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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UPPER SOUTH EAST COMMUNITIES)
COALITION,)

Plaintiff,)

v.)

U.S. ARMY CORPS OF ENGINEERS; LT. GEN.)
THOMAS P. BOSTICK, in his official capacity,)
Chief of Engineers and Commanding General, U.S.)
Army Corps of Engineers; COL. MICHAEL J.)
FARRELL, in his official capacity, District)
Commander, Sacramento District, U.S. Army)
Corps of Engineers; KRISTINE S. HANSEN, in)
her official capacity, Senior Project Manager, Reno)
Field Office, Sacramento District, U.S. Army)
Corps of Engineers; and REGIONAL)
TRANSPORTATION COMMISSION OF)
WASHOE COUNTY.)

Defendants.)

Case No. 3:13-cv-00403-LRH- WGC

**MEMORANDUM IN SUPPORT OF THE
MOTION TO DISMISS OF DEFENDANT
REGIONAL TRANSPORTATION
COMMISSION OF WASHOE COUNTY**

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2 Defendant Regional Transportation Commission of Washoe County (“RTC”), by its
3 attorneys, requests this Court to dismiss the Complaint of Plaintiff Upper Southeast
4 Communities Coalition (“Coalition”) for failing to state a claim upon which relief can be
5 granted, and in support thereof states as follows:
6

7 **INTRODUCTION**

8 The Plaintiff seeks to have this Court halt construction on a road project due to purported
9 violations of the federal Clean Water Act even though the very work Plaintiff seeks to enjoin
10 does not impact any *water*. The Complaint acknowledges that the work at issue – the Phase I
11 construction project – was found by the U.S. Army Corps of Engineers to be outside the
12 jurisdiction of the Clean Water Act because the work does not impact navigable waters of the
13 United States. The Complaint must therefore fail because it lacks the most basic allegation
14 necessary to bring an action under the Clean Water Act, namely that an unpermitted *discharge*
15 has occurred into jurisdictional waters of the United States. Further, the Plaintiff lacks standing
16 because the injunctive relief Plaintiff seeks is not available under the facts alleged. The
17 Complaint attempts to mask these fatal pleading issues by using misleading language, and
18 thereby improperly obfuscates the facts. The Complaint is improper and should be dismissed for
19 failing to satisfy Federal Rules of Civil Procedure 8(a)(2), 12(b)(6), and 12(e).
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23 **STANDARD**

24 Under Rule 12(b)(6), courts dismiss claims upon motion of the defendant when the
25 complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. Pro. 12(b)(6). In a
26 Rule 12(b)(6) motion to dismiss, a court is to consider all factual allegations in the Plaintiff’s
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1 complaint as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). However, mere conclusory
2 statements making formulaic recitations of the elements are not entitled to that assumption
3 “because they do nothing more than state a legal conclusion—even if that conclusion is cast in the
4 form of a factual allegation.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009),
5 quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007). “In sum, for a complaint to
6 survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences
7 from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss*
8 at 969. “The pleading must contain something more than a statement of facts that merely creates
9 a suspicion of a legally cognizable right of action, on the assumption that all the allegations in
10 the complaint are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
11 (2007).
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14 SUMMARY OF THE COMPLAINT’S ALLEGATIONS

15 The allegations below are set forth in the Complaint. Defendant RTC does not admit any
16 of these allegations and, if subsequent pleadings are needed, RTC reserves the right to raise
17 serious concerns about the good faith basis of certain allegations that are contained in the
18 Complaint.
19

20 The Upper South East Communities Coalition (“Coalition” or “Plaintiff”), a local
21 citizens’ advocacy group, alleges various violations. Complaint at ¶ 2. The citizens’ suit was
22 brought against RTC under what is commonly referred to as the federal Clean Water Act. *Id.* at ¶
23 3.

24 Defendants include RTC and the U.S. Army Corps of Engineers (“Corps of Engineers” or
25 “Corps”) and certain affiliated individuals. *Id.* at ¶¶ 20-24. RTC is the local public agency
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1 responsible for the transportation infrastructure, including the planning and construction of
2 roads, in Reno, Sparks, and unincorporated portions of Washoe County, Nevada. *Id.* at ¶ 24.

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4 RTC is currently building Phase I of a roadway called the Southeast Connector
5 (hereinafter, the “Connector” or the SEC). The Phase I construction project of the Connector is
6 about one mile in length. The Phase II project of the Connector, which is *not* under construction,
7 is planned to be about 4.5 miles in length. *Id.* at ¶¶ 2 and 4.

8 In November 2012, the Corps of Engineers notified RTC by letter that the Corps had
9 determined that the Phase I construction project would not result in the discharge of dredged or
10 fill material within navigable waters of the United States and would not involve work in
11 navigable waters of the United States. *Id.* at ¶ 43. As a result, the Corps of Engineers advised
12 RTC that a Department of Army Section 404 permit under the Clean Water Act was not required
13 for the Phase I construction project. *Id.*

14
15 In November 2012, RTC approved contracts for construction of the Phase I project. *Id.* at
16 ¶ 45. Construction of the Phase I project is now underway and has been underway since
17 February 2013. *Id.* at ¶ 47.

18
19 The Complaint alleges that *the Connector* (not the Phase I project), as proposed, affects
20 11.23 acres of wetlands. *Id.* at ¶ 77. Plaintiff Coalition members assert that they recreate in the
21 Truckee River and Truckee Meadows and at the Rosewood Lakes Golf Course. *Id.* at ¶ 18 and
22 26. Some Plaintiff Coalition members purportedly live next to the “proposed” path of the
23 Connector. *Id.* at ¶ 26.

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25 **SUMMARY OF PLEADING OMISSIONS AND
THE COMPLAINT’S OBFUSCATION**

26 Importantly, the Complaint fails to allege essential facts required for an action asserting
27 violations under the Clean Water Act. Some examples include:
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- The Complaint does not (and cannot in good faith) allege any discharge of a pollutant into waters of the United States in the Phase I construction project – the construction project Plaintiff has put at issue in this lawsuit and seeks to enjoin.
- The Complaint does not allege that the Phase I construction project at issue actually impacts jurisdictional waters of the United States (and of course it does not).
- The Complaint does not allege that the Phase I construction project is a “major federal action” or is otherwise “federalized” (and it is not “federalized” because it is not funded with any federal monies).
- Plaintiff alleges that there will be “irreparable environmental harm in the form of significant impacts to the riparian and aquatic environment of the Truckee River and Truckee Meadows, degrading habitat for fish, birds, and other wildlife, and increasing the risks of catastrophic floods.” *Id.* at ¶ 7. Importantly though, missing from all the conclusory (and baseless) rhetoric is any allegation that any portion of the Phase I construction project, the only construction project now underway, will result in any environmental harm.
- The Complaint fails to allege standing for its members *as related to* the Phase I project the Plaintiff has put at issue.

Contrary to Rule 8 of the Federal Rules of Civil Procedure, the Complaint fails to provide a short and plain statement of pertinent facts and instead, in several significant respects, obfuscates the relevant facts. The Complaint alleges that RTC applied for a Section 404 permit in May 2011 for the *then-proposed* SEC. *Id.* at ¶ 36. However, as the Complaint partly informs, various stakeholders raised concerns about *that* roadway plan during the Corps’ administrative

1 process, which was and is designed to vet issues and concerns with a Section 404 permit request.
2 *Id.* at ¶ 38 and 39. As a result of stakeholder input, RTC substantially redesigned the proposed
3 roadway to address the concerns that had been raised over the plan tendered in May 2011.
4 Paragraph 43 of the Complaint shows that the Plaintiff is aware that the substantially modified
5 SEC plan removed all impacts to jurisdictional waters for the Phase I construction project. The
6 Plaintiff also knows (but failed to advise the Court in its Complaint) that a Section 404 permit
7 application is currently pending before the Corps for the proposed Phase II work.¹ Instead, the
8 Complaint misleadingly alleges that, “RTC has begun construction of a 5.5-mile highway that
9 will require the filling of 11.23 acres of wetlands, an activity that requires a Section 404
10 Permit....” *Id.* at ¶ 77.

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12
13 Because the revised planned Phase II project will impact jurisdictional waters, RTC
14 submitted to the Corps a substantially revised 404 application on July 19, 2013.² The Plaintiff
15 knows this new permit application is now pending before the Corps and that this application
16 pertaining to the remaining four-fifths of the SEC is currently subject to the Corps’ pending
17 administrative processes. The Complaint fails to advise this Court that RTC submitted a 404
18 application to the Corps on July 19, 2013.

19
20 A few paragraphs later, still in the sole count directed to RTC, the Complaint states,
21 “Each day that RTC continues construction of the SEC without a 404 Permit constitutes a
22 separate and distinct day of violation under the CWA.” ¶ 81. The Complaint’s clear implication
23 is that RTC is *currently* engaged in construction that includes “the filling of ... wetlands”
24 without a permit. This false impression is further underscored by the title Plaintiff provided for
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26 ¹ <http://www.southeastconnector.com/usace-permit-application/>

27 ² See footnote 1.

1 the sole count against RTC: “Dredging and Filling of Wetlands Without an Authorizing Permit.”

2 The Complaint should be dismissed.

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4 ARGUMENT

5 A. The Complaint fails to allege a Clean Water Act violation because it fails to allege a
6 discharge to waters of the United States.

7 The Second Claim for Relief (the only Claim directed against RTC³) is captioned
8 “Dredging and Filling of Wetlands Without an Authorizing Permit.” This count is based on
9 alleged violations of Sections 301(a) and 404(a) of the Clean Water Act, 33 U.S.C. §§ 1311(a)
10 and 1344(a). Section 301(a) makes “the discharge of any pollutant by any person” unlawful
11 except when the discharge is in compliance with other sections of the Act, including Section 404.
12 Section 404(a) establishes a permit program “for the discharge of dredged and fill material into
13 navigable waters at specified disposal sites.”

14 Both Section 301(a) and Section 404(a) are based on the concept of a “discharge”. The
15 Act defines the phrase “discharge” to mean a “discharge of a pollutant” or pollutants “when used
16 without qualification,” and the phrase “discharge of a pollutant” is defined as the “addition” of
17 pollutants to jurisdictional waters. 33 U.S.C. §§ 1362 (12) and (16). In the absence of a
18 “discharge”, there is no CWA issue. As the Fifth Circuit has recognized,

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20 *The conclusion is inescapable. The existence of discharge is*
21 *critical. The discharge must be of effluent or dredged or fill*
22 *material. The discharge of effluent is not . . . merely an*
23 *aggravating factor when addressing whether or not a section 404*
permit is required. On the face of the statute, it [a discharge] is the
requirement for statutory coverage.

24 ³ The First Claim for Relief, pursuant to the Administrative Procedures Act and relating to NEPA and the ESA, is
25 directed against the Corps only, not RTC. No similar claim is addressed to RTC because the statutes cited require
26 action by the federal government only. See Paragraphs 61 and 62. As the Ninth Circuit has recognized, the general
27 rule is that “the federal government is the only proper defendant in an action to compel compliance with NEPA.”
28 *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114 (9th Cir. 2000), *abrogated on*
other grounds by Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

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2 *Save Our Community v. U.S. EPA*, 971 F.2d 1155, 1163 (5th Cir. 1992) (emphasis added). *See*
3 *also Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006) (finding that water
4 withdrawals associated with gold mining permits did not violate the Clean Water Act because
5 they did not involve discharges); *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997)
6 (holding that the withdrawal of water from a lake did not trigger the provisions of section 401
7 since “neither the withdrawal of water from the Lake nor the reduction in the volume of water ...
8 ‘results in a discharge’ for purposes of Section 401(a)(1).”); *Connecticut Coastal Fisherman’s*
9 *Assn. v. Remington Arms Co. Inc.*, 989 F.2d 1305, 1312 (2nd Cir. 1993) (after gun club was
10 closed, no likelihood existed of continuing discharges that would violate the Clean Water Act);
11 and *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), *cert.*
12 *denied*, 108 S.Ct 484, 484 U.S. 975 (since at time of suit the defendant had ceased operating
13 under a permit because of its completion of a tie-in arrangement with a municipal treatment
14 facility, “there was no reasonable likelihood that defendant’s alleged infractions would continue,
15 and the district court correctly determined that the action should be dismissed.”).

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18 The Plaintiff concedes that Section 301(a) violations must be based on illegal discharges.
19 At Paragraph 54, the Complaint notes that the prohibition in Section 301(a) applies to the
20 “*discharge* of pollutants to navigable waters of the United States.” (Emphasis added.) The
21 Complaint nevertheless fails to allege that *any* discharge has taken or will take place in the very
22 Phase I construction project the Plaintiff seeks to enjoin. This lack of essential allegation is
23 particularly telling in light of the Complaint stating that Plaintiff’s members have allegedly
24 “visited the site of Phase I regularly over the last several months.” *See* ¶ 50.

25
26 RTC does not mean to imply that this significant pleading deficiency is a scrivener’s
27 error that can be corrected by re-pleading. Rather, the Plaintiff did not make this essential
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1 allegation because Plaintiff cannot in good faith allege any discharge into navigable waters in the
2 Phase I construction project because Plaintiff knows that no jurisdictional waters have been or
3 will be impacted in the Phase I construction project.
4

5 Instead of alleging that an illegal discharge has occurred, the Plaintiff implies that
6 beginning construction of a portion of the SEC is a violation of the Act whether or not the
7 construction project at issue has resulted in any discharge. For instance, Paragraph 10 alleges
8 that “commencing Phase I of the SEC without a Section 404 Permit” is a violation. Paragraph 47
9 describes work that has taken place in Phase I since February 2013 as including “clearing and
10 grubbing”, grading, and “other earth moving activities”, but is silent on any discharges in the
11 Phase I project. In Paragraph 80, the Plaintiff alleges that “RTC’s *violations* have been
12 occurring regularly and consistency [sic] since at least February 2013 and are continuing to occur
13 through the date of this Complaint.” (Emphasis added.) Paragraph 81 alleges that RTC will
14 continue to violate Section 404 of the Act “[e]ach day that RTC continues construction of the
15 SEC without a Section 404 permit.” Finally, in the Relief Requested portion of the Complaint,
16 the Plaintiff asks this Court to “[a]djudge and declare that RTC has violated and continues to
17 violate the [Clean Water Act] by constructing the first phase of the SEC without a Section 404
18 Permit.” The Complaint obfuscates what has occurred in the Phase I construction project at issue
19 and what is currently planned to occur in Phase II, the separate portion of the SEC currently the
20 subject of the Corps’ administrative process regarding RTC’s pending Section 404 permit
21 application. Despite this obfuscation, mere construction activities that do not involve a discharge
22 into jurisdictional waters cannot – as a matter of law – constitute a violation of the Clean Water
23 Act.
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1 In fact, the Plaintiff is well aware that no illegal discharge will occur in the Phase I
2 construction project, the only portion of the SEC for which actual construction has commenced.
3 RTC is legally incapable of obtaining a 404 permit for the Phase I construction project when the
4 Corps – the federal agency with jurisdiction over this issue – says that no permit is required.
5 RTC has proceeded properly – it provided information to the Corps about the proposed Phase I
6 construction work and it filed a permit application as a precursor to the Phase II project. At no
7 place does the Complaint allege that *any discharge* will occur during Phase I. To the contrary,
8 the Complaint acknowledges at Paragraph 43 that the Corps notified RTC in November 2012
9 “that Phase I would not result in the discharge of dredged or fill material within waters of the
10 United States and would not involve work in navigable waters of the United States.” Complaint
11 at ¶ 43. The Complaint does not allege that RTC has commenced *any* construction on *any*
12 portion of the planned SEC other than the Phase I construction project.
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15 The Complaint also fails to allege that any discharge in violation of Section 301(a) of the
16 Clean Water Act will take place in the future. The Complaint does not (and cannot) allege that
17 any discharges will occur as a result of the Phase I construction project. Significantly, the
18 Complaint also does not allege that RTC will discharge into jurisdictional waters in Phase II
19 without first obtaining a Section 404 Permit from the Corps. RTC has no intention of
20 commencing the Phase II project until the Corps completes its now-pending administrative
21 process on RTC’s Section 404 permit application.
22

23 Paragraph 78 of the Complaint states, “Pursuant to the definitions contained in the CWA,
24 RTC is a “person” responsible for discharging “pollutants” from a “point source” into the
25 “waters of the United States” and lacks permit authority for such discharges as required by
26 Section 301(a) of the CWA.” This paragraph is apparently intended as a statement of the law
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1 (namely, that a “person” cannot discharge into waters of the United States without a 404 permit
2 and that RTC is such a “person” for purposes of this statutory scheme). We trust this paragraph
3 was not intended to lull the reader into a sense that “such discharges” had occurred. There is no
4 actual dispute on this elementary proposition of the law, and RTC of course will need to obtain a
5 Section 404 permit prior to discharging pollutants to jurisdictional waters for the Phase II
6 project. What is necessary to sustain a cause of action for a claimed violation under Section
7 301(a) of the Act, however, is an allegation that RTC is currently discharging or will in the
8 future discharge pollutants to jurisdictional waters without a permit *in the construction project at*
9 *issue*, namely the Phase I project.
10

11 Without an allegation of a discharge into jurisdictional waters in the Phase I project – the
12 very construction project Plaintiff seeks to enjoin, there can be no violation of Section 301(a) of
13 the Clean Water Act as a matter of law. The Complaint is fatally flawed.
14

15 B. Plaintiff lacks standing to pursue this lawsuit.

16 A citizens’ suit brought under the Clean Water Act requires the three basic elements of
17 Article III standing: (1) a concrete, particularized injury in fact; (2) a causal connection between
18 the injury and the conduct complained of; and (3) the injury must be likely to be redressed by a
19 decision in the plaintiff’s favor. *Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981, 984 (9th Cir.
20 1994). The Complaint fails to appropriately allege either a particularized injury in fact or that
21 the alleged injury is redressable by a decision in Plaintiff’s favor.
22

23 The Complaint seeks to enjoin the Phase I construction project. The Phase I construction
24 project is thus the focus of the lawsuit. A 404 permit application is pending and will be resolved
25 before any construction can or will begin in the Phase II construction project, further
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1 underscoring the fact that the only construction at issue in the Complaint is the Phase I
2 construction project.

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4 Regarding injury in fact, the Plaintiff failed to allege that any of its members live or
5 recreate on the land that encompasses the Phase I construction project. The Plaintiff refers to the
6 “golf course,” but the Plaintiff knows (but fails to plead) that the golf course is in the area
7 planned for the Phase II project. Complaint at ¶ 26. The Plaintiff makes other vague allegations
8 that presumably were an attempt to satisfy the necessary standing requirements, but none relate
9 to the Phase I construction project. Complaint at ¶¶ 18 and 26. Finally, members of the
10 Coalition allegedly live adjacent to the “proposed path” of the Southeast Connector, also an
11 apparent reference to Phase II. *Id.* at ¶ 18. Despite the Complaint’s obfuscation of the Phase I
12 project with the Phase II project, the Plaintiff has failed to allege the standing requirements as
13 related to the very construction work the Plaintiff seeks to enjoin – the Phase I construction
14 project. Without such standing allegations as to the Phase I construction project, there is no
15 standing for the claim Plaintiff now pursues.

16
17 The Plaintiff must also allege for standing purposes that, if it prevails, the relief it seeks
18 could redress its purported injury. Even if an allegation of a violation of Section 301(a) could be
19 sustained (which, here, it cannot), the injunctive relief requested by the Plaintiff in the Relief
20 Requested portion of the Complaint would simply not be available. The Plaintiff asks this Court
21 to issue a preliminary injunction to enjoin RTC “from engaging in any physical construction
22 activities associated with the SEC unless and until the Corps has issued a Section 404 permit....”
23 Rule 65(d)(1)(C) of the Federal Rules of Civil Procedure requires that every injunction “describe
24 in reasonable detail . . . the act or acts restrained or required.” The Ninth Circuit has explained
25 that in a Clean Water Act context, the scope of injunctive relief is limited to preventing the
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1 discharge of pollutants, not the cessation of all construction. *See Save Our Sonoran*, 408 F.3d at
2 1125 (where the Court noted that, “It is the effect on the jurisdictional waters, not on the
3 environment in general, that determines the proper scope of the preliminary injunction. Any
4 injunction must be tailored accordingly.”). Because no illegal discharge has or will occur with
5 respect to the Phase I construction, no injunctive relief can be forthcoming under the Clean
6 Water Act addressing the Phase I project. Put differently, an injunction issued for an alleged
7 violation of the Clean Water Act cannot enjoin activity beyond the area in which there is
8 jurisdiction under the Clean Water Act (namely, the injunction cannot reach beyond the area
9 containing jurisdictional waters). *Id.* (“If Lone Mountain can demonstrate to the district court
10 that a portion of the contested property can be developed without affecting jurisdictional waters,
11 so that no Section 404 permit would be required, then the preliminary injunction must be
12 modified accordingly.”). The bottom line is that Plaintiff does not possess standing because its
13 alleged injuries neither occur in nor can possibly be redressed by injunctive relief involving the
14 Phase I construction project.
15
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17 CONCLUSION

18 Despite attempting to obfuscate the facts, the Complaint does not allege that any
19 discharges to jurisdictional waters have or will occur as a result of the Phase I construction
20 project or that RTC intends to fill any jurisdictional waters without first obtaining a Section 404
21 permit issued by the Corps. As such, no violation of the Clean Water Act has been properly
22 alleged. Even if the Complaint had contained sufficient allegations of a Clean Water Act
23 violation against RTC, however, the Plaintiff does not have standing to challenge any actions by
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RTC relating to the Phase I construction project. For these reasons, this Court should dismiss the Complaint, and grant such further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 19th day of August, 2013, I served true copies of the foregoing *Memorandum in Support of the Motion to Dismiss of Defendant Regional Transportation Commission of Washoe County* by Regular U.S.

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Candace Kelley