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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILD EQUITY INSTITUTE, a non-profit corporation, *et al.* Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, *et al.*, Defendants.	Case No.: 3:11-CV-00958 SI **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION** Date: November 18, 2011 Time: 9:00 a.m. Courtroom: 10, 19th Floor Judge: Hon. Susan Illston

November 4, 2011

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GLOSSARY

2008 Bi-Op	October 7, 2008 Biological Opinion
2010 Letter	November 18, 2010 Letter from the Fish and Wildlife Service
Baye Decl.	Declaration of Dr. Peter Baye (Pl. Ex. 52)
Campo Dep.	September 13, 2011 Deposition of Jon Campo (Pl. Ex. 9)
CRLF or Frog	California Red-Legged Frog
ESA or Act	Endangered Species Act
FWS or Service	U.S. Fish and Wildlife Service
Goodale Mon. Decl.	Monitoring Declaration of Margaret Goodale (Pl. Ex. 11)
Hayes Decl.	Declaration of Dr. Marc Hayes (Pl. Ex. 6, as corrected (DN 62))
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
Jennings Decl.	Declaration of Mark Jennings
McNally Decl.	Declaration of Sam McNally (Pl. Ex. 51)
Murphy Decl.	Declaration of Dennis Murphy
Plater Decl.	Declaration of Brent Plater (Pl. Ex. 46)
RPD	San Francisco Recreation and Parks Department
SFGS or Snake	San Francisco Garter Snake
SFPGA	San Francisco Public Gulf Alliance
Supp. Hayes Decl.	Supplemental Declaration of Dr. Marc Hayes (Pl. Ex. 47)
Supp. Kamman Decl.	Supplemental Declaration of Greg Kamman (Pl. Ex. 45)
Supp. Snavely Decl.	Supplemental Declaration of Jewel Snavely (Pl. Ex. 48)
Vandivere Decl.	Declaration of William Vandivere
Vredenberg Decl.	Declaration of Dr. Vance Vredenberg (Pl. Ex. 3)
Wayne Decl.	Declaration of Lisa Wayne

INTRODUCTION

Based on Defendants' *own* documents, and the views of the U.S. Fish and Wildlife Service ("FWS" or "Service") and three highly credible experts, Plaintiffs have demonstrated that San Francisco's Recreation and Parks Department's ("RPD") activities at Sharp Park golf course ("Sharp Park") – principally pumping, mowing, and golf cart use – are "taking" the imperilled California red-legged frog ("CRLF" or "Frog") and the San Francisco Garter Snake ("SFGS" or "Snake") in violation of Section 9 of the Endangered Species Act ("ESA" or "Act"). 16 U.S.C. § 1538. To remedy these violations, Plaintiffs have requested that the Court enjoin RPD from operating the pumps in Horse Stable Pond, and from using or authorizing the use of mowing equipment or golf carts on holes 9-18 (all within 200 meters of Sharp Park water bodies) until this case is resolved next year.

The relief Plaintiffs seek is vitally important at this time. In recent years, the National Park Service ("NPS") has undertaken a multi-million dollar restoration and recovery effort at Mori Point, adjacent to Sharp Park, to stave off extinction of the critically imperilled SFGS and aid in the recovery of the CRLF. NPS's recovery efforts, however, are being *undermined* by the take of these species that is occurring at Sharp Park – which now serves as a "population sink" for the Mori Point/Sharp Park populations of both of these species. *See* Supplemental Declaration of Dr. Marc Hayes ("Supp. Hayes Decl.") (Pl. Ex. 45) ¶¶ 11-14; *see also id.* Exh. A.

Contrary to the claims of Defendants and Intervenor San Francisco Public Golf Alliance ("SFPGA"), Plaintiffs' requested interim relief is narrowly tailored to prevent ongoing take of the SFGS and the CRLF and protect both species, while also protecting surrounding communities and permitting golf course activities that do not cause take. Sharp Park Golf Course already floods annually. As depicted in Plaintiffs' original motion, these flood waters often extend onto several golf fairways around Laguna Salada. *See, e.g.*, Declaration of Dr. Marc Hayes (Pl. Ex. 6), Ex. B. Although we cannot predict the weather, as explained by the expert hydrologists the injunction against pumping requested by Plaintiffs will result in high-water levels similar to what the golf course already absorbs on an annual basis – while at the same preventing RPD from draining this water so rapidly that the species are harmed and killed as a result.

Similarly, Plaintiffs' requested injunction concerning mowing operations and golf cart use is specifically tailored to the biological needs of these species. Despite Defendants' protestations, it is clear that, in patent violation of the ESA, RPD's mowing activities have already killed at least one of the last remaining San Francisco gartersnakes in the Sharp Park/Mori Point population. *See* Declaration of Steve Salisbury ¶¶ 3-4 (Pl. Ex. 46) (Sharp Park neighbor who found the dead snake "chopped in several places" Hole 12's green apron). The mowing restrictions and golf cart restrictions are designed to prevent this from happening again before this case can be resolved on the merits, while also allowing golf to continue on about one-half of the course.

While essentially conceding that take of the CRLF has occurred, and is likely to continue to occur, at Sharp Park – *see, e.g.*, Defendants' Preliminary Injunction Opposition ("Def. Opp.") (DN 63), Declaration of Lisa Wayne ("Wayne Decl.") (DN 72), ¶ 14 (discussing RPD's efforts to "*mitigate [the] adverse impacts*" of its activities) (emphasis added); SFPGA's Preliminary Injunction Opposition ("SFPGA Opp.") (DN 67), Declaration of Mark Jennings ("Jennings Decl."), ¶ 39 (asserting that Defendants "ensure the *least damaging* pumping operation) (emphasis added) – Defendants and SFPGA ask the Court to approve *their preferred, non-binding approach to operating Sharp Park*, under which take will continue to occur, and to allow RPD to simply provide whatever mitigation for take it is willing to undertake at any given time. Def. Opp. at 18-21; SFPGA Opp. at 10-12; *see also* Def. Opp. at 6 (conceding that RPD's "Compliance Plan" simply "informs management"). But Congress delegated the responsibility for determining when and under what conditions take of listed species may occur to an expert agency – the U.S. Fish and Wildlife Service ("FWS"). *See* 16 U.S.C. § 1539(a)(1)(B). Thus, rather than evaluating whether RPD has taken appropriate steps to ameliorate the effects of its ongoing take of the CRLF and the SFGS, under Circuit precedent the crucial but limited role for the Court is to determine whether RPD's activities are likely to continue to take these species, and if so, to enjoin activities causing a take, *after which RPD will be free to seek from the FWS appropriate authorization for its activities* – which, inexplicably, Defendants have never done despite knowing for years about the legal mechanisms to do so.

If RPD had authorization – through an Incidental Take Permit ("ITP"), *id.*, an enhancement permit, *id.* § 1539(a)(1)(A), or otherwise – there would of course be no basis to

enjoin RPD's duly authorized activities here. However, contrary to Defendants' claims, Def. Opp. at 16-18, RPD's take-causing activities have not and have never been authorized by the Service. As explained below, neither the 2008 Biological Opinion ("Bi-Op"), nor the 2010 letter amending that Bi-Op, contain *any* incidental take authorization encompassing Defendants' mowing or pumping operations. Further, the "project description" for the 2010 letter that Defendants disingenuously stress in support of their assertion that FWS somehow "concluded" that continued pumping is "essential," *e.g.* Def. Opp. at 14, is *merely RPD's own characterization of its activities*, not the judgment or opinion of the FWS. Accordingly, the Service has recently reaffirmed what is apparent from the face of the document – that the project description was provided by Defendants and "does not represent *any conclusions or analysis by the Service*" concerning the underlying pumping operations. Oct. 27, 2011 email from FWS solicitor (emphasis added) (Declaration of Brent Plater (Pl. Ex. 47) ("Plater Decl."), Ex. A).

Moreover, Defendants' and SFPGA's assertions that the modest interim relief Plaintiffs seek would *harm* the CRLF and SFGS at Sharp Park are based on fundamental mischaracerizations of that relief and, as explained by leading experts on both species, are baseless. To the contrary, the relief sought by Plaintiffs will not only address ongoing unlawful take, but will improve conditions for both species until this case can be resolved on the merits (or Defendants obtain proper authorization from the FWS). *See, e.g.*, Supp. Hayes Decl. ¶ 3-4, 7-10; 16. Defendants' and SFPGA's other arguments, including that any injunction on pumping operations risks flooding adjoining homes, are similarly flawed. As discussed below, it is undisputed that Defendants could, consistent with the relief Plaintiffs seek, pump water from a higher elevation northeast of Laguna Salada to eliminate any such risk. *See* Declaration of Greg Kamman (Pl. Ex. 44); *see also* Supplemental Declaration of Greg Kamman (Pl. Ex. 48) ("Supp. Kamman Decl.") ¶¶ 2-4.

ARGUMENT

A. THE COURT MUST CRAFT RELIEF ADDRESSING DEFENDANTS' ONGOING VIOLATIONS OF THE ESA.

1. Defendants Are Taking The CRLF and the SFGS.

a. Pumping Operations

Plaintiffs' opening brief demonstrated that Defendants' massive pumping of water from Horse Stable Pond is taking the CRLF by modifying the species' habitat and stranding egg masses and tadpoles. Plaintiffs' Preliminary Injunction Memorandum (DN 53) ("Pl. Mem.") at 13-15. In addition to the views of independent experts, Plaintiffs submitted the views of FWS officials – who, for *years*, have warned Defendants that pumping water from Horse Stable Pond is taking CRLF by lowering water levels. *See, e.g.*, Pl. Ex. 30 (2005 FWS letter); Pl. Ex. 33 (Mar. 1, 2011 FWS email instructing Defendants to "ensure that pumping at Horse Stable Pond does not strand any *additional* egg masses") (emphasis added).

Plaintiffs also relied on the views of Defendants' *own experts*, such as Karen Swaim, who has submitted an expert declaration for Defendants, but who, in a 2008 Report for RPD wrote unequivocally that when RPD pumps water "more than a few inches [it] poses a *significant desiccation risk* to developing" CRLF eggs, and thus, "*[d]iscontinuing pumping at Horse Stable Pond would result in reduced fluctuations in water level and a lower risk of egg mass desiccation*." Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008) ("Swaim 2008") at 4-4 (Pl. Ex. 22) (emphasis added). Indeed, in stark contrast to Defendants' litigation position here – which they do not even attempt to harmonize with their own prior reports – Ms. Swaim explained in 2008 that, "*[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").

In light of this evidence it is unsurprising that Defendants and SFPGA spend relatively little time disputing whether the RPD pumping operations are in fact taking CRLF egg masses. With respect to the *wholly* stranded egg mass located by Plaintiffs just last winter and positively

identified by Dr. Vredenberg, *see* Pl. Mem. at 1 and 15, Defendants simply defer to SFPGA's declarant, Dr. Jennings (*see* Def. Opp. at 15), whose effort to question whether this egg mass was taken is based on a seriously erroneous understanding of what occurred. [1]

As for the enormous number of egg masses that RPD admits it attempted to move last winter (and the many documented egg mass strandings in earlier years), Defendants' newly-minted theory that these strandings can be characterized as resulting from natural conditions that were "entirely independent of pumping," Def. Opp. at 15, is flatly inaccurate in light of both the City's submission as well as its own documents (including the views of its own experts). It is also nonsensical on its face. Defendants never explain why RPD would expend its scarce resources translocating frog egg masses unless its own operations, rather than purely natural factors, were contributing to the conditions necessitating the relocations. If actions speak louder than words, Defendants' mass relocation efforts speak volumes about Defendants' recognition that the egg masses needed to be relocated because of Defendants' responsibility for the take-causing conditions at Sharp Park.

In any event, Defendants' assertion that the egg masses moved last winter by Mr. Campo "were at risk for reasons entirely independent of pumping," Def. Opp. at 15, is groundless. To be sure, *once Defendants have pumped the water level below* where these CRLF egg masses are laid, and the area becomes disconnected from the rest of the wetland, *additional pumping* may

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[1] As Dr. Jennings notes, Dr. Vredenberg observed the egg mass once, on February 23, 2011, Jennings Decl. ¶ 38, but as Dr. Vredenberg unequivocally explains in his declaration on that day he observed the egg mass "completely exposed to the air" – *i.e.*, desiccated. Vredenberg Decl. ¶ 23 (Pl. Ex. 3). Jewel Snavely observed the egg mass again on March 1, 2011, at which time she observed it to still be completely exposed. Snavely Decl. ¶ 5 (Pl. Ex. 4). Ms. Snavely did *not move* the egg mass, as Mr. Jennings surmises. *Compare* Jennings Decl. ¶ 48 *with* Supplemental Declaration of Jewel Snavely (Pl. Ex. 49) (explaining that when she said "I relocated the egg mass I first discovered on February 21, 2011," she meant she *found it again*). Finally, Dr. Jennings' effort to discredit Dr. Vredenburg by claiming that Dr. Vredenberg failed to notify the authorities about this stranded egg mass is also misplaced, because Plaintiffs *did* notify the FWS. *See* Plater Decl. (Pl. Ex. 47), ¶ 4 and Ex. B (February 24, 2011 letter to the FWS notifying the agency about this stranded egg mass). It also bears emphasizing that Defendants' suggestion that this is the only desiccated egg mass found in Sharp Park in recent years is entirely at odds with *RPD's records as well*. *E.g.* Deposition of Jon Campo ("Campo Dep.") (Pl. Ex. 9) at 83 (discussing multiple "stranded" egg masses); Campo Dep. Ex. 9 (Pl. Ex. 50) (noting "stranded" egg masses).

have little effect on the length of time that the pools will remain. However, what none of Defendants' experts can or even attempt to deny – and what the evidence overwhelmingly demonstrates – is that if Defendants cease the pumping *that causes these shallow pool to form in the first place*, then these egg masses would not be stranded and would not need to be moved. Again, Plaintiffs cannot put it better than Karen Swaim's own 2008 Report: "*[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*." Swaim 2008 at 4-4 (Pl. Ex. 22) (emphasis added); *see also* Supp. Kamman Decl. ¶¶ 5-13 (explaining that without Defendants' pumping operations the isolated pools where egg masses were found last winter would be part of the contiguous waterbody created through winter rains).

The very carefully worded declaration from Defendants' hydrologist further demonstrates this point. *See* Declaration of William Vandivere ("Vandivere Decl.") (DN 66-2), ¶ 10. Mr. Vandivere explains that once the water level is low enough to sufficiently dry up the channel, and thus sever the surface water connection, between Horse Stable Pond and Laguna Salada, further pumping from Horse Stable Pond does not impact shallow swales that form near Laguna Salada. *Id.* He therefore concludes that it is uncertain whether current pumping operations "would accelerate the loss of accumulated water . . . from the site's isolated ponding zones." *Id.*

What he conspicuously does *not* (and cannot) dispute, however, is that without the City's pumping, not only would the surface water connection not have been severed, but the isolated swales would *never have come into being*, because the largely flat surface area around Laguna Salada would *all* be hydrologically connected. *See* Supp. Kamman Decl. ¶¶ 5-13. Indeed, Defendants' and SFPGA's own maps make this very point, showing where the water levels will be in Sharp Park without pumping. *See* Vandivere Decl., Ex. 2; *see* also SFPGA Opp., Declaration of Jason Blasi (DN 71), Ex. A. As these maps reflect, if pumping from Horse Stable Pond is halted the areas where egg masses are now being jeopardized *will be under water*

and connected to the main lagoon. Id.; see also Sharp Park Conceptual Alternatives Report, App. A (Hydrology Report), at Figure 12 (Pl. Ex. 25, last page) (same).[2]

In short, the entire pumping regime at Sharp Park is causing these harmful habitat modifications, resulting in "actual death or injury" of egg masses, which falls squarely within the definition of a prohibited take under the ESA. 50 C.F.R. § 17.3 (defining "harm"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1065 (9th Cir. 1996) ("[a]n indirect cause, such as habitat modification, also comes within the meaning of 'harm,'" and thus take, in the ESA). This is especially so because Mr. Campo has admitted that he cannot possibly locate all the egg masses placed in harm's way by the pumping operations. *See* Pl. Mem. at 17; *see also* Jennings Decl. ¶ 42 ("not all egg masses are identified because of wind, rain, turbidity, and other such weather conditions").

As for Defendants' take through entrainment of the CRLF and the SFGS in the pumps, Pl. Mem. at 18-19, Defendants' position again does not withstand scrutiny. As a factual matter, it is telling that Defendants' pump operator claims he has never even *seen* a CRLF near the pumps, Def. Opp. at 16, when Dr. Hayes happened to *see and photograph* one pressed against the screen on one of his inspections of the site. *See* Hayes Decl. ¶ 26 and Ex. C. Moreover, one of Ms. Swaim's employees independently concluded that entrainment of CRLF is likely after observing other wildlife sucked through the pumps. *See* Pl. Ex. 43 As a legal matter, Defendants are simply wrong in claiming that Plaintiffs can meet the legal standard of a likely take only by producing dead bodies. Def. Opp. at 16. Expert opinion may be relied on to establish that a potential mode of take is reasonably certain to occur, *Marbled Murrelet*, 83 F.3d at 1067-68, and that is exactly what Plaintiffs' experts have opined with respect to the entrainment risk. *Cf. Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 786 (9th

[2] Indeed, among the many contradictions in Defendants' arguments is that at the same time they try to imply that these areas *could somehow remain* isolated ponds irrespective of pumping, they complain that without pumping the entire golf course (and perhaps more) will flood.

Cir. 1995) (an injunction may be issued "'*before* harm to a species occurs'") (quoting S. Rep. 418, 97th Cong., 2d Sess. 24 (1982)) (emphasis added).[3]

b. Mowing Operations and Golf Cart Use

Defendants offer a similarly unconvincing defense of their unlawful take of the species through mowing operations. As Plaintiffs have explained, RPD itself, and Karen Swaim in particular, have recognized the serious risks to the species posed by mowing operations, and a SFGS was in fact found run over by a lawnmower on the course several years ago. Pl. Mem. at 19.[4]

Defendants ignore their own prior findings, and endeavor to undermine the significance of the dead SFGS. Def. Opp. at 10-12. As for the dead Snake and Defendants' claim that "the actual cause and location" of that "snake death are uncertain," Def. Opp. at 11, attached is a declaration from Steve Salisbury, *who found that Snake*, and who explains unequivocally that he found it on the golf course, and that it "appeared to have been chopped in several places on its body." *See* Declaration of Steve Salisbury (Pl. Ex. 46) ¶ 3 and Att. 1 (map showing location where he found the Snake); *see also* Def. Opp., Swaim Decl., Ex. 2 (2006 RPD email

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[3] Defendants' claim that RPD "typically" only uses a smaller pump that causes less entrainment risk, Def. Opp. at 16, also once again begs the question of RPD's compliance with the ESA; since this protocol is not even in the optional "Compliance Plan," decisions about which pump to use and when rests entirely with RPD, and nothing constrains turning on the larger pump for any reason, at any time.

[4] Defendants' effort to undermine Plaintiffs' experts on the grounds that they have not seen SFGS in Sharp Park, Def. Opp. at 11, l.1-11, is a *non-sequitor*: their expert views are, as is entirely appropriate, based on their expertise concerning the species (which they have seen elsewhere) and its habitat needs, and their personal observations of Sharp Park. Such well-founded expert opinion is more than sufficient to support a take claim. *See, e.g. Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 578-79 (D. Md. 2009). It is similarly entirely appropriate for Plaintiffs' experts to rely on a study concerning the risks posed to snakes by mowing operations elsewhere. *See, e.g.*, *South Yuba River Citizens League v. National Marine Fisheries Service*, 257 F.R.D. 607, 616 (E. D. Cal. 2009) ("An expert may appropriately apply principles discerned through general studies to the facts presented"). Indeed, it is ironic for Defendants to ask the Court to discredit the views of well-recognized experts, when at the same time they ask the Court to adopt assertions as to which they provide *no expert opinion or other evidence at all*. *See, e.g.* Def. Opp. at 12 (claiming, without reference or citation, that "ground vibration caused by approaching mowers would alert snakes to flee long before the mower could pose any harm"); *id.* at 19 (claiming, with no citation, that there could soon be "a local overpopulation" of CRLF at Sharp Park).

documenting that Mr. Salisbury found the snake and that at that time it "appeared to have been killed by a lawn mower").[5]

In another ESA Section 9 case, the court considered whether a dead animal found in tire tracks on a beach was killed by off-road vehicles where defendants similarly claimed that "no conclusions can be drawn about the cause of the death of the" bird. *United States v. Town of Plymouth, Mass.*, 6 F. Supp.2d 81, 91 (D. Mass. 1998). The court concluded that "the reasonable inference to be drawn in this whodunit is that the chick was killed by an ORV," *id.*, and crafted appropriate preliminary injunctive relief. Similarly here, the reasonable – indeed, unassailable – inference given where this Snake was found, Salisbury Decl. ¶ 3, is that it was run over by an RPD mower, which is exactly what Defendants themselves (and the FWS) assumed prior to this litigation. *See* Swaim Decl., Ex. 2; FWS 5-Year Report (Pl. Ex. 20) at 17.[6]

Defendants and SFPGA also anomalously suggest that there are now too few SFGS in Sharp Park for there to be a substantial risk of take. *E.g.* Def. Opp. at 3, 11 ("If SFGS is present at all in Sharp Park today, it is present in very small numbers. Needless to say, for take of any sort to occur, the species must be present in Sharp Park"). However, their own experts are emphatic that Sharp Park provides high quality habitat for the species, and that they are still found there. Swaim Decl. ¶ 4; Jennings Decl. ¶ 35 (describing Sharp Park as "an ideal freshwater Frog and Snake habitat"); *see also* Wayne Decl., Ex. 5 (2008 FWS Bi-Op) at 11 (FWS conclusion that the SFGS "is reasonably certain to occur" in Sharp Park"); Swaim 2008

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[5] Defendants' alternative assertion that this killing is irrelevant to their "current lawnmowing practices," Def. Opp. at 11, l.24-25, also makes no sense, since the City has pointed to no substantial, binding changes in its mowing practices since this incident. To the contrary, as explained below, Defendants' actual mowing practices are inconsistent with *both* their own Compliance Plan (which requires biological monitors prior to mowing) *and* the views of Defendants' expert Karen Swaim (whose opinion "assumes" no mowing after 8:30 am).

[6] *Town of Plymouth* is also instructive for the present case for several other reasons: (1) the Court found an unlawful take based in part on the death of that one bird two years earlier, despite the City's contention that the listed species at issue (the piping plover) was "flourishing" in the area, *id.* at 91; and (2) the court issued a preliminary injunction concerning the City's management of the beach, even though it did not "doubt the good faith or diligence of those employees entrusted with managing Long Beach and with monitoring the piping plover." *Id.* at 85, 91.

(Pl. Ex. 22) at 1-2 (describing Sharp Park as "an important part of the overall distribution of" SFGS). Defendants also acknowledge that there is a *single* SFGS population encompassing Sharp Park and Mori Point, Swaim Decl. ¶ 4, and SFGS have been documented even more frequently in Mori Point. Swaim 2008 at 1-4.[7]

Finally, inasmuch as Defendants rely on their purported mowing restrictions as sufficient to avoid take, Def. Opp. at 12, one threshold flaw is that Defendants' recitation of what they are doing – through the declaration of Mr. Kappelman – *is not even consistent with their own Compliance Plan*. The Compliance Plan mandates that biological monitors inspect the area before mowing occurs. Compliance Plan at 10 (Pl. Ex. 8) (requiring a "biological monitor" to "inspect for SFGS and CRLF" "within ½ hour prior to mowing" that occurs before 8:00 am, and other monitoring for later mowing). According to Mr. Kappelman, however, rather than utilizing any such monitors, and waiting "until the animal has departed the area," as also mandated by the Compliance Plan, Pl. Ex. 8 at 10, the staff *themselves look for the species on their mowers, and then "shoo them away" before mowing*. Declaration of Wayne Kappelman (DN 65) ¶¶ 6-8. This not only contradicts the Compliance Plan, but is a startling flat-out admission of an ESA violation, since Section 9 also prohibits "harassment" of listed species without FWS authorization. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

Another overarching problem with the Compliance Plan approach is the entire premise that visual surveys by monitors – even with adequate training – could observe a SFGS or CRLF before it is run over by a lawnmower. As Plaintiffs have explained, single pass visual surveys are not capable of observing all wildlife, because detection rates are imperfect. Pl. Mem. at 17-18. Indeed, Mr. Salisbury, who discovered the dead SFGS in Sharp Park, explains in his

[7] Indeed, Defendants appear to be putting forward an untenable "goldilocks" theory of ESA liability: there are just *too many* CRLF for Defendants to be found to be engaged in a violation, Def. Opp. at 19 (claiming that "the CRLF population is booming at Sharp Park"), and there are just *too few* SFGS for there to be a take. Under this view it is not clear what number of a species would be "just right" for a take to occur – other than something *different* than the numbers of CRLF and SFGS in Sharp Park. In any case, notwithstanding Defendants' patent effort to have it both ways, the fact is that there have been, and will be, takes of both species – which is all the Court needs to find in order to craft appropriate relief.

declaration that he could not see it until he "was almost on top of it—it was not clearly visible from even a few feet away." Salisbury Decl. ¶ 4.

Defendants' categorical assertions in their brief that mowing near park water bodies "takes place between 7:00am and 9:00am, *after the sun is up*," Def. Opp. at 12 (emphasis added), is also belied by the fact that Plaintiffs' members have on multiple occasions witnessed mowing on these holes *before 7 a.m. See* Goodale Monitoring Decl. ¶ 2; Snavely Decl. ¶¶ 2, 5. Similarly, while Dr. Jennings' and Karen Swaim's conclusions that take through mowing is unlikely is premised on mowing occurring "in the early morning hours," Jennings Decl. ¶ 56; Swaim Decl. ¶ 6 (assuming no mowing after 8:30 am), *just last month RPD was mowing holes in the afternoon*, including within twenty feet of aquatic features. *See* Monitoring Declaration of Sam McNally ("McNally Decl."), ¶ 2 (Pl. Ex. 51) (documenting mid-afternoon mowing of holes 9, 10, and 13 on September 19, 2011). Thus, it is apparent Defendants are not following their own Compliance Plan, which they characterize as a document that mainly "informs management." Def. Opp. at 6. Accordingly, since Defendants are not even doing what they claim is necessary to avoid take through mowing operations, Plaintiffs have plainly met their burden to demonstrate the likelihood of take.[8]

As regards the golf carts, Defendants *are* directly responsible for the flagrant and frequent use of golf carts and other vehicles off the paved trails. *See* Goodale Monitoring Decl. ¶¶ 4-16 (discussing more than *25* separate incidents of golf carts travelling off trails on Holes 9 through 17 in 2010); *id.* ¶ 19 (witnessing a golf cart on the fairway for hole 11, as well as an RPD maintenance cart on hole 12 and another on hole 9); *see also* McNally Decl. ¶ 3 (documenting golf carts off paved trails *just two months ago*). Indeed, in *Plymouth*, as here, the City similarly claimed relief was not necessary in light of its authority to restrict off-road vehicles as necessary to protect the species. *See* 6 F. Supp. 2d at 85, n.2. Nonetheless, the City

[8] Plaintiffs have also explained that recent research demonstrates the importance of terrestrial insects to the diet of SFGS, *see* Vredenberg Decl. ¶ 10, 25, and thus Defendants' modifications of this habitat is also taking SFGS through interference with the species' feeding activities. 50 C.F.R. § 17.3.

was found responsible for the continuing take that was occurring, because of the "unwritten policy and practice" of allowing off-road vehicle use where it posed a danger to the species. *Id.* at 91. Similarly, here, where it is apparent that Defendants "policy and practice" effectively permits both routine golf carts and its own vehicles to travel off the paved paths in CRLF and SFGS habitat, relief is appropriate.[9]

2. Defendants Have No Authorization For This Unlawful Take.

In light of Defendants' surprising claim that take associated with their pumping operations have somehow been authorized by the FWS, Plaintiffs asked FWS officials to respond. On October 27, 2011, Plaintiffs received that response from a FWS solicitor, who explained that the language Defendants have quoted in their brief from a 2010 FWS letter is, as the letter itself reflected, "merely the Service's recitation of the project description that was provided in the City's November 3, 2010, request for informal consultation, *and does not represent any conclusions or analysis by the Service"* concerning the City's pumping operations. Plater Decl., Ex. A (emphasis added).

For this and other reasons, it is apparent that Defendants also cannot avoid liability under the ESA on the grounds that the FWS has authorized its pumping activities at Sharp Park. Def. Opp. at 5-6, 14, 16-18 (erroneously claiming that plaintiffs have failed to demonstrate that any incidental take "exceeds the scope of existing FWS authorization"). Neither the 2008 Biological Opinion ("2008 Bi-Op"), nor the 2010 letter amending that Bi-Op ("2010 Letter"), *authorizes any take associated with Defendants' pumping operations*, or otherwise supports Defendants' claim that FWS has "determined" or "concluded," Def. Opp. at 1, 14, that operating the pumps in Horse Stable Pond is permissible, let alone beneficial to the species. *See* Wayne Decl., Ex. 5 (2008 Bi-Op); Ex 6 (2010 Letter); *see also* Ex. 7 (Defendants' request to reinitiate consultation).

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[9] It is important to bear in mind in this regard that RPD's "prohibition" against golf carts off trails is not a law or even a regulation – it is simply another measure in the non-binding Compliance Plan. *See Animal Protection Inst.* v. *Holston*, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008) ("the fact that a trapper may not have followed the discretionary, unenforceable recommendations that are included in the DNR handbook should not exempt the DNR from liability").

The 2008 Bi-Op concerned the repair of the outfall pipe that drains water from Horse Stable Pond, which was damaged. Wayne Decl., Ex. 5 at 2. According to the Bi-Op, the damaged pipes were causing erosion to the seawall. *Id.* The Bi-Op expressly concerns the repair work to be done on these pipes, for which an Army Corps permit was required, and *not* Defendants' overall pumping operations. *Id.* at 3 (noting the project area is .023 acres). Contrary to Defendants' suggestion, Def. Opp. at 17, the Bi-Op does *not* discuss Defendants' pumping activities as an "effect" of the action, nor does it authorize incidental take associated with those activities. 2008 Bi-Op at 11-13; *id.* at 14 (authorizing incidental take *only* "within the .023 acre action area").

Two years later, RPD contacted FWS directly, seeking an amendment to the 2008 Bi-Op to allow the agency to remove "accumulated sediment in a small area at the entrance to the pump house and repair the weir system." Wayne Decl., Ex. 7. In that letter Lisa Wayne, Director of RPD's Natural Areas Program, *id.* ¶ 2, provided a "Project Description" that included the statement that "efficient operation of the pumps is crucial to maintaining water level fluctuation to minimize and avoid stranding of egg masses of the California red-legged frog." *Id.* at 1. However, the letter makes clear that RPD was only seeking approval for the sediment removal activities. *Id.* at 1-3. *Nowhere* does RPD request the FWS's opinion on, or authorization for, the impacts of pumping operations on the species.

Nor does the FWS's 2010 Letter include that opinion or any authorization concerning pumping activities. Wayne Decl., Ex. 6. Rather, consistent with Lisa Wayne's letter, the 2010 Letter simply addresses the proposal to remove "accumulated sediment at the entrance to the pump house." *Id.* at 1. To be sure, the 2010 Letter includes the "Project Description" as provided by Lisa Wayne, which included the statement about the "efficient operation of the pumps." However, the 2010 Letter does not purport to authorize or even analyze pumping activities, as a Solicitor for the FWS has recently reaffirmed. *See* October 27, 2011 email from FWS (Plater Decl., Ex. A).

Finally, and perhaps most importantly from a legal standpoint, neither the 2008 Bi-Op nor the 2010 Letter ever purports to *authorize any incidental take of either species beyond the less than a quarter acre action area where the activities were being performed.* 2008 Bi-Op at 14; 2010 Letter at 4. Rather, they explicitly provide that any *other* incidental take will require reinitiating consultation to obtain further take coverage. 2008 Bi-Op at 18; 2010 Letter at 4. Thus, since the basis of Plaintiffs' motion is that Defendants *are* taking these species well outside the small area where RPD has undertaken certain pump repairs, these FWS documents cannot possibly constitute a valid defense to Defendants' unlawful take of these species in any event.[10]

In sum, contrary to Defendants' claims, the record is clear that the FWS has *never authorized incidental take through the activities at issue here, including pumping operations.*

3. The Court Must Afford Appropriate Relief.

Defendants and SFPGA contend that the Court should afford no injunctive relief *even if* RPD's operations at Sharp Park are likely to take CRLF and SFGS, claiming that Plaintiffs can only demonstrate irreparable harm by showing a threat to the populations of these species as a whole. Def. Opp. at 18-20; SFPGA Opp. at 10-11. As a threshold matter, however, this Court must follow the Ninth Circuit precedents on this issue, which are absolutely clear that a Plaintiffs' only burden to demonstrate irreparable harm and obtain an injunction in an ESA Section 9 take case is to show a take is likely to occur, and that the effects of a Defendants' activities on the population of a species, or the species as a whole, is not even a relevant consideration. *E.g. Palila v. Hawaii Dept of Land & Nat. Resources*, 639 F.2d 495, 497 (9th Cir. 1981) ("The *only facts material* to [a Section 9 take] case are those relating to the questions

[10] It is thus especially inappropriate for Defendants to claim that the Court should rely on the FWS's non-existent "conclusion" that RPD's pumping operations are appropriate in lieu of the views of well-regarded scientists familiar with these species and their habitat requirements. *Compare* Def. Opp. at 14 (urging the Court to rely on the 2010 Letter's project description over "plaintiffs' so-called experts") *with* Jennings Decl. ¶ 7 (recognizing Dr. Hayes as having an "international reputation" as a CRLF "expert"); *id.* ¶ 18 (Jennings discussion of his papers co-authored with Dr. Hayes and Dr. Vredenberg).

whether the [species] is an endangered species and, if so, whether the defendants' actions amounted to a taking") (emphasis added); *Marbled Murrelet v. Babbitt*, 83 F.3d at 1068 ("[a] reasonably certainty of imminent harm" to a protected species is sufficient for issuance of an injunction under section 9 of the ESA); *Rosboro Lumber Co.*, 50 F.3d at 787–88.[11]

Thus, for example, in *Marbled Murrelet*, the Ninth Circuit affirmed a preliminary injunction where plaintiffs demonstrated a likelihood of future take of members of a protected species that occupied a site where defendant sought to log trees. 83 F.3d at 1062. Other decisions in the Ninth Circuit have reached the same result. *Rosboro*, 50 F.3d at 785 (injury to *one owl pair* warranted relief under the ESA because "[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult"); *accord, e.g. Center for Biological Diversity v. U.S. Forest Svc.*, 2011 WL 5008514, *3 (D. Ariz. Oct. 11, 2011) (granting a preliminary injunction where plaintiffs made "a showing that a violation of the ESA is at least likely in the future"); *see also Holston*, 541 F. Supp. 2d at 1081 (injunction warranted to address likely take of individual members of the species); *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 896 F. Supp. 1170 (M.D. Fla. 1995) (granting preliminary injunctive relief against a County based on likely take of individual members of a species, explaining that the "future threat of a even single taking is sufficient to invoke the authority of the Act").[12]

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[11] Defendants are also wrong in suggesting that the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), altered the standard for irreparable harm in an ESA case. Def. Opp. at 10, n.5. *Winter* arose under the National Environmental Policy Act, a purely procedural statute, 555 U.S. at 15, rather than under the ESA, which flatly prohibits take of listed species without FWS authorization, and which is based on Congress's determination that scrupulous compliance with the ESA is essential in dealing with imperiled species. *See TVA v. Hill*, 437 U.S. 153, 194 (1978). Accordingly, at least until and unless the Ninth Circuit instructs otherwise, Circuit precedents on the standard for injunctive relief in ESA cases should continue to be followed after *Winter*, as several courts have already determined. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 693 F. Supp. 2d 1145, 1149-50 (E.D. Cal. 2010); *Or. Natural Desert Ass'n v. Kimbell*, No. 07-1871-HA, 2009 WL 1663037, at *1 (D. Or. June 15, 2009).

[12] Defendants cite *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508 (9th Cir. 1994), for the proposition that relief is not required, Def. Opp. at 18, but in that case plaintiffs failed to show any likelihood of future take of members of the species at issue. *Id.* at 1512 (finding no "clear evidence that the BN operations will result in the death of members of a

This approach is also consistent with the applicable Supreme Court precedents, which explain that "[c]ourts of equity cannot, in their discretion, *reject* the balance that Congress has struck in a statute," but rather "[t]heir choice (unless there is statutory language to the contrary) is simply whether a *particular means* of enforcing the statute should be chosen over another permissible means." *United States v. Oakland Cannabis Buyer's Coop.*, 532 U.S. 483, 497-98 (2001) (emphasis added). As the Court explained in *TVA v. Hill*, in the ESA Congress "intended endangered species to be afforded the *highest of priorities*," 437 U.S. at 174 (emphasis added), and thus an injunction was necessary in that case – which concerned enjoining a massive dam project that was near completion – because that was the only way "of ensuring compliance" with the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *see also Oakland Cannibis*, 532 U.S. at 497 (explaining that in *Hill* "Congress' 'order of priorities,' as expressed in the statute, would be deprived of effect if the District Court could choose to deny injunctive relief"). Accordingly, contrary to Defendants' and SFPGA's contentions, if the Court determines that ongoing take of the CRLF or the SFGS is likely, the Court must craft appropriate injunctive relief to stem those legal violations.[13]

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protected species"). Indeed, the Court in that case expressly *rejected* the proposition that "threat of extinction to the species is required before an injunction may issue under the ESA," explaining that such a standard "would be contrary to the spirit of the statute," and referring approvingly to another decision where a court had enjoined the killing of nine members of a species in violation of the Act. *Id.* at 1512, n. 8 (citing *Fund for Animals v. Turner*, 1991 WL 206232 (D.D.C. Sept. 27, 1991)). SFPGA's reliance on *Defenders of Wildlife v. Salazar*, 2009 WL 8162144 (D. Mont. Sept. 8, 2009), is also misplaced, since that case did not involve a claim based on a Section 9 violation at all but, rather, challenged a FWS decision to partially delist a species. *Id.* Further, the Court ultimately *did* grant relief in that case without making any finding that the species as a whole was being harmed. *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

[13] Defendants' reliance on *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, (D. Me. 2008), is also off the mark. *See* Def. Opp. at 18- 20. The Court in that case simply declined to award relief concerning *one kind* of trapping where the evidence showed the animals caught in those traps were only "temporarily trapped and released," without being killed or even injured, *id.* at 104, but *did grant a preliminary injunction* as to certain *other* trapping, where only *one* member of the species had been killed from that kind of trap. *Id.* at 109-110 (although "only one lynx has been subject to a take, it is reasonably foreseeable that other lynx will be subject to future takes in the event" relief is not afforded). That result is entirely consistent with the relief Plaintiffs seek here, which will prevent likely future *lethal* take. Moreover, the court there limited the relief in significant part due to the "relatively brief interval" before the FWS was expected to resolve a "pending ITP application." *Id.* at 109. *Here there is no such*

B. NONE OF DEFENDANTS' ADDITIONAL ARGUMENTS WARRANT A DIFFERENT RESULT.

1. The Relief Plaintiffs Seek Will Be Beneficial To The CRLF and the SFGS.

Defendants and SFPGA conclusorily assert that allowing water to accumulate within Sharp Park to avoid the continued stranding of CRLF egg masses and tadpoles might have the opposite effect of impairing CRLF breeding and harming SFGS. Def. Opp. at 20; SFPGA Opp. at 12. These assertions are legally irrelevant, but they are also wholly meritless and unsupported by Defendants' own experts.

This Court need not decide – at this stage, or even on the merits – which precise management approach in Sharp Park is the best for the CRLF and the SFGS. That is the FWS's job. Rather, as explained, if the Court agrees that unauthorized take of the species is likely, then the appropriate relief is an injunction halting the activities causing take – after which Defendants may always seek authorization from the FWS. To the extent an activity is properly authorized by the expert agency, there is no violation of Section 9 and no relief from the Court would be warranted. But unless and until Defendants obtain that authorization they cannot, and should not be permitted to, avoid their liability by claiming that *they* know how best to manage the ongoing take of federally listed species.[14]

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application, and Defendants' reference to the pending application for dredge work near the pumps, Def. Opp. at 21, is irrelevant.

Similarly, in affirming the denial of a preliminary injunction in *Water Keepers Alliance v. U.S. Dept of Defense*, 271 F.3d 21, 34 (1st Cir. 2001), also relied on by Defendants, Def. Opp. at 19, the First Circuit concluded both that plaintiffs were not likely to prevail on their claim, and that they had not made the requisite "showing of probable deaths" of members of the species. Plaintiffs amply meet those standards here. *See also Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997) (relied on by Defendants, Def. Opp. at 19, but simply standing for the proposition that a district court is "not required to go any farther than ensuring that any violation would end" – precisely what Plaintiffs seek here).

[14] As Plaintiffs have explained, *see* Pl. Mem. at 2, in the long-term the FWS's authorization should be obtained through the Section 10 ITP process, through which the FWS authorizes incidental take of the species by approving a Habitat Conservation Plan and otherwise insuring that RPD minimizes and mitigates the adverse effects of its activities on the species to the maximum extent practicable. 16 U.S.C. § 1539(a)(2). Indeed, just last month the FWS publicized the draft of just such an HCP for another golf course project. *See* http://www.fws.gov/pacific/news/news.cfm?id=2144374841 (FWS announcing issuance of a draft HCP for a golf course project in Hawaii). In the short term, RPD could seek a permit for

Nonetheless, Defendants' claim that their approach is better for these species is not only legally immaterial, it is groundless. Defendants principally rely on Dr. Dennis Murphy, a *butterfly expert* with no apparent background or expertise in either the CRLF or the SFGS other than being retained by Defendants concerning the impacts of their activities at Sharp Park on the species. *See* Declaration of Dr. Dennis Murphy ¶¶ 2-8.[15]

In any event, Dr. Murphy's opinion (as well as that of Lisa Wayne) is based on at last two demonstrably false premises: (1) that under Plaintiffs' proposed injunction Defendants could no longer relocate stranded egg masses, Murphy Decl. ¶ 11; Wayne Decl. ¶¶ 53-54; and (2) that enjoining pumping will lead to increased growth of vegetation (tules and cattails) that can hinder CRLF breeding. Murphy Decl. ¶ 28.[16]

As to the first point, contrary to Defendants' assumption, Plaintiffs are not asking the Court to enjoin all "active management" of Sharp Park. Murphy Decl. ¶ 12. Plaintiffs have only asked for specific injunctive relief concerning pumping from Horse Stable Pond and mowing and golf cart restrictions. Thus, Defendants' experts argue against a straw man in

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activities it can demonstrate will aid in the species' recovery through Section 10(a)(1)(A), 16 U.S.C. § 1539(a)(1)(A).

Moreover, the FWS created a "safe harbor" program precisely to allow landowners who wanted to take actions to benefit species to do so by obtaining appropriate incidental take coverage for the improvements. 50 C.F.R. §17.22(c)(2). As the FWS explained in issuing the policy, "[l]andowners whose properties support endangered or threatened species as a result of their positive, voluntary conservation efforts *might violate section 9 of the Act if they significantly develop, modify, or manage those properties in a way that subsequently causes incidental take of those species*," 64 Fed. Reg. 32717 (1999) (emphasis added) – thus recognizing that even activities designed to benefit species must be permitted by the FWS where they cause take to occur. Indeed, while, as explained below, Defendants are wrong in claiming that they somehow *created* habitat for these species, as the safe harbors regulation shows Defendants would be responsible for their current ongoing take even if that were so.

[15] Dr. Murphy is well-known for assisting developers and others in litigation under the ESA. *See, e.g.*, Evan Halper, "A Sell out Or Just Practical," L.A. Times, Mar. 14, 2003 ("Dennis Murphy so pleased Riverside County developers last year, they gave him a brand-new Audi convertible with a big bow on it") (available at http://articles.latimes.com/2003/mar/14/local/me-murphy14) . Presumably this explains why Defendants retained a butterfly expert to contradict the views of leading Frog and Snake scientists.

[16] It is also based on the erroneous assumption that the relief Plaintiffs seek will be in effect indefinitely, Murphy Decl. ¶ 14,17-18; *see also* Jennings Decl. ¶ 59, when in fact it will only stay in effect until the Court makes a final determination on the merits and imposes final relief, or the FWS has issued an appropriate authorization for Defendants' activities.

claiming that RPD will no longer be able to relocate egg masses should the Court enter the injunction Plaintiffs request. Murphy Decl. ¶ 14; Wayne Decl. ¶¶ 53-54. To the contrary, while, as Plaintiffs' experts have explained, enjoining pumping from Horse Stable Pond will *reduce* egg mass and tadpole strandings (a point Defendants' experts never dispute), *see* Hayes Decl. ¶¶ 22-42; Vredenberg Decl. ¶ 20-25, Supp. Hayes Decl.¶ 3, 7-10, even assuming *arguendo* that relocating egg masses becomes appropriate for some reason, *nothing in Plaintiffs request for relief would prevent RPD from continuing these relocation efforts* should RPD obtain appropriate authorization from the FWS to do so.

Dr. Murphy also has no expert basis for opining that less pumping of water from Sharp Park would "exacerbate the proliferation of aquatic vegetation that is closing open water and creating less suitable conditions" for the CRLF. Murphy Decl. ¶ 28; *see also* Jennings Decl., ¶ 60. As explained in the attached rebuttal declaration by Dr. Peter Baye, who *is* an expert in coastal wetlands systems, including vegetation, in fact, it is *the artificially lowered water levels in Sharp Park that are accelerating the growth of this vegetation.* Declaration of Dr. Peter Baye ("Baye Decl.") ¶ 11 (Pl. Ex. 52). Less pumping, therefore, which would raise water levels, would in fact *curtail* the growth of this vegetation. *Id.* Accordingly, in light of the opinion of an actual expert on the precise issue at hand, the fact that Defendants' pumping activities are *accelerating* the growth of this vegetation is yet another form of habitat modification that is unlawfully taking these species.[17]

Dr. Murphy's overall opinion appears to be that since Defendants' pumping regime has not *yet caused the extirpation* of the CRLF or the SFGS, then the Court should "[d]o no harm" by allowing these activities to continue. Murphy Decl. ¶¶ 17-18. This turns the ESA on its head, for as Plaintiffs have already explained, if Defendants are engaged in an activity that is manipulating CRLF habitat and causing the lethal take of the species, whether that activity

[17] There is of course no "battle of experts" when the views of an actual expert on a pertinent issue are contradicted by someone whose expertise lies elsewhere. *See Beech Ridge*, 675 F. Supp. 2d at 564-67.

threatens the species with immediate local extirpation is irrelevant, for, "[o]nce a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Rosboro*, 50 F.3d at 785.[18]

Along the same lines, Dr. Murphy suggests that allowing more water to accumulate in Sharp Park poses uncertain risks that should not be allowed to occur. Murphy Decl. ¶¶ 12-15. He never articulates what those risks are, however, and for good reason; as Plaintiffs' experts have explained, and Defendants' (and SFPGA's) experts have not meaningfully disputed, the fact is that the relief Plaintiffs seek – a ban on pumping from Horse Stable Pond – will allow habitat conditions that are beneficial to the CRLF, and will reduce the ongoing take caused by Defendants' unlawful modification of CRLF habitat. *See, e.g.*, Supp. Hayes Decl. ¶¶ 7-9.[19]

Moreover, all of Dr. Murphy's – and Dr. Jenning's – discussions about "active management" and the need to manipulate the habitat in Sharp Park for the purported benefit of the species (which they emphasize to erroneously suggest that Plaintiffs are demanding an end

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[18] Dr. Murphy (and Defendants) also proceed on the false premise that the CRLF are "booming" at Sharp Park. Def. Opp. at 19; Murphy Decl. ¶ 22; *see also* Jennings Decl. ¶ 41; Wayne Decl. ¶ 11 (claiming that the number of egg masses observed last year indicates a growing population). In fact, little can be inferred about the status of the CRLF at Sharp Park from the breeding occurring in recent years. Supp. Hayes Decl. ¶ 11-14. In particular, as Dr. Hayes explains, any increase in population is due to improved habitat conditions at Mori Point, which is part of the contiguous habitat for the one overall CRLF population that inhabits both areas. *Id.* ¶ 11. Thus, while the improved conditions at Mori Point are assisting the CRLF population, conditions at Sharp Park remain a "population sink" that is adversely affecting the overall population. *Id.* ¶ 12-14.

[19] Arguing against another straw man, Defendants also repeatedly assert that Plaintiffs are seeking to return Sharp Park to its state decades ago, prior to construction of the sea wall. *E.g.* Def. Opp. at 13, n.8 (claiming Dr. Vredenberg shows a "surprising lack of knowledge" by referring to a "naturally functioning wetlands complex" in Sharp Park, because the natural state would mean no sea wall). As Defendants know, Plaintiffs are not asking for relief related to the sea wall. However, within the wetlands complex that presently exists in Sharp Park, the pumping operations are creating an unnatural system which should be returned to its natural state.

Moreover, SFPGA is factually wrong in claiming that the area was inhospitable to the species prior to the sea wall. SFPGA Opp. at 3. As Plaintiffs have already noted, the same firm that completed the 1992 report on which SFPGA relies issued a more recent and comprehensive report in 2010 that concluded that, in fact, there are several lines of evidence that show that Laguna Salada was suitable habitat prior to the existence of the golf course. *See* Pl. Mem. at 24, n.17; *see also* Baye Decl. ¶¶ 3-10;

to any such management), Murphy Decl. ¶ 18; Jennings Decl. ¶ 59, simply further demonstrate that, if they wish to continue these activities at Sharp Park, *Defendants must obtain an ITP or some other FWS authorization*. *See also, e.g.* Wayne Decl. ¶ 13 (noting management activities undertaken to "*mitigate adverse impacts* to the CRLF population in Sharp Park")(emphasis added). Again, the ESA provides a *specific mechanism for the expert FWS* to address any of the "active management" Defendants claim is so essential to these species, in the context of an ITP and HCP that will delineate precisely what actions are required to offset the effects of Defendants' take, and will provide Defendants with specific authorization to incidentally take a specific number of each species. Defendant cannot bypass that process – and continue their unlawful activities – on the basis of their own expert's views that RPD is doing its *best* to actively manage the habitat to limit harm to the species (within the constraints of operating a golf course). *See also* Jennings Decl. ¶ 39 (claiming RPD makes its best efforts to achieve "the least damaging pumping operations"). [20]

Finally, Defendants' suggestion that an injunction concerning pumping water from Horse Stable Pond could harm SFGS is also wholly meritless. Def. Opp. at 20; Wayne Decl. ¶ 11. SFGS are aquatic creatures, and there is no basis to speculate that SFGS might drown or be otherwise harmed with additional water in Sharp Park. Suppl. Hayes Decl. ¶ 4. Rather, the pumping restrictions Plaintiffs seek here, as well as the restrictions on mowing, will *benefit* the SFGS as well as the CRLF. *Id.* ¶ 16.

2. Temporarily Enjoining Pumping From Horse Stable Pond Does Not Risk Harm To Pacifica Residents.

In a final effort to avoid any restrictions on Sharp Park before this case is finally resolved, Defendants and SFPGA conjure a series of plagues they claim will befall the area

[20] Indeed, it is highly ironic for Dr. Murphy to invoke the San Bruno Mountain HCP in service of his purported concern with "unintended consequences" that might result from the relief Plaintiffs seek here. Murphy Decl. ¶ 12. As Plaintiffs have explained, Congress created the ITP process *precisely to provide a mechanism for the specific HCP to which Dr. Murphy refers*. Pl. Mem. at 15-16. Once again, the notion that the Court should decide that RPD knows what is best for these species, rather than the FWS, turns the ESA on its head.

should the Court enjoin pumping from Horse Stable Pond and certain mowing activities, including that this relief could flood residential areas, increase "the threat of fire danger, with vagrants, result in urban blight, and create potential health risks from increased mosquitos and ticks . . . ." SFPGA Opp. at 2, 14; Def. Opp. at 20. Of course, none of this has happened in adjacent areas – such as Mori Point – currently managed for their natural values. In any event, these hyperbolic claims are wholly without merit or support.[21]

As for the risk of flooding beyond the boundaries of the Park, it is critical at the outset to stress that no one disagrees that the risk that winter rains could cause flooding that extends beyond the golf course, with or without pumping from Horse Stable Pond, is extremely small. *See* Vandivere Decl. ¶ 4 ("for the upcoming winter or any year, the probability of floodwater levels exceeding + 12 ft. NAVD88 is at least *4 percent* (assuming the pumps are used), and likely higher if no pumping occurred.") (emphasis added).[22]

Nonetheless, even as to that small risk, none of Defendants' experts disputes that the risk can be addressed by using mobile pumps outside of Horse Stable Pond, as Mr. Kamman has explained. Kamman Decl. ¶ 4. Rather, Mr. Vandivere simply states that Mr. Kamman did not

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[21] Equally specious is SFPGA's suggestion that compelling Defendants to comply with the ESA if they wish to run a golf course in listed species' habitat will result in efforts to legislatively "gut the" ESA. SFPGA Opp. at 1. In any event, while cases pitting more general wildlife impacts against, say, military activities, *e.g. Winter*, 555 U.S. 7, may require a difficult balancing of equitable considerations, Plaintiffs respectfully submit that not only is such balancing *not permitted under the ESA*, *see, e.g. Hill*, 437 U.S. at 193 ("Congress has ma[de] it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"), it is not at all difficult here where the only thing that will *actually* be impacted by the interim relief Plaintiffs seek is the ability of some golfers to maximize the degree to which they have uninterrupted access to 18 holes of golf at one of numerous golf courses in the Bay area. Indeed, in this regard it also bears mentioning that Sharp Park golf course receives failing grades from its golfers in nearly every category the National Golf Foundation measures, and loses hundreds of thousands of dollars every year. *See* Operational Review and Recommendations For City of San Francisco Golf Operations (Draft 2007) (available at http://wildequity.org/versions/3790); Plaintiffs' Intervention Opposition (DN 38), Ex. 1 (City budget document showing Sharp Park deficits).

[22] As the City has explained, even when the Horse Stable Pond pumps are operating, there have been periods "when the pumps cannot keep up with incoming flow," as a result of which "portions of the Sharp Park golf course, along with Pacifica neighborhoods to the north and south of the course, flood." May 24, 2005 Letter from RPD to FWS (Def. Opp., Declaration of Virginia Elizondo, Ex. 4).

establish a "chain of responsibility for obtaining and using such pumps." Vandivere Decl. ¶ 6. Certainly, the City cannot use the fact that it does not have such pumps on hand to allow them to continue violating the ESA; to the contrary, if they prove necessary the City can certainly obtain them. In short, since any additional risk of flooding can be addressed without pumping from Horse Stable Pond, the Court should not let this concern weigh in the balance at all.[23]

Defendants' other concerns are equally unsubstantiated, since, again, they presume that the golf course will be abandoned and otherwise no longer actively managed due to the modest *interim* relief Plaintiffs seek. Thus, for example, the "fire danger" SFPGA raises, as well as the purported risk of "homeless encampments," *see* Declaration of Mary Ann Nihart, ¶ 14, presuppose that Sharp Park will be "[l]eft unattended," *id.*, which is not any part of Plaintiffs' requested relief. Similarly, the concern Ms. Nihart claims that some *other* individual has about mosquitos presumes that "treatment by helicopters with larvacide" would no longer occur, *id.* ¶ 17 – but again, that hearsay concern is not a component of Plaintiffs' requested relief. Further, Ms. Nihart's concern about mosquitos is tied to the growth of the cattails in Sharp Park, *id.* ¶ 18, but, as Dr. Baye explains, allowing more water in Sharp Park will help *reduce* the growth of these cattails. Baye Decl. ¶ 11.[24]

3. The Relief Plaintiffs Seek Both Allows Golf To Continue At Sharp Park This Winter And Will Not Prevent Golf From Continuing In The Future.

Finally, again, while not even a relevant consideration in an ESA case, it also bears emphasizing that, contrary to Defendants' and SFPGA's claims, golfing can continue at Sharp

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[23] Plaintiffs are assuming that these mobile pumps would be used in areas of elevation that would not permit pumping below approximately 10 feet NAVD88. Suppl. Kamman Decl. ¶¶ 2-3. Defendants have made the same assumption, *see* Vandivere Decl. ¶ 7 (discussing a minimum of 10 feet NAVD88).

[24] Lest the Court be left with the misimpression that public sentiment favors preserving the 18-hole golf course at Sharp Park under any circumstances, it also bears noting that a broad spectrum of environmental, social service, park advocacy, and historic organizations support changes to Sharp Park for the benefit of these species, including the San Francisco Neighborhood Parks Council, the National Japanese American Historical Society, Coleman Advocates for Children and Youth, Arriba Juntos, Chinese Progressive Alliance, and nearly every environmental organization in San Mateo and San Francisco Counties. *See* Support Letters (available at http://wildequity.org/pages/3034).

Park this winter, and in the future, under the injunction Plaintiffs seek. Only holes 9-18 would be impacted by the mowing restrictions Plaintiffs propose, and thus golfers can continue uninterrupted play on the holes east of Highway 1 (4-7) and four of the holes on the west side of the highway (1-3, and 8). In any case, the Court certainly cannot allow a violation of the ESA to proceed in order to avoid *some* restrictions on golfing at one golf course. *Compare Marbled Murrelet*, 83 F.3d 1060 (enjoining timber operation); *Beech Ridge*, 675 F. Supp. 2d 540 (enjoining large-scale wind power project).

If the Court agrees to enjoin mowing, then the impacts of flooding on the golf course will be largely irrelevant, since the same holes would be impacted. Moreover, even under Defendants' current management parts of the golf course can become flooded during the CRLF breeding season. Wayne Decl. ¶ 32 (explaining that current management "may result in areas of the golf course being flooded"); *see also* Hayes Decl., Ex. B (photos of flooded course).

Finally, the Court should also reject the suggestions that enjoining these activities until this case can be resolved on the merits could have long-term deleterious effects on the golf course itself. *E.g.* SFPGA Opp., Declaration of Robert Jones ¶ 2 (claiming that an end to park maintenance would allow invasive grasses to grow). Again, Plaintiffs have only asked for specific relief for a limited period, not some kind of permanent ban on managing Sharp Park, as Defendants and SFPGA erroneously assume.

APPROPRIATE RELIEF AND CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enjoin pumping from Horse Stable Pond or mowing or golf cart use on holes 9-18 (within 200 meters of Sharp Park waterbodies). However, if the Court concludes that any of Defendants or SFPGA's concerns warrant some lesser relief, at *minimum* the Court should Order that Defendants fully implement their own Compliance Plan, which RPD is plainly not implementing, but provides a no-mow zone where mowing would not be permitted, *see* Compliance Plan at 10 and Pl Ex. 53 (color version of Compliance Plan map indicating these zones), and also contains at least *some* restrictions on mowing operations, including the use of biological monitors and some time-of-day restrictions.

The Compliance Plan will not address the threats to CRLF egg masses from pumping operations, since mass strandings occurred last winter even under the Compliance Plan protocols. As to that concern, *at minimum*, the Court should prohibit the use of the *larger pump* in Horse Stable Pond, and prohibit pumping water below 10 feet NAVD88. Defendants themselves emphasize the reduced entrainment risk from using only the smaller pump (which they claim is the one mostly used in any event). *See* Def. Opp. at 16; Wayne Decl. ¶ 17. This approach would obviate the need for Defendants to pump from another location in the event rains bring the water level above 10 feet, and would thus address Defendants' purported concern about acquiring those pumps. Moreover, as reflected in Defendants' own map, *see* Vandivere Decl., Ex. 2, requiring Defendants to maintain more water in Sharp Park – even at as little as 8 feet NAVD88 – will greatly increase the contiguous waterbody that will be available for CRLF breeding, and thus will significantly reduce the habitat modification that RPD is engaged in to the detriment of the species. *See* Supp. Hayes Decl. ¶ 3 (explaining that allowing water levels to rise to at least 10 feet NAVD88 would significantly improve habitat conditions, although enjoining pumping from Horse Stable Pond altogether remains the most effective means to reduce RPD-caused take of CRLF).

Dated: November 4, 2011

Respectfully submitted,

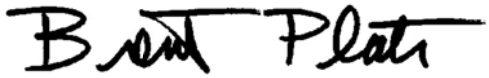

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EXHIBIT LIST

45 Supplemental Declaration of Dr. Marc Hayes

46 Declaration of Steve Salisbury

47 Declaration of Brent Plater

48 Supplemental Declaration of Greg Kamman

49 Supplemental Declaration of Jewel Snavely

50 March 5, 2004 Data Sheet for Horse Stable Pond (Campo Dep. Ex. 9)

51 Declaration of Sam McNally

52 Declaration of Dr. Peter Baye

53 Compliance Plan Map

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011 I caused the foregoing Reply in Support of Motion for a Preliminary Injunction and accompanying exhibits to be served, via ECF-filing, as well as via Federal Express delivery, on the following counsel of record:

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