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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
9

10 UPPER SOUTH EAST COMMUNITIES
11 COALITION,

12 Plaintiff,

13 v.

14 U.S. ARMY CORPS OF ENGINEERS; LT.
15 GEN. THOMAS P. BOSTICK, in his
official capacity, Chief of Engineers and
16 Commanding General, U.S. Army Corps of
Engineers; COL. MICHAEL J. FARRELL,
17 in his official capacity, District Commander,
Sacramento District, U.S. Army Corps of
18 Engineers; KRISTINE S. HANSEN, in her
official capacity, Senior Project Manager,
19 Reno Field Office, Sacramento District, U.S.
Army Corps of Engineers; and REGIONAL
20 TRANSPORTATION COMMISSION OF
WASHOE COUNTY,

21 Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: June 17, 2015

Time: 9:30 a.m.

Crtrm. 6

Judge: Hon. John A. Mendez

Action Filed: April 29, 2015

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INTRODUCTION

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2 On April 16, 2015, the United States Army Corps of Engineers (“Corps”)¹ issued a permit
3 authorizing the Regional Transportation Commission of Washoe County (“RTC”) to begin
4 constructing Phase II of the Southeast Connector (“Project”), a new, six-lane highway that will
5 permanently destroy 11.23 acres of wetlands in a specially designated flood detention area on the
6 eastern boundaries of Reno and Sparks, Nevada. This area has been identified by both the Corps and
7 the local flood control district as a place where water from the region’s inevitable floods will be
8 stored and dispersed so that businesses and infrastructure—including the Reno International
9 Airport—are spared. It is also an area that has been significantly impacted by the region’s mining
10 history; the soils in and around the Project site are heavily laden with a highly toxic form of mercury
11 which, if disturbed and transported into nearby wetlands and waterbodies, poses a serious threat to
12 the health of area residents and special status species alike. In light of these potentially significant
13 environmental impacts, the Corps was required to prepare an environmental impact statement
14 (“EIS”); it did not. Instead, it issued the permit based on an environmental assessment (“EA”) and
15 “Finding of No Significant Impact” (“FONSI”), without any prior public notice or opportunity to
16 comment.

17 On April 29, 2015, Plaintiff Upper South East Communities Coalition (“Coalition” or
18 “Plaintiff”) filed suit, challenging the Corps’ action under the Federal Water Pollution Control Act,
19 commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*; the National
20 Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”); and the Administrative Procedure
21 Act, 5 U.S.C. § 701 *et seq.* (“APA”). One week later, the Coalition filed this motion for a
22 preliminary injunction.

23 A preliminary injunction is necessary to preserve the status quo here. Project construction
24 (including massive grading, filling of wetlands, and other ground-disturbing activity) is scheduled to
25 begin on or about **June 1, 2014**. *See* Ex. 43 at 866. These construction activities will cause

26
27 ¹ Defendants U.S. Army Corps of Engineers, Chief of Engineers and Commanding General Lt. Gen.
28 Thomas P. Bostick, District Commander Col. Michael J. Farrell, and Regulatory Division Chief
Michael S. Jewell are referred to collectively in this brief as the “Corps.”

1 irreparable harm to the Coalition and its members, most of whom live in the area surrounding the
2 Project and regularly enjoy its wildlife and views. For some members, the Project will run within a
3 few hundred feet of their back yards, running straight through the adjacent golf course (which also
4 serves as a flood detention area). Declaration of Richard Odynski In Support of Plaintiff’s Motion
5 for Preliminary Injunction (“Odynski Decl.”) at ¶ 2; Declaration of Helene Sasser In Support of
6 Plaintiff’s Motion for Preliminary Injunction (“Sasser Decl.”) at ¶ 2. Filling the affected wetlands
7 and grading a five-mile swath through the floodplain are significant, permanent alterations to this
8 region; once construction begins, the environmental harms associated with it will be permanent and
9 irreparable. *See id.*

10 The Coalition is also likely to suffer irreparable *procedural* harm if Project construction is
11 allowed to continue before the Coalition’s claims have been heard. NEPA is a “stop, look, and
12 listen” statute—it requires federal agencies to consider the environmental impacts of its actions
13 before deciding to take them. It also requires federal agencies to involve the public in this
14 environmental review process. If the Project is already built by the time the Coalition’s claims are
15 heard, an order requiring the Corps to go back and properly consider the environmental impacts of
16 the highway will be of little value to the surrounding community, nor will it satisfy the statute’s
17 purpose.

18 In addition, the Coalition is likely to succeed on the merits of its NEPA and CWA claims.
19 The Project involves the construction of a 4.5-mile long, six-lane highway through undeveloped
20 flood detention basins with mercury-laden soils. Numerous commenters, including Region IX of the
21 Environmental Protection Agency (“EPA”), raised substantial questions about the severity of the
22 Project’s environmental impacts, noting in particular the risk that it could add toxic mercury to
23 Steamboat Creek. In fact, EPA was so concerned about this and other Project impacts that it
24 objected to the Project and recommended denial of the permit—*twice*.

25 The Coalition was also concerned about these and other potentially devastating Project
26 impacts and repeatedly urged the Corps to prepare an EIS to analyze them. So did the Pyramid Lake
27 Paiute Tribe, whose lands and resources are downstream of the Project and thus will be impacted by
28 any increase in contaminants to Steamboat Creek; the Sierra Club, which advocates on behalf of the

1 environment; Scenic Nevada, which advocates for public open spaces; and numerous private
2 citizens. Even the City of Reno, which holds two out of six seats on the RTC’s governing board,
3 urged the Corps to prepare an EIS. The Corps rejected all of these requests.

4 Instead, after 20 months of deliberating—a sign in and of itself that this Project was no run-
5 of-the-mill wetlands fill permit—the Corps issued an “environmental assessment/finding of no
6 significant impact” (“EA/FONSI”). The Corps did not provide the public with any notice of this
7 EA/FONSI, much less an opportunity to comment. In fact, the Coalition did not even receive a copy
8 of the EA/FONSI until May 4, 2015, more than two weeks after the Permit was issued and nearly a
9 week after it filed this suit. The Corps’ failure to prepare an EIS for this Project, and its failure to
10 provide the public with the notice and comment opportunities required by its own regulations,
11 plainly violated NEPA.

12 The Corps’ approval of the Permit also violated the CWA, which prohibits the Corps from
13 issuing a permit to fill jurisdictional wetlands (“Section 404 Permit”) “if there is a practicable
14 alternative to the proposed discharge which would have less adverse impact on the aquatic
15 ecosystem.” 40 C.F.R. § 230.10(a). Information submitted along with RTC’s permit application
16 showed that there are, indeed, alternative ways of improving traffic congestion without destroying
17 wetlands, disturbing toxics, and increasing the risk of flooding, and the Corps’ reasons for rejecting
18 these alternatives were not supported by the record. Thus, the Coalition is likely to succeed on its
19 CWA claim, as well.

20 Finally, the balance of the equities and public interest tip sharply in the Coalition’s favor.
21 Numerous statutes, regulations, and executive orders discourage the destruction of wetlands and the
22 construction of roads through floodplains. In enacting NEPA, Congress also stated a strong public
23 policy in favor of providing the public with information about the environmental consequences of
24 their actions. And there appears to be no reason why, after the Corps and RTC took 20 months to
25 process the Permit application, RTC cannot wait another few months to begin construction. In fact,
26 according to RTC’s own submittal, the Project is not needed to alleviate traffic congestion until the
27 year 2035.

1 For all these reasons, the Coalition respectfully requests that the Court issue a preliminary
2 injunction to preserve the status quo until the Court has heard and decided the Coalition's claims.

3 **STATEMENT OF FACTS**

4 **I. The Project Is Proposed to Be Built in a Designated Flood Detention Basin with
5 Abundant Wildlife and Wetlands.**

6 The Project is proposed to be built in an undeveloped floodplain south of the City of Sparks
7 and just east of the City of Reno. *See* Exhibit 1² at 001. This floodplain was designated by the Corps
8 as the "Truckee Meadows Reach," and includes farmland, the public Rosewood Lakes Golf Course
9 and the Butler Ranch North flood detention basins (together, "Truckee Meadows"). Exh. 33 at 484-
10 85; Exh. 4 at 023.2³. This area has been designated by the Federal Emergency Management Agency
11 as a "Special Flood Hazard Area," and is prone to serious and repeated flooding. Exh. 2 at 010. In
12 January 1997, severe flooding throughout the Reno-Sparks metropolitan area and Truckee Meadows
13 exceeded all previous records. Exh. 1 at 002. One death was reported in Washoe County as a result
14 of the flood, which caused \$450 million (unadjusted) in reported damages in the Truckee Meadows
15 alone. *Id.*; Exh. 3. To prevent a recurrence of this disastrous flooding, the Corps is working together
16 with a regional flood control agency on a flood control project, which designates the Truckee
17 Meadows area as a detention basin for flood waters. *See* Exh. 4 at 023.2.

18 The area also contains abundant wetlands and stretches of the Truckee River and Steamboat
19 Creek. Exh. 33 at 482-83. These waterbodies, in turn, support a wide variety of wildlife species,
20 including red-tailed hawk, red-shouldered hawk, great horned owl, American kestrel, red-winged
21 blackbird, Exh. 4 at 021, and golden eagle and bald eagle. Odynski Decl. at ¶ 3. The Truckee River
22 is home to the Federally threatened Lahontan cutthroat trout, the Lahontan redbside shiner, speckled

23 ² This Exhibit and all other Exhibits ("Exh.") cited in this Memorandum are contained separately in
24 Plaintiff's Documentary Evidence In Support of Motion for Preliminary Injunction, filed
25 concurrently with this Memorandum, pursuant to the Court's Order Re Filing Requirements for
Cases Assigned to Judge Mendez.

26 ³ Plaintiffs cite to the *Draft* Truckee Meadows Flood Control Project General Reevaluation Report,
27 and *Draft* EIS though final versions of these documents have subsequently been published, in case
28 the Corps does not include the final versions of these documents in the administrative record for this
action.

1 dace, Tahoe sucker, and mountain sucker. Exh. 4 at 022. Pyramid Lake, downstream of Steamboat
2 Creek and the Truckee River, is habitat for the endangered Cui-ui fish. Exh. 1 at 005. According to
3 local agencies and the Corps, Steamboat Creek offers one of the last and best remaining
4 opportunities in the greater Truckee Meadows area to create a linear open space, connecting
5 “valuable wetland areas in the Reno [planning area] with Steamboat Creek, south Rosewood Lakes
6 and Hidden Valley, Hidden Valley Regional Park, and ultimately the Truckee River to the north.”
7 Exh. 4 at 023.1.

8 Underlying this rich habitat, however, lies a more pernicious legacy of the area’s mining
9 history: soils laden with high levels of mercury and methylmercury. Exh. at 5 024. These toxic
10 contaminants originated in Washoe Lake, where, in the late 1800s, mills used elemental mercury to
11 combine silver and gold extracted from the Comstock deposit. *Id.*; Exh. 6 at 029. Since then, this
12 mercury has been carried downstream by normal stream flows and flood events. Exh. 6 at 029.
13 When elemental mercury is exposed to certain chemicals and substances in the environment (a
14 process known as “methylation”), the result is methylmercury. Exh. 5 at 025. Methylmercury is the
15 most toxic form of mercury, and even low doses can affect neurological and cardiovascular systems
16 in humans and fish. *Id.* The Project area also contains high concentrations of boron and arsenic. *See*
17 Exh. 4 at 022. Indeed, nearly all of the surface soil throughout the entire length of the proposed
18 Project footprint exceeds toxicity guidelines. Exh. 7 at 032.1.

19 **II. RTC Applies to the Corps for a Section 404 Permit to Construct the Project Through**
20 **Truckee Meadows.**

21 Despite the history of flooding in this area, its historic soil contamination, and the sensitive
22 natural resources found there, in November 2008, the RTC⁴ voted to move forward with permitting
23 and constructing a new six-lane highway, the Southeast Connector, which would cut across the
24 entire length of the Truckee Meadows floodplain, including the area planned as a flood detention
25 area by the Corps and the local flood control agency in their flood control project. Exh. 4 at 023.2;
26 Exh. 8. The route selected by RTC crosses the Truckee River, runs alongside Steamboat Creek, and

27 ⁴ RTC is a joint powers agency; its board is comprised of two Reno City Council Members, one
28 Sparks City Council Member, and two Washoe County Commissioners. Exh. 10.

1 requires filling approximately 11.45 acres of wetlands subject to the jurisdiction of the Corps. Exh.
2 8; Exh. 39 at 830. It would also put a highway through the area highlighted by the Corps and other
3 local agencies as the last, best place to create a linear open space in the Truckee Meadows area.
4 Exh. 4 at 023.1.

5 Because the Project would fill jurisdictional wetlands, RTC was required to obtain a permit
6 from the Corps under Section 404 of the Clean Water Act before beginning construction. *See*
7 *generally* Exh. 9. In May 2011, RTC submitted its Section 404 permit application, which described
8 the proposed Project as a “major arterial” running from the intersection of Greg Street and Sparks
9 Boulevard in the north, to the intersection of Veterans Parkway and South Meadows Parkway in the
10 south. *Id.* at 042. The application also described six alternatives, including the RTC’s “preferred”
11 alternative through Truckee Meadows (the so-called “Valley Corridor” alternative), other north-
12 south corridors, and an alternative that would not construct any new roads but would “widen and
13 improve existing streets only.” *See id.* at 060-067.

14 Scores of residents living near the proposed Project site, as well as the U.S. Fish and Wildlife
15 Service, Pacific Southwest Region, EPA, Region 9, and the Washoe-Storey Conservation District,
16 objected to RTC’s permit application, expressing concerns about the road’s flooding impacts,
17 destruction of wetlands, impacts on birds and other species, loss of property value, air quality
18 degradation, mercury contamination, and noise impacts. *See, e.g.,* Exh. 11; Exh. 12; Exh. 13.
19 Commenters also questioned the need for a new 5.5-mile-long, six-lane highway, given the
20 existence of another major arterial (S. McCarran Blvd.), which runs parallel to the proposed Project
21 and lies between 0.06 and 1.5 miles to its west. *See* Exh. 11 at 101. Members of the Coalition were
22 among those who objected. *See* Exh. 14. In fact, when EPA first commented on the Project in 2011,
23 it “object[ed] to the project as proposed and recommend[ed] permit denial” unless the Corps could
24 demonstrate that the Project was the “least environmentally damaging practicable alternative” and
25 otherwise address the Project’s impacts to aquatic resources. Exh. 12 at 103.

26 **III. RTC Begins to Build Phase I of the Project Before Obtaining a Section 404 Permit.**

27 Apparently sensing that the Section 404 permit process was not going to go smoothly, the
28 RTC asked the Corps for permission to “segment” the project into two phases, allowing RTC to

1 begin construction on “Phase I” before completing environmental review and permitting for the
2 entire new highway. Exh. 15. Phase I, which was the northernmost mile of the new highway,
3 included a bridge over the Truckee River and an overpass over Clean Water Way, dead-ending 800
4 feet south of Clean Water Way. *See id.*; Exh. 8; Exh. 16. It was estimated to cost \$65 million. Exh.
5 17.

6 After determining that Phase I would not result in the discharge of dredged or fill material
7 within waters of the United States and would not involve work in navigable waters of the United
8 States, the Corps advised RTC that a Section 404 Permit was not required for this work. Exh. 18.
9 RTC then withdrew its first permit application and began construction of Phase I in February 2013.
10 Exh. 17.

11 The Coalition challenged the Corps’ action, alleging that allowing RTC to proceed with
12 Phase I—which was essentially a “bridge to nowhere” as it connected Greg Street to a field on the
13 far (south) side of Clean Water Way—segmented the project in violation of NEPA. *See Upper*
14 *Southeast Communities Coalition v. U.S. Army Corps of Engineers, et al.*, Case No. 3:13-cv-00403
15 (D. Nev. 2013) (filed July 29, 2013); Exh. 19 (Complaint for Declaratory and Injunctive Relief and
16 Civil Penalties). The Coalition also alleged that permitting RTC to construct Phase I would
17 constrain the Corps’ analysis of Phase II, which indisputably required a Section 404 Permit. Exh.
18 19. The Coalition was particularly concerned that, once Phase I was built, the Corps would consider
19 that investment as a thumb on the scale in favor of Phase II being the “least environmentally
20 damaging *practicable* alternative.” *Id.*

21 In response, the Corps submitted sworn testimony assuring the Coalition that the Corps
22 would not consider either the completion of Phase I or its cost in the Corps’ evaluation of project
23 alternatives. *See* Exh. 20 at 181. After obtaining these assurances, the Coalition voluntarily
24 dismissed its lawsuit without prejudice. Exh. 21. Phase I of the Highway Project was completed on
25 or around July 2014.⁵ Exh. 29 at 458.

26
27
28 ⁵ The Coalition does not state any challenge to Phase I activities in its present suit.

1 **IV. RTC Submits a New Application, Requesting a Section 404 Permit for Phase II.**

2 In July, 2013, RTC submitted a new (albeit incomplete) application for a Section 404 Permit
3 for Phase II of the Project. *See generally* Exh. 22. Phase II would start at the end of Phase I and
4 construct another 4.5 miles of highway through wetlands and floodplains to the intersection of
5 Veterans Parkway and South Meadows Parkway. *Id.* at 200; Exh. 8. According to the Permit
6 Application, the Project’s purpose is “to provide improved north-south regional linkages between
7 the South Truckee Meadows and the City of Sparks for all modes of travel” because “[t]he existing
8 roadway network is insufficient for the amount of traffic in the network for the design year [i.e.,
9 2035].” Exh. 22 at 200-04 (project part of 2035 RTP), 232 (“Design year forecast traffic volumes
10 through 2035.”). Phase II would run along Steamboat Creek, requiring five bridges, four spanning
11 drainages and wetlands. The six-lane highway would permanently destroy 11.45 acres of
12 jurisdictional wetlands and temporarily affect 16.58 more. *Id.* at 207; Exh. 39 at 830.⁶

13 The Coalition submitted extensive comments to the Corps on the significant environmental
14 impacts that would result from construction and operation of Phase II, including potential flood
15 impacts, impacts to threatened and endangered species, and potential contamination of Steamboat
16 Creek as a result of disturbing the area’s mercury-laden soils. *See* Exh. 23. The Coalition also
17 commented, based on the documents submitted in connection with the Section 404 Permit
18 application, that there were a number of practicable alternatives to building a highway through
19 wetlands and a floodplain that would accomplish the Project’s goals with fewer environmental
20 impacts. *Id.* at 343. The Coalition urged the Corps to prepare an EIS and hold a public hearing
21 before taking action on the application. *Id.* at 343, 355.

22 The EPA also reiterated its objections to the Project, noting that RTC had not demonstrated
23 that the Project was the “least environmentally damaging practicable alternative” (“LEDPA”) or
24 provided adequate details about the project’s impacts and proposed mitigation measures. Exh. 24 at
25 365. EPA recommend denial of the permit unless these issues were resolved. *Id.*

26
27 ⁶ Although RTC’s permit application states that the project will result in the loss of 11.23 acres of
28 wetlands, the Corps found that the project would actually result in the loss of 11.45 acres.

1 In February, 2014, RTC provided the Corps with a revised analysis of Project alternatives.
2 Exh. 35. As the Coalition pointed out in another comment letter to the Corps, this revised analysis
3 inflated the cost of alternatives to the Project, without any explanation or evidence to support the
4 suddenly increased cost. Exh. 26. It also ignored the cost of building Phase I in its calculation of
5 Project cost, in direct contravention of the Corps' sworn declaration stating that RTC's investment
6 of "substantial resources" into Phase I would "not be a factor in the consideration of alternatives" to
7 Phase II. *Id.* at 410-11. Taken together, these two manipulations made it appear as though all
8 alternatives to the Project would be significantly more expensive and thus financially infeasible. *Id.*
9 at 412.

10 Several months later, the Coalition obtained a series of e-mails between EPA and the Corps
11 regarding the Project's potential to contaminate Steamboat Creek with mercury and
12 methylmercury,⁷ a toxic substance so harmful that there are no safe exposure levels. Exh. 31; Exh.
13 32. The Coalition again submitted comments to the Corps, raising questions about this potentially
14 significant Project impact. Exh. 40. Once again, the Coalition urged the Corps to include analysis of
15 this issue in an EIS. *Id.* And once again, the Coalition received no response.

16 The Coalition was not alone in its concerns, however. The Pyramid Lake Paiute Tribe, whose
17 lands are downstream of the Project site, was also concerned about the potential impacts of
18 disturbing the contaminated soil along Steamboat Creek and requested that the Corps prepare an
19 EIS. The Reno City Council—which has two members on the six-member board of the RTC—
20 adopted a resolution requesting that the Corps prepare an EIS for the Project or, at the very least,
21

22 _____
23 ⁷ Throughout this entire process, the only document the Corps ever provided to the public without a
24 prior FOIA request, was a notice of the original, 2011 Section 404 Permit application. Declaration
25 of Kimberly Rhodemyre In Support of Plaintiff's Motion for Preliminary Injunction ("Rhodemyre
26 Decl.") ¶ 11. Except for emails saying the permit was still under review, the Corps rarely provided
27 the Coalition with any other information about the Project unless the Coalition submitted a FOIA
28 request to obtain this information. *Id.* The Corps even failed to provide the Coalition with notice of
changes to RTC's permit application. Had the Coalition not submitted repeated FOIA requests to
the Corps, the public would have been entirely in the dark about the Project and its effects until
weeks after the permit was issued.

1 provide the City with notice and a period of time to comment on any EA/FONSI issued for the
2 Project. *See* Exh. 28.

3 Despite these pleas from the neighboring public, affected Tribe, and the City of Reno, the
4 Corps did not prepare an EIS for the Section 404 Permit. Instead, on April 15, 2015, the day that the
5 City of Reno adopted its resolution requesting an EIS, the Corps simply issued the Section 404
6 Permit for Phase II of the Project. Exh. 39.

7 The Corps also apparently issued an Environmental Assessment (“EA”) and Finding of No
8 Significant Impact (“FONSI”) (together, “EA/FONSI”) for the permit. However, the Corps did not
9 post the EA/FONSI on its website, or allow members of the public to view it in the Corps’ offices.
10 Rhodemyre Decl. ¶¶ 7, 9; Exh. 37. In fact, when a member of the Coalition contacted the Corps and
11 asked for a copy, she was told that the Corps might post the document on its website but that any
12 such posting “may take a couple of weeks.”⁸ Exh. 37 at 802. The Corps representative further
13 informed the Coalition member that she could submit a request for the EA/FONSI under the
14 “Freedom of Information Act” (“FOIA”), but that FOIA allows agencies up to 20 days to respond to
15 such requests. *Id.*

16 Meanwhile, RTC has begun pre-construction activities, Rhodemyre Decl. ¶ 6, and is
17 scheduled to begin ground-disturbing activities in the first week of June. Declaration of Winter King
18 In Support of Plaintiff’s Motion for Preliminary Injunction (“King Decl.”) ¶ 6; Ex. 43 at 866.

19 **ARGUMENT**

20 **I. Standard of Review.**

21 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
22 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
23 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
24 *Natural Res. Def. Council*, 555 U.S. 720 (2008). Following *Winter*, the Ninth Circuit has held that
25 “[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions
26

27 ⁸ As of May 5, 2015, neither the Corps’ nor RTC’s website provided the public with access to the
28 EA/FONSI. Rhodemyre Decl. ¶ 7.

1 going to the merits were raised and the balance of hardships tips sharply in the plaintiffs favor,” as
2 long as “the other two elements of the Winter test are also met.” *Alliance for the Wild Rockies v.*
3 *Cottrell*, 632 F.3d 1127, 1132, 1134-35 (9th Cir. 2011) (internal quotation marks omitted).

4 As discussed below, the Coalition satisfies all of these requirements.

5 **II. The Coalition Is Likely to Succeed on the Merits of Its Claims.**

6 **A. The Corps Violated the National Environmental Policy Act (NEPA).**

7 In this case, the Corps was presented with an application to permanently fill more than 11
8 acres of wetlands, and temporarily fill another 16.5 acres, so that RTC can build a 5.5-mile, six-lane
9 highway through a federally designated floodplain containing soils contaminated with toxic
10 mercury. This is an incredibly controversial project, with hundreds of residents, a federally
11 recognized tribe, and the City of Reno all voicing concerns about its environmental impacts and
12 demanding that they be analyzed in an EIS. These significant environmental impacts even led EPA
13 to object to the Project and recommend denial.

14 Instead of preparing an EIS and involving this concerned public in the environmental review
15 process, the Corps issued the permit based on an EA/FONSI, with no public notice or opportunity to
16 review. The Corps’ actions plainly violate NEPA, and therefore the Coalition is likely to succeed on
17 the merits of its NEPA claims.

18 **1. Overview of NEPA.**

19 NEPA’s fundamental purpose is to inform federal agencies about the environmental impacts
20 of their proposed actions and force them to ensure that their actions promote the environmental
21 protection policies defined in NEPA. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1502.1. To accomplish this
22 purpose, federal agencies must prepare an “environmental impact statement” (“EIS”) before
23 approving any “major Federal action” that could significantly affect the quality of the human
24 environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4(a)(1). An EIS is a “detailed written
25 statement” that “provide[s] [a] full and fair discussion of significant environmental impacts” of the
26 proposed action. 40 C.F.R. §§ 1508.8(b), 1508.11, 1502.1.

27 When an agency is uncertain whether the impacts of a “major federal action” will be
28 significant, the agency must prepare an EA. *See* 40 C.F.R. §§ 1501.3, 1501.4, 1508.9. An EA is a

1 “concise public document” that briefly provides sufficient evidence and analysis for determining
2 whether to prepare an EIS. *See* 40 C.F.R. § 1508.9. If, after preparing an EA, the agency concludes
3 that its action will not have a significant effect on the human environment, then it issues a “Finding
4 of No Significant Impact” or “FONSI,” which briefly presents the reasons why an environmental
5 impact statement need not be prepared. 40 C.F.R. § 1508.13.

6 Public involvement is critical to the NEPA process. *See, e.g.*, 40 C.F.R. § 1500.2(d). The
7 statute’s implementing regulations have numerous provisions dictating the public notice and
8 comment procedures for preparing both an EIS and an EA/FONSI. *See* 33 C.F.R. §§ 230.11, 230.18;
9 *see generally* 40 C.F.R. § 1506.6. Under these rules, an agency must provide public notice of every
10 FONSI. *See* 40 C.F.R. § 1506.6(b); 33 C.F.R. 230.11. And every FONSI must include, summarize,
11 or attach and incorporate by reference, the EA upon which it is based. *Id.*, Question 37a. In certain
12 circumstances, the Corps must also provide a 30-day comment period on an EA/FONSI prior to
13 taking action. 40 C.F.R. § 1501.4(e)(2).

14 **2. The Corps Failed to Provide Adequate Public Notice and Review of the**
15 **EA/FONSI.**

16 Here, the Corps issued the Section 404 Permit on the basis of an EA/FONSI. Under NEPA’s
17 implementing regulations, then, the Corps was required to “[p]rovide public notice of [the
18 EA/FONSI’s] availability.” 40 C.F.R. § 1506.6(b); *see also* 33 C.F.R. § 230.11 (Corps regulations
19 requiring notice of availability of a FONSI to concerned agencies, organizations and the interested
20 public). According to the Council on Environmental Quality (“CEQ”), the agency tasked with
21 implementing NEPA, “[t]he objective [of providing public notice] is to notify all interested or
22 affected parties.” CEQ 40 Questions, Question 38.A. Thus, for projects that affect a particular
23 locality, the CEQ suggests that posting a notice of the EA/FONSI in the local newspaper would be
24 appropriate. *Id.*

25 Despite these regulations and guidelines, the Corps provided *no* public notice of the Project
26 EA/FONSI. It did not provide the Coalition with notice of the availability of the EA/FONSI, even
27 though the Coalition and its members were clearly “interested” members of the public. Rhodemyre
28 Decl. at ¶ 8. The Coalition did not see any notice of the EA/FONSI in the local press. Rhodemyre

1 Decl. at ¶ 7. In fact, the only “notice” the Coalition was aware of was a press release on the Corps’
2 own website announcing that the permit had issued. It did not even mention, let alone provide a
3 copy of, the EA/FONSI. Exh. 30. Even if it had, however, an internal posting of a press release
4 cannot satisfy NEPA’s notice requirements because an interested member of the public would have
5 no way of knowing that the posting existed unless she routinely checked the Corps’ website. *See*
6 *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 967, 970 (9th Cir. 2003)
7 (insufficient notice and opportunity for public participation where EA/FONSI was made available
8 on federal agency website, but not published elsewhere or in the Federal Register).

9 When members of the Coalition asked for a copy of the EA/FONSI, they were told the Corps
10 might put the document on its website in two or three weeks, and if the public requested the
11 document through a FOIA letter, they might get it within 20 days. Exh. 37. This failure to make the
12 EA/FONSI immediately available to the public also violated NEPA’s notice requirements. 33
13 C.F.R. § 230.11; CEQ 40 Questions, Question 38.A (FONSIs “are public ‘environmental
14 documents’ . . . and, therefore, agencies must give public notice of their *availability*.” (emphasis
15 added)).

16 Finally, the Corps’ refusal to provide the public with a 30-day comment period on the
17 EA/FONSI before taking action on the Permit violated NEPA regulations and CEQ guidance.
18 Agencies must provide the public with a 30-day period to comment on an EA/FONSI—*before*
19 deciding whether to prepare an EIS and *before* the action may begin—when “[t]he proposed action
20 is, or is closely similar to, one which normally requires the preparation of an [EIS].” 40 C.F.R.
21 § 1501.4(e)(2)(i). According to the CEQ:

22 Public review is necessary, for example, (a) if the proposal is a borderline case, i.e.,
23 when there is a reasonable argument for preparation of an EIS; . . . (c) when there is
24 either scientific or public controversy over the proposal; or (d) when it involves a
25 proposal which is or is closely similar to one which normally requires preparation of
26 an EIS. [40 C.F.R. §§ 1501.4(e)(2), 1508.27]. **Agencies also must allow a period of
public review of the FONSI if the proposed action would be located in a
floodplain or wetland.** E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

26 CEQ 40 Questions, Question 37b.A (emphasis added).

27 As discussed in the next section, this Project was, at the very least, a borderline case for an
28 EIS. It took the agency 20 months from the date of RTC’s July 19, 2013 permit application to

1 consider all of the information about potentially significant environmental impacts this Project will
 2 cause. Resource agencies, including the EPA, expressed serious concerns about the effects of
 3 disturbing contaminated soils along Steamboat Creek. Exh. 24; Exh. 31; Exh. 32. Moreover, the
 4 Project would be located in a floodplain and wetlands. Exh. 2 at 010; Exh. 33 at 482-83; Exh. 39 at
 5 813. According to NEPA’s implementing regulations and CEQ’s guidance, this fact alone required
 6 the Corps to allow a period of public review. *See* CEQ 40 Questions, Question 37b.A. The Corps
 7 did not do so here, and as a result, it violated NEPA.

8 The Ninth Circuit has repeatedly held that failing to provide the public with notice and an
 9 opportunity to comment on EA/FONSI violates NEPA and the CEQ implementing regulations. In
 10 *Citizens for Better Forestry*, the U.S. Department of Agriculture prepared an EA/FONSI for a final
 11 rulemaking, but did not publish them in the Federal Register or entertain comments on the
 12 documents. 341 F.3d at 967. The court deemed the Department’s actions a “wholesale neglect of the
 13 regulations’ mandatory inclusion of the public” which violated the NEPA regulations. *Id.* at 970-71
 14 (interpreting 40 C.F.R. §§ 1501.4 and 1506.6). *See also Anderson v. Evans*, 314 F.3d 1006, 1016
 15 (9th Cir. 2002) (40 C.F.R §§ 1503.1 and 1506.6 require that the public be given an opportunity to
 16 comment on draft EAs, and public hearings are “encouraged”); *Ocean Mammal Inst. v. Gates*, 546
 17 F. Supp. 2d 960, 972-73 (D. Haw. 2008) *modified in part Ocean Mammal Inst. v. Gates*, No. CIV.
 18 07-00254DAE-LEK, 2008 WL 2020406 (D. Haw. May 9, 2008) (Navy’s failure to publish
 19 EA/FONSI and provide opportunity for public comment violated the clear language of the NEPA
 20 regulations, 40 C.F.R. § 1506.6, and NEPA’s overall purpose and intent). Here, too, the Corps’
 21 wholesale refusal to provide the public with an opportunity to review and comment on the
 22 EA/FONSI violated NEPA.

23 **3. The Corps Failed To Prepare an EIS for the Project, Even Though the**
 24 **Record Contains Ample Evidence that the Project Could Cause**
Significant Environmental Impacts.

25 The Corps also violated NEPA by failing to prepare an EIS for the Project. As discussed
 26 above, NEPA requires federal agencies to prepare an EIS for all “major Federal actions significantly
 27 affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Issuance of a Section 404
 28 Permit is a “major federal action” to which NEPA applies. *Save Our Sonoran, Inc. v. Flowers*, 408

1 F.3d 1113, 1121 (9th Cir. 2004), citing *Tillamook County v. U.S. Army Corps of Eng'rs*, 288 F.3d
2 1140, 1142 (9th Cir. 2002); 33 C.F.R. § 325.2(a)(4).

3 Numerous regulations, guidelines, and court decisions indicate that there is a low bar for
4 preparing an EIS (instead of an EA). An EIS must be prepared if “*substantial questions* are raised as
5 to whether a project . . . *may* cause significant degradation of some human environmental factor.”
6 *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (emphases added; internal
7 quotation marks omitted). To trigger this requirement, a “plaintiff need not show that significant
8 effects *will in fact occur*,” but need only raise “substantial questions whether a project may have a
9 significant effect.” *Id.* (internal quotation marks omitted); *see also Ocean Advocates v. U.S. Army*
10 *Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2005) (describing Ninth Circuit’s standard for
11 reviewing an agency’s decision not to prepare an EIS); *National Audubon Soc. v. Hoffman*, 132 F.3d
12 7, 13 (2d Cir. 1997) (if it is a “close call” whether the proposed action will result in a significant
13 environmental impact, “an EIS should be prepared”) (*citing Found. for N. Am. Wild Sheep v. U.S.*
14 *Dep’t of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982)).

15 In this case, there are, at the very least “substantial questions” about whether the Project will
16 have a significant effect on the environment. The Project will permanently destroy more than eleven
17 acres of wetlands, which, on its own is significant effect on the environment. *See* 40 C.F.R.
18 §§ 230.1(d), 230.41(b) (NEPA regulations expressly state that filling of wetlands is considered
19 among the “most severe” environmental impacts representing an irreversible loss of resources); *see*
20 *also* 40 C.F.R. § 1508.27(b)(3) (defining the presence of wetlands as a “[u]nique characteristic” of a
21 project site).

22 Moreover, constructing the Project and creating new wetlands to replace those filled by it
23 runs a significant risk of contaminating Steamboat Creek with highly toxic methylmercury. Exh. 31.
24 In fact, the EPA repeatedly raised this concern in its correspondence with the Corps. In several
25 lengthy e-mails, EPA’s “mercury expert” highlighted the risk, providing a summary of recent
26 scientific research and questioning the assumptions, support, and conclusions contained in RTC’s
27 technical memorandum on the topic. *Id.*; *see also* Exh. 32 (questioning numerous unfounded
28 assumptions, conclusions that lack support, and factual errors). EPA then provided a number of

1 “[p]ossible ways to reduce [this] risk,” including “reducing inorganic [mercury] source loading,
2 reducing organic carbon, nutrient, or sulfate loading,” and adding “activated carbon.” Exh. 31 at
3 477.⁹ There were no simple, guaranteed mitigation measures; according to EPA, finding a
4 mechanism that works “is probably very site specific . . . and may be very expensive.” *Id.* EPA also
5 described a number of additional studies that could be conducted to eliminate at least some of the
6 uncertainty surrounding the Project’s potentially toxic impacts. *Id.* at 476. It was in part because of
7 this risk that EPA objected to the Project and recommended denying the permit. Exh. 24 at 365.

8 Because there was so much uncertainty about the Project’s impacts on mercury
9 contamination, and because there were numerous studies that could have been conducted to reduce
10 this uncertainty, the Corps was required to prepare an EIS to look into this issue. *Sierra Club v. U.S.*
11 *Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (An EIS is required where uncertainty may be
12 resolved by collecting more data, or where the collection of more data may prevent “speculation on
13 potential . . . effects. The purpose of an EIS is to obviate the need for such speculation by insuring
14 that available data are gathered and analyzed prior to the implementation of the proposed action.”).
15 The agency’s failure to do so violated NEPA.

16 The Coalition also raised “substantial questions” about the Project’s impacts on flooding in
17 the area. According to a civil engineer specializing in flood control projects, the flood analysis
18 prepared by RTC was patently insufficient. It used outdated modeling and data, and failed to
19 consider a whole range of flood events, thus potentially underestimating the impacts of placing this
20 six-lane highway through the floodplain. *See* Exh. 23 at 356-57. These potentially significant
21 impacts should have been analyzed in an EIS, but were not.

22 Nor has the Corps provided a sufficient explanation for why it did not prepare an EIS. In
23 *Ocean Advocates*, the Ninth Circuit held that, when the Corps declines to prepare an EIS, it bears
24 the burden of putting forth a “convincing statement of reasons” demonstrating why none was
25 necessary. 402 F.3d at 864. Moreover, it cannot simply rely on representations made by the permit
26

27 ⁹ The Corps did not require RTC to implement any of these mechanisms as a condition of approving
28 the Permit. Exh. 39 at 830-35 (permit conditions).

1 applicant, but must “look through” those claims. *Id.* Here, the Corps has not provided a convincing
2 statement of reasons for its decision. In fact, the Corps did not provide the Coalition with *any*
3 statement of reasons until May 4, after the Coalition had already submitted a FOIA request for the
4 EA/FONSI *and* sued the Corps. And the EA/FONSI provides no reasoned response to EPA’s
5 questions and concerns in its summary conclusion that the Project will not add any mercury to
6 Steamboat Creek. Exh. 33 at 509. Under *Ocean Advocates*, then, the Corps was required to prepare
7 an EIS. *Ocean Advocates*, 402 F.3d 846 at 866.

8 Finally, according to CEQ guidance, “a lengthy EA indicates that an EIS is needed.” CEQ 40
9 Questions, Question 36.b. A typical EA should not exceed 10-15 pages. *Id.*, Question 36a.A. Here,
10 the EA is more than 60 pages long and with exhibits approaches 200 pages. *See generally* Exh. 33.
11 The substantial length of this EA, together with the amount of time it took the Corps to prepare, also
12 indicates that an EIS was required.

13 **B. The Corps Violated the Clean Water Act (CWA).**

14 **1. Overview of CWA, Section 404.**

15 Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the point source
16 discharge of pollutants to navigable waters of the United States unless the discharge is in
17 compliance with a permit issued pursuant to section 402 or 404 of the Clean Water Act, 33 U.S.C.
18 §§ 1342 & 1344. “Wetlands” are considered “waters of the United States,” and therefore a Section
19 404 permit is required prior to any activity that involves filling wetlands. *See* 33 C.F.R.
20 § 328.3(a)(3). The Corps is the principal federal agency charged with issuing Section 404 permits.

21 The purpose of this statute is to prevent any unnecessary alteration or destruction of wetlands
22 and floodplains, which Congress has repeatedly identified as valuable public resources that must be
23 protected. *See* 40 C.F.R. § 230.1(d) (from national perspective, filling of wetlands considered
24 among “most severe environmental impacts”); 33 C.F.R § 320.4(b) (wetlands a “productive and
25 valuable public resource,” unnecessary alteration or destruction of which is discouraged as
26 “contrary to the public interest”); *id.* at § 320.4(*l*) (government shall ensure to “maximum extent
27 practicable” that natural and beneficial values served by floodplains are restored and preserved).

1 To further this purpose, the Corps may not issue a Section 404 permit unless it finds that the
2 project requiring the permit is “the least environmentally damaging practicable alternative”
3 (“LEDPA”). See 40 C.F.R. § 230.10.¹⁰ An alternative is “practicable” if it is available and capable
4 of being done after taking into consideration existing technology and logistics in light of the overall
5 project purposes. See Exh. 36 at 793.

6 The alternatives analysis required by the CWA and its implementing regulation must reflect
7 the Corps’ *independent judgment* and consider the *public’s concerns*; it cannot simply defer to the
8 applicant’s purported project purpose. See 33 C.F.R. § 325, App. B(9)(c)(4). See also U.S. Army
9 Corps of Engineers, *Permit Elevation, Hartz Mountain Development Corp.* (1989) 6-7 (alternatives
10 analysis cannot simply “provide a rationalization for the applicant’s preferred result”). Where the
11 location of proposed dredging or filling contains wetlands or other “special aquatic sites,” and the
12 project does not require access or proximity to wetlands to fulfill its basic purpose, the Corps must
13 presume that practicable alternatives are available and will have less adverse impacts “unless clearly
14 demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3).

15 **2. The Corps Violated the CWA by Approving the Project Even Though It**
16 **Is Not the “Least Environmentally Damaging Practicable Alternative.”**

17 Over the course of the Corps’ consideration of the proposed Project, RTC provided several
18 different alternatives analyses in hopes of convincing the Corps that the Project was the LEDPA.
19 However, as described in detail in the Coalition’s April 3, 2014 comment letter, see Exh. 26, these
20 analyses do not “clearly demonstrate[]” that Project is the LEDPA. In fact, they are nothing more
21 than a “rationalization” for RTC’s preferred result. As a result, the Corps’ issuance of the Section
22 404 Permit for the Project violated the CWA.

23 ¹⁰ Under these guidelines, the project also must not result in a violation of water quality standards or
24 toxic effluent standards, jeopardize a threatened or endangered species, or violate requirements
25 imposed to protect a marine sanctuary, 40 C.F.R. § 230.10(b), or cause or contribute to significant
26 degradation of waters. *Id.* § 230.10(c). Significant degradation may include individual or cumulative
27 impacts to human health and welfare; fish and wildlife; ecosystem diversity, productivity, and
28 stability; and recreational, aesthetic, or economic values. *Id.* Finally, the project proponent must take
all appropriate and practicable steps to minimize the potential adverse effects of filling wetlands on
the aquatic ecosystem. *Id.* § 230.10(d).

1 There are numerous examples of this “rationalization” in both RTC’s alternatives analyses
2 and in the EA/FONSI. For example, RTC’s analysis rules out a number of alternatives because their
3 cost would exceed the cost of the Project. *See generally* Exh. 34 at 677 *et seq.* However, the fact
4 that an alternative is somewhat more expensive is not sufficient to rule it out as a practicable
5 alternative. *See* Exh. 36 at 789 (“EPA’s 404(b)(1) Guidelines are written hierarchically to ensure
6 that maximum efforts are made to achieve the objective of the CWA.”). After all, acquiring land in a
7 floodplain or wetland area is almost always going to be less expensive than acquiring land that is
8 suitable for development or that is already developed. Exh. 23 at 348. Thus, if cost alone could rule
9 out alternatives, the CWA LEDPA analysis would be largely meaningless.

10 Here, moreover, the analysis provided by RTC to show that the Project is less expensive than
11 environmentally superior alternatives contains fundamental errors skewing the result in favor of
12 RTC’s preferred outcome. Most obviously, RTC *excludes* the cost of building Phase I in its estimate
13 of the Project’s cost. As described above, Phase I—the northernmost mile of RTC’s preferred
14 route—was originally part of the “Project” as described in RTC’s 2011 Section 404 Permit
15 application. Exh. 9 at 042. RTC removed that section of the highway from its application and went
16 ahead with construction of it after the Corps determined it would not impact any jurisdictional
17 waters. Exh. 15; Exh. 8 (delineating “Phases”). The Coalition challenged those actions, alleging that
18 they were a transparent ploy to (a) limit the scope of environmental review conducted for the
19 Section 404 permit and (b) render “impracticable” alternative routes that have fewer environmental
20 impacts but no connection to Phase I. *See* Exh. 19.

21 In response, the Corps filed a sworn declaration stating in no uncertain terms that RTC’s
22 investment of “substantial resources” into Phase I “will not be a factor in the consideration of
23 alternatives” to Phase II. Exh. 20 at 181. Yet, when RTC submitted its most recent alternatives
24 analysis to the Corps, it *excluded* the cost of building Phase I when calculating this cost of the
25 Project. Exh. 35 at 735 (describing Project as ending at Clean Water Way, where Phase I dead-
26 ends). This exclusion dramatically understates the total cost of the Project, making it appear far less
27 expensive than other alternatives that have no impacts to wetlands or floodplains at all.

1 This improperly skewed analysis is precisely what the Corps swore, in a declaration to the
2 Nevada District Court, it would *not* do when analyzing alternatives to Phase II. Exh. 20 at 181. The
3 Corps tries to get around its previous testimony in the EA/FONSI by declaring that the cost of Phase
4 I was “irrelevant” in the alternatives analysis because all of the alternatives, with the exception of
5 the Mustang Corridor Alternative, would connect to Phase I. Exh. 33 at 492. This statement is
6 patently incorrect: *Five* of the six alternatives considered and rejected by the Corps would not utilize
7 Phase I. Exh. 33 at 498-99 (describing “Widen and Improve Existing Streets Only,” “McCarran
8 Widening,” “Sparks Industrial or Ridge Corridor,” “Mustang Corridor,” and “Mass Transit
9 Alternatives.”). Moreover, the Corps’ rationale in rejecting several of these alternatives was, in part,
10 financial. *See* Exh. 33 at 498-99.

11 In addition, RTC’s most recent alternatives analysis dramatically and inexplicably *increased*
12 the cost estimates for these alternatives, while simultaneously *decreasing* the estimated cost of the
13 Project. For example, in September 2013, RTC stated that the cost of the Sparks Industrial
14 Alternative, an alternative that would construct a new roadway through hills east of an industrial
15 area and connect it to widened existing streets, was \$352-\$437 million. Exh. 34 678. In the revised
16 analysis issued five months later, that estimate jumped more than *75 percent* to \$655-\$740 million.
17 Exh. 35 at 714. Meanwhile, during that same five-month period, RTC’s estimate for the cost of its
18 preferred route (the Project) dropped *50 percent*, from \$218-\$258 million to \$120-\$140 million.
19 *Compare* Exh. 34 at 678 *with* Exh. 35 at 704.

20 Putting these two changes together results in a substantial change in the comparative costs of
21 RTC’s preferred route and environmentally superior alternatives. While RTC originally claimed that
22 the Sparks Industrial Alternative was approximately 1.7 times more expensive than the preferred
23 route, five months later it claimed, without any explanation, that the same alternative was *nearly 5.5*
24 *times more expensive* than the Project. This blatant manipulation of the comparative cost estimates
25 renders the alternatives analysis supplied by RTC wholly insufficient to demonstrate that the Project
26 is the LEDPA.

27 Finally, the Corps rejects two alternatives—“Widen and Improve Existing Streets Only” and
28 “McCarran Widening”—for the sole reason that they would require RTC to relocate existing

1 commercial properties. Exh. 33 at 498. The only “evidence” offered in the EA/FONSI to support the
2 conclusion that this requirement rendered these alternatives unreasonable was the following
3 statement: “Often, it is very difficult to successfully relocate a business to a nearby location,
4 particularly in areas where available properties are scarce.” *Id.* This extraordinarily general
5 statement, without any evidence indicating it would be difficult to relocate businesses in this region,
6 is plainly insufficient to rule these alternatives out, especially when they would have zero impacts
7 on wetlands or other waters of the United States. *Id.* at 495.

8 As a result, the Coalition is likely to succeed on its claims that the Corps violated the CWA
9 when it issued the Section 404 Permit for the Project. *See Kunaknana v. U.S. Army Corps of Eng’rs*,
10 23 F. Supp. 3d 1063, 1094 (D. Alaska 2014) (Section 404 Permit LEDPA analysis was arbitrary
11 where Corps relied on certain information in considering alternatives under CWA, but disclaimed its
12 significance for NEPA purposes).

13 **III. The Coalition Will Suffer Immediate, Irreparable Harm If the Court Does Not Issue a**
14 **Preliminary Injunction.**

15 According to information dated April 17, 2015 and posted on the RTC’s website for the
16 Highway Project, “Construction activities for Phase 2 of the SouthEast Connector [Project] will
17 begin on Monday, April 20, 2015. Local contractor Granite Construction will begin delivering
18 equipment and materials in an effort to facilitate staging for heavy construction operations to begin
19 in the very near future. Additionally, Granite Construction will be placing environmental controls
20 and fencing to delineate where construction operations will occur.” Exh. 29 at 456. Construction
21 workers have already altered the project site by marking locations for, and beginning the movement
22 of, underground utilities and other project features, in preparation for grading and construction
23 activities. *See Rhodemyre Decl.* at ¶¶ 6. Ground-disturbing activities, including massive grading, are
24 scheduled to begin on or about June 1. Exh. 43.

25 If RTC is allowed to continue Project construction before Plaintiff’s claims are heard,
26 Plaintiff will suffer irreparable harm. The Coalition’s members use and enjoy the lands and waters
27 that will be altered, replaced, covered over, or otherwise affected by the Project. *Odynski Decl.* ¶¶ 3-
28 5; *Sasser Decl.* ¶¶ 3-4. Such environmental injury “can seldom be adequately remedied by money

1 damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Production*
2 *Co. v. Village of Gambell, Alaska*, 480 US 531, 545 (1987). At this point, nothing prohibits RTC
3 from filling the wetlands that are the subject of the Section 404 Permit. And once RTC begins
4 disturbing the mercury-laden soils around Steamboat Creek, any contamination that is released will
5 be permanent and irreparable. *See Alliance for the Wild Rockies*, 632 F.3d at 1135 (environmental
6 harms, by their nature, are irreparable).

7 In addition to these substantive injuries, the Coalition will also suffer irreparable *procedural*
8 harm if no injunction is issued. The CWA and NEPA require thorough environmental review and
9 public participation *before* there is an “irretrievable commitment” of resources to the Project
10 requiring federal approval. *See Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974)
11 (NEPA requires detailed statement on any irreversible and irretrievable commitments of resources
12 involved in proposed action); *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985) (impact
13 should be considered before agency is so committed to project that consideration would be
14 meaningless). The Coalition has alleged that the Corps violated these requirements by failing to
15 prepare an EIS and by completely denying the public notice and an opportunity to review the
16 EA/FONSI. *Citizens for Better Forestry*, 341 F.3d at 970 (cognizable procedural injury where
17 citizens were deprived of opportunity to comment on EA/FONSI). If the Project is built before these
18 claims can be heard, these procedural injuries will be irreparable. *Quechan Tribe of Fort Yuma*
19 *Indian Reservation v. U.S. Dept. of the Interior*, 755 F. Supp. 2d 1104, 1107, 1120 (S.D. Cal. 2010)
20 (failure to follow consultation procedures in National Historic Preservation act a procedural harm
21 warranting issuance of preliminary injunction to stop construction on utility-scale solar plant); *Save*
22 *Strawberry Canyon v. Dep’t of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009) (“The
23 procedural injury is also irreparable—even if a NEPA review might later be conducted.”).

24 A preliminary injunction is necessary to prevent these harms from occurring. The Corps
25 retains continuing jurisdiction over the Section 404 Permits and may modify, suspend, or revoke
26 them. *See* 33 C.F.R. § 325.7; Exh. 39 at 831. A preliminary injunction ordering the Corps to
27 suspend the Section 404 Permit for the Project will cause construction activities to cease, and will
28 maintain the status quo until the Court has decided the Coalition’s claims.

IV. The Balance of the Hardships and Public Policy Tip Sharply in the Coalition's Favor.

Three key factors tip the balance of equities sharply in the Coalition's favor. *First*, numerous federal statutes, regulations, and executive orders set forth the positions of Congress and the President that there is a strong public policy *against* projects like the Highway Project that require filling wetlands and placing new construction in floodplains. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 915 (5th Cir. 1983) (legislative history of CWA indicates Congress recognized importance of protecting wetlands as means of reaching CWA's goals to restore and maintain integrity of Nation's waters); 40 C.F.R. § 230.1(d) (from national perspective, filling of wetlands considered among "most severe environmental impacts"); 33 C.F.R § 320.4(b) (wetlands a "productive and valuable public resource," unnecessary alteration or destruction of which discouraged as "contrary to the public interest"); *id.* at § 320.4(l) (government shall ensure to "maximum extent practicable" that natural and beneficial values served by floodplains are restored and preserved); Exec. Order No. 11, 990, 42 Fed. Reg. 26961 (May 24, 1977) (agencies must minimize degradation of wetlands and maintain natural wetland systems, species and habitat diversity); Exec. Order No. 11, 988, 42 Fed. Reg. 26951 (May 24, 1977) (agencies must reduce risk of flood impacts and restore and preserve floodplains' natural values through permitting activities); *see also Quechan Tribe*, 755 F. Supp. 2d at 1121 (upholding public policy as indicated by Congressional act).

These authorities also indicate a strong public policy in favor of thorough agency and public review *before* approving projects that will impact waters of the U.S. *See, e.g.*, Exec. Order No. 11,990 (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 (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). Without a preliminary injunction, construction and fill activities will take place without adequate environmental review and in direct contravention of this clear public policy.

1 *Second*, any delay caused by the preliminary injunction will be minimal and thus will have a
 2 marginal impact on the ultimate completion date of the Project if it is permitted to go forward. The
 3 Corps took 20 months to respond to RTC’s Section 404 Permit application. Having taken this long,
 4 the Corps cannot claim any harm from suspending this decision for a few more months until the
 5 merits can be heard. Moreover, according to RTC documents, the Project is designed to alleviate
 6 traffic congestion projected in 2035. Exh. 22 at 200. There is no reason to believe a short delay now
 7 would impact that target date.

8 *Third*, the Coalition sought this preliminary injunction motion as soon as reasonably possible
 9 after it learned that the Corps had issued a Section 404 Permit to RTC. The Coalition discovered
 10 that the Section 404 Permit had been issued on April 15, 2015. Rhodemyre Decl. at ¶ 8. It
 11 immediately attempted to obtain a copy of the EA/FONSI for the Project, only to be told that this
 12 public document would not be made available to the public for several weeks. Rhodemyre Decl. ¶ 9;
 13 Exh. 37. The Coalition filed its complaint seven days later—before receiving the EA/FONSI—and
 14 immediately contacted counsel for RTC and the Corps to determine Project construction schedule.
 15 King Decl. ¶ 2. After being told that ground-disturbing activity would not begin until the first week
 16 of June King Decl. ¶ 5, the Coalition filed this Motion in time to have it heard by June 17.

17 **V. This Court Should Not Require the Coalition to Post Anything More than a Nominal**
 18 **Bond.**

19 The Coalition respectfully requests that the Court not require the posting of a security bond,
 20 or at most that it require only a nominal bond, during the period of any preliminary injunction. The
 21 Court has the discretion to dispense with the security bond and should do so when requiring it
 22 “would effectively deny access to judicial review” or where the likelihood of success on the merits
 23 tips “in favor of a minimal bond or no bond at all.” *People ex rel. Van De Kamp v. Tahoe Reg’l*
 24 *Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (bond for non-profit group waived).
 25 Accordingly, federal courts have consistently waived the bond requirement in public interest
 26 environmental litigation, or required only a nominal bond. *See, e.g., id.*; *Wilderness Soc’y v. Tyrrel*,
 27 701 F. Supp. 1473, 1492 (E.D. Cal. 1988), rev’d on other grounds, 918 F.2d 813 (9th Cir. 1990)
 28 (\$100 bond); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (no bond); *W. Va. Highlands*

1 *Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir. 1971) (\$100 bond); *Sierra Club*
2 *v. Block*, 614 F. Supp. 488, 494 (D.D.C. 1985) (\$20 bond).

3 To require the Coalition to post more than a nominal bond would effectively deny it access to
4 judicial review. The Coalition is a non-profit organization funded entirely by donations from
5 individuals who are concerned about the environmental impacts of the proposed Project. *See*
6 Rhodemyre Decl. ¶ 3. Given Plaintiff's status as an environmental non-profit organization, and the
7 imminent and irreparable injury to the public interest that is at stake, the Court should exercise its
8 discretion not to require a bond, or should require only a nominal bond.

9 **CONCLUSION**

10 For all of these reasons, the Coalition respectfully requests that the Court grant its motion for
11 preliminary injunctive relief.
12

13 DATED: May 6, 2015

SHUTE, MIHALY & WEINBERGER LLP

14 By: /s/

WINTER KING

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16 Attorneys for Plaintiff Upper South East
17 Communities Coalition

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