WINTER KING (CA Bar No. 237958)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Email: king@smwlaw.com

Attorneys for Plaintiff Upper South East Communities Coalition

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UPPER SOUTH EAST COMMUNITIES COALITION,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS; LT. GEN. THOMAS P. BOSTICK, in his official capacity, Chief of Engineers and Commanding General, U.S. Army Corps of Engineers; COL. MICHAEL J. FARRELL, in his official capacity, District Commander, Sacramento District, U.S. Army Corps of Engineers; and MICHAEL S. JEWELL Chief, Regulatory Division, Sacramento District, U.S. Army Corps of Engineers.

Defendants.

REGIONAL TRANSPORTATION COMMISSION OF WASHOE COUNTY,

Intervenor Defendant.

Case No. 2:15-cv-00930-JAM-DAD

Combined Reply in Support of Plaintiff's Motion for Preliminary Injunction

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INTRODUCTION

Plaintiff Upper South East Community Coalition has asked this Court to issue an injunction preventing the Regional Transportation Commission of Washoe County ("RTC") from building a six-lane, 4.5 mile highway ("Project") through the undeveloped floodplain and wetlands of the Truckee Meadows area of Reno and Washoe County, Nevada until the Court hears and decides the merits of the Coalition's claims. These claims allege that Defendants U.S. Army Corps of Engineers, et al. ("Corps") violated numerous regulations designed to implement the National Environmental Policy Act ("NEPA") when it issued a wetlands fill permit ("Section 404 Permit" or "Permit") for the Project. Specifically, the Corps violated NEPA by failing to prepare an environmental impact statement ("EIS") for this massive new road; it also violated its clear, regulatory obligations to notify the public when it issued an environmental assessment ("EA") and to provide the public with an opportunity to comment on the EA. The Coalition also alleges that the Corps failed to rebut the presumption, which is mandatory under the Clean Water Act ("CWA"), that there are other, less environmentally damaging ways of reducing traffic congestion in the region than building this new highway through the floodplain.

In response, the Corps and RTC (together, "Defendants") make two principal arguments: *First*, they argue, the Corps satisfied its obligation to involve the public in its NEPA review process by issuing a four-page notice in 2013, indicating that RTC had submitted an application for a wetlands fill permit. *Second*, they argue that the Corps properly determined the Project would not have a significant effect on the environment, and thus an EIS was not required, because of certain mitigation measures and design features that had been incorporated into the permit.

Neither argument justifies the Corps' violation of NEPA's implementing regulations, and thus the Coalition is likely to succeed on the merits of its case. NEPA requires the Corps to prepare an EIS whenever substantial questions are raised as to whether a project may have significant environmental impacts. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). Even if an EIS is not required, the Corps must circulate a draft EA for public review when "[t]he proposed action is, or is closely similar to, one which normally requires the preparation of an [EIS]." 40 C.F.R. § 1501.4(e)(2)(i). Here, the Project would cut straight through a floodplain and flood storage

basins, which, due to the region's mining history, contain mercury-laden soils. The Environmental Protection Agency ("EPA") was so concerned about the Project's impacts, including its potential to contaminate nearby Steamboat Creek with methylmercury, that it recommended denial of the Project and raised serious questions about the mercury analysis prepared by RTC. Contrary to Defendants' claims in their opposition briefs, the Corps did not address EPA's concerns; it ignored them. Thus, unlike the cases cited by Defendants, here, the Coalition has shown that there remain substantial questions about the Project's environmental impacts, and thus the Corps violated NEPA by failing to prepare an EIS or, at the very least, provide the public with an opportunity to comment on the environmental assessment ("EA").

Moreover, the design features and mitigation measures cited by Defendants do not resolve these substantial questions; nor will they prevent the irreparable harm faced by the Coalition and its members if construction is allowed to move forward. As another district court concluded in issuing an injunction to prevent development in Phoenix pending review of the Corps' issuance of another Section 404 Permit: "If this desert land is disrupted, it cannot be restored." *Save Our Sonoran, Inc. v. Flowers*, 227 F. Supp. 2d 1111, 1115 (D. Ariz. 2002). The same conclusion holds true here.

The Corps, in its opposition, has also failed to justify its conclusion that the Project is the "least environmentally damaging practicable alternative" for reducing future traffic congestion in the area. The Corps asserts that it did not reject any alternatives on the basis of cost, and thus disavows any reliance on RTC's questionable cost estimates. But this means that the only reason the Corps had for rejecting two alternatives involving widening existing roads was the following statement: "Often, it is very difficult to successfully relocate a business to a nearby location, particularly in areas where available properties are scarce." While the Corps calls this statement "self-evident," the agency points to no evidence to suggest it would be difficult to relocate businesses in this region, much less that this difficulty renders the alternatives impracticable.

Finally, RTC attempts to persuade the Court that it should not grant the Coalition's motion because the group filed an earlier "baseless" lawsuit challenging the construction of "Phase I" of the Project. This earlier suit was not baseless; it challenged RTC's blatant attempt to segment the Project into two pieces, thereby narrowing the scope of review for its Section 404 Permit and

putting a thumb on the scale in support of its preferred route. The Coalition only dismissed this action, as the Corps acknowledges in its brief, when the Corps submitted a sworn declaration that it would not consider the substantial resources already expended on Phase I—which is, indisputably, a bridge to nowhere—in determining whether there were practicable alternatives to "Phase II."

For all of these reasons, the Coalition urges the Court to grant its Motion for Preliminary Injunction and thus preserve the status quo until its claims can be heard on the merits.

ARGUMENT

I. The Coalition Is Likely to Succeed on the Merits.

A. The Corps Violated NEPA.

1. The Corps Failed to Provide the Public with Notice of the EA/FONSI and an Opportunity to Comment on It.

In this case, the Corps issued a Section 404 Permit for a highly controversial, six-lane highway through an undeveloped floodplain and federal flood storage basins on the basis of an EA/Finding of No Significant Impact ("FONSI") without first providing the public with any notice or opportunity to comment on the Corps' environmental analysis. In fact, the only notice the Corps ever provided to the public about the Project was its four-page, August 2013 notice indicating that RTC had applied for the Permit and the Corps would accept public comments on the application. Plaintiff's Documentary Evidence in Support of Plaintiff's Motion for Preliminary Injunction ("Pltf. Exh.") 33-545 to 548 (ECF 5-38 at 64-67). The Corps held no public meetings about the Project; it never provided notices to the public when the Project changed or when the Corps received additional scientific studies. The Corps did not even provide the public with notice that it had issued the Permit or the EA/FONSI.

Nonetheless, Defendants make two arguments to support their assertion that the Corps complied with NEPA regulations requiring federal agencies to "involve . . . the public, to the extent practicable," in the preparation of the EA[1]: *First*, they argue, the public had an opportunity to comment on the 2013 public notice. And *second*, they note that, despite the lack of communication

[1] 40 C.F.R. § 1501.4(b). The Corps must also "[m]ake diligent efforts to involve the public in . . . implementing [its] NEPA procedures." 40 C.F.R. § 1506.6(a).

from the Corps, the Coalition took the initiative and submitted additional comments based on information it acquired about the Project through Freedom of Information Act ("FOIA") requests.

Neither argument, however, justifies the Corps' patent failure to "[p]rovide public notice of [the EA/FONSI's] availability." S*ee* 40 C.F.R. § 1506.6(b); *see also* 33 C.F.R. § 230.11 (Corps regulations requiring notice of availability of a FONSI to concerned agencies, organizations and the interested public). The Corps essentially admits that no such notice was provided, and thus the Coalition is likely to prevail on this claim.[2]

Nor do these arguments justify the Corps' failure to provide the public with a 30-day period to comment on the EA/FONSI. Under NEPA's implementing regulations, this comment period is required when "[t]he proposed action is, or is closely similar to, one which normally requires the preparation of an [EIS]." 40 C.F.R. § 1501.4(e)(2)(i). In such circumstances, simply providing an opportunity to comment on a notice of application (as opposed to the EA itself) does not satisfy the plain language of this regulation.

Here the Coalition has demonstrated that the Project is, or is closely similar to, the type of action that normally requires the preparation of an EIS. As described below (*see infra*, Section I.A.2), the Project is a six-lane highway through a floodplain, flood detention basins, wetlands, and a public golf course. EPA recommended denying the Permit—twice—on account of its potentially devastating impacts to the ecology of the area, including its potential to contaminate nearby Steamboat Creek with highly toxic methylmercury. Pltf.'s Exhs. 12, 24 (ECF 5-18, 5-30). Because of these significant impacts, even the City of Reno urged the Corps to prepare an EIS. Pltf.'s Exh. 28 (ECF 5-33). Unlike a run-of-the-mill wetlands fill permit, the Corps determined that the extent and scope of the wetlands affected by the Project "federalized" it, so that the Corps was required to

[2] In recognition that it plainly did not provide the required public notice of the EA/FONSI, the Corps makes the fall-back argument that any error in this regard was harmless. Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction ("Corps Br.") at 9-10. Not so. The Coalition was not provided with a copy of the EA/FONSI for three weeks after it was approved. During those three weeks, RTC was permitted to carry on with construction of the Project. Moreover, the Coalition was forced to file its suit challenging the Project and prepare its Motion for Preliminary Injunction before it had even been permitted to review the Corps' environmental analysis. Thus, this error was far from harmless.

consider the environmental impacts of the entire highway, not just those portions over waters of the United States. Pltf.'s Exh. 33 at 488 (ECF 5-38 at 7). Given these facts, which show that the Project is, or is closely similar to, the type of action that normally requires the preparation of an EIS, the Corps abused its discretion by failing to provide the public with a 30-day comment period on the EA/FONSI.

Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers ("*Bering Strait*") is not to the contrary. 524 F.3d 938 (9th Cir. 2008). In that case, the Ninth Circuit simply held that "circulation of a draft EA is not required in every case," *id*. at 952, a proposition the Coalition does not dispute. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Preliminary Injunction ("Opening Brief") at 12 (ECF 5-1 at 17). The court went on to hold that the Corps was not required to circulate a draft EA for public review and comment if the agency, through other means, "provided the public with sufficient environmental information . . . to permit the public to weigh in with their views and thus inform the agency decision-making process." *Id*. at 953. In that case, the Court held, the Corps satisfied this requirement by "widely disseminat[ing information about the project] throughout the community" and "reasonably and thoroughly tender[ing environmental information] to the public." *Id*.

At least two factors distinguish *Bering Strait* from the Coalition's case. *First*, the *Bering Strait* decision does not even mention, much less analyze, the regulation the Coalition claims was violated here: 40 C.F.R. § 1501.4(e)(2)(i). Thus, unlike in *Bering Strait*, the Coalition is not relying solely on the Corps' general obligation to "involve the public, to the extent practicable," in the preparation of the EA. Rather, the Coalition has shown that, under section 1501.4(e)(2)(i), the Corps was required to circulate the EA because the Project is, at the very least, "closely similar to" the type of project that "normally requires the preparation of an [EIS]." *See infra*, Section I.A.2. No similar evidence was provided in *Bering Strait*.

Second, in this case, the Corps did *not* widely disseminate information about the Project throughout the community. In fact, the community only obtained new documents related to the Project (modifications to Project description, new studies, etc.), by submitting periodic FOIA requests to the agency. Declaration of Kimberly Rhodemyre in Support of Plaintiff's Motion for

Preliminary Injunction ("Rhodemyre Decl.") at ¶ 11 (ECF 5-3 at 4). Whether the Corps complied with its obligations to involve the public in its NEPA review cannot depend on whether a single community group diligently sought out project documents that the Corps failed to provide on its own initiative.

Finally, it is not the case, as Defendants insist, that simply providing the public with an opportunity to comment on the initial "notice of application" for a project is always sufficient to satisfy the Corps' more general obligation to involve the public in the preparation of an EA. In a recent case involving the Corps' issuance of dredge and fill permits in West Virginia, the court held that the Corps' public notice failed to meet the standards set forth in *Bering Strait*. *See Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F.Supp.2d 783 (S.D. W. Va. 2009). The Corps had permitted two surface mining projects and prepared an EA/FONSI for each. *Id.* at 793-99. For each application, the Corps had issued a three- or four-page public notice, with a brief description of the project, and accepted public comments. *Id*. at 793, 795. After the close of public comment, the applicant submitted additional information on each project, including more detailed alternatives analyses and descriptions of mitigation. *Id.* at 794, 797. The court held that the Corps' failure to include this substantive information about proposed mitigation in the notices deprived the plaintiffs of the opportunity, required by *Bering Strait*, to "weigh in" on "truly significant" issues presented by the permit applications. *Id.* at 811.[3]

The Corps' four-page August 2013 public notice was likewise insufficient. Pltf.'s Exh. 33 at 545-48 (ECF 5-38 at 64-67). The notice contained *no* information about two "truly significant" impact areas that were critical to the Corps' decision to approve the permit: methylmercury

[3] Recent research commissioned by the Council on Environmental Quality supports this conclusion. *See* Deverman, et al., *Environmental Assessments: Guidance on Best Practice Principles*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10142, 10156, 10158 (2015) (concluding that failure to circulate an EA/FONSI for public comment results in a "lack of public involvement [that] is strongly correlated with inadequate EAs" and citing 2012 CEQ-commissioned survey resulting in recommendation that "[a]t a minimum, the agency should provide a notice of the availability of EAs and FONSIs to interested or affected parties and the public . . . for review"); *id*. at 10158 ("Allowing members of the public to weigh in with their views informs and thus strengthens the agency decisionmaking process and analysis.").

contamination and flood impacts.[4] *Id*. It did not state that the Project will be built in a floodplain, or mention that the underlying it soil has for decades been contaminated with mercury. After the public notice was issued, RTC supplemented its application with additional information on these two topics, including a "flood memo" in October 2013 (*see* Pltf.'s Exh. 23 at 352 (ECF 5-29 at 15) (discussing memo)) and a methylmercury analysis in March 2014 (Pltf.'s Exh. 6 (ECF 5-12)). RTC also submitted two post-notice alternatives analyses. (Pltf.'s Exhs. 34, 35 (ECF 5-40 and 5-41)). In October 2014, RTC made changes to the number of acres of wetlands affected by the Project and to RTC's compensatory mitigation. *See* Pltf.'s Exh. 40 at 858 (ECF 5-46 at 6) (discussing changes). The Corps provided no notice of any of these changes, studies, or analyses. For this reason as well the Coalition is likely to succeed on this NEPA claim.

2. The Corps Failed to Prepare an EIS for the Project.

In response to the Coalition's claim that the Corps violated NEPA by not preparing and EIS, the Corps argues that an EA was sufficient because mitigation measures and design features incorporated into the Project would reduce its environmental impacts. In particular, Defendants note that RTC "proposes the permanent removal of 10,000 kg of mercury from the Steamboat Creek floodplain, to be sequestered in the roadway embankment." Corps Br. at 12 (ECF 23 at 18). Defendants also point to mitigation measures requiring RTC to create new wetlands to replace the ones that will be lost. *Id*. at 12-13 (ECF at 18-19); Intervenor Regional Transportation Commission of Washoe County's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction ("RTC Br.") at 13 (ECF 22 at 17). With these mitigation measures, Defendants claim, the Corps properly determined that the Project would not have any significant environmental impacts, and an EIS was unnecessary.

The fundamental problem with this argument is that it ignores the standard of review that the Ninth Circuit has clearly laid out for when an EIS is required: An EIS must be prepared if "substantial questions are raised as to whether a project . . . *may* cause significant degradation of

[4] The four-page notice included two attachments with numerical data and diagrams regarding mitigation, but only for the project's impacts on wetlands. Pltf.'s Exh. 33 at 549-60 (ECF 5-38 at 68-79).

some human environmental factor." *Greenpeace Action*, 14 F.3d at 1332 (internal quotation marks omitted). To trigger this requirement, a "plaintiff need not show that significant effects *will in fact occur*," but need only raise "substantial questions whether a project may have a significant effect." *Id.* (internal quotation marks omitted); *see also Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2004) (describing Ninth Circuit's standard for reviewing an agency's decision not to prepare an EIS). Moreover, an EIS is required where uncertainty about a project's impacts may be resolved by collecting more data, or where the collection of more data may prevent "speculation on potential . . . effects." *Id.* at 870-71.

Here, even with the mitigation measures cited by Defendants, there are still substantial questions about the Project's impacts. Throughout the Corps' review process, EPA raised serious questions about the Project's potential to increase mercury and methylmercury contamination in the area. Pltf.'s Exhs. 12, 24, 31, 32 (ECF 5-18, -30, -36, -37). In correspondence, EPA noted that there was substantial uncertainty about how the Project would affect the methylation of mercury in the floodplain and described a number of additional studies that could be conducted to eliminate at least some of the uncertainty surrounding the Project's potentially toxic impacts. Pltf.'s Exh. 31 at 476-77 (ECF 5-36 at 2-3). EPA noted that remediation of mercury was "a challenging and emerging science." Pltf.'s Exh 24 at 367 (ECF 5-30 at 3). "Because of the *uncertainty* and *magnitude* involved" with the Project, EPA "highly recommended" a pilot study to assess whether the Project would "truly limit[]" mercury methylation. Pltf.'s Exh. 24 at 367-68 (ECF 5-30 at 3-4) (emphases added).

Rather than conduct this potentially costly study, RTC hired a consultant to prepare a technical memorandum on the subject. Pltf.'s Exh. 6 (ECF 5-12). Contrary to RTC's claims (RTC Br. at 14 n.7 (ECF 22 at 18 n. 7)), this study did not satisfy EPA's concerns. In fact, EPA's mercury expert reviewed this study and found numerous unsupported and incorrect assumptions in it, along with unwarranted and even "misleading" conclusions. Pltf.'s Exh. 32 at 479 (ECF 5-37 at 1). For example, EPA noted that a fundamental conclusion in the memo—that the only 43 kilograms of mercury would be deposited on the floodplain over 100 years—was a "*huge over extrapolation* of an extremely limited measurement." Pltf.'s Exh. 32 at 480 (ECF 5-37 at 2) (emphasis added). The

memo then relied on this unsupported conclusion to conclude the Project would have an overall beneficial effect because RTC would "isolate" 10,000 kilograms of mercury under the road bed. Pltf.'s Exh. 6 (ECF 5-12). EPA's expert calls this conclusion "a bit misleading":

> [P]resumably only a very small fraction of the 10,000 kg is currently in a position where it is available for methylation? This is unclear. If the majority of the 10,000 kg is underground, it may have very limited potential to become methylated, whereas the much smaller amount of [mercury] deposited from the river may have a much higher potential to be methylated. Their bulk comparison of 43 [kg] to 10,000 kg seems a bit misleading.

Id.

EPA also rejects the memo's conclusion that the Project design would minimize methylation of mercury because any flooding would occur "early in the season when temperatures are low." *Id*. EPA calls this assumption "not warranted," noting that there are "many studies of high [methylmercury] production occurring at a few degrees [Celsius]. I assume the 'low' temperatures being referred to in this memo are quite a bit higher." *Id*. EPA then noted the lack of evidence to support the memo's conclusion that "reduc[ing] the energy of the system through reconnection of the channel to the floodplain" would also reduce methylation. *Id.* at 481 (ECF 5-37 at 3). "Its [sic] unclear how reducing the energy of the system will limit methylation. This should be better explained. In general, I would think that reducing the energy of the water would increase the potential for . . . methylation." *Id*.

The Corps did not provide an explanation for these unfounded conclusions. Nor did it resolve any of the other questions raised by EPA's mercury expert. Instead, in a two-page memo, the Corps simply stated that it had consulted with EPA, reviewed the technical memos prepared by RTC's consultant, and concluded that the design features proposed by RTC—placing 10,000 kilograms of mercury under the new highway and "reducing the energy of the system" by connecting Steamboat Creek to the floodplain—would "help mitigate potential production of methyl mercury." RTC Br. Exh. 1-N (ECF 32-2 at 2-3). But these are the very design features EPA had questioned at length in

its prior correspondence. Thus, the Corps did not "resolve" the serious questions raised by EPA; it ignored them.[5]

The evidence here is similar to that presented in *Anderson v. Evans*, a case in which the Ninth Circuit found that an EIS was required to address the potential impacts of allowing a Tribal whale hunt. 314 F.3d 1006, 1018 (9th Cir. 2002). There the Court held that the effects of the Tribe's whaling were uncertain and "'likely to be highly controversial'." *Id.* (quoting 40 C.F.R. § 1508.27(b)(4)). According to the Court, "[n]o one, including the government's retained scientists, has a firm idea what will happen to the local whale population if the Tribe is allowed to hunt and kill whales . . . . There is at least a substantial question whether killing five whales from this group . . . could have a significant impact on the environment." *Id.* at 1019.

The same uncertainty is present here. *See* Pltf.'s Exh. 24 at 367-68 (ECF 5-30 at 3-4) (noting "uncertainty and magnitude" of potential mercury impacts, and recommending further studies). In fact, the Corps appears to concede as much in its two-page memo when it states "[m]any parameters influence the production of methyl mercury in riparian systems" and "some wetlands act as mercury sinks while others with similar geochemical and morphological characteristics act as methylation beds." RTC Br. Exh. 1-N at 1 (ECF 32-2 at 2). Yet, rather than prepare an EIS to analyze this issue and, in the process, conduct the additional studies recommended by EPA to determine the potential impacts and possible mitigation measures, the Corps simply approved the Permit. This refusal to take a hard look at the Project's mercury impacts in an EIS violated NEPA.[6] *See also Ocean*

[5] The Corps also makes the claim that EPA's concerns must have been "satisfactorily addressed" by the Corps because EPA did not use its veto power to overturn the Permit. Corps Br. at 14 n.7 (ECF 23 at 20 n.7). However, as Justice Ginsburg noted recently, the EPA has only used this veto power "a dozen times over 36 years encompassing more than one million permit applications." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 303 n.5 (2009) (Ginsburg, J., dissenting). The fact that EPA did not take the extremely rare step of vetoing this Permit thus offers no support for the Corps' assertion that EPA "concluded [the mercury] risks had been satisfactorily addressed." Corps. Br. at 14 n.7 (ECF 23 at 20 n.7). Tellingly, the Corps does not cite any correspondence from EPA suggesting it had reached this conclusion.

[6] The Council on Environmental Quality ("CEQ") regulations set out a number of considerations for determining whether a project will "significantly" affect the environment. *See* 40 C.F.R.

(footnote continued on next page)

Advocates, 402 F.3d at 870-71 (finding Corps' failure to prepare an EIS to analyze impacts of dock extension violated NEPA because agency "relied entirely on [the permit applicant's] unsupported assertions" and preparing an EIS would have reduced the need for speculation as to project effects.)

Given the record present here, the Corps' reliance on *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986), is misplaced. In that case, the Ninth Circuit held that mitigation measures could be considered in determining whether an agency was required to prepare an EIS. *Id.* at 836. However, the plaintiffs there did not point to any evidence questioning the adequacy of the mitigation measures. *Id.* at 838. Instead, they raised "a strictly legal argument" that an EIS cannot be avoided by requiring "off-site" mitigation. *Id*. at 837-38. Here, on the contrary, the record contains serious and unanswered questions about the adequacy of the mitigation measures (or "design features") relied on by the Corps to conclude that an EIS was unnecessary.[7]

Both Defendants argue that the time it took the Corps to issue the Permit and the length of the EA argue in favor of the Corps' thoroughness, not in favor of the conclusion that an EIS was required. Again, this argument ignores caselaw and CEQ guidance: When it is a close call, or when there are substantial questions raised about a Project's impacts, an EIS is required. *See Ocean Advocates*, 402 F.3d at 864-65; *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997). The length of an EA can be indicative that it is a "close call." *See* "Forty Most Asked Questions

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§§ 1508.27. These considerations include "[t]he degree to which the effects on the quality of the environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain," and the "[u]nique characteristics of the geographic area such as proximity to . . . park lands [or] wetlands." *Id*. § 1508.27(b). Here, as in *Anderson*, the effects of the Project on mercury contamination are both highly controversial and uncertain. *See Anderson*, 314 F.3d at 1018. In addition, the Project is also proposed in a unique geographic area—a floodplain with wetlands.

[7] The Corps also cites to *Ecology Center v. Castaneda*, 574 F.3d 652 (9th Cir. 2009), in support of the proposition that the Corps' conclusions about the efficacy of mitigation measures are entitled to deference. In that case, however, the agency prepared an EIS. *Id* at 655-56. Here, the Corps prepared only an EA/FONSI. This decision to short-circuit the environmental review process must be overturned if substantial questions are raised indicating that the Project may significantly affect the environment.

Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026 (Mar. 23, 1981), Question 36.b.

Defendants also dismiss the CEQ's "Forty Most Asked Questions" document as too old, and assert that it is not controlling authority. *See* Corps Br. at 10, 13 (ECF 23 at 16, 19); RTC Br. at 9 n.5 (ECF 22 at 13 n.5). However, as recently as 2011, the Ninth Circuit used this memorandum to interpret federal NEPA regulations and decide whether an agency has complied with them. *See, e.g.*, *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 n.12 (9th Cir. 2011) (applying framework from "Forty Most Asked Questions" to determine whether supplemental EIS was required); *see also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2006) (relying on definition of "worst-case scenario" analysis provided in "Forty Most Asked Questions"). There is no reason why this Court should not do the same in determining whether the Corps was required to circulate the EA/FONSI for public comment here.

B. The Corps Violated the Clean Water Act.

1. The Corps' Explanation for Selecting the Project as the "Least Environmentally Damaging Alternative" Is Not Supported by the Record.

In adopting the Clean Water Act, Congress clearly expressed its intention to protect the waters of the United States, including the nation's wetlands, from pollution and destruction. 33 U.S.C. § 1251(a). To implement this Congressional mandate, the Corps adopted regulations governing the issuance of wetlands fill permits. These regulations state that the unnecessary alteration or destruction of wetlands is a "severe environmental impact" and "contrary to the public interest." *See* 40 C.F.R. § 230.1(d); 33 C.F.R. § 320.4(b)(i). They also state that the Corps may not issue a wetlands fill permit unless the agency finds that the project requiring the permit is "the least environmentally damaging practicable alternative" ("LEDPA"). *See* 40 C.F.R. § 230.10(a). Where, as here, the proposed project does not require access or proximity to wetlands to fulfill its basic purpose, the Corps must *presume* that there are other, less environmentally harmful, feasible alternatives "unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3).

The Corps has *not* "clearly demonstrated" that there are *no* other practicable alternatives to building a highway through the floodplain and wetlands of the Truckee Meadows. In its brief, the

Corps expressly states that it did not reject any alternatives on the ground that they are economically infeasible and disavows any reliance on RTC's analysis of alternatives' cost. Corps Br. at 20-21 (ECF 23 at 26-27). Thus, its alternatives analysis must stand or fall based on other considerations.[8]

These "other" considerations are insufficient to rebut the presumption that there are feasible, less environmentally damaging alternatives. For example, the Corps rejected two alternatives—"Widen and Improve Existing Streets Only" and "McCarran Widening"—for the sole reason that they would require RTC to relocate some existing businesses. Pltf.'s Exh. 33 at 498 (ECF 5-38 at 17). The only evidence cited in support of this reasoning was the following statement: "Often, it is very difficult to successfully relocate a business to a nearby location, particularly in areas where available properties are scarce." *Id*.

While the Corps calls this statement "self-evident" (Corps Br. at 22 (ECF 23 at 28)), it is, in fact, conclusory and unsupported. As the D.C. district court explained, "The Corps must adequately explain why there is no less-damaging practicable alternative. If the Corps cannot so explain based on the record before it, it must reconsider its determination based on an adequate analysis of the alternatives." *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 130 (D.D.C. 2009). There is simply no evidence in the record that relocating businesses in this region is "difficult," much less prohibitive. In fact, it is not at all uncommon for public agencies to be required to relocate businesses displaced by infrastructure projects; the federal government and numerous states have statutes requiring such relocation assistance. *See, e.g.*, 42 U.S.C. §§ 4601-4655; Nev. Rev. Stat. §§ 342.015 et seq.; Cal. Gov't Code §§ 7260 et seq.; Conn. Gen. Stat. §§ 8-266 et seq. Without any other concrete evidence, the existence of Nevada's relocation statute cannot render these alternatives—which would impact almost no waters of the United States and leave the Truckee Meadows floodplain area undeveloped—impracticable.

[8] RTC attempts to explain its February 2014 cost estimates by claiming they are more "precise" and "realistic" reflections of engineering and site information. RTC Opp. at 18 (ECF 22 at 22). This explanation still fails to justify why only RTC's preferred route became dramatically cheaper, while the cost of alternatives soared. The Corps does not appear to have scrutinized RTC's cost claims at all. *See* Pltf.'s Exh. 33 at 499 (ECF 5-38 at 18) (parroting RTC's cost estimate for the Sparks Industrial alternative).

The remaining alternatives that the Corps "carried forward" in its analysis were, with the exception of the "No Build" alternative, simply variations on RTC's preferred route. They all cut through the Truckee Meadows floodplain; they all impact substantial waters of the United States. Pltf.'s Exh. 35 at 704-10 (ECF 5-41at 22-27). Thus, the Corps' failure to demonstrate with evidence that widening existing streets was infeasible violated the CWA. 40 C.F.R. § 230.10(a)(3).

II. The Coalition Will Suffer Irreparable Harm if an Injunction Is Not Issued.

RTC plans to build a six-lane highway through the Truckee Meadows and across the Rosewood Lakes Golf Course. Pltf.'s Exh. 22 at 200, 207 (ECF 5-28 at 14, 21). This construction project requires RTC to conduct major grading—moving hundreds of thousands of cubic yards of earth—in soils that, by all accounts, contain high levels of mercury. Pltf.'s Exh. 22 at 221-22 (ECF 5-28 at 35-36). The highway will indisputably fill existing wetlands and construction will occur next to an already impacted creek. Pltf.'s Exh. 22 at 207, 212 (ECF 5-28 at 21, 26). For certain stretches, the finished road (and therefore construction of it) will run within a couple hundred feet of where Coalition members live. Rhodemyre Decl. at ¶ 3 (ECF 5-3 at 2, ¶ 3); Declaration of Richard Odynski in Support of Plaintiff's Motion for Preliminary Injunction at ¶ 3 (ECF 5-5 at 2, ¶ 3); Declaration of Helene Sasser in Support of Plaintiff's Motion for Preliminary Injunction at ¶ 3 (ECF 504 at 2, ¶ 3). Once the highway is built, the Coalition members will never again be able to enjoy and utilize the portion of Truckee Meadows area being converted to a new highway; nor will they ever again be able to use the portion of the golf course that will be paved over. The views from their homes and public open spaces will be forever changed. These are all irreparable impacts.

This evidence clearly demonstrates irreparable harm. In *Alliance for the Wild Rockies v. Cottrell*, for example, the Ninth Circuit found that a logging project, which involved cutting dead and dying trees on 1,652 acres of national forest land that had recently been damaged by a wildfire, would cause irreparable harm to members of an environmental group. 632 F.3d 1127, 1128-29, 1135 (9th Cir. 2011). The only harm alleged by the group was that the project would "harm its members' ability to 'view, experience, and utilize' the [affected] areas [of the forest] in their undisturbed state." *Id*. at 1135.

The Forest Service, which had approved the logging operation, argued that the group had not shown irreparable harm because the operation would affect only 1,600 acres out of 27,000 that had been affected by the fire. According to the Forest Service, the group's members could still "view, experience, and utilize" other areas of the forest, including the other 25,000 acres that had burned. *Id*. The Ninth Circuit rejected the argument:

> This argument proves too much. Its logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area as long as there are other areas of the forest that are not harmed. The Project will prevent the use and enjoyment by [plaintiff's] members of 1,652 acres of the forest. This is hardly a de minimus injury.

Id.

If outdoor enthusiasts suffer irreparable harm when they can no longer "view, experience, and utilize" 1,600 acres of fire-damaged forest "in their undisturbed state," the Coalition and its members will also suffer irreparable harm when they can no longer "view, experience, and utilize" the Truckee Meadows area, Rosewood Lakes Golf Course, and even their own backyards "in their undisturbed state." Instead, there will be a six-lane highway running through it. Thus, the development of this highway, like the implementation of the logging project in *Alliance for Wild Rockies*, would cause irreparable harm.

Defendants respond that there will be no irreparable harm here because RTC will create new, "higher quality" wetlands as mitigation for the wetlands destroyed by the Project. Corps Br. at 22-23 (ECF 23 at 28-29); RTC Br. at 13, 21 (ECF 22 at 17, 25). However, substantial research has concluded that such replacement wetlands rarely result in equivalent, much less "higher quality," wetlands. *See, e.g.*, NAT'L RESEARCH COUNCIL [CANADA], COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 2-10 (Natl. Acad. Press, 2001) (finding a lack of functional and value equivalence between destroyed wetlands and those created or restored in compensation); James Murphy, et. al., *New Mitigation Rule Promises More of the Same: Why the New Corps & EPA Mitigation Rule Will Fail to Protect Our Aquatic Resources Adequately*, 38 STETSON L. REV. 311, 311 (2009) ("[M]itigation [under section 404] has been largely unsuccessful at replacing either the extent or functions of the aquatic resources destroyed or degraded by such discharges.") (footnotes omitted). Moreover, according to EPA, these new wetlands themselves pose a significant

risk of increasing mercury contamination in the adjacent Steamboat Creek. *See* Pltf.'s Exh. 31 at 475-76 (ECF 5-36 at 1-2). The creation of new wetlands does nothing to remedy the harms caused by the construction of the road itself. *See Alliance for Wild Rockies*, 632 F.3d at 1135 (irreparable harm not remedied by fact that group could visit other fire-affected areas of park in undisturbed state). Nor will mercury monitoring prevent irreparable harm from occurring, as Defendants claim. *See Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (rejecting EIS because Navy's proposal to monitor impacts from dumping of polluted spoil would be "too little and too late"). At best, monitoring for mercury impacts will simply memorialize the fact that the harm has occurred.

In *Save Our Sonoran*, the District Court of Arizona issued an injunction preventing development of a residential subdivision on 600 acres of land in Phoenix until the court could decide plaintiff's challenge to the issuance of a Section 404 permit. 227 F. Supp. 2d at 1115. In discussing the potential for irreparable harm, the court held simply: "If this desert land is disrupted, it cannot be restored." *Id.* The same holds true here.

III. The Balance of the Equities Tips in the Coalition's Favor, and Public Policy Supports an Injunction.

In support of their contention that issuing an injunction would not be in the public interest, Defendants make three arguments. *First*, both RTC and the Corps claim a public interest completing the highway to reduce traffic congestion and provide better access during flood to certain communities. *Second*, RTC claims that any delay "may" require the agency to pay its contractor additional compensation, and "could" delay the "Critical Path Schedule" for the Project. RTC Br. at 23 (ECF 22 at 27). And *third*, the Corps argues that, whenever the United States is the party against whom an injunction is sought, "the public interest weighs in favor of the agency's decision." Corps Br. at 24 (ECF 23 at 30). None of these arguments tips the balance in Defendants' favor.

At the outset, these arguments ignore numerous federal statutes and executive orders that strongly discourage development in floodplains and wetlands. *See, e.g.*, 33 U.S.C. § 1344; Exec. Order No. 11,990, 42 Fed. Reg. 26961 (May 24, 1977) (agencies must implement NEPA and public review process to ensure no practicable alternatives to new construction in wetlands, and all

practicable measures adopted to minimize harm); Exec. Order No. 11,988, 42 Fed. Reg. 26951 (May 24, 1977) (agencies must implement NEPA and public review process to avoid direct or indirect support of floodplain development where there is a practicable alternative, and adopt all practicable measures to minimize potential harm); 33 C.F.R § 320.4(b) (wetlands are a "productive and valuable public resource . . . unnecessary alteration or destruction of which should be discouraged as contrary to the public interest"); *id.* at § 320.4(*l*)(2) (government shall ensure to "maximum extent practicable" that natural and beneficial values served by floodplains are restored and preserved). When Congress, the President, and the Corps itself have clearly defined where the public interest lies—here, in protecting floodplains and wetlands from development and destruction—courts do not second-guess that determination. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 331 (1978) (refusing to question Congress' weighing of interests when enacting statute); *Salazar v. Buono*, 559 U.S. 700, 735 (2010) (Scalia, J., concurring in the judgment) ("Federal courts have no warrant to revisit [Congress' decision about what is in the public interest]—and to risk replacing the people's judgment with their own. . . .").[9]

In addition, according to the evidence in the record, the highway is not currently needed to reduce traffic congestion. RTC claims that its traffic modeling now shows a "*present* need and benefit to the community for a 2 to 4 lane facility," yet it cites no support for this statement other than the extra-record declaration of Garth Oksol, RTC's Project Manager. RTC Br. at 2 (ECF 22 at 6). The 2013 permit application does not mention any "2 to 4 lane facility" and instead states that "[t]he existing roadway network is insufficient for the amount of traffic in the network for the *design year*"—commonly 20 years from project completion. *See* Pltf.'s Exh. 22 at 200 (ECF 5-28 at 14) (emphasis added). RTC has consistently contradicted the alleged need for the SEC "now" in its representations to the public, as well as in its prior permit application in 2011. *See* Pltf.'s Exh. 9 at

[9] The Corps also takes the position that building a new highway and thereby relieving traffic congestion is in the public interest. Corps Br. at 24. But the Corps is not a transportation agency; it is charged with protecting the nation's waters from fill and other pollution. Thus, it is inappropriate at best for the Corps to suggest that there is a greater public interest in building roads than in preserving the very resources it is charged to protect.

41(ECF 5-15 at 7) (SEC purpose is to "provid[e] improved connectivity . . . within the *year 2030 timeframe*" (emphasis added)).

The record also contradicts RTC's related claims that the Project is needed to provide access to certain communities in the event of a flood and that the Coalition is simply a "NIMBY" group that does not care about the safety of these communities. One of the Coalition's principal concerns is that the new highway will actually increase flooding impacts in the affected communities. *See* Pltf.'s Complaint at 1-2 (ECF 1 at 2-3).

Finally, RTC makes the circular and self-serving argument that, because it negotiated a contract with Granite Construction Company that "may" require RTC to pay extra if an injunction is issued, it would be unfair to issue an injunction. RTC Br. at 22-23 (ECF 22 at 26-27). But this asserted "equitable" consideration is nothing more than a contractual problem of RTC's own making. As a result, it cannot weigh against issuing an injunction. *See S. Cal. Edison Co. v. F.E.R.C.*, 805 F.2d 1068, 1072 (D.C. Cir. 1986) ("Equity does not move in favor of one whose own conduct or action has brought upon it misfortune or pecuniary loss.").

IV. The Coalition Is Willing to Work with RTC and the Corps to Tailor the Injunction.

In its Motion, the Coalition has asked the Court to issue an injunction ordering the Corps to suspend or revoke the Permit until the Coalition's case can be decided on the merits. ECF 5 at 2. Since the Coalition filed its Motion, RTC has intervened in the case. ECF 12. Thus, with all relevant parties before it, the Court now has the ability to craft a more narrowly tailored injunction that could preserve the status quo while potentially allowing some construction-related activities to proceed.

The Coalition is willing to work with RTC and the Corps on a narrower injunction. For example, the Coalition has already identified numerous pre-construction Permit conditions that RTC could proceed with (and, indeed, must complete) before certain construction activities can commence. These pre-construction activities include: complete total and dissolved mercury sampling upstream and downstream of the project limits and bridge construction areas in waters; provide financial assurances for compensatory mitigation before construction activities within waters of the U.S.; and record permanent conservation easements or deed restrictions over mitigation wetlands and designate a preserve manager for them. *See* Pltf.'s Exh. 39 at 830-34 (ECF

5-45 at 22-25). The Coalition would have no objection to allowing RTC to proceed with these pre-construction activities before the Coalition's case is heard on the merits, and there may be other activities (e.g., property acquisition) that could proceed without causing irreparable harm.

V. The Court Should Not Require Any Bond.

Finally, RTC argues that, if the Court grants the Coalition's Motion, it should impose an "appropriate" bond. However, RTC does not describe the amount of any bond that it believes would be "appropriate," much less cite any evidence to support a specific amount. Moreover, RTC is a public agency; it receives funds from a gas tax, not from investors, financers, or, in this instance, even federal grant programs. It is not seeking to build a facility that will earn income, which will be delayed or lost upon issuance of an injunction. It is seeking to build a road with funds it has already collected. As a result, any delay would have minimal economic effect on RTC.

Lacking any financial evidence to support a bond, RTC points to the Coalition's earlier suit, claiming it was "baseless" and suggesting that the Coalition's dismissal of that earlier suit should somehow be factored into the Court's decision on a bond here. However, the purpose of requiring a bond is to compensate the enjoined party for economic loss during an injunction, not retaliate against the moving party. *See Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1038 (9th Cir. 1994) (award of damages from preliminary injunction bond is compensatory, not punitive). Moreover, as even the Corps admits, the Coalition did not dismiss its earlier suit because it was "baseless" but rather because the Coalition achieved one of its primary objectives when the Corps submitted a sworn declaration promising that RTC's premature construction of Phase I would not be used to tip the scales in favor of Phase II (as opposed to less environmentally damaging alternatives). *See* Corps Br. at 21 (ECF 23 at 27) ("In resolving [the Coalition's earlier] litigation, the Corps agreed that the cost of Phase I would not be part of the calculus for assessing Phase II alternatives.").[10]

[10] The Coalition also received assurances from RTC in that case that Phase I had "utility independent of Phase 2," and thus could connect to other local streets even if the Permit for Phase II was denied. *Upper Se. Cmtys. Coal. v. U.S. Army Corps of Eng'rs*, U.S. District of Nevada Case No. 3:13-cv-00403-MMD-WGC, ECF 48, at 4 (Filed 9/05/13).

In fact, the Corps' subsequent environmental analysis shows that the Coalition's earlier claim was sound. That claim alleged that the Corps impermissibly "segmented" the Project when it authorized the agency to build Phase I before obtaining a Section 404 Permit for the entire project. Pltf.'s Exh. 19 at 128, 138 (ECF 5-25 at 3, 13). In considering whether to issue a Section 404 Permit to RTC, the Corps was required to analyze the environmental impacts from the entire highway project, not just the portions that would directly impact waters of the United States. *Id*. By allowing Phase I to move forward before that environmental review was complete, the Coalition argued, the Corps essentially allowed that portion of the highway to go unanalyzed. *Id*.

In the EA, the Corps actually agreed with the premise of the Coalition's earlier suit: because most of the Project would impact wetlands and waters of the U.S., the Project was "federalized" and the Corps was required to consider the environmental effects from the entirety of "Phase II," not just those portions that affect wetlands, in its NEPA review. Pltf.'s Exh. 33 at 488 (ECF 5-38 at 7). Unfortunately for the public, since the Corps had already allowed Phase I to be built, that portion of the "federalized" highway escaped NEPA review. Thus, the Coalition's earlier suit was not "baseless"; it was prescient.

CONCLUSION

For all of these reasons, the Coalition respectfully requests that the Court grant Plaintiff's Motion for Preliminary Injunction.

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SHUTE, MIHALY & WEINBERGER LLP

By: /s/
WINTER KING

Attorneys for Plaintiff Upper South East Communities Coalition

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