

WILD EQUITY
INSTITUTE, a non-profit
corporation, *et al.*

Plaintiffs,

v.

CITY AND COUNTY OF
SAN FRANCISCO, *et al.*,

Defendants.

Date: November 18, 2011
Time: 9:00 a.m.
Courtroom: 10, 19th Floor
Judge: Hon. Susan Illston

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W.,
Suite 700
Washington, D.C., 20009
Telephone: (202) 588-5206
Facsimile: (202) 588-5049
eric@meyerglitz.com
hcrystal@meyerglitz.com

Attorneys for Plaintiffs

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GLOSSARY

Alt. Report	Sharp Park Conceptual Restoration Alternatives Report
Bowie Decl.	Declaration of John Bowie (Pl. Ex. 26)
Campo Dep.	September 13, 2011 Deposition of Jon Campo (Pl. Ex. 5)
CRLF or Frog	California Red-Legged Frog
CRLF Rec. Plan	Recovery Plan for the California Red-Legged Frog (Pl. Ex. 17)
Dexter Decl.	Declaration of Wendy Dexter (Pl. Ex. 7)
Draft Natural Areas Plan	Final Draft, Significant Natural Resources Areas Management Plan (Pl. Ex. 21)
ESA or Act	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
GGNRA	Golden Gate National Recreation Area
Goodale Mon. Decl.	Monitoring Declaration of Margaret Goodale (Pl. Ex. 11)
Graham Decl.	Declaration of Laurie Graham (Pl. Ex. 16)
Hayes Decl.	Declaration of Dr. Mark Hayes (Pl. Ex. 6)
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
PGA	Public Golf Association
Pilgrim Decl.	Declaration of Robert Pilgrim (Pl. Ex. 15)
RPD	San Francisco Recreation and Parks Department
SFGS 5-Year Rev.	San Francisco Garter Snake 5-Year Review (Pl. Ex. 20)
SFGS or Snake	San Francisco Garter Snake
SFGS Rec. Plan	Recovery Plan for the San Francisco Garter Snake (Pl. Ex. 19)
Sharp Park	Sharp Park Golf Course
Snavelly Decl.	Declaration of Jewel Snavelly (Pl. Ex. 4)

Swaim 2008 Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008)
(Pl. Ex. 22)

Vredenberg Decl. Declaration of Dr. Vance Vredenberg (Pl. Ex. 3)

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 18, 2011, at 9:00 am, or as soon thereafter as counsel may be heard by this Court, located in Courtroom 10 at 450 Golden Gate Ave., 19th Floor, San Francisco California, Plaintiffs will move for a preliminary injunction in this action. By this motion Plaintiffs seek an injunction against the City and County of San Francisco's pumping water from Horse Stable Pond in Sharp Park Golf Course, located in Pacifica, California, and an injunction against the use of mowing equipment or motorized golf carts on Sharp Park Golf Course holes 9-18, until this case may be resolved on the merits.

This motion is made pursuant to Federal Rule of Civil Procedure 65 and is supported by the accompanying memorandum of points and authorities, declarations, and other attached exhibits, a proposed order, all the pleadings and papers on file in this action, and such additional information as may be presented to the Court at or before the hearing.

Dated: September 23, 2011

Respectfully submitted,



Brent Plater (CA Bar No. 209555)
WILD EQUITY INSTITUTE
bplater@wildequity.org

Howard M. Crystal (D.C. Bar No. 446189)
Eric R. Glitzenstein (D.C. Bar No. 358287)
Pro Hac Vice
MEYER GLITZENSTEIN & CRYSTAL
eglitzenstein@meyerglitz.com
hcrystal@meyerglitz.com

Attorneys for Plaintiffs

Plaintiffs' Preliminary Injunction Motion
and Supporting Memorandum

MEMORANDUM OF POINTS AND AUTHORITIES

This case concerns the California red-legged frog (“CRLF” or “Frog”) and the San Francisco Garter Snake (“SFGS” or “Snake”), *see* Plaintiffs’ Exhibit (“Pl. Ex.”) 1 (photographs), two species listed under the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1531, *et seq.*, that are being unlawfully “taken” within the meaning of Section 9 of the Act, *id.* § 1538, at Sharp Park golf course (“Sharp Park”) by the Defendant City and County of San Francisco’s Recreation and Parks Department (“RPD”). During winter rains RPD pumps massive volumes of water out of Sharp Park from Horse Stable Pond. *See* Pl. Ex. 2 (video of pumping operations). This pumping dramatically and artificially lowers water levels in the Park’s water bodies, significantly modifying the species’ habitat and, in turn, strands and kills CRLF egg masses and/or CRLF tadpoles. Plaintiffs’ expert Dr. Vance Vredenberg *personally observed a stranded egg mass in Sharp Park earlier this year*. *See, e.g.*, Declaration of Dr. Vance Vredenberg (“Vredenberg Decl.”) (Pl. Ex. 3) ¶ 23 and Ex. B (photographs); *see also* Declaration of Jewel Snavelly (“Snavelly Decl.”) (Pl. Ex. 4) ¶¶ 3-5. It also threatens to entrain the species in the pumps.

The U.S. Fish and Wildlife Service (“FWS”) has repeatedly raised concerns about this ongoing take. *See, e.g.*, January 13, 2011 FWS email (Pl. Ex. 5 at 4) (Sept. 13, 2011 Deposition of Jon Campo (“Campo Dep.”), Dep. Ex. 6) (noting “the probability that egg mass strandings will occur on a regular basis in the future”). However, RPD has inexplicably refused to follow the process set forth in the ESA for precisely this kind of situation, and thus absent the relief sought here these legal violations will continue this upcoming winter season.

RPD also routinely mows grass and vegetation directly in SFGS and CRLF habitat. According to leading experts on both species, these large-scale mowing operations are also unlawfully taking these species and modifying their habitat. *See, e.g.*, Declaration of Dr. Mark Hayes (“Hayes Decl.”) (Pl. Ex. 6) ¶ 44 and Ex. E (discussing Snake run over by a lawn mower at Sharp Park). Motorized golf cart use in prime Snake and Frog upland habitat is similarly causing ongoing take. *See, e.g.*, Declaration of Wendy Dexter (“Dexter Decl.”), ¶ 22, 25 (Pl. Ex. 7).

As explained below, the only lawful way RPD can engage in this ongoing take is to obtain an Incidental Take Permit (“ITP”) pursuant to Section 10 of the ESA. *See* 16 U.S.C. § 1539. In evaluating such a permit the FWS will determine, *inter alia*, whether, and how, RPD’s activities may continue; the extent of the incidental take, if any, that will be authorized; and the specific mitigation and minimization required to insure that RPD’s take of these species does not undermine the species’ survival and recovery. *Id.*; *see also, e.g., Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1129 (S.D. Cal. 2006) (explaining that to obtain an ITP an applicant must “submit[] a ‘conservation plan’ that will –as its name plainly connotes – help ‘conserve’ the species by facilitating its survival and recovery”) (citations omitted).

Rather than comply with this detailed, Congressionally-mandated mechanism, RPD has responded to its documented violations of the ESA by preparing its own so-called “ESA Compliance Plan.” Pl. Ex. 8. The Compliance Plan presumes pumping water from Sharp Park’s Horse Stable Pond may be conducted without stranding CRLF egg masses, and that certain purported “monitoring” prior to mowing, and rules for golf carts use, can adequately address unlawful take. *Id.*

Each of these premises has proven illusory. As noted, last winter Plaintiffs’ expert identified a fully-exposed CRLF egg mass, Vredenberg Decl. ¶ 23, and RPD tried to relocate more than 125 egg masses that it determined would not survive in the habitat where they were laid. Moreover, the RPD employee responsible for this wholesale species transplantation has testified that he cannot possibly find all of the egg masses impacted by RPD’s pumping operations. *See, e.g., Campo Dep.* (Pl. Ex. 9) at 104 and 116; *see also* Mar. 2, 2011 RPD email (Pl. Ex. 10) (Campo Dep. Ex. 16) (indicating RPD moved 128 of 159 egg masses observed last winter). Similarly, while RPD’s conditions on mowing and golf carts cannot avoid take even if faithfully applied, even those conditions are not being followed. *E.g. Campo Dep.* at 125, 127; *see also, e.g., Mon. Declaration of Margaret Goodale* (“Goodale Mon. Decl.”) (Pl. Ex. 11), ¶¶ 2-

19 (documenting recent mowing without monitoring, and golf carts on fairways, in Sharp Park).¹

In light of these long-standing legal violations, Plaintiffs seek a temporary injunction prohibiting Defendants from pumping water from Horse Stable Pond in Sharp Park, and prohibiting mowing and golf cart use on holes 9-18 (all of which are within approximately 200 meters of Sharp Park water bodies), until this case can be resolved on the merits, or until RPD obtains an ITP encompassing the various modes of unlawful take in which the City is engaged. As detailed below, Plaintiffs plainly meet the standards for a preliminary injunction in an ESA case. Although RPD's *own* documents and testimony amply demonstrate Plaintiffs' likelihood of success on the merits, Plaintiffs are also submitting declarations from three of the leading experts on the Frog and the Snake – Dr. Vance Vredenberg, Ph.D, a professor at San Francisco State University who specializes in the ecology of amphibians; Dr. Marc Hayes, Ph.D, who has worked for nearly four decades as a research and field ecologist and herpetologist specializing in reptiles and amphibians in California and elsewhere (and was one of the two original petitioners for the ESA listing of the Frog); and Wendy Dexter, who has twenty years of experience as a wildlife biologist studying reptiles and amphibians – who further explain that, absent the relief Plaintiffs seek, RPD's activities will continue to unlawfully take these two species at Sharp Park, and also impair their long-term survival and recovery. *See* Pl. Exs. 3, 6, and 7.

To the extent they are relevant in an ESA case, the balance of hardships and public interest also strongly counsel in Plaintiffs' favor. As outlined in three other attached declarations, Defendants' take of the Frog and the Snake is irreparably harming Plaintiffs' members' interests in observing and appreciating these species in their natural habitat in Sharp

¹ Defendants have also apparently recently applied for two FWS permits that might lead to some narrow authorization for incidental take of the Frog or the Snake over the next several months – one to the Army Corps to permit RPD to dredge sediment and vegetation near the pumphouse, and another to the FWS to permit RPD to continue surveying for egg masses. *See* Pl. Ex. 12; Pl. Ex. 13. Irrespective of whether these permits are issued, however, RPD has not applied for the *only* kind of permit that would allow the agency to cause take *through the golf course's operations itself* – an ITP under ESA Section 10. 16 U.S.C. § 1539.

Park.² The public interest also plainly favors protecting imperilled species and insuring a local government agency's compliance with federal law. *E.g. Elder v. Nat'l Conference of Bar Examiners*, No. C 11-00199 SI, 2011 WL 672662, at *11 (N.D. Cal. Feb. 16, 2011) (noting that "the public clearly has an interest in the enforcement of its statutes") (other citations omitted). Indeed, the Supreme Court and Ninth Circuit have held that the public interest weighs so heavily in favor of protecting imperilled species that where, as here, an injunction is necessary to prevent unauthorized take, any purported competing interests do not even weigh in the Court's analysis. *See, e.g. TVA v. Hill*, 437 U.S. 153, 194 (1978) ("the balance has been struck in favor of affording endangered species the highest of priorities"); *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

BACKGROUND

A. The Endangered Species Act

In order to "halt and reverse the trend towards species extinction, whatever the cost," *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (quoting *TVA*, 437 U.S. at 184), the ESA broadly prohibits the "take" of listed species, 16 U.S.C. § 1538 – including any "egg or offspring thereof," 16 U.S.C. § 1532(8); *see also* 50 C.F.R. § 17.31(a) (extending take prohibitions to threatened species). "Take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19). The FWS's regulations further define "harm" to include any "significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," and "harass" to include any "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3; *see also Sweet Home*, 515 U.S. 687 (upholding FWS definition of

² *See* Declarations of Margaret Goodale ("Goodale Decl.") (Pl. Ex. 14); Robert Pilgrim ("Pilgrim Decl.") (Pl. Ex. 15); and Laurie Graham ("Graham Decl.") (Pl. Ex. 16).

“harm”); *accord Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (explaining that the ESA defines “take” in the “broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife”) (quoting S. Rep. No. 307, 93d Cong., 1st Sess. (1973)).

Under the ESA the fact that an activity is likely to take a listed species does not necessarily mean that it may not occur. Rather, Section 10 of the Act authorizes the FWS to issue ITPs for a specific level of take, where the applicant has developed an appropriate Habitat Conservation Plan (“HCP”) for the species, and has satisfied several other elements designed to minimize and mitigate the impacts of the proposed activity. 16 U.S.C. § 1539(a). The FWS may grant the ITP – after affording an opportunity for public comment – based on certain specific findings, including that the impacts will be minimized and mitigated “to the maximum extent practicable,” and that the HCP will aid the species’ survival and recovery. *Id.* § 1539(a)(2)(B).

B. The Imperilled Species Present At Sharp Park

1. The California Red-Legged Frog

The California red-legged frog, *Rana draytonii*, the largest frog native to the western United States, has been lost from over 70% of its historic range, and has suffered a population decline of 90%. *See* Recovery Plan for the California Red-Legged Frog (FWS 2002) (excerpts) (“CRLF Rec. Plan”) (Pl. Ex. 17) at 1; *see also* Vredenberg Decl. ¶ 9.³ The Frog, one of many amphibian species that has endured massive declines in recent decades, *id.* ¶ 4 (explaining that amphibians are “the most threatened group of vertebrates on earth”), is currently only found in select coastal drainages from Marin County south to Baja California, with a few isolated populations in the Sierra Nevada and the Transverse ranges.

³ Dr. Vredenberg, who has extensively studied world-wide amphibian declines and ecology, including their diet and habitat needs, and has published in leading journals on these matters, has specifically supervised research concerning the Frog in Sharp Park. Vredenberg Decl. ¶ 10, 15; *see also id.* Ex A (C.V.).

1 In 1996, in response to a listing petition co-authored by Plaintiffs' expert Dr. Hayes⁴ –
 2 the FWS listed the CRLF as a “threatened” species – *i.e.*, “likely to become an endangered
 3 species within the foreseeable future throughout all or a significant portion of its range,” 16
 4 U.S.C. § 1532(20). *See* 61 Fed. Reg. 25,813 (1996); *see also* 50 C.F.R. § 17.11(h). The Frog
 5 requires aquatic, riparian, and upland habitats to survive. CRLF Rec. Plan at 12-15; Vredenberg
 6 Decl. ¶ 10. While the species spends considerable time in aquatic environments, recent research
 7 has revealed that almost all of the CRLF diet is composed of *terrestrial insects*. *Id.*

8 Frogs breed in aquatic habitats from November to April, *id.* ¶ 8; CRLF Rec. Plan at 15-
 9 16, and in recent years egg masses have been found in Sharp Park beginning in late December.
 10 *See, e.g.*, Dec., 2010 Data Sheets (Pl. Ex. 18). CRLF breeding involves females laying eggs
 11 while being fertilized by males and attaching the eggs to emergent vegetation near the water
 12 surface. *Id.*; Vredenberg Decl. ¶ 8. Egg masses can contain between 2,000-5,000 eggs. *Id.*

13 CRLF lay their eggs near the water surface to “maximize[e] growth potential [through]
 14 water temperatures” and to “minimize[e] exposure to aquatic predators.” *Id.* ¶ 19; *see also*
 15 Hayes Decl. ¶ 25 and n.1. They have evolved to recognize the optimal water level to maximize
 16 these benefits while minimizing the natural risks of desiccation. Vredenberg Decl. ¶ 20. If left
 17 undisturbed, CRLF eggs hatch within 6 to 14 days, and the tadpoles typically metamorphose
 18 into frogs between July and September, although some may overwinter before metamorphosis.
 19 Vredenberg Dec. ¶ 8. There is a significant breeding population of the Frog at Sharp Park, part
 20 of a larger population that includes CRLF in the adjacent Mori Point National Park. Dexter
 21 Decl. ¶ 13.

22
 23
 24
 25
 26 ⁴ *See* Hayes Decl. ¶ 4. Dr. Hayes, who currently serves as a Senior Research Scientist
 27 with the Washington Department of Fish and Wildlife, has extensively studied CRLF
 28 populations, and is an international expert in their habitat and ecological needs. *Id.* ¶¶ 2, 5, and
 10; *see also, e.g. id.*, Exh. A (C.V.) at 8-14 (listing Dr. Hayes many publications)

2. The San Francisco Garter Snake

The highly endangered San Francisco garter snake, *Thamnophis sirtalis tetrataenia*, is a harmless and fantastically colored serpent identified by its reddish-orange head with red, black, and turquoise blue racing stripes on its sides and back. Pl. Ex. 1 (photograph); Dexter Decl.

¶ 12.⁵ The SFGS, which can grow to over four feet, is restricted primarily to San Mateo County, where, in 1985, the FWS identified six populations as “essential to the long-term survival of the subspecies.” SFGS Recovery Plan (FWS 1985) (“SFGS Rec. Plan”) (Pl. Ex. 19) at 1, 19. One of those is the population at Sharp Park. *Id.*

SFGS are generally active during the daytime, and are often found around ponds and marshes, but spend considerable time in nearby upland areas such as grasslands and dense vegetation, which provide habitat for basking, breeding, and retreat from predators. Dexter Decl. ¶ 12. Telemetry studies have revealed that SFGS travel on average one to two hundred meters from aquatic habitats. *Id.*; *see also id.* ¶ 17 (noting “forays up to 671 meters”).

SFGS typically eat frogs, especially Sierran treefrog (also called Pacific Treefrog) and the CRLF. *Id.* ¶ 12; *see also* San Francisco Garter Snake 5 Year Review (FWS 2006) (“SFGS 5-Year Rev.”) (Pl. Ex. 20) at 9-10. As the FWS has explained, the Snake requires “shallow water near the shoreline” to obtain this prey. *Id.* at 11; Dexter Decl. ¶ 26.

The SFGS is principally threatened by alteration and isolation of habitats from urbanization, including “recreational development.” SFGS Rec. Pl. at 13. The most endangered serpent in North America, SFGS populations remain in only a few fragmented locations; the species is now so rare “that accurate estimation of its total population size is difficult.” Hayes Decl. ¶ 14. The species has been designated as “endangered” – *i.e.*, “in danger of extinction throughout all or a significant portion of its range,” 16 U.S.C. § 1532(6)) – since before the 1973 ESA was enacted. *See* 32 Fed. Reg. 4,001 (March 11, 1967); 50 C.F.R. § 17.11(h).

⁵ Wendy Dexter, currently principal biologist at Condor Consulting, Inc., has extensively studied the SFGS, and has frequently collaborated with the FWS on ESA permitting for the SFGS. In light of this expertise, she is one of the few biologists authorized by that agency to engage in recovery actions for the species. *Id.* ¶ 1-8; *see also id.* Ex. A (resume).

As the City has recognized, the SFGS was found in relatively large numbers in Sharp Park in the 1940s. *See, e.g.* RPD Final Draft, Significant Nat. Res. Areas Mgmt. Plan (“Draft Natural Areas Plan”), p. 6-4.7 (2006) (Pl. Ex. 21). The species is still present in Sharp Park today, but has declined significantly. *See, e.g.*, Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008) (“Swaim 2008”) at 1-3 to 1-4 (Pl Ex. 22); *see also* Sharp Park Conceptual Rest. Alt. Report (“Alt. Report”) (RPD 2009) (Pl. Ex. 23) (excerpts) at 1; *accord* Hayes Decl. ¶ 17. As with the CRLF, the SFGS in Sharp Park is part of one population encompassing adjacent Mori Point. Dexter Decl. ¶ 13; *see also id.* ¶ 15 (noting SFGS observed in Mori Point in 2011).

C. Sharp Park Golf Course

Sharp Park, just over 400 acres located on the coast in Pacifica, is owned by Defendants and operated by RPD and its contractors. *See* Defendants’ Answer (“Answer”) (DN 15), ¶¶ 19, 47; Alt. Report at 1; *see also* Pl. Ex. 24 (map of Sharp Park). Highway 1 runs through the Park, and two portions of the National Park Service’s Golden Gate National Recreation Area (“GGNRA”) – Mori Point and Sweeney Ridge – border Sharp Park to the South and East. Answer ¶ 48; Alt. Report at at 1, 11.

As RPD itself has explained, several water bodies west of Highway 1 in Sharp Park, and their surroundings, provide “extensive habitat for the SFGS and the CRLF.” *Id.* at 11. The largest, Laguna Salada, “consists of an open water pond and adjacent emergent wetland occupying about 27 acres.” *Id.* at 12. A small channel carries water between the lagoon and the considerably smaller Horse Stable Pond to the South. *Id.* Sanchez Creek is a channelized creek that runs into Horse Stable Pond. *Id.*

Between the golf course and the ocean is an elevated sea wall. *Id.* at 21. Surrounded by hills to the East, during winter rains large volumes of water drain into Sharp Park, raising the water levels in Park water bodies and flooding portions of the golf course. *Id.* at 23 and Kamman Hydrology Report (“Hydrology Report”) (RPD Report, Appendix A) (Pl. Ex. 25); *see id.* at 11 (“Typically, more than 85% of the annual rainfall occurs during the period between November and March”); *see also, e.g.*, Hayes Decl., Ex. B (photographs). To drain this water, the City utilizes two pumps that push water from Horse Stable Pond through the sea wall and

1 dump it on the ocean beach. *See, e.g.*, Compliance Plan at 3; Hydrology Report at 4. As RPD
2 explains in the Compliance Plan:

3 The Department currently pumps storm water from Horse Stable pond to the ocean. The
4 pumps that control the water levels in Horse Stable Pond and Laguna Salada are located
5 in a pump house at the southwest corner of Horse Stable Pond. There are two electric
6 pumps located in the pump house, a large pump with a capacity of 10,000 gallons per
7 minute (gpm) and a smaller pump with a capacity of 1,500 gpm. The pumps sit in a wet
8 well and are controlled by electric probes, which are adjustable and set by Department
9 engineers. A gauge board is mounted to the outside of the pump house that allows
10 monitoring of the water levels. *Pumping takes place primarily during the rainy season*
11 *between November and May.*

12 Compliance Plan at 3-4 (emphasis added); *see also* Hydrology Report at 4 (indicating that the
13 large pump is designed to activate when water levels reach 7.5 feet and the smaller pump when
14 the level reaches 6.9 feet as measured by probes located near the pumps); *accord* Answer ¶ 51
15 (DN 15) (“Defendants admit that San Francisco operates the Sharp Park pump house as needed
16 to pump water out of Horse Stable Pond into the ocean in an effort to manage the water level”);
17 Declaration of John Bowie (“Bowie Decl.”) (Pl. Ex. 26), Ex A (pumping photograph).

18 The golf course itself contains 18 holes of fairways, tees, and greens. Alt. Report at 1.
19 Holes 4-7 are located East of Highway 1 (and are connected to the rest of the golf course by a
20 tunnel underneath the highway), and the remaining holes are on the Western side of the
21 Highway. Alt. Report at 1, and Figure 2. Holes 9-18 are the closest holes to Sharp Park water
22 bodies. *Id.*

23 RPD routinely mows grasses and other vegetation throughout the golf course. *See*
24 *generally* Compliance Plan at 3. Paved golf cart paths also run throughout the course, including
25 near the water bodies, and golfers use electric golf carts – on and off the cart paths – to traverse
26 the course. Compliance Plan at 5; *id.* at 4 (“Golfers frequently deviate from the fairway
27 searching for lost golf balls”).
28

D. RPD Activities Taking The Frog And The Snake At Sharp Park

1. Water Management Activities

For many years, RPD's massive water pumping operations from Horse Stable Pond have been stranding Frog egg masses by lowering water levels after Frogs lay their eggs. If the eggs do not remain in water they dry out – desiccate – and die, and if the area dries out before the tadpoles can go through metamorphosis they will similarly die. Almost twenty years ago, a biologist discovered more than 50 separate Frog egg masses desiccated in Sharp Park. Dec. 30, 1992 Letter (Pl. Ex. 27) (“pumping of water out of Horse Stable Pond and the resultant exposure of shoreline is causing massive frog egg mortality”). Indeed, in *listing the CRLF*, the FWS specifically noted that “*poorly timed releases of storm water from Horse Stable Pond at Sharp Park in February 1992 resulted in exposure and desiccation of 62 California red-legged frog egg masses,*” and therefore the species’ listing was based in part on the threats posed by “[m]anagement of water bodies for flood control.” 61 Fed. Reg. at 25,825-26 (emphasis added).

In more recent years RPD employees – most often a gardener named Jon Campo – have surveyed egg masses and have consistently documented large numbers of them stranded in Sharp Park. *E.g.* Jan. 17, 2003 Data Sheet (Pl. Ex. 28) (Campo Dep. Ex. 8) at 3 (noting “stranded” egg masses); Mar. 5, 2004 Data Sheet (Pl. Ex. 29) (Campo Dep. Ex. 9) (same). In 2005, the FWS wrote to RPD, reiterating the concern raised in listing the species – *i.e.*, that RPD’s water pumping operations have “lowered the water level at Horse Stable Pond and resulted in the stranding and exposure of a number of egg masses of the California red-legged frog.” FWS Letter of Feb. 1, 2005 (Pl. Ex. 30); *see also id.* (noting that pumping “caused the death of an unknown quantity of embryonic tadpoles of the completely aquatic early stage of this animal’s lifecycle”). At that time FWS specifically recommended that, “in order to avoid further potential violation of the [ESA],” RPD must “*obtain authorization for incidental take . . . as appropriate for the California red-legged frog, and also the endangered San Francisco garter snake . . . which also has been documented to inhabit the area.*” *Id.* (emphasis added). That is, not only was the *listing* of the Frog based in part on the very pumping operations at issue, but *more than six years ago*, the FWS specifically explained that, in light of RPD’s

1 massive modifications of the species' habitat, RPD must pursue an ITP – a permit that, if the
 2 Section 10 criteria are satisfied, would require specific measures, including conservation
 3 measures, as a condition for the allowable take of the species. *See generally* Dexter Decl. ¶¶ 8,
 4 33; Hayes Decl. ¶ 15.

5 RPD did not heed FWS's admonition to follow the Congressionally-mandated process
 6 for obtaining authorization for this ongoing take. Yet this take *has continued*. *E.g.* Feb., 2007
 7 Data Sheet (Pl. Ex. 31) (Campo Dep. Ex. 10 at 2) ("STRANDED"); Jan., 2008 Data Sheet (Pl.
 8 Ex. 32) (Campo Dep. Ex. 12) ("stranded 7 inches above"; "whole mass stranded"); *see also*
 9 Answer ¶ 58. Indeed, *this past winter alone Mr. Campo observed more than 125 egg masses*
 10 *that he concluded would "become stranded and desiccate" in Sharp Park*. Jan. 21, 2011 email
 11 (Pl. Ex. 5 at 2); Campo Dep. Ex. 16 (Pl. Ex. 10). As before, the FWS responded to this
 12 continuing violation of the ESA by once again admonishing RPD to obtain take authorization,
 13 Pl. Ex. 5, but RPD has still declined to do so.

14 Instead of seeking an ITP, RPD prepared its so-called "ESA Compliance Plan," which
 15 directs RPD to attempt to manage water levels to avoid stranding egg masses. Compliance Plan
 16 at 12-13. Because that effort has utterly failed and simply cannot eliminate strandings caused by
 17 the pumping operations, RPD's alternative solution has been to seek FWS's permission to *move*
 18 egg masses in Sharp Park in an *ad-hoc* effort to save those at risk. *See, e.g.*, Pl. Ex. 5. Viewing
 19 these efforts as an "emergency salvage," Mar. 1, 2011 email (Pl. Ex. 33), the FWS has permitted
 20 RPD to undertake some movements of egg masses, while making crystal-clear that it has *not*
 21 thereby authorized the underlying conditions that resulted in this emergency – *i.e.*, the pumping
 22 operation from Horse Stable Pond itself. *Id.*; *see also* Jan. 13, 2011 Email (Pl. Ex. 5 at 4)
 23 ("these actions are being completed as an emergency").⁶

24
 25 ⁶ Mr. Campo was listed on a "Recovery Permit" that had been issued to the *National Park*
 26 *Service* pursuant to Section 10(a)(1) of the Act, Pl. Ex. 34, which is designed exclusively for
 27 actions that "enhance" the survival or propagation of a species, 16 U.S.C. § 1539(a)(1)(A), not
 28 actions that result in incidental take during otherwise legitimate activities (like operating a golf
 course). Although the FWS's approval to move egg masses has been purportedly pursuant to
 that permit, the FWS has indicated that RPD may no longer proceed under it in the future. Pl.
 Ex. 5 at 1; *see also* Campo Dep. at 70-71.

As explained below, moving egg masses is legally irrelevant to Defendants' ESA violations, for while this is the kind of activity that might conceivably be authorized as a *minimization* measure pursuant to a properly issued ITP, RPD cannot avoid liability for its massive habitat modification by simply moving the egg masses to new locations without an ITP. *See supra* at 15-16. In any event, the gardener who moves the egg masses says he is confident he cannot find them all. *E.g.* Campo Dep. at 116.

2. Mowing and Golf Cart Use

As noted, RPD mows the courses, including areas near Park water bodies that are particularly important habitat for the Frog and Snake. The course fairways and surrounds are mowed twice every week, and the rough every two weeks, while the greens and tees are mowed as often as every day. Pl. Ex. 35. Golfers also use electric golf carts through the course, both on the designated golf cart paths and off of them. *E.g.* Compliance Plan at 4-5; Campo Dep. at 127.

These activities are also reasonably certain to cause ongoing take of the Frog and the Snake. In 2005, a SFGS was found after it had been run over by a lawn mower, Hayes Decl. ¶ 44 and Ex. E; Dexter Decl. ¶ 21, and, given the species' use of habitat, both species would be expected to be found in mowed areas and areas where golf carts are used in proximity to Park water bodies. Dexter Decl. ¶¶ 23-24; Vredenberg Decl. ¶ 10, 25; Hayes Decl ¶ 49.⁷

ARGUMENT

Although, in an ordinary case, a court will decide a request for a preliminary injunction by considering (a) whether the plaintiff has demonstrated "serious questions going to the merits," (b) whether there is "a likelihood of irreparable injury," (c) the balance of hardships, and (d) whether "the injunction is in the public interest," *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011), it is well-established that "[t]he traditional preliminary injunction analysis *does not apply to injunctions issued pursuant to the ESA.*"

⁷ Although the Snake is rare in Sharp Park – just as it is rare throughout its remaining range – Defendants cannot legitimately dispute the species' ongoing presence there. *See, e.g.*, Swaim 2008 at 1-2 (recognizing "a significant population" of Snake at Sharp Park that is "essential to" the species "long term survival").

1 *National Wildlife Fed. v. Nat'l Marine Fisheries Svc.*, 422 F.3d 782, 793 (9th Cir. 2005)
 2 (emphasis added) (citations omitted). Rather, “[i]n cases involving the ESA, Congress
 3 removed from the courts their traditional equitable discretion in injunction proceedings of
 4 balancing the parties’ competing interests.” *Id.* at 793-94 (other citations omitted); *see also*
 5 *TVA v. Hill*, 437 at 194; *accord Center for Biological Diversity v. BLM*, No. 03-2509 SI, 2004
 6 WL 3030209, at *1 (N.D. Cal. 2004) (“The traditional test, however, does not apply in ESA
 7 cases”). Thus, here, where it is evident that Defendants are taking two listed species,
 8 preliminary injunctive relief is warranted. *E.g. Palila v. Hawaii Dept of Land & Nat.*
 9 *Resources*, 639 F.2d 495, 497 (9th Cir. 1981) (“The only facts material to [a Section 9 take] case
 10 are those relating to the questions whether the [species] is an endangered species and, if so,
 11 whether the defendants’ actions amounted to a taking”).

12 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

13 As noted, Congress defined the term “take” in the “broadest possible manner to include
 14 every conceivable way” that a listed species could be taken, *Sweet Home*, 515 U.S. at 704
 15 (quoting S. Rep. No. 93-307, at 7 (1973)), including “wound[ing],” “harm[ing], and
 16 “harass[ing]” any member of the species, including its eggs. 16 U.S.C. §§ 1532(19), 1532(8).
 17 Prohibited “harm,” in turn, includes activities that modify a species’ habitat so as to impair
 18 essential behavioral functions such as breeding. 50 C.F.R. § 17.3; *see also Marbled Murrelet v.*
 19 *Babbitt*, 83 F.3d 1060, 1065 (9th Cir. 1996) (“[a]n indirect cause, such as habitat modification,
 20 also comes within the meaning of ‘harm’ in the statute”). Defendants’ activities constitute a
 21 prohibited take under the ESA.

22 **A. RPD’s Water Pumping From Sharp Park Is Taking CRLF And SFGS.**

23 **1. Pumping Is Stranding And Desiccating CRLF.**

24 Defendants’ take of CRLF through water pumping activities has been ongoing for many
 25 years. In particular:

- after “massive frog egg mortality” was documented in 1992, the FWS listed the species, noting specifically the recent “exposure and desiccation of 62 California red-legged frog egg masses” at Sharp Park, Pl. Ex. 27; 61 Fed. Reg. at 25,826;
- these ESA violations nonetheless continued, and in 2003 and 2004, RPD continued to find “stranded” egg masses, Pl. Exs. 28, 29;
- in 2005, FWS again notified RPD of ongoing “stranding and exposure” of CRLF egg masses at Sharp Park, Pl. Ex. 30;
- yet these violations continued unabated, with additional strandings in 2007 and 2008, Pl. Ex. 31 (2007); Pl. Ex. 32 (2008).

In light of this history, three years ago Defendants’ own biological consultants, Swaim Biological Inc., issued a Report concluding that when the massive pumping at Sharp Park draws water down “more than a few inches [it] poses a *significant desiccation risk to developing eggs attached to emergent vegetation and to those deposited in shallow water.*” Swaim 2008 at 4-4 (Pl. Ex. 22) (emphasis added). Accordingly, the Report explained that “[d]iscontinuing pumping at Horse Stable Pond would result in reduced fluctuations in water level and a lower risk of egg mass desiccation,” because “[u]nder natural conditions, rainfall and inflow from the rest of the watershed during this period would prevent egg masses from becoming stranded above the waterline.” *Id.* (emphasis added); *see also id.* at 4-8 (recommending that RPD “[e]liminate unnatural water level reductions during the frog breeding season”) (emphasis added).⁸

⁸ *see also id.* at 4-6 (“Pumping water can strand frog egg masses in the canal and cause them to fail. As in Horse Stable Pond, drawdown of water in the canal more than a few inches poses a significant risk of drying out for developing eggs attached to emergent vegetation and for those deposited in shallow water. Once all of the eggs have hatched into tadpoles, the threat posed by changing water levels is reduced or eliminated, provided that sufficient water remains for development and metamorphosis”); *see also* Alt. Report (Pl. Ex. 23) at 39 (recognizing both that CRLF “lay their eggs during wet periods in the shallow pools that form in the flooded fairways,” and that “[w]hen the water levels drop, these egg masses can be stranded on dry ground and desiccate”); *see also id.* (“Even if water persists long enough for eggs to hatch in these areas, most tadpoles would have limited mobility in the dense vegetation in the marsh area and may be stranded well before metamorphosis”).

1 However, the City has neither ceased pumping during the CRLF breeding season, nor
 2 has the City even applied for an ITP that might authorize these activities. Rather, pumping has
 3 continued, and last winter not only were more than 125 egg masses documented as stranded by
 4 RPD, Pl. Exs. 5 and 10, but Plaintiffs' expert Dr. Vredenberg personally observed a CRLF egg
 5 mass that was completely exposed for days and was eventually seen partially frozen.
 6 Vredenberg Decl. ¶¶ 23 and Ex. B; Snavelly Decl. ¶¶ 3-5.

7 These habitat modifications plainly violate the ESA. As Dr. Vredenberg explains, CRLF
 8 "have evolved over millions of years towards a strategy of egg-laying that *balances* water depth,
 9 water temperature, predator avoidance, and pond desiccation." Vredenberg Decl. ¶ 20
 10 (emphasis added). In particular, the species has evolved in a manner that "is cued in on *natural*
 11 rates of desiccation." *Id.* ¶ 21 (emphasis added); Hayes Decl. ¶¶ 23-25. Accordingly, by
 12 artificially accelerating the rate at which the water levels are drawn down in Sharp Park, thereby
 13 dramatically upsetting the natural ecosystem, RPD is necessarily interfering with CRLF
 14 breeding in a manner that is demonstrably causing death and injury to CRLF, which constitutes
 15 unlawful take through "harm" of the species. 50 C.F.R. § 17.3 (defining "harm" to include
 16 "significantly impairing essential behavioral patterns, including breeding, feeding or
 17 sheltering"); *see also* 61 Fed. Reg. at 25,832 (FWS listing rule for the CRLF, stating that
 18 "[u]nauthorized destruction/alteration of the species' habitat," such as "draining" water bodies
 19 may be a take); *Marbled Murrelet*, 83 F.3d at 1064-66 (finding take through destruction of
 20 habitat); *see also Swinomish Indian Tribal Cmnty. V. Skagit County Dike Dist.*, 618 F. Supp. 2d
 21 1262 (W.D. Wash. 2008) (finding a take based on operations of a tidegate that was removing
 22 habitat previously available to juvenile salmon species). Moreover, by removing a significant
 23 prey source for the SFGS, Defendants' habitat modifications are taking that species as well.
 24 Dexter Decl. ¶ 26; 5-Year Review at 11 (discussing SFGS need to obtain CRLF in shallow
 25 waters).

26 The Court need go no further to resolve Plaintiffs' likelihood of success on the merits
 27 here. Indeed, *this is precisely the kind of activity that Congress designed the ITP process to*
 28 *address – i.e., activities that "take" species through modification of their habitat. See, e.g.*

1 *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982-83 (9th Cir. 1985) (discussing
 2 the legislative history of ESA Section 10, which in turn referred to a proposal to construct
 3 “some 3000 dwelling units on the San Bruno Mountain near San Francisco [that was] also
 4 habitat for three endangered butterflies,” which could be permitted under Section 10, “while at
 5 the same time encouraging these developers to become more actively involved in the
 6 conservation of these species”) (quoting Sen. Rep. No. 97-418, 97th Cong., 2d Sess. 10
 7 (1982)). In short, since RPD may not engage in this habitat modification without an ITP under
 8 the ESA, Plaintiffs are entitled to injunctive relief to halt these illegal practices.⁹

9 But even if the Court were to go on and consider RPD’s efforts to *minimize* the extent of
 10 the take – efforts, again, which are properly considered only in the context of an ITP application
 11 – those efforts are simply *exacerbating* the damage RPD is doing to the species, and, in any
 12 event, certainly cannot lawfully excuse Defendants’ ongoing take.

13 As noted, last winter season Mr. Campo identified more than 125 egg masses that he
 14 concluded would not thrive in the location where they were laid. He repeatedly requested the
 15 FWS’s permission to move these egg masses, and he subsequently relocated them.¹⁰ However,

18 ⁹ See also, e.g. Dexter Decl. ¶¶ 8, 33 (“In my experience and judgment, it is also the case
 19 that [RPD’s] activities are precisely the kind of activities for which HCPs are needed”); Hayes
 20 Decl. ¶ 37 (“Based on my experience in participating in and contributing to ITPs and HCPs, it
 21 is clear to me that all of these and other survival and recovery-related issues all should be
 22 considered comprehensively in the appropriate regulatory process, i.e., the process for
 23 considering and approving an ITP and HCP, rather than handled on an emergency, ad hoc
 basis”); accord *Southwest Center For Biological Diversity v. Bartel*, 470 F.Supp.2d 1118,
 1127 -1128 (S.D.Cal. 2006) (“In specially-controlled situations, Congress allows the sacrifice
 of a certain number of creatures provided that adequate steps are taken to minimize the
 detriment in a manner that ensures the continued vitality of the species involved overall”).

24 ¹⁰ See e.g. Jan. 4, 2011 Data Sheet (Pl. Ex. 36) (Campo Dep. Ex. 13) (identifying 39 CRLF
 25 egg masses in a “shallow swale” that was not “sustainable habitat”); Jan. 7, 2011 FWS email
 26 (Pl. Ex. 37) (Campo Dep. Ex. 14) (authorizing egg mass movements “only if it is apparent that
 27 the egg masses will be stranded and subjected to desiccation if not moved”) (emphasis added);
 28 Jan. 12, 2011 email (Pl. Ex. 38) (Mr. Campo email discussing egg masses found in “shallow
 swales on the edge of the 14th fairway as well as the 12th hole”); Jan 13, 2011 email (Pl. Ex. 5
 at 3) (FWS authorizing additional egg mass movement “as an emergency”); Jan. 21, 2011
 email (Pl. Ex. 5 at 2) (Mr. Campo email identifying another 24 egg masses located where
 “without intervention they will become stranded and desiccate [sic].”).

1 in doing so RPD did not heed FWS's warnings to *cease the pumping operations* that were
 2 causing these conditions.¹¹

3 Moreover, these efforts are no defense to a Section 9 claim in any event, because
 4 Defendants are admittedly not even *finding* all of the egg masses that are at risk of desiccation
 5 through pumping operations at Sharp Park. Indeed, RPD's Egg Mass Data Sheets are replete
 6 with notations on the difficulties in finding all of the egg masses, and in his recent deposition
 7 Mr. Campo frankly admitted that *he is confident he cannot find them all*.¹² Indeed, as noted, last
 8 winter Plaintiffs observed a stranded egg mass out of water altogether for several days, Snavelly
 9 Decl. ¶¶ 3-5, but Mr. Campo testified that he only learned about this egg mass from a posting by
 10 Plaintiffs, *not* due to his surveying efforts. Campo Dep. at 117-119.

11 Accordingly, it is reasonably certain that RPD – which intends this winter to continue
 12 with the same “survey methodology that has been in place for 10 years at Sharp Park,” Aug. 14,
 13 2011 Permit Appl. (Pl. Ex. 13 at CCSF 4422) – will, if permitted to survey for egg masses this
 14 upcoming winter, continue to miss egg masses laid in Sharp Park habitat being impaired by the
 15 Horse Stable Pond pumping operations. Moreover, as Plaintiff' expert Dr. Hayes – who has
 16 spent “hundreds of hours searching, identifying, and monitoring [CRLF] during all stages of its
 17 life cycle,” Hayes Decl. ¶ 5 – explains, RPD'S approach to surveying for egg masses is so
 18 patently inadequate that it is not even possible to calculate the *detectability* rate, let alone
 19 conclude that all of the at-risk egg masses are being relocated. *Id.* ¶ 34 (explaining that
 20 detecting CRLF with RPD's methods “is nearly impossible to do, even where habitat

21 ¹¹ Compare Feb. 18, 2011 email (Pl. Ex. 5 at 1) (FWS warning RPD to “ensure that any
 22 pumping with the current rains will not be responsible for take, such as additional
 23 strandings.”) with Feb. 22, 2011 email (Pl. Ex. 39) (Mr. Campo notifying FWS about “9 new
 egg masses on the edge of the 14th [hole] which will need to be moved”).

24 ¹² Jan. 9, 2004 Data Sheet (Pl. Ex. 40) (Campo Dep. Ex. 18) (“visibility of water poor with
 25 wind, rain and turbidity”); Dec. 11, 2007 Data Sheet (Pl. Ex. 41) (Campo Dep. Ex. 20) (“light
 26 difficult to survey”); Jan. 29, 2009 email (Pl. Ex. 42) (Campo Dep. Ex. 21) (noting Mr. Campo
 27 had missed “more than half” of 35 egg masses located on January 29, 2009 when he had
 28 surveyed for them on January 22 “due to poor light conditions and turbidity in the water”);
 Campo Dep. at 116 (Q: “are you confident that you find all of the egg masses in Sharp Park
 during your surveys?” A: “No.”); *id.* at 50 (Q: “have you told any of them [co-workers] that
 you cannot find all of the egg masses?” A: “Yes.”).

complexity is extraordinarily low and the surveyor has the highest possible visibility of the habitat,” and that “[a]t Sharp Park, habitat complexity is high and visibility is at least partially to highly limited”).¹³

2. Pumping Is Entraining Mobile Life Stages Of CRLF.

Further exacerbating Defendants’ legal violations, the pumps themselves are reasonably certain to entrain or otherwise injure tadpoles or other mobile life stages of the CRLF. The pumps force water through the outfall pipe with such tremendous force, *see* Pl. Ex. 2, that small creatures unlucky enough to be in the proximity of the pumps will either be pulled up against the screen or sucked through the pumps altogether. Hayes Decl. ¶¶ 26-27, 38; *see also id.* Ex. C (photograph of CRLF Dr. Hayes recently saw near the pump). Defendants’ own contractors have documented freshwater crayfish that have been sucked through the pumps, Nov. 2008 Swaim Biological Monitoring Form (Pl. Ex. 43) (noting “several dead crayfish found at discharge end of pipe at beach,” and that “[i]f crayfish can become entrained in pump then frog might also”), which makes entrainment by Frogs and tadpoles, which are relatively weaker swimmers, likely. Hayes Decl. ¶¶ 26-27 and Att. D (explaining that the pump has no “screening mechanism around known oviposition sites that would prevent tadpoles, particularly hatchlings, from wandering too close to the pump intake port during a pumping event; and it does not provide for some kind of velocity reduction mechanism, such as screening baffles, associated directly with the intake port to reduce the likelihood of CRLF life stages being plastered against

¹³ It is also apparent that the mass relocation of the species from one location to another is rife with biological peril, which is exactly why FWS has authorized these activities only on an “emergency” basis, rather than as a systematic solution to the large-scale take occurring at the golf course. RPD’s gardener, Mr. Campo, moves CRLF egg masses by putting them into a large bucket, sometimes up to eight at a time, and then pouring them out of the bucket in the new location. Campo Dep. at 56-57. Sometimes he returns and finds that an egg mass he has placed in a new location is no longer there. *Id.* at 60. Sometimes the egg masses do not attach to vegetation at their new locations. *Id.* at 57. Again, while all of these adverse effects *might* be authorized under an ITP, pursuant to which RPD *might* be permitted to engage in *incidental take* of the CRLF in exchange for engaging in specific recovery actions, absent that permit the inevitable take occurring as part of these operations merely reinforces how far Defendants have traveled from the statutory mechanism that is plainly called for here. *See* Vredenberg Decl. ¶ 22 (“it is my professional opinion that at least some eggs and even entire egg masses that are relocated by the City in 2011 did not survive the relocation effort”).

the screen”); *see also* Dexter Decl. ¶ 10 (having worked on “many projects where CRLF were present [and] pumping was required,” “I have found that unless there is a vigilant monitor clearing the fine mesh screen and very low water velocities, tadpoles become entrained and either are sucked through the pump and killed or they are sucked against the mesh and die because they cannot free themselves”).

Indeed, once again, RPD’s own biologist and staff have recognized this very concern. Swaim 2008 at 4-4 (“pumping could still pose a threat if tadpoles were caught in the pump mechanism or forced from Horse Stable Pond into the ocean”); *see also* Campo Dep. at 123 (acknowledging concern about CRLF going into the pumps). Accordingly, in the absence of injunctive relief the pumps in Horse Stable pond will cause unlawful take through entrainment as well. *See United States v. Glenn-Colusa Irr. Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (enjoining pumping operations entraining salmon species); *South Yuba River Citizens League v. NMFS*, No. S-06-2845, __ F. Supp. 2d __, 2011 WL 3163296 (E.D. Cal. July 26, 2011) (issuing injunctive relief to address, *inter alia*, “increased entrainment”).

B. Mowing And Golf Cart Use Near Water Bodies At Sharp Park Is Taking The Frog and The Snake.

As noted, RPD frequently mows the greens, fairways, and roughs throughout Sharp Park. In 2005, a dead SFGS was found after it had been run over by a lawn mower. Hayes Decl. ¶ 44 and Ex. E; Dexter Decl. ¶ 21; *see also* FWS 5-Year Report at 17 (“A SFGS was killed last year by a lawn mower at a golf course”). Because Park water bodies are adjacent to mowed areas of the golf course, RPD *itself* has acknowledged that movement through these areas may expose the SFGS to “mortality from predation, mowing, and being crushed by golf carts and people.” Alt. Report at 30; *see also* Swaim 2008 at 4-8 (recommending moving certain holes in Sharp Park due to risk of “mortality due to golf course maintenance (primarily mowing)”). It is also indisputable that golfers regularly use golf carts on golf course fairways *and off* of the paved trails. Campo Dep. at 127 (noting that he has seen golf carts driving on fairways in 2011); Goodale Mon. Decl. (Pl. Ex. 11), ¶¶ 5-16 and Exh. A-C (noting recent sightings of golf carts off designated trails).

1 RPD's mowing practices, and golf cart use, in proximity to wetlands are also likely to
 2 cause ongoing take of the CRLF and the SFGS. Indeed, as with pumping operations, the large-
 3 scale mowing in Sharp Park is "significantly modifying" the species' habitat, and thereby
 4 "interfering with [] essential life functions," Vredenberg Decl. ¶¶ 10, 25 – and thus, absent an
 5 ITP, is unlawful.

6 Moreover, Plaintiffs' expert Wendy Dexter explains that, "[u]pon inspecting the golf
 7 course, it is clear to me that the City is mowing aquatic vegetation, *i.e.*, it is mowing wetland
 8 habitats that are important for the" SFGS, which "alone creates a high degree of certainty that a
 9 San Francisco garter snake will be taken by golf course mowing operations." Dexter Decl. ¶ 24;
 10 *see also id.* ¶ 23("mowing around the edges of Laguna Salada is reasonably certain to be killing
 11 San Francisco garter snakes"); *id.* (beyond a "very narrow band of emergent wetland habitat"
 12 the SFGS faces "a very high likelihood of being taken directly by golf or mowing operations").
 13 Indeed, the SFGS moves through upland habitats *as far as 200 meters from aquatic features.*
 14 Dexter Decl. ¶¶ 17, 20. Accordingly, minimizing take requires a 200 meter buffer from the
 15 wetlands, "which will provide a reasonably large swath of buffer and edge habitat that will be
 16 free from mowing and wheels that could compress and take endangered frogs and snakes."
 17 Dexter Decl. ¶ 49; Hayes Decl. ¶ 49; Vredenberg Decl. ¶ 26. This requires that mowing and
 18 golf cart use be prohibited on holes Nine through Eighteen.

19 Recognizing the serious risks that these activities also pose to the species, RPD's
 20 Compliance Plan "requires" golf carts to stay on designated paved paths, Compliance Plan at 8,
 21 and sets out a protocol whereby a "biological monitor" is supposed to inspect mowing areas
 22 prior to mowing activities. Compliance Plan at 9-10. However, as with Defendants' egg mass
 23 relocations, these efforts cannot, and do not, solve Defendants' unlawful take of the species,
 24 because they do not address Defendants' unlawful habitat modification. *See supra* at 15-16.
 25 Moreover, as Plaintiffs' experts explain, these efforts also would not avoid direct take even if
 26 faithfully carried out. Dexter Decl. ¶ 31 (explaining how monitoring protocol will "inevitably
 27 result in an under-observance of frogs and snakes"); Hayes Decl. ¶ 48.

In any event, however, it is also evident that there is significant *non-compliance* with the Compliance Plan. Golf carts regularly ride on the fairways rather than designated paths. *E.g.* Goodale Mon. Decl. ¶¶ 5-17.¹⁴ Mowers regularly mow without prior monitoring. *Id.* ¶¶ 2-4, 18-19 and Exs. E-F (photographs); Snavelly Decl. ¶¶ 2 and 4.; *see also* Campo Dep. at 125 (RPD employee noting that he has seen mowing in Sharp Park but has *never* seen a monitor) The Compliance Plan is thus irrelevant to Plaintiffs’ likelihood of demonstrating a take from mowing and golf cart usage in any event.

II. THE COURT SHOULD CRAFT APPROPRIATE INJUNCTIVE RELIEF TO ADDRESS DEFENDANTS’ ONGOING TAKE OF THE CRLF AND SFGS.

As noted, *see supra* at 12-13, the traditional test for a preliminary injunction does not apply in the context of the ESA. Rather, under Supreme Court and Circuit precedent, so long as it is likely that ongoing, illegal – and especially, as here, *lethal* – take will occur, injunctive relief to address that take must be crafted, because Congress has afforded listed species the “highest of priorities,” and has eliminated the equitable balancing otherwise required. *TVA*, 437 U.S. at 194; *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988).

To demonstrate an ESA violation warranting injunctive relief, a plaintiff must demonstrate that a defendant’s activities are “likely” to cause unlawful take. *E.g. Marbled Murrelet*, 83 F.3d at 1067 (affirming injunction upon finding that “implementation of Pacific Lumber’s harvesting plan would likely harm marbled murrelets”); *Ctr. for Biological Diversity v. Marina Point Development Associates*, 434 F.Supp.2d 789, 795 (C.D. Cal. 2006) (“To obtain injunctive relief, a plaintiff need only show that the defendants’ activities are likely to cause a ‘take’ in the future”); *Animal Protection Institute v. Holsten*, 541 F.Supp. 2d 1073, 1081 (D. Minn. 2008) (injunction issued where the “Court finds it likely that additional takings may occur

¹⁴ Moreover, within a 200 meter area, golf cart use *on* the golf cart paths – as provided for in the Compliance Plan – itself seriously risks taking SFGS, which, because these paths “absorb and store heat,” providing SFGS with “exceptional opportunities for quick warming on cold sunny mornings, throughout the day, and even after the sun has set.” Dexter Decl. ¶ 25; *see also id.* (detailing risks golf carts pose to snakes); *accord* Hayes Decl. ¶ 45 (“Though golf cart paths have traditionally been viewed as innocuous, recent work clearly demonstrates that they are responsible for substantial mortality among snakes”).

unless further regulations are implemented”). Thus, although in some cases this standard has been met even where past take has not yet even occurred, *see, e.g., Marbled Murrelet*, 83 F.3d at 1064-66, in this case, where both unlawful, lethal take *has* already occurred, and inevitably *will continue* to occur absent relief from this Court, injunctive relief is plainly appropriate.¹⁵

Accordingly, in light of Defendants’ take of the CRLF and SFGS, Plaintiffs seek a narrowly tailored injunction to put a halt to Defendants’ legal violations until this case can be resolved on the merits or Defendants obtain an ITP – which it has known *for years* is necessary to continue golf course operations. In particular, Defendants should be enjoined from operating the pumps in Horse Stable Pond, or from using, or authorizing the use of, mowing equipment or motorized golf carts anywhere on holes Nine through Eighteen, which are within approximately 200 meters of Sharp Park water bodies. In light of Defendants’ *own* recognition of the threats posed by these activities, as well as the professional opinions of leading experts on each species, it is evident that this relief is the minimum necessary to address Defendants’ ongoing take at this time. *See Marbled Murrelet*, 83 F.3d at 1064-66 (enjoining habitat destruction that would take listed species); *Glenn-Colusa*, 788 F. Supp. at 1128 (“an injunction must issue” where defendants are harming species by violating the ESA); *Center for Biological Diversity*, 2004 WL 3030209, at * 6 (finding that an injunction “tailored to the likelihood of future harm to the tortoise” “must issue . . . to protect the tortoise”).

¹⁵ *See also, e.g., Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 104 (D. Me. 2008) (finding that the death of a single Canada lynx from trapping was sufficient to support preliminary injunctive relief; *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 563 (D. Md. 2009) (enjoining construction of a wind energy project in light of threatened take of listed species, where no member of the species had yet been taken).

In *Marbled Murrelet* the Ninth Circuit also framed the applicable test as whether there is “[a] reasonably certain threat of imminent harm to a protected species,” *Marbled Murrelet*, 83 F.3d at 1066 – a test the Court concluded had been met based on evidence demonstrating that future take was likely. *Id.* at 1067. Although subsequently, the Ninth Circuit framed the applicable test as whether the challenged activity “would harm,” or “would more likely than not harass” the species at issue, *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (a case where the Court concluded that the species at issue was not even present in the project area), this was simply another way of asking the same basic question – *i.e.*, whether the plaintiff had demonstrated a “reasonably certain threat of imminent harm,” *id.*, which, in turn, is shown through evidence establishing that ongoing take is likely to occur. *See Beech Ridge Energy*, 675 F. Supp. 2d at 563.

Moreover, this relief would be compelled in this case even under the traditional preliminary injunction test, whereby the Court *would* balance the competing interests of the parties. Because Plaintiffs' members' regularly visit Sharp Park and enjoy and appreciate viewing the CRLF and looking for the SFGS in their natural habitats there, Defendants' activities, which are unlawfully taking the species, irreparably harm them by diminishing their opportunities to engage in and enjoy these activities. Goodale Decl. ¶¶ 1, 13, 17; Pilgrim Decl. ¶ 1, 5, 10 ; Graham Decl. ¶¶ 1-3. These kinds of diminished opportunities have long been recognized as sufficient to demonstrate both standing and irreparable harm. *E.g. Fund for Animals v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) (where a plaintiff will have "fewer opportunities to view wild [animals] as a result of the defendants' actions," irreparable harm is established); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992); *Cottrell*, 632 F.3d at 1135 ("The Supreme Court has instructed us that environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable") (other citations omitted); *accord Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, No. C 05-2227, 2005 WL 1514071 at *2 (N.D. Cal. June 27, 2005) (granting preliminary injunction upon finding that "the balance of hardships tips strongly in favor of plaintiffs, given the irreversible nature of environmental harm and that defendant only claims economic harm").¹⁶

On the other side of the coin, although it is difficult to fathom how an interest in the uninterrupted use of one of many golf courses available in the Bay area could *possibly* outweigh

¹⁶ Moreover, a Plaintiffs' irreparable harm is also not diminished by virtue of an opportunity that might exist to visit someplace *else*, such as other populations of the Frog and Snake. *Cottrell*, 632 F.3d at 1135 (rejecting the argument that plaintiffs had no irreparable harm because they could visit "other areas of the forest that are not harmed"). Plaintiffs similarly need not demonstrate that Defendants' take is affecting the species as a whole. *See, e.g. Palila*, 639 F.2d at 497 ("any dispute or uncertainty as to the current population trends of the [species] is immaterial" in a Section 9 case). Nonetheless, Plaintiffs' experts have also explained that unless Defendants' activities are modified, "the Sharp Park/Mori population" of the SFGS "will continue to decline, increasing the potential for the population to become extirpated." Dexter Decl. ¶ 27; Hayes Decl. ¶ 21 ("unless golf operations that cause ongoing take of these species is halted, both populations at Sharp Park may be lost, and the SFGS's entire species will be in jeopardy"); Vredenberg Decl. ¶ 14.

the Congressional mandate to protect listed species, the narrow injunction Plaintiffs seek will not even prevent golf at Sharp Park during the winter season. Rather, golf could continue to be played on at least holes One through Eight if weather conditions allow.

More importantly, RPD has been on notice for *years*, if not decades, that its operations are taking these species – indeed, RPD’s taking was cited as one of the reasons for *listing* the species, *see supra* at 12 – and yet the City has inexplicably failed even to initiate the ITP process mandated by the ESA. Accordingly, neither RPD nor the Intervenor San Francisco Public Golf Association (“PGA”) should be heard to object to this injunctive relief on the grounds that it could interfere with the golf course. *See, e.g., Natl Parks & Cons. Assn v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (rejecting intervenors’ purported injuries from an injunction where objections to the project had been lodged years earlier).¹⁷

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction. A Proposed Order is attached.¹⁸

¹⁷ As Plaintiffs explained in responding to PGA’s motion to intervene, none of PGA’s various claims – *e.g.*, that the golf course is essential to serve a community need for less expensive golf, or that the golf course created the species’ habitat in the first place, *see* PGA Intervention Memorandum (“Int. Mem.”) (DN 19) at 5, 7 – has any merit. *See* Plaintiffs’ Intervention Response at 8-10 (DN 38); NGF Consulting, Operational Review and Recommendations For City of San Francisco Golf Operations 30, 24 (2007) (showing Sharp Park fees are comparable to other courses) (available at <http://sf-recpark.org/Modules/ShowDocument.aspx?documentid=207> (last visited Sept. 22, 2011)); Conceptual Ecosystem Restoration Plan and Feasibility Assessment, Laguna Salada, Pacifica, California (Feb. 9, 2011) at 10 (available at <http://wildequity.org/versions/3921> (last visited Sept. 22, 2011)) (explaining historical conditions in the area).

¹⁸ Plaintiffs also anticipate that Defendants may raise a concern regarding whether enjoining the pumps in Horse Stable Pond could threaten flooding that extends beyond the boundaries of Sharp Park. As explained in the attached declaration of Greg Kamman, a hydrologist previously hired by the City to study hydrological conditions in Sharp Park, in the event water levels exceed a water surface elevation of 12 feet, mobile pumps operating from the eastern side of the Laguna Salada wetlands complex can pump water to address any such risks. Declaration of Greg Kamman (Pl. Ex. 44). Plaintiffs’ proposed order would not prevent such pumping.

Dated: September 23, 2011

Respectfully submitted,



Brent Plater (CA Bar No. 209555)
WILD EQUITY INSTITUTE
PO Box 191695
San Francisco, CA 94119
Telephone: (415) 349-5787
bplater@wildequity.org

Howard M. Crystal (D.C. Bar No. 446189)
Eric R. Glitzenstein (D.C. Bar No. 358287)
Pro Hac Vice

MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C., 20009
Telephone: (202) 588-5206
Facsimile: (202) 588-5049
eglitzenstein@meyerglitz.com
hcrystal@meyerglitz.com

Attorneys for Plaintiffs

EXHIBIT LIST

- 1 Photographs of the California Red-Legged Frog and the San Francisco Garter Snake
- 2 DVD containing short video of water pumping out from Horse Stable Pond
- 3 Declaration of Dr. Vance Vredenberg
- 4 Declaration of Jewel Snively
- 5 Email exchange between RPD and FWS (Sept. 13, 2011 Deposition of Jon Campo, Ex. 6)
- 6 Declaration of Dr. Mark Hayes
- 7 Declaration of Wendy Dexter
- 8 RPD ESA Compliance Plan
- 9 Transcript of Sept. 13, 2011 Deposition of Jon Campo ("Campo Dep.")
- 10 Mar. 2, 2011 RPD email (Campo Dep. Ex. 16)
- 11 Monitoring Declaration of Margaret Goodale
- 12 Aug. 15, 2011 RPD Army Corps Permit Application
- 13 Aug. 25, 2011 RPD Recovery Permit Application
- 14 Declaration of Margaret Goodale
- 15 Declaration of Robert Pilgrim
- 16 Declaration of Laurie Graham
- 17 California Red-Legged Frog Recovery Plan (excerpts)
- 18 December, 2010 Egg Mass Data Sheets
- 19 San Francisco Garter Snake Recovery Plan
- 20 San Francisco Garter Snake 5 Year Review
- 21 Final Draft, Significant Natural Resources Areas Management Plan
- 22 2008 Sharp Park Wildlife Surveys
- 23 Sharp Park Conceptual Restoration Alternatives Report (excerpts)

24 Sharp Park map
25 Kamman Hydrology Report
26 Declaration of John Bowie
27 Dec. 30, 1992 Letter
28 Jan. 17, 2003 Data Sheet (Campo Dep. Ex. 8)
29 Mar. 5, 2004 Data Sheet (Campo Dep. Ex. 9)
30 Feb. 1, 2005 FWS letter
31 Feb. 2007 Data Sheet (Campo Dep. Ex. 10)
32 Jan. 2008 Data Sheet (Campo Dep. Ex 12)
33 Mar. 1, 2011 email
34 FWS Recovery Permit issued to the National Park Service
35 Sharp Park mowing schedule
36 Jan. 4, 2011 Data Sheet (Campo Dep. Ex. 13)
37 Jan. 7, 2011 FWS email (Campo Dep. Ex. 14)
38 Jan 12, 2011 email
39 Feb. 22, 2011 email
40 Jan. 9, 2004 Data Sheet (Pl. Ex. 40) (Campo Dep. Ex. 18)
41 Dec. 11, 2007 Data Sheet (Campo Dep. Ex. 20)
42 Jan. 29, 2009 email (Campo Dep. Ex. 21)
43 Nov. 2008 Swaim Biological Monitoring Form
44 Declaration of Greg Kamman

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011 I caused the foregoing Motion for a Preliminary Injunction, Supporting Memorandum, accompanying exhibits and proposed order to be served, via ECF-filing, as well as via Federal Express delivery, on the following counsel of record:

Owen J. Clements
James M. Emery
Deputy City Attorneys
Office of the City Attorney
1390 Market Street, 7th Floor
San Francisco, California 94102-5408

Counsel for Defendants City and County of San Francisco

Christopher J. Carr
Morrison and Foerster
425 Market Street
San Francisco, CA 94105-2482

Counsel for Defendant Intervenors

/s/ Howard M. Crystal
Howard M. Crystal (D.C. Bar No. 446189)
Pro Hac Vice
MEYER GLITZENSTEIN & CRYSTAL
hcrystal@meyerglitz.com

Attorney for Plaintiffs