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14 SUPERIOR COURT OF CALIFORNIA  
15 COUNTY OF MARIN

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17 SALMON PROTECTION AND  
WATERSHED NETWORK, a Project of  
18 TURTLE ISLAND RESTORATION  
19 NETWORK, a California non-profit  
corporation,

20 Petitioner,

21 v.

22 COUNTY OF MARIN; BOARD OF  
23 SUPERVISORS OF MARIN COUNTY,  
24 AND DOES 1 through 10, inclusive,

25 Respondents.  
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27  
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**FILED**

**OCT 24 2014**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

By: E. CHAIS, Deputy

Case No. CIV 1004866

**PETITIONER'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR ENTRY OF  
FINAL JUDGMENT AND  
PEREMPTORY WRIT OF MANDATE**

Trial Date: Dec. 5, 2014

Date: 9:00 a.m.

Department: E

Judge: Hon. Paul Haakenson

Action Filed: September 14, 2010

Case No. CIV 1004866

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MOTION FOR ENTRY OF FINAL JUDGMENT AND PEREMPTORY WRIT OF MANDATE

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## INTRODUCTION

This matter is on remand from the First District Court of Appeal. The Court of Appeal reversed Judge Duryee’s earlier decision in the case, concluding that the County of Marin (“County”) did not comply with the California Environmental Quality Act (“CEQA”) in adopting its 2007 Countywide General Plan (“Plan”). Specifically, the Court held that the County’s Environmental Impact Report (“EIR”) for the Plan “provides no help to decision-makers or the public to understand the likely consequences, or at least the range of potential consequences, of a buildout within the watershed of the scope described in the countywide plan. Providing that long-term view is the point of a cumulative impact analysis . . .” (*Salmon Protection and Watershed Network v. County of Marin* (Mar. 5, 2014) 2014 WL 845416, Slip Op. at 16.) Recognizing that “future buildout in the watershed continues to pose a significant threat to survival of the salmonids,” the Court also held that the EIR unlawfully “defers the formulation of meaningful mitigation measures to abate this significant impact and fails to comply with the mandates of CEQA.” (*Id.* at 19.) Because the EIR “fails to provide the information . . . necessary to make informed judgments about the advisability, so far as the San Geronimo Valley watershed is concerned, of adopting the countywide plan,” the Court concluded that “the county prejudicially abused its discretion by failing to proceed in the manner required by CEQA.” (*Id.*)

The issue now before this Court is how to implement that holding in a way that is consistent with CEQA and with the resource protection concerns that animated the appellate court’s decision. The normal remedy for a CEQA violation is a writ of mandate vacating and setting aside the underlying decision until and unless respondent completes an adequate environmental analysis and demonstrates its compliance through a return to the writ. The Court of Appeal followed this general approach: “The judgment is reversed. The matter is remanded with instructions to enter a writ of mandate directing the county to set aside its approval of the [Plan] and certification of the related EIR with respect to the San Geronimo watershed only, pending preparation of a supplemental EIR with respect to the San Geronimo watershed only that analyzes cumulative impacts in conformity with Guidelines section 15130, subdivision (b) and this opinion, and that describes mitigation measures in conformity with Guidelines



1 reinforcing process that the National Marine Fisheries Service (“Service”) has characterized as an  
2 “extinction vortex.” (*Id.*, Vol. I, at 48-49.)

3 The streamside habitat in the San Geronimo Valley watershed, within the larger Lagunitas Creek  
4 watershed, is essential to bringing coho salmon back from the brink of extinction. The San Geronimo  
5 Valley’s stream system is “considered one of the most important spawning and nursery areas for [coho  
6 salmon and steelhead trout].” (AR 15747; AR 9121.) Of the 78 watersheds that historically supported  
7 Central California Coast coho, the Service has singled out the Lagunitas Creek watershed in Marin as  
8 uniquely suited to help recover these species, and it identified the San Geronimo Valley as the critical  
9 spawning and nursery grounds, supporting one-third of the Lagunitas coho spawning and rearing  
10 activity. (*Id.*; *Recovery Plan*, Vol. 1, at 40.)

11 Given their anadromous life cycle – the fish rely on freshwater streams in the early and late  
12 stages of their lives to migrate between spawning habitat and the ocean – coho salmon (and their only  
13 slightly less imperiled steelhead trout cousins) are particularly threatened by urban development in  
14 streamside habitat. (AR 15750-51.) Streamside alterations harm salmon by causing water pollution  
15 (AR 12486), barriers to migration (AR 12483), and insufficient water flow (AR 18220). Construction  
16 alongside streams increases bank erosion, which in turn increases sediment runoff to stream channels.  
17 (AR 15750-51.) Removal of native vegetation, in order to improve stream access for landowners and  
18 make room for lawns and ornamental plants, deprives streams of vital nutrient inputs and decreases the  
19 availability of woody debris that provides essential refuge and nursery habitat. (AR 18131-32; AR  
20 12490.) Worse yet, the loss of vegetation reduces shade coverage and can “increase water temperatures  
21 beyond the range tolerable to salmon and steelhead.” (AR 18145.) Once this streamside habitat is lost to  
22 development, it cannot be mitigated by protecting habitat elsewhere: “Riparian habitats are  
23 irreplaceable, vital biological systems.” (AR 7572.) Simply put, the “plight of the salmon is inexorably  
24 tied to the story of the changing landscape.” (*Recovery Plan*, Vol. 1, at x.)

25  
26 **II. The Court of Appeal Found that the EIR at Issue Here Unlawfully Failed to Analyze**  
27 **Cumulative Impacts and Necessary Measures to Mitigate Such Impacts.**

28 Petitioner Salmon Protection and Watershed Network (“SPAWN”) filed this lawsuit on

1 September 14, 2010 challenging the adequacy of the County's EIR on several grounds under CEQA.<sup>2</sup>  
2 On September 11, 2012, Judge Duryee found that the EIR provided adequate analysis. On April 26,  
3 2013, SPAWN raised two issues on appeal: (1) the EIR failed to properly analyze cumulative impacts  
4 on imperiled salmonid populations and (2) the EIR relied on an inadequate mitigation measure to reduce  
5 an otherwise significant impact on coho salmon to less-than-significant. On March 5, 2014, the Court of  
6 Appeal reversed the trial court's judgment on both grounds.

7  
8 As to cumulative impacts, the Court of Appeal held that "[i]n approving the EIR despite its  
9 failure to provide this critical information [on cumulative impacts], the county prejudicially abused its  
10 discretion by failing to proceed in the manner required by CEQA." (*SPAWN*, Slip Op. at 7.) In  
11 rejecting the County's argument that cumulative impacts can be assessed at the individual project level,  
12 the Court framed the issue as "whether the program EIR must contain a more meaningful analysis of the  
13 cumulative impacts on fishlife of projected development in the watershed." (*Id.* at 6.) The Court  
14 explained that as individual projects go forward, "no analysis of the cumulative impacts of development  
15 in the watershed will ever be made" because the "cumulative impact will not be known until the last  
16 development has been proposed." (*Id.*) The Court pointed to the California Regional Water Quality  
17 Control Board's opinion that "[it] is the cumulative impacts of the projects that most frequently lead to  
18 the decline of a species, not the individual projects." (*Id.*)

19 Because neither the Plan nor the EIR "estimate or evaluate in any meaningful terms how much  
20 [the projected] construction is likely to affect the streams abutting these sites," the Court was left, as is  
21 the public, with many unanswered questions: (1) "What, for example, is the maximum amount of  
22 impervious surface that may reasonably be placed in the watershed under the plan?" (2) If salmonid  
23 habitat will be eliminated under the Plan, "what is a reasonable estimate of the loss, and what variables  
24 will determine its extent?" (3) "[H]ow many and what size of lots are estimated to fall within [the  
25 infeasibility exception to the streamside setback policies] and what is the significance of such  
26

27 <sup>2</sup> A separate claim concerned the County's mandatory duty to adopt an ordinance to protect Stream  
28 Conservation Areas. (AA 440). That claim, since denied by the Court of Appeals, has no bearing on the  
remedy for the CEQA violations at issue here.

1 exceptions?" (*SPAWN*, Slip Op. at 7.) Given the fundamental holes in the analysis, the Court of  
2 Appeal concluded that "the report provides no help to decision-makers or the public to understand the  
3 likely consequences, or at least the potential range of consequences, of a buildout within the watershed  
4 of the scope described in the countywide plan." (*Id.*)

5 Similarly, the Court found the EIR wanting with respect to mitigation. In the Court's words, the  
6 EIR "impermissibly defers the formulation of meaningful mitigation measures to abate this significant  
7 impact" of buildout in the watershed. (*SPAWN*, Slip Op. at 9.) Specifically, the Court rejected the  
8 mitigation program that called for continued participation in the FishNet 4C program as insufficient to  
9 "justify a finding that the significant impact of buildout on threatened salmonids will be mitigated to a  
10 less-than-significant level." (*Id.* at 8.) That mitigation program – a voluntary agreement to cooperate  
11 with other agencies – did not define any "specific measures to be taken to reduce the impact of buildout  
12 on the threatened fish species," nor did it specify performance standards. (*Id.* at 9.) The Court  
13 cautioned that, in the absence of formulated mitigation measures or performance standards, the EIR  
14 "provides no adequate criteria by which to evaluate either the sufficiency of such measures or the extent  
15 to which the impacts of future construction in the watershed will be mitigated by those measures." (*Id.*)

16  
17 In order to remedy these violations, the Court of Appeal remanded the matter to this Court to  
18 enter a writ of mandate directing the County to prepare a supplemental EIR that analyzes cumulative  
19 impacts and describes mitigation measures in compliance with CEQA. (*SPAWN*, Slip Op. at 24).

## 20 ARGUMENT

21 The Court of Appeal appropriately directed this Court to enter a writ of mandate setting aside the  
22 flawed EIR and the accompanying 2007 Plan, but one additional remedy measure is necessary to avoid  
23 "death by a thousand cuts" while the County prepares a supplemental EIR to address the impacts of  
24 future development. Pursuant to Public Resources Code section 21168.9, the Court should suspend the  
25 County's issuance of development approvals within the Stream Conservation Area in the San Geronimo  
26 Valley watershed until it completes a Supplemental EIR that adequately evaluates cumulative impacts  
27 and identifies measures to mitigate those impacts. CEQA provides broad judicial authority for such a  
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1 tailored remedy, and the equities warrant that modest, reasonable remedy here. Allowing new  
2 development to proceed *while* the County evaluates the impacts of that development would undermine  
3 the very purpose of CEQA and the concern that animated the Court of Appeal’s decision.

4 **I. The Court Has Broad Statutory Authority under CEQA to Fashion a Reasonable**  
5 **Remedy Tailored to the Circumstances of this Case.**

6 This Court has ample authority to suspend development pending compliance with CEQA. As a  
7 general matter, section 1094.5(f) of the California Code of Civil Procedure commands that an unlawful  
8 agency decision be “set aside” and authorizes the Court “to take such further action as is specifically  
9 enjoined upon it by law . . . .” (Cal. Code Civ. Proc. § 1094.5(f).) The California Legislature  
10 subsequently enacted Public Resources Code section 21168.9 “to give the trial courts some flexibility in  
11 tailoring a remedy to fit a specific CEQA violation.” (*San Bernardino Valley Audubon Soc. v. Metro.*  
12 *Water Dist. of S. California* (2001) 89 Cal.App.4th 1097, 1103.) In particular and as relevant here,  
13 section 21168.9 authorizes the Court to “mandate that the public agency and any real parties in interest  
14 suspend any or all specific project activity or activities . . . that could result in an adverse change or  
15 alteration to the physical environment” if such activities “will prejudice the consideration or  
16 implementation of particular mitigation measures or alternatives to the project.” (Cal. Pub. Res. Code  
17 § 21168.9(a)(2).)

18 Under this broad statutory authority, courts routinely suspend project activities as part of a  
19 remedy tailored to the specific CEQA violation at issue. (*San Joaquin Raptor/Wildlife Rescue Center v.*  
20 *County of Stanislaus* (1994) 27 Cal.App.4th 713 (suspending all project activities pending CEQA  
21 compliance where the EIR failed to adequately analyze cumulative impacts of residential development  
22 project in wetlands habitat); *Pres. Wild Santee v. City of Santee* (2012) 210 Cal. App.  
23 4th 260 (upholding trial court’s limited remedy suspending all project activities pending CEQA  
24 compliance even where court found the EIR defective in a single respect for its failure to adequately  
25 address fire safety impacts of residential development project in a high fire hazard zone); *Anderson First*  
26 *Coal. v. City of Anderson* (2005) 130 Cal.App.4th 1173 (upholding trial court’s severance remedy  
27 suspending all construction and operation activities at a gas station pending CEQA compliance where  
28

1 the EIR failed to address the gas station’s traffic and air quality effects).)

2 In doing so, they must be mindful of CEQA’s primary purpose to “[e]nsure that the long-term  
3 protection of the environment shall be the guiding criterion in public decisions.” (*No Oil, Inc. v. City of*  
4 *Los Angeles* (1974) 13 Cal.3d 68, 74; *see also Laurel Heights Improvement Assn. v. Regents of Univ. of*  
5 *California* (1988) 47 Cal. 3d 376, 423.) As the California Supreme Court has repeatedly held, CEQA  
6 should be implemented to “afford the fullest possible protection to the environment.” (*Wildlife Alive v.*  
7 *Chickering* (1976) 18 Cal.3d 190, 206 (quotation omitted); *see also Friends of Mammoth v. Board of*  
8 *Supervisors* (1972) 8 Cal.3d 247, 259.) By crafting precautionary remedies that prevent harm from  
9 happening before public officials even understand what harms will occur, courts effectuate the  
10 Legislature’s declared intention “that all public agencies responsible for regulating activities affecting  
11 the environment give prime consideration to preventing environmental damage when carrying out their  
12 duties.” (*Mountain Lion Found. v. County of Kern* (1997) 16 Cal.4th 105, 112.)

13  
14 Crafting remedies that require public agencies to consider the consequences of their actions  
15 *before* they act is absolutely critical to the proper functioning of CEQA’s statutory scheme. An  
16 adequate EIR is “the heart of CEQA,” (*Laurel Heights*, 47 Cal.3d at 392 (internal quotation marks  
17 omitted)), and “the key to environmental protection under [the Act].” (*No Oil, Inc.*, 13 Cal.3d at 70.) It  
18 is “the primary means of achieving the Legislature’s considered declaration that it is the policy of the  
19 state to ‘take all action necessary to protect, rehabilitate, and enhance the environmental quality of the  
20 state.’” (*Id.*) The EIR serves as an “‘environmental alarm bell’ whose purpose is to alert the public and  
21 its responsible officials to environmental changes before they have reached the point of ecological no  
22 return.” (*Laurel Heights*, 47 Cal.3d at 392.) To be legally adequate, therefore, a CEQA analysis must  
23 “be prepared with a sufficient degree of analysis to provide decision-makers with information which  
24 enables them to make a decision which intelligently takes account of environmental consequences.”  
25 (Cal. Code Regs., tit. 14, § 15151; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70  
26 Cal.App.4th 20, 26; *Burbank-Glendale-Pasadena Airport Auth.*, 233 Cal.App.3d at 596.) If agencies are  
27 allowed to proceed before evaluating consequences, it would be far too easy for the process to lose its  
28

1 integrity and for agencies to sweep “stubborn problems and serious criticism . . . under the rug.” (*Kings*  
2 *County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733.) Given CEQA’s objectives,  
3 courts should tailor the remedy for an inadequate EIR to fit the circumstances of each case, taking  
4 account of the public interest in avoiding serious environmental harm while the requisite review is  
5 completed. (*POET, LLC v. California Air Res. Bd.* (2013) 218 Cal.App.4th 681, 697.) In *POET*, for  
6 instance, the court elected not to suspend California’s low carbon fuel standards *because* doing so  
7 “would result in *more environmental harm* than allowing them to remain in effect pending the  
8 completion of [the agency’s] corrective action.” (*Id.* (emphasis added).) In *Laurel Heights*, the Court  
9 found substantial evidence in the record that the agency’s ongoing operations would be mitigated and  
10 thus declined to suspend activities that had already begun, but enjoined any expansion of existing  
11 operations and the commencement of additional operations until a new EIR was certified and the project  
12 reapproved. (47 Cal.3d at 424.) Likewise here, SPAWN reasonably seeks a temporary suspension of  
13 new development approvals until the cumulative impacts of those approvals and appropriate mitigation  
14 measures have been considered and implemented in a new Countywide Plan.

15  
16 **II. The Tailored Remedy Sought by SPAWN Is Appropriate, Reasonable, and Necessary.**

17 **A. Temporary Suspension of Development Avoids the Risk of Cumulative**  
18 **Environmental Harm.**

19 Temporary suspension of new development approvals within San Geronimo Valley streamside  
20 habitat until the County properly assesses cumulative impacts and mitigation measures is a narrowly  
21 tailored, reasonable remedy that will effectuate the purposes of CEQA and the Court of Appeal’s  
22 decision in this matter. The Court found that “what is missing in the present case . . . is not an analysis  
23 of how salmonids will be affected by construction of a single building, but a meaningful analysis of the  
24 likely cumulative impacts of a widespread buildout, regardless of the details of individual projects.”  
25 (*SPAWN*, Slip Op. at 15.) As a result of this deficiency, “[t]here will be little additional information  
26 with which to evaluate cumulative impacts as each successive project is proposed; to the contrary, the  
27 ability to evaluate and respond to cumulative impacts will decline with each succeeding project.” (*Id.*)  
28 Moreover, the EIR fails to provide any “adequate criteria by which to evaluate either the sufficiency of

1 [proposed mitigation] measures or the extent to which the impacts of future construction in the  
2 watershed will be mitigated by those measures.” (*Id.* at 19.) These fundamental flaws mean, as the  
3 Court of Appeal recognized, that neither the public nor the County fully understands the import and  
4 impact of each new development on the precarious salmonid populations that use the San Geronimo  
5 watershed as their last, best spawning ground and rearing habitat. Allowing those impacts to occur  
6 before we know what they are and how we might mitigate them would render court-ordered  
7 supplemental CEQA review a meaningless paper exercise.  
8

9 The facts before the Court here are closely analogous to those in *San Joaquin Raptor/Wildlife*  
10 *Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, where the court suspended project  
11 activities for a large residential development because the EIR contained an inadequate cumulative  
12 impacts analysis and the project threatened to destroy wetlands before the developer identified them.  
13 There, the EIR lacked “any meaningful exploration and public disclosure of the true scope of the  
14 development project, its sensitive environmental setting, environmental impacts or feasible alternatives.”  
15 (*Id.* at 742.) The court’s suspension of development was, therefore, “necessary . . . to protect the site  
16 from adverse and possibly irreparable alteration” while the agency remedied its defective EIR. (*Id.* at  
17 741.) Similarly here, the EIR lacks “a meaningful analysis of the likely cumulative impacts of  
18 widespread buildout” and “provides no help to decision-makers or the public to understand the likely  
19 consequences, or at least the range of potential consequences, of a buildout.” (*SPAWN*, Slip Op. at 15-  
20 16.) Moreover, the County’s “ability to evaluate and respond to cumulative impacts will decline with  
21 *each succeeding project.*” (*SPAWN*, Slip Op. at 16 (emphasis added).) Thus, a temporary suspension of  
22 permitting in the narrow Stream Conservation Area of this single watershed is both necessary and  
23 appropriate.

24 **B. Temporary Suspension of Development Preserves the County’s Ability to Craft and**  
25 **Evaluate a Full Range of Possible Mitigation Measures.**

26 Allowing the County to proceed with piecemeal approvals of individual developments would  
27 also “prejudice the consideration or implementation of particular mitigation measures or alternatives to  
28 the project.” (Cal. Pub. Res. Code § 21168.9(a)(2).) As noted by the Court of Appeal in striking down

1 the County's deferred mitigation measures, "[m]itigation measures must be fully enforceable through  
2 permit conditions, agreements, or other legally-binding instruments." (Cal Code Regs., tit. 14,  
3 § 15126.4(a)(2).) By approving development while mitigation options are still being identified, the  
4 County would foreclose any realistic possibility of actually imposing enforceable measures on those  
5 projects already approved.

6  
7 Moreover, as noted in salmonid recovery plans developed by federal wildlife agencies, the  
8 cumulative impacts of development have had and will have major impacts on salmonid habitat. But  
9 until the County meaningfully reviews and considers the substantial body of science on the impacts of  
10 development, it will be impossible to know whether development can safely proceed, how it should best  
11 occur (*e.g.*, what practices should be followed), and where (*e.g.*, whether measures are required just on  
12 mainstream and tributary reaches or whether additional measures are also required in areas influencing  
13 ephemeral headwaters). If and when the Supplemental EIR reflects this reality, the only mitigation  
14 measures remaining to the County may be those that place the full burden of cumulative impacts  
15 mitigation entirely on projects yet to be proposed, leading to inequitable treatment of similarly situated  
16 landowners and increasing the pressure on County staff to allow further habitat degradation.

17 In short, this is a textbook case for the proposition that "[w]ithout relief, the [environment] may  
18 be damaged and the important purposes of CEQA will be subverted." (*San Joaquin Raptor*, 27  
19 Cal.App.4th at 742.) New development without mitigation further threatens already-depleted critical  
20 streamside habitat for imperiled coho and steelhead and subverts the utility of the County's  
21 Supplemental EIR. The imperiled salmon and trout populations that rely on this singular watershed  
22 represent tremendously valuable ecological resources. Allowing streamside development to proceed in  
23 the critical San Geronimo watershed before the County fully evaluates and mitigates cumulative impacts  
24 would, as the Court of Appeal recognized, "be putting the cart before the horse." (*SPAWN*, Slip Op. at  
25 16 (citation omitted).)

## 26 CONCLUSION

27 For the foregoing reasons, the Court should enter a judgment and writ of mandate decertifying  
28

1 the EIR, setting aside the Countywide Plan with respect to the San Geronimo Valley watershed, and  
2 suspending any new development approvals in the Stream Conservation Area of the San Geronimo  
3 Valley until and unless the County demonstrates on a return to the writ that it has adequately considered  
4 the Plan's cumulative impacts on salmonids and identified mitigation measures to address those impacts.  
5

6 Dated: October 24, 2014

Respectfully submitted,

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9  
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