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PROTECTION AND WATERSHED  
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13  
14 SUPERIOR COURT OF CALIFORNIA  
15 COUNTY OF MARIN

16  
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  
23 COUNTY OF MARIN; BOARD OF  
SUPERVISORS OF MARIN COUNTY,  
24 AND DOES 1 through 10, inclusive,

25 Respondents.  
26  
27  
28

**FILED**

NOV 21 2014

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: J. Chen, Deputy

Case No. CIV 1004866

**PETITIONER'S REPLY 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

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## INTRODUCTION

In its opposition brief, the County of Marin mixes apples and oranges and fails entirely to respond to SPAWN's California Environmental Quality Act ("CEQA") remedy arguments under Public Resources Code section 21168.9. This case involves two distinct sets of claims. The first five causes of action allege violations of CEQA for failure to prepare a legally adequate Environmental Impact Report ("EIR") in support of the 2007 Countywide Plan ("2007 Plan"). Judge Duryee ruled against SPAWN on these claims, finding the EIR adequate in all respects and accordingly, denied the petition for writ of mandate. For that reason, the court did not reach or address CEQA remedy issues.

The separate and distinct sixth cause of action in the writ petition alleges a stand-alone claim related to the County's failure to satisfy a self-imposed mandatory duty to adopt a Stream Conservation Area ("SCA") ordinance by a date certain. This sixth cause of action does not allege or involve a CEQA violation; rather, it seeks a writ of mandate under California Code of Civil Procedure ("CCP") section 1085 compelling the County to perform the mandatory duty it imposed upon itself to mitigate significant impacts associated with its adoption of the 2007 Plan. While finding the existence of a mandatory duty (a fact the County essentially conceded), Judge Duryee declined to interfere with the County's legislative priorities by imposing a judicial deadline for adopting the SCA ordinance. Instead, the court sought to incentivize the County by using its equitable powers to enjoin development approvals until the SCA ordinance was adopted. Because the court declined to grant a writ for the sixth, non-CEQA cause of action, there was no remedy briefing for this claim, either. Instead, Judge Duryee sua sponte issued that injunction as alternative relief.

On appeal, the First Appellate District came to precisely the opposite conclusion. First, it found that the EIR was legally defective in two important respects and remanded the matter to this court for entry of a writ consistent with CEQA. Second, on the County's cross-appeal, the appellate court found that Judge Duryee had erroneously issued an injunction for the sixth, non-CEQA claim because liability on the writ petition was properly denied and there was no briefing or evidence before the court to support other equitable relief in the form of an injunction.

1 SPAWN is now before the court seeking relief on its CEQA claims. The County does not  
2 respond to the ample statutory and case law authority permitting courts to set aside project approvals and  
3 suspend activities pending adequate compliance with CEQA. Indeed, that relief is the typical remedy  
4 granted in CEQA cases because agencies must go back and make an environmentally informed decision  
5 before proceeding with the project. The very purpose of CEQA is undermined if the agency can move  
6 forward with the project while it is revising the EIR. Instead of addressing this issue, the County spends  
7 its opposition brief discussing the appellate court's holding on the cross-appeal of the sixth, non-CEQA  
8 claim – a matter that is no longer properly before this court.  
9

10 The Court of Appeal's discussion of the equitable injunction is simply not relevant to the CEQA  
11 remedy that SPAWN seeks here. Nothing in CEQA or the writ statute suggests that a prevailing party  
12 must separately demonstrate irreparable harm, as a party must, for example, on a preliminary injunction  
13 motion prior to consideration of the merits or where the party is seeking alternative equitable relief.  
14 Once the court decides the merits and finds that an agency has failed to comply with CEQA, as occurred  
15 here, the resulting writ of mandate must "set aside" the accompanying agency approval, CCP §  
16 1094.5(f), and may properly suspend activities that could prejudice the consideration or implementation  
17 of particular mitigation measures or project alternatives. (Cal. Pub. Res. Code § 21168.9.) Given the  
18 serious cumulative impacts and mitigation measure violations found by the appellate court here, there is  
19 every reason for this court to issue a writ suspending development activities in the San Geronimo Valley  
20 SCA pending full compliance with CEQA. The County offers no countervailing rationale for not doing  
21 so, just a misdirected legal argument.  
22

## 23 ARGUMENT

### 24 I. The Appellate Court's Holding on the non-CEQA Claim is Not Relevant to the CEQA 25 Remedy before this Court.

26 The County asserts, without any support, that the appellate court already rejected the statutory  
27 remedy available for the CEQA claims. And based on that error, the County argues that this court may  
28 not provide a remedy for the CEQA violations established by the appellate court's opinion. But the  
appellate court has not considered, much less rejected, a statutory remedy under CEQA. Quite the

1 opposite; the appellate court directed the trial court to enter a writ consistent with its opinion and in  
2 conformity with CEQA. In arguing that the appellate court has already ruled on the statutory remedy for  
3 the CEQA violations, the County confuses the appellate court’s discussion of the alternative relief  
4 granted by the trial court – for the single non-CEQA claim – with the statutory remedy for the CEQA  
5 violations now before this court, calling them the “precise same injunction.” (Resp. Br. at 2.) But the  
6 statutory remedy before this court is not the same as the alternative relief on the non-CEQA claim  
7 rejected by the Court of Appeal.  
8

9 The County’s confusion begins with failing to see the differences between the two sets of claims  
10 in this case. Originally, SPAWN brought five claims against Marin County, all alleging CEQA  
11 violations for deficiencies in the EIR prepared for the 2007 Plan. In both the Plan and EIR, the County  
12 committed to adopting an ordinance to protect and restore the riparian habitat in the Stream  
13 Conservation Areas (SCAs) within four years. After that time elapsed and the County still had not  
14 fulfilled this promise, SPAWN amended the complaint to add a sixth cause of action for the County’s  
15 failure to adopt the ordinance. Unlike the CEQA claims brought under Public Resources Code section  
16 21168, the sixth claim was a stand-alone CCP section 1085 claim brought to compel the County to  
17 perform its self-imposed mandatory duty to adopt the ordinance.  
18

19 Next, the County blurs the distinction between the appellate court’s discussion of Judge Duryee’s  
20 alternative equitable relief for the sixth cause of action and the remedy for the CEQA violations now  
21 before this court. In its opinion, the appellate court first provided a lengthy analysis of the County’s  
22 failure to assess cumulative impacts or identify mitigation measures to address the impacts of buildout  
23 on imperiled salmon in the sensitive stream habitat in San Geronimo Valley. As a result of these  
24 violations, the appellate court reversed this court’s judgment on the CEQA claims.  
25

26 The appellate court then turned to the County’s cross-appeal on the sixth cause of action. To be  
27 clear, the appellate court upheld the trial court’s denial of the writ of mandate on the single non-CEQA  
28 claim; “[T]here is no basis to issue a writ of mandate compelling” the County enact the required  
ordinance. (*Salmon Protection and Watershed Network v. County of Marin* (Mar. 5, 2014) 2014 WL

1 845416, Slip Op. at 10.) In doing so, the appellate court relied on Judge Duryee’s reasoning that  
2 recognized a both mandatory duty to adopt the ordinance but also the County’s discretion as to the  
3 timing of implementing that duty. While denying the writ for the sixth cause of action but then  
4 fashioning alternative relief, this court nonetheless enjoined development in sensitive habitat until the  
5 County adopted the protective ordinance. The trial court explained, “[a]lthough this court will not  
6 intrude on the County’s discretion over when to adopt a new SCA ordinance to accomplish this General  
7 Plan objective, as the County concedes it must, good cause exists to enjoin the County from approving  
8 any development applications for building within the SCAs until the ordinance is adopted.” (Trial Court  
9 Order, *Salmon Protection v. County of Marin* (June 18, 2012) at 5). Based on its equitable powers, the  
10 trial court fashioned relief without first finding the violation of a mandatory duty.  
11

12 It is not surprising then that the Court of Appeal, having found no basis for a writ, found no basis  
13 for the alternative equitable relief imposed by the trial court. While acknowledging the “undeniable  
14 logic to the alternative remedy that the [trial] court fashioned,” the appellate court found that the  
15 “necessary predicates for injunctive relief have not been met,” pointing to the absence of briefing on the  
16 issue. (*SPAWN*, Slip Op. at 10-11.) Contrary to the County’s assertion that the appellate court “fully  
17 analyzed the propriety” of that injunction, the appellate court concluded that it did not have the benefit  
18 of a full record. And “[o]n the record before it, the trial court “simply had no authority to add the  
19 injunction to its judgment.” (*Id* at 11.) The alternative relief for the non-CEQA claim – imposed with  
20 no authority – is far different from the statutory remedies available for CEQA violations pursuant to  
21 Public Resources Code section 21168.9.  
22

23 **II. This Court Can and Should Issue the Suspension Remedy Consistent with the Appellate  
24 Court’s Decision and CEQA.**

25 SPAWN seeks a statutory remedy – suspension of project activities pending CEQA compliance  
26 – that comports with the appellate court’s findings and the remedies provided for CEQA violations by  
27 statute. The appellate court’s opinion found that the EIR fails to address the significant cumulative  
28 impacts of buildout allowed under the 2007 Plan and improperly defers formulation of mitigation

1 measures to address those significant impacts. CEQA, of course, requires that adequate environmental  
2 analysis precede and inform the project activities under review. Post-decisional studies are expressly  
3 prohibited. Given these requirements, the Public Resources Code provides remedies specific to CEQA  
4 violations under Public Resources Code section 21168.9, including the one sought here – suspension of  
5 project activities until a CEQA-compliant EIR is complete. The suspension remedy is necessary here in  
6 order to provide time for the County to supplement its analysis before projects move forward in the  
7 streamside habitat. Nothing in the appellate court’s opinion suggests otherwise. If anything, the  
8 appellate opinion perfectly illustrates the harms likely to occur if individual projects go forward without  
9 the guidance of a proper cumulative impacts analysis.  
10

11 **A. This Court Can Fashion a Statutory Remedy Tailored to the CEQA Violations.**

12 As the court stated in *City of Redlands v. County of San Bernardino*, “[u]nder Public Resources  
13 Code section 21168.9, upon a finding of the agency’s noncompliance with CEQA, the court must enter  
14 an order mandating that the agency set aside its decision and take any actions necessary to achieve  
15 compliance.” (*City of Redlands v. County of San Bernardino*, 96 Cal. App. 4th 398, 414-415 (2002).)  
16 There, the appellate court upheld the trial court’s imposition of a suspension remedy that enjoined the  
17 County from adopting new general plan amendments until the County first prepared an EIR that fully  
18 complied with CEQA. The court found that the trial court “reasonably included” the injunctive order  
19 “to prevent the County from attempting technical compliance with the court’s order (i.e. by simply  
20 enacting new amendments with similar language), without remedying the deficiencies.” (*Id.* at 415.)

21 The County helpfully suggests that “if this Court had issued a CEQA writ in the first instance . . .  
22 petitioner’s arguments might even have some very limited possible relevance.” (Resp. Br. at 2.) That is  
23 precisely the point. Because this court did not issue a CEQA writ in the first instance, it did not consider  
24 remedies for CEQA violations. The court in *Federation of Hillside and Canyon Associations v. City of*  
25 *Los Angeles*, 83 Cal. App. 4th 1252 (2000) faced the very same situation (reversing trial court’s denial  
26 of CEQA claims because city’s transportation analysis for a general plan framework was inadequate).  
27 There, the appellate court specifically reserved the remedy considerations for the trial court where the  
28

1 appellate court reversed the trial court’s judgment on the CEQA claims. Because the trial court  
2 originally denied the CEQA claims, the appellate court had no record before it on the CEQA remedy. In  
3 reversing the trial court’s judgment, the court expressly declared that, in the absence of a trial record on  
4 remedy, “it would be inappropriate for this court to order a specific remedy ... The trial court retains  
5 jurisdiction in this matter to order other remedies, if appropriate.” (*Id.* at 1266.) Like the trial court in  
6 *Federation of Hillside*, this Court retains jurisdiction to consider remedies appropriately tailored to the  
7 violations found by the appellate court for the first time.  
8

9 **B. This Court Should Fashion a Suspension Remedy Consistent with the Appellate  
10 Court’s Opinion and CEQA.**

11 Once a court finds a CEQA violation, CEQA then affords trial courts broad statutory authority to  
12 suspend project activities. Yet the County argues, without ever addressing the Public Resources Code  
13 which forms the statutory basis for the suspension remedy, that “petitioners just baldly assert, without  
14 any authority, that this court can revisit the issue of remedies . . . .” (Resp. Br. at 2.) The County need  
15 look no further than the very statute that governs CEQA remedies for the judicial authority to  
16 temporarily suspend development. Section 21168.9 states clearly that “[i]f a court finds, as a result of a  
17 trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public  
18 agency has been made without compliance with this division, the court shall enter an order” that may  
19 include “a mandate that the public agency and any real parties in interest suspend any or all project  
20 activity or activities . . . .” (emphasis added). (Cal. Pub. Res. Code § 21168.9.)

21 The County claims that the specificity of the disposition limits “this Court to order one – and  
22 only one – remedy.” (Resp. Br. at 3.) But the disposition places no limits on the remedies to be  
23 employed by the trial court so long as they conform to the opinion and CEQA. If the Court of Appeal  
24 intended to limit the California Legislature’s prevailing intent in enacting section 21168.9 – “to give the  
25 trial courts some flexibility in tailoring a remedy to fit a specific CEQA violation” – it certainly would  
26 have said so. (*San Bernardino Valley Audubon Soc. v. Metro. Water Dist. of S. California* (2001) 89  
27 Cal.App.4th 1097, 1103.) Nowhere in the Court of Appeal’s disposition, nor in its fuller opinion,  
28

1 however, can one find the County's desired limitation on CEQA remedies. The Court of Appeal did not  
2 address the remedies under CEQA, and as other California appellate courts have recognized, the "trial  
3 court, acting under the authority provided by Public Resources Code section 21168.9, is the more  
4 appropriate forum to consider and rule upon requests to enjoin all or portions of the project pending the  
5 completion of administrative and judicial proceedings . . . ." (*Planning & Conservation League v. Dep't*  
6 *of Water Res.* (2000) 83 Cal.App.4th 892, 926 n.16.)

7  
8 A suspension remedy is particularly necessary here to implement the Court of Appeal's decision  
9 and is appropriate under CEQA. Suspensions are warranted under CEQA where project activities  
10 "could result in an adverse change or alteration to the physical environment" and "will prejudice the  
11 consideration or implementation of particular mitigation measures or alternatives to the project." (Pub.  
12 Res. Code § 21168.9(a)(2); *See POET, LLC*, 218 Cal.App.4th at 761 (stating that "the more common  
13 [remedy for CEQA noncompliance] is for the court to exercise its discretionary authority under section  
14 21168.9, subdivision (a)(2), by suspending the operation of the regulation, ordinance, or *program*."))  
15 (emphasis added.) CEQA uses program EIRs to achieve advantages that project-specific analyses lack,  
16 including a "consideration of cumulative impacts that might be slighted in a case-by-case analysis" and  
17 "at an early time when the agency has greater flexibility to deal with basic problems or cumulative  
18 impacts." (Cal. Code Regs. tit. 14, § 15168(b).) Suspensions of activities pursuant to a non-compliant  
19 program EIR will ensure that supplemental analysis can achieve these advantages.

20 Equitable considerations, as well, dictate that a limited suspension on new development  
21 approvals in the SCA of the San Geronimo Valley watershed is a necessary and appropriate remedy.  
22 The County has wholly failed to make any showing that the equities dictate otherwise. Like the  
23 residential developer whose project was enjoined in *San Joaquin Raptor/Wildlife Rescue Center*, the  
24 County has "failed to demonstrate any specific injury or prejudice it will suffer as a result" of an  
25 injunction. (27 Cal.App.4th at 742). Similarly, no prospective developers in the watershed have "begun  
26 any [development] activities." (*Burbank-Glendale-Pasadena Airport Authority*, 233 Cal.App.3d at  
27 596.) Like the agencies in those cases, the County has not shown any evidence that a suspension of  
28

1 project activities will result in any injury. Moreover, the reason that any potentially “affected parties”  
2 are not before this Court is of their own doing – landowners in the San Geronimo Valley watershed  
3 requested a withdrawal from the case.<sup>1</sup> (Resp. Br. at 3.) Accordingly, any prospective development that  
4 would be restricted by a temporary suspension remains speculative.

5  
6 More importantly, absent a suspension remedy under CEQA, the very concerns that animated the  
7 Court of Appeal’s holding would come to pass. The Court of Appeal’s lengthy analysis of the  
8 inadequate EIR demonstrates the adverse effects that would result from proceeding to build in the  
9 streamside habitat without a full analysis of cumulative impacts. According to the Court of Appeal, the  
10 County’s EIR lacks “a meaningful analysis of the likely cumulative impacts of widespread buildout” and  
11 “provides no help to decision-makers or the public to understand the likely consequences, or at least the  
12 range of potential consequences, of a buildout.” (*SPAWN*, Slip Op. at 7.). The Court of Appeal found  
13 that the County’s “ability to evaluate and respond to cumulative impacts will decline with each  
14 succeeding project.” (*Id.* at 7.) The Court of Appeal further found “that future buildout in the watershed  
15 continues to pose a significant threat to survival of the salmonids” and that the County’s proposed  
16 mitigation “simply defers the formulation of meaningful mitigation measures to abate this significant  
17 impact . . . .” (*Id.* at 9.) And the Court of Appeal recognized the unique significance of cumulative  
18 impacts where imperiled species are at risk; “[i]t is the cumulative impacts of the projects that most  
19 frequently lead to the decline of a species, not the individual projects.” (*Id.* at 6.) Continued  
20 development in the critical streamside habitat – whether under the 2007 or 1994 Plan – will prejudice  
21 the County’s supplemental EIR and cause unaccounted for environmental harm. This Court should  
22 temporarily suspend development in SCA of the San Geronimo Valley watershed to implement the  
23 Court of Appeal’s decision.

24  
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26 \_\_\_\_\_  
27 <sup>1</sup> Affected landowners initially intervened in this case and then asked to be voluntarily dismissed in  
28 order to pursue their appeal of a legal issue. The Court of Appeal subsequently heard and rejected that  
appeal. (*Salmon Protection and Watershed Network v. County of Marin*, 205 Cal. App.4<sup>th</sup> 195 (2012).)

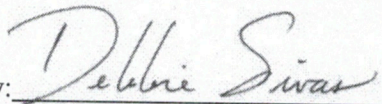
1 **CONCLUSION**

2 For the foregoing reasons, Petitioner SPAWN requests that the Court enter a judgment and writ  
3 of mandate decertifying the EIR, setting aside the Countywide Plan with respect to the San Geronimo  
4 Valley watershed, and suspending any new development approvals in the Stream Conservation Area of  
5 the San Geronimo Valley until and unless the County demonstrates on a return to the writ that it has  
6 adequately considered the Plan's cumulative impacts on salmonids and identified mitigation measures to  
7 address those impacts.

8  
9 Dated: November 21, 2014

Respectfully submitted,

10 ENVIRONMENTAL LAW CLINIC  
11 Mills Legal Clinic at Stanford Law School

12  
13 By:   
14 Rose Stanley  
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15 Attorneys for Petitioner SPAWN  
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**PROOF OF SERVICE**

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On November 21, 2014, I served the foregoing **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF FINAL JUDGMENT AND PEREMPTORY WRIT OF MANDATE**

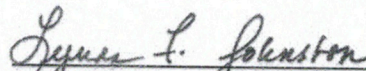
on all persons named below by placing true and correct copies thereof

- in a sealed envelope, with postage fully prepaid, in the United States Mail at Stanford, California, addressed as follows:
- for facsimile transmission to each recipient identified below to the facsimile number appearing after such recipient's name and mailing address.
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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed November 21, 2014 at Stanford, California.

  
LYNDA F. JOHNSTON