GUALALA REDWOODS, INC. v. CALIFORNIA STATE BOARD OF FORESTRY AND FIRE PROTECTION; CALIFORNIA DEPARTMENTOF FORESTRY AND FIRE PROTECTION; and ANDREA TUTTLE, in her official capacity as Director of the California Department of Forestry and Fire Protection. Case No. 02CS00356.

HEARING: 3:00 p.m. 12/01/2005. Petition for Writ of Mandate.

COURT'S RULING UNDER SUBMISSION: DENIED.

The petition for writ of mandate came on for hearing in Department 16 at 3:00 p.m. on December 1, 2005. The court, having reviewed and considered the pleadings on file and having heard and considered the arguments of counsel, and having received and reviewed the additional citations referenced in supplemental briefing, hereby denies the petition for the reasons stated below.

Petitioner Gualala Redwoods, Inc. ("Petitioner") petitions this Court for a peremptory writ of mandate pursuant to California Code of Civil Procedure sections 1085 and 1094.5 directing Respondents to set aside their disapproval of Timber Harvesting Plan 1-00-101MEN. The Court finds that the petition should be denied.

Background Facts

Petitioner is in the business of growing and harvesting timber. Petitioner owns certain timberlands in Mendocino County which are zoned Timber Production Zone and are thus designated for the growing and harvesting of timber. The timberlands are located within the 100 year floodplain of the North Fork and Little North Fork of the Gualala River. Since 1993, the Gualala River has been listed as "sediment impaired" under the Clean Water Act. (AR 800, 878.)

Commencing in April, 2000, Petitioner applied to the California Department of Forestry and Fire Protection ("CDF") for permission to log its timberlands pursuant to its proposed Timber Harvesting Plan 1-00-101MEN (the "THP"). (AR 1.) As originally proposed, the THP sought permission to perform a light selection harvest on 181 acres of Petitioner's land. (AR 1-143.)

On April 7, 2000, CDF sent the initial THP to the National Marine Fisheries Service ("NMFS") for review and comment. (AR 372-73.) On June 27, 2000, NMFS submitted a letter which quoted its February 8, 2000 Salmonid Guidelines and stated "the outstanding issue of most concern is the proposed harvest within the area that encompasses both the 20-year flood prone zone and the riparian area within 180 feet (site-potential tree height) from the stream." (AR 432.) The letter further states that:

> "The NMFS has reviewed the harvest planning document and conducted a site visit and finds the THP does not have adequate conservation practices which reflect current scientific information on cumulative watershed impacts, and impacts to salmonids and water quality. NMFS has determined the proposed THP operations, without additional modifications, combined with current conditions, could potentially impair behavior patterns of coho salmon, occurring in the North Fork and Little North Fork Gualala River, as defined by the 'Harm' rule (November 8, 1999, 64 FR 6072)." (AR 428.)

NMFS recommended denial of the plan. (AR 434.)

Petitioner protested the NMFS letter, contending that the opinions expressed by NMFS were not supported in the record by substantial evidence or facts. (AR 476.) Petitioner then contracted with Dr. Steve Mader of CH2MHILL to review and comment on the pre-harvest reports. (AR 477.) Following the completion of Dr. Mader's report, Petitioner submitted Dr. Mader's responses to CDF and also proposed a number of modifications to the THP. (AR 479-517, 520-653.) At the same time, Petitioner requested that CDF proceed with a second review of the THP.

On February 14, 2001, NMFS wrote to CDF indicating that it had received a copy of Dr. Mader's responses along with a copy of the modified THP. The letter indicates that NMFS reviewed the information and found the revised THP to be a sufficient deviation from the original THP to justify an additional pre-harvest inspection. Therefore, NMFS requested that CDF facilitate an additional pre-harvest inspection with NMFS. (AR 518.) In addition, NMFS requested that prior to the additional pre-harvest inspection, CDF provide NMFS with certain reports and literature that were referenced in Dr. Mader's memorandum and in the revised THP. (AR 519.) It appears that CDF never responded to this request for information. (AR 991.)

The additional (second) pre-harvest inspection began on May 31, 2001, and concluded on July 11, 2001. On July 12, 2001, after the second pre-harvest inspection, Petitioner added information to the cumulative impact analysis section of the THP to address concerns expressed by agency representatives. (AR 670.) In particular, Petitioner submitted a supplemental cumulative effects analysis by Dr. Mader dated July 6, 2001. The Supplemental analysis by Dr. Mader states:

> "James (2001) concluded that the former California Forest Practice rules provided more than adequate protection for stream water temperature, canopy cover/shade, and water quality, and that the Interim Rules now in place are even less likely to cause significant adverse effects and are unnecessary to protect habitat conditions of salmonid streams.

> "The presumption is that the Cassidy THP contains a 'take' avoidance strategy for protected fish through conformance with the CFPRs, proposed mitigation for site-specific resource management concerns, and the design of operations that avoid or mitigate potential project-level and cumulative effects." (AR 884.)

On July 13, 2001, in order to simplify the review process, Petitioner submitted a complete copy of a revised THP. The revised THP called for harvest on only 148 acres.

On July 26, 2001, CDF staff issued what Petitioner characterizes as a "favorable" report regarding Petitioner's THP. In the Cumulative Impacts portion of the report, CDF staff stated:

> "Based upon a review of this THP, a significant adverse impact is not reasonably expected to occur to any of the seven resource subjects listed on page 51 [watershed, soil productivity, biological, recreation, visual, traffic, other]. The potential impacts of this THP have been mitigated by the silvicultural method chosen, the WLPZ canopy retention levels, the equipment limitations proposed for the watercourses, the rocked road system, and the timing of operations . . . ." (AR 969, 785.)

Based on this report, Petitioner conjectures that CDF was on course to approve the THP until NMFS submitted its July 30, 2001 letter. (Opening Brief, at p.14.)

On July 30, 2001, NMFS submitted a comment letter to CDF. The comment letter refers to NMFS' long-standing position that CDF's Forest Practice Rules fail to adequately address the impacts of timber harvesting on riparian functions important to salmon habitats. Specifically, the letter states NMFS' belief that CDF needs to expand its protection of watercourses to include channel migration areas and flood prone zones so as to ensure that such riparian functions will be maintained. (AR 989.)

The NMFS comment letter then quotes at length from the NMFS February 8, 2000 Salmonid Guidelines, in which NMFS concludes that forest management activities within riparian areas may result in significant adverse impacts to salmonids and their habitats, including changes in stream temperatures, increased sediment levels, altered composition and abundance of fish species and macro invertebrates, destabilized stream banks, reduced in-stream structural complexity, reduced large woody debris recruitment, and altered peak and base flows. (AR 989.)

The NMFS comment letter states that NMFS staff has reviewed the proposed operation described in the THP and determined that, without additional modifications, the THP operations "are likely to result in the unauthorized taking of federally listed

anadromous salmonids either directly or indirectly through the impairment of essential behavior patterns as defined by the 'Harm' rule (November 8, 1999)." (AR 990.) Specifically, the letter concluded that:

> "The excess channel bed load poses an immediate risk to increased flood frequency and inundation depth such that meander cutoff and channel abandonment by the river system may occur resulting in channel incision and general floodplain and valley degradation. There is continuous sediment input from road use and maintenance and a demonstrated rate and type of harvest in the watershed since 1988 that is a concern to the NMFS. The NMFS also believes the ambiguity in the current Forest Practice Rules definition delineating the watercourse and lake transition line . . . does not provide adequate protection for federally listed salmonids which feed, rear, shelter and migrate in the complex floodplain ecosystem." (AR 990.)

In addition, the NMFS letter states:

> "Due to the status of the CCC Coho ESU, the extremely low numbers of coho salmon in the Gualala watershed, the rate of harvesting in these watersheds leading to the current landscape conditions, the risk of major channel abandonment by the stream and the inadequate Forest Practice Rule protections for flood prone zones the NMFS recommends the following for this plan to meet ESA take avoidance standards: No harvesting should occur within the 100-year flood prone zone per the Short Term Habitat Conservation Plan Guidelines and no cutting should occur one site potential tree height from the edge of that zone." (AR 991.)

CDF received the NMFS letter on August 6, 2001. The next day, August 7, 2001, CDF recommended denial of the THP. (AR 1022.) CDF's recommended denial was "[b]ased on the finding that the THP would be 'likely to result in the unauthorized taking of federally listed salmonids.'" (AR 1022.)

On October 5, 2001, CDF sent formal notice of disapproval, which indicates that the plan was being denied under 14 CCR 898.2(d) based on the determination by NMFS in the July 30, 2001, letter that the THP operations, without additional modifications, are likely to result in the unauthorized taking of federally listed anadromous salmonids. (AR 1046.)

Petitioner appealed the decision to the California State Board of Forestry and Fire Protection. On February 6, 2002, Petitioner's appeal was heard by the Board. Following testimony from both parties, NMFS, and certain interested persons, the Board voted 3-2 to uphold the decision of the CDF. The Board upheld the denial based on the reasons

given by NMFS in their letter of July 30, 2001. (AR 2164-66; *see also* RT at pp. 2, 8-9, 50, 52, 69, 84, 101, 176, 185, 198.) Formal notice of the Board's action was sent to Petitioner on February 15, 2002. (AR 2164-66.)

Subsequent to the denial of Petitioner's THP, on February 25, 2002, CDF's Deputy Chief of Forest Practice, William E. Snyder, sent Petitioner a letter indicating that based on the NMFS position that no harvesting should occur within the 100-year flood prone zone and because NMFS had not identified any additional modifications which will allow the THP to meet the conditions established by NMFS to avoid the likely taking, measures to avoid likely take are not available and options for bringing the plan into conformance with the rules of the Board are not available. (AR 1053.) The February 25 letter indicates that no further action or review regarding the THP is contemplated by either the CDF or the Board. (*Id*.)

On March 8, 2002, Petitioner filed the instant petition for writ of mandamus challenging the Board's decision to deny the THP.

Standard of Review

The parties dispute what the proper standard of review is. Respondents contend that the Court's review should be guided by the substantial evidence test. Petitioner, on the other hand, contends that the independent judgment test applies.

The distinction between the substantial evidence test and the independent judgment test is important. Under the substantial evidence test, the Court does not ask what proposed facts are more likely than not to be the true. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017.) Inherent in the substantial evidence test is the proposition that a finding must be affirmed if it is supported by substantial evidence, even though the reviewing court considers it more likely than not that the finding under review is incorrect. (*Id*. at p. 1015.) The power of the court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the challenged finding. (*Associated Builders & Contractors v. San Francisco Airports Comm'n*. (1999) 21 Cal.4th 352, 374; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277; *River Valley Preservation Project v. Metropolitan Transit Dev. Bd*. (1995) 37 Cal.App.4th 154, 168.) Where proof permits an inference either way, the trial court may not disregard or overturn the Board's finding for the reason that it is considered that a contrary finding would have been equally or more reasonable. (*Id*.; *Mahdavi v. Fair Employment Practice Comm'n.* (1977) 67 Cal.App.3d 326, 340.) The substantial evidence test begins with a bias toward confirming findings already made, and rejects them only where findings are devoid of evidentiary support, based upon inferences arbitrarily drawn and without reasonable foundation, or contrary to facts judicially known and universally accepted as true.

(*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017; *Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273.)

In contrast, in applying the independent judgment test, a trial court reweighs the evidence from the hearing and makes its own determination as to whether the administrative findings are supported by the weight (i.e. preponderance) of the evidence. (*Vaill v. Edmonds* (1991) 4 Cal.App.4th 247, 257-58.)

The "independent judgment" test applies in cases that substantially affect a fundamental vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) Here, Petitioner contends that the Board's decision perpetrated a regulatory "taking" of his property without compensation, and therefore the Court should independently review the Board's decision to deny the THP. The Court does not agree.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 16, the California Supreme Court held that a complaint for damages based on inverse condemnation may be joined with a petition for writ of mandate seeking to set aside the allegedly unconstitutional act. (*Id*.) Further, the Court also held that when a taking of property is alleged, the court must accord the property owner de novo review of any evidence before the agency in ruling on the inverse condemnation claim. (*Id*.) This is a rather unexceptional holding. It simply means that when an inverse condemnation complaint is joined in a writ proceeding, the trial of the inverse condemnation complaint will not be limited to a substantial evidence review of the evidence before the administrative agency. It does not mean, as Petitioner asserts, that any time an inverse condemnation claim is joined with a writ claim that the court must conduct a de novo review of the evidence for purposes of *both* the inverse condemnation claim *and* the writ claim. There is nothing in *Hensler* to suggest that joining an inverse condemnation claim with a writ claim would convert the court's review of the writ claim from a "substantial evidence" review to a heightened "independent judgment" review. This Court finds the writ claim will continue to be governed by the "substantial evidence" test.

The Board's decision denying Petitioner's THP did not affect a fundamental vested right. The Board's decision disapproved a particular Timber Harvesting Plan because the plan was not in conformance with the rules and regulations of the Board and the provisions of the Z'Berg-Nejedy Forest Practice Act. (AR 2165.) Petitioner did not have a vested right to an approved Timber Harvest Plan. Further, as set forth in the Board's decision and order, disapproval of the plan is "without prejudice to the applicant submitting a plan at a later time complying with the rules and regulations of the Board and the provisions of the Z'Berg-Nejedy Forest Practice Act." (*Id*.; *see also* AR 1046 [finding THP operations, without additional modifications, are likely to result in the unauthorized taking of federally listed anadromous salmonids].) The challenged decision did not deprive Petitioner of such right because it was not a final decision that no Timber

Harvest Plan would be approved; only that the particular THP proposed by Petitioner would not be approved.

Neither did CDF's February 25, 2002, letter affect a fundamental vested right. That letter was not, as Petitioner alleges, a decision by the Board that a Timber Harvest Plan will not be approved for Petitioner's property. (*See* AR 1053.) Indeed, the February 25 letter was not sent by the Board at all, but by CDF's Deputy Chief of Forest Practice.[1] In addition, the purpose of that letter was merely to confirm that the Board's review of Petitioner's proposed THP is completed and that no further action or review was contemplated in respect to that particular proposal. (*See* AR 1053 ["[n]o further action or review regarding THP 1-00-101 MEN is contemplated by either the Director or the Board and the status of THP 1-00-101 MEN is that it continues to be deemed denied."].) CDF's letter did not purport to foreclose future consideration by the Board of a different Timber Harvest Plan for Petitioner's property -- and even if it did, it would be contrary to the Board's decision, which expressly contemplated that Petitioner could submit a new plan at a later time. (AR 2165.)

Discussion

A. Petitioner's Writ Claim

Having resolved the issue of the proper standard of review, the Court now addresses Petitioner's arguments on the merits of the writ, namely, (1) that the Board abrogated its statutory duties and effectively applied an underground regulation in that the Board denied the THP based on NMFS' policy against harvesting in a floodplain, rather than reviewing the plan to determine if it is in conformance with the Forest Practice Rules; (2) that the Board applied the wrong legal definition of a "take"; and (3) that there is not sufficient evidence in the record to support the Board's decision that a take will occur.

In reviewing Petitioner's THP, the Public Resources Code and the Board's regulations provide that the rules adopted by the Board shall be the only criteria employed in reviewing plans. (14 CCR § 898.1; Pub. Resources Code § 4582.75.) Further, the Board itself was governed by section 1054.8 of the California Code of Regulations, which provides that the Board shall determine, upon the record before it, whether a proposed timber harvest plan is in conformance with the rules and regulations of the Board and the provisions of the Z'Berg-Nejedy Forest Practice Act. If the Board determines that the plan is in conformance with the rules and regulations of the Board and the provisions of the Act, it shall approve the plan. If the Board determines the plan

[1] The February 25 letter indicates that a cc was sent to the Board of Forestry and Fire Protection, but there is no indication that the letter ever was reviewed or approved by the Board before it was sent.

is not in conformance with the regulations of the Board and the provisions of the Act, it shall disapprove the plan. (14 CCR § 1054.8.)

Petitioner contends that the Board abrogated its statutory duty to determine whether Petitioner's THP is in conformance with the rules of the Board in order to placate NMFS which believed that no harvesting should occur within the 100-year flood prone zone. The flaw in Petitioner's argument is that the Board's denial of this particular THP was not based on NMFS' position that no harvesting should occur within the 100-year flood prone zone. Rather, the record shows that the Board's denial was based on the determination that the THP operations, without additional modifications, are likely to result in the unauthorized taking of federally listed anadromous salmonids. (AR 1022, 1046.) This was not an application of an underground regulation.

The Forest Practice Rules specifically provide that "[t]he Director shall disapprove a plan as not conforming to the rules of the Board if . . . (d) Implementation of the plan as proposed would result in either a 'taking' or finding of jeopardy of wildlife species listed as rare, threatened, or endangered, by the Fish and Game Commission, the National Marine Fisheries Service, or Fish and Wildlife Service, or would cause significant, long-term damage to listed species." (14 CCR § 898.2(d).) Section 895.1 of Title 14 of the California Code of Regulations defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct with regard to a federally listed wildlife species." (14 CCR § 895.1.) That section also defines "harm" to mean "an act where it actually kills or injures a federally listed wildlife species. Such acts may include a significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." (*Id*.) Thus, it is not improper for the Board to deny a timber harvest plan based on a determination that the plan would result in the unauthorized taking, particularly since the ESA explicitly defines "persons" prohibited from engaging in a taking to include states and state officials.[2] (*See* 16 U.S.C. § 1532(13).)

In finding that Petitioner's THP is likely to result in a taking, the Board obviously relied on the determination of NMFS in its July 30, 2001, letter that the THP operations, without additional modifications, are likely to result in the unauthorized taking of federally listed salmonids. However, nothing prohibits an agency from making a

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[2] In supplemental briefing ordered by the Court, Respondents cited *Strahan v. Coxe* (1st Cir. 1997) 127 F.3d 155, for the proposition that state licensing and permitting activities are themselves subject to the take prohibitions of the federal ESA. In its response, Petitioner did not dispute that this was the law, but referred the Court to a Fall 2001 edition of Natural Resources and Environment, wherein the note editor suggested that it is a routine and simple matter for state regulatory agencies to avoid third-party liability for an unauthorized taking. This may be so, but it does not alter the Court's conclusion in this case. Out of fairness to Respondents, the Court did not consider the last two paragraphs of Petitioner's responsive e-mail because they exceeded the scope of the Court's ruling authorizing the parties to submit supplemental authorities, but not supplemental briefing.

determination based on another agency's findings and comments, and the record shows this is what occurred here. (*Respers v. University of Cal. Retirement System* (1985) 171 Cal.App.3d 864, 871-72 [holding that an administrative body may make findings by incorporating findings made by other agencies]; *see* AR 2164-66; *see also* RT at pp. 2, 8-9, 50, 52, 69, 84, 101, 176, 185, 198.) Accordingly, the Court finds that the Board did not improperly abrogate its statutory duties. The Court next considers whether the Board applied the wrong legal standard of a "take."

In arguing that Respondents applied the wrong legal standard, Petitioner focuses on the undisputed fact that the Board based its denial of the THP entirely on a determination that the proposed THP operations are "likely" to result in the unauthorized taking of federally listed salmonids. Relying on the Ninth Circuit decision in *Arizona Cattle Growers' Association v. United States Fish and Wildlife* (9th Cir. 2001) 273 F.3d 1229, Petitioner contends that the Endangered Species Act requires a finding that a proposed action would "actually," not just "likely," result in a taking.

Respondents criticize Petitioner for citing to federal cases discussing the federal definition of a "taking," but in this instance there does not appear to be any significant difference between the federal and state definitions. The ESA defines "taking" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19).) The definition of "harm" is "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." (50 CFR § 17.3.)

As described above, the Forest Practice Rules definitions of "take" and "harm" are nearly identical. Section 895.1 of Title 14 of the California Code of Regulations defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct with regard to a federally listed wildlife species." (14 CCR § 895.1.) It further defines "harm" to mean "an act where it actually kills or injures a federally listed wildlife species. Such acts may include a significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." (*Id*.) Thus, the federal and state definitions are virtually the same and, as a result, Petitioner's discussion of federal case law was not improper. (*See Moreland v. Department of Corporations* (1987) 194 Cal.App.3d 506, 513 [when a state law is patterned after a federal law, the two are construed together and federal cases interpreting the federal law offer persuasive authority in construing the state law].)

In *Arizona Cattle Growers*, the Ninth Circuit considered the question when habitat modification will constitute a "taking" for purposes of the ESA. The Court found that habitat modification or degradation, standing alone, is not a taking. To be a taking,

the modification or degradation must be significant, must significantly impair essential behavior patterns, and must result in actual injury to a protected wildlife species. (*Arizona Cattle Growers, supra,* at p.1238.)

Arizona Cattle Growers does not mean, however, that a taking may be found only after actual injury has already occurred. In *Forest Conservation Council v. Rosboro Lumber Company* (9th Cir. 1995) 50 F.3d 781, the Ninth Circuit rejected the argument that the term "actually" requires a showing that the challenged action already has caused or presently is causing an injury and that claims of a future injury are foreclosed. (*Id*. at p. 784.) Rather, the Court explained, the term "actually" was included in the definition of "harm" to preclude claims that only involve habitat modification, without any attendant death or injury to protected wildlife. But so long as some injury to wildlife is reasonably certain to occur, either in the past, present, or future, the Court found that the injury requirement would be satisfied. (*Id*.; *see also Marbled Murrelet v. Pacific Lumber Company* (9th Cir. 1996) 83 F.3d 1060, 1068 [upholding finding of take based on reasonable certainty of imminent harm]; *American Bald Eagle v. Bhatti* (1993) 9 F.3d 163, 166 [same].) In addition, harm to wildlife includes habitat degradation that merely prevents (or possibly just retards) recovery of a protected species. (*National Wildlife Federation v. Burlington Northern Railroad, Inc.* (9th Cir. 1994) 23 F.3d 1508, 1513; *see also Rosboro Lumber Company, supra,* at pp.784, 788 [a claim will satisfy the "actual injury" requirement if there is sufficient evidence to show that the habitat modification is "reasonably certain" to injure the protected species].) In sum, to find a taking based on habitat degradation, there must be a showing that the challenged activity will significantly modify the affected wildlife's habitat and that such habitat modification is reasonably certain to kill or injure such wildlife by significantly impairing its essential behavior patterns.

In this case, the NMFS letter describes environmental conditions believed to pose a high risk of habitat modification and then concludes that the operation of Petitioner's THP under such conditions is "likely to result" in the unauthorized taking of salmonids either directly or "indirectly through the impairment of essential behavior patterns as defined by the 'Harm' rule." Petitioner interprets Respondents' position as "likely harm" and contends this does not meet the standard of "actual" harm. (*See also* Reply Brief, at p.4.)

The Court is not persuaded that applying a test of "likely harm" means that the Board applied the wrong legal standard. To the contrary, the Court finds that a finding of "likely harm" is equivalent to a finding that harm is "reasonably certain" to occur. This was NMFS' interpretation as well. General Counsel for the National Oceanic and Atmospheric Association testified on behalf of NMFS that "[l]ikely to result" is the phraseology that NMFS uses for the term "would result" when discussing future activities. (RT, at p. 187.) Accordingly, the Court is not persuaded that Respondents applied the wrong legal standard.

Having concluded that Respondents did not apply the wrong legal standard, the Court next must consider whether Respondents' finding of "likely harm" is supported by substantial evidence. Petitioner contends that there isn't any evidence in the administrative record of likely harm to salmonids. The Court does not agree.

First, the NMFS July 30 letter, and NMFS' testimony at the hearing before the Board, both establish the likelihood of habitat degradation. In particular, the NMFS letter states that excess channel bed load poses an "immediate risk" to increased flood frequency and inundation depth such that meander cutoff and channel abandonment by the river system may occur resulting in channel incision and general floodplain and valley degradation. (AR 990.) Similarly, Charlotte Ambrose, a natural resource specialist with the Protected Resources Division of NMFS, opined at the hearing that the proposed timber operations would cause significant habitat modifications, including decreased large wood recruitment, increased sediment delivery, increased mass wasting potential, increased peak flows, and decreased channel complexity. (RT, at p. 19.) Ms. Ambrose concluded that the proposed harvesting activities will combine with the accumulation of ongoing and previous timber operations and result in further significant modifications of salmon habitats. (RT, at p. 12.) Dr. Brian Clue, a fluvial geomorphologist/hydrologist also submitted testimony on behalf of NMFS, and he too concluded that approving the THP would contribute to further degradation of stream channels and fish habitat. (RT, at p. 37-38.)

Second, there is evidence in the record that the likely habitat degradation is reasonably certain to harm coho salmonid. (*See* RT, at p. 22 et seq.) Among other things, Ms. Ambrose opined that conifer removal and channel aggradation reduces channel complexity (loss of pool formation and sediment sorting), which in turn, impairs salmon rearing, sheltering, feeding, spawning, and migration. The loss of cool water refugia in the river further harms coho due to inefficient feeding, thermal stress, increased susceptibility to disease, reduced competitive vigor and/or death. High sediment input reduces egg-to-fry emergence by suffocating eggs and entombing alevins, and by filling refugia areas and shifting macro invertebrate communities, which are a food source of coho. Increased turbidity from sediment input decreases feeding ability and increased gill abrasion. Further, extremely high sediment delivery results in direct mortality to coho eggs and alevins by washing them downstream, smothering them or entombing them. (RT, at pp. 22-23; *see also* RT, at p. 31.)

For these reasons, the Court concludes that there is substantial evidence in the record to support the finding that a take would occur.

B. Petitioner's Inverse Condemnation Claim

In addition to its writ claim, Petitioner contends that this matter properly presents a claim for regulatory taking of Petitioner's property. The Court rejects this contention.

To maintain an inverse condemnation action, a property owner must allege that a public entity has, in fact, taken (or damaged) his property, such that the property owner is entitled to "just compensation." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App. 4th 521, 529.) Property is "taken or damaged" within the meaning of article I, section 19 of the California Constitution when: (1) the property has been physically invaded in a tangible manner; (2) no physical invasion has occurred, but the property has been physically damaged; or (3) an intangible intrusion onto the property has occurred which has caused no damage to the property but places a burden on the property that is direct, substantial, and peculiar to the property itself. Where an inverse condemnation claim is based upon a regulatory taking, an individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking. (*Hensler*, *supra*, at p.10.) To state a cause of action for a regulatory taking, the property owner must allege that the regulation deprived the landowner of all economically beneficial use of the property; defeated reasonable, investment-backed expectations; or did not substantially advance legitimate state interests. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 964; *Smith v. City & County of San Francisco* (1990) 225 Cal.App.3d 38, 45; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618.)

In the instant case, the verified Petition includes some allegations that the land comprising the THP will become useless and of no economic value, but the Petition does not set forth a taking claim. For example, the Petition does not allege any claim to "just compensation;" does not allege that there has been a final and authoritative determination as to the legally permitted use of the property; and does not allege any *facts* showing that the denial of Petitioner's THP deprived Petitioner of all (or even a significant portion of) the economically beneficial use of its property.

Further, even if the verified Petition alleged a taking claim, it does not appear that a claim for inverse condemnation would be ripe. A taking claim is not ripe until there has been a final, definitive decision regarding the application of a regulation to the property at issue. (*Santa Monica Beach, Ltd.*, *supra*, at p.964; *Smith*, *supra*, at p.45; *Palazzolo*, *supra*, at p.618.) As discussed above, the Board did not issue a final, definitive decision regarding whether *any* timber harvesting will be allowed on Petitioner's property. The Board simply concluded that, "without additional modifications," Petitioner's particular THP operations are likely to result in the unauthorized taking of federally listed anadromous salmonids. (AR 990, 1046.) The Board's disapproval was "without prejudice to the applicant submitting a plan at a later time complying with the rules and regulations of the Board and the provisions of the Z'Berg-Nejedy Forest Practice Act." (AR 2165.)

Petitioner contends it is at a loss as to what "additional modifications" it might make to bring its timber harvesting operations within the rules and regulations of the Board. It is not the Court's role to answer this question.[3] Nevertheless, it appears that one obvious solution would be to apply for an Incidental Take Permit. Petitioner's plan was denied because NMFS and the Board found the plan was likely to result in a taking of coho salmon. The Board's rules and regulations provide that the Director shall disapprove a plan as not conforming to the rules of the Board if implementation of the plan as proposed would result in a "taking" of rare, threatened, or endangered species. (14 CCR § 898.2(d).) Section 898.2(d) also provides, however, that the Director is not required to disapprove a plan which would result in a taking if the taking is "incidental" and has been "authorized by a wildlife agency acting within its authority under state or federal endangered species acts." (*Id*.)

The ESA permits the Secretary of Commerce (or Secretary of the Interior) to permit any taking otherwise prohibited by [16 USCS § 1538(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." (16 U.S.C. § 1539(a)(1)(B).) To receive an Incidental Take Permit, a person must file an application a habitat conservation plan that specifies the impact which will likely result from such taking; what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. (16 U.S.C. § 1539(a)(2)(A).) The Secretary shall issue the permit if the Secretary finds, after opportunity for public comment, that (i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) that the conservation plan measures required by the Secretary will be met. (16 U.S.C. § 1539(a)(2)(B).)

In this case, Petitioner never applied for an Incidental Take Permit and, consequently, the federal government has never taken final action regarding Petitioner's proposal to harvest trees on its property. This Court has no way to predict whether the Secretary will issue an Incidental Take Permit to Petitioner and, if so, what the conditions

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[3] The administrative record discusses some possible alternatives to the proposed THP, such as helicopter logging to reduce sediment. (*See, e.g.*, AR 409-17.)

of any such permit might be.[4] Accordingly, even if Petitioner had stated a takings claim, the takings claim would not be ripe. (*See, e.g., Morris v. United States* (Fed. Cir. 2004) 392 F.3d 1372 [finding property owners' fifth amendment claim for a regulatory taking of the value of trees sought to be harvested was not ripe because the property owners never applied for an incidental take permit].)

The petition for writ of mandamus shall be denied. Respondents are directed to prepare a formal judgment and order, attaching the Court's ruling as an exhibit; submit each to opposing counsel for approval as to form; and thereafter submit them to the Court in accordance with Rule of Court 391. Respondents shall be entitled to recover their costs upon appropriate applications.

[4] It appears to have been NMFS' position that Petitioner must obtain an Incidental Take Permit before harvesting trees on its property, as evidenced by the following language from NMFS' July 30, 2001 letter to the Department: "Absent an ESA section 4(d) limitation on the take prohibitions for forestry activities in California or an ESA section 10(a)(1)(B) [incidental take] permit, the standard for timber harvest in California is no take." (AR 979.)