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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 CENTER FOR BIOLOGICAL DIVERSITY,
16 SIERRA CLUB, WILLITS
17 ENVIRONMENTAL CENTER,
18 ENVIRONMENTAL PROTECTION
19 INFORMATION CENTER,

20 Plaintiffs,

21 CALIFORNIA FARM BUREAU
22 FEDERATION,

23 Plaintiff-Intervenor,

24 v.

25 FEDERAL HIGHWAY ADMINISTRATION,
26 CALIFORNIA DEPARTMENT OF
27 TRANSPORTATION, MALCOLM
28 DOUGHERTY, in his official capacity as
Director of the California Department of
Transportation, U.S. ARMY CORPS OF
ENGINEERS,

Defendants.

Case No. No. CV 12-2172 JSW

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM IN SUPPORT OF
MOTION**

HEARING DATE: October 26, 2012

TIME: 9:00 AM

COURTROOM: 11

JUDGE: Hon. Jeffery S. White

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1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE THAT** at 9:00 am on October 26, 2012, or soon thereafter as
3 counsel may be heard, in the courtroom of the Honorable Jeffrey S. White, located on the 19th Floor
4 of the Federal Courthouse at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs will and
5 hereby do move for a preliminary injunction pursuant to Fed. R. Civ. Proc. 65.

6 Plaintiffs seek a preliminary injunction restraining and enjoining Defendant State of California
7 Department of Transportation (“Caltrans”) and its officers, agents, servants, employees, contractors,
8 attorneys, and all those in active concert or in participation with Caltrans to prevent Caltrans from
9 taking any actions towards completing the Willits Bypass Project (“Bypass”). This motion is made on
10 the ground that immediate and irreparable injury will result to Plaintiffs, the public and the
11 environment unless the Bypass is enjoined pending trial of this action.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Willits Bypass Project (“Project”) as currently proposed will result in a large-scale four
4 lane bypass cutting through acres of wetlands and riparian habitat that surround the community of
5 Willits, California. If allowed to proceed, this Project will irreparably harm the nearby environment
6 including oak woodlands, migratory streams for endangered fish, agricultural lands and grassy
7 hillsides. Plaintiffs bring this motion to prevent the commencement of construction of the Project so
8 as to prevent the destruction of the environment while this case is being heard. Plaintiffs are informed
9 and believe that some construction activity could potentially commence as early as mid-October—
10 unfortunately before the merits of this action will be heard or decided.

11 **II. FACTUAL BACKGROUND**

12 **A. Early Stages of the Project**

13 Caltrans has sought construction of a bypass around the town of Willits in Mendocino County
14 since 1962. *See* Caltrans, *Willits Bypass: Background* (2012)
15 (<http://www.dot.ca.gov/dist1/d1projects/willits/background.htm>). The goal has been to build a new
16 segment of Route 101 that would bypass the town of Willits with the hope of “reliev[ing] congestion,
17 reduc[ing] delays, and improve[ing] safety for interregional traffic.” *Id.* From its conception, the
18 bypass has been envisioned as a four-lane freeway, with Caltrans deeming no other alternatives
19 sufficient for the needs of interregional traffic or the community. However, throughout the life of the
20 Project, members of the community and other government agencies have supported alternatives to the
21 four-lane freeway design, citing the bypass’s significant environmental impacts, the Project’s
22 questionable need, and serious funding constraints. Declaration of Ellen Drell, ¶3, 4; *see also* *See*
23 Caltrans, *Willits Bypass: Background* (2012)
24 (<http://www.dot.ca.gov/dist1/d1projects/willits/background.htm>).

25 Ignoring these concerns, in 1994 Caltrans and FHWA again only fully considered four-lane
26 freeway alternatives when the agencies established the Project’s “purpose and need” as part of the
27 planning process. *See* Caltrans, *Willits Bypass: Background* (2012)
28 (<http://www.dot.ca.gov/dist1/d1projects/willits/background.htm>). This inevitably led to a multi-

1 agency planning process concluding that only a four-lane freeway would meet the purpose and need of
2 the Project to relieve congestion, reduce delays and improve safety for interregional traffic. Alternative
3 routes, two-lane alternatives, and other traffic solutions were proposed by the public but deemed to not
4 satisfy the four-lane purpose and need of the Project. Declaration of Richard Estabrook, ¶ 4.

5 Since 1994, projected traffic increases have not been realized and traffic volumes have
6 demonstrated that a four-lane freeway is not necessary to accomplish the Project’s primary goals of
7 relieving congestion, reducing delays and improving safety for interregional traffic, and that other
8 options, including two-lane alternatives that have never been adequately considered, would meet most
9 of the objectives of the Project while having the least impact on the environment. Declaration of
10 Richard Estabrook, ¶ 13, 14. Yet the purpose and need of the Project has never been sufficiently re-
11 evaluated.

12 **B. Drafting of the EIS**

13 The most recent Environmental Impact Statement (“EIS”) for the Project was drafted in
14 2002 and finalized in 2006. The Project’s design called for substantial impacts to the environment
15 surrounding Willits, including loss of vital riparian habitat and oak woodlands, destruction of wetlands,
16 leveling of hillsides, movement of million cubic yards of fill, deterioration of salmon and steelhead
17 migratory streams and altering the floodplain of Little Lake Valley and direct conversion of agricultural
18 land. *See* Exhibit 1 (DEIS: Summary (2002)). However neither the draft nor final EIS contemplated
19 either the phased construction plan that is now the current proposal for the Project or the current
20 Monitoring and Mitigation Plan (“MMP”) involving direct and indirect impacts to some 2,000 acres of
21 exiting agricultural lands. As part of its alternatives analysis, the Final EIS considered four alternatives
22 to the Project, all of which were variations on a four-lane freeway design and a no build alternative. *See*
23 Exhibit 1 (DEIS: Appendix H NEPA/404 Alternative Analysis, H-1 (2002)). Alternative J1T, which
24 called for a four lane freeway bypass with “a center valley alignment that stays close to the developed
25 portion of Willits to minimize impacts to the agricultural land” was adopted both by the EIS and by the
26 U.S. Army Corps of Engineers in their Least Environmentally Damaging Practicable Alternative
27 (“LEDPA”) analysis. Exhibit 1 (DEIS at 5-128 (2002)).

1 **C. Significant Changes and Ongoing Revisions of the Project**

2 Since the 2006 Final EIS, Caltrans and other agencies working on the Project have released many
3 documents detailing changes to the Project that describe significant new impacts on the environment.
4 Documents hinting at changes to the Project and its environmental impacts include Caltrans' 2010 and
5 2011 Biological Assessments, Caltrans' 2010 and 2011 NEPA/CEQA Revalidation Documents, 2011
6 Mitigation and Monitoring Plan as part of the Clean Water Act 404 permitting process, Supplemental
7 EIR on Northern Semaphore Grass, June 2010 and January 2012 National Marine Fisheries Service
8 Biological Opinion, April 2012 Draft Grazing Plan, 2010 California Department of Fish and Game
9 Streambed Alteration Agreement and Incidental Take Permit and 2010 401 Conditional Permit.

10 Some of the changes to the Project and changed circumstances that will significantly alter its
11 impact on the environment that were brought to light through these documents include a new phased
12 construction plan and alteration of the Bypass footprint, resulting in new impacts to additional areas in
13 Little Lake Valley, increased habitat loss for the threatened Baker's meadowfoam, destruction of
14 additional wetland, oak woodlands and riparian habitat, additional degradation to habitat of federally
15 endangered and threatened fish, as well as significant new impacts to agricultural lands. *See* Exhibit 8
16 (2010 NEPA/CEQA Revalidation Document); Exhibit 9 (2011 NEPA/CEQA Revalidation Documents);
17 *see also* Declaration of Ellen Drell, ¶ 10, 11, 12.

18 In particular, the new phased approach of the Project would require two periods of construction
19 potentially years apart, with Phase I construction alone expected to last approximately five years.
20 Exhibit 2 (2012 Mitigation and Monitoring Plan: Figure 7-1 (hereinafter "2012 MMP")); Exhibit 3
21 (2012 NMFS Biological Opinion at 5). Phase I will create a "functional interim facility" with two
22 lanes and four lanes worth of fill. Exhibit 8 (2010 NEPA/CEQA Revalidation Document at 3.) Two
23 additional lanes will be built during Phase II of the construction. *Id.* This is in contrast to the original
24 timeline for construction of the Project which was 3 years for the full four-lane bypass. Exhibit 4
25 (Final EIS at 1-4). Lengthening and dividing the construction phases of the Project is expected to
26 bring damaging road-building activities such as pile-driving, creation of staging areas, new haul and
27 access roads, movement of earthen material, construction of concrete batch plants, temporary bridge
28 construction, stream dewatering and transportation of needed materials into sensitive wetlands,

1 salmon-bearing streams, and riparian habitat *twice* over two different periods of construction. *See*
2 Exhibit 8 (2010 NEPA/CEQA Revalidation Document (detailing the impacts of construction on the
3 environment and the new impacts from the phasing approach)).

4 More straightforward are the new changes to the Project that will directly impact vegetation by
5 forcing its removal or destroying its habitat and direct conversion of agricultural lands located within
6 the Project footprint. In comparison to environmental impacts described in the 2006 Final EIS, the
7 current design of the Project harms more acres of the listed Baker's meadowfoam, including 30 new
8 acres of temporary impacts to the plant's habitat. Exhibit 9 (2011 NEPA/CEQA Revalidation
9 Document, 3-4 (2011)). The Project will also result in permanent loss of 5 percent of total occupied
10 habitat of North Coast semaphore grass in Little Lake Valley, none of which was discussed in the
11 2006 EIS because the occurrence of the listed species was discovered after the release of the
12 document. Exhibit 8 (2010 NEPA/CEQA Revalidation Document, 13 (2010)). Changes to the
13 Project will also result in additional acres of wetlands being filled or temporarily disturbed, damage to
14 an additional 26 acres oak woodland grassland and related mitigation resulting in permanent
15 conversion of some 400 acres of existing grazing lands and significant grazing and management
16 restrictions on 1,600 acres. *Id.* at 17, 26; Exhibit 9 (2011 NEPA/CEQA Revalidation Document, 5
17 (2011)); Exhibit 5 (U.S. Army Corp Permit Evaluation and Decision Document, Appendix 2: Corps
18 Review of Applicant Response to Comments on Special Public Notice, 24 (2012)). In fact the Willits
19 Bypass project is now among the largest wetland fill development projects authorized by the Army
20 Corps San Francisco District in the last 20 years. Declaration of Peter Baye, ¶5.

21 Other key changes from the Project redesign will pose new and significant environmental
22 impacts on federally listed Northern California steelhead, Southern Oregon/Northern California coho
23 salmon, and California Coastal Chinook salmon. Exhibit 8 (2010 NEPA/CEQA Revalidation
24 Document, 10 (2010)). The Project redesign will also pose new unexamined impacts on each of these
25 endangered and threatened fish that rely on streams in Little Lake Valley. Declaration of Gordon
26 Becker, ¶ 23-26. These impacts include but are not limited to more stream crossings, alteration of
27 water flow from dewatering, greater soil disturbance increasing the potential for sedimentation of
28 spawning and rearing habitat, removal of riparian vegetation at stream crossing leading to increasing

1 in water temperature, and decreases in water quality. *Id.* Despite these numerous and distinct new
2 circumstances, Caltrans and FHWA have not prepared a Supplemental EIS to analyze how each of
3 these new changes will impact the environment or the cumulative impacts of the changes.

4 The current plan for the Project calls for a four-lane freeway approximately 5.9 miles that
5 begins 0.8 miles south of the current Haehl Creek Overhead and ends 1.8 miles south of the Reynolds
6 Highway. Caltrans, *Willits Bypass Background* (2012)
7 (<http://www.dot.ca.gov/dist1/d1projects/willits/status.htm>) The 5.9 mile long Willits Bypass roadway
8 alignment essentially follows the valley floor, thus involving construction-phase and long-term
9 impacts to streams that serve migratory fish such as Upp, Mill, Broad, Baechtel and Haehl creeks and
10 patches of wetlands and riparian forests that dot Little Lake Valley. Declaration of Gordon Becker,
11 ¶15. Substantially altering the existing drainage patterns of Outlet creek and its Little Lake Valley
12 tributaries as well as destroying acres of oak woodlands and wetlands, the Project will be constructed
13 in phases and could last over ten years.

14 **D. Current Project Construction Timeline**

15 According to Caltrans' projected Project timeline, the contract for the Project will be awarded
16 in the late summer so that construction of the Project can begin in the fall. Caltrans, *Willits Bypass:
17 Status and Schedule* (2012) (<http://www.dot.ca.gov/dist1/d1projects/willits/status.htm>). As of now,
18 Caltrans is on schedule and has awarded the bid to a non-local contractor. *Ukiah Daily Journal*, \$107
19 Million Contract Awarded for Willits Bypass (Sept. 5, 2012) (available at
20 http://www.ukiahdailyjournal.com/ci_21473584/107-mil-contract-awarded-willits-bypass). After
21 receiving Caltrans' approval of the contract, the winner of the bid must begin acquiring the necessary
22 permits and approvals to begin construction. *See* Exhibit 6 (Caltrans: Notice To Bidders And Special
23 Provisions For Construction On State Highway In Mendocino County In And Near Willits From 1.3
24 Km South Of Haehl Overhead To 2.9 Km South Of Reynolds Highway (May 14, 2012) (hereinafter
25 Notice to Bidders)). Following a 55 day waiting period between the awarding of the contract and the
26 beginning of construction, the contractor can begin construction. *Id.* Based on the information
27 provided by Caltrans that means construction of the Project will likely begin in October of this year.

1 **III. LEGAL STANDARD**

2 To be granted a preliminary injunction, a plaintiff must show that: “[(1)] that he is likely to
3 succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary
4 relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public
5 interest.” *Am. Trucking Assns. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The
6 purpose of a preliminary injunction is to “preserve[s] the status quo pending at least some discovery
7 and further hearing on the merits.” *Alliance for The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th
8 Cir. 2011). Because a preliminary injunction can be granted early on during litigation, “the factual
9 record under consideration at the preliminary injunction stage may differ materially from the fully
10 developed factual record.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873,
11 876-77 (9th Cir. 2009).

12 When evaluating a motion for preliminary injunction, “a court employs a sliding scale when
13 considering a plaintiff’s showing as to the likelihood of success on the merits and the likelihood of
14 irreparable harm.” *Sun Earth, Inc. v. Sun Earth Solar Power Co.*, 2012 U.S. Dist. LEXIS 13506, *15-
15 16 (N.D. Cal. Feb. 3, 2012). Under the sliding scale approach, “the elements of the preliminary
16 injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of
17 another.” *Alliance for the Wild Rockies*, 632 F.3d at 1131 (9th Cir. 2011). Therefore an injunction
18 should issue where there are “serious questions going to the merits” and where the balance of
19 hardships sharply in plaintiffs’ favor, provided that there is a likelihood of irreparable injury and that
20 the injunction is in the public interest. *Id.* at 1132, 1135.

21 **IV. ARGUMENT**

22 Plaintiffs can clearly meet each of the four elements required for a preliminary injunction.
23 First, without a preliminary injunction, construction on the Willits Bypass is expected to begin in the
24 fall. As early as October, construction of the Project would result in the cutting down of mature oak
25 forests and riparian vegetation. Many of these trees serve a vital role in the habitat and streams used
26 by endangered and threatened migratory fish and will be impacted by this Project. Second, because
27 Plaintiffs can show new significant and substantial environmental impacts from the Project which
28 were not evaluated in the Final EIS, Plaintiffs will likely succeed on the merits of this case. Third,

1 while Defendants may suffer some economic consequences by halting or delaying construction this
2 fall, these consequences are outweighed by the irreparable and substantial harm Plaintiffs will bear if
3 this motion is not granted. In light of these differing consequences, the balance of equities tips in
4 favor of Plaintiffs. And lastly, the public interest is served both by preventing irretrievable
5 environmental harm and by transparent, thorough and adequate environmental analysis.

6 **A. In the Absence of Injunctive Relief, Plaintiffs are Likely to be Irreparably and**
7 **Imminently Injured**

8 The environmental injuries at risk from this Project are both irreparable and imminent, thereby
9 justify granting injunctive relief. Irreparable injuries are those injuries which cannot be adequately
10 remedied by money damages or other legal remedies and the injuries are “permanent or at least of long
11 duration.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). In essence, irreparable
12 injuries are those where failure to enter the injunction would render final judgment useless because of
13 the harm already occurred. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

14 When contemplating whether an injury rises to the standard of irreparable, courts have given
15 special consideration to environmental injuries. Environmental injuries often are irreparable because
16 they “can seldom be adequately remedied by money damages and is often permanent or at least of
17 long duration.” *Amoco Production Co.*, 480 U.S. at 545. However, not every “potential
18 environmental injury automatically merits an injunction;” it is only those injuries that are *likely* that
19 meet the requirements of a preliminary injunction. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th
20 Cir. 2008); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22-23, 129 S. Ct. 365, 172 L. Ed.
21 2d 249 (2008). To be likely, an injury must not be speculative or remote and with the potential for
22 harm imminent. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).
23 Here Caltrans has made clear that construction and with it significant environmental impacts
24 (including cutting of trees and loss of habitat) are expected to begin as early as this fall. Therefore the
25 environmental impacts from the construction are not only irreparable but also imminent.
26
27
28

1 *i. The Cutting Down of Tress from Initial Project Construction would be an*
2 *Irreparable and Imminent Injury*

3 As noted above, construction on the Project is scheduled to begin in fall, most likely by the end
4 of October. Caltrans, *Willits Bypass: Status and Schedule* (2012)
5 (<http://www.dot.ca.gov/dist1/d1projects/willits/status.htm>). Based on conversations with Caltrans
6 representatives and construction-related documents released by the agency, Plaintiffs are informed and
7 believe that initial phases of construction will involve the cutting down of a variety of trees along the
8 Bypass's footprint. Declaration of Ellen Drell, ¶5, 6; *see also* Declaration of Aruna Prabhala, ¶2. The
9 5.9 mile Bypass winds through areas of oak woodland and riparian forests all of which have been
10 proposed for removal. The trees that will be cut down serve as habitat for migratory birds and provide
11 vital shade to riparian habitat and streams of migratory endangered fish. Declaration of Gary Hughes,
12 ¶ 8, 9, 10. Specific trees that will be cut down to make way for initial construction of the project will
13 include:

- 14 a. At proposed site of the southern interchange mixed conifers and hardwood forest will be
15 removed to make room for the southbound on-ramp
- 16 b. Oak woodlands including individual heritage trees that are in the proposed path of the
17 Bypass and the northbound off-ramp
- 18 c. South of East Hill Road there is a mix of conifer and oaks on the eastern edge of a wet
19 meadow
- 20 d. North of East Hill Road additional oak trees South and north of Center Valley Road: riparian
21 vegetation along Heahl Creek and Baechtel Creek.
- 22 e. North of Hearst Road individual valley oaks and multi-hundred year-old valley oaks
- 23 f. Where the Bypass and railroad over-crossing a grove of oaks, including one oak tree that is
24 estimated to be over 200 years old.
- 25 g. At the proposed site of the northern interchange oaks tree and several acres of continuous
26 riparian forest that consists of Oregon ash and willow
- 27
- 28

1 h. At Oil Well Hill, which is borrow site and will be used for fill for the Project,
2 approximately twelve acres of mixed conifer forest will be cut down. *See* Declaration of
3 Ellen Drell, ¶7, 8; *see also* Exhibit 7 (Aerial Maps of Willits Bypass).

4 The timing of the tree cutting is dictated in part by the strict work window restrictions and
5 order of work detailed by Caltrans in their Notice to Bidders and Special Provision for the Project. *See*
6 Exhibit 6 (Notice to Bidders). For example, Caltrans specified that “Tree removal or topping of trees
7 to be removed will take place after August 31 and prior to February 1 of each year.” *Id.* at 62; *see also*
8 *Id.* at 80 (“Above-ground riparian vegetation removal from stream banks shall only occur between
9 September 1 through January 31 of any year). Similarly in the Final EIS, Caltrans planned for
10 “vegetation removal [on Oil Well Hill] will take place from October 1st through February 1st.”
11 Exhibit 4 (Final EIS: Appendix G 9-9 (2006); *see also* Final EIS 2-12 (states that the first activities
12 will involve clearing of construction sites). Although no specific dates are listed in these documents,
13 these construction activities are nonetheless imminent. Because construction can begin on “the 55th
14 day after contract approval,” which is anticipated in September, the trees described above could be cut
15 down as soon as end of October. Exhibit 6 (Notice to Bidders at 20).

16 Therefore there is ample evidence that numerous hundred-year-old oak trees, Oregon ash and
17 willows could be cut down before the end of this year without a preliminary injunction to temporarily
18 halt construction of the Bypass. The loss of such trees is an irreparable injury since Caltrans cannot
19 replace the lost trees or reverse the harmful impacts to the surrounding environment after the
20 conclusion of this case.

21 ***ii. The Removal of Vegetation to Accommodate Construction of the Bypass***
22 ***would be an Irreparable and Imminent Injury***

23 Similar to the impacts to trees described above, riparian vegetation along the proposed path of
24 the Bypass will be removed as part of initial construction of the Project. In particular, riparian
25 vegetation along the four crossings of Haehl Creek will be removed to accommodate the Project. *See*
26 Exhibit 7 (Aerial maps of Project showing vegetation along Bypass’s route); *see also* Declaration of
27 Ellen Drell, ¶8; *see also* Declaration of Gary Hughes, ¶7. Near Center Valley Road, riparian
28 vegetation that now lines the sides of Haehl Creek will be removed during early construction. *Id.*

1 South of Hearst Road, wet meadow vegetation will also be removed. Declaration of Ellen Drell, ¶8.
2 Additionally, significant loss of riparian vegetation will occur at the confluence of Baechtel and
3 Broaddus Creek, both of which provide habitat for salmon and steelhead migration. Riparian
4 vegetation along Mill Creek, which include oak trees, will also have to be cleared. Declaration of
5 Ellen Drell, ¶8. Lastly, to make way for the northern interchange of the Bypass, several acres of
6 riparian forest of Oregon ash and willow trees will be cleared. *See* Exhibit 7 (Aerial map of Bypass
7 Route showing vegetation); *see also* Declaration of Ellen Drell, ¶8.

8 Aside from the loss of the vegetation itself, riparian vegetation removal will impact the
9 surrounding environment. For example, “where extensive riparian vegetation would be removed by
10 large channel realignments, particularly in critical salmonid habitat areas, there would likely be severe
11 consequences to the habitat quality by increased stream temperatures.” Exhibit 1 (Draft EIS at 5-45).
12 As noted above, an irreparable environmental injury is one that cannot be “adequately remedied by
13 money damages and is often permanent or at least of long duration.” *Amoco Production Co.*, 480 U.S.
14 at 545. The removal of riparian vegetation and subsequent consequences to the surrounding habitat
15 cannot be remedied by future monetary damages or remedial actions and will permanently alter the
16 environment of Little Lake Valley. Without injunctive relief, these environmental damages will come
17 to pass and Plaintiffs will be unable to achieve adequate relief regardless of whether they succeed on
18 the merits of the action.

19 ***iii. The Impacts on Migratory Streams for Endangered and Threatened Fish are***
20 ***an Irreparable and Imminent Injury***

21 The imminent environmental impacts of the Project construction are not limited to vegetation.
22 Little Lake Valley and the Project site are home to numerous streams and tributaries that support fish
23 passage and migration. In particular, the Outlet Creek basin, where the Project is located, contains one
24 the most extensive salmonid habitat resources of the upper Eel River tributaries and the basin’s coho
25 salmon population represents the long migration of wild, non-hatchery influenced left in California.
26 Declaration of Gordon Becker, ¶3. Outlet Creek and other nearby streams serves as spawning and
27 rearing habitat as well as a migratory corridor to endangered and threatened coho and Chinook salmon
28 and steelhead trout. *Id.* at ¶8, 12, 13. The Willits Bypass will result in construction and long-term

1 impacts to Outlet Creek and the lower portions of Upp, Mill, Broadus, Baechtel and Haehl creeks. *Id.* at
2 15. The proposed Project has the potential to disrupt migratory patterns and degrade stream habitat as
3 noted in the Final EIS for the Project. *See* Exhibit 4 (Final EIS 5.7.3.5) These impacts could be realized
4 in the coming months from initial construction activities that will results in the removal of riparian
5 vegetation along Haehl, Baechtel, Broadus, Mill and Upp Creek, changes to in-channel conditions,
6 increased water temperatures, and decreased water quality. Declaration of Gordon Becker, ¶ 25. These
7 impacts could lead to permanent harm to the affected fish species by delaying or preventing in-migrating
8 adult or out-migrating juveniles' passage due to construction activities. *Id.* at ¶ 19, 20. Courts have
9 found that such "permanent damage to a sensitive species...may indeed be irreparable." *Sierra Club v.*
10 *Bosworth*, 2005 U.S. Dist. LEXIS 27573, 38 (2005). Therefore the irreparable and imminent injury
11 facing migratory fish from the Project construction help justify the granting of Plaintiffs' request for
12 injunctive relief until the case can be resolved on its merits.

13 ***iv. Draining of and Alteration of Wetlands as part of Project Construction and***
14 ***Mitigation would be an Irreparable and Imminent Injury***

15 Caltrans' current construction plans call for the draining of wetlands impacted by the Project to
16 occur in the beginning of 2013. Declaration by Aruna Prabhala, ¶ 2. Construction of the Bypass
17 cannot move forward unless much of the wetlands along the footprint of the Project are completely
18 drained and those immediate Project impact will cause irreversible and irreparable injury to affected
19 wetlands. Declaration of Peter Baye, ¶13. Wetland soils and subsoils altered by drainage, trenching,
20 dewatering, oxidation, and compaction by heavy equipment are generally very difficult (if not
21 impossible), to rehabilitate or restore to approximate pre-impact conditions. *Id.* at ¶ 17. Any potential
22 restoration would occur only after a long period of time (relative to human lifespan), and only with high
23 uncertainty due to significant risk of the altered wetland changing to an alternative wetland type or
24 structure, thereby preventing recovery of the existing wetlands. *Id.* Therefore any wetlands in Little
25 Lake Valley that is drained as part of early Project construction, the land and habitat it supports will be
26 irreparably harmed. Declaration of Plaintiffs and/or wetlands expert. Therefore, any relief Plaintiffs
27 could receive after succeeding on the merits would be meaningless. *Doran*, 422 U.S. at 932 (1975).

1 In addition, Project activities impacting jurisdictional wetlands under the Clean Water Act will
2 in turn trigger permanent mitigation requirements. Mitigation obligations for the Project will
3 currently impacting over 2,000 acres of existing agricultural lands, including the loss of some 400
4 acres of existing grazing lands, along with the associated habitats and ecological functions of these
5 lands. (Exhibit 2, 2012 Final Mitigation and Monitoring Plan) Unless Project activities affecting
6 wetlands are stayed pending resolution of this action, farmland will be permanently lost through direct
7 conversion under the Project's footprint as well as conversion through the mitigation obligations.

8 Although each of the environmental impacts listed above are significant on their own, when
9 taken together it is clear that without a preliminary injunction the environment of Little Lake Valley
10 will be fundamentally altered prior to the conclusion of this case. Here "even if plaintiff ultimately
11 wins, much of the environmental harm will already have occurred and alternatives will have been
12 foreclosed. In sum, absent an injunction, plaintiff is highly likely imminently to suffer irreparable
13 injury from the alleged NEPA breach." *Save Strawberry Canyon v. DOE*, 613 F. Supp. 2d 1177,
14 1189-1190 (N.D. Cal. 2009). Therefore, a preliminary injunction is not only appropriate but is also
15 necessary.

16 **B. There are Serious Questions Going to the Merits of the Case and Plaintiffs are**
17 **Likely to Succeed on the Merits**

18 As noted above, when evaluating whether a preliminary injunction is warranted the Ninth
19 Circuit employs the sliding scale approach where an injunction should be issued where there are
20 "serious questions going to the merits" and where the balance of hardships fall sharply in plaintiffs'
21 favor, provided that there is a likelihood of irreparable injury and that the injunction is in the public
22 interest. *Alliance for the Wild Rockies*, 632 F.3d at 1135 (2011). Even without the full administrative
23 record available, Plaintiffs can show not only that there are serious questions going to the merits of the
24 case but also that Plaintiffs are likely to succeed on the merits.

25 "Serious questions" are those that are "substantial, difficult and doubtful, requiring a more
26 thorough investigation." *Northwest Env'tl. Def. Ctr. v. United States Army Corps of Eng'rs*, 817 F.
27 Supp. 2d 1290, 1302 (D. Or. 2011) (citing *Rep. of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th
28 Cir. 1988)). Plaintiffs allege that Caltrans and FHWA have failed to comply with their obligations

1 under the National Environmental Policy Act (“NEPA”) by failing to supplement the Final EIS in light
2 of significant new environmental impacts from the Project and by failing to adequately consider all
3 reasonable alternatives to the Project. Both case law and the factual history of the Project, at a
4 minimum, raise serious questions as to whether Caltrans has fully complied with its NEPA obligations
5 and strongly suggest that Plaintiffs will succeed on the merits in this case.

6 ***i. Standard of Review for the Merits: Caltrans’ Alleged Violations of NEPA***
7 ***are Reviewable under the APA***

8 Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the
9 environment.” 42 U.S.C. § 4331. The cornerstone of NEPA is the environmental impact statement
10 (“EIS”) that must be prepared for all “major federal actions significantly affecting the quality of the
11 human environment.” 42 U.S.C. § 4332. NEPA’s implementing regulations require federal agencies
12 to prepare supplements to a final EIS if there are “significant new circumstances or information
13 relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §
14 1502.9(c)(1)(ii).

15 Whether FHWA and Caltrans¹ have fully met their obligations under NEPA is reviewable
16 under the Administrative Procedure Act (“APA”). *See Friends of Yosemite Valley v. Norton*, 348 F.3d
17 789, 793 (9th Cir. Cal. 2003). Under the APA, a reviewing court must “hold unlawful and set aside
18 agency actions that are . . . arbitrary, capricious, and an abuse of discretion, or otherwise not in
19 accordance with law . . . [or] without observance of procedure required by law.” 5 U.S.C. §§
20 706(2)(A), 706(2)(D). A court must “engage in a searching and careful inquiry, the keystone of which
21 is to ensure that the [agency] engaged in reasoned decision making,” *Nw. Coal. for Alternatives to*
22 *Pesticides v. U.S. E.P.A.*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotations omitted), to
23

24
25 ¹ Caltrans is responsible for ensuring that the Project has met all federally-mandated requirements,
26 including those that arise under NEPA, pursuant to a 2007 Memorandum of Understanding (“MOU”)
27 and Section 327 of the Surface Transportation and Project Delivery Pilot Program. 27 U.S.C § 327.
28 Caltrans is thus a proper subject of this motion. FHWA has filed a motion to dismiss in this action, but
as of the date of this filing, FHWA is still a proper party to the suit and therefore a proper subject of this
motion as well.

1 determine whether the agency’s conclusions are rationally supported, complete, reasoned, and
2 adequately explained. *Id.* “Ultimately, [the court’s] role ‘is to insure that the agency has taken a “hard
3 look” at environmental consequences [of the proposed action].” *Cal. Wilderness Coal. v. U.S. DOE*,
4 631 F.3d 1072, 1097 (9th Cir. 2011) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

5 ***ii. Plaintiffs are likely to Prevail on the Claim that Defendants have Violated***
6 ***NEPA by Failing to Supplement the Final EIS***

7 When there is new information “sufficient to show that the remaining federal action will affect
8 the quality of the human environment in a *significant* manner or to a *significant* extent not already
9 considered, a supplemental EIS must be prepared.” *Marsh v. Oregon Natural Resources Council*, 490
10 U.S. 360, 374 (1989) (emphasis added); *see also* 40 C.F.R. § 1502.9(c)(1)(ii) (NEPA’s implementing
11 regulations require federal agencies to prepare supplements to a final EIS if there are “significant new
12 circumstances or information relevant to environmental concerns and bearing on the proposed action
13 or its impacts”). As noted above, in the six years since the Final EIS was published there have been
14 numerous changes to the Project, many of which will result in significant environmental impacts that
15 were not considered in the EIS.

16 Significance in the context of NEPA is determined by two factors: context and intensity. 40
17 C.F.R. §1508.27. Context looks to “the affected region, the affected interests and the locality” of the
18 action. 40 C.F.R. §1508.27(a). Whereas intensity refers to the severity of the impact, including both
19 beneficial and adverse impacts. 40 C.F.R. §1508.27(b). Factors determining the intensity of impact
20 include the unique characteristics of the geographic areas such as proximity to prime farmlands and
21 wetlands, controversial or unique impacts, cumulative impacts, and the degree of adverse affect on
22 endangered or threatened species or its habitat. *Id.*

23 **1. Changes to the Construction Design of the Project will have**
24 **Significant Environmental Impacts that Justify a Supplemental**
25 **EIS**

26 After facing years of funding shortages, Caltrans choose to implement design changes including
27 phasing the construction of the Project. Exhibit 8 (2010 NEPA/CEQA Revalidation Document, 3
28 (2010)). As noted above the new phased approach of the Project would require two periods of

1 construction potentially years apart, with construction now lasting nearly double the length of time
2 originally disclosed and analyzed in the Final EIS. Exhibit 10 (2010 NMFS Biological Opinion at 13);
3 Exhibit 4 (Final EIS at 1-4 (2006)). Lengthening and dividing the construction phases of the Project is
4 expected to bring damaging road-building activities such as pile-driving, creation of staging areas, new
5 haul and access roads, movement of earthen material, construction of concrete batch plants, temporary
6 bridge construction, stream dewatering and transportation of needed materials into sensitive wetlands,
7 salmon-bearing streams, and riparian habitat *twice* over two different periods of construction. *See*
8 Exhibit 8 (2010 NEPA/CEQA Revalidation Document (detailing the impacts of construction on the
9 environment and the new impacts from the phasing approach)). These impacts will hurt numerous
10 aspects of the environment by damaging the habitat of wildlife and sustainability of the ecosystems.

11 In both context and intensity these new impacts will be significant environmental impacts. For
12 example, migratory fish will be unable to use several streams for passage due to stream dewatering and
13 pile driving. Entering the construction site a second time for Phase II will require additional removal of
14 vegetation. NMFS highlighted this and other construction related concerns when they stated “the extent
15 of take to juvenile steelhead is likely to persist in the action area for at least a five-year period...[and]
16 elevated water temperatures may persist for as long as ten years, depending upon how quickly proposed
17 re-vegetation provides shade to the affected stream reaches.” Exhibit 10 (2010 NMFS Biological
18 Opinion, 66).

19 The Project redesign has also resulted in significant changes in the amount of fill required for the
20 Bypass. In the Final EIS, the chosen modified alternative J1T was estimated to require 1.0 million cubic
21 meters (or 1.3 million cubic yards) of imported fill. Exhibit 4 (Final EIS, 2-8, 2-9 (2006)). However in
22 the Army Corps’ Decision Document discussing the CWA 404 permit issued for the Project, the Bypass
23 is now estimated to require 2.5 million cubic yards of fill material, or almost double the Final EIS
24 estimate. Exhibit 5 (US Army Corp Decision Document, 4 (2012)). It remains unclear where this
25 additional fill will come from and where along the Project site it will be placed. This nearly doubling of
26 the amount of fill is a changed circumstance that will have significant environmental impacts on the
27 Project site and surrounding environment. These examples of changes to the Project’s design that have
28

1 significant environmental impacts show that a supplement EIS is both warranted and necessary prior to
2 construction of the Bypass.

3 **2. Additional Changes in Land Management Practices on**
4 **Mitigation Lands will have Significant Environmental Impacts**
5 **that Justify a Supplemental EIS**

6 Since the 2006 Final Environmental Impact Statement (“EIS”) was adopted, the amount of
7 agricultural land impacted by the Project has increased from less than 150 acres in 2006 to over 2,000
8 acres today. Of this additional farmland impacted, over 400 acres will be permanently converted from
9 agricultural use with remaining acreage being affected, but in ways that are not known. Exhibit 2
10 (2012 Mitigation and Monitoring Plan); *see also* Exhibit 5 (U.S. Army Corp Permit Evaluation and
11 Decision Document, Appendix 2: Corps Review of Applicant Response to Comments on Special Public
12 Notice, 24 (2012)). There have been significant concerns about the Project’s impact on agricultural
13 land. As explained in the 2002 Draft EIS, the LEDPA (Alternative J1T) was specifically adopted in
14 order to “minimize impacts to the agricultural land.” Exhibit 1 (DEIS at 5-128 (2002)).

15 Notwithstanding this, the Corps 2012 MMP subsequently expands the impacts to agricultural
16 land without adequate supplemental environmental review. Such impacts are significant as they
17 include sizeable losses of agricultural lands, complete restrictions and prohibitions on agricultural
18 practices and production on agricultural lands, and elimination of grazing, all of which were not
19 analyzed or disclosed in the Final EIS. These new impacts raised in the MMP will result in significant
20 new environmental impacts on farmland and environment of Little Lake Valley as whole and therefore
21 justify preparation of a supplement EIS prior to construction of the Project.

22 **3. Significant Environmental Impacts to Additional Acres of Oak**
23 **Woodland, Wetlands and Baker’s Meadowfoam and Northern**
24 **Semaphore Grass Justifying a SEIS**

25 The Project re-design presents particularly significant environmental impacts on the plants and
26 trees in Little Lake Valley, which were already anticipated to experience negative impacts in the Final
27 EIS. For example, an additional 26 acres oak woodland grassland will be harmed and potentially
28 removed due to the re-design. Exhibit 8 (2010 NEPA/CEQA Revalidation Document, 17 (2010)). The

1 significance of such an increase in impacts is clear when considering that there are only 99 acres of total
2 oak woodland on the Floor of Little Lake Valley. Exhibit 4 (Final EIS, H-6 (2006); Exhibit 8 (2010
3 NEPA/CEQA Revalidation Document, 17 (2010)). Similarly, the Project will also result in permanent
4 loss of 5 percent of total occupied habitat of North Coast semaphore grass in Little Lake Valley. Exhibit
5 8 (2010 NEPA/CEQA Revalidation Document, 17 (2010)). This state-listed plant will lose a significant
6 amount of its total population due to this one Project. Similarly, the listed Baker's meadowfoam is
7 anticipated to face nearly 30 new acres of temporary impacts to its habitat and over five acres of
8 permanent impacts. *Id.* at 14. Caltrans cannot claim that it has met its NEPA obligations for
9 environmental analysis through its earlier analysis of the impacts to Baker's meadowfoam in the 2006
10 Final EIS, because an agency has "a continuing duty to gather and evaluate new information relevant to
11 the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017,
12 1023 (9th Cir. 1980). Furthermore, "when new information comes to light the agency must consider it,
13 evaluate it, and make a reasoned determination whether it is of such significance as to require an SEIS."
14 *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). Caltrans has failed to make such
15 a reasoned determination or fully evaluate the cumulative impacts to the numerous types of vegetation
16 that will be newly impacted by the Project.

17 Also of concern are the almost 10 additional acres of wetlands that will be newly impacted by
18 the Project. The 2006 Final EIS anticipated a total of 69.50 acres of wetlands either being filled or
19 temporary disturbed. Now the Project anticipates a total of 77.31 acres of wetlands to be impacted by
20 the Project, with 53.37 acres permanently filled. Exhibit 8 (2010 NEPA/CEQA Revalidation Document,
21 9 (2010)). Phase I of the Project will fill over 65 acres alone. Declaration of Peter Baye, ¶6. The loss
22 of so many acres of wetlands is of particular importance because "[w]etlands are among the most
23 biologically productive natural ecosystems in the world" and "provide many benefits, including food
24 and habitat for fish and wildlife; flood protection; shoreline erosion control; natural products for human
25 use; water quality improvement; and opportunities for recreation, education, and research." Army Corps
26 of Engineers, *Why Wetlands are Important* (2012)
27 (http://www.mvn.usace.army.mil/ops/regulatory/reg_wetland_importance.asp) . In particular, the
28 specific types of wetlands most heavily impacted are relatively rare subjects for wetland impact analysis

1 and mitigation, which is in part why the 2012 MMP describes the mitigation actions as “speculative.”
2 Declaration of Peter Baye, ¶9, 10 (citing 2012 MMP at 2-6, 6-9). The impacts to the wetlands include
3 draining, removal of established vegetation and excavation or soil removal. *Id.* at ¶ 15. The additional
4 wetlands that will be newly impacted represent a significant impact to the environment in both terms of
5 context and intensity. These new losses of wetlands and other vegetation in Little Lake Valley rise to
6 the level of significance under NEPA and justify a supplement EIS.

7 **4. Additional Impacts to Migratory Streams of Threatened and**
8 **Endangered Fish will have Significant Environmental Impacts**
9 **that Justify a Supplemental EIS**

10 As noted above, the re-designed Project will adversely affect southern Oregon/northern
11 California coasts coho salmon, California coastal Chinook salmon, and northern California steelhead
12 that rely on Haehl, Baechtel, Broaddus, Mill, Outlet and Upp Creek. The Outlet Creek basin of Little
13 Lake contains one of the most extensive salmonid habitat resources of the upper Eel River tributaries.
14 Declaration of Gordon Becker, ¶3. In particular, the four-year Phase I construction period which
15 include building of bridge and viaduct crossings will delay or prevent fish passage as well impact
16 water quality through increased turbidity and temperature. *Id.* at ¶19, 20. Also, during the
17 construction phase fish will be relocated to avoid underwater sound levels associated with pile driving,
18 water flow will be temporarily altered, soil disturbed, and riparian vegetation removed at important
19 stream crossings. *See* Exhibit 8 (2010 NEPA/CEQA Revalidation Documents, 10 (2010)). Because
20 factors determining the intensity of impact include the degree of adverse affect on endangered or
21 threatened species and their habitat, these impacts are undoubtedly significant under NEPA. 40 C.F.R.
22 §1508.27(b). These impacts undoubtedly show further environmental analysis by Caltrans is needed
23 prior to approval of the Project. Therefore, it is likely Plaintiffs will succeed on their first claim.

24 ***iii. Plaintiffs are likely to Prevail on the Claim that Defendants have Violated***
25 ***NEPA by Failing to Evaluate All Reasonable Alternatives in Light of New***
26 ***Circumstances***

27 NEPA also requires that agencies rigorously explore and objectively evaluate all reasonable
28 alternatives to the proposed action, thereby providing a clear basis for choice among options by

1 decision-makers and the public. 42 U.S.C. § 4332(2)(C)(iii); 23 C.F.R § 771.105; 40 C.F.R. §§
2 1508.9, 1502.14. “NEPA regulations describe this alternatives requirement as the ‘heart’ of the EIS
3 and require the agency to produce an EIS that ‘[r]igorously explore[s] and objectively evaluate[s] all
4 reasonable alternatives’ so that the agency can ‘sharply defin[e] the issues and provid[e] a clear basis
5 for choice among options by the decisionmaker and the public.’” *Kootenai Tribe of Idaho v. Veneman*,
6 313 F.3d 1094, 1120 (9th Cir. 2002) (quoting 40 C.F.R. § 1502.14).

7 Just as “the existence of a viable but unexamined alternative renders an [EIS] inadequate,” the
8 failure to consider reasonable alternatives in light of new circumstances through a supplement EIS is a
9 failure to comply with NEPA. *Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797,
10 813 (9th Cir. 2005) (“NRDC”). To this end, courts have “held that where changed circumstances
11 affect the factors relevant to the development and evaluation of alternatives, the [responsible agency]
12 must account for such change in the alternatives it considers. *NRDC*, 421 F.3d at 813-814 (2005)
13 (citing *Alaska Wilderness*, 67 F.3d at 730-31 (“While we cannot predict what impact the elimination
14 of the [long-term] contract will have on the Forest [814] Service's ultimate land use decisions, clearly
15 it affects the range of alternatives to be considered.”).

16 Nowhere is such re-analysis of alternatives more needed than at the case at hand. Only four-
17 lane alternatives were fully considered in the 2002 DEIS because of traffic projections made in the late
18 1990’s. Exhibit 1 DEIS 3-25 (2002); *see also* Declaration of Richard Estabrook, ¶4. When making
19 their traffic projections, Caltrans relied on growth factors of 1.27% per year from 1998 to 2008 and
20 1.59% per year for 1998 to 2028. Declaration of Richard Estabrook, ¶6,7. These factors were applied
21 to 1998 data for peak hour traffic volumes on which Level of Service for the bypass was based. *Id.* at
22 ¶8. Unfortunately, these same traffic projections continue to determine what level of service and by
23 extension what the range of reasonable alternatives should be considered.

24 However, actual traffic data has shown that Caltrans’ 1990’s traffic projections significantly
25 overestimated the amount of both regional and local traffic likely to use the bypass. *Id.* at ¶9, 13.
26 Based on data from Caltrans’ website monitoring traffic volumes through the area, Caltrans
27 overestimated the growth in traffic volume coming from the south for 2008 by 74%. *Id.* at ¶11.
28 Caltrans projected an 18% increase in traffic coming from the north between 1998 and 2008 when in

1 reality traffic at the north city limit declined by 11% in that time period. *Id.* This significant new
2 information, as well as Caltrans' new phased construction plan, call into question what range of
3 alternatives for the proposed Project are reasonable and whether all of those alternatives have been
4 sufficiently analyzed.

5 Just as the Ninth Circuit in *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519, 1520
6 (9th Cir. 1992), found that an agency must look at every reasonable alternative within the range dictated
7 by the nature and scope of the proposed action, sufficient to permit a reasoned choice, when the nature
8 and scope of the proposed action changes the range of reasonable alternatives also change. Here,
9 Caltrans has admitted that "a functional interim two lane facility constructed initially and, when
10 adequate funding becomes available in the future, the remaining lanes will be constructed to complete
11 the four-lane bypass." Exhibit 8 (2010 NEPA/CEQA Revalidation Document at 3 (2010)). By
12 proceeding with a two lane facility yet failing to fully analyze two lane alternatives, Caltrans has failed
13 to meet its statutory obligations under NEPA. Similarly, Defendants may have failed to consider
14 alternatives to potentially lessen or avoid significant, heretofore undisclosed impacts to agricultural
15 lands of the MMP. Given these significant omissions, it is not only likely that Plaintiffs will succeed at
16 their second claim against defendant Caltrans, but also likely that Defendants' Project alternatives will
17 be found inadequate in other respects as well. At the least it is clear that there are serious issues with the
18 adequacy and sufficiency of Caltrans' environmental analysis for the Project that warrant further
19 investigation by this court.

20 **C. The Balance of the Equities Clearly Tip in Favor of Plaintiffs' Requested Relief**

21 An examination of relevant facts makes clear that the balance of the equities tips heavily in
22 favor of granting Plaintiffs the requested injunction. When determining whether a preliminary
23 injunction is appropriate, Ninth Circuit courts apply a traditional balance of harms analysis. *Lands*
24 *Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008). Because environmental injuries are often
25 irreparable, "if such injury is sufficiently likely, therefore, the balance of harms will usually favor the
26 issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S.
27 531, 545 (1987); *Northwest Env'tl. Def. Ctr. v. United States Army Corps of Eng'rs*, 817 F. Supp. 2d
28 1290, 1302 (D. Or. 2011). While "the environmental risk were the preliminary injunction not granted

1 must be weighed against the economic loss or other risk were the injunction granted...the scale must
2 tip sharply on the side of environmental risk.” *Bair v. Cal. State DOT*, 2011 U.S. Dist. LEXIS 72295,
3 21-22 (N.D. Cal. 2011).²

4 As noted above, the environmental harm from initial Project construction is significant and
5 irreparable. While Defendants may cite economic harms from delaying the Project’s construction,
6 those harms pale in comparison to the environmental harms at issue. Before the end of the year,
7 construction from the Project will result in the cutting down of trees, loss of habitat of migratory birds,
8 and damage to streams used by endangered and threatened fish and permanent conversion of
9 agricultural land and associated habitat values in perpetuity, as a requirement of the current MMP.
10 Each of these harms is irreparable and cannot be corrected if Plaintiffs succeed on the merits in this
11 case. Whereas granting a preliminary injunction will result only in a temporary delay in construction.
12 Since this Project has been discussed for over fifty years and construction has yet to begin six years
13 after the final EIS, an additional delay of a few months to resolve this litigation is hardly irreparable to
14 Defendants. *See Caltrans, Willits Bypass - Purpose and Need* (2012)
15 (<http://www.dot.ca.gov/dist1/d1projects/willits/background.htm>).

16 Ultimately, when balancing the equities as part of a preliminary injunction analysis, “it is
17 axiomatic that environmental damage cannot be undone, whereas economic injury can almost always
18 be rectified.” *Sierra Club v. Bosworth*, 2005 U.S. Dist. LEXIS 27573, 38 (N.D. Cal. Nov. 14, 2005).
19 The significant environmental harms at issue here clearly tip the balance of equities in favor of
20 granting a preliminary injunction until the merits of the case can be resolved.

21
22 ² *See also Ctr. for Food Safety v. Vilsack*, 2010 U.S. Dist. LEXIS 141390, 22-23 (N.D. Cal. 2010)
23 (citing *National Parks & Conservation Ass’n*, 241 F.3d at 738 (finding that the defendants' loss of
24 anticipated revenues did not outweigh the potential irreparable harm to the environment); *Lands Council*
25 *v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (“Consistent with Amoco Production Company, we have
26 held that the public interest in preserving nature and avoiding irreparable environmental injury
27 outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their
28 underlying claim.”); *Save Our Sonoran*, 408 F.3d at 1125 (affirming injunction where district court
found that balance of hardships tipped in favor of injunction in light of likelihood of environmental harm
and despite [23] the fact that defendant would suffer financial harm); *Idaho Sporting Congress, Inc. v.*
Alexander, 222 F. 3d 562, 569 (9th Cir. 2000) (finding injunction proper where environmental harm was
sufficiently likely, despite fact that it “could present financial hardship” to government agency, the
intervenors and the surrounding communities).)

1 **D. Plaintiffs’ Requested Injunctive Relief would Serve the Public Interest**

2 Lastly, granting Plaintiffs’ request for injunctive relief serves the public interest. An “alleged
3 NEPA violation and the possibility of resulting environmental harm certainly adversely affect the
4 public interest. *Save Strawberry Canyon v. DOE*, 613 F. Supp. 2d 1177, 1190 (N.D. Cal. 2009). The
5 Ninth Circuit has repeatedly “recognize[d] the well-established ‘public interest in preserving nature
6 and avoiding irreparable environmental injury.’” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
7 1127, 1138-1139 (9th Cir. 2011) (quoting *Lands Council*, 537 F.3d at 1005).

8 By granting a preliminary injunction, this court will preserve the status quo and prevent the
9 environment and unique and important local agricultural resources from being harmed by the Project
10 and its mitigation measures until this litigation can be resolved on its merits. As noted above,
11 construction for the Project is slated to begin in the coming weeks and will irreparably damage the
12 environment of Little Lake Valley. A temporary preliminary injunction will ensure that the Project’s
13 significant environmental harm will occur only after full compliance with all applicable federal
14 regulation has been established.

15 Courts have “also recognized the public interest in careful consideration of environmental
16 impacts before major federal projects go forward and... have held that suspending such projects until
17 that consideration occurs ‘comports with the public interest.’” *Alliance for the Wild Rockies v.*
18 *Cottrell*, 632 F.3d 1127, 1138-1139 (9th Cir. 2011) (quoting *S. Fork Band Council of W. Shoshone v.*
19 *U.S. DOI*, 588 F.3d 718 (9th Cir. 2009). Because “Congress’s determination in enacting NEPA was
20 that the public interest requires careful consideration of environmental impacts before major federal
21 projects may go forward,” ensuring that Caltrans has fully analyzed and accounted for the
22 environmental impacts of the Project as required by NEPA prior to construction is in the interest of the
23 public. *South Fork Bank Council of Western Shoshone of Nevada v. United States Dept. of Interior*,
24 588 F.3d 718, 728 (9th Cir. 2009). This of particular importance here since Caltrans has entered into
25 a pilot program where the agency has taken on temporary responsibility of FHWA’s NEPA
26 responsibility.

27 Caltrans and FHWA have a responsibility to ensure that all environmental impacts of this
28 complex and evolving Project are fully analyzed and adequately mitigated. Therefore, establishing

1 FHWA and Caltrans' adherence to NEPA "invokes a public interest of the highest order: the interest in
2 having government officials act in accordance with the law." *Seattle Audubon Soc'y v. Evans*, 771 F.
3 Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd* 952 F.2d 297 (9th Cir. 1991). It is vital to the public
4 interest as the habitat and wildlife of Little Lake Valley remains preserved until FHWA and Caltrans
5 sufficiently demonstrate that they have fully complied with all applicable federally mandated
6 requirements.

7 Additionally, both federal and state law recognizes the public interest in protecting and
8 preventing conversion of farmland. For example, the federal Farmland Protection Policy Act notes
9 that the "Nation's farmland is a unique natural resource and provides food and fiber necessary for the
10 continued welfare of the people of the United States" and declares the federal policy goal "to minimize
11 the extent to which Federal programs contribute to the unnecessary and irreversible conversion of
12 farmland to nonagricultural uses." (7 U.S.C. § 4201, et seq.) Similarly, California's Williamson Act
13 declares that "preservation of a maximum amount of the limited supply of agricultural land" and
14 "discouragement of premature and unnecessary conversion of agricultural land" is "a matter of public
15 interest" and "necessary for the promotion of the general welfare and the protection of the public
16 interest in agricultural land." (Cal. Gov. Code, § 51220). Accordingly, in addition to preventing
17 environmental harm from the project, preventing farmland conversion as a result of the project is also
18 in the public interest.

19 **E. No Bond Should be Required from the Plaintiffs**

20 Under Rule 65(c) of the Federal Rules of Civil Procedure, a preliminary injunction can be
21 issued "only if the movant gives security in an amount that the court considers proper to pay the costs
22 and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R.
23 Civ. P. 65(c). However, courts have the "discretion to dispense with the security requirement, or to
24 request mere nominal security, where requiring security would effectively deny access to judicial
25 review." *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1190-91 (N.D. Cal.
26 2009) (Alsup, J.) (requiring no bond). Indeed, federal courts in the Ninth Circuit consistently reject
27 defendants' requests for substantial bonds in environmental cases, emphasizing that "[t]here seems to
28 be little reason for requiring more than a nominal bond of these plaintiffs, who are acting much as

1 private attorneys general.” *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1314, n. 4 (9th Cir.
2 1990) (no bond required for preliminary injunction against logging); *see also The Wilderness Society*
3 *v. Tyrrel*, 701 F. Supp. 1473, 1492 (E.D. Cal. 1988); *California v. Tahoe Regional Planning Agency*,
4 766 F.2d 1319, 1325-1326 (9th Cir. 1985). Plaintiffs are four environmental groups to whom anything
5 more than a nominal bond would significantly limit their access to judicial review. Therefore,
6 Plaintiffs should not be required to post anything more than a nominal bond as a condition of granting
7 the requested relief.

8 **V. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request the Court to grant the requested
10 injunctive relief.

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12 Respectfully submitted this 7th day of September, 2012.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on 7 September, 2012, I electronically filed the following documents:

3 *Motion to for Preliminary Injunction, Memorandum in Support of Motion, Declaration of Aruna*
4 *Prabhala in Support of Motion for Preliminary Injunction, Declaration of Ellen Drell in Support of*
5 *Motion for Preliminary Injunction, Declaration of Gary Hughes in Support of Motion for Preliminary*
6 *Injunction, Declaration of Richard Estabrook in Support of Motion for Preliminary Injunction,*
7 *Declaration of Gordon Becker in Support of Motion for Preliminary Injunction, Declaration of Peter*
8 *Baye in Support of Motion for Preliminary Injunction* with the Clerk of the Court using the CM/ECF
9 system, which will send notification of such filing to the following:

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