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12 *City of Palm Desert*

13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 CITY OF PALM DESERT, a municipal  
16 corporation,  
17 Plaintiff,  
18 v.  
19 FEDERAL HOUSING FINANCE  
20 AGENCY; FEDERAL NATIONAL  
21 MORTGAGE ASSOCIATION; and  
22 FEDERAL HOME LOAN MORTGAGE  
23 CORPORATION,  
24 Defendants.

Case No.  
**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**JURISDICTION AND VENUE**

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2           1.       This Court has subject matter jurisdiction to hear this case pursuant to  
3 28 U.S.C. §1331 (action arising under the laws of the United States); 5 U.S.C. §701,  
4 et seq. (action arising under the Administrative Procedure Act); 12 U.S.C. §1452(f)  
5 (action involving the Federal Home Loan Mortgage Corporation); 12 U.S.C.  
6 §§1723a(a) (action involving the Federal National Mortgage Association); 28 U.S.C.  
7 §2201, et seq. (action for declaratory and injunctive relief); and 28 U.S.C. §1367  
8 (supplemental jurisdiction).

9           2.       This Court has personal jurisdiction over the defendants in that each  
10 defendant is present and does business within the Northern District of California.

11           3.       Venue is properly laid in this Court pursuant to 28 U.S.C. §1391(e)  
12 because a substantial part of the events or omissions giving rise to the claims alleged  
13 in this complaint occurred within the Northern District of California and the  
14 defendants are present in the Northern District of California.

**PARTIES**

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16           4.       Plaintiff, City of Palm Desert, is a municipal corporation, duly  
17 incorporated and organized under and pursuant to the provisions of the California  
18 Constitution and the general laws of the State of California.

19           5.       Defendant, Federal Housing Finance Agency (hereinafter “FHFA”) is  
20 an independent agency of the federal government created in 2008 pursuant to the  
21 Federal Housing Finance Regulatory Reform Act of 2008, 12 U.S.C. §4511, Pub.L.  
22 110-289, 122 Stats. 2661. Pursuant to the Act, FHFA has general supervisory and  
23 regulatory authority over the Federal National Mortgage Association (hereinafter  
24 “Fannie Mae”) and the Federal Home Loan Mortgage Corporation (hereinafter  
25 “Freddie Mac”). Plaintiff is informed and believes and thereupon alleges that on or  
26 about September 7, 2008, FHFA appointed itself Conservator of Fannie Mae and  
27 Freddie Mac.

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1           6. Defendant, Federal National Mortgage Association (hereinafter “Fannie  
2 Mae”) is a federally chartered government-sponsored enterprise. Fannie Mae is a  
3 corporation whose stock is publicly traded and which is subject to the regulations of  
4 the Securities and Exchange Commission. Fannie Mae purchases or guarantees  
5 home loans originated by lenders throughout the United States, in order to facilitate  
6 the availability of such lenders’ capital for the making of additional home loans to  
7 other borrowers. Fannie Mae finances the purchase of said loans through the  
8 issuance of obligations for purchase by investors throughout the United States,  
9 including debt securities (e.g., notes and bonds), equity securities (i.e., stock), and  
10 securities whose repayment is secured by “pools” of said home loans previously  
11 purchased by Fannie Mae. Pursuant to 12 U.S.C. §1723a(a), Fannie Mae has the  
12 power to sue and to be sued in both the state and federal courts.

13           7. Defendant, Federal Home Loan Mortgage Corporation (hereinafter  
14 “Freddie Mac”), is a federally chartered government-sponsored enterprise. Freddie  
15 Mac is a corporation whose stock is publicly traded and which is subject to the  
16 regulations of the Securities and Exchange Commission. Freddie Mac purchases or  
17 guarantees home loans originated by lenders throughout the United States, in order to  
18 facilitate the availability of such lenders’ capital for the making of additional home  
19 loans to other borrowers. Freddie Mac finances the purchase of said loans through  
20 the issuance of Freddie Mac obligations for purchase by investors throughout the  
21 United States, including debt securities (e.g., notes and bonds), equity securities (i.e.,  
22 stock), and securities whose repayment is secured by “pools” of said home loans  
23 previously purchased by Freddie Mac. Pursuant to 12 U.S.C. §1452(c), Freddie Mac  
24 has the power to sue and to be sued in both the state and federal courts.

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**FIRST CLAIM FOR RELIEF**

(Adoption of Regulations in Violation of Administrative Procedure Act)

8. Plaintiff repeats the allegations contained in paragraphs 1 through 7 of this complaint and incorporates them herein by this reference as though set forth again in full.

**I. Assessment Financing in California**

9. For more than 100 years, the State of California has authorized the construction of public works and improvements for the public good which are financed by the issuance of public agency bonds. Security for repayment of the bonds is assured by assessments which are levied on the benefitted properties over a period of years which matches the repayment schedule for the bonds, and which generally is limited in duration, correlating with a maximum term of 120% of the reasonably expected economic life of the financed public improvements, pursuant to federal tax laws. Pursuant to the Improvement Act of 1911, California Streets & Highways Code Section 5000, et seq., the obligation to repay assessments levied pursuant to the Act takes priority over all other obligations on the property – including any preexisting purchase money mortgage and any subordinate or secondary mortgage obligations. Plaintiff is informed and believes and thereupon alleges that defendants, Fannie Mae and Freddie Mac, have consistently and without exception purchased and guaranteed mortgages on California properties subject to assessment liens which enjoy a statutory priority over any underlying mortgage obligation.

10. On July 21, 2008, Governor Schwarzenegger signed into law Stats. 2008, Ch. 159, §1, (“AB 811”), an urgency statute which became effective immediately, to amend existing contractual assessment law set forth in Chapter 29 of Part 3 of the Improvement Act of 1911, California Streets & Highways Code Section 5898.10 et seq., to authorize local governments to finance real property improvements which reduce energy use and provide clean electrical power. This

1 legislation was drafted by the City of Palm Desert and introduced by Assembly  
2 Member Lloyd Levine. Examples of the improvements contemplated by AB 811  
3 include distributed generation renewable energy sources, solar electrical generation  
4 panels, energy efficient windows and glass doors, attic and wall insulation, tankless  
5 water heaters, energy efficient pool pumps and natural gas pool heaters, and energy  
6 efficient heating, ventilating and air conditioning (HVAC) systems. As with other  
7 public improvements, financing of these improvements is authorized by law to be  
8 financed by the issuance of public agency bonds. Streets & Highways Code §§  
9 5898.22(d) and 5898.28.

10       11. In California, this type of financing is referred to as an “AB 811  
11 program” or “contractual assessment program” to finance the installation of  
12 distributed generation renewable energy sources or energy efficiency improvements  
13 that are permanently fixed to real property. Approximately 22 other states have  
14 adopted similar legislation following California’s, and these are referred to nationally  
15 as “Property Assessed Clean Energy” (or “PACE”) programs.

16       12. Security for repayment of the AB 811 program bonds is assured by  
17 assessments which are levied on the benefitted properties over a period of years  
18 which matches the repayment schedule for the bonds and which generally is limited  
19 in duration, correlating with a maximum term of 100% of the reasonably expected  
20 economic life of the financed energy improvements (ranging generally from 10-20  
21 years), pursuant to Palm Desert’s contractual assessment program established under  
22 AB 811 and in accordance with the United States Department of Energy’s best  
23 practice guidelines and underwriting standards for PACE programs, issued on May 7,  
24 2010. As with benefit assessments imposed for public improvements over the past  
25 century, the obligation to repay the contractual assessments takes priority over all  
26 other obligations on the property – including any purchase money mortgage and any  
27 subordinate or secondary mortgage obligation.

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1 a public works project (i.e., undergrounding of power lines or installation of  
2 streetlights). The local government then provides the up-front funds for the project,  
3 and the property owners pay an annual assessment until those funds, plus interest, are  
4 repaid. . . . [AB 811] will . . . help thousands of residents afford solar energy and  
5 help California reach its goal to reduce greenhouse gas emissions by 25% in 2025.”

6 16. The City of Palm Desert’s Energy Independence Program helps its  
7 residents (i) to pay their utility bills by reducing spikes in energy bills during peak  
8 months (sometimes completely offsetting a property’s power consumption with on-  
9 site generation), (ii) to pay for the energy improvement with the energy savings  
10 generated by the improvement, and (iii) to achieve the public benefits of reduction of  
11 carbon emissions, helping to alleviate global warming, and energy conservation.

12 17. The May 29, 2008 bill analysis of AB 811 by the California Senate  
13 Local Government Committee and the June 10, 2008 bill analysis by the California  
14 Senate Floor both state, “In response to rising energy costs and concerns about  
15 climate change, local governments want to promote energy efficiency and renewable  
16 energy generation. . . . By lowering energy costs, reducing energy demand, and  
17 expanding generation from renewable energy sources, the voluntary contractual  
18 benefit assessment programs authorized by AB 811 will benefit residents throughout  
19 California.” As summarized by the Director of the Office of Energy Management of  
20 the City of Palm Desert in 2008, “The Energy Independence Program is a rallying  
21 cry for responsible local action. It’s all-American and provides independence from:  
22 the helplessness of high bills; conventional, carbon-based generation and fuels;  
23 utilizing scarce resources that must be saved for future generations; international  
24 tensions over energy supplies; and climate changes due to individual actions.”

25 18. In adopting Resolution No. 08-75 announcing its intention to establish  
26 the Energy Independence Program, the City Council of the City of Palm Desert  
27 determined that “Energy conservation efforts, including the promotion of energy  
28 efficiency improvements to residential, commercial, industrial, or other real property,

1 are necessary to address the issue of global climate change,” and additionally found  
2 that a public purpose will be served by the Energy Independence Program and the  
3 City’s financing of renewable energy and energy efficiency improvements to real  
4 property within the City. Similarly, the Program Report and Administrative  
5 Guidelines required by AB 811 and approved by Resolution No. 08-89 states that the  
6 program “shores up the local economy, the California power grid, and national and  
7 global energy interests, and makes it possible for Palm Desert to fulfill energy  
8 conservation and climate protection commitments. The City has established a goal to  
9 reduce electric and natural gas energy consumption by 30%.”

10 *B. State of California Energy Action Plan*

11 19. Palm Desert’s City-wide goal to reduce overall electricity and natural  
12 gas consumption by 30% within 5 years was established in partnership with the  
13 City’s serving utilities, Southern California Edison and Southern California Gas  
14 Company, and The Energy Coalition, a non-profit corporation serving Southern and  
15 Northern California to further the State of California Energy Action Plan.

16 20. The State of California Energy Action Plan responds to the national  
17 issue of limited conventional energy resources, marked particularly by the Western  
18 United States Energy Crisis of 2000 and 2001 preceding the adoption of the plan and  
19 culminating in the bankruptcy of Pacific Gas and Electric Company (PG&E) and the  
20 financial distress of Southern California Edison, both in early 2001.

21 21. As estimated by the Public Policy Institute of California, a nonprofit,  
22 nonpartisan think tank, the harmful economic effect of the Western United States  
23 Energy Crisis of 2000 and 2001 upon the California economy is estimated to have  
24 cost Californians \$40 billion to \$45 billion over the 2-year period from 2001 through  
25 2003, or approximately 3.5% of the yearly total economic output of California.

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1           22. The State of California Energy Action Plan was adopted on May 8,  
2 2003 by the California Energy Commission, the California Public Utilities  
3 Commission, and the Consumer Power and Conservation Financing Authority.<sup>1</sup> The  
4 plan “identifies specific goals and actions to eliminate energy outages and excessive  
5 price spikes in electricity or natural gas,” and aims to establish specific actions to  
6 “[e]nsure that adequate, reliable, and reasonably-priced electrical power and natural  
7 gas supplies, including prudent reserves, are achieved and provided through policies,  
8 strategies, and actions that are cost-effective and environmentally sound for  
9 California’s consumers and taxpayers.” The plan places highest priority on energy  
10 efficiency, demand response, renewable and distributed generation to provide the  
11 preferred means to meet California’s energy needs.

12           23. The second State of California Energy Action Plan, dated September 21,  
13 2005, was adopted by the California Energy Commission and the California Public  
14 Utilities Commission to “further expand the scope of the original EAP [Energy  
15 Action Plan] to describe research, development and demonstration activities that are  
16 critical to realizing our energy goals.” In 2006, the California Public Utilities  
17 Commission formally approved funding for the Palm Desert Energy Efficiency  
18 Partnership Demonstration Project, also known as “Set to Save” (“Set To Save  
19 Partnership”) - a pilot energy efficiency program for the City of Palm Desert and its  
20 energy partners that works together with the Energy Independence Program toward  
21 achieving the City’s thirty percent reduction in energy and natural gas consumption.  
22 The Set To Save Partnership and the Energy Independence Program offer measures  
23 and incentives to property owners in residential as well as commercial sectors in a  
24 coordinated effort to achieve the targeted energy reduction.

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27 <sup>1</sup> The Consumer Power and Conservation Financing Authority is now defunct.  
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1           26. As to greenhouse gases, the January 15, 2008 bill analysis of AB 811 by  
2 the California Assembly Committee on Local Government states, “California is the  
3 12th largest producer of greenhouse gases in the world. While AB 1493 (Pavley),  
4 Chapter 200, Statutes of 2002, and AB 32 (Nunez & Pavley), Chapter 488, Statutes  
5 of 2006, address the reduction of carbon emissions from vehicle tailpipes and large  
6 stationary sources, it is generally acknowledged that the state and its citizens must  
7 look for every possible means to further reduce these emissions.”

8           27. Similarly, the January 23, 2008 bill analysis of AB 811 by the California  
9 Assembly Committee on Appropriations states, “This bill is intended to further the  
10 goals of AB 32 (Nunez and Pavley), Chapter 488, Statutes of 2006, relating to  
11 reductions in greenhouse gas emissions, by encouraging energy conservation efforts.  
12 The bill provides homeowners with a means of financing large up-front capital costs  
13 associated with energy efficiency improvements to their property through a system of  
14 contractual assessments. The resulting project provides both a public benefit and an  
15 incidental benefit to particular homeowners making the investment.”

16                           *B. White House “Recovery Through Retrofit” Report*

17           28. In October 2009, the White House Middle Class Task Force and White  
18 House Council on Environmental Quality released a report entitled, “Recovery  
19 Through Retrofit,” containing a proposal for Federal action to lay the groundwork for  
20 a self-sustaining home energy efficiency retrofit industry, including a  
21 recommendation in support of “PACE” programs.<sup>3</sup> The recommendations in the  
22 report were developed through a broad interagency process with the Office of the  
23 Vice President, eleven federal departments and agencies, and six White House  
24 Offices, coordinated by the White House Council on Environmental Quality.

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28 <sup>3</sup> <http://www.whitehouse.gov/administration/eop/ceq/initiatives/retrofit>.

1           29.   Emphasizing the importance of addressing the global climate change  
2 crisis, the “Recovery Through Retrofit” Report states, “There are almost 130 million  
3 homes in this country. Combined, they generate more than 20 percent of our  
4 nation’s carbon dioxide emissions, making them a significant contributor to global  
5 climate change. Existing techniques and technologies in energy efficiency  
6 retrofitting can reduce home energy use by up to 40 percent per home and lower  
7 associated greenhouse gas emissions by up to 160 million metric tons annually by the  
8 year 2020. Furthermore, home energy efficiency retrofits have the potential to  
9 reduce home energy bills by \$21 billion annually, paying for themselves over time.”  
10 Middle Class Task Force and Council on Env’tl. Quality, Exec. Office of the Pres. of  
11 the U.S., *Recovery Through Retrofit* 1 (2009). According to data compiled by the Set  
12 To Save Partnership, residential energy consumers in the City of Palm Desert  
13 account for 44% of the total electric usage and 75% of the total natural gas usage.  
14 (<http://www.settosave.com/about/index2.asp>) Additionally, the potential of the  
15 Energy Independence Program and other AB 811 programs extends beyond  
16 residential properties, as California law authorizes the use of contractual assessments  
17 to finance energy efficiency and renewable energy improvements to commercial,  
18 industrial, agricultural, or other real property as well. Streets & Highways Code  
19 §§ 5898.14(a)(2) and 5898.21.

20           30.   The “Recovery Through Retrofit” report additionally finds that despite  
21 the real energy cost savings and environmental benefits associated with improving  
22 home energy efficiency, a series of barriers have prevented a self-sustaining retrofit  
23 market from forming, including lack of access to information, lack of access to  
24 financing, and lack of access to skilled workers. An additional barrier to home  
25 energy retrofit identified in the report is the “high turnover rate of housing in the  
26 United States . . . The debt accrued by a retrofit is tied to the individual making the  
27 investment, rather than the home itself, even though the savings are passed on to the  
28 next owner of the home. This means that retrofits frequently don’t pay for

1 themselves before the homeowner who took the initiative moves . . . [PACE  
2 financing] tie[s] the retrofitting loan to the property instead of the individual,  
3 permitting the energy retrofit assessment to be paid off in annual installments as part  
4 of the property’s usual property tax bill.” Middle Class Task Force and Council on  
5 Env’tl. Quality, Exec. Office of the Pres. of the U.S., *Recovery Through Retrofit* 8  
6 (2009).

7 31. The “Recovery Through Retrofit” report identifies “PACE” programs as  
8 part of the solution for overcoming these barriers: “PACE programs address these  
9 barriers by providing access to capital that might be otherwise be limited to  
10 homeowners. PACE provides beneficial financial terms, streamlines the application  
11 process with lower application and transaction fees relative to other lending options,  
12 and establishes a financing mechanism in which that debt obligation is tied to the  
13 property and the owners receiving the energy savings benefits.” Middle Class Task  
14 Force and Council on Env’tl. Quality, Exec. Office of the Pres. of the U.S., *Recovery*  
15 *Through Retrofit* 8 (2009).

16 32. As discussed in the January 15, 2008 California Assembly Committee  
17 on Local Government’s bill analysis of AB 811 and the January 28, 2008 California  
18 Assembly Floor Analysis, AB 811 is inherently different from home equity  
19 financing, in that it prohibits contractual assessment programs from being used to  
20 finance the purchase of appliances or installations that are not permanently fixed to  
21 real property (such as a new energy-efficient refrigerator or dishwasher that can  
22 removed by the owner). The requirement that the energy improvement be  
23 permanently fixed to real property, Streets & Highways Code § 5898.12, results in  
24 the related energy savings accruing to the owner of the property – the same person  
25 responsible for payment of the assessment.

26 *C. U.S. Department of Energy*

27 33. In October 2009, the United States Department of Housing and Urban  
28 Development and the United States Department of Energy jointly announced their

1 policy to support “PACE” programs through grants under the American Recovery  
2 and Reinvestment Act’s Energy Efficiency and Conservation Block Grant Program.  
3 Specifically, the Department of Energy awarded over \$300 million directly to  
4 specified local governments in the State of California, and an additional \$35 million  
5 to the California Energy Commission for distribution to smaller local government  
6 agencies.

7       34. On May 7, 2010, the United States Department of Energy issued its best  
8 practice guidelines and underwriting standards for PACE programs. These  
9 guidelines and underwriting standards are the culmination of the directive to federal  
10 agencies set forth in the White House’s “Recovery Through Retrofit” Report, to  
11 “speed the adoption of more detailed, uniform ‘Best Practices’ that include robust  
12 and effective homeowner and lender protections,” that “build[] on the expertise of  
13 the Federal Government, the Department of Energy, the Department of Housing and  
14 Urban Development, and the Department of the Treasury.” Although adopted prior  
15 to the issuance of these guidelines, Palm Desert’s underwriting criteria are in  
16 substantial compliance with, and in some instances are more stringent than, the best  
17 practice guidelines and underwriting standards issued by the U.S. Department of  
18 Energy.

19                                   **IV. AB 811 and Public Health and Welfare**

20       35. On December 15, 2009, the United States Environmental Protection  
21 Agency published in the Federal Register (under Docket ID No. EPA-HQ-OAR-  
22 2009-0171) its final findings regarding greenhouse gases under Section 202(a) of the  
23 Clean Air Act,<sup>4</sup> that confirm with substantial evidence the concerns of the People of  
24 the State of California, the California Legislature, the White House Middle Class  
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27 <sup>4</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under  
28 Section 202(a) of the Clear Air Act, 74 Fed. Reg. 66,496 (2009).

1 Task Force, and the White House Council of Environmental Quality, as to the  
2 dangers of greenhouse gases and global climate change.

3 36. Notably, these findings include the finding that the current and projected  
4 concentrations of the six key well-mixed greenhouse gases - carbon dioxide,  
5 methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur  
6 hexafluoride - in the atmosphere threaten the public health and welfare of current and  
7 future generations. Endangerment and Cause or Contribute Findings for Greenhouse  
8 Gases Under Section 202(a) of the Clear Air Act, 74 Fed. Reg. 66,496-66,499  
9 (2009).

10 37. The 50-page Federal Register publication constituting the United States  
11 Environmental Protection Agency’s December 15, 2009 findings includes substantial  
12 discussion and documentation as to some of the more commonly known dangers of  
13 global warming. As stated in the agency’s December 7, 2009 press release,  
14 “Scientific consensus shows that as a result of human activities, GHG [greenhouse  
15 gas] concentrations in the atmosphere are at record high levels and data shows that  
16 the Earth has been warming over the past 100 years, with the steepest increase in  
17 warming in recent decades. The evidence of human-induced climate change goes  
18 beyond observed increases in average surface temperatures; it includes melting ice in  
19 the Arctic, melting glaciers around the world, increasing ocean temperatures, rising  
20 sea levels, acidification of the oceans due to excess carbon dioxide, changing  
21 precipitation patterns, and changing patterns of ecosystems and wildlife.”

22 38. Further, the United States Environmental Protection Agency’s  
23 December 15, 2009 findings discuss scientific documentation of how elevated  
24 concentrations of greenhouse gases and associated climate change endanger public  
25 health. Among such public health risks are fatalities on account of greater incidences  
26 of extreme weather events occasioned by the greenhouse gas-related climate  
27 changes: “The impact on mortality and morbidity associated with increases in  
28 average temperatures which increase the likelihood of heat waves also provides

1 support for a public health endangerment finding. There are uncertainties over the  
2 net health impacts of a temperature increase due to decreases in cold-related  
3 mortality, but there is some recent evidence that suggests that the net impact on  
4 mortality is more likely to be adverse, in a context where heat is already the leading  
5 cause of weather-related deaths in the United States.” Endangerment and Cause or  
6 Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clear Air  
7 Act, 74 Fed. Reg. 66,496, 66,526 (2009).

8         39. Palm Desert experiences an average of 350 days of sunshine each year.  
9 Summer highs above 108 degrees are common and sometimes exceed 120 degrees,  
10 and summer night lows often stay above 82 degrees. Palm Desert’s residents include  
11 many senior citizens living on a limited fixed income, and the inability of senior  
12 citizen residents to pay a seasonally high energy bill during the summer may result in  
13 the utility shutting off services, drastically increasing the chances of heat-related  
14 fatalities. Energy efficient and renewable improvements financed by Palm Desert’s  
15 AB 811 program help to reduce spikes in energy bills during peak demand months.

16         40. The United States Environmental Protection Agency’s December 15,  
17 2009 findings additionally discuss scientific evidence of the impacts of climate  
18 change on energy consumption and production, and on key climate-sensitive aspects  
19 of the nation’s infrastructure. The findings state that greenhouse gas-associated  
20 climate change “is expected to call for an increase in electricity production,  
21 especially supply for peak demand. The U.S. energy sector, which relies heavily on  
22 water for cooling capacity and hydropower, may be adversely impacted by changes  
23 to water supply in reservoirs and other water bodies.” Endangerment and Cause or  
24 Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clear Air  
25 Act, 74 Fed. Reg. 66,496, 66,533-66,534 (2009). As to infrastructure, the findings  
26 state, “The significance of gradual climate change, *e.g.*, increase in the mean  
27 temperature, lies in changes in the intensity and frequency of extreme events.  
28 Extreme weather events could threaten U.S. energy infrastructure (transmission and

1 distribution), transportation and infrastructure (roads, bridges, airports and seaports),  
2 water infrastructure, and other built aspects of human settlement. Moreover, soil  
3 subsidence caused by the melting of permafrost in the Arctic region is a risk to gas  
4 and oil pipelines, electrical transmission towers, roads, and water systems. . . .  
5 Overall, the evidence strongly supports the view that climate change presents risks of  
6 serious adverse impacts on public welfare from the risk to energy production and  
7 distribution as well as risks to infrastructure and settlements.” Endangerment and  
8 Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the  
9 Clear Air Act, 74 Fed. Reg. 66,496, 66,534 (2009).

10 41. The United States Environmental Protection Agency’s December 15,  
11 2009 findings were issued in response to a United States Supreme Court decision on  
12 April 2, 2007, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Court  
13 found that greenhouse gases are air pollutants covered by the Clean Air Act, and  
14 holding that the Administrator of the United States Environmental Protection Agency  
15 must determine whether or not emissions of greenhouse gases from new motor  
16 vehicles cause or contribute to air pollution which may reasonably be anticipated to  
17 endanger public health or welfare, or whether the science is too uncertain to make a  
18 reasoned decision. The United States Environmental Protection Agency received  
19 over 380,000 public comments during the 60-day public comment period, and the  
20 agency’s responses to the public comments on the proposed findings are available on  
21 the agency’s website.

22 **V. Palm Desert’s Validation Judgment**

23 42. The validity and legality of City of Palm Desert’s assessment bonds  
24 financing the Energy Independence Program, the superior lien priority of  
25 assessments levied thereunder and all proceedings related thereto, including  
26 Resolution No. 08-89, against all legal challenges, were all adjudicated conclusively,  
27 pursuant to California Code of Civil Procedure Section 860, *et seq.*, by the Riverside  
28 County Superior Court on May 21, 2010 (Docket No. RIC 10000792). A true and

1 copy of the judgment in that validation proceeding is attached hereto as Exhibit A  
2 and incorporated herein by this reference.

3 **VI. FHFA’s Cursory July 6, 2010 Regulation**

4 43. On July 6, 2010, FHFA issued a regulation determining that “energy  
5 retrofit lending programs present significant safety and soundness concerns that must  
6 be addressed by” Fannie Mae and Freddie Mac. A true and correct copy of FHFA’s  
7 July 6, 2010, regulation is attached hereto as Exhibit B and incorporated herein by  
8 this reference.

9 44. The Administrative Procedure Act, 5 U.S.C. §551 sets forth the process  
10 and requirements for adoption of a regulation by a federal agency, including  
11 publication of the proposed regulation in the Federal Register, providing a general  
12 statement of the basis and purpose of the proposed regulation, and providing an  
13 opportunity for public comment on the proposed regulation prior to its adoption.

14 45. Plaintiff is informed and believes and thereupon alleges that the FHFA’s  
15 July 6, 2010, regulation was never published in the Federal Register and in numerous  
16 other respects did not conform to or comply with the requirements of the  
17 Administrative Procedure Act.

18 46. The practical effect of the July 6, 2010, FHFA regulation is to  
19 discriminate against and prohibit superior priority assessment liens for energy retrofit  
20 programs while at the same time continuing to recognize superior priority assessment  
21 liens for other public benefit improvements authorized by California law, such as  
22 street lighting, undergrounding of utility lines, public landscaping, and sewerage  
23 collection systems.

24 47. Plaintiff is informed and believes and thereupon alleges that following  
25 the July 6, 2010, regulation issued by FHFA, the contractual assessment clean energy  
26 program in Palm Desert, as well as AB 811 programs in other jurisdictions  
27 throughout California, have either come to an immediate halt or are suffering  
28 discriminating acts by lenders, notwithstanding Palm Desert’s implementation of

1 underwriting guidelines that are substantially in compliance with, and in some  
2 instances are more stringent than, the best practice guidelines and underwriting  
3 standards for PACE programs, issued by the United States Department of Energy on  
4 May 7, 2010, and notwithstanding other jurisdictions’ implementation of, or  
5 willingness to implement, such guidelines.

6 48. Review of plaintiff’s claim of FHFA’s noncompliance with the  
7 Administrative Procedure Act is authorized by the Administrative Procedure Act, 5  
8 U.S.C. §706(2)(D).

9 **SECOND CLAIM FOR RELIEF**

10 (Violation of National Environmental Policy Act)

11 49. Plaintiff repeats the allegations contained in paragraphs 1 through 48 of  
12 this complaint and incorporates them herein by this reference as though set forth  
13 again in full.

14 50. The National Environmental Policy Act, 42 U.S.C. §4332 et seq., and its  
15 implementing regulations require any federal agency to prepare an environmental  
16 impact analysis or environmental impact statement prior to approving a major action  
17 or project which may significantly affect the environment.

18 51. The FHFA’s July 6, 2010, regulation was a major action or project by a  
19 federal government agency that may significantly affect the environment –  
20 specifically by precluding energy conservation and clean energy projects throughout  
21 the United States utilizing assessment lien financing. The contractual assessment  
22 energy program in the City of Palm Desert was expressly authorized by California  
23 law, was established in furtherance of the California State Energy Action Plan, and  
24 was validated by the Superior Court of the State of California.

25 52. Plaintiff is informed and believes and thereupon alleges that FHFA  
26 failed to prepare any kind of environmental impact analysis or environmental impact  
27 statement prior to adopting the July 6, 2010, regulation, and in numerous other  
28 respects failed to comply with the requirements of the National Environmental

1 Protection Act. Review of plaintiff’s claim of noncompliance is authorized by the  
2 Administrative Procedure Act, 5 U.S.C. §706(2)(D).

3 **THIRD CLAIM FOR RELIEF**

4 (Adoption of Arbitrary, Capricious, and Irrational Regulation)

5 53. Plaintiff repeats the allegations contained in paragraphs 1 through 52 of  
6 this complaint and incorporates them herein by this reference as though set forth  
7 again in full.

8 54. The summary prohibition of all superior priority contractual assessment  
9 lien programs in the nation by the adoption of the July 6, 2010, FHFA regulation was  
10 and is arbitrary, capricious, and irrational in the following respects:

- 11 (a) The regulation does not distinguish between superior lien PACE  
12 programs in states which require acceleration of the assessment  
13 obligation in the event of a default, and superior lien PACE programs in  
14 other states, such as California, which do not authorize acceleration of  
15 the assessment obligation;
- 16 (b) The regulation ignores the fact that lien priority for assessments,  
17 authorized in California for the last 100 years, does not violate or run  
18 contrary to the Fannie Mae or Freddie Mac Uniform Security Interests –  
19 to the contrary, plaintiff is informed and believes and thereupon alleges  
20 that more mortgages on California residential property have been  
21 purchased or guaranteed by Fannie Mae and Freddie Mac than in any  
22 other State over the past fifty years;
- 23 (c) The regulation ignores the fact that most PACE programs in California  
24 are modeled after the AB 811 program in Palm Desert and follow  
25 prudent and conservative underwriting principles and standards  
26 consistent with those adopted by another agency of the federal  
27 government, the United States Department of Energy;
- 28

1 (d) The regulation undermines its own stated purpose of protecting the  
2 safety and soundness of mortgage loans by directing lenders to  
3 discriminate against property owners in PACE jurisdictions by  
4 tightening borrower debt-to-income ratios to account for possible future  
5 PACE assessments and by ignoring the additional income to be realized  
6 by the property owner in the form of utility savings, an action that will  
7 depress property values and mortgage lender collateral in PACE  
8 jurisdictions, when in fact a PACE assessment underwritten in  
9 accordance with Palm Desert’s guidelines and the United States  
10 Department of Energy guidelines will only result in an improved  
11 borrower debt-to-income ratio;

12 (e) The regulation undermines its own stated purpose of protecting the  
13 safety and soundness of mortgage loans by directing lenders to  
14 discriminate against property owners in PACE jurisdictions by adjusting  
15 loan-to-value ratios to reflect the maximum permissible PACE loan  
16 amount available to borrowers in PACE jurisdictions and by ignoring  
17 the additional value added to the property by the installation of the  
18 financed energy improvement, an action that will depress property  
19 values and mortgage lender collateral in PACE jurisdictions, when in  
20 fact a PACE improvement underwritten in accordance with Palm  
21 Desert’s guidelines and the United States Department of Energy  
22 guidelines adds an equal amount of value to the property as the principal  
23 amount of the PACE assessment;

24 (f) The regulation seeks to rewrite a century of California law, creating  
25 special rules (which the California Legislature has not approved) to  
26 apply only to assessment liens for clean energy and energy conservation  
27 retrofit programs and not to myriad other local improvement  
28

1 assessments that may finance improvements for public projects (such as  
2 median landscaping for public streets); and

3 (g) The regulation is completely contradictory to, and in conflict with, the  
4 regulations and underwriting standards for PACE programs approved by  
5 the United States Department of Energy on May 7, 2010, and operates  
6 to summarily veto more than \$300 million in grants to California’s state  
7 and local governments by the United States Department of Energy  
8 pursuant to the American Recovery and Reinvestment Act’s Energy  
9 Efficiency and Conservation Block Grant Program.

10 55. FHFA is prohibited by the Fourteenth Amendment to the United States  
11 Constitution, by the Administrative Procedure Act, and by other provisions of federal  
12 law from adopting regulations that are arbitrary, capricious, and irrational on their  
13 face and in their application.

14 **WHEREFORE**, plaintiff, City of Palm Desert, prays judgment as follows:

15 1. For a judgment against defendant, Federal Housing Finance Agency,  
16 declaring the FHFA July 6, 2010, regulation invalid, null and void for failure to  
17 comply with the Administrative Procedure Act and ordering FHFA to follow the  
18 Administrative Procedure Act and to consider and formally comment on the United  
19 States Department of Energy Guidelines in its rulemaking process;

20 2. For a judgment against defendants, Federal Housing Finance Agency,  
21 Federal Home Loan Mortgage Corporation, and Federal National Mortgage  
22 Association, declaring the FHFA July 6, 2010, regulation invalid, null and void for  
23 failure to comply with the National Environmental Policy Act;

24 3. For a judgment against defendants, Federal Housing Finance Agency,  
25 Federal Home Loan Mortgage Corporation, and Federal National Mortgage  
26 Association, declaring the FHFA July 6, 2010, regulation invalid, null and void on  
27 grounds that it is arbitrary, capricious, and irrational in violation of the United States  
28 Constitution and the laws of the United States;

1           4.     For a judgment against defendants, Federal Housing Finance Agency,  
2 Federal Home Loan Mortgage Corporation, and Federal National Mortgage  
3 Association, enjoining and prohibiting each of them from executing or enforcing the  
4 FHFA July 6, 2010, regulation;

5           5.     For a judgment against defendants, Federal Housing Finance Agency,  
6 Federal Home Loan Mortgage Corporation, and Federal National Mortgage  
7 Association, for plaintiff's costs of suit herein, including reasonable attorney's fees,  
8 to the extent allowed by law.

9           6.     For such other and further relief as may appear to the Court to be just  
10 and proper in the circumstances.

11 Dated: October 1, 2010

RICHARDS, WATSON & GERSHON  
A Professional Corporation  
MITCHELL E. ABBOTT  
DAVID G. ALDERSON

By: \_\_\_\_\_  
Mitchell E. Abbott  
Attorneys for Plaintiff,  
*City of Palm Desert*

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**DEMAND FOR TRIAL BY JURY**

Plaintiff, City of Palm Desert, hereby requests a trial by jury on all matters as to which a jury trial is available by law or rule of court.

Dated: October 1, 2010

**RICHARDS, WATSON & GERSHON**  
A Professional Corporation  
**MITCHELL E. ABBOTT**  
**DAVID G. ALDERSON**

By: \_\_\_\_\_  
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