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18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE DISTRICT OF ARIZONA

20 Patagonia Area Resource Alliance, et al.,)
)

21 Plaintiffs,)
)

22 v.)
)

23 United States Forest Service, et al.,)
)

24 Federal Defendants,)
)

25 and)
)

26 Arizona Standard, LLC, et al.)
)

27 Defendant-Intervenors.)
)

28)
)

Case No. 4:23-cv-00280-JGZ
MOTION FOR PRELIMINARY
INJUNCTION AND
MEMORANDUM IN SUPPORT

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APA	Administrative Procedure Act
BA	Biological Assessment
BiOp	Biological Opinion
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
Consideration of Comments	U.S. Forest Serv., Consideration of Comments for Flux Canyon Exploration Drilling Project (Sept. 18, 2022) (Ex. 25)
Davis Response	Letter from Kurt Davis, Deputy Forest Supervisor, to Roger Flynn, Western Mining Action Project, May 25, 2023 (Ex. 19)
Delaney (1999)	David K. Delaney et al., <i>Effects of Helicopter Noise on Mexican Spotted Owls</i> , 63 J. WILDLIFE MGMT. 60 (1999) (Ex. 35)
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
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3	Hermosa Project Update	<i>Hermosa Project Update</i> , SOUTH32 (Jan. 17, 2022) (Ex. 28)
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5	NEPA	National Environmental Policy Act
6	PACs	Protected Activity Centers
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13	South32 Hermosa Critical Minerals Project	<i>South32 Hermosa Critical Minerals Project</i> , PERMITTING DASHBOARD (May 5, 2023) (Ex. 30)
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15	Sunnyside BA	U.S. Forest Serv., Biological Assessment for Sunnyside Exploration Drilling Project (Aug. 2020) (Ex. 36)
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17	Sunnyside BiOp	U.S. Fish & Wildlife Serv., Biological Opinion (Dec. 1, 2022) (Ex. 15)
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19	Sunnyside Draft EA	U.S. Forest Serv., Sunnyside Exploration Drilling Project: Draft Environmental Assessment (Mar. 2021) (Ex. 13)
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21	Sunnyside DN/FONSI	U.S. Forest Serv., Decision Notice and Finding of No Significant Impact for the Sunnyside Exploration Drilling Project (June 2023) (Ex. 17)
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23	Sunnyside Plan	Arizona Standard, Plan of Operations: Sunnyside Exploration Drilling Project (Dec. 19, 2022) (Ex. 16)
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27	Sunnyside Water Report	U.S. Forest Serv., Sunnyside Exploration Drilling Project: Water Resource Analysis Technical Report (June 24, 2022) (Ex. 21)
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1	The FAST-41 Process	<i>The FAST-41 Process</i> , PERMITTING DASHBOARD (Aug. 16, 2022) (Ex. 32)
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3	Training Guide	U.S. Forest Serv., Training Guide for Reclamation Bond Estimation and Administration (2004) (Ex. 33)
4	USFS	United States Forest Service
5	Vega Letter	Letter from Raul Vega, Reg'l Supervisor, Ariz. Game & Fish Dep't, to Celeste Kinsey, District Ranger, Coronado Nat'l Forest, Scoping for Flux Canyon Exploration Drilling, Sept. 14, 2022 (Ex. 18)
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12	WestLand 2019	WestLand Resources, Inc., 2019 Yellow-Billed Cuckoo Survey Near Harshaw, Arizona (Jan. 6, 2020) (Dec. 4, 2017) (Ex. 39)
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MOTION FOR PRELIMINARY INJUNCTION

1
2 Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs Patagonia Area
3 Resource Alliance, et al., request a preliminary injunction to prevent irreparable harm
4 from imminent development of the Sunnyside and Flux Canyon exploratory mineral
5 drilling projects in the Patagonia Mountains of southeast Arizona’s Coronado National
6 Forest.

7 The defendant U.S. Forest Service authorized these projects in one of the most
8 biologically diverse mountain ranges in the United States without taking a “hard look” at
9 their impacts, as is required by NEPA. The projects will clear trees and other vegetation
10 in sensitive areas, introduce long-term noise and human disturbance into the midst of
11 important habitat for threatened and endangered species, and risk pollution of the
12 municipal watershed for the town of Patagonia, Arizona. Nevertheless, USFS deemed
13 their impacts too insignificant to merit full examination in an environmental impact
14 statement. In so doing, however, USFS disregarded the projects’ cumulative impacts with
15 other ongoing and anticipated mineral developments in this same sensitive area,
16 discounted significant threats to imperiled wildlife based on flawed assumptions and
17 reasoning, and refused necessary steps to enable evaluation of the projects’ risk to
18 affected water sources, among other failings. NEPA’s “look-before-you-leap” mandate
19 does not permit USFS to cut corners and ignore such environmental impacts. Moreover,
20 injunctive relief is necessary to prevent irreparable environmental harm from project
21 development activities commencing as early as September 15, 2023, and the balance of
22 harms and public interest favor an injunction. Accordingly, Plaintiffs satisfy all
23 requirements for preliminary injunctive relief and this Court should grant their requested
24 injunction. *See Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008)
25 (stating injunction requirements).¹

26
27 ¹ Plaintiffs’ standing is demonstrated by their member declarations filed in support of this
28 motion, which demonstrate that Plaintiffs’ members satisfy Article III’s injury, causation,

1 **MEMORANDUM IN SUPPORT**

2 **BACKGROUND**

3 **I. The Patagonia Mountains**

4 The Patagonia Mountains are one of southeast Arizona’s “sky islands”—mountain
5 ranges that rise abruptly from surrounding grasslands and desert scrub “to form forested
6 islands among a ‘desert sea.’” Sunnyside EA at 28 (Ex. 14). Located within the Coronado
7 National Forest, the Patagonia Mountains are a biodiversity hotspot providing habitat for
8 numerous wildlife species listed as threatened or endangered under the Endangered
9 Species Act. *Id.* at 28–29. These include the Mexican spotted owl, a nocturnal denizen of
10 forested canyons that is listed as a threatened species under the ESA. *Id.* at 30; Sunnyside
11 BiOp at 24–25 (Ex. 15). The Patagonia Mountains contain multiple confirmed nesting
12 and roosting sites for Mexican spotted owls. *See* Sunnyside BiOp at 31–32 (Ex. 15).

13 The Patagonia Mountains also provide occupied habitat for the Western yellow-
14 billed cuckoo, a slender songbird listed as threatened under the ESA. *See id.* at 6, 14–16.
15 Cuckoos migrate to the Patagonia Mountains from as far away as Argentina during their
16 annual breeding season that coincides with summer monsoon precipitation. *See id.* at 6–8.
17 There they build their nests and raise their young, often in riparian woodlands but also in
18 more arid ephemeral drainages and on adjacent terraces and hillsides that come to life
19 with monsoon rains. *See id.* at 8, 13.

20 These mountains also provide habitat for two rare cat species, the North American
21 jaguar and ocelot, both listed as endangered under the ESA. *See id.* at 1, 47–48, 54. In
22 fact, the Patagonia Mountains represent a key movement corridor for jaguars and ocelots
23 that recently and increasingly have been moving northward from Mexico to reoccupy
24 their historic range in the United States, as these species’ northward movements remain
25 unblocked by the border wall in the landscape connecting the Patagonia Mountains with

26 _____
27 and redressability requirements. Further, the interests at stake are germane to Plaintiffs’
28 purposes and participation of Plaintiffs’ individual members is unnecessary. *See Hunt v.*
Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977).

1 jaguar and ocelot habitat in Sonora, Mexico. *See id.* at 47–48. Underscoring the
2 importance of this connection, jaguars and ocelots have been detected recently south of
3 the Patagonia Mountains in Sonora, Mexico and in the Patagonia, Huachuca, and Santa
4 Rita Mountains to the north in the United States. *Id.* at 47–48, 51–52. The U.S. Fish and
5 Wildlife Service, which administers the ESA for these species, has determined that
6 maintaining the Patagonia Mountains habitat corridor “is important to improving the
7 viability” of jaguars and ocelots “in southern Arizona.” *Id.* at 56; *see id.* at 47–48, 62–63.

8 In addition to providing important habitat for imperiled wildlife, the Patagonia
9 Mountains also are vital for nearby human communities. These mountains encompass a
10 large portion of the Sonoita Creek watershed, which provides the sole source of potable
11 water for the town of Patagonia, Arizona and its 900 residents, along with 300 private
12 well users within a 3-mile radius. Sunnyside EA at 58 (Ex. 14). “The shallow depth of the
13 aquifer, combined with the nature of the soils and underlying geology, make the
14 relationship between the surface and ground water watersheds a particularly close and
15 connected one” in this area. *Id.* at 58–59.

16 **II. The Challenged Projects**

17 In the midst of these environmentally sensitive public lands, USFS has authorized
18 the Sunnyside and Flux Canyon exploratory mineral drilling projects. *See* Sunnyside
19 DN/FONSI (Ex. 17); Flux Canyon DM (Ex. 24). Specifically, the Sunnyside Project
20 proposes exploration drilling in Humboldt and Flux Canyons and nearby areas of the
21 Patagonia Mountains. *See* Sunnyside EA at 29 (Ex. 14). There, a mining company,
22 Arizona Standard, proposes road and well-pad construction followed by drilling for 24
23 hours per day, 7 days per week, on up to 30 drill pads for up to seven years, with
24 reclamation activities continuing thereafter. *See* Sunnyside Plan at 1–14, 51–53 (Ex. 16).
25 USFS authorized the Sunnyside Project pursuant to the agency’s locatable minerals
26 regulations at 36 C.F.R. 228, Subpart A, on June 16, 2023. *See* Sunnyside DN/FONSI
27 (Ex. 17).
28

1 Only about a mile downslope from the Sunnyside Project site on the hillsides of
2 Flux Canyon, another mining company, South32 Hermosa, Inc., proposes a second
3 project to drill 24 hours per day, 7 days per week, this one involving six new drill pads
4 and associated access roads. Flux Canyon Plan at 1–10 (Ex. 23). The Flux Canyon
5 Project would drill for up to seven months—contemporaneously with the Sunnyside
6 Project—and the proponent asserts that all drilling, reclamation, and revegetation work
7 would be complete within twelve months. *Id.* at 1–2, 12–13. USFS authorized this project
8 under the agency’s minerals regulations on May 30, 2023. *See* Flux Canyon DM (Ex. 24).

9 Together, these projects would develop 36 new well pads with associated roads,
10 drilling equipment, lights, and other infrastructure scattered across an area spanning
11 about two and a half miles along the western Patagonia Mountains, from high-elevation
12 areas near Humboldt Canyon down to the lower hillsides of Flux Canyon. *See* Shafer
13 Decl. Ex. 3 (Ex. 10) (map depicting both projects together). While the aggregate physical
14 footprints of the two projects would total about 11.86 acres, *see* Sunnyside Plan at 8–11
15 (Ex. 16); Flux Canyon DM at 4 (Ex. 24), their environmental disruption from noise, dust,
16 lights, and human disturbance would extend much farther. For example, according to
17 Arizona Standard’s own analysis, even at *1.2 miles* from the source, the Sunnyside
18 Project’s proposed drilling and construction activities would produce noise at a volume
19 greater than a threshold level that research results showed to cause a flushing response in
20 nesting Mexican spotted owls (46 dBA). *See* Sunnyside BA 5-2 (Ex. 36) (projecting
21 noise at 47.5 dBA 6,400 feet from operations); *see also* Delaney (1999) at 68 (Ex. 35)
22 (identifying 46 dBA noise threshold for chain saw disturbance to cause flushing
23 response).² Similarly, South32’s analysis for the Flux Canyon Project identified a 94-acre
24 zone that would be affected by that project’s lights, noise, and dust, and reported that

25
26
27 ²The Delaney (1999) study, and USFS’s improper reliance on it, are further discussed at
28 Argument Point I.B, *infra*. Plaintiffs cite it here to demonstrate that disturbance impacts
would be expansive even under the agency’s own cited evidence.

1 operations would cause even higher noise impacts (about 69 dBA) at the perimeter of that
2 zone. *See* Flux Canyon BA at 12, 24 (Ex. 27).

3 The impact zone for these disturbances encompasses occupied habitat for Mexican
4 spotted owls and Western yellow-billed cuckoos, as well as two key habitat linkages for
5 other species including jaguars and ocelots whose importance has been highlighted by the
6 Arizona Game and Fish Department. *See* Vega Letter at 2 (Ex. 18); *see also* Sunnyside
7 BiOp at 52–63 (Ex. 15); Sunnyside BA at 5-28 to 5-29 (Ex. 36). Specifically, regarding
8 the owls, part of the Sunnyside Project would occur within Humboldt Canyon, a narrow,
9 steep-walled and tree-lined canyon that contains Protected Activity Centers for Mexican
10 spotted owls. *See* Sunnyside BA at 3-1 (Ex. 36); Sunnyside BiOp at 25, 31–32 (Ex. 15);
11 *see also* Serraglio Decl. Exs. 1–3 (Ex. 9) (photos of owls in canyon); Shafer Decl. Exs. 1,
12 2 (Ex. 10) (photos of owls and canyon). Designated pursuant to FWS’s Mexican Spotted
13 Owl Recovery Plan, such PACs encompass known nesting and roosting sites for Mexican
14 spotted owls. *See* Sunnyside BiOp at 25 (Ex. 15). Surveys confirm recent owl occupancy
15 of at least two PACs in the area. *See id.* at 31–32; Sunnyside BA at 5-7 to 5-12 (Ex. 36).
16 The drill sites for these projects also would be within the drainage of Alum Gulch, which
17 drains into Sonoita Creek, the drinking-water source for more than a thousand Arizonans.
18 *See* Sunnyside EA at 58–59, 61 (Ex. 14).

19 Further, these developments would occur in a portion of the Patagonia Mountains
20 where other mineral projects are ongoing or anticipated. These include the Hermosa
21 Project, a planned underground zinc mine located immediately east of the proposed
22 Sunnyside Project on a 450-acre private parcel called the Trench Camp property. *See id.*
23 at 26. Owned by South32, the Hermosa Project currently involves drilling of two sloped
24 tunnels as a prelude to 22 years of mining production commencing as soon as Fiscal Year
25 2027. *See id.*; *Hermosa Project Update* at 2, 4, 10 (Ex. 28). In addition to mine shafts,
26 planned surface developments for the Hermosa Project include a paste plant, processing
27 plant, and dry-stack tailings storage facility. *See Hermosa Project Update* at 11 (Ex. 28).

28

1 Nearby, South32 also proposes a further development dubbed the Hermosa
2 Critical Minerals Project, a planned zinc and manganese mine that the federal
3 government has fast-tracked for permitting under Title 41 of the Fixing America’s
4 Surface Transportation Act (FAST) Act of 2015, 42 U.S.C. § 4380 et seq. (“FAST-41”).
5 *See South32 Hermosa Critical Minerals Project* (Ex. 30). According to the government
6 and South32, Hermosa CMP would exploit the same underground mineral deposit as the
7 Hermosa Project, would also require a dry-stack tailings facility, and plans approximately
8 60 years of mining with “subsurface and surface disturbance of lands within the
9 Coronado National Forest.” *See id.*; *see also Hermosa CMP Update* at 2, 3 (Ex. 29). The
10 government plans to approve this project in September 2026. *See South32 Hermosa*
11 *Critical Minerals Project* (Ex. 30).

12 Cumulatively, the challenged projects and nearby ongoing and planned
13 developments contemplate many years of simultaneous industrial activity within a
14 northwest-to-southeast corridor spanning the heart of the Patagonia Mountains. *See*
15 *Sunnyside EA* at 85, fig. 9 (Ex. 14) (map of foreseeable developments).

16 **III. NEPA’s Environmental Analysis Requirements**

17 USFS’s approval of the Sunnyside and Flux Canyon Projects triggered USFS’s
18 obligations under our nation’s leading environmental analysis statute, the National
19 Environmental Policy Act. NEPA has “twin aims.” *Balt. Gas & Elec. Co. v. Natural Res.*
20 *Def. Council*, 462 U.S. 87, 97 (1983). First, it requires each federal agency “to consider
21 every significant aspect of the environmental impact of a proposed action. Second, it
22 ensures that the agency will inform the public that it has indeed considered environmental
23 concerns in its decisionmaking process.” *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062,
24 1066 (9th Cir. 2002) (cleaned up).

25 To that end, NEPA requires federal agencies to prepare a detailed Environmental
26 Impact Statement before undertaking “major Federal actions significantly affecting the
27 quality of the human environment.” 42 U.S.C. § 4332(2)(C). Pursuant to implementing
28 regulations promulgated by the federal CEQ, if an agency believes a proposed action is

1 unlikely to have significant environmental effects, or is unsure whether a proposed action
2 will have significant environmental effects, it may instead prepare a less exhaustive
3 Environmental Assessment of the proposed action. 40 C.F.R. § 1501.5. “If substantial
4 questions are raised regarding whether the proposed action *may* have a significant effect
5 upon the human environment, a decision not to prepare an EIS is unreasonable.” *Save the*
6 *Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (emphasis in original).³

7 NEPA defines “effects” to include the direct, indirect, and cumulative effects of
8 proposed actions. *See* 40 C.F.R. § 1508.1(g); *see also id.* §§ 1508.7–1508.8 (2019) (for
9 NEPA processes begun before the 2020 revision of these regulations). Cumulative effects
10 are “effects on the environment that result from the incremental effects of the action
11 when added to the effects of other past, present, and reasonably foreseeable actions,”
12 regardless of who undertakes those actions. *Id.* § 1508.1(g)(3). They include “effects on
13 natural resources and on the components, structures, and functioning of affected
14 ecosystems,” as well as “aesthetic, historic, cultural, economic, social, or health
15 [effects].” *Id.* § 1508.1(g)(4).

16 If an agency concludes through an EA process that no EIS is required because the
17 proposed action will not significantly affect the environment, it must issue a Finding of
18 No Significant Impact explaining the basis for that determination. *Id.* § 1501.6. To justify
19 such a FONSI, “[f]ederal agencies must undertake a ‘full and fair’ analysis of the

21 ³ In 2020 and 2022, CEQ revised its NEPA regulations. *See* National Environmental
22 Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022);
23 Update to the Regulations Implementing the Procedural Provisions of the National
24 Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). Because the NEPA
25 process for the Sunnyside Project began before September 14, 2020, the previous
26 regulations apply to that Project. *See* 40 C.F.R. § 1506.13; *see also* Sunnyside Scoping
27 Notice (Ex. 12); Sunnyside Draft EA at 6 (Ex. 13) (“This analysis and NEPA
28 documentation is being prepared pursuant to the 1978 implementing regulations.”).
Because the NEPA process for the Flux Canyon Project began after September 14, 2020,
the revised regulations, as well as the further revised versions of 40 C.F.R. §§ 1502.13,
1507.3, 1508.1(g), (z), apply to that Project. *See* Flux Canyon Scoping Notice (Ex. 22);
87 Fed. Reg. at 23,453.

1 environmental impacts of their activities, and NEPA imposes procedural requirements
2 designed to force agencies to take a ‘hard look’ at environmental consequences of their
3 proposed actions.” *350 Mont. v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) (cleaned
4 up). “To satisfy the ‘hard look’ requirement, an agency must provide a reasonably
5 thorough discussion of the significant aspects of the probable environmental
6 consequences.” *Id.*

7 In narrow situations, neither an EIS nor EA is required and federal agencies may
8 invoke a Categorical Exclusion from further NEPA analysis. *See* 40 C.F.R. § 1501.4. CEs
9 are appropriate only for categories of actions that the agency has previously determined
10 “normally do not have a significant effect on the human environment.” *Id.* § 1508.1(d);
11 *see also id.* § 1501.3(a)(1). Even if an agency determines that a CE covers a proposed
12 action, the agency must still “evaluate the action for extraordinary circumstances in
13 which a normally excluded action may have a significant effect.” *Id.* § 1501.4(b).
14 Otherwise, the agency “shall prepare an environmental assessment or environmental
15 impact statement, as appropriate.” *Id.* § 1501.4(b)(2). When relying on a CE, an agency
16 “must supply a convincing statement of reasons why potential effects are insignificant.”
17 *Alaska Ctr. for Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) (citation and
18 internal quotation marks omitted).

19 USFS’s CE regulations require a “scoping” process prior to the use of a CE to
20 “determine the scope of the issues to be addressed.” 36 C.F.R. § 220.6(c); *Alaska Ctr.*,
21 189 F.3d at 858. If USFS “determines, based on scoping, that it is uncertain whether the
22 proposed action may have a significant effect on the environment,” the Service must
23 prepare an EA. 36 C.F.R. § 220.6(c). Thus, only if USFS appropriately determines that a
24 proposed action *certainly* will have no significant environmental effect may a CE be
25 utilized. *See id.*⁴

26
27 ⁴ Congress amended NEPA in the Fiscal Responsibility Act of 2023, which became
28 effective June 3, 2023. *See* Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-46 (2023). Nothing

1 IV. USFS's Deficient Environmental Analysis

2 Despite the sensitivity of the proposed Sunnyside and Flux Canyon project
3 locations and the scope and duration of their proposed development activities, USFS did
4 not adequately analyze their impacts, either individually or cumulatively with each other
5 or with other projects that are ongoing or planned in the same area, as required by NEPA.

6 In authorizing the Sunnyside Project under NEPA, USFS relied on an EA and
7 FONSI that determined the project threatened no significant impact—but offered no
8 discussion of the Project's cumulative impacts with the Flux Canyon Project on Mexican
9 spotted owls, Western yellow-billed cuckoos, jaguars, or ocelots; no discussion of the
10 fast-tracked Hermosa CMP at all; and only cursory discussion of Sunnyside's cumulative
11 impacts with the ongoing Hermosa private-land project. *See* Sunnyside EA at 26 tbl. 8,
12 37–41 (Ex. 14).

13 Regarding impacts on Mexican spotted owls in particular, USFS's FONSI relied
14 on a December 2022 Biological Opinion prepared by FWS after consultation with USFS
15 to examine project impacts under the ESA. *See* Sunnyside DN/FONSI at 20 (Ex. 17); *see*
16 *also* 16 U.S.C. § 1536(a)(2), (b)(3)(A) (ESA consultation and BiOp requirements). That
17 BiOp concluded that the Project “is not likely to jeopardize the continued existence” and
18 is not likely to “destroy or adversely modify designated critical habitat” of the owl, but is
19

20
21 _____
22 in this amendment indicates that Congress meant to apply it to NEPA processes
23 conducted before its enactment, such as those at issue here, *see id.*, and it should not be
24 construed to apply to such processes given that Plaintiffs relied on the NEPA provisions
25 in effect during these processes to guide their participation, *see Bahr v. Regan*, 6 F.4th
26 1059, 1069 (9th Cir. 2021) (recognizing “presumption against retroactivity” where
27 retroactive statutory application would “affect[] reliance interests”). But even if the
28 amendment applied, it does not modify the NEPA duties at issue. *See, e.g.*, § 321(a), (b),
137 Stat. at 39 (requiring agencies to prepare EIS for actions posing “a reasonably
foreseeable significant effect on the quality of the human environment,” to prepare EA “if
the significance of such effect is unknown,” and to “ensure the . . . scientific integrity, of
the discussion and analysis in an environmental document”).

1 expected to “take”⁵ owls through harassment that would reduce the owls’ breeding
2 success or cause them to seasonally depart the area, although it would not likely cause the
3 owls to “permanently desert the area because of the disturbance.” Sunnyside BiOp at 35–
4 40 (Ex. 15). In so concluding, however, the BiOp that USFS relied upon discussed only
5 limited evidence documenting Mexican spotted owls’ response only to sporadic, short-
6 term noise disturbances, and not to chronic, round-the-clock noise disturbance similar to
7 that which the Sunnyside Project would introduce directly into their occupied PACs for
8 up to seven years. *Id.* at 40; *see* Sunnyside BA at 5-10 to 5-11, Figs. 5-3 & 5-4 (Ex. 36)
9 (mapping proximity of drilling to owl locations).⁶

10 Nor did USFS offer any meaningful analysis in response to objections raised by
11 local residents, and the Town of Patagonia itself, that project drilling to depths of up to
12 6,500 feet could allow low-quality water from deep aquifers to mix with, and pollute,
13 drinking-water sources. *See* Davis Response at 1 & appx. A, 4, 36–38 (Ex. 19);
14 Sunnyside EA at 16 (Ex. 14). Specifically, USFS refused requests to collect groundwater
15 samples sufficient to establish baseline water conditions, despite acknowledging that “the
16 quality of groundwater in the project area is unknown.” Sunnyside EA at 60 (Ex. 14).

17 For the Flux Canyon Project, USFS’s NEPA analysis was even more cursory.
18 USFS’s decision memo for this Project determined that it could be categorically excluded
19 from NEPA analysis requirements. *See* Flux Canyon DM at 3 (Ex. 24). In so concluding,
20 USFS offered no discussion of the Flux Canyon Project’s cumulative impacts with the
21 Sunnyside Project, Hermosa Project, or Hermosa CMP—despite the fact that the Arizona
22 Game and Fish Department specifically requested that USFS conduct such a cumulative
23 impacts analysis in light of “current exploration activity” in this important habitat-linkage
24 area. *See* Vega Letter at 2 (Ex. 18). In responding to Arizona Game and Fish’s request,

25 _____
26 ⁵ Under the ESA, “take” in this context “means to harass, harm, pursue, hunt, shoot,
27 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16
28 U.S.C. § 1532(19).

⁶ Plaintiffs have requested filing of unredacted versions of these maps under seal to
protect species locational information.

1 USFS claimed that cumulative effects were considered in determining the Flux Canyon
2 Project's eligibility for a CE, but provided no written documentation of such analysis and
3 said it faced no requirement to do so. Consideration of Comments at 4 (Ex. 25).

4 **ARGUMENT**

5 This Court should issue a preliminary injunction to prohibit implementation of the
6 challenged project approvals until Plaintiffs' claims can be adjudicated. To obtain a
7 preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2)
8 that they are likely to suffer irreparable harm in the absence of injunctive relief; (3) that
9 the balance of equities favors an injunction; and (4) that an injunction is in the public
10 interest. *Winter*, 555 U.S. at 20. Alternatively, Plaintiffs need only raise "serious
11 questions going to the merits" so long as they demonstrate that the balance of hardships
12 tips sharply in their favor and satisfy other injunction requirements. *All. for the Wild
13 Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, Plaintiffs prevail under
14 either standard.

15 **I. Plaintiffs Are Likely to Succeed on the Merits**

16 First, Plaintiffs are likely to succeed on the merits of their claims. This Court
17 reviews USFS's NEPA compliance under the arbitrary-and-capricious test of the APA, 5
18 U.S.C. § 706(2)(A). *350 Mont.*, 50 F.4th at 1263. Here, USFS arbitrarily authorized two
19 round-the-clock drilling projects in an environmentally sensitive area without adequate
20 consideration of resulting impacts and thereby violated NEPA.

21 **A. USFS Failed to Consider Both Projects' Cumulative Impacts**

22 USFS violated NEPA's requirement to consider cumulative impacts in approving
23 both projects. Whether relying on an EA or a CE, an agency must adequately consider the
24 cumulative impacts of the project with other existing, ongoing, and foreseeable actions.
25 *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916–17 (9th Cir. 2012) (for
26 EAs); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026–27 (9th Cir. 2007) (for CEs). USFS
27 failed to do so. This failure was particularly troubling because this Court in 2015, per
28 Judge Marquez, ruled that USFS violated NEPA by failing to adequately analyze

1 cumulative impacts in approving an earlier version of the Sunnyside Project that
2 contemplated a smaller footprint with fewer impacts. *See Defs. of Wildlife v. U.S. Forest*
3 *Serv.*, No. CV-14-02446-TUC-RM, slip op. at 13–16 (D. Ariz. Sep. 15, 2015) (Ex. 34).
4 Instead of rectifying that error, USFS compounded it in the challenged decisions.

5 **1. Sunnyside Project**

6 First, the Sunnyside Project EA disregarded numerous cumulative impacts. An EA
7 must “fully” address cumulative impacts, *Kern*, 284 F.3d at 1078, giving “a sufficiently
8 detailed catalogue of past, present, and future projects, and provide adequate analysis
9 about how these projects, and differences between the projects, are thought to have
10 impacted the environment.” *Te-Moak Tribe of W. Shoshone of Nev. v. Dep’t of Interior*,
11 608 F.3d 592, 603 (9th Cir. 2010) (holding that agency EA failed to adequately analyze
12 cumulative impacts of mineral exploration project and nearby mining project).

13 Here, USFS failed to do so. The Sunnyside EA offered *no discussion* of the
14 cumulative impact posed by the Sunnyside Project together with the Flux Canyon Project
15 on Mexican spotted owls, Western yellow-billed cuckoos, jaguars, and ocelots—even
16 though the EA listed these species among the “relevant resources” for the Flux Canyon
17 Project in a table identifying reasonably foreseeable actions “in the cumulative effects
18 analysis areas.” Sunnyside EA at 26 (Ex. 14); *see also id.* at 37–41.

19 USFS further failed to discuss *at all* the cumulative impact of the Sunnyside
20 Project together with the fast-tracked Hermosa CMP in the Coronado National Forest,
21 which proposes operations beginning in 2026 that would overlap with Sunnyside drilling.
22 *See South32 Hermosa Critical Minerals Project* (Ex. 30). The government and South32
23 announced Hermosa CMP and its FAST-41 coverage on May 8, 2023, about five months
24 after USFS’s Sunnyside EA and more than a month before its FONSI. *See Permitting*
25 *Council Announcement* (Ex. 31); *Hermosa CMP Update* (Ex. 29). Hermosa CMP
26 emerged on that date as a full-blown project proposal, described in a nine-page project
27 update from South32, with USFS itself named as the “lead agency” pushing forward the
28 FAST-41 process. *See Hermosa CMP Update* (Ex. 29); *South32 Hermosa Critical*

1 *Minerals Project* (Ex. 30). Thus, Hermosa CMP was foreseeable at the time of the
2 Sunnyside FONSI. Further, USFS and South32 obviously conferred about the project
3 before their public announcement, and indeed the FAST-41 intake process contemplates
4 coordination between such a “lead agency” and project sponsor to determine program
5 eligibility. *See The FAST-41 Process* (Ex. 32). These circumstances support a reasonable
6 inference that USFS also knew of Hermosa CMP at the time of the Sunnyside EA, given
7 the short five-month period between the EA issuance and FAST-41 announcement, and
8 USFS’s lead role in determining the appropriateness of fast-track permitting for this
9 project on national forest lands.⁷ *See Te-Moak*, 608 F.3d at 603 (finding that agency’s
10 knowledge of mining project at time of 2004 EA on separate mineral exploration
11 proposal can “be reasonably inferred by [agency’s] December 2005 publication” of
12 notice of intent to prepare EIS on mining project). NEPA therefore required USFS to
13 consider Sunnyside’s cumulative impact with the “identified proposal[]” for Hermosa
14 CMP. 36 C.F.R. § 220.3 (defining “reasonably foreseeable future actions” for USFS
15 NEPA compliance); *see Te-Moak*, 608 F.3d at 603; *All. for the Wild Rockies v. Marten*,
16 585 F. Supp. 3d 1252, 1276–77 (D. Mont. 2021) (holding USFS violated NEPA by
17 failing to consider cumulative impact of logging project together with second project,
18 where evidence “indicates the Forest Service was actively working on” second project
19 when it approved logging project); *see also N. Plains Resource Council v. Surface*
20 *Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (“[P]rojects need not be finalized
21 before they are reasonably foreseeable.”).

22 As for Sunnyside’s cumulative impact with the ongoing private-land Hermosa
23 Project, USFS offered only cursory and conclusory analysis that arbitrarily ignored
24 available information. USFS claimed in the Sunnyside EA that “[n]o details are available
25 on the project timeline at this time,” Sunnyside EA at 26 (Ex. 14), ignoring South32’s
26

27 ⁷ Plaintiffs have submitted a request to USFS under the Freedom of Information Act
28 seeking documents regarding the agency’s involvement with the Hermosa CMP proposal.

1 own statement a year before the Sunnyside EA that the project portends 22 years of
2 mining with first production targeted for Fiscal Year 2027, *see Hermosa Project Update*
3 at 2, 4, 10 (Ex. 28)—which again overlaps with the Sunnyside Project’s seven-year
4 operations period. Further, while USFS acknowledged that even Hermosa’s ongoing
5 exploration activity caused noise and disturbance that apparently prompted Mexican
6 spotted owls to avoid the Trench Camp property, *see Sunnyside EA* at 38 (Ex. 14), USFS
7 provided no detail as to the likely impacts of further noise and disturbance at the Trench
8 Camp site when full-scale mining begins. *See id.* at 38–39. Rather, for owls, cuckoos,
9 jaguars, and ocelots, the EA merely stated generally that “South32 anticipates developing
10 a mine and mill on the site in the near future, which could increase the level of
11 disturbance at the site,” and anticipated potentially increased truck traffic. *Id.* at 38, 39–
12 40, 41. The EA did not analyze the additional noise, light, and disturbance impacts of
13 South32’s publicly reported plans to, for example, construct and operate a mine, paste
14 plant, processing plant, and dry-stack tailings storage facility there, *Hermosa Project*
15 *Update* at 10–11 (Ex. 28)—even though these are the impacts most harmful to affected
16 species. *See Sunnyside BiOp* at 20, 34, 56 (Ex. 15).

17 NEPA does not permit such “conclusory” analysis. *Te-Moak Tribe*, 608 F.3d at
18 604. The agency “must provide some quantified or detailed information.” *Bark v. U.S.*
19 *Forest Serv.*, 958 F.3d 865, 872 (9th Cir. 2020) (cleaned up). USFS did not do so, nor did
20 it explain “why more definitive information could not be provided,” *id.* (cleaned up)—a
21 conspicuous omission given South32’s public statements detailing the project. These
22 errors undermine USFS’s ultimate conclusion that the Sunnyside and Hermosa projects
23 “would result in moderate”—but insignificant—cumulative impacts for affected species.
24 Sunnyside EA at 39, 40, 41 (Ex. 14); *see also Sunnyside DN/FONSI* at 20 (Ex. 17).
25 Given the absence of any “quantified assessment of their combined impacts,” *Bark*, 958
26 F.3d at 872 (cleaned up)—particularly regarding key noise, light, and disturbance
27 effects—“neither the courts nor the public can be assured that the agency provided the
28 hard look that it is required to provide.” *Te-Moak Tribe*, 608 F.3d at 603; *cf. 350 Mont.*,

1 50 F.4th at 1265 (noting NEPA requires “a convincing statement of reasons to explain
2 why a project’s impacts are insignificant” (cleaned up)).

3 These USFS omissions constituted especially significant oversights in evaluating
4 Sunnyside Project impacts because USFS repeatedly concluded that Sunnyside would not
5 have significant effects on ESA-listed species largely because the Project occupies only a
6 small proportion of these species’ total habitat and they can simply go elsewhere to avoid
7 project disturbance. *See* Sunnyside EA at 33, 35, 36 (Ex. 14); Davis Response at appx. A,
8 23 (Ex. 19). Such agency reasoning ignores the threat that, in doing so, these species
9 would then be harmed by ongoing and foreseeable developments occurring
10 simultaneously at numerous nearby sites—the very cumulative impacts that USFS failed
11 to analyze.

12 These oversights also are significant because the Patagonia Mountains constitute a
13 rare and vital wildlife movement corridor between Mexico and the United States, and
14 maintaining this corridor “is important to improving the viability” of jaguars and ocelots
15 “in southern Arizona.” Sunnyside BiOp at 56 (Ex. 15); *see also id.* at 47–48, 62–63.
16 Multiple mineral exploration and development projects proceeding simultaneously in this
17 area threaten to sever that connection. *See* Sunnyside EA at 85 (Ex. 14) (mapping zone of
18 developments in Patagonia Mountains). Further, Mexican spotted owls and Western
19 yellow-billed cuckoos also depend on connectivity—both are part of interbreeding
20 metapopulations, the behaviors of which will be disrupted by the cumulative presence of
21 multiple mineral projects. *See* PARA Objections at 14, 20, 33 (Ex. 20); Sunnyside BiOp
22 at 22–23 (Ex. 15). Yet USFS cannot legitimately assess this threat of “death by a
23 thousand cuts” if it does not catalog and adequately examine the cumulative impacts of
24 ongoing and foreseeable projects.

25 In 2015, this Court held that USFS violated NEPA because it failed “to consider
26 the Sunnyside Project’s cumulative effects in relation to other temporally and
27 geographically similar mineral exploration projects.” *Def. of Wildlife*, No. CV-14-
28 02446-TUC-RM, slip op. at 13 (Ex. 34). The USFS in that case did “not specifically

1 discuss” projects that presented an apparent threat of cumulative impacts. *Id.* at 14. Now,
2 despite expansion of the Sunnyside Project itself as well as a growing number of
3 ongoing, authorized, and anticipated developments in this same sensitive area, USFS
4 repeated the same error with even greater consequences. Accordingly, USFS violated
5 NEPA.

6 2. **Flux Canyon Project**

7 USFS’s NEPA violation in failing to consider cumulative impacts was even more
8 stark for the Flux Canyon Project, as USFS offered no cumulative effects analysis *at all*
9 *for any species or issue*. USFS thus offered no discussion of Flux Canyon’s cumulative
10 impacts with, for example, the Hermosa Project or Sunnyside Project, both of which
11 would conduct operations contemporaneously with Flux Canyon drilling. This omission
12 violated NEPA requirements that apply during two steps of the process that is required
13 for USFS to categorically exclude a project from environmental analysis—scoping and
14 consideration of extraordinary circumstances. *See* 36 C.F.R. § 220.6(b)–(c). In the
15 “scoping process,” USFS “determine[s] the scope of the issues to be addressed,” *Alaska*
16 *Ctr.*, 189 F.3d at 858, and must analyze cumulative impacts in doing so. *Bosworth*, 510
17 F.3d at 1026–27; *see also* 36 C.F.R. § 220.4(f).⁸ Further, even if USFS determines an
18 action may be categorically excluded, it must still “evaluate the action for extraordinary
19 circumstances in which a normally excluded action may have a significant effect,” 40
20 C.F.R. § 1501.4(b), and must consider cumulative impacts in doing so. *Def’s. of Wildlife*,
21 No. CV-14-02446-TUC-RM, slip op. at 13–14 (Ex. 34); *see also* Consideration of
22 Comments at 4 (Ex. 25) (USFS acknowledging that its “analysis of extraordinary
23 circumstances considers the direct, indirect, and cumulative effects from the impacts of
24 the proposed action”).

25
26
27
28

⁸ *See* Forest Serv. Handbook § 1909.15, ch. 31.3,
https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3826583.pdf.

1 Here, USFS did not claim to have conducted any cumulative effects analysis
2 during scoping. *See* Consideration of Comments at 4 (Ex. 25). And while the agency
3 claimed to have considered cumulative effects in its “analysis of extraordinary
4 circumstances,” it provided no such analysis and insisted it was not required to “include a
5 written cumulative effects analysis.” *Id.* However, “[w]hen an agency decides to proceed
6 with an action in the absence of an EA or EIS, the agency must adequately explain its
7 decision” by supplying “a convincing statement of reasons why potential effects are
8 insignificant.” *Alaska Ctr.*, 189 F.3d at 859 (citation and internal quotation marks
9 omitted). Absent any written cumulative effects analysis, USFS fails to explain, let alone
10 convince. USFS therefore again violated NEPA.

11 **B. USFS Failed to Take a “Hard Look” at the Sunnyside Project’s**
12 **Impacts to Mexican Spotted Owls**

13 USFS violated NEPA yet again by failing to take a “hard look” at the Sunnyside
14 Project’s impact on Mexican spotted owls. NEPA requires an agency preparing an EA to
15 take “a ‘hard look’ at the consequences of its actions,” and base its decision “on a
16 consideration of the relevant factors.” *350 Mont.*, 50 F.4th at 1265; *see also* 40 C.F.R. §§
17 1508.8, 1508.9, 1508.25(c) (2019). USFS violated this requirement in evaluating the
18 Sunnyside Project’s introduction of up to seven years of nonstop drilling noise into PACs
19 occupied by Mexican spotted owls. As Plaintiffs informed the agency, scientific evidence
20 demonstrates that exposure to such nonstop noise reduces overall fitness and “some
21 raptors may permanently abandon nesting territory in response to persistent disturbance.”
22 PARA Objections at 25–26 (Ex. 20) (citing FWS document).

23 Nevertheless, USFS failed to discuss this evidence and instead concluded that the
24 Sunnyside Project threatened no significant impacts on ESA-listed species. Sunnyside
25 DN/FONSI at 19–20 (Ex. 17). USFS cited no independent analysis to support its FONSI
26 but instead relied on FWS’s BiOp, which determined that the Project may reduce owls’
27 ability to successfully rear young or cause owls to seasonally depart their established
28 territories, but likely would not cause them to “permanently desert the area.” Sunnyside

1 BiOp at 40 (Ex. 15). The BiOp reasoned that “[n]oise levels are expected to attenuate
2 below the threshold level for injury of owls”—which it pegged at 92 dBA—at about “100
3 feet from any drill area.” *Id.* at 35. In reaching these conclusions, the BiOp relied upon a
4 single scientific study—Delaney (1999). *See* Sunnyside BiOp at 35, 40 (Ex. 15). Yet, on
5 its face, Delaney (1999) does not support these conclusions.⁹

6 At the outset, Delaney (1999) identified the 92 dBA noise level only as the
7 threshold for Mexican spotted owls to flush and fly away in response to helicopter
8 disturbance, *see* Delaney (1999) at 68 (Ex. 35), not as an all-encompassing “threshold
9 level for injury of owls,” as the BiOp claimed. Sunnyside BiOp at 35 (Ex. 15). In fact,
10 Delaney (1999) identified a much lower noise threshold—46 dBA—for the owls’
11 flushing response to chain saw disturbance, which it deemed to validate “the already
12 established pattern that ground-based activities are typically more disturbing to raptors
13 than aerial activities.” Delaney (1999) at 68, 74 (Ex. 35). Neither FWS in the BiOp, nor
14 USFS in the DN/FONSI that relied on it, explained why they determined the Sunnyside
15 Project’s threshold noise level for *any* injury to owls based on Delaney (1999)’s higher
16 threshold for aerial helicopter disturbance rather than its lower threshold for ground-
17 based chain saw disturbance, given that Sunnyside Project impacts will result from
18 ground-based construction and drilling activities. For this reason alone, USFS’s FONSI
19 was arbitrary. *See Earth Island Inst. v. Hogarth*, 494 F.3d 757, 766 (9th Cir. 2007)
20 (holding agency’s scientific conclusion invalid if agency “did not consider all the relevant
21 factors and if there is no rational connection between the facts found and the
22 determination made”).

23 More fundamentally, Delaney (1999) documented Mexican spotted owls’
24 reactions only to intermittent bursts of less than ten minutes of helicopter disturbance and
25

26 ⁹ Plaintiffs have served USFS and FWS with a notice of intent to sue for ESA violations
27 in the BiOp and other actions approving the challenged Projects, and intend to amend
28 their complaint to add ESA claims unless remedial action is taken within the statutory 60-
day notice period. *See* 16 U.S.C. § 1540(g).

1 five minutes of chainsaw disturbance per day—not any kind of long-term disturbance and
2 certainly not the round-the-clock, chronic noise disturbance for up to seven years that the
3 Sunnyside Project threatens. Delaney (1999) at 60–61 (Ex. 35). Further, it focused on
4 measuring specific owl responses to these short-term disturbances, including flushing and
5 alert behavior, and offered no evidence about whether owls were likely to “permanently
6 desert the area because of the disturbance,” as the BiOp claimed. *Id.*; Sunnyside BiOp at
7 40 (Ex. 15). And it explicitly stated that its findings were specific to the circumstances it
8 studied and “caution[ed] against use of [its] findings to infer how spotted owls would
9 respond under different circumstances that were not directly tested,” including more
10 frequent disturbances. Delaney (1999) at 74 (Ex. 35).

11 USFS violated NEPA by ignoring Plaintiffs’ evidence of significant harm to
12 Mexican spotted owls and instead resting its FONSI on a BiOp analysis that disregarded
13 key limitations and explicit cautions in Delaney (1999) itself. In conducting
14 environmental analyses, agencies must explain why “comparison legitimately may be
15 drawn” between “totally dissimilar” scientific findings and the circumstances before
16 them, including specifically where, as here, an agency relies on studies concerning
17 wildlife responses to “isolated and sporadic” disturbances to draw conclusions about the
18 impacts of a “regular, long-term intrusion” on their habitat. *Found. for N. Am. Wild Sheep*
19 *v. Dep’t of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982). This is especially so where, as
20 here, the very scientific findings upon which the agency relies explicitly disavow such
21 comparison. *See Carlton v. Babbitt*, 26 F. Supp. 2d 102, 109 (D.D.C. 1998) (finding that
22 agency arbitrarily attempted “to avoid the explicit limitations of [the author’s] work” in
23 applying inapposite scientific study); *see also Ctr. for Biological Diversity v. Jewell*, No.
24 CV-15-00019-TUC-JGZ, 2018 WL 1586651, at *16 (D. Ariz. Mar. 31, 2018) (holding
25 that agency committed “egregious oversight” by ignoring scientists’ warning that agency
26 “misapplied and misinterpreted” their findings). Yet USFS offered no explanation for its
27 reliance on a BiOp that drew inapposite comparisons and disregarded Delaney (1999)’s
28 explicit limitations. Where, as here, an agency’s FONSI arbitrarily incorporates a BiOp

1 analysis that disregarded key factors, the agency violates NEPA. *Nat'l Wildlife Fed'n v.*
2 *Norton*, 332 F. Supp. 2d 170, 180–82 (D.D.C. 2004).

3 USFS compounded this error in responding to Plaintiffs' administrative objections
4 to the proposed Sunnyside Project decision. There, USFS claimed that the differences
5 between the sporadic, short-term disturbances studied in Delaney (1999) and the chronic,
6 long-term noise disturbance threatened by the Sunnyside Project “would not change the
7 effects analyses from noise and wildlife displacement.” Davis Response at appx. A, 23
8 (Ex. 19). However, as discussed, Delaney (1999) itself warned that the type of
9 disturbance *was critical* to application of its findings, *see* Delaney (1999) at 74 (Ex. 35),
10 and USFS did not explain its contrary conclusion.¹⁰

11 **C. USFS Failed to Adequately Analyze Baseline Conditions in the**
12 **Sunnyside Project Area**

13 USFS further violated NEPA by failing to adequately evaluate the Sunnyside
14 Project's threat of water pollution from drilling multiple boreholes to depths of up to
15 6,500 feet through underground aquifers of unknown quality. Specifically, USFS failed to
16 analyze the baseline conditions of affected water resources to enable an assessment of

17
18 ¹⁰ USFS also unlawfully evaded its regulatory obligation to respond to many of Plaintiffs'
19 objections to USFS's improper reliance on Delaney (1999), instead wrongly claiming that
20 Plaintiffs lacked standing to raise such objections because they were not based on
21 Plaintiffs' previous draft EA comments. *See* Davis Response at appx. A, 25–26 (Ex. 19);
22 36 C.F.R. § 218.11(b)(1). USFS's dismissal of such objections ignored the fact that FWS
23 issued the BiOp citing Delaney (1999), upon which USFS subsequently relied, on
24 December 1, 2022, while the comment period on USFS's draft EA concluded more than a
25 year earlier on April 5, 2021. *See* Sunnyside DN/FONSI at 15 (Ex. 17). Because it was
26 impossible for Plaintiffs to critique agency reliance on Delaney (1999) more than a year
27 before such reliance was disclosed, USFS erred in dismissing Plaintiffs' objections. *See*
28 36 C.F.R. § 218.8(c) (requiring that objections must be based on prior comments “unless
the issue is based on new information that arose after the opportunities for comment”);
All. for the Wild Rockies v. Savage, 897 F.3d 1025, 1034 (9th Cir. 2018) (holding that
plaintiff did not waive objection to USFS project decision where plaintiff's “failure to
object at an earlier time resulted from the Forest Service's failure to disclose this aspect
of the Project in the Draft Environmental Impact Statement. It was first revealed in the
Final Environmental Impact Statement, to which [plaintiff] promptly objected.”).

1 this threat, despite the fact that project-area waters constitute the drinking-water source
2 for the Town of Patagonia and nearby residences. *See* Sunnyside EA at 60 (Ex. 14); Davis
3 Response at appx. A, 4, 36–38 (Ex. 19).

4 NEPA requires establishment of baseline conditions for the affected environment as a
5 “practical requirement” of the environmental analysis process. *Or. Nat. Desert Ass’n v. Jewell*,
6 840 F.3d 562, 568 (9th Cir. 2016) (cleaned up). “Without establishing the baseline conditions
7 which exist” before the project begins, “there is simply no way to determine what effect the
8 proposed [action] will have on the environment and, consequently, no way to comply with
9 NEPA.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir.
10 1988). While there are several ways for an agency to establish baseline conditions, its
11 assessment “must be based on accurate information and defensible reasoning.” *Or. Nat.*
12 *Desert Ass’n*, 840 F.3d at 570. An “unsupported assumption” is insufficient. *Id.*

13 Here, the Sunnyside Plan of Operations acknowledged “a potential risk to impact
14 groundwater quality and quantity through potential water exchange between aquifers.
15 Deep boreholes drilled through the groundwater system could create a preferred pathway
16 for groundwater in deeper formations to migrate upward and intermingle with the shallow
17 parts of the system.” Sunnyside Plan at 31 (Ex. 16). Yet USFS failed to establish the
18 baseline water quality conditions for the Sunnyside Project so that an informed analysis
19 of likely changes in water quality could be conducted. The Sunnyside EA acknowledged
20 that “[n]o groundwater quality samples have been collected in the project area and the
21 quality of groundwater in the project area is unknown.” Sunnyside EA at 60 (Ex. 14). The
22 Sunnyside FONSI overlooked this issue altogether.

23 When Plaintiffs pointed such omissions out to the agency, *see* PARA Objections
24 at 6 (Ex. 20), USFS acknowledged the absence of baseline groundwater data for the
25 Project area but argued that “detailed information in the Water Resources Report (PR
26 486, pp. 4–15) provides surrogate information about the affected environment and
27 proximate groundwater conditions that were used to make reasonable predictions about
28 existing conditions in the immediate drilling locations.” Davis Response at appx. A, 36

1 (Ex. 19). However, this Report itself acknowledged uncertainty in its discussion of
2 groundwater: “During drilling, the proponent . . . could allow groundwater from the
3 deeper aquifer systems, *about which little is known at this time*, to flow to shallower
4 aquifer systems or to the ground surface.” Sunnyside Water Report at 15 (Ex. 21)
5 (emphasis added). USFS also failed to explain how the Report’s surrogate data
6 adequately accounted for—much less negated any threat to—groundwater quality in the
7 Project area. The Water Resource Report relied heavily on a 2001 study of groundwater
8 samples and noted that “[o]nly one of the 20 monitoring wells sampled (CCK-08/09) is
9 located within 3 miles of the project area,” *id.* at 8—and that well showed elevated levels
10 of arsenic and barium, *id.* at 8–9; Sunnyside EA at 60 (Ex. 14). USFS further failed to
11 reconcile its conclusion with data from the Humboldt Well, an old artesian well within
12 Humboldt Canyon itself that was recently documented to be leaking water containing
13 heavy metals and required remediation work for that reason. Sunnyside EA at 27 (Ex.
14 14). Instead of factoring this well into its analysis of threats to groundwater, USFS
15 merely commented, “[o]ther than the artesian flow observed in the Humboldt Well, little
16 is known about the deeper bedrock aquifer system,” *id.* at 59 (emphasis added), and gave
17 it no further consideration. *See id.* at 59–60, 62–63, 65.

18 USFS violated NEPA by failing to rationally justify its reliance on twenty-year-
19 old sampling data from miles away—and disregarding the nearest data indicating
20 elevated pollutant levels—to safeguard threatened drinking-water sources in the Project
21 area. In similar circumstances, courts reviewing EAs for mineral exploration have
22 rejected assumptions equivalent to those on which USFS relied here. In *Idaho*
23 *Conservation League v. U.S. Forest Serv.*, 429 F. Supp. 3d 719 (D. Idaho 2019), the court
24 held that USFS failed to comply with NEPA where it “never addressed whether . . .
25 hydrogeologic conditions were similar enough . . . that monitoring on the east side [of a
26 ridge] would accurately estimate conditions on the west side” where drilling would occur.
27 *Id.* at 732. Similarly, in *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424-HZ,
28 2021 WL 641614 (D. Or. Feb. 15, 2021), the court rejected USFS’s extrapolative baseline

1 groundwater analysis because “the EA fails to explain why the three historical drillholes
2 sampled once in 2014 are sufficient to establish an adequate baseline for the entire Project
3 Area,” even though—unlike here—the sampled drillholes were at least in the relevant
4 project area. *Id.* at *20. And while a different conclusion might be warranted if USFS had
5 provided a “detailed description” justifying its FONSI and no information indicated a
6 potential pollution threat, *see Concerned Citizens & Retired Miners Coal. v. U.S. Forest*
7 *Serv.*, 279 F. Supp. 3d 898, 933–36 (D. Ariz. 2017), those are not the circumstances here.
8 Accordingly, USFS again violated NEPA.

9 **D. Further NEPA Violations Invalidate USFS’s Categorical Exclusion of**
10 **the Flux Canyon Project**

11 Regarding the Flux Canyon Project, for additional reasons beyond the cumulative-
12 impacts issue discussed *supra*, USFS violated NEPA by categorically excluding the
13 Project from further NEPA analysis. *See* Flux Canyon DM (Ex. 24).

14 **1. USFS Arbitrarily Invoked a CE to Evade Analysis**

15 First, USFS “entirely failed to consider an important aspect of the problem” in
16 shoehorning the Flux Canyon Project into the categorical exclusion that the agency
17 invoked. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
18 (1983) (arbitrary-and-capricious test). “When an agency decides to proceed with an
19 action in the absence of an EA or EIS, the agency must adequately explain its decision.”
20 *Alaska Ctr.*, 189 F.3d at 859.

21 Here, USFS relied on 36 C.F.R. § 220.6(e)(8), which excludes from further NEPA
22 analysis mineral exploration projects that are “Short-term (1 year or less).” Flux Canyon
23 DM at 3 (Ex. 24). However, to wedge the Flux Canyon Project into its desired categorical
24 exclusion, USFS approved a five-month reclamation and revegetation period that
25 comports with neither customary operator standards nor biological reality: “It does not
26 even cover a single growing season, is nowhere near the three years to six years set by the
27 Forest Service for similar projects and does not conform to standard practice for
28 reclamation projects.” AMRC Comments at 4 (Ex. 26). Without requiring monitoring and

1 adaptive management for more than one growing season, neither the operator nor USFS
2 can possibly ensure that reclamation plants are taking root. Indeed, USFS’s own
3 reclamation requirements for the Sunnyside Project estimated that it would take “*three*
4 *years* after reclamation of a drill site, road improvement, and/or . . . temporary bypass
5 road” for reclaimed areas to meet prescribed revegetation standards, Sunnyside EA at 22
6 (Ex. 14) (emphasis added), and agency policy specifically recommends consideration of
7 “*long-term* maintenance requirements” for “tasks such as revegetation.” Training Guide
8 at 38 (Ex. 33) (emphasis added).

9 USFS’s CE justification for the Flux Canyon Project offered no explanation for
10 discarding such considerations. Yet USFS’s own mineral regulations require that, upon
11 conclusion of project operations, operators must “reclaim the surface disturbed in
12 operations,” including by “[r]eshaping and revegetation of disturbed areas, where
13 reasonably practicable.” 36 C.F.R. § 228.8(g)(4) (emphasis added). USFS’s justification
14 for invoking the 36 C.F.R. § 220.6(e)(8) CE took no account of the incongruity between
15 its truncated reclamation and revegetation period and this regulatory requirement.
16 Instead, when Plaintiffs raised the inadequate-reclamation issue with USFS, the agency
17 simply responded: “The project is designed as a one-year project which meets the
18 requirements of 36 CFR 220.6(e)(8) which includes concurrent reclamation activities.”
19 Consideration of Comments at 6 (Ex. 25). However, to satisfy rational decisionmaking
20 requirements, USFS’s “approach must be tied, even if loosely, to the purposes of the”
21 relevant laws and “the appropriate operation of the . . . system” it administers. *Judulang*
22 *v. Holder*, 565 U.S. 42, 55 (2011). Here, those laws and that system seek to ensure
23 reshaping and revegetation of disturbed areas, where practicable, 36 C.F.R. §
24 228.8(g)(4)—not to shortcut public-land protections in the interest of avoiding NEPA
25 analysis. USFS’s invocation of the 220.6(e)(8) CE, premised on its arbitrary truncation of
26 the reclamation and revegetation period, was thus unlawful.

27 USFS’s conduct was especially troubling in light of this Court’s ruling against the
28 agency in *Defenders of Wildlife*. There, this Court addressed a NEPA challenge to

1 USFS’s invocation of the same 220.6(e)(8) CE for an earlier version of the Sunnyside
2 Project that was similar in scope to the current Flux Canyon Project—exploratory drilling
3 on six well sites over approximately six months. *See Defs. of Wildlife*, No. CV-14-02446-
4 TUC-RM, slip op. at 1, 6–8 (Ex. 34). Because reclamation activities and USFS
5 monitoring to ensure their effectiveness would continue for an additional three years for
6 that project, this Court held that USFS erred in invoking the 220.6(e)(8) CE for short-
7 term (one year or less) mineral exploration. *Id.*, slip op. at 6–8. The lesson of this Court’s
8 ruling was that, where project operations and necessary efforts to ensure effective
9 reclamation extend beyond a year, USFS may not utilize the 220.6(e)(8) CE and instead
10 should prepare at least an EA. *See id.*, slip op. at 16. But instead of heeding that lesson,
11 here USFS sought to evade it through the gambit of shortening reclamation activities to
12 the point where their effectiveness to protect public lands cannot be confirmed, and
13 doubled down on invocation of the 220.6(e)(8) CE. This Court should not reward such
14 agency conduct.

15 **2. USFS Irrationally Discounted Extraordinary Circumstances**

16 Even assuming the Flux Canyon Project did fit into the 220.6(e)(8) CE—which it
17 does not—USFS still unlawfully invoked that CE in this case because the agency
18 irrationally discounted possible foraging and nesting by Western yellow-billed cuckoos in
19 the Flux Canyon Project area. As discussed *supra*, USFS has an obligation to evaluate an
20 otherwise categorically excluded action for “extraordinary circumstances in which a
21 normally excluded action may have a significant effect.” 40 C.F.R. § 1501.4(b). USFS’s
22 NEPA regulations specify that potential impacts on ESA-listed species must be
23 considered in determining whether extraordinary circumstances are present. 36 C.F.R. §
24 220.6(b)(1)(i), (2). Here, USFS determined that cuckoos are unlikely to occur in the Flux
25 Canyon project area, because this area “does not contain suitable foraging or breeding
26 habitat.” Flux Canyon BA at 33 (Ex. 27). In reaching this conclusion, however, USFS did
27 not actually survey the project area. *Compare id.* at figs. 2–4 with WestLand 2019 at fig.
28 2a (Ex. 39); WestLand 2018 at fig. 2a (Ex. 38); WestLand 2017 at fig. 2a (Ex. 37).

1 Instead, USFS assumed that, because cuckoo detections in the nearest surveyed locations
2 were “near the drainage bottom as opposed to the upper hillsides, where Project activities
3 would occur,” there would be no effect to cuckoos given that “no surface disturbance
4 would occur in the drainage bottom.” Flux Canyon BA at 33 (Ex. 27).

5 USFS’s assumption that cuckoos are unlikely to breed or forage in the hillsides
6 where the Flux Canyon Project would take place was arbitrary. As extensively described
7 and documented by FWS, in southeastern Arizona locations such as the Patagonia
8 Mountains, cuckoo “breeding habitat is more variable than in the rest of its range” and
9 “may include . . . hillsides.” *See* Endangered and Threatened Wildlife and Plants;
10 Designation of Critical Habitat for the Western Distinct Population Segment of the
11 Yellow-Billed Cuckoo, 86 Fed. Reg. 20,798, 20,836–37 (Apr. 21, 2021); *see also id.* at
12 20,840, 20,841, 20,845. Specifically, “hillsides immediately adjacent to the tree-lined
13 drainages” that are characterized by “sparsely treed savannahs with a variety of grasses[]
14 contribut[e] toward foraging and breeding habitat for the western yellow-billed cuckoo”
15 in this region. *Id.* at 20,837. Further, cuckoos are known to forage in “upland areas”
16 following precipitation. *Id.* at 20,840. Indeed, in considering the environmental
17 consequences of the Sunnyside Project, USFS itself acknowledged that recent surveys of
18 southeastern Arizona have found cuckoos breeding “in upland areas.” Sunnyside EA at
19 30 (Ex. 14). Yet USFS failed to apply this same understanding in its extraordinary-
20 circumstances determination for the Flux Canyon Project. In applying an erroneous
21 assumption to dismiss the Flux Canyon Project’s potential impact on cuckoos, USFS
22 arbitrarily discounted the threat of harm to habitat for an ESA-listed species and thus
23 again violated NEPA.

24 **II. Injunctive Relief is Needed to Prevent Irreparable Harm**

25 This Court should issue preliminary injunctive relief to prevent irreparable harm to
26 Plaintiffs and the environment. *Winter*, 555 U.S. at 20. “Environmental injury, by its
27 nature, can seldom be adequately remedied by money damages and is often permanent or
28 at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore,

1 the balance of harms will usually favor the issuance of an injunction to protect the
2 environment.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

3 Here, injury to Plaintiffs and the Patagonia Mountains environment is imminent
4 because Arizona Standard and South32 intend to commence Sunnyside and Flux Canyon
5 project development activities as early as September 15, 2023. In the aggregate, such
6 activities threaten surface disturbance and vegetation removal through the construction of
7 36 drill pads and approximately one mile of new temporary roads, along with widening
8 of 10.5 miles of existing roads. *See* Sunnyside EA at 9–12 (Ex. 14); Flux Canyon DM at
9 4 (Ex. 24). These developments would be undertaken with bulldozers, excavators, and
10 chainsaws in sensitive habitat for numerous imperiled species. *See* Sunnyside EA at 14–
11 15, 28–32 (Ex. 14); Flux Canyon Plan at 11–12 (Ex. 23); Flux Canyon DM at 10–11 (Ex.
12 24). The Sunnyside Project alone would remove up to 180 trees greater than 5 inches
13 diameter at breast height (dbh) or root collar, Sunnyside EA at 9 (Ex. 14), and larger trees
14 of 12 inches dbh or greater would be avoided only “to the extent possible,” *id.* at 97. This
15 construction activity would pave the way for round-the-clock drilling that would persist
16 for up to seven years in the case of the Sunnyside Project, including in occupied PACs
17 for Mexican spotted owls, with noise and disturbance impacts extending far beyond the
18 project footprints. *See id.* at 14, 33; Flux Canyon Plan at 11 (Ex. 23) (seven months of
19 drilling cumulatively with Sunnyside Project); Sunnyside BA at 5-2 (Ex. 36); Flux
20 Canyon DM at 12, 24 (Ex. 24).

21 These developments will harm Plaintiffs’ “members’ ability to view, experience,
22 and utilize the areas in their undisturbed state,” and thereby inflict an “actual and
23 irreparable injury.” *All. for the Wild Rockies*, 632 F.3d at 1135 (internal quotation marks
24 omitted); *see also* Cantillo Decl. ¶¶ 9, 12 (Ex. 1); Featherstone Decl. ¶ 8 (Ex. 2); Herr
25 Decl. ¶¶ 14–15 (Ex. 3); MacFarland Decl. ¶ 11 (Ex. 5); McSpadden Decl. ¶ 12 (Ex. 6);
26 Serraglio Decl. ¶ 8 (Ex. 9); Shafer Decl. ¶ 12 (Ex. 10). Thus, these Projects’ removal of
27 trees and other vegetation and subsequent environmental disturbance from drilling
28 constitute irreparable environmental harm warranting injunctive relief. *See Env’tl. Prot.*

1 *Info. Ctr. v. Carlson*, 968 F.3d 985, 991 (9th Cir 2020) (holding logging of trees for 200
2 feet on either side of roads running through burned forest area constituted irreparable
3 harm); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005) (“[O]nce
4 the desert is disturbed, it can never be restored.”); *High Sierra Hikers Ass’n v. Blackwell*,
5 390 F.3d 630, 642 & n.4 (9th Cir. 2004) (recognizing irreparable injury from harm to
6 vegetation in “environmentally sensitive areas”); *Anglers of the Au Sable v. U.S. Forest*
7 *Serv.*, 402 F. Supp. 2d 826, 837–38 (E.D. Mich. 2005) (finding irreparable harm from
8 clearing of drill site in sensitive national forest area, with visual and recreational impacts
9 caused by construction and associated noise and disturbance).

10 Further, the threat of irreparable harm to the environment and Plaintiffs’ interests
11 is compounded in this case by the prospect of significant injury to an ESA-listed species,
12 the Mexican spotted owl. “Harm to endangered or threatened species is considered
13 irreparable harm, and the balance of hardships will generally tip in favor of the species.”
14 *Ctr. for Biological Diversity*, 2018 WL 1586651, at *22 (citing cases). Agency analysis
15 of the Sunnyside Project admits that the Project’s intrusion of development close to and
16 even within the core of occupied PACs threatens harassment of owls, which may cause
17 owls to “fail to successfully rear young” or “depart in one or more breeding seasons.”
18 Sunnyside BiOp at 40 (Ex. 15); *see also* Sunnyside DN/FONSI at 20 (Ex. 17) (relying on
19 BiOp); Sunnyside BA at 5-10 to 5-11, Figs. 5-3 & 5-4 (Ex. 36) (maps of Sunnyside
20 development near and in PACs). As discussed above, however, this analysis misapplied
21 scientific evidence concerning the Project’s impacts, thereby understating its likely injury
22 to owls, including the potential for permanent habitat abandonment. *See* Point I.B, *supra*.

23 Indeed, as explained in the attached declaration of Douglas J. Tempel, an expert
24 wildlife biologist who has extensive experience with spotted owls, this Project threatens a
25 severe impact to Mexican spotted owls that was not addressed in the agency analysis:
26 chronic, round-the-clock noise that interferes with the owls’ foraging ability. *See* Tempel
27 Decl. ¶¶ 8–10 (Ex. 11). As Tempel explains, owls rely on hearing to hunt at night and
28 have highly sensitive, directional hearing that enables them to locate their prey. *Id.* ¶¶ 10–

1 12. Yet scientific research has documented that chronic noise at levels that will be
2 pervasive in the Sunnyside Project vicinity and surrounding areas—noise in the 40-60
3 dBA range, *see* Sunnyside BA at 5-2 (Ex. 36)—has the effect of masking prey sounds
4 and impairing owls’ ability to successfully forage. Tempel Decl. ¶¶ 10–12 (Ex. 11).
5 Because there would be no break in this chronic noise impact for up to seven years, the
6 affected owls likely would permanently abandon their territories for at least the full
7 duration of the drilling project. *Id.* ¶ 13. As Tempel summarized: “Simply put, if the owls
8 cannot successfully hunt in the affected area, they will have to go elsewhere.” *Id.* Nor
9 would planned mitigation measures alleviate this threat. *Id.* ¶ 17. The loss of resident
10 owls from these locations would represent a further environmental injury, as well as an
11 injury to Plaintiffs’ members who seek to observe and hear the owls in these long-
12 established territories. *See* MacFarland Decl. ¶ 11 (Ex. 5); McSpadden Decl. ¶¶ 9, 13 (Ex.
13 6); Serraglio Decl. ¶ 15 (Ex. 9); Shafer Decl. ¶ 12 (Ex. 10). Further, such injury is likely
14 given current owl occupancy of the area; as of July 3, 2023, a Mexican spotted owl PAC
15 in the Project area harbored an active nest with two adults and two juveniles. *See*
16 Serraglio Decl. ¶¶ 13–14 & Exs. 1–3 (Ex. 9). This too constitutes irreparable harm
17 justifying an injunction. *See Forest Guardians v. U.S. Forest Serv.*, No. CIV 04-0011
18 MCA/RHS, 2004 WL 7338105, at *17–18 (D.N.M. Feb. 4, 2004) (finding irreparable
19 harm from proposed logging in occupied PAC for Mexican spotted owls).

20 **III. The Balance of Equities and Public Interest Support an Injunction**

21 The balance of equities and public interest also support preliminary injunctive
22 relief. While the injuries that the challenged projects threaten to inflict on the
23 environment and Plaintiffs’ interests are irreversible or at least of many years’ duration,
24 any hardship to USFS or the project proponents would consist principally of dashed
25 economic hopes and would last only until legitimate NEPA analysis could be conducted.
26 Such impacts do not trump harms to the environment and imperiled species in the
27 equitable balancing analysis. *S. Fork Band Council of W. Shoshone of Nev. v. Dep’t of*
28 *Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (balance of hardships favored plaintiff in

1 challenge to mining project because principal hardship to project developer was
2 “economic” and “may for the most part be temporary”); *accord League of Wilderness*
3 *Def. Blue Mtns. Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

4 As for the public interest, the Ninth Circuit recognizes “the public interest in
5 careful consideration of environmental impacts before major federal projects go forward,
6 and . . . [has] held that suspending such projects until that consideration occurs comports
7 with the public interest.” *All. for the Wild Rockies*, 632 F.3d at 1138 (citation and internal
8 quotation marks omitted). Injunctive relief would serve this interest, as well as the “well-
9 established public interest in preserving nature and avoiding irreparable environmental
10 injury.” *Id.* (citation and internal quotation marks omitted).

11 **IV. The Court Should Impose No Bond or Only a Nominal Bond**

12 In issuing the requested injunctive relief, the Court should require no or only a
13 nominal bond. *See* Fed. R. Civ. Proc. 65(c) (plaintiff must generally post a bond “in an
14 amount that the court considers proper”); *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th
15 Cir. 2009) (“Rule 65(c) invests the district court with discretion as to the amount of
16 security required, if any.” (citation and internal quotation marks omitted)). Where, as
17 here, plaintiffs are nonprofit organizations seeking to vindicate an established public
18 interest in environmental protection, courts routinely waive the bond requirement or
19 impose a nominal bond. *See California ex rel. Van De Kamp v. Tahoe Regional Planning*
20 *Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (no bond); *Friends of the Earth v.*
21 *Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (reversing unreasonably high bond because
22 it served to thwart citizen actions); *Forest Guardians*, 2004 WL 7338105, at *19 (no
23 bond). This Court should do likewise.

24 **CONCLUSION**

25 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their
26 request for a preliminary injunction to prohibit implementation of the challenged
27 Sunnyside and Flux Canyon Project approvals until Plaintiffs’ claims can be adjudicated.
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Respectfully submitted this 14th day of July, 2023.

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