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16 UNITED STATES DISTRICT COURT
17 DISTRICT OF NEVADA

18 UPPER SOUTH EAST COMMUNITIES) Case No. 3:13-cv-00403-MMD-(WGC)
COALITION,)

19)
20 Plaintiff,)

21 v.)

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

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1 TRANSPORTATION COMMISSION OF)
 WASHOE COUNTY.)
 2 Defendants.)

3 **DEFENDANT REGIONAL TRANSPORTATION COMMISSION**
 4 **OF WASHOE COUNTY’S OPPOSITION TO PLAINTIFF’S**
 5 **MOTION FOR PRELIMINARY INJUNCTION**

6 Defendant Regional Transportation Commission of Washoe County (“RTC”) opposes
 7 Plaintiff’s motion for preliminary injunction (hereinafter the “Motion”) (Doc. # 13), which
 8 should be denied for the reasons set forth below.

9 **INTRODUCTION**

10 Plaintiff Upper South East Communities Coalition (“Plaintiff” or “Coalition”) seeks to
 11 have the Court send home scores of construction workers and engineers on a roadway project
 12 that has been underway in full view of the public for more than six months and was the subject of
 13 years of public planning. Such an injunction would subject RTC – and thus the taxpayers – to
 14 substantial costs in construction delay penalties and other unbudgeted expenses. Plaintiff asks
 15 the Court to halt RTC’s construction work because of a purported violation of the Clean Water
 16 Act (“CWA”), yet the Plaintiff concedes in deposition that it has *no evidence* of any discharges to
 17 waters of the United States that would constitute a CWA violation. Specifically, RTC has not
 18 impacted any jurisdictional waters of the United States, and the construction project at issue
 19 involves no federal monies and is being built on non-federal lands; furthermore, regarding the
 20 construction project at issue, the U.S. Army Corps of Engineers (“Corps”) has expressly
 21 disavowed any jurisdiction after its deliberative agency review of its statutory jurisdiction.

22 Plaintiff’s claim is baseless. First, Plaintiff’s Complaint is facially defective because it
 23 fails to plead a cognizable claim under the CWA, and RTC’s pending Motion to Dismiss should
 24 be granted (and thus Plaintiff has no likelihood of success). Second, no facet of the construction
 25 project at issue has impacted any jurisdictional waters for CWA purposes. With no impacts to
 26 (that is, with no unpermitted discharges to) waters of the United States, there can be no CWA

1 violation. Third, Plaintiff claims that it needs an injunction based on irreparable harms, but
2 Plaintiff's corporate designee repeatedly conceded at deposition that there is *no evidence* of any
3 irreparable harm. Finally, Plaintiff asserts that it needs an injunction to prevent purported
4 irreparable harm due to certain construction activity; but, the primary construction activity
5 Plaintiff seeks to enjoin has already been completed; thus, even if an injunction were justifiable –
6 which is not the case here – such an injunction claim became moot while Plaintiff sat on its
7 hands.

8 RTC has followed the law. The Plaintiff's claims are groundless. Injunctive relief is not
9 available to Plaintiff, and Plaintiff's motion should be denied.

10 **FACTUAL BACKGROUND**

11 RTC is currently building Phase I of a roadway called the SouthEast Connector
12 ("Connector" or the "SEC"). Affidavit of Paul G. Oksol, attached hereto and incorporated herein
13 by reference, and identified as RTC Exhibit 1("P. Oksol Aff") at ¶¶5 and 67. The Phase I
14 construction project of the Connector is about one mile long, running from the intersection of
15 Sparks Boulevard and Greg Street to about 800 feet south of Clean Water Way. *Id.* at ¶5. RTC
16 has completed more than 40 percent of the overall Phase 1 project and virtually all vegetation,
17 including trees, shrubs, and weeds, have already been removed from the roadway path. *Id.* at
18 ¶67. RTC's contractors have already completed *all* shrub and vegetation clearing that is to occur
19 near the Truckee River banks and almost all that is to occur near the Steamboat Creek banks. *Id.*
20 It is undisputed that none of these clearing operations impacted any jurisdictional waters. *Id.*

21 If the Phase 1 construction project were stopped, RTC and the taxpayers would suffer
22 substantial financial harm. *Id.* at ¶69. RTC is under contract to Keiwit Construction. *Id.* RTC is
23 subject to penalties and fees under the contract in the event work stops. *Id.* RTC would have to
24 pay salaried personnel on site and substantial fees for rental of large equipment, such as cranes,
25 on site drilling equipment, and material storage fees. *Id.* Further expenses could be incurred
26 with Keiwit's subcontractors. *Id.* If work were stopped for just 90 days, the stoppage costs

1 would likely exceed \$2 million. *Id.* The 100 to 200 hourly employees now on the site would be
2 laid off. *Id.* at ¶70. Additional costs would be incurred by RTC for fencing and security at the
3 site, and for the need to address rust and material degradation resulting from the unanticipated
4 time in which materials at the site are exposed to the elements. *Id.* at ¶71.

5 There could be adverse environmental effects resulting from leaving the now-cleared
6 roadway soil barren for prolonged periods, including soil erosion and infestation of the invasive
7 whitetop weed. *Id.* An infestation of the noxious weed would cause RTC to incur further costs
8 upon restarting work. *Id.*

9 The Phase 2 project of the Connector, which is *not* under construction, is planned to be
10 about 4.5 miles in length and is planned to run from the end of the Phase 1 project to the
11 intersection of South Meadows Parkway and Veterans Parkway. *Id.* at ¶5. Importantly, while
12 the Connector has been ultimately envisioned as a single roadway, Phase 1 can stand on its own
13 with utility independent of Phase 2 and with the option of tying Phase 1 into the existing
14 transportation network with or without the Phase 2 project. *Id.* at ¶¶ 42-43. A connection from
15 the Phase 1 roadway via Mill Street extension or Pembroke (or both) to McCarran Boulevard
16 could easily be made. *Id.* The currently adopted Regional Transportation Plan (“RTP”) – as well
17 as previous RTPs – depicts a connection from the Phase 1 roadway via a Mill Street Extension to
18 McCarran Boulevard. *Id.* Such a connection would help alleviate regional traffic congestion.
19 *Id.* Additionally, the Phase 1 project includes a bridge over the Truckee River, which is designed
20 to be utilized safely during flood events up to a 117-year event (which significantly exceeds the
21 McCarran Boulevard Bridge tolerance for flood conditions). *Id.* at ¶21. This Phase 1 bridge will
22 provide emergency access and an evacuation route over the Truckee River that does not currently
23 exist. *Id.*

24 RTC is the public agency created under Nevada law and serves as the Metropolitan
25 Planning Organization, Public Transit Authority, and Street and Highway agency for Washoe
26 County. *Id.* at ¶7. RTC is empowered to spend countywide motor fuel taxes on regional

1 roadways consistent with the RTP. *Id.* RTC board is composed of elected officials from Reno,
2 Sparks and Washoe County. *Id.* The Connector roadway project concept dates back to the late
3 1950s. *Id.* at ¶12. Regional decision makers first approved the then-called Truckee Meadows
4 Area Urban Transportation Plan in 1965, which envisioned such a roadway. *Id.* at ¶12.

5 Planners discussed various corridors over the decades, but the Valley Corridor, where the
6 SEC is currently being constructed and planned, was consistently deemed the most cost-effective
7 route with the most travel benefits. *Id.* at ¶12. In January 2007, RTC board, after extensive
8 public hearings and comment periods, approved the Valley Corridor for what was to be the SEC.
9 *Id.* at ¶13 and RTC Board meeting minutes for Jan. 19, 2007, attached as RTC Exhibit 1-D. The
10 5.5-mile six-lane roadway has been designed to relieve commuter congestion on portions of I-80,
11 I-580, Southeast McCarran, Longley Lane, Greg Street and Double R Boulevard and other
12 significant regional routes. *Id.* at ¶¶19, 22-24.

13 The concept of phasing for the SEC is not new and runs throughout its history. *Id.* at ¶39.
14 The 1965 Urban Transportation Plan (“UTP”) described the original State Route 27 as a longer
15 roadway and this has already been completed in phases over the last 48 years. *Id.* Developers
16 built a southern section, approximately 4 miles in length, over a period of about 5-7 years in the
17 2000’s. The Phase 1 project and the currently planned Phase 2 project would comprise the last
18 phases of the overall 16-mile roadway identified in 1965. *Id.*

19 Travel demands for organizations such as RTC are commonly analyzed in terms of 5, 10
20 and 20 year time horizons. *Id.* at ¶20. RTC’s traffic modeling shows that 6 lanes will be fully
21 utilized in the 20 year time horizon. *Id.* However, the modeling shows a *current* benefit for a
22 north-south roadway, which is the SEC. *Id.* This modeling indicates a *present* need and benefit
23 to the community for a 2 to 4 lane facility. *Id.* Because of construction inflation, economies of
24 scale, and reduction of future traffic impacts, RTC is planning on 6 lanes at this time. *Id.* The
25 SEC is needed now to relieve current traffic congestion in the community. *Id.*

1 In November 2010, RTC conducted a Cost and Risk Assessment of the SEC and analyzed
2 various scenarios of constructing and permitting the SEC. *Id.* at ¶40. As a result, RTC decided *in*
3 *2010* to design the northern part of the SEC (the Phase 1 construction project) as a separate
4 design package. *Id.* The north end of the SEC was chosen to provide a northern point of access
5 from I-80, which would otherwise be unavailable because of the physical barrier presented by the
6 Truckee River. *Id.* From a design standpoint, the southern limit of Phase 1 was chosen at 800
7 feet south of Clean Water Way in order to provide a sufficient platform and work area to
8 construct the bridge over Clean Water Way. *Id.* In so doing, if Phase 2 were delayed or
9 curtailed, it will be relatively easy to add connections to Mill Street or Pembroke. *Id.* RTC
10 already possesses the right of way for completion in this manner and doing so could be
11 accomplished without impacting any jurisdictional waters. *Id.*

12 In 2008, local voters approved ballot initiative RTC-5 encouraging the Nevada
13 Legislature to move forward with legislation to allow RTC to index fuel taxes to inflation and
14 thereby obtain additional funding to build major road projects – including the SEC. *Id.* at ¶14.
15 The Cities of Reno and Sparks own much of the land under Phase 1. *Id.* at ¶16. Despite
16 Plaintiff’s assertions to the contrary, the overall community and the majority of its elected
17 officials have supported and continue to support additional roadway capacity and the SEC. *Id.* at
18 ¶¶14-16. The entire project is being funded with local dollars through bond sales. *Id.* at ¶15. No
19 federal monies or land are being utilized for the SEC. *Id.*

20 As noted above, the project has been planned in phases for years with Phase 1 approved
21 for a separate design package in 2010. *Id.* at ¶¶29 and 39. RTC submitted a Section 404 permit
22 application to the Corps in May 2011, which at that time described the Connector as a single
23 project because at that time *both* proposed phases involved impacting waters of the United States,
24 subjecting portions of both phases to Corps jurisdiction. *Id.* at ¶29. In May 2011, the then-
25 proposed Phase 1 section of the SEC included a realignment of Steamboat Creek necessitating a
26 Corps review. *Id.* at ¶30. RTC engaged in extensive public outreach after filing that Section 404

1 permit application. *Id.* at ¶¶17-18, 31. Stakeholders, including the Pyramid Lake-Piaute Tribe
 2 and the Truckee Meadows Water Reclamation Facility, expressed concerns regarding the stream
 3 realignment. *Id.* at ¶31. In response to those stakeholders' comments, RTC made *substantial*
 4 redesigns to Phase 1 and Phase 2. *Id.* at ¶¶32-35. Importantly, under the new design, the 5.5-
 5 mile realignment of Steamboat Creek originally planned in May 2011 for the entire SEC was
 6 completely and totally eliminated and other significant mitigation plans were added. Affidavit of
 7 Matthew Setty, attached hereto and incorporated herein by reference, and identified as RTC
 8 Exhibit 2 ("M. Setty Aff.") at ¶7 and P. Oksol Aff. at ¶32.

9 Stakeholder input directly impacted the substantial changes; in turn, these changes
 10 garnered support of more stakeholders. P. Oksol Aff. at ¶33. The resulting Phase 1 project ends
 11 approximately one and a half miles from the jurisdictional waters that the revised, proposed
 12 Phase 2 project would impact. *Id.* at ¶36. In September 2012, RTC formally advised the Corps by
 13 letter of its changes to Phase 1 and that Phase 1, with this new scope, no longer impacted
 14 jurisdictional waters. *Id.* at ¶36 and Sept. 26, 2012, L. Gibson Ltr. to K. Hansen, attached as
 15 RTC Exhibit 1-I (Plaintiff's Exhibit, Doc. # 22 at 6-7). RTC explained the independent utility of
 16 the Phase 1 project as separate and distinct from the Phase 2 project. Sept. 26, 2012, L. Gibson
 17 Ltr. to K. Hansen (Plaintiff's Exhibit, Doc. # 22 at 6-7).

18 "Phase 1 contains no impacts to Waters of the U.S. and can be
 19 connected to the existing transportation network with no additional
 20 impacts to Waters of the U.S. if needed. ...
 21 Phase 1 can be a single and complete project by connecting to
 22 Clean Water Way or Pembroke Drive or a Mill Street Extension
 23 which is in the current 2030 Regional Transportation Plan. Either
 24 option would have no impacts to Water of the U.S." L. Gibson Ltr.
 25 to K. Hansen, RTC Ex. 1-I (Plaintiff's Exhibit, Doc. # 22 at 6)

23 On November 16, 2012, Kristine Hansen, Senior Project Manager with the Reno office of the
 24 Corps of Engineers responded to RTC, expressly disclaiming any jurisdiction over the Phase 1
 25 project because jurisdictional waters were not impacted. Nov. 16, 2012 K. Hansen Ltr. to P.
 26 Oksol (Plaintiff's Exhibit, Doc. # 22 at 11-12), P. Oksol Aff. at ¶37, and RTC Exhibit 1-K. Her

1 letter stated, “we have determined that the proposed work will not result in the discharge of
2 dredged or fill material within waters of the United States and does not involve work in navigable
3 waters of the United States; therefore, a Department of the Army Permit is not required for this
4 work.” Nov. 16, 2012 K. Hansen Ltr. to P. Oksol, (Doc. # 22 at 11) and RTC Exhibit 1-K. The
5 Corps’ website listed the May 2011 permit as “Withdrawn” as of July 2012. P. Oksol Aff. at
6 ¶36.

7 Upon receiving the declination of jurisdiction from the Corps, RTC obtained necessary
8 permitting from state and local agencies and began construction. *Id.* at ¶38. Substantial
9 modeling and calculations were done to ensure Phase 1 had a zero net impact on flooding in the
10 area, as this was very important to RTC and its stakeholders. *Id.* at ¶57. The City of Sparks, the
11 public entity responsible for the applicable flood zone, formally approved the net zero impact
12 assessment for flooding in Phase 1. *Id.* at ¶57 and RTC Exhibit 1-L.

13 On July 19, 2013, prior to the filing of Plaintiff’s lawsuit, RTC submitted an almost
14 completely revised Section 404 permit application with a vastly altered and improved mitigation
15 plan to the Corps for the Phase 2 project. P. Oksol Aff. at ¶34; M. Setty Aff. at ¶7-9. The Corps’
16 administrative review, which is subject to public comment, is currently underway. *See* Corps
17 website at
18 [http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Article/17655/spk-](http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Article/17655/spk-2010-01058-southeast-connector-nv.aspx)
19 [2010-01058-southeast-connector-nv.aspx](http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Article/17655/spk-2010-01058-southeast-connector-nv.aspx).

20 In the July 2013 application, RTC has proposed affecting 11.23 acres of wetlands in
21 Phase 2. P. Oksol Aff. at ¶50 and M. Setty Aff. at ¶9. This amounts to just more than 1 percent
22 of the entire SEC that encompasses roughly 1,000 acres. P. Oksol Aff. at ¶50. RTC proposes
23 replacing those wetlands, depending on their quality, in ratios that leave the community with net
24 *increased* wetland acreage.¹ In addition to mitigation for impacts to jurisdictional wetlands, the

25 ¹ The proposed RTC mitigation plan calls for 3 to 1 replacement of higher functioning obligate wetlands, 2 to 1 for
26 agricultural wetlands, and 1.5 to 1 for whitetop infested wetlands. All of the new wetlands will be contiguous, rather
than separated as they are now, providing for more beneficial environmental effects. P. Oksol Aff. at ¶53.

1 project proposes to develop an additional approximately 150 acres of wetland habitat to address
2 water quality, weed management, flood mitigation, and contaminated soils so as to appropriately
3 address environmental concerns regarding the Phase 2 project. M. Setty Aff. at ¶9. The proposed
4 project will result in an enhanced ecological function of the Steamboat Creek Corridor,
5 mitigation of existing environmental degradation (specifically noxious weeds and historic soil
6 contamination), protection of endangered species habitat relied upon by Lahontan cutthroat trout
7 (“LCT”) and Cui-ui, and provide for functional and sustainable flood plain management. *Id.*
8 The net result will be a substantial *increase* in the quantity and quality of the wetlands in Truckee
9 Meadows. *Id.* All of these issues are before the Corps and the Plaintiff plans to submit
10 comments in the Corps’ pending administrative process. 8/23/13 Coalition Corporate Designee
11 Deposition at 34:21-35:1 (hereinafter “Coalition Corp. dep.”), attached as RTC Exhibits 3 and 3-
12 A, B, and C, with declaration and exhibits included.

13 The Biological Assessment contained in the July 2013 Section 404 application has
14 concluded that while the project may pose temporal impacts to habitats within the Truckee River
15 (during the construction), the project is “not likely to adversely affect” species protected under
16 the Endangered Species Act. M. Setty Aff. at ¶12. The result will be an *improvement* to the
17 Steamboat Creek and Truckee River environments, which will *benefit* the habitats for the LCT
18 and the Cui-ui. *Id.* Either way, these issues are pending before the Corps.

19 In addition to the net gain in wetlands, the SEC will provide substantial environmental
20 benefits to the community. P. Oksol Aff. at ¶51. The SEC will reduce air pollution by
21 alleviating traffic congestion on the regional roadway network. *Id.* at ¶52. The Connector also
22 includes a 10 foot wide multi-use path that will connect the extensive network of bike lanes in
23 south Reno to the popular Truckee River Trail. *Id.* The excavation to offset roadway fill in Phase
24 2 is planned to occur alongside Steamboat Creek, which will allow the creek to return to a more
25 natural floodplain. *Id.* at ¶54. This will reduce sediment transport by retarding the flow
26 velocities. *Id.*

1 Historic mercury exists within the corridor of the roadway (and pretty much throughout
2 the surrounding area). *Id.* at ¶55. The SEC is not a mercury clean-up project. *Id.* However,
3 RTC conducted a three dimensional analysis of the locations and concentrations of mercury in
4 the SEC area. *Id.* The SEC will permanently sequester existing mercury contamination within
5 the Corridor limits by encapsulating the mercury-containing soils within the roadway prism. *Id.*
6 This will *reduce* the mercury load to the creek and Truckee River from that which currently
7 occurs during rain events. *Id.*

8 These environmental benefits have been created in part due to extensive outreach with
9 stakeholder groups. *Id.* at ¶¶31-33 and 54-55. RTC cares about the interests of its stakeholders,
10 takes pride in its environmental and regulatory compliance in the development of all its projects,
11 and seeks to ensure that the SEC as designed serves as a national model for sustainable roadway
12 design. *Id.* at ¶66.

13 **A PRELIMINARY INJUNCTION IS NEITHER WARRANTED NOR JUSTIFIED**

14 “An injunction is a matter of equitable discretion and is an extraordinary remedy that may
15 only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Earth Island*
16 *Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (internal quotation marks omitted).

17 To obtain a preliminary injunction, a plaintiff must meet a four-pronged test. “A plaintiff
18 seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he
19 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
20 equities tips in his favor, and that an injunction is in the public interest.” *Alliance for the Wild*
21 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), quoting *Winter v. Natural Res. Def.*
22 *Council, Inc.*, 129 S. Ct. 365, 374 (2008).

23 The purpose of a preliminary injunction is to preserve the status quo in a case where a
24 plaintiff is likely to win on the merits. *Winnemucca Indian Colony v. U.S. ex rel. Dep't of the*
25 *Interior*, 837 F. Supp. 2d 1184, 1188-90 (D. Nev. 2011). The Ninth Circuit has allowed a
26 “sliding scale” test where there are serious questions going to the merits, the balance of hardships

1 tips sharply in plaintiff's favor, and other prongs of the test are met. *Alliance for the Wild*
2 *Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). In interpreting the U.S. Supreme
3 Court's opinion in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19 (2008) and parsing
4 out the "serious questions" language of *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
5 1131 (9th Cir. 2011), the U.S. District Court of Nevada stated that, to satisfy *Winter* and win an
6 injunction, among other prongs of the test, the movant must still *at least* show a likelihood of
7 success on the merits. "'Reasonable probability' appears to be the most lenient position on the
8 sliding scale that can satisfy the requirement that success be 'likely.'" *Winnemucca Indian*
9 *Colony v. U.S. ex rel. Dep't of the Interior*, 837 F. Supp. 2d 1184, 1189-90 (D. Nev. 2011). It has
10 also been stated, pre-*Winter*, that there must be a "fair chance of success on the merits."
11 *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988).

12 The four prongs are addressed below. As explained below, the Plaintiff has no basis for a
13 lawsuit and certainly no basis for an injunction.

14 **PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS**

15 **The Complaint Fails to State a Claim and Ipso Facto Plaintiff Cannot Succeed**

16 The Plaintiff has not shown that it has any potential to succeed on the merits, much less
17 the "likelihood of success" on the merits needed to obtain a preliminary injunction. Although the
18 Plaintiff asserts that it will win on the merits based on the "violations" of relevant statutes by
19 RTC, no violations have actually occurred. Plaintiff concedes it has no evidence of *any*
20 discharges by RTC into waters of the United States. Coalition Corp. dep. at. 65:23-66:6 and
21 82:3-6.

22 The Plaintiff has alleged that RTC violated the Clean Water Act ("CWA") by beginning
23 construction on the Phase 1 project before obtaining a Section 404 permit from the Corps. On
24 August 19, however, RTC filed a Motion to Dismiss based on two grounds. First, Section 301(a)
25 and Section 404(a) of the Clean Water Act are based on the concept of unpermitted "discharge"
26 into waters of the United States, but the Complaint fails to allege that *any* unpermitted discharge

1 has already occurred or will in the future occur into jurisdictional waters of the United States
 2 during the Phase 1 construction project. (Tellingly, the Plaintiff's Memorandum in Support of
 3 the Motion for Preliminary Injunction is devoid of facts demonstrating that unpermitted
 4 discharges have occurred or will occur with respect to the Phase 1 construction project).

5 Second, the Plaintiff lacks standing because, among other things, the injunctive relief
 6 requested by the Plaintiff cannot redress Plaintiff's purported harms. Plaintiff seeks to enjoin
 7 construction of the Phase 1 construction project, but it is undisputed that this project does not
 8 impact jurisdictional waters. The Plaintiff cannot seek an injunction *under the CWA* for activities
 9 *on land* having no impact on waters of the United States. *See Save Our Sonoran, Inc. v. Flowers*,
 10 408 F.3d 1113, 1125 (9th Cir. 2005) (where the Court noted that, "It is the effect on the
 11 jurisdictional waters, not on the environment in general, that determines the proper scope of the
 12 preliminary injunction. Any injunction must be tailored accordingly."). The Plaintiff cannot
 13 succeed on the merits without a cognizable complaint.²

14 **Plaintiff Fails to Present Any Evidence to Support its Naked Allegations and**
 15 **The Evidence of Record is Directly Against Plaintiff**

16 The Plaintiff makes factually baseless allegations. In the Complaint, Plaintiff asserts that
 17 the SEC "if not abated *will cause* potentially significant impacts to the riparian and aquatic
 18 environments...." Complaint at ¶4 (emphasis added). "The Defendants' actions *will cause*
 19 Plaintiff irreparable environmental harm...." Complaint at ¶8 (emphasis added). "[B]y allowing
 20 RTC to begin construction ... *will result* in irreparable harm to the environment...." Complaint
 21 at ¶18 (emphasis added); *see also* Complaint at ¶28. Yet, the Plaintiff's corporate designee
 22 conceded in deposition that the Plaintiff has no such evidence. Coalition Corp. Dep. at pp. 21-
 23 22, 24-26 and 32.

24
 25 _____
 26 ² The shortcomings of the Complaint are set forth more fully in RTC's Motion to Dismiss and Memorandum in
 Support of the Motion to Dismiss. (Doc. ##31-32)

1 The Plaintiff alleges that the construction will be “degrading habitat for fish, birds, and
2 other wildlife, and increasing the risk of catastrophic floods.” Complaint at ¶8.³

3 Notwithstanding these allegations, the Plaintiff has no such evidence. Coalition Corp. dep. at pp.
4 21-22 and 24-26.

5 The Coalition has no evidence that the Phase 1 construction project will increase
6 flooding. Coalition Corp. dep. at 22:16-19 and 23:11-22.

7 Q Miss Rhodemyre, as the spokesperson today for the Coalition, can you tell me,
8 does the Coalition contend that the Phase I construction project will increase
9 flooding?

A Well, since there's been no environmental impact study on that, we don't know.

10 *Id.* at 21:16-20.

11 The Coalition has no evidence of negative effects on aquatic habitats or birds:

12 Q And so what you are saying is, as the spokesperson for the Coalition, is, that the
13 Coalition doesn't know one way or the other as to whether the Phase I construction
14 project may or may not negatively affect aquatic habitat values for fish, correct?

A Correct.

15 Q And same for aquatic wildlife and birds, correct?

A Correct.

16 *Id.* at 26:3-10.

17 Though a “discharge” of fill, dredge or a pollutant into waters of the United States is
18 essential to a CWA violation, the Complaint repeatedly asserts that RTC has violated the CWA.
19 *See* Complaint at ¶¶ 3, 30, 80 and 81. These allegations are untrue. The Plaintiff’s corporate
20 designee conceded that there is no evidence of any discharge from the very Phase 1 construction
21 project Plaintiff seeks to enjoin.

22 Q Again, just so the record is clear, the Coalition doesn't know one way or the
23 other whether there has been any discharge of any dredge, fill or pollutant into the
24 waters of the United States as a result of the Phase I construction project?

A Correct.

25 ³ Plaintiff mentions Truckee Meadows being a “Special Flood Hazard Area.” A “special flood hazard area” is an
26 area designated by the Federal Emergency Management Agency pursuant to the National Flood Insurance Program.
The designation does not implicate Corps’ jurisdiction with respect to a Section 404 Permit application.

1 Q And same question in future tense: Does the Coalition contend that the Phase I
2 construction project will cause any discharges of any dredge, fill or pollutant into
3 waters of the United States?

4 A We don't know. There hasn't been a study yet.

5 Coalition Corp. dep. at 32:6-16.

6 As explained above, without a discharge into jurisdictional waters, there can be no CWA
7 violation. Similarly, Plaintiff also concedes that the Coalition has no evidence of any impacts to
8 any jurisdictional waters from the Phase 1 construction project. *Id.* at 32:6-23. In fact, the sole
9 affirmative *evidence* is that there have been *no* impacts to jurisdictional waters during the Phase 1
10 construction project. Affidavit of P. Oksol at ¶35.

11 Several essential points are undisputed:

- 12 • The Phase 1 construction work is what Plaintiff seeks to enjoy (as this is the only
13 construction project underway).
- 14 • The Phase 1 construction project and the entire SEC are being paid for with local
15 funds, and thus they are not being paid with federal funds.
- 16 • The Phase 1 project does not impact any jurisdictional waters of the United States.
- 17 • RTC has not discharged any fill, dredge or pollutant into any waters of the United
18 States as part of the Phase 1 project.
- 19 • Plaintiff has no *evidence* of *any* environmental harms.
- 20 • Plaintiff has no evidence that the Phase 1 project will have any impact on any
21 flooding and has no basis to challenge the modeling done to establish, in fact, that
22 the Phase 1 project will cause no net rise in any flood conditions.

23 Plaintiff also alleges “actual and concrete injuries Defendants have caused and are
24 continuing....” Complaint at ¶31. But the Plaintiff has no such evidence.

25 Q As the corporate designee of the Coalition, then, I take it you will agree that the
26 Coalition is not aware of any specific incident or occurrence where an actual
27 discharge into waters of the United States has, in fact, occurred from the Phase I
28 construction project, correct?

A Correct.

Coalition Corp. dep. at 32:17-23.

1 Plaintiff claims the relief requested (the injunction to stop the Phase 1 construction) “will
 2 fully redress” Plaintiff’s purported injuries. Complaint at ¶18. Plaintiff asserts that the
 3 construction includes “massive grading efforts, removal of riparian vegetation...” Complaint at
 4 ¶4. Plaintiff’s lawyers (albeit without testimony or affidavit) assert that temperature changes can
 5 affect fish. Though generic and not presented in a cognizable manner, the Plaintiff’s counsel
 6 cobbles together an alleged harm contention by stating “Removal of vegetation along the
 7 Truckee River’s banks will increase erosion, sedimentation, and water temperature, and decrease
 8 nutrients on which aquatic species depend.” Motion at p. 16.

9 The Plaintiff attempts to justify enjoining (*thus preventing*) this clearing of brush and
 10 vegetation near the banks due to this contention that such vegetation may impact water
 11 temperature, which in turn may impact fish. However, it is undisputed that all vegetation near
 12 the Truckee River and almost all near Steamboat Creek that will be removed for the Phase 1
 13 project has already been cleared and removed.⁴ P. Oksol Aff. at ¶67. Even if Plaintiff had the
 14 legal basis to stop this construction (which it does not) and even if Plaintiff offered cognizable
 15 evidence to support its assertions of harm (which it did not), there is nothing to enjoin. The
 16 vegetation to which Plaintiff’s counsel refers was already removed while Plaintiff sat on its
 17 proverbial hands. There is no harm to redress⁵, even if Plaintiff could state a claim.

18 Plaintiff expressly claims to have exhausted all administrative remedies. Complaint at
 19 ¶16. However, Plaintiff’s corporate designee admitted that the Plaintiff plans to submit
 20 comments to the Corps regarding RTC’s *pending* Section 404 permit application. Coalition
 21 Corp. dep. at 34:21-35:1.

22 Plaintiff also attempts to couch RTC as trying to do construction “until the moment
 23 before it physically fills wetlands, and not a second sooner.” Motion at p. 13. This prose might

24 ⁴ “However, none of the clearing of vegetation near the Truckee River and Steamboat Creek banks touched on any
 25 jurisdictional waters.” P. Oksol Aff. at ¶67.

26 ⁵ Q The Coalition in the injunction wants the clearing of vegetation to be stopped in the Phase I construction project;
 27 is that correct? A Yes. Coalition Corp. dep. At 27:4-7.

1 be more persuasive if it had a factual bearing on the matter at issue. Lawyer's prose
 2 notwithstanding, the Phase 1 project ends approximately one and a half miles *before* the first
 3 place the planned Phase 2 project would impact any waters of the United States. Coalition Corp.
 4 dep. at 68:8-17 and P. Oksol Aff. at ¶36.

5 Rather than violating the Clean Water Act (as Plaintiff alleges without basis), RTC has
 6 proceeded with the Phase 1 construction project in a transparent and proper manner. As
 7 discussed above, RTC changed plans substantially and, in so doing, removed any impacts to
 8 jurisdictional waters as part of the Phase 1 project. The Corps treated the May 2011 proposal as
 9 "withdrawn." P. Oksol Aff. at ¶36. RTC discussed the changes to the project with the Corps,
 10 and the Corps confirmed that the Phase 1 construction work would not require a Section 404
 11 permit, as the Corps could have no CWA jurisdiction over a construction project that does not
 12 impact jurisdictional waters. The Plaintiff cannot show that RTC violated the Clean Water Act
 13 when the Corps, the agency responsible for issuing Section 404 permits, told RTC that a permit
 14 was unnecessary for the Phase 1 construction work. Also, Plaintiff has no evidence to
 15 demonstrate that the Phase 1 project has impacted or will impact jurisdictional waters.

16 In fact, the evidence is undisputed that the Phase 1 project does not impact waters of the
 17 United States. The Corps made this assessment and declined jurisdiction on that basis. Nov. 16,
 18 2012 K. Hansen Ltr to P. Oksol, Doc. # 22 at 11-12, P. Oksol Aff. at ¶37, and RTC Exhibit 1-K.
 19 The record is undisputed that the Corps, in declining jurisdiction, correctly determined that Phase
 20 1 impacts no waters of the United States. The U.S. Supreme Court recently ruled that agencies
 21 are to receive *Chevron* deference⁶ in determinations of jurisdiction. *City of Arlington, Tex. v.*
 22 *F.C.C.*, 133 S. Ct. 1863, 1870-71 (2013). On these grounds alone, the Plaintiff cannot prevail.

23 **The NEPA Assertions Do Not Support Plaintiff's Claim**

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 25 ⁶ Where a statute is ambiguous or open to interpretation, a court must defer to the agency's interpretation. *See*
 26 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The *City of Arlington* case
 clarified that this *Chevron* deference to agencies is to be afforded to agencies' determinations of jurisdiction.

1 The count in the Complaint asserting a claim under the National Environmental Policy
 2 Act (“NEPA”) is not directed to RTC. Only federal government agencies are subject to NEPA.
 3 See 42 U.S.C. §4332 (applying NEPA to “all agencies of the Federal Government”) and see
 4 generally *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365
 5 F. Supp. 2d 1146, 1156 (D. Nev. 2005) (court noting that interstate compact with substantial state
 6 involvement and limited federal oversight was not bound by NEPA). RTC anticipates the
 7 Government Defendants will squarely address the ill-conceived NEPA count.⁷ Also, a project
 8 must first be deemed a “major federal action” before it could be subject to NEPA. It is
 9 undisputed that Phase 1 involves no federal monies and no jurisdictional waters; thus, Phase 1
 10 cannot be “federalized”⁸ and the Plaintiff’s discussion about segmentation has no legal basis.

11 Unless a project involves major federal action, NEPA does not
 12 apply. The segmentation cases are distinguishable because they
 13 involve the question of whether a *federal* project has been illegally
 14 segmented to avoid compliance with NEPA. See, e.g., *Taxpayers*
 15 *Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C.Cir.1987) (per
 16 curiam) (construction of Los Angeles subway was major federal
 17 action because UMTA provided funds for construction); *Swain v.*
 18 *Brinegar*, 542 F.2d 364 (7th Cir.1976) (en banc) (highway
 19 constructed in part with federal funds was major federal action);
 20 *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir.1973)
 21 (construction of highway was major federal action because state
 22 requested federal funds and obtained federal location approval).

23 *Macht v. Skinner*, 916 F.2d 13, 16 n.4 (D.C. Cir. 1990)(emphasis original).⁹

24 ⁷ Even if RTC is dismissed and the Corps is not, an injunction cannot lie against RTC as to the Phase 1 project.
 25 First, as discussed above, the dictates of an injunction under the CWA cannot go beyond the physical area in which
 26 CWA affords jurisdiction, and that would exclude the non-federalized, land-based construction in Phase 1. *Save Our*
 27 *Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005). Also, while non-parties may in certain instances be
 28 bound by injunctions against parties where there is notice, the general rule in courts of equity is that injunctions may
 not be issued against a non-party. *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394
 (Fed. Cir. 1996) (“[C]ourts of equity have long observed the general rule that a court may not enter an injunction
 against a person who has not been made a party to the case before it.”) Absent proof of a violation of the CWA,
 there is no basis to enjoin RTC.

⁸ This is particularly so after the Corps deemed the May 2011 Section 404 permit proposal to be withdrawn. P.
 Oksol Aff. at ¶36.

⁹ Interestingly, *Macht* is more on point with the instant situation than any case cited by Plaintiff. In *Macht*, which
 involved a 27-mile light rail project, Maryland withdrew its overall application to the Federal Urban Mass
 Transportation Administration (UMTA) for funding when it realized the project would be subject to NEPA. Instead,

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However, even if the Phase 1 project were federalized (which it is not), the segmentation line of cases suggested by Plaintiff is unhelpful to Plaintiff's claim. First, the cases relied upon by Plaintiff are inapposite.¹⁰ Second, the case heavily relied upon by Plaintiff, *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (Motion at 11), involved a highway that was found to be a major federal action and has been seriously questioned for failing to exhaust the administrative process. *See Karst Environmental Education and Protection, Inc. v. Environmental Protection Agency*, 475 F.3d 1291, 1295 (D.C. Cir. 2006) (standing for the principle that there must be both a major federal action *and* final agency action). Third, and perhaps even more importantly, the Ninth Circuit applies the "independent utility" test in determining whether project segments (subject to NEPA) are so interrelated as to require analysis together under NEPA. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). Specifically, if the segment at issue has independent utility, that is the end of the analysis. *Id.* ("When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes."). In the instant case, there is no *factual* dispute: the Phase 1 project has

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it proceeded to build the first 22.5-mile section entirely with state and local funds. Even with \$2.5 million in UMTA funding for preliminary engineering and the need for a Section 404 Corps' permit, the D.C. Circuit reasoned that those factors were not sufficient to transform the otherwise entirely state-funded portion of rail line into a "major federal action" within the meaning of NEPA. *Id.* at 19-20.

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¹⁰ All but one of the cases cited by Plaintiff for improper segmentation involved federal funding, often with multiple federal agencies having oversight, and where federal approval was discretionary over large portions or all phases of the projects. In *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009), the only case cited by Plaintiff not involving federal funding, involved a 10,000-acre housing development. In contrast to the instant matter, the Environmental Protection Agency and Fish and Wildlife Service both wanted a full-scale environmental analysis in *White Tanks*. But, more importantly, the Ninth Circuit noted in its reasoning that by the developer's own admission, the *entire* housing development would not have been feasible without a Section 404 permit. *Id.* at 1041-42. Thus, the sole case cited by Plaintiff that did not involve federal funding for the segment at issue involved the exact opposite factual scenario – the developer conceding that the segment had no independent utility (*White Tanks*), in contrast to the instant situation with Plaintiff conceding (by RTC presenting affirmative evidence of independent utility and Plaintiff not presenting evidence to the contrary) that the Phase 1 project has independent utility.

1 independent utility. P. Oksol Aff. at 42-45; Coalition Corp. dep. at 29:1-7 (“Q My question is,
 2 do you know of any impediment that would keep the Phase I project from being able to be
 3 connected to an extension from Mill Street? A No. Q As you sit here today, do you know of any
 4 reason why the Phase I project could not also be connected to Pembroke? A No. Except there
 5 hasn't been a study.”). Because there is independent utility to the segment at issue (the Phase 1
 6 project), the segmentation analysis becomes irrelevant.

7 Once past the failure to state a claim, the absence of facts to support spurious allegations
 8 of harm, and the fact that the work sought to be enjoined is already completed, the apparent gist
 9 of Plaintiff’s concern is that the expense of the Phase 1 project will unduly influence the Corps in
 10 making its decision on RTC’s pending July 2013 Section 404 permit application. Complaint at
 11 14 (Third Relief Requested). The concern is nonsense. First, as discussed immediately above,
 12 Plaintiff’s NEPA-based segmentation analysis is baseless. Second, Plaintiff’s contention
 13 assumes without basis that the Corps will not do its job in reviewing this pending 404
 14 application. *See generally Sun Oil Co. v. U. S.*, 572 F.2d 786, 805 (Ct. Cl. 1978) (“[T]here is a
 15 presumption that public officials perform their duties in a proper manner.”). Third, the Plaintiff
 16 has proffered no factual basis to support an implication that the Corps will not do its job.

17 The Plaintiff has failed to state a cognizable legal claim. The Plaintiff has no evidence to
 18 support its frivolous assertions. The Plaintiff sat on its hands¹¹ and the very construction work
 19 (clearing of vegetation) it desires to enjoin has already been accomplished. Phase 1 is more than
 20 40% completed. This leaves nothing to enjoin, even if Plaintiff’s claim would not have been so
 21 woefully lacking in law and fact. The Plaintiff is not just “unlikely to succeed” on the merits but
 22 rather has *no* chance to prevail. The Plaintiff’s suit is ill-conceived and baseless.

23 **THE PLAINTIFF CONCEDES IT HAS NO EVIDENCE**
 24 **OF IRREPARABLE HARM AND THERE IS NONE**

25 _____
 26 ¹¹ Q “So the Coalition was aware the project was going to be segmented in late 2012 or early 2013, correct? A Yes”.
 Coalition Corp. dep. at 40:19-21.

1 The Coalition has no evidence to support a contention that irreparable harm to the
2 environment will occur unless a preliminary injunction is issued. Plaintiff's counsel makes out
3 of context, generic references contained on pages 15 and 16 of the Motion to portions of the draft
4 Environmental Impact Study ("EIS") for the Truckee Meadows Flood Control Project (which is
5 an entirely different matter and project being considered by the Corps). This does not
6 demonstrate that any environmental harm will occur as a result of the Phase 1 construction
7 project.

8 The Motion similarly tries to rely on the draft EIS for the Truckee Meadows Flood
9 Control Project to claim that the Phase 1 construction work will impact water quality and fish
10 species in the Truckee River. *See* Petta Decl. Exhibit 36 and 37 (Doc. #25 at 53-56). Again, the
11 document discusses the Truckee Meadows Flood Control Project work (such as in-channel
12 floodwall construction), not any work associated with the Phase 1 construction project. *See* Petta
13 Decl. Exhibit 36 (Doc. #25 at 53-54). Also, the Truckee Meadows Flood Control Project is a
14 Corps-driven construction project. In addition, the document explains that Best Management
15 Practices ("BMPs")¹² would "reduce these construction-related effects to a less than significant
16 level." *Id.*

17 Nothing in the document demonstrates that water temperatures of the Truckee River will
18 be elevated or a concern as a result of the Phase 1 construction project. Although the document
19 mentions the existence of two threatened or endangered fish species in the Truckee River (*See*
20 Petta Decl. Exhibit 37) (Doc. #25 at 55-56), the mere existence of such fish is not sufficient to
21 demonstrate that the fish will be adversely impacted as a result of the Phase 1 construction
22 project. The Coalition, therefore, has presented no evidence that the Phase 1 construction project
23 will adversely impact fish species or water quality. Plaintiff has no proof of *any* irreparable
24 harm. Perhaps even more telling on this point than Plaintiff's counsel's curious excerpts from
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26 ¹² Importantly, RTC employs BMPs in Phase 1 as part of its Storm Water Prevention Plan. P. Oksol Aff. ¶67.

1 various flood study documents is the Plaintiff's own corporate designee admissions. Plaintiff
 2 conceded that it has no knowledge or evidence of whether the Phase 1 construction project has
 3 *any* impacts (much less *irreparable* harms) to aquatic wildlife or aquatic habitat or birds. *See*
 4 Coalition Corporate Deposition (quoted *supra* at p. 13).

5 **Q** Do you know whether the Phase I construction project
 will have any impact on any endangered species?

6 **A** We don't. There hasn't been a study yet.

7 Coalition Corp. Des. Dep at 26:12-14.

8 With no irreparable harm – and Plaintiff has declined to proffer any, there can be no
 9 injunction. Nevertheless, the Motion mentions that RTC “uncovered petroleum-based waste in
 10 the course of Phase 1 construction activities” and then surmises that, “Continued construction of
 11 Phase 1 could result in more spills of oil and other chemicals.” *See* Motion p. 16 (*citing* Petta
 12 Decl. Exhibit 38 and 39). In fact, however, the referenced documents demonstrate that
 13 appropriate steps have been taken to respond to the discovery of the *pre-existing* waste materials
 14 that had been buried long ago. Mere speculation concerning “more spills” is not only an
 15 insufficient basis on which to support a claim of irreparable harm, it is also a reckless disregard
 16 of the facts. To the extent it was an effort to imply a spill occurred *as a result of* the
 17 construction, it is grossly misleading.

18 At pages 16-17 of the Motion, Plaintiff cites several cases for the proposition that
 19 environmental harm, once done, is irreparable. And, Plaintiff asserts that “it will be impossible
 20 to undo the grading, paving, and other environmental harm associated with [Phase 1]
 21 construction.” (Motion at 17). But the cases Plaintiff cites undermine its position. The harm in
 22 the cases cited was not only quantifiable, imminent, and significant, but also the plaintiffs in
 23 those cases presented *evidence* of the harms alleged. For example, in *Sierra Club v. Martin*, 933
 24 F. Supp. 1559, 1562 (N.D. Ga. 1996) *rev'd*, 110 F.3d 1551, 1565 (11th Cir. 1997), there were an
 25 estimated 2,000 to 9,000 migratory birds to be killed in alleged violation of an international
 26 treaty, as part of a clear cut logging. *Id* (“Plaintiffs have affirmative evidence of the number of

1 deaths that will occur and are not merely relying upon assumptions. In the instant case, the
2 evidence affirmatively shows that thousands of migratory birds will be killed directly by cutting
3 down the trees with nests and juvenile birds in them.”). *See also Save the Courthouse Comm. v.*
4 *Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975) (involving the proposed total demolition of a
5 courthouse complex that plaintiff established had met eligibility criteria for listing on the
6 National Register of Historic Places); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
7 1135 (9th Cir. 2011) (proposed logging project would have prevented the use and enjoyment of
8 1,652 acres of forest where plaintiff’s members would hunt, fish, hike, horseback ride, and cross-
9 country ski). Plaintiff has failed to provide any evidence of the quantifiable, imminent and
10 significant harm present in the very cases upon which Plaintiff relies.

11 Plaintiff’s claim of procedural harms is baseless. NEPA extends only to projects that
12 amount to a major federal action. “Where federal funding is not present, this court has generally
13 been unwilling to impose the NEPA requirement” of an EIS. *State of Alaska v. Andrus*, 591 F.2d
14 537, 541 (9th Cir. 1979); *see also, Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327 (9th
15 Cir. 1975) (“For an action to be subject to NEPA, however, it must be shown to be ‘federal.’”)

16 The cases cited by the Plaintiff on pages 17 and 18 of the Motion for the proposition that
17 irreparable “procedural” harm is sufficient to support a preliminary injunction in this case do not
18 support that proposition. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974) involved an
19 unsuccessful effort to stop a dam project *after* an EIS pursuant to NEPA had been prepared by
20 the relevant federal agency. *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) involved
21 overturning a finding of no significant impact *after* review was completed by the relevant federal
22 agency. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp.
23 2d 1104 (S.D. Cal. 2010) involved a challenge to a solar energy project on Indian land *after* an
24 EIS for the project was issued. Finally, *Los Padres Forestwatch v. U.S. Forest Service*, 776 F.
25 Supp. 2d 1042, 1046 (N.D. Cal. 2011) involved a federally-funded project to clear vegetation to
26 reduce the risk of forest fires that was initiated *after* project approval but before the Forest

1 Service had prepared either an EA or an EIS as required by NEPA. Because each of these cases,
 2 unlike the present situation, involved administrative decisions rendered *after* the relevant
 3 administrative process had concluded, the holdings in these cases do not support Plaintiff's
 4 argument that it may suffer "procedural" harm *before* the Corps' administrative process with
 5 respect to RTC's Section 404 application has concluded.

6 On page 19 of its Memorandum, Plaintiff suggests that the Corps' evaluation will be
 7 "truncated and meaningless" unless a preliminary injunction issues. The suggestion is not only
 8 based on no evidence, it also improperly implies that the Corps, an agency of the Federal
 9 Government, will disregard NEPA when it evaluates RTC's Section 404 permit. *See* discussion,
 10 *supra* at 18-19. Likewise, and as discussed above, Plaintiff's concern about the influence the
 11 Phase 1 expenses may have on the Corps' decision on the Phase 2 Section 404 permit is
 12 unfounded and moot. *See* discussion, *supra* at 18-19.

13 **THE EQUITIES AND PUBLIC INTERESTS LEAVE NOTHING**
 14 **TO "BALANCE" AS NONE FAVOR PLAINTIFF**

15 The Plaintiff argues that the equities are in its favor. However, the only issues the
 16 Plaintiff discusses (wetlands and flood plain¹³ concerns) involve Phase 2 of the SEC, not the
 17 Phase 1 construction work currently underway. The wetlands and flood plains issues are before
 18 the Corps in the Corps' pending administrative process.

19 Elsewhere in the Motion, Plaintiff makes repeated assertions implying that the Connector
 20 is not needed and is only being built for future needs. This is false. One example is Plaintiff's
 21 Motion on page 8, where Plaintiff cites its Exhibits 23 and 24 (Doc. #25 at 11-15), for the
 22 assertion that: "In a recent public meeting, representatives of RTC acknowledged that this
 23 proposed major arterial is not needed to address any current traffic congestion..." The
 24

25 ¹³ As noted above, there is no evidence to controvert the fact that Sparks, after reviewing flood modeling
 26 information, certified that the Phase 1 was a no net rise project. *Supra* at 12-13. Plaintiff's corporate designee
 admitted that Plaintiff had no evidence to the contrary. Coalition Corp. dep. at 21:16-19 and 22:11-22.

1 speaker's¹⁴ *actual statement* from the exhibit was: “[T]he eastern part of this valley is very
 2 underserved when it comes to north-south connectivity, and that is what this project is going to
 3 provide... another purpose of the project is future congestion ... It will help with congestion we
 4 have today, but it is ultimately for the future congestion that will be coming.” Both exhibits
 5 cited are abundantly clear, that future traffic congestion is *one* though not the only reason RTC
 6 has cited for planning to build the Connector. The traffic modeling shows a *current* need for the
 7 Connector. P. Oksol Aff. at ¶20. Plaintiff does not dispute this with evidence and conceded that
 8 the Coalition has done no traffic studies. Coalition Corp. dep. at 67:5-9.

9 There are other real reasons for the project not mentioned by Plaintiff: improving
 10 emergency flood access during flood events; relieving current congestion; improving north-south
 11 connectivity; improving multi-modal transportation options; enhancing roadway safety; and
 12 enhancing environmental resources, including a net *increase* in total wetlands. P. Oksol Aff at
 13 ¶24 and M. Setty Aff. at ¶¶9-12. The Corridor, including its net *increase* of more than 150 acres
 14 of wetlands habitat, has many important benefits; these points stand undisputed. M. Setty Aff. at
 15 ¶9. As explained above, Plaintiff has nothing to gain by an injunction at this time (even if
 16 Plaintiff would have or could have established a legal basis for one).

17 However, and importantly, halting construction of the Phase 1 construction work will
 18 have many negative consequences, including but not limited to:

- 19 • Costing the citizens substantial construction delay penalties and the cost of rented
 20 equipment already on site. RTC would have to pay salaried personnel on site and fees for
 21 rental of large equipment, such as cranes, drilling equipment, and material storage fees. If
 22 work were stopped for even 90 days, these additional delay-related costs would likely
 23 exceed \$2 million. RTC would need to engage unplanned for security. There will also be
 24 costs to RTC associated with material degradation. P. Oksol Aff at ¶69.

25 _____
 26 ¹⁴ The speaker, not identified in Plaintiff's Motion, was P. Garth Oksol, an RTC staff engineer and the SEC
 Manager, whose affidavit accompanies this brief.

- 1 • Putting 100 to 200 hourly construction workers abruptly out of work while the region's
- 2 economic recovery is still far from complete. *Id.* at ¶70.
- 3 • Causing potential environmental harm because of the sections of cleared land that would
- 4 be left barren, including soil erosion issues. *Id.* at ¶71.
- 5 • Stopping a significant road project that the democratic process has indicated is supported
- 6 by and wanted by the majority of citizens. *Id.* at ¶¶14-16.

7 These consequences weigh heavily against issuing a preliminary injunction halting the remainder
8 of the Phase 1 construction work.

9 Finally, Plaintiff argues that it should not be penalized for delaying more than six months
10 after Phase 1 construction work began to bring its lawsuit. But the beginning of Phase 1
11 construction activities was open and obvious in areas where Plaintiff's members have claimed
12 they recreate. In fact, RTC held a well-publicized ground breaking ceremony on December 14,
13 2012. For example, *see* web-based print stories for local television stations, (Channel 8)
14 [http://www.kolotv.com/home/headlines/Groundbreaking-on-Renos-SouthEast-Connector-](http://www.kolotv.com/home/headlines/Groundbreaking-on-Renos-SouthEast-Connector-183597651.html)
15 [183597651.html](http://www.kolotv.com/home/headlines/Groundbreaking-on-Renos-SouthEast-Connector-183597651.html) and (Channel 2) <http://www.ktvn.com/story/20339383/rtc-southeast-connector>
16 The fact that contracts had been secured was publicized more than two weeks before the
17 groundbreaking. (Channel 2) <http://www.ktvn.com/story/20198641/southeast-connector> .

18 Significant construction began in February 2013.¹⁵ Nevertheless, the Plaintiff waited
19 until the end of July to sue. “A delay in seeking a preliminary injunction is a factor to be
20 considered in weighing the propriety of relief.” *Lydo Enterprises, Inc. v. City of Las Vegas*, 745
21 F.2d 1211, 1213 (9th Cir. 1984). In *Clark v. Volpe*, 342 F. Supp. 1324, 1327-29 (E.D. La. 1972),
22 a case involving a citizens group that was attempting to stop construction of a road through a
23 park, a federal court held that laches applied where “plaintiffs stood idly by during the remaining
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25 ¹⁵ Also, had the Plaintiff not so delayed (assuming *arguendo* the Plaintiff could have stated a viable claim), the
26 potential costs to RTC would have been much lower. Now, with the project heading towards 50% completion, the
costs to stop work would be higher. P. Oskol Aff. at ¶69.

1 months as bulldozers and chain saws stripped and leveled the land and as vast sums of public
 2 money were expended on highway construction.” The Fifth Circuit affirmed. 461 F.2d 1266 (5th
 3 Cir. 1972). Plaintiff offers no meaningful justification for sitting on its hands. Coalition Corp.
 4 dep. at 29:9-19. The delay in bringing this suit must be considered because the delay cuts against
 5 Plaintiff. Because more than 40 percent of the Phase 1 work – and virtually *all* of the Phase 1
 6 work occurring near water involving vegetation – has been completed, the equities clearly favor
 7 allowing the Phase 1 construction work to proceed.

8 No equities favor Plaintiff. There is no weight to be afforded Plaintiff’s desire for an
 9 injunction that addresses nothing. There is no weight to be given Plaintiff’s desire for an
 10 injunction that has no legal basis. But, there are serious and real human and monetary harms for
 11 an injunction, even if brief. There is no legal or factual basis for the Complaint. There is nothing
 12 to be gained from an injunction at this time, but much to lose. An injunction is not warranted.¹⁶

13 CONCLUSION

14 The Complaint and the Motion for Preliminary Injunction are baseless. RTC’s Motion to
 15 Dismiss should be granted as Plaintiff fails to state a claim. Worse yet, the Plaintiff has no
 16 evidence to support the allegations in its Complaint or in its pending Motion. It is undisputed
 17 that RTC has not discharged anything into waters of the United States, and thus there is no good
 18 faith basis for asserting a violation of the CWA. Plaintiff has no evidence of *any* harm, much
 19 less irreparable harm. Yet an injunction would cost RTC and the taxpayers substantial money,
 20 would result in job losses, and would have adverse environmental consequences. No equities cut
 21 in Plaintiff’s favor; there is nothing to weigh. The bottom line is that there is no legal or factual
 22 basis for an injunction.

23
 24 ¹⁶ Plaintiff’s request for a minimal bond is curious. Plaintiff was warned about bringing a frivolous suit in RTC’s
 25 July 24, 2013, letter (*See* RTC Response Ltr. to Coalition’s Notice of Intent to Sue (May 29, 2013) at pp. 11-12,
 26 Attached as RTC Exhibit 4) but brought suit nevertheless. It is neither fair nor consistent with the letter and spirit of
 F.R.C.P. 65 to allow Plaintiff to attempt to take an action that will cost taxpayers large sums of money, with a
 baseless suit *and without the Plaintiff even posting a meaningful bond.*

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2013, a true and correct copy of the foregoing document, with the accompanying index of exhibits and exhibits, was electronically filed with the Clerk of the Court using the ECF system. Electronic service is thereby made pursuant to the ECF system terms.

/S/ Edward A. Cohen
Counsel for Regional Transportation
Commission of Washoe County