surveys or studies in the action area for its analysis, as Plaintiffs seem to suggest. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1047 (9th Cir. 2015) (the best available science standard in the ESA "does not require the agency to 'conduct new tests or make decisions on data that does not yet exist'") (citation omitted). And Plaintiffs point to no specific studies or data that FWS failed to consider in the meadowfoam environmental baseline. *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 659 (9th Cir. 2009) (rejecting best available science claim where plaintiff did not cite "any scientific studies that indicate the [agency]'s analysis is outdated or flawed").

For all these reasons, the Court should find that the BiOp adequately analyzed the environmental baseline for meadowfoam.

b. FWS Thoroughly Analyzed the Effects of the Project and Its Mitigation Measures on Meadowfoam.

As discussed above, FWS thoroughly addressed the effects of the Project on meadowfoam and its mitigation measures to find that permitting the Project would not jeopardize the species. Plaintiffs contend that FWS departed from a "prior determination" when approaching meadowfoam mitigation measures. ECF No. 30 at 21-23. Their argument, however, relies on a 20-year-old draft biological opinion for an entirely different project that was never finalized. Additionally, citing "[o]ther projects" in Chico, Plaintiffs contend that FWS needed to justify its approval of a mitigation plan that has a different preservation ratio for meadowfoam. *Id.* at 23-24. Plaintiffs' arguments all fail.

Plaintiffs' attempts to compare the Project to the Eastgate development fall flat. First, Plaintiffs' arguments rely on a draft biological opinion for the Eastgate development, but that draft was predecisional and never finalized. Fris Decl. ¶ 10. Thus, Plaintiffs' characterizations of the statements in that draft biological opinion as FWS's "determination" or "position" are overreaching;

FWS did not take any final position that the Eastgate development would likely jeopardize meadowfoam. Moreover, if FWS had ultimately issued a final biological opinion for the Eastgate project, the agency could have reached a different conclusion. *See U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 786 (2021) (holding draft biological opinions "reflect a preliminary view—not a final decision—about the likely effect of the [agency action] on endangered species"). Because FWS never reached a final determination about the Eastgate development, it was not required to explain the reason for any purportedly different approach between that preliminary draft and the BiOp here. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (discussing that an "[u]nexplained inconsistency in *agency policy* is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (emphasis added) (citation omitted)).

Moreover, the Eastgate development is easily distinguishable from the Project, and Plaintiffs' argument that both projects would have similar effects on meadowfoam is incorrect. *See* ECF No. 30 at 22-23. First, the proposed mitigation lands considered for the Eastgate development did not provide as many benefits to meadowfoam as the Preserve that will be established for this Project. The mitigation proposed for the Eastgate development was hydrologically connected to, and downslope of, the housing development part of that project. Corps 008459. As a result, the Eastgate development would have reduced the available watershed and severed the upper parts of the swales needed to support meadowfoam around that development. *Id.* That development was also projected to reduce the amount of occupied meadowfoam habitat on the site by at least 33%. *Id.* Thus, in the draft biological opinion, FWS expressed concern that the loss of occupied habitat combined with the change to hydrology could "appreciably reduce the short and long-term persistence of the meadowfoam on the entire site," including in the mitigation lands. Corps 008460. FWS harbors no similar concerns for the Project here. The Preserve is not hydrologically connected to the development site, and FWS does not expect development to affect the Preserve. FWS 000858. Instead, the Preserve will permanently protect and manage the portions of the Project's action area with "the most dense and abundant amounts of occupied [meadowfoam] habitat," helping to offset the approximate 20% reduction of occupied meadowfoam habitat in the action area. FWS 000868-69. Further, the genetic material from

the one meadowfoam population that the Project would adversely affect will be preserved. FWS 000870. No genetic preservation measures were proposed for the Eastgate development. For all these reasons, the Project at issue is fundamentally different from the Eastgate development.

Additionally, despite Plaintiffs' claims, FWS's understanding of meadowfoam's status has changed since 2002 when it made its preliminary assessment of the Eastgate development. *See* ECF No. 30 at 22-23. When FWS prepared its draft biological opinion for the Eastgate development, FWS knew of only nine occurrences of meadowfoam. Corps 008454. However, by the time of the 2008 five-year review, FWS knew of at least 21 meadowfoam occurrences—more than twice as many. FWS 000860. And the BiOp states that "[t]here appears to have been little change to [meadowfoam]'s status since the 2008 five-year review." FWS 000860. Thus, Plaintiffs' contention that the meadowfoam's status is the same as in 2002 plainly mischaracterizes the BiOp. Moreover, even if Plaintiffs had cited any data to support their bald assertion that there is "less meadowfoam now then there was in 2007" (which they did not), it would not hint at the overall status of meadowfoam. *See* ECF No. 30 at 23. As the BiOp states, there is a natural variance in the species' population numbers from year to year. *See* FWS 000866; FWS 001909.

Plaintiffs' attack on the meadowfoam preservation ratio for the Project is also misleading. Plaintiffs inaccurately describe FWS as having "required" a 19:1 preservation ratio for other projects affecting meadowfoam. ECF No. 30 at 23-24. When FWS consults on a project under ESA Section 7, it does not dictate the parameters of a project. Instead, the ESA requires FWS to evaluate the effects of an action on listed species as described by the action agency and offer its opinion about the effects of the action on listed species. *See* 50 C.F.R. § 402.14(c)(1), (g)(3)-(4); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1217 (D. Idaho 1993) ("Nor is [the consulting agency] required to develop and evaluate alternatives to the action proposed by the [action agency]; it must simply evaluate the *effects of the proposed action*[.]"), *aff'd*, 42 F.3d 1399 (9th Cir. 1994). For example, the proponent of the Meriam Park project, cited by Plaintiffs, proposed conservation measures that resulted in a 19:1 preservation ratio for meadowfoam. FWS 001748; *see* FWS 000897-98 (conservation measures proposed by project applicant); FWS 000942 (same). On the facts presented to FWS for the Merriam

Park project, FWS determined that a 19:1 preservation ratio for meadowfoam was an appropriate conservation measure. *See* FWS 001748, 001758-59. This hardly stands as a hard and fast requirement for any action. To the contrary, FWS has reached no-jeopardy determinations for meadowfoam based on a variety of different conservation strategies proposed by other projects. *See* FWS 001698, 001727 (Cohasset Road Widening project BiOp finding meadowfoam preservation ratios of 10:1 and 5:1 were not likely to jeopardize the species).[13] Nor do Plaintiffs recognize the significant conservation benefits that the Project provides for meadowfoam. The Project will take genetic preservation steps for the species as well as permanently secure 132 acres of private land for a fully funded and managed Preserve. These steps will provide protection to a higher percentage of the known populations of meadowfoam than what would otherwise be available under the ESA given that the statute does not prohibit the take of listed plants on private property.

Thus, Plaintiffs have failed to show that the Project's proposed mitigation strategies for meadowfoam are arbitrary and capricious, and the Court should uphold FWS's findings.

2. The Biological Opinion Thoroughly Analyzed the Effects of the Stonegate Project on Vernal Pool Species.

FWS reasonably concluded in the BiOp that permitting the Project was not likely to jeopardize the Vernal Pool Species after considering the mitigation measures proposed by the Project and the effects the species are expected to face from climate change. The Court should reject Plaintiffs' efforts to mischaracterize the record and improperly introduce extra-record evidence; it should, instead, grant summary judgment to Federal Defendants.

a. FWS Properly Considered the Project's Mitigation Measures.

The BiOp reasonably analyzed the Project's mitigation measures before determining that they would ameliorate or eliminate many threats identified by the Recovery Plan that the Vernal Pool Species face. Despite Plaintiffs' arguments to the contrary, the ESA does not require federal agencies

[13] Plaintiffs' reference to the Recovery Plan is misplaced. As explained below, "recovery plan objectives are discretionary for federal agencies." *Conservation Cong. v. Heywood*, No. 2:11-cv-02250-MCE, 2015 WL 5255346, at *1 (E.D. Cal. Sept. 9, 2015) (quotation omitted), *aff'd*, 690 F. App'x 541 (9th Cir. 2017). And in any event, FWS found that the project contributed to the Recovery Plan's goals. *See* FWS 000867-68.

to implement recovery plan objectives in their actions. *Conservation Cong. v. Heywood*, 2015 WL 5255346, at *1. Here, FWS properly examined the alternative conservation mechanisms the Project proposed—most notably, the fully funded and managed Preserve—and determined that permitting the Project would not preclude the recovery of the Vernal Pool Species. Moreover, FWS found the Project would contribute to the Recovery Plan's goals by eliminating or ameliorating many of the threats the species face, a finding the ESA did not require it to make. Further, FWS and the Corps both mandated implementing the Project's conservation measures as conditions of the Incidental Take Statement and Section 404 Permit respectively. For all these reasons, the Court should uphold FWS's mitigation analysis for the Vernal Pool Species.

FWS found that the Project included alternative, site-specific conservation measures that contribute to meeting the Recovery Plan's goals for the Vernal Pool Species. Before construction begins, the developer must carry out a host of mitigation measures. The developer must establish a permanent, fully-funded, 132-acre Preserve in the action area as well as develop and implement a long-term management plan for the Preserve. FWS 000857-58; *see* Corps 6:000004. The developer must also purchase 15.48 acres of fairy and tadpole shrimp preservation credits at FWS-approved conservation banks, and the Corps must provide receipts of the credits to FWS. FWS 000858; FWS 000872. Further, FWS-approved personnel will gather seeds from the one affected meadowfoam population, and ten percent of the seeds will be stored in an FWS-approved facility. *Id.* The Project includes various other mitigation measures to protect the species while construction is ongoing. FWS 000856-57. Finally, the developer must opt to do one of the following: plant the remaining seeds in the Preserve to establish another 1.35 acres of occupied meadowfoam habitat, purchase meadowfoam credits at an FWS-approved conservation bank, purchase another property with occupied meadowfoam habitat, or participate in the Butte Regional Conservation Plan. FWS 000859. FWS concluded that these mitigation efforts will help "maintain the geographic distribution and genetic representation of vernal pool fairy shrimp and vernal pool tadpole shrimp within the Doe Mill core recovery area." FWS 000868. For meadowfoam, FWS concluded that these efforts will contribute to meeting high-priority goals laid out in the Recovery Plan and provide suitable habitat for meadowfoam

reproduction and nutrition "commensurate with habitat lost as a result of the project." FWS 000868-69. FWS's thorough analysis of the effects of the Project's mitigation measures supports its finding that the Project is not likely to jeopardize the Vernal Pool Species and is entitled to the Court's deference.[14]

Plaintiffs incorrectly claim that the Project "does not provide for concrete site-specific methods for protecting vernal pool species," yet they fail to acknowledge the mitigation measures that must be taken before construction can begin: the mandated permanent, fully-funded, and managed Preserve; the meadowfoam seed collection; or the purchase of fairy and tadpole shrimp preservation credits. ECF No. 30 at 24; *see* FWS 00856-59; FWS 000872. These mitigation measures are a far cry from the "general commitments to future improvement" discussed in *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020), which the Ninth Circuit found to be insufficient. Instead, the mitigation measures provide concrete commitments "subject to deadlines or otherwise-enforceable obligations" that the Corps and developer must carry out. *Id.* at 743, 747.

Accordingly, there is no merit to Plaintiffs' argument that these measures are non-binding. ECF No. 30 at 25. FWS's Incidental Take Statement explains that the conservation measures are "non-discretionary" and must be "binding conditions of any grant or permit issued to the applicant, as appropriate, for the [take] exemption in section 7(o)(2) to apply." FWS 000871; *see* FWS 000872-73 (Incidental Take Statement terms and conditions); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1122, 1184-85 (E.D. Cal. 2008) (mitigation measures sufficient where made part of biological opinion's terms and conditions and incidental take statement, and were enforceable under civil and criminal law). The Section 404 Permit separately incorporates the conservation measures as "Special Conditions" that the developer must adhere to. Corps 6:000003-07. While the developer may choose from one of four additional meadowfoam conservation methods, it *must* complete one of them. FWS 000859. And if it does not, the Corps can enforce the Section 404

[14] Plaintiffs mischaracterize a comment from the California Department of Fish and Wildlife ("CDFW"), claiming that CDFW urged FWS to adhere to the Recovery Plan's preservation targets when analyzing the Project. ECF No. 30 at 24. But CDFW merely recommended that an effects analysis for meadowfoam "should take the [Recovery Plan] into consideration," which FWS did. Corps 35:000351-52.

permit conditions against the developer. 33 U.S.C. § 1344(s).

Plaintiffs' argument that the BiOp does not analyze whether some of the conservation methods are available also fails. *See* ECF No. 30 at 25. First, the developer proposed the alternative conservation methods for FWS to consider in the BiOp, so it was reasonable for FWS to assume that the developer could carry out the conservation measures it proposed. Second, if one method is not available, then the developer must go forward with another. FWS 000859. And the administrative record supports the reasonableness of the four alternatives the Project proposes. FWS found the Preserve alone would provide suitable habitat for meadowfoam reproduction and nutrition "commensurate with habitat lost as a result of the project." FWS 000868-69. Because the Preserve itself contributes so greatly to meadowfoam conservation, it was reasonable for the BiOp to allow the developer to choose from a suite of further meadowfoam conservation methods as part of its no-jeopardy determination and assessment of measures that will aid the species' recovery.

Contrary to Plaintiffs' arguments, the ESA did not require FWS to implement specific parts of the Recovery Plan to reach a no-jeopardy determination. *See* ECF No. 30 at 24. Section 4(f) broadly requires FWS to implement a species recovery plan but makes clear that the specifics of implementing a plan are left to FWS's discretion. 16 U.S.C. § 1533(f)(1); *see United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998) (discussing that FWS has broad discretion to determine what methods to use in species conservation, including which recovery plan provisions to adopt and implement). The Ninth Circuit has explained that recovery plans provide guidance, but "are not binding authorities." *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) (citation omitted); *Cascadia Wildlands*, 801 F.3d at 1114 n.8; *see also Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234, 1244 n.6 (9th Cir. 2015) (a recovery plan is not binding on an agency's subsequent determinations under ESA Section 7); *Ctr. for Biological Diversity*, 509 F. Supp. 3d at 1267 (recovery plans are "only a precursor to policy implementation" that "may be followed at times and disregarded at others"). And here, both the Recovery Plan and the BiOp recognized the non-binding nature of the Recovery Plan's suggested conservation methods. FWS 001406 (Recovery Plan stating: "While this recovery plan identifies a specific strategy for obtaining recovery of the covered vernal pool plant and animal species, it is not

the only mechanism through which recovery may be obtained."); FWS 000864 (BiOp stating: "[T]he Recovery Plan also states that alternative strategies . . . may present opportunities to conserve species habitat and meet the recovery criteria described in the Recovery Plan.").

FWS adequately analyzed the Project's concrete, enforceable mitigation measures and reasonably concluded that they were not likely to jeopardize the Vernal Pool Species and were consistent with the Recovery Plan's goals. The Project did not need to adhere to the specific conservation measures suggested by the Recovery Plan because "it is possible to reach one's destination—recovery of the species—by a pathway neither contemplated by the traveler setting out nor indicated on the map." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012). The Court should uphold the BiOp's analysis of the Project's mitigation measures.

b. FWS Sufficiently Considered Climate Change's Effects on the Vernal Pool Species.

The BiOp and the supporting record show that FWS sufficiently considered the anticipated effects of climate change on the Vernal Pool Species. The BiOp incorporated documents that discuss the threats that climate change poses for the species, and the BiOp's effects analysis adequately addressed those threats. And while the Court should exclude the extra-record documents improperly submitted by Plaintiffs in support of this aspect of their argument, even if they are considered, they are not the best scientific and commercial data available for this Project and would not have changed FWS's conclusions in the BiOp or Incidental Take Statement.

The BiOp and its supporting record show that FWS adequately assessed the anticipated effects of climate change on the Vernal Pool Species in the Project's action area using the best available science. As part of its discussion of the status of the species, the BiOp incorporated by reference the five-year reviews for the each of the Vernal Pool Species. FWS 000859-60; *see* FWS 001770-845 (vernal pool fairy shrimp five-year review); FWS 001846-95 (vernal pool tadpole shrimp five-year review); FWS 001896-924 (meadowfoam five-year review). Each five-year review discussed the likely impacts of climate change on the Vernal Pool Species. For fairy shrimp, FWS's five-year review noted that changes in precipitation because of climate change "could alter marginal pools towards

more or less favorable periods of inundation" and change water chemistry, and that habitat fragmentation could make species range shifts in the face of climate change difficult. FWS 001814-15. For tadpole shrimp, FWS's five-year review also discussed potential climate change threats from inundation and habitat fragmentation, as well as potential high rates of short-term mortality from drought. FWS 001880-81. For meadowfoam, FWS's five-year review discussed that climate change could cause drought or flood conditions that would strain meadowfoam, especially occurrences in fragmented habitat. FWS 001916. In sum, FWS expected that climate change would exacerbate the threats the species face from changes in vernal pool hydrology and habitat fragmentation.

The BiOp, in turn, addresses the threats to the species caused by climate change. When discussing the threats faced by fairy and tadpole shrimp, the BiOp states that "alteration of hydrologic patterns can change the timing and duration of ponding in some types of vernal pools," and that "[h]abitat loss exacerbates the highly fragmented distribution of these species." FWS 000860. The BiOp also notes that "potential changes to hydrology" and "habitat loss and fragmentation" remain threats to meadowfoam. *Id.* And the Project includes measures to mitigate these threats, as considered in the BiOp. For example, the BiOp notes that management of the Preserve will include "maintaining the hydrology of the vernal pools or vernal pool complexes," and will "eliminate or ameliorate threats to vernal pool species, including further loss, fragmentation, degradation, and alternation of habitat." FWS 000869. Overall, the BiOp and its supporting record show that during consultation FWS sufficiently considered the anticipated effects of climate change on the species and the steps the Project takes to mitigate them. *See Concerned Friends of the Winema v. McKay*, -- F. Supp. 3d --, No. 1:19-cv-516-MC, 2022 WL 2439918, at *13 (D. Or. July 5, 2022) (holding BiOp's climate change analysis was sufficient where BiOp addressed effects like drought and water temperature data on species).

That the BiOp itself does not include the phrase "climate change" is not dispositive. *See* ECF No. 30 at 19. As the Ninth Circuit has recognized, courts "must uphold an agency action—even if it is made with 'less than ideal clarity'—as long as 'the agency's path may reasonably be discerned' from the record." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1250 (9th Cir. 2013) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). FWS's

consideration of climate change when consulting on the Project is reasonably discernable from the record. As discussed above, the BiOp incorporated the five-year reviews' discussions of climate change impacts on the Vernal Pool Species and explicitly analyzed the effects that climate change is anticipated to cause in the context of the Project. Thus, FWS's climate change analysis was reasonable.

The cases Plaintiffs rely on are distinguishable. In *Pacific Coast Federation of Fishermen's Associations*, 606 F. Supp. 2d 1122, the consulting agency did not consider data showing that "climate change would significantly change the hydrology of Northern California's river systems" and instead relied on a model that assumed the same conditions experienced in the project area from 1922 to 1994. *Id.* at 1183.[15] In contrast, the BiOp acknowledged that changing hydrology and habitat fragmentation threatens the Vernal Pool Species and considered that possibility both in its effects analysis and jeopardy determination. FWS 000859-62, 000867-69. Additionally, unlike *Turtle Island Restoration Network v. U.S. Department of Commerce*, 878 F.3d 725, 737 (9th Cir. 2017), and *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d at 930, the Stonegate BiOp incorporated discussions of climate change's effects on the Vernal Pool Species and analyzed those effects. FWS 000859-62, 000867-69. And the biological opinions in the cases cited by Plaintiffs did not address mitigation measures taken to combat climate change's effects, while here FWS considered that the permanent Preserve will manage and maintain vernal pool hydrology and prevent further habitat fragmentation—the primary effects Vernal Pool Species face from climate change. FWS 000869.

The Court should disregard the two extra-record studies improperly submitted by Plaintiffs and the arguments that rely on them for the reasons discussed in Federal Defendants' motion to exclude. *See* ECF No. 38. But even if the Court considers the studies, they were not the best available science for this consultation and do not change FWS's analysis of the Project. Neither Kneitel (2014) nor Montrone et al. (2019) provide site-specific information about any of the Vernal Pool Species.

[15] Plaintiffs' reliance on the out-of-circuit case *Appalachian Voices v. U.S. Department of Interior*, 25 F.4th 259 (4th Cir. 2022), is just as distinguishable. There, the biological opinion relied on a model that did not incorporate climate change's effects over time, which the court found was arbitrary and capricious. *Id.* at 277. Here, the BiOp determined that the mitigation measures proposed would eliminate or ameliorate the primary effects the Vernal Pool Species face from climate change because of the fully funded management of the Preserve.

Instead, they discuss potential climate change effects on the species generally. *See* Fris Decl. ¶¶ 5, 8. And the species-wide effect both studies examine—the effects of changing hydrology on vernal pool species—is already addressed by the BiOp. Kneitel (2014) examined the effects of inundation duration and timing on fairy shrimp and tadpole shrimp, and Montrone et al. (2019) examined the effects of shorter inundation periods on vernal pool species in an isolated, snow-fed pool in a different vernal pool region. *Id.* ¶¶ 4, 7. Yet the BiOp already considered the effects of altering the timing and duration of inundation periods on the Vernal Pool Species and that those effects would be ameliorated or eliminated by the Preserve's maintenance of vernal pool hydrology. FWS 000860, 000869. Additionally, Kneitel (2014) does not address meadowfoam, and the applicability of the Montrone et al. (2019) study to the vernal pools in the Project area is questionable given the study's location. Fris Decl. ¶¶ 6-7. And, after reviewing the studies, FWS confirmed that even if the BiOp had explicitly addressed them, they would not have changed the effects analysis, jeopardy determination, or incidental take statement. *Id.* ¶¶ 5-9.

The BiOp presented a well-reasoned analysis that considered the Project's baseline conditions, impacts, and proposed mitigation efforts to conclude that the Project was not likely to jeopardize the Vernal Pool Species. Thus, the Court should reject Plaintiffs' arguments that the BiOp is arbitrary and capricious and grant summary judgment for Federal Defendants on these claims.

B. The Corps Reasonably Concluded that the Stonegate Project Would Have No Effect on the Giant Garter Snake and Thus Did Not Need to Consult on the Species.

The Corps appropriately determined that permitting the Project would have "no effect" on the GGS and that it was not required to consult on the species. Under ESA Section 7, an action agency, like the Corps here, first asks FWS whether any listed or proposed-to-be-listed species "may be present" in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If the answer is affirmative, the action agency may prepare a biological assessment to determine whether the identified species "is likely to be affected by such action." *Id.* If the action agency determines in the biological assessment "that its action will have 'no effect' on a listed species or critical habitat," then the agency has no further obligations under the ESA. *Karuk Tribe*, 681 F.3d at 1027; *Protect our Water v. Flowers*, 377

F. Supp. 2d 844, 871 (E.D. Cal. 2004) ("[I]f the agency determines that a particular action will have no effect on an endangered or threatened species, the formal consultation requirements are not triggered.") (citation omitted). "[A]n agency's 'no effect' determination under the ESA must be upheld unless arbitrary and capricious." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). To review whether an agency's "no effect" determination was arbitrary or capricious, a court must decide whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.* at 496 (citation omitted).

To begin with, the Complaint alleges in Count 3 that FWS failed to consult on the GGS, yet the arguments in Plaintiffs' summary judgment brief do not mention FWS. For this reason alone, the Court should grant summary judgment to FWS on this claim. *Kleppe*, 427 U.S. at 412. Even if Plaintiffs had addressed FWS in their summary judgment brief, their claim would still fail. The ESA does not require FWS to consult on the effects of any action on any species, much less the GGS, unless an action agency (here, the Corps) initiated consultation. *See Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1067 (N.D. Cal. 2009) (holding plaintiffs lacked standing to bring failure-to-consult claim against FWS because the action agency had not initiated consultation (citing *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1069 (9th Cir. 2005))). Thus, summary judgment for Federal Defendants for the failure-to-consult claim against FWS is appropriate.

The Court should also grant summary judgment to Federal Defendants in connection with the failure-to-consult claim against the Corps. The Corps considered the relevant factors for the GGS and offered a rational connection between the facts and its "no effect" determination. Using a list of species that "may be present" in the Project's action area obtained from FWS, which included the GGS, Corps 250:005436-38, the Biological Assessment considered whether the Project is expected to affect the species, Corps 250:005398-400. The Biological Assessment considered the historical and current range of the species. Corps 250:005399-400. The Biological Assessment then discussed that the California Natural Diversity Database had no record of GGS occurrences within five miles of the Project's action area. Corps 250:005400. While acknowledging that the Project area has a depressional perennial marsh that could provide marginal habitat for the GGS, the Biological Assessment stated it

is too small to support a GGS population and not connected to known GGS populations. *Id*. The Biological Assessment reasonably concluded that because of the lack of suitable habitat in the action area and the lack of documented occurrences in the Project's vicinity, the GGS is not expected to occur on or near the action area and thus is not expected to be affected by the Project. *Id.* Thus, the Corps had no further obligations under ESA Section 7 as to that species. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996) (determining that the Forest Service's "no effect" finding "obviates the need for formal consultation under the ESA").

Plaintiffs' arguments to the contrary all fail because they improperly conflate the "may be present" standard with a "may affect" determination. Plaintiffs' entire argument boils down to the legal presupposition that a "no effect" determination is necessarily arbitrary or capricious where a listed species "may be present" in the project area. This is an incorrect articulation of the law. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1447 (upholding Forest Service's "no effect" determination for the Mexican Spotted Owl despite the presence of the owl near the project area); *Defs. of Wildlife*, 414 F.3d at 1072 (upholding "no effect" determination because no pygmy-owls had been found to live in the project area). All that is required of an action agency is to obtain a list of endangered or threatened species that "may be present" in the action area and then determine whether the proposed action may affect the species. Plaintiffs' suggestion that the Corps acted arbitrarily or capriciously because the GGS "may be present" in the Project area erases the lines between two distinct legal standards.

The mere presence of GGS habitat in the Project's action area did not require the Corps to conclude that permitting the Project may affect the species. Courts in this District have upheld "no effect" findings where the action area includes a species' habitat but the species had not been detected there, even if the species is known for travelling great distances. *Conservation Cong. v. U.S. Forest Serv.*, No. 2:16-cv-00864-MCE-AC, 2018 WL 2427640, at *11 (E.D. Cal. May 30, 2018) (upholding "no effect" finding where action area included gray wolf habitat because "no gray wolf had ever frequented the Project area nor was anything unique about the Project area anticipated to attract gray wolves in the future"); *Flowers*, 377 F. Supp. 2d at 877 (upholding "no effect" finding where "habitats with characteristics suitable for the [species] appear to exist at the [project] site," but no species were

present); *see Defs. of Wildlife v. Flowers*, No. CIV02195TUCCKJ, 2003 WL 22143266, at *4, 6 (D. Ariz. Aug. 18, 2003) (upholding "no effect" determination where "the Continental Reserve property has now been surveyed for four consecutive years (1998, 1999, 2000, and 2001) without detecting [the species]"). The Biological Assessment here similarly concluded that the Project would have "no effect" on GGS because the species had not been detected within five miles of the action area. Corps 250:005400.[16] Thus, the Court should reject Plaintiffs' argument that the presence of GGS habitat in the Project action area required a different effects determination. *See* ECF No. 30 at 26.

Plaintiffs' reliance on other projects that required ESA Section 7 consultation on the GGS cannot save their argument. *See* ECF No. 30 at 26-27. The 2007 State Route 32 Widening project is distinguishable from the Stonegate Project in several ways. First, FWS assumed that the GGS occurred in a part of the State Route 32 project's action area, but the record for the Stonegate Project does not support any similar assumption. *See* FWS 000896.[17] Additionally, the State Route 32 biological opinion noted that the project site provided suitable snake habitat, *id.*, while the Biological Assessment here stated that the small amount of GGS habitat in the Project action area is "marginal," Corps 250:005400. The Meriam Park project is also distinguishable. The Meriam Park project was projected to affect more than nine acres of suitable GGS habitat, unlike the 1.24 acres of marginal habitat present in the action area here. FWS 001743; Corps 250:005400. Additionally, the Little Chico Creek channel where GGS habitat was located on the Meriam Park action area could have hydrologically connected to other habitat areas. *See* FWS 001743. In contrast, the marginal habitat on the Project site is not close to other suitable GGS habitat or corridors that connect to known GGS populations. Corps 250:005400. This lack of connection to other habitat areas also addresses Plaintiffs concerns about the proximity

[16] As discussed in the Recovery Plan for the GGS, the snakes typically travel little from day to day. *Recovery Plan for the Giant Garter Snake*, U.S. Fish & Wildlife at I-5 (Sept. 28, 2017), https://ecos.fws.gov/docs/recovery_plan/20170928_Signed%20Final_GGS_Recovery_Plan.pdf (last visited Aug. 26, 2022). They have been documented traveling up to 2,625 feet, but on average travel between 148 feet and 328 feet per day during their active season. *Id.* All of these distances are far less than five miles.

[17] Plaintiffs mischaracterize this record cite as supporting the proposition that there was a GGS sighting at Dead Horse Slough. ECF No. 30 at 27. This page merely states that "[t]he snake is assumed to occur in Dead Horse Slough." FWS 000896.

of the State Route 32 and Meriam Park projects to the Stonegate Project. *See* ECF No. 30 at 27.[18] And the 2006 and 2008 biological opinions for these projects do not support Plaintiffs' argument when it is undisputed that no GGS occurrence has ever been recorded within five miles of the Stonegate Project action area. *See* Corps 250:005400; *see also Friends of the Clearwater v. Probert*, No. 3:21-cv-00189-CWD, 2022 WL 2291246, at *28 (D. Idaho June 24, 2022) (upholding agency "no effect" finding "based upon its conclusion that [the species] do not 'occupy' the project areas").

In sum, the Corps' "no effect" finding is reasonable, and the Court should grant summary judgment for Federal Defendants on the failure-to-consult claims in Count 3 of Plaintiffs' Complaint.

II. The Corps' Alternatives Analysis Under the CWA 404(b)(1) Guidelines Was Thorough and Reasonable.

A. The Corps Engaged in a Robust Alternatives Analysis.

Plaintiffs correctly point out that the applicant bears the burden of proving that no practicable alternatives exist. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002) (citing *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1167 (9th Cir. 1988)). Defendant-Intervenors originally proposed that the Corps consider three on-site alternatives and a no-action alternative. Corps 324:006569. Over the next three years, the Corps, Defendant-Intervenors, and EPA engaged in an iterative, collaborative process that produced a more rigorous analysis of even more alternatives. *Compare id. with* Corps 301:006015-6019; *see, e.g.,* Corps 322:006539 (Corps recommending that Defendant-Intervenors consider additional alternatives); Corps 320:006483 (Defendant-Intervenors agreeing to consider six additional alternatives suggested by the Corps); Corps 302:006069-77 (showing back-and-forth between Defendant-Intervenors and the Corps about alternatives analysis); Corps 303:006111-12 (showing back-and-forth between Defendant-Intervenors and EPA about same). By the end, the Corps had considered nine alternatives: three off-site, five on-site, and no action in addition to the Original Proposed Action. *E.g.,* Corps 35:000367-71. In total, the

[18] Plaintiffs claim, without citing any record evidence, that the habitat in Little Chico Creek and Dead Horse Slough is connected to the Project site via the Butte Creek diversion canal. ECF No. 30 at 27. The Biological Assessment refutes this, noting that the Butte Creek diversion channel does not support the GGS because it does not provide vegetative cover and is too shallow during the GGS's active period. Corps 250:005400.

Corps' alternatives analysis accounts for over 600 pages of the administrative record.

The Corps analyzed the alternatives' practicability based on costs, logistical concerns like connection to existing infrastructure, environmental impacts, and conformity with the Project's purpose. *E.g.*, Corps 35:000367-71. The Corps ultimately selected Alternative 5 as the LEDPA, resulting in substantial reductions in environmental impacts compared to the Original Proposed Action. Corps 35:000367; Corps 36:000659. Because the Project is not water-dependent, the Corps properly applied the presumption that practicable alternatives exist, analyzed many potential alternatives, and reasonably concluded that Alternative 5 was practicable and the LEDPA.

B. Neither the "Bruce Road Alternative" Nor the On-Site Alternative 1 is the LEDPA.

At the outset, Plaintiffs conflate what they call the "Bruce Road Alternative" with On-Site Alternative 1. Plaintiffs describe the Bruce Road Alternative as a development of only "the approximately 50-acre parcel west of Bruce Road." ECF No. 30 at 30 (quoting Corps 310:006326-27). Plaintiffs then spend their entire argument complaining that the Corps erroneously rejected the Bruce Road Alternative, but they only criticize the Corps' discussion of On-Site Alternative 1. ECF No. 30 at 32. On-Site Alternative 1 is not the same as the so-called Bruce Road Alternative. While the Bruce Road Alternative would confine development to the 50-acre parcel west of Bruce Road, Corps 310:006326-27, On-Site Alternative 1 would develop 117 acres of land, including land east of Bruce Road, Corps 35:000369; Corps 308:006278-79; Corps 308:006315 (map showing that On-Site Alternative 1 will develop east of Bruce Road). Regardless of whether Plaintiffs' argument is that the Corps should have chosen On-Site Alternative 1 or the so-called Bruce Road Alternative, the record makes clear that the Corps reasonably rejected both of those alternatives in determining the LEDPA.

1. <u>The Corps Reasonably Rejected On-Site Alternative 1 as the LEDPA.</u>

The Corps considered whether nine alternatives were practicable on the basis of cost, existing technology, and logistics in light of the project's overall purpose, and the Corps ultimately decided that Alternative 5 was the LEDPA. The Corps analyzed these factors vis-à-vis On-Site Alternative 1 and ultimately decided that On-Site Alternative 1 was impracticable due to cost.

a. On-Site Alternative 1 Was Far Too Costly to Be Practicable.

The Corps must consider cost in its LEDPA analysis. 40 C.F.R. § 230.10(a)(2); *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir. 1986) ("The regulations explicitly charge the Corps with taking [into consideration] cost"). Here, the Corps found that On-Site Alternative 1 was impracticable because it would result in a 19 percent increase in the cost per developable acre over the Original Proposed Action. Corps 35:000369. This increase in costs is driven in part by the need for updated infrastructure to accommodate On-Site Alterative 1's expanded preserve and relocated storm water facility. Corps 301:006026. On-Site Alternative 1 would also cut single-family residential lots by 48 percent and commercial development by 40 percent. Corps 35:000369; Corps 296:005979. Therefore, On-Site Alternative 1 would spread the 19 percent increase in cost per developable acre across a substantially decreased development, such that sale of the lots would not cover the costs of construction. Corps 35:000369; *see also* Corps 301:006027. Thus, the Corps reasonably concluded that On-Site Alternative 1 is impracticable due to cost.

Plaintiffs attack the Corps' cost analysis on four grounds, but each is unpersuasive. First, Plaintiffs generally allege that the Corps uncritically accepted Defendant-Intervenors' claims about cost. ECF No. 30 at 31. But the Corps reasonably relied on the cost information provided by Defendant-Intervenors. As the Ninth Circuit recognizes, "[t]he Corps is not a business consulting firm," and it is ill-equipped to "evaluate [an applicant's] business needs." *Hintz*, 800 F.2d at 835 (quoting *River Road All. v. U.S. Army Corps of Eng'rs*, 764 F.2d 445, 453 (7th Cir. 1985)). Therefore, the Corps "ha[s] to depend primarily on [the applicant] for such information" regarding the economic feasibility of alternatives. *Id.* "[T]o require anything further would place unreasonable and unsuitable responsibilities on the Corps, which [at times] receives over 14,000 permit applications per year." *Id.* at 835-36 (citing *River Road Alliance*, 764 F.2d at 453). Of course the Corps cannot blindly accept an applicant's alternatives assessment, *id.* at 835, but that did not happen. Defendant-Intervenors initially found that On-Site Alternative 1 was impracticable because of the 19 percent increase in cost per developable acre. Corps 318:006441. The Corps did not blindly accept that conclusion and instead pointed out that the overall construction cost of On-Site Alternative 1 was less than the Original

Proposed Action. Corps 301:005994. Defendant-Intervenors replied that while that was true, On-Site Alternative 1's "19% increase in cost per developable acre would be distributed over a substantially decreased development potential [compared to the Original Proposed Action] . . . resulting in cost per unit . . . and cost per square foot . . . exceeding regional prices and adversely affecting this development from providing an economically viable project with competitive prices." Corps 301:006027. The Corps then requested that Defendant-Intervenors provide a market value analysis to support its cost assertions, which Defendant-Intervenors supplied. Corps 296:005979 ("At the request of the U.S. Army Corps of Engineers (Corps), supplemental cost information quantifying market values for [single family residential] lots, based on current costs in the region . . . is presented below."). The record shows that the Corps engaged critically with Defendant-Intervenors' cost estimates and required Defendant-Intervenors to provide additional information to justify their assertions.

Next, Plaintiffs complain that the Memorandum for Record[19] lacks information about how On-Site Alternative 1 would not be economically viable in Butte County's housing market. *See* ECF No. 30 at 31. While it is true that the Memorandum for Record does not have such detailed information, the administrative record does. 5 U.S.C. § 706 (arbitrary and capricious actions are reviewed on the *whole* record, not fractions thereof). At EPA's and the Corps' request, Defendant-Intervenors provided a market value analysis of On-Site Alternative 1 that evaluated its projected cost of construction as compared to its projected values based on residential values in the City of Chico. Corps 296:005980-82 (analysis based on "baseline values identified for single-family residential lots in the City of Chico"). It then compared On-Site Alternative 1's costs and lot values to Alternative 5 and the Original Proposed Action. Corps 296:005981. This market analysis still indicated that On-Site Alternative 1 was too costly. Corps 296:5981-82.

Equally unfounded is Plaintiffs' allegation that the Corps failed to explain how a 19 percent increase in cost per developable acre would render the homes "unsellable." ECF No. 30 at 31. Plaintiffs again confuse the record. The Corps never indicated that On-Site Alternative 1 would render the homes

[19] Plaintiffs' mistakenly refer to the Memorandum for Record as the "ROD." *See, e.g.*, ECF No. 30 at 31 (citing Corps 35:000369 as the "ROD," but Corps 35:000369 is the Memorandum for Record).

"unsellable." Rather, it found that sale of the residential lots would not cover the costs of construction. Corps 35:000369. The Corps does not have a duty to explain a conclusion that it did not make.

In a last-ditch effort, Plaintiffs assert that just because an alternative may cost "somewhat more" does not mean that it is impracticable. ECF No. 30 at 32. But On-Site Alternative 1 was not just "somewhat more" expensive: it was 19 percent more costly per developable acre such that sale of the lots would not cover the costs of construction. In *Center for Biological Diversity v. U.S. Army Corps of Engineers*, No. CV 14-1667 PSG (CWx), 2015 WL 12659937, at *6 (C.D. Cal. June 30, 2015), the court upheld a Corps' cost analysis that found that alternatives with a 5 to 10 percent increase in cost per developable acre were impracticable. On-Site Alternative 1 is far more costly.

Plaintiffs then cite an out-of-circuit district court case to argue that the Corps should have ignored that On-Site Alternative 1 would lead to a net loss for the applicant. *See* ECF No. 30 at 32. But the Ninth Circuit has found the opposite. The plaintiffs in *Jones v. National Marine Fisheries Service*, 741 F.3d 989 (9th Cir. 2013), argued that the Corps should not have issued a 404 permit for a larger mining project because there were smaller mining operations that plaintiffs claimed were the LEDPA. But those smaller mining operations would not extract enough minerals to cover the project's costs, so the Ninth Circuit agreed that those smaller operations were impracticable. *See id.* at 1002. The court found that "[l]ogically, no one would seek financing to build a refining facility if it were not possible to extract a sufficient quantity of minerals to make the project profitable." *Id.* The same logic applies here: no developer would build a development if it would cause the developer to lose money. *See Sylvester v. U.S. Army Corps of Eng'rs*, 882 F.2d 407, 409-10 (9th Cir. 1989) (holding that the Corps appropriately considered whether an alternative "is economically advantageous" and "economically viable"). The Corps reasonably found that On-Site Alternative 1 is therefore impracticable.

b. The Corps Appropriately Considered Chico's Housing Needs and Activation of the Bruce Road Corridor.

The Corps rejected On-Site Alternative 1 on the basis of cost, but it also considered factors related to the Project's purpose as required by the Guidelines. Plaintiffs argue that the Corps should

not have considered two factors—(1) Chico's need for housing, and (2) activation of the Bruce Road Corridor—because they are outside of the overall project purpose as defined by the Corps in the Memorandum for Record. ECF No. 30 at 30. In other words, Plaintiffs believe that the Corps' purpose analysis should have been limited to the narrow universe of factors related to "construct[ing] a medium-scale mixed-use development in northwest Butte County, California." Corps 35:000350. But Plaintiffs misstate the law. The Ninth Circuit has repeatedly held that "the Corps has a duty to consider the *applicant's* purpose" and to "take into account the objectives of the *applicant's* project." *Sylvester*, 882 F.2d at 409 (emphasis added) (quoting *La. Wildlife Fed'n v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (per curiam)). "Indeed, it would be bizarre if the Corps were to ignore the purpose for which the *applicant* seeks a permit and to substitute a purpose it deems more suitable." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 912 (9th Cir. 2018) (emphasis added) (quoting *La. Wildlife Fed'n*, 761 F.2d at 1048). The Corps had a duty to consider both the overall Project purpose as defined by the Corps and the Project's purposes and objectives as described by Defendant-Intervenors.

Chico's housing needs and activation of the Bruce Road Corridor are both factors that fall within Defendant-Intervenors' project purpose and objectives. Plaintiffs quote less than half of Defendant-Intervenors' purpose and need statement. ECF No. 30 at 30. The full statement says that "[t]he applicant initially identified a need for housing due to a housing shortage in northwest Butte County," and that Chico lost nearly 14,000 residences in a wildfire and has over 1,983 homeless individuals. Corps 35:000350. The full purpose and need statement shows that addressing Chico's housing needs was part of Defendant-Intervenors' purposes and objectives in applying for the 404 permit. This is demonstrated throughout the record. *See, e.g.,* Corps 324:006566 (early draft of Defendant-Intervenors' alternatives analysis that defines the project purpose as "to implement a balanced mixed-use infill development that helps the City of Chico meet its housing needs"); Corps 296:005979 (stating On-Site Alternative 1 was impracticable due to "the massive loss of regional housing stock" to wildfires). The Corps properly considered Chico's housing needs. *Sylvester*, 882 F.2d at 409.

The same is true for the Corps' consideration of activation of the Bruce Road corridor. Activation of the Bruce Road corridor refers to commercial and recreational development of both sides of Bruce Road. *See* Corps 303:006141 ("activating the Bruce Road corridor through [] development of commercial land uses[.]"); Corps 302:006081 (describing the City's plans regarding "activated nodes of commercial activities . . . in expectation that both sides of Bruce Road along the [Project] Property will be developed"). This goal is consistent with both the Corps' statement of the overall project purpose as creating a "mixed-use" development and Defendant-Intervenors' objective of creating "commercial development [and] a park and bicycle path." Corps 35:000350. Moreover, the record makes clear that activating the Bruce Road corridor was one of Defendant-Intervenors' core objectives in seeking the permit. For example, Defendant-Intervenors wrote that "Alternative 1 fails to activate the Bruce Road corridor because this alternative does not provide opportunities for the development of any commercial land uses or other pedestrian-friendly land uses on both sides of this corridor and running the length of this corridor. . . . Alternative 1 therefore *does not meet* the Project Purpose criterion." Corps 303:006146 (emphasis in original); Corps 303:006163 (same); Corps 302:006073 (same). So while the Corps ultimately deemed On-Site Alternative 1 impracticable due to cost, both activation of the Bruce Road corridor and Chico's housing needs were part of the Project's objectives, and therefore it was reasonable that the Corps considered them.

2. The Corps Reasonably Rejected the So-Called Bruce Road Alternative.

The Corps reasonably rejected the so-called Bruce Road Alternative because the 50-acre parcel west of Bruce Road was not large enough to meet the project's purposes. The Project's purpose was to create a medium-scale, mixed-use development that would help meet Chico's housing needs and commercially activate the Bruce Road corridor. The Corps asked Defendant-Intervenors about the required size of the development, to which Defendant-Intervenors responded that because "the Stonegate Project proposes a mix of single-family homes, multi-family residential, retail commercial, office uses, and open space," "[i]n order to accommodate all of these uses . . . the needed development area for this project is approximately 200 acres." Corps 306:006203; *see also* Corps 304:006189 (Corps and Defendant-Intervenors discussing need for a development area above 50 acres). Therefore,

Plaintiffs' so-called Bruce Road alternative was screened out because 50 acres was too small to meet the project purposes.

Moreover, EPA was not the staunch advocate for the Bruce Road Alternative that Plaintiffs portray. Plaintiffs rely entirely on a single email from Joseph Morgan, a life scientist at EPA's regional office, as proof that EPA unequivocally supported the Bruce Road Alternative. ECF No. 30 at 30 (quoting Corps 310:006326-27). But that email was from 2018, and over the next two years EPA, the Corps, and Defendant-Intervenors continued to evaluate the Bruce Road Alternative and ultimately determined that it was not a viable alternative. *See, e.g.,* Corps 302:006071 (EPA and Defendant-Intervenors discussing how the Bruce Road alternative "does not meet most of the project objectives"); Corps 304:006189 (Corps and Defendant-Intervenors discussing need for a development area above 50 acres); Corps 301:005993 (same); Corps 201:003842 (letter from Corps to EPA noting that since 2017, "the applicant has provided extensive alternatives information and revised [Alternative 5] to avoid and minimize regulated impacts to waters of the U.S. in compliance with 40 CFR 230"). EPA did not continue to support consideration of the Bruce Road Alternative.[20] Instead, EPA accepted the Corps' decision and EPA regional staff declined to elevate the issue to EPA headquarters. Corps 198:003836. EPA's acceptance of the Corps' decision did not express any concern that the Project as permitted was not the LEDPA, and noted Chico's "dire housing shortage" and that "the compensatory mitigation requirements in the draft permit conditions [were] significantly improved over the applicant's initial proposal." *Id.* By the end, EPA scientist Joseph Morgan wrote to the Corps: "thank you for working with me through this long and difficult permitting process, and for your measured consideration of our comments on the public notices and supporting documents . . . it's important to recognize the improvements made to the proposal . . ." Corps 197:003835. Thus, EPA was not the

[20] The Corps and EPA have a Memorandum of Agreement that details the dispute resolution process that the agencies follow if EPA has concerns about a permit. Memorandum of Agreement Between the Env't Prot. Agency and the Dep't of the Army (Aug. 11, 1992) (hereinafter, "MOA") (available at https://www.epa.gov/sites/default/files/2015-03/documents/1992_moa_404q.pdf (last visited Aug. 26, 2022)). The MOA provides that if the EPA and Corps regional offices cannot agree on the permitting decision, EPA regional staff may elevate the issue to EPA headquarters. MOA 7–8, para. 3. The Corps and EPA followed that process here, and EPA ultimately agreed with the permitting decision and declined to elevate the issue to a higher level of review. Corps 198:003836.

staunch advocate for the Bruce Road Alternative that Plaintiffs portray.

In sum, "the record reflects [that] the Corps made the proper analysis and weighed the correct factors in making its determination that" Alternative 5 was the LEDPA. *Butte Env't Council v. U.S. Army Corps of Eng'rs*, No. 2:08-cv-1316-GEB-CMK, 2009 WL 497575, at *5 (E.D. Cal. Jan. 21, 2009) (quoting *Hintz*, 800 F.2d at 833). Thus, the Court should grant summary judgment to Federal Defendants on Count 5.

III. The Corps Complied with NEPA.

The Corps fully complied with NEPA in its analysis of the proposed project. The Corps discussed the need for the project, examined both off- and on-site alternatives, and considered the environmental impacts of the proposed action and alternatives. 40 C.F.R. § 1508.9(b) (setting out requirements for EAs). Based on this analysis, the Corps reasonably determined that with the required mitigation, the permit would not have a significant impact on the human environment and that an EIS was not necessary. Corps 35:000397; *see Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (noting that mitigation measures can be considered in determining whether an EIS is necessary).

The record supports the Corps' determination that with the compensatory mitigation required in the permit, the Project would not have significant impacts. The developer is required to purchase 12.22 seasonal-wetland-creation-credits at the Colusa Basin Mitigation Bank and 4.28 vernal-pool-establishment-credits at the Meridian Ranch Mitigation Bank, which fully compensates for the loss of 5.92 acres of seasonal wetlands, 2.85 acres of vernal pools, 0.30 acre of ditch/canal, and 0.07 acre of excavated pit. Corps 35:00048. In addition, the Project involves an on-site Preserve that will preserve 10.65 acres of waters of the United States, including 2.65 acres of vernal pool invertebrate habitat and 4.46 acres of occupied Butte County meadowfoam habitat in the Preserve, which will be managed in accordance with a Corps-approved long-term management plan. Corps 35:000347. And "the proposed [P]reserve will combine the 117.3-acre open space of the proposed project" with an adjacent, existing 14.76-acre preserve "under a single conservation easement, with consistent management funded in perpetuity." FWS 000869. As FWS noted, the compensatory mitigation will offset adverse effects to

ESA-listed species. FWS 000871. The Corps thus acted reasonably in not preparing an EIS. *See Save the Yaak*, 840 F.2d at 717 (upholding agency decision not to prepare EIS when agency "reasonably concluded that the project will have no significant adverse environmental consequences").

"An EIS is required if [the EA] process raises 'substantial questions' about whether an agency action will have a significant effect." *Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1007 (9th Cir. 2020) (quoting *Blue Mountains*, 161 F.3d at 1212). "To determine whether an action "significantly" affects the environment, agencies must consider both the "context" and "intensity" of the possible effects." *Id.* (citing 40 C.F.R. § 1508.27). "Consideration of intensity 'refers to the severity of impact.'" *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020) (quoting 40 C.F.R. § 1508.27(b)). The NEPA regulations set forth ten factors to be considered in determining whether the "intensity" of an action requires an EIS. 40 C.F.R. § 1508.27(b). "An action may be, but is not necessarily, 'significant' if any one of those factors is met." *Am. Wild Horse Campaign*, 963 F.3d at 1008 (citing *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008).

Plaintiffs argue that the Corps was required to prepare an EIS based on "substantial questions" regarding the Project's impact on the environment. ECF No. 30 at 33-37. The administrative record, however, demonstrates that the Corps did not act arbitrarily in deciding not to prepare an EIS.

First, Plaintiffs argue that several agencies and organizations concluded that the Project would have significant impacts, but an examination of the comments shows that this claim lacks merit. ECF No. 30 at 33-34. Most of the comments Plaintiffs identify were made before changes were made to minimize the Project's impacts and the compensatory mitigation plan was finalized, and Plaintiffs also exaggerate the import of the comments. For example, as discussed above, Plaintiffs' assertions that EPA concluded the project would have significant and unacceptable impacts are overblown and based on earlier iterations of the Project. The Memorandum for Record notes that EPA submitted comments on the Corps' Public Notices, indicating concerns about impacts to aquatic resources of national importance. Corps 35:000352–53. In the course of the NEPA and Section 404(b)(1) process, however, the Project was modified both to avoid and minimize impacts (e.g., the selection of Alternative 5 that

avoided development east of the diversion channel) and to require additional compensatory mitigation. Corps 35:000365 (noting revision of compensatory mitigation). If EPA had continued concerns with the Corps' permitting decision, it could have elevated those concerns. It did not do so, and on July 31, 2020, EPA informed the Corps that it would not seek higher-level review of the draft permit, noting the "significantly improved" compensatory mitigation requirements. Corps 198:003836.

Similarly, Plaintiffs misrepresent the substance of many comments. As one example, instead of finding that the Project would have significant effects, as Plaintiffs portray, FWS found that the required compensatory mitigation "will have the effect of protecting and managing lands for the species' conservation in perpetuity," and would provide habitat as good as or better than habitat lost as a result of the Project. FWS 000868. This conclusion does not, therefore, raise "substantial questions" regarding the Project's impact on the environment, as Plaintiffs assert. ECF No. 30 at 34. The Ninth Circuit has also held that the disclosure of impacts on wildlife or habitat does not necessarily trigger the "'substantial questions' threshold." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). Thus, FWS's "may affect, and is likely to adversely affect" determination is not sufficient to require an EIS, in light of its ultimate no-jeopardy determination and overall conclusion that the Project's compensatory mitigation measures will actually benefit the species.

Likewise, the CDFW comments were made in response to the 2017 Public Notice and thus did not take into account the compensatory mitigation or the modifications later made to avoid and minimize impacts to species. Corps 351:006702. CDFW's comments also do not conclude that there would be significant impacts, as Plaintiffs assert, but warn that the project "may result in adverse impacts," and that further study was required. Both FWS and the Corps conducted further study before the permit was issued. The local Audubon Society comments were likewise made in 2018. FWS 003192; Corps 35:000361. In addition, the Corps explained in the Memorandum for Record that while the proposed project "would have a minor long-term effect on wildlife species that utilize the project site, such as frogs, birds, and amphibious species," wildlife would be able to use similar resources that would be preserved in perpetuity as part of the on-site Preserve. Corps 35:000373.

Plaintiffs also note that the City of Chico's environmental impact report under the California Environmental Quality Act ("CEQA") found that the Project would result in significant impacts related to greenhouse gas emissions, thus indicating that the Corps should have prepared an EIS. The Ninth Circuit recently rejected this argument, however. *See Ctr. for Cmty. Action & Env't Justice v. FAA*, 18 F.4th 592, 605 (9th Cir. 2021) ("*CCA*"). In *CCA*, which similarly involved a federal agency EA and a CEQA finding of significant impacts on "Air Quality, Greenhouse Gas, and Noise," the Ninth Circuit found that a NEPA analysis need not rely on the CEQA finding of significant effects "because CEQA and NEPA are different statutes with different requirements." *Id*. "So instead of simply relying on the conclusions in the CEQA report, [the plaintiff] must identify specific findings in that report that it believes raise substantial questions about environmental impact." *Id.* at 605-06. Plaintiffs here point only to the conclusions in the CEQA report and do not identify any specific findings. Further, as in *CCA*, even if greenhouse gas emissions are projected to exceed the regional greenhouse gas thresholds, Plaintiffs have "not articulate[d] why the presence of this one intensity factor requires the preparation of an EIS." *Id*. at 606. Plaintiffs have not demonstrated substantial questions about the Project's impacts that would require an EIS.

Moreover, the "intensity" factors do not require an EIS here. Plaintiffs argue that the Corps should have prepared an EIS because the Project (1) is in proximity to an ecologically sensitive area, and (2) may adversely affect an ESA-listed species or its habitat. Again, however, the Memorandum for Record demonstrates that the impact of the project with compensatory mitigation is not significant. As Plaintiffs note, EPA raised concerns about aquatic resources of national importance and made the project a candidate for elevation under the 404(q) MOA. After the Corps required additional compensatory mitigation, however, EPA declined to elevate the decision. The Memorandum for Record fully explains why the compensatory mitigation was sufficient to result in a FONSI, and Plaintiffs have not demonstrated that the Project's proximity to an ecologically sensitive area is sufficient to require an EIS. *See CCA*, 18 F.4th at 606 (noting that one "intensity" factor may not be sufficient to require EIS).

Plaintiffs rely on *Klamath-Siskiyou Wildlands Center v. USFS*, 373 F. Supp. 2d 1069 (E.D.

Cal. 2004), to argue that a determination that a project "will affect, is likely to adversely affect" a listed species is sufficient on its own to require an EIS. But the case does not so hold. The court specifically noted that the "express finding that the project will likely adversely affect the spotted owl, combined with the lack of current survey data, uncertainty regarding the efficacy of mitigation measures, and the effects on critical habitat raise substantial questions regarding whether the project will significantly affect the Northern Spotted Owl." 373 F. Supp. 2d at 1083. Those circumstances are not present here. Further, this is not a case where the Corps simply relied on the no-jeopardy determination to support its FONSI. Instead, FWS determined that the Project would benefit ESA-listed species and their habitat and that determination is supported by the record. Plaintiffs simply have not shown "intensity" that would require preparation of an EIS.

Finally, Plaintiffs argue that the Corps should have prepared an EIS because the Project is highly controversial. But a project is "highly controversial" only if there is a "'substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.'" *Native Ecosystems*, 428 F.3d at 1240 (quoting *Blue Mountains,* 161 F.3d at 1212). In *American Wild Horse Campaign*, for example, the agency received nearly 5,000 public comments, but the court held that the action was not controversial because plaintiffs did not identify evidence that contradicted the agency's findings. 963 F.3d at 1011. In other words, Plaintiffs must "cast serious doubt upon the reasonableness of the agency's conclusions." *Id.* (quoting *Humane Soc'y of U.S. v.Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010)). Here, Plaintiffs have shown nothing more than some opposition to the Project. They have shown no evidence in the record demonstrating a "substantial dispute" about the Project's effects, and the Project therefore is not "highly controversial."

The Memorandum of Record also contains a convincing statement of reasons supporting the FONSI, as discussed further above. The Corps did not simply rely upon the no-jeopardy determination, as Plaintiffs imply, but on the mitigation measures to benefit the species. The Corps also explained in the Memorandum for Record that the Project "would have a minor long-term effect on wildlife species" because wildlife would be able to use similar resources that would be preserved in perpetuity as part of the on-site Preserve. Corps 35:000363, 000373, 000380. Plaintiffs have not shown that the

Corps acted arbitrarily or capriciously by preparing an EA and FONSI, and thus have not carried their burden under the APA. Summary judgment should be granted in the Corps' favor on Count 4.

IV. No Remedy Is Warranted, but Should the Court Be Inclined to Grant Any Relief, Federal Defendants Request the Opportunity for Further Briefing.

Plaintiffs ask the Court to vacate the BiOp, 404 Permit, and Memorandum for Record for the Project, and to enjoin the Project's implementation. ECF No. 1 at 40; ECF No. 30 at 8-9. As discussed above, Federal Defendants' actions were reasonable and consistent with governing law. But even if the Court were to find a legal violation, the propriety of vacatur depends on the seriousness of any legal violation and "the disruptive consequences of an interim change that may itself be changed." *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam)). Because these considerations can be known only after a ruling on the parties' cross-motions for summary judgment, Federal Defendants request the opportunity to address these issues through separate remedy briefing, if the Court finds any violation of law. *See, e.g.*, *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 388 (E.D. Cal. 2007) (ordering supplemental briefing on the appropriate remedy and noting that "it is not prudent to impose a remedy without further input from the parties").

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' Cross-Motion for Summary Judgment.

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Respectfully submitted,

TODD KIM
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

S. JAY GOVINDAN, Acting Section Chief
BRIDGET K. MCNEIL, Assistant Section Chief

/s/ Kamela A. Caschette
KAMELA A. CASCHETTE, Trial Attorney
Wildlife & Marine Resources Section
Tel: (202) 305-0340
Kamela.Caschette@usdoj.gov

/s/ Paul Caintic
PAUL CAINTIC, Trial Attorney
Environmental Defense Section
Tel: (202) 514-2593
Paul.Caintic@usdoj.gov

/s/ Devon Lehman McCune
DEVON LEHMAN MCCUNE, Trial Attorney
Natural Resources Section
Tel: (303) 844-1487
Devon.McCune@usdoj.gov

Attorneys for Federal Defendants