1. The Recovery Plan For Vernal Pool Ecosystems Of California And Southern Oregon Is A Voluntary Guidance Document, Not A Regulatory Document. None Of The Actions Or Maps Associated With The Recovery Plan Carry Any Regulatory Authority.

Section 4 of the Endangered Species Act ("ESA") requires the Secretary of the Interior[1] to "develop and implement ... recovery plans" for "the conservation and survival of endangered species and threatened species" unless the agency finds that "such a plan will not promote the conservation of the species."[2] To the "maximum extent practicable," each plan must include: 1) "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;" 2) "objective measurable criteria which, when met, would result in a determination ... that the species be removed from the list"; and 3) "estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal."[3]

The Sierra Vista Project is located within the area covered by the "Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon" (Dec. 15, 2005)("Vernal Pool Recovery Plan"). The preface to the Vernal Pool Recovery Plan, page xxv, clearly states that:

> Recovery plans . . .are voluntary guidance documents, not regulatory documents, that broadly address conservation needs of the species. Recovery plans are necessarily expansive, identifying many options and strategies that may contribute recovery as possible. None of the actions or maps associated with this recovery plan carry any regulatory authority.

Further, the Vernal Pool Recovery Plan explains that "no agency or other entity is required by the Endangered Species Act to implement the recovery strategy or specific recommended action in a recovery plan," page J-2, and that recovery plans are also "not land use plans and cannot restrict activities proposed by other agencies or the public." Page J-4.

A recovery plan neither expands or contracts any obligations under the ESA. Whether or not the Service has adopted a recovery plan, all persons are subject to the prohibitions against take of a listed species in Section 9 of the ESA, and all federal agencies must comply with the requirement under Section 7 of the ESA to ensure that its actions do not

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[1] See 16 U.S.C. §1532(15) (defining "Secretary" to include both the Secretary of the Interior (acting through the Fish and Wildlife Service ("Service")), and the Secretary of Commerce (acting through the National Marine Fisheries Service ("Fisheries," a division of the National Oceanic and Atmospheric Administration, is also known as NOAA Fisheries)); 50 C.F.R. §§424.01-.21 (joint regulations for the Service and Fisheries)). The Service is generally responsible for terrestrial and freshwater species, while Fisheries is responsible for marine and anadromous species. This memo generally discussed the Service, however the issues apply for the most part equally to Fisheries.

[2] 16 U.S.C. §1533(f)(1).

[3] Id. §1533(f)(1)(B)(i)-(iii).

jeopardize the continued existence of a listed species or adversely modify designated critical habitat.

The statements in the Vernal Pool Recovery Plan that a recovery plan is not a regulatory document is consistent with case law interpreting Section 4. In National Wildlife Federation v. National Park Service, 669 F. Supp. 384 (D. Wyo. 1987), plaintiffs argued that the Park Service was required by the terms of the Grizzly Bear Recovery Plan to close the Fishing Bridge Campground in Yellowstone National Park because it was located in grizzly bear habitat which increased human-bear encounters and subsequent bear mortality. The court rejected that argument, indicating that recovery plans are not mandatory, and concluding that the Service need not conform agency action to completed plans if they decide not to do so.[4]

In Defenders of Wildlife v. Lujan, 792 F. Supp. 834 (D.D.C. 1992), plaintiffs sued in an attempt to force implementation of the specific provisions of the 1987 Northern Rocky Mountain Wolf Recovery Plan, which required reintroduction of the wolf in Yellowstone National Park. The Court denied plaintiffs' motion and explained that "[t]he Recovery Plan itself has never been an action document .... It left open different approaches and contemplated that when an agency or group made specific proposals for achieving a particular objective of the plan, there would be a need for further study."[5]

In Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996), environmental groups challenged the Corps of Engineers' decision to authorize construction of a landfill in wetlands based on alleged noncompliance with ESA Section 4(f). The groups argued that permitting the landfill violated the 1987 Florida Panther Recovery Plan. They claimed that the ESA requires the development and implementation of recovery plans for endangered species, that the Service failed to implement the plan by issuing a no jeopardy opinion for construction within the panther's habitat, and that the Corps acted arbitrarily in relying on the no jeopardy opinion in authorizing construction.[6] The Eleventh Circuit rejected the recovery plan argument in part because its practical effect "would be to elevate the ... Recovery Plan into a document with the force of law ... Section 1533(f) makes it plain that recovery plans are for guidance only."[7] The court concluded that the Service had not failed to implement the recovery plan when it issued a no jeopardy opinion, specifically because of the discretionary nature of recovery plans. Instead, the court found that the Service had followed the mandates of Section 7 to assess the impact of the landfill and conclude essentially that, while the landfill project site was within the area covered by the recovery plan, the impact area was not occupied panther habitat, was not

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4 National Wildlife Federation v. National Park Service, 669 F. Supp. at 388-89 (D. Wyo. 1987).

5 Defenders of Wildlife v. Lujan, 792 F .Supp. 834, 835 (D.D.C. 1992).

6 Fund for Animals, Inc. v. Rice, 85 F.3d 535, 547 (11th Cir. 1996).

7 Id. at 547. See also Strahan v. Linnon, 967 F. Supp. 581, 597 (D. Mass. 1997) (holding that recovery plans are not documents with the force of law); Biodiversity Legal Foundation v. Norton, 285 F. Supp. 2d 1 (D.D.C. Sept. 2003) (court agreed with defendant Service that, under Fund for Animals v. Rice, recovery plans "do not command the force of law.").

designated critical habitat, and had not been identified as a panther reintroduction area according to the biological opinion.[8]

2. CEQA Does Not Require The City of Roseville to Implement the Recovery Plan For Vernal Pool Ecosystems Of California And Southern Oregon

CEQA ensures that agencies mitigate or avoid significant effects on the environment of projects that they approve, whenever feasible.[9] An environmental impact report prepared pursuant to CEQA facilitates this goal by "identify[ing] the significant effects on the environment of a project, identify[ing] alternatives to the project, and indicat[ing] the manner in which those significant effects can be mitigated or avoided."[10]

Neither the CEQA statute nor the Guidelines specifically address the role of a federal recovery plan. The case law recognizes recovery plans are documents that set forth recommendations,[11] and information that is relevant to CEQA review of biological resources, but there is no requirement under CEQA that mandates compliance with a recovery plan.[12] Information in a recovery plan can properly be considered in the determination of the likelihood of significant impacts to determine if an EIR is necessary,[13] and the determination of what mitigation measures might be appropriate to mitigate the significant impacts of a project.[14] Comments by the Service and statements in a recovery plan do not preclude the lead agency from reaching its own independent conclusion in an EIR on effects to listed species.[15] In addition, because under CEQA, mitigation measures must be enforceable through permits, agreements or other legally binding instruments,[16] recovery plans cannot serve as the basis for

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8 Id. at 547-548.

9 Cal. Pub. Res. Code § 21002.1(b).

10 CEQA § 21002.1(a).

11 California Native Plant Society v. County of El Dorado, 170 Cal. App. 4th 1026, 1034 (2009); National Parks and Conservation Association v. County of Riverside, 71 Cal. App. 4th 1341,1351n.4 (1999).

12 See CNPS, 170 Cal. App .4th at 1060.

13 CNPS, 170 Cal .App .4th 1026, 1060 (2009)(recovery plan corroborated lack of information confirming that and EIR should have been prepared).

14 See e.g., National Parks and Conservation Association v. County of Riverside, 71 Cal. App. 4th 1341, 1367 (1999)(considering whether recommendation for no new landfills in management area extended outside management area); *CNPS*, 170 Cal. App. 4th 1026, 1060 (2009) (assessing reasonableness of transplantation and propagation to mitigate project impacts to rare plants).

15 E.g., Association of Irritated Residents v. County of Madera, 107 Cal. App. 4th 1383, 1395-99 (2003).

16 Cal. Code of Regs. § 15126.4(a)(2).

mitigation measures since they are not legally binding unlike the permits and requirements that result from Sections 7 and 10 of the Endangered Species Act.[17]

[17] E.g., Association of Irritated Residents, 107 Cal. App. 4th at 1397