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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lower San Pedro Watershed Alliance; Center for Biological Diversity; Sierra Club; Maricopa Audubon Society; Tucson Audubon Society; and Cascabel Conservation Association, Plaintiffs, v. Col. Aaron Barta, in his official capacity as Commander of the Los Angeles District of the U.S. Army Corps of Engineers; Amy Lueders, in her official capacity as Regional Director of the Southwest Region of the U.S. Fish and Wildlife Service; the U.S. Army Corps of Engineers; and the U.S. Fish and Wildlife Service, Defendants.	No. CV-19-48-TUC-RCC Judge: Raner C. Collins **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON NEPA AND CWA CLAIMS**

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List of Acronyms

The following is a list of acronyms used throughout this Statement of Facts in Support of Motion for Partial Summary Judgment. The list is provided for the Court's convenience.

ADWR	Arizona Department of Water Resources
BLM	Bureau of Land Management
CWA	Clean Water Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
HMMP	Habitat Mitigation and Monitoring Plan
IBA	Important Bird Area
JD	Jurisdictional Determination
LEDPA	Least environmentally damaging practicable alternative
LOS	level of service
NEPA	National Environmental Policy Act
RD	Revitalization District
SPRNCA	San Pedro Riparian National Conservation Area

INTRODUCTION

Plaintiffs Lower San Pedro Watershed Alliance et al. (collectively, the Watershed Alliance) challenge the U.S. Army Corps of Engineers' (Corps) decision to grant a permit under Section 404 of the Clean Water Act (CWA) for a proposed development—the Villages at Vigneto—without analyzing the significant, adverse impacts of this massive 12,167-acre master-planned community on the San Pedro River (River) and its surrounding ecosystem. This oversight violates the National Environmental Policy Act (NEPA) and CWA, as alleged in Counts one through six of the Amended Complaint.[1]

The San Pedro River is the last, major free-flowing river in the desert southwest, a sanctuary for millions of migratory birds, and home to multiple endangered species, including the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel. Sustained by both surface flows and groundwater that percolates to the surface, the River stands out as a ribbon of green in an otherwise arid environment; it is a lifeline for the wildlife that find refuge and water in the relative cool of the River's cottonwood forests.

[1] Amended Compl. ¶¶293-337, ECF No. 27. The Court bifurcated the case, instructing the Watershed Alliance to file a motion for partial summary judgment on its NEPA and CWA claims while it seeks to complete the record and pursue discovery to corroborate bad-faith political interference relating to the Endangered Species Act (ESA) claim. ECF No. 38.

To protect the unique and priceless natural values found in and around the River, Congress designated the San Pedro Riparian National Conservation Area (SPRNCA) in 1988. However, excessive groundwater pumping has already begun to dry up the River and its riparian vegetation and springs, leaving little to no water to spare.

Here, El Dorado Benson, LLC (El Dorado) proposes to build Vigneto, a twenty-square-mile master-planned community that would rely solely on groundwater pumping to support 28,000 new homes, 3 million square feet of commercial space, and luxurious amenities, such as golf courses, lakes, fountains, and verdant landscaping. El Dorado would destroy the dense network of jurisdictional waters on the site and draw down the groundwater aquifer that supports the River, causing significant adverse impacts that must be thoroughly and comprehensively analyzed by the Corps under both NEPA and the CWA. Instead, the Corps evaded its obligations under both statutes.

The Corps violated NEPA by arbitrarily constraining its scope of analysis to just a few small fragments of the Vigneto development. First, to avoid preparing a comprehensive Environmental Impact Statement (EIS) for El Dorado's 12,167-acre development, the Corps limited its analysis to a smaller, now-defunct 8,212-acre development that El Dorado has not actually proposed. Second, the Corps compounded this error by further limiting its analysis within that inadequate 8,212-acre area based on El Dorado's self-serving representation that it could build Vigneto without a 404 permit (despite spending years seeking a 404 permit). Based on that representation, and over the repeated objections of the Environmental Protection Agency (EPA), the Corps cut down the scope of its analysis to a mere 1,919 acres, which includes only 1.8% of the developable acreage identified in El Dorado's Master Plan. As a result, the Corps undertook almost no analysis of the massive Vigneto development proposed by El Dorado and its far-reaching environmental consequences.

This oversight violated NEPA. As EPA demonstrated, El Dorado's assertion that it could build Vigneto without a permit is impracticable, infeasible, and improbable due

to the dense network of jurisdictional waters interwoven throughout the site. Accordingly, the Corps must analyze the significant impacts of the Vigneto development, which fall within its control and responsibility under NEPA.

The Corps also violated the CWA in three respects. First, the Corps failed to demonstrate that granting a 404 permit for Vigneto is the least environmentally damaging practicable alternative (LEDPA). If El Dorado could in fact develop the site without impacting jurisdictional waters (the Corps' baseless rationale for avoiding a comprehensive NEPA analysis), then the Corps is barred by the CWA from issuing a 404 permit at all. Second, the Corps granted the permit based on the assumption that El Dorado would offset the significant adverse impacts of destroying jurisdictional waters with compensatory mitigation measures on an offsite parcel located downstream from the Vigneto development. But modeling shows that groundwater pumping and stormwater runoff from the Vigneto development would actually degrade the offsite parcel, devaluing, if not entirely negating, the proposed mitigation measures on that parcel. Third, the Corps violated its regulations by refusing to undertake a comprehensive analysis of the public interest.

For these reasons, the Watershed Alliance respectfully asks the Court to vacate the 404 permit and remand it to the Corps so the agency can prepare a comprehensive EIS, as required by NEPA, and comply with the CWA's substantive requirements.

LEGAL BACKGROUND

I. National Environmental Policy Act

Congress enacted NEPA[2] "to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Lands*

[2] All citations to NEPA's implementing regulations refer to the regulations that were promulgated in 1978 and governed the process here.

Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005). NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C); 40 C.F.R. §1501.4. In particular, NEPA requires agencies to prepare a comprehensive EIS where there is a "single proposal with a single purpose." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F.Supp.3d 861, 939 (D. Or. 2016) (collecting cases). The Ninth Circuit has repeatedly rejected agencies' attempts to constrain their NEPA scope of analysis to evade review of a proposed development. *See White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040-42 (9th Cir. 2009); *Save Our Sonoran, Inc. v. Flowers (SOS)*, 408 F.3d 1113, 1124 (9th Cir. 2005).

To determine whether an EIS is required, the responsible agency may prepare an Environmental Assessment (EA) with "sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. §1508.9. The agency may forego preparation of an EIS if it makes a "finding of no significant impact" (FONSI), *id*. §§1501.4(e), 1508.13, and provides a convincing statement of reasons to explain why a project's impacts are insignificant. If the EA establishes that the agency's action may have a significant effect upon the environment, an EIS must be prepared. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005).

II. Clean Water Act

The CWA establishes a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," to conserve the recreational value of such waters, and to protect wildlife species that rely on aquatic resources for their survival. 33 U.S.C. §1251(a). Section 404 of the CWA authorizes the Corps to regulate and issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* §1344(a). When it reviews a 404 permit application, the Corps must follow binding guidelines established by the

Corps and EPA (the 404(b)(1) Guidelines or Guidelines), which are codified at 40 C.F.R. Part 230. *See* 33 U.S.C. §1344(b); *see* Am. Compl. ¶¶44-57 (summarizing applicable requirements of the Guidelines). In addition to the 404(b)(1) Guidelines, the Corps has promulgated regulations that prohibit issuing any permit if the "district engineer determines that it would be contrary to the public interest." 33 C.F.R. §320.4(a)(1).

FACTUAL BACKGROUND

I. The San Pedro River and Watershed

The San Pedro River is one of the most significant perennial undammed desert rivers in the United States. SOF¶1.[3] The River and its surrounding cottonwood-willow forest support one of the most important corridors for millions of migratory songbirds in the United States. SOF¶2. The River's ecosystem also provides a unique refuge for many federally listed species under the ESA, including the jaguar, western yellow-billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel. *Id.*

In 1988, Congress recognized the importance of the San Pedro River and designated 36 miles of the River's upper basin as the first riparian National Conservation Area. SOF¶4. Congress mandated that SPRNCA be managed "to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River." 16 U.S.C. §460xx(a). St. David Cienega is a large groundwater-fed wet marsh within the northern boundary of SPRNCA adjacent to the San Pedro River floodplain and serves as an indicator of SPRNCA's health. SOF¶¶6-7. The United States holds an express federal reserved water right to accomplish the purposes of the SPRNCA

[3] In connection with this motion for summary judgment and memorandum in support, the Watershed Alliance filed a separate Statement of Facts (SOF), setting forth the factual background. LRCiv. 56.1(a).

reservation, including the protection of springs like St. David Cienega. 16 U.S.C. §460xx-1(d).

A network of ephemeral and intermittent tributary streams sustain the physical, chemical, and biological integrity of the River. SOF¶¶8-10. These waterways serve a number of vital functions, including filtering runoff, controlling stormwater flows, recharging the groundwater aquifer, and providing diverse habitats for wildlife. SOF¶¶8-9. Protecting these ephemeral streams is of critical importance to the San Pedro River. SOF¶¶8-11.

Groundwater pumping is a significant threat to the River because it lowers the water table and creates an expanding cone of depression. SOF¶¶12-18. This depression eventually "captures" water from the aquifer that would have otherwise reached the surface near the River and sustained riparian habitat and spring flows. SOF¶¶16-19. As documented by multiple hydrologists, including those with the U.S. Geological Survey, groundwater pumping is already reducing stream flow levels along the San Pedro River. SOF¶¶13-19. This pumping has begun to dry up the River and its riparian vegetation and springs, leaving little to no water to spare. SOF¶¶18, 20-24. Climate change poses a further threat due to the increased likelihood of severe droughts. SOF¶¶25-27.

II. The Villages at Vigneto Master-Planned Community

In this increasingly arid environment, a series of developers, and now El Dorado, have attempted to transform thousands of acres of largely undeveloped habitat approximately two miles upland from the San Pedro River into a master-planned community that relies solely on groundwater pumping to support thousands of homes, commercial developments, and water-intensive uses like golf courses and fountains. SOF¶¶28, 41-52.

In 2005, Pulte Homes (Pulte) received preliminary approval from the City of Benson to construct an 8,212-acre master-planned community known as the Whetstone Ranch. SOF¶¶28, 41. The site, however, contains a mosaic of ephemeral streams that

play a vital role in sustaining the San Pedro River and wildlife habitat. SOF¶¶8-11, 28-31. The Corps delineated 75 miles of jurisdictional waters of the United States on the site protected by the CWA that carry stormwater down from the Whetstone Mountains, before fanning out across the site and connecting to the San Pedro River. SOF¶¶29-32. The Corps issued an approved jurisdictional determination for these ephemeral waters in 2003, which is binding on the Government and prohibits the unauthorized discharge of any pollutants into these jurisdictional waters. SOF¶¶32-33.

Accordingly, in 2006, Pulte obtained a 404 permit from the Corps to fill these jurisdictional waters at hundreds of locations to develop the 8,212-acre Whetstone Ranch. SOF¶¶34, 40. However, Pulte never developed the property, and the Whetstone Ranch proposal lapsed in 2007. SOF¶41. Pulte sold its undeveloped lands to El Dorado in 2014. *Id.*

El Dorado has since acquired thousands of acres of additional land and now plans to construct a 12,167-acre, fully integrated master-planned community, known as the Villages at Vigneto. SOF¶¶42-43. The Vigneto development would be almost 50% larger than the prior defunct Whetstone Ranch proposal. SOF¶42. Accordingly, the City of Benson instructed El Dorado to prepare a master plan for the significantly larger Vigneto development. *Id.*

In 2016, El Dorado submitted to the City of Benson a Final Community Master Plan and Development Plan (Master Plan) for Vigneto, setting forth a comprehensive proposal to develop 28,000 dwellings, 3 million square feet of commercial developments, four golf courses (totaling 546 acres), a resort (220 acres), and a Town Center (115 acres), among other things. SOF¶¶43-45, 53. The purpose of the Master Plan is to ensure the development of a cohesive and integrated community, which is Vigneto's selling point, as highlighted in El Dorado's marketing materials. SOF¶¶43-44.

A prerequisite of this master-planned community is an efficient, safe, and interconnected transportation network. SOF¶¶46-48. To satisfy that requirement, El

Dorado prepared a Master Transportation Plan for Vigneto (Transportation Plan), which lays out a series of looping arterial, collector, and local roadways, as well as multi-modal pathways for golf carts, to provide quick, efficient access to all corners of the site. SOF¶¶48-52. With its Master and Transportation Plans, El Dorado obtained approval from the City of Benson in 2016 to develop the entire 12,167-acre Vigneto development on an accelerated 20-year schedule. SOF¶¶53, 55-60.

El Dorado also needed a 404 permit from the Corps to fill the network of jurisdictional waters on the site and achieve its purpose of developing "a master-planned community with interrelated villages" that are connected by an efficient and well-coordinated transportation network. SOF¶¶33, 63, 79. Instead of requesting a 404 permit for the entire Vigneto development, though, El Dorado asked the Corps to reinstate the prior 404 permit for the abandoned 8,212-acre Whetstone Ranch proposal. SOF¶63. El Dorado also urged the Corps to forego analysis of Vigneto's impacts based on the assertion that it could develop the property without a 404 permit (i.e., the no-action alternative). SOF¶¶66, 110.

III. FWS, EPA, and the Public Demand a Comprehensive Analysis of the Vigneto Development.

In 2017, the Corps sought public comment, and advice from EPA, on whether to grant a 404 permit for the Vigneto development. SOF¶¶62-64. It also initiated consultation under Section 7 of the ESA with the U.S. Fish and Wildlife Service (FWS). SOF¶64. Both EPA and FWS insisted that the Corps prepare a comprehensive analysis of the Vigneto development, including the impacts of groundwater pumping, surface runoff, and destruction of critical habitat for listed and endangered species. SOF¶¶71-99, 107-08, 133.

In a December 4, 2017 letter, EPA reiterated its longstanding concerns about any development on the site, explaining that El Dorado would not be able to develop Vigneto without a 404 permit due to the "extensive, dendritic, capillary-like assemblage of washes

and desert grassland habitats" on the site. SOF¶71. EPA rejected El Dorado's assertion that it could develop Vigneto without a 404 permit, concluding that any large-scale development without a permit is "unrealistic" and "impracticable" due to the severe logistical constraints created by the network of jurisdictional waters, including the lack of a viable transportation network—a prerequisite of any large-scale development on the site. SOF¶¶71, 78-96. EPA further explained that, even if development could occur under the no-action alternative, it "fails to meet the project purpose" of a master-planned community and would be significantly different from the Villages at Vigneto. *Id.* EPA thus insisted on a comprehensive analysis of the development in an EIS, as required by NEPA. SOF¶¶71-95.

EPA also objected to the 404 permit on the grounds that it would cause significant impacts to waters of the United States, in violation of the 404(b)(1) Guidelines. SOF¶¶113-25. To purportedly mitigate these impacts, El Dorado prepared a Habitat Mitigation and Monitoring Plan (HMMP), claiming it would preserve open space on the development site and enhance an offsite parcel located just downstream from the proposed development. SOF¶¶154-58. However, groundwater pumping from the Vigneto development would draw down surface and subsurface flows at the offsite parcel by up to five meters. SOF¶¶119-25, 159-63. The Vigneto development would also exponentially increase surface runoff and erosion at the offsite parcel. SOF¶¶115-18, 159, 164. As a result, the offsite parcel would be degraded—not improved—by the Vigneto development, rendering it an unacceptable mitigation site.

Like EPA, FWS insisted on a comprehensive consultation regarding the impacts of the 12,167-acre Vigneto development on listed species and critical habitat. SOF¶¶107-10, 133. FWS informed the Corps multiple times that it is "reasonably certain" that the proposed development would have "appreciable direct and indirect effects to listed species and critical habitat" due to, among other things, groundwater pumping, surface runoff, and habitat destruction. SOF¶¶107, 143-48. FWS objected to the Corps' refusal

to consult on these impacts and its piecemeal analysis of just fragments of the development. SOF¶¶107-10.

The Watershed Alliance and public submitted extensive comments, including multiple hydrological studies demonstrating the significant adverse impacts of the development on the San Pedro River watershed. SOF¶¶134-40.

IV. The Corps Grants a 404 Permit Without Analyzing the Impacts of the Vigneto Development.

Rather than analyzing the impacts of the Vigneto development, however, the Corps severely limited its scope of analysis to small fragments of the development, turning a blind eye on the significant, adverse environmental impacts identified by EPA, FWS, and the public. First, the Corps artificially segmented the 12,167-acre Master Plan, limiting its analysis to an 8,212-acre area that it labeled "Phase I" of the Vigneto development. SOF¶¶63-65, 73, 101. The Master Plan, however, identifies no such Phase I. SOF¶¶74-75. Instead, this 8,212-acre area is a relic of the abandoned Whetstone Ranch proposal. SOF¶¶41-42, 73, 101. Second, the Corps cut its analysis down even further to just a fraction of the 8,212-acre area based on El Dorado's bare and implausible assertion that it could develop the site without a 404 permit. SOF¶¶66-68, 101. Accordingly, the Corps disclaimed its authority to examine the impacts of the Vigneto development and constrained the scope of analysis in its EA to 1,919 acres, comprising just the isolated spots where El Dorado would fill jurisdictional waters on the project site, some limited upland buffers, and the offsite parcel. SOF¶¶66-68, 101.

As a result of this constrained scope of analysis, the Corps' EA only analyzes the impacts of developing 151 acres of commercial and residential development (approximately 1.8% of the developable acreage identified in El Dorado's Master Plan). SOF¶67. The Corps concluded that any impacts within this narrow area would have insignificant impacts on the environment and no effect on endangered species or critical habitat. SOF¶68. The Corps thus refused to prepare a comprehensive EIS or formally

consult with FWS. *Id.*

FWS Arizona Field Supervisor, Steven Spangle, objected to this piecemeal and incomplete analysis in a series of meetings with the Corps in 2017 and refused to concur with the Corps' limited analysis. SOF¶¶107-10. Mere weeks later, however, Mr. Spangle abruptly reversed course and issued a Letter of Concurrence, acquiescing in the Corps' narrow scope of analysis and decision to forego formal consultation. SOF¶¶111-12. Mr. Spangle subsequently admitted that his decision was due to improper political interference and "plainly admitted that he was forced to concur on a decision that was his to make." ECF No. 48 at 7. As this Court concluded, "Spangle's statements call FWS' entire decision-making process into question. These statements, at the very least, support a showing of bad faith sufficient to warrant deliberative materials and limited extra-record discovery." *Id.* Consistent with the Court's order, the Watershed Alliance is separately pursuing extra-record discovery to corroborate the existing evidence of improper political interference in the consultation process.

The Watershed Alliance's members have provided declarations showing that the Corps' decision to grant a 404 permit for the Vigneto development threatens their recreational interests and enjoyment of their own adjacent property. SOF¶¶178-81. With the 404 permit in hand, El Dorado plans to fill jurisdictional waters and develop the property on an accelerated schedule. SOF¶177. These activities would irreversibly alter the natural tributaries that sustain the San Pedro River. SOF¶181. Moreover, groundwater pumping at the proposed development would lower the aquifer, impairing riparian habitat along the San Pedro River. *Id.* These impacts would adversely affect the Watershed Alliance members' enjoyment of the River and species that depend on this unique habitat for their survival. SOF¶¶178-81.[4]

[4] The Watershed Alliance has standing to pursue this action, as their members suffer an injury in fact that is caused by the Corps' decision to grant a 404 permit for the Vigneto

STANDARD OF REVIEW

The Administrative Procedure Act (APA) provides a cause of action to review the Corps' decision under the CWA and NEPA. 5 U.S.C. §§701-06. An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. The Corps Violated NEPA By Arbitrarily Narrowing the Scope of Analysis.

El Dorado cannot construct the Villages at Vigneto without a 404 permit due to the dense network of jurisdictional waters cutting across the project site. Yet, rather than analyzing the impacts of the entire Vigneto development, the Corps constrained its scope of analysis to just a fraction of the site, violating NEPA in two fundamental ways. First, the Corps failed to base its scope of analysis on the 12,167-acre project proposed by El Dorado in its Master Plan. Instead, the Corps limited its analysis to a smaller project (the 8,212-acre Whetstone Ranch) that was abandoned over a decade ago. This error violates NEPA because the Corps impermissibly segmented, and thus failed to take a hard look at, the impacts of the entire development. Second, even within this unduly narrow 8,212-acre area, the Corps still refused to analyze the impacts of the Vigneto development and instead accepted El Dorado's bare assertion that it could develop the property without a 404 permit. As shown by EPA, however, filling the network of jurisdictional waters on the site is a prerequisite to developing a master-planned community and achieving the

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development and is redressable by the Court. *See SOS*, 408 F.3d at 1120; *White Tanks*, 563 F.3d at 1039.

purpose of the project. Accordingly, the Corps must analyze the impacts of the entire development, which fall within its control and responsibility under NEPA.

A. The Corps Cannot Avoid Its Obligation to Prepare a Comprehensive EIS by Illegally Segmenting the Vigneto Development.

EPA advised the Corps to prepare a comprehensive EIS to evaluate El Dorado's Master Plan for the Vigneto development. SOF¶71. The Corps, however, refused to do so. Instead, the Corps artificially segmented the Vigneto development, limiting its analysis to a so-called 8,212-acre "Phase I." SOF¶¶63-65, 73, 101. This ploy violates NEPA because the 12,167-acre Vigneto Master Plan is either a "single proposal" or a series of "connected" or "cumulative" actions that must be analyzed in a single EIS. *Nat'l Wildlife Fed'n*, 184 F.Supp.3d at 938.

i. The Vigneto Master Plan is a Single Proposal That Must Be Analyzed in a Single EIS.

El Dorado prepared a Master Plan to construct an interconnected 12,167-acre community known as the Villages at Vigneto. SOF¶¶42-52. El Dorado submitted this plan to the City of Benson and obtained public financing to develop the entire property on an accelerated 20-year schedule. SOF¶¶53-60. Given this "single proposal," the Corps must prepare a "single NEPA review document" analyzing the impacts of allowing El Dorado to fill jurisdictional waters and develop its 12,167-acre master-planned community. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002); *Nat'l Wildlife Fed'n*, 184 F.Supp.3d at 939.

The Corps refused to do so, restricting its analysis to an 8,212-acre area, which it labeled "Phase I" of the Vigneto development. SOF¶¶63-65, 73, 101. The Vigneto Master Plan does not, however, identify an 8,212-acre "Phase I." SOF¶74. Nor does this 8,212-acre area align with any of the planning boundaries set forth in the Master Plan. SOF¶¶56-58, 74-76. Instead, the Corps carried over this 8,212-acre area from the prior Whetstone Ranch proposal, which lapsed over a decade ago and was much smaller than the 12,167-acre Vigneto development. SOF¶¶41-42, 73, 101. The Corps then used this

constrained permit area to avoid *any* analysis of the significant impacts of developing the remaining 3,955 acres of the development laid out in the Master Plan. SOF¶¶65, 101, 132.

This tactic plainly violates NEPA, as the Vigneto development was "conceived of as an integrated whole." *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F.Supp.2d 1298, 1315 (S.D. Fla. 2005). The Corps cannot ignore the "bigger or more troublesome environmental issues of the planned development" by limiting its scope of analysis to a prior, smaller project that was not proposed by El Dorado and lapsed over a decade ago. *Id.* Indeed, NEPA strictly prohibits the Corps' attempt to artificially segment the Vigneto development in order to "avoid consideration of [the] entire action's effects on the environment," as occurred here. *See W. Radio Servs. Co., Inc. v. Glickman*, 123 F.3d 1189, 1194 (9th Cir. 1997); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006) (holding that NEPA prohibits agencies from illegally segmenting a project).

ii. The Vigneto Development Constitutes a Series of Connected Actions that Must Be Analyzed in a Comprehensive EIS.

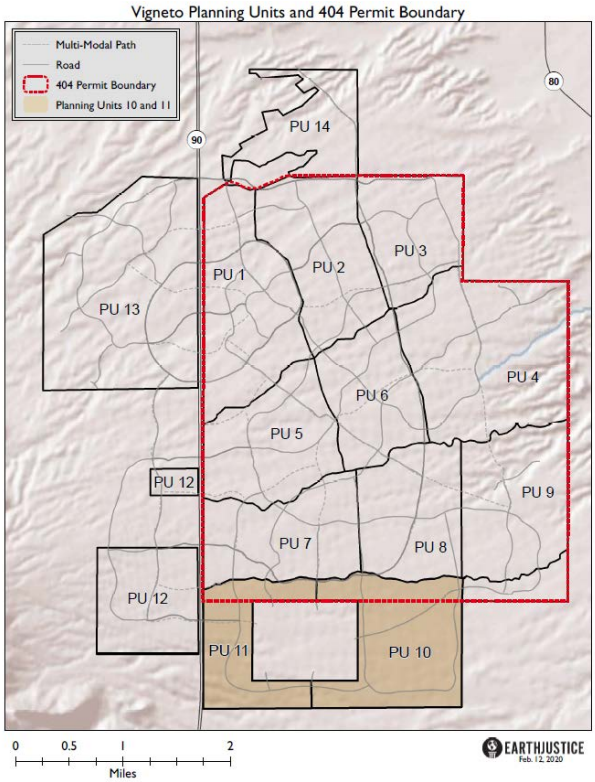
Even if the Master Plan did carve out a so-called 8,212-acre Phase I, which it did not, the remaining 3,955 acres of the proposed development are sufficiently "connected" as to require a single EIS for the entire development.

NEPA's implementing regulations define "connected actions" as actions that are "closely related and therefore should be discussed in the same impact statement." 40 C.F.R. §1508.25(a)(1). Actions are "connected" when they:

> (i) Automatically trigger other actions which may require environmental impact statements.
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Id. The Ninth Circuit has applied an "independent utility" test to determine whether multiple actions are connected, thereby requiring consideration in a single EIS. *See Great Basin Mine Watch*, 456 F.3d at 969. "The crux of the test is whether each of two projects would have taken place *with or without the other* and thus had independent utility." *Sierra Club v. BLM*, 786 F.3d 1219, 1226 (9th Cir. 2015) (emphasis in original) (quotation and citation omitted).

Here, the remaining 3,955 acres of the Vigneto development "cannot or will not proceed" as planned, unless El Dorado constructs the so-called 8,212-acre "Phase 1." 40 C.F.R. §1508.25(a)(1)(ii). This is particularly apparent for planning units 10 and 11 (PU 10 & PU 11) which *overlap and extend beyond* the Corps' artificial 8,212-acre permit area, as shown in the map below.



SOF¶¶74-75. These units cannot be developed as part of the planned, integrated community design, unless El Dorado first completes construction of the 8,212-acre area. *See Nat'l Wildlife Fed'n*, 184 F.Supp.3d at 939 ("One of the factors considered in

determining whether actions are 'connected' for purposes of NEPA is whether the completion of one action affects implementation of another action.").

The remaining 3,955 acres of the proposed development are also "interdependent parts of a larger action"—the Master Plan—"and depend on the larger action for their justification." 40 C.F.R. §1508.25(a)(1)(iii). Considered alone, the remaining 3,955 acres contain none of the defining features of the Vigneto development, such as the Town Center—"the heart of the community." SOF¶76. Nor do they contain the Golf Center or any of the Information Centers, Community Recreation Centers, or Public Services (i.e., fire station and hospitals) included in the Master Plan. *Id.* As a result, those 3,955 acres depend on the so-called Phase I to provide "the anchor and catalyst for the remaining development," underscoring their interdependence on the larger Master Plan and the Corps' obligation to prepare a comprehensive EIS. *Fla. Wildlife Fed'n*, 401 F.Supp.2d at 1315.

iii. The Vigneto Development Consists of a Series of Cumulative Actions That Must Be Analyzed in a Comprehensive EIS.

NEPA also requires agencies to prepare a single EIS for "cumulative" actions—those actions "which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. §1508.25(a)(2). Cumulatively significant impacts "cannot be avoided by . . . breaking [an action] down into small component parts." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (quoting 40 C.F.R. §1508.27(b)(7)).

Here, El Dorado needs to fill jurisdictional waters across the entire 12,167-acre site to develop Vigneto, resulting in cumulatively significant impacts on the same jurisdictional waters and the same San Pedro River watershed. SOF¶¶33, 63, 77. "A single EIS, therefore, was required to address the cumulative effects of the[] proposed [development]." *Blue Mountains Biodiversity*, 161 F.3d at 1215 (requiring a single EIS for multiple timber sales that could cumulatively impact the "same watershed").

The Corps, however, refused to prepare a single EIS, claiming that development on the remaining 3,955 acres is too "speculative" because the "details and planning decisions regarding future phases has not been completed by the developer." SOF¶101. The record squarely refutes this assertion. El Dorado owns all 12,167 acres of land and prepared a detailed Master Plan for the entire development. SOF¶¶41-42, 61. It obtained authorization from the City of Benson and public financing to develop the site according to the Master Plan. SOF¶¶53-60. These facts demonstrate that the construction of the other 3,955 acres of the Vigneto development is not too "tentative or unlikely" to warrant consideration as a reasonably foreseeable future action. *Fla. Wildlife Fed'n*, 401 F.Supp.2d at 1327-28. Indeed, the Corps acknowledged that development of remaining phases is "reasonably foreseeable," undercutting its only excuse for refusing to prepare a single EIS. SOF¶126.

The Administrative Record contains ample information for the Corps to analyze the overall impacts of the Vigneto development in a single EIS. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) ("It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now."). The Master Plan provides detailed maps setting out the transportation system and land uses across the entire property, including the other 3,955 acres of development planned by El Dorado. SOF¶¶46, 76, 127. This information shows that it is "reasonably certain" the remaining 3,955 acres of the development would have significant impacts on wildlife, such as the jaguar, western-yellow billed cuckoo, northern Mexican gartersnake, and southwestern willow flycatcher. SOF¶¶131, 143-48. Furthermore, the Watershed Alliance used El Dorado's proposal to generate a map showing where the proposed development would impact jurisdictional waters on the remaining 3,955 acres so that the Corps could evaluate the cumulative impacts of filling these waters on the San Pedro River. SOF¶¶128-29. Finally, the Master Plan identifies a water budget for the entire Vigneto development, including the

other 3,955 acres, which hydrologists used to model the impacts of the entire development on groundwater and surface flows in the watershed. SOF¶¶77, 130. The Corps had an obligation to use all of this data in a single EIS to assess the entire Vigneto development. Its refusal to do so was arbitrary and capricious. *See Blue Mountains Biodiversity*, 161 F.3d at 1215.

At the very least, the Corps was required to consider the impacts of development on the remaining 3,955 acres in its cumulative impacts analysis. *See* 40 C.F.R. §1508.25(c). Yet, the Corps inexplicably failed to undertake *any* analysis of these cumulative impacts. In its final 2019 revised EA the development, the Corps acknowledged that development on the remaining 3,955 acres is "reasonably foreseeable." SOF¶126. Rather than utilizing the available information noted above to assess cumulative impacts, the Corps copied *verbatim* its cumulative impacts analysis from an earlier 2018 EA, where it had *refused* to analyze the cumulative impacts of the remaining 3,955 acres. SOF¶132. There is thus no analysis of cumulative impacts on wildlife habitat, such as the "reasonably certain" adverse effects of the development on the remaining 3,955 acres, which overlap with 650 acres of jaguar critical habitat. SOF¶131-32, 147. Nor is there any analysis of the cumulative impacts of the remaining 3,955 acres on groundwater drawdown, jurisdictional waters, or the San Pedro River. SOF¶¶77, 130, 132. The Corps' wholesale failure to analyze these cumulative impacts violates NEPA, even if development of the remaining 3,955 acres is not a "cumulative action" under the statute. *See Native Ecosystems Council*, 304 F.3d at 895-96 n.2 (agency violated NEPA by failing to analyze cumulative impacts of reasonably foreseeable future actions although those actions were not "cumulative actions").

In sum, the Corps artificially segmented the Vigneto development to evade NEPA's requirement to prepare a comprehensive EIS. As a result, no document has analyzed El Dorado's proposed Vigneto development, a clear error.

B. The Corps Cannot Avoid its Obligation to Analyze the Impacts of the Vigneto Development Within the 8,212-Acre Area.

Even within its unduly narrow 8,212-acre area, the Corps still refused to analyze the impacts of the Vigneto development and instead severely constrained its analysis based on the flawed assumption that El Dorado could develop a master-planned community without a 404 permit. That assumption runs directly contrary to Ninth Circuit precedent, ignores the facts in the record, and disregards EPA's expert advice. By unduly constraining its analysis, the Corps abdicated its obligation to analyze the impacts of the development, which fall within its control and responsibility under NEPA.

i. The Impacts of the Vigneto Development Are Within the Corps' Control and Responsibility.

The Ninth Circuit has consistently differentiated between the Corps' jurisdiction under the CWA, which is limited to "waters of the United States," and the requisite scope of analysis under NEPA, which "may be expanded well beyond the waters that provide the initial jurisdictional trigger." *White Tanks*, 563 F.3d at 1040-41. The Corps' own regulations reflect this point by requiring the agency to analyze not just the impacts of filling jurisdictional waters but also "those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant federal review." *Id.* at 1041 (quoting 33 C.F.R. Pt. 325 App. B §§7(b)(1), 7(b)(2)(A)). The regulations identify "typical factors" that are relevant to this analysis, including the relationship between the "location and configuration" of the waters and the larger development for which the permit is sought. 33 C.F.R. Pt. 325 App. B §7(b)(2)(iii).

Accordingly, to determine the appropriate scope of analysis, the Corps must focus on "the relationship between the jurisdictional waters and the projects for which the dredge and fill permits were sought." *White Tanks*, 563 F.3d at 1041. As explained by the Ninth Circuit, "[i]t is not the quantity of the water that matters, but the fact that the waters will be affected, and further, whether the waters must be affected to fulfill the project's goals." *Id.* Yet, the Corps has consistently failed to follow this directive and

instead has repeatedly constrained its scope of analysis for master-planned communities, in violation of NEPA.

For example, in *White Tanks*, as here, the Corps limited its analysis to just a fraction of a master-planned community on the grounds that "some large-scale development" could proceed without a 404 permit (i.e., the "no-action alternative"). *Id.* The Ninth Circuit rejected this faulty rationale, explaining that the no-action alternative "was not feasible, because the result would not be a cohesive master-planned community," as proposed by the developers. *Id.* While some development might occur without a permit, that development would not meet the developers' purpose, as the "result would be isolated clusters of development, which would not be connected to each other" due to the intervening jurisdictional waters. *Id.* In short, without a 404 permit, "the project, as [the developers] conceive it, could not proceed." *Id.* at 1042. The Ninth Circuit thus concluded that the "project's viability is founded on the Corps' issuance of a Section 404 permit," requiring the Corps to analyze the impacts of the entire master-planned development under NEPA. *Id.*

Likewise, in *Save Our Sonoran*, the Ninth Circuit rejected the Corps' attempt to narrow its scope of analysis to just a fraction of a master-planned community. 408 F.3d at 1122. One of the "key factual findings" by the court was that "denial of a [404] permit would prevent the site from developing in a manner consistent with the developer's purpose." *Id.* The Ninth Circuit thus concluded that "any development the Corps permits would have an effect on the whole property. The NEPA analysis should have included the entire property." *Id.*

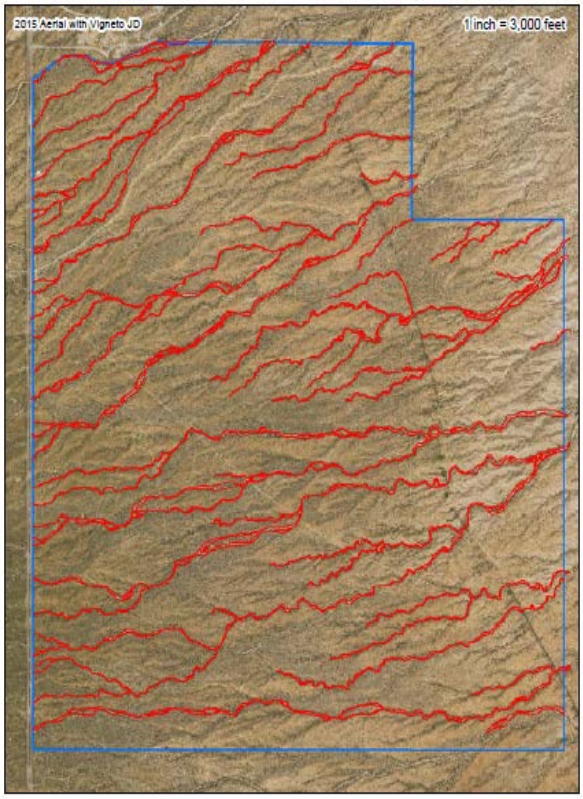
ii. The Corps Arbitrarily Constrained Its Scope of Analysis Based on an Impractical, Unrealistic, and Infeasible No-Action Alternative.

As these cases make clear, the Corps cannot evade its obligation to analyze the impacts of the Vigneto development based on El Dorado's bare assertion that it could develop a master-planned community without a 404 permit. SOF¶¶66-68, 101. This "is

not an accurate description of the situation as reflected in the administrative record." *White Tanks*, 563 F.3d at 1041. EPA demonstrated that the no-action alternative is infeasible and impracticable due to the lack of viable transportation network—a fatal shortcoming that impedes *any* large-scale development on the site. Even assuming El Dorado could overcome that foundational problem, it still cannot achieve its basic purpose of a cohesive, master-planned community without a 404 permit, as it plainly admitted. Accordingly, the impacts of the development are within the Corps' control and responsibility and must be analyzed under NEPA.

The basic purpose of the project is to develop "a master-planned community with interrelated villages" consisting of residential, commercial, and recreational facilities. SOF¶¶79-80. El Dorado cannot, however, achieve that purpose without first constructing an integrated transportation network, which is a basic objective and cornerstone of the Master Plan. SOF¶¶46-52, 79. The Transportation Plan underscores this point, explaining that "land use and transportation are *inextricably linked*"—the one does not occur without the other. SOF¶81. That interdependence is especially true given the sheer size of the Vigneto development, which would sprawl across 20 square miles (approximately the size of Manhattan) and generate 237,607 vehicle trips per day. SOF¶¶42, 84. To safely handle that volume of traffic, El Dorado needs to construct an interconnected network of looping roads to provide internal circulation, reduce external vehicle trips along State Route 90, and avoid overwhelming State Route 90's capacity in violation of state roadway standards. SOF¶¶46-52, 86-88.

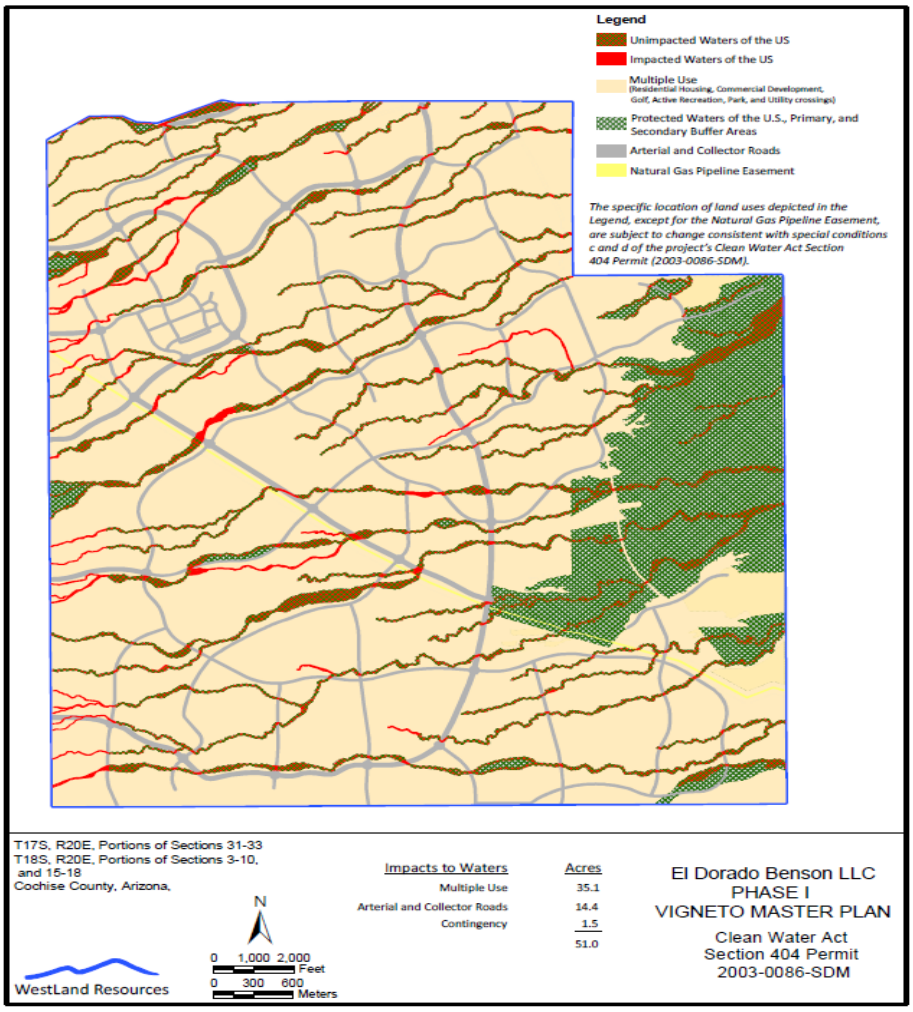
The 8,212-acre permit area, however, straddles a 75-mile network of braided ephemeral streams that weave across the project site like capillaries through tissue, as depicted in the following map.



SOF¶¶29-30. These jurisdictional waters pose a literal roadblock to the requisite interconnected transportation network, as it would be "prohibitively" expensive to span all of these streams with bridges. SOF¶83. Accordingly, El Dorado sought a 404 permit to fill these waters at 350 locations spread across the site and construct the integrated transportation network needed to achieve its purpose of building a cohesive, master-planned community. SOF¶¶33-34, 79-82.[5]

El Dorado would not be able to construct its master-planned community, let alone *any* large-scale development, without a 404 permit due to the lack of an integrated transportation network. SOF¶¶83-96. As depicted below, the dense web of jurisdictional waters severs the transportation network needed for the Vigneto development at hundreds of locations across the site. SOF¶82.

[5] The jurisdictional waters are so prevalent that El Dorado requested a special permit condition that allows it to fill any of the 450 acres of waters throughout the permit area. SOF¶82.



El Dorado would not therefore be able to construct this vital infrastructure without a 404 permit. SOF¶¶83-84, 95-96. Instead, under the no-action alternative, streets "would have to be oriented west-to-east between the major washes, and would not be interconnected and integrated." SOF¶¶83-84. As a result, access to the property would "be restricted to a right in/right out pattern" along State Route 90, meaning that all of traffic generated by the development would be funneled to State Route 90. *Id.*

EPA demonstrated that the lack of an integrated transportation network would create significant logistical problems, rendering any large-scale development "impracticable" without a 404 permit. SOF¶¶78, 84. In particular, EPA highlighted the

lack of "a traffic circulation system" under the no-action alternative "that could meet current standards for design, setback, and emergency and fire vehicle access." SOF¶¶84-88. The numbers prove the point. Assuming full build-out of the site (i.e., the same number of homes as the planned Vigneto development), the no-action alternative would generate the same volume of traffic—237,607 vehicle trips per day. SOF¶84. This overwhelming volume of traffic would be funneled "in all events" to State Route 90 due to the lack of an internal circulation system to handle that traffic within the project site. *Id.* The result would be gridlock, as State Route 90 can only handle 30,600 trips per day with an acceptable level of service—a small fraction of the projected traffic volume for the hypothetical development under the no-action alternative. SOF¶¶84-85. Traffic would be reduced to "breakdown flows" or worse, which would violate state roadway standards and inhibit, or prevent, emergency vehicles from responding within the mandated timeframes. SOF¶¶85-88. As a result, a large-scale development under the no-action alternative would not just be fragmented and isolated, but impracticable and unsafe, particularly for retirees with potentially life-threatening health conditions.

These stark facts reveal a fatal problem with the no-action alternative: without a 404 permit, El Dorado cannot construct the interconnected transportation network needed to handle the development's traffic, and thus cannot develop a viable, large-scale development. Yet, the Corps simply disregarded these facts and assumed a large-scale development was feasible without a 404 permit—a counter-factual assumption that ignores EPA's expert advice, overlooks "an important aspect of the problem," and "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

Even assuming El Dorado could overcome this infrastructure problem, it still cannot meet its purpose of developing a cohesive, master-planned community without a 404 permit. Under the hypothetical no-action alternative, El Dorado would purportedly squeeze clusters of houses between the jurisdictional streams on an *ad hoc* basis. SOF¶89; *see also* SOF¶¶35-36. But such random, isolated subdivisions would lack the

sense of community at the heart of the Vigneto development. SOF¶¶43, 79-80, 95-96. There would be no incentive for residents to live or work within the bounds of such an "unconnected" and unappealing development, as the prior developer plainly admitted. SOF¶¶36, 43, 89. The prior developer thus acknowledged a significant reduction in the amount and diversity of housing under the no-action alternative. SOF¶37. Indeed, El Dorado has been unable to sell homes in just such an isolated subdivision located adjacent to the Vigneto site, which contains hundreds of vacant lots to this day. SOF¶89. EPA thus labeled the hypothetical no-action alternative development as "unrealistic." *Id.* Even El Dorado admits that it would be forced set aside 3,000 acres for agricultural uses, such as vineyards and nut orchards, under the no-action alternative. SOF¶90. This agricultural operation appears nowhere in the Master Plan for Vigneto. SOF¶¶43-47.

EPA concluded that the hypothetical no-action alternative "fails to meet the project purpose." SOF¶78. Likewise, the Corps, El Dorado, and the prior developer have repeatedly acknowledged that the no-action alternative does not meet the "overall project purpose" and is not "practicable." SOF¶¶35-39, 95-99. As in *White Tanks*, "the developers themselves have told the Corps that, without the permit, the project *as they conceive it*, could not proceed." 563 F.3d at 1041-42 (emphasis added). Because the "project's viability [is] founded on the Corps' issuance of a Section 404 permit," the Corps must analyze the impacts of the Vigneto development under NEPA. *Id.* at 1042.

Confirming this point, El Dorado did not proceed with any development on the site while the 404 permit was suspended. SOF¶¶70, 102. The lack of development further demonstrates the Corps' control and responsibility over the site. *See SOS*, 408 F.3d at 1124 (distinguishing *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000), where the developer proceeded with development despite suspension of 404 permit); *White Tanks*, 563 F.3d at 1036 (same).

In addition to these myriad problems, El Dorado does not have approval from the City of Benson to proceed with the no-action alternative. SOF¶¶91-94. This

hypothetical concept would require major modifications to the Master Plan due to the lack of an integrated transportation network. SOF¶¶83, 89-93. Even assuming El Dorado could obtain approval for those major modifications, the development would still lead to unacceptable and unsafe levels of service on State Route 90, violating state roadway standards and emergency response requirements. SOF¶¶86-88.

These points firmly demonstrate the Corps' obligation to expand its analysis under its regulations to encompass the entire site. The development of a master-planned community is inextricably linked to the "location and configuration" of the waters. 33 C.F.R. Pt. 325 App. B §7(b)(2)(ii). Without a 404 permit, a cohesive master-planned community is not feasible, and no large-scale development can occur as a practical matter. Furthermore, the jurisdictional waters are "not all confined to particular portions of the development site," but instead are dispersed like capillaries through tissue. *White Tanks*, 563 F.3d at 1041. As a result, they affect the entire master-planned development, underscoring the "extent to which the entire project will be within the Corps' jurisdiction." 33 C.F.R. Pt. 325 App. B §7(b)(2)(iii). Accordingly, the Corps has "sufficient control and responsibility" under its regulations, and must extend the scope of its NEPA analysis to encompass the impacts of the entire development. *Id.* §7(b)(1).

EPA urged the Corps to prepare a comprehensive EIS to "assess the direct, secondary, and cumulative impacts" of the entire master-planned community, which falls within the Corps' control and responsibility. SOF¶71. These comments from EPA—"not the usual suspect[] in opposing the action of a federal agency"—underscore the Corps' obligation to analyze the impacts of the development under NEPA. *SOS*, 408 F.3d at 1122 ("It is significant at the outset to recall that two federal agencies, the EPA and the FWS . . . disagreed with the acreage limitations set forth in the permit applications and thus with the Corps' interpretation of its NEPA responsibility."); *see also White Tanks*, 563 F.3d at 1042 ("[W]hen other federal agencies suggest to the Corps that the Corps has inappropriately failed fully to consider the effects of a project, this

court is more likely to find that the Corps has acted in an arbitrary and capricious manner.").

iii. The Corps Arbitrarily Reversed Its Prior Findings In An Attempt to Circumvent NEPA.

Despite suspending the 404 permit in 2019 to purportedly clarify or correct its analysis, the Corps still failed to correct the fatal flaws in its 2018 EA. SOF¶100. Instead, in the subsequently revised 2019 EA, the Corps tried to reverse its prior findings in a transparent attempt to evade NEPA based purely on semantics.

In the revised 2019 EA, the Corps did not address EPA's comments about the severe logistical constraints posed by the no-action alternative, and thus "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43; *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) ("[C]omments from responsible experts or sister agencies . . . may not simply be ignored. There must be good faith, reasoned analysis in response."). The Corps also failed to test the "tenability or reasonableness" of El Dorado's "self-serving" assertion that it could develop the property without a 404 permit, despite its obligation to do so and the clear evidence refuting the viability of the no-action alternative, as outlined above. *See Ocean Advocates*, 402 F.3d at 866.

Instead, the Corps simply reversed its position in the revised 2019 EA on the no-action alternative without any explanation. In its 2018 EA, the Corps determined that the no-action alternative would *not* meet the overall project purpose. SOF¶¶95-99. However, in the revised 2019 EA, the Corps committed an abrupt about-face and asserted that the no-action alternative could meet El Dorado's overall project purpose. SOF¶¶101-06. This abrupt, unexplained reversal violates the APA, which requires the Corps to (a) "display awareness that it *is* changing position"; (b) show that the new decision is permissible under governing statutes; (c) explain why the agency believes the new policy is better than the old one; and (d) "show that there are good reasons for the

new policy." *FCC v. Fox Television Stations, Inc. (Fox Television)*, 556 U.S. 502, 515-16 (2009) (emphasis in original). The Corps, however, satisfied none of these requirements.

As an initial matter, the Corps did not even "display awareness" that it was changing position on whether the no-action alternative could meet the project purpose. For almost 15 years, the Corps, EPA, El Dorado, and the prior developer consistently concluded that the no-action alternative does *not* meet the overall project purpose. SOF¶¶35-39, 78, 95-99. The Corps impermissibly departed "*sub silentio*" from these prior findings, including those in the 2018 EA. *Fox Television*, 556 U.S. at 515.

Furthermore, the Corps did not explain why it reversed this position at the eleventh-and-a-half hour in its revised 2019 EA, let alone give the "good reasons" required by the law. *Id.* Instead, the Corps relied on the same analysis from its 2018 EA, almost word for word, that demonstrated the no-action alternative did *not* meet the overall project purpose and was *not* feasible. SOF¶103. The only difference in the revised 2019 EA is the Corps' newfound assertion that the no-action alternative suddenly meets the overall project purpose. Such "unexplained conflicting findings" based on the same record violate the APA. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (*en banc*); *see also Fox Television*, 556 U.S. at 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

The Corps cannot use this arbitrary, last-minute reversal to evade its obligation to comprehensively analyze the impacts of the Vigneto development. *See Sierra Club v. U.S. Army Corps Eng'rs*, 772 F.2d 1403, 1053 (2nd Cir. 1985) ("No court should allow the use of semantics to succeed in an attempt at glossing over an environmental violation."). The Corps may have switched a few words, but that gamesmanship does not alter the fact that the no-action alternative fails to meet El Dorado's stated purpose, as acknowledged by El Dorado itself. SOF¶¶95-97, 99. It also does nothing to alleviate the

very real logistical constraints identified by EPA that render any large-scale development without a permit "impractical" and "unrealistic" due to the lack of an integrated transportation network, SOF¶¶83-94, 104-06. By failing to address these fatal flaws, the Corps did not "examine the relevant data and articulate a satisfactory explanation" for how El Dorado could develop the site without a 404 permit, rendering its decision to dramatically limit its scope of analysis arbitrary, capricious, and contrary to NEPA. *See State Farm*, 463 U.S. at 43.

II. The Corps Violated NEPA by Failing to Prepare an EIS.

NEPA requires agencies to prepare a thorough EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). To determine whether an action may have a significant impact on the environment, thereby requiring an EIS, agencies must evaluate the context and the intensity of the proposed action based on a set of ten factors. 40 C.F.R. §1508.27; *see also Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988).

EPA determined that the prior 8,212-acre Whetstone Ranch proposal would have "substantial and unacceptable impact[s]" which "clearly pass NEPA's 'significance' threshold, both individually and cumulatively." SOF¶113. Thus, granting a 404 permit for the significantly larger Vigneto development unquestionably has a significant impact, requiring preparation of an EIS. In fact, the proposed permit triggers six of NEPA's significance factors, any one of which "may be sufficient to require preparation of an EIS in appropriate circumstances." *See Ocean Advocates*, 402 F.3d at 865. The Corps, however, either refused or failed to analyze these factors, rendering its decision to forego preparation of an EIS arbitrary and capricious.

A. The Vigneto Development Would Significantly Impact the Unique Characteristics of the Area.

The Corps must prepare an EIS because groundwater pumping and surface runoff from the Vigneto development pose a threat to the "[u]nique characteristics of the

geographic area" given its proximity to "ecologically critical areas," such as SPRNCA and the San Pedro River. 40 C.F.R. §1508.27(b)(3). The Corps' failure to consider these impacts rendered its FONSI wholly inadequate.

The San Pedro River provides critical habitat for a number of endangered species, serves as a globally important migratory bird corridor, and qualifies as an EPA-designated Aquatic Resource of National Importance due to its ecological significance. SOF¶¶1-3, 144, 146. Furthermore, Congress designated a 36-mile section of the River as a conservation area—SPRNCA—to "protect, preserve, and enhance" this unique and fragile aquatic ecosystem. 16 U.S.C. §460xx(a); SOF¶¶4-7. The San Pedro River and SPRNCA thus qualify as "ecologically critical areas" requiring heightened scrutiny under NEPA. *See* 40 C.F.R. §1508.27(b)(3).

Groundwater modeling shows that the Vigneto development would have a significant impact on St. David Cienega, a groundwater-fed marsh within SPRNCA that is an indicator of riparian health. SOF¶¶13-18, 119-24. Groundwater pumping could reverse surface flows, drying up the Cienega and this critical riparian area. SOF¶¶16-18, 22-24, 119-24. The proposed development would have an even greater impact on the San Pedro River just north of SPRNCA, causing a five-meter drawdown of the water table along this segment of the River east of the development. SOF¶¶123-25. The drop in surface flows and the groundwater table would cause widespread mortality of riparian habitat that provides a major wildlife corridor and refuge. SOF¶¶20-24, 125. These irreversible impacts to the unique characteristics of the River and SPRNCA require detailed analysis in a thorough EIS, as EPA demanded again and again. SOF¶¶71, 113.

Hydrological modeling also shows that the development would dramatically increase runoff into the San Pedro River by upwards of 413%, indicating that the proposed land-use changes will result in significant alteration of the hydrologic regime within and downstream of the impacted watersheds where they empty into the River. SOF¶¶116-18. Runoff would degrade water quality from sediment and pollutant

transport, increase erosion and alteration of the stream channel, and destroy critical habitat for endangered species, like the western yellow-billed cuckoo. SOF¶¶118, 144. These significant impacts require preparation of an EIS, and yet were arbitrarily dismissed by the Corps when it constrained its scope of analysis to just a small fraction of the development's impacts on groundwater pumping and runoff. *See Colo. River Indian Tribes v. Marsh*, 605 F.Supp.1425, 1433 (C.D. Cal. 1985) (holding that the Corps improperly limited its scope of analysis when it assessed "only those impacts physically dependent upon activities within its redefined jurisdiction").

B. The Vigneto Development Would Cause Cumulatively Significant Impacts.

Cumulatively significant impacts "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. §1508.7. Where "several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS." *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 602 (9th Cir. 2010).

The Vigneto development would have a cumulatively significant impact on the environment. Development in the 8,212-acre permit area would degrade jurisdictional waters that support the San Pedro River, destroy thousands of acres of upland habitat, and draw down groundwater levels along the San Pedro River. SOF¶¶115-25. These impacts would be exacerbated by the cumulatively significant impacts of developing the remaining 3,955 acres of the Vigneto property, which would affect the same resources. SOF¶¶77, 131, 147. Additionally, development of the remaining 3,955 acres would adversely affect the jaguar by destroying 650 acres of the species' critical habitat. SOF¶147. The Corps violated NEPA by not only overlooking these cumulative impacts, but also by impermissibly segmenting the Vigneto development into phases to avoid a finding of significance. *See* 40 C.F.R. §1508.27(b)(7) ("Significance cannot be avoided

by terming an action temporary or by breaking it down into small component parts."); *see also Blue Mountains Biodiversity*, 161 F.3d at 1215.

The Corps compounded its error by disregarding the cumulative impacts of climate change, which will exacerbate the effects of groundwater drawdown and loss of riparian habitat caused by Vigneto. Scientific studies predict that climate change will reduce groundwater recharge in the aquifer that supports the San Pedro River and increase drought conditions, making the River and its riparian habitat much more susceptible to declines in groundwater levels. SOF¶¶25-27. Yet, the Corps failed to "consider that information in any *meaningful* or logical way," entirely ignoring the effects of climate change in violation of NEPA. *See AquAlliance v. U.S. Bureau of Reclamation*, 287 F.Supp.3d 969, 1031-32 (E.D. Cal. 2018) (agency violated NEPA by failing to consider reduced snowpack and streamflow due to climate change).

C. The Proposed Mitigation Measures Are Highly Uncertain.

EPA concluded that filling 51 acres of streams would result in "substantial and unacceptable" impacts to jurisdictional waters, including the San Pedro River. SOF¶154. Nonetheless, the Corps refused to prepare an EIS, asserting that it had mitigated these significant impacts. SOF¶¶68-69, 155-56. The proposed mitigation measures are, however, "highly uncertain or involve unique or unknown risks." 40 C.F.R. §1508.27(b)(5). Accordingly, the Corps must prepare a comprehensive EIS to assess the adequacy of these mitigation measures and their long-term efficacy. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732-33 (9th Cir. 2001) ("The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.").

The Corps required El Dorado to undertake habitat restoration activities on an offsite parcel directly downstream from the Vigneto development to offset the impacts of filling 51 acres of jurisdictional waters. SOF¶¶155-58. The proposed activities include preserving a wetland complex fed by an artesian well, planting cottonwoods, and

installing erosion control measures. SOF¶¶158-61, 164. The Corps presumed these activities would provide mitigation in perpetuity because "the basic natural process" on the offsite parcel "would remain in place (*e.g.*, depth to groundwater, hydrology, and soils)." SOF¶159.

The record refutes this assumption, demonstrating that it is "highly uncertain" whether the mitigation measures would succeed and provide the necessary environmental benefit. 40 C.F.R. §1508.27(b)(5). Groundwater pumping for the Vigneto development would draw down surface and subsurface flows at the offsite parcel by up to five meters, eliminating or reducing the groundwater-fed artesian well. SOF¶¶123-24, 162. Without this water source, the wetland complex would "cease to exist," undercutting El Dorado's purported efforts to protect the site. *Id.* Furthermore, groundwater pumping would draw down the water table, endangering, if not causing widespread mortality of, any cottonwoods El Dorado plants on the offsite parcel, SOF¶¶160-62. Additionally, the Vigneto development would exponentially increase runoff, further degrading the offsite parcel. SOF¶¶116-18, 164.

Yet, the Corps analyzed none of these impacts due to its unduly constrained scope of analysis, which simply disregarded the development's far-reaching impacts, including on the offsite mitigation parcel. SOF¶¶163-64. As a result, the Corps' "speculative and conclusory" statements about the mitigation measures are "insufficient to demonstrate that the mitigation measures would render the environmental impact so minor as to not warrant an EIS." *See Nat'l Parks*, 241 F.3d at 735; *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F.Supp.2d 1069, 1082-83 (E.D. Cal. 2004) (holding that "uncertainty regarding the efficacy of mitigation measures," among other things, "raise[d] substantial questions regarding whether the project will significantly affect" listed species).

To comply with NEPA, the Corps must prepare a comprehensive EIS for the Vigneto development to assess the effects of groundwater drawdown and increased

runoff on the efficacy of the proposed mitigation measures. Indeed, the Corps must undertake this comprehensive analysis regardless of whether it has control and responsibility over the entire project to comply with its independent obligation under NEPA to evaluate the effectiveness of the proposed mitigation and whether it would mitigate impacts below NEPA's significance threshold. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective.").

D. The Impacts of the Vigneto Development Are Highly Controversial.

An EIS is required for the Vigneto development due to the project's "highly controversial" impacts on the environment. 40 C.F.R. §1508.27(b)(4). "The term 'controversial,' refers 'to cases where a substantial dispute exists as to the size, nature, or effect' of the [proposed action]." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982). Here, multiple agencies, experts, and members of the public disagreed with the Corps regarding the magnitude of the effects of granting a 404 permit. The Corps' refusal to address these concerns led to a flawed EA and an arbitrary FONSI.

EPA repeatedly urged the Corps to prepare an EIS due to the significant impacts of the project on the environment, including the San Pedro River. SOF¶¶71, 113-14, 133. These unaddressed concerns underscore the need for a thorough analysis of these controversial impacts under NEPA. *See Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (holding that comments from EPA urging the Forest Service to prepare an EIS were "sufficient to raise substantial questions" about whether the proposed actions would have significant environmental effects, requiring an EIS).

Multiple experts also raised concerns about the size, nature, and effects of granting a 404 permit for the Vigneto development. One hydrologist, Dr. Robert Prucha, prepared a groundwater model that identified significant impacts to the San Pedro River.

SOF¶¶122-23. A second hydrologist, Chris Eastoe, conducted multiple studies confirming that groundwater drawdown could reduce, if not reverse, flows at a critical spring in SPRNCA. SOF¶¶14-15. A third hydrologist, Professor Thomas Meixner, confirmed the potentially significant impacts of the development on the San Pedro River. SOF¶124. "This is precisely the type of 'controversial' action for which an EIS must be prepared. Otherwise, 40 C.F.R. §1508.27(b)(4) is rendered a nullity." *Sierra Club*, 843 F.2d at 1193; *Found. for N. Am. Wild Sheep*, 681 F.2d at 1182 (holding that critical responses from conservationists, biologists, and other experts to an EA created a controversy, requiring an EIS).

Additionally, the "outpouring of public protest" regarding the impacts of the development further underscores the need to prepare an EIS. *Nat'l Parks*, 241 F.3d at 736-37. Over 15,000 members of the public submitted comments identifying a diverse array of concerns with the size, nature, and effects of the proposed development. SOF¶¶134-39 (excerpting some public comments). Yet, the Corps never even acknowledged receiving these comments. SOF¶140. Furthermore, investigative reporters wrote dozens of stories documenting the controversy surrounding the development's impacts on the San Pedro River, SOF¶141, and congressional representatives raised concerns about the Corps' failure to thoroughly analyze those impacts, SOF¶142. This substantial public controversy regarding the impacts of the Corps' decision "further supports the need for an EIS." *Ocean Mammal Inst. v. Gates*, 546 F.Supp.2d 960, 980 (D. Haw. 2008).

E. The Vigneto Development Threatens a Violation of Other Laws Imposed for the Protection of the Environment.

NEPA requires agencies to prepare an EIS if the proposed "action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. §1508.27(b)(10). Here, the Corps must prepare an EIS to

ensure that the Vigneto development will not threaten federally reserved groundwater rights at SPRNCA.

Congress expressly reserved federal water rights in "a quantity of water sufficient to fulfill the purposes" of SPRNCA, 16 U.S.C. §460xx-1(d), including rights to springs and to groundwater supporting riparian vegetation, *see id.* §460xx(a). The proposed development would, however, deplete groundwater levels that support St. David Cienega, impairing this critical groundwater-fed marsh within SPRNCA. SOF¶¶7, 16-19, 123-24. The Corps must prepare an EIS to assess whether its grant of a 404 permit, and the associated groundwater drawdown, would threaten SPRNCA's federally reserved water rights. *See High Country Citizens' All. v. Norton*, 448 F.Supp.2d 1235, 1243-46 (D. Colo. 2006) (requiring agency to prepare an EIS analyzing the impacts of agreements on federally reserved water rights in the Black Canyon of the Gunnison National Park); *see also* 40 C.F.R. §1502.2(d) (requiring an EIS to "state how alternatives considered in it . . . will or will not achieve the requirements of . . . other environmental laws and policies."). The Corps' wholesale failure to analyze this issue violated NEPA and led to an uninformed decision to forego preparation of an EIS.

F. The Vigneto Development May Adversely Affect Listed Species and Critical Habitat.

The Corps must prepare an EIS due to the "degree to which" granting a 404 permit for the Vigneto development "may adversely affect an endangered or threatened species or its habitat." 40 C.F.R. §1508.27(b)(9).

The Vigneto development would cause a cascade of habitat loss-related impacts on the jaguar, western-yellow billed cuckoo, southwestern willow flycatcher, northern Mexican gartersnake, and Huachuca water umbel, including their proposed and designated critical habitat. SOF¶¶143-48. For example, the development would adversely affect thousands of acres of upland and riparian habitat along the San Pedro River, which serves as one of the few remaining strongholds for the endangered western

yellow-billed cuckoo. SOF¶¶144-45. These adverse effects on listed species require a thorough analysis in an EIS. *See Cascadia Wildlands v. U.S. Forest Serv.*, 937 F.Supp.2d 1271, 1283 (D. Or. 2013) (holding that impacts to 488 acres of spotted owl habitat and potential take of multiple owls "contribute to this Court's finding that the Project may have a significant effect on the environment"); *see also Klamath-Siskiyou Wildlands Ctr.*, 373 F.Supp.2d at 1080-81 (adverse effects on listed species "is an important factor supporting the need for an EIS"). By disregarding these effects based on an impermissibly narrow scope of analysis, the Corps arbitrarily ignored the significant impacts of its decision.

In sum, each of these significance factors require preparation of a thorough EIS to assess the significant impacts of granting a 404 permit. The Corps' failure to prepare an EIS violated NEPA.

III. The Corps Violated the Clean Water Act by Failing to Ensure that Granting a 404 Permit Is the Least Environmentally Damaging Practicable Alternative.

The Watershed Alliance vigorously disputes the Corps' baseless assertion that the no-action alternative is practicable and thus a basis for circumventing its obligation under NEPA. *See supra* section I.A. However, assuming that alternative is practical for purposes of this claim alone, the agency has failed to justify its decision to grant a 404 permit to destroy jurisdictional waters for the Vigneto development.

The 404(b)(1) Guidelines prohibit the issuance of a 404 permit "if there is a [1] practicable alternative to the proposed discharge [2] which would have less adverse impact on the aquatic ecosystem, [3] so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. §230.10(a). The Corps must provide a rational explanation for why there is "no less-damaging practicable alternative" to a proposed 404 permit. *See All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F.Supp.2d 121, 130 (D.D.C. 2009). "If the Corps cannot so explain based

on the record before it, it must reconsider its determination based on an adequate analysis of the alternatives." *Id.*

Here, the Corps failed to demonstrate that granting a 404 permit to El Dorado to destroy 51 acres of jurisdictional waters and cause significant impacts on the aquatic ecosystem is the LEDPA. According to the Corps, the no-action alternative is practicable and would avoid the discharge of any fill into jurisdictional waters. SOF¶151. If that is the case, the Corps cannot grant a 404 permit, as explained by EPA. SOF¶¶149-50 ("If a development similar enough to the proposed project which meets the applicant's goals is practicable without a permit, no permit may be issued pursuant to the regulations." (citing 40 C.F.R. §230.10(a))).

To circumvent this clear prohibition, the Corps claimed that granting a 404 permit to destroy jurisdictional waters for the Vigneto development is actually beneficial because the no-action alternative would have other significant environmental impacts. In particular, the Corps asserted the no-action alternative would involve transitional agricultural development and lack the compensatory mitigation measures required in the 404 permit. SOF¶¶152-53. This rationale was arbitrary and capricious for at least three reasons.

First, the Corps' argument contradicts the position it adopted to avoid a comprehensive consultation with FWS regarding the adverse impacts of the Vigneto development on endangered species and critical habitat. The Corps claimed that formal consultation was not required under the ESA for the Vigneto development because "a similar development (resulting in *similar effects*) could occur absent permit issuance." SOF¶151. The Corps cannot now claim that the no-action alternative will have *significantly greater* (i.e. different) effects to circumvent the CWA's LEDPA requirement. *Id.*; 40 C.F.R. §230.10(a). The Corps' inconsistent positions are "the hallmark of arbitrary action," *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134,

1145 (9th Cir. 2015), and expose the agency's irreconcilable attempt to evade both the ESA and CWA.

Second, the Corps' analysis was based on an inconsistent and thus arbitrary comparison of the Vigneto development and the no-action alternative. To minimize the environmental consequences of granting a 404 permit, the Corps limited its analysis to just 1,919 acres of the Vigneto development, claiming the impacts of activities in this constrained area were insignificant. SOF¶¶65-68, 101, 168. But the Corps did not use that same narrow scope of analysis to evaluate the impacts of the no-action alternative. SOF¶152. Instead, the Corps used a broader scope of analysis and then claimed that the no-action alternative would cause greater environmental effects because it might use more groundwater for 3,000 acres of transitional agriculture—an effect that would occur *outside* the narrow 1,919-acre scope of analysis used by the Corps to minimize the effects of the proposed alternative. *Id.* In other words, the Corps did not use the same yardstick—i.e., the same scope of analysis—to fairly compare the alternatives. By using differing scopes of analysis, the Corps creates the false appearance that the no-action alternative would somehow be more environmentally detrimental. Due to this skewed comparison, the Corps "failed to assess rationally" whether the no-action alternative was the LEDPA, violating the CWA. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1189 (10th Cir. 2002); *See Envtl. Def. v. U.S. Army Corps of Eng'rs*, 515 F.Supp.2d 69, 84 (D.D.C. 2007) (rejecting Corps' "internally inconsistent" analysis that skewed results).

Third, the Corps impermissibly relied on El Dorado's proposed compensatory mitigation measures to assert that the no-action alternative would have more impacts because, without the 404 permit, there would be no mitigation measures. SOF¶153. As an initial matter, the Watershed Alliance disputes the effectiveness of the mitigation measures, as discussed below in Section IV. In any event, the Corps' reasoning is nonsensical because the purpose of the compensatory mitigation is to *offset* the

unavoidable impacts of granting the 404 permit. SOF¶¶155-56. By contrast, the no-action alternative does not impact jurisdictional waters in the first place and thus does not require compensatory mitigation. SOF¶¶150-51. As such, and as explained by EPA, the "*compensatory* acreage . . . cannot be used to make the project proposal appear 'less damaging' than other alternatives." SOF¶153. True to that point, the CWA expressly prohibits the Corps from double-counting mitigation activities as part of the LEDPA, as that would allow developers to buy down, rather than avoid, a project's impacts—precisely what occurred here in violation of the CWA. *See* Memorandum of Agreement Between EPA and ACE—The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210, 9212 (Mar. 12, 1990) ("Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the [LEDPA].").[6]

Even assuming the Corps rationally eliminated the no-action alternative, it still failed to consider "all appropriate and practicable measures to minimize" impacts on aquatic resources from granting a 404 permit for the Vigneto development, as required by the Guidelines. *See* 40 C.F.R. §230.12(a)(3)(iii). The Corps identified spanned crossings as a means to avoid direct impacts on waters of the United States. SOF¶150. Yet, the Corps did not consider, let alone require, these measures to avoid and minimize the harms of the Vigneto development. This oversight was contrary to the CWA. *See* 40 C.F.R. §230.10(d) (prohibiting issuance of a 404 permit "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts").

IV. The Corps Violated the Clean Water Act by Failing to Adequately Mitigate the Effects of Granting the 404 Permit.

To comply with the CWA, the Corps must ensure that El Dorado successfully mitigates the impacts of filling 51 acres of jurisdictional waters to construct the Vigneto

[6] Alternatively, as argued in section IV.C. below, the Corps' approach resulted in impermissible double-counting of avoidance measures to satisfy both its LEDPA and compensatory mitigation requirements.

development. 40 C.F.R. §§230.10(d), 230.91. The proposed mitigation measures, however, violate the CWA in three ways. First, the Corps failed to ensure the proposed mitigation on the offsite parcel would be ecologically successful or sustainable because it did not consider the significant impacts of the entire 12,167-acre Vigneto development on the offsite parcel due to its narrowly constrained analysis. Second, the Corps did not require a sufficient monitoring period to ensure the offsite mitigation measures would be effective. Third, the Corps improperly credited El Dorado for its proposed compensatory mitigation measures after having relied on those same measures to select the proposed action as the LEDPA.

A. The Corps Failed to Demonstrate that the Proposed Mitigation Would Be Ecologically Successful and Sustainable.

The Corps must ensure that the proposed mitigation measures on the offsite parcel would be ecologically successful and sustainable. 40 C.F.R. §230.93(a)(1). The Guidelines thus require the offsite parcel "be ecologically suitable for providing the desired aquatic resource functions." *Id.* §230.93(d)(1). Accordingly, the Corps must analyze the hydrological conditions, soil characteristics, size, and location of the mitigation site relative to hydrologic sources and other ecological features, development trends, anticipated land use changes, and relative locations of the impact and mitigation sites. *Id.* Yet, the Corps never undertook this critical analysis and turned a blind eye on the ample evidence demonstrating that the offsite parcel is not suitable for mitigation because the Vigneto development would adversely impact that parcel.

The Corps assumed that mitigation activities on the offsite parcel would be ecologically successful and sustainable because natural processes, like "depth to groundwater, hydrology, and soils," would remain in place. SOF¶159. The Corps thus credited El Dorado with purportedly preserving a wetland complex that depends on a groundwater-fed artesian well. SOF¶161. But the Vigneto development would cause a five-meter drawdown in this area after 100 years, reducing, if not eliminating, any

groundwater discharges at the artesian well. SOF¶¶123-24, 162. As El Dorado conceded in its HMMP, which the Corps relied upon, "[a]bsent this source of water, the wetland area within the mitigation site would no longer support wetland hydrology and the wetland soils and vegetation would cease to exist at the site over time." SOF¶162. There is thus no basis for the Corps' assumption that El Dorado's proposal to protect this wetland complex "in perpetuity" would be ecologically successful, let alone provide the requisite compensatory mitigation under the Guidelines. SOF¶156.

The Corps further erred by assuming that El Dorado's proposed revegetation activities on the offsite parcel would be ecologically successful, despite clear evidence to the contrary. El Dorado proposes to plant 400 cottonwoods trees, which require fairly persistent streamflows and shallow (high) groundwater depths to survive. SOF¶160. El Dorado identified depth to alluvial groundwater on the offsite parcel at approximately 44 to 53 inches, and so, would plant the cottonwood rootballs 48 inches below the ground surface. *Id.* As noted above, though, anticipated drawdown from groundwater pumping for the Vigneto development would lower groundwater levels by 196 inches (or five meters), SOF¶¶123-24, 162, thereby causing widespread mortality of any cottonwoods El Dorado plants on the offsite parcel, SOF¶22. This outcome is particularly likely given that El Dorado would not provide any supplemental watering for the cottonwoods. SOF¶160. This likely die-off undercuts the Corps' unsupported assumption that these mitigation activities would be successful, rendering the proposed mitigation inadequate.

The Corps also overlooked the impacts on the offsite parcel as a result of exponentially-increased surfacewater runoff from the upstream Vigneto development. The Corps credited El Dorado with controlling already active erosion on the offsite parcel without ever analyzing how the increase in runoff from the development would impact the efficacy of erosion control measures. SOF¶¶116-18, 164. The Corps thus overlooked a critical issue, rendering its analysis arbitrary and capricious. *State Farm*, 463 U.S. at 43 (explaining that agency action is arbitrary and capricious if it "entirely fail[s] to consider

an important aspect of the problem"). By converting thousands of acres of upland habitat into impervious surfaces, runoff and sediment deposition from the Vigneto development would have significant adverse impacts on the offsite parcel. SOF¶¶116-18, 164. Because the Corps did not analyze these impacts, it failed to show that the offsite parcel would be suitable for mitigation.

Compounding these errors, the Corps disregarded the effects of climate change, which would exacerbate the adverse impacts from the Vigneto development on the offsite parcel. SOF¶163. According to climate modeling, drought conditions will become more persistent in the desert southwest, stressing riparian habitat and fragile aquatic ecosystems. SOF¶¶25-27. The drastic increase in groundwater pumping for the Vigneto development, at 8,427 acre-feet per year, would amplify the effects of drought conditions, potentially causing widespread mortality of riparian habitat on the offsite parcel. SOF¶¶25-27, 121-25.

The Corps had ample available information showing that the impacts from groundwater drawdown and runoff caused by the development would devalue, if not completely negate, the proposed mitigation measures on the offsite parcel. By failing to analyze these impacts, the Corps has not shown that El Dorado's proposed compensatory mitigation would be ecologically successful or sustainable. 40 C.F.R. §230.93(a)(1), (d)(1). This error renders the HMMP inadequate.

B. The Five-Year Monitoring Period Fails to Ensure the Mitigation Would Be Ecologically Successful and Sustainable.

The Corps accepted El Dorado's short five-year monitoring period for assessing whether the proposed mitigation measures on the offsite parcel actually offset the impacts of permitted fill activities. SOF¶165. This monitoring period is plainly insufficient given the anticipated time lag for impacts from the Vigneto development.

Monitoring is essential to determine whether developers are in compliance with permit conditions and the purpose of a mitigation plan is actually achieved. 40 C.F.R.

§230.96(a)(1). Mitigation efforts must be monitored for an adequate period to ensure the project meets performance standards. *Id.* §230.96(b). Thus, a longer monitoring period is required for aquatic resources with slow development rates. *Id.*

Here, a five-year monitoring period is wholly inadequate, as it fails to capture the impacts of the Vigneto development on the offsite parcel. First, El Dorado plans to construct the Vigneto development over a 20-year period with "impacts to jurisdictional waters . . . occur[ing] incrementally over" that build-out period. SOF¶165. A five-year monitoring period would only capture a fraction—less than one fourth—of the anticipated impacts from the development. *Id.* Second, a five-year monitoring period would also exclude the impacts of groundwater drawdown caused by the Vigneto development, which would be delayed due to the time lag between groundwater pumping and the point at which pumping effects reach surface waters. SOF¶¶19, 166. Consequently, a monitoring period that ends well before El Dorado would complete construction of the Vigneto development and before the impacts of groundwater pumping on surface resources would be fully realized is insufficient to ensure the success of the proposed compensatory mitigation, as required by the Guidelines. 40 C.F.R. §230.96(a)(1), (b).

C. The Corps Improperly Double-Counted Mitigation Measures.

Under the 404(b)(1) Guidelines, mitigation activities follow a three-part sequence: avoidance, minimization, and then compensatory mitigation. 40 C.F.R. §230.91(c); *see also* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,594 (Apr. 10, 2008) ("[C]ompensatory mitigation is not considered until *after* all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem." (emphasis added)). "Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the [LEDPA]." 55 Fed. Reg. at 9211.

Here, the Corps impermissibly double-counted the proposed mitigation measures, plainly violating the CWA. As discussed above, the Corps did not require El Dorado to take further steps to avoid or minimize impacts from the permitted activity, and rejected the no-action alternative as the LEDPA because it would not include restrictive covenants to protect 1,624 acres of open space, and would not include restoration of the Offsite Mitigation Parcel. SOF¶167. Thus, the Corps cannot rely on the protection of the same open spaces and restoration of the same offsite parcel as compensation for the impacts of granting the 404 permit. 55 Fed. Reg. at 9211. Such double-counting would short-circuit the sequencing process under the CWA, which requires an applicant to avoid, minimize, *and then* compensate for unavoidable impacts to jurisdictional waters. 73 Fed. Reg. at 9,594; 40 C.F.R. §230.91(c).

V. The Corps Failed to Determine Whether Granting a 404 Permit for the Vigneto Development is in the Public Interest.

The Corps' regulations prohibit the issuance of any permit if the "district engineer determines that it would be contrary to the public interest." 33 C.F.R. §320.4(a)(1). This far-reaching inquiry requires the Corps to undertake a full evaluation of "the probable impacts" of a proposed project on "[a]ll factors which may be relevant to the proposal[,] including the cumulative effects thereof." *Id.* The Corps may deny or impose conditions on a 404 permit "at any time to satisfy the legal requirements or to otherwise satisfy the public interest." *Ocean Advocates*, 402 F.3d at 871.

Here, the Corps has control and responsibility over the entire proposed Vigneto development, as discussed in detail above. *See supra* section I. It must therefore consider the impacts of the entire development on the public interest, including the loss of crucial surface and base flows for the San Pedro River and within SPRNCA; the reduction in groundwater levels throughout the middle San Pedro River basin that provide residential water supplies; the degradation of thousands of acres of ephemeral streams and upland habitat; the adverse impacts on hundreds of species of wildlife,

including listed species and critical habitat; and the potential loss of millions of dollars of revenue from recreational activities, including bird watching. SOF¶¶3, 168-75.

The Corps, however, refused to undertake a comprehensive analysis of the public interest factors due to its impermissibly narrow scope of analysis. SOF¶¶168-75. As a result, the Corps overlooked the substantial impacts of granting a 404 permit on the public interest, violating its own regulations. *See* 33 C.F.R. §320.4(a)(1). Furthermore, the Corps' decision to grant a 404 permit violated multiple substantive requirements of the 404(b)(1) Guidelines, as discussed above. *See supra* sections III-IV. For this additional reason, the Corps' decision to grant the permit was arbitrary, capricious and contrary to its regulations. *See* 33 C.F.R. §320.4(a)(1); *All. to Save the Mattaponi*, 606 F.Supp.2d at 136.

VI. The Court Should Vacate the 404 Permit and Order Preparation of an EIS.

Under the APA, courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action."). Due to the violations of NEPA and the CWA, the Court should vacate the 404 permit and remand to the Corps for preparation of a comprehensive EIS. *See White Tanks*, 563 F.3d at 1042 (remanding matter for entry of injunction while Corps prepared a comprehensive environmental analysis); *Blue Mountains Biodiversity Project*, 161 F.3d at 1216.

CONCLUSION

For the foregoing reasons, the Watershed Alliance respectfully requests that the Court grant its motion for partial summary judgment on its CWA and NEPA claims.

Respectfully submitted this 21st day of December 2020,

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STATEMENT REGARDING ORAL ARGUMENT

The Watershed Alliance believes that oral argument would be beneficial given the factual complexity of the case and the significant issues regarding NEPA and the CWA.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically transmitted the foregoing and all exhibits to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ *Stuart Gillespie*

CERTIFICATE OF COMPLIANCE

I hereby certify that the above memorandum complies with the 14,000-word limit set in this Court's Order of July 29, 2019, ECF No. 23.

/s/ *Stuart Gillespie*