

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL
DIVERSITY, et al,

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE, et al,

Defendant.

No. 2:21-cv-01527-DJC-DMC

ORDER

This case concerns the federal government's permitting of the proposed Stonegate Development Project in Chico, California. Plaintiffs allege that the project – a proposed 314-acre multi-use development with 423 single-family residential lots, 13.4 acres of multi-family residential land uses, 36.6 acres of commercial land uses, 5.4 acres of storm water facilities, 3.5 acres of park, and a 137-acre open space preserve – would result in a significant loss of local wetland and vernal pool habitats, harming endangered and threatened species that rely on them. For the reasons discussed below, the Court finds that the government's 2020 approval of the project is at least in part arbitrary and capricious.

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FACTS AND PROCEDURAL HISTORY

Plaintiffs are AquAlliance and the Center for Biological Diversity ("Center"), two environmental nonprofit organizations. (ECF No. 1, Compl. ¶¶ 9, 14.) Both organizations have members who own property near the proposed project site. (*Id.* ¶ 16.) AquAlliance's mission is to defend northern California waters and challenge threats to the hydrologic health of the Sacramento River watershed. (*Id.* ¶ 9.) The organization has a long history of regional environmental advocacy, which includes purchasing land for purposes of conservation and hosting environmental educational conferences on vernal pools. (*Id.* ¶¶ 10, 11.) AquAlliance's members frequent the area designated for development for purposes of recreation, wildlife viewing, aesthetic enjoyment, and environmental education. (*Id.* ¶ 12.) The Center is a national organization with local members in Butte County, where Chico is located. (*Id.* ¶ 14.) The Center works to protect the habitats and ecological communities that may be adversely affected by human activity. (*Id.*) Both organizations' membership includes scientists who study threatened and endangered species. (*Id.* ¶ 18.)

Federal Defendants are the U.S. Army Corps of Engineers ("Corps") and the U.S. Fish and Wildlife Service ("USFWS"), an agency within the U.S. Department of the Interior. (*Id.* ¶¶ 24, 26.) The Corps is responsible for the Project's compliance with the Endangered Species Act ("ESA"), the Clean Water Act ("CWA"), and the National Environmental Policy Act ("NEPA"). (*Id.* ¶ 26.) The USFWS is tasked with protecting and managing the fish, wildlife, and native plant resources of the United States, in part by ensuring compliance with the ESA. (*Id.* ¶ 24.) The USFWS is also responsible for ensuring that the Corps' permitting decisions comply with the ESA. (*Id.*) Defendant-Intervenors are Epick Homes, Inc and Bruce Road Associates, LP, two developers of the Proposed Project. (ECF No. 9.)

The Stonegate Project ("Project" or "Proposed Project") is proposed on a 314-acre site located on both the east and west end of Bruce Road and north of the Skyway in southern Chico, Butte County, California. (Compl. ¶ 73.) The mixed-use

1 development project would include 423 single-family residential lots, 13.4 acres of
2 multi-family residential land uses, 36.6 acres of commercial land uses, 5.4 acres of
3 storm water facilities, 3.5 acres of park, and a 137-acre open space preserve. (*Id.*) The
4 location selected for the Project is host to seasonal vernal pool and vernal swale
5 complexes, which are pools that form during the rainy season and dry out during the
6 summer and fall months. (*Id.* ¶ 74.) The vernal pools support a wide variety of
7 wildlife, and the genetic makeup of species in a single vernal pool can vary from that
8 of a nearby pool, making their interconnectivity critical to support the sharing of
9 genetic information between the species. (*Id.* ¶¶ 76, 77.) These species include the
10 vernal pool fairy shrimp (*Branchinecta lynchi*), an aquatic crustacean endemic to vernal
11 pool and ephemeral freshwater habitat that has been listed under the ESA as a
12 threatened species since 1994. (*Id.* ¶¶ 106, 107.) Vernal pool tadpole shrimp
13 (*Lepidurus packardii*), as the name suggests, also share the vernal pool habitat, and
14 have been listed as a threatened species under the ESA since 1994. (*Id.* ¶¶ 114-16.)
15 The Butte County meadowfoam (*Limnanthes floccosa ssp. californica*), an herbaceous
16 annual found only in vernal pool habitat in Butte County, California, has been listed as
17 endangered under the California Endangered Species Act since 1982 and under the
18 ESA since 1992. (*Id.* ¶¶ 121-23.) Finally, the giant garter snake (*Thamnophis gigas*) is
19 a species endemic to Central Valley California wetlands, including wetlands in Butte
20 County, and has been listed as threatened under the ESA since 1993. (*Id.* ¶¶ 134-35.)

21 Only 10% of the historic vernal pool habitat remains viable in California. (*Id.*
22 ¶ 78.) In 2006, the USFWS released its 2005 Recovery Plan for Vernal Pool Ecosystems
23 of California and Southern Oregon ("2005 Recovery Plan" or "Recovery Plan"). (*Id.*
24 ¶ 109.) The Recovery Plan, which covered both fairy and tadpole shrimp, identified
25 core areas to be the initial focus of protection measures. (*Id.* ¶¶ 109, 110.) The 2005
26 Recovery Plan recommended that 85% of vernal pool fairy shrimp habitat that existed
27 in 2005 be preserved. (*Id.* ¶ 112.) If completed, the Project would permanently
28 destroy 9.14 acres of wetlands, although some additional meadowfoam habitat may

1 be established through mitigation efforts. (*Id.* ¶¶ 30, 131.)

2 The Corps issued a public notice for the Project in March 2017, followed by a
3 revised public notice in September 2018. (*Id.* ¶ 79.) Forty-one public comments,
4 including comments from Plaintiffs that highlighted potential danger to the vernal
5 pools and the species that rely on them, were received in response to the two public
6 notices. (*Id.* ¶¶ 79-81.) Plaintiffs requested a public hearing on the Project and
7 informed the Corps that it believed the Corps would need to prepare an
8 Environmental Impact Statement (“EIS”) that includes an adequate list of reasonable
9 alternatives to comply with NEPA. (*Id.* ¶ 80.) The USFWS also submitted comments,
10 noting that previous comments it had submitted to a prior iteration of the Project
11 remained unchanged. (*Id.* ¶ 82.) Those comments expressed the position that,
12 among other issues, even partial development of the property could preclude
13 recovery of listed species that rely on the vernal pools on the Project site because they
14 would be “significantly and adversely impacted by edge effects of the proposed
15 development.” (*Id.*) In April 2017, the U.S. Environmental Protection Agency (“EPA”)
16 submitted comments reflecting concern for the vernal pools and requesting that there
17 be additional exploration of a least environmentally damaging practicable alternative.
18 (*Id.* ¶ 84.) And in May 2017, the California Department of Fish and Wildlife submitted
19 comments expressing the view that the Project as proposed would result in significant
20 impacts to the environment and recommended the preparation of an EIS. (*Id.* ¶ 83.)

21 The Corps ultimately declined to offer a public hearing on the project,
22 concluding that such a meeting would be unlikely to produce additional information
23 to inform the Corps’ decision. (*Id.* ¶ 85.) In August 2020, the Corps issued its
24 Memorandum for Record for the Project, which constitutes the “Environmental
25 Assessment, 404(b)(1) Guidelines Evaluation, as applicable, Public Interest Review,
26 and Statement of findings for the subject application.” (*Id.* ¶ 86.) The Memorandum
27 of Record acknowledged the multiple requests received for an alternatives analysis for
28 the Project and identified three offsite alternatives, all of which failed to meet Project

objectives as defined by the Corps. (*Id.* ¶¶ 87-89.) The Memorandum also analyzed six onsite alternatives, assessing factors such as overall project purpose, development cost, and environmental impacts, and concluded that two of those options were not practicable, three were practicable but inappropriate due to insufficient reduction of aquatic impacts of additional adverse effects, and one (Alternative 5) was practicable. (*Id.* ¶ 90.) Alternative 5 would reduce the number of housing units by 10% and impacts to jurisdictional waters by 7%, compared to the proposed Project, although both iterations would include significant development within the parcel east of Bruce Road. (*Id.*) The Corps, in response to EPA and other commenters' request for analysis of an alternative that would only develop the parcel west of Bruce Road, concluded that any such alternative would not meet Project objectives. (*Id.* ¶ 91.) The Corps emphasized that restricting development to west of Bruce Road would fail to meet housing goals and would not reduce impacts to meadowfoam by a significant margin. (*Id.*) Limiting development to the parcel west of Bruce Road would reduce impacts to meadowfoam by 0.10 acres, a 9% decrease compared to the approved project. (*Id.* ¶ 92.) It would also reduce impacted vernal pool fairy shrimp and vernal pool tadpole shrimp occupied habitat by 6.76 acres, a 77% decrease compared to the approved project. (*Id.*)

In March 2019, the USFWS issued the Biological Opinion for the Project, and in December 2019, issued an amended Biological Opinion. (*Id.* ¶ 94.) A second amended Biological Opinion (BO, 08ESMF00-2016-F-0236-3) was issued on January 23, 2020, to address typographic errors. (*Id.*) The amended Biological Opinion addressed revisions to the on-site preserve boundary that excluded the Butte Creek Diversion Channel from the on-site preserve. (*Id.*) The Biological Opinion acknowledged that there would be harm to some ESA-listed species, but that the Project would not jeopardize the continued survival and recovery of the listed fairy shrimp, tadpole shrimp, and meadowfoam. (*Id.* ¶ 95.) The Biological Opinion did not analyze impacts on the listed giant garter snake, which is known to also generally

1 inhabit the Project area. (*Id.*)

2 The USFWS's conclusions in the Biological Opinion relied on several
3 assumptions, including that there was no change in the status of any of the listed
4 species since status reviews in 2007 for the vernal shrimp and 2008 for meadowfoam,
5 although it did note that there were existing environmental threats to vernal pool
6 habitats. (*Id.* ¶ 96.) In its assessment of vernal pool species, the Biological Opinion
7 analyzed the vernal pool fairy shrimp and vernal pool tadpole as different species, but
8 did not differentiate between the two in terms of its jeopardy finding or required
9 conservation measures. (*Id.* ¶ 97.) The Biological Opinion permits the purchase of
10 various credits from a mitigation bank, in theory ensuring that the loss of habitat or
11 species in one area can be compensated by the increased population in another area.
12 (See *id.* ¶ 101.) It is unclear whether the necessary mitigation credits are presently
13 available at USFWS-approved mitigation banks in the region for both the vernal pool
14 shrimp and meadowfoam. (*Id.* ¶ 102)

15 Plaintiffs bring five claims against Federal Defendants. First, Plaintiffs allege
16 that the USFWS violated the Endangered Species Act, 16 U.S.C. §§ 1531-44, and the
17 Administrative Procedure Act, 5 U.S.C. §§ 701-06 by failing to fully consider the
18 impacts to ESA-listed species in the Biological Opinion, thus rendering that document
19 arbitrary and capricious. (*Id.* ¶¶ 139-48.) Second, Plaintiffs allege that the USFWS
20 violated the Endangered Species Act, 16 U.S.C. §§ 1531-44, and the Administrative
21 Procedure Act, 5 U.S.C. §§ 701-06, by departing, without justification, from the
22 agency's previous policy regarding adequate mitigation ratios required for impacts to
23 Butte County meadowfoam, rendering the new policy arbitrary and capricious. (*Id.*
24 ¶¶ 149-52.) Third, Plaintiffs allege that Federal Defendants violated the Endangered
25 Species Act, 16 U.S.C. § 1536, by failing to assess potential impacts on the giant garter
26 snake, which is known to generally inhabit the area of the Proposed Project. (*Id.* ¶¶
27 153-57.) Fourth, Plaintiffs allege that the Corps violated the National Environmental
28 Policy Act by rendering an inadequate environmental analysis and failing to prepare

1 an environmental impact statement. (*Id.* ¶¶ 158–66.) Specifically on that claim,
2 Plaintiffs allege that the Corps’ environmental assessment failed to consider all
3 environmental consequences of the Project, evaluate feasible environmentally
4 superior alternatives, and provide the public with notice and opportunity to comment
5 on its environmental assessment and Finding of No Significant Impact. (*Id.*) And fifth,
6 Plaintiffs allege that the Corps violated the Clean Water Act, 33 U.S.C. § 1344(b) and
7 Section 404(b)(1) of the Project’s Permit Guidelines, by failing to adopt the alternative
8 that best avoids, minimizes, and mitigates impacts to the aquatic ecosystem while still
9 achieving the Project’s purpose as the least environmentally damaging practicable
10 alternative. (*Id.* ¶¶ 167–77.)

11 Plaintiffs request that the Court: (1) declare the USFWS 2020 Biological Opinion
12 unlawful under the ESA and arbitrary and capricious under the APA; (2) declare that
13 the Corps violated the ESA, NEPA, CWA, and the APA in issuing the Permit for the
14 Proposed Project; (3) issue an injunction that the Biological Opinion be set aside and
15 vacated; (4) issue an injunction that the Corps’ 404 Permit and Memorandum of
16 Record for the Proposed Project be set aside and vacated; (5) enjoin any
17 implementation of the Proposed Project pending completion of a legally adequate
18 Biological Opinion, NEPA analysis, and CWA analysis; (6) award Plaintiffs their costs of
19 litigation, including reasonable attorneys’ fees¹; and (7) grant any other relief as the
20 Court deems just and proper. (*Id.* at 40.)

21 This case was filed in August 2021 and was originally assigned to District Judge
22 Troy L. Nunley. (ECF No. 1.) Plaintiffs moved for summary judgment in July 2022.
23 (ECF No. 30). The case was reassigned to District Judge Dale A. Drozd in August
24 2022. (ECF No. 33.) Also in August 2022, Federal Defendants moved for summary
25 judgment and to exclude Plaintiffs’ extra-record declaration, and Defendant-
26 Intervenor moved for summary judgment in September 2022. (ECF Nos. 38, 39, 41.)

27
28 ¹ Should a party seek to recover reasonable costs of litigation, including attorneys’ fees, they should submit and notice a separate Motion on this Court’s calendar.

1 In April 2023, this case was reassigned to District Judge Daniel J. Calabretta. (ECF
2 No. 53.)

3 **LEGAL STANDARD**

4 Ordinarily, summary judgment is appropriate under Rule 56 where the moving
5 party "shows that there is no genuine dispute as to any material fact and the movant is
6 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, "[i]n a case
7 involving review of a final agency action under the Administrative Procedure Act . . .
8 the standard set forth in Rule 56(c) does not apply because of the limited role of a
9 court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d
10 76, 89 (D. D.C. 2006). "A court conducting [Administrative Procedure Act] judicial
11 review does not resolve factual questions, but instead determines 'whether or not as a
12 matter of law the evidence in the administrative record permitted the agency to make
13 the decision it did.'" *Conservation Cong. v. U.S. Forest Serv.*, No. 2:12-CV-02800-TLN,
14 2014 WL 2092385, at *4 (E.D. Cal. May 19, 2014) (quoting *Mainella*, 459 F. Supp. 2d at
15 90). In a case brought under the APA, summary judgment is the "mechanism for
16 deciding, as a matter of law, whether the agency action is supported by the
17 administrative record and otherwise consistent with the APA standard of review."
18 *Conservation Cong.*, 2014 WL 2092385, at *4.

19 Because the NEPA, CWA, and ESA – the statutes which Plaintiffs allege
20 Defendants violated – do not allow a private right of action, the agency's decisions is
21 reviewed under the APA. See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d
22 1233, 1238 (9th Cir. 2005). Under the APA, a decision may be set aside if it is
23 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
24 *Id.*; 5 U.S.C. § 706(2)(A). Such review "is narrow and a court is not to substitute its
25 judgment for that of the agency." *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto.*
26 *Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, a court may only set aside a decision if
27 the agency "has relied on factors which Congress has not intended it to consider,
28 entirely failed to consider an important aspect of the problem, offered an explanation

1 for its decision that runs counter to the evidence before the agency, or is so
2 implausible that it could not be ascribed to a difference in view or the product of
3 agency expertise." *Id.*

4 **DISCUSSION**

5 Plaintiffs challenge the USFWS' permitting of the Proposed Project, alleging
6 deficiencies in the: (1) Biological Opinion's finding of "no jeopardy"; (2) assessment of
7 giant garter snake presence at the site of the Proposed Project; (3) analysis of a least
8 environmentally damaging practicable alternative, and; (4) lack of EIS issuance. The
9 Court discusses each alleged deficiency in turn.

10 **A. The Biological Opinion's "No Jeopardy" Finding**

11 Undergirding an effort to protect certain species from further deteriorating
12 population numbers, Congress enacted the ESA, which among other things prohibits
13 agency actions that are "likely to jeopardize the continued existence of any
14 endangered species or threatened species." 16 U.S.C. §1536(a)(2). To jeopardize
15 means "to engage in an action that reasonably would be expected, directly or
16 indirectly, to reduce appreciably the likelihood of both the survival and recovery of a
17 listed species in the wild by reducing the reproduction, numbers, or distribution of
18 that species." 50 C.F.R. § 402.02; see *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries*
19 *Serv.*, 524 F.3d 917, 929-30 (9th Cir. 2008).

20 Plaintiffs bring four subclaims in their argument that the USFWS improperly
21 arrived at a "no jeopardy" finding and that the agency's ultimate conclusion was
22 arbitrary and capricious in violation of the ESA and APA. First, Plaintiffs allege that the
23 USFWS incorrectly assessed local meadowfoam populations to arrive at a faulty
24 population baseline. Second, Plaintiffs argue that the USFWS failed to properly
25 account for the impacts of climate change on vernal pool species, rendering the
26 Biological Opinion's assessment of the Proposed Project's impacts on ESA-listed
27 species inadequate. Third, Plaintiffs assert that the USFWS' meadowfoam impact
28 analysis is in contradiction to its previous findings in a similar project. And finally,

1 Plaintiffs believe that the USFWS improperly gave credence to unenforceable
2 mitigation efforts.

3 The Court finds that the USFWS properly relied on a series of studies to
4 substantiate the local meadowfoam population baseline. However, the Court finds
5 that the Biological Opinion's lack of analysis regarding climate change is arbitrary and
6 capricious. The Court finds that the USFWS' previous conclusions from and reliance in
7 limited part on a 2002 draft biological opinion are not arbitrary and capricious.
8 Finally, the Court finds that the 2005 Recovery Plan is nonbinding, and therefore the
9 Court cannot require enforcement of specific mitigation methods.

10 **i. Meadowfoam Baseline**

11 Plaintiffs argue that the USFWS improperly calculated the baseline population
12 number of meadowfoam local to the area of the Proposed Project in violation of the
13 ESA. Plaintiffs believe that this incorrect baseline negates the USFWS' "no jeopardy"
14 finding as it pertains to the meadowfoam species. The USFWS asserts that it properly
15 identified four different meadowfoam populations and relied on up-to-date studies to
16 ascertain the species' population numbers.

17 As a requirement for permitting a development, the USFWS must evaluate the
18 impacts that development will have on species listed under the ESA. Among other
19 things, the ESA requires the USFWS to assess: (1) the current status of the listed
20 species and its "environmental baseline"; (2) the cumulative effects of non-federal
21 action; and (3) the effects of the agency's action. 50 C.F.R. § 402.14(g). At issue here
22 is whether the USFWS complied with the ESA's first requirement and computed an
23 environmental baseline for the local meadowfoam species. This baseline must
24 include "the past and present impacts of all Federal, State, or private actions and other
25 human activities in the action area" and "the impact of State or private actions which
26 are contemporaneous with the consultation in process." 50 C.F.R. § 402.02(d).

27 The USFWS' discussion of the meadowfoam baseline in its Biological Opinion is
28 scarce, measuring only a half a page. AR 000866. It references six previous studies

1 conducted over three decades, noting that “[a]s expected for this species, the
2 population size and extent has been found to vary over time.” *Id.* From those studies,
3 the Biological Opinion concludes that there are 16,542 individual meadowfoam plants
4 occupying 5.14 acres throughout the proposed project site. *Id.* Plaintiffs attack the
5 veracity of the final 16,542 number, noting that a 2016 study incorporated into the
6 Biological Opinion found only 4,303 plants, and that other studies have shown
7 similarly disparate numbers. (ECF No. 30 at 17.²) But as Plaintiffs recognize, “the
8 available survey counts demonstrate high population variability over time.” (*Id.* at 18.).
9 For example, approximately 9,000 meadowfoam plants were identified in 1988, with
10 the number dropping to 950 in 2002, and rising again to 10,200 in 2008. AR 002558.
11 This is likely due to the meadowfoam’s seed dormancy, which is believed to be “the
12 cause of population fluctuations of up to two orders of magnitude between years,” as
13 seeds that do not germinate in their first year may still be viable in subsequent years.
14 AR 001909. While the USFWS’s 16,542 baseline number may be substantially higher
15 than the 4,303 plants identified in 2016, that increase is not incongruent with the
16 observed pattern of meadowfoam population growth and decline. Plaintiffs cannot
17 pick out specific studies relied on by USFWS to distinguish USFWS’ final
18 environmental baseline number without recognizing the overall context of population
19 change for the species, which fluctuates year to year.

20 Plaintiffs also contend that the USFWS did not provide an accurate snapshot of
21 the status of local meadowfoam and the threats facing the species, which would also
22 render the environmental baseline insufficient. (ECF No. 30 at 18.) Plaintiffs claim that
23 the USFWS “offers almost no further analysis specific to the condition of the
24 meadowfoam populations” and “only discusses threats to meadowfoam generally.”
25 (*Id.*) Not so. The Biological Opinion specifically addresses the status of local
26 meadowfoam, noting that the species is “threatened by land conversion to urban

27
28 ² Citations to specific pages in the parties’ briefing are to the page number found on the bottom of the document, rather than the Bates number in the upper margin.

1 development, habitat loss and fragmentation, impacts from surrounding land use,
2 adjacent road widening, competition with nonnative plant species, potential changes
3 to hydrology, introduction of pesticides and herbicides, off-road vehicles, stochastic
4 extinction, and other human activities.” AR 000860. The Biological Opinion expands
5 on its previous observations, including additional discussion of the threat of
6 “proposed development projects,” lack of management of invasive species (including
7 inappropriate levels of grazing), and species “extirpation.” AR 000860. While the
8 irony of the USFWS explicitly recognizing urban development and related activities as
9 direct threats to meadowfoam is not lost on the Court, the Court concludes that the
10 procedural requirement that the USFWS acknowledge and document these threats to
11 meadowfoam satisfies its obligations to assess the species’ status. *See Seven Cnty.*
12 *Infrastructure Coal. v. Eagle Cnty., Colorado*, 145 S. Ct. 1497, 1507 (2025) (“NEPA
13 imposes no substantive environmental obligations or restrictions. NEPA is a purely
14 procedural statute . . .).

15 The USFWS’ reliance on these studies satisfies its obligations under the ESA.
16 The agency is not expected to conduct its own studies, and its choice here to rely on a
17 series of studies spanning three decades persuades the Court that the agency did not
18 act in an arbitrary and capricious manner in assessing the local meadowfoam species’
19 population numbers. The Court also concludes that that the Biological Opinion
20 properly identified and discussed threats to the species.

21 **ii. Climate Change Impacts on Vernal Pool Species**

22 Plaintiffs argue that the USFWS failed to analyze climate change’s impacts on
23 ESA-listed species in contravention of the ESA. They assert that those ESA-listed
24 species are uniquely adapted to the vernal pool habitat, which is highly susceptible to
25 changes in precipitation and temperature, and that any discussion offered by the
26 USFWS merely incorporates “by reference” broader climate change discussions that
27 are not present in the Biological Opinion. The USFWS responds that it expressly
28 incorporated climate change into its analysis and discussion of vernal pool species.

a. Admission of Extra-Record Documents

As an initial matter, the Court must address Federal Defendants' contention that Plaintiffs' submission of a declaration and its attachments, which are two scientific studies that are not part of the administrative record. (See ECF No. 38; see also ECF No. 39 at 22.) Plaintiff argues that it submits these extra-record documents not to attack the basis of the USFWS' conclusions (or lack thereof) regarding climate change, but merely to show "that there is scientific consensus over the basic proposition that [vernal pool] species are being adversely affected by climate change, and not for any site-specific analysis." (ECF No. 45 at 6.)

Plaintiffs attaches the declaration of Ross A Middlemiss, an attorney for Plaintiffs, that itself includes two attachments: a copy of *Climate change impacts on vernal pool hydrology and vegetation in northern California*, 574 JOURNAL OF HYDROLOGY, 1003-1013 (2019) by Montrone et al., and *Inundation timing, more than duration, affects the community structure of California vernal pool mesocosms*, 732 HYDROBIOLOGIA, 71-83 (2014), by Kneitel, J.M. (ECF No. 30-3.) Federal Defendants note that neither study was raised during the parties' negotiations over the administrative record, and argue that the studies attack the merits of the Biological Opinion, which puts them outside of the Court's purview. (ECF No. 38 at 3.) Should the Court consider the documents, Federal Defendants separately argue that the Court should then also consider the declaration of Michal Fris, who provides substantive rebuttal as to why Plaintiffs' proffered studies do not demonstrate that the USFWS has failed its duties to consider the best available scientific studies as they pertain to contemporary climate change discourse, as required by the ESA. (*Id.* at 3-4.)

Typically, a court reviewing an agency action under the APA will rely solely on the administrative record prepared by and agreed upon by the parties. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). However, as relevant here, a plaintiff can submit additional materials outside the administrative record to aid the

1 court in weighing “whether the agency has considered all relevant factors and has
2 explained its decision.” *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004)
3 (internal quotations omitted).

4 The Court will accept Plaintiffs’ proffered declaration and attached studies
5 *solely to* assess the parties’ claims regarding whether the USFWS properly accounted
6 for the best available scientific studies when making its determination regarding
7 climate change’s impact on the vernal pool habitats. As Federal Defendants properly
8 point out, Plaintiffs cannot present extra-record studies to challenge substantive
9 agency determinations after the fact. *San Luis & Delta-Mendota Water Auth. v. Locke*,
10 776 F.3d 971, 993 (9th Cir. 2014) (“Although the relevant factors exception permits a
11 district court to consider extra-record evidence to develop a background against
12 which it can evaluate the integrity of the agency’s analysis, the exception does not
13 permit district courts to use extra-record evidence to judge the wisdom of the
14 agency’s action.”). However, under *Lands Council*, Plaintiffs may present extra-record
15 studies to support their argument that an agency has not weighed all relevant factors,
16 here being the contemporary body of scientific data regarding climate change’s
17 impact on vernal pool habitats and the species that depend on them. As emphasized
18 earlier, the Court will limit its analysis of the studies to their existence and
19 representation that there was contemporary scientific consensus that climate change
20 impacted vernal pools, rather than the intricacies of those studies or their
21 methodologies.

22 The Court will also decline to assess Federal Defendants’ proffered Fris
23 Declaration, as it addresses the substance of the articles provided by Plaintiffs and the
24 methods used by the studies’ authors. Because the Court is merely acknowledging
25 the studies’ existence rather than their underlying merits and methodologies,
26 consideration of the Fris Declaration is improper and unnecessary. Further, Federal
27 Defendants identify no binding caselaw that supports their argument that the Fris
28 Declaration should be considered. Instead, they rely on out-of-district and out-of-

1 circuit caselaw for the proposition that the Court should allow rebuttal to expert
2 witness testimony. *See, e.g., United States v. Jacques*, 784 F. Supp. 2d 59, 66-67 (D.
3 Mass. 2011). But the Middlemiss Declaration and accompanying studies are not
4 expert testimony, and as emphasized earlier, the Court is not considering the scientific
5 merits of the accompanying articles. Instead, the extra-record documents are
6 accepted for the narrow purposes of assessing whether the USFWS has met its burden
7 of assessing the best contemporary scientific evidence regarding climate change and
8 its impact on vernal pools.

9 **b. Acknowledgment of Climate Change**

10 When drafting a Biological Opinion, an agency must “use the best scientific and
11 commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). In the ESA
12 context, Courts have read this requirement as including agencies to adequately
13 address climate change’s impact on ESA-listed spaces. *Appalachian Voices v. U.S.*
14 *Dept. of Interior*, 25 F. 4th 259, 271 (4th Cir. 2022) (“It is clear, however, that climate
15 change typically must form part of the analysis in some way.”) (citing *S. Yuba River*
16 *Citizens League v. Nat’l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1274 (E.D. Cal.
17 2010)).

18 Vernal pool species are susceptible to the effects of climate change. *See, e.g.,*
19 AR 002027-002028 (certain meadowfoam populations “are less likely to adapt to
20 sudden environmental changes such as global climate change”). Despite this,
21 Plaintiffs allege that the USFWS “failed to incorporate a discussion of [climate
22 change’s] threats into any part of its jeopardy analysis.” (ECF No. 30 at 20.) Federal
23 Defendants concede that the Biological Opinion itself does not include the phrase
24 “climate change,” but counter that the Biological Opinion “incorporated documents
25 that discuss the threats the climate change poses for the species” and thus the
26 Biological Opinion’s “effects analysis adequately addressed those threats.” (ECF No.
27 39 at 22-23.)

28 It is true that the Biological Opinion references several existing documents

(various 5-year reviews for vernal pool species) that expressly discuss climate change's impacts on ESA-listed vernal pool species. See, e.g., AR 001814 (discussing climate change's impacts on vernal pool shrimp). However, Federal Defendants' assertion that the Biological Opinion "expressly incorporates" those documents is unsupported by the record. (See ECF No. 50 at 13.) For example, when discussing the status of the vernal pool fairy shrimp, the Biological Opinion merely notes: "For the most recent comprehensive assessment of the rangewide status of the fairy shrimp, please refer to the *Vernal Pool Fairy Shrimp (Branchinecta lynchi)* 5-Year Review: Summary and Evaluation (Service 2007a)." The Biological Opinion does not otherwise incorporate the 5-year review's analysis or discussion of climate change. AR 000859-000860. The Biological Opinion goes on to note that "[t]hreats such as the loss of vernal pool habitat primarily due to widespread urbanization were evaluated during the reviews and discussed in the final documents have continued to act on the fairy shrimp and tadpole shrimp since the 2007 5-year reviews were finalized." AR 000860. While the Biological Opinion explicitly recognizes the continued threat of urbanization, it does not do so for climate change. The Biological Opinion then lists other examples of ongoing threats, including those stemming from infrastructure and urbanization, and changes in vernal pool hydrology due to the increase in the runoff associated with infrastructure. *Id.* Finally, the Biological Opinion notes that "[i]n addition, truncation or alteration of hydrologic patterns can change the timing and duration of ponding in some types of vernal pools." *Id.*

The Biological Opinion fails to address climate change in the context of its other discussed species. For example, under its meadowfoam section, it similarly states: "For the most recent comprehensive assessment of the rangewide status of the meadowfoam, please refer to the *Limnanthes floccose ssp. Californica (Butte County Meadowfoam)* 5-Year Review: Summary and Evaluation (Service 2008). AR 000860. Again, it does not otherwise reference climate change when discussing the threats facing the species, nor are any of the threats discussed clearly linked or exacerbated

1 by climate change.

2 In *S. Yuba River Citizens League*, a case from this district, the court was
3 confronted with a similar issue of whether it could read in climate change's impacts
4 into more generalized discussion of hydrologic flow effects. 723 F. Supp. 2d at 1273-
5 74. The court found that an agency that failed to expressly mention climate change or
6 discuss its impacts could not rely on general references to changes in water
7 temperature and its effects on ESA-listed species to satisfy its requirement to assess
8 the best scientific available. *Id.* This Court agrees. It is true that the Biological
9 Opinion references documents that themselves expressly discuss climate change and
10 its impacts on the vernal pool species. But the Biological Opinion does not in fact
11 expressly incorporate those documents – it simply refers readers to them and does
12 not otherwise engage with their conclusions regarding climate change or work those
13 conclusions into the Biological Opinion's analysis. Federal Defendants' attempt to tie
14 discussion of other threats facing vernal pool species to climate change is
15 unpersuasive. The Biological Opinion only generally references changes in
16 "hydrologic patterns" and the dangers of "habitat loss," but does not tie either of
17 those threats to climate change. There could be a variety of factors that influence
18 changes in hydrologic patterns or habitat loss, and Federal Defendants' argument that
19 climate change would necessarily be linked to those issues is feeble without any effort
20 to establish a connection between them. This issue is nearly identical to what the
21 court confronted in the *S. Yuba River Citizens League* court, in which the court noted:
22 "Although the [Biological Opinion] discussed present impacts on temperature, the
23 [Biological Opinion] does not address whether global warming will alter the
24 temperature that results from a given flow regime, nor does the [Biological Opinion]
25 address whether global warming will inhibit the ability to provide the presently-
26 anticipated flow regimes." *Id.* at 1274.

27 Federal Defendants' reliance on *Concerned Friends of the Winema v. McKay*,
28 614 F. Supp. 3d 756, 774 (D. Or. 2022) for the proposition that the Biological

1 Opinion's climate change analysis is sufficient if it identifies and addresses related
2 effects on a species is misplaced. (See ECF No. 39 at 23.) That case is arguably
3 somewhat distinguishable because the Biological Opinion at issue there
4 acknowledged, at least facially, climate change's impact on the ESA-listed species.
5 *Concerned Friends of the Winema*, 614 F. Supp. 3d at 774 (noting that the Biological
6 Opinion stated: "historical loss of Oregon spotted frog habitats and lasting
7 anthropogenic changes in natural disturbance processes are exacerbated by the
8 introduction of reed canary grass, non-native predators, and *potentially climate*
9 *change*"). There, the district court granted summary judgment to the federal agency,
10 the U.S. Forest Service, finding that the Biological Opinion's indirect analysis of
11 climate change was sufficient to comply with the agency's responsibility of addressing
12 the best scientific data available. *Id.* at 760-70. In any event, that case was later
13 overruled in part by the Ninth Circuit (after briefing had been completed in the
14 present matter), which noted the Biological Opinion's discussion of climate change
15 was "deficient" because it did "not account for climate change as a cumulative effect
16 or baseline condition." *W. Watersheds Project v. McKay*, No. 22-35706, 2023 WL
17 7042541, *2 (9th Cir. Oct. 26, 2023). The Ninth Circuit critiqued the Biological
18 Opinion's lack of assessment on how climate change would impact other local
19 environmental conditions such as changes in water level and streamflow, determining
20 that the Biological Opinion's omission amounted to a "fail[ure] to consider an
21 important aspect of the problem." *Id.* Here, as discussed above, the USFWS'
22 Biological Opinion fails to connect any of its identified environmental concerns to
23 climate change.

24 While it is true that Biological Opinions need not be written with absolute
25 clarity, courts must still critically assess whether an agency has sufficiently made clear
26 how it arrived at its ultimate conclusions, such as a finding of no jeopardy. *Motor*
27 *Vehicle Mfrs. Ass'n.*, 463 at 43. Here, the general references to threats that may, but
28 not necessarily, implicate climate change is insufficient to satisfy the USFWS's

1 responsibility to assess the best scientific data and its duty to incorporate climate
2 change into its analysis. Accordingly, Plaintiffs identification of additional studies via
3 the Middlemiss declaration, which demonstrate that there was a contemporary body
4 of scientific data discussing climate change and its impact on vernal pool species, are
5 particularly pertinent to establish the USFWS' lack of climate change discussion. That
6 agency's failure to meaningfully address that body of existing scientific data indicates
7 that its assessment process was arbitrary and capricious.

8 **iii. The USFWS' Previous Findings Related to Meadowfoam Impact**

9 Plaintiffs point to a previous assessment conducted by the USFWS for a similar
10 local project in which the agency determined that project would jeopardize local
11 meadowfoam populations. Plaintiffs contend that the USFWS' departure from that
12 position for the Proposed Project in dispute in this case is arbitrary and capricious.
13 Plaintiffs further argue that the Corps' reliance on a different section of that draft
14 biological opinion in rejecting an alternative to the project at issue in this case is
15 indicative that the draft biological opinion is more than just a draft. Defendants
16 counter that the previous finding was solely a draft and the agency never made a final
17 determination regarding the project's effects on meadowfoam, and therefore, does
18 not conflict with the agency's present conclusions.

19 Plaintiffs identify a 2002 draft biological opinion for the Eastgate development
20 project in southeast Chico, which was a proposed mixed-use project that would
21 impact local ESA-listed species. AR 008445-008471. That draft biological opinion
22 found that due to the "critically endangered status of the meadowfoam and the
23 importance of each population to the survival and recovery of this species,
24 preservation of existing habitat, ideally with management for viable populations, is
25 essential to its conservation. AR 008442; (ECF No. 30 at 21-24.) That is, the draft
26 biological opinion explicitly recognized that the protection of "each population" of
27 meadowfoam was essential. The Proposed Project in this case, however, would result
28 in the loss of one of the four local meadowfoam populations, thereby conflicting with

1 the agency's previous conclusions that protection of all the local populations was
2 "essential." (ECF No. 39 at 12;) see AR 008442. Plaintiffs posit that the threats facing
3 meadowfoam populations have not abated since 2002, and thus, USFWS' current
4 conclusion that meadowfoam species would not be placed in jeopardy by the
5 Proposed Project is contradictory of its previous finding and therefore arbitrary and
6 capricious. Defendants, in response, note that the current Proposed Project includes
7 mitigation measures ameliorating the development's effect on meadowfoam that
8 were not present in the Eastgate project's plans. (See ECF No. 39 at 18.) The
9 inclusion of mitigation measures distinguishes, at least somewhat, the previous
10 tentative conclusion regarding jeopardy to meadowfoam from the current Proposed
11 Project's finding.

12 Federal Defendants also fairly note that the 2002 document to which Plaintiffs
13 point is a draft document that was never finalized and was therefore subject to
14 change. (ECF No. 39 at 15-16;) see *United States Fish & Wildlife Serv. v. Sierra Club,*
15 *Inc.*, 592 U.S. 261, 270-71 (2021) (draft biological opinions allow for the "possibility of
16 postcirculation changes"). To rebut this, Plaintiffs point out that Defendants relied in
17 part on the 2002 Eastgate draft biological opinion when assessing the Proposed
18 Project at issue in this case. See AR 35:000368. The Corps, in weighing the merits of
19 off-site Alternative 2 to the Proposed Project (Defendants' requirement to assess
20 alternatives will be discussed later in this Order), state:

21
22 This alternative is a 215-acre parcel located south of Humboldt
23 Road in the eastern portion of the City of Chico. Dead House Slough is
24 located to the north of the parcel. Little Chico Creek is south of the parcel.
25 The parcel is zoned by the City of Chico as Low Density
26 Residential/Resource Constraint. The parcel is located in the foothills with
27 substantial topographic relief. The parcel is designated as an FD-SD
28 overlay zone, which means it has substantial topographic relief and would
require site-specific design solutions to develop. Access to the site is
limited to Humboldt Road with no alternative access. Development
would require extensions of utilities, as well as water and sewer services
to the site. As of 2018, the City of Chico was considering closing

1 Humboldt Road. In addition, based on a review of aerial photography, the
2 site appears to be bisected by a drainage and several tributaries to this
3 main drainage exist. The site also appears to have mima mound
4 topography which is likely to support vernal pools or other seasonal
5 wetlands. The western portion of the site is also designated as critical
6 habitat for [meadowfoam] and was subject to a draft Jeopardy Biological
7 Opinion for a previously proposed Eastgate Project development. The
8 USFWS stated in their draft jeopardy opinion that development of the site
9 would jeopardize the continued existence of [meadowfoam]. Based on
10 this information, we have determined the development of [Alternative 2]
11 would result in increased adverse effects to the environment. Therefore,
12 this alternative has been eliminated from consideration.

13 AR 35:000368.

14 On this point, it is not clear to the Court whether Alternative 2 was rejected
15 solely because of the 2002 draft biological opinion's findings, or whether there were
16 additional factors considered. While the Corps identifies additional considerations
17 beyond the project's effects on meadowfoam such as the need for "site-specific
18 design solutions" and "extensions of utilities, as well as water and sewer services to the
19 site," the Corps' analysis does not indicate how much weight those factors were given,
20 if any, as opposed to the environmental impacts in its rejection of Alternative 2.

21 The Court shares Plaintiffs' concern that Federal Defendants are picking
22 elements of the 2002 draft biological opinion to rely on when convenient while
23 simultaneously disavowing the opinion as merely a draft when it conflicts with Federal
24 Defendants' contemporary conclusions. However, as both parties recognize, the 2002
25 draft biological opinion is just that – a draft. The Corps' reliance on the draft opinion
26 appears to be limited and cabined to the analysis of an alternative to the project that
27 would be precisely where the once-proposed Eastgate project was. That is, the
28 USFWS did not act improperly by failing to impute the preliminary findings of a draft
biological opinion to an entire new project when that draft opinion was focused on
development of a certain parcel that is different from where the new project is
proposed to be placed.

The Court recognizes that the underlying merits regarding ESA-listed species in

1 the 2002 draft biological opinion appear at least in part at odds with the conclusions
2 of the finalized 2019 Biological Opinion implicated in this case, and the Court does
3 not mean to downplay this inconsistency. But given the unfinalized status of the 2002
4 draft biological opinion, the Corps' identification of distinguishing factors such as the
5 contemporary mitigation measures not present in the Eastgate project's plans, and the
6 Corps' limited reliance on it the draft opinion, the Court declines to view the 2002
7 draft biological opinion's conclusions as binding precedent to which Federal
8 Defendants must adhere. Accordingly, the Court finds that any citation to or reliance
9 on the draft biological opinion does not conflict with Federal Defendants' conclusions
10 on the current Proposed Project and is not arbitrary and capricious.

11 **iv. Credence Given to 2005 Recovery Plan and Unenforceable**
12 **Mitigation Methods**

13 Plaintiffs assert that that the USFWS' own 2005 Recovery Plan for vernal pool
14 species called for significant conservation efforts that are incongruent with the
15 agency's later decision to permit the Proposed Project. Further, Plaintiffs point to
16 mitigation methods identified in the 2005 Recovery Plan that the agency relies on but
17 are not enforceable and have not been tested as viable options. The USFWS counters
18 that its 2005 Recovery Plan is itself not a binding document, and that developers of
19 the Proposed Project are not tied to particular mitigation methods, although they
20 must utilize *some* mitigation measures in general.

21 The 2005 Recovery Plan calls for 85% of local vernal pool fairy shrimp habitat
22 and 95% of vernal pool tadpole shrimp and meadowfoam habitat to be preserved,
23 while the Proposed Project is slated to only preserve 20% of vernal pool shrimp
24 habitat and 80% meadowfoam habitat. See AR 000867. But, Federal Defendants are
25 correct that recovery plans, such as the 2005 Recovery Plan at issue here, are not
26 binding. *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) ("Recovery
27 Plans are prepared in accordance with section 1533(f) of the Endangered Species Act
28 for all endangered and threatened species, and while they provide guidance for the

1 conservation of those species, they are not binding authorities.”). While Plaintiffs’
2 reliance on the actual text of 16 U.S.C. section 1533(f)(1), which states that USFWS
3 “shall develop and implement plans” (emphasis added), does demonstrate the
4 agency’s requirement to effectuate environmental conservation efforts, the agency’s
5 approach here of referencing the 2005 Recovery Plans for various vernal pool species
6 appears consistent with its requirement. See, e.g., AR 000860. The agency has some
7 leeway in how it preserves the habitats it identified and which mitigation efforts may
8 be utilized by developers, and a recovery plan is only a non-final step in that process.
9 See *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 418 (9th Cir. 2023)
10 (“Moreover, a recovery plan does not contain any ‘binding legal obligations to which
11 [the agency] is subject.’”) (quoting *Whitewater Draw Nat. Res. Conservation Dist. v.*
12 *Mayorkas*, 5 F. 4th 997, 1009 (9th Cir. 2021)). That is, the recovery plan is more of a
13 roadmap than a legal obligation.

14 Mitigation measures proffered by a Biological Opinion must constitute a “clear,
15 definite commitment of resources” and be “under agency control or otherwise
16 reasonably certain to occur.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723,
17 743 (9th Cir. 2020) (internal quotations omitted). Even though the 2005 Recovery Plan
18 is nonbinding, Federal Defendants do point to a number of mitigation possibilities
19 identified in the Plan as a basis for allowing the Proposed Project to proceed. See AR
20 000864. However, adherence to those specifically identified mitigation methods
21 appears unenforceable, and the mitigation methods themselves are vague. See *id.*
22 For example, a proposed mitigation method for meadowfoam conservation is the
23 transfer of that species’ seeds to create a new occupied habitat in the Proposed
24 Project’s onsite reserve. AR 000859. But, there is no binding requirement in the
25 Biological Opinion that the onsite preserve be enacted, meaning there is no
26 guarantee that seed transfer would occur. Another mitigation method identified in
27 the Biological Opinion is the utilization of mitigation credits for a meadowfoam seed
28 bank, yet the USFWS does not identify whether those credits are available, or

1 purchasing another meadowfoam-occupied parcel, which again, the agency has not
2 determined is possible. *See id.*

3 Federal Defendants push the onus of determining the viability of these
4 mitigation measures onto the developers. (ECF No. 39 at 21 (“[T]he developer
5 proposed the alternative conservation methods for [the USFWS] to consider in the
6 [Biological Opinion], so it was reasonable for [the USFWS] to assume that the
7 developer could carry out the conservation measures it proposed.”) The Court is
8 somewhat troubled by this approach. *See Selkirk Conservation All. v. Forsgren*, 336
9 F.3d 944, 955 (9th Cir. 2003) (“Even given the cooperation of private entities, the
10 agencies must vigilantly and independently enforce environmental laws.”) However,
11 as emphasized earlier, the 2005 Recovery Report need not be binding on the agency
12 or developers. *Cascadia Wildlands v. Bureau of Indian Affs*, 801 F.3d 1105, 1114 n.8
13 (9th Cir. 2015) (“The Endangered Species Act does not mandate compliance with
14 recovery plans for endangered species.”). Accordingly, any mitigation methods
15 identified the 2005 Recovery Report need not be made enforceable by a Biological
16 Opinion, and their identification and the general requirement that there be some
17 mitigation measures satisfies the Report’s duty of creating a roadmap of viable
18 mitigation actions for developers and the agency. Although the Court is circumspect
19 of relying so heavily on the developers’ identification of conservation methods without
20 oversight from the USFWS, the Court declines to view the agency’s reliance on the
21 2005 Recovery Report’s (nonbinding) mitigation measures as arbitrary and capricious.

22 **B. Presence of Giant Garter Snake at the Proposed Project Site**

23 Permitting agencies must assess the direct and indirect effects of a proposed
24 development on all ESA-listed species that would be impacted by that development.
25 50 C.F.R. § 402.02; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir.
26 2011). But “if the agency determines that a particular action will have no effect on an
27 endangered or threatened species, the formal consultation requirements are not
28 triggered.” *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 871 (E.D. Cal. 2004)

1 (citing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir.1994)).

2 In assessing the Proposed Project, the Federal Defendants did not account for
3 any impacts on the ESA-listed giant garter snake, finding that the proposed
4 development site does not contain sufficient suitable habitat for the snake and that
5 there have been no documented occurrences of the snake within five miles of the site.
6 The analysis of this issue by the Corps provided, in relevant part:

7 There are no CNDDDB occurrences of this species within five miles of the
8 Action Area (CDFW 2018). The Action Area contains Butte Creek
9 Diversion Channel with steep banks that are perennially inundated.
10 However, the Butte Creek Diversion Channel does not provide vegetative
11 cover and is too shallow during the snake's active period (April through
12 October) to support habitat for this species. The depressional perennial
13 marsh provides marginal habitat for GGS. However, it is too small
14 (approximately 1.24 acres) to support a GGS population and the
15 depressional perennial marsh is not in the vicinity of other suitable habitat
or corridors that would connect to known populations of GGS. Given the
lack of suitable habitat within the Action Area coupled with the absence
of occurrences in the vicinity, this species is not expected to occur on or
near the Action Area. Therefore, this species is not expected to be
affected by the Proposed Action and is not addressed further in this BA.

16 AR 250:005400.

17 Plaintiffs contest this finding, alleging that the giant garter snake has been
18 found at and within five miles of the site, and that regardless, the agency should
19 assume its presence given the availability of the snake's habitat in the project site.
20 Further, Plaintiffs point to studies conducted as part of the development process of
21 adjacent sites, which found the need to assess impacts on the giant garter snake.

22 Giant garter snakes live in upland and aquatic habitats, which the parties agree
23 are present at the proposed project site. (ECF No. 30 at 26; ECF No. 39 at 26-27;) AR
24 000896. This includes vegetative cover such as cattail, which are present within the
25 Proposed Project area's freshwater marshes. AR 002276. Additionally, giant garter
26 snakes have been observed using burrows for refuge in the summer as much as 50
27 meters away from the edge of marsh habitats. AR 008152. Defendants argue that the
28 giant garter snake habitat within the Proposed Project is too small to support a snake

1 population, noting that it is only approximately 1.24 acres, and that regardless of the
2 present suitable habitat, there have been no sightings of the snake. AR 250:005400.

3 Contrary to Federal Defendants' claim that the giant garter snake is not present
4 in the area, there have been sightings of at least one giant garter snake within five
5 miles of the proposed site at a nearby location called Dead Horse Slough. AR 005067
6 ("A giant garter snake [] was sighted during a sight visit in close proximity to Dead
7 Horse Slough, therefore [giant garter snake] habitat is assumed to exist within Dead
8 Horse Slough."). After first claiming that there have been no documented sightings of
9 a giant garter snake in the area (ECF No. 39 at 26-27), Federal Defendants then
10 shifted their argument to be that the one sighting identified by Plaintiffs is separated
11 from the Proposed Project site "by State Route 32 and a distance of about a mile that
12 includes residential and commercial development" (ECF No. 50 at 15). While this may
13 be true, the underlying reasoning of the Biological Opinion's finding of "no effect" on
14 the giant garter snake is premised on the assumption that the species "has not been
15 detected within five miles of the action area." (ECF No. 39 at 28; see *id.* at 29 (noting
16 Federal Defendants' argument that "it is undisputed that no [giant garter snake]
17 occurrence has ever been recorded within five miles of the Stonegate Project action
18 area")). Federal Defendants may not retroactively change their argument in their
19 Reply after Plaintiffs identify faulty assumptions underlying Defendant's Biological
20 Opinion. If the specific location of the giant garter snake sighting was significant, that
21 must have been addressed by the USFWS during the permitting process, rather than
22 justified by post-hoc rationalizations in Federal Defendants' briefing.

23 Separately, Plaintiffs point to nearby developments that accounted for giant
24 garter snakes during their permitting process. (See ECF No. 30 at 26-28.) These
25 projects are the State Route 32 Widening Project (AR 000888-000907) and the
26 Meriam Park Development Project (AR 001740-001769). Both projects are in the
27 same vicinity as the Proposed Project, and both assessed potential impacts on the
28 giant garter snake. For example, the State Route 32 Widening Project determined

1 that “[t]he snake is assumed to occur in Dead Horse Slough, and because of the
2 presence of suitable habitat, the Service believes that the snake is reasonably certain
3 to occur within the proposed project’s action area and, therefore, the proposed
4 project is likely to adversely affect the snake.” AR 000896. And, the Meriam Park
5 Development Project found that “[t]he proposed project would permanently destroy
6 3.6 acres and temporarily affect (over multiple seasons) 5.69 acres of giant garter
7 snake habitat.” AR 001743.

8 Federal Defendants seek to distinguish these two projects. (See ECF No. 39 at
9 28.) They argue first that the State Route 32 Widening Project merely assumed that
10 there were giant garter snakes at the development location. (*Id.*) But critically, the
11 USFWS itself acknowledged the potential effect on the snake on the State Route 32
12 Widening Project, noting that “because of the presence of suitable habitat, the Service
13 believes that the snake is reasonably certain to occur within the proposed project’s
14 action area and, therefore, the proposed project is likely to adversely affect the snake
15 through temporary loss of 0.227 acres of potential aquatic habitat and permanently
16 destroy 1.519 acres of upland habitat and 0.093 acres of aquatic habitat.” AR 000896.
17 So it was not just that the Widening Project assumed snakes were there – USFWS itself
18 supported that assumption.

19 Federal Defendants further counter that the amount of giant garter snake
20 habitat at the Proposed Project site is “marginal.” (ECF No. 39 at 28.) As an initial
21 matter, comparing the acreage at issue in the Proposed Site and that of the Widening
22 Project, the Court is unclear why the former is marginal and the latter is cause for
23 concern; the Biological Opinion does not discuss this matter in any depth. More
24 significantly though, the Biological Opinion’s reasoning that the habitat is marginal is
25 expressly “coupled with the absence of occurrences [of giant garter snake] in the
26 vicinity” and with the assumption that there have been no “occurrences of this species
27 within five miles of the Action Area.” AR 250:005400. But as discussed above, there
28 has been at least one sighting of the giant garter snake within five miles. It is

1 impossible for the Court to decouple Federal Defendants' reliance on the small area
2 of habitat and its erroneous assumption that there had been no sightings of the snake
3 in the area.

4 As for the Meriam Park Development Project, Federal Defendants contend that
5 that development affected nearly nine times the amount of giant garter snake habitat,
6 and again that there had been no local sightings of the snake. (ECF No. 39 at 28-29.)
7 But that does not detract from Plaintiffs' point that assessment of giant garter snake at
8 the Proposed Project sight is improperly tied to an assumption that there have been
9 no snake sightings. And both projects indicate that it would be reasonable to account
10 for their presence absent some valid justification as to why doing so was unnecessary.

11 Both sides cite to *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006
12 (9th Cir. 2012) for the proposition that the USFWS must assess whether an ESA-listed
13 species will be affected, and that the agency is only discharged from further
14 assessment if it properly finds that there would be "no effect" on the species. Here,
15 the agency's conclusion that the Proposed Project would have no effect on the species
16 makes sense if premised upon the assumption that no snake has been sighted in the
17 area. But Plaintiffs have identified that there has been at least one giant garter snake
18 sighting in the area. And while the Proposed Project contains giant garter snake
19 habitat, and other nearby projects accounted for potential habitat loss, Federal
20 Defendants reached the conclusion that the species would not be affected by the
21 Proposed Project, despite acknowledging separately that development tends to
22 significantly impact the species and its habitat. As in *Karuk Tribe*, Plaintiffs have thus
23 identified a species and habitat that would be affected by the Proposed Project but
24 that have not been properly accounted for, evincing the Federal Defendants'
25 noncompliance with the ESA.

26 To sum, the Court finds that Federal Defendants' failure to consider potential
27 effects on the ESA-listed giant garter snake was based on a faulty assumption that
28 there have been no sightings of the snake within five miles of the project renders its

1 Biological Opinion arbitrary and capricious. The Court appreciates that this
 2 conclusion is based on the single sighting of a giant garter snake twelve years before
 3 the no-effect finding was issued for the Proposed Project. And it may well be that,
 4 after a more thorough analysis, Federal Defendants conclude the project will in fact
 5 have a minimal impact on the snake. But the factual underpinning that was used to
 6 justify conducting *no* analysis of the giant garter snake – that there have been no
 7 sightings within five miles of the project – is simply incorrect, rendering the Biological
 8 Opinion invalid. Moreover, this sighting is in the context of the fact that the project
 9 type contains the appropriate habitat for the giant garter snake, and that nearby
 10 projects accounted for the presence of the giant garter snake, including at the
 11 USFWS’s urging in at least one circumstance. The Court therefore grants Plaintiffs’
 12 request for summary judgment on this issue.³

13 **C. LEDPA**

14 The CWA aims to “restore and maintain the chemical, physical, and biological
 15 integrity of the Nation’s waters” by prohibiting the unpermitted discharge of
 16 pollutants into navigable waters of the United States. 33 U.S.C. §§ 1251(a), 1311(a).
 17 The Corps, under oversight from the EPA, issues permits for discharges of dredged or
 18 fill materials. *Id.* § 1344(a)-(c). When issuing this type of permit, known as a Section
 19 404 permit, the Corps must follow binding guidelines set out in EPA regulations (the
 20 “404(b)(1) Guidelines” or “Guidelines”). 33 U.S.C. § 1344(b); 40 C.F.R. Ch. 1, Subch. H,
 21 Pt. 230. The applicant bears the burden of proving that no practicable alternatives
 22 exist. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1163 (10th Cir.
 23 2002) (citing *Res. Invs., Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1167 (9th Cir.
 24 1988)).

25 The Corps may not issue a Section 404 permit if there is a “practicable
 26

27 ³ Separately, the parties agree the Court should grant summary judgment on to Federal Defendants on
 28 the failure-to-consult claim against the Corps, and the Court will do so. (See ECF No. 44 at 25-26, n.12
 (expressly conceding the point to Defendants).)

1 alternative to the proposed discharge which would have less adverse impact on the
2 aquatic ecosystem" and which "does not have other significant adverse environmental
3 consequences." 40 C.F.R. § 230.10(a). "An alternative is practicable if it is available
4 and capable of being done after taking into consideration cost, existing technology,
5 and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). The
6 Guidelines prohibit the Corps from permitting anything other than the least
7 environmentally damaging practicable alternative ("LEDPA"). See 40 C.F.R.
8 §230.10(a).

9 Here, Plaintiffs argue that the Corps failed to adopt the LEDPA as required
10 under the CWA, and therefore the subsequent issuance of the Section 404 permit is
11 improper. (ECF No. 30 at 29-32.) Specifically, Plaintiffs allege that the official LEDPA,
12 known as Alternative 5, considered by the Corps was not actually the least damaging
13 alternative; Plaintiffs view the actual LEDPA as being either Alternative 1 or the "Bruce
14 Road Alternative" (although Federal Defendants fairly and correctly point out that
15 Plaintiffs appear to conflate the two). (*Id.*) Federal Defendants counter that the Corps
16 and Defendant-Intervenor considered three off-site alternatives, five on-site
17 alternatives, and a no-action alternative. (ECF No. 39 at 29.) Alternative 1 would
18 develop 117 acres of land, including land east of Bruce Road. AR 35:000369; AR
19 308:006278-79, 308:006315. Meanwhile, the Bruce Road Alternative, which is indeed
20 distinct from Alternative 1, would restrict development to the 50-acre parcel west of
21 Bruce Road. AR 302:006071. The Court finds that Defendants jointly proffer sufficient
22 reasons for not considering these alternatives as viable, and therefore finds that there
23 is no violation of the CWA.

24 **i. Alternative 1**

25 The Corps must consider cost in its LEDPA analysis. 40 C.F.R. § 230.10(a)(2);
26 *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir. 1986) ("The regulations
27 explicitly charge the Corps with taking [into consideration] cost"). Plaintiffs appear to
28 argue that Defendants improperly rejected Alternative 1 for cost reasons, noting that

1 Alternative 1 would result in an estimated "19 percent increase in the cost per
2 developable acre from \$256,266 to \$305,034." (ECF No. 30 at 31); see AR 35:000369.
3 Plaintiffs attack the rejection of Alternative 1 on the basis that there is no evidence in
4 the administrative record of the increase in cost or how that would render Alternative
5 1 impracticable. But, there is evidence in the administrative record that the increase in
6 costs and decrease in project scope would render the project financially unviable. For
7 example, Defendants jointly assessed the costs and determined that "the 19%
8 increase in cost per developable acre would be distributed over a substantially
9 decreased development potential (57% decrease in development footprint acreage),
10 resulting in cost per unit (for residential development) and cost per square foot (for
11 commercial development) exceeding regional prices and adversely affecting this
12 development from providing an economically viable project with competitive prices."
13 AR 301:006027. And in a subsequent study, Defendant-Intervenor supplied data to
14 the Corps on current regional costs, bolstering the conclusion that Alternative 1
15 simply was not economically feasible. See AR 296:005979-005982.

16 In sum, Defendants reasonably rejected Alternative 1 on economic viability
17 grounds. This alone is sufficient to remove Alternative 1 from consideration, and
18 therefore, the Court will not view Alternative 1 as the LEDPA.

19 **ii. Bruce Road Alternative**

20 Plaintiffs also propose that the Bruce Road Alternative may be the LEDPA.
21 Defendants counter that the Bruce Road Alternative was rejected due to its reduced
22 scope, which would not satisfy the Project's goal of meeting Chico's housing needs
23 and commercially activating the Bruce Road corridor. Given the various purposes
24 prompting the development, Defendant-Intervenors determined that the
25 development would need to be approximately 200 acres. AR 306:006203. The Bruce
26 Road Alternative would limit the Proposed Project to 50 acres. (See ECF No. 39 at 35.)
27 The administrative record supports Defendants' joint contention that the Bruce Road
28 Alternative was rejected because it cannot meet the various needs of the Proposed

1 Project based in on its limited size. See AR 302:006071. Simply put, reducing the
2 proposed acreage of the project by 75% would severely limit its ability to meet
3 Chico's identified housing and commercial needs. Rejecting this small-scale version
4 of the project was proper.

5 **D. Preparation of an EA and not an EIS**

6 Prior to implementing certain agency actions, an agency must first prepare an
7 environmental assessment, or "EA," describing initial environmental impacts of the
8 action. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d
9 1172, 1185 (9th Cir. 2008) (citing 40 C.F.R. § 1508.9(a)(1)). An EA is a "'concise public
10 document' that '[b]riefly provide[s] sufficient evidence and analysis for determining
11 whether to prepare an environmental impact statement or a finding of no significant
12 impact.'" *Id.* (quoting 40 C.F.R. § 1508.9(a)(1)). For "major Federal actions
13 significantly affecting the quality of the human environment" or instances where
14 substantial questions are raised as to potential environmental effects, NEPA requires a
15 federal agency to prepare an environmental impact statement, or "EIS." 42 U.S.C.
16 § 4332(2)(C); *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th
17 Cir. 2004). An EIS is not required if the EA does not find that there will be a significant
18 environmental impact; in those instances, an EA is sufficient.

19 Here, the Corps prepared only an EA, and finding that there would be no
20 significant environmental impact, did not subsequently prepare an EIS. Plaintiffs
21 challenge this determination and allege that the Corps should have prepared an EIS
22 due to the substantial questions raised on the Proposed Project's environmental
23 impacts. (ECF No. 30 at 33-37.) Federal Defendants argue that the Corps fully
24 complied with its NEPA obligations because there were no substantial questions
25 raised as to the environmental effects, and accordingly, the Corps did not need to
26 prepare an EIS. (ECF No. 39 at 37-42.)

27 "To determine whether an action 'significantly' affects the environment,
28 agencies must consider both the 'context' and 'intensity' of the possible effects." *Am.*

1 *Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1007 (9th Cir. 2020) (citing 40
2 C.F.R. § 1508.27). Intensity refers to the severity of impact, and NEPA regulations
3 include ten intensity factors that agencies must consider. An action may be, but is not
4 necessarily, significant if any one of those factors is met. *Id.* at 1008 (internal citation
5 and quotations omitted).

6 Courts can consider many factors when assessing intensity, and all need not be
7 present in any given case. *See id.* As to the intensity of the Proposed Project, Plaintiffs
8 first argue that there is a substantial question as to the environmental impacts of the
9 Proposed Project. (ECF No. 30 at 34.) Plaintiffs point to numerous state and federal
10 entities, including the EPA, California Department of Fish and Wildlife, the USFWS,
11 and the City of Chico, all of whom have raised at least some level of concern
12 regarding the environmental impacts of the project. *See* AR 310:006326; AR
13 351:006703; AR 00851; AR 346:006687–006688. However, Federal Defendants fairly
14 point out that those comments predate the addition of an extensive mitigation plan
15 being added to the Project’s plans. *See* AR 35:000384. The comments identified by
16 Plaintiffs respond to an outdated version of the project, which did not incorporate
17 additional mitigation measures. *See, e.g.,* AR 351:006703 (submission from California
18 Fish and Wildlife Service cabining its comment in response to the Project “[a]s
19 described in the public notice”); *see also* AR 351:006706 (submission from same
20 agency noting that its comments are toward “the Project as proposed”). The
21 mitigation measures adapted are, at least on paper, significant. For example, they
22 include the proposed purchase of 12.22 seasonal wetland creation credits from the
23 Colusa Basin Mitigation Bank and 4.28 vernal pool establishment credits at the
24 Meridian Ranch Mitigation Bank (AR 35:000365), the elimination of development east
25 of the Butte Creek Diversion Channel and the elimination of a utility line crossing that
26 Channel (AR 35:000384), and the establishment of a 132-acre water preserve (AR
27 35:000384). On balance, the Court is not convinced that the substance of the
28 comments represents a substantial question, given that they do not address the most

1 recent iteration of the project, and due to the substantive differences between the
2 Project's iterations.

3 Second, Plaintiffs emphasize that the project would cause permanent impacts
4 to an ecologically sensitive area and that it would adversely affect ESA-listed species
5 and their habitats. (ECF No. 30 at 34.) Plaintiffs point to the EPA, which did initially
6 raise concerns about the project. However, the EPA then declined to elevate its
7 concerns following the addition of mitigation efforts discussed, as discussed in the
8 preceding paragraph. AR 198:003836. The decision of the EPA not to repursue its
9 comments regarding the Proposed Project is indicative to the Court of the weight of
10 the mitigation measures added to the project to the EPA, and the Court will decline to
11 view the EPA's original comments as an indicator of the current iteration of the
12 Project's impacts.⁴

13 Third, Plaintiffs argue that the project's controversial nature supports the need
14 to develop an EIS. (ECF No. 30 at 35.) Plaintiffs point to numerous comments
15 submitted by community members, agencies, and organizations regarding the
16 development. (*Id.*) But "[m]ere opposition to an action does not, by itself, create a
17 controversy within the meaning of NEPA regulations." *Am. Wild Horse Campaign*, 963
18 F.3d at 1011. Instead, a plaintiff must "cast [] serious doubt upon the reasonableness
19 of the agency's conclusions." *Id.* (quoting *Humane Soc'y of U.S. v. Locke*, 626 F.3d
20 1040, 1057 (9th Cir. 2010)). But in doing so, Plaintiffs rely on the previous California
21 Department of Fish and Wildlife and EPA comments. (ECF No. 44 at 39.) The Court
22 has already determined that those comments do not address the most up-to-date
23 project iteration, and therefore, carry less force. And, the mere submission of dozens
24 of comments submitted regarding the Proposed Project does not inherently render
25

26 ⁴ As discussed earlier in this Order, the Court acknowledges the criticisms of the nonbinding nature of
27 specific mitigation measures. However, given the various agencies' decision not to submit additional
28 comments following the addition of the mitigation measures to the Proposed Project, the Court
concludes that *those* agencies found the mitigation measures sufficient to ameliorate any previously
existing concerns.

1 the Project controversial. *See Am. Wild Horse Campaign*, 963 F.3d at 1006-07, 1011-
2 12 (holding that an agency decision that garnered nearly 5,000 public comment
3 letters was not controversial).

4 While it is true that the Court has concerns with the Biological Opinion on which
5 the EA relies, that does not render the project “controversial” such that an EIS was
6 required. That is because, at this stage, the failure to consider climate change and the
7 giant garter snake are procedural in nature, and the Court cannot conclude that either
8 issue will render the project sufficiently controversial to warrant an EIS. For example,
9 on remand, Federal Defendants may conclude that the impacts of climate change and
10 effects on the giant garter snake are not significant. On the other hand, on a harder
11 look at these issues, the Corps may determine that it should prepare an EIS; nothing in
12 this Order prevents the Corps from doing so. But on this record, Plaintiffs have not
13 established that there is sufficient environmental debate within the agencies that
14 would necessitate an EIS, especially given the Court’s deferential review to the
15 agency. *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

16 **CONCLUSION**

17 For the reasons discussed above, Plaintiffs’ Motion for Summary Judgment
18 (ECF No. 30) is GRANTED IN PART and DENIED IN PART. Federal Defendants’ Cross-
19 Motion for Summary Judgment (ECF No. 39) and Defendant-Intervenors’ Cross-
20 Motion for Summary Judgment (ECF No. 41) are GRANTED IN PART and DENIED IN
21 PART. Federal Defendants’ Motion to Exclude Plaintiffs’ Extra-Record Declaration
22 (ECF No. 38) is DENIED. The Court declares the USFWS 2020 Biological Opinion
23 unlawful under the ESA and arbitrary and capricious under the APA. The Court will set
24 aside and vacate the Biological Opinion on that basis.

25 The Court also declares that the Corps violated the ESA and APA by failing to
26 consult with the USFWS regarding potential impacts on the giant garter snake, and
27 issuance of the Stonegate permit is unlawful to the extent it relies on the parties’
28 failure to consult. The Court hereby enjoins any implementation of the Proposed

1 Project pending completion of a legally adequate Biological Opinion and consultation
2 regarding the giant garter snake.

3
4 IT IS SO ORDERED.

5 Dated: **July 17, 2025**


Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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