

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Center for Biological Diversity v. U.S. Fish and Wildlife Service

Center for Biological Diversity · No. 2:21-cv-01527-DJC-DMC · Decided July 17, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 EASTERN DISTRICT OF
CALIFORNIA 10 11 CENTER FOR BIOLOGICAL No. 2:21-cv-01527-DJC-DMC DIVERSITY,
et al, 12 Plaintiff, 13 ORDER v. 14 UNITED STATES FISH AND WILDLIFE 15 SERVICE, et al,
16 Defendant. 17 18 This case concerns the federal government’s permitting of the proposed 19
Stonegate Development Project in Chico, California.

Plaintiffs allege that the project — 20 a proposed 314-acre multi-use development with 423
single-family residential lots, 21 13.4 acres of multi-family residential land uses, 36.6 acres of
commercial land uses, 22 5.4 acres of storm water facilities, 3.5 acres of park, and a 137-acre open
space 23 preserve — would result in a significant loss of local wetland and vernal pool habitats,
24 harming endangered and threatened species that rely on them.

For the reasons 25 discussed below, the Court finds that the government’s 2020 approval of the
project is 26 at least in part arbitrary and capricious. 27 //// 28 //// 1 FACTS AND PROCEDURAL
HISTORY 2 Plaintiffs are AquAlliance and the Center for Biological Diversity (“Center”), two 3
environmental nonprofit organizations. (ECF No. 1, Compl. ¶¶ 9, 14.) Both 4 organizations have
members who own property near the proposed project site.

(Id. 5 ¶ 16.) AquAlliance’s mission is to defend northern California waters and challenge 6 threats
to the hydrologic health of the Sacramento River watershed. (Id. ¶ 9.) The 7 organization has a
long history of regional environmental advocacy, which includes 8 purchasing land for purposes
of conservation and hosting environmental educational 9 conferences on vernal pools.

(Id. ¶¶ 10, 11.) AquAlliance’s members frequent the 10 area designated for development for
purposes of recreation, wildlife viewing, 11 aesthetic enjoyment, and environmental education.
(Id. ¶ 12.) The Center is a 12 national organization with local members in Butte County, where
Chico is located. (Id. 13 ¶ 14.)

The Center works to protect the habitats and ecological communities that may 14 be adversely
affected by human activity. (Id.) Both organizations’ membership 15 includes scientists who study
threatened and endangered species. (Id. ¶ 18.) 16 Federal Defendants are the U.S. Army Corps of
Engineers (“Corps”) and the 17 U.S. Fish and Wildlife Service (“USFWS”), an agency within the
U.S. Department of the 18 Interior.

(Id. ¶¶ 24, 26.) The Corps is responsible for the Project's compliance with the 19 Endangered Species Act ("ESA"), the Clean Water Act ("CWA"), and the National 20 Environmental Policy Act ("NEPA"). (Id. ¶ 26.) The USFWS is tasked with protecting 21 and managing the fish, wildlife, and native plant resources of the United States, in part 22 by ensuring compliance with the ESA.

(Id. ¶ 24.) The USFWS is also responsible for 23 ensuring that the Corps' permitting decisions comply with the ESA. (Id.) Defendant- 24 Intervenor are Epick Homes, Inc and Bruce Road Associates, LP, two developers of 25 the Proposed Project. (ECF No. 9.) 26 The Stonegate Project ("Project" or "Proposed Project") is proposed on a 314- 27 acre site located on both the east and west end of Bruce Road and north of the 28 Skyway in southern Chico, Butte County, California.

(Compl. ¶ 73.) The mixed-use 1 development project would include 423 single-family residential lots, 13.4 acres of 2 multi-family residential land uses, 36.6 acres of commercial land uses, 5.4 acres of 3 storm water facilities, 3.5 acres of park, and a 137-acre open space preserve. (Id.)

The 4 location selected for the Project is host to seasonal vernal pool and vernal swale 5 complexes, which are pools that form during the rainy season and dry out during the 6 summer and fall months. (Id. ¶ 74.) The vernal pools support a wide variety of 7 wildlife, and the genetic makeup of species in a single vernal pool can vary from that 8 of a nearby pool, making their interconnectivity critical to support the sharing of 9 genetic information between the species.

(Id. ¶¶ 76, 77.) These species include the 10 vernal pool fairy shrimp (*Branchinecta lynchi*), an aquatic crustacean endemic to vernal 11 pool and ephemeral freshwater habitat that has been listed under the ESA as a 12 threatened species since 1994. (Id. ¶¶ 106, 107.) Vernal pool tadpole shrimp 13 (*Lepidurus packardii*), as the name suggests, also share the vernal pool habitat, and 14 have been listed as a threatened species under the ESA since 1994.

(Id. ¶¶ 114–16.) 15 The Butte County meadowfoam (*Limnanthes floccosa* ssp. *californica*), an herbaceous 16 annual found only in vernal pool habitat in Butte County, California, has been listed as 17 endangered under the California Endangered Species Act since 1982 and under the 18 ESA since 1992. (Id. ¶¶ 121–23.)

Finally, the giant garter snake (*Thamnophis gigas*) is 19 a species endemic to Central Valley California wetlands, including wetlands in Butte 20 County, and has been listed as threatened under the ESA since 1993. (Id. ¶¶ 134–35.) 21 Only 10% of the historic vernal pool habitat remains viable in California. (Id. 22 ¶ 78.)

In 2006, the USFWS released its 2005 Recovery Plan for Vernal Pool Ecosystems 23 of California and Southern Oregon ("2005 Recovery Plan" or "Recovery Plan"). (Id. 24 ¶ 109.) The Recovery Plan, which covered both fairy and tadpole shrimp, identified 25 core areas to be the initial focus of protection measures. (Id. ¶¶ 109, 110.)

The 2005 26 Recovery Plan recommended that 85% of vernal pool fairy shrimp habitat that existed 27 in 2005 be preserved. (Id. ¶ 112.) If completed, the Project would permanently 28 destroy 9.14 acres of wetlands, although some additional meadowfoam habitat may 1 be established through mitigation efforts. (Id. ¶¶ 30, 131.) 2 The Corps issued a public notice for the Project in March 2017, followed by a 3 revised public notice in September 2018.

(Id. ¶ 79.) Forty-one public comments, 4 including comments from Plaintiffs that highlighted potential danger to the vernal 5 pools and the species that rely on them, were received in response to the two public 6 notices. (Id. ¶¶ 79–81.) Plaintiffs requested a public hearing on the Project and 7 informed the Corps that it believed the Corps would need to prepare an 8 Environmental Impact Statement (“EIS”) that includes an adequate list of reasonable 9 alternatives to comply with NEPA.

(Id. ¶ 80.) The USFWS also submitted comments, 10 noting that previous comments it had submitted to a prior iteration of the Project 11 remained unchanged. (Id. ¶ 82.) Those comments expressed the position that, 12 among other issues, even partial development of the property could preclude 13 recovery of listed species that rely on the vernal pools on the Project site because they 14 would be “significantly and adversely impacted by edge effects of the proposed 15 development.” (Id.)

In April 2017, the U.S. Environmental Protection Agency (“EPA”) 16 submitted comments reflecting concern for the vernal pools and requesting that there 17 be additional exploration of a least environmentally damaging practicable alternative. 18 (Id. ¶ 84.) And in May 2017, the California Department of Fish and Wildlife submitted 19 comments expressing the view that the Project as proposed would result in significant 20 impacts to the environment and recommended the preparation of an EIS.

(Id. ¶ 83.) 21 The Corps ultimately declined to offer a public hearing on the project, 22 concluding that such a meeting would be unlikely to produce additional information 23 to inform the Corps’ decision. (Id. ¶ 85.)

In August 2020, the Corps issued its 24 Memorandum for Record for the Project, which constitutes the “Environmental 25 Assessment, 404(b)(1) Guidelines Evaluation, as applicable, Public Interest Review, 26 and Statement of findings for the subject application.” (Id. ¶ 86.)

The Memorandum 27 of Record acknowledged the multiple requests received for an alternatives analysis for 28 the Project and identified three offsite alternatives, all of which failed to meet Project 1 objectives as defined by the Corps. (Id. ¶¶ 87–89.)

The Memorandum also analyzed 2 six onsite alternatives, assessing factors such as overall project purpose, development 3 cost, and environmental impacts, and concluded that two of those options

were not 4 practicable, three were practicable but inappropriate due to insufficient reduction of 5 aquatic impacts of additional adverse effects, and one (Alternative 5) was practicable.

6 (Id. ¶ 90.) Alternative 5 would reduce the number of housing units by 10% and 7 impacts to jurisdictional waters by 7%, compared to the proposed Project, although 8 both iterations would include significant development within the parcel east of Bruce 9 Road. (Id.)

The Corps, in response to EPA and other commenters' request for analysis 10 of an alternative that would only develop the parcel west of Bruce Road, concluded 11 that any such alternative would not meet Project objectives. (Id. ¶ 91.)

The Corps 12 emphasized that restricting development to west of Bruce Road would fail to meet 13 housing goals and would not reduce impacts to meadowfoam by a significant margin. 14 (Id.) Limiting development to the parcel west of Bruce Road would reduce impacts to 15 meadowfoam by 0.10 acres, a 9% decrease compared to the approved project. (Id. 16 ¶ 92.) It would also reduce impacted vernal pool fairy shrimp and vernal pool tadpole 17 shrimp occupied habitat by 6.76 acres, a 77% decrease compared to the approved 18 project.

(Id.) 19 In March 2019, the USFWS issued the Biological Opinion for the Project, and in 20 December 2019, issued an amended Biological Opinion. (Id. ¶ 94.) A second 21 amended Biological Opinion (BO, 08ESMF00-2016-F-0236-3) was issued on January 22 23, 2020, to address typographic errors. (Id.)

The amended Biological Opinion 23 addressed revisions to the on-site preserve boundary that excluded the Butte Creek 24 Diversion Channel from the on-site preserve. (Id.) The Biological Opinion 25 acknowledged that there would be harm to some ESA-listed species, but that the 26 Project would not jeopardize the continued survival and recovery of the listed fairy 27 shrimp, tadpole shrimp, and meadowfoam.

(Id. ¶ 95.) The Biological Opinion did not 28 analyze impacts on the listed giant garter snake, which is known to also generally 1 inhabit the Project area. (Id.) 2 The USFWS's conclusions in the Biological Opinion relied on several 3 assumptions, including that there was no change in the status of any of the listed 4 species since status reviews in 2007 for the vernal shrimp and 2008 for meadowfoam, 5 although it did note that there were existing environmental threats to vernal pool 6 habitats.

(Id. ¶ 96.) In its assessment of vernal pool species, the Biological Opinion 7 analyzed the vernal pool fairy shrimp and vernal pool tadpole as different species, but 8 did not differentiate between the two in terms of its jeopardy finding or required 9 conservation measures. (Id. ¶ 97.)

The Biological Opinion permits the purchase of 10 various credits from a mitigation bank, in theory ensuring that the loss of habitat or 11 species in one area can be compensated by the

increased population in another area. 12 (See *id.* ¶ 101.) It is unclear whether the necessary mitigation credits are presently 13 available at USFWS-approved mitigation banks in the region for both the vernal pool 14 shrimp and meadowfoam.

(*Id.* ¶ 102) 15 Plaintiffs bring five claims against Federal Defendants. First, Plaintiffs allege 16 that the USFWS violated the Endangered Species Act, 16 U.S.C. §§ 1531–44, and the 17 Administrative Procedure Act, 5 U.S.C. §§ 701–06 by failing to fully consider the 18 impacts to ESA-listed species in the Biological Opinion, thus rendering that document 19 arbitrary and capricious.

(*Id.* ¶¶ 139–48.) Second, Plaintiffs allege that the USFWS 20 violated the Endangered Species Act, 16 U.S.C. §§ 1531–44, and the Administrative 21 Procedure Act, 5 U.S.C. §§ 701–06, by departing, without justification, from the 22 agency’s previous policy regarding adequate mitigation ratios required for impacts to 23 Butte County meadowfoam, rendering the new policy arbitrary and capricious.

(*Id.* 24 ¶¶ 149–52.) Third, Plaintiffs allege that Federal Defendants violated the Endangered 25 Species Act, 16 U.S.C. § 1536, by failing to assess potential impacts on the giant garter 26 snake, which is known to generally inhabit the area of the Proposed Project. (*Id.* ¶¶ 27 153–57.) Fourth, Plaintiffs allege that the Corps violated the National Environmental 28 Policy Act by rendering an inadequate environmental analysis and failing to prepare 1 an environmental impact statement.

(*Id.* ¶¶ 158–66.) Specifically on that claim, 2 Plaintiffs allege that the Corps’ environmental assessment failed to consider all 3 environmental consequences of the Project, evaluate feasible environmentally 4 superior alternatives, and provide the public with notice and opportunity to comment 5 on its environmental assessment and Finding of No Significant Impact.

(*Id.*) And fifth, 6 Plaintiffs allege that the Corps violated the Clean Water Act, 33 U.S.C. § 1344(b) and 7 Section 404(b)(1) of the Project’s Permit Guidelines, by failing to adopt the alternative 8 that best avoids, minimizes, and mitigates impacts to the aquatic ecosystem while still 9 achieving the Project’s purpose as the least environmentally damaging practicable 10 alternative.

(*Id.* ¶¶ 167–77.) 11 Plaintiffs request that the Court: (1) declare the USFWS 2020 Biological Opinion 12 unlawful under the ESA and arbitrary and capricious under the APA; (2) declare that 13 the Corps violated the ESA, NEPA, CWA, and the APA in issuing the Permit for the 14 Proposed Project; (3) issue an injunction that the Biological Opinion be set aside and 15 vacated; (4) issue an injunction that the Corps’ 404 Permit and Memorandum of 16 Record for the Proposed Project be set aside and vacated; (5) enjoin any 17 implementation of the Proposed Project pending completion of a legally adequate 18 Biological Opinion, NEPA analysis, and CWA analysis; (6) award Plaintiffs their costs of 19 litigation, including reasonable attorneys’ fees¹; and (7) grant any other relief as the 20 Court deems just and proper.

(Id. at 40.) 21 This case was filed in August 2021 and was originally assigned to District Judge 22 Troy L. Nunley. (ECF No. 1.) Plaintiffs moved for summary judgment in July 2022. 23 (ECF No. 30). The case was reassigned to District Judge Dale A. Drozd in August 24 2022. (ECF No. 33.) Also in August 2022, Federal Defendants moved for summary 25 judgment and to exclude Plaintiffs’ extra-record declaration, and Defendant- 26 Intervenor moved for summary judgment in September 2022.

(ECF Nos. 38, 39, 41.) 27 1 Should a party seek to recover reasonable costs of litigation, including attorneys’ fees, they should 28 submit and notice a separate Motion on this Court’s calendar. 1 In April 2023, this case was reassigned to District Judge Daniel J. Calabretta. (ECF 2 No. 53.) 3 LEGAL STANDARD 4 Ordinarily, summary judgment is appropriate under Rule 56 where the moving 5 party “shows that there is no genuine dispute as to any material fact and the movant is 6 entitled to judgment as a matter of law.” Fed.

R. Civ. P. 56(a). However, “[i]n a case 7 involving review of a final agency action under the Administrative Procedure Act... 8 the standard set forth in Rule 56(c) does not apply because of the limited role of a 9 court in reviewing the administrative record.” *Sierra Club v. Mainella*, 459 F. Supp. 2d 10 76, 89 (D. D.C. 2006). “A court conducting [Administrative Procedure Act] judicial 11 review does not resolve factual questions, but instead determines ‘whether or not as a 12 matter of law the evidence in the administrative record permitted the agency to make 13 the decision it did.’” *Conservation Cong. v. U.S. Forest Serv.*, No. 2:12-CV-02800-TLN, 14 2014 WL 2092385, at *4 (E.D.

Cal. May 19, 2014) (quoting *Mainella*, 459 F. Supp. 2d at 15 90). In a case brought under the APA, summary judgment is the “mechanism for 16 deciding, as a matter of law, whether the agency action is supported by the 17 administrative record and otherwise consistent with the APA standard of review.” 18 *Conservation Cong.*, 2014 WL 2092385, at *4. 19 Because the NEPA, CWA, and ESA — the statutes which Plaintiffs allege 20 Defendants violated — do not allow a private right of action, the agency’s decisions is 21 reviewed under the APA.

See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 22 1233, 1238 (9th Cir. 2005). Under the APA, a decision may be set aside if it is 23 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 24 *Id.*; 5 U.S.C. § 706(2)(A). Such review “is narrow and a court is not to substitute its 25 judgment for that of the agency.” *Motor Vehicle Mfgs.*

Ass’n v. State Farm Mut. Auto. 26 Ins. Co., 463 U.S. 29, 43 (1983). Accordingly, a court may only set aside a decision if 27 the agency “has relied on factors which Congress has not intended it to consider, 28 entirely failed to consider an important aspect of the problem, offered an explanation 1 for its decision that runs counter to the evidence before the agency, or is so 2 implausible that it could not be ascribed to a difference in view or the product of 3 agency expertise.” *Id.* 4 DISCUSSION 5 Plaintiffs challenge the USFWS’ permitting of the Proposed Project, alleging 6

deficiencies in the: (1) Biological Opinion's finding of "no jeopardy"; (2) assessment of 7 giant garter snake presence at the site of the Proposed Project; (3) analysis of a least 8 environmentally damaging practicable alternative, and; (4) lack of EIS issuance.

The 9 Court discusses each alleged deficiency in turn. 10 A. The Biological Opinion's "No Jeopardy" Finding 11 Undergirding an effort to protect certain species from further deteriorating 12 population numbers, Congress enacted the ESA, which among other things prohibits 13 agency actions that are "likely to jeopardize the continued existence of any 14 endangered species or threatened species." 16 U.S.C. §1536(a)(2).

To jeopardize 15 means "to engage in an action that reasonably would be expected, directly or 16 indirectly, to reduce appreciably the likelihood of both the survival and recovery of a 17 listed species in the wild by reducing the reproduction, numbers, or distribution of 18 that species." 50 C.F.R. § 402.02; see *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries* 19 Serv., 524 F.3d 917, 929–30 (9th Cir.

2008). 20 Plaintiffs bring four subclaims in their argument that the USFWS improperly 21 arrived at a "no jeopardy" finding and that the agency's ultimate conclusion was 22 arbitrary and capricious in violation of the ESA and APA.

First, Plaintiffs allege that the 23 USFWS incorrectly assessed local meadowfoam populations to arrive at a faulty 24 population baseline. Second, Plaintiffs argue that the USFWS failed to properly 25 account for the impacts of climate change on vernal pool species, rendering the 26 Biological Opinion's assessment of the Proposed Project's impacts on ESA-listed 27 species inadequate.

Third, Plaintiffs assert that the USFWS' meadowfoam impact 28 analysis is in contradiction to its previous findings in a similar project. And finally, 1 Plaintiffs believe that the USFWS improperly gave credence to unenforceable 2 mitigation efforts. 3 The Court finds that the USFWS properly relied on a series of studies to 4 substantiate the local meadowfoam population baseline.

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

10 i. Meadowfoam Baseline 11 Plaintiffs argue that the USFWS improperly calculated the baseline population 12 number of meadowfoam local to the area of the Proposed Project in violation of the 13 ESA. Plaintiffs believe that this incorrect baseline negates the USFWS' "no jeopardy" 14 finding as it pertains to the meadowfoam species.

The USFWS asserts that it properly 15 identified four different meadowfoam populations and relied on up-to-date studies to 16 ascertain the species' population numbers. 17 As a requirement for permitting a development, the USFWS must evaluate the 18 impacts that development will have on species listed under the ESA. Among other 19 things, the ESA requires the USFWS to assess: (1) the current status of the listed 20 species and its "environmental baseline"; (2) the cumulative effects of non-federal 21 action; and (3) the effects of the agency's action.

50 C.F.R. § 402.14(g). At issue here 22 is whether the USFWS complied with the ESA's first requirement and computed an 23 environmental baseline for the local meadowfoam species. This baseline must 24 include "the past and present impacts of all Federal, State, or private actions and other 25 human activities in the action area" and "the impact of State or private actions which 26 are contemporaneous with the consultation in process." 50 C.F.R. § 402.02(d).

27 The USFWS' discussion of the meadowfoam baseline in its Biological Opinion is 28 scarce, measuring only a half a page. AR 000866. It references six previous studies 1 conducted over three decades, noting that "[a]s expected for this species, the 2 population size and extent has been found to vary over time." Id. From those studies, 3 the Biological Opinion concludes that there are 16,542 individual meadowfoam plants 4 occupying 5.14 acres throughout the proposed project site.

Id. Plaintiffs attack the 5 veracity of the final 16,542 number, noting that a 2016 study incorporated into the 6 Biological Opinion found only 4,303 plants, and that other studies have shown 7 similarly disparate numbers. (ECF No. 30 at 17.2) But as Plaintiffs recognize, "the 8 available survey counts demonstrate high population variability over time." (Id. at 18.).

9 For example, approximately 9,000 meadowfoam plants were identified in 1988, with 10 the number dropping to 950 in 2002, and rising again to 10,200 in 2008. AR 002558. 11 This is likely due to the meadowfoam's seed dormancy, which is believed to be "the 12 cause of population fluctuations of up to two orders of magnitude between years," as 13 seeds that do not germinate in their first year may still be viable in subsequent years.

14 AR 001909. While the USFWS's 16,542 baseline number may be substantially higher 15 than the 4,303 plants identified in 2016, that increase is not incongruent with the 16 observed pattern of meadowfoam population growth and decline. Plaintiffs cannot 17 pick out specific studies relied on by USFWS to distinguish USFWS' final 18 environmental baseline number without recognizing the overall context of population 19 change for the species, which fluctuates year to year.

20 Plaintiffs also contend that the USFWS did not provide an accurate snapshot of 21 the status of local meadowfoam and the threats facing the species, which would also 22 render the environmental baseline insufficient. (ECF No. 30 at 18.) Plaintiffs claim that 23 the USFWS

“offers almost no further analysis specific to the condition of the 24 meadowfoam populations” and “only discusses threats to meadowfoam generally.” 25 (Id.)

Not so. The Biological Opinion specifically addresses the status of local 26 meadowfoam, noting that the species is “threatened by land conversion to urban 27 2 Citations to specific pages in the parties’ briefing are to the page number found on the bottom of the 28 document, rather than the Bates number in the upper margin. 1 development, habitat loss and fragmentation, impacts from surrounding land use, 2 adjacent road widening, competition with nonnative plant species, potential changes 3 to hydrology, introduction of pesticides and herbicides, off-road vehicles, stochastic 4 extinction, and other human activities.” AR 000860.

The Biological Opinion expands 5 on its previous observations, including additional discussion of the threat of 6 “proposed development projects,” lack of management of invasive species (including 7 inappropriate levels of grazing), and species “extirpation.” AR 000860. While the 8 irony of the USFWS explicitly recognizing urban development and related activities as 9 direct threats to meadowfoam is not lost on the Court, the Court concludes that the 10 procedural requirement that the USFWS acknowledge and document these threats to 11 meadowfoam satisfies its obligations to assess the species’ status.

See *Seven Cnty. 12 Infrastructure Coal. v. Eagle Cnty., Colorado*, 145 S. Ct. 1497, 1507 (2025) (“NEPA 13 imposes no substantive environmental obligations or restrictions. NEPA is a purely 14 procedural statute...”). 15 The USFWS’ reliance on these studies satisfies its obligations under the ESA. 16 The agency is not expected to conduct its own studies, and its choice here to rely on a 17 series of studies spanning three decades persuades the Court that the agency did not 18 act in an arbitrary and capricious manner in assessing the local meadowfoam species’ 19 population numbers.

The Court also concludes that that the Biological Opinion 20 properly identified and discussed threats to the species. 21 ii. Climate Change Impacts on Vernal Pool Species 22 Plaintiffs argue that the USFWS failed to analyze climate change’s impacts on 23 ESA-listed species in contravention of the ESA. They assert that those ESA-listed 24 species are uniquely adapted to the vernal pool habitat, which is highly susceptible to 25 changes in precipitation and temperature, and that any discussion offered by the 26 USFWS merely incorporates “by reference” broader climate change discussions that 27 are not present in the Biological Opinion.

The USFWS responds that it expressly 28 incorporated climate change into its analysis and discussion of vernal pool species. 1 a. Admission of Extra-Record Documents 2 As an initial matter, the Court must address Federal Defendants’ contention that 3 Plaintiffs’ submission of a declaration and its attachments, which are two scientific 4 studies that are not part of the administrative record.

(See ECF No. 38; see also ECF 5 No. 39 at 22.) Plaintiff argues that it submits these extra-record documents not to 6 attack the basis of the USFWS' conclusions (or lack thereof) regarding climate change, 7 but merely to show "that there is scientific consensus over the basic proposition that 8 [vernal pool] species are being adversely affected by climate change, and not for any 9 site-specific analysis." (ECF No. 45 at 6.)

10 Plaintiffs attaches the declaration of Ross A Middlemiss, an attorney for 11 Plaintiffs, that itself includes two attachments: a copy of Climate change impacts on 12 vernal pool hydrology and vegetation in northern California, 574 JOURNAL OF 13 HYDROLOGY, 1003–1013 (2019) by Montrone et al., and Inundation timing, more than 14 duration, affects the community structure of California vernal pool mesocosms, 732 15 HYDROBIOLOGIA, 71–83 (2014), by Kneitel, J.M.

(ECF No. 30-3.) Federal Defendants 16 note that neither study was raised during the parties' negotiations over the 17 administrative record, and argue that the studies attack the merits of the Biological 18 Opinion, which puts them outside of the Court's purview. (ECF No. 38 at 3.) Should 19 the Court consider the documents, Federal Defendants separately argue that the 20 Court should then also consider the declaration of Michal Fris, who provides 21 substantive rebuttal as to why Plaintiffs' proffered studies do not demonstrate that the 22 USFWS has failed its duties to consider the best available scientific studies as they 23 pertain to contemporary climate change discourse, as required by the ESA.

(Id. at 3– 24 4.) 25 Typically, a court reviewing an agency action under the APA will rely solely on 26 the administrative record prepared by and agreed upon by the parties. *Friends of the 27 Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

However, as relevant here, 28 a plaintiff can submit additional materials outside the administrative record to aid the 1 court in weighing "whether the agency has considered all relevant factors and has 2 explained its decision." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) 3 (internal quotations omitted). 4 The Court will accept Plaintiffs' proffered declaration and attached studies 5 solely to assess the parties' claims regarding whether the USFWS properly accounted 6 for the best available scientific studies when making its determination regarding 7 climate change's impact on the vernal pool habitats.

As Federal Defendants properly 8 point out, Plaintiffs cannot present extra-record studies to challenge substantive 9 agency determinations after the fact. *San Luis & Delta-Mendota Water Auth. v. Locke*, 10 776 F.3d 971, 993 (9th Cir. 2014) ("Although the relevant factors exception permits a 11 district court to consider extra-record evidence to develop a background against 12 which it can evaluate the integrity of the agency's analysis, the exception does not 13 permit district courts to use extra-record evidence to judge the wisdom of the 14 agency's action.").

However, under *Lands Council*, Plaintiffs may present extra-record 15 studies to support their argument that an agency has not weighed all relevant factors, 16 here being the contemporary body of scientific data regarding climate change's 17 impact on vernal pool habitats and the species that depend on them.

As emphasized 18 earlier, the Court will limit its analysis of the studies to their existence and 19 representation that there was contemporary scientific consensus that climate change 20 impacted vernal pools, rather than the intricacies of those studies or their 21 methodologies. 22 The Court will also decline to assess Federal Defendants' proffered Fris 23 Declaration, as it addresses the substance of the articles provided by Plaintiffs and the 24 methods used by the studies' authors.

Because the Court is merely acknowledging 25 the studies' existence rather than their underlying merits and methodologies, 26 consideration of the Fris Declaration is improper and unnecessary. Further, Federal 27 Defendants identify no binding caselaw that supports their argument that the Fris 28 Declaration should be considered. Instead, they rely on out-of-district and out-of- 1 circuit caselaw for the proposition that the Court should allow rebuttal to expert 2 witness testimony.

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

9 b. Acknowledgment of Climate Change 10 When drafting a Biological Opinion, an agency must “use the best scientific and 11 commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). In the ESA 12 context, Courts have read this requirement as including agencies to adequately 13 address climate change's impact on ESA-listed spaces. *Appalachian Voices v. U.S. 14 Dept. of Interior*, 25 F. 4th 259, 271 (4th Cir.

2022) (“It is clear, however, that climate 15 change typically must form part of the analysis in some way.”) (citing *S. Yuba River 16 Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1274 (E.D. Cal. 17 2010)). 18 Vernal pool species are susceptible to the effects of climate change. See, e.g., 19 AR 002027–002028 (certain meadowfoam populations “are less likely to adapt to 20 sudden environmental changes such as global climate change”).

Despite this, 21 Plaintiffs allege that the USFWS “failed to incorporate a discussion of [climate 22 change's] threats into any part of its jeopardy analysis.” (ECF No. 30 at 20.) Federal 23 Defendants concede that the Biological Opinion itself does not include the phrase 24 “climate change,” but counter that the Biological Opinion “incorporated documents 25 that discuss the

threats the climate change poses for the species” and thus the 26 Biological Opinion’s “effects analysis adequately addressed those threats.” (ECF No. 27 39 at 22–23.)

28 It is true that the Biological Opinion references several existing documents 1 (various 5-year reviews for vernal pool species) that expressly discuss climate change’s 2 impacts on ESA-listed vernal pool species. See, e.g., AR 001814 (discussing climate 3 change’s impacts on vernal pool shrimp).

However, Federal Defendants’ assertion 4 that the Biological Opinion “expressly incorporates” those documents is unsupported 5 by the record. (See ECF No. 50 at 13.) For example, when discussing the status of the 6 vernal pool fairy shrimp, the Biological Opinion merely notes: “For the most recent 7 comprehensive assessment of the rangewide status of the fairy shrimp, please refer to 8 the Vernal Pool Fairy Shrimp (*Branchinecta lynchi*) 5-Year Review: Summary and 9 Evaluation (Service 2007a).” The Biological Opinion does not otherwise incorporate 10 the 5-year review’s analysis or discussion of climate change.

AR 000859–000860. The 11 Biological Opinion goes on to note that “[t]hreats such as the loss of vernal pool 12 habitat primarily due to widespread urbanization were evaluated during the reviews 13 and discussed in the final documents have continued to act on the fairy shrimp and 14 tadpole shrimp since the 2007 5-year reviews were finalized.” AR 000860. While the 15 Biological Opinion explicitly recognizes the continued threat of urbanization, it does 16 not do so for climate change.

The Biological Opinion then lists other examples of 17 ongoing threats, including those stemming from infrastructure and urbanization, and 18 changes in vernal pool hydrology due to the increase in the runoff associated with 19 infrastructure. *Id.* Finally, the Biological Opinion notes that “[i]n addition, truncation 20 or alteration of hydrologic patterns can change the timing and duration of ponding in 21 some types of vernal pools.” *Id.* 22 The Biological Opinion fails to address climate change in the context of its 23 other discussed species.

For example, under its meadowfoam section, it similarly 24 states: “For the most recent comprehensive assessment of the rangewide status of the 25 meadowfoam, please refer to the *Limnanthes floccose* ssp. *Californica* (Butte County 26 Meadowfoam) 5-Year Review: Summary and Evaluation (Service 2008). AR 000860. 27 Again, it does not otherwise reference climate change when discussing the threats 28 facing the species, nor are any of the threats discussed clearly linked or exacerbated 1 by climate change.

2 In *S. Yuba River Citizens League*, a case from this district, the court was 3 confronted with a similar issue of whether it could read in climate change’s impacts 4 into more generalized discussion of hydrologic flow effects. 723 F. Supp. 2d at 1273– 5 74.

The court found that an agency that failed to expressly mention climate change or 6 discuss its impacts could not rely on general references to changes in water 7 temperature and its effects on ESA-listed species to satisfy its requirement to assess 8 the best scientific available. *Id.* This Court agrees. It is true that the Biological 9 Opinion references documents that themselves expressly discuss climate change and 10 its impacts on the vernal pool species.

But the Biological Opinion does not in fact 11 expressly incorporate those documents — it simply refers readers to them and does 12 not otherwise engage with their conclusions regarding climate change or work those 13 conclusions into the Biological Opinion’s analysis. Federal Defendants’ attempt to tie 14 discussion of other threats facing vernal pool species to climate change is 15 unpersuasive.

The Biological Opinion only generally references changes in 16 “hydrologic patterns” and the dangers of “habitat loss,” but does not tie either of 17 those threats to climate change. There could be a variety of factors that influence 18 changes in hydrologic patterns or habitat loss, and Federal Defendants’ argument that 19 climate change would necessarily be linked to those issues is feeble without any effort 20 to establish a connection between them.

This issue is nearly identical to what the 21 court confronted in the *S. Yuba River Citizens League* court, in which the court noted: 22 “Although the [Biological Opinion] discussed present impacts on temperature, the 23 [Biological Opinion] does not address whether global warming will alter the 24 temperature that results from a given flow regime, nor does the [Biological Opinion] 25 address whether global warming will inhibit the ability to provide the presently- 26 anticipated flow regimes.” *Id.* at 1274.

27 Federal Defendants’ reliance on *Concerned Friends of the Winema v. McKay*, 28 614 F. Supp. 3d 756, 774 (D. Or. 2022) for the proposition that the Biological 1 Opinion’s climate change analysis is sufficient if it identifies and addresses related 2 effects on a species is misplaced. (See ECF No. 39 at 23.) That case is arguably 3 somewhat distinguishable because the Biological Opinion at issue there 4 acknowledged, at least facially, climate change’s impact on the ESA-listed species.

5 *Concerned Friends of the Winema*, 614 F. Supp. 3d at 774 (noting that the Biological 6 Opinion stated: “historical loss of Oregon spotted frog habitats and lasting 7 anthropogenic changes in natural disturbance processes are exacerbated by the 8 introduction of reed canary grass, non-native predators, and potentially climate 9 change.”). There, the district court granted summary judgment to the federal agency, 10 the U.S. Forest Service, finding that the Biological Opinion’s indirect analysis of 11 climate change was sufficient to comply with the agency’s responsibility of addressing 12 the best scientific data available.

Id. at 760–70. In any event, that case was later 13 overruled in part by the Ninth Circuit (after briefing had been completed in the 14 present matter), which noted the Biological Opinion’s discussion of climate change 15 was “deficient” because it did “not account for climate change as a cumulative effect 16 or baseline condition.” *W. Watersheds Project v. McKay*, No. 22-35706, 2023 WL 17 7042541, *2 (9th Cir.

Oct. 26, 2023). The Ninth Circuit critiqued the Biological 18 Opinion’s lack of assessment on how climate change would impact other local 19 environmental conditions such as changes in water level and streamflow, determining 20 that the Biological Opinion’s omission amounted to a “fail[ure] to consider an 21 important aspect of the problem.” Id. Here, as discussed above, the USFWS’ 22 Biological Opinion fails to connect any of its identified environmental concerns to 23 climate change.

24 While it is true that Biological Opinions need not be written with absolute 25 clarity, courts must still critically assess whether an agency has sufficiently made clear 26 how it arrived at its ultimate conclusions, such as a finding of no jeopardy. *Motor 27 Vehicle Mfrs. Ass’n.*, 463 at 43.

Here, the general references to threats that may, but 28 not necessarily, implicate climate change is insufficient to satisfy the USFWS’s 1 responsibility to assess the best scientific data and its duty to incorporate climate 2 change into its analysis.

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

8 iii. The USFWS’ Previous Findings Related to Meadowfoam Impact 9 Plaintiffs point to a previous assessment conducted by the USFWS for a similar 10 local project in which the agency determined that project would jeopardize local 11 meadowfoam populations. Plaintiffs contend that the USFWS’ departure from that 12 position for the Proposed Project in dispute in this case is arbitrary and capricious.

13 Plaintiffs further argue that the Corps’ reliance on a different section of that draft 14 biological opinion in rejecting an alternative to the project at issue in this case is 15 indicative that the draft biological opinion is more than just a draft. Defendants 16 counter that the previous finding was solely a draft and the agency never made a final 17 determination regarding the project’s effects on meadowfoam, and therefore, does 18 not conflict with the agency’s present conclusions.

19 Plaintiffs identify a 2002 draft biological opinion for the Eastgate development 20 project in southeast Chico, which was a proposed mixed-use project that would 21 impact local ESA-listed species. AR 008445–008471. That draft biological opinion 22 found that due to the “critically

endangered status of the meadowfoam and the 23 importance of each population to the survival and recovery of this species, 24 preservation of existing habitat, ideally with management for viable populations, is 25 essential to its conservation.

AR 008442; (ECF No. 30 at 21–24.) That is, the draft 26 biological opinion explicitly recognized that the protection of “each population” of 27 meadowfoam was essential. The Proposed Project in this case, however, would result 28 in the loss of one of the four local meadowfoam populations, thereby conflicting with 1 the agency’s previous conclusions that protection of all the local populations was 2 “essential.” (ECF No. 39 at 12;) see AR 008442.

Plaintiffs posit that the threats facing 3 meadowfoam populations have not abated since 2002, and thus, USFWS’ current 4 conclusion that meadowfoam species would not be placed in jeopardy by the 5 Proposed Project is contradictory of its previous finding and therefore arbitrary and 6 capricious. Defendants, in response, note that the current Proposed Project includes 7 mitigation measures ameliorating the development’s effect on meadowfoam that 8 were not present in the Eastgate project’s plans.

(See ECF No. 39 at 18.) The 9 inclusion of mitigation measures distinguishes, at least somewhat, the previous 10 tentative conclusion regarding jeopardy to meadowfoam from the current Proposed 11 Project’s finding. 12 Federal Defendants also fairly note that the 2002 document to which Plaintiffs 13 point is a draft document that was never finalized and was therefore subject to 14 change.

(ECF No. 39 at 15–16;) see *United States Fish & Wildlife Serv. v. Sierra Club, 15 Inc.*, 592 U.S. 261, 270–71 (2021) (draft biological opinions allow for the “possibility of 16 postcirculation changes”). To rebut this, Plaintiffs point out that Defendants relied in 17 part on the 2002 Eastgate draft biological opinion when assessing the Proposed 18 Project at issue in this case.

See AR 35:000368. The Corps, in weighing the merits of 19 off-site Alternative 2 to the Proposed Project (Defendants’ requirement to assess 20 alternatives will be discussed later in this Order), state: 21 This alternative is a 215-acre parcel located south of Humboldt 22 Road in the eastern portion of the City of Chico. Dead House Slough is 23 located to the north of the parcel.

Little Chico Creek is south of the parcel. The parcel is zoned by the City of Chico as Low Density 24 Residential/Resource Constraint. The parcel is located in the foothills with substantial topographic relief. The parcel is designated as an FD-SD 25 overlay zone, which means it has substantial topographic relief and would 26 require site-specific design solutions to develop.

Access to the site is limited to Humboldt Road with no alternative access. Development 27 would require extensions of utilities, as well as water and sewer services to the site. As of 2018, the City of Chico was considering closing 28 1 Humboldt Road.

In addition, based on a review of aerial photography, the site appears to be bisected by a drainage and several tributaries to this 2 main drainage exist. The site also appears to have mima mound 3 topography which is likely to support vernal pools or other seasonal wetlands.

The western portion of the site is also designated as critical 4 habitat for [meadowfoam] and was subject to a draft Jeopardy Biological Opinion for a previously proposed Eastgate Project development. The 5 USFWS stated in their draft jeopardy opinion that development of the site 6 would jeopardize the continued existence of [meadowfoam]. Based on this information, we have determined the development of [Alternative 2] 7 would result in increased adverse effects to the environment.

Therefore, this alternative has been eliminated from consideration. 8 9 AR 35:000368. 10 On this point, it is not clear to the Court whether Alternative 2 was rejected 11 solely because of the 2002 draft biological opinion's findings, or whether there were 12 additional factors considered. While the Corps identifies additional considerations 13 beyond the project's effects on meadowfoam such as the need for "site-specific 14 design solutions" and "extensions of utilities, as well as water and sewer services to the 15 site," the Corps' analysis does not indicate how much weight those factors were given, 16 if any, as opposed to the environmental impacts in its rejection of Alternative 2.

17 The Court shares Plaintiffs' concern that Federal Defendants are picking 18 elements of the 2002 draft biological opinion to rely on when convenient while 19 simultaneously disavowing the opinion as merely a draft when it conflicts with Federal 20 Defendants' contemporary conclusions.

However, as both parties recognize, the 2002 21 draft biological opinion is just that — a draft. The Corps' reliance on the draft opinion 22 appears to be limited and cabined to the analysis of an alternative to the project that 23 would be precisely where the once-proposed Eastgate project was. That is, the 24 USFWS did not act improperly by failing to impute the preliminary findings of a draft 25 biological opinion to an entire new project when that draft opinion was focused on 26 development of a certain parcel that is different from where the new project is 27 proposed to be placed.

28 The Court recognizes that the underlying merits regarding ESA-listed species in 1 the 2002 draft biological opinion appear at least in part at odds with the conclusions 2 of the finalized 2019 Biological Opinion implicated in this case, and the Court does 3 not mean to downplay this inconsistency. But given the unfinalized status of the 2002 4 draft biological opinion, the Corps' identification of distinguishing factors such as the 5 contemporary mitigation measures not present in the Eastgate project's plans, and the 6 Corps' limited reliance on it the draft opinion, the Court declines to view the 2002 7 draft biological opinion's conclusions as binding precedent to which Federal 8 Defendants must adhere.

Accordingly, the Court finds that any citation to or reliance 9 on the draft biological opinion does not conflict with Federal Defendants' conclusions 10 on the current Proposed Project and is not arbitrary and capricious. 11 iv. Credence Given to 2005 Recovery Plan and Unenforceable 12 Mitigation Methods 13 Plaintiffs assert that that the USFWS' own 2005 Recovery Plan for vernal pool 14 species called for significant conservation efforts that are incongruent with the 15 agency's later decision to permit the Proposed Project.

Further, Plaintiffs point to 16 mitigation methods identified in the 2005 Recovery Plan that the agency relies on but 17 are not enforceable and have not been tested as viable options. The USFWS counters 18 that its 2005 Recovery Plan is itself not a binding document, and that developers of 19 the Proposed Project are not tied to particular mitigation methods, although they 20 must utilize some mitigation measures in general.

21 The 2005 Recovery Plan calls for 85% of local vernal pool fairy shrimp habitat 22 and 95% of vernal pool tadpole shrimp and meadowfoam habitat to be preserved, 23 while the Proposed Project is slated to only preserve 20% of vernal pool shrimp 24 habitat and 80% meadowfoam habitat. See AR 000867. But, Federal Defendants are 25 correct that recovery plans, such as the 2005 Recovery Plan at issue here, are not 26 binding.

Conservation Cong. v. Finley, 774 F.3d 611, 614 (9th Cir. 2014) ("Recovery 27 Plans are prepared in accordance with section 1533(f) of the Endangered Species Act 28 for all endangered and threatened species, and while they provide guidance for the 1 conservation of those species, they are not binding authorities."). While Plaintiffs' 2 reliance on the actual text of 16 U.S.C. section 1533(f)(1), which states that USFWS 3 "shall develop and implement plans" (emphasis added), does demonstrate the 4 agency's requirement to effectuate environmental conservation efforts, the agency's 5 approach here of referencing the 2005 Recovery Plans for various vernal pool species 6 appears consistent with its requirement.

See, e.g., AR 000860. The agency has some 7 leeway in how it preserves the habitats it identified and which mitigation efforts may 8 be utilized by developers, and a recovery plan is only a non-final step in that process. 9 See Ctr. for Biological Diversity v. Haaland, 58 F.4th 412, 418 (9th Cir. 2023) 10 ("Moreover, a recovery plan does not contain any 'binding legal obligations to which 11 [the agency] is subject.'") (quoting Whitewater Draw Nat.

Res. Conservation Dist. v. 12 Mayorkas, 5 F. 4th 997, 1009 (9th Cir. 2021)). That is, the recovery plan is more of a 13 roadmap than a legal obligation. 14 Mitigation measures proffered by a Biological Opinion must constitute a "clear, 15 definite commitment of resources" and be "under agency control or otherwise 16 reasonably certain to occur." Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 17 743 (9th Cir.

2020) (internal quotations omitted). Even though the 2005 Recovery Plan 18 is nonbinding, Federal Defendants do point to a number of mitigation possibilities 19 identified in the Plan as a basis for allowing the Proposed Project to proceed. See AR 20 000864.

However, adherence to those specifically identified mitigation methods 21 appears unenforceable, and the mitigation methods themselves are vague. See *id.* 22 For example, a proposed mitigation method for meadowfoam conservation is the 23 transfer of that species' seeds to create a new occupied habitat in the Proposed 24 Project's onside reserve. AR 000859. But, there is no binding requirement in the 25 Biological Opinion that the onsite preserve be enacted, meaning there is no 26 guarantee that seed transfer would occur.

Another mitigation method identified in 27 the Biological Opinion is the utilization of mitigation credits for a meadowfoam seed 28 bank, yet the USFWS does not identify whether those credits are available, or 1 purchasing another meadowfoam-occupied parcel, which again, the agency has not 2 determined is possible. See *id.* 3 Federal Defendants push the onus of determining the viability of these 4 mitigation measures onto the developers.

(ECF No. 39 at 21 (“[T]he developer 5 proposed the alternative conservation methods for [the USFWS] to consider in the 6 [Biological Opinion], so it was reasonable for [the USFWS] to assume that the 7 developer could carry out the conservation measures it proposed.”) The Court is 8 somewhat troubled by this approach. See *Selkirk Conservation All. v. Forsgren*, 336 9 F.3d 944, 955 (9th Cir.

2003) (“Even given the cooperation of private entities, the 10 agencies must vigilantly and independently enforce environmental laws.”) However, 11 as emphasized earlier, the 2005 Recovery Report need not be binding on the agency 12 or developers. *Cascadia Wildlands v. Bureau of Indian Affs*, 801 F.3d 1105, 1114 n.8 13 (9th Cir. 2015) (“The Endangered Species Act does not mandate compliance with 14 recovery plans for endangered species.”).

Accordingly, any mitigation methods 15 identified the 2005 Recovery Report need not be made enforceable by a Biological 16 Opinion, and their identification and the general requirement that there be some 17 mitigation measures satisfies the Report's duty of creating a roadmap of viable 18 mitigation actions for developers and the agency.

Although the Court is circumspect 19 of relying so heavily on the developers' identification of conservation methods without 20 oversight from the USFWS, the Court declines to view the agency's reliance on the 21 2005 Recovery Report's (nonbinding) mitigation measures as arbitrary and capricious. 22 B. Presence of Giant Garter Snake at the Proposed Project Site 23 Permitting agencies must assess the direct and indirect effects of a proposed 24 development on all ESA-listed species that would be impacted by that development.

25 50 C.F.R. § 402.02; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 26 2011). But “if the agency determines that a particular action will have no effect on an 27 endangered or threatened species, the formal consultation requirements are not 28 triggered.” *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 871 (E.D. Cal. 2004) 1 (citing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir.1994)).

2 In assessing the Proposed Project, the Federal Defendants did not account for 3 any impacts on the ESA-listed giant garter snake, finding that the proposed 4 development site does not contain sufficient suitable habitat for the snake and that 5 there have been no documented occurrences of the snake within five miles of the site. 6 The analysis of this issue by the Corps provided, in relevant part: 7 There are no CNDDB occurrences of this species within five miles of the Action Area (CDFW 2018).

The Action Area contains Butte Creek 8 Diversion Channel with steep banks that are perennially inundated. 9 However, the Butte Creek Diversion Channel does not provide vegetative cover and is too shallow during the snake’s active period (April through 10 October) to support habitat for this species.

The depressional perennial 11 marsh provides marginal habitat for GGS. However, it is too small (approximately 1.24 acres) to support a GGS population and the 12 depressional perennial marsh is not in the vicinity of other suitable habitat or corridors that would connect to known populations of GGS. Given the 13 lack of suitable habitat within the Action Area coupled with the absence 14 of occurrences in the vicinity, this species is not expected to occur on or near the Action Area.

Therefore, this species is not expected to be 15 affected by the Proposed Action and is not addressed further in this BA. 16 AR 250:005400. 17 Plaintiffs contest this finding, alleging that the giant garter snake has been 18 found at and within five miles of the site, and that regardless, the agency should 19 assume its presence given the availability of the snake’s habitat in the project site.

20 Further, Plaintiffs point to studies conducted as part of the development process of 21 adjacent sites, which found the need to assess impacts on the giant garter snake. 22 Giant garter snakes live in upland and aquatic habitats, which the parties agree 23 are present at the proposed project site. (ECF No. 30 at 26; ECF No. 39 at 26–27;) AR 24 000896. This includes vegetative cover such as cattail, which are present within the 25 Proposed Project area’s freshwater marshes.

AR 002276. Additionally, giant garter 26 snakes have been observed using burrows for refuge in the summer as much as 50 27 meters away from the edge of marsh habitats. AR 008152. Defendants argue that the 28 giant garter snake habitat within the Proposed Project is too small to support a snake 1 population, noting that it is only approximately 1.24 acres, and that regardless of the 2 present suitable habitat, there have been no sightings of the snake.

AR 250:005400. 3 Contrary to Federal Defendants' claim that the giant garter snake is not present 4 in the area, there have been sightings of at least one giant garter snake within five 5 miles of the proposed site at a nearby location called Dead Horse Slough. AR 005067 6 ("A giant garter snake [] was sighted during a sight visit in close proximity to Dead 7 Horse Slough, therefore [giant garter snake] habitat is assumed to exist within Dead 8 Horse Slough.").

After first claiming that there have been no documented sightings of 9 a giant garter snake in the area (ECF No. 39 at 26–27), Federal Defendants then 10 shifted their argument to be that the one sighting identified by Plaintiffs is separated 11 from the Proposed Project site "by State Route 32 and a distance of about a mile that 12 includes residential and commercial development" (ECF No. 50 at 15).

While this may 13 be true, the underlying reasoning of the Biological Opinion's finding of "no effect" on 14 the giant garter snake is premised on the assumption that the species "has not been 15 detected within five miles of the action area." (ECF No. 39 at 28; see *id.* at 29 (noting 16 Federal Defendants' argument that "it is undisputed that no [giant garter snake] 17 occurrence has ever been recorded within five miles of the Stonegate Project action 18 area"))).

Federal Defendants may not retroactively change their argument in their 19 Reply after Plaintiffs identify faulty assumptions underlying Defendant's Biological 20 Opinion. If the specific location of the giant garter snake sighting was significant, that 21 must have been addressed by the USFWS during the permitting process, rather than 22 justified by post-hoc rationalizations in Federal Defendants' briefing.

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

For example, the State Route 32 Widening Project determined 1 that "[t]he snake is assumed to occur in Dead Horse Slough, and because of the 2 presence of suitable habitat, the Service believes that the snake is reasonably certain 3 to occur within the proposed project's action area and, therefore, the proposed 4 project is likely to adversely affect the snake." AR 000896.

And, the Meriam Park 5 Development Project found that "[t]he proposed project would permanently destroy 6 3.6 acres and temporarily affect (over multiple seasons) 5.69 acres of giant garter 7 snake habitat." AR 001743. 8 Federal Defendants seek to distinguish these two projects. (See ECF No. 39 at 9 28.) They argue first that the State Route 32 Widening Project merely assumed that 10 there were giant garter snakes at the development location.

(Id.) But critically, the 11 USFWS itself acknowledged the potential effect on the snake on the State Route 32 12 Widening Project, noting that “because of the presence of suitable habitat, the Service 13 believes that the snake is reasonably certain to occur within the proposed project’s 14 action area and, therefore, the proposed project is likely to adversely affect the snake 15 through temporary loss of 0.227 acres of potential aquatic habitat and permanently 16 destroy 1.519 acres of upland habitat and 0.093 acres of aquatic habitat.” AR 000896.

17 So it was not just that the Widening Project assumed snakes were there — USFWS itself 18 supported that assumption. 19 Federal Defendants further counter that the amount of giant garter snake 20 habitat at the Proposed Project site is “marginal.” (ECF No. 39 at 28.)

As an initial 21 matter, comparing the acreage at issue in the Proposed Site and that of the Widening 22 Project, the Court is unclear why the former is marginal and the latter is cause for 23 concern; the Biological Opinion does not discuss this matter in any depth. More 24 significantly though, the Biological Opinion’s reasoning that the habitat is marginal is 25 expressly “coupled with the absence of occurrences [of giant garter snake] in the 26 vicinity” and with the assumption that there have been no “occurrences of this species 27 within five miles of the Action Area.” AR 250:005400.

But as discussed above, there 28 has been at least one sighting of the giant garter snake within five miles. It is 1 impossible for the Court to decouple Federal Defendants’ reliance on the small area 2 of habitat and its erroneous assumption that there had been no sightings of the snake 3 in the area. 4 As for the Meriam Park Development Project, Federal Defendants contend that 5 that development affected nearly nine times the amount of giant garter snake habitat, 6 and again that there had been no local sightings of the snake.

(ECF No. 39 at 28–29.) 7 But that does not detract from Plaintiffs’ point that assessment of giant garter snake at 8 the Proposed Project sight is improperly tied to an assumption that there have been 9 no snake sightings. And both projects indicate that it would be reasonable to account 10 for their presence absent some valid justification as to why doing so was unnecessary.

11 Both sides cite to *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006 12 (9th Cir. 2012) for the proposition that the USFWS must assess whether an ESA-listed 13 species will be affected, and that the agency is only discharged from further 14 assessment if it properly finds that there would be “no effect” on the species.

Here, 15 the agency’s conclusion that the Proposed Project would have no effect on the species 16 makes sense if premised upon the assumption that no snake has been sighted in the 17 area. But Plaintiffs have identified that there has been at least one giant garter snake 18 sighting in the area. And while the Proposed Project contains giant garter snake 19 habitat, and other nearby projects accounted for potential habitat loss, Federal 20 Defendants reached the conclusion that the species

would not be affected by the 21 Proposed Project, despite acknowledging separately that development tends to 22 significantly impact the species and its habitat.

As in Karuk Tribe, Plaintiffs have thus 23 identified a species and habitat that would be affected by the Proposed Project but 24 that have not been properly accounted for, evincing the Federal Defendants' 25 noncompliance with the ESA. 26 To sum, the Court finds that Federal Defendants' failure to consider potential 27 effects on the ESA-listed giant garter snake was based on a faulty assumption that 28 there have been no sightings of the snake within five miles of the project renders its 1 Biological Opinion arbitrary and capricious.

The Court appreciates that this 2 conclusion is based on the single sighting of a giant garter snake twelve years before 3 the no-effect finding was issued for the Proposed Project. And it may well be that, 4 after a more thorough analysis, Federal Defendants conclude the project will in fact 5 have a minimal impact on the snake. But the factual underpinning that was used to 6 justify conducting no analysis of the giant garter snake — that there have been no 7 sightings within five miles of the project — is simply incorrect, rendering the Biological 8 Opinion invalid.

Moreover, this sighting is in the context of the fact that the project 9 type contains the appropriate habitat for the giant garter snake, and that nearby 10 projects accounted for the presence of the giant garter snake, including at the 11 USFWS's urging in at least one circumstance.

The Court therefore grants Plaintiffs' 12 request for summary judgment on this issue.³ 13 C. LEDPA 14 The CWA aims to “restore and maintain the chemical, physical, and biological 15 integrity of the Nation’s waters” by prohibiting the unpermitted discharge of 16 pollutants into navigable waters of the United States. 33 U.S.C. §§ 1251(a), 1311(a). 17 The Corps, under oversight from the EPA, issues permits for discharges of dredged or 18 fill materials.

Id. § 1344(a)–(c). When issuing this type of permit, known as a Section 19 404 permit, the Corps must follow binding guidelines set out in EPA regulations (the 20 “404(b)(1) Guidelines” or “Guidelines”). 33 U.S.C. § 1344(b); 40 C.F.R. Ch. 1, Subch. H, 21 Pt. 230.

The applicant bears the burden of proving that no practicable alternatives 22 exist. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 23 2002) (citing *Res. Invs., Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1167 (9th Cir. 24 1988)). 25 The Corps may not issue a Section 404 permit if there is a “practicable 26 27 3 Separately, the parties agree the Court should grant summary judgment on to Federal Defendants on the failure-to-consult claim against the Corps, and the Court will do so.

(See ECF No. 44 at 25–26, n.12 28 (expressly conceding the point to Defendants).) 1 alternative to the proposed discharge which would have less adverse impact on the 2 aquatic ecosystem” and which “does not have other significant adverse environmental 3 consequences.” 40 C.F.R. § 230.10(a). “An alternative is practicable if it is available 4 and capable of being done after taking

into consideration cost, existing technology, 5 and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2).

The 6 Guidelines prohibit the Corps from permitting anything other than the least 7 environmentally damaging practicable alternative (“LEDPA”). See 40 C.F.R. 8 §230.10(a). 9 Here, Plaintiffs argue that the Corps failed to adopt the LEDPA as required 10 under the CWA, and therefore the subsequent issuance of the Section 404 permit is 11 improper. (ECF No. 30 at 29–32.)

Specifically, Plaintiffs allege that the official LEDPA, 12 known as Alternative 5, considered by the Corps was not actually the least damaging 13 alternative; Plaintiffs view the actual LEDPA as being either Alternative 1 or the “Bruce 14 Road Alternative” (although Federal Defendants fairly and correctly point out that 15 Plaintiffs appear to conflate the two).

(Id.) Federal Defendants counter that the Corps 16 and Defendant-Intervenor considered three off-site alternatives, five on-site 17 alternatives, and a no-action alternative. (ECF No. 39 at 29.) Alternative 1 would 18 develop 117 acres of land, including land east of Bruce Road. AR 35:000369; AR 19 308:006278-79, 308:006315. Meanwhile, the Bruce Road Alternative, which is indeed 20 distinct from Alternative 1, would restrict development to the 50-acre parcel west of 21 Bruce Road.

AR 302:006071. The Court finds that Defendants jointly proffer sufficient 22 reasons for not considering these alternatives as viable, and therefore finds that there 23 is no violation of the CWA. 24 i. Alternative 1 25 The Corps must consider cost in its LEDPA analysis. 40 C.F.R. § 230.10(a)(2); 26 *Friends of the Earth v. Hintz*, 800 F.2d 822, 833 (9th Cir.

1986) (“The regulations 27 explicitly charge the Corps with taking [into consideration] cost”). Plaintiffs appear to 28 argue that Defendants improperly rejected Alternative 1 for cost reasons, noting that 1 Alternative 1 would result in an estimated “19 percent increase in the cost per 2 developable acre from \$256,266 to \$305,034.” (ECF No. 30 at 31); see AR 35:000369.

3 Plaintiffs attack the rejection of Alternative 1 on the basis that there is no evidence in 4 the administrative record of the increase in cost or how that would render Alternative 5 1 impracticable. But, there is evidence in the administrative record that the increase in 6 costs and decrease in project scope would render the project financially unviable.

For 7 example, Defendants jointly assessed the costs and determined that “the 19% 8 increase in cost per developable acre would be distributed over a substantially 9 decreased development potential (57% decrease in development footprint acreage), 10 resulting in cost per unit (for residential development) and cost per square foot (for 11 commercial development) exceeding regional prices and adversely affecting this 12 development from providing an economically viable project with competitive prices.” 13 AR 301:006027.

And in a subsequent study, Defendant-Intervenor supplied data to 14 the Corps on current regional costs, bolstering the conclusion that Alternative 1 15 simply was not economically feasible. See AR 296:005979–005982. 16 In sum, Defendants reasonably rejected Alternative 1 on economic viability 17 grounds. This alone is sufficient to remove Alternative 1 from consideration, and 18 therefore, the Court will not view Alternative 1 as the LEDPA.

19 ii. Bruce Road Alternative 20 Plaintiffs also propose that the Bruce Road Alternative may be the LEDPA. 21 Defendants counter that the Bruce Road Alternative was rejected due to its reduced 22 scope, which would not satisfy the Project’s goal of meeting Chico’s housing needs 23 and commercially activating the Bruce Road corridor. Given the various purposes 24 prompting the development, Defendant-Intervenors determined that the 25 development would need to be approximately 200 acres.

AR 306:006203. The Bruce 26 Road Alternative would limit the Proposed Project to 50 acres. (See ECF No. 39 at 35.) 27 The administrative record supports Defendants’ joint contention that the Bruce Road 28 Alternative was rejected because it cannot meet the various needs of the Proposed 1 Project based in on its limited size. See AR 302:006071. Simply put, reducing the 2 proposed acreage of the project by 75% would severely limit its ability to meet 3 Chico’s identified housing and commercial needs.

Rejecting this small-scale version 4 of the project was proper. 5 D. Preparation of an EA and not an EIS 6 Prior to implementing certain agency actions, an agency must first prepare an 7 environmental assessment, or “EA,” describing initial environmental impacts of the 8 action. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 9 1172, 1185 (9th Cir.

2008) (citing 40 C.F.R. § 1508.9(a)(1)). An EA is a “‘concise public 10 document’ that ‘[b]riefly provide[s] sufficient evidence and analysis for determining 11 whether to prepare an environmental impact statement or a finding of no significant 12 impact.’” *Id.* (quoting 40 C.F.R. § 1508.9(a)(1)).

For “major Federal actions 13 significantly affecting the quality of the human environment” or instances where 14 substantial questions are raised as to potential environmental effects, NEPA requires a 15 federal agency to prepare an environmental impact statement, or “EIS.” 42 U.S.C. 16 § 4332(2)(C); *Ocean Advocs. v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864–65 (9th 17 Cir.

2004). An EIS is not required if the EA does not find that there will be a significant 18 environmental impact; in those instances, an EA is sufficient. 19 Here, the Corps prepared only an EA, and finding that there would be no 20 significant environmental impact, did not subsequently prepare an EIS. Plaintiffs 21 challenge this determination and allege that the Corps should have prepared an EIS 22 due to the substantial questions raised on the Proposed Project’s environmental 23 impacts.

(ECF No. 30 at 33–37.) Federal Defendants argue that the Corps fully 24 complied with its NEPA obligations because there were no substantial questions 25 raised as to the environmental effects, and accordingly, the Corps did not need to 26 prepare an EIS. (ECF No. 39 at 37–42.) 27 “To determine whether an action ‘significantly’ affects the environment, 28 agencies must consider both the ‘context’ and ‘intensity’ of the possible effects.” Am.

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

6 Courts can consider many factors when assessing intensity, and all need not be 7 present in any given case. See id. As to the intensity of the Proposed Project, Plaintiffs 8 first argue that there is a substantial question as to the environmental impacts of the 9 Proposed Project. (ECF No. 30 at 34.) Plaintiffs point to numerous state and federal 10 entities, including the EPA, California Department of Fish and Wildlife, the USFWS, 11 and the City of Chico, all of whom have raised at least some level of concern 12 regarding the environmental impacts of the project.

See AR 310:006326; AR 13 351:006703; AR 00851; AR 346:006687–006688. However, Federal Defendants fairly 14 point out that those comments predate the addition of an extensive mitigation plan 15 being added to the Project’s plans. See AR 35:000384.

The comments identified by 16 Plaintiffs respond to an outdated version of the project, which did not incorporate 17 additional mitigation measures. See, e.g., AR 351:006703 (submission from California 18 Fish and Wildlife Service cabining its comment in response to the Project “[a]s 19 described in the public notice”); see also AR 351:006706 (submission from same 20 agency noting that its comments are toward “the Project as proposed”).

The 21 mitigation measures adapted are, at least on paper, significant. For example, they 22 include the proposed purchase of 12.22 seasonal wetland creation credits from the 23 Colusa Basin Mitigation Bank and 4.28 vernal pool establishment credits at the 24 Meridian Ranch Mitigation Bank (AR 35:000365), the elimination of development east 25 of the Butte Creek Diversion Channel and the elimination of a utility line crossing that 26 Channel (AR 35:000384), and the establishment of a 132-acre water preserve (AR 27 35:000384).

On balance, the Court is not convinced that the substance of the 28 comments represents a substantial question, given that they do not address the most 1 recent iteration of the project, and due to the substantive differences between the 2 Project’s iterations. 3 Second, Plaintiffs emphasize that the project would cause permanent impacts 4 to an ecologically sensitive area and that it would adversely affect ESA-listed species 5 and their habitats.

(ECF No. 30 at 34.) Plaintiffs point to the EPA, which did initially 6 raise concerns about the project. However, the EPA then declined to elevate its 7 concerns following the addition of mitigation efforts discussed, as discussed in the 8 preceding paragraph. AR 198:003836.

The decision of the EPA not to repursue its 9 comments regarding the Proposed Project is indicative to the Court of the weight of 10 the mitigation measures added to the project to the EPA, and the Court will decline to 11 view the EPA's original comments as an indicator of the current iteration of the 12 Project's impacts.⁴ 13 Third, Plaintiffs argue that the project's controversial nature supports the need 14 to develop an EIS.

(ECF No. 30 at 35.) Plaintiffs point to numerous comments 15 submitted by community members, agencies, and organizations regarding the 16 development. (Id.) But "[m]ere opposition to an action does not, by itself, create a 17 controversy within the meaning of NEPA regulations." *Am. Wild Horse Campaign*, 963 F.3d at 1011. Instead, a plaintiff must "cast [] serious doubt upon the reasonableness 19 of the agency's conclusions." *Id.* (quoting *Humane Soc'y of U.S. v. Locke*, 626 F.3d 20 1040, 1057 (9th Cir.

2010)). But in doing so, Plaintiffs rely on the previous California 21 Department of Fish and Wildlife and EPA comments. (ECF No. 44 at 39.) The Court 22 has already determined that those comments do not address the most up-to-date 23 project iteration, and therefore, carry less force. And, the mere submission of dozens 24 of comments submitted regarding the Proposed Project does not inherently render 25 26 4 As discussed earlier in this Order, the Court acknowledges the criticisms of the nonbinding nature of specific mitigation measures.

However, given the various agencies' decision not to submit additional 27 comments following the addition of the mitigation measures to the Proposed Project, the Court concludes that those agencies found the mitigation measures sufficient to ameliorate any previously 28 existing concerns. 1 the Project controversial. See *Am. Wild Horse Campaign*, 963 F.3d at 1006–07, 1011–2 12 (holding that an agency decision that garnered nearly 5,000 public comment 3 letters was not controversial).

4 While it is true that the Court has concerns with the Biological Opinion on which 5 the EA relies, that does not render the project "controversial" such that an EIS was 6 required. That is because, at this stage, the failure to consider climate change and the 7 giant garter snake are procedural in nature, and the Court cannot conclude that either 8 issue will render the project sufficiently controversial to warrant an EIS.

For example, 9 on remand, Federal Defendants may conclude that the impacts of climate change and 10 effects on the giant garter snake are not significant. On the other hand, on a harder 11 look at these issues, the Corps may determine that it should prepare an EIS; nothing in 12 this Order prevents the Corps from doing so. But on this record, Plaintiffs have not 13 established that there

is sufficient environmental debate within the agencies that 14 would necessitate an EIS, especially given the Court's deferential review to the 15 agency.

See *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). 16 CONCLUSION 17 For the reasons discussed above, Plaintiffs' Motion for Summary Judgment 18 (ECF No. 30) is GRANTED IN PART and DENIED IN PART. Federal Defendants' Cross- 19 Motion for Summary Judgment (ECF No. 39) and Defendant-Intervenors' Cross- 20 Motion for Summary Judgment (ECF No. 41) are GRANTED IN PART and DENIED IN 21 PART.

Federal Defendants' Motion to Exclude Plaintiffs' Extra-Record Declaration 22 (ECF No. 38) is DENIED. The Court declares the USFWS 2020 Biological Opinion 23 unlawful under the ESA and arbitrary and capricious under the APA.

The Court will set 24 aside and vacate the Biological Opinion on that basis. 25 The Court also declares that the Corps violated the ESA and APA by failing to 26 consult with the USFWS regarding potential impacts on the giant garter snake, and 27 issuance of the Stonegate permit is unlawful to the extent it relies on the parties' 28 failure to consult.

The Court hereby enjoins any implementation of the Proposed 1 | Project pending completion of a legally adequate Biological Opinion and consultation 2 || regarding the giant garter snake. 3 A IT 1S SO ORDERED. 5 | Dated: _July 17, 2025 "Daniel CoD tto— Hon. Daniel t |. od 6 UNITED STATES DISTRICT JUDGE 7 8 9 10 11 12 13 14 pscs - CBD 221ev01527.msg 15 16 17 18 19 20 21 22 23 24 25 26 27 28 36