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September 28, 2007
Page 7

EXHIBIT C

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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA
AUG 31 2006
GARY M. BLAIR, Executive Officer
BY Ruth Rinker
RUTH RINKER, Deputy Clerk

CALENDARED
MORRISON & FOERSTER
SEP 06 2006
FOR DATE(S) _____
BY mjm

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA

17 NANCY CRAWFORD-HALL, an individual, and
18 SAN LUCAS RANCH, INC., a California
19 corporation,

Petitioners,

v.

21 CACHUMA OPERATION AND MAINTENANCE
22 BOARD, and DOES 1-20,

Respondents.

24 CACHUMA CONSERVATION RELEASE
25 BOARD, and DOES 21-50,

Real Parties in Interest.

Case No. 1171135

**REPLY BRIEF OF PETITIONERS
NANCY CRAWFORD-HALL AND
SAN LUCAS RANCH, INC.**

(Cal. Civ. Proc. Code §§ 1085, 1094.5;
Cal. Pub. Res. Code §§ 21168, 21168.5)

Date: October 25, 2006
Time: 9:30
Dept.: SM4

The Honorable Diana R. Hall

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1 **I. INTRODUCTION**

2 Respondent Cachuma Operation and Maintenance Board (“COMB”) sells and delivers water
3 from Lake Cachuma. When the State Water Resources Control Board (“State Water Board”), a state
4 agency responsible for protecting public trust resources, began evaluating how to protect the
5 remnants of Southern California steelhead fisheries decimated by the operations of the Bradbury Dam
6 at Lake Cachuma, COMB proposed a self-serving list of “fish management” measures aimed at
7 protecting water deliveries first, and fish second. Despite COMB’s obvious financial self-interest, it
8 attempts to tarnish Petitioners as being economically interested. COMB’s attack in this regard is both
9 offensive and irrelevant. Petitioners’ action seeks to alert this Court, and the public, to COMB’s
10 numerous violations of CEQA – those violations are not excused because the Petitioner’s interest is
11 broader than environmental protection.

12 On the merits, COMB’s response to Petitioners’ Opening Brief consists of a series of weak,
13 inaccurate, and frequently misleading arguments. COMB misses the mark when it attempts to claim
14 that Ms. Crawford-Hall is judicially estopped from arguing the COMB is not the proper lead agency
15 to review COMB’s “flow-related projects.” It cannot meet the elements of judicial estoppel, and
16 cannot explain why equity would support application of estoppel to prevent review of a defective
17 EIR. COMB also protests that it is the proper lead agency for all activities in the Fish Management
18 Plan Environmental Impact Report (“FMP EIR”), but concedes that the State Water Board, not
19 COMB, is primarily responsible for all flow-related projects. Thus, Petitioners have shown that
20 COMB usurped the State Water Board’s role as lead agency for flow-related projects in violation of
21 CEQA.

22 Petitioners have also shown that the environmental setting, project description, and
23 cumulative impacts sections of the FMP EIR are inadequate and inaccurate because they omit
24 meaningful discussions of the impacts of the State Water Board’s on-going Cachuma water rights
25 hearing and the State Water Board’s Draft EIR evaluating the water rights hearings. COMB claims it
26 was permitted to exclude analysis of the State Water Board’s “speculative” water rights hearings, but
27 COMB’s failure to discuss and analyze the well-known water rights proposals before the State Water
28 Board violates the most fundamental purpose of CEQA as an environmental document.

1 Finally, as Petitioners demonstrated in their Opening Brief, and COMB failed to rebut, the
2 FMP EIR cites to no reliable data or scientific evidence or reports to support its naked conclusion that
3 Upper Hilton Creek, above the Highway 154 culvert, has suitable habitat for steelhead. Nor does
4 COMB provide reasoned analysis supported by evidence to explain why COMB ignored the findings
5 of Petitioners' expert that Upper Hilton Creek is unsuitable for steelhead spawning.

6 COMB's failure to comply with CEQA constitutes prejudicial error. This Court should issue
7 a writ of mandate setting aside COMB's certification of the FMP EIR and approval of the FMP.

8 **II. ARGUMENT**

9 **A. The FMP EIR Violates CEQA Because COMB Is Not the Proper Lead Agency** 10 **for the Project's Flow-Related Projects**

11 **1. COMB's Judicial Estoppel Argument Fails Because Petitioners Took No** 12 **Position Regarding COMB's Status As Lead Agency for the FMP EIR in a** 13 **Prior Proceeding**

14 COMB improperly attempts to shoehorn the concept of judicial estoppel into this matter by
15 contending that Petitioner Ms. Crawford-Hall took the position in previous litigation that COMB is
16 the proper lead agency to prepare the FMP EIR – a document that *did not exist* at that time of the
17 earlier litigation. First, COMB cannot show that any of the elements of judicial estoppel are present
18 here: (1) the same party has taken two positions, (2) the positions were taken in a prior judicial or
19 quasi-judicial proceeding, (3) the tribunal adopted the position or accepted it as true, (4) the positions
20 are totally inconsistent and 5) the first position was not taken as a result of ignorance, fraud or
21 mistake. *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997). Second, judicial
22 estoppel is an equitable doctrine whose application, even when all necessary elements are present, is
23 discretionary. *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 36 Cal.4th
24 412, 422 (2005). The doctrine should be applied with caution and limited to egregious
25 circumstances. *Haley v. Dow Lewis Motors, Inc.*, 72 Cal. App. 4th 497, 511 (1999). Here, this Court
26 need not wrestle with the troubling implications of exercising its discretion to cut short its review of
27 COMB's compliance with CEQA because COMB cannot establish the basic elements of its defense.

28 In 2001, Ms. Crawford-Hall challenged COMB's approval of a mitigated negative declaration
for the "Hilton Creek Fish Passage Enhancement to the Bedrock Cascade and Chute Project,"

1 contending that “COMB knew the chute project was only one element of a larger project, the Hilton
2 Creek Habitat Enhancement and Fish Passage project (‘Hilton Creek Project’), [but] nonetheless
3 defined its ‘project’ for CEQA purposes to exclude the other elements of the Hilton Creek Project.”
4 (Petitioners’ Request for Judicial Notice (“Petitioners’ RJN”), Ex. A, p. 1: 8-11; 40 AR 372:18108-
5 111.) On October 9, 2001, the Santa Barbara County Superior Court agreed that COMB violated
6 CEQA, and issued a writ of mandate ordering COMB to set aside its mitigated negative declaration
7 and approval of the Hilton Creek cascade and chute project. (40 AR 372:18108-111.)¹

8 COMB claims that Ms. Crawford-Hall’s earlier petition “admitted and alleged that COMB
9 was the proper lead agency for analyzing impacts associated with steelhead habitat projects.” (Joint
10 Opposition to Opening Brief of Petitioners (“Opp. Br.”) at 13:2-3.) But her earlier petition made no
11 such allegations. It alleged only that “COMB is the lead agency responsible under CEQA for
12 evaluating the environmental impacts of the *Project*,” defining “Project” as the “Fish Passage
13 Enhancement to the Bedrock Cascade and Chute on Hilton Creek.” (64 AR 461:30454; 55
14 [emphasis added].) Next, COMB points to Ms. Crawford-Hall’s prayer that an EIR be prepared.
15 (Opp. Br. at 13:3-5.) Again, COMB fails to mention that her earlier petition prayed for an EIR to be
16 prepared just for the “Project” that is, the “Fish Passage Enhancement to the Bedrock Cascade and
17 Chute on Hilton Creek.” (64 AR 461:30454, 30462.)

18 COMB also misrepresents the earlier petition, stating “Crawford-Hall even argued that the
19 EIR must consider the *entire FMP* – the very project at issue here.” (Opp. Br. at 13:6-7) (emphasis in
20 original). In fact, the earlier petition discusses COMB’s failure to consider the whole of the “Hilton
21 Creek Fish Passage Enhancement Project” which, Crawford-Hall argued, “contemplates the removal
22 of a series of at least six impediments to the steelhead’s passage, of which the Project is only one
23 element” and fails to analyze the “foreseeable future phase of the Enhancement Project to be
24 undertaken to modify the culvert under Highway 154 at Hilton Creek.” (64 AR 461:30459.)
25 Tellingly, the words “lead agency” *do not appear* in Ms. Crawford-Hall’s briefing regarding the
26

27 ¹ Pages of the Administrative Record cited in Petitioners’ Opening and Reply briefs are included in
28 the Excerpts of Administrative Record submitted herewith in three volumes.

1 mitigated negative declaration, or in support of her motion for attorney’s fees. (See Petitioner’s RJN,
2 Exs. A, B; COMB’s RJN Exs. 11, 12.) Not surprisingly, the question of who would serve as lead
3 agency for an EIR that *did not exist* was not discussed in the earlier litigation.

4 COMB even stretches to include Ms. Crawford-Hall’s briefing on her Motion for Attorney’s
5 Fees to try to support its claims, but can only cite to her statement properly informing this Court of
6 COMB’s decision to prepare an EIR for the Chute Project and the Fish Management Plan. (Opp. Br.
7 at 13:10-12.) Further, as COMB is well aware, this Court denied the Motion, making it impossible
8 for COMB to claim that any of Ms. Crawford-Hall’s assertions in support of the Motion were
9 adopted or accepted as true by this Court. *ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825,
10 832 (2005) *additional citations omitted*. (“If the party did not succeed, then a later inconsistent
11 position poses little risk of inconsistent judicial determinations and consequently introduces ‘little
12 threat to judicial integrity’”.)

13 Even if COMB could construe Ms. Crawford-Hall’s earlier petition as taking *any* position on
14 COMB’s future status as a lead agency for flow-related projects within the FMP EIR, COMB admits
15 that no tribunal has previously adopted or accepted such a position as true, stating “Crawford-Hall
16 did not argue in that first lawsuit – and the Court did not rule – that COMB was an improper lead
17 agency. . . .” (Opp. Br. at 13:16-17.) This is correct, the Court issued no ruling, and Ms. Crawford-
18 Hall made no argument, regarding COMB’s status as a lead agency for an EIR that *did not exist*, as
19 that issue was not before this Court in the previous litigation.

20 Finally, the question of judicial estoppel against Ms. Crawford-Hall is truly academic, as
21 Petitioner San Lucas Ranch was not a party to the earlier challenge, and is a separate party with full
22 rights to maintain this action. Therefore, even if COMB’s glaringly deficient judicial estoppel
23 argument could be accepted, it would not bar San Lucas Ranch from pursuing these same claims.

24 **2. The State Water Board, Not COMB, Has Principal Responsibility for**
25 **Approving All of the Flow-Related Projects Within the FMP**

26 As COMB agrees, CEQA section 21067 defines a lead agency as “the public agency which
27 has the principal responsibility for carrying out or approving a project which may have a significant
28 effect on the environment.” However, COMB admits that it *does not have* principal responsibility for

1 carrying out or approving key elements of the Project:² those activities relating to the surcharging and
2 release of water from Lake Cachuma through Bradbury Dam, activities within the sole jurisdiction
3 and control of the State Water Board. (40 AR 372:18200.) Notably, COMB carefully limits its
4 discussion of its role in approving and carrying-out the activities in the Project to *non-flow* projects,
5 and never explains why it declared itself lead agency for the Project’s flow-related activities. As
6 discussed in Petitioners’ Opening Brief, a lead agency must “*independently* participate, review,
7 analyze and discuss the alternatives in good faith.” *Planning & Conservation League v. Dep’t of*
8 *Water Res.* (“PCL”), 83 Cal. App. 4th 892, 904 (2000) (citing *Kings County Farm Bureau v. City of*
9 *Hanford*, 221 Cal. App. 3d 692, 736 (1990)) (emphasis in original). “So significant is the role of the
10 lead agency that CEQA proscribes delegation.” *Id.* at 907 (citing *Kleist v. City of Glendale*, 56 Cal.
11 App. 3d 770, 779 (1976)). Accordingly, an EIR prepared by an improper lead agency is in error. *Id.*

12 COMB argues that it is the proper lead agency for the FMP EIR because of its “extensive
13 approval, implementation and funding responsibilities” for the “*non-flow* FMP/BO projects.” (Opp.
14 Br. at 16:5-6 (emphasis added).) However, a critical element of the Project is the set of activities that
15 COMB euphemistically describes as “Releases For Fish.” (39 AR 371:17408.) In truth, the
16 “Releases for Fish” activities involve surcharging and releasing water from Lake Cachuma, and are
17 more accurately described as water release, or flow-related, projects. (47 AR 445:21350-57.)
18 COMB admits that these activities are within the State Water Board’s sole control.
19 (40 AR 372:18200 (“[T]he State Water Board retains primary jurisdiction to determine water release
20 requirements. . . .”); *id.* at 18209 (“The proper amount of rearing flows is not within the jurisdiction
21 of the lead agencies.”).) Given that COMB has no discretion over the flow-related projects, it is not
22 the proper lead agency to direct environmental review of them.

23 COMB argues that because the State Water Board “agreed that COMB was the appropriate
24 CEQA lead agency for the [FMP EIR]” this Court must concur. (Opp. Br. at 17:1-2.) This argument
25 is flawed in two respects. First, as held by the Court of Appeal in *PCL*, public agencies are not free

26 _____
27 ² Petitioners refer to the activities examined in the FMP EIR as the “Project,” whereas COMB uses
28 the term “FMP/BO,” as well as “flow-related” and “non-flow related” projects in an apparent attempt
to confuse the simple fact that the Project includes both.

1 to elect which among them will serve as lead agency if, as here, that decision does not comply with
2 CEQA. 83 Cal. App. 4th at 904. This Court owes no deference to COMB’s determination. The
3 designation of lead agency is a question of law on which courts exercise independent judgment. *Id.*
4 Second, though it chose not to refer COMB’s decision to act as lead agency for arbitration, the State
5 Water Board hardly supported COMB’s decision to act as lead agency, submitting comments on the
6 Draft FMP EIR asking that COMB revise its “project description to exclude any flow related
7 measures” from [the FMP EIR’s] analysis of environmental impacts. (40 AR 372:17888.)

8 COMB also argues that the State Water Board’s preparation of a draft EIR examining the
9 same flow issues COMB examined in the FMP EIR has no bearing on COMB’s status as lead agency
10 because “[t]hese two projects are very distinct.” (Opp. Br. at 18:6-7.) To argue this point, COMB
11 characterizes the FMP EIR as if it only analyzed *non-flow* projects, describing the Project as the
12 “implementation of physical mitigation measures,” while describing the State Water Board’s water
13 rights hearings as involving “potential flow release modifications.” (*Id.* at 18:7-10.) As described
14 above, this is a false distinction, ignoring the FMP EIR’s purported analysis of flow releases.

15 COMB makes a half-hearted attempt to argue that it should be considered lead agency under
16 CEQA Guideline section 15051(c) because it acted first in considering the “non-flow FMP/BO
17 projects.” (*Id.* at 17:23.) But again, COMB can only make claims regarding the “non-flow FMP/BO
18 projects,” because it knows that the State Water Board issued an Notice of Preparation of an EIR to
19 analyze Lake Cachuma water releases in 1999, over a year before COMB issued its Notice of
20 Preparation of the FMP EIR. (*Id.*; 47 AR 445:12324-325; 32 AR 214:14735.)

21 Finally, COMB argues that public policy supports its decision to act as lead agency. Again,
22 COMB couches its arguments only in terms of “non-flow FMP/BO projects,” though these are just
23 one part of the Project. (Opp. Br. at 20-22.) While Petitioners do not contend the State Water Board
24 is the appropriate lead agency for non-flow projects, this does not change the fact that, in violation of
25 CEQA, COMB impermissibly arrogated to itself the authority to determine the environmental
26 impacts of flow-related projects within the sole jurisdiction of the State Water Board. Thus, the FMP
27 EIR should be set aside.

1 **B. COMB’s Failure to Discuss or Analyze the State Water Board’s Cachuma Water**
2 **Rights Hearing and Draft EIR Violated CEQA**

3 The cascading impact of COMB’s insistence that it is the appropriate lead agency for flow-
4 related projects pervades the FMP EIR, resulting in prejudicial error throughout. In an attempt to
5 mask the essential role of the State Water Board in determining what water releases will be allowed
6 from Lake Cachuma, and thus what type of flow-related projects will be allowed, COMB minimized
7 any reference to, or analysis of, the State Water Board’s on-going review of the Cachuma water
8 rights permits. Further, COMB dismissed the likely cumulative impacts to the Project from the State
9 Water Board’s hearing as “speculative.” As a result, the FMP EIR’s environmental setting, project
10 description, and cumulative impacts analysis are each inadequate.

11 **1. The FMP EIR’s Environmental Setting Description Is Inaccurate and**
12 **Misleading**

13 The FMP EIR’s description of the environmental setting for the Project states that
14 “implementation of the FMP/BO projects will not require modification of Reclamation’s current
15 water rights permits from the State Water Board as the proposed flow-related projects (i.e., release
16 ramping, and releases from Bradbury Dam for fish purposes) and reservoir surcharging are allowable
17 under the current water rights permits.” (36 AR 312:15945-46.) COMB put forth this description
18 though it knew the State Water Board was reviewing those same flow-related projects as part of its
19 hearings on the Cachuma water rights permits. (47 AR 445:21350-57.) COMB maintained this
20 position, though the State Water Board repeatedly objected to its presumptions regarding Cachuma
21 water rights. (39 AR 371:17857; 40 AR 372:17891, 17888.) Now COMB argues that the FMP EIR
22 environmental setting is accurate because there is no connection between the water rights hearings
23 and the environmental setting of the FMP EIR. But COMB’s refusal to disclose the status of the
24 Lake Cachuma water rights resulted in an inaccurate and misleading environmental setting.

25 In *Friends of the Eel River v. Sonoma County Water Agency*, the Court of Appeal found the
26 environmental setting of the Sonoma County Water Agency’s EIR analyzing increased water
27 diversions from the Russian River to be inadequate because it did not disclose the Federal Energy
28 Regulatory Commission’s (“FERC”) parallel consideration of a proposal to curtail the amount of

1 water the Russian River could divert from the Eel River due to impacts on salmonid species.
2 108 Cal. App. 4th 859, 874-75 (2003). COMB claims its refusal to detail the State Water Board's
3 water rights hearings is distinguishable from the prejudicial error in *Eel River* because, unlike the
4 FERC proceedings, (1) the "on-going State Board hearings [are not] designed to alleviate a known
5 environmental problem;" (2) the State Water Board has not yet determined what water rights permits
6 it will issue; (3) there is no "reasonably foreseeable correlation" between the water rights hearings
7 and the environmental setting of the FMP EIR; and, (4) the FMP EIR does reference the water rights
8 hearings. (Opp. Br. at 25:5-6, 22-23.) None of COMB's arguments withstands scrutiny.

9 First, just as in *Eel River*, the State Water Board, is seeking to address a known environmental
10 problem: the impact of operations of Bradbury Dam on steelhead in the Santa Ynez River. (47 AR
11 445:21322-325; 40 AR 372:17891.) The State Water Board initiated the Cachuma water rights
12 hearings for the express purpose of "provid[ing] appropriate protection of downstream water rights
13 and public trust resources [i.e. steelhead] on the Santa Ynez River." (47 AR 445:21312 [emphasis
14 added].) Second, the water releases under consideration by the State Water Board have been
15 available to COMB, through the State Water Board's Draft EIR, since August of 2003, more than a
16 year before COMB certified the FMP EIR. (47 AR 445:21292-542.) Therefore, just as in *Eel River*,
17 where the Sonoma County Water Agency was aware of the proposals under consideration by FERC
18 to alter diversions from the Eel River to protect salmon and chose not to discuss them, so too COMB
19 was aware of the proposed water releases under consideration by the State Water Board to protect
20 steelhead, but chose not to discuss them.

21 Third, COMB's appearances before the State Water Board's water rights hearings belie its
22 statement that there is "no correlation" between the hearings and the FMP EIR. COMB admitted that
23 the FMP EIR will be inaccurate unless the State Water Board adopts the flow-related projects COMB
24 prefers. If it does not do so, further environmental review of the FMP may be required. COMB:

25 requested the State Water Board to select Alternative 3C [from among
26 the State Water Board's draft EIR alternatives]. In that event, the
27 [FMP EIR] will, in fact, accurately reflect the State Water Board's
28 changes to Reclamation's water rights permits. Depending on the
changes to Reclamation's water rights permits actually selected by the
State Water Board, the lead agencies will exercise their discretion to

1 determine whether additional environmental review is required under
2 CEQA and NEPA.

3 (40 AR 372:18202-203.) This demonstrates that the State Water Board’s water rights hearing and
4 COMB’s Project are intertwined, just as the state and federal proceedings were in *Eel River*.

5 Fourth, while the FMP EIR does *mention* the State Water Board’s hearings and the draft EIR
6 prepared by the State Water Board, it does so only minimally, and primarily in order to dismiss their
7 relevance. COMB steadfastly refused to include detailed information about the water rights hearings
8 in the FMP EIR, and despite having the State Water Board’s Draft EIR in hand, stated “[t]here is no
9 available information on what type of action, if any, the State Water Board may take in the [water
10 rights] hearings. . . .” (39 AR 371:17756.) COMB’s EIR thus failed one of the most fundamental
11 purposes – providing information to the public and decision-makers.

12 **2. The FMP EIR’s Project Description Is Inaccurate and Unstable**

13 By omitting information about the State Water Board’s water rights hearing, COMB curtailed
14 the FMP EIR’s project description, depriving the public of important information as to how the
15 outcome of State Water Board’s water rights hearings could impact the Project. As discussed in
16 Petitioners’ Opening Brief, the project description is unstable because it inconsistently describes the
17 activities that comprise the Project. (Opening Br. at 25-24.) COMB did not respond to Petitioners’
18 arguments regarding instability of the project description, thus it must be presumed that COMB
19 concedes this infirmity. Regarding the inaccuracy of the project description, COMB responds that it
20 was not obligated to discuss the water rights hearings in the FMP EIR because the permitting
21 decisions are not “linked to” the approval of the FMP, and because COMB did not have sufficient
22 reliable data to analyze the impacts of changes to the water rights permit. Again, COMB limits its
23 arguments to the FMP EIR’s *non-flow* related projects. Further, it relies on a misreading of CEQA
24 case law.

25 Its protestations aside, COMB concedes that there is a link between Lake Cachuma water
26 rights and the Project, stating “the only possible impacts [from the State Water Board’s decision] – if
27 there are any – would be to flow related projects. There would be absolutely no impact to non-flow
28 projects” (Opp. Br. at 28:9-11.) COMB’s exclusion of discussion of the State Water Board’s

1 water rights hearings, which it admits may impact the Project, resulted in an inadequate project
2 description.

3 Further, COMB's excuse for not analyzing the voluminous data regarding flow-related
4 projects provided by the State Water Board in its Draft EIR is that the State Water Board's ultimate
5 decision regarding water rights is "speculative." But none of the cases cited by COMB to support its
6 contention that it is speculative to discuss the impacts of a project *already under environmental*
7 *review*. Instead, *Lake County Energy Council v. County of Lake*, 70 Cal. App. 3d 851 (1977)
8 considered the need to discuss impacts of geothermal production at a site that might never be found
9 suitable for such use; *Towards Responsibility in Planning v. City Council*, 200 Cal. App. 3d 671,
10 681(1988) considered the need to discuss impacts of construction of a regional water quality facility
11 that studies indicated was not needed; and *Residents Ad Hoc Stadium Committee v. Board of*
12 *Trustees*, 89 Cal. App. 3d 274, 286 (1979) considered the need to discuss infeasible project
13 alternatives and did not consider the adequacy of project descriptions. Nothing in CEQA supports
14 COMB's treatment of a project already under environmental review as speculative.

15 3. The FMP EIR's Cumulative Impacts Analysis Is Deficient

16 COMB contends that it was reasonable to exclude analysis of the alternatives under
17 consideration by the State Water Board regarding water rights at Lake Cachuma from the FMP EIR's
18 cumulative impacts section. COMB argues it was entitled to exclude this analysis because the State
19 Water Board's project is not "probable," and not all projects under environmental review "must be
20 cumulatively analyzed." (Opp. Br. at 29:5-8.) Further, COMB seeks to distinguish its decision from
21 the Sonoma County Water Agency's fatal decision in *Eel River* not to provide cumulative impacts
22 analysis of FERC's proposals to curtail water diversions from the Eel River. But, under settled
23 CEQA case law, COMB was obligated to include the State Water Board's proposals in its cumulative
24 impacts analysis, and its failure to do so is prejudicial error.

25 COMB argues that the variation in the alternatives under consideration by the State Water
26 Board in its water rights hearings excused COMB from discussing the water rights hearings. To
27 advance this theory, COMB misrepresents *Eel River*, suggesting that the only reason the Court of
28 Appeal found that the FERC proposals should have been included in the Agency's cumulative

1 impacts analysis was due to the uniformity of FERC’s proposals to decrease water diversions from
2 the Eel River. (Opp. Br. at 29:9-19.) In fact, the Court of Appeal ruled that it was “reasonable and
3 practical” to include analysis of the FERC proposals on a number of grounds, but foremost because

4 [a]t the time the EIR was prepared, the proposals before FERC had
5 progressed to the point that an Environmental Impact Statement, the
6 federal equivalent of an EIR, had been initiated. ***Based on this fact
alone***, we can conclude the ***possible*** curtailment of Eel River diversions
7 was a reasonably foreseeable future project, which should have been
8 included in the EIR’s discussion of cumulative impacts.

8 *Eel River*, 108 Cal. App. 4th at 870 (emphasis added). As succinctly stated in *San Franciscans For*
9 *Reasonable Growth v. San Francisco*, 151 Cal. App. 3d 61, 75 (1984) “experience and common
10 sense indicate that projects which are under review are [reasonably] foreseeable probable future
11 projects.” Here, the State Water Board’s water rights permit was under environmental review,
12 examining the same flow-related projects included in the FMP EIR. For this reason *alone* it was
13 error to exclude analysis of the water rights hearings from FMP EIR’s cumulative impacts section.

14 COMB ignores a further ground upon which the *Eel River* Court concluded the FERC
15 proceedings should have been included in the Sonoma County Water Agency’s EIR cumulative
16 impacts analysis: the Agency was “participating actively in [the FERC] proceeding.” *Eel River*,
17 108 Cal. App. 4th at 871. COMB admits it is a participant in the State Water Board proceedings,
18 noting that “at the WR 94-5 water rights hearing in November 2003, Reclamation and COMB
19 requested that the State Water Board adopt the Project releases for the protection of public trust
20 resources. . . .” (39 AR 371:17403.) . In fact, as discussed in Petitioners’ Opening Brief, COMB
21 continues to plead with the State Water Board to select a water release alternative that will match the
22 water releases COMB “adopted” in its FMP EIR. (Opening Br. at 29-30; 54 AR 452:25485.)

23 COMB also makes the outrageous claim that the FMP EIR “discussed the alternatives which
24 could be analyzed by the State Board in any future final EIR.” (Opp. Br. at 30:3-4.) But none of
25 COMB’s citations to the record contain descriptions of *any* of alternatives the State Water Board is
26 considering, nor do they contain *any* discussion as to how those alternatives would impact the
27 Project. (39 AR 371:17402, 72; 40 AR 372:18320.)
28

1 COMB complains that it should not be “required to wait for the State Board’s Draft EIR to be
2 completed . . . to determine if the State Board’s project may or may not have an effect on Cachuma
3 Project operations.” (Opp. Br. at 22:12-14.) This echoes COMB’s earlier contention that “the timing
4 of a decision by the State Water Board and the issuance of a Final EIR are unknown . . . [h]ence there
5 is no need to delay the implementation of the FMP/BO pending the State Water Board’s
6 decision. . . .” (40 AR 372: 18233, *see also* 17954.) But, as the Court stated in *Eel River*, “[w]e do
7 not agree that a lengthy review process means a project is speculative . . . the proposals pending
8 before FERC to decrease Eel River diversions may not be considered speculative simply because the
9 FERC process appears to be a lengthy one.” 108 Cal. App. 4th at 870. The FMP EIR’s failure to
10 discuss or analyze the State Water Board’s water rights hearing and Draft EIR renders the
11 environmental setting, project description, and cumulative impacts analysis inadequate and
12 inaccurate. This constitutes prejudicial error, requiring that the FMP EIR be set aside.

13 **C. The FMP EIR Violates CEQA Because No Substantial Evidence Supports Its**
14 **Conclusion That Upper Hilton Creek Is Suitable Habitat for Steelhead**

15 In their Opening Brief, Petitioners demonstrated that the record is devoid of any evidence to
16 support the FMP EIR’s conclusion that “excellent rearing” and “some spawning” habitat for
17 steelhead exists on Upper Hilton Creek above the Highway 154 culvert and that impacts to steelhead
18 resulting from the Project would be less than significant. (39 AR 371: 17627-29; *see* Opening Br. at
19 p. 31-37.) To the contrary, Petitioners cited to substantial evidence in the record that removing the
20 existing Highway 154 culver barrier to lure fish up Hilton Creek would be “tantamount to trout
21 murder.” (40 AR. 372:18115.) COMB has utterly failed to rebut Petitioners’ arguments. Instead, it
22 contends that: (1) Petitioners’ arguments are not ripe because COMB did not approve the Highway
23 154 project; and (2) COMB’ experts concluded that Upper Hilton Creek has suitable habitat for
24 steelhead, and Petitioners cannot rely on a so-called “battle-of-the-experts” to defeat this finding.
25 (Opp. Br. at 30-31, 31-37.) Neither argument has merit.

26 First, COMB’s ripeness argument is frivolous. While COMB did not approve the Highway
27 154 Culvert Project, it did certify the FMP EIR as having adequately evaluated the environmental
28 impacts of the Highway 154 project. (44 AR 423:20292-20332.) A certified EIR that goes

1 unchallenged is conclusively presumed valid. *See* Cal. Pub. Res. Code § 21167.2. Thus, had
2 Petitioners not challenged the FMP EIR, Caltrans could have relied on the FMP EIR’s analysis
3 regarding the Highway 154 project, and Petitioners would have been barred from raising a challenge
4 to such reliance except under very limited circumstances. Thus, Petitioners timely brought this
5 challenge to the FMP EIR, even as it pertains to the as yet unapproved Highway 154 project.
6 Moreover, COMB misleadingly informs the Court that it “rejected” the Highway 154 project. (*See*
7 *Opp. Br.* at 31:13.) COMB actually stated only that it was not approving the Highway 154 project “at
8 this time.” (44 AR 423:20295).

9 None of the cases COMB cites to in support of its claim of lack of ripeness are remotely
10 relevant, because none involves a challenge to a certified EIR for a project that could be approved in
11 the future. (*See Hunt v. Super. Ct.*, 21 Cal.4th 984, 998 (1999) (reviewing trial court’s preliminary
12 injunction prohibiting county from adopting a standard for determining eligibility for medical
13 benefits; did not involve a CEQA challenge to an EIR); *Pac. Legal Found. v. Cal. Coastal Comm’n*,
14 33 Cal.3d 158, 170 (1982) (facial challenges to Coastal Commission guidelines for public access not
15 ripe; did not involve a CEQA challenge to an EIR); *Trancas Property Owners Ass’n v. City of*
16 *Malibu*, 138 Cal. App. 4th 172, 183 (2006) (refusing to review “the intrinsic merits of maps that have
17 been rejected”; did not involve an EIR).

18 Second, COMB erroneously characterizes Petitioners’ challenge as a “disagreement among
19 experts.” Here, rather than a clash of experts, the *only* substantial evidence in the record concerning
20 Upper Hilton Creek above the Highway 154 culvert demonstrates that it is not habitable for
21 steelhead. COMB attempts to refute this by citing to “evidence” it claims supports its finding that
22 Upper Hilton Creek above the Highway 154 culvert has suitable habitat. (*Opp. Br.* at 33-36.) But a
23 review of this “evidence” shows it to be nothing but pure speculation, or, in several cases, citation to
24 discussions of *lower*, not upper, Hilton Creek, and thus irrelevant. COMB erroneously claims the
25 following constitutes substantial evidence:

- 26 • A “seed population of steelhead in Hilton Creek” is “demonstrated by the fish rescues conducted
27 in 1995 and 1998, observations of a steelhead in a pool *downstream* of the Highway 154 culvert”;
28 and observation of a steelhead in upper Hilton Creek by Dr. Rich. (*Opp. Br.* at 34:13-15)
(emphasis added). **All the fish rescues occurred below Highway 154 and are thus irrelevant.**
(30 AR 178:13873.) **Likewise, observations of steelhead were made in a pool below Highway**

1 154. (31 AR 190:14367; 40 AR 372:18259.) Finally, the “extremely emaciated” fish
2 observed by Dr. Rich above Highway 154 died after the pool in which it was observed dried
3 up. (40 AR 372:18126; 42 AR 392:19470-71, 19473.) This is not substantial evidence of
4 suitable habitat.

- 5 • “On August 22, 2000, two steelhead were observed immediately downstream of the Highway 154
6 culvert,” and “spawning in Upper Hilton Creek had been observed.” (Opp. Br. at 34:16-18.)
7 Existence of fish “immediately downstream” of the Highway 154 culvert is not substantial
8 evidence of suitable habitat *above* the culvert. Further, the spawning observed was
9 “between the cascade/chute impediment and the confluence with the Santa Ynez River”—
10 i.e., *lower* Hilton Creek, below the Highway 154 culvert where Reclamation provides
11 supplemental water year round to compensate for the fact that Hilton Creek otherwise dries
12 up. (47 AR 445:21438.)
- 13 • “There is suitable habitat because there is year-round water in most years;” the supplemental
14 watering system provides “lower Hilton Creek” with “consistent, cool water from Lake
15 Cachuma”; and Dr. Rich noticed “‘abundant water’ in Hilton Creek in 2003.” (Opp. Br. at 34:19-
16 21.) The supplemental water system serves a portion of Hilton Creek far below Highway
17 154. (30 AR 178:13876.) Further, COMB misleading truncates Dr. Rich’s statement
18 regarding “abundant water.” Her full statement is: “Because both supplemental discharge
19 points were active in January 2003, there was abundant water on the Bureau’s property
20 while the upper part of Hilton Creek was dry.” (40 AR 372:18166 (DVD 10:31-11:13)
21 (emphasis added).) COMB provides no evidence of water in Upper Hilton Creek.
- 22 • “[O]n January 13, 2001 a large steelhead . . . was observed upstream of the passage impediment.”
23 (Opp. Br. at 34:22-24.) COMB refers to the “passage impediment” but fails to explain that
24 the impediment was the bedrock chute barrier, *not* the Highway 154 culvert. (31 AR
25 190:14367-68.) Again, COMB refers to lower Hilton Creek, and cannot show that steelhead
26 survive in Upper Hilton Creek.
- 27 • “COMB’s Project Biologist . . . reported observations of several steelhead in the pool
28 immediately below the highway 154 Culvert.” (Opp. Br. at 34:25-26.) Existence of fish
“immediately below” of the Highway 154 culvert is not substantial evidence of suitable
habitat *above* the culvert.
- Fish were “observed” on the “Highway 154 Reach” and “steelhead successfully rear in the
Highway 154 Reach.” (Opp. Br. at 34:27-28.) The “Highway 154 Reach” is located on the
mainstem of the Santa Ynez River, far below the Highway 154 culvert, thus observations of
fish there is not evidence of suitable habitat above the culvert. (39: AR 371:17531; 40 AR
18260; 29 AR 177:13615.)
- Steelhead decline has been caused by extensive loss of habitat and “reconnecting habitat” through
barrier removal restores access. (Opp. Br. at 35:1-2.) This statement does not speak to the
suitability of habitat on Upper Hilton Creek above the Highway 154 culvert. Moreover,
COMB cannot cite to any evidence (there is none) that Upper Hilton Creek was ever native
habitat to steelhead. Diverting fish from suitable habitat to unsuitable habitat will only
cause their deaths.
- COMB’s project biologist visited “selected sites” on Upper Hilton Creek and “observed rearing
habitat.” (Opp. Br. at 35:3-4.) As explained in Petitioners’ Opening Brief, and not rebutted
by COMB, during the project biologist’s brief, four-hour visit in the winter he did not take
any measurements, conduct any surveys, take any samples, or otherwise compile any data.
(42 AR 293:19472.) The record contains no data or any recording, written or otherwise, of
the biologist’s visit. “Substantial evidence” does not include expert opinion unless it is
“supported by facts,” and expressly excludes “unsubstantiated opinion or narrative.”

1 CEQA Guidelines, § 15384(a), (b); *see also Berkeley Keep Jets Over the Bay Comm. v. Bd. of*
2 *Port Comm'rs*, 91 Cal. App. 4th 1344, 1355 (2001); *Laurel Heights Improvement Ass'n v.*
3 *Regents of Univ. of Cal.*, 47 Cal. 3d 376, 409, fn. 12 (1988).

- 4 • Hilton Creek is “immediately downstream of Bradbury Dam” and thus steelhead “will be looking
5 for nearby spawning and rearing habitat . . .” (Opp. Br. at 35:4-5.) **This is not evidence of the
6 existence or quality of steelhead habitat above the Highway 154 culvert. In fact, it is just an
7 admission of the obvious – Bradbury Dam blocks historic migration patterns.**
- 8 • Upper Hilton Creek has “perennial habitat in many years” evidenced by “observations from the
9 Highway 154 easement and by inference based on comparison” of other tributaries. (Opp. Br. at
10 35:6-8.) **As discussed, the “inference” that upper Hilton Creek has “perennial habitat” is
11 based on the project biologist’s limited and brief observations, which do not amount to
12 evidence, much less “expert opinion supported by facts.” CEQA Guidelines, § 15384(b);
13 40 AR 372:18298. There is no evidence, moreover, to support the “inference” that because
14 other creeks have “perennial habitat” the same would be true of Upper Hilton Creek above
15 the Highway 154 culvert. COMB has engaged in unacceptable speculation.**
- 16 • Hilton Creek has a “gradient that precludes inhabitation by predatory fish . . .” (Opp. Br. at
17 35:9-10.) **Again, this citation fails to speak to the suitability of habitat above the Highway
18 154 Culvert. (40 AR 372:18298.)**
- 19 • Pool habitat in upper Hilton Creek is “greater than those in lower Hilton” and the dense canopy
20 provides favorable cover for the habitat. (Opp. at 35:11-12.) **The referenced pools and canopy
21 cover are below the Highway 154 culvert and thus cannot be offered to support COMB’s
22 contention that steelhead habitat exists above the Highway 154 culvert. (39 AR 371:17534.)**

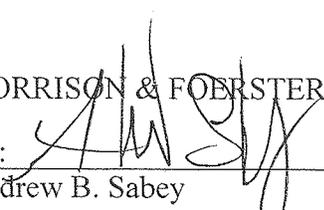
23 In short, COMB’s Opposition Brief confirms that its “substantial evidence” that upper Hilton
24 Creek above the Highway 154 culvert has suitable steelhead habitat is based only a conclusory,
25 unwritten opinion by the project biologist, during a four-hour visit during the winter, that is
26 unsupported by any tests, data, reports, or other objective evidence. CEQA requires more. The FMP
27 EIR’s conclusion that adequate steelhead habitat above the Highway 154 culvert exists, and that the
28 Highway 154 culvert project will not have a substantial adverse impact on steelhead, is not supported
by substantial evidence in the record, rendering it fatally defective under CEQA.

29 III. CONCLUSION

30 For the foregoing reasons, this Court should issue a writ of mandate ordering COMB to set
31 aside the FMP EIR.

32 Dated: August 30, 2006

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