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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 WILD EQUITY)
INSTITUTE, a non-profit)
corporation, *et al.*)
15 Plaintiffs,)
16 v.)
17 CITY AND COUNTY OF)
SAN FRANCISCO, *et al.*,)
18 Defendants.)

Case No.: 3:11-CV-00958 SI

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF POINTS AND
AUTHORITIES**

DATE: APRIL 20, 2012
TIME: 9:00 A.M.
COURTROOM 10, 19TH FLOOR
JUDGE: HON. SUSAN ILLSTON

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24 March 2, 2012
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Alt Report	Sharp Park Conceptual Restoration Alternatives Report (RPD 2009)
Bi-Op	Biological Opinion
CCSF	City and County of San Francisco
CRLF or Frog	California red-legged frog
Draft BA	Draft Biological Assessment Sharp Park Safety Infrastructure Improvement and Habitat Enhancement Project
ESA or Act	Endangered Species Act
Final Rule	Final Rule Listing the California Red Legged Frog as a Threatened Species
FWS or Service	United States Fish and Wildlife Service
GGNRA	National Park Service's Golden Gate National Recreation Area
HCP	Habitat Conservation Plan
Hydrology Report	Kamman Hydrology Report
Rec. Plan	Recovery Plan for the California Red Legged Frog (2002)
RPD	San Francisco Recreation and Park Department
Swaim 2008	Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008)

1 desiccated Frog egg masses at Sharp Park over many years, and *as recently as a few weeks ago*;
 2 (2) deposition testimony, including the deposition of the RPD’s natural areas program director
 3 Lisa Wayne, admitting that take of the species has occurred; (3) the FWS’s consistent
 4 admonition that pumping operations must be authorized under the ESA because of ongoing take
 5 of Frogs; and (4) the RPD’s draft Biological Assessment, within which the City and County of
 6 San Francisco (“CCSF”) admits that pumping operations result in desiccation of egg masses,
 7 and through which CCSF seeks to initiate formal consultation between the Army Corps of
 8 Engineers and the FWS under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), to obtain
 9 incidental take authorization for RPD’s pumping and other activities at Sharp Park. Partial
 10 summary judgment on this issue at this time will further judicial economy and efficiency by
 11 narrowing both the number of issues over which further discovery will be necessary and the
 12 matters the Court will need to consider and resolve at trial.¹

BACKGROUND

A. The California Red-Legged Frog And Its Protection Under the Endangered Species Act

17 The once abundant CRLF (*see* photographs (Crystal Decl., Ex. 2)), the largest frog
 18 native to the western United States, has been decimated by a myriad of threats, including
 19 “construction of reservoirs and water diversions” Recovery Plan for the California Red-
 20 Legged Frog (FWS 2002) (excerpts) (“Rec. Plan”) at 1 (Crystal Decl., Ex. 3). Lost from over
 21 70% of its historic range, the Frog is now found only in select coastal drainages from Marin
 22 County to Baja California, with a few isolated populations in the Sierra foothills. *Id.*

24 ¹ Resolving this threshold liability issue now may also facilitate a resolution of all
 25 or a portion of this case at the Court ordered Settlement Conference before Judge Spero on
 26 June 4, 2012. *See* DN 93 (Order of Feb. 1, 2011). While Plaintiffs have also obtained
 27 compelling evidence that the San Francisco garter snake continues to occupy Sharp Park and
 28 is at significant risk of ongoing take, including RPD documents, testimony and other evidence,
 these issues warrant resolution through expert testimony at trial.

1 CRLF breed in aquatic habitats. Defendants' Answer (DN 15) ¶ 36. Breeding, which
2 generally occurs from November through April, involves females laying egg masses – each of
3 which can contain between 2,000 and 5,000 eggs – and attaching them to vertical emergent
4 vegetation at the water surface while being fertilized by males. Rec. Plan at 15-16.

5 Egg masses are typically deposited “during or shortly after large rainfall events.” Final
6 Rule Listing the California Red-Legged Frog as a Threatened Species (“Final Rule”), 61 Fed.
7 Reg. 25,813, 25,814 (May 23, 1996) (Crystal Decl., Ex. 4); *see also* Sharp Park Conceptual
8 Restoration Alternatives Report (RPD 2009) (“Alt. Report”)² at 29 (Crystal Decl., Ex. 5)
9 (“CRLF typically breeds during or shortly after large rainfall events in late winter or early
10 spring”). Eggs generally hatch within 6 to 14 days depending on water temperatures, become
11 tadpoles after approximately 20 to 22 days, and then develop into frogs in 11 to 20 weeks. Rec.
12 Plan at 16; *see also* Alt. Report at 29.

13 Although egg masses are typically laid on emergent aquatic vegetation, when water
14 levels are kept artificially low – such as those artificially maintained in Sharp Park – tule and
15 cattail growth overgrow aquatic areas needed for Frog breeding. *See, e.g.*, Jan. 9, 2012
16 Deposition of Lisa Wayne (“Wayne Dep.”) at 215 (Crystal Decl., Ex. 6)³; *see also* Final Rule at
17 25,821 (recognizing that the diversion of water from coastal lagoons containing CRLF can
18
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20

21 ² RPD prepared the Alternatives Report in response to an ordinance passed by the
22 Board of Supervisors by a vote of 11-0 to consider restoration options for Sharp Park.
23 Although the Report recommends *remedial* actions that are irrelevant to the present motion –
24 and the efficacy of which Plaintiffs strenuously dispute – the Report’s admissions of adverse
impacts on the CRLF and the species’ habitats in the Park are relevant to the threshold liability
issue here.

25 ³ Lisa Wayne is the Natural Areas Program Director for RPD, Wayne Dep. at 18,
26 1.8-13, and is the official responsible for deciding the pumping protocols at Sharp Park,
27 including the water levels the pumps are set to maintain and when the pumps are to be turned
28 on and off before, during, and after the CRLF breeding season. *Id.* at 28, 1.15-16; *id.* at 54,
1.12-13.

1 “result in changes in lagoon vegetation and hydrology that are unfavourable to California red-
2 legged frogs”).

3 Once egg masses are laid, they must remain hydrated. Otherwise, they dry out –
4 desiccate – and die. Answer ¶ 37; *see also* Sept. 13, 2011 Deposition of Jon Campo (“Campo
5 Dep.”) at 27, 1.20-25 (Crystal Decl., Ex. 7).⁴ Similarly, tadpoles must remain hydrated until they
6 metamorphose into adult Frogs, at which point they may also inhabit terrestrial habitats near
7 aquatic areas. *See also* Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008) (“Swaim
8 2008”) at 4-2 (Crystal Decl., Ex 8).⁵

9
10 In light of the myriad threats facing the species and its highly reduced range and
11 population, in 1996 the FWS determined that the Frog is a “threatened” species, which means
12 that the expert federal agency charged with administering the ESA (*see* 50 C.F.R. 402.01(b))
13 concluded that the Frog is “likely to become an endangered species within the foreseeable future
14 throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20); *see* 61 Fed. Reg.
15 25,813 (1996) (Final Listing Rule); *see also* 50 C.F.R. § 17.11(h). Under the ESA, this makes it
16 unlawful for anyone – including any local government, 16 U.S.C. § 1532(13) – to “take” any
17 member of the species, 16 U.S.C. § 1538, which includes any “egg or offspring thereof.” 16
18 U.S.C. § 1532(8); *see also* 50 C.F.R. § 17.31(a) (extending take prohibitions to threatened
19 species).
20

21 “Take” under the ESA is broadly defined to mean “harass, harm, pursue, hunt, shoot,
22 wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.” 16 U.S.C.
23
24

25 ⁴ Mr. Campo is a gardener employed by RPD who has been conducting surveys for
26 CRLF at Sharp Park for many years. *Id.* at 18, 1.11-12 and 32, 1.22-24.

27 ⁵ The 2008 Sharp Park Wildlife Surveys Report was prepared for RPD by Swaim
28 Consulting, Inc. in connection with the Alternatives Report.

1 § 1532(19). The FWS’s regulations further define “harm” to include any “significant habitat
2 modification or degradation where it actually kills or injures wildlife by significantly impairing
3 essential behavioral patterns, including breeding, feeding or sheltering,” and harass to include
4 any “intentional or negligent act or omission which creates the likelihood of injury to wildlife by
5 annoying it to such an extent as to significantly disrupt normal behavioral patterns which
6 include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

7
8 Among the specific threats to the CRLF that the FWS focused on in listing the species is
9 take through the destruction and modification of the Frog’s breeding habitat through “flood
10 control maintenance” and other water management activities – *including at Sharp Park in*
11 *particular. See Proposed Rule to List the Frog as an Endangered Species, 59 Fed. Reg. 4,888,*
12 *4,893 (1994) (discussing the threats posed by, inter alia, “flood control” efforts); Final Rule at*
13 *25,825-26 (explaining that “[m]anagement of water bodies for flood control also has the*
14 *potential to adversely impact [Frog] localities,” and listing as an example “poorly timed releases*
15 *of storm water from Horse Stable Pond at Sharp Park in February 1992 [that] resulted in*
16 *exposure and desiccation of 62 California red-legged frog egg masses”); Rec. Plan at 20 (same).*
17 Thus, pursuant to the FWS’s policy “to identify to the maximum extent practicable at the time a
18 species is listed those activities that would or would not constitute a violation of section 9 of the
19 Act,” in the Final Listing Rule the Service specifically identified, among the activities that could
20 “result in ‘take’” of the species, the “[u]nauthorized destruction/alteration of the species’ habitat
21 such as discharge of fill material, *draining*, ditching, tiling, pond construction, [and] diversion or
22 *alteration of stream channels or surface or ground water flow into or out of a wetland* (i.e., due
23 to roads, impoundments, *discharge pipes*, storm water detention basins, etc.)” Final Rule at
24 25,831-32 (emphasis added).

25
26
27 While the ESA broadly prohibits any “take” of listed species, under the Act an applicant
28 may obtain authorization to engage in activities that will result in incidental take. Thus, section

1 10 of the ESA authorizes the FWS to issue Incidental Take Permits for a specific level of take,
2 where the applicant has developed an appropriate Habitat Conservation Plan (“HCP”) for the
3 species, and has satisfied several other elements designed to minimize and mitigate the impacts
4 of the proposed activity. 16 U.S.C. § 1539(a).⁶ Section 7 provides that where a federal agency
5 – referred to as the “action agency” – approves a third parties’ permit or application for an
6 activity impacting listed species, the FWS may issue a Biological Opinion (“Bi-Op”) providing
7 an Incidental Take Statement that similarly authorizes take of the species, so long as the activity
8 is not likely to jeopardize the species, along with conditions that will minimize and mitigate
9 those impacts. *Id.* §§ 1536(a)(2); 1536(b); 50 C.F.R. §§ 402.01-.16. The Section 7 process
10 generally begins with the preparation of a Biological Assessment (“BA”) by the action agency
11 or applicant to provide information the FWS can rely on in preparing its Bi-Op. 16 U.S.C.
12 § 1536(c); 50 C.F.R. § 402.12. Although the FWS’s implementing regulations provide a time
13 period for the completion of the process and a Bi-Op, that period does not even *begin* to run
14 until the FWS has determined that all of the necessary information has been included in the BA.
15 *Id.* § 402.14(c).

16
17
18 **B. Sharp Park Golf Course And RPD’s Pumping Operations**

19 Sharp Park, located on the coast in Pacifica, is owned by CCSF and operated by RPD
20 and its contractors. *See* Complaint (DN 1) and Defendants’ Answer (“Answer”) (DN 15), ¶¶ 19,
21 47. Highway 1 runs through the Park, and two portions of the National Park Service’s Golden
22 Gate National Recreation Area (“GGNRA”) – Mori Point and Sweeney Ridge – border Sharp
23 Park to the South and East. *See* Complaint ¶ 47; Answer ¶¶ 47, 48. An earthen levee currently
24 separates the golf course from the ocean. *Alt. Report* at 21.

25
26 ⁶ Section 10 also authorizes issuance of incidental take authorization through
27 “enhancement” permits for activities designed to enhance the survival or recovery of a
28 species. *Id.* § 1539(a)(1)(A).

1 As CCSF explained in its Alternatives Report, “[o]ne of the park’s most prominent
2 natural features is a wetland complex located at the west end of the park [*i.e.*, just East of the sea
3 wall]. The wetland complex consists of a lagoon (Laguna Salada), a pond (Horse Stable Pond),
4 and a channel that connects the two bodies of water.” Alt. Report at 1; *see also* Answer ¶ 49;
5 Crystal Decl., Ex. 9 (Sharp Park map). Laguna Salada “consists of an open water pond and
6 adjacent emergent wetland occupying about 27 acres.” Alt. Report at 12. A small channel
7 about 1,000 feet long carries water between the lagoon and the considerably smaller Horse
8 Stable Pond to the South. *Id.* Sanchez Creek is a channelized creek that runs into Horse Stable
9 Pond. *Id.*

11 Because the Sharp Park “wetland complex is at the hydrologic terminus of an 844-acre
12 coastal watershed,” during the winter rainy season water flows into this complex, causing water
13 levels to naturally rise. *Id.* at 23 and Kamman Hydrology Report (“Hydrology Report”) (RPD
14 Report, Appendix A) (Crystal Decl., Ex. 10)⁷; Answer ¶ 54 (admitting that “winter rains may
15 also cause flooding at the Sharp Park golf course”); *see also* RPD Mar. 24, 2005 letter to FWS
16 (Crystal Decl., Ex. 11) (“[t]he watershed that drains into Sharp Park runs from the ridgeline of
17 Mori Point (south of Horse Stable Pond) east to Sweeney Ridge, north along Sweeney ridge to
18 Milagra Ridge, and then westerly along the south leg of Milagra Ridge to the north side of
19 Ellreka Square neighborhood”). In an effort to artificially manage the water levels that would
20 otherwise occur, RPD operates two pumps that push enormous volumes of water from Horse
21 Stable Pond through the sea wall and dump it on the ocean beach. *See* Answer ¶ 51 (DN 15)
22 (“Defendants admit that San Francisco operates the Sharp Park pump house as needed to pump
23 water out of Horse Stable Pond into the ocean in an effort to manage the water level”);
24
25

26 ⁷ The Kamman Hydrology Report was also prepared for RPD in connection with
27 the Alternatives Report.
28

1 Hydrology Report at 4; *accord* Declaration of John Bowie (“Bowie Decl.”), Ex. A (pumping
2 photograph).

3 The pumps turn on and off automatically at water levels set by the pump operator, who
4 sets “floats” to trigger the pumps to turn on or off at specific water levels. Dec. 14, 2011
5 Deposition of John Ascariz (“Ascariz Dep.”) at 21-22 (Crystal Decl., Ex. 12).⁸ RPD sets the
6 pump levels so that the smaller pump will turn off when the target water level is achieved, and
7 does not turn on again until a sufficiently higher water level (typically 3.6 inches higher⁹) is
8 achieved, to avoid rapid oscillation of the pumps, which can reduce their life expectancy.
9
10 Ascariz Dep. at 22-25. The larger pump is typically set to turn on when the water level rises
11 even higher because water is entering the system faster than the smaller pump can remove it.
12 *Id.*; *see also* Sharp Park Pump Log (Crystal Decl. Ex. 13 (excerpts)).¹⁰

13 To increase “flood capacity” in the system before winter rains, RPD drains Sharp Park’s
14 wetland system. *See* Wayne Dep. at 133, 1.5-6. Similarly, throughout the rainy season RPD uses
15 the pumps in an effort to maintain water levels, and to lower water levels once they raise due to
16 winter rains, to avoid flooding of the golf course. *Id.* at 93-94.

19
20 ⁸ Mr. Ascariz is the Stationary Engineer responsible for adjusting the pump levels
in the Horse Stable Pond pumphouse as directed by Lisa Wayne. Ascariz Dep. at 22-24.

21 ⁹ Mr. Ascariz testified that the pumps are typically set at a .3 increment on the
22 gauge (*e.g.*, to turn on at 2.3 and off at 2.0 on the gauge), *see* Ascariz Dep. at 23, 1.20-24 and
23 27, 1.21-22, and Ms. Wayne explained that the numbers on the gauge represent 1 foot
24 increments, so that .1 on the gauge is 1/10th of a foot, or 1.2 inches. Wayne Dep. at 48, 1.12-
13. The numbers on the gauge are based on a base level of 5.9 feet so that, for example, 1.0
on the gauge represents 6.9 feet of water. *See* Kamman Hydrology Report at 4, n.2

25 ¹⁰ The Sharp Park Pump Log is a handwritten log recording the use of the Horse
26 Stable Pond pumps from 1998. The Log generally indicates the gauge level the pumps are set
27 to maintain, and the cumulative time that each of the two pumps has been operating. *See*
Ascariz Dep. at 39, 1.17-20 and 72-73. Mr. Ascariz testified that maintaining such a log book
is a standard protocol for a pumphouse engineer. *Id.* at 40, 1.19-21; *id.* at 64.

1 For example, during the winter of 2010-2011 RPD operated the large pump for more
 2 than 400 hours, and the small pump for more than 850 hours. *See* Ascariz Dep. at 91-93.¹¹
 3 Thus, using CCSF’s own estimate of the capacity of the pumps (*i.e.*, 1000 gallons/minute
 4 (“gpm”) for the small pump and 6,000 gpm for the large¹²), this means that RPD pumped
 5 approximately *195 million gallons* of freshwater from Sharp Park waterbodies last winter alone
 6 – a massive change in the ecological conditions that would otherwise exist in this Frog habitat,
 7 which adversely impacts the species in several ways.¹³

8
 9 **C. RPD’s Ongoing Take Of CRLF Egg Masses At Sharp Park**

10 Sharp Park’s water bodies indisputably “provide habitat for the red-legged frog.”
 11 Answer ¶ 49. For many years Frogs have been trying to breed in these water bodies during the
 12 rainy season. *See, e.g.* Final Listing Rule at 25,825-26 (discussing Frog egg masses in Horse
 13 Stable Pond twenty years ago).

14 However, RPD’s massive water pumping operations, which lower water levels from
 15 where they would otherwise exist, have caused repeated and ongoing strandings of CRLF egg
 16 masses. *E.g.*, Campo Dep. at 120, 1.19-21 (“if the pump is turned on, the water level will go
 17 down. That can strand an egg mass.”). *Indeed, in the past month alone Plaintiffs’*
 18 *representatives have witnessed multiple egg masses stranded in Horse Stable Pond and Laguna*
 19 *Salada. See* Declarations of Erica Ely (“Ely Decl.”) and Cory Singer (“Singer Decl.”)

21
 22 ¹¹ Mr. Ascariz confirmed these numbers by subtracting the pump log hour
 23 recordings for December 7, 2010 (on page 78 of the Log) from the recordings at the end of the
 24 winter, on March 31, 2011 (on page 90 of the Log). *See* Ascariz Dep. at 92-93; *see also*
 25 Ascariz Dep. at 21 (explaining the hour meters on the pumps); *id.* at 73 (explaining how
 26 numbers are recorded in the Log).

27 ¹² *See* Ascariz Dep. at 54, 1.11-13.

28 ¹³ The 195 million gallon number is derived by converting the number of hours the
 pumps ran into minutes (400 hours = 24,000 minutes; 850 hours = 51,000 minutes) and then
 multiplying that number by the pumps’ gpm (24,000 x 6,000; 51,000 x 1,000), and adding the
 results.

1 (discussing identifications of stranded egg masses in Sharp Park in January and February, 2012);
2 *see also, e.g.*, Declaration of Jewel Snavelly (“Snavelly Decl.”) (discussing stranded egg mass
3 from last winter).

4 Although egg mass strandings have occurred for many years, RPD has claimed that since
5 2005 a “pumping protocol” is in place to protect egg masses by not pumping water below egg
6 masses once they are discovered. *See* RPD Mar. 24, 2005 letter to FWS (Crystal Decl., Ex. 11);
7 *see also* Def’s Opp. to Plfs.’ Mot. for a Prelim. Inj. (“Prelim. Inj. Opp.”), Declaration of Lisa
8 Wayne ¶ 21-33 (DN 72); *see also* Wayne Dep. at 42-43 (discussing “new protocols” instituted
9 after 2005 strandings). Under that protocol Ms. Wayne decides whether and when to change the
10 settings on the pump floats, or turn the pumps on or off, and communicates those decisions to
11 the pump operator. Wayne Dep. at 43, 1.16-24. However, as explained below, these efforts
12 cannot and have not avoided ongoing CRLF egg mass strandings because it has proven
13 impossible to manage water levels to avoid strandings.
14

15 **D. RPD’s Recent Effort To Obtain Authorization For**
16 **The Take of CRLF At Sharp Park**

17 For many years, the FWS has advised RPD that pumping operations at Sharp Park are
18 taking CRLF. For example, in February, 2005 FWS wrote RPD explaining that pumping
19 operations that winter had “lowered the water level at Horse Stable Pond and resulted in the
20 stranding and exposure of a number of egg masses of the California red-legged frog [and]
21 caused the death of an unknown quantity of embryonic tadpoles of the completely aquatic early
22 stage of this animal’s lifecycle.” *See* FWS Letter of Feb. 1, 2005 (Crystal Decl., Ex. 14). The
23 FWS therefore recommended that RPD “obtain authorization for incidental take as
24 appropriate for the California red-legged frog” *Id.*; *see also, e.g.* Jan. 13, 2011 FWS email
25 (Crystal Decl., Ex. 15 at 4) (“Considering the probability that egg mass strandings will occur on
26
27
28

1 a regular basis in the future it may be wise if we consult via a 10a1A permit or a biological
2 opinion”).

3 However, instead of obtaining that authorization, RPD instead has engaged in an *ad-hoc*
4 process of seeking the FWS’s “emergency” approval to relocate egg masses at risk of
5 desiccation from the pumping operations. *Id.* As noted, however, the FWS has recently
6 instructed RPD that it may no longer move egg masses without first obtaining incidental take
7 coverage pursuant to either Section 7 or 10 of the ESA. FWS Letter of Dec. 18, 2011 (Crystal
8 Decl., Ex. 1).¹⁴

9
10 In the parties’ original, June 17, 2011 Case Management Report CCSF informed the
11 Court that it intended to engage in Section 7 consultation concerning activities at Sharp Park
12 only once it completed its Significant Natural Resource Areas Management Plan. *See* Case
13 Management Report (DN 43) at 3. However, in the January 20, 2012 Further Case Management
14 Report CCSF explained that it has now decided, apparently due to this litigation, to “include
15 pumping and golf course operations within the scope” of a *separate* project CCSF wants to
16 undertake to upgrade the Horse Stable Pond pumphouse. *See* Further Case Management Report
17 (DN 91) at 2.

18
19 On January 4, 2012, representatives from RPD, the Corps and the FWS met to discuss
20 initiating this consultation. Wayne Dep. at 207-210. Subsequently, the FWS sent a letter
21 making clear that the agency would not even *begin* the consultation until it has received

22 ¹⁴ FWS’s recent letter was in response to RPD’s application for a section
23 10(a)(1)(A) enhancement permit to both continue surveying for CRLF egg masses and to
24 undertake vegetation removal in Sharp Park wetlands. *See* Aug. 25, 2011 Recovery Permit
25 Application (Crystal Decl. Ex. 16). Although the FWS authorized Jon Campo and Lisa
26 Wayne to continue *looking for* CRLF egg masses, the Service’s December 18, 2011 response
27 to the application not only told RPD that it may no longer seek to *move* stranded and at-risk
28 egg masses, the agency also denied RPD’s request to undertake habitat modifications,
explaining RPD had not justified how those activities met the requirements for an
enhancement permit. FWS Letter of Dec. 18, 2011 (Crystal Decl., Ex. 1).

1 adequate information from RPD, including “detailed conservation measures to avoid and
2 minimize the effect” of the activities on the CRLF and the San Francisco Garter Snake
3 (“SFGS”). FWS Letter of Jan. 18, 2012 (Crystal Decl., Ex. 17); *see also* 50 C.F.R. § 402.14
4 (detailing information that must be provided to initiate consultation).

5 On or about February 6, 2012, CCSF completed an initial “draft” Biological Assessment
6 (“BA”) as part of that process. *See* Draft Biological Assessment Sharp Park Safety
7 Infrastructure Improvement and Habitat Enhancement Project (“Draft BA”) (Crystal Decl., Ex.
8 18). As discussed below, although this Draft BA certainly underscores that RPD *is* taking
9 CRLF at Sharp Park through pumping operations, it does not otherwise bear on this motion.
10

11 ARGUMENT

12 Under Federal Rule of Civil Procedure 56, summary judgment is appropriate “if the
13 pleadings, depositions, answer to interrogatories, and admission on file, together with the
14 affidavits, if any, show that there is no genuine issue as to any material fact and the moving
15 party is entitled to judgment as a matter of law.” *Sluimer v. Verity, Inc.*, 606 F.3d 584, 586 (9th
16 Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Partial summary
17 judgment is appropriate where a party makes that showing on part of a claim, such as
18 demonstrating there is no genuine dispute regarding liability. *See, e.g., Gonzales v. Arrow*
19 *Financial Services, LLC*, 660 F.3d 1055 (9th Cir. 2011) (affirming partial summary judgment
20 on liability); *West Coast Home Builders, Inc. v. Aventis Cropscience USA Inc.*, 2009 WL
21 2612380 (N.D. Cal. Aug 21, 2009) (resolving motion for partial summary judgment on
22 liability).
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25 Here, the record establishes that there is no genuine dispute regarding RPD’s ongoing
26 “take” of CRLF at Sharp Park through massive pumping operations from Horse Stable Pond.
27 Accordingly, Plaintiffs are entitled to partial summary judgment on this liability issue. *See, e.g.*,
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1 *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008) (granting plaintiffs’ motion
2 for summary judgment that the defendant was violating ESA Section 9).

3 **I. The Legal Standard To Establish A “Take” Under the ESA**

4 As the Supreme Court has emphasized, in the ESA Congress defined “take” in the
5 “broadest possible manner to include *every conceivable* way in which a person can ‘take’ or
6 attempt to ‘take’ any fish or wildlife.” *Babbitt v. Sweet Home Chapter of Communities for a*
7 *Great Oregon*, 515 U.S. 687, 704 (1995) (quoting S. Rep. No. 93-307, at 7 (1973)). This broad
8 prohibition on take expressly includes the take of any “egg, or offspring” of a listed species. 16
9 U.S.C. § 1532(8).

10
11 It is well established that unintentional and indirect “take” of protected species is
12 prohibited under the statute. *Sweet Home*, 515 U.S. at 702 (upholding definition of “harm”
13 which includes “indirectly injuring endangered animals through habitat modification”). Thus,
14 for example, logging that will remove trees in which some listed birds breed is a kind of habitat
15 modification that constitutes take – even if the birds are not present when the trees are cut.
16 *Marbled Murrelet v. Babbitt*, 880 F. Supp. 1343 (N.D. Cal. 1995), *aff’d* 83 F.3d 1060 (9th Cir.
17 1996); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995)
18 (finding take based on logging that would impair breeding for a pair of listed owls). Similarly,
19 lighting that impairs the movements of newborn turtles, or off-road vehicle use that threatens
20 newborn birds, have all been found to be unlawful take. *United States v. Town of Plymouth,*
21 *Mass.*, 6 F. Supp.2d 81, 91 (D. Mass. 1998); *Loggerhead Turtle v. County Council of Volusia*
22 *County, Fla.*, 896 F. Supp. 1170 (M.D. Fla. 1995).

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25 Moreover, at least in determining the threshold question of *liability* for take under the
26 ESA it also does not matter how *much* take is occurring. Plaintiffs’ burden is simply to establish
27 an “imminent threat of future harm” to individual members of the species, nothing more. *E.g.*,
28 *Marbled Murrelet*, 83 F.3d at 1064. In *Rosboro Lumber*, for example, the Court of Appeals

1 concluded that this standard was met based on a “claim of future injury to *a pair* of Northern
2 Spotted Owls” through habitat modification. 50 F.3d at 782 (emphasis added).¹⁵

3 Thus, it is a violation of the ESA to engage in an activity likely to cause *any* take of
4 members of a listed species. *See also, e.g., Palila v. Hawaii Dep’t of Land & Nat. Resources,*
5 639 F.2d 495, 497 (9th Cir. 1981) (“The only facts material to [a Section 9 take] case are those
6 relating to the questions whether the [species] is an endangered species and, if so, whether the
7 defendants’ actions *amounted to a taking*”) (emphasis added).¹⁶

9 **II. RPD’s Sharp Park Pumping Operations Are Taking CRLF.**

10 The undisputed facts conclusively establish that RPD is taking CRLF at Sharp Park.
11 The take is both direct – with numerous egg masses killed by pumping operations across several
12 decades – and indirect, through the modification of habitat harming and harassing the species.

15 ¹⁵ In considering Plaintiffs’ request for a preliminary injunction the Court
16 considered whether Plaintiffs had demonstrated sufficient irreparable harm to preliminarily
17 enjoin a long-standing practice, Nov. 29, 2011 Order (DN 86) at 10-12, but that inquiry is not
18 relevant to this motion. At this juncture, Plaintiffs are simply seeking a determination
19 regarding RPD’s *liability*. Although Plaintiffs maintain that Circuit precedent is clear that a
20 final determination of a section 9 violation necessitates the crafting of appropriate injunctive
relief, *e.g. Rosboro Lumber*, 50 F.3d at 785 (explaining that “[o]nce a member of an
endangered species has been injured, the task of preserving that species becomes all the more
difficult”), this motion does not concern relief issues.

21 ¹⁶ Accordingly, even assuming *arguendo* that the extent of the take or its level of
22 impact on the listed species could be a factor in crafting an appropriate final *remedy* for
23 violations of the ESA, for purposes of the present motion the Court need only conclude that
24 *some* unauthorized take of CRLF will likely continue to occur from pumping operations at
25 Sharp Park. *See also, e.g., Sweet Home*, 515 U.S. at 703 (in the course of upholding the
26 definition of “harm,” distinguishing the ESA Section 7 process, which focuses on whether an
27 activity is “likely to jeopardize” a population of a species, from Section 9, explaining that “§ 7
28 contains limitations that § 9 *does not*, applying only to actions “likely to jeopardize the”
species) (emphasis added). To the extent they are deemed relevant to the crafting of an
appropriate remedy, questions concerning the impacts of the take on the CRLF population at
Sharp Park – which Plaintiffs’ experts believe are extremely detrimental over the long-term –
should be addressed at trial.

1 Defendants admit both types of take in numerous documents – including in direct testimony –
2 and thus there is no material dispute about this take liability.

3 **A. Pumping Operations Are Stranding and Desiccating CRLF Egg Masses.**

4 Defendants’ pumping operations cause CRLF egg masses and tadpoles to become
5 stranded (*i.e.*, no longer in contact with water) and desiccated (dried up and dead through such
6 exposure). This ongoing take of a federally listed species has continued *this* winter, just as it has
7 gone on for many winter seasons. *See, e.g.*, Ely Decl. ¶¶ 1-9.

8
9 Indeed, this relationship between the pumping operations and the stranding and
10 desiccation of Frog egg masses at Sharp Park was specifically noted in *listing* the CRLF more
11 than 15 years ago, 61 Fed. Reg. at 25,825-26, and in 2005 the FWS formally notified RPD that
12 its pumping operations were unlawfully taking the species. FWS Letter of Feb. 1, 2005
13 (Crystal Decl., Ex. 14). Although in response to the FWS’s 2005 letter RPD instituted a
14 “pumping protocol” that it claimed would finally resolve this problem, the take of CRLF egg
15 masses nonetheless has continued. *E.g.* Feb. 14, 2007 Egg Mass Data Sheet (Crystal Decl., Ex.
16 19 at 2) (“STRANDED”) ¹⁷; Answer ¶ 58 (“Defendants admit that in 2008, California red-
17 legged frog egg masses were observed exposed above the water line at Sharp Park”); Jan. 29,
18 2008 Egg Mass Data Sheet (Crystal Decl., Ex. 20) (“stranded 7 inches above”; “whole mass
19 stranded”) ¹⁸; Wayne Dep. at 196, l.12-15 (acknowledging that an egg mass without enough
20 water around it is at high risk of stranding). Thus, as Ms. Wayne frankly admitted at her
21 deposition, as recently as 2008 she herself witnessed egg masses in Horse Stable Pond which
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24 ¹⁷ Mr. Campo testified that RPD routinely relies on these Data Sheets to record
25 observations of egg masses in Sharp Park, Campo Dep. at 41, l.17-19, and that where the data
26 sheet indicates an egg mass is “stranded” that means “an egg mass that is out of the water.”
Id. at 48, l.1-2; *see also* Wayne Dep. at 37, l.17-19.

27 ¹⁸ *See also* Wayne Dep. at 188-89 (acknowledging that she filled out this Data
28 Sheet, and that it reflects an eggs mass *7 inches out of water*).

1 were exposed due to pumping operations. Wayne Dep. at 107-113; *see also id.* at 109, 1.2
2 (discussing egg masses that “were kind of falling apart”); *see also* Jan. 31, 2008 email from Lisa
3 Wayne (explaining that some of these egg masses were “highly degraded (my guess from being
4 left out of the water so long)” and that “[d]elays in the management of the pumps has resulted in
5 harm to the frogs already”) (Crystal Decl., Ex. 21).¹⁹

6 In 2008 RPD hired Swaim Biological, Inc., a biological consulting firm, to conduct
7 wildlife surveys and prepare a wildlife report for Sharp Park. Swaim 2008 at 1-1 (Crystal Decl.,
8 Ex. 8). That Report concluded that when the pumps in Horse Stable Pond draw water down
9 “more than a few inches [it] poses a *significant desiccation risk* to developing eggs attached to
10 emergent vegetation and to those deposited in shallow water.” *Id.* at 4-4 (emphasis added); *see*
11 *also id.* (“At Horse Stable Pond, receding water level caused by pumping has stranded egg
12 masses and caused them to dry out”); *see also* Wayne Dep. at 151-52 (acknowledging that
13 Karen Swaim, principle of Swaim Biological, Inc., is familiar with the effects of pumping
14 operations in Sharp Park) *accord, e.g.*, FWS Mar. 11, 2009 Bi-Op for Pacifica Recycled Water
15 Project at 20 (Crystal Decl., Ex. 22) (noting “incidence of red-legged frogs being killed due to
16 the draining of Horse Stable Pond by Sharp Park Golf Course”).
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21 ¹⁹ Since there is no dispute that RPD’s pumping protocol is not and cannot be
22 successful in avoiding the ongoing take of CRLF, the agency’s efforts to protect egg masses
23 are instead classic mitigation and minimization measures designed to *reduce the extent and*
24 *impact* of the take that is inevitably occurring – *i.e.* the kinds of measures the FWS may
25 evaluate and even approve in the context of an appropriate take permit. Thus, while RPD may
26 actively seek to minimize and mitigate this take while also operating a golf course, because
27 those efforts are inevitably unsuccessful in eliminating the take altogether Plaintiffs are
28 entitled to summary judgment on CCSF’s liability until and unless CCSF obtains take
authorization in the manner mandated by the ESA. *See, e.g., Town of Plymouth*, 6 F. Supp.2d
at 91 (finding unlawful take of birds from off-road vehicles even though the court did not
“doubt the good faith or diligence of those employees entrusted with managing Long Beach
and with monitoring the piping plover”).

1 Last winter Mr. Campo observed more than 125 egg masses that he concluded would
2 “become stranded and desiccate” in Sharp Park in the locations where they were laid. Jan. 12,
3 2011 RPD email and Jan. 13, 2011 FWS response (Crystal Decl., Ex. 15 at 4 and 5); *see also*
4 RPD Mar. 2, 2011 email to FWS (Crystal Decl., Ex. 23).²⁰ RPD obtained “emergency salvage”
5 permission from the FWS to allow RPD to relocate these egg masses “only if it is apparent that
6 the egg masses will be stranded and subjected to desiccation if not moved.” Jan. 7, 2011 FWS
7 email (Crystal Decl., Ex. 24); Mar. 1, 2011 FWS email (Crystal Decl., Ex. 25). Thus, as CCSF
8 explained in response to Plaintiffs’ Interrogatories, up until last winter, “*when water level*
9 *variations after heavy rains have put Frog egg masses at risk, San Francisco protects those egg*
10 *masses by relocating them.*” Defendants’ Response to Plaintiffs’ First Set of Interrogatories at 3
11 (Crystal Decl., Ex. 26) (emphasis added); *see also id.* at 8, 1.20 (“San Francisco has taken
12 affirmative steps to relocate stranded Frog egg masses at Sharp Park”); *id.* at 10, 1.27 (“Mr. Jon
13 Campo has in recent years relocated Frog egg masses within Sharp Park as appropriate to
14 preserve those Frog egg masses when water levels recede after heavy rain”).

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17 However, this protocol could only prevent all take of CRLF if RPD staff detect every
18 egg mass laid at Sharp Park. But just last year at least one egg mass was documented exposed
19 to the air *for almost a week* because it had not been detected during RPD survey efforts, and was
20 only identified because of a website posting by Plaintiffs. *See* Snavely Decl. ¶¶ 2-4 ; Bowie
21 Decl. ¶¶ 2-5; Campo Dep. at 117-119; Wayne Dep. at 191-92. This is not an isolated problem:
22 both Mr. Campo and Ms. Wayne frankly testified that they cannot locate all the egg masses
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24 ²⁰ *See, e.g.*, Jan. 21, 2011 RPD email to FWS (Crystal Decl. Ex. 15 at 2)
25 (identifying another 24 egg masses located where “without intervention they will become
26 stranded and desiccate [sic].”). Mr. Campo testified that he translocates egg masses for two
27 reasons: (a) because he is concerned that the egg mass will desiccate if not moved, and (b)
28 because he is concerned there may be insufficient water for the tadpoles to survive. Campo
Dep. at 53-54.

1 during their surveys, given various limiting conditions such as lighting, turbidity, and weather
2 conditions. Campo Dep. at 50, 1.6-9 and 116, 1.10-15; Campo Dep. at 116-17. Thus, since RPD
3 is continuing the “survey methodology that has been in place for 10 years at Sharp Park,” Aug.
4 25, 2011 Permit Appl. (Crystal Decl., Ex. 16 at CCSF 44222), CRLF take will inevitably
5 continue.²¹

6 Moreover, since last December even the “emergency” back-stop of moving egg masses
7 that become stranded – which the Court found relevant to its conclusion that preliminary
8 injunctive relief was unnecessary for this winter season, *see* Order of Nov. 29, 2011 at 14 (DN
9 86) (relying on “defendants’ careful attention to moving any vulnerable egg masses and their
10 continuing interactions with FWS seeking authorization to do so”) – *is no longer available*.
11 Rather, on December 8, 2011, the FWS wrote to RPD and explained that “must obtain incidental
12 take coverage *prior* to seeking the movement of any egg masses” in Sharp Park. Dec. 18, 2011
13 FWS Letter (Crystal Decl., Ex. 1) (emphasis added).²²
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17 ²¹ *See also* Jan 9, 2004 Egg Mass Data Sheet (“visibility of water poor with wind,
18 rain and turbidity”); Dec. 11, 2007 Egg Mass Data Sheet (“light difficult to survey”); Jan. 29,
19 2009 RPD email (noting Mr. Campo had missed “more than half” of 35 egg masses located on
20 January 29, 2009 when he had surveyed for them on January 22 “due to poor light conditions
21 and turbidity in the water”) (collected at Crystal Decl., Ex. 27); Campo Dep. at 116 (Q: “are
22 your confident that you find all of the egg masses in Sharp Park during your surveys?” A:
23 “No.”); *id.* at 50 (Q: “have you told any of them [co-workers] that you cannot find all of the
24 egg masses?” A: “Yes.”); Wayne Dep. at 62-63.

25 ²² The recent FWS letter also bluntly explains that the FWS *has never authorized*
26 *CCSF’s pumping operations*. *Id.* (“The Sacramento Fish and Wildlife Service Office has
27 previously informed your office that operations and management of the Sharp Park golf course
28 are not presently covered for incidental take, and for such coverage to be provided, the
activities must be covered either through an incidental take permit under Section 10(a)(1)(B)
of the ESA, or through the formal consultation process under Section 7 of the ESA”). This
should eliminate any confusion engendered by CCSF’s misstatements to this Court that the
stranding of egg masses through pumping operations *has* been authorized by the FWS. *See,*
e.g., Case Management Report at 3 (DN 43) (“the Service has determined that continued
operation of the pumps in Horse Stable Pond furthers the purposes of the Endangered Species
Act”); *see also* Prelim. Inj. Opp. (DN 63) at 18 (claiming that “any take incidental to pump

1 Nonetheless, as was inevitable, when RPD drained Sharp Park’s wetlands this winter *egg*
2 *masses became stranded at Sharp Park*. Thus, on January 28, 2012, Erica Ely, a herpetology
3 student at San Francisco State University, Ely Decl. ¶ 2, identified two egg masses partially
4 exposed to the air, and two CRLF egg masses stranded on the muddy lagoon bottom, on the
5 edges of Horse Stable Pond and Laguna Salada respectively. *Id.* ¶ 7. Two days later, on
6 January 30, 2012, Ms. Ely observed that one of the two exposed egg masses she identified on
7 January 28 was even further out of the water, stretched out across its aquatic vegetation brace,
8 *id.* ¶ 10, and that a total of 7-8 egg masses were bottomed out on the muddy lagoon bottom of
9 Laguna Salada, with the most severely impacted egg masses having eggs completely exposed to
10 the air and without their protective jelly. *Id.* ¶ 11. When she returned on February 1, 2012, she
11 again saw exposed egg masses, but some had been removed from the lagoon. *Id.* ¶ 12. And
12 most recently, when she returned on February 17, 2012 and February 19th, she again saw the
13 egg mass she had first identified on the edge of Horse Stable Pond on January 28, 2012. *Id.*
14 ¶ 14. During both of those visits the egg mass “was completely exposed to the air and
15 completely desiccated.” *Id.* In addition to Ms. Ely’s observations, Cory Singer, a biologist and
16 graduate of San Francisco State University, also visited the area on February 2, 2012 and
17 identified seven CRLF egg masses that were either partially or completely exposed to the air.
18 Singer Decl. ¶ 3.²³

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22 operations at Horse Stable Pond *is covered* by the 2008 biological opinion and incidental take
23 statement as well as the 2010 amendment”) (emphasis added).

24 ²³ During these visits these witnesses also saw officials with Swaim Consulting
25 looking for CRLF egg masses in Sharp Park water bodies, and green flags indicating that
26 someone – presumably Swaim biologists – had also identified these at-risk egg masses. Singer
27 Decl. ¶ 3; Ely Decl. ¶ 7. During Ms. Ely’s visit to Sharp Park on February 1, 2012, one of the
28 egg masses she had previously seen was gone, and the area where it was located appeared to
have been scooped out. *Id.* ¶ 12. A monitoring flag nearby indicated that the egg mass had been
moved. *Id.* Similarly, when she returned on February 8, 2012, the egg masses she had
previously identified in Laguna Salada were no longer there, and had apparently been relocated.

1 Accordingly, the Court should have no difficulty concluding that RPD's pumping
2 operations are directly taking CRLF within the meaning of the ESA.

3 **B. Pumping Operations Are Also Fundamentally Altering**
4 **CRLF Breeding Habitat in Sharp Park.**

5 In addition to this direct take of the species through pumping operations, RPD is also
6 harming and harassing CRLF by fundamentally degrading and diminishing the species' breeding
7 habitat in Sharp Park. As noted, before the rainy season even begins RPD pumps down Sharp
8 Park water bodies in order to increase flood capacity. *See* Wayne Dep. at 87-88; *see also id.* at
9 133, 1.5-6 (before the winter "we want to get it as low as we can for flood capacity"); *see also*
10 Ascariz Dep. at 42, 1.18-19 ("We like to pump it down, pump it down for when we do have our
11 first rains"); *id.* at 45, 1.20-24; 46, 1.18-22; 79, 1.6-7; *accord* Draft BA at 22 (discussing
12 intentions to lower water levels "to increase water storage capacity"). Then, throughout the
13 winter season, RPD continues to pump away water as it enters the system in an effort to keep the
14 water volume at the same low level where it began. Wayne Dep. at 93-94; *see also id.* at 147,
15 1.9-11 ("Standard post egg mass protocol is to reduce the water levels after the eggs have
16 hatched out to tadpoles"); *id.* at 94, 1.4-8 (Q: "So if you could keep the water level at, say, 1.5
17 throughout the winter, then that's – you would leave it there, there would be no reason to change
18 it other than your detection of egg masses, right?" A: "Right."); *id.* at 130-31.²⁴

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21 *Id.* ¶ 13. Such activities, undertaken without the express approval of the FWS and in the face of
22 the Service's admonition that such relocation of a listed species requires formal incidental take
23 authorization under section 7 or 10 of the ESA, reinforces Plaintiffs' position that RPD's
24 pumping operations entail ongoing and unlawful "take" of the species which requires a FWS
25 permit. 16 U.S.C. § 1532(19) (defining "take" to include "capture").

26 ²⁴ To be sure, under RPD's "pumping protocol," once Frog egg masses are detected
27 RPD tries to maintain the water level to keep the egg masses hydrated, an approach fraught
28 with numerous problems. However, there is no dispute that CCSF routinely pumps the water
out of the Park before the rainy season begins and then during the season, which prevent Frogs
from breeding in certain areas. *See* Ascariz Dep. at 80-82 (explaining that RPD's goal is to

1 These artificially low water levels encourage the growth of vegetation that
2 fundamentally impairs CRLF breeding. See Wayne Dep. at 215, 1.3-5 (explaining that “[i]t’s, I
3 think, fairly well-accepted that these aggressive emergent plants are – do better in water
4 columns that are shallower”); Wayne Dep. at 214, 1.2-3 (“we tend to see frogs lay eggs in areas
5 that have more open water and less dense vegetation”).

6 Indeed, as the 2008 Swaim Report explains, “[t]he primary limiting factor for the CRLF
7 is the deterioration of breeding habitat as Laguna Salada due to a vegetation structure
8 inappropriate for successful breeding.” Swaim 2008 at ES-2; *see also id.* at 4-2 (“The remainder
9 of Laguna Salada wetland lacks areas that are accessible to frogs with both the appropriate water
10 depths and emergent vegetation for breeding and egg mass attachment”).

11 This is a classic example of “harm” under the ESA, which is defined to include
12 “significant habitat modification or degradation where it actually kills or injures fish or wildlife
13 by *significantly impairing essential behavioral patterns, including breeding, feeding or*
14 *sheltering.*” 50 C.F.R. § 17.3 (emphasis added); *see also, e.g., Swinomish Indian Tribal Cmty.*
15 *v. Skagit County Dike Dist. No. 22*, 618 F. Supp. 2d 1262 (W.D. Wash. 2008) (granting
16 summary judgment finding a take based on operations of a tidegate that was removing habitat
17 previously available to juvenile salmon species).²⁵

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21 *avoid* having Frogs lay their eggs at a higher water lever, which RPD would then have to
maintain).

22 ²⁵ Indeed, it was to allow just such modifications of species’ habitat that Congress
23 crafted Section 10 of the ESA, which, as noted, permits the FWS to authorize habitat
24 modifications that take listed species, but only if the species will not be jeopardized and an
25 HCP is approved. *See, e.g., Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976,
26 982-83 (9th Cir. 1985) (discussing the legislative history of ESA Section 10, which in turn
27 referred to a proposal to construct “some 3000 dwelling units on the San Bruno Mountain
28 near San Francisco [that was] also habitat for three endangered butterflies,” which could be
permitted under Section 10, “while at the same time encouraging these developers to become
more actively involved in the conservation of these species”) (quoting S. Rep. No. 97-418, at
10 (1982)); *see also Sweet Home*, 515 U.S. at 707 (explaining how the Section 10 permitting

1 Drawing water down from Sharp Park water bodies also fundamentally alters where
2 CRLF breed by making *less aquatic habitat available*. As is obvious and undisputed, when
3 massive quantities of water are pumped out of a wetlands ecosystem, this must dramatically
4 affect the Frog's normal breeding and other behaviors. Wayne Dep. at 149 (acknowledging that
5 more water in Sharp Park water bodies provides more aquatic habitat for CRLF). In this regard
6 RPD's pumping operations also constitute "harassment" within the meaning of the ESA. *See*
7 50 C.F.R. § 17.3 (defining harassment to include any "intentional or negligent act or omission
8 which creates the likelihood of injury to wildlife by annoying it to such an extent as to
9 significantly disrupt normal behavioral patterns which include, but are not limited to, breeding,
10 feeding, or sheltering.") (emphasis added). Indeed, in *Sweet Home* the Supreme Court
11 explained by way of example of unlawful "harassment" the "activities of birdwatchers where
12 the effect of those activities might disturb the birds and make it difficult for them to hatch or
13 raise their young." 515 U.S. at 705 (quoting H.R. Rep. No. 93-412, at 15 (1973)). If bird
14 watching that "make[s] it difficult" for birds to hatch constitutes "harassment," then *draining a*
15 *waterbody and therefore removing aquatic habitat necessary for breeding is plainly*
16 *"harassment" as well.*²⁶

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24 process further evidences that Congress intended to broadly prohibit take through habitat
modification).

25 ²⁶ The Supreme Court in *Sweet Home* also discussed as an example of unlawful
26 "take" "an activity, such as *draining a pond*," that would destroy a species' breeding habitat.
27 515 U.S. at 699-700. Managing the water in Sharp Park in a manner that destroys the
28 suitability of areas for CRLF breeding, by draining areas and encouraging the overgrowth of
vegetation, is similarly impermissible without an appropriate permit.

1 **III. The FWS Has Not Authorized The Take of CRLF At Sharp Park, And The**
2 **Defendants' Recent Efforts To Initiate The Section 7 Consultation Process**
3 **Reinforce That RPD Is Engaged In An Unlawful Take.**

4 The FWS has never authorized the Sharp Park pumping operations that degrade CRLF
5 breeding habitat and lead to the routine stranding of CRLF egg masses. To the contrary, FWS
6 has recently told RPD that “operations and management of the Sharp Park Golf Course *are not*
7 *presently covered for incidental take.*” Crystal Decl., Ex. 1 (emphasis added). Accordingly,
8 since the sole question here is whether RPD’s management of pumping operations at Sharp
9 Park is reasonably certain to cause at least *some* take of Frog egg masses in the future and/or
10 other modes of take through extensive habitat modification, and RPD presently has no
11 authorization to engage in the activities that cause stranding of egg masses, future unlawful take
12 is not only likely, it is virtually certain at least until and unless RPD finally obtains formal
13 authorization consistent with the ESA.

14 FWS has also recently explained that RPD’s ESA permit to continue surveying for egg
15 masses “does not authorize . . . movement of CRLF egg masses.” Crystal Decl., Ex. 1. But
16 even assuming *arguendo* that RPD could continue moving at-risk egg masses on an *ad-hoc*
17 basis, this mitigation measure would not remove liability for take, since, *inter alia*, it is
18 undisputed that RPD cannot locate all egg masses, and thus last winter Plaintiffs themselves
19 were able to locate an egg mass that was exposed for at least 6 days. Snavelly Decl. ¶ 4; Wayne
20 Dep. at 191-92 (admitting this egg mass was not identified during RPD surveys); *see supra* at 18
21 (discussing surveying limitations).

22 As for the Section 7 process, as noted RPD recently submitted a “Draft BA” seeking to
23 move the consultation process forward; that BA requests that the Service provide authorization
24 for CRLF take caused by pumping operations at Sharp Park. Draft BA at 6 (Crystal Decl., Ex.
25 18). Indeed, in the BA RPD frankly acknowledges that its pumping operations have been taking
26 CRLF egg masses for many years, *id.* at 41 (“Whereas in 2004 and 2005, stranded egg masses
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1 accounted for 25 and 37 percent of observed egg masses in the LS watershed, in 2007 and 2008,
2 they accounted for 10 and 3 percent of the observed egg masses”), and will continue to do so,
3 which, of course, is why RPD is finally seeking authorization under section 7. *Id.* at 51
4 (recognizing that pumping operations can take “CRLF by lowering the water level in HSP
5 during the breeding season and exposing egg masses to the air causing desiccation”); *id.*
6 (RPD pumping operations may “result in desiccation of egg masses”); *id.* (“For example, during
7 the monitoring surveys an egg mass (or masses) that is in a vulnerable situation could be missed
8 in a visual survey or miscommunication regarding target water levels could occur between
9 monitoring staff and the engineers”).

11 However, while the Draft BA further supports the conclusion that Plaintiffs’ are entitled
12 to partial summary judgment here, it certainly does not undermine the need for such a ruling,
13 Defendants’ claims to the contrary notwithstanding. *See* DN 92 at 3 (arguing that the
14 consultation will resolve Plaintiffs’ claim). Indeed, as noted, the Service has already told the
15 Corps that it will not even *begin* the consultation until it receives “detailed conservation
16 measures to avoid and minimize effects to listed species,” FWS Letter of Jan. 18, 2012 (Crystal
17 Decl., Ex. 17), and the general measures contained in the Draft BA – which basically mirror
18 RPD’s existing and wholly inadequate pumping protocols – may not even be accepted by the
19 FWS as a basis for beginning the consultation process. *See* Crystal Decl., Ex. 28 (draft letter to
20 FWS summarizing 2010 meeting between FWS and RPD where FWS listed extensive
21 conditions RPD would have to meet to obtain incidental take authorization). It is similarly
22 uncertain whether RPD, which has been discussing these issues with FWS for many years, *see*
23 Wayne Dep. at 197-99, will continue the process through its completion, or what activities the
24 FWS and Corps may ultimately cover within the scope of a completed consultation and Corps’
25 permitting process.
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1 Moreover, it is apparent that this litigation is what has finally driven RPD to seek
2 authorization for its overall pumping operations, since CCSF previously represented that it
3 would not undertake this process until after it completed its system-wide management plan.
4 Case Management Report at 3 (DN 43). However, while the litigation has prompted RPD to
5 finally start the process, this Court's finding of liability for RPD's take of CRLF will help to
6 ensure that if the process is not completed for any reason, the Court will be in a position to craft
7 appropriate relief following the trial to be held in October, 2012.

8
9 At the end of the day, RPD's own documents and the testimony of its personnel – as well
10 as the section 7 process in which it is now finally engaging – confirm that what is in dispute
11 concerning the impacts of RPD's pumping operations on CRLF egg masses is not *whether* the
12 activities cause effects that constitute take under the ESA, but rather whether Defendants are
13 *addressing* that take through appropriate mitigation actions. Although Plaintiffs' experts
14 strongly believe they are not – and Plaintiffs believe that is the *exact issue* that should best be
15 handled by the expert agency in an incidental take process – at this juncture the Court should
16 resolve in Plaintiffs' favor the narrow but crucial issue of whether there is a Section 9 violation,
17 and allow these other issues to be resolved at trial.

18 CONCLUSION

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20 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion
21 for partial summary judgment. A Proposed Order is attached.

22 Dated: March 2, 2012

23 Respectfully submitted,

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