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

DEFENDERS OF WILDLIFE, SIERRA CLUB, )  
and SANTA CLARA VALLEY AUDUBON )  
SOCIETY, )

Plaintiffs, )

v. )

U.S. FISH AND WILDLIFE SERVICE and )  
U.S. ARMY CORPS OF ENGINEERS, )

Defendants. )

CASE NO.: 5:16-cv-1993

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

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## NATURE OF THE CASE

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

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

19           3.       Panoche Valley Solar LLC has proposed to develop a massive solar energy  
20 project in the ecologically sensitive Panoche Valley. If constructed, the 247-megawatt solar  
21 facility will consist of approximately 1,529 acres of photovoltaic panels, each panel roughly six  
22 by three feet in size, on a 2,154-acre project site. The project will also include electricity  
23 collection lines, operation and maintenance buildings, roads, fences, water tanks and treatment  
24 facilities, interconnection facilities and compensatory mitigation lands. In total, the project will  
25 affect more than 26,000 acres of sensitive habitat.  
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1           4. Under Section 7 of the Endangered Species Act, federal agencies must ensure that  
2 no project authorized, funded, or permitted will jeopardize the continued existence of any  
3 threatened species. A federal agency satisfies this obligation, in part, by consulting with the  
4 federal wildlife agency that has expertise and jurisdiction over the species, in this case the U.S.  
5 Fish and Wildlife Service. At the conclusion of formal consultation, the Service issues a  
6 Biological Opinion for the project that may include “reasonable and prudent alternatives” and  
7 other terms and conditions to ensure against jeopardy to listed species. Federal agencies must  
8 comply with all reasonable and prudent alternatives in a Biological Opinion. 16 U.S.C. §  
9 1536(b)(4). To avoid liability for take of listed species, Federal agencies must also comply with  
10 all “reasonable and prudent measures” necessary to minimize impact to the species. Id.

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

21           6. The revised Biological Opinion found that the project would not cause jeopardy to  
22 the blunt-nosed leopard lizard, the giant kangaroo rat, San Joaquin kit fox, and other species,  
23 provided that the Corps and the project developer agree to detailed terms and conditions  
24 specifying both on and off-site avoidance and mitigation measures for the species. The  
25 Biological Opinion specifically requires that the Corps adopt these measures and include them as  
26 binding enforceable conditions in its Section 404 permit for the project. The Corps’  
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1 responsibility for ensuring compliance extends to the “construction, operations, and maintenance  
2 phases” of the 30-year project. Biological Opinion at 106.

3         7.         The Corps issued a Record of Decision and a Section 404 permit for the Project  
4 on March 15, 2016. Rather than incorporate all the terms and conditions outlined in the  
5 Biological Opinion, however, the Permit and Record of Decision only adopts species protection  
6 and mitigation measures with respect to areas “related to its jurisdiction.” U.S. Army Corps of  
7 Engineers, Record of Decision, Action ID SPN-2009-00443, Mar. 15, 2016 (“ROD”).  
8 Problematically, the ROD takes a narrower view of the extent of the Corps’ jurisdiction than that  
9 which the Service relied upon in reaching its no jeopardy conclusions. The ROD defines the  
10 Corps’ jurisdiction over the proposed action as “limited to construction activities within the  
11 0.121 acres of water of the U.S. that would be filled, upland areas adjacent to the waters of the  
12 U.S. that would be filled, as well as upland access and staging areas.” ROD at 22.

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

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

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

4           11.     The Clean Water Act also obligates the Corps to ensure against jeopardy to  
5 threatened and endangered species. EPA's 404(b)(1) Guidelines, which are binding regulations  
6 that constrain the Corps' authority to issue dredge and fill permits under Clean Water Act  
7 Section 404, prohibit the Corps from authorizing an application for dredge and fill activities if,  
8 inter alia, the activity "jeopardizes the continued existence" of an endangered species under the  
9 ESA. 40 C.F.R. § 230.10(b)(3). The 404(b)(1) Guidelines further state that the Corps must  
10 consider both direct and indirect impacts to ESA listed species from the dredge or fill activities.  
11 40 C.F.R. § 230.30(b). The 404(b)(1) Guidelines mandate that the Corps' determination of  
12 whether an activity "jeopardizes the continued existence" of an ESA endangered species is  
13 determined by the outcome of the formal consultation process under the ESA. 40 C.F.R. §  
14 230.30(c).

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

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

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

### 8 **JURISDICTION AND VENUE**

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

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

16 17. Venue is proper in the Northern District of California, San Jose Division, pursuant  
17 to 28 U.S.C. § 1391(e)(1)(B) because a substantial part of the events or omissions giving rise to  
18 the violations alleged in this complaint occurred in this district and the species affected by the  
19 challenged actions are located in this district in this division. Furthermore, Plaintiff Sierra Club is  
20 incorporated in California and its headquarters is in this judicial district. 28 U.S.C. §  
21 1391(e)(1)(C).

### 22 **THE PARTIES**

23 18. Plaintiff Defenders of Wildlife ("Defenders") is a national nonprofit conservation  
24 organization headquartered in Washington, D.C., with offices in numerous locations across the  
25 country, including California. Founded in 1947, Defenders is dedicated to protecting all native  
26 wild animals and plants in their natural communities, and preserving the habitat on which they  
27

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

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8 19. Plaintiff Sierra Club is a national nonprofit organization of approximately  
9 630,000 members, roughly 146,000 of whom live in California. The Sierra Club is dedicated to  
10 exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the  
11 responsible use of the earth's ecosystems and resources; to educating and encouraging humanity  
12 to protect and restore the quality of the natural and human environment; and to using all lawful  
13 means to carry out these objectives. In California, the Sierra Club advocates for and monitors the  
14 enforcement of environmental laws and regulations, and is focused on the preservation and  
15 protection of natural resources.

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

23 21. Defenders, the Sierra Club, the Santa Clara Valley Audubon Society (collectively  
24 "conservation groups"), and their members derive scientific, educational, recreational and other  
25 benefits from California's grassland areas, including the Panoche Valley. The conservation  
26 groups' members have recreational, aesthetic, educational, and scientific interests in the  
27 preservation of California's Panoche Valley and the wildlife that depend on these habitats,  
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1 including the endangered giant kangaroo rat, the San Joaquin kit fox, and the blunt-nosed leopard  
2 lizard, among other species. The conservation groups' members regularly visit the Panoche  
3 Valley, including the areas that will be affected by the project, and intend to do so in the future.  
4 The Service's unlawful Biological Opinion and the Corps' unlawful decision to issue a Section  
5 404 permit in reliance on that opinion has harmed, and will harm, the conservation groups and  
6 their members, by hindering efforts to protect wildlife and wildlife habitat and reducing the  
7 ecological, aesthetic, and recreational value of these areas. The relief sought would redress the  
8 injuries of the conservation groups and their members.

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

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

## 20 **STATUTORY BACKGROUND**

### 21 **A. The Endangered Species Act**

22 24. The ESA was enacted to "provide a program for the conservation of ...  
23 endangered species and threatened species" and to "provide a means whereby the ecosystems  
24 upon which endangered species and threatened species depend may be conserved." 16 U.S.C. §  
25 1531(b). Through the ESA, Congress declared its policy "that all Federal departments and  
26 agencies shall seek to conserve endangered species and threatened species and shall utilize their  
27 authorities in furtherance of the purposes of [the Act]." *Id.* § 1531(c)(1).



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

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

11           27. When listing a species as endangered or threatened, the ESA also requires  
12 designation of the species’ “critical habitat.” *Id.* § 1533(a)(3). Critical habitat is habitat that is  
13 “essential to the conservation of the species.” *Id.* § 1532(5).

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

15           28. Under section 7(a)(2) of the ESA, a federal agency cannot undertake any action  
16 that is “likely to jeopardize the continued existence” of any listed species or cause “destruction  
17 or adverse modification” to any designated critical habitat for the species. 16 U.S.C. §  
18 1536(a)(2). An “action” includes “all activities or programs of any kind authorized, funded, or  
19 carried out, in whole or in part, by Federal agencies,” that are within the agencies’ discretionary  
20 control. 50 C.F.R. §§ 402.02, 402.03.

21           29. To assist federal agencies in complying with their substantive duty to avoid  
22 jeopardizing listed species, section 7(a)(2) establishes an interagency consultation requirement.  
23 16 U.S.C. § 1536(a)(2). “If a project is allowed to proceed without substantial compliance with  
24 those procedural requirements, there can be no assurance that a violation of the ESA’s  
25 substantive provisions will not result. The latter, of course, is impermissible.” *Thomas v.*  
26 *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (citation omitted).  
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30. To facilitate the consultation process, a federal agency proposing an action that “may affect” a listed species must prepare a document called a “biological assessment.” See 16 U.S.C. §§ 1536(a)(2), (c); 50 C.F.R. §§ 402.02, 402.12, 402.14. The agency preparing the biological assessment must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). In the biological assessment, the action agency evaluates the potential effects of the proposed action on all listed species within the action area identified by the appropriate wildlife agency – here the Service –and determines, in the first instance, whether any listed species is likely to be affected by the proposed action. See 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.02, 402.12, 402.14(d).

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

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

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

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

13  
14 34. Indeed, the Service’s consultation handbook states: “The Act requires the action  
15 agency to provide the best scientific and commercial data available concerning the impact of the  
16 proposed project on listed species or designated critical habitat. If relevant data are known to be  
17 available to the agency or will be available as the result of ongoing or imminent studies, the  
18 Services should request those data and any other analyses required by the regulations at 50 CFR  
19 §402.14(c), or suggest that consultation be postponed until those data or analyses are available as  
20 outlined in section 4.4(A) of this handbook.” *Id.* at 1-6 (directing that biological opinions should  
21 be based on the available information, “giving the benefit of the doubt to the species,” with  
22 consultation possibly being reinitiated if additional information becomes available”).

23 35. A federal agency cannot ignore available biological information, especially if that  
24 information is the most current, or is scientifically superior to that on which the decision-maker  
25 relied. Moreover, a federal agency requesting consultation under Section 7 of the ESA cannot  
26 refuse to provide FWS with the “most relevant scientific data available from reputable scientists  
27 on the ground that it was not perfect” or its methodology could be criticized, because doing so  
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1 would eviscerate the statutory requirement that the best available science be used. Natural Res.  
2 Def. Council v. Evans, 279 F. Supp. 2d 1129, 1179-80 (N.D. Cal. 2003).

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

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

14 38. A consultation is complete when the Service issues a biological opinion.  
15 However, both the action agency and the Service have a non-discretionary duty to reinitiate  
16 consultation under certain circumstances. 50 C.F.R. § 402.16; Env'tl. Protection Info. Ctr. v.  
17 Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001) (duty to reinitiate consultation under  
18 50 C.F.R. § 402.16 lies with both FWS and the action agency). The action agency and FWS must  
19 reinitiate consultation where the action agency retains discretionary involvement or control over  
20 the action and (1) the amount of take specified is exceeded; (2) new information "reveals effects  
21 of the action that may affect listed species or critical habitat in a manner or to an extent not  
22 previously considered;" (3) if the action is "subsequently modified in a manner that causes an  
23 effect to the listed species or critical habitat that was not considered in the biological opinion;" or  
24 (4) if a new species is listed or critical habitat is designated. 50 C.F.R. § 402.16.

25 39. To satisfy the requirement of ESA section 7(a)(2) to ensure that its actions avoid  
26 "jeopardy," an agency must comply with the reasonable and prudent alternatives identified by  
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the Service in the existing biological opinion or reinitiate consultation aimed at revising them. Southwest Ctr. for Biological Diversity v. Klasse, 1999 WL 34689321, at \*6-7 (E.D. Cal. Mar. 31, 1999) (interpreting the Ninth Circuit’s decision in Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987)); Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation, 6 F. Supp. 2d 1119, 1131 (D. Ariz. 1997), aff’d, 143 F.3d 515 (9th Cir. 1998) (“Marsh requires federal agencies to comply with existing (and unchallenged) RPAs or to reinitiate consultation to revise RPAs so that jeopardy is reasonably likely to be alleviated.”).

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

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

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

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

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

### 10 **3. ESA Section 10 Take Exceptions**

11  
 12 43. Section 10 of the ESA also creates a limited exception to the ESA's take  
 13 prohibition on private lands where no federal permit or authorization is required. Under Section  
 14 10, the Service can authorize the take of listed species that incidentally results from otherwise  
 15 lawful activities. 16 U.S.C. § 1539(a)(1)(B). A permit issued pursuant to ESA section  
 16 10(a)(1)(B) is referred to as an "incidental take permit."

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

24 45. Before issuing an incidental take permit, the Services must find, among other  
 25 things, that the expected taking will be incidental; that the applicant will, to the maximum extent  
 26 practicable, minimize and mitigate the impacts of such taking; that the applicant has assured  
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adequate funding for its HCP; and that the taking will not appreciably reduce the likelihood of the survival and recovery of listed species in the wild. 16 U.S.C. § 1539(a)(2)(B).

**B. The Clean Water Act**

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

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

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

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

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

3 50. In addition, the Environmental Protection Agency (“EPA”) promulgated  
4 regulations, known as the “404(b)(1) Guidelines,” for Section 404 permits. 33 U.S.C. §  
5 1344(b)(1); 40 C.F.R. § 230 et seq. The Corps reviews all proposed Section 404 permits under  
6 both the Corps’ public interest factors and EPA’s 404(b)(1) Guidelines. 33 U.S.C. § 1344(b)(1);  
7 33 C.F.R. § 320.2(f). A permit must be denied if it is contrary to the public interest or does not  
8 comport with the Section 404(b)(1) Guidelines. 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10,  
9 230.12.

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

21 52. The “loss of values” that the Corps must consider in evaluating the impact of a  
22 discharge on the biological characteristics of an aquatic ecosystem includes, with respect to  
23 threatened and endangered species, “[t]he impairment or destruction of habitat to which these  
24 species are limited. . . includ[ing] adequate good quality water, spawning and maturation areas,  
25 nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory  
26 species [which] can be adversely affected by changes in either the normal water conditions for  
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1 clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current  
2 patterns, circulation and fluctuation, or the physical removal of habitat.” 40 C.F.R. §  
3 230.30(b)(2). The Corps must also evaluate whether the discharge could kill individuals of an  
4 endangered or threatened species. 40 C.F.R. § 230.30(b)(1).

5 53. EPA’s 404(b)(1) Guidelines prohibit the Corps from authorizing an application  
6 for dredge and fill activities if, inter alia: (1) the activity “jeopardizes the continued existence” of  
7 an endangered species under the ESA (40 C.F.R. §§ 230.10(b)(3), 230.12(a)(3)(ii)); (2) there is a  
8 practicable alternative which would have less adverse impact and does not have other significant  
9 adverse environmental consequences (40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i)); (3) the discharge  
10 will result in significant degradation to waters of the U.S. (40 C.F.R. § 230.10(c),  
11 230.12(a)(3)(ii)); or (4) there does not exist sufficient information to make a reasonable  
12 judgment as to whether the proposed discharge will comply with the Corps’ Guidelines for  
13 permit issuance. (40 C.F.R. § 230.12(3)(iv)). The Corps must document its findings of  
14 compliance or noncompliance with these restrictions. 40 C.F.R. § 230.12(b).

15 54. Practicable alternatives are those alternatives that are “available and capable of  
16 being done after taking into consideration cost, existing technology, and logistics in light of  
17 overall project purposes.” 40 C.F.R. § 230.10(a)(2). “The regulations explicitly charge the Corps  
18 with taking” these factors into account in evaluating whether there are practicable alternatives.  
19 Friends of Earth v. Hintz, 800 F.2d 822, 833 (9th Cir. 1986). “An applicant cannot define a  
20 project in order to preclude the existence of any alternative sites and thus make what is  
21 practicable appear impracticable.” Sylvester v. U.S. Army Corps of Eng’rs, 882 F.2d 407, 409  
22 (9th Cir. 1989) (citing Hintz).

23 55. Whether an alternative is practicable also depends on the weight of the potential  
24 harm. Alameda Water & Sanitation Dist. v. Reilly, 930 F. Supp. 486, 492 (D. Colo. 1996)  
25 (upholding EPA determination that practicable alternatives existed even though the record  
26 showed “very substantial regulatory and legal obstacles to these alternatives” such as moving an  
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entire town and obtaining a Presidential exemption, because “the impacts [of the proposed project] were much greater” than the impacts of those alternatives).

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

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

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

### **C. The National Environmental Policy Act**

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

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

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

8  
9 61. NEPA and its implementing regulations, promulgated by the Council on  
10 Environmental Quality, require federal agencies to prepare an Environmental Impact Statement  
11 (“EIS”) whenever they propose to take a “major federal action” that “may significantly affect the  
12 quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11; see also 33  
13 C.F.R. §§ 230.1, 230.6; 43 C.F.R. §§ 46.10 et seq.

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

23 63. If an agency is unsure whether a proposed action will have significant  
24 environmental effects, it may prepare a shorter document called an “environmental assessment”  
25 (“EA”) to determine whether the proposed action’s impacts are significant and an EIS is  
26 required. 40 C.F.R. §§ 1501.4(b); 1508.9. If the EA concludes that a project “may” have a  
27 significant impact on the environment, then an EIS must be prepared. See Idaho Sporting  
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1 Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998). If not, the federal agency must  
2 provide a detailed statement of reasons why the proposed action's impacts are insignificant and  
3 issue a finding of no significant impact ("FONSI"). Id. § 1508.13.

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

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

21 66. NEPA also requires federal agencies to identify and assess "alternatives to the  
22 proposed action." 42 U.S.C. § 4332(C)(iii) & (E); see 40 C.F.R. § 1500.2(e). The analysis of the  
23 differing environmental impacts of these alternatives is considered the "heart" of the NEPA  
24 analysis. Id. § 1502.14. Agencies must "[r]igorously explore and objectively evaluate all  
25 reasonable alternatives" that serve the purpose and need of the project. Id. § 1502.14(a). This  
26 analysis is intended to provide a "clear basis for choice among options by the decisionmaker and  
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the public.” Id. § 1502.14. If an agency determines an alternative need not be considered, it must supply a reasonable explanation. Id. § 1502.14(a).

#### **D. The Administrative Procedure Act**

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

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

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

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

## FACTUAL AND PROCEDURAL BACKGROUND

### a. Project Site and Location

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

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

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

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

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

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

11 **b. Proceedings**

12 76. In April 2009, Solargen Energy contacted the Service about a possible 420-  
13 megawatt solar project. On August 12, 2010, the Corps requested formal consultation with the  
14 Service over this project, because the applicant was seeking a Section 404 permit and the project  
15 was likely to adversely affect multiple imperiled species in the project area. On December 17,  
16 2010, the Corps revised its request and sought consultation instead on a 399-megawatt project.

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

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

21 79. In August 2012, Duke Energy joined PV2 as a partner in proposing the project.  
22 Duke Energy was designated the project lead for consultation with the Service. In June 2014,  
23 The Corps submitted another revised consultation request due to further changes to the project  
24 design.  
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1           80.     On July 25, 2014, the Service was informed that Duke Energy had withdrawn  
2 from the project, and that a new entity, Panoche Valley Solar, LLC, would continue to pursue the  
3 project.

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

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

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

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

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

25           86.     The Service made clear in the letter that under the ESA "Reasonable and Prudent  
26 Measures and Terms and Conditions are non-discretionary and must be undertaken by the Corps  
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1 so that they become binding conditions of any grant or permit issued by the Corps to the  
2 applicant. If the Corps fails to assume and implement the Terms and Conditions or fails to  
3 require the applicant to adhere to the Terms and Conditions through enforceable terms that are  
4 included in the Corps' permit or grant document, the protective coverage of section 7(o)(2) may  
5 lapse. Please confirm that the Corps acknowledges and accepts these responsibilities and will  
6 include in the Corps' permit and enforce all Terms and Conditions in the Incidental Take  
7 Statement." Id. at 3.

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

26 88. The Service went on to say that "Because take resulting from the operation,  
27 maintenance, and decommissioning of the project will not be exempted through this consultation,  
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1 we continue to recommend that Panoche Valle Solar, LLC apply for an Incidental Take Permit,  
2 pursuant to section 10(a)(1)(B) of the Act, to address such take.” Id.

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

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

21 91. Defenders of Wildlife sent the Corps and the Service a 60-day notice letter of  
22 intent to sue for violations of the ESA related to the biological opinion on December 23, 2015.  
23 The letter alleged that the Service had failed to consider various expert opinions and other  
24 materials relevant to the analysis and requested reinitiation of consultation. Letter from Jason  
25 Rylander, Defenders of Wildlife to Sally Jewell, Secretary of the Interior and John McHugh,  
26 Panoche Valley LLC, December 23, 2015. Defenders also sent the applicant, Panoche Valley  
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1 Solar, LLC, a 60-day notice letter of intent to sue for violations of the ESA. The letter made clear  
2 that no action could be taken on the site that would affect listed species until the Corps issued a  
3 Section 404 permit that incorporated all of the terms of the conditions of the Biological Opinion.  
4 The letter informed Panoche Valley Solar, LLC, that until the Corps issued a permit that imposed  
5 binding conditions consistent with the requirements of the Biological Opinion, the company  
6 would lack incidental take coverage and thus would be in violation of Section 9 for any actions  
7 on the site that took listed species. Letter from Jason Rylander, Defenders of Wildlife to Eric  
8 Charniss, Panoche Valley LLC, December 23, 2015.

9  
10 92. The Final EIS and Notice of Availability for the project was issued on December  
11 31, 2015. The FEIS “includes short-term effects from construction activities and long-term  
12 effects from the presence of a solar facility. It also includes the effects from operational and  
13 maintenance activities associated with operating the facility, which are considered an indirect  
14 effect of the construction of the solar facility. Impacts associated with operational and  
15 maintenance activities are included within the NEPA scope of analysis, as they are indirect  
16 effects caused by the construction of a solar facility and may affect federally listed threatened  
17 and/or endangered species. However, these activities, because they would not result in the  
18 discharge of dredged and/or fill material into waters of the U.S., do not require a Section 404  
19 permit and are not within USACE jurisdiction.” The FEIS does not include an analysis of  
20 decommissioning or repurposing the project after it ceases to operate.

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

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

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

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

19           97.     The Corps then issued a Record of Decision and a Section 404 permit for the  
20 Project on March 15, 2016. U.S. Army Corps of Eng'rs, Record of Decision, Action ID SPN-  
21 2009-00443, Mar. 15, 2016 ("ROD").

22           98.     Despite the now clear statement in the revised Biological Opinion that the Corps  
23 accept liability for all phases of the project, for the duration of the project, the Corps' Record of  
24 Decision and a Section 404 permit for the Project do not incorporate all the terms and conditions  
25 outlined in the Biological Opinion. Instead, the Permit and Record of Decision only requires  
26 compliance with the "mandatory terms and conditions associated with 'incidental take' of the  
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1 attached Biological Opinion,” that are “related to the Corps’ jurisdiction.” ROD at 22. This  
2 contravenes the Corps’ earlier statement to the Service that the “project area” and not its specific  
3 jurisdiction should be the focus of the species consultation.

4 99. Problematically, the ROD takes a much narrower view of the extent of the Corps’  
5 jurisdiction than that which the Service relied upon in reaching its no jeopardy conclusions. The  
6 ROD defines the Corps’ jurisdiction over the proposed action as “limited to construction  
7 activities within the 0.121 acres of water of the U.S. that would be filled, upland areas adjacent  
8 to the waters of the U.S. that would be filled, as well as upland access and staging areas.” ROD at  
9 22.

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

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

21 102. The Westlands CREZ site is available for long-term lease and is suitable for a  
22 photovoltaic solar project of comparable size. The U.S. Environmental Protection Agency  
23 recommended to the Corps that the applicant consider siting the project at this location. The  
24 Corps, however, rejected the alternative as infeasible because the Panoche Valley Solar, LLC,  
25 did not receive a response from a single telephone call and letter from to Westside Holdings,  
26 which controls the property. The Corps also stated that because planning, permitting, and  
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1 construction can take 4-6 years, a similar project at the Westlands CREZ site (assuming it was  
2 available to Panoche) was unlikely to be completed by December 31, 2019.

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

8 **d. Other Proceedings**

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

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

25 106. In March 2015, the Sierra Club and Santa Clara Valley Audubon Society filed a  
26 lawsuit in California state court challenging the San Benito County Board of Supervisors'  
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1 approval of the final supplemental version of the state-mandated environmental impact review  
2 for the 247-megawatt project. The environmental organizations argued that the EIR for the  
3 project failed to comply with the California Environmental Quality Act by: failing to describe a  
4 baseline for biological resources, failing to address new research information surfacing since the  
5 original lawsuit such as impacts of climate change on the blunt-nose leopard lizard, new  
6 information on potential impacts of other species in the area such as the golden eagle, use of  
7 groundwater with the accelerated construction schedule, and inadequate re-circulation of the new  
8 environmental document. On September 17, 2015, the trial court ruled against the plaintiffs. That  
9 case is now on appeal.

10  
11 107. Additionally, on November 20, 2015, the California Department of Fish and  
12 Wildlife (“CDFW”), Central Region (4), issued an Incidental Take Permit under the California  
13 Endangered Species Act, Cal. Fish & G. Code §§ 2050-2100, for the Panoche Valley Solar  
14 Project. Conservation groups have also challenged this permit in state court alleging violations of  
15 the California Endangered Species Act and the state’s fully-protected species law. The case is  
16 pending. Sierra Club v. Cal. Dep’t of Fish & Wildlife, No. BS 161458 (Cal. App. Dep’t Super.  
17 Ct., filed Mar. 21, 2016).

18 **e. The Giant Kangaroo Rat**

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

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

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

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

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

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

25           114. The Biological Opinion fails to adequately evaluate the impact that the proposed  
26 project will have on the recovery of the species. It also erroneously assumes that the Corps will  
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1 ensure that required conservation measures intended to ensure against jeopardy to the species  
2 will be followed throughout the project site for the duration of the project.

3 **f. The Blunt-Nosed Leopard Lizard**

4 115. The Blunt-nosed leopard lizard has been on the federal endangered list since  
5 1967. It is also considered a “fully protected species” under California law. Despite these  
6 protections, the species’ numbers are declining and its habitat is shrinking. As with the giant  
7 kangaroo rat, the blunt-nosed leopard lizard is one of the upland species of the San Joaquin  
8 Valley, whose range has been drastically reduced.

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

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

21 118. The Project plans to mitigate impacts to the species “by buffering any BNLL  
22 [blunt-nosed leopard lizard] sighting with a 52.4-acre area.” Based on the best available science,  
23 the California Department of Fish and Wildlife (“CDFW”) has determined that a minimum 395-  
24 acre buffer is actually needed to avoid many impacts to blunt-nosed leopard lizards and a buffer  
25 of up to 657 acres from sightings would provide the greatest assurances to avoid impacts.  
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1           119. Recent science indicates that climate change will have a devastating range-wide  
2 impact on the already endangered blunt-nosed leopard lizard. Indeed, Dr. Barry Sinervo, the  
3 leading expert on the species, warned in a letter that the Draft Environmental Impact Statement  
4 for the Project “provides an inadequate assessment of the likely take of BNLL [“blunt-nosed  
5 leopard lizard”], and ignores the specific value of the Panoche Valley in the contest of species-  
6 wide refugia from climate change.” He further stated that locating the Panoche Solar Project  
7 “nearby or on such long-term population centers [as found in the Panoche Valley] will jeopardize  
8 the long-term persistence of the species.” Letter from Dr. Barry Sinervo, Univ. of Calif., Santa  
9 Cruz to Lisa Gibson, U.S. Army Corps of Eng’rs, Comment on the DEIS (SCH#2010031008),  
10 Oct. 26, 2015.

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

15           **g. The San Joaquin Kit Fox**

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

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

25           123. The Recovery Plan for the Upland Species of the San Joaquin Valley lays out a  
26 number of goals for recovery of the San Joaquin kit fox. One key downlisting criteria for the San  
27

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

9  
10 124. The Biological Opinion also erroneously assumes that the Corps will ensure that  
11 required conservation measures intended to ensure against jeopardy to the species will be  
12 followed throughout the project site for the duration of the project.

13 **FIRST CAUSE OF ACTION:**

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

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

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

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

25 128. The Service based its “no jeopardy” Biological Opinion and Incidental Take  
26 Statements on the premise that the Corps has and will exercise authority to regulate the  
27 “construction, operations, and maintenance phases of the proposed project.” Id.  
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1           129. According to the Biological Opinion, “the protective coverage of section 7(o)(2)  
2 may lapse if: (1) the Corps fails to require the Applicant to adhere to the Terms and Conditions  
3 of the Incidental Take Statement through enforceable terms that are added to the permit, (2) the  
4 Corps fails to retain oversight to ensure compliance with the Terms and Conditions of the  
5 Incidental Take Statement, or (3) the Corps or the Applicant fails to adhere to the Terms and  
6 Conditions of the Incidental Take Statement.” Id.

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

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

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

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

24           134. Because the Corps has not accepted responsibility for ensuring compliance with  
25 the Incidental Take Statement, the mitigation or conservation measures relied upon in reaching a  
26 “no jeopardy” opinion, are not “reasonably certain to occur.” Nat’l Wildlife Fed’n v. Nat’l  
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1 Marine Fisheries Serv., 524 F.3d 917 n. 17 (9th Cir. 2008); Rock Creek All. v. U.S. Fish &  
 2 Wildlife Serv., 663 F.3d 439, 444 (9th Cir. 2011).

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

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

## 9 **SECOND CAUSE OF ACTION:**

### 10 **(VIOLATION OF ESA AND APA – Against the Service)**

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

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

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

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

25 141. First, although the Service concludes that "9 individuals may be subject to injury  
 26 or mortality from capture/relocation activities," it assumes that "all relocated individuals," which  
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1 it estimates at 435, “may be directly lost or ecologically functionally lost by not reproducing.” Id.  
2 at 69. This amounts to roughly 8 percent of the estimated giant kangaroo rat population. The  
3 Service never explains why such a significant loss, which may have impacts on genetic diversity,  
4 will not impair the recovery of the species.

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

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

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

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

23 146. First, it does not explain what impact the potential loss of 435 giant kangaroo rats  
24 could have on the San Joaquin kit fox, which feeds on giant kangaroo rats and share the same  
25 habitat.  
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1           147. Second, the Service does not explain how the loss 1,688 acres of prime kit fox  
2 habitat is consistent with the species' Recovery Plan, which specifically calls for protecting 90  
3 percent of "existing potential habitat" in the Ciervo-Panoche Natural Area. U.S. Fish & Wildlife  
4 Serv., Recovery Plan for Upland Species of the San Joaquin Valley, California, at Table 5  
5 (1998). The Service never attempts to analyze what impact this loss of habitat will have on that  
6 goal, including whether that threshold may be crossed this and other projects. The Service relies  
7 on protection of conservation lands that already provide "near optimal conditions for the  
8 species." Id. at 82. In other words, the conservation lands do not actually mitigate for the  
9 significant net loss of habitat but merely preserve, to some degree, a portion of what already  
10 exists and has been targeted for preservation.

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

22           149. The Service further acknowledges that "despite the conservation of existing  
23 habitat, the project would still result in a net loss of suitable and occupied habitat for the San  
24 Joaquin kit fox and a minor reduction of area available for the recovery of the species." Id. at 82.  
25 Because the Service never states how much area is required for recovery, its conclusions that  
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1 recovery of the San Joaquin kit fox will not be impaired lack adequate support and are arbitrary  
2 and capricious.

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

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

21 152. Similarly, the Service rejects a habitat suitability model by Dr. Barry Sinervo, the  
22 leading expert on blunt-nosed leopard lizards, again because the model has not been peer  
23 reviewed. Their cursory explanation of why the model would not change their analysis was  
24 arbitrary and capricious. Biological Opinion at 62 n.5. The Biological Opinion also fails to  
25 address scientific information that shows there may be more blunt-nosed leopard lizards in the  
26 footprint of the site than the survey data suggested. In particular, the Service misapplied Warrick  
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et al. 1998 to underestimate the take of blunt-nosed leopard lizard that may occur at the site. The Service offers no explanation for its failure to properly consider this information.

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

### **THIRD CAUSE OF ACTION:**

#### **(Violation of CWA Section 404 – Against the Corps)**

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

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

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

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

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

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

8 159. The Corps’ reliance on the final Biological Opinion to assert that issuance of the  
9 discharge will not jeopardize any ESA-listed species is arbitrary and capricious. The Biological  
10 Opinion makes clear that the “no jeopardy” determination for blunt-nosed leopard lizard, San  
11 Joaquin kit fox, and other species depends on the Corps incorporating all of the mitigation  
12 measures specified in the Biological Opinion as binding conditions of any 404 permit. See, e.g.,  
13 Biological Opinion at 103 (concluding effect on reproduction for blunt-nosed leopard lizard will  
14 be small “because we expect the Applicant’s avoidance and minimization measures will  
15 minimize such losses” and that a “small” effect will not appreciably reduce reproduction range  
16 wide); id. (relying on Applicant’s “avoidance, minimization, and conservation measures” to  
17 conclude that numbers of blunt-nosed leopard lizard “will minimize” losses, such that numbers  
18 will be only “slightly reduced”); Biological Opinion at 103-104 (relying on “avoidance,  
19 minimization, and conservation measures” for blunt-nosed leopard lizard to minimize adverse  
20 effects on recovery); Biological Opinion at 83-84, 101 (relying on applicant’s avoidance and  
21 minimization measures to conclude that impacts to numbers and reproduction of San Joaquin kit  
22 fox will be minimal); Biological Opinion at 84, 102 (relying on applicant’s “avoidance,  
23 minimization, and conservation measures” for San Joaquin kit fox to “minimize” and adverse  
24 effects on recovery); see also Biological Opinion at 106, 116-117 (for incidental take coverage to  
25 apply, “[t]he Corps must include all measures, plans, conditions, and reporting requirements in  
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1 the biological assessment and this biological opinion as binding terms and conditions of any and  
2 all permits it issues for the project and must monitor and enforce their implementation.”).

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

12 161. Put another way, the Biological Opinion’s “no jeopardy” conclusions are  
13 predicated on the assumption that the Corps has legal authority to enforce all of the avoidance,  
14 minimization, and conservation measures outlined for the project as binding requirements of the  
15 404 permit. Biological Opinion at 106. Yet the 404 permit that the Corps issued through its  
16 Record of Decision imposes as binding conditions only a limited subset of the terms and  
17 conditions that the Biological Opinion’s “no jeopardy” conclusion for giant kangaroo rat, blunt-  
18 nosed leopard lizard, San Joaquin kit fox, California tiger salamander, and other species relied  
19 upon. *See* ROD at 22 (describing permit conditions); 404 PERMIT at 7. The permit makes  
20 binding only those conditions of the Biological Opinion that are “related to . . . construction  
21 activities within the 0.121 acres of waters of the U.S. that would be filled, upland areas adjacent  
22 to the waters of the U.S. that would be filled, as well as upland staging and access areas.” *See*  
23 404 PERMIT at 7, ROD at 22 (describing permit conditions). But vast portions of the site, and  
24 the construction that will occur at those portions of the site, are not encompassed by that  
25 description of the scope of the conditions.  
26  
27  
28

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

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

8  
9 **FOURTH CAUSE OF ACTION:**

10 **(Violation of CWA Section 404 – Against the Corps)**

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

13           165. EPA's 404(b)(1) Guidelines prohibit the Corps from authorizing an application  
14 for dredge and fill activities if, (2) there is a practicable alternative which would have less  
15 adverse impact on waters of the United States and does not have other significant adverse  
16 environmental consequences (40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i)). The Corps must  
17 document its findings of compliance or noncompliance with these restrictions. 40 C.F.R. §  
18 230.12(b).

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

25           167. The EPA specifically recommended that the applicant consider this site because it  
26 would have potentially minimal impacts to waters of the United States, imperiled species, and  
27 the environment. Nonetheless, the Corps determined that the site was not feasible because the  
28

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

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

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

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

#### 18 **CONCLUSION**

19       171. For these reasons, Plaintiffs ask the Court to vacate and set aside the Biological  
20 Opinion and Incidental Take Statement issued by the Service to the Corps pursuant to Section 7  
21 of the Endangered Species Act for the Panoche Valley Solar project. Plaintiffs further ask the  
22 Court to vacate and set aside the permit issued by the Corps to Panoche Valley Solar, LLC,  
23 pursuant to Section 404 of the Clean Water Act.  
24  
25  
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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request this Court:

1. Declare that the U.S. Fish and Wildlife Service's March 8, 2016, Biological Opinion and Incidental Take Statement violates the ESA and the APA;
2. Set aside and remand the Biological Opinion and Incidental Take Statement in accordance with the Court's ruling;
3. Declare that the U.S. Army Corps of Engineers March 15, 2016, Record of Decision and Section 404 Permit violates the Clean Water Act and the EPA's 404(b)(1) Guidelines;
4. Set aside and remand the Record of Decision and Section 404 Permit in accordance with the Court's ruling;
5. Award plaintiffs their costs and attorneys' fees; and
6. Grant plaintiffs such additional relief as this Court may deem just and proper.

April 15, 2016

Respectfully Submitted,

By: /s/Jason C. Rylander

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