

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION ONE**

SIERRA CLUB and FRIENDS OF  
THE GUALALA RIVER

Petitioners and Appellants;

v.

CALIFORNIA DEPARTMENT OF  
FORESTRY AND FIRE  
PROTECTION;

Respondent;

PHIL CAMPBELL, JUNE  
CAMPBELL, REX CAMPBELL,  
STEVE CAMPBELL and KAREN  
HAY;

Respondents and Real Parties  
In Interest.

A113774

Sonoma County Superior Court  
Case No. SCV 236838

Hon. Allan D. Hardcastle

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## **I. INTRODUCTION**

Petitioners and Appellants SIERRA CLUB and FRIENDS OF THE GUALALA RIVER (“Appellants”) appeal the March 27, 2006 order of the Sonoma County Superior Court denying their petition for writ of administrative mandate under Code of Civil Procedure section 1094.5 and Public Resources Code section 21167 (California Environmental Quality Act). That petition sought to overturn the May 4, 2005 action by Respondent CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION (“CDF”) issuing Timberland Conversion Permit No. 00-469 (“TCP 00-469”), to Real Parties In Interest Steve and June Campbell, et al., (“Real Parties”), authorizing the Campbells to clear-cut a 90-acre parcel of coastal forestland in northwest Sonoma County and convert it into a commercial vineyard. The trial court’s order finally disposed of all issues among the parties and is therefore appealable. In general, an order denying writ of mandate is appealable. *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4<sup>th</sup> 345, 352.

Appellants filed their Notice of Appeal on April 12, 2006, and filed a petition for writ of supersedeas on May 9, 2006. On May 10, 2006, this court granted Appellants’ request for an emergency stay of activities conducted pursuant to TCP 00-469 pending consideration of the supersedeas petition. On May 19, 2006, the court issued an order staying these same activities pending consideration of the merits of this appeal.

## **II. STATEMENT OF THE CASE**

The case is brought under the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000 *et seq.*<sup>1</sup> Appellants

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<sup>1</sup> All statutory references are to the Public Resources Code unless otherwise indicated.



challenge CDF's adoption of a mitigated negative declaration ("MND") before issuing TCP 00-469, rather than an environmental impact report ("EIR"). Appellants contend CDF abused its discretion in this regard because there is substantial evidence in the administrative record supporting a "fair argument" that Real Parties' timberland conversion project ("Project") may have a significant impact on the environment, thereby mandating preparation of an EIR under CEQA.

TCP 00-469 authorizes the permanent deforestation of a 90-acre parcel of coastal forestland containing redwood, Douglas fir, and other coniferous and hardwood trees, and its subsequent conversion to commercial vineyard use. The Project includes clear-cutting trees, removing roots and stumps, chemically "sterilizing" the soil, ripping and grading the site, planting vines, and then consistently applying agricultural chemical fertilizers, pesticides, and/or herbicides during grape production.

The record shows that the Project not only may but will have significant individual and cumulative effects on the environment. The site drains, via Buckeye Creek and another tributary, into the Gualala River, a coastal stream that supports habitat for endangered coho salmon and steelhead trout. The Gualala currently suffers significant water quality and habitat degradation from deforestation and timberland conversion activities throughout its watershed. It has been listed under Section 303(d) of the federal Clean Water Act as water quality impaired due to excessive sediment runoff and elevated stream temperatures, which are the direct results of land clearance in the watershed and reductions of instream flows from irrigation.

Commenting expert hydrologists, biologists, and staff of the California Department of Fish and Game are in unanimous agreement that the Project, even after implementation of mitigation measures identified by CDF, will increase flows of sediment, increase instream temperatures, and

reduce instream flows in the Gualala and its tributaries, causing further degradation of water quality and aquatic habitat. In addition, the record shows that the Project site itself provides habitat for the federally endangered Northern Spotted Owl and various other bird and wildlife species, and that permanent deforestation will cause significant adverse impacts on these species.

Under CEQA's extremely low "fair argument" evidentiary standard governing EIR preparation, CDF was required to prepare an EIR if there was *any* substantial evidence in the record that the Project *may* have a significant environmental effect. CEQA Guidelines (hereafter "Guidelines"), 14 C.C.R. § 15064. This was true even if CDF was presented with other substantial evidence that the Project would not have a significant effect. Guidelines, § 15064(f)(1), *citing No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75. CDF was barred from engaging in any balancing of expert opinion at this stage of environmental review, and was accordingly obliged to resolve any doubts in favor of preparing an EIR.

Here, the record is replete with substantial evidence, in the form of unanimous expert opinion and testimony from scientific experts and resource agency personnel, that the Project's environmental impacts may or will be significant. These include individual and cumulative impacts on water quality and fish habitat in the Gualala and its tributaries from sedimentation and pesticide/herbicide runoff; permanent loss of habitat for the Northern Spotted Owl and other native birds; and impacts to surface and groundwater hydrology from Project-related irrigation activities. The record also contains ample expert and agency opinion that mitigation measures added to the Project in the MND are inadequate to mitigate all impacts to less than significant levels.

In denying a writ of mandate in the face of this record, the trial court clearly applied the wrong standard of review, holding that the case was

governed by the more deferential “substantial evidence” standard rather than the “fair argument” standard:

“[t]he court has concluded that the proper standard of review is the ‘substantial evidence’ test rather than the ‘fair argument’ test sought by petitioners. It appears to the court that there is substantial evidence that the mitigated project does not have a substantial effect on the environment.” *See* Order Denying Writ of Mandate, Appellants’ Appendix (“AA”), Tab B.

Appellants submit that this constituted clear prejudicial error. The applicable standard of review by a court of an agency’s decision not to prepare an EIR is, and has always been, the “fair argument” standard – under which the presence of other substantial evidence that a Project would not have a significant impact is irrelevant. Guidelines, § 15064(g); *see City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531, 541-542.

As stated, the trial court’s order denying mandate is appealable. The standard of review is *de novo*. *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4<sup>th</sup> 1035, 1109. If, following its own independent review of the record, this court determines there is *any* substantial evidence supporting a fair argument that Real Parties’ Project *may* have a significant direct and/or cumulative effect on the environment, then the trial court’s order must be reversed.

### **III. FORM OF CITATIONS TO ADMINISTRATIVE RECORD AND APPENDIX**

Appellants have elected to proceed by appendix *in lieu* of clerk’s transcript pursuant to Rule 5.1. *See* AA, Tab C. Appellants’ Appendix will be abbreviated “AA,” and citations to it will take the form: “AA, Tab X.”

The Administrative Record has been lodged in three separate bound volumes. Citations to it will be in the form: “AR II:00123,” where “II” is the Volume number and “00123” is the Bates Stamped page number. An

index of the Administrative Record appears at the beginning of each volume.

Certain documents in the Administrative Record were originally presented to CDF on a CD-ROM. As they were quite voluminous, the parties agreed to print and attach copies of those they chose to cite in future briefs rather than including all of them in the printed record. To the extent cited in this brief, such documents (which are not Bates-stamped) are included in Volume III of the Administrative Record under exhibit tabs, and will be cited in the form: “AR III, Tab X.” Certain documents the parties agreed were erroneously excluded from the printed version of the record also appear in this volume. A copy of the parties’ agreement governing this protocol is included in Volume III, Tab A.

#### **IV. STATEMENT OF FACTS**

##### **A. ENVIRONMENTAL SETTING**

The 90-acre Project site is located on a ridgetop near the town of Annapolis in Northwestern Sonoma County. AR II:000665, 000667. The site lies within the watershed of Buckeye Creek, a tributary to the Gualala River. *Id.* Watercourses directly affected by Project irrigation and drainage activities are: Franchini Creek, Porter Creek, Grasshopper Creek, Soda Springs Creek, Buckeye Creek, and the Gualala River, all of which lie in the Gualala River watershed. AR II:000679; AR I:000151, 000157. The MND approved for the Project describes the site as “a mosaic of conifer timber and hardwoods . . . moderately stocked with second growth redwood, sugar pine, and Douglas-fir.” AR II:000667. The MND acknowledges that “[w]ildlife is abundant with avian and terrestrial species,” including but not limited to “red tail hawks, ravens, stellar jays,

wrens, deer, feral pigs, wood rats, and bobcats . . . found on a regular basis throughout the property.” *Id.*

The natural resources of the Gualala watershed are of exceptional value and vital importance to Sonoma County and to the North Coast generally, benefiting and sustaining a broad spectrum of human and wildlife-based interests. The North Coast Regional Water Quality Control Board has designated the following beneficial uses for the Gualala River and its tributaries: critical cold freshwater habitat; fish migration, and fish spawning; other wildlife habitat; municipal water supply; groundwater recharge; and recreation uses. AR II:000667. The Gualala historically supported annual runs of coho salmon, *Oncorhynchus kisutch*, and steelhead trout, *Oncorhynchus mykiss*. AR. II:001097. According to the California Department of Fish & Game (“DFG”), the coho, a federally-listed threatened species, is now approaching extirpation in the Gualala watershed, while the steelhead, federally listed as threatened, is in significant decline. AR II:000673-000674; II:001119. Both Grasshopper Creek and the unnamed Buckeye Creek tributary on which the Project is situated also support the threatened steelhead. AR II:001053-1054; 001119. In addition, forest lands in the Gualala River drainage, including those on the Project site, provide valuable foraging and roosting habitat for the northern spotted owl, *Strix occidentalis caurina*, a federally-listed threatened species.

## **B.**

### **RESOURCE DEGRADATION IN THE GUALALA WATERSHED FROM TIMBER HARVEST AND CONVERSION ACTIVITIES APPROVED BY CDF.**

The record shows that the Gualala and its tributaries have suffered and continue to suffer significant water quality and habitat impairment as a direct result of logging and timberland conversion activities such the Project at issue here. Deforestation of watershed lands for vineyard

development has increased water temperature and sediment loading, and decreased instream flows, all of which degrade habitat and aggravate the existing impairment of coho and steelhead. AR II:000667; 001118-001124; 001033-001038; *see* comments of fisheries biologist Patrick Higgins AR III, Tab. B, p. 3. Long term vineyard operation on these lands in turn increases runoff of pesticides, herbicides, fertilizers and other agricultural chemicals into these streams, further degrading water quality and fish habitat. AR II:001149-001150; 001152-001153. As a result of these and other timber harvesting activities, the Gualala is now listed under Section 303(d) of the federal Clean Water Act<sup>2</sup> as water quality-impaired from excessive sediment deposits and heightened temperatures, conditions which seriously degrade habitat for fish and other aquatic life. AR II:000667.

The record shows that much of this degradation is directly attributable to CDF's systemic failure to adequately consider cumulative impacts to water quality and aquatic habitat from timber harvest and timberland conversion activities in the North Coast. Several federal and state agencies, as well as scientific experts, have published reports in recent years documenting the inadequacy of CDF's Forest Practice Rules ("FPRs")<sup>3</sup> to assess and mitigate cumulative watershed effects from logging and conversion projects.

For example, in listing the North Coast population of steelhead as threatened under the federal Endangered Species Act, the National Marine Fisheries Service ("NMFS") specifically found that the aquatic habitat

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<sup>2</sup> Section 303(d) requires States to maintain a list of watercourses whose water quality is impaired to the point where it is inadequate to support its potential beneficial uses. *See* 33. U.S.C. § 1313(d).

<sup>3</sup> The Forest Practice Rules, set forth at 14 C.C.R. § 895 *et seq.*, nominally require CDF to evaluate and mitigate cumulative watershed effects of timber harvest activities on downstream waterbodies listed under Section 303(d) of the Clean Water Act. 14 C.C.R. § 898.

protection measures contained in the FPRs are “scientifically inadequate to protect salmonids including steelhead,” “do not ensure protection of anadromous salmonid habitat and populations,” and provide “inadequate and ineffective cumulative impact analysis.” *See* 65 Fed.Reg. 36074, 36076; 36085-36086 (June 7, 2000), AR III, Tab H.

The U.S. Environmental Protection Agency has expressed similar concerns that the FPRs, which provide only for a parcel-by-parcel based assessment, “do not adequately address cumulative impacts from timber harvesting activities.” *See* Letter from Alexis Strauss, EPA Region IX, to Robert Kerstiens, California Board of Forestry (Nov. 11, 1997), AR III, Tab I, p. 1-2. The U.S. Forest Service, for its part, found the FPRs “not sufficient to restrict excess sediment production from logging-related activities to levels that will not . . . degrade water quality,” while noting that “[s]everal studies carried out recently in northwest California have demonstrated that cumulative watershed impacts have occurred despite the continued implementation of California’s Forest Practice Rules.” *See* Letter from Leslie Reed, U.S. Forest Service, to Fred Keeley, Speaker pro tem of California Legislature (May 24, 1999), AR III, Tab J, p. 1-2. Even a “blue ribbon panel” convened at CDF’s own request to evaluate the cumulative impacts of forest practices on water quality in the North Coast Region shared these concerns:

“Denials of the likelihood of CWEs [cumulative watershed effects] are repeated regularly by applicants and reviewers, despite the widespread recognition among environmental scientists that, in the aggregate, timber harvest in coastal California has resulted and continues to result in radical alterations of water quality, habitat conditions, and perhaps flood risk.” *See* University of California Committee on Cumulative Watershed Effects, “A Scientific Basis for the Prediction of Cumulative Watershed Effects” (June 2001), referenced at AR II:1106.

In addition to these cumulative watershed effects, ongoing elimination of forest land in this area from forest-to-vineyard conversion activities has restricted the already-truncated range of the northern spotted owl, both through direct loss of existing forest land and the increased fragmentation of remaining forest habitat. AR II:001081. Habitat loss and fragmentation has also negatively affected other forest-dependent wildlife. *Id.*

Yet despite these concerted warnings from sister agencies and others, CDF continues to approve timber harvest plans (“THPs”) and TCPs on a piecemeal basis throughout the Gualala watershed without meaningful assessment of cumulative watershed effects. CDF has in fact already approved 21 timberland conversion projects in this Project’s “watershed assessment area,” with six additional conversion projects pending, and one proposed. AR II:000813-000814. All but three are vineyard conversions. *Id.* In addition, 28 THPs have been filed in the watershed assessment area in the past ten years alone, and one application is pending. *Id.*

In summary, the timberland-to-vineyard conversion project at issue here would occur within a natural area of Northern California that is both unusually high in resource value, and unusually threatened by resource degradation from multiple, simultaneous timber harvests and forest-to-vineyard conversion projects in its vicinity.

### **C. REGULATORY FRAMEWORK**

CDF’s review and approval of timberland conversion projects occurs as a two-step process. Under the Z’Berg-Nejedly Forest Practice Act of 1973 (Pub. Resources Code § 4511, *et seq.*), an approved Timber Harvest Plan (“THP”) is required before a project proponent may remove live trees from a particular site. § 4581 *et seq.* A Timberland Conversion Permit (“TCP”) is then required to permanently convert timberlands to uses other



than growing timber. § 4621 *et seq.* The pertinent distinction between a THP and a TCP is that a THP envisions post-harvest reforestation. It does not envision the permanent conversion of harvested timberlands to other, non-forestry related uses such as grape-growing. Thus, tree-cutting by itself may properly occur pursuant to a THP, but permanent removal of living tree stumps and alteration of underlying soil characteristics to enable growth of other crops requires a TCP.

The Secretary of the Resources Agency has certified the THP review process as a “certified regulatory program” under section 21080.5 (*see* CEQA Guidelines, 14 C.C.R. § 15251(a)), thereby exempting THPs from the environmental review provisions of CEQA. The TCP review process has not been similarly certified, however, and thus is not exempt from CEQA. Therefore, any person proposing to convert timberland to some other use must obtain from CDF both a THP, the environmental review of which occurs outside the purview of CEQA, and a TCP, to which CEQA directly and fully applies.

#### **D. PROJECT DESCRIPTION & PROCEDURAL HISTORY**

In or around April 2000, Real Parties applied to CDF for a TCP and approval of a THP (THP No. 1-00-147 SON). As described by CDF, the Project would occur in several phases. First, Real Parties would clear-cut the redwood, sugar pine and Douglas fir on the site. AR II:000666. Next, they would remove or burn hardwoods, unmerchantable slash, roots and stumps. AR II:000716. Real Parties would then rip, rock-pick and grade the soil, then treat it with chemicals to “sterilize” it prior to vine planting. AR II:000718. Finally, a vineyard would be planted and maintained, together with an irrigation system, and deer-fencing. AR II:000735-000736. The vineyard’s irrigation system would capture runoff that would otherwise flow into Buckeye Creek or recharge groundwater in its

watershed, use it for irrigation, and then drain the agricultural runoff back into the Creek via one or more of its tributaries. *Id.*; AR II:1119; 1053-1054. Various chemical fertilizers, herbicides and pesticides would be applied to the vineyard in perpetuity during operations. AR II:000736.

### **1. The 2001 Draft Negative Declaration**

In or around August, 2001, CDF released a draft initial study and negative declaration (“draft ND”) for the Project. AR I:000163-000269. At the time, the Project was described as affecting only 88 acres instead of 90. *Id.* Attached to the draft ND, *inter alia*, was an Erosion Control Plan (“ECP”) prepared for the THP in 2000. AR I:000245 *et seq.* The ECP purported to include mitigation measures to minimize adverse impacts on water quality and aquatic habitat in the watershed from Project-generated soil erosion and sedimentation. AR I:000246-254.

The 2001 ND concluded the Project “could not have [any] significant effect on the environment.” AR II:000131. In particular, the ND concluded the Project had “no potential to degrade the quality of the environment, [or] substantially reduce the habitat of a fish or wildlife species[.]” AR II:000186. The ND also concluded the Project would not have any impacts that were “cumulatively considerable,” including, implicitly, cumulative impacts on watershed resources. *Id.*

Several individuals, organizations, and government agencies, including DFG, submitted written comments on the draft ND and, specifically, on the ECP as well. These commenters unanimously criticized the lack of analysis in the negative declaration and called for CDF to prepare a full EIR for the Project. Following is a summary of points raised in DFG’s comment letter dated September 5, 2001 (AR II:001118-001125):

- ◆ The permanent loss of habitat for the Federally threatened northern spotted owl should be considered a significant impact in the ND (AR II:001118-001119);

- ◆ The project could adversely affect water quality and quantity, causing significant impacts to threatened salmonid habitat (AR II:001119);
- ◆ The use of agricultural chemicals during vineyard operations could contaminate streams, causing significant impacts to threatened species and habitat (AR II:0001121);
- ◆ Depletion of groundwater from irrigation pumping could impair natural hydrologic process, significantly impacting downstream threatened fish populations (AR II:001121-001122);
- ◆ The lack of substantial evidence supporting sediment transport assumptions in the ECP required further analysis of potential effects to steelhead (AR II:001122); and
- ◆ The project may have cumulatively considerable impacts to northern spotted owl and steelhead populations and habitat. (AR II:001123).

Significantly, DFG concluded its letter thus:

“Finally, the Department believes that CDF, as Lead Agency under the CEQA process, should find, consistent with CEQA section 15065, that the proposed 88-acre timberland conversion may have a significant effect on the environment, and should, therefore, require that an EIR be prepared for this project.” AR II:001124, emphasis added.

DFG’s request for an EIR was seconded by the Sonoma County Permit and Resource Management Department, who, in a letter dated September 7, 2001, stated:

“Given the potential cumulative effect of this and the other pending conversions, the County would request an EIR before considering approval. The cumulative effect of the loss of timberland to this region and to the county should be considered, as well as the impact on water resources, biotic resources, and inconsistency with the County General Plan.” AR II:001134, emphasis added.

Additional comments submitted by technical experts corroborated these agencies’ concerns. Most notably, Dennis Jackson, a professional

hydrologist, commented that alterations in stream flows caused by the Project's drainage system and water use may significantly impair threatened fish species through sedimentation, scouring of eggs from beds, and reduced summer flows. AR II:001033-001038. Jackson also commented that the Project was in an area designated as "water-scarce" in Sonoma County, and that the ND had not demonstrated an adequate water supply without potential impairment of surface flows necessary to threatened fish. AR II:001036-001037.

**2. CDF Separately Grants A Conversion Permit Exemption For The Project's Irrigation Pond, Gets Sued For Improper "Piecemealing," And Never Adopts The 2001 Negative Declaration.**

Unbeknownst to those commenting on the August 2001 draft ND, Real Parties had on June 21, 2001 applied to CDF for a "Less-Than-Three-Acre Conversion Exemption" to clear timber from a two-acre area immediately adjacent to the Project site, in order to build the vineyard's irrigation pond.<sup>4</sup> See Complaint, *Coast Action Group v. CDF*, AR I:000274. Despite the pending status of the TCP, not to mention the pending CEQA review, CDF approved the Conversion Exemption as an entirely separate project. *Id.* Real Parties later proceeded to clear-cut the two-acre site and construct the irrigation pond, completing it by October, 2001.

Upon learning of the proposed Conversion Exemption, DFG and others strenuously objected to CDF. In a letter dated November 26, 2001, DFG protested that CDF's approval of the two-acre Conversion Exemption as a separate project outside the TCP process constituted improper project "piecemealing" under CEQA, and appeared designed to avoid applicable

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<sup>4</sup> Under CDF regulations, a Conversion Exemption allows logging and conversion of timberland sites of less than three acres without a THP or TCP. 14 C.C.R. § 1104.1.

environmental review requirements. *See* AR III, Tab C, p. 2. DFG then stated that pond construction *by itself* could significantly impact listed species:

“The Department believes that the 31-acre foot irrigation pond has the potential to adversely affect Federally-listed threatened, steelhead trout (*Oncorhynchus mykiss*). . . . The Department asserts that without adequate impact analysis, the irrigation pond could have a significant effect on the environment, per Section 15065(a) of CEQA [sic], because it has the potential to degrade the quality of the aquatic environment in Buckeye Creek and restrict the range of steelhead trout. . . . We believe this [analysis] can be achieved within the context of an EIR, which should be prepared to address all project impacts associated with the Campbell Vineyard Conversion project.” *Id.* at 2, emphasis added.

Ultimately, an organization called Coast Action Group, which is not affiliated with either Petitioner here, sued CDF and Real Parties over the Conversion Exemption. AR I:000274-000280. Neither Sierra Club nor Friends of the Gualala River was a party to that lawsuit, or participated in its prosecution or settlement in any manner. *See* AR I:000274-000284. The case eventually settled, with CDF agreeing to rescind its Conversion Exemption approval and to revise the still-pending 2001 ND to include the irrigation pond in the project description, thereby increasing the total size of the affected area to 90 acres. *See* Settlement Agreement, AR I:000281-000284. As a consequence of the litigation, CDF never approved the 2001 version of the ND.<sup>5</sup> Instead, it set about revising it to include a more complete and accurate project description. AR II:000662.

### **3. The 2004 Mitigated Negative Declaration.**

On or around July 9, 2004, CDF released for public comment a revised initial study and mitigated negative declaration for the Project (“MND”). The stated purpose of the revised MND was to “remedy the

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<sup>5</sup> This point is key, as Real Parties argued to the trial court that Petitioners were guilty of laches for failing to challenge the 2001 *draft* ND.

apparent piecemealing” of the Project in 2001. AR II:000662. The MND found that the Project, after mitigation, would not have a significant environmental impact. AR II:000661-000969.

The initial study and MND for the most part repeated the impact analysis from its 2001 predecessor. It included the original TCP application and plan, the original THP, additional environmental information submitted by Real Parties, a hydrologic review, a copy of Sonoma County’s erosion control ordinance, a letter from the U.S. Fish and Wildlife Service regarding the northern spotted owl, and the settlement agreement between Coast Action Group and Real Parties. AR II:000661-000969. Notably, despite DFG’s comments criticizing the erosion control measures cited in the 2001 ND, the 2004 MND attached as an appendix and referenced the same March 7, 2000 Erosion Control Plan (ECP) that CDF had circulated with the 2001 draft ND. AR II:000865-000908. As such, the MND contained very little new analysis suggesting that CDF considered the expert and agency comments received on the 2001 draft ND.

Indeed, even a cursory review of the 2004 MND’s “analysis” and “mitigation” of biological and watershed resource impacts reveals that CDF simply ignored the great bulk of DFG’s and other experts’ concerns regarding the Projects individual and cumulative impacts. *See* AR II:000678-000680. The purportedly new “mitigation” measures identified in the MND were for the most part mere restatements of the measures described in the 2001 draft ND and its supporting documentation – the same measures expressly criticized as deficient by DFG and commenting experts. In particular, the MND’s sedimentation mitigation measures (AR II:000678, 679) are verbatim restatements of mitigation measures from the 2000 ECP. AR II:000866 *et seq.*, *cf.* AR I:000245 *et seq.* Again, both DFG and hydrologist Dennis Jackson had previously reviewed this ECP and expressly warned of its inadequacy in their comments on the 2001 draft

ND. *See* AR II:001118 (DFG letter stating it had reviewed the THP and ECP in tandem with 2001 draft ND); AR II:001033 (Jackson letter stating his comments were based on review of both THP and ECP).

Other purportedly “new” mitigation measures in the 2004 MND are, upon closer examination, revealed to be similar repetitions of the 2001 ND’s mitigation commitments that DFG and others had already deemed inadequate in comments on the latter. *See* discussion, *supra*.

#### **4. Expert Comments Criticizing The 2004 MND**

Various scientific experts and members of the public, including Appellants here, commented on the 2004 MND during the public comment period. These experts were again unanimous that the Project, even after implementation of the mitigation measures identified in the MND, would have a significant adverse effect on the environment. Pertinent comments are summarized below.

First, Peter Baye, Ph.D., submitted comments on the Project’s individual and cumulative impacts. AR II:001076-001082. Dr. Baye is a professional plant ecologist and botanist, specializing in coastal plant communities and species for over 25 years with over 12 years experience in the preparation, review, and management of NEPA and CEQA documents for the U.S. Army Corps of Engineers and the California Coastal Conservancy. AR II:001077. Dr. Baye has over 12 years experience coordinating and preparing Endangered Species Act consultations for the Army Corps and the U.S. Fish and Wildlife Service and over 5 years experience in preparing endangered species recovery plans for the Service. *Id.*

Dr. Baye commented that the Project would have the following significant impacts, and that these impacts would be significant both individually and cumulatively. Following is a summary of his comments:

- ◆ Fertilizer applications to highly transmissive sandy soils has a significant potential to cause eutrophication (loss of dissolved oxygen) deadly to salmonids and other aquatic animal species (AR II:001080);
- ◆ Eutrophication may interact cumulatively with sedimentation impacts to further degrade or thwart recovery of local stream steelhead habitat (*id.*);
- ◆ Nutrient enrichment may be exacerbated by reduction in groundwater discharges due to overdrafting of groundwater for irrigation and pond storage (*id.*);
- ◆ Substantial Project water use to establish new vines may impair survivorship of juvenile steelhead in summer channel bed pools of Gualala River tributaries (AR II:001081);
- ◆ The Project will result in the permanent loss of 63 acres of habitat for the northern spotted owl, which will restrict the range of this species (*id.*);
- ◆ The expansion of patches of agricultural open habitats affects the distribution and abundance of northern spotted owl predators (*id.*); and
- ◆ The Project may contribute to the endangerment of Annapolis manzanita, a rare species distributed almost entirely within the Goldridge soil series undergoing rapid agricultural conversion (AR II:001082).

James Jordan, Jr. submitted comments on behalf of Petitioner Friends of the Gualala River. AR II:001096-001107. His letter focused on the Project's cumulative watershed effects. It accordingly attached and incorporated by reference a series of expert comments prepared by professional hydrologists Dennis Jackson and Greg Kamman, and by professional biologist Patrick Higgins, addressing impacts from two other forest-to-vineyard conversion projects in the same watershed, the Martin Conversion (THP 1-04-059 SON), and the Artesa Conversion (THP 1-04-



171 SON). AR III, Tabs D, E, and F. Jordan stressed that that the Martin and Artesa Conversions involve the same land use alteration as the Campbell Conversion (timberland to vineyard), are in the same watershed and habitat area (Gualala River, Grasshopper Creek, and Buckeye Creek), would affect the same aquatic and terrestrial species (coho salmon, steelhead, spotted owl, etc.), and were occurring at the same time.

The comments of Baye, Higgins, Jackson, and Kamman showed that ongoing water quality and habitat degradation in the watershed would be cumulatively significant, and that an EIR should be prepared. AR II:001096-001097; 001102. Specifically, they documented the following cumulative impacts:

- ◆ Increased sedimentation and higher water temperatures in the drainages surrounding the Project area and in the Gualala River drainage downstream and consequent harm to coho salmon, steelhead, and other aquatic life (Baye, AR II:001078; Higgins, AR III, Tab B, pp. 3-13; Jackson, AR III, Tab D, p. 7);
- ◆ Changes in surface water flows and consequent harm to threatened fish and other aquatic life (Higgins, AR III, Tab B, pp. 15-16; Jackson, AR III, Tab D, pp. 7, 14-15);
- ◆ Water pollution from viticultural chemicals downstream of the Project, and consequent harm to threatened fish and other aquatic life (Baye, AR II:001080);
- ◆ Permanent loss of forest habitat and fragmentation of remaining forest habitat and consequent harm to forest wildlife through that loss and fragmentation (Baye, AR II:001081); and
- ◆ Impacts to groundwater and surface water supplies (Kamman, AR III, Tab E, p. 6.)

Finally, Peter Ashcroft, a long-time resident of the area, submitted comments on behalf of the Redwood Chapter of the Petitioner Sierra Club. AR II:001086-001087. Mr. Aschcroft's letter explained:

- ◆ The Project will result in excess sediment, increased water temperatures, and reduced summer surface flows in the Gualala River and its tributaries, impairing the habitat of threatened salmonids, as evidenced by comments by hydrologists on similar projects. (AR II:001086);

Despite these expert comments documenting the Project's significant individual and cumulative impacts, and despite the grave concerns expressed by DFG throughout the process, and the repeated, unanimous requests that a full EIR be prepared, CDF approved TCP 00-469 and adopted the MND, without change, on May 4, 2005. Concurrent with its approval, CDF released its written responses to comments received during the environmental review process. AR II:001277-001342. The cavalier manner in which CDF dismissed wholesale DFG's protests and request for an EIR bears noting:

"The CDFG review is based on incomplete consideration of site facts, and a biased evaluation of future vineyard management activities which are closely regulated by Local, State, and Federal agencies. We disagree that potential significant adverse impacts were not disclosed. The CDFG memo assertions have been carefully evaluated and refuted on a point by point basis. Accordingly, the CDFG conclusion that the environmental quality will be degraded and that appropriate mitigations have not been considered is not passed on [sic] full or complete evaluation of site conditions. The assertion that the conversion should be denied cannot be supported in fact. The request for EIR preparation is not based on sound reasoning or scientific principles and should be dismissed." AR II:001286.

On May 5, 2005, CDF filed a CEQA Notice of Determination with the State Clearinghouse. On May 19, 2005, CDF approved the associated THP for the Project. AR II:001345.

**E.**  
**PROCEEDINGS BELOW**

On June 2, 2005, Appellants filed their Petition for Writ of Mandate. AA, Tab E. Appellants simultaneously sought a TRO barring Real Parties from tree-cutting on the Project site, which the trial court denied. Real Parties then proceeded to cut most of the trees at the site, though they left the stumps in the soil. Thereafter, on September 20, 2005, the trial court granted in part a preliminary injunction barring Real Parties from certain conversion activities, including stump removal and soil sterilization work, pending a final judgment on the merits. *See Register of Actions, AA, Tab D, p. 5.*

On February 22, 2006, the trial court heard oral argument on the writ petition. A central issue was the appropriate standard of review. Appellants' counsel explained and underscored that the correct standard for review of a mitigated negative declaration under CEQA is the "fair argument" standard. *See RT 3:21-22; 30:23-24.* Counsel for CDF, however, urged the court instead to adopt a "substantial evidence" test:

"What we argued in our reply brief is that the fair argument test, which is a test under CEQA and does apply under certain circumstances, is not the test here. Rather, the fair argument test predates the creation by the legislature, by the guidelines, of the mitigated negative declaration concept. And there's a specific guideline which they acknowledge, Section 15064(f)2 of the Code of Regulations, which defines what a mitigated negative declaration is, and defines a standard to be applied. I believe it is a substantial evidence standard. They still disagree with that, but the language speaks for itself." RT 14:20-28, 15:1-2.

The trial court apparently agreed with CDF, and denied the writ by order dated March 27, 2006. The court reasoned:

"WRIT OF MANDATE IS DENIED. The court has concluded that the proper standard of review is the 'substantial evidence' test rather than the fair argument test sought by petitioners. It appears to the

court that there is substantial evidence that the mitigated project does not have a substantial effect on the environment. Most of the information upon which the Petitioners rely is either not substantial evidence or appears to be directed solely to the 2001 negative declaration. This court has determined that respondents have not abused their discretion, have proceeded in the manner required by law and that the decision is supported by substantial evidence. Finally, the court believes the doctrine of laches, as it was argued by the respondents, is applicable, although the court did not rely upon the doctrine in reaching its decision. Each side to bear its own costs and fees.” AA, Tab B.

This appeal followed.<sup>6</sup>

## V. STANDARD OF REVIEW

Appellate review of an agency’s decision not to prepare an EIR is *de novo*, “with a preference for resolving doubts in favor of environmental review.” *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4<sup>th</sup> 1035, 1109; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4<sup>th</sup> 608, 617-618. The appellate court applies the same scope and standard of review to the agency’s decision as that applied by the trial court. *County Sanitation Dist. v. Kern County* (2005) 127 Cal.App.4<sup>th</sup> 1544, 1577-1578. The appellate court is not, however, bound in any way by the superior court’s findings. *Id.*

When any court reviews an agency’s decision to certify a negative declaration rather than an EIR, it must determine whether substantial evidence supports a “fair argument” that the project may have a significant effect on the environment. *See* §§ 21080, subs. (c) & (d), 21151; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4<sup>th</sup> 1112, 1123; *County Sanitation Dist. No. 2 v. County of Kern* (2005)

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<sup>6</sup> As discussed, On May 19, 2006, the court issued an order staying these same activities pending consideration of the appeal’s merits.

127 Cal.App.4<sup>th</sup> 1544, 1579. Stated otherwise, when an agency’s decision not to prepare an EIR is challenged, “the concern of judicial review, by both trial and appellate courts, is whether there is substantial evidence in the record supporting a fair argument of significant environmental impact.” *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1348, emphasis added.

The “fair argument” standard of CEQA is discussed in more detail in the following section.

## **VI. ARGUMENT**

### **A.**

#### **CEQA’S LOW “FAIR ARGUMENT” STANDARD FOR EIR PREPARATION.**

“CEQA is a comprehensive scheme designed to provide long-term protection to the environment.” *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112. In enacting CEQA, the Legislature declared its intention that “all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties.” *Id.* Accordingly, “CEQA is to be interpreted ‘to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.’” *Ibid.*

CEQA requires all agencies to prepare an EIR for any project that they intend to carry out or approve that “may have a significant effect on the environment.” § 21151(a). The determination whether a project may have such an effect follows from the agency’s preparation of an initial study. Guidelines, § 15063(a). If, following the initial study, there is substantial evidence, in light of the whole record before the lead agency, that a project may have a significant effect on the environment, “the agency shall prepare a draft EIR.” Guidelines, § 15064 (a)(1), emphasis added.

Importantly, substantial evidence of an actual impact need not be established; if there is substantial evidence in the record that a project may have a significant effect on the environment, the lead agency must prepare an EIR. *Id.*, subd. (f)(1); *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003. In other words, if a lead agency is presented with a “fair argument” that a project may have a significant effect on the environment, even after mitigation measures are implemented, the lead agency shall prepare an EIR “even though it may also be presented with other substantial evidence that the project will not have a significant effect.” Guidelines, § 15064(f)(1), *citing No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.

The term “substantial evidence” is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” Guidelines, § 15384(a). Per the Guidelines, “substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion support by facts.” Guidelines, § 15064(f)(5). “Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence.” *Id.*

Nevertheless:

“in marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.” Guidelines, § 15064 subd. (g), emphasis added.

Thus, evidence to support a fair argument need not be ““overwhelming or overpowering evidence.’ Nor does it have to be uncontradicted.” *Friends of*

*the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1402. Credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive, and under such circumstances an EIR must be prepared. See *City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531, 541-542. “Deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.” *Quail Botanical Gardens Fnd’n v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.

Courts routinely describe the “fair argument” test as “a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review.” *County Sanitation Dist. v. Kern County* (2005) 127 Cal.App.4th 1544, 1579. This extremely liberal evidentiary standard is founded upon the principle that, because adopting a negative declaration has a “terminal effect on the environmental review process,” resolving any doubts in favor of preparing an EIR is necessary to “substitute some degree of factual certainty for tentative opinion and speculation.” *Citizens of Lake Murray Area Association v. City Council* (1982) 129 Cal.App.3d 436, 440; *No Oil, supra*, 13 Cal.3d at p. 85.

In sum, if there is any substantial evidence whatsoever in the record that this timberland conversion Project may have a significant environmental effect, individually and/or cumulatively, then the trial court’s ruling must be reversed, regardless of the existence of contradictory evidence in the record.

**B.**  
**THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE PROJECT  
WILL HAVE INDIVIDUALLY SIGNIFICANT EFFECTS ON THE  
ENVIRONMENT.**

As discussed, DFG and commenting experts identified several Project-caused impacts that were individually and/or cumulatively significant when viewed in conjunction with other similar projects underway in the same watershed. The following section highlights evidence of the Project's significant individual impacts. A later section will highlight evidence of its cumulatively considerable impacts.

**1. Substantial Evidence Of Significant Impacts On Water  
Quality And Aquatic Habitat.**

DFG and scientific experts were unanimous in their comments that the Project will further degrade water quality in the Gualala and its tributaries to the detriment of endangered coho and threatened steelhead. In comments on the 2001 ND, DFG began by informing CDF that “[o]n July 17, 2001, [DFG] personnel personally observed juvenile, Federally-listed threatened steelhead trout (*Oncorhynchus mykiss*) in Grasshopper Creek, approximately 2,000 feet downstream of the northern edge of the conversion boundary.” AR II:001119. DFG then stated:

“The THP, TCP and [Erosion Control Plan] fail to adequately consider, provide sufficiently detailed analysis, and disclose potential impacts to steelhead trout from the proposed withdrawal of water via the onsite well for irrigation, and the capture of surface flow for a proposed reservoir impoundment. Most important, an evaluation of water quantity and quality available to juvenile steelhead during the summer months in dry years when vineyard operations are occurring, was not included in the impact analysis. [DFG] believes that the proposed project could adversely affect salmonid habitats in Grasshopper Creek and Buckeye Creek, and result in the restriction of the range of steelhead in the watershed.” AR II:001119.



DFG further protested that the vineyard's use of agricultural chemicals, including fertilizers, pesticides, and herbicides could cause toxic effects to steelhead and their food resources. AR II:001121. DFG also complained that the Project's irrigation pond, which CDF had attempted improperly to "piecemeal," would by itself cause significant impacts on salmonids by reducing runoff flows into the affected creeks. AR III, Tab C, p. 2.

As a result, DFG repeatedly requested that an EIR be prepared to address these and other issues. AR II: 001124; AR III, Tab C, p. 2. *See* further discussion in Statement of Facts, *supra*. These comments from DFG, a sister agency with special expertise over the resources implicated, clearly constitute "facts, reasonable assumptions predicated upon facts, and expert opinion support by facts," and thus substantial evidence under section § 15064(f)(5) of the Guidelines. The court could and should reverse the trial court's order on this basis of DFG's comments alone.

Corroborating DFG, however, were hydrologists Jackson and Kamman, and biologists Higgins and Baye. As elaborated upon below, these scientists all concurred that the Project would significantly impact water quality salmonid habitat in a variety of respects.

**a. Water Quality Impacts From Sedimentation**

Baye, PhD, underscored the inadequacy and perfunctory nature of sediment mitigation measures specified in the 2004 MND:

"[n]o criteria or 'caps' for sediment yield or post-harvest erosion are set; no monitoring or reporting of monitoring data are proposed or required. There are no corrective or contingency measures proposed or required for greater-than-expected erosion and sediment transport to affected tributaries of the listed sediment-impaired and temperature-impaired Gualala River." AR II:001080.

Baye commented further:

"Gullyng of unconsolidated, disturbed, fine sandy sediments of the Ohlson Ranch formation has been evident on nearby new vineyards on similar slopes during the vulnerable first several years after

ripping and tillage. During extreme winter storms, local failure of erosion control measures on erodible, sandy soils with incomplete vegetation cover and minimal root consolidation could result in significant impacts on sedimentation of steelhead streams downslope.” AR II:1080.

Dennis Jackson, a professional hydrologist with several years of experience working for the Mendocino County Water Agency (*see* AR II:001153), concurred. Commenting on the THP and ND in 2002, he explained that tree removal would increase sediment transport in affected streams through increased splash erosion. AR II:001150. He objected that sedimentation had not been quantified, AR II:000874, and that the reliance on future studies in the ECP made it impossible to determine the effectiveness of measures that might be imposed to control sediment transport. AR II:1035-1035.

Also concurring was Biologist Patrick Higgins. In comments on the TCP for the nearby Martin Vineyard Conversion, in the same watershed (submitted by James Jordan in comments on the 2004 MND here), he documented that sedimentation in the Buckeye Creek basin is 200% above natural background levels and a major cause of degradation of salmonid habitat. AR III, Tab. B, pp. 2-3, 5-10. He offered data showing that sedimentation is actually of recent origin, contrary to the assertion in the MND that historic logging practices prior to the Forest Practice Act are responsible for the sedimentation. *Id.* pp.5-10; MND, AR II:00668, 00814. This also suggests that mere compliance with the Forest Practice Rules cannot be expected to prevent sediment transport. *Id.*

Thus, all these experts reinforced DFG’s concerns that the Project’s impacts on salmonids from sedimentation are likely significant. AR II:001122.

**b. Impacts On Salmonids From Alterations Of Instream Flow Hydrology**

Hydrologist Jackson concurred with DFG that the 2001 ND was wholly inadequate in that it failed to disclose significant impacts from Project-caused increases in peak flows and decreased summer flows in Grasshopper and Buckeye Creeks, and from water scarcity in dry years. AR II:001033-001038. High peak flows and diminished summer base flows degrade the quality of salmonid habitat. AR II:001035. Jackson explained that infiltration capacity of vineyard soils would be reduced, and thus peak flows increased, because deep ripping will mix sandy clay loam subsoil with sandy loam topsoil. AR II:001150. Jackson also observed that the North Coast Regional Water Quality Control Board, an expert agency charged with protecting the resource at issue, had found that vineyard conversions “will certainly increase the peak flows.” AR II:001149-100150.

Jackson also showed how the Project will in fact decrease summer base flows to the detriment of salmonids. Specifically, he showed that rainfall is routed to stream channels quickly via overland flows, more slowly via shallow subsurface flows, and even more slowly via groundwater pathways, such that increased peak surface runoff will necessarily result in decreased infiltration and decreased subsurface and groundwater flows to the stream system. AR II:001149-001150. Thus, he explained, the reduction in water moving along the slower pathways caused by the Project’s irrigation system will reduce summer and fall streamflows, to the detriment of coho and steelhead. AR II:1150.

Biologist Patrick Higgins commented similarly, citing studies showing that timber harvesting increases peak flows in affected streams, and that cold water summer base flows are essential to maintenance of steelhead and to recovery of the coho. AR III, Tab B, p. 15. Higgins also

commented that groundwater recharge from runoff is essential to maintenance of summer base flows, citing several scientific studies, and he indicated that conversions reduce this infiltration. *Id.*

These expert comments all reinforce DFG's objection that the Project's use of surface flows would impair steelhead habitat. AR II:001119, 001121-001122.

**c. Water Quality Impacts From Chemical Runoff**

DFG and commenting experts were also unanimous in their opinions that agricultural chemical runoff from vineyard operations was likely to have significant impacts on water quality and salmonid habitat. Jackson commented that, contrary to claims in the 2000 Erosion Control Plan ("ECP"), water quality impacts from agricultural chemicals would not be avoided by Real Parties' proposed use of slow "agronomic irrigation rates." AR II:001152. On the contrary, chemicals can even be transported into the groundwater system by rainfall that occurs in the following year's wet season. *Id.* This reinforces DFG's concerns that application of large quantities of agricultural chemicals on unstable soils within 600 feet of a stream supporting salmonids may have toxic effects. AR II:001121. Note, too, that DFG also warned that accidental chemical spills could occur, and that no contingency plan had been prepared to address this risk. *Id.*

Baye concurred, warning that due to the high permeability of soils at the Project site, and the high rates of fertilization proposed, leaching of nutrients from fertilizer applications to groundwater could cause eutrophication of warm stream pools downslope, a process that "may cause long-term impacts to stream pools that provide habitat for juvenile steelhead." AR II:001080. This nutrient enrichment would be exacerbated by reductions in groundwater discharges. *Id.*

**d. Water Temperature Impacts**

Higgins presented evidence that Buckeye Creek water temperatures are already stressful for steelhead and well beyond the range required for coho salmon recovery, and that vineyard operations in this watershed would exacerbate this condition. AR III, Tab B, p. 4. He described how increased sedimentation from vineyard operations increases instream temperatures by increasing width to depth ratios facilitating heat exchange with the atmosphere. *Id.* He also showed that reductions in cooling summer base flows and scouring of riparian areas by increased peak flows also cause temperature increases. *Id.* at p. 4, 15.

Baye, meanwhile, commented out that temperature increases would exacerbate eutrophication. AR II:001080. Neither the heating mechanisms identified by Higgins nor the potential for eutrophication identified by Baye was addressed in the 2004 MND.

**e. Water Supply Impacts**

Jackson concurred with DFG that the Project's irrigation system could lead to significant reductions in the availability of water in dry years. Jackson first documented how the 2000 ECP, which CDF relied upon to support the MND, was based on an incorrect assumption that mean annual precipitation would be 72 inches, a material flaw. AR II:001151-001152. Jackson then calculated the correct mean annual precipitation based on local rainfall data to be 59.4 inches, a result confirmed by the USGS annual precipitation map showing 60 inches. AR II:001151. Thus, the ECP overstated rainfall by 21%, in turn understating potential impacts on area water supplies. *Id.*

Using correct rainfall data, Jackson recalculated runoff rates and concluded that the ECP's estimates for the reservoir yield for dry and extremely dry year conditions were overstated by 26% and 15%

respectively. *Id.* Jackson described further that insufficient water availability may result in additional impacts from appropriation of other water supplies, including groundwater pumping or stream diversions. AR II:001151.

Indeed, comments submitted by Coast Action Group in 2002 (AR II:001070-001072) show that the Project’s runoff containment pond lacks sufficient capacity to irrigate the vineyard, based on the vineyard water requirements assumed by the Project’s proponents. This demonstrates that the reservoir, even in combination with the existing well and other runoff from the available drainage area, would not have sufficient capacity to support the project, thus likely necessitating diversion of creek waters for irrigation. *See Id.*

In sum, Appellants submit that the foregoing expert opinion clearly constitutes “expert opinion supported by facts,” and thus substantial evidence that the Project may have significant adverse impacts on water quality and salmonid habitat in the already compromised streams of Buckeye Creek, Grasshopper Creek, and the Gualala River. An EIR is therefore required.

**2. Substantial Evidence Of Impacts On The Endangered Northern Spotted Owl – Triggering A Mandatory Finding Of Significance And Thus An EIR**

The Project involves the permanent deforestation of 88 acres of timberland providing habitat for the endangered Northern Spotted Owl. This fact alone triggers a mandatory finding of significance and thus an EIR pursuant to section 15065 of the CEQA Guidelines.

In comments on the 2001 draft ND, DFG advised CDF as follows:  
“The post-harvest NSO [northern spotted owl] habitat map shows that no NSO habitat will remain on the plan area following project activities, resulting in a permanent loss of 63 acres of functional NSO foraging, roosting and nesting habitats. Under CEQA Section

15065 [sic], the proposed conversion will result in the restriction of the range of NSO and, thus, should be considered a significant impact to this Federally threatened species.” AR II: 0001119.

DFG also commented that the ND’s cumulative effects analysis was deficient because it did not evaluate loss of NSO habitat. AR II:001123. DFG determined that because the Project would restrict the range of NSO, a mandatory finding of significance, and hence the duty to prepare an EIR, was triggered. AR II:00122.

Baye, PhD, agreed. In comments on the 2004 MND, he explained that the loss of NSO habitat was a significant impact under CEQA Guidelines section 15065. AR II:001081. Baye also cited scientific studies that establish that the expansion of patches of agricultural open habitats in maturing coastal forests affects the distribution and abundance of NSO predators. *Id.* This landscape-level effect was not considered or mitigated in the MND. *Id.*

CEQA Guidelines § 15065 requires a mandatory finding of significance and preparation of an EIR if a project has the potential to restrict the range, to substantially reduce the habitat, or to reduce the number of a threatened species. Here, there is substantial evidence from experts and DFG that the project will reduce the range of the NSO by eliminating habitat. Thus, CDF should have prepared an EIR on this basis alone.

### C.

#### **THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE PROJECT WILL HAVE CUMULATIVELY CONSIDERABLE IMPACTS ON THE ENVIRONMENT**

In addition to evaluating a project’s direct and indirect environmental effects, CEQA requires a lead agency also to assess whether a project’s cumulative effect requires an EIR. Guidelines, § 15064(h); *Communities for a Better Environment v. Resources Agency* (“CBE”)

(2002) 103 Cal.App.4th 98, 114. CEQA defines “cumulative effect” as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” Guidelines, § 15355. The cumulative impact from several projects is defined in that section as:

“the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.”

An EIR must be prepared if a project’s cumulative impact “may be significant and the project’s incremental effect, though individually limited, is cumulatively considerable.” Guidelines, §§ 15064(h)(1), 15065(a)(3); *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1401. “Cumulatively considerable means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.” Guidelines, § 15064(h)(1); *CBE, supra*, 103 Cal.App.4th at 114.

Note that a project’s impact can be cumulatively considerable even if its individual contribution to an existing state of environmental impairment is only *de minimis*. As the *CBE* court stated, “the guiding criterion on the subject of cumulative impact is whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect.” *Id.* at 118, *citing Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718, *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024-1026. Thus, the greater an existing problem, the more likely a project’s incremental contribution will be found cumulatively considerable regardless of its individual magnitude. *See Kings County, supra*, 221



Cal.App.3d at 720-721 (invalidating an EIR that found a power plant project's air quality impacts to be less than significant because it would have added only a small amount of additional air pollution to the region's existing air quality problem).

Finally, courts have affirmed that the "fair argument" standard applies to the determination whether evidence of potential cumulative impacts require preparation of an EIR. *CBE, supra*, 103 Cal.App.4<sup>th</sup> at 115. In this case, therefore, CDF was obligated to prepare an EIR if there was any substantial evidence in the record that this Project's impacts *may* be cumulatively considerable, even if those impacts are "individually limited." As discussed below, CDF's purported analysis of cumulative impacts is hollow and perfunctory, rendering it inadequate on its face, while expert and agency opinion in the record establishes the Project will in fact have significant cumulative impacts on watershed resources.

**1. The MND's Analysis Of Cumulative Impacts Is Legally Deficient.**

When CDF released the initial study and draft ND for the TCP in 2001, it included no independent cumulative impact analysis at all. AR I:000164-000267. Instead, it simply attached a few pages from the THP's own inadequate cumulative impact analysis and checked a "less than significant impact" box . AR I:000186, 000241-000243.<sup>7</sup> *See* Statement of Facts, Section B, *supra*. Commenting on that ND, DFG stated:

"[DFG] believes that the THP [sic] is deficient in its analysis of significant cumulative environmental effects resulting from this project, for two reasons. First, [DFG] maintains that the THP has not adequately identified the project's potential significant adverse effects on biological resources, which could be cumulatively considerable. Second, the permanent, cumulative loss of foraging,

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<sup>7</sup> This conduct certainly affirms the concerns voiced by NMFS, EPA, the U.S. Forest Service, and Little Hoover Commission about the inadequacy of CDF's approach to cumulative impact analyses generally.

roosting and nesting habitat for northern spotted owl, and the degradation and depletion of summer habitat for juvenile steelhead trout, were not included in the assessment. Consistent with CEQA section 15064(i) [sic], the Department believes that effects to these two threatened species may be cumulatively considerable and should be examined within the context of an [EIR].” AR II:001123.

Hydrologist Dennis Jackson’s shared these concerns, commenting that cumulative impacts on stream flows and salmonid habitat had not been evaluated in the 2001 ND. AR II:001154-001155.

The 2004 MND, for its part, shows no meaningful revision or supplementation of CDF’s cumulative impact analysis in response to these comments – again confirming the concerns raised by NMFS, EPA, *et al.* The 2004 MND again simply references a discussion of cumulative impacts contained in the THP. *See* AR II:00706, referencing AR II:000810.<sup>8</sup> As even a cursory review will reveal, that “analysis” consists only of boilerplate information about special status species and existing watershed conditions, coupled with irrelevant repetitions of the MND’s earlier (and clearly erroneous) conclusions that the Project’s *individual* effects are not significant. AR II:000810-000824.

Compare, for example, the MND’s boilerplate discussions of individual soil productivity impacts (AR II:000670) with those in the THP’s discussion of cumulative soil productivity impacts (AR II:000816-000817). They are identical, word for word. Compare, too, the MND’s perfunctory analysis of individual biological impacts (AR II:000671-000677), with the THP’s discussion of cumulative biological impacts (AR II:000817-000824). Also identical.

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<sup>8</sup> As the THP’s cumulative impact discussion, AR II:000810 *ff*, is incorporated by reference into the 2004 MND, AR II:000706, that discussion hereafter is referred to as the MND’s discussion of cumulative impacts.

Furthermore, the MND critically omits discussion of the impacts of numerous other timberland conversion projects in the area. After listing past and future timber harvests and conversions, the MND provides a single conclusory sentence stating that “[n]o continuing significant environmental impacts caused by projects within the last 10 years were identified in the research on this cumulative impact assessment.” AR II:000812-000813. Clearly, no actual analysis of cumulative impacts occurred.

CEQA does not permit a lead agency to conclude that a Project’s cumulative impacts are not significant simply because it also concludes that its individual effects are not. On the contrary, CEQA requires a cumulative impact analysis precisely because a project may contribute to an impact that is cumulatively significant when viewed in tandem with other projects, even though it may not cause individually significant impacts. *CBE, supra*, 103 Cal.App.4th at 114-115; Kostka & Zischke, “Practice Under the California Environmental Quality Act,” § 13.37 (1<sup>st</sup> ed., 2003 update). Thus, a cumulative impact analysis must separately consider the effects of a project viewed in connection with the effects of *other* projects. *Id.* at 119-120. This requires *actual analysis* of the other projects’ impacts. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729. The MND’s single conclusory sentence about the impacts of other projects is not sufficient; some specificity and detail and reasoned analysis is required. *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d, 397, 411.

Courts have underscored the importance of meaningful cumulative impact analysis. As the *CBE* court stated:

“One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions

when considered collectively with other sources with which they interact.” *CBE, supra*, 103 Cal.App.4<sup>th</sup> at 114.

Unfortunately, CDF’s analysis of cumulative impacts in this case simply reaffirms the concern by NMFS, EPA, the U.S. Forest Service, and the Little Hoover Commission that CDF’s cumulative impact analyses are perfunctory and flawed. *See* Statement of Facts, Section B, *supra*.

Appellants submit that CDF’s failure to conduct any meaningful analysis of cumulative impacts renders *per se* the use of an MND improper. “If [an] agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311. Furthermore, “[a] negative declaration is inappropriate where the agency has failed either to provide an accurate project description or to gather information and undertake an adequate environmental analysis.” *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 406. Thus, this court could and should reverse the trial court’s ruling based solely on CDF’s failure to perform an adequate analysis of cumulative watershed impacts.

In any event, as discussed below, there is substantial evidence in the form of DFG and expert opinion that the Project will in fact have cumulatively considerable impacts in tandem with other timberland conversion and timber harvest projects in the same watershed, thus triggering an EIR.

## **2. Substantial Evidence Of Cumulatively Considerable Impacts On Water Quality And Habitat.**

The record is replete with evidence supporting a fair argument that the Project will have significant cumulative impacts as well as significant individual impacts. As discussed, James Jordan, Jr. submitted a series of

expert comments previously submitted to CDF by professional hydrologists Dennis Jackson and Greg Kamman, and biologist Patrick Higgins, documenting foreseeable cumulative impacts from other forest-to-vineyard conversion projects in the very same watershed. AR II:001096-001107; Appx. I, Tab G, Exhs. B, D-G. Baye, Jackson, and DFG also commented on cumulative impacts. AR II:1078-1079; 1123; 001154-001155. As summarized below, these included cumulative impacts on salmonids and other aquatic life from increased sedimentation, higher water temperatures, and chemical contamination in the drainages surrounding the Project area and in the already-degraded Gualala River drainage downstream (e.g., AR II:001078) and from changes in surface water flows (e.g., AR III, Tab B., pp. 15-16).

**a. Cumulative Sedimentation Impacts**

Higgins presented evidence confirming that this watershed is subject to cumulative sedimentation impacts from other projects; that timber harvest of more than 25 percent of a watershed in 30 years will compromise habitat and impact salmonids; that all of the Buckeye Creek watersheds have been logged in excess of 25 percent in just 10 years; and that sedimentation impacts are recent, negating CDF's claim that compliance with Forest Practice Rules prevents ongoing sediment transport. AR III, Tab B, pp. 5-10. Jackson and Baye offered evidence that this Project in particular will contribute to these cumulative impacts, citing increased splash erosion and an inadequate sediment mitigation plan. AR II:001150, 001080.

James Jordan of Friends of the Gualala in turn submitted several scientific studies showing that sedimentation loads to the Gualala River from logging are additive, affirming that CDF should have considered the combined sedimentation effects of all of the conversions and harvest plans in the watershed. AR II:001100-001103. *See, e.g., Lewis et al., Impacts*

of Logging on Storm Peak Flows, Flow Volumes, and Suspended Sediment Loads in Caspar Creek, California, pp. 25, 27, cited and referenced at AR II:0001102. Baye, warned that “[g]iven the number of vineyard conversions in the assessment area, all establishing vines at the same time, there is a reasonable potential for significant cumulative impacts on survivorship of juvenile steelhead in summer channel bed pools of [the] Gualala River tributaries in Annapolis.” AR II:001081.

**b. Cumulative Water Quality Impacts From Chemical Runoff**

The MND concluded that there would be no cumulatively significant impact on water quality because equipment maintenance and fueling operations would occur outside of riparian zones. AR II:000815. Once again, the analysis is a verbatim repetition of the MND’s evaluation of the Project’s individual impacts and fails entirely to address potential impacts from other projects. Compare AR II:000815 to 000668. Substantial evidence controverts the claim. Jackson and Baye both demonstrated that chemical contamination from agricultural fertilizers and pesticides may leach into groundwater and impair streams downslope, to the detriment of salmonids. AR II:001152; 001080. DFG specifically objected to the application of large volumes of agricultural chemicals to unstable soils near Grasshopper Creek, and to the lack of mitigation to address accidents. AR II:001121. Baye expressly identified impacts from agricultural chemicals as a potential cumulative impact. AR II:1078. Indeed, the MND’s cumulative impact analysis does not even consider agricultural chemicals, focusing instead only on vehicle fueling and maintenance.

**c. Cumulative Hydrologic Impacts**

The MND’s cumulative impact analysis concluded that there would be no cumulatively significant impact on peak flows because of the broken

ground and retention of vegetative cover. This, yet again, is nothing more than a repetition of the analysis offered for the Project's *individual* impacts. Compare AR II:000815 to III:000668. As discussed above, this analysis is controverted by substantial evidence that peak flows will increase as a result of the Project and similar projects in the area. Jackson, AR II:001149-001150; Higgins, AR III, Tab B, p. 5.

Furthermore, the MND failed to consider the effects of multiple vineyard conversions on summer base flows. AR II:000814-000815. Baye indicated that there is a reasonable potential for cumulatively significant impacts due to the number of conversions in the assessment area, all establishing vines at the same time. AR II:001081. Jackson provided evidence that the Project would decrease summer base flows, and that groundwater infiltration and surface flows are interconnected. AR II:001149-001150, 001153. Higgins also indicated that groundwater recharge from infiltration is essential to maintenance of summer base flows, citing several studies. AR III, Tab B, p. 15. All this demonstrates that the Project may have a cumulatively considerable effect on peak flows and summer base flows, again to the detriment of salmonids.

**d. Cumulative Temperature Impacts**

Cumulative impacts on stream temperatures are a key concern, given the potential harm to cold water-reliant salmonids. The MND's cumulative impact "analysis" acknowledged that stream temperatures are already too high for Coho salmon – a fact underscored by the Gualala's listing under Section 303(d) of the Clean Water Act as water-quality impaired by high temperatures. AR II:000667. The MND concluded, however, that there would be no significant impact on temperature "due primarily to the absence of any class I or II watercourses within the project." AR II:000814, emphasis added.

This obviously does not constitute an analysis of cumulative impacts, as it fails to describe how the purported absence of Class I and II streams within the Project site would result in no significant impacts on water temperatures downstream, in Buckeye Creek and the Gualala River. On the contrary, DFG confirmed that the Project's hydrologic effects would occur downstream. AR II:001121-001122.

In sum, Appellants submit that the foregoing expert opinion clearly constitutes "expert opinion supported by facts," and thus substantial evidence that the Project may have cumulatively considerable impacts on water quality and salmonid habitat in the already compromised streams of Buckeye Creek, Grasshopper Creek, and the Gualala River. An EIR is therefore required.

**D.**  
**MITIGATION MEASURES IN THE 2004 MND DO NOT REDUCE IMPACTS  
TO LESS-THAN-SIGNIFICANT LEVELS**

CDF and Real Parties argued below that, despite all the foregoing expert and agency comments, mitigation measures contained in the 2004 MND rendered all individual and cumulative Project impacts less-than-significant. The record establishes that this is manifestly incorrect.

First, recall that the 2004 MND's stated purpose was to "remedy the apparent piecemealing" of the Project in 2001 – not to address substantive concerns regarding Project impacts raised in comments on the 2001 ND. AR II:000662. As a result, CDF simply ignored the great bulk of DFG's and other experts' concerns regarding hydrological, water supply, water quality, sedimentation, and temperature impacts on the salmonid habitat; impacts on the NSO; and cumulative impacts. *See* AR II:000678-000680.

CDF characterized the planned implementation of "an Erosion Control Plan" as a "new" mitigation measure. This is not true. As discussed, this plan is nothing more than the 2000 ECP that CDF had



circulated with the 2001 draft ND. AR II:000866 et seq., cf. AR I:000245 et seq. Both DFG and hydrologist Dennis Jackson had previously reviewed this very same ECP in tandem with the 2001 draft ND, and expressly warned of its inadequacy. *See* AR II:001118 (DFG comment letter stating it had reviewed the THP and ECP in tandem with 2001 draft ND); 001033 (Jackson letter stating his comments were based on review of THP and ECP). Other purportedly “new” mitigation measures in the MND are, upon examination, similar restatements of the “commitments” contained in the 2001 ND. Upon closer examination, these measures do not even constitute actual mitigation of anything.

To illustrate, Appellants reproduce below, in their entirety, all purportedly “new” measures found in the 2004 MND (at AR II:000678 – 000680), together with an explanatory response to each.

#### **Biological Resources Impacts**

**“Mitigation Measure 3.1:** A Botanical Survey shall be conducted during the blooming season and prior to operations to identify and evaluate habitat for endangered, threatened, rare, and species of special concern within the project site.” AR II:000678.

Appellants’ Response: Conducting a botanical survey does not constitute actual mitigation of the impacts to NSO, salmon, steelhead, or other species of concerns identified by Fish & Game. No action is specified based on the result of this survey. This simply is not mitigation.

**“Mitigation Measure 3.2:** A Biologist shall conduct Northern Spotted Owl Surveys prior to operations for the occurrence of the species within 1.3 miles of the operations.” *Id.*

Response: Again, conducting a survey is not mitigation. Furthermore, there is no evidence Real Parties even conducted such a survey prior to clear-cutting most the Project site in the summer of 2005 prior to the trial court’s issuance of a partial preliminary injunction. Real

Parties appear to have already violated even this toothless mitigation requirement.

**“Mitigation Measure 3.3:** A data base search (Natural Diversity Data Base) was conducted by the Forester regarding endangered, threatened, rare, and species of special concern within and adjacent to the project area with negative results.” *Id.*

Response: This describes one step in the analysis of potential impacts; it does not constitute a mitigation measure since it does not describe any prospective activity to lessen impacts. Searching a database does not constitute mitigation. Furthermore, simply because no listed species occur *on or immediately adjacent* to the Project site does not mean the project will not have significant impacts on listed fish and bird species, *who move around*, and who will be impacted by sediments and other pollutants traveling downriver. Indeed, Fish & Game specifically expressed concern about *downstream* fish populations. AR II:001121-001122.

**“Mitigation Measure 3.4:** The potential degradation of water quality that could potentially impact fish and fish habitat shall be mitigated by not permitting operations between October 1 and April. The planting of a cover crop prior to the winter period and the design and development of an Erosion Control Plan [“ECP”] shall mitigate runoff. By restricting operations to slopes less than 20% and requiring setbacks from watercourses between 25 and 50 feet the impact to water quality and fish and fish habitat will be insignificant.” AR II:000678.

Response: Here, the referenced ECP *is* the 2000 ECP that was circulated with the 2001 draft ND and criticized by Fish & Game and Jackson. This ECP *already included* the various other measures identified in Mitigation Measure 3.4, such as barring operations during the rainy season (AR II:000871-000872), planting cover crops (AR II:000872-000873, 000893), riparian setbacks of 25 to 50 feet in accordance with local ordinance (AR II:000871, 000949); and slope control (AR II:000869,

000870). Again, this is precisely the set of erosion control measures that DFG, Jackson, and Baye found inadequate to mitigate impacts on salmonid habitat. Jackson and Baye both criticized the ECP because it relies on future designs, provides no performance criteria for acceptable sedimentation, provides no contingency if those criteria are not met, and requires no monitoring or reporting. AR II:001135, 001080.

Regardless, an agency may only defer the formulation of mitigation measures when it “recognizes the significance of the potential environmental effect, commits itself to mitigating its impact, and articulates specific performance criteria for the future mitigation.” *Gentry v. City of Murietta* (1995) 36 Cal.App.4<sup>th</sup> 1359, 1411, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029; CEQA Guidelines § 15126.4(a)(1)(B). Here, because the sedimentation has not been quantified and no sediment caps or targets have been set, CDF has neither “recognized the significance of the potential environmental effect” nor set performance criteria. AR II:001122, 001135, 001080.

“[A]n agency goes too far when it simply requires a project applicant to obtain a . . . report and then comply with any recommendations that may be made in the report.” *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4<sup>th</sup> 1261, 1275; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4<sup>th</sup> 777, 793. Here, CDF is clearly just telling the applicant to get a report, in the form of a design study, and then to comply with its recommendations. AR II:000871-000873. Furthermore, an agency may not delegate approval of mitigation measures because that violates CEQA’s requirement that environmental analysis derive from the decision making body itself. *Sundstrom v County of Mendocino* (1988) 202 Cal.App. 3d 296, 307. This requirement is violated here because there is no indication that CDF will be involved in further approval of final design and installation of the erosion control system.

Finally, the mitigation will not be enforceable since no effective monitoring will be required: the ECP states that a “*scientifically-based* sediment yield monitoring program” will not be imposed on the applicant because it is “inconsistent” with requirements imposed on other growers, and that the landowner will be the “responsible party” to monitor sediment on a “traditional visual basis.” AR II:000875.

**“Mitigation Measure 3.5:** Wildlife corridors shall be established to aid in the movement of wildlife and to allow for the passage of mammals through the vineyard by fencing zones approximately 10 feet in width and eight feet in height.” AR II:000678.

Response: While this may appear to be a constructive attempt to improve wildlife habitat, it does not respond to the concerns of Fish & Game, Jackson, and other commenters who focused on impacts on water supply, water quality, sediment transport, and loss of NSO habitat.

**“Mitigation Measure 3.6:** Maintain a Wildlife Corridor on the property located between the Vineyard fencing and Grasshopper Creek. The first 150 feet extending from the Creek to the fence shall be managed according to the Forest Practice Rules. The balance of the corridor shall be maintained with at least 70% canopy cover, determined by a solar pathfinder. The canopy shall be comprised of at least 50% conifers that are well distributed representing all size classes present, so long as that ratio is possible given the natural conditions.” AR II:000678-000679.

Response: Same as above.

### **Hazardous Materials (Pesticides/Herbicides) Impacts**

**“Mitigation Measure 5.1:** [Organic herbicide, pesticide, fertilizer, and soil amendment] Applicators must possess a Qualified Applicators License to apply the above referenced materials.

**“Mitigation Measure 5.2:** Detailed records must be kept of chemicals stored and date of application.” AR II:000679.

Response: Again, the 2000 ECP already included the requirement that chemicals be applied by qualified individual (AR II:000873), a

measure found inadequate by commenting experts and DFG, who expressed concern about applying large amounts of chemicals on unstable soils 600 feet from salmonid-bearing waters. AR II:001121.

Furthermore, requiring qualified chemical applicators and maintenance of records quite obviously does not constitute mitigation of impacts from the regular use of these chemicals or from potential accidents. CDF also may not simply presume that compliance with chemical regulations will prevent significant impacts, particularly in the face of evidence to the contrary. *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal.App.4th 1, 12-18; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 115-116 (“CBE”). Nor may CDF dismiss as speculative concerns about chemical use that it has not investigated itself. *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2006) 139 Cal.App.4th 165, 231 (“we conclude that CDF’s statement that ‘the use [of herbicide in accordance with label instructions and DPR restrictions] would not have a significant effect on the environment’ is not a finding based on an analysis of the record, but a statement that attempts to describe the legal effect of the DPR regulatory program”). Thus, neither CDF’s investigation nor the offered “mitigation” addresses the impacts identified.

### **Hydrology and Water Quality Impacts**

**“Mitigation Measure 6.1:** To offset the degradation of water quality a riparian buffer has been developed (25’ adjacent to slopes <30% and 50’ adjacent to slopes > or = 30%) adjacent to the class III watercourses. A cover crop shall be planted prior to the winter period upon the removal of forest vegetation to inhibit the erosion of soil and the transport of sediment. An Erosion Control Plan shall be designed by a qualified engineer and administered by a vineyard management company.” AR II:000679.

Response: See the comments on Mitigation Measure 3.4, *supra*. Again, the referenced Erosion Control Plan **is** the 2000 ECP already circulated and criticized by Fish & Game and Dennis Jackson, and the other measures specified here in Mitigation Measure 6.1 are *already included* in it. AR II:000871-000873. It was precisely this set of erosion control measures that DFG, Jackson, and Baye found inadequate to mitigate impacts on salmonid habitat to less than significant levels.

**“Mitigation Measure 6.2:** Cease any and all water extraction from Grasshopper Creek for irrigation purposes, including subsurface flows hydrologically connected to the Creek, other than those associated with the irrigation reservoir. The Campbell’s [sic] will disconnect the irrigation lines from the well on their property adjacent to the creek and from the instream diversion on Grasshopper Creek, and will provide verification of the disconnection to Coast Action. The Campbell’s [sic] are not foreclosed from seeking an instream diversion for irrigation purposes as long as they obtain all permits for such use as required by law, including a permit from the State Water Resources Control Board. In addition, the Campbell’s [sic] agree that the terms of such permit or permits will require compliance with the Guidelines for Monitoring Instream Flow to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams by California Department of Fish and Game and National Marine Fisheries Service.” AR II:000680.

Response: While this may prevent future unpermitted diversions directly from Grasshopper Creek, it entirely fails to address most of the significant hydrological impacts identified by experts. Jackson pointed out that diversion of *runoff* to fill the reservoir would impair stream flows to both the Grasshopper and Buckeye creek watersheds. AR II:001148-001149. Conversion would increase peak flows, decrease summer base flows, and decrease groundwater infiltration. AR II:001033-001038, 001148-001150, 001121-001122. Expert evidence shows that reservoir water will be insufficient, requiring either groundwater pumping or stream diversions. AR II:001151-001153; 1070-1072.

While a permit may be required for future stream diversions, this does not meet the requirement that a CEQA document actually identify the essential water source and evaluate resulting impacts to water supplies and from water supply infrastructure at the time of project approval, an omission Jackson identified. AR II:001151-001153, 1061; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4<sup>th</sup> 182, 199-205; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829-830.

In sum, all the “new” mitigation measures included in the 2004 MND that Respondents now claim Appellants failed to address are, upon examination, either: (a) restatements of the same measures contained in the 2000 ECP previously circulated and critiqued, (b) wholly non-responsive to the concerns raised by DFG and Jackson in 2001; or (c) plainly not mitigation measures of any sort at all. Clearly there remains substantial evidence in light of the whole record that the Project at the very least *may* have a significant impact even after implementation of CDF’s “new” mitigation measures.

## **VII. CONCLUSION**

This court should reverse the trial court’s order denying a writ of mandate and upholding CDF’s reliance on a mitigated negative declaration in approving TCP 00-469. That order was based on the trial court’s clearly erroneous determination that CEQA’s “fair argument” standard did not apply to its review of the MND. When the “fair argument” is correctly applied to the administrative record here, the outcome is clear: substantial evidence in the form of agency and expert opinion based on facts establishes that this Project not only may but will have significant impacts on the environment, both individually and in combination with the other forest-to-vineyard conversion projects underway in the Gualala River

watershed. CDF accordingly abused its discretion by failing to prepare an EIR before approving TCP 00-469.

The court should accordingly REVERSE the trial court's March 27, 2006 order and REMAND the matter with instructions to issue the writ of mandate sought by Appellants.

Dated: July 11, 2006

Respectfully submitted,

M. R. WOLFE & ASSOCIATES, P.C.



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### **CERTIFICATION OF LENGTH**

I, Mark R. Wolfe declare:

In accordance with Rule 14(c)(1) of the California Rules of Court, I hereby certify that the length of this brief excluding tables, as calculated by the word processing software with which it was produced, is 13,486 words.

I affirm, under penalty of perjury, that the foregoing is true and correct.



Dated: July 11, 2006

By: \_\_\_\_\_  
Mark R. Wolfe



**PROOF OF SERVICE**

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco and my business address is 49 Geary Street, Suite 200, San Francisco, California, 94108.

On July 12, 2006, I served the attached document(s):

**APPELLANTS’ OPENING BRIEF; APPELLANTS’ APPENDIX (Index); ADMINISTRATIVE RECORD VOLS. I – III, (Indexes)**

on the following parties in the manner indicated:

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



Dated: July 12, 2006

\_\_\_\_\_  
Erin Sanderson