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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

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

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

**PLAINTIFFS' MOTION FOR A PRELIMINARY  
INJUNCTION AND SUPPORTING  
MEMORANDUM**

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

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September 23, 2011

Attorneys for Plaintiffs

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**GLOSSARY**

1		
2	Alt. Report	Sharp Park Conceptual Restoration Alternatives Report
3	Bowie Decl.	Declaration of John Bowie (Pl. Ex. 26)
4	Campo Dep.	September 13, 2011 Deposition of Jon Campo (Pl. Ex. 5)
5	CRLF or Frog	California Red-Legged Frog
6	CRLF Rec. Plan	Recovery Plan for the California Red-Legged Frog (Pl. Ex. 17)
7	Dexter Decl.	Declaration of Wendy Dexter (Pl. Ex. 7)
8	Draft Natural Areas Plan	Final Draft, Significant Natural Resources Areas Management Plan (Pl. Ex. 21)
9	ESA or Act	Endangered Species Act
10	FWS	U.S. Fish and Wildlife Service
11	GGNRA	Golden Gate National Recreation Area
12	Goodale Mon. Decl.	Monitoring Declaration of Margaret Goodale (Pl. Ex. 11)
13	Graham Decl.	Declaration of Laurie Graham (Pl. Ex. 16)
14	Hayes Decl.	Declaration of Dr. Mark Hayes (Pl. Ex. 6)
15	HCP	Habitat Conservation Plan
16	ITP	Incidental Take Permit
17	PGA	Public Golf Association
18	Pilgrim Decl.	Declaration of Robert Pilgrim (Pl. Ex. 15)
19	RPD	San Francisco Recreation and Parks Department
20	SFGS 5-Year Rev.	San Francisco Garter Snake 5-Year Review (Pl. Ex. 20)
21	SFGS or Snake	San Francisco Garter Snake
22	SFGS Rec. Plan	Recovery Plan for the San Francisco Garter Snake (Pl. Ex. 19)
23	Sharp Park	Sharp Park Golf Course
24	Snavelly Decl.	Declaration of Jewel Snavelly (Pl. Ex. 4)
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1 Swaim 2008 Sharp Park Wildlife Surveys (Swaim Biological, Inc. 2008)  
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3 Vredenberg Decl. Declaration of Dr. Vance Vredenberg (Pl. Ex. 3)

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1           **NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION**

2           TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

11           This motion is made pursuant to Federal Rule of Civil Procedure 65 and is supported by  
12 the accompanying memorandum of points and authorities, declarations, and other attached  
13 exhibits, a proposed order, all the pleadings and papers on file in this action, and such  
14 additional information as may be presented to the Court at or before the hearing.  
15

16 Dated: September 23, 2011

Respectfully submitted,

17  
18           

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28           Attorneys for Plaintiffs

Plaintiffs' Preliminary Injunction Motion  
and Supporting Memorandum



**MEMORANDUM OF POINTS AND AUTHORITIES**

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

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

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

1 As explained below, the only lawful way RPD can engage in this ongoing take is to  
2 obtain an Incidental Take Permit (“ITP”) pursuant to Section 10 of the ESA. *See* 16 U.S.C.  
3 § 1539. In evaluating such a permit the FWS will determine, *inter alia*, whether, and how,  
4 RPD’s activities may continue; the extent of the incidental take, if any, that will be authorized;  
5 and the specific mitigation and minimization required to insure that RPD’s take of these species  
6 does not undermine the species’ survival and recovery. *Id.*; *see also, e.g., Sw. Ctr. for*  
7 *Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1129 (S.D. Cal. 2006) (explaining that to  
8 obtain an ITP an applicant must “submit[ ] a ‘conservation plan’ that will –as its name plainly  
9 connotes – help ‘conserve’ the species by facilitating its survival and recovery”) (citations  
10 omitted).

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

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

1 19 (documenting recent mowing without monitoring, and golf carts on fairways, in Sharp  
2 Park).<sup>1</sup>

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

19 To the extent they are relevant in an ESA case, the balance of hardships and public  
20 interest also strongly counsel in Plaintiffs' favor. As outlined in three other attached  
21 declarations, Defendants' take of the Frog and the Snake is irreparably harming Plaintiffs'  
22 members' interests in observing and appreciating these species in their natural habitat in Sharp  
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24 <sup>1</sup> Defendants have also apparently recently applied for two FWS permits that might lead to  
25 some narrow authorization for incidental take of the Frog or the Snake over the next several  
26 months – one to the Army Corps to permit RPD to dredge sediment and vegetation near the  
27 pumphouse, and another to the FWS to permit RPD to continue surveying for egg masses. *See*  
28 Pl. Ex. 12; Pl. Ex. 13. Irrespective of whether these permits are issued, however, RPD has not  
applied for the *only* kind of permit that would allow the agency to cause take *through the golf  
course's operations itself* – an ITP under ESA Section 10.16 U.S.C. § 1539.

1 Park.<sup>2</sup> The public interest also plainly favors protecting imperilled species and insuring a local  
2 government agency's compliance with federal law. *E.g. Elder v. Nat'l Conference of Bar*  
3 *Examiners*, No. C 11-00199 SI, 2011 WL 672662, at \*11 (N.D. Cal. Feb. 16, 2011) (noting that  
4 "the public clearly has an interest in the enforcement of its statutes") (other citations omitted).  
5 Indeed, the Supreme Court and Ninth Circuit have held that the public interest weighs so heavily  
6 in favor of protecting imperilled species that where, as here, an injunction is necessary to  
7 prevent unauthorized take, any purported competing interests do not even weigh in the Court's  
8 analysis. *See, e.g. TVA v. Hill*, 437 U.S. 153, 194 (1978) ("the balance has been struck in favor  
9 of affording endangered species the highest of priorities"); *Sierra Club v. Marsh*, 816 F.2d 1376,  
10 1387 (9<sup>th</sup> Cir. 1987).

## 11 BACKGROUND

### 12 **A. The Endangered Species Act**

13 In order to "halt and reverse the trend towards species extinction, whatever the cost,"  
14 *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995)  
15 (quoting *TVA*, 437 U.S. at 184), the ESA broadly prohibits the "take" of listed species, 16  
16 U.S.C. § 1538 – including any "egg or offspring thereof," 16 U.S.C. § 1532(8); *see also* 50  
17 C.F.R. § 17.31(a) (extending take prohibitions to threatened species). "Take" is defined to mean  
18 "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in  
19 such conduct." 16 U.S.C. § 1532(19). The FWS's regulations further define "harm" to include  
20 any "significant habitat modification or degradation where it actually kills or injures fish or  
21 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or  
22 sheltering," and "harass" to include any "intentional or negligent act or omission which creates  
23 the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt  
24 normal behavioral patterns which include, but are not limited to, breeding, feeding, or  
25 sheltering." 50 C.F.R. § 17.3; *see also Sweet Home*, 515 U.S. 687 (upholding FWS definition of  
26

27 <sup>2</sup> *See* Declarations of Margaret Goodale ("Goodale Decl.") (Pl. Ex. 14); Robert Pilgrim  
28 ("Pilgrim Decl.") (Pl. Ex. 15); and Laurie Graham ("Graham Decl.") (Pl. Ex. 16).

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

5 Under the ESA the fact that an activity is likely to take a listed species does not  
6 necessarily mean that it may not occur. Rather, Section 10 of the Act authorizes the FWS to  
7 issue ITPs for a specific level of take, where the applicant has developed an appropriate Habitat  
8 Conservation Plan (“HCP”) for the species, and has satisfied several other elements designed to  
9 minimize and mitigate the impacts of the proposed activity. 16 U.S.C. § 1539(a). The FWS  
10 may grant the ITP – after affording an opportunity for public comment – based on certain  
11 specific findings, including that the impacts will be minimized and mitigated “to the maximum  
12 extent practicable,” and that the HCP will aid the species’ survival and recovery. *Id.* §  
13 1539(a)(2)(B).

## 14 **B. The Imperilled Species Present At Sharp Park**

### 15 **1. The California Red-Legged Frog**

16 The California red-legged frog, *Rana draytonii*, the largest frog native to the western  
17 United States, has been lost from over 70% of its historic range, and has suffered a population  
18 decline of 90%. *See* Recovery Plan for the California Red-Legged Frog (FWS 2002) (excerpts)  
19 (“CRLF Rec. Plan”) (Pl. Ex. 17) at 1; *see also* Vredenberg Decl. ¶ 9.<sup>3</sup> The Frog, one of many  
20 amphibian species that has endured massive declines in recent decades, *id.* ¶ 4 (explaining that  
21 amphibians are “the most threatened group of vertebrates on earth”), is currently only found in  
22 select coastal drainages from Marin County south to Baja California, with a few isolated  
23 populations in the Sierra Nevada and the Transverse ranges.

24  
25  
26 <sup>3</sup> Dr. Vredenberg, who has extensively studied world-wide amphibian declines and  
27 ecology, including their diet and habitat needs, and has published in leading journals on these  
28 matters, has specifically supervised research concerning the Frog in Sharp Park. Vredenberg  
Decl. ¶ 10, 15; *see also id.* Ex A (C.V.).

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

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

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

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

## 2. The San Francisco Garter Snake

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

¶ 12.<sup>5</sup> The SFGS, which can grow to over four feet, is restricted primarily to San Mateo County, where, in 1985, the FWS identified six populations as “essential to the long-term survival of the subspecies.” SFGS Recovery Plan (FWS 1985) (“SFGS Rec. Plan”) (Pl. Ex. 19) at 1, 19. One of those is the population at Sharp Park. *Id.*

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

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

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

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



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

### 9 **C. Sharp Park Golf Course**

10 Sharp Park, just over 400 acres located on the coast in Pacifica, is owned by Defendants  
11 and operated by RPD and its contractors. *See* Defendants’ Answer (“Answer”) (DN 15), ¶¶ 19,  
12 47; Alt. Report at 1; *see also* Pl. Ex. 24 (map of Sharp Park). Highway 1 runs through the Park,  
13 and two portions of the National Park Service’s Golden Gate National Recreation Area  
14 (“GGNRA”) – Mori Point and Sweeney Ridge – border Sharp Park to the South and East.  
15 Answer ¶ 48; Alt. Report at at 1, 11.

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

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



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

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

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

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

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

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

2 **1. Water Management Activities**

3 For many years, RPD's massive water pumping operations from Horse Stable Pond have  
4 been stranding Frog egg masses by lowering water levels after Frogs lay their eggs. If the eggs  
5 do not remain in water they dry out – desiccate – and die, and if the area dries out before the  
6 tadpoles can go through metamorphosis they will similarly die. Almost twenty years ago, a  
7 biologist discovered more than 50 separate Frog egg masses desiccated in Sharp Park. Dec. 30,  
8 1992 Letter (Pl. Ex. 27) (“pumping of water out of Horse Stable Pond and the resultant exposure  
9 of shoreline is causing massive frog egg mortality”). Indeed, in *listing the CRLF*, the FWS  
10 specifically noted that “*poorly timed releases of storm water from Horse Stable Pond at Sharp*  
11 *Park in February 1992 resulted in exposure and desiccation of 62 California red-legged frog*  
12 *egg masses,*” and therefore the species’ listing was based in part on the threats posed by  
13 “[m]anagement of water bodies for flood control.” 61 Fed. Reg. at 25,825-26 (emphasis added).

14 In more recent years RPD employees – most often a gardener named Jon Campo – have  
15 surveyed egg masses and have consistently documented large numbers of them stranded in  
16 Sharp Park. *E.g.* Jan. 17, 2003 Data Sheet (Pl. Ex. 28) (Campo Dep. Ex. 8) at 3 (noting  
17 “stranded” egg masses); Mar. 5, 2004 Data Sheet (Pl. Ex. 29) (Campo Dep. Ex. 9) (same). In  
18 2005, the FWS wrote to RPD, reiterating the concern raised in listing the species – *i.e.*, that  
19 RPD’s water pumping operations have “lowered the water level at Horse Stable Pond and  
20 resulted in the stranding and exposure of a number of egg masses of the California red-legged  
21 frog.” FWS Letter of Feb. 1, 2005 (Pl. Ex. 30); *see also id.* (noting that pumping “caused the  
22 death of an unknown quantity of embryonic tadpoles of the completely aquatic early stage of  
23 this animal’s lifecycle”). At that time FWS specifically recommended that, “in order to avoid  
24 further potential violation of the [ESA],” RPD must “*obtain authorization for incidental take . . .*  
25 *. as appropriate for the California red-legged frog, and also the endangered San Francisco*  
26 *garter snake . . . which also has been documented to inhabit the area.*” *Id.* (emphasis added).  
27 That is, not only was the *listing* of the Frog based in part on the very pumping operations at  
28 issue, but *more than six years* ago, the FWS specifically explained that, in light of RPD’s

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

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

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

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

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

## 7 **2. Mowing and Golf Cart Use**

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

13 These activities are also reasonably certain to cause ongoing take of the Frog and the  
 14 Snake. In 2005, a SFGS was found after it had been run over by a lawn mower, Hayes Decl.  
 15 ¶ 44 and Ex. E; Dexter Decl. ¶ 21, and, given the species' use of habitat, both species would be  
 16 expected to be found in mowed areas and areas where golf carts are used in proximity to Park  
 17 water bodies. Dexter Decl. ¶¶ 23-24; Vredenberg Decl. ¶ 10, 25; Hayes Decl ¶ 49.<sup>7</sup>

## 18 **ARGUMENT**

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

25  
 26 <sup>7</sup> Although the Snake is rare in Sharp Park – just as it is rare throughout its remaining  
 27 range – Defendants cannot legitimately dispute the species' ongoing presence there. *See, e.g.*,  
 28 Swaim 2008 at 1-2 (recognizing "a significant population" of Snake at Sharp Park that is  
 "essential to" the species "long term survival").

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

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

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

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

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

24 Defendants’ take of CRLF through water pumping activities has been ongoing for many  
25 years. In particular:  
26  
27  
28

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

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

21  
22  
23 <sup>8</sup> *see also id.* at 4-6 (“Pumping water can strand frog egg masses in the canal and cause them to  
24 fail. As in Horse Stable Pond, drawdown of water in the canal more than a few inches poses a  
25 significant risk of drying out for developing eggs attached to emergent vegetation and for  
26 those deposited in shallow water. Once all of the eggs have hatched into tadpoles, the threat  
27 posed by changing water levels is reduced or eliminated, provided that sufficient water  
28 remains for development and metamorphosis”); *see also* Alt. Report (Pl. Ex. 23) at 39  
(recognizing both that CRLF “lay their eggs during wet periods in the shallow pools that form  
in the flooded fairways,” and that “[w]hen the water levels drop, these egg masses can be  
stranded on dry ground and desiccate”); *see also id.* (“Even if water persists long enough for  
eggs to hatch in these areas, most tadpoles would have limited mobility in the dense vegetation  
in the marsh area and may be stranded well before metamorphosis”).

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

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

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



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

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

13 As noted, last winter season Mr. Campo identified more than 125 egg masses that he  
14 concluded would not thrive in the location where they were laid. He repeatedly requested the  
15 FWS’s permission to move these egg masses, and he subsequently relocated them.<sup>10</sup> However,  
16  
17

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

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



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

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

11 Accordingly, it is reasonably certain that RPD – which intends this winter to continue  
12 with the same “survey methodology that has been in place for 10 years at Sharp Park,” Aug. 14,  
13 2011 Permit Appl. (Pl. Ex. 13 at CCSF 4422) – will, if permitted to survey for egg masses this  
14 upcoming winter, continue to miss egg masses laid in Sharp Park habitat being impaired by the  
15 Horse Stable Pond pumping operations. Moreover, as Plaintiff expert Dr. Hayes – who has  
16 spent “hundreds of hours searching, identifying, and monitoring [CRLF] during all stages of its  
17 life cycle,” Hayes Decl. ¶ 5 – explains, RPD'S approach to surveying for egg masses is so  
18 patently inadequate that it is not even possible to calculate the *detectability* rate, let alone  
19 conclude that all of the at-risk egg masses are being relocated. *Id.* ¶ 34 (explaining that  
20 detecting CRLF with RPD's methods “is nearly impossible to do, even where habitat  
21

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

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

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

## 4 2. Pumping Is Entraining Mobile Life Stages Of CRLF.

5 Further exacerbating Defendants’ legal violations, the pumps themselves are reasonably  
6 certain to entrain or otherwise injure tadpoles or other mobile life stages of the CRLF. The  
7 pumps force water through the outfall pipe with such tremendous force, *see* Pl. Ex. 2, that small  
8 creatures unlucky enough to be in the proximity of the pumps will either be pulled up against the  
9 screen or sucked through the pumps altogether. Hayes Decl. ¶¶ 26-27, 38; *see also id.* Ex. C  
10 (photograph of CRLF Dr. Hayes recently saw near the pump). Defendants’ *own* contractors  
11 have documented freshwater crayfish that have been sucked through the pumps, Nov. 2008  
12 Swaim Biological Monitoring Form (Pl. Ex. 43) (noting “several dead crayfish found at  
13 discharge end of pipe at beach,” and that “[i]f crayfish can become entrained in pump then frog  
14 might also”), which makes entrainment by Frogs and tadpoles, which are relatively weaker  
15 swimmers, likely. Hayes Decl. ¶¶ 26-27 and Att. D (explaining that the pump has no “screening  
16 mechanism around known oviposition sites that would prevent tadpoles, particularly hatchlings,  
17 from wandering too close to the pump intake port during a pumping event; and it does not  
18 provide for some kind of velocity reduction mechanism, such as screening baffles, associated  
19 directly with the intake port to reduce the likelihood of CRLF life stages being plastered against  
20

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

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

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

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

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

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

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

19 Recognizing the serious risks that these activities also pose to the species, RPD’s  
20 Compliance Plan “requires” golf carts to stay on designated paved paths, Compliance Plan at 8,  
21 and sets out a protocol whereby a “biological monitor” is supposed to inspect mowing areas  
22 prior to mowing activities. Compliance Plan at 9-10. However, as with Defendants’ egg mass  
23 relocations, these efforts cannot, and do not, solve Defendants’ unlawful take of the species,  
24 because they do not address Defendants’ unlawful habitat modification. *See supra* at 15-16.  
25 Moreover, as Plaintiffs’ experts explain, these efforts also would not avoid direct take even if  
26 faithfully carried out. Dexter Decl. ¶ 31 (explaining how monitoring protocol will “inevitably  
27 result in an under-observance of frogs and snakes”); Hayes Decl. ¶ 48.  
28

1 In any event, however, it is also evident that there is significant *non-compliance* with the  
 2 Compliance Plan. Golf carts regularly ride on the fairways rather than designated paths. *E.g.*  
 3 Goodale Mon. Decl. ¶¶ 5-17.<sup>14</sup> Mowers regularly mow without prior monitoring. *Id.* ¶¶ 2-4,  
 4 18-19 and Exs. E-F (photographs); Snavely Decl. ¶¶ 2 and 4.; *see also* Campo Dep. at 125 (RPD  
 5 employee noting that he has seen mowing in Sharp Park but has *never* seen a monitor) The  
 6 Compliance Plan is thus irrelevant to Plaintiffs’ likelihood of demonstrating a take from mowing  
 7 and golf cart usage in any event.

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

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

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

24  
 25 <sup>14</sup> Moreover, within a 200 meter area, golf cart use *on* the golf cart paths – as provided for  
 26 in the Compliance Plan – itself seriously risks taking SFGS, which, because these paths  
 27 “absorb and store heat,” providing SFGS with “exceptional opportunities for quick warming  
 28 on cold sunny mornings, throughout the day, and even after the sun has set.” Dexter Decl. ¶  
 25; *see also id.* (detailing risks golf carts pose to snakes); *accord* Hayes Decl. ¶ 45 (“Though  
 golf cart paths have traditionally been viewed as innocuous, recent work clearly demonstrates  
 that they are responsible for substantial mortality among snakes”).

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

5 Accordingly, in light of Defendants’ take of the CRLF and SFGS, Plaintiffs seek a  
6 narrowly tailored injunction to put a halt to Defendants’ legal violations until this case can be  
7 resolved on the merits or Defendants obtain an ITP – which it has known *for years* is necessary  
8 to continue golf course operations. In particular, Defendants should be enjoined from operating  
9 the pumps in Horse Stable Pond, or from using, or authorizing the use of, mowing equipment or  
10 motorized golf carts anywhere on holes Nine through Eighteen, which are within approximately  
11 200 meters of Sharp Park water bodies. In light of Defendants’ *own* recognition of the threats  
12 posed by these activities, as well as the professional opinions of leading experts on each species,  
13 it is evident that this relief is the minimum necessary to address Defendants’ ongoing take at this  
14 time. *See Marbled Murrelet*, 83 F.3d at 1064-66 (enjoining habitat destruction that would take  
15 listed species); *Glenn-Colusa*, 788 F. Supp. at 1128 (“an injunction must issue” where  
16 defendants are harming species by violating the ESA); *Center for Biological Diversity*, 2004  
17 WL 3030209, at \* 6 (finding that an injunction “tailored to the likelihood of future harm to the  
18 tortoise” “must issue . . . to protect the tortoise”).

19  
20 <sup>15</sup> *See also, e.g., Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 104 (D. Me. 2008)  
21 (finding that the death of a single Canada lynx from trapping was sufficient to support  
22 preliminary injunctive relief; *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp.  
2d 540, 563 (D. Md. 2009) (enjoining construction of a wind energy project in light of  
threatened take of listed species, where no member of the species had yet been taken).

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



1           Moreover, this relief would be compelled in this case even under the traditional  
 2 preliminary injunction test, whereby the Court *would* balance the competing interests of the  
 3 parties. Because Plaintiffs’ members’ regularly visit Sharp Park and enjoy and appreciate  
 4 viewing the CRLF and looking for the SFGS in their natural habitats there, Defendants’  
 5 activities, which are unlawfully taking the species, irreparably harm them by diminishing their  
 6 opportunities to engage in and enjoy these activities. Goodale Decl. ¶¶ 1, 13, 17; Pilgrim Decl.  
 7 ¶ 1, 5, 10 ; Graham Decl. ¶¶ 1-3. These kinds of diminished opportunities have long been  
 8 recognized as sufficient to demonstrate both standing and irreparable harm. *E.g. Fund for*  
 9 *Animals v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) (where a plaintiff will have “fewer  
 10 opportunities to view wild [animals] as a result of the defendants’ actions,” irreparable harm is  
 11 established); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992); *Cottrell*, 632 F.3d at  
 12 1135 (“The Supreme Court has instructed us that environmental injury, by its nature, can  
 13 seldom be adequately remedied by money damages and is often permanent or at least of long  
 14 duration, *i.e.*, irreparable”) (other citations omitted); *accord Forest Serv. Emp. for Env’tl. Ethics*  
 15 *v. U.S. Forest Serv.*, No. C 05-2227, 2005 WL 1514071 at \*2 (N.D. Cal. June 27, 2005)  
 16 (granting preliminary injunction upon finding that “the balance of hardships tips strongly in  
 17 favor of plaintiffs, given the irreversible nature of environmental harm and that defendant only  
 18 claims economic harm”).<sup>16</sup>

19           On the other side of the coin, although it is difficult to fathom how an interest in the  
 20 uninterrupted use of one of many golf courses available in the Bay area could *possibly* outweigh  
 21

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

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

4 More importantly, RPD has been on notice for *years*, if not decades, that its operations  
5 are taking these species – indeed, RPD’s taking was cited as one of the reasons for *listing* the  
6 species, *see supra* at 12 – and yet the City has inexplicably failed even to initiate the ITP process  
7 mandated by the ESA. Accordingly, neither RPD nor the Intervenor San Francisco Public Golf  
8 Association (“PGA”) should be heard to object to this injunctive relief on the grounds that it  
9 could interfere with the golf course. *See, e.g., Natl Parks & Cons. Assn v. Babbitt*, 241 F.3d  
10 722, 738 (9<sup>th</sup> Cir. 2001) (rejecting intervenors’ purported injuries from an injunction where  
11 objections to the project had been lodged years earlier).<sup>17</sup>

### 12 CONCLUSION

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

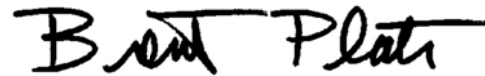
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18 <sup>17</sup> As Plaintiffs explained in responding to PGA’s motion to intervene, none of PGA’s  
19 various claims – *e.g.*, that the golf course is essential to serve a community need for less  
20 expensive golf, or that the golf course created the species’ habitat in the first place, *see* PGA  
21 Intervention Memorandum (“Int. Mem.”) (DN 19) at 5, 7 – has any merit. *See* Plaintiffs’  
22 Intervention Response at 8-10 (DN 38); NGF Consulting, Operational Review and  
23 Recommendations For City of San Francisco Golf Operations 30, 24 (2007) (showing Sharp  
24 Park fees are comparable to other courses) (available at <http://sf-recpark.org/Modules/ShowDocument.aspx?documentid=207> (last visited Sept. 22, 2011); Conceptual Ecosystem  
25 Restoration Plan and Feasibility Assessment, Laguna Salada, Pacifica, California (Feb. 9,  
26 2011) at 10 (available at <http://wildequity.org/versions/3921> (last visited Sept. 22, 2011)  
27 (explaining historical conditions in the area).

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



Dated: September 23, 2011

Respectfully submitted,



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**EXHIBIT LIST**

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

1 24 Sharp Park map  
2 25 Kamman Hydrology Report  
3 26 Declaration of John Bowie  
4 27 Dec. 30, 1992 Letter  
5 28 Jan. 17, 2003 Data Sheet (Campo Dep. Ex. 8)  
6 29 Mar. 5, 2004 Data Sheet (Campo Dep. Ex. 9)  
7 30 Feb. 1, 2005 FWS letter  
8 31 Feb. 2007 Data Sheet (Campo Dep. Ex. 10)  
9 32 Jan. 2008 Data Sheet (Campo Dep. Ex 12)  
10 33 Mar. 1, 2011 email  
11 34 FWS Recovery Permit issued to the National Park Service  
12 35 Sharp Park mowing schedule  
13 36 Jan. 4, 2011 Data Sheet (Campo Dep. Ex. 13)  
14 37 Jan. 7, 2011 FWS email (Campo Dep. Ex. 14)  
15 38 Jan 12, 2011 email  
16 39 Feb. 22, 2011 email  
17 40 Jan. 9, 2004 Data Sheet (Pl. Ex. 40) (Campo Dep. Ex. 18)  
18 41 Dec. 11, 2007 Data Sheet (Campo Dep. Ex. 20)  
19 42 Jan. 29, 2009 email (Campo Dep. Ex. 21)  
20 43 Nov. 2008 Swaim Biological Monitoring Form  
21 44 Declaration of Greg Kamman  
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**CERTIFICATE OF SERVICE**

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

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