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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION

DEFENDERS OF WILDLIFE, SIERRA CLUB, and SANTA CLARA VALLEY AUDUBON SOCIETY, Plaintiffs, v. U.S. FISH AND WILDLIFE SERVICE and U.S. ARMY CORPS OF ENGINEERS, Defendants.	CASE NO.: 5:16-cv-1993 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

NATURE OF THE CASE

1. This complaint challenges the unlawful actions of the U.S. Fish and Wildlife Service ("Service") and the U.S. Army Corps of Engineers ("Corps") with respect to a proposed solar facility in the ecologically unique Panoche Valley of California. Specifically, this case challenges the Biological Opinion and Incidental Take Statement issued under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, by the Service to the Corps. It further challenges the wetlands dredge and fill permit issued by the Corps to Panoche Valley Solar, LLC, under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The agencies have violated the ESA and the CWA by failing to ensure that the facility, as proposed, will not jeopardize the survival and recovery of the critically imperiled blunt-nosed leopard lizard, the giant kangaroo rat, San Joaquin kit fox, and other species.

2. The Panoche Valley is a unique California treasure. Located in San Benito County, California, 30 miles south of Los Banos and 60 miles west of Fresno, the Panoche Valley represents a lost landscape in California's busy and fragmented Central Valley and surrounding foothills. It remains, for now, a bucolic valley of open grasslands dotted with small ranches and family-owned organic farms. The Panoche Valley is one of only three core areas left in California necessary for the survival and recovery of the highly endangered San Joaquin kit fox, the endangered blunt-nosed leopard lizard, and the endangered giant kangaroo rat.

3. Panoche Valley Solar LLC has proposed to develop a massive solar energy project in the ecologically sensitive Panoche Valley. If constructed, the 247-megawatt solar facility will consist of approximately 1,529 acres of photovoltaic panels, each panel roughly six by three feet in size, on a 2,154-acre project site. The project will also include electricity collection lines, operation and maintenance buildings, roads, fences, water tanks and treatment facilities, interconnection facilities and compensatory mitigation lands. In total, the project will affect more than 26,000 acres of sensitive habitat.

4. Under Section 7 of the Endangered Species Act, federal agencies must ensure that no project authorized, funded, or permitted will jeopardize the continued existence of any threatened species. A federal agency satisfies this obligation, in part, by consulting with the federal wildlife agency that has expertise and jurisdiction over the species, in this case the U.S. Fish and Wildlife Service. At the conclusion of formal consultation, the Service issues a Biological Opinion for the project that may include "reasonable and prudent alternatives" and other terms and conditions to ensure against jeopardy to listed species. Federal agencies must comply with all reasonable and prudent alternatives in a Biological Opinion. 16 U.S.C. § 1536(b)(4). To avoid liability for take of listed species, Federal agencies must also comply with all "reasonable and prudent measures" necessary to minimize impact to the species. Id.

5. In the present case, the Corps consulted with the Service because the Panoche Valley project was likely to adversely affect multiple imperiled species in the project area. On October 5, 2015, the Service issued a Biological Opinion and Incidental Take Statement for the project. Plaintiffs wrote to the Corps and to the Service to notify the agencies that the Service had failed to consider various expert opinions and other materials relevant to the analysis. Subsequently, the Corps requested reinitiation of formal consultation to address some changes to the project design. This resulted in a second Biological Opinion and Incidental Statement, dated March 8, 2016. U.S. Fish & Wildlife Serv., Reinitiation of Formal Consultation for the Panoche Valley Solar Farm, San Benito County, California (File Number 2009-00443S), March 8, 2016 ("Biological Opinion").

6. The revised Biological Opinion found that the project would not cause jeopardy to the blunt-nosed leopard lizard, the giant kangaroo rat, San Joaquin kit fox, and other species, provided that the Corps and the project developer agree to detailed terms and conditions specifying both on and off-site avoidance and mitigation measures for the species. The Biological Opinion specifically requires that the Corps adopt these measures and include them as binding enforceable conditions in its Section 404 permit for the project. The Corps'

responsibility for ensuring compliance extends to the "construction, operations, and maintenance phases" of the 30-year project. Biological Opinion at 106.

7. The Corps issued a Record of Decision and a Section 404 permit for the Project on March 15, 2016. Rather than incorporate all the terms and conditions outlined in the Biological Opinion, however, the Permit and Record of Decision only adopts species protection and mitigation measures with respect to areas "related to its jurisdiction." U.S. Army Corps of Engineers, Record of Decision, Action ID SPN-2009-00443, Mar. 15, 2016 ("ROD"). Problematically, the ROD takes a narrower view of the extent of the Corps' jurisdiction than that which the Service relied upon in reaching its no jeopardy conclusions. The ROD defines the Corps' jurisdiction over the proposed action as "limited to construction activities within the 0.121 acres of water of the U.S. that would be filled, upland areas adjacent to the waters of the U.S. that would be filed, as well as upland access and staging areas." ROD at 22.

8. Contrary to the express conditions of the Biological Opinion, the Corps has failed to take responsibility for implementing conservation measures beyond a tiny area of the project specifically related to the dredge and fill of waters of the United States, and then only during the construction phase of the project. The Corps has not committed to ensuring ESA compliance during the "operations and maintenance phases" of the project. ROD at 22.

9. To the extent mitigation or conservation measures are relied upon in reaching a "no jeopardy" opinion, such measures must be "reasonably certain to occur" or the Biological Opinion is invalid. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917 n. 17 (9th Cir. 2008). Since the Corps has not agreed to enforce the mitigation and conservation measures that are intended to ensure against jeopardy over the life of the project, these protections are not "reasonably certain to occur." Because these protections are not enforceable and are not reasonably certain to occur, the Service's reliance on them to conclude that the Project will not jeopardize the species is arbitrary and capricious.

10. The Service's Biological Opinion also fails to utilize the best available scientific data and is otherwise arbitrary and capricious in assessing whether the project will jeopardize the San Joaquin kit fox, the blunt-nosed leopard lizard, and the giant kangaroo rat.

11. The Clean Water Act also obligates the Corps to ensure against jeopardy to threatened and endangered species. EPA's 404(b)(1) Guidelines, which are binding regulations that constrain the Corps' authority to issue dredge and fill permits under Clean Water Act Section 404, prohibit the Corps from authorizing an application for dredge and fill activities if, inter alia, the activity "jeopardizes the continued existence" of an endangered species under the ESA. 40 C.F.R. § 230.10(b)(3). The 404(b)(1) Guidelines further state that the Corps must consider both direct and indirect impacts to ESA listed species from the dredge or fill activities. 40 C.F.R. § 230.30(b). The 404(b)(1) Guidelines mandate that the Corps' determination of whether an activity "jeopardizes the continued existence" of an ESA endangered species is determined by the outcome of the formal consultation process under the ESA. 40 C.F.R. § 230.30(c).

12. By failing to adopt and enforce the terms and conditions of the Biological Opinion for the entire project, as required by the Service, the Corps has not ensured against jeopardy to listed species as the CWA and its regulations require. The Corps' reliance on the final Biological Opinion to assert that issuance of the discharge permit will not jeopardize any ESA-listed species is thus arbitrary and capricious.

13. The 404(b)(1) Guidelines also require the Corps to consider alternatives that will be less environmentally damaging. EPA recommended that the applicant consider siting the project at an alternative location – the Westlands CREZ location – that would have fewer impacts on jurisdictional waters and listed species. On information and belief, Plaintiffs allege that the Applicant did not adequately consider or pursue this alternative site and that the Corps improperly relied upon the Applicant's preferred timeline to reject this alternative. For these

reasons, the Corps' conclusion that the Westland CREZ site was not a practicable alternative was arbitrary and capricious.

14. For these reasons, and as further stated below, Plaintiffs ask the Court to vacate and set aside the Biological Opinion and Incidental Take Statement issued by the Service to the Corps pursuant to Section 7 of the ESA for the Panoche Valley Solar project. Plaintiffs further ask the Court to vacate and set aside the permit issued by the Corps to Panoche Valley Solar, LLC, pursuant to Section 404 of the CWA.

JURISDICTION AND VENUE

15. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. The issuance of a biological opinion is considered a final agency action, and therefore is subject to judicial review. Bennett v. Spear, 520 U.S. 154, 178 (1997). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). Defendants are federal agencies.

16. The relief requested is authorized by 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act). An actual controversy, within the meaning of the Declaratory Judgment Act, exists between Plaintiffs and Defendants.

17. Venue is proper in the Northern District of California, San Jose Division, pursuant to 28 U.S.C. § 1391(e)(1)(B) because a substantial part of the events or omissions giving rise to the violations alleged in this complaint occurred in this district and the species affected by the challenged actions are located in this district in this division. Furthermore, Plaintiff Sierra Club is incorporated in California and its headquarters is in this judicial district. 28 U.S.C. § 1391(e)(1)(C).

THE PARTIES

18. Plaintiff Defenders of Wildlife ("Defenders") is a national nonprofit conservation organization headquartered in Washington, D.C., with offices in numerous locations across the country, including California. Founded in 1947, Defenders is dedicated to protecting all native wild animals and plants in their natural communities, and preserving the habitat on which they

depend. Defenders believes in the inherent value of wildlife and the natural world, and works to establish legal safeguards for native wildlife. Defenders is actively involved in species protection and restoration efforts throughout the nation. Defenders has more than 1.2 million members and supporters nationwide, roughly 120,000 of whom reside in California. Defenders has worked for the preservation of several California species such as the blunt-nosed leopard lizard and the giant kangaroo rat.

19. Plaintiff Sierra Club is a national nonprofit organization of approximately 630,000 members, roughly 146,000 of whom live in California. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. In California, the Sierra Club advocates for and monitors the enforcement of environmental laws and regulations, and is focused on the preservation and protection of natural resources.

20. Plaintiff Santa Clara Valley Audubon Society is a California Non-Profit Public Benefit Corporation. Santa Clara Valley Audubon Society works to preserve, enjoy, restore, and foster public awareness of native birds in their ecosystems through education programs, recreational birding, and environmental advocacy in Santa Clara Valley and its vicinity. Santa Clara Valley Audubon Society's members frequently visit Panoche Valley and have a deep interest in the protection of bird and wildlife species and the habitat they depend on in the Panoche Valley.

21. Defenders, the Sierra Club, the Santa Clara Valley Audubon Society (collectively "conservation groups"), and their members derive scientific, educational, recreational and other benefits from California's grassland areas, including the Panoche Valley. The conservation groups' members have recreational, aesthetic, educational, and scientific interests in the preservation of California's Panoche Valley and the wildlife that depend on these habitats,

including the endangered giant kangaroo rat, the San Joaquin kit fox, and the blunt-nosed leopard lizard, among other species. The conservation groups' members regularly visit the Panoche Valley, including the areas that will be affected by the project, and intend to do so in the future. The Service's unlawful Biological Opinion and the Corps' unlawful decision to issue a Section 404 permit in reliance on that opinion has harmed, and will harm, the conservation groups and their members, by hindering efforts to protect wildlife and wildlife habitat and reducing the ecological, aesthetic, and recreational value of these areas. The relief sought would redress the injuries of the conservation groups and their members.

22. Defendant United States Fish and Wildlife Service is a federal agency within the United States Department of the Interior. The Service is responsible for administering and implementing the ESA with respect to threatened and endangered species such as the giant kangaroo rat, the blunt-nosed leopard lizard, and San Joaquin kit fox.

23. Defendant United States Army Corps of Engineers is a federal agency within the Department of Defense. The Corps is responsible, in its regulatory role, for ensuring that the discharge of dredge or fill material into waters of the United States, including wetlands, associated with the Solar Project complies with the CWA and all implementing regulations. The Corps is also responsible for ensuring that any permit it issues is in compliance with all federal laws, including the ESA.

STATUTORY BACKGROUND

A. The Endangered Species Act

24. The ESA was enacted to "provide a program for the conservation of … endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Through the ESA, Congress declared its policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]." Id. § 1531(c)(1).

25. The ESA defines "conserve" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." Id. § 1532(3). Accordingly, the goal of the ESA is not only to temporarily save endangered and threatened species from extinction, but also to recover these species to the point where they are no longer in danger of extinction, and thus no longer in need of ESA protection.

26. Pursuant to the ESA, a species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range. . . ." Id. § 1532(6). A species is listed as "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20).

27. When listing a species as endangered or threatened, the ESA also requires designation of the species' "critical habitat." Id. § 1533(a)(3). Critical habitat is habitat that is "essential to the conservation of the species." Id. § 1532(5).

1. ESA Section 7(a)(2) Consultation Protections

28. Under section 7(a)(2) of the ESA, a federal agency cannot undertake any action that is "likely to jeopardize the continued existence" of any listed species or cause "destruction or adverse modification" to any designated critical habitat for the species. 16 U.S.C. § 1536(a)(2). An "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," that are within the agencies' discretionary control. 50 C.F.R. §§ 402.02, 402.03.

29. To assist federal agencies in complying with their substantive duty to avoid jeopardizing listed species, section 7(a)(2) establishes an interagency consultation requirement. 16 U.S.C. § 1536(a)(2). "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (citation omitted).

30. To facilitate the consultation process, a federal agency proposing an action that "may affect" a listed species must prepare a document called a "biological assessment." See 16 U.S.C. §§ 1536(a)(2), (c); 50 C.F.R. §§ 402.02, 402.12, 402.14. The agency preparing the biological assessment must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). In the biological assessment, the action agency evaluates the potential effects of the proposed action on all listed species within the action area identified by the appropriate wildlife agency – here the Service –and determines, in the first instance, whether any listed species is likely to be affected by the proposed action. See 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.02, 402.12, 402.14(d).

31. If the proposed action is likely to adversely affect a listed species, the action agency and the Service must engage in formal consultation. 50 C.F.R. § 402.14. At the conclusion of the formal consultation process, the Service provides the action agency with a biological opinion as to whether the action is likely to jeopardize any listed species. See 16 U.S.C. § 1536(b)(3)(A), (4); 50 C.F.R. §§ 402.02, 402.14(g), (h). According to the Service's regulations, jeopardy results when it is reasonable to expect that the action would "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. In evaluating whether an action will jeopardize the continued existence of a listed species, the biological opinion must evaluate whether the action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of" the recovery of a listed species in the wild, even if the Service concludes the action would not reduce the likelihood of survival. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 931–32 (9th Cir. 2008) (interpreting 50 C.F.R § 402.02).

32. If the action is likely to result in jeopardy to a listed species, the biological opinion must set forth the reasonable and prudent alternatives that would avoid this ESA violation. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(h)(3). The Service must use

the best scientific and commercial data available in drafting a biological opinion. 16 U.S.C. § 1536(a)(2).

33. The "best scientific and commercial data" standard requires a broad review of relevant information. The Service's ESA Consultation Handbook states: "Section 7 biologists should seek out available information from credible sources such as listing packages, recovery plans, active recovery teams, species experts, State/tribal wildlife and plant experts, universities, peer-reviewed journals and State Heritage programs. Prior consultations on the species also can provide information on baseline and cumulative effects on the species and its habitat, and should provide the species status and environmental baseline data upon which subsequent consultations are based." U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act (Mar. 1998), p.1-7.

34. Indeed, the Service's consultation handbook states: "The Act requires the action agency to provide the best scientific and commercial data available concerning the impact of the proposed project on listed species or designated critical habitat. If relevant data are known to be available to the agency or will be available as the result of ongoing or imminent studies, the Services should request those data and any other analyses required by the regulations at 50 CFR §402.14(c), or suggest that consultation be postponed until those data or analyses are available as outlined in section 4.4(A) of this handbook." Id. at 1-6 (directing that biological opinions should be based on the available information, "giving the benefit of the doubt to the species," with consultation possibly being reinitiated if additional information becomes available").

35. A federal agency cannot ignore available biological information, especially if that information is the most current, or is scientifically superior to that on which the decision-maker relied. Moreover, a federal agency requesting consultation under Section 7 of the ESA cannot refuse to provide FWS with the "most relevant scientific data available from reputable scientists on the ground that it was not perfect" or its methodology could be criticized, because doing so

would eviscerate the statutory requirement that the best available science be used. Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1179-80 (N.D. Cal. 2003).

36. So long as the Service does not base its decisions on speculation, or disregard superior data, the fact that the studies on which it does rely are imperfect does not undermine those authorities as the best scientific data available—"the Service must utilize the best scientific ... data available, not the best scientific data possible" (emphasis added). Building Industry Ass'n of Superior California v. Norton, 247 F.3d 1241, 1246-1267 (D.C. Cir. 2001), cert. denied 534 U.S. 1108.

37. Regardless of the conclusion reached by the Service in a biological opinion, the action agency has an independent duty to meet its substantive section 7 obligation to ensure that its actions do not jeopardize listed species. 16 U.S.C. § 1536(a)(2). An action agency violates its substantive section 7 duty if it relies on an inadequate, incomplete, or flawed biological opinion in carrying out an action.

38. A consultation is complete when the Service issues a biological opinion. However, both the action agency and the Service have a non-discretionary duty to reinitiate consultation under certain circumstances. 50 C.F.R. § 402.16; Envtl. Protection Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001) (duty to reinitiate consultation under 50 C.F.R. § 402.16 lies with both FWS and the action agency). The action agency and FWS must reinitiate consultation where the action agency retains discretionary involvement or control over the action and (1) the amount of take specified is exceeded; (2) new information "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;" (3) if the action is "subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion;" or (4) if a new species is listed or critical habitat is designated. 50 C.F.R. § 402.16.

39. To satisfy the requirement of ESA section 7(a)(2) to ensure that its actions avoid "jeopardy," an agency must comply with the reasonable and prudent alternatives identified by

the Service in the existing biological opinion or reinitiate consultation aimed at revising them. Southwest Ctr. for Biological Diversity v. Klasse, 1999 WL 34689321, at *6-7 (E.D. Cal. Mar. 31, 1999) (interpreting the Ninth Circuit's decision in Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)); Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation, 6 F. Supp. 2d 1119, 1131 (D. Ariz. 1997), aff'd, 143 F.3d 515 (9th Cir. 1998) ("Marsh requires federal agencies to comply with existing (and unchallenged) RPAs or to reinitiate consultation to revise RPAs so that jeopardy is reasonably likely to be alleviated.").

40. To the extent mitigation or conservation measures are relied upon in reaching a "no jeopardy" opinion, such measures must be "reasonably certain to occur." National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917 n. 17 (9th Cir. 2008). To demonstrate that mitigation measures satisfy the reasonable certainty requirement, they must be achieved through "specific and binding plans," constitute "solid guarantees," and be financed by a "clear, definite commitment of resources." Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439, 444 (9th Cir. 2011) (quoting Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d at 935-36) (internal quotation marks omitted).

2. ESA Section 9(a)(1)(B) Take Prohibition and Exceptions

41. Under Section 9 of the ESA, it is unlawful for anyone to "take" an endangered species of fish or wildlife. 16 U.S.C. §§ 1538(a)(1)(B), (G). Congress broadly defined "take" in the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532(19). The term "harm" is further defined by regulation to include "significant habitat modification or degradation where it actually kills or injures wildlife significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3.

42. Congress created two "incidental take" exceptions to section 9's take prohibition. One of those exceptions allows "incidental take statements" for federal agencies. 16 U.S.C. § 1536(o)(2). As part of the Section 7 consultation process, the Service may provide an incidental

take statement to an action agency only after making a no jeopardy finding or identifying a reasonable and prudent alternative that avoids jeopardy. Id. § 1536(b)(4); 50 C.F.R. §§ 402.14(g)(7), (h)(3)(i). An incidental take statement must (1) specify the impacts on the species, (2) specify the reasonable and prudent measures that FWS considers necessary to minimize such impact, and (3) set forth the terms and conditions that must be complied with by the federal agency to implement these reasonable and prudent measures. 16 U.S.C. § 1536(b)(4). Failure to comply with the mandatory terms and conditions of an incidental take statement nullifies the protection from civil and criminal liability for take that occurs due to the action authorized by the agency.

3. ESA Section 10 Take Exceptions

43. Section 10 of the ESA also creates a limited exception to the ESA's take prohibition on private lands where no federal permit or authorization is required. Under Section 10, the Service can authorize the take of listed species that incidentally results from otherwise lawful activities. 16 U.S.C. § 1539(a)(1)(B). A permit issued pursuant to ESA section 10(a)(1)(B) is referred to as an "incidental take permit."

44. To obtain an incidental take permit, an applicant must submit to the Service a habitat conservation plan ("HCP") that specifies the impacts that will likely result from the expected taking; the steps the applicant will take to minimize and mitigate such impacts; a description of what alternative actions to such taking the applicant considered; and the reasons why such alternatives are not being utilized. 16 U.S.C. § 1539(a)(2)(A). The public must also be given an opportunity to comment on an applicant's habitat conservation plan and application materials before any permit is issued. 16 U.S.C. §§ 1539(a)(2)(B), (c).

45. Before issuing an incidental take permit, the Services must find, among other things, that the expected taking will be incidental; that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; that the applicant has assured

adequate funding for its HCP; and that the taking will not appreciably reduce the likelihood of the survival and recovery of listed species in the wild. 16 U.S.C. § 1539(a)(2)(B).

B. The Clean Water Act

46. The CWA is designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA generally prohibits the discharge of pollutants, including dredged or fill material, into the waters of the United States unless authorized by a permit. See id. § 1311(a).

47. The term "discharge of fill material" is defined as "the addition of fill material into the waters of the United States" and includes dams, the placement of pilings that have the effect of impairing water flow or otherwise have the effect of a discharge of fill material, and the placement of fill necessary for the construction of any structure in the waters of the United States. 33 C.F.R. §§ 323.2(f), 323.3(c); 40 C.F.R. § 232.2.

48. Section 404 of the CWA authorizes the Corps to issue permits for the discharge of dredge or fill material into waters of the United States. 33 U.S.C. § 1344.

49. The Corps adopted regulations, known as the "public interest" factors, to implement its permitting authority. 33 C.F.R. §§ 320 et seq. "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process." Id. § 320.4(a)(1). The Corps must consider a broad range of potential relevant impacts as part of its public interest review, including "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and

conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." Id.

50. In addition, the Environmental Protection Agency ("EPA") promulgated regulations, known as the "404(b)(1) Guidelines," for Section 404 permits. 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230 et seq. The Corps reviews all proposed Section 404 permits under both the Corps' public interest factors and EPA's 404(b)(1) Guidelines. 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f). A permit must be denied if it is contrary to the public interest or does not comport with the Section 404(b)(1) Guidelines. 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10, 230.12.

51. To ensure these mandatory CWA requirements are satisfied, the Corps must fully evaluate the direct, secondary, and cumulative impacts of the activity, including impacts to endangered species, the aquatic environment, fish and wildlife, and human impacts. See, e.g., 33 C.F.R. §§ 320.4(a)(1), 336.1(c)(5) (endangered species), 336.1(c)(8) (fish and wildlife); 40 C.F.R. §§ 230.11(a)- (h), 230.20-23 (aquatic ecosystem), 230.30 (threatened and endangered species), 230.31 (fish and wildlife), 230.51 (recreational and commercial fisheries), 230.52 (water-related recreation), 230.53 (aesthetics). The 404(b)(1) Guidelines also set forth particular restrictions on discharges, described more fully below. 40 C.F.R. §§ 230.10, 230.12. The Corps must set forth its findings in writing on the short-term and long-term effects of the discharge of dredge or fill activities, as well as compliance or non- compliance with the restrictions on discharge. Id. §§ 230.11, 230.12(b).

52. The "loss of values" that the Corps must consider in evaluating the impact of a discharge on the biological characteristics of an aquatic ecosystem includes, with respect to threatened and endangered species, "[t]he impairment or destruction of habitat to which these species are limited. . . includ[ing] adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species [which] can be adversely affected by changes in either the normal water conditions for

clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat." 40 C.F.R. § 230.30(b)(2). The Corps must also evaluate whether the discharge could kill individuals of an endangered or threatened species. 40 C.F.R. § 230.30(b)(1).

53. EPA's 404(b)(1) Guidelines prohibit the Corps from authorizing an application for dredge and fill activities if, inter alia: (1) the activity "jeopardizes the continued existence" of an endangered species under the ESA (40 C.F.R. §§ 230.10(b)(3), 230.12(a)(3)(ii)); (2) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences (40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i)); (3) the discharge will result in significant degradation to waters of the U.S. (40 C.F.R. § 230.10(c), 230.12(a)(3)(ii)); or (4) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Corps' Guidelines for permit issuance. (40 C.F.R. § 230.12(3)(iv)). The Corps must document its findings of compliance or noncompliance with these restrictions. 40 C.F.R. § 230.12(b).

54. Practicable alternatives are those alternatives that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). "The regulations explicitly charge the Corps with taking" these factors into account in evaluating whether there are practicable alternatives. Friends of Earth v. Hintz, 800 F.2d 822, 833 (9th Cir. 1986). "An applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." Sylvester v. U.S. Army Corps of Eng'rs, 882 F.2d 407, 409 (9th Cir. 1989) (citing Hintz).

55. Whether an alternative is practicable also depends on the weight of the potential harm. Alameda Water & Sanitation Dist. v. Reilly, 930 F. Supp. 486, 492 (D. Colo. 1996) (upholding EPA determination that practicable alternatives existed even though the record showed "very substantial regulatory and legal obstacles to these alternatives" such as moving an

entire town and obtaining a Presidential exemption, because "the impacts [of the proposed project] were much greater" than the impacts of those alternatives).

56. "Fundamental to [404(b)(1)] Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c).

57. The burden of proof to demonstrate compliance with the 404(b)(1) Guidelines rests with the applicant. 40 C.F.R. § 230.1(c); Utahns v. United States DOT, 305 F.3d 1152, 1187 (10th Cir. 2002). The Corps must deny a permit where the proposed discharge fails to comply with the Guidelines or there is insufficient information to determine compliance. 40 C.F.R §§ 230.10, 230.12(a).

58. The Corps' decision to authorize dredge or fill activities governed by section 404 requires submission of an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; 33 C.F.R. § 325.2(a)(4). The Corps must comply with the requirements of 33 C.F.R. § 325 Appendix B with respect to the environmental procedures and documentation required by NEPA. 33 C.F.R. § 325.2(a)(4).

C. The National Environmental Policy Act

59. NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's core precept is simple: look before you leap. Id. § 4332(2)(C); 40 C.F.R. §§ 1502.2(f), (g), and 1506.1.

60. NEPA has "twin aims." First, it requires federal agencies "to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the

agency will inform the public that it has indeed considered environmental concerns in its decision-making process." Kern v. BLM, 284 F.3d 1062, 1066 (9th Cir. 2002), quoting Baltimore Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). To fulfill these goals, each federal agency must take a "hard look" at the impacts of its actions prior to the point of commitment, so that it does not deprive itself of the ability to "foster excellent action." See 40 C.F.R. § 1500.1(c). In this way, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.

61. NEPA and its implementing regulations, promulgated by the Council on Environmental Quality, require federal agencies to prepare an Environmental Impact Statement ("EIS") whenever they propose to take a "major federal action" that "may significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11; see also 33 C.F.R. §§ 230.1, 230.6; 43 C.F.R. §§ 46.10 et seq.

62. An EIS is a "detailed written statement" that "provide[s] full and fair discussion of significant environmental impacts" and "inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. §§ 1502.1, 1508.11. The scope of the EIS is defined by the purposes and mandates of the statutory authority under which the action is proposed. The sufficiency of an EIS must be evaluated with reference to the ESA's requirement to recover listed species. Indeed, NEPA's implementing regulations require that an EIS "shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of . . . environmental laws and policies" such as the ESA. Id. § 1502.2(d).

63. If an agency is unsure whether a proposed action will have significant environmental effects, it may prepare a shorter document called an "environmental assessment" ("EA") to determine whether the proposed action's impacts are significant and an EIS is required. 40 C.F.R. §§ 1501.4(b); 1508.9. If the EA concludes that a project "may" have a significant impact on the environment, then an EIS must be prepared. See Idaho Sporting

Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). If not, the federal agency must provide a detailed statement of reasons why the proposed action's impacts are insignificant and issue a finding of no significant impact ("FONSI"). Id. § 1508.13.

64. To determine whether there "may" be significant impacts, NEPA regulations require agencies to consider the "context" and "intensity" of the impacts. 40 C.F.R. § 1508.27. "Context" refers to the setting of the proposed action, while "intensity" refers to the "severity of the impact." Id. NEPA regulations require federal agencies to consider ten factors in weighing the severity of the impacts. Id. § 1508.27(b). These factors include "unique characteristics of the geographic area" such as proximity to "ecologically critical areas;" the degree to which the impacts are "highly uncertain" or involve "unique or unknown risks;" the degree to which the action may adversely affect an endangered species; and whether the action threatens a violation of any environmental laws. Id. § 1508.27(b) (3), (5), (7), (9), (10). Significance may exist even if the agency believes the proposed action to be, on balance, beneficial. Id. § 1508.27(b)(1).

65. In completing an EIS or an EA, federal agencies must broadly consider the environmental impacts of their actions. Federal agencies must analyze the direct, indirect, and cumulative impacts of proposed actions. 40 C.F.R. §§ 1508.7 & 1508.8. Indirect effects are "caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." Id. § 1508.8(b). Cumulative impacts include impacts of "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." Id. § 1508.7.

66. NEPA also requires federal agencies to identify and assess "alternatives to the proposed action." 42 U.S.C. § 4332(C)(iii) & (E); see 40 C.F.R. § 1500.2(e). The analysis of the differing environmental impacts of these alternatives is considered the "heart" of the NEPA analysis. Id. § 1502.14. Agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives" that serve the purpose and need of the project. Id. § 1502.14(a). This analysis is intended to provide a "clear basis for choice among options by the decisionmaker and

the public." Id. § 1502.14. If an agency determines an alternative need not be considered, it must supply a reasonable explanation. Id. § 1502.14(a).

D. The Administrative Procedure Act

67. The APA confers a right of judicial review on any person adversely affected by final agency action, and provides for a waiver of the federal government's sovereign immunity. 5 U.S.C. § 701-706.

68. Although the ESA does contain a citizen suit provision, that provision does not govern suits against the Service challenging its discretionary actions under the ESA such as the issuance of biological opinions. Bennett v. Spear, 520 U.S. 154, 156 (1997) (challenges to the Service's biological opinions are brought pursuant to APA). Accordingly, the APA governs the scope and standard of review for Plaintiffs' ESA claim concerning the Service's biological opinion for the Panoche Project.

69. Similarly, though the CWA also contains a citizen suit provision, that provision does not govern suits brought to challenge a decision made by the Corps in its capacity as a regulatory entity authorizing a discharge under Section 404. 33 U.S.C. § 1365(a). Consequently, the APA also governs the scope and standard of review for Plaintiffs' CWA claim against the Corps.

70. Upon review of agency action under the APA, the court shall "hold unlawful and set aside actions . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. § 706(2). An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

FACTUAL AND PROCEDURAL BACKGROUND

a. Project Site and Location

71. California's Panoche Valley is a rare and special refuge for many threatened and endangered species. More than twenty years ago, the U.S. Fish and Wildlife Service identified the Panoche Valley as one of the three core areas necessary for the survival and recovery of the endangered San Joaquin kit fox, blunt-nosed leopard lizard, and the giant kangaroo rat. The Panoche Valley has become even more important for these species, and many others, because the other two core areas necessary for the survival and recovery of the species have already been impacted. The two other core areas are Western Kern and the Carrizo Plains. The Carrizo Plains has been impacted with solar projects and dry land farming, and Kern has been impacted with oil and gas development as well as solar and agriculture conversion.

72. The Panoche Valley is also a globally significant Audubon Important Bird Area and a refuge for many other rare species, including: mountain plover, burrowing owl, short-eared owl, long-eared owl, golden eagle, ferruginous hawk, loggerhead shrike, grasshopper sparrow, tricolored blackbird, Northern harrier, Swainson's hawk, white-tailed kite, Oregon vesper sparrow, short-nosed kangaroo rat, San Joaquin pocket mouse, Tulare grasshopper mouse, tiger salamander, vernal pools, fairy shrimp, and a number of rare plants.

73. Panoche Valley Solar LLC has proposed to develop a massive solar energy project in this irreplaceable area of unique ecological value. The current proposal is for a 247-megawatt solar farm consisting of approximately 1,529 acres of photovoltaic panels installed on a 2,154-acre project site. Each panel will be roughly six by three feet in size. The project will also include electricity collections lines, operation and maintenance buildings, roads, fences, water tanks and treatment facilities, interconnection facilities and compensatory mitigation lands. In total, the project will affect more than 26,000 acres of sensitive habitat.

74. Construction is anticipated to take 18 months. Power generated by the project would connect to the electrical grid via an existing Pacific Gas and Electric transmission line.

Operation and maintenance of the project is expected to last 30 years, after which the project could be decommissioned or repowered with new photovoltaic panels.

75. The Project site is located along Little Panoche Road in the heart of the Panoche Valley, in southeastern San Benito County, some 30 miles south of Los Banos and 60 miles west of Fresno. The Project site consists of 2,506 acres currently used for livestock grazing and open-space, and is located 2 miles southwest of the Fresno County Line and the Panoche Hills, and 15 miles west of Interstate 5. The Project is specifically located within Township 15S, Range 10E, Sections 3-5, 8-11, 13-17, and 20-25 and Township 15S, Range 11E, Sections 18, 20, 29, and 30 of the United States Geologic Survey's Cerro Colorado, Llanada, Mercury Hot Springs, and Panoche 7.5-minute topographic quadrangle maps.

b. Proceedings

76. In April 2009, Solargen Energy contacted the Service about a possible 420-megawatt solar project. On August 12, 2010, the Corps requested formal consultation with the Service over this project, because the applicant was seeking a Section 404 permit and the project was likely to adversely affect multiple imperiled species in the project area. On December 17, 2010, the Corps revised its request and sought consultation instead on a 399-megawatt project.

77. On April 19, 2011, Solargen sold its assets to PV2 Energy.

78. In March 2012, the Service submitted a response indicating that consultation had begun but a timeline could not be established due to the incomplete NEPA process. The Service stressed that the NEPA alternatives analysis would influence the final project for consultation.

79. In August 2012, Duke Energy joined PV2 as a partner in proposing the project. Duke Energy was designated the project lead for consultation with the Service. In June 2014, The Corps submitted another revised consultation request due to further changes to the project design.

80. On July 25, 2014, the Service was informed that Duke Energy had withdrawn from the project, and that a new entity, Panoche Valley Solar, LLC, would continue to pursue the project.

81. On November 20, 2014, the Service acknowledged initiation of formal consultation and agreed upon a schedule under which the Service would release a draft biological opinion to the Corps and the Applicant shortly after the release of the public draft of the EIS.

82. On May 12, 2015, the Corps informed the Service that it was reassigning the project from the San Francisco District to the Sacramento District Office.

83. On August 21, 2015, the Service sent a draft biological opinion to the Corps, which in turn shared it with the applicant.

84. In a letter accompanying the draft, the Service specifically raised questions regarding the extent of the Corps' jurisdiction over the project. Letter from Stephen P. Henry, Field Supervisor, to Michael S. Jewell, Chief, Regulatory Divisions, August 21, 2015. The Service cited an electronic message from the Corps, dated August 7, 2015, in which the Corps stated that its jurisdiction was limited to "waters of the United States." The message, however, requested formal consultation of the entire project site and asked that the Service use the term "permit area" as opposed to "jurisdiction" or "discretional authority." Id. at 2.

85. Because of this, the Service asked the Corps to "define the extent of the Corps' jurisdiction and discretionary authority, both geographically and temporally, for the purposes of this formal consultation" and to "define specifically what you mean by 'permit area'" and how this relates to the Corps' jurisdiction and discretionary authority." The letter also asked the Corps "how you as the permitting agency would exert control over [the activities of other entities involved in the project] to ensure implementation of all measures and conditions contained in the biological opinion." Id. at 2.

86. The Service made clear in the letter that under the ESA "Reasonable and Prudent Measures and Terms and Conditions are non-discretionary and must be undertaken by the Corps

so that they become binding conditions of any grant or permit issued by the Corps to the applicant. If the Corps fails to assume and implement the Terms and Conditions or fails to require the applicant to adhere to the Terms and Conditions through enforceable terms that are included in the Corps' permit or grant document, the protective coverage of section 7(o)(2) may lapse. Please confirm that the Corps acknowledges and accepts these responsibilities and will include in the Corps' permit and enforce all Terms and Conditions in the Incidental Take Statement." Id. at 3.

87. To underscore the point, the Service wrote: "You have determined that the Corps' discretionary authority will cease upon completion of the project's construction and that the Corps lacks authority and jurisdiction over any activities beyond construction. Consistent with this position, your National Environmental Policy Act (NEPA) Environmental Impact Statement (EIS) does not analyze the effects of operation and maintenance or decommissioning of the project. Because you have determined that you lack authority and jurisdiction in the first instance over operation, maintenance, and decommissioning of the project, there is no scenario under which the Corps would enforce non-discretionary terms and conditions to minimize the impacts of take resulting from these activities. Nor would the Corps comply with the duty to reinitiate consultation under 50 CFR 402.16 if any consultation reinitiation trigger is met, including if the anticipated level of take is exceeded, during these post-construction activities. The take exemption provided under section 7(o) of the Act applies to the Federal action; i.e., the action over which the Corps possesses discretionary control or jurisdiction and is co-extensive with the scope of the Federal action. As a result, the take exemption provided under section 7(o) does not extend to post-construction activities. Please confirm with your applicant, Panoche Valley Solar, LLC, that they understand take resulting from those activities will not be exempted through this consultation." Id.

88. The Service went on to say that "Because take resulting from the operation, maintenance, and decommissioning of the project will not be exempted through this consultation,

we continue to recommend that Panoche Valle Solar, LLC apply for an Incidental Take Permit, pursuant to section10(a)(1)(B) of the Act, to address such take." Id.

89. After receiving comments from the Corps and the Applicant, including revised project descriptions, the Service issued a final biological opinion and incidental take statement on October 5, 2015.

90. The letter accompanying that opinion states: "As a reminder, the incidental take statement (ITS) in this Biological Opinion is effective only if and when the federal action is completed for the proposed project addressed in this consultation. In other words, the exemption from the take prohibitions of section 9 of the Act only applies to activities carried out as part of the proposed action when the Clean Water Act section 404 permit is issued to the Applicant. The measures set forth in the ITS must become binding conditions of your permit to the Applicant in order for the exemption in section 7(o)(2) of the Act to apply. As you are probably aware, in the September 29, 2015, decision in Sierra Club v. U.S. Army Corps of Engineers, the D.C. Circuit Court of Appeals found that the Service's issuance of an ITS in its role as a consulting agency did not authorize incidental take, and that, as here, the Applicant can only rely on the safe harbor provided by the take exemption in section 7(o)(2) of the Act if the Terms and Conditions of the ITS have been included as binding, enforceable terms of the Corps' permit." Letter from Stephen P. Henry, Field Supervisor, to Michael S. Jewell, Chief, Regulatory Divisions, October 5, 2015. This exact language also appears in the transmittal letter for the final reinitiated Biological Opinion dated March 8, 2016, as discussed further below.

91. Defenders of Wildlife sent the Corps and the Service a 60-day notice letter of intent to sue for violations of the ESA related to the biological opinion on December 23, 2015. The letter alleged that the Service had failed to consider various expert opinions and other materials relevant to the analysis and requested reinitiation of consultation. Letter from Jason Rylander, Defenders of Wildlife to Sally Jewell, Secretary of the Interior and John McHugh, Panoche Valley LLC, December 23, 2015. Defenders also sent the applicant, Panoche Valley

Solar, LLC, a 60-day notice letter of intent to sue for violations of the ESA. The letter made clear that no action could be taken on the site that would affect listed species until the Corps issued a Section 404 permit that incorporated all of the terms of the conditions of the Biological Opinion. The letter informed Panoche Valley Solar, LLC, that until the Corps issued a permit that imposed binding conditions consistent with the requirements of the Biological Opinion, the company would lack incidental take coverage and thus would be in violation of Section 9 for any actions on the site that took listed species. Letter from Jason Rylander, Defenders of Wildlife to Eric Charniss, Panoche Valley LLC, December 23, 2015.

92. The Final EIS and Notice of Availability for the project was issued on December 31, 2015. The FEIS "includes short-term effects from construction activities and long-term effects from the presence of a solar facility. It also includes the effects from operational and maintenance activities associated with operating the facility, which are considered an indirect effect of the construction of the solar facility. Impacts associated with operational and maintenance activities are included within the NEPA scope of analysis, as they are indirect effects caused by the construction of a solar facility and may affect federally listed threatened and/or endangered species. However, these activities, because they would not result in the discharge of dredged and/or fill material into waters of the U.S., do not require a Section 404 permit and are not within USACE jurisdiction." The FEIS does not include an analysis of decommissioning or repurposing the project after it ceases to operate.

93. The Corps requested reinitiation of formal consultation and proposed some additional changes to the project design on January 25, 2016. This resulted in a second Biological Opinion and Incidental Statement, dated March 8, 2016. U.S. Fish & Wildlife Serv., Reinitiation of Formal Consultation for the Panoche Valley Solar Farm, San Benito County, California (File Number 2009-00443S), March 8, 2016 ("Biological Opinion").

c. The Final Biological Opinion and Record of Decision

94. The revised final Biological Opinion for the project found that the project would not cause jeopardy to the blunt-nosed leopard lizard, the giant kangaroo rat, San Joaquin kit fox, and other species, provided that the Corps and the project developer agree to detailed terms and conditions specifying both on and off-site avoidance and mitigation measures for the species.

95. The revised final Biological Opinion specifically requires that the Corps adopt these measures and include them as binding enforceable conditions in its Section 404 permit for the project. Despite the Service's earlier statements that the Corps would not accept responsibility for ensuring compliance beyond the construction phase of the project, the new Biological Opinion is expressly premised on the notion that the Corps' has and will exercise its authority to ensure compliance throughout the "construction, operations, and maintenance phases" of the 30-year project. Biological Opinion at 106.

96. According to the Biological Opinion, "the protective coverage of section 7(o)(2) may lapse if: (1) the Corps fails to require the Applicant to adhere to the Terms and Conditions of the Incidental Take Statement through enforceable terms that are added to the permit, (2) the Corps fails to retain oversight to ensure compliance with the Terms and Conditions of the Incidental Take Statement, or (3) the Corps or the Applicant fails to adhere to the Terms and Conditions of the Incidental Take Statement." Id.

97. The Corps then issued a Record of Decision and a Section 404 permit for the Project on March 15, 2016. U.S. Army Corps of Eng'rs, Record of Decision, Action ID SPN-2009-00443, Mar. 15, 2016 ("ROD").

98. Despite the now clear statement in the revised Biological Opinion that the Corps accept liability for all phases of the project, for the duration of the project, the Corps' Record of Decision and a Section 404 permit for the Project do not incorporate all the terms and conditions outlined in the Biological Opinion. Instead, the Permit and Record of Decision only requires compliance with the "mandatory terms and conditions associated with 'incidental take' of the

attached Biological Opinion," that are "related to the Corps' jurisdiction." ROD at 22. This contravenes the Corps' earlier statement to the Service that the "project area" and not its specific jurisdiction should be the focus of the species consultation.

99. Problematically, the ROD takes a much narrower view of the extent of the Corps' jurisdiction than that which the Service relied upon in reaching its no jeopardy conclusions. The ROD defines the Corps' jurisdiction over the proposed action as "limited to construction activities within the 0.121 acres of water of the U.S. that would be filled, upland areas adjacent to the waters of the U.S. that would be filed, as well as upland access and staging areas." ROD at 22.

100. The Corps does not define how far the upland areas under its jurisdiction extend, but condition 4 of the ROD mentions a 100-foot buffer zone and condition 10 mentions a 50-foot buffer zone adjacent to the waters. Regardless, this is a far cry from the entire 2,154-acre project site and additional 25,618-acre mitigation area as contemplated by the Biological Opinion.

101. The Corps' EIS for the project analyzes a range of alternatives, including one that would have no significant impacts to listed species. This option, the Westlands CREZ site, is comprised of some 35,558 acres of degraded former agricultural lands in Kings County and Fresno County. The state's Draft Environmental Impact Report found that the Westlands CREZ alternative would meet the objective of minimizing impacts on the community and the environment by locating the facility in a remote location, on land with compatible topography, and outside of parkland and designated habitat conservation areas. DEIR, p. E-18.

102. The Westlands CREZ site is available for long-term lease and is suitable for a photovoltaic solar project of comparable size. The U.S. Environmental Protection Agency recommended to the Corps that the applicant consider siting the project at this location. The Corps, however, rejected the alternative as infeasible because the Panoche Valley Solar, LLC, did not receive a response from a single telephone call and letter from to Westside Holdings, which controls the property. The Corps also stated that because planning, permitting, and

construction can take 4-6 years, a similar project at the Westlands CREZ site (assuming it was available to Panoche) was unlikely to be completed by December 31, 2019.

103. The Corps did not consider additional sites proposed in comments by The Nature Conservancy. The Conservancy identified 435,601 acres of Low Biodiversity Conservation Value / Salt-affected lands where solar projects could be sited without unnecessarily impacting biodiversity or agricultural values in its 2013 Western San Joaquin Valley Least-Conflict Solar Energy Assessment. The Corps did not explain why it did not consider any of these lands.

d. Other Proceedings

104. As the project also requires state and local permits, Solargen first submitted an application to the County of San Benito for a conditional use permit to construct a 420 megawatt photovoltaic solar power plant on the proposed site on October 16, 2009. The County of San Benito issued an Environmental Impact Report ("EIR") pursuant to the California Environmental Quality Act, CA Pub. Resources Code, § 21001, et seq., on September 30, 2010. The County issued a conditional use permit on October 20, 2010. Save Panoche Valley, et al, filed an administrative appeal and a lawsuit challenging the County's certification of the EIR. The case went to the Court of Appeals. After a hearing, the trial court denied Save Panoche Valley's petition for writ of mandate on August 30, 2011, The Court of Appeals affirmed. Save Panoche Valley v. San Benito Cty., 217 Cal. App. 4th 503, 509 (2013).

105. In 2011, Panoche Valley Solar, LLC sought a new permit from the County of San Benito, for their revised project. Various conservation groups expressed additional concerns to the county's Board of Supervisors, noting in particular the potential impacts of the proposal to threatened, endangered, and fully-protected species such as the blunt-nosed leopard lizard, the San Joaquin kit fox, the giant kangaroo rat and the California tiger salamander. Despite these objections, the County approved the Panoche Valley Solar Project in March 2015.

106. In March 2015, the Sierra Club and Santa Clara Valley Audubon Society filed a lawsuit in California state court challenging the San Benito County Board of Supervisors'

approval of the final supplemental version of the state-mandated environmental impact review for the 247-megawatt project. The environmental organizations argued that the EIR for the project failed to comply with the California Environmental Quality Act by: failing to describe a baseline for biological resources, failing to address new research information surfacing since the original lawsuit such as impacts of climate change on the blunt-nose leopard lizard, new information on potential impacts of other species in the area such as the golden eagle, use of groundwater with the accelerated construction schedule, and inadequate re-circulation of the new environmental document. On September 17, 2015, the trial court ruled against the plaintiffs. That case is now on appeal.

107. Additionally, on November 20, 2015, the California Department of Fish and Wildlife ("CDFW"), Central Region (4), issued an Incidental Take Permit under the California Endangered Species Act, Cal. Fish & G. Code §§ 2050-2100, for the Panoche Valley Solar Project. Conservation groups have also challenged this permit in state court alleging violations of the California Endangered Species Act and the state's fully-protected species law. The case is pending. Sierra Club v. Cal. Dep't of Fish & Wildlife, No. BS 161458 (Cal. App. Dep't Super. Ct., filed Mar. 21, 2016).

e. The Giant Kangaroo Rat

108. The giant kangaroo rat has already lost over 95% of its historic range due to development. More recent calculations indicate that its populations are only found in 1.8% of its historical range.

109. The effects of habitat fragmentation on species persistence is well documented in the scientific literature. The proposed project, despite providing some connectivity through the site, will fragment currently occupied habitat for the rat. It will create new hazards for them in adjacent habitat by, among other things, creating new perching opportunities for avian predators on the perimeter fences and facilities, and increasing light pollution at night, when giant kangaroo rats are most active, making them more vulnerable to predation.

110. Unfortunately, the unprecedented and on-going drought in California has also impacted the giant kangaroo rat's population throughout the range. The giant kangaroo rat exhibits "boom and bust" population cycles, however, the on-going drought coupled with additional destruction and fragmentation of habitat during the low population part of the cycle could cause localized extirpations that may not recover especially if projections for climate change for their current habitat are accurate.

111. The project contemplates translocation of giant kangaroo rats. Translocation involves capture of all individuals within the construction footprint for the project and reintroduction at an offsite location within the proposed mitigation lands. Although there is some evidence that the initial relocation of giant kangaroo rates can occur without significant mortality from the trapping and release itself, the best available scientific data does not demonstrate that those relocated individuals will thrive and reproduce. Indeed, Dr. Tim Bean, the leading expert on giant kangaroo rats told the Corps that, based on a review of eight different studies in 2012, translocation of kangaroo rats have been ineffective with no documented cases in which a viable population persists over the long term. Letter from Dr. William "Tim" Bean, Assistant Professor of Wildlife at Humboldt State University, to Lisa Gibson, U.S. Army Corps of Eng'rs, Re: Draft EIS SPN-2009-00443S, Oct. 23, 2015.

112. The Recovery Plan for the Upland Species of the San Joaquin Valley lays out a number of goals for recovery of the giant kangaroo rat. One key downlisting criteria is that habitat conservation occur throughout the species range.

113. The Service concludes that "9 individuals may be subject to injury or mortality from capture/relocation activities," but it assumes that "all relocated individuals," which it estimates at 435, "may be directly lost or ecologically functionally lost by not reproducing." Biological Opinion at 69.

114. The Biological Opinion fails to adequately evaluate the impact that the proposed project will have on the recovery of the species. It also erroneously assumes that the Corps will

ensure that required conservation measures intended to ensure against jeopardy to the species will be followed throughout the project site for the duration of the project.

f. The Blunt-Nosed Leopard Lizard

115. The Blunt-nosed leopard lizard has been on the federal endangered list since 1967. It is also considered a "fully protected species" under California law. Despite these protections, the species' numbers are declining and its habitat is shrinking. As with the giant kangaroo rat, the blunt-nosed leopard lizard is one of the upland species of the San Joaquin Valley, whose range has been drastically reduced.

116. Preliminary results from data collected by U.S. Geological Survey ("USGS") and BLM across the Panoche Valley demonstrates that there is significant blunt-nosed leopard lizard genetic variability, and that valley floor (just east of the project site) populations are more similar to the Panoche Hills population than to the Silver Creek Ranch population, which is distinct from the valley floor and Panoche Hills populations. Because of this and the importance of genetic diversity to species recovery, it is not possible to offset valley floor proposed project site impacts to blunt-nosed leopard lizard by protecting blunt-nosed leopard lizard populations elsewhere in the general area.

117. The Recovery Plan for the Upland Species of the San Joaquin Valley lays out a number of goals for recovery of the blunt-nosed leopard lizard. One key downlisting criteria includes requirements for "Protection of five or more areas, each about 5,997 acres or more of contiguous, occupied habitat."

118. The Project plans to mitigate impacts to the species "by buffering any BNLL [blunt-nosed leopard lizard] sighting with a 52.4-acre area." Based on the best available science, the California Department of Fish and Wildlife ("CDFW") has determined that a minimum 395-acre buffer is actually needed to avoid many impacts to blunt-nosed leopard lizards and a buffer of up to 657 acres from sightings would provide the greatest assurances to avoid impacts.

119. Recent science indicates that climate change will have a devastating range-wide impact on the already endangered blunt-nosed leopard lizard. Indeed, Dr. Barry Sinervo, the leading expert on the species, warned in a letter that the Draft Environmental Impact Statement for the Project "provides an inadequate assessment of the likely take of BNLL ["blunt-nosed leopard lizard"], and ignores the specific value of the Panoche Valley in the contest of species-wide refugia from climate change." He further stated that locating the Panoche Solar Project "nearby or on such long-term population centers [as found in the Panoche Valley] will jeopardize the long-term persistence of the species." Letter from Dr. Barry Sinervo, Univ. of Calif., Santa Cruz to Lisa Gibson, U.S. Army Corps of Eng'rs, Comment on the DEIS (SCH#2010031008), Oct. 26, 2015.

120. The Biological Opinion fails to adequately evaluate the project's impact on the recovery of the species. It also erroneously assumes that the Corps will ensure that required conservation measures intended to ensure against jeopardy to the species will be followed throughout the project site for the duration of the project.

g. The San Joaquin Kit Fox

121. The San Joaquin kit fox has also been listed as endangered since 1967. It has suffered similar declines in population and habitat. As with the giant kangaroo rat and the blunt-nosed leopard lizard, the San Joaquin kit fox is one of the upland species of the San Joaquin Valley whose range has been drastically reduced.

122. Monitoring of the San Joaquin kit fox on the mitigation lands for solar projects on the Carrisa Plain, north of Carrizo Plains, documented 20% confirmed mortalities of kit fox, and despite good body condition and ample dens, no evidence of successful reproduction. Although these observations are undoubtedly confounded by drought, the additive impact from development indisputably affects this highly endangered canid.

123. The Recovery Plan for the Upland Species of the San Joaquin Valley lays out a number of goals for recovery of the San Joaquin kit fox. One key downlisting criteria for the San

Joaquin kit fox includes requirements for protection of core areas, including that 90 percent of "existing potential habitat" in the Ciervo-Panoche Natural Area be preserved. While the biological opinion notes that the project is within an identified core area for the San Joaquin kit fox, it fails to evaluate adequately the impact that the proposed project will have on the recovery of the species. The Biological Opinion simply concludes that "despite the conservation of existing habitat, the project would still result in a net loss of suitable and occupied habitat for the San Joaquin kit fox and a minor reduction of area available for the recovery of the species." Biological Opinion at 82.

124. The Biological Opinion also erroneously assumes that the Corps will ensure that required conservation measures intended to ensure against jeopardy to the species will be followed throughout the project site for the duration of the project.

FIRST CAUSE OF ACTION:

(VIOLATION OF ESA Section 7 and the APA – Against the Service)

125. Petitioner realleges and incorporates by reference all the allegations previously set forth in this Complaint, as though fully set forth below.

126. The Incidental Take Statement for the Panoche project contains specific "non-discretionary" mitigation measures that "must be undertaken by the Corps or made binding conditions of any grant or permit issued to the Applicant, as appropriate, for the exemption in section 7(o)(2) to apply." Biological Opinion at 106.

127. The Incidental Take Statement further states that "The Corps has a continuing duty to monitor and regulate the activity covered by these Incidental Take Statements and the Corps and the Applicant have a continuing duty to comply with the Reasonable and Prudent Measures and implementing Terms and Conditions set forth below." Id.

128. The Service based its "no jeopardy" Biological Opinion and Incidental Take Statements on the premise that the Corps has and will exercise authority to regulate the "construction, operations, and maintenance phases of the proposed project." Id.

129. According to the Biological Opinion, "the protective coverage of section 7(o)(2) may lapse if: (1) the Corps fails to require the Applicant to adhere to the Terms and Conditions of the Incidental Take Statement through enforceable terms that are added to the permit, (2) the Corps fails to retain oversight to ensure compliance with the Terms and Conditions of the Incidental Take Statement, or (3) the Corps or the Applicant fails to adhere to the Terms and Conditions of the Incidental Take Statement." Id.

130. In its Record of Decision, however, the Corps disclaims responsibility for implementing or monitoring the Terms and Conditions of the Incidental Take Statement. Contrary to the Service's express position that the Corps exercise its authority over the "construction, operations, and maintenance phases" of the entire project, the Corps' ROD only requires compliance with the "mandatory terms and conditions associated with 'incidental take' of the attached Biological Opinion," that are "related to the Corps' jurisdiction." ROD at 22.

131. The Corps ROD then limits its jurisdiction over the Proposed Action to "construction activities within the 0.121 acres of waters of the U.S. that would be filled, as well as upland access and staging areas." Id.

132. The Corps does not define how far the upland areas under its jurisdiction extend, but condition 4 of the ROD mentions a 100-foot buffer zone and condition 10 mentions a 50-foot buffer zone adjacent to the waters. ROD at 19. This is a far cry from the entire 2,154-acre project site and additional 25,618-acre mitigation area as contemplated by the Biological Opinion.

133. The "no-jeopardy opinion" depends on the Corps asserting jurisdiction over the entire project and assumes that the Corps will enforce the Terms and Conditions of the Incidental Take Statement throughout the project and mitigation area. The Corps has accepted no such responsibility.

134. Because the Corps has not accepted responsibility for ensuring compliance with the Incidental Take Statement, the mitigation or conservation measures relied upon in reaching a "no jeopardy" opinion, are not "reasonably certain to occur." Nat'l Wildlife Fed'n v. Nat'l

Marine Fisheries Serv., 524 F.3d 917 n. 17 (9th Cir. 2008); Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439, 444 (9th Cir. 2011).

135. Under these circumstances, with no assurance that the Biological Opinion's protections and mitigation measures will be implemented by the permittee and enforced by the Corps, the Service's "no jeopardy" opinion must be deemed arbitrary and capricious and the protective coverage of Section 7(o)(2) cannot apply.

136. For these reasons, the Service's Biological Opinion and Incidental Take Statement must be set aside.

SECOND CAUSE OF ACTION:

(VIOLATION OF ESA AND APA – Against the Service)

137. Petitioner realleges and incorporates by reference all the allegations previously set forth in this Complaint, as though fully set forth below.

138. The Service's no jeopardy conclusion for the giant kangaroo rat, the San Joaquin kit fox, and the blunt-nosed leopard lizard is based on statements in the Biological Opinion that are internally inconsistent, unsupported by the evidence, contrary to the best available scientific and commercial data, or otherwise arbitrary and capricious.

139. For the giant kangaroo rat, the Service concludes that "[a]lthough some occupied and suitable habitat would be removed and mortality of some individuals is expected, implementation of the proposed project would have minimal effect on, and would not impede recovery of the species due to preservation of important occupied habitat in the conservation lands and the capture and relocation measures incorporated into the project to minimize mortality to giant kangaroo rats." Id. at 77. This statement is unsupported.

140. The Biological Opinion fails to support the conclusion that the recovery of the giant kangaroo rats will not be impaired.

141. First, although the Service concludes that "9 individuals may be subject to injury or mortality from capture/relocation activities," it assumes that "all relocated individuals," which

it estimates at 435, "may be directly lost or ecologically functionally lost by not reproducing." Id. at 69. This amounts to roughly 8 percent of the estimated giant kangaroo rat population. The Service never explains why such a significant loss, which may have impacts on genetic diversity, will not impair the recovery of the species.

142. Second, the Service states that 1,688 acres of occupied habitat will be permanently lost as a result of the project. Although the Service states that "conservation of the Silver Creek Conservation lands would result in the permanent protection and management of an area identified in the Recovery Plan as important for recovery of the species," id. at 75, it fails to explain how these lands – which are already vital to the species – actually make up for the net loss of habitat.

143. Third, as the Service later concedes, these mitigation lands are not permanently protected. Most of these lands are subject to mineral claims, thus "[t]he value of the conservation lands could be reduced if subsurface mineral rights are exercised." Id. at 98.

144. Fourth, the Biological Opinion relies in part on the applicant's apparent pledge to acquire and preserve an additional 1,000 acres of land suitable for giant kangaroo rats, but the Service does not know the location of this land and has no means of assessing its value.

145. For the San Joaquin kit fox, the Service concludes that "With the protection of lands to the north and south of the project site and the habitat corridor through the project footprint, the function of the Ciervo-Panoche Natural Area will be maintained and recovery of the species will not be impeded by the proposed project." Id. at 86. The Service, however, only addresses the survival of the species and does not explain why the project will not impact its recovery.

146. First, it does not explain what impact the potential loss of 435 giant kangaroo rats could have on the San Joaquin kit fox, which feeds on giant kangaroo rats and share the same habitat.

147. Second, the Service does not explain how the loss 1,688 acres of prime kit fox habitat is consistent with the species' Recovery Plan, which specifically calls for protecting 90 percent of "existing potential habitat" in the Ciervo-Panoche Natural Area. U.S. Fish & Wildlife Serv., Recovery Plan for Upland Species of the San Joaquin Valley, California, at Table 5 (1998). The Service never attempts to analyze what impact this loss of habitat will have on that goal, including whether that threshold may be crossed this and other projects. The Service relies on protection of conservation lands that already provide "near optimal conditions for the species." Id. at 82. In other words, the conservation lands do not actually mitigate for the significant net loss of habitat but merely preserve, to some degree, a portion of what already exists and has been targeted for preservation.

148. Third, the Biological Opinion depends, in part, on the acquisition and protection of the same additional 1,000 acres of habitat that the applicant pledges to acquire for giant kangaroo rats. The Service assumes that this land will also provide mitigation benefits for San Joaquin kit foxes, but the Service concedes that these benefits are uncertain at best: "Since we do not know the location of the additional 1,000 acres of conservation land that the applicant has committed to acquiring and preserving, we do not know the usage of that land by San Joaquin kit fox. We anticipate that since the land will be suitable for giant kangaroo rats, the preferred prey for San Joaquin kit fox, that the site will also be suitable for the San Joaquin kit fox." Id. at 82. Given that the Service previously assumed that all of the translocated giant kangaroo rats could perish, there is no reason for the Service to be confident that giant kangaroo rats will be present on the site, assuming it is acquired, or that it will benefit the San Joaquin kit fox.

149. The Service further acknowledges that "despite the conservation of existing habitat, the project would still result in a net loss of suitable and occupied habitat for the San Joaquin kit fox and a minor reduction of area available for the recovery of the species." Id. at 82. Because the Service never states how much area is required for recovery, its conclusions that

recovery of the San Joaquin kit fox will not be impaired lack adequate support and are arbitrary and capricious.

150. For the blunt-nosed leopard lizard, but also for other species discussed above, the Service has also violated the ESA by failing to use the best scientific and commercial information available to assess impacts to the species. In numerous instances, the Biological Opinion arbitrarily and capriciously rejects (usually in brief footnotes added after reinitiation of consultation) various studies as "not peer reviewed" even though peer review is not required to meet the ESA's "best available scientific and commercial data" standard.

151. For example, the Service rejected a thorough genetic study prepared by U.S. Geological Survey scientists for the Bureau of Land Management that supports the importance of the blunt-nosed leopard lizard population at the Panoche site to the species as a whole. It did so on the grounds that the study "has not been subject to peer review and is not considered as best scientific information available." Biological Opinion at 89 n.10. But the Service never explains why it is not considered the best scientific information available, other than the lack of peer review. This is not a reasonable explanation as peer review is not required to meet the best available scientific information standard under the ESA, and in any event, most if not all of the survey data received from the Applicant and the Corps was also not peer reviewed. Moreover, the study is more recent and more comprehensive than Grimes et al. 2014, which the Service cites instead. The Service may not reject current research by federal biologists while at the same time accepting raw survey data from the Applicant and the Corps.

152. Similarly, the Service rejects a habitat suitability model by Dr. Barry Sinervo, the leading expert on blunt-nosed leopard lizards, again because the model has not been peer reviewed. Their cursory explanation of why the model would not change their analysis was arbitrary and capricious. Biological Opinion at 62 n.5. The Biological Opinion also fails to address scientific information that shows there may be more blunt-nosed leopard lizards in the footprint of the site than the survey data suggested. In particular, the Service misapplied Warrick

et al. 1998 to underestimate the take of blunt-nosed leopard lizard that may occur at the site. The Service offers no explanation for its failure to properly consider this information.

153. The Service cannot ignore available biological information, especially information that has been prepared by the government's own scientists and is the most current, or is scientifically superior to that on which the decision-maker relied. For all of these reasons, the Service's no-jeopardy conclusions with respect to the giant kangaroo rat, the San Joaquin kit fox, and the blunt-nosed leopard lizard are arbitrary and capricious and should be set aside.

THIRD CAUSE OF ACTION:

(Violation of CWA Section 404 – Against the Corps)

154. Petitioner realleges and incorporates by reference all the allegations previously set forth in this Complaint, as though fully set forth below.

155. EPA's 404(b)(1) Guidelines prohibit the Corps from authorizing an application for dredge and fill activities if, inter alia, the activity "jeopardizes the continued existence" of an endangered species under the ESA. 40 C.F.R. § 230.10(b)(3). The regulation states: "No discharge of dredged or fill material shall be permitted if it . . . [j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended." Id.

156. The 404(b)(1) Guidelines further state that the impacts on ESA listed species to be considered by the Corps must include both direct and indirect impacts from the dredge or fill activities. See 40 C.F.R. § 230.30(b) ("The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include . . . (3) Facilitating incompatible activities.").

157. The 404(b)(1) Guidelines mandate that the Corps' determination of whether an activity "jeopardizes the continued existence" of an ESA endangered species is determined by

the outcome of the formal consultation process under the ESA. See 40 C.F.R. § 230.30(c). That regulation states: "Where consultation with the Secretary of the Interior occurs under section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final." Id.

158. Thus, the Record of Decision's assertion that the permitted discharge will not "[j]eopardize endangered or threatened species or their critical habitat," ROD at 15, must rely on the outcome of the consultation process, where consultation has occurred.

159. The Corps' reliance on the final Biological Opinion to assert that issuance of the discharge will not jeopardize any ESA-listed species is arbitrary and capricious. The Biological Opinion makes clear that the "no jeopardy" determination for blunt-nosed leopard lizard, San Joaquin kit fox, and other species depends on the Corps incorporating all of the mitigation measures specified in the Biological Opinion as binding conditions of any 404 permit. See, e.g., Biological Opinion at 103 (concluding effect on reproduction for blunt-nosed leopard lizard will be small "because we expect the Applicant's avoidance and minimization measures will minimize such losses" and that a "small" effect will not appreciably reduce reproduction range wide); id. (relying on Applicant's "avoidance, minimization, and conservation measures" to conclude that numbers of blunt-nosed leopard lizard "will minimize" losses, such that numbers will be only "slightly reduced"); Biological Opinion at 103-104 (relying on "avoidance, minimization, and conservation measures" for blunt-nosed leopard lizard to minimize adverse effects on recovery); Biological Opinion at 83-84, 101 (relying on applicant's avoidance and minimization measures to conclude that impacts to numbers and reproduction of San Joaquin kit fox will be minimal); Biological Opinion at 84, 102 (relying on applicant's "avoidance, minimization, and conservation measures" for San Joaquin kit fox to "minimize" and adverse effects on recovery); see also Biological Opinion at 106, 116-117 (for incidental take coverage to apply, "[t]he Corps must include all measures, plans, conditions, and reporting requirements in

the biological assessment and this biological opinion as binding terms and conditions of any and all permits it issues for the project and must monitor and enforce their implementation.").

160. The Service cannot lawfully rely on such mitigation measures to reach its no jeopardy conclusion unless the action agency ensures they are sufficiently certain to occur by making those measures binding upon and enforceable against the permit applicant. Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439, 444 (9th Cir. 2011); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv, 524 F.3d 917, 935-36 (9th Cir. 2008); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d at 1205, 1213-15 (D. Or. 2003). This includes conservation measures associated with all of the construction activities for the solar panel farm project, as well as measures associated with the operation and maintenance of the solar panel farm over the 30 year life of the solar project. Biological Opinion at 106.

161. Put another way, the Biological Opinion's "no jeopardy" conclusions are predicated on the assumption that the Corps has legal authority to enforce all of the avoidance, minimization, and conservation measures outlined for the project as binding requirements of the 404 permit. Biological Opinion at 106. Yet the 404 permit that the Corps issued through its Record of Decision imposes as binding conditions only a limited subset of the terms and conditions that the Biological Opinion's "no jeopardy" conclusion for giant kangaroo rat, blunt-nosed leopard lizard, San Joaquin kit fox, California tiger salamander, and other species relied upon. *See* ROD at 22 (describing permit conditions); 404 PERMIT at 7. The permit makes binding only those conditions of the Biological Opinion that are "related to . . . construction activities within the 0.121 acres of waters of the U.S. that would be filled, upland areas adjacent to the waters of the U.S. that would be filled, as well as upland staging and access areas." See 404 PERMIT at 7, ROD at 22 (describing permit conditions). But vast portions of the site, and the construction that will occur at those portions of the site, are not encompassed by that description of the scope of the conditions.

162. By failing to adopt and enforce the terms and conditions of the Biological Opinion for the entire project, as required by the Service, the Corps has not ensured against jeopardy to listed species as the CWA and its regulations require. The Corps' reliance on the final Biological Opinion to assert that issuance of the discharge permit will not jeopardize any ESA-listed species is thus arbitrary and capricious.

163. The Corps' Section 404 permit for this project is thus invalid and should be vacated.

FOURTH CAUSE OF ACTION:

(Violation of CWA Section 404 – Against the Corps)

164. Petitioner realleges and incorporates by reference all the allegations previously set forth in this Complaint, as though fully set forth below.

165. EPA's 404(b)(1) Guidelines prohibit the Corps from authorizing an application for dredge and fill activities if, (2) there is a practicable alternative which would have less adverse impact on waters of the United States and does not have other significant adverse environmental consequences (40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i)). The Corps must document its findings of compliance or noncompliance with these restrictions. 40 C.F.R. § 230.12(b).

166. EPA specifically recommended that the applicant consider siting the project at an alternative location – the Westlands CREZ location – that would have fewer impacts on jurisdictional waters and listed species. The Westlands CREZ location consists of 35,558 acres of degraded agricultural land in Kings and Fresno counties that is no longer suitable for farming and provides no meaningful habitat for listed species. The Corps has indicated that the site is suitable for a solar facility and that "future plans for the site" include one or more solar facilities.

167. The EPA specifically recommended that the applicant consider this site because it would have potentially minimal impacts to waters of the United States, imperiled species, and the environment. Nonetheless, the Corps determined that the site was not feasible because the

Applicant did not receive a response to inquiries regarding the site and consequently limited project planning had occurred such that it might not be possible to develop a project by the Applicant's preferred date, December 31, 2019.

168. On information and belief, Plaintiffs allege that the Applicant did not adequately consider or pursue this alternative site and that the Corps improperly relied upon the Applicant's preferred timeline to reject this alternative. According to the ROD, representatives of Panoche made one telephone call and sent one additional letter to Westlands Holdings regarding the availability of the site for their solar project. The Applicant appears to have made no additional attempt to investigate the site alternative. The Corps' conclusion that the site was not practicable based on the Applicant's limited efforts to pursue the site is not consistent with EPA's 404(b)(1) guidelines and is otherwise arbitrary and capricious.

169. Likewise, the Corps' complete failure to consider alternative sites on low conservation value lands suggested by The Nature Conservancy in its 2013 Western San Joaquin Valley Least-Conflict Solar Energy Assessment was arbitrary and capricious.

170. For these reasons, the Corps' conclusion that the Westland CREZ site was not a practicable alternative was arbitrary and capricious. The Corps' Section 404 permit for this project is thus invalid and should be vacated.

CONCLUSION

171. For these reasons, Plaintiffs ask the Court to vacate and set aside the Biological Opinion and Incidental Take Statement issued by the Service to the Corps pursuant to Section 7 of the Endangered Species Act for the Panoche Valley Solar project. Plaintiffs further ask the Court to vacate and set aside the permit issued by the Corps to Panoche Valley Solar, LLC, pursuant to Section 404 of the Clean Water Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

1. Declare that the U.S. Fish and Wildlife Service's March 8, 2016, Biological Opinion and Incidental Take Statement violates the ESA and the APA;

2. Set aside and remand the Biological Opinion and Incidental Take Statement in accordance with the Court's ruling;

3. Declare that the U.S. Army Corps of Engineers March 15, 2016, Record of Decision and Section 404 Permit violates the Clean Water Act and the EPA's 404(b)(1) Guidelines;

4. Set aside and remand the Record of Decision and Section 404 Permit in accordance with the Court's ruling;

5. Award plaintiffs their costs and attorneys' fees; and

6. Grant plaintiffs such additional relief as this Court may deem just and proper.

April 15, 2016

Respectfully Submitted,

By: /s/Jason C. Rylander

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