

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF  
CALIFORNIA, ex rel. KAMALA D.  
HARRIS, ATTORNEY GENERAL,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;  
EDWARD DeMARCO, in his capacity  
as Acting Director of FEDERAL  
HOUSING FINANCE AGENCY; FEDERAL  
HOME LOAN MORTGAGE CORPORATION;  
CHARLES E. HALDEMAN, Jr., in his  
capacity as Chief Executive  
Officer of FEDERAL HOME LOAN  
MORTGAGE CORPORATION; FEDERAL  
NATIONAL MORTGAGE ASSOCIATION;  
and MICHAEL J. WILLIAMS, in his  
capacity as Chief Executive  
Officer of FEDERAL NATIONAL  
MORTGAGE ASSOCIATION,

Defendants

No. C 10-03084 CW  
No. C 10-03270 CW  
No. C 10-03317 CW  
No. C 10-04482 CW

ORDER GRANTING IN  
PART AND DENYING  
IN PART  
DEFENDANTS'  
MOTIONS TO DISMISS  
(Docket Nos. 49,  
41, 74, 18, and  
13), AND GRANTING  
IN PART AND  
DENYING IN PART  
SONOMA COUNTY'S  
MOTION FOR A  
PRELIMINARY  
INJUNCTION (Docket  
No. 33)

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United States District Court  
For the Northern District of California

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SONOMA COUNTY and PLACER COUNTY,

Plaintiff and  
Plaintiff-Intervener,

v.

FEDERAL HOUSING FINANCE AGENCY;  
EDWARD DeMARCO, in his capacity  
as Acting Director of FEDERAL  
HOUSING FINANCE AGENCY; FEDERAL  
HOME LOAN MORTGAGE CORPORATION;  
CHARLES E. HALDEMAN, Jr., in his  
capacity as Chief Executive  
Officer of FEDERAL HOME LOAN  
MORTGAGE CORPORATION; FEDERAL  
NATIONAL MORTGAGE ASSOCIATION;  
and MICHAEL J. WILLIAMS, in his  
capacity as Chief Executive  
Officer of FEDERAL NATIONAL  
MORTGAGE ASSOCIATION,

Defendants.

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SIERRA CLUB,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;  
and EDWARD DeMARCO, in his  
capacity as Acting Director of  
FEDERAL HOUSING FINANCE AGENCY,

Defendants.

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CITY OF PALM DESERT,

Plaintiff,

v.

FEDERAL HOUSING FINANCE AGENCY;  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION; and FEDERAL HOME  
LOAN MORTGAGE CORPORATION,

Defendants.

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1 California, Sonoma and Placer Counties, the City of Palm  
2 Desert and the Sierra Club have sued the Federal Housing Finance  
3 Agency (FHFA), the Federal National Housing Association (Fannie  
4 Mae), the Federal Loan Mortgage Corporation (Freddie Mac) and  
5 their directors.<sup>1</sup> The lawsuits challenge actions by the FHFA,  
6 Fannie Mae and Freddie Mac which have allegedly blocked government  
7 programs financing energy conservation.<sup>2</sup> Plaintiffs seek  
8 declaratory and injunctive relief, alleging violations of the  
9 Administrative Procedures Act (APA), the National Environmental  
10 Policy Act (NEPA), various state laws and the Constitution's Tenth  
11 Amendment and Spending Clause.  
12

13 Defendants have moved to dismiss all claims.<sup>3</sup> Plaintiffs  
14 jointly oppose. Sonoma County also moves for a preliminary  
15 injunction. Defendants' motions to dismiss are GRANTED IN PART.  
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19 <sup>1</sup> By stipulation, the claims against Defendants Charles E.  
20 Halderman, Jr. and Michael J. Williams, who were sued in their  
21 official capacities as Chief Executive Officers for Fannie Mae and  
22 Freddie Mac, have been dismissed. No. C 10-03084, Docket No. 83;  
23 No. C 10-03270, Docket No. 93.

24 <sup>2</sup> Three similar cases have been filed in federal district  
25 courts in Florida and New York: The Town of Babylon v. Federal  
26 Housing Finance Agency, et al., 2:10-cv-04916 (E.D.N.Y.); Natural  
27 Resource Defense Council, Inc. v. Federal Housing Finance  
28 Authority, et al., 1:10-cv-07647-SAS (S.D.N.Y.); and Leon County  
v. Federal Housing Finance Agency, et al., 4:10-cv-00436-RH  
(N.D.Fla.). The Babylon and Natural Resource Defense Council  
actions have been dismissed, and notices of appeal have been  
filed.

<sup>3</sup> Unless noted otherwise, citations to the record refer to  
the California action, C 10-03084.

1 Sonoma County's motion for a preliminary injunction is GRANTED IN  
2 PART.

3 BACKGROUND

4 The present actions arise from disputes about certain  
5 federally funded, state and locally administered initiatives known  
6 as Property Assessed Clean Energy (PACE) programs. The Department  
7 of Energy substantially funds PACE programs, as part of the  
8 American Recovery and Reinvestment Act of 2008. Through these  
9 programs, state and local governments finance energy conservation  
10 improvements with debt obligations secured by the retrofitted  
11 properties. As a related benefit, the programs are intended to  
12 create jobs.  
13

14 In the Housing and Economic Recovery Act of 2008 (HERA),  
15 Public Law 110-289, 122 Stat. 2654, Congress established the FHFA  
16 to regulate and oversee Fannie Mae and Freddie Mac (collectively,  
17 the Enterprises), as well as the Federal Home Loan Banks (Banks),  
18 which largely control the country's secondary market for  
19 residential mortgages. The HERA amended the Federal Housing  
20 Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C.  
21 § 4501 et seq. (Safety and Soundness Act). The Safety and  
22 Soundness Act outlines the regulatory and oversight structure for  
23 the Enterprises and the Banks, denominated the regulated entities.  
24 12 U.S.C. § 4502(20). As amended by the HERA, the Safety and  
25 Soundness Act vests in the FHFA the authority to act as a  
26 conservator and receiver for the Enterprises and the Banks. 12  
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United States District Court  
For the Northern District of California

1 U.S.C. §§ 4511(b); 4617(a). Since September 6, 2008, both  
2 Enterprises have been in FHFA conservatorship. Id.

3 The parties disagree about the nature of the debt obligations  
4 created by PACE programs, and the extent to which the obligations  
5 create risks for secondary mortgage holders, such as the  
6 Enterprises. Defendants contend that PACE programs, in particular  
7 those that result in lien obligations that take priority over  
8 mortgage loans, make alienation of the encumbered properties more  
9 difficult, and thus pose risk to the security interests of  
10 entities that purchase the mortgages for investment purposes.  
11 Plaintiffs allege that Defendants' actions have thwarted PACE  
12 programs. They claim that (1) Defendants disregarded statutorily  
13 imposed procedural requirements in adopting policies about the  
14 PACE debt obligations, (2) Defendants' determinations were  
15 substantively unlawful because they were arbitrary and capricious,  
16 and (3) Defendants mischaracterized the legal nature of the  
17 obligations, contrary to state law, deeming them loans rather than  
18 traditional public assessments.  
19  
20

21 The actions Defendants took are as follows. In a letter  
22 dated June 18, 2009, addressed to banking and creditor trade  
23 groups, as well as associations for mortgage regulators, governors  
24 and state legislators, the FHFA asserted in general terms that the  
25 PACE program posed risks to homeowners and lenders. On September  
26 18, 2009, Fannie Mae issued a "Lender Letter" to its mortgage  
27 sellers and servicers in response to questions about PACE  
28

1 programs, providing a link to the FHFA's June 18, 2009 letter.

2 First Amended Complaint (FAC), Ex. A.

3 On May 5, 2010, Fannie Mae and Freddie Mac both issued  
4 letters to their mortgage sellers and servicers, again addressing  
5 concerns about PACE programs. FAC, Ex. B.

6 On July 6, 2010, the FHFA issued a statement that the PACE  
7 programs "present significant safety and soundness concerns that  
8 must be addressed by Fannie Mae, Freddie Mac and the Federal Home  
9 Loan Banks." FAC, Ex. C. The FHFA stated that first liens  
10 created by PACE programs were different from "routine tax  
11 assessments," and posed significant risks to lenders, servicers,  
12 and mortgage securities investors. Id. The FHFA "urged state and  
13 local governments to reconsider these programs" and called "for a  
14 pause in such programs so concerns can be addressed." Id. The  
15 FHFA directed Fannie Mae, Freddie Mac and the Banks to undertake  
16 "prudential actions," including reviewing their collateral  
17 policies to assure no adverse impact by PACE programs. Id.  
18 Although Defendants have taken the position that the FHFA issued  
19 the statement in its capacities as conservator and as regulator,  
20 the statement itself does not say so, or cite any statutory or  
21 regulatory provision.  
22  
23

24 On August 31, 2010, Fannie Mae and Freddie Mac, citing the  
25 FFAFA's July 2010 statement, announced to lenders that they would  
26 not purchase mortgages originated on or after July 6, 2010, which  
27  
28

1 were secured by properties encumbered by PACE obligations.

2 Declaration of Scott Border, Exs. 20 & 21.

3 At the Court's request, on February 8, 2011, the United  
4 States submitted a Statement of Interest in these lawsuits.

5 On February 28, 2011, the FHFA's General Counsel sent a  
6 letter to General Counsel for Fannie Mae and Freddie Mac,  
7 reaffirming that debts arising from PACE programs pose significant  
8 risks to the Enterprises. Defendants' Notice of New Authority,  
9 Ex. A. The FHFA invoked its statutory authority as conservator  
10 and directed that the "Enterprises shall continue to refrain from  
11 purchasing mortgage loans secured by properties with outstanding  
12 first-lien PACE obligations." Id. In addition, the letter  
13 ordered that the "Enterprises shall continue to operate in  
14 accordance with the Lender Letters and shall undertake other steps  
15 necessary to protect their safe and sound operations from these  
16 first-lien PACE programs." Id.

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19 LEGAL STANDARD

20 Dismissal is appropriate under Rule 12(b)(1) when the  
21 district court lacks subject matter jurisdiction over the claim.  
22 Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction  
23 must exist at the time the action is commenced. Morongo Band of  
24 Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376,  
25 1380 (9th Cir. 1988). A federal court is presumed to lack subject  
26 matter jurisdiction until the contrary affirmatively appears.  
27  
28

1 Stock W., Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th  
2 Cir. 1989).

3 Dismissal under Rule 12(b)(6) for failure to state a claim is  
4 appropriate only when the complaint does not give the defendant  
5 fair notice of a legally cognizable claim and the grounds on which  
6 it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

7 A complaint must contain a "short and plain statement of the claim  
8 showing that the pleader is entitled to relief." Fed. R. Civ. P.  
9 8(a). In considering whether the complaint is sufficient to state  
10 a claim, the court will take all material allegations as true and  
11 construe them in the light most favorable to the plaintiff. NL  
12 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

13 However, this principle is inapplicable to legal conclusions;  
14 "threadbare recitals of the elements of a cause of action,  
15 supported by mere conclusory statements," are not taken as true.  
16 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing  
17 Twombly, 550 U.S. at 555).  
18  
19

## 20 DISCUSSION

### 21 I. Subject Matter Jurisdiction

#### 22 A. Article III Standing

23 Although Defendants did not initially raise the issue, the  
24 United States argues in its Statement of Interest that Plaintiffs  
25 do not have Article III standing and, therefore, the Court does  
26 not have subject matter jurisdiction to consider their claims.  
27

28 "If the court determines at any time that it lacks subject-matter

1 jurisdiction, the court must dismiss the action." Fed. R. Civ. P.  
2 12(h)(3). To establish constitutional standing, a plaintiff must  
3 satisfy three requirements--(1) injury in fact; (2) causation; and  
4 (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555,  
5 560 (1998). The party invoking federal jurisdiction bears the  
6 burden of establishing that it has Article III standing. Steel  
7 Co. v. Citizens for a Better Environment, 523 U.S. 83, 103-104  
8 (1998). On a motion to dismiss, a plaintiff need only show that  
9 the facts alleged, if proved, would confer standing. Central  
10 Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir.  
11 2002).

12  
13 The United States does not argue that Plaintiffs do not  
14 allege "injury in fact," and the Court finds that they do.  
15 Rather, the United States asserts that Plaintiffs cannot satisfy  
16 the causation requirement because the Enterprises took the  
17 position that PACE debt obligations were incompatible with their  
18 uniform security instruments in their May 5, 2010 letters, before  
19 the FHFA issued its July 6, 2010 statement. The United States  
20 argues that Plaintiffs have alleged no facts suggesting that the  
21 Enterprises would have altered their position if the FHFA had not  
22 issued its July statement.  
23

24  
25 With respect to redressability, the United States asserts  
26 that it is mere speculation that if the FHFA changed its policy on  
27 the PACE program, individuals would be able to obtain mortgages,  
28 or refinance existing mortgages, on properties encumbered by PACE-

1 related debt obligations. The United States further argues that  
2 it is speculative that the notice and comment process would change  
3 the FHFA's and the Enterprises' position with respect to PACE  
4 programs.

5 Plaintiffs claim procedural as well as substantive injury.  
6 "A showing of procedural injury lessens a plaintiff's burden on  
7 the last two prongs of the Article III standing inquiry, causation  
8 and redressability." Salmon Spawning & Recovery Alliance v.  
9 Gutierrez, 545 F.3d 1220, 1226 (9th Cir. 2008). The Supreme Court  
10 has explained that  
11

12 a litigant to whom Congress has accorded a procedural  
13 right to protect his concrete interests . . . can  
14 assert that right without meeting all the normal  
15 standards for redressability and immediacy. When a  
16 litigant is vested with a procedural right, that  
17 litigant has standing if there is some possibility  
18 that the requested relief will prompt the injury-  
19 causing party to reconsider the decision that  
20 allegedly harmed the litigant.

21 Massachusetts v. EPA, 549 U.S. 497, 517-18 (2007) (internal  
22 quotation marks and citations omitted). Where a plaintiff asserts  
23 that an agency has failed to follow procedural requirements in  
24 considering the environmental impact of its action, for purposes  
25 of redressability, "[i]t suffices that . . . the [agency's]  
26 decision could be influenced by the environmental considerations  
27 that [the relevant statute] requires an agency to study."  
28 Citizens for Better Forestry v. USDA, 341 F.3d 961, 976 (9th Cir.  
2003) (alterations and emphasis in original, internal quotation  
marks omitted); Natural Resources Defense Council, Inc. v. EPA,

1 638 F.3d 1183, 1189 n.3 (9th Cir. 2011); Salmon Spawning, 545 F.3d  
2 at 1226-27; Sierra Forest Legacy v. United States Forest Service,  
3 652 F. Supp. 2d 1065, 1078 (N.D. Cal. 2009). In contrast, "a  
4 plaintiff alleging a substantive violation must demonstrate that  
5 its injury would likely be redressed by a favorable court  
6 decision." Salmon Spawning, 545 F.3d at 1228.

7  
8 With regard to causation, Plaintiffs have alleged a  
9 sufficient connection between Defendants' actions and the  
10 thwarting of PACE programs and their anticipated benefits. To  
11 hold otherwise would suggest that Congress imposed procedural  
12 requirements that have no meaningful effect. See Citizens for  
13 Better Forestry, 341 F.3d at 973.

14  
15 Although the FHFA's July 2010 statement was issued after  
16 Fannie Mae and Freddie Mac's May 2010 announcements to their  
17 sellers and servicers, the FHFA had publicized its concerns in the  
18 prior, June 2009, letter. Fannie Mae, in turn, cited that letter  
19 as it raised caution about PACE programs in its September 2009  
20 Lender Letter. In addition, Fannie Mae's and Freddie Mac's August  
21 31, 2010 announcements that they would not purchase PACE-  
22 encumbered mortgages originated on or after July 6, 2010, were  
23 issued in response to the FHFA's statement.

24  
25 Further, Plaintiffs' claims of procedural violations are  
26 redressable. If the statutorily mandated procedures were  
27 followed, Plaintiffs' interests could be protected by a resulting  
28 change in the FHFA, Fannie Mae and Freddie Mac's policy, spurring

1 lenders to renew financing of PACE-encumbered properties.  
2 Plaintiffs have alleged that, prior to the July 2010 statement,  
3 PACE programs were operational and PACE participants were able to  
4 refinance their mortgages. They further allege that, after the  
5 FHFA's July 2010 statement and the Enterprises' announcements, the  
6 programs faltered and participants became unable to refinance or  
7 transfer their properties without paying off the PACE debt in  
8 full. FAC ¶ 35. Accepting the allegations as true, the financing  
9 and benefits previously afforded by PACE programs could be renewed  
10 as a result of new information gleaned through the notice and  
11 comment and environmental review processes and a resulting change  
12 in Defendants' position and related marketplace practices.

14 Although Plaintiffs' substantive claims are subject to  
15 greater scrutiny with regard to Article III standing requirements,  
16 the causation and redressability requirements are adequately  
17 plead. The alleged reaction of the marketplace to Defendants'  
18 actions and the rapid demise of PACE programs establish a  
19 sufficient causal connection between Defendants' actions and  
20 Plaintiffs' purported injury. Redressability is sufficiently  
21 alleged because, if the FHFA's policy were set aside as arbitrary  
22 and capricious, it is likely that financing streams would be  
23 renewed.  
24

26 This case is distinguishable from Levine v. Vilsack, 587 F.3d  
27 986 (9th Cir. 2009), a case upon which the United States relies to  
28 argue that Plaintiffs' claims are not redressable. In Levine, the

1 plaintiffs brought suit against the Secretary of Agriculture,  
2 alleging that the agency's interpretive rule excluding poultry  
3 from the Humane Methods of Slaughter Act (HMSA) was arbitrary and  
4 capricious under the APA. The plaintiffs sought to block the  
5 inhumane slaughter of poultry under the HMSA, but the statute  
6 lacked an enforcement provision. Id. at 989. Plaintiffs' goal  
7 would be achieved only if the Secretary proceeded to add poultry  
8 to the list of protected species under the Federal Meat Inspection  
9 Act, a separate statute which was not at issue in the case. Id.  
10 at 993-95. The court reasoned that it was speculative whether the  
11 Secretary would do so and whether resulting regulations would make  
12 the slaughter of poultry more humane. Id. at 996-97.

14 The present actions differ because further action by a  
15 federal agency would not be required to achieve Plaintiffs' goals.  
16 Plaintiffs have alleged that PACE encumbrances were treated like  
17 tax assessments until the FHFA took the actions it did.  
18 Plaintiffs adequately allege that a change in the FHFA's policy  
19 would lead to a return previous marketplace practices.  
20

21 Accordingly, Plaintiffs' claims sufficiently allege the  
22 injury in fact, causation and redressability necessary to  
23 establish standing at this stage of the litigation.  
24

#### 25 B. Statutory Preclusion of Judicial Review

26 Defendants argue that, pursuant to Federal Rule of Civil  
27 Procedure 12(b)(1), the present actions should be dismissed for  
28 lack of subject matter jurisdiction. Specifically, Defendants

1 assert that three statutory provisions--12 U.S.C. §§ 4617(f),  
2 4635(b), and 4623(d)--preclude judicial review of Plaintiffs'  
3 claims for relief.

4 The courts have long recognized a presumption in favor of  
5 judicial review of administrative actions. Love v. Thomas, 858  
6 F.2d 1347, 1356 (9th Cir. 1988) (citing Block v. Community  
7 Nutrition Inst., 467 U.S. 340, 349-51 (1984)). The presumption  
8 may be overcome by various means, including "specific language or  
9 specific legislative history that is a reliable indicator of  
10 congressional intent" or "by inference of intent drawn from the  
11 statutory scheme as a whole." Block, 467 U.S. at 349.

12 Although "great weight" is ordinarily given to an agency's  
13 interpretation of a statute it is charged with enforcing, "that  
14 deference does not extend to the question of judicial review, a  
15 matter within the peculiar expertise of the courts." Love, 858  
16 F.2d at 1352 n.9.

17 The Court considers whether any of the three provisions  
18 preclude its authority to hear Plaintiffs' claims.

19 1. Section 4617(f)

20 Section 4617(a) authorizes the appointment of the FHFA as  
21 conservator or receiver for a regulated entity under certain  
22 circumstances. 12 U.S.C. § 4617(a). As conservator, the FHFA  
23 immediately succeeds to "all rights, titles, powers, and  
24 privileges of the regulated entity, and of any stockholder,  
25 officer, or director of such regulated entity" with respect to the  
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1 entity and its assets. 12 U.S.C. § 4617(b)(2)(A). The FHFA may  
2 take over assets and operate the entity subject to its  
3 conservatorship, collect all obligations and money due, perform  
4 all functions of the regulated entity in its name consistent with  
5 the FHFA's appointment as conservator, and preserve and conserve  
6 the entity's assets and property. 12 U.S.C. § 4617(b)(2)(B)(i)-  
7 (iv).

8  
9 Section 4617(f) limits judicial review of such actions,  
10 stating that "no court may take any action to restrain or affect  
11 the exercise of powers or functions of the Agency as a conservator  
12 or a receiver." 12 U.S.C. § 4617(f). There is little case law  
13 interpreting Section 4617(f). However, the parties recognize that  
14 the language in the provision is similar to 12 U.S.C. § 1821(j),  
15 which limits judicial review of actions taken by the Federal  
16 Deposit Insurance Corporation (FDIC) in its capacity as a  
17 conservator or receiver. Sahni v. American Diversified Partners,  
18 83 F.3d 1054, 1058-59 (9th Cir. 1996). That provision states that  
19 "no court may take any action," except at the request of the FDIC  
20 Board of Directors by regulation or order, "to restrain or affect  
21 the exercise of powers or functions of the [FDIC] as a conservator  
22 or a receiver." 12 U.S.C. § 1821(j).

23  
24 The Ninth Circuit has stated, "The bar imposed by § 1821(j)  
25 does not extend to situations in which the FDIC as receiver  
26 asserts authority beyond that granted to it as a receiver."  
27 Sharpe v. FDIC, 126 F.3d 1147, 1155 (9th Cir. 1997) (citing  
28

1 National Trust for Historic Preservation v. FDIC, 995 F.2d 238,  
2 240 (D.C. Cir. 1993), judgment vacated, 5 F.3d 567 (D.C. Cir.  
3 1993), reinstated in relevant part, 21 F.3d 469 (D.C. Cir. 1994)).  
4 In Sharpe, the Ninth Circuit held that the FDIC, in breaching a  
5 contract, did not act within its statutorily defined receiver  
6 powers to disaffirm or repudiate contracts; the court was  
7 permitted to review the plaintiffs' breach of contract claim  
8 against the FDIC.  
9

10 The FHFA contends that it issued its July 2010 statement and  
11 February 2011 letter as conservator of the Enterprises.  
12 Plaintiffs respond that Defendants' actions amount to substantive  
13 rule-making, and that rule-making is not a part of the FHFA's role  
14 as conservator. The FHFA has directed Fannie Mae and Freddie Mac  
15 prospectively to refrain from purchasing any mortgage loan secured  
16 by property with an outstanding PACE obligation. This appears to  
17 amount to substantive rule-making.  
18

19 Distinct from the FHFA's powers as a conservator or receiver,  
20 it has supervisory and regulatory authority over Fannie Mae,  
21 Freddie Mac and the Federal Home Loan Banks, the regulated  
22 entities. See 12 U.S.C. § 4511(b); § 4513b; § 4513(a)(1)(A),  
23 (B)(i)-(v).  
24

25 Therefore, the Court must next consider whether the FHFA's  
26 rule-making is pursuant to its authority as a conservator, or to  
27 its supervisory or regulatory authority. The Ninth Circuit has  
28 explained that, "in interpreting a statute, the court will not

1 look merely to a particular clause in which general words may be  
2 used, but will take in connection with it the whole statute (or  
3 statutes on the same subject) and the objects and policy of the  
4 law." Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d  
5 1209, 1219 (9th Cir. 1987) (internal quotation marks omitted). In  
6 Morrison-Knudsen, the Ninth Circuit declined to hold that the  
7 Federal Savings and Loan Insurance Corporation's authority to  
8 adjudicate creditor claims was in keeping with the ordinary  
9 functions of a receiver. Id. at 1217. The Ninth Circuit found  
10 that the language in the relevant statute failed to enumerate, and  
11 the statutory scheme did not support, the power to adjudicate  
12 creditor claims. Id. at 1218-20.

14 Here, it is clear from the statutory scheme overall and other  
15 provisions of section 4617 that Congress distinguished between the  
16 FHFA's powers as a conservator and its authority as a regulator,  
17 and did not intend that the former would subsume the latter.

19 Specific provisions of section 4617 include the phrase, "The  
20 agency may, as conservator . . .," in reference to the FHFA's  
21 authority in that role, while other provisions addressing the  
22 FHFA's regulatory powers do not contain analogous language.

23 Compare 12 U.S.C. § 4617(b)(1) and (2)(C) with § 4617(b)(2)(A),  
24  
25  
26  
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28

1 (B), (G), (H), (I) (i) (I) and (J)<sup>4</sup> and § 4617(b) (4). Section  
2 4617(b) indicates that Congress intended to enumerate the FHFA's  
3 powers and duties as a conservator, while delegating other duties  
4 to the FHFA's regulatory authority. The statute does not identify  
5 substantive rulemaking as a conservatorship power.

6 The cases upon which Defendants rely to assert that the  
7 FHFA's powers as a conservator are "sweeping" and "broad," such  
8 that its July 2010 statement and February 2011 letter escape  
9 judicial review, are inapposite. The cases address FHFA actions  
10 typical of the ordinary day-to-day functions of an agency acting  
11 as conservator or receiver. See e.g., Freeman v. FDIC, 56 F.3d  
12 1394 (D.C. Cir. 1995) (holding that, pursuant to 12 U.S.C.  
13 § 1821(j), the court was precluded from taking any action that  
14 might restrain the FDIC from conducting a nonjudicial foreclosure  
15 sale of assets acquired from a failed bank); National Trust, 995  
16 F.2d at 239-41 (holding that a lawsuit to enjoin the FDIC's sale  
17 to liquidate assets was precluded by § 1821(j)); Hindes v. FDIC,  
18 137 F.3d 148, 160 (3rd Cir. 1998) (precluding an order voiding  
19 FDIC action in its corporate capacity, which triggered a state  
20 agency to close a bank and appoint the FDIC as receiver);  
21 Telematics International, Inc. v. NEMLC Leasing Corp., 967 F.2d  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>4</sup> Although section 4617(b) (2) (J) is worded as a broad,  
27 catchall provision, given the overall scheme of section 4617, it  
28 would be incorrect to find that section 4617(b) (2) (J) authorizes  
the FHFA to do anything and everything, including engaging in  
rule-making, as a conservator.

1 703, 707 (1st Cir. 1992) (precluding plaintiff from attaching a  
2 certificate of deposit held by a bank because the attachment would  
3 impede the FDIC from attaching the asset); Save Our Wetlands, Inc.  
4 v. State of La., Landmark Lands Co., 1996 WL 194924, \*2-3 (E.D.  
5 La.) (stating that disposition of a failed institution's assets is  
6 a power of a receiver, and a challenge to title of a property  
7 directly affects the receiver's function); Pyramid Const. Co.,  
8 Inc. v. Wind River Petroleum, Inc., 866 F. Supp. 513, 518-19 (D.  
9 Utah 1994) (precluding an order to rescind the Resolution Trust  
10 Corporation's sale of a parcel and force transfer of that parcel  
11 from one private party to another); Furgatch v. Resolution Trust  
12 Corp., 1993 WL 149084, \*2 (N.D. Cal.) (precluding injunction  
13 against a bank and trustee to prevent a foreclosure sale because  
14 it would indirectly enjoin a foreclosure by the RTC in its role as  
15 conservator).

16  
17  
18 Substantive rule-making is not appropriately deemed action  
19 pursuant to the FHFA's conservatorship authority. The FHFA's  
20 policy-making with respect to PACE programs does not involve  
21 succeeding to the rights or powers of the Enterprises, taking over  
22 their assets, collecting money due or operating their business.  
23 Given the presumption in favor of judicial review, section 4617(f)  
24 does not preclude review of the July 2010 statement and February  
25 2011 letter.  
26  
27  
28

## 1 2. Section 4623(d)

2 The FHFA argues that its July 2010 statement was exempt from  
3 judicial review pursuant to 12 U.S.C. § 4623(d), which restricts  
4 judicial review of any action taken under section 4616(b)(4).<sup>5</sup>  
5 Section 4616(b)(1) through (4) describes supervisory actions that  
6 the FHFA Director may take with respect to "significantly  
7 undercapitalized" regulated entities. Section 4616(b)(4)  
8 authorizes the Director to require a "significantly  
9 undercapitalized" regulated entity "to terminate, reduce, or  
10 modify any activity that the Director determines creates excessive  
11 risk to the regulated entity." The Safety and Soundness Act  
12 establishes a tiered system of classification of the  
13 capitalization of the regulated entities; "significantly  
14 undercapitalized" is the second lowest of the four tiers. See 12  
15 U.S.C. § 4614(a) and (b)(1)(C).  
16

17  
18 It is not clear that the FHFA acted pursuant to section  
19 4616(b)(4) because it could have done so only if it found that

---

20 <sup>5</sup> Defendants assert that Title 12 U.S.C. sections 4623(d) and  
21 section 4635(b) preclude judicial review of the July 2010  
22 statement, as alternative arguments to their contention that  
23 section 4617(f) bars review. The FHFA issued its February 2011  
24 letter after the parties completed briefing on Defendants' motions  
25 to dismiss, and the Court permitted supplemental briefing to  
26 address the February 2011 letter. Defendants did not argue that  
27 12 U.S.C. §§ 4635(b) and 4623(d) also apply to the February 2011  
28 letter. They took the position that section 4617(f) precluded  
review of the February 2011 letter because it was issued expressly  
in the FHFA's capacity as conservator of Fannie Mae and Freddie  
Mac. Docket No. 105 and 107. Accordingly, the Court does not  
address 12 U.S.C. §§ 4635(b) or 4623(d) with respect to the  
February 2011 letter.

1 Fannie Mae, Freddie Mac and the Federal Home Loan Banks were  
2 significantly undercapitalized. Defendants have not shown that  
3 the FHFA imposed such a classification. Because a regulated  
4 entity may be placed into FHFA conservatorship on grounds apart  
5 from its capital classification, it is not possible to infer from  
6 Fannie Mae or Freddie Mac's conservatorship that they were  
7 classified as significantly undercapitalized. Nothing in the July  
8 2010 statement refers to section 4616(b)(4), or makes reference to  
9 undercapitalization. Thus, section 4623(d) does not limit the  
10 Court's jurisdiction to hear Plaintiffs' claims.

12 3. Section 4635(b)

13 The FHFA contends that it issued its July 2010 statement  
14 pursuant to its enforcement authority<sup>6</sup> and, thus, under 12 U.S.C.  
15 § 4635(b), the action is beyond the Court's purview. Section  
16 4635(b) bars judicial review of the "issuance or enforcement of  
17 any notice or order" under 12 U.S.C. § 4624(b) and (c). Sections  
18 4624(b) and (c) authorize the FHFA to issue orders to "make  
19 temporary adjustments to the established standards for an  
20 enterprise or both enterprises" and to "require an enterprise,  
21 under such terms and conditions as the Director determines to be  
22 appropriate, to dispose of or acquire any asset . . ." 12 U.S.C.  
23 § 4624(b)-(c).  
24  
25

---

27 <sup>6</sup> Again, Defendants do not appear to argue that the February  
28 2011 letter was issued under this authority.

1 Neither sections 4624(b) nor (c) applies to the July 2010  
2 statement. The statement was directed to the regulated entities,  
3 not solely the Enterprises. The statement does not refer to  
4 section 4624(b) or any established standard that the FHFA sought  
5 to adjust. Defendants now assert that the relevant standard that  
6 the FHFA sought to modify is set forth in 12 C.F.R. § 1252.1, a  
7 regulation mandating the Enterprises to comply with the portfolio  
8 holdings criteria established in their respective Senior Preferred  
9 Stock Purchase Agreements with the Department of Treasury.  
10 However, the July 2010 statement did not adjust the Stock Purchase  
11 Agreements; those agreements simply addressed the amount of  
12 mortgage assets that the Enterprises must hold in their  
13 portfolios. Finally, section 4624(c) does not avail Defendants  
14 because the July 2010 statement did not order the acquisition or  
15 disposal of assets. Thus, if anything, the statement appears to  
16 fall under the authority of section 4624(a), which provides that  
17 the FHFA Director "shall, by regulation, establish criteria  
18 governing the portfolio holdings of the enterprises . . ." This  
19 would seem to support Plaintiffs' argument that the FHFA's action  
20 amounted to substantive rule-making.  
21  
22

23 Accordingly, 12 U.S.C. § 4635(b) does not restrict this  
24 Court's jurisdiction over Plaintiffs' claims.  
25

26 In sum, none of the three statutory provisions upon which  
27 Defendants rely--12 U.S.C. § 4617(f), 12 U.S.C. § 4623(d) or 12  
28

1 U.S.C. § 4635(b)--applies to the FHFA's policy on PACE financing.  
 2 Plaintiffs' actions are not precluded on these grounds.

3 II. Motion to Dismiss for Failure to State a Claim

4 A. Administrative Procedures Act

5 Plaintiffs allege that the FHFA's policy statements<sup>7</sup> on PACE  
 6 obligations failed to comply with the notice and comment  
 7 requirements of, and was arbitrary and capricious in violation of,  
 8 the APA, 5 U.S.C. §§ 553, 706(2)(D).  
 9

10 1. Judicial review under the APA

11 To invoke judicial review of agency action under the APA,  
 12 Plaintiffs must demonstrate prudential standing. This standing  
 13 requirement is distinct from Article III standing, in that it is a  
 14 "purely statutory inquiry" to determine "whether a particular  
 15 plaintiff has been granted a right to sue by the statute under  
 16 which he or she brings suit." City of Sausalito v. O'Neil, 386  
 17 F.3d 1186, 1199 (9th Cir. 2004). "For a plaintiff to have  
 18 prudential standing under the APA, 'the interest sought to be  
 19 protected by the complainant [must be] arguably within the zone of  
 20 interests to be protected or regulated by the statute . . . in  
 21 question.'" Nat'l Credit Union Admin. v. First National Bank &  
 22 Trust Co., 522 U.S. 479, 488 (1998) (alteration in original). The  
 23  
 24

25 <sup>7</sup> Plaintiffs assert that the February 2011 letter, as well as  
 26 the July 2010 statement, are unlawful under the APA; Defendants'  
 27 supplemental briefing did not address the APA issues as they  
 28 relate to the February 2011 letter. The Court assumes that the  
 APA analysis of the July 2010 statement applies equally to the  
 February 2011 letter.

1 test requires that "we first discern the interest 'arguably . . .  
2 to be protected' by the statutory provision at issue; we then  
3 inquire whether the plaintiff's interests affected by the agency  
4 action in question are among them." Id. at 492. To satisfy the  
5 zone of interest test, "there does not have to be an 'indication  
6 of congressional purpose to benefit the would-be plaintiff.'" Id.  
7 A plaintiff is outside a provision's zone of interest where "the  
8 plaintiff's interests are so marginally related to or inconsistent  
9 with the purposes implicit in the statute that it cannot  
10 reasonably be assumed that Congress intended to permit the suit."  
11 Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399 (1987).  
12 The test is not "especially demanding." Id. at 399.

14 With regard to the first factor in the zone of interest test,  
15 the parties agree that the paramount goal of the Safety and  
16 Soundness Act is to protect the stability and ongoing operation of  
17 the residential mortgage market.  
18

19 California and the municipalities are arguably within the  
20 Safety and Soundness Act's zone of interests because the housing  
21 mortgage market operates alongside a system of laws and  
22 assessments that California and the municipalities have erected.  
23 Although Congress has not expressed a specific purpose to benefit  
24 state and local governments through the Safety and Soundness Act,  
25 California and the municipalities' interests are affected by the  
26 Act and are consistent with its purposes. The governmental  
27 Plaintiffs share an interest in a safe and sustainable secondary  
28

1 mortgage market and suffer as a result of a faltering mortgage  
2 market. Defendants' actions, pursuant to the Act, have allegedly  
3 reversed the longstanding treatment of local assessments in  
4 mortgage lending, thwarted California and the municipalities' PACE  
5 programs, and curtailed access to mortgages for residents who  
6 participate in the programs. Although there is a potential for  
7 disruption inherent in allowing every party adversely affected by  
8 Defendants' actions to seek judicial review, California and the  
9 municipalities are well-positioned to represent the public  
10 interest reliably without undermining the Act's objectives. See  
11 Clarke, 479 U.S. at 397 n.12 (stating that the ability of a  
12 plaintiff to serve as a "reliable private attorney general" is  
13 relevant to the zone of interest test.)

14  
15 The Sierra Club, however, bears a significantly less direct  
16 relationship to the mortgage market. The environmental interests  
17 the Sierra Club asserts, even taking account of the Act's public  
18 interest provision, are too attenuated from the Act's central  
19 purpose to find prudential standing under the APA for the  
20 organization on that basis.

21  
22 Defendants also argue that Plaintiffs have failed to allege a  
23 final agency action. Under the APA, judicial review is only  
24 permissible for final agency action. 5 U.S.C. § 704. "For an  
25 agency action to be final, the action must (1) 'mark the  
26 consummation of the agency's decisionmaking process' and (2) 'be  
27 one by which rights or obligations have been determined, or from  
28

1 which legal consequences will flow.'" Oregon Natural Desert Ass'n  
2 v. United States Forest Service, 465 F.3d 977 (9th Cir. 2006). To  
3 determine whether the consummation prong of the test has been  
4 satisfied, the court must make a pragmatic consideration of the  
5 effect of the action, not its label. Id. at 982, 985. The  
6 finality requirement is satisfied when an agency action imposes an  
7 obligation, denies a right, or fixes some legal relationship as a  
8 consummation of the administrative process. Id. at 986-87. "An  
9 agency action may be final if it has a 'direct and immediate . . .  
10 effect on the day-to-day business' of the subject party." Id. at  
11 987 (alteration in original).

12  
13 The FHFA presented its July 2010 statement as the  
14 consummation of a decision-making process that involved "careful  
15 review" and "over a year of working with federal and state  
16 government agencies." FAC, Ex. A, at 10. The statement was  
17 designed to "pause" PACE programs nation-wide. See id. The day  
18 the statement was issued, the FHFA's counsel sent it to the  
19 California Attorney General. The statement had a legal effect  
20 because it immediately imposed on the regulated entities  
21 obligations to take certain prudential actions. Fannie Mae and  
22 Freddie Mac promptly responded on August 31, 2010, publishing  
23 announcements to industry lenders that they would no longer  
24 purchase mortgage loans originated on or after July 6, 2010,  
25 secured by properties with an outstanding PACE obligation. The  
26 Act authorizes the FHFA Director to take enforcement action  
27  
28

1 against regulated entities to police their lawful operation. See  
2 e.g., 12 U.S.C. § 4631(a)(1). Thus, the present case is  
3 distinguishable from Fairbanks North Star Borough v. Army Corps of  
4 Engineers, 543 F.3d 586, 593-97 (2008), and Hindes, 137 F.3d at  
5 162-63. The July 2010 statement indicated the FHFA's final stance  
6 on PACE obligations, and the February 2011 letter reiterated that  
7 policy, thus demonstrating a final agency action by the FHFA  
8 subject to review under the APA.

#### 10 2. Notice and comment requirement

11 Title 12 U.S.C. § 4526(b) provides that any regulations  
12 issued by the FHFA Director pursuant to the agency's general  
13 regulatory authority shall comply with the APA's requirements for  
14 notice and comment. "Interpretative rules," however, are exempt  
15 from the APA's notice and comment requirements. 5 U.S.C.  
16 § 553(b)(3)(A). This exemption is narrowly construed. Flagstaff  
17 Medical Center, Inc. v. Sullivan, 962 F.2d 879, 885 (9th Cir.  
18 1992). Likewise, the notice and comment requirements are not  
19 imposed on orders that result from an agency adjudication. Yesler  
20 Terrace Community Council v. Cisneros, 37 F.3d 442, 448 (9th Cir.  
21 1994).

22  
23 An interpretive rule is one "issued by an agency to advise  
24 the public of the agency's construction of the statutes and rules  
25 which it administers." Erringer v. Thompson, 371 F.3d 625, 630  
26 (9th Cir. 2004) (citing Shalala v. Guernsey Mem'l Hosp., 514 U.S.  
27 87, 88 (1995)). "Because they generally clarify the application  
28

1 of a law in a specific situation, they are used more for  
2 discretionary fine-tuning than for general law making."  
3 Flagstaff, 962 F.2d at 886. On the other hand, substantive rules,  
4 sometimes referred to as legislative rules, "create rights, impose  
5 obligations, or effect a change in existing law pursuant to  
6 authority delegated by Congress." Erringer, 371 F.3d at 630.  
7 "There is no bright-line distinction between interpretative and  
8 substantive rules." Flagstaff, 962 F.2d at 886. A court need not  
9 accept an agency's characterization of its rule at face value.  
10 Hemp Industries Ass'n v. DEA, 333 F.3d 1082, 1087 (9th Cir. 2003).

11  
12 That the FHFA's policy amounted to substantive rulemaking is  
13 supported by the FHFA's handling of another issue: Guidance it  
14 recently proposed to issue with respect to private transfer fee  
15 covenants. On August 16, 2010, the FHFA published a notice and  
16 request for comments in the Federal Register concerning the  
17 proposed Guidance that the regulated entities "should not deal in  
18 mortgages on properties encumbered by private transfer fee  
19 covenants" because "[s]uch covenants appear adverse to liquidity,  
20 affordability and stability in the housing finance market and to  
21 financially safe and sound investments." 75 Fed. Reg. 49932 (Aug.  
22 16, 2010). In this analogous instance, the FHFA apparently deemed  
23 it appropriate to comply with the APA notice and comment  
24 requirements.  
25  
26  
27  
28

1 The Court finds that the FHFA's policy on PACE obligations  
2 amounts to substantive-rulemaking, not interpretive rule-making  
3 that would be exempt from the notice and comment requirement.

4 Defendants also argue that the APA's notice and comment  
5 requirements do not apply because the July 2010 statement was an  
6 order resulting from an adjudication. Yesler explains that  
7 "adjudications resolve disputes among specific individuals in  
8 specific cases [and] . . . have an immediate effect on specific  
9 individuals (those involved in the dispute)." 37 F.3d at 448  
10 (parenthetical in original). "Rulemaking, in contrast, is  
11 prospective, and has a definitive effect on individuals only after  
12 the rule subsequently is applied." Id. The FHFA's policy does  
13 not refer to a specific homeowner seeking a mortgage, or to a  
14 group of PACE participants. It is a prospective, generally  
15 applicable directive. Accordingly, it would be inappropriate to  
16 apply the adjudication exemption from the APA's notice and comment  
17 requirements to the actions of which Plaintiffs complain.

20 3. Arbitrary and capricious action--discretionary act  
21 exemption

22 In addition to their procedural claim under the APA,  
23 Plaintiffs allege a substantive claim that the FHFA's policy is  
24 arbitrary and capricious. Under the APA, a claim for arbitrary  
25 and capricious action is exempt from judicial review when the  
26 challenged action is "committed to agency discretion by law." 5  
27 U.S.C. § 701(a)(2). In the Ninth Circuit there are two  
28

1 circumstances in which judicial review is foreclosed by  
2 § 701(a)(2).

3 The first of these of circumstances is that in which a  
4 court would have no meaningful standard against which  
5 to judge the agency's exercise of discretion and there  
6 thus is no law to apply. The second such circumstance  
7 is that in which the agency's action requires a  
8 complicated balancing of a number of factors which are  
9 peculiarly within [the agency's] expertise, including  
10 the prioritization of agency resources, likelihood of  
11 success in fulfilling the agency's statutory mandate,  
12 and compatibility with the agency's overall policies.

13 Newman v. Apfel, 223 F.3d 937, 943 (9th Cir. 2000) (internal  
14 quotation marks and citations omitted, alteration in original).

15 In section 4526(b), the Safety and Soundness Act expressly  
16 adopts the requirements of the APA with respect to its regulatory  
17 actions, giving rise to a presumption of judicial oversight. 12  
18 U.S.C. § 4526(b). See Newman, 223 F.3d at 943 ("[T]he APA  
19 embodies a 'basic presumption of judicial review.'"). That the  
20 FHFA has "wide discretion" does not establish that it may justify  
21 its choices on "specious grounds." Id. The Ninth Circuit has  
22 "emphasized that § 701(a)(2) stakes out 'a very narrow  
23 exception.'" Id. (citing Citizens to Preserve Overton Park v.  
24 Volpe, 401 U.S. 402, 410 (1971)).

25 In Newman, the Ninth Circuit approved judicial review of  
26 Social Security regulations defining the statutory terms,  
27 "reliable" and "currently available" information. 223 F.3d at  
28 943. When certain information was deemed reliable and currently  
available, pursuant to the regulation, a different method of

1 calculating Supplemental Security Income benefits would apply.  
2 Id. at 939. The plaintiff claimed that the regulation's  
3 definitions of the terms "reliable" and "currently available" were  
4 arbitrary and capricious. The Ninth Circuit agreed, after holding  
5 that the claim was subject to judicial review. The court reasoned  
6 that the definition and application of the two statutory terms,  
7 and of the terms "arbitrary" and "capricious," did not defy  
8 "meaningful review" or involve a complicated balancing of a number  
9 of factors "peculiarly within the agency's expertise." Id. at  
10 943.

11  
12 The same reasoning applies to the present case. Plaintiffs'  
13 claims would require the Court to determine whether the FHFA's  
14 decision to treat debt obligations arising from PACE programs as  
15 assessments, rather than loans, was arbitrary and capricious.  
16 Under this limited review, the claims do not oblige the Court to  
17 evaluate whether the FHFA arrived at the correct conclusion, as a  
18 matter of policy.

19  
20 The FHFA action challenged here is unlike the agency actions  
21 disputed in cases in which courts have found review precluded.  
22 See e.g., Lincoln v. Vigil, 508 U.S. 182 (1993) (agency's  
23 allocation of a lump-sum appropriation); Heckler v. Chaney, 470  
24 U.S. 821, 831 (agency's decision not to institute enforcement  
25 proceedings); Center for Policy Analysis on Trade and Health v.  
26 Office of the United States Trade Representative, 540 F.3d 940,  
27 947 (9th Cir. 2008) (political question regarding committee  
28

1 membership). The FHFA's obligation to consider the impact of the  
2 PACE programs in a manner that is not arbitrary or capricious does  
3 not involve a complicated political calculus or the balancing of  
4 multiple factors so peculiarly within the agency's expertise that  
5 judicial review is unwarranted.

6 In sum, the FHFA's July 2010 statement and February 2011  
7 letter are not insulated from judicial review for arbitrariness by  
8 the discretionary act exemption.

9  
10 B. NEPA Claims

11 California, Sonoma County, Palm Desert and the Sierra Club  
12 assert claims for violation of the NEPA based on the FHFA's  
13 failure to consider the environmental impact of its actions.<sup>8</sup>  
14 Defendants move to dismiss the NEPA causes of action for failure  
15 to state a claim.

16  
17 The NEPA requires federal agencies to prepare a detailed  
18 Environmental Impact Statement (EIS) for all "major Federal  
19 actions significantly affecting the quality of the human  
20 environment." 42 U.S.C. § 4332(2)(C); Ka Makani 'O Kohala Ohana,  
21 Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002). In the  
22 alternative, an agency may prepare a more limited environmental  
23 assessment (EA) concluding in a "Finding of No Significant  
24

25  
26 \_\_\_\_\_  
27 <sup>8</sup> The parties' supplemental briefing did not address the NEPA  
28 issues with regard to the February 2011 letter, which reaffirmed  
the FHFA's July 2010 statement. The Court's NEPA analysis of the  
July 2010 statement applies equally to the February 2011 letter.

1 Impact." San Luis Obispo Mothers for Peace v. Nuclear Regulatory  
2 Com'n., 449 F.3d 1016, 1020 (9th Cir. 2006).

3 "Because NEPA does not contain a separate provision for  
4 judicial review, we review an agency's compliance with NEPA under  
5 the Administrative Procedure Act . . ." Ka Makani, 295 F.3d at  
6 959. This Court earlier held that Plaintiffs, other than the  
7 Sierra Club, satisfied the zone of interest test under the APA  
8 with respect to the Safety and Soundness Act. The Court must now  
9 consider whether Plaintiffs are within the zone of interest sought  
10 to be protected by the NEPA. See Ashley Creek Phosphate Co. v.  
11 Norton, 420 F.3d 934, 939 (9th Cir. 2005).

12 "NEPA's purpose is to protect the environment." Citizens for  
13 Better Forestry, 341 F.3d at 976. The statute's "twin aims" are  
14 to place upon a federal agency "the obligation to consider every  
15 significant aspect of the environmental impact of a proposed  
16 action" and "ensure that the agency will inform the public that it  
17 has indeed considered environmental concerns in its decisionmaking  
18 process." Baltimore Gas and Elec. Co. v. Natural Resource Defense  
19 Council, Inc., 462 U.S. 87, 97 (1983). All Plaintiffs in the  
20 present actions asserting NEPA claims, including the Sierra Club,  
21 plainly seek to protect the environment and, as a result, the zone  
22 of interest requirement is satisfied.  
23  
24  
25

26 Defendants next contend that the adoption of the FHFA's PACE  
27 policy was not a major federal action significantly altering the  
28 quality of the human environment because Plaintiffs' alleged

1 environmental injury is not "fairly traceable" to the policy.  
2 However, in making this argument Defendants incorrectly rely on  
3 Lujan's discussion of Article III standing, 504 U.S. at 561,  
4 rather than authority addressing prudential standing under the  
5 APA. Plaintiffs have adequately alleged that the FHFA's policy  
6 has decimated PACE programs and significantly impacted the  
7 environment by depriving California and its citizens of  
8 opportunities to improve water and energy conservation.  
9

10 Nor does Northcoast Environmental Center v. Glickman, 136  
11 F.3d 660 (9th Cir. 1998), demonstrate that Plaintiffs have failed  
12 to satisfy the "major federal action" requirement. Northcoast  
13 presented a challenge to an inter-agency program that involved  
14 activities that did not have an "actual or immediately threatened  
15 effect," because they implicated setting guidelines and goals for  
16 research, management strategies and information sharing, rather  
17 than specific activities with a direct impact. Id. at 669-70.  
18 Here, however, Plaintiffs do not challenge such a broad program  
19 involving activities preliminary to discrete agency action.  
20

21 Relying on National Wildlife Federation v. Espy, 45 F.3d  
22 1337, 1343 (9th Cir. 1995), Defendants also argue that the FHFA's  
23 adoption of its PACE policy was not a major federal action because  
24 it did not alter an environmental status quo, as required to  
25 trigger obligations under the NEPA. Defendants' reliance on  
26 National Wildlife Federation is unavailing. In that case, the  
27 court found that the contested agency action did not alter the  
28

1 environmental status quo because the grazing of a certain wetland  
2 parcel was occurring before the agency transferred the parcel and  
3 the transfer would simply allow a continuation of the grazing.  
4 Id. at 1343-44. Here Plaintiffs allege that the FHFA's policy  
5 changed the status quo by thwarting financing for PACE-encumbered  
6 properties, thus curtailing energy conservation efforts that were  
7 ongoing beforehand. The policy, by the terms of the July 2010  
8 statement, aimed to place PACE programs on "pause," and changed  
9 the status quo by blocking these emerging environmental  
10 conservation efforts, through the direction of marketplace  
11 practices.

12  
13 For purposes of this motion, Plaintiffs sufficiently allege  
14 that the FHFA's policy entailed a major federal action under the  
15 NEPA.

16  
17 Finally, Defendants contend that environmental review would  
18 serve no purpose because the FHFA is statutorily precluded from  
19 altering its safety and soundness determinations based on  
20 environmental concerns. The NEPA gives way when a competing  
21 statute creates an "irreconcilable and fundamental conflict."  
22 Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma,  
23 426 U.S. 776, 788 (1976).

24  
25 The FHFA's dual obligations to ensure that the regulated  
26 entities operate safely and soundly and in the public interest do  
27 not indicate that the agency's consideration of the environmental  
28 impact resulting from its actions with regard to the PACE programs

1 is precluded. Notably, the NEPA does not mandate results, but  
2 simply requires a process by which the agency considers  
3 environmental impact and informs the public of its decision-making  
4 process.

5 Defendants argue that the FHFA was required to act without  
6 regard to environmental concerns due to the national housing  
7 crisis. The FHFA, however, admittedly engaged in a year-long  
8 review, consulting with various stakeholders. Thus, Defendants  
9 cannot be heard to argue that the urgency of the crisis and the  
10 FHFA's statutory duties created an insurmountable conflict with  
11 NEPA's requirements. Cf., Flint Ridge, 426 U.S. at 791 (finding  
12 an irreconcilable conflict because the relevant statute required a  
13 time frame that did not permit NEPA compliance).

14  
15 Department of Transportation v. Public Citizen is not on  
16 point. There the Supreme Court found that an agency's EIS was not  
17 required to include the environmental impact of Mexican motor  
18 carriers entering the United States because the agency had no  
19 authority to prevent the carriers from cross-border operations.  
20 541 U.S. 752, 767 (2004). Here, however, there is no categorical  
21 bar to the FHFA's authority to consider environmental impacts.  
22 Grand Council of the Crees v. Federal Energy Regulatory  
23 Commission, 198 F.3d 950 (D.C. Cir. 2000), is inapposite because  
24 it did not address the Safety and Soundness Act.  
25

26  
27 Because Plaintiffs have satisfied the zone of interest test  
28 and alleged a major federal action that has altered the

1 environmental status quo, and because environmental considerations  
2 are not precluded by the Safety and Soundness Act, Plaintiffs have  
3 stated cognizable claims for violation of the NEPA.

4 C. Tenth Amendment Commerce Clause

5 Placer County claims that the FHFA violated the  
6 Constitution's Tenth Amendment Commerce Clause by interfering with  
7 the county's taxation and assessment powers. Even if the FHFA  
8 interfered with Placer County's authority, the FHFA's actions are  
9 not barred by the federal Commerce Clause. It is well established  
10 that Congress may impede a State's power to tax, where the  
11 enactment is a proper exercise of its constitutional authority.  
12 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). In a  
13 recent case affirming a dismissal of a Tenth Amendment challenge  
14 to a federal banking regulation, the Supreme Court stated,  
15 "Regulation of national banking operations is a prerogative of  
16 Congress under the Commerce and Necessary and Proper Clauses."  
17 Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007). Placer  
18 County's response that state and local laws authorizing PACE  
19 programs do not attempt to regulate banks is unavailing because  
20 its Tenth Amendment claim challenges the FHFA's action pursuant to  
21 the Safety and Soundness Act.  
22  
23

24 Furthermore, Placer County concedes that its claim does not  
25 arise from a theory that a federal program commandeered the  
26 legislative process of the States by directly compelling them to  
27 enact and enforce a federal regulatory program. Yet it cites no  
28

1 authority for the proposition that a federal agency's action that  
2 indirectly interferes with a state or local sovereign's assessment  
3 powers may form the basis for a Tenth Amendment claim.

4 Accordingly, Placer County's Tenth Amendment claim is dismissed.

5 Leave to amend is not warranted because Placer County's theory is  
6 not cognizable.

7 D. Spending Clause

8  
9 Where Congress grants money pursuant to its powers under the  
10 Constitution's Spending Clause, any conditions imposed on receipt  
11 of the funds must be unambiguously authorized by Congress.

12 Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17

13 (1981). Placer County alleges that the FHFA violated the Spending  
14 Clause by placing conditions on PACE programs without clear  
15 authorization from Congress to do so. Defendants, however,  
16 correctly point out that the FHFA's policy does not impose any  
17 terms, let alone ambiguous requirements, for States and counties  
18 to receive federal funds to support their PACE programs. Rather,  
19 the policy directed the regulated entities to undertake  
20 "prudential actions" with respect to the programs. A requirement  
21 that makes a program more costly or difficult to operate, without  
22 imposing a substantive condition not clearly required by Congress,  
23 does not give rise to a Spending Clause violation. See Winkelman  
24 ex rel. Winkelman v. Parma City School Dist., 550 U.S. 516, 533-34  
25 (2007). Therefore, Placer County's Spending Clause claim is  
26  
27 dismissed without leave to amend.  
28

## 1 E. Claim for Declaratory Relief

2 Plaintiffs seek declaratory relief in the form of an order  
3 stating that, under California law, debt obligations created by  
4 their PACE programs are assessments, not loans. The Court will  
5 resolve the asserted substantive claims, but a claim for  
6 declaratory relief is not a means for a party independently to  
7 seek court interpretations of legal terms. Plaintiffs' claim for  
8 declaratory relief is dismissed without leave to amend.  
9

## 10 III. State Law Claims

11 Plaintiffs' state law claims are subject to dismissal due to  
12 various deficiencies in their allegations that Defendants point  
13 out. However, because the claims are clearly preempted by federal  
14 law, the Court dismisses them without leave to amend for that  
15 reason. Federal preemption arises under the Supremacy Clause of  
16 the United States Constitution and applies in the following three  
17 circumstances:  
18

19 First, Congress may state its intent through an  
20 express preemption statutory provision. Second, in  
21 the absence of explicit statutory language, state law  
22 is preempted where it regulates conduct in a field  
23 that Congress intended the Federal Government to  
24 occupy exclusively . . . Finally, state law that  
25 actually conflicts with federal law is preempted.

26 Kroske v. U.S. Bank Corp., 432 F.3d 976, 981 (9th Cir. 2005)  
27 (citing English v. General Elec. Co., 496 U.S. 72, 78-79 (1990)).

28 In general, there is a presumption against federal  
preemption. See id. Here, the presumption against federal  
preemption does not apply because there is a history of a

1 significant federal presence in the area of regulating the safety  
2 and soundness of the Enterprises. See Silvas v. E\*Trade Mortgage  
3 Corp., 514 F.3d 1001, 1005 (9th Cir. 2008). Federal preemption  
4 based on an actual conflict arises "where it is impossible for a  
5 private party to comply with both state and federal requirements,  
6 or where state law stands as an obstacle to the accomplishments  
7 and execution of the full purposes and objectives of Congress."  
8 English, 496 U.S. at 79 (internal citations removed). Congress  
9 has established the FHFA to serve as the primary regulatory  
10 authority supervising the Enterprises and the Federal Home Loan  
11 Banks. Exposure to state law claims would undermine the FHFA's  
12 ability to establish uniform and consistent standards for the  
13 regulated entities, and thwart its mandate to assure their safe  
14 and sound operation. If Plaintiffs' state claims were not  
15 preempted, liability based on these claims would create obstacles  
16 to the accomplishment of the policy goals set forth in the Safety  
17 and Soundness Act.

20 Plaintiffs argue, in the alternative, that a ruling on the  
21 federal preemption defense is premature. They suggest that the  
22 FHFA must make a factual showing that PACE-encumbered mortgages  
23 pose an actual obstacle to the purpose and goals of the Safety and  
24 Soundness Act. Plaintiffs do not cite any authority for requiring  
25 such a showing, and it would defeat the purpose of conflict  
26 preemption, which is to preserve the supremacy of federal law in  
27 an area that Congress intended to occupy. See Fidelity Federal  
28

1 Savings and Loans Ass'n. v. de la Cuesta, 458 U.S. 141, 169-70  
2 (1982). Accordingly, preemption does not depend on such a  
3 showing.

4 Plaintiffs' state law claims are preempted by federal law and  
5 are dismissed without leave to amend.

6 IV. Preliminary Injunction

7 Sonoma County has moved for a preliminary injunction, which  
8 California has supported as amicus curiae. Sonoma County requests  
9 that the status quo be restored by setting aside Defendants'  
10 policies regarding PACE debt obligations. At the Court's request,  
11 the parties filed supplemental briefing on the balance of  
12 hardships that might result from a narrower injunction directing  
13 the FHFA merely to initiate the notice and comment process,  
14 without changing its current policies.  
15

16 "A plaintiff seeking a preliminary injunction must establish  
17 that he is likely to succeed on the merits, that he is likely to  
18 suffer irreparable harm in the absence of preliminary relief, that  
19 the balance of equities tips in his favor, and that an injunction  
20 is in the public interest." Winter v. Natural Res. Def. Council,  
21 Inc., 555 U.S. 7, 19 (2008). Alternatively, "a preliminary  
22 injunction could issue where the likelihood of success is such  
23 that serious questions going to the merits were raised and the  
24 balance of hardships tips sharply in plaintiff's favor," so long  
25 as the plaintiff demonstrates irreparable harm and shows that the  
26 injunction is in the public interest. Alliance for the Wild  
27  
28

1 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation  
2 and internal quotation and editing marks omitted). The court may  
3 employ a sliding scale when considering a plaintiff's likelihood  
4 of success on the merits and the likelihood of irreparable harm.  
5 Id. "Under this approach, the elements of the preliminary  
6 injunction test are balanced, so that a stronger showing of one  
7 element may offset a weaker showing of another." Id.

8  
9 Sonoma County has not demonstrated a likelihood that it will  
10 prevail on the merits to obtain the sweeping relief it initially  
11 requested. Nor does the balance of hardships tip sharply in its  
12 favor with regard to that relief. However, Sonoma County has  
13 established a likelihood that it will succeed in its efforts to  
14 require the FHFA to comply with the APA's notice and comment  
15 requirements. The balance of hardships tips sharply towards  
16 Sonoma County in that the FHFA has failed to mention any prejudice  
17 that would result if it were to proceed with the notice and  
18 comment process, as long as it was not required to change its  
19 policy in the meantime. Thus, the Court GRANTS Sonoma County's  
20 motion for a preliminary injunction requiring the FHFA, without  
21 changing its current policy, to proceed with the notice and  
22 comment process relating to its policy on PACE-related debts.  
23

#### 24 CONCLUSION

25  
26 Plaintiffs have Article III standing, and the provisions of  
27 the Safety and Soundness Act do not preclude judicial review of  
28 Plaintiffs' claims. Plaintiffs, except for the Sierra Club, may

1 pursue their claims for violations of the APA. The Sierra Club's  
2 APA claims are dismissed without leave to amend. Plaintiffs have  
3 satisfied the requirements necessary to pursue claims for  
4 violation of the NEPA. Placer County's claims under the Tenth  
5 Amendment and the Spending Clause and Plaintiffs' claims for  
6 declaratory relief are dismissed without leave to amend.  
7 Plaintiffs' state law claims are preempted by federal law and are  
8 dismissed without leave to amend. Thus, Defendants' motions to  
9 dismiss are GRANTED IN PART AND DENIED IN PART. C 10-03084,  
10 Docket No. 49; C 10-03270, Docket Nos. 41 and 74; C 10-03317,  
11 Docket No. 18; C 10-04482, Docket No. 13.

12  
13 Sonoma County's motion for a preliminary injunction is  
14 GRANTED IN PART. C 10-03270, Docket No. 33. The Court will, by a  
15 separate order, require the FHFA, without withdrawing its July  
16 2010 statement or its February 2011 letter, to proceed with the  
17 notice and comment process with regard to those directives. The  
18 County shall submit a proposed form of order after submitting it  
19 to Defendants for approval as to form.  
20

21 IT IS SO ORDERED.

22  
23  
24 Dated: August 26, 2011



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27  
28  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge