

1 **INTRODUCTION**

2 1. Petitioners and Plaintiffs Center for Biological Diversity, Friends of the Gualala
3 River, and Coast Action Network (“Petitioners”) challenge the decision of the California
4 Department of Forestry and Fire Protection (“CAL FIRE”) to approve the Bower nonindustrial
5 timber management plan (“NTMP”), 1-08-009-MEN. In approving the NTMP, CAL FIRE
6 failed to comply with the California Environmental Quality Act (“CEQA”), the California
7 Endangered Species Act (“CESA”), the Forest Practice Act (“FPA”), and applicable
8 implementing Forest Practice Rules. Petitioners seek an order setting aside approval of the
9 NTMP because CAL FIRE’s approval constitutes an abuse of discretion and is contrary to law.
10 (Code Civ. Proc. § 1094.5; Pub. Resources Code § 21168.5.)

11 2. At stake in this case is the future of 18 acres of old-growth, late-seral redwood
12 forest estimated to be centuries old. Age matters because it is only through the long aging
13 process that redwood forest stands develop the late-seral characteristics that are of significant
14 value to many wildlife species, including the endangered marbled murrelet, a coastal bird well
15 known for relying exclusively on late-seral forest for nesting.

16 3. The vast majority of old-growth, late-seral redwood forest stands are now gone
17 from California. Only three to five percent of the original redwood forest remains. In this case,
18 the situation is especially stark. In the entire watershed in which the proposed harvest would
19 take place, the California Department of Fish and Game (“DFG”) was unable to identify any
20 late-seral forest stands outside of the 18 acres stand in the NTMP. Thus, for wildlife that
21 depends on late-seral forest habitat, this NTMP’s stand constitutes the entirety of the available
22 late-seral habitat in the watershed. The NTMP’s proposal to log substantial amounts of this
23 stand and surrounding area will thus have significant impacts on wildlife which could have been
24 avoided, contrary to CEQA, CESA, and the FPA.

25 4. Petitioners also challenge DFG’s abdication of its public trust and CESA
26 responsibilities under common law and statute, and its failure to fulfill its role as a trustee and
27 responsible agency under the Forest Practice Rules, CEQA, and the Fish and Game Code in the

1 administrative review process of this NTMP. As trustee charged with the protection of wildlife
2 resources, DFG was under an affirmative obligation to perform its statutory and common law
3 duties to ensure adequate protection of California wildlife. While DFG found the NTMP to
4 cause unmitigated, significant impacts to forest and wildlife, it did not take actions consistent
5 with its public trust and CESA responsibilities to ensure that State fish and wildlife would be
6 protected. DFG's failure to conform with its statutory and common law duties as trustee for the
7 State's wildlife resources will cause substantial and adverse harm to public trust resources,
8 especially the marbled murrelet. Petitioners allege that DFG's actions constitute an abuse of
9 discretion and are contrary to law and seek mandamus and declaratory relief on this issue. (Code
10 Civ. Proc. §§ 1060; 1085; 1094.5; Pub. Resources Code § 21168)

11 5. Petitioners respectfully request that this Court vacate and set aside the approval of
12 the NTMP and order Respondents to comply with CEQA, CESA, the FPA, and public trust
13 responsibilities.

14 **PARTIES & JURISDICTION**

15 6. Petitioner CENTER FOR BIOLOGICAL DIVERSITY ("CBD") is a non-profit,
16 public interest corporation with over 40,000 members and offices in San Francisco, California
17 and elsewhere in the United States. CBD and its members are dedicated to protecting diverse
18 native species and habitats through science, policy, education, and environmental law.

19 7. Petitioner FRIENDS OF THE GUALALA RIVER ("FOGR") is a non-profit,
20 grassroots watershed protection association formed to share common concerns and research
21 regarding the welfare of the Gualala River, its estuary and habitat. FOGR's goal is to protect the
22 Gualala River watershed and the species that rely on it.

23 8. Petitioner COAST ACTION GROUP ("CAG") is an organization dedicated to the
24 protection of fishery and water quality resources on the north coast of California. Coast Action
25 Group has a history of actions supporting the protection of fish, forest, and water quality
26 resources dating back to 1990. Coast Action Group exists in order to protect fish and wildlife
27 through application of state and federal laws and comments on issues of concern statewide

1 dealing with forestry and water quality issues.

2 9. CBD, FOGR, and CAG, and their members would be directly, adversely and
3 irreparably harmed by the challenged actions, as described herein, unless and until this Court
4 provides the relief prayed for in this petition.

5 10. Respondent CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE
6 PROTECTION (“CAL FIRE”) is an agency of the State of California located in Sacramento,
7 California, which authorized and approved the NTMP challenged in this action.

8 11. Respondent CALIFORNIA DEPARTMENT OF FISH AND GAME is a
9 department within the government of California charged with statutory duties under the
10 California Fish and Game Code to manage California’s diverse fish, wildlife, and plant
11 resources, and the habitats upon which they depend, for their intrinsic and ecological values and
12 for their use and enjoyment by the public. The Department is the designated state trustee under
13 the California Department Fish and Game Code §§ 711.7 and 1600 for fish and wildlife
14 resources, and in this capacity has affirmative common law and statutory obligations to ensure
15 the protection of public trust wildlife resources

16 12. The true names and capacities of Respondent Does 1-10 are not presently known
17 to Petitioners. Petitioners may amend this Petition to add the true names and capacities of said
18 Does at such time as they are discovered.

19 13. Real party in interest, NORTH GUALALA WATER COMPANY, is a plan
20 submitter and owner of timber and timberlands that are the subject of the challenged NTMP.

21 14. Real party in interest, BOWER LIMITED PARTNERSHIP, is a plan submitter
22 and owner of timber and timberlands that are the subject of the challenged NTMP.

23 15. Real parties in interest, JOHN AND MARGARET BOWER, are plan submitters
24 and owners of timber and timberlands that are the subject of the challenged NTMP.

25 16. The true names and capacities of Real Party Does 11-100 are not presently known
26 to Petitioners. Petitioners may amend this Petition to add the true names and capacities of said
27 Does at such time as they are discovered.

1 17. Jurisdiction of this court is invoked pursuant to Code Civ. Proc. §§ 1060; 1085;
2 1094.5; and Public Resources Code §§ 4514.5, 21080.5(g), 21168, and 21168.5.

3 **LEGAL BACKGROUND**

4 18. “The plain intent of the Legislature in enacting the [Forest Practice Act] was to
5 require the Board to view the forests of the state as a complete working ecosystem, and not only
6 as a producer of high quality timber, but also as forestlands valuable in their own right as a
7 public resource. [T]he protection of California’s watersheds and soils has been an important
8 goal of the FPA since its enactment in 1973.” (See Attorney General Office’s Advice Regarding
9 Board of Forestry’s Regulatory Authority to Provide for the Restoration of Resources.)

10 19. To implement this intent, the Forest Practice Act and its implementing Forest
11 Practice Rules (“Rules” or “FPRs”) contain provisions such as 14 Cal. Code Regs. §§ 898.2 and
12 896, which require that CAL FIRE

13 disapprove a plan as not conforming to the rules of the Board if any one of the following
14 conditions exist: . . . (c) There is evidence that the information contained in the plan is
15 incorrect, incomplete or misleading in a material way, or is insufficient to evaluate
16 significant environmental effects. (d) Implementation of the plan as proposed would
17 result in either a ‘taking’ o[r] finding of jeopardy of wildlife species listed as rare,
threatened, or endangered, . . . or would cause significant, long-term damage to listed
species;

18 incorporate feasible silvicultural systems, operating methods, and procedures that will
substantially lessen significant adverse impacts on the environment.

19 Similarly, 14 Cal. Code Regs. § 898.7 mandates that timber harvest operations

20 Maintain functional wildlife habitat in sufficient condition for continued use by the
21 existing wildlife community within the planning watershed;

22 Retain or recruit late and diverse seral stage habitat components for wildlife concentrated
23 in the watercourse and lake zones and as appropriate to provide for functional
connectivity between habitat.

24 20. CAL FIRE is also obligated to comply with the California Endangered Species
25 Act which states that

26 The Legislature hereby finds and declares [that endangered and threatened species] are of
27 ecological, educational, historical, recreational, esthetic, economic, and scientific value to

1 the people of this state, and the conservation, protection, and enhancement of these
2 species and their habitat is of statewide concern.

3 The Legislature further finds and declares that it is the policy of the state that state
4 agencies should not approve projects as proposed which would jeopardize the continued
5 existence of any endangered species or threatened species or result in the destruction or
6 adverse modification of habitat essential to the continued existence of those species, if
7 there are reasonable and prudent alternatives available consistent with conserving the
8 species or its habitat which would prevent jeopardy. Furthermore, it is the policy of this
9 state and the intent of the Legislature that reasonable and prudent alternatives shall be
10 developed by the department, together with the project proponent and the state lead
11 agency, consistent with conserving the species, while at the same time maintaining the
12 project purpose to the greatest extent possible.

13 The Legislature further finds and declares that it is the policy of this state that all state
14 agencies, boards, and commissions shall seek to conserve endangered species and
15 threatened species and shall utilize their authority in furtherance of the purposes of this
16 chapter.

17 Conserve . . . means to use, and the use of, all methods and procedures which are
18 necessary to bring any endangered species or threatened species to the point at which the
19 measures provided pursuant to this chapter are no longer necessary.

20 (Fish and Game Code §§ 2050-2061.)

21 21. CESA compels CAL FIRE to “use . . . all methods and procedures which are
22 necessary to bring any endangered species or threatened species to the point at which the
23 measures provided pursuant to this chapter are no longer necessary.”

24 **CEQA Requirements**

25 22. The California Environmental Quality Act mandates that significant
26 environmental impacts be avoided or mitigated if feasible. CEQA achieves this through several
27 mechanisms. For instance, CEQA requires thorough consideration of alternatives to the
28 proposed action that could avoid or substantially lessen the significant impacts of the project.
29 “Without meaningful analysis of alternatives in the EIR, neither courts nor the public can fulfill
30 their proper roles in the CEQA process.” (*Laurel Heights Improvement Assn. v. Regents of
31 University of California* (1988) 47 Cal.3d 376, 404.)

32 23. CEQA also requires a cumulative impact analysis which ensures that the
33 significant impacts of many different projects over time are identified so as to “alert the public

1 and its responsible officials to environmental changes before they have reached ecological points
2 of no return.” (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1229.) CEQA’s
3 requirement to conduct an adequate cumulative impact analysis is especially relevant in this case
4 because of the overall lack of late-seral forest stands in the affected region.

5 24. Cumulative impacts are the incremental effects from multiple projects that
6 combine to affect the environment. “The cumulative impacts from several projects is the change
7 in the environment which results from the incremental impact of the project when added to other
8 closely related, past, present, and reasonably foreseeable probable future projects.” (CEQA
9 Guidelines, § 15355.) Cumulative impacts are “two or more individual effects which, when
10 considered together, are considerable or which compound or increase other environmental
11 impacts . . . [they] can result from individually minor but collectively significant projects taking
12 place over a period of time.” (CEQA Guidelines, § 15355.) Such incremental effects must be
13 analyzed whether they fall on-site or off-site. (*See Friends of the Old Trees v. Department of*
14 *Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1396; 14 Cal. Code Regs. § 912.9.)

15 **Forest Practice Rule Requirements**

16 25. The Forest Practice Rules also require a cumulative impact assessment. Under 14
17 Cal. Code Regs. § 897(b)(2), “[i]ndividual THPs shall be considered in the context of the larger
18 forest and planning watershed in which they are located, so that biological diversity and
19 watershed integrity are maintained within larger planning units and adverse cumulative impacts .
20 . . are reduced.” (14 Cal. Code Regs. § 15355.)

21 26. The Rules, 14 Cal. Code Reg. § 898, require cumulative impacts to be assessed
22 according to the Technical Rule Addendum No. 2, (“TRA2”), found at 14 Cal. Code Regs. §
23 912.9.

24 27. TRA2 states that “[s]ignificant cumulative effects may be expected where there is
25 a substantial reduction in required habitat” for wildlife species, or where “the project will result
26 in substantial interference with the movement of resident or migratory species.” (14 Cal. Code
27 Regs. § 912.9, TRA2.C.2.) Significant factors include impacts to “Snags/den trees . . . Downed,

1 large woody debris, Late seral (mature) forest characteristics, Multistory canopy and Late seral
2 habitat continuity.” (*Id.*, TRA2.C.4.)

3 28. The Rules require particular focus on cumulative impacts to “Late Seral (Mature)
4 Forest Characteristics: Determination of the presence or absence of mature and over-mature
5 forest stands and their structural characteristics provides a basis from which to begin an
6 assessment of the influence of management on associated wildlife Previously harvested
7 forests . . . may include remnant patches of late seral stage forest which generally conform to the
8 definition of unharvested forests but do not meet the acreage criteria.” (*Id.*, TRA2.C.4.f.)

9 29. The Rules also require the NTMP to describe and evaluate cumulative impacts to
10 “Late Seral Habitat Continuity.”

11 30. Projects containing areas meeting the definitions for late-seral stage
12 characteristics must be evaluated for late-seral habitat continuity. The fragmentation and
13 resultant isolation of late-seral habitat types is one of the most significant factors influencing the
14 sustainability of wildlife populations not adapted to edge environments. (*See* TRA2.C.4.g.)

15 31. The Rules also require the NTMP to consider cumulative impacts to “Special
16 Habitat Elements” such as “large decadent trees/snags with broken tops or other features . . . and
17 other key elements [which] may need special protection.” (*Id.*, TRA2.C.4.h.)

18 **Fish and Game Code and Public Trust Requirements**

19 32. Section 711.7(a) of the California Fish & Game Code states that: “the fish and
20 wildlife resources are held in trust for the people of the state by and through the [DFG].”
21 Furthermore, section 1802 provides: “The [DFG] has jurisdiction over the conservation,
22 protection, and management of fish, wildlife, native plants, and habitat necessary for biologically
23 sustainable populations of those species. The [DFG], as trustee for fish and wildlife resources,
24 shall consult with lead and responsible agencies and shall provide, as available, the requisite
25 biological expertise to review and comment upon environmental documents and impacts arising
26 from project activities, as those terms are used in the California Environmental Protection Act
27 (Division 13 (commencing with Section 21000) of the Public Resources Code).” DFG acts as a

1 trustee agency under CEQA for the protection of wildlife and wildlife habitat in its review of
2 Timber Harvest Plans. (See 14 Cal. Code Regs. § 1037.3.)

3 33. DFG also acts as a responsible agency under CEQA when it takes specific actions
4 with regard to its authority to implement the policies and requirements of CESA. DFG is the
5 only state agency that can authorize the take of endangered species and is therefore responsible
6 for ensuring that take is avoided. Moreover, DFG is bound by the general provisions of the Fish
7 and Game Code that address endangered species, sections 2050-2068, which as described above,
8 require the conservation of listed species.

9 34. DFG has both statutory and common law duties as trustee for the State’s wildlife
10 resources that must be fulfilled to adequately protect California’s forest and wildlife resources,
11 including endangered species like the marbled murrelet.

12 35. DFG’s duties with respect to the endangered marbled murrelet include
13 maintaining sufficient populations of the species and its habitat, providing for the beneficial use
14 and enjoyment of the species by all citizens of the State, and perpetuation of the species for its
15 intrinsic and ecological values.

16 **FACTUAL BACKGROUND**

17 36. The Bower NTMP proposes to harvest 615 acres in the Gualala River watershed.
18 The planning watersheds include the Little North Fork and North Fork Gualala rivers, which are
19 listed as “impaired” water bodies due to excessive sediment and elevated stream temperatures.
20 The NTMP would allow the landowner to log the area for the next 100 years with limited
21 environmental review and regulatory oversight.

22 37. The NTMP proposes to log significant amounts of forest within Unit 9, an 84 acre
23 area identified by DFG as providing extremely high quality habitat for late-seral dependent forest
24 wildlife, including logging an approximately nine foot wide tree exhibiting old-growth
25 characteristics of significant value to wildlife, including to the marbled murrelet.

26 38. Unit 9 is comprised primarily of redwood trees, Douglas fir, and hardwoods, and
27 includes an 18 acre stand of old-growth, late-seral habitat that the DFG recommended for

1 preservation due to its exceptional habitat value and small acreage in comparison – only 3 % --
2 to the overall NTMP area. The core of the stand does not appear to have been harvested in the
3 past. The NTMP proposes to log significant amounts of large old trees in this 18 acre stand,
4 even though the area is the only remaining late-seral habitat in the entire watershed.

5 39. There is less than 0.5% of late-seral habitat in the planning watershed, all of
6 which is thought to be contained in the 18 acre stand of Unit 9 of this NTMP. According to
7 DFG, this “deficiency of large trees . . . is indicative of several timber entries and evidence of an
8 already present cumulative adverse impact.”

9 40. The 18 acre stand of late-seral habitat in Unit 9 is of exceptional value to wildlife
10 because of its intact structure, old-growth characteristics and extreme rarity in the watershed.
11 The DFG Pre-Harvest Inspection (PHI) Report extensively discusses the extreme scarcity of late-
12 seral habitat and why it is of exceptional ecological value.

13 41. For instance, the 18 acre stand provides critical habitat for the endangered
14 marbled murrelet, given its close proximity to the coast where marbled murrelets are present.
15 The marbled murrelet is listed as state endangered, federally threatened, and is a sensitive species
16 as defined by FPR § 895.1.

17 42. Marbled murrelet occupancy of stands, and the overall abundance of the species,
18 has been related to the proportion of old-growth forest available based on studies conducted in
19 California. The final rule listing marbled murrelets as federally threatened (U.S. Fish and
20 Wildlife Service 1992) regards loss of older forests and associated nest sites as the main cause of
21 decline in murrelet populations. Furthermore, fragmentation of old-growth also has the potential
22 of reducing murrelet breeding success by increasing the densities of predator populations.

23 43. The U.S. Fish and Wildlife Service has found that the “principal factor considered
24 to affect the marbled murrelet throughout the southern portion of its range (from British
25 Columbia south to California) is the loss of nesting habitat (older forests), mainly from
26 commercial timber harvest and forest management practices.” The U.S. Fish and Wildlife
27 Service notes that while “take of marbled murrelets is not likely in suitable habitat that has been

1 surveyed to protocol with no occupancy detected (incidental take may still occur due to the
2 potential for survey error), . . . it is important to note that adverse effects to the species may still
3 result from modification of suitable unoccupied habitat.”

4 44. The record in this case also shows that certain aspects of the NTMP are
5 unresolved. For example, even basic issues, like the boundaries of the late-seral stand, and its
6 actual acreage size, are still in dispute. Additionally, substantial new information was presented
7 shortly before, during, and after Second Review of the NTMP, and yet the NTMP was not then
8 re-circulated for 30 days.

9 45. As result of these inadequacies, DFG determined that the NTMP will eliminate
10 existing important and limited late-seral components in the watershed for wildlife dependent on
11 it (including the marbled murrelet and other existing associated species that select for late-seral
12 habitat):

13 DFG has demonstrated the NTMP will harvest a substantial amount of defect trees in
14 Unit 9, ostensibly converting existing LS habitat to young second-growth habitat. This
15 will result in eliminating existing important and limited [late-seral] components in the
16 watershed for wildlife dependent on (including the marbled murrelet) and other existing
associated species that select for [late-seral] habitat.

17 **PROCEDURAL BACKGROUND**

18 46. Real Parties submitted the NTMP in April of 2008.

19 47. On June 17, 2009, DFG submitted its PHI Report, which identified that the
20 project as proposed would have significant impacts on late-seral habitat and dependent wildlife,
21 including the marbled murrelet.

22 48. A “final” NTMP was issued in November 2009 and circulated for 30 days for
23 public comment which ended on December 16, 2009. However, new information from both the
24 project proponent and from Cal Fire was submitted during the public comment period, but
25 without re-circulating the NTMP. Moreover, Second Review itself occurred during the public
26 comment period.

27 49. CAL FIRE issued its response to comments and approved the NTMP on

1 December 31, 2009. The approved NTMP was filed with the Resources Agency on January 6,
2 2010.

3 50. Petitioners have performed all conditions precedent to the filing of this Petition by
4 raising issues known to them before during the review process of the NTMP. Petitioners
5 requested that CAL FIRE not approve the NTMP, and have performed all conditions precedent
6 to the other causes of action.

7 51. Prior to filing of this action, Petitioners notified CAL FIRE and DFG of their
8 intent to file a lawsuit. (*See Exhibit A, letters to CAL FIRE and DFG.*)

9 52. Petitioners also provided a copy of the Petition to the Attorney General's Office.
10 (*See Exhibit B, letter to the California Attorney General.*)

11 53. At all times mentioned herein, CAL FIRE has been able to deny the approval and
12 operation of the NTMP at issue. Despite such ability, and despite Petitioners' demand for denial,
13 CAL FIRE has failed and continues to fail to perform its duty to deny the approval and operation
14 of the plan.

15 54. If CAL FIRE is not ordered to set aside its approval of the NTMP, and real parties
16 are not enjoined from engaging in timber operations on this NTMP site, the land, wildlife habitat,
17 and environmental values subject to and affected by the NTMP will suffer irreparable, and
18 permanent damage.

19
20 **FIRST CAUSE OF ACTION**
(CAL FIRE Violations of CEQA and Forest Practice Rules)

21 55. Petitioners hereby refer to and fully incorporate by reference the paragraphs set
22 forth above as though fully set forth at length herein.

23 56. An NTMP must identify, evaluate, and mitigate the possible significant
24 environmental impacts of the proposed project. (Pub. Res. Codes 21080.5; *see* CEQA
25 Guidelines, §§ 15126-15126.4; 14 Cal. Code Regs. §§ 896-898, 898.2, 1090.) The lead agency
26 is required to conduct "a thorough investigation" with respect to significant impacts and its
27 conclusion must be based on substantial evidence. (*See* Pub. Res. Codes §§ 21168, 21168.5,

1 21082.2; CEQA Guidelines, §§ 15144-15145.) Under CEQA and the FPA, a project's
2 significant effects must be evaluated and avoided or mitigated. (*See* CEQA Guidelines, §§
3 15026.6; 15126-15126.4.)

4 57. An NTMP's impacts analysis must address the project's cumulative impacts.
5 (Pub. Res. Code § 21080.5; 14 Cal. Code Regs. § 896-898.2, 912.9, TRA2.C, 1090;
6 *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal. App. 3d 604; *see*
7 *also* CEQA Guidelines, §§ 15130, 15355.)

8 58. Respondent CAL FIRE prejudicially abused its discretion in approving the Bower
9 NTMP by failing to proceed in the manner required by law to identify, map, evaluate and avoid
10 or mitigate the significant site specific and cumulative impacts of the NTMP; by failing to
11 provide relevant information about the environmental setting in which the project occurs; by not
12 supporting its approval and decision with substantial evidence and by not retaining or recruiting
13 functional late-seral forest habitat in the present or in the future. (*See* 14 Cal. Code Regs. §
14 897(b)(1), 898, 898.1(c)(1), 898.1(f), 898.2(c), 952.9 & Appendix Technical Rule Addendum #
15 2; 959.16, 15126, 15130, and 15355, and Public Resources Code §§ 21002, 21002.1, 21082.2
16 and 21080.5(d).)

17 59. The NTMP also fails to proceed according to law in failing to analyze and discuss
18 its impacts in relation to baseline conditions in the area, which show a pre-existing condition in
19 the watershed that is well below the level of late-seral habitat found to be adequate for late-seral
20 forest dependent wildlife. The logging proposed in the NTMP will have significant impacts to
21 late-seral habitat within the NTMP area, particularly within Unit 9's 18 acre stand of old-growth
22 forest, thus rendering it unsuitable for marbled murrelets and other species. However, the NTMP
23 and CAL FIRE do not provide adequate information or mitigation to ensure that impacts are
24 either avoided or substantially reduced, or that late-seral habitat is preserved and recruited in the
25 watershed in the future.

26 60. Under CEQA and the Rules, CAL FIRE is not permitted to approve projects as
27 proposed if there are feasible mitigation measures available which would avoid or substantially

1 lessen the significant environmental effects of such project. CAL FIRE must also disapprove a
2 project when there is evidence that the information contained in the plan is incorrect, incomplete
3 or misleading in a material way, or is insufficient to evaluate significant environmental effects.

4 61. Here, CAL FIRE did not require the NTMP to include the necessary information
5 for proper decision-making, and did not properly analyze the fact that the NTMP will cause
6 further loss, degradation, and fragmentation of already depleted late-seral forest habitat, or that
7 the NTMP will harm numerous wildlife species, including the endangered marbled murrelet. As
8 a result, CAL FIRE has failed to require the NTMP to avoid or mitigate its significant
9 environmental impacts. Moreover, the NTMP fails to guarantee the retention of late-seral habitat
10 over the life-time of the NTMP. The RPF for this project stated at Second Review that it was not
11 the landowner's intent to manage the Unit 9 18 acres as late-seral forest. Further, CAL FIRE's
12 biologist stated that "[b]asal fire scars and associated hollows are an uncommon element that
13 receive an inordinate amount of wildlife use. Trees slated for harvest that exhibit these
14 characteristics should be retained where they occur." Despite this, CAL FIRE approved the
15 harvesting of numerous trees that contain hollows and/or fire scars.

16 62. In short, the NTMP fails to adequately consider site-specific and cumulative
17 impacts. The heavy logging proposed in Unit 9 and the 18 acre old-growth stand will have
18 significant impacts on the stand's current late-seral functionality for wildlife including listed and
19 other sensitive species. The pre-project deficiency of late-seral habitat in the planning watershed
20 is indicative of several timber entries and evidence of an already present cumulative adverse
21 impact. Any additional impacts to this last existing remnant stand of forest would add to past
22 and reasonably foreseeable future impacts and is therefore cumulatively significant. The
23 NTMP's proposed harvest would not avoid or mitigate long-term impacts to late-seral forest
24 habitats and would not provide for late-seral forest contiguity. The NTMP does not contain
25 adequate and feasible mitigation for the permanent loss of late-seral habitat and trees with late-
26 seral characteristics. The NTMP also fails to adequately address the significant cumulative
27 impacts of greenhouse gas emissions associated with the NTMP.

1 63. Under CEQA and the Forest Practice Rules, CAL FIRE is also required to
2 consider a range of reasonable alternatives to the proposed project. (Pub. Res. Code §§ 21001,
3 21080.5; CEQA Guidelines, § 15126.6(a); 14 Cal. Code Regs. §§ 895.1, 896, 898, 898.1, 1090.)
4 The consideration of alternatives must be sufficiently detailed to provide decision-makers and
5 the public with information to allow them to intelligently take account of environmental
6 consequences. (CEQA Guidelines, § 15126.6(f).)

7 64. Here, the NTMP does not adequately analyze alternatives that would avoid
8 logging the 18 acre late-seral stand identified by DFG as critical for late-seral dependent wildlife,
9 and provides an inadequate discussion of how the alternatives that are discussed would differ in
10 terms of impacts.

11 65. The discussion of alternatives must also include identification of the
12 environmentally superior alternative. If the environmentally superior alternative is the “no
13 project” alternative, the discussion shall also identify an environmentally superior alternative
14 among the other alternatives. (CEQA Guidelines, § 15126.6(e)(2).)

15 66. The NTMP fails to identify the environmentally superior alternative. Instead, it
16 identifies the proposed project as environmentally superior. The proposed project, however, is
17 not an alternative. CEQA requires identification of the environmentally superior *alternative*.
18 (CEQA Guidelines, § 15126.6(e)(2).)

19 67. CAL FIRE violated these and related laws, regulations and rules in approving the
20 NTMP. cursory consideration of alternatives violates CEQA because it prevents meaningful
21 public participation and informed decision making. (*Laurel Heights Improvement Assn., supra*;
22 CEQA Guidelines, § 15126.6(f).) Further, CAL FIRE’s reasoning that it was entitled to consider
23 a “more circumscribed” range of alternatives because the NTMP was mitigated to avoid
24 significant effects ignores the fact that the NTMP will have significant effects and, further, is
25 wrong as a matter of law. (*See Laurel Heights, supra*, 47 Cal.3d 376, 401-402; *Friends of the*
26 *Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1403; Pub.
27 Res. Code §§ 21002, 21002.1.)

1 74. Here, the proposed logging will further fragment and deplete late-seral forest
2 habitat which is of incalculable importance to the future well-being of the endangered marbled
3 murrelet. The murrelet’s endangered status is largely due to the fact that so little late-seral forest,
4 upon which the species depends, is left. Yet the NTMP contains little discussion of how the
5 absence of this species in the NTMP area is correlated with the loss of adequate high quality
6 habitat in the planning area. This failure of the NTMP to adequately assess and explain why the
7 NTMP will not violate CESA renders the NTMP illegal.

8 75. The NTMP must consider its impact “in the context of the larger forest and
9 planning watershed in which they are located, so that biological diversity and watershed integrity
10 are maintained and adverse cumulative impacts are reduced.” Thus, while the marbled murrelet
11 may not be present in the NTMP area at this time, the unoccupied habitat is nonetheless critical
12 for this species to have any chance of surviving into the future and should be retained.

13 76. The current baseline demonstrates that the marbled murrelet is in critical
14 condition. Therefore, any further negative contribution to the current baseline will indeed
15 preclude conservation of this bird, will jeopardize its continued existence, and will adversely
16 modify habitat essential to its continued existence in violation of CESA.

17 77. The NTMP will cause loss of the last remaining old-growth stand in the entire
18 watershed, leading to further habitat fragmentation in which habitat outside the NTMP will also
19 lose ecological value due to the fact that late-seral forest habitat in the region, and at the
20 landscape level, will be further depleted and fragmented by this NTMP. This reduction in size
21 and connectivity of habitat will increase the influence of adverse environmental and
22 demographic stochastic events on the murrelet thus pushing it closer to extirpation on the
23 Mendocino coast. Moreover, movement of murrelet individuals among habitat must be
24 sufficient to repopulate unoccupied areas; the more depleted or fragmented an area, the more
25 difficult it becomes to repopulate unoccupied habitat.

26 78. CAL FIRE asserts that “the habitat in the plan area that may be suitable for this
27 endangered species is being conserved.” However the logging proposed in the NTMP does not

1 conserve late-seral habitat and provides no mechanism whereby such habitat will be recruited
2 over time in order to contribute to species recovery, as required by CESA.

3 79. In sum, CAL FIRE is in violation of CESA's mandate that a) endangered species
4 be conserved, protected, restored, and enhanced, b) jeopardy be avoided, c) habitat essential to
5 the continued existence of endangered species be protected, and d) take be avoided.

6
7 **THIRD CAUSE OF ACTION**
(DFG Violations of Public Trust and CESA Duties to Protect Fish and Wildlife Species)

8 80. Petitioners hereby refer to and fully incorporate by reference the paragraphs set
9 forth above as though fully set forth at length herein.

10 81. In its role as a trustee and responsible agency during the NTMP review process,
11 DFG at all times had both a common law and statutory obligation to consider and ensure the
12 protection of public trust wildlife resources, including wildlife dependent on late-seral forest
13 habitat, for the benefit of the State and the public beneficiary. (*See* Fish & Game Code §§ 703,
14 711.7(a); 1015; 1600; 1801-1802; 2051, 2052, 2052.1; 2055; 2061; 2080, 2081, 2085; Pub. Res.
15 Code § 21001(c); *see also* *Environmental Protection & Information Center v. California Dept. of*
16 *Forestry & Fire Protection* (2008) 44 Cal.4th 459; *Center for Biological Diversity v. FPL Group*
17 (2008) 166 Cal. App. 4th 1349.)

18 82. In its review of the NTMP, DFG had affirmative common law and statutory
19 obligations as the State trustee to protect state wildlife resources, including providing relevant
20 and expert information to the NTMP review process as a trustee agency under CEQA, taking all
21 actions necessary to conserve and protect imperiled and listed wildlife species, and making
22 findings supported by substantial evidence that demonstrate the analytical route traveled by the
23 agency in coming to its determination. (*See* *Topanga Assn. for a Scenic Community v. County of*
24 *Los Angeles* (1974) 11 Cal.3d 506, 515.)

25 83. In its review of the NTMP in this case, DFG did not comply with the affirmative
26 common law and statutory obligations set forth above. Instead, although DFG made a finding
27 that the NTMP would have cumulatively significant impacts on late-seral wildlife, DFG failed to

1 exercise its common law and statutory authorities to carry out those findings; failed to issue a
2 final determination that the NTMP would have a significant cumulative adverse effect on
3 imperiled and/or listed wildlife species; failed to make and issue findings and/or take other
4 necessary actions to ensure the protection of wildlife species under DFG's jurisdiction; and
5 failed to adequately participate in the CEQA process so as to demonstrate to the public that the
6 lead agency, CAL FIRE, had properly considered full information in reaching its decision to
7 approve the NTMP.

8 84. The interests encompassed by the public trust are protected by DFG acting
9 pursuant to its common law and explicit statutory authorization. Nonetheless, the public retains
10 the right to bring actions to enforce the trust when public agencies fail to discharge their duties.
11 When the appropriate state agencies fail to do so, members of the public may seek to compel the
12 agency to perform its duties to protect fish and wildlife public trust resources affected by a
13 project.

14 85. Here, DFG failed to comply with its common law and statutory obligations to
15 protect public trust resources in its role as trustee and responsible agency in the NTMP review
16 process. DFG's failure is a breach and violation of the public trust. Petitioners have and will
17 suffer damage from such breach amounting to the loss of a natural public resource, namely late-
18 seral dependent wildlife species and their habitat, including the endangered marbled murrelet.

19 86. Petitioners allege that the duties alleged herein are mandatory and, accordingly,
20 they are appropriately subject to issuance of a writ of mandate under Code of Civil Procedure §
21 1085. Petitioners further allege that DFG's actions in this case constitute a failure to proceed
22 according to law and thus are also an abuse of discretion under Code of Civil Procedure §
23 1094.5. Petitioners also seek declaratory relief that DFG's actions are contrary to its public trust
24 and CESA obligations pursuant to Code of Civil Procedure § 1060.

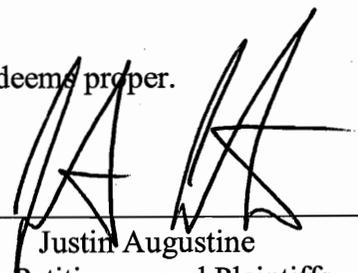
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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioners pray for judgment as follows:

- 3 1. For Writ of Mandate ordering CAL FIRE to set aside approval of NTMP 1-08-
4 009-MEN, based on its violations of CEQA, CESA, the FPA, and the Forest
5 Practice Rules;
- 6 2. For Writ of Mandate setting aside approval of NTMP 1-08-009-MEN, based on
7 DFG's violations of, and failure to fulfill, its public trust and statutory obligations,
8 as set forth above;
- 9 3. For declaratory relief that DFG is in violation of its public trust and statutory
10 obligations;
- 11 4. For a permanent injunction enjoining real party, its agents, employees,
12 representatives, and all persons acting in concert or participating with it, from
13 engaging in any activity, including timber harvesting, pursuant to NTMP 1-08-
14 009-MEN, until the NTMP complies with California law, statutes and regulations;
- 15 5. That this Court retains jurisdiction until the Writs of Mandate have been complied
16 with and such compliance has been approved by the Court;
- 17 6. For reasonable attorney's fees under California Code of Civil Procedure Section
18 1021.5;
- 19 7. For costs of suit; and
- 20 8. For such other and further relief as the Court deems proper.

21
22 DATED: February 5, 2010

By: 

Justin Augustine
For Petitioners and Plaintiffs

1 **VERIFICATION**

2 I have read the foregoing Petition for Writ of Mandate and know its contents.

3 I am an attorney with the Center for Biological Diversity, a non-profit corporation, which
4 is a party to this action. No officer of the corporation resides or has offices in the County where
5 I reside. Therefore, pursuant to Code of Civil Procedure section 446, I make this verification,
6 and am authorized by the corporation to do so.

7 I have read the petition and know its contents. The matters stated in it are true of my own
8 knowledge except as to those matters that are stated on information and belief, and as to those
9 matters I believe them to be true.

10
11 Executed on February 5, 2010, at San Francisco, California.

12
13 I declare under penalty of perjury under the laws of the State of California that the foregoing is
14 true and correct.

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Justin Augustine
Center for Biological Diversity

EXHIBIT A



February 4, 2010

By U.S. Mail and Email

Ginevra K. Chandler
Cal Fire Legal
California Department of Forestry and Fire Protection
P.O. Box 944246
Sacramento, CA 94244-2460
Fax: 916-657-4072
Email: Giny.Chandler@fire.ca.gov

Re: Notice of Intent to Challenge Approval of the Bower NTMP

Dear Ms. Chandler:

Please take notice that, on behalf of the Center for Biological Diversity, Friends of the Gualala River, and Coast Action Group, we intend to commence an action to challenge the California Department of Forestry and Fire Protection's violations of the California Environmental Quality Act, California Endangered Species Act, and Forest Practice Act in regard to the Bower NTMP, 1-08-009-MEN.

Please feel free to contact me if you have any questions regarding this notice, which is being provided pursuant to Public Resources Code Section 21167.5.

Sincerely,

Justin Augustine
Staff Attorney
Center for Biological Diversity



February 4, 2010

By U.S. Mail and Email

Director John McCamman
Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

Re: Notice of Intent to Sue the Department of Fish and Game regarding the Bower
NTMP

Dear Mr. McCamman:

Please take notice that, on behalf of the Center for Biological Diversity, Friends of the Gualala River, and Coast Action Group, we intend to commence an action to challenge the California Department of Fish and Game's public trust and statutory violations in regard to the Bower NTMP, 1-08-009-MEN.

Please feel free to contact me if you have any questions regarding this notice, which is being provided pursuant to Public Resources Code Section 21167.5.

Sincerely,

Justin Augustine
Staff Attorney
Center for Biological Diversity

Cc: Thomas Gibson
Acting General Counsel
Department of Fish and Game
1416 Ninth Street, Suite 1341
Sacramento, CA 95814
tgibson@dfg.ca.gov

EXHIBIT B



February 5, 2010

By U.S. Mail and Email

Kenneth Paul Alex
Office of the Attorney General
1515 Clay Street / PO 70550
Oakland, CA 94612-0550
ken.alex@doj.ca.gov

Re: Notice of Intent to Challenge Approval of the Bower NTMP: *Center for Biological Diversity et al v. California Department of Forestry and Fire Protection et al*

Dear Mr. Alex:

Please find enclosed a copy of the Verified Petition for Writ of Mandate/Complaint filed to challenge the California Department of Forestry and Fire Protection's violations of CEQA, CESA, and the Forest Practice Act, and the California Department of Fish and Game's public trust and statutory violations, in regard to the Bower NTMP, 1-08-009-MEN.

Please don't hesitate to call if you have any questions.

Sincerely,

Justin Augustine
Staff Attorney
Center for Biological Diversity

Enclosure: Verified Petition for Writ of Mandate