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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

SALMON PROTECTION AND WATERSHED NETWORK, a project of TURTLE ISLAND RESTORATION NETWORK, a non-profit corporation, and CENTER FOR BIOLOGICAL DIVERSITY, a non-profit organization, Petitioners, v. COUNTY OF MARIN, Respondent.	Case No. CIV 1903709 To be jointly briefed and heard with Case No. CIV 1004866 **PETITIONERS' OPENING BRIEF AND OPPOSITION TO RETURN TO WRIT** Date: March 5, 2021 Time: 1:30 p.m. Dept: E Judge: Hon. Andrew Sweet Case Filed: September 26, 2019

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CEQA	California Environmental Quality Act
EIR	Environmental Impact Report
MMRP	Mitigation Monitoring and Reporting Program
NMFS	National Marine Fisheries Service
SEIR	Supplemental Environmental Impact Report
SCA	Stream Conservation Area
SPAWN	Salmon Protection and Watershed Network

INTRODUCTION

The facts and history of this matter are complex, but the legal issue presented to the Court is simple: May a county mitigate a project's significant environmental impacts by promising that a future board of supervisors will legislate a solution years down the line? The answer is no.

In these joint actions, Petitioners Salmon Protection and Watershed Network ("SPAWN") and the Center for Biological Diversity ("Center") (collectively, "Petitioners") challenge the adequacy of the County of Marin's ("County") Supplemental Environmental Impact Report ("SEIR") for its 2007 Marin Countywide General Plan Update ("Countywide Plan"). The SEIR violates the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 et seq., because it relies on legally deficient mitigation for the Countywide Plan's admittedly significant impacts to salmon and salmon spawning habitat from development. Instead of actually mitigating these impacts, the SEIR attempts to pledge a future County Board of Supervisors to adopting an ordinance to deal with the problem. But that pledge is a mirage because the County cannot lawfully bind the Board to take future legislative action.

The Lagunitas Creek watershed in Marin County is the last bastion of the imperiled Central California Coast Coho salmon and contains federally designated critical habitat for native steelhead trout. Streamside development in the watershed continues to harm these species by degrading sensitive instream habitat and disrupting spawning. When the County first adopted the Countywide Plan in 2007, it proposed to address these impacts by enacting a future ordinance governing development in "Stream Conservation Areas."

Petitioner SPAWN challenged the decision in this Court, arguing successfully that the County had improperly postponed developing adequate mitigation for those impacts. After a ruling by the Court of Appeal, the trial court issued a writ in 2015 directing the County to set aside its approval of the Countywide Plan in the San Geronimo Valley and undertake supplemental environmental review.

At the conclusion of the County's supplemental environmental review process, the County certified the SEIR and reapproved the 2007 Countywide Plan for the San Geronimo Valley. But instead of adopting effective, legally adequate protections for salmon and their habitat, as it was

required to do, the County pursued the same failed mitigation strategy as before – impermissibly passing its responsibility for protecting salmon to others in the future. CEQA requires that measures adopted to mitigate significant environmental impacts be within an agency's statutory powers, enforceable, and enacted at the time a project is approved. The County cannot bind a future Board to take future legislative action to protect these species. Thus, the proposed mitigation – on which the entire SEIR relies to find that significant impacts will be avoided – is unenforceable and inadequate under CEQA. Meanwhile, Coho and steelhead in the Lagunitas Creek watershed spiral toward extinction.

LEGAL BACKGROUND

CEQA is a "comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) The Legislature enacted CEQA to require public agencies to "give prime consideration to preventing environmental damage when carrying out their duties." (*Ibid.*) For local planning decisions – like general plan updates – that may have a significant impacts on the environment, CEQA and the CEQA Guidelines[1] require the "lead agency" to prepare an Environmental Impact Report ("EIR") to evaluate these impacts, consider alternatives, and if necessary adopt mitigation. (Pub. Res. Code §§ 21061, 21100; CEQA Guidelines §§ 15126.2. 15126.4, 15126.6, 15378(a)(1).)

An EIR is intended "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Res. Code § 21061.) The report serves as an "environmental alarm bell" that "alert[s] the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 (*Laurel Heights*).)

For any environmental impacts identified as significant, the EIR must include mitigation measures to reduce, avoid, or minimize the impacts. (*Sierra Club v. State Bd. of Forestry* (1994) 7

[1] Cal. Code Regs., tit. 14, §§ 15000 et seq.

Cal.4th 1215, 1233; *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 506 ["A mitigation measure is a change that would reduce or minimize the project's significant adverse environmental impact"] (*Golden Door*).) Mitigation measures must be enforceable through permit conditions, agreements, or other legally-binding instruments. (CEQA Guidelines § 15126.4, subd. (a)(2); *Golden Door*, *supra*, 50 Cal.App.5th at p. 506.) Except in very limited circumstances, mitigation may not be deferred, and must be adopted at the time the project is approved. (CEQA Guidelines § 15126.4, subd. (a)(1)(B).)

FACTUAL BACKGROUND

I. The Decline of Salmonids in Marin County

Marin County's Coho salmon and native steelhead trout are in danger of extinction. In 1996, the National Marine Fisheries Service ("NMFS") listed the Central California Coast Coho, which includes the population in the Lagunitas Watershed, as "threatened" under the federal Endangered Species Act. (61 Fed.Reg. 56,138 (Oct. 31, 1996).) NMFS estimated that the abundance of native Coho along the central coast had fallen from hundreds of thousands of individuals in the 1940s to "probably less than 6,000 naturally-reproducing Coho salmon" by the 1990s, as a result of habitat degradation and other factors. (*Ibid.*)

The Coho population's listing status did not stem its decline. By 2004, the California Department of Fish and Wildlife reported that "[c]oho salmon abundance, including hatchery stock, ha[d] declined at least 70% since the 1960s," and was at "6 to 15% of its abundance during the 1940s." (AR[2] 12442 [2004 Recovery Strategy for California Coho Salmon].) Consequently, NMFS "uplisted" the Coho to "endangered" in 2005, concluding that the population was "in danger of extinction." (70 Fed.Reg. 37,160, 37,187 (June 28, 2005).) NMFS also listed the Central California

[2] Petitioners use "AR" to refer to the administrative record in Case No. CIV 1004866 (which was certified by the County and lodged with the Court in two parts on December 5, 2011 and January 6, 2012) and "SAR" to refer to the administrative record in Case No. CIV 1903709 (which was certified by the County and lodged with the Court on August 27, 2020). For the Court's convenience, Petitioners lodged a second electronic copy of the administrative record in Case No. CIV 1004866 with the Court concurrently with filing this opening brief.

Coast steelhead as "threatened" in 1997 (62 Fed.Reg. 43,937 (Aug. 18, 1997)), a status it reaffirmed in 2006. (71 Fed.Reg. 834 (Jan. 5, 2006)).

NMFS singled out the Lagunitas Creek watershed in Marin County as uniquely critical to the species' recovery. In fact, the Lagunitas Coho run is considered the single most important in the entire state of California. (AR 17899.) Coho in this watershed are sustained by a habitat of numerous interconnected pools, streams, and creeks that begin below Mount Tamalpais and wind through San Geronimo Valley before emptying into Tomales Bay. (AR 15746; AR 15750.) Accordingly, in 2004, the State of California independently concluded that "permanent loss of access to spawning and rearing habitat" in upstream reaches of the Lagunitas Creek watershed is among the "primary problems" facing the Coho population. (AR 12574.)

San Geronimo Valley, in particular, is "one of the most important spawning and nursery areas for [Coho salmon and steelhead trout]," sustaining one-third of all spawning and rearing activity in the Lagunitas Creek watershed. (AR 15747; AR 9121.) The area's intricate system of tributaries, with its many slow-moving side channels, is well suited to rearing salmonids. (AR 15724.) San Geronimo Valley's intermittent streams, which typically flow only during the wet season, provide valuable winter habitat lacking in most California stream systems. (AR 7547; AR 8564-65.) These streams also create residual pools that can sustain salmonids through the dry summer months. (AR 8465-66.) Its ephemeral streams, which flow only during and after heavy rain events, sustain watershed health by containing floods, maintaining water levels, trapping excess sediment, and preserving water quality. (See AR 8465-66; AR 8423-28.) Salmonids also rely on the San Geronimo Valley's dense and varied riparian vegetation, including abundant alder and willow trees. (AR 15747.)

Coho and steelhead in San Geronimo Valley are under siege, however, threatened by development that harms their stream habitat. Threats to their survival arise from, among other things, "high fine sediment loads, low summer stream flow, high summer water temperature, a shortage of cover in the form of [large woody debris], and loss of riparian vegetation." (AR 12574.) Development along the watershed's streams drives many of these threats, creating a "cascade of changes in important geomorphic processes, habitat characteristics, species abundance, and

population dynamics." (AR 8514.) For example, construction and grading cause bank erosion and stream channelization, leading to higher levels of fine sediment and faster water flows. (AR 15750-51.) Impervious roads and rooftops intensify peak water flows and reduce groundwater absorption, degrading spawning habitat by eroding streambeds and filling them with "chronic high sediment loads" that smother nests and eggs. (AR 12490-91.) And increased water velocity contributes to juvenile mortality. (SAR 1257.)

Development often removes native vegetation, thereby depriving stream ecosystems of vital nutrient inputs. (AR 12490.) Removing native vegetation can also "increase water temperatures beyond the range tolerable to salmon and steelhead" (AR 18145) and reduce the large woody instream debris critical for Coho and steelhead (AR 18131-32). Other cumulative impacts from development include water pollution (AR 12486), barriers to migration (AR 12483), and insufficient water flow (AR 18220).

These impacts have hastened the salmonid populations' continued decline. Though 4,000 adult Coho historically spawned in the watershed, recent studies have estimated that only 300 fish returned during the 2013-2014 spawning season. (SAR 1193.) Researchers estimate that 584 Coho entered the watershed during the 2015-2016 season (SAR 19840), well short of NMFS's recovery target of 2,600 individuals (see SAR 19848). The population has not recovered to even half its 2004 levels and disappeared almost entirely in 2008-2009. (*Ibid.*)

II. The County's 2007 Countywide Plan and Accompanying EIR

In 2007, the County adopted the Countywide Plan to update and replace its 1994 general plan. The Countywide Plan is a "comprehensive long-range general plan for the physical development" of the County. (AR 7514.) Like all general plans in California, the Countywide Plan is the "constitution for future development" in the County, "located at the top of the hierarchy of local government law regulating land use." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, internal citations and quotation marks omitted.) The Countywide Plan authorizes a nearly 20 percent increase in housing development in unincorporated Marin County, including San Geronimo Valley, by 2030, and a nearly 40 percent increase in commercial developed area. (AR 1052-53.)

The 2007 Countywide Plan recognizes the urgent need for stream habitat protections. (See AR 7547-48.) Nonetheless, it undermines existing policies that protected so-called Stream Conservation Areas ("SCA") along streams.[3] For example, the Countywide Plan permits the County to grant certain exemptions to its streamside development setback requirement – a loophole that did not exist in the 1994 plan. (AR 7565-67). SPAWN objected to this and other changes in the Countywide Plan that weakened protections for salmon habitat. (AR 10526-37.)

The County prepared an EIR addressing the Countywide Plan's potentially significant environmental impacts. In January 2007, the County released a Draft EIR (AR 2801-3671) which was criticized by salmon experts. For example, the California Regional Water Quality Control Board for the San Francisco Bay Region warned that the Draft EIR did not address the cumulative impacts of streamside setback exceptions, decreased ephemeral stream protections, and aggregated development under the Countywide Plan. (AR 1456-60.) A September 2007 consensus letter signed by over 100 scientists echoed this concern, highlighted the habitat loss and degradation from development authorized by the Countywide Plan, and recommended the County adopt numerous concrete measures to protect salmonids. (AR 9121-28.)

The County brushed aside these concerns and in November 2007 approved the Countywide Plan and certified a Final EIR in substantially the same form as the draft. (AR 9-11; AR 210-1085.)

III. SPAWN's Successful Challenge to the 2007 EIR in Court

SPAWN, which had commented extensively during the environmental review process, was deeply concerned about the Countywide Plan's dramatic impacts on salmonid habitat and populations and the EIR's shortcomings under CEQA. In lieu of filing a lawsuit, however, SPAWN instead entered a tolling agreement with the County to enable the County to address the EIR's deficiencies and improve protections for the coho and steelhead. (See *Salmon Protection and Watershed Network v. County of Marin* (2014) 2014 WL 845416, at *4 (*SPAWN*).) The agreement

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[3] A Stream Conservation Area is "defined by a development setback on each side of the streamside top of bank that is the greater of either (a) 50 ft landward from the outer edge of woody riparian vegetation associated with the stream or (b) 100 feet landward from the top of bank." (SAR 1170.) SCAs are "established to protect the active channel, water quality and flood control functions, as well as associated fish and wildlife habitat values along streams." (*Ibid*.)

required the County to take additional steps to study and mitigate the effects on salmonids of buildout in San Geronimo Valley. (*Ibid.*) In addition, the County had to place a moratorium on building in SCAs until February 2010 and fund a report with recommendations to improve salmonid habitat in the valley. (*Ibid.*)

Concluding that the County's resulting actions were inadequate to address impacts to salmonid habitat, SPAWN filed a lawsuit on September 4, 2010 (Marin County Superior Court Case No. CIV 1004866), challenging: (1) the adequacy of the 2007 EIR, and (2) the County's failure to adopt a stream conservation ordinance as called for in the Countywide Plan. (See *SPAWN*, *supra*, 2014 WL at p. *5.) The trial court upheld the EIR and denied SPAWN's request to compel the County's Board of Supervisors to adopt an ordinance. (*Ibid.*) In its ruling, the trial court concluded that SPAWN was "improperly seeking to use mandate to control how the Board of Supervisors must exercise its discretion over when to adopt the ordinance." (Judgment Denying Writ of Mandate and Granting Injunctive Relief, Ex. A, *Salmon Protection and Watershed Network v. County of Marin* (Super. Ct. Marin County Sept. 11, 2012, No. CIV 1004866).) Nevertheless, the court entered an injunction prohibiting further development in SCAs in the San Geronimo Valley until the County adopted such an ordinance. (*SPAWN*, *supra*, 2014 WL at p. *5.)

SPAWN appealed and the County cross-appealed. The First District Court of Appeal reversed the trial court, finding that the EIR did not comply with CEQA. (*SPAWN*, *supra*, 2014 WL at p. *6-*9.) The Court held that the County had failed to properly analyze the impacts to salmonids from the buildout authorized by the Countywide Plan. (*Id.* at p. *9.) It also found the EIR's mitigation for these impacts to be inadequate because the County neither committed to adopting mitigation measures nor defined performance standards by which to evaluate such measures. (*Id.* at p. *9.) The Court set aside the injunction on development, however, because it found SPAWN had not demonstrated the necessary legal predicates for injunctive relief. (*Id.* at p. *11.) Notably, the Court observed that it lacked power to compel the Board of Supervisors to adopt an SCA ordinance because "it remain[ed] within the discretion of the county to determine when to enact the required ordinance . . . ." (*Ibid.*)

The Court remanded the case to the trial court with instructions to "enter a writ of mandate directing the county to set aside its approval of the 2007 Countywide 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 . . . ." (*SPAWN*, *supra*, 2014 WL at p. *11.) The trial court entered the writ of mandate on April 2, 2015. (Peremptory Writ of Mandate, *Salmon Protection and Watershed Network v. County of Marin* (Super. Ct. Marin County Apr. 2, 2015, No. CIV 1004866).)

IV. The County's Supplemental Environmental Review

Following issuance of the writ of mandate, the County undertook supplemental environmental review. It circulated a Draft Supplemental Environmental Impact Report ("SEIR") on May 1, 2017, (SAR 1142), and a Final SEIR on August 3, 2018, (SAR 1142). In August 2019, the County published an "amendment" to the Final SEIR with responses to public comments on the Final SEIR. (SAR 1989-2178.)

The SEIR identifies two potentially significant impacts to salmonids and their habitat in San Geronimo Valley from the Countywide Plan: (1) "reduced survival of fry and juvenile salmonid life stages due to reduced winter rearing habitat" (SAR 1237) and (2) "reduced spawning success due to elevated sediment delivery and increased high flow frequency and magnitude" (SAR 1257). Regarding continued loss of winter rearing habitat, the SEIR acknowledges that the "[l]ow abundance and quality of overwintering habitat has been identified as the freshwater habitat condition that is most likely limiting salmonid production in Lagunitas Creek and its tributaries, including the San Geronimo Creek watershed." (SAR 1237.) The SEIR further explains:

> The primary causes of the degraded winter rearing habitat are simplification of instream habitat, loss of off-channel (e.g., floodplain) habitat, and reduced connectivity between the stream channels and the little remaining floodplain. With the reduction in winter rearing habitat, juvenile salmonids have less available refuge from high winter flows, increasing their susceptibility to downstream displacement and reducing survival.

(SAR 1237.) By increasing the rate of runoff and altering local hydrologic processes, buildout under the Countywide Plan would continue to increase winter storm flow magnitude and frequency, degrading habitat and further compromising the ability of juvenile Coho to find refuge during high

flows. (SAR 1247.) The SEIR concludes that buildout under the Countywide Plan would thus have a potentially significant cumulative impact on winter survival of juvenile Coho. (*Ibid.*)

To address this impact, the SEIR includes two mitigation measures. The first, Measure 5.1-1, calls for the County to adopt a new ordinance governing development in the SCA ("Mitigation Ordinance"), much like the County proposed in the 2007 Countywide Plan. (SAR 1248.) The SEIR states that the Mitigation Ordinance would eventually: (i) expand development activities requiring a permit, (ii) enact new permit and site-assessment requirements, (iii) require standard management practices such as replanting of riparian trees, and (iv) require low-impact development designs that reduce peak discharges. (SAR 1248-54.) Crucially, however, *the SEIR did not include the actual ordinance (or even a draft of one), and the Board adopted no such ordinance when it certified the SEIR and reapproved the Countywide Plan*. (SAR 8-11.) Instead, Measure 5.1-1 calls for the *future* adoption of a Mitigation Ordinance. (SAR 1248.) The SEIR ostensibly obligates the County to adopt a Mitigation Ordinance within five years of certifying the SEIR. (*Ibid.*) But this timing is only provisional; Measure 5.1-1 states that the County could choose to further postpone adoption of the measure indefinitely due to "unforeseen delays." (*Ibid.*)

A second mitigation measure in the SEIR would require bank stabilization projects to improve the complexity of instream habitat for the portion of a stream affected by a project. (SAR 1254-55 [Mitigation Measure 5.1-2, "Biotechnical Techniques and Salmonid Habitat Enhancement Elements for All Bank Stabilization Projects"].) Measure 5.1-2 applies only to bank stabilization projects (SAR 1254), whereas Measure 5.1-1's Mitigation Ordinance would apply to buildout in SCAs more generally (SAR 1248-52). Ultimately, the SEIR relies on Measure 5.1-1, and not Measure 5.1-2, to conclude that buildout under the Countywide Plan would have a less-than-significant impact on winter rearing habitat of juvenile Coho. (See SAR 1132, 1256-57, 1271; see also SAR 2155 [Mitigation Ordinance's purpose is "to mitigate for the potentially significant impact of the Proposed Project on coho salmon winter rearing success"], 2171.)

The SEIR finds that reduced salmonid spawning success is a second potentially significant impact of the Countywide Plan. (SAR 1257.) Development increases erosion and runoff rates, causing elevated sediment delivery to streams and increased frequency and magnitude of high flows.

(*Ibid.*) These heightened peak flows scour redds, destroying fish eggs; elevated sediment levels magnify the scouring effect. (*Ibid*.) The SEIR once more relies on Measure 5.1-1 to reduce this impact to less than significant. (See SAR 1132, 1263-64, 1272.) The SEIR concludes that "Mitigation Measure 5.1-1 will avoid or minimize the hydrologic effects and stream sedimentation associated with potential future development in the SCA, helping reduce the potential for redd scour and degradation of salmonid winter rearing habitat." (SAR 1263.)

Although generally supportive of further protections in the SCA, SPAWN objected in its comments on the Draft SEIR that the County had provided "inadequate mitigation for the significant impacts on spawning and rearing salmonid habitat." (SAR 1694.) In particular, SPAWN expressed concern that Measure 5.1-1 was "vague, unenforceable, and lacks any timeline or deadline for the formulation and adoption" of the Mitigation Ordinance. (SAR 1694.) In response, the County proclaimed its discretion to enact an ordinance in the future (SAR 1293 ["[I]t is within the discretion of Marin County to determine when to enact the required SCA Ordinance"]), though it added a nominal 5-year timeline for adoption to the text of Measure 5.1-1, with an exception for "unforeseen delays" (SAR 1293-94).

SPAWN also objected that the proposed Mitigation Ordinance lacks the specific performance standards required by CEQA when an agency elects to defer implementing mitigation. (SAR 1719-20.) The County responded by revising Measure 5.1-1 to include some additional language regarding standard management practices and low-impact development practices. (SAR 1297-1303.) SPAWN noted in its comments on the Final SEIR, however, that the updated requirements merely hide the absence of performance standards by proposing several management practices. (SAR 2109-11.) SPAWN also renewed its objection that the SEIR defers mitigation efforts to a future Board of Supervisors without any standards that gauge actual improvements in winter rearing habitat or spawning success. (SAR 2111-12.) The Center also alerted the County to its concerns that Measure 5.1-1 failed to meet CEQA's requirements for mitigation, commenting that the measure is unenforceable and improperly deferred, and requesting that the Board postpone reapproval of the Countywide Plan until it was prepared to adopt a Mitigation Ordinance. (SAR 21973-75.)

V. The County's Certification of the SEIR, reapproval of the Countywide Plan, and Filing of a Return to the Writ.

Despite Petitioners' and others' objections, on August 20, 2019, the Board of Supervisors certified the Final SEIR and re-approved the 2007 Countywide Plan. (SAR 8-11.) The County filed a Notice of Determination on August 27, 2019. (SAR 1-3.) On September 12, 2019, the County filed a return to the writ in Case No. CIV100486 claiming that "the County has satisfied its obligations pursuant to the writ of mandate issued by the Court on April 5 [*sic*], 2015." (Appellee's Return to Peremptory Writ of Mandamus (Super. Ct. Marin County Sept. 12, 2019, No. CIV 1004866).)

SPAWN objected to the County's return, arguing that the SEIR fails to satisfy the writ. (Pet'r's Case Management Statement (Super. Ct. Marin County Oct. 7, 2019, No. CIV 1004866).) Petitioners also filed a new lawsuit alleging the County's certification of the SEIR and reapproval of the Countywide Plan violated CEQA. (Verified Petn. for Writ of Mandate (Super. Ct. Marin County Sept. 26, 2019, No. CIV 1903709).) Petitioners sought to consolidate the two related cases (Pet'r's Case Management Statement (Super. Ct. Marin County Oct. 7, 2019, No. CIV 1004866)), but the County objected (See Case Management Minute Order (Super. Ct. Marin County Oct. 8, 2019, No. CIV 1004866)). Accordingly, Petitioners file this opening brief in both cases.

STANDARD OF REVIEW

In evaluating an EIR for compliance with CEQA, the court reviews an agency's actions for prejudicial abuse of discretion. (Pub. Res. Code § 21168.5.) An agency abuses its discretion in certifying an EIR where either (1) "the agency has not proceeded in a manner required by law" or (2) the decision "is not supported by substantial evidence." (*Ibid.*; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512 (*Sierra Club*).)

To evaluate claims that an agency failed to proceed in the manner required by CEQA, courts "determine de novo whether the agency has employed the correct procedures." (*Sierra Club*, *supra*, 6 Cal.5th at p. 512.) This non-deferential standard of review charges courts with "scrupulously enforce[ing] all legislatively mandated CEQA requirements . . . ." (*Ibid.*, quoting *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) Procedural defects broadly encompass an

agency's legal – rather than factual – errors. (See *Sierra Club*, *supra*, 6 Cal.5th at p. 512; *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 837-38 ["The public agency could fail to proceed in the manner required by CEQA, thereby committing procedural (i.e., legal) error"] (*King & Gardiner Farms*).) Thus, a court may determine whether an agency "followed applicable law." (*Id.* at p. 838.)

Only when factual questions predominate do courts employ the substantial evidence standard. (*Golden Door*, *supra*, 50 Cal.App.5th at p. 505.) Under those circumstances, the court must determine whether the EIR contains "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines § 15384.) Courts employing substantial evidence review must carefully "scrutinize the record" because "[t]he often technical nature of challenges to EIRs . . . requires particular attention to detail by a reviewing court." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 408.)

ARGUMENT

Although the long history of the Countywide Plan, the County's environmental review, and the attendant litigation is complex, the issue these cases present to the Court is simple. CEQA does not permit the County to postpone mitigating a project's significant impacts by promising that a future Board of Supervisors will legislate a solution at an uncertain date several years from now. As a result, the SEIR is defective as a matter of law.

Specifically, the SEIR's Measure 5.1-1 violates CEQA in two ways. First, it runs afoul of CEQA's requirements that mitigation must be within the lead agency's authority and enforceable through legally binding instruments. As a matter of law, the Board of Supervisors cannot compel, direct, or constrain its future exercise of legislative discretion. And as the County well knows, its paper "commitment" to doing so is unenforceable by the public or the courts.

Second, Measure 5.1-1 is improperly deferred mitigation measures. CEQA places strict limitations on the circumstances in which lead agencies may defer mitigation. When they do so, agencies must explain why the mitigation cannot be adopted concurrently with project approval and must include specific performance criteria in the deferred measures. The County did neither.

I. Mitigation Measure 5.1-1 Is Invalid and Unenforceable as a Matter of Law.

CEQA requires lead agencies to mitigate or avoid the significant environmental effects of projects that they approve or carry out if it is feasible to do so. (Pub. Res. Code § 21002.1, subd. (b); *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 359.) The agency must be able to find, based on substantial evidence, that the adopted mitigation measures are "required or incorporated into the project" and that those measures will "mitigate or avoid significant effects on the environment." (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 937.) Mitigation measures must, of course, be both within the agency's statutory power, (Pub. Res. Code § 21004; CEQA Guidelines § 15040), and enforceable (Pub. Res. Code § 21081.6, subd. (b); CEQA Guidelines § 15126.4, subd. (a)(2)).

Measure 5.1-1 – the backbone of the SEIR's mitigation strategy – purports to commit the Board to enacting a proposed Mitigation Ordinance within five years—or indefinitely longer, if there are "delays caused by continuing, new, or threatened litigation."[4] (SAR 1248.) The measure states:

> **Mitigation Measure 5.1-1: Expanded SCA Ordinance**
> The County shall adopt an Expanded SCA Ordinance consistent with Goal BIO-4 and associated Implementing Programs under the Proposed Project. The County shall commence with development of the Expanded SCA Ordinance following certification of the Final SEIR and, barring unforeseen delays caused by continuing, new, or threatened litigation related to the SEIR process and/or the Ordinance, shall complete the Expanded SCA Ordinance within five years of Final SEIR certification.

(*Ibid.*)[5] The measure's text goes on to describe several provisions that "shall" be incorporated in the future ordinance. (*Ibid.*) But the current Board of Supervisors lacks the legal authority to constrain the legislative discretion of a future board. Thus, this measure is unenforceable, contrary to CEQA.

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[4] The full text of Mitigation Measure 5.1-1 is included as Attachment A to this brief.

[5] The County's threat to further delay adoption of stream protections if Petitioners were forced to sue is an improper attempt to deter citizens from exercising CEQA's statutory remedies, which are critical to "ensur[ing] that the review process is completed appropriately." (*Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 713.) The County clearly intended to put Petitioners in a double-bind by building this threat into Measure 5.1-1, stating in response to comments on the SEIR, "it is not in the best interests of the numerous stakeholders in the SEIR process or the San Geronimo Valley ecosystem as a whole, to continue to delay development of the ordinance and the protections it will offer salmonids and their habitat." (SAR 2117.)

The County's dependence on an invalid and unenforceable mitigation measure constitutes legal error subject to de novo review. (*City of Marina*, *supra*, 39 Cal.4th at p. 355 ["At issue, rather, are the Trustees' findings that mitigation is infeasible and that mitigation is not their responsibility. These findings depend on a disputed question of law—a type of question we review de novo"]; see also *Sierra Club*, *supra*, 6 Cal.5th at p. 512; *King & Gardiner Farms*, *supra*, 45 Cal.App.5th at pp. 837-38.) "De novo review of legal questions is also consistent with the principle that, in CEQA cases, '[t]he court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.'" (*City of Marina*, *supra*, 39 Cal.4th at p. 356, quoting *Laurel Heights*, *supra*, 47 Cal.3d at p. 392.)

A. Mitigation Measure 5.1-1 Is Invalid Because the Board of Supervisors Lacks Authority to Compel a Future Board to Adopt a Mitigation Ordinance.

CEQA provides that "[i]n mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than [CEQA]." (Pub. Res. Code §21004.) Measures beyond the authority or power of the adopting lead agency are invalid as a matter of law. (See Pub. Res. Code § 21004; CEQA Guidelines § 15040; *Kenneth Mebane Ranches v. Super. Ct.* (1992) 10 Cal.App.4th 276, 291-92.)

In *Kenneth Mebane Ranches*, for example, a flood control district sought to condemn property outside its jurisdiction to mitigate the loss of an endangered plant species. (*Kenneth Mebane Ranches*, *supra*, 10 Cal.App.4th at pp. 279-80.) Because the district could not show the "extreme expediency or necessity" required under the California Eminent Domain Law, the statute did not grant the district the power to condemn the property. (*Ibid.*) Accordingly, the proposed condemnation was not a legally adequate mitigation measure under CEQA. (*Id.* at p. 292; see also *City of Marina*, *supra*, 39 Cal.4th at pp. 356-65 [analyzing arguments by the California State University Board of Trustees that mitigation payments to another agency were impermissible under the California Constitution].)

Mitigation Measure 5.1-1 exceeds the Board's powers on its face. The measure purports to commit the County to enacting a Mitigation Ordinance by roughly 2024. (SAR 1248.) Consequently, the County's mitigation "commitment" relies on tying the hands of future board

members. But the current Board of Supervisors lacks authority to compel or constrain its future legislative discretion in this manner: "[A]n act of one legislature is not binding upon, and does not tie the hands of future legislatures." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 589-90; see also *City & County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 929 ["It is a familiar principle of law that no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence"].) Indeed, only the People of California, through the power of initiative, may bind the discretion of legislative bodies. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715-16 ["The people's reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures"], original italics.)

This foundational constitutional principle applies to resolutions of a local legislative body. (See *City and County of San Francisco*, *supra*, 13 Cal.3d at p. 929.) In *City and County of San Francisco*, the San Francisco School Board adopted a resolution increasing its pay schedule for teachers. (*Id.* at p. 910.) A taxpayer challenged the portion of the resolution preventing revision of the resolution without the approval of an employee council, arguing the provision "represent[ed] an improper limitation on subsequent board action." (*Id.* at p. 929.) The court agreed, holding that "a school board cannot, by resolution, bar itself or future boards from adopting subsequent resolutions which may alter earlier established policies." (*Ibid.*) Such a restriction on the freedom of a legislative body is prohibited. (*Ibid.*, citing *Thompson v. Bd. of Trustees* (1904) 144 Cal. 281, 283; *McNeil v. City of South Pasadena* (1913) 166 Cal. 153, 155-156; *In re Collie* (1952) 38 Cal.2d 396, 398.)

If it were binding, Measure 5.1-1 would impermissibly restrict the legislative freedom of the Board of Supervisors in the future. In adopting a resolution certifying the SEIR (SAR 8-10), the Board ostensibly committed to implementing at some later date the mitigation measures described by the SEIR. Measure 5.1-1 not only demands that a future board enact a specific law (SAR 1248 ["The County *shall* adopt an Expanded SCA Ordinance"], emphasis added), but provides further, specific instruction in the form of provisions that the future ordinance "*shall* incorporate." (*Ibid.*, emphasis added.) For example, Measure 5.1-1 calls for the Mitigation Ordinance to expand the set of development activities within SCAs that require permitting (*ibid.*) and to require certain

development practices for projects in SCAs (SAR 1250-54). Measure 5.1-1's provisions for a future Mitigation Ordinance may be improvements to the County's existing legislative scheme, but the Board has no authority to force a future board to incorporate them. In short, a county board of supervisors makes laws by legislating in the present, not by passing a resolution certifying an environmental review document that calls for specific legislative action in the future. (See SAR 8-11 [August 20, 2020 Board resolution certifying Final SEIR].)

The inadequacy of the County's approach is fully revealed when considered in light of Measure 5.1-1's timeframe of *five years or more* for the Board to adopt an ordinance. (SAR 1248.) The Marin County Board of Supervisors is composed of five Supervisors, at least two of whom are elected every two years. (Gov. Code, § 25000.) Three of the current Supervisors' terms expire in January 2021.[6] By August 2024 (five years after the certification of the SEIR), all five of the Supervisors who certified the SEIR will have been up for election at least once, and a majority of them twice. It is entirely possible that by 2024, none of the Supervisors who certified the SEIR will be sitting on the Board. Even assuming the best of intentions, current Board members simply cannot dictate the actions of a future Board.

The County could and should have adopted the ordinance in 2019, when it re-approved the Countywide Plan. (CEQA Guidelines § 15130 [permitting adoption of ordinances as a form of mitigation, particularly to address cumulative impacts].) Instead, the County improperly attempted to satisfy its CEQA obligations by kicking the can down the road and pledging to specific legislative action in the future. Because the Board cannot control the discretion of a future legislative body, any measure that hinges on an attempt to do so exceeds the County's legal authority and thus fails to meet CEQA's requirements for valid mitigation.

B. Mitigation Measure 5.1-1 Is Unlawful Because It Cannot Be Enforced.

In addition to being within an agency's powers, mitigation measures must also be "fully enforceable." (Pub. Res. Code § 21081.6, subd. (b).) Mitigation measures are made enforceable

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[6] *See* https://www.marincounty.org/depts/bs/about-the-board-of-supervisors/current-board-of-supervisors.

"through permit conditions, agreements, or other legally-binding instruments." (CEQA Guidelines § 15126.4.) This requirement "ensure[s] that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261; see also *Golden Door*, *supra*, 50 Cal.App.5th at p. 506, quoting *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1167 ["Mitigating conditions are not mere expressions of hope"].)

Accordingly, an agency cannot relinquish implementation of mitigation to parties over whom the agency has no control. (See *King & Gardiner Farms*, *supra*, 45 Cal.App.5th at pp. 859-60.) In *King & Gardiner Farms*, Kern County amended zoning ordinances to streamline the oil and gas development permitting process. (*Id.* at p. 831.) The accompanying EIR included a water resources mitigation measure which provided that "[t]he five biggest oil industry users of municipal and industrial water shall work together to develop and implement a plan identifying new measures to reduce municipal and industrial water use by 2020." (*Id.* at p. 859.) The county never committed – whether through the provisions of the EIR or an independent legal agreement – to ensuring the oil companies actually implemented any identified measures. Thus, the court observed that the measure "commit[ted] no one to adopting or implementing anything to take advantage of those opportunities," and that the measure was not "fully enforceable through permit conditions, agreements, or other legally-binding instruments." (*Id.* at p. 860; see also *Tracy First*, *supra*, 177 Cal.App.4th at pp. 937-38 [traffic infrastructure plan by different agency was not viable mitigation because formulating and implementing it was outside lead agency's control].)

Similarly, here the County has proposed to leave adoption and implementation of the Mitigation Ordinance to a body over which the County has no control – a future Board of Supervisors. But as discussed above, the current Board of Supervisors has no authority to bind the legislative discretion of a future board. Consequently, should a future board fail to enact an ordinance, no one – including the current Board of Supervisors, the courts, or the citizenry – would be able to enforce Measure 5.1-1 through "legally-binding instruments." (CEQA Guidelines § 15126.4, subd. (a)(2).)

Truly enforceable commitments are those that allow the public or interested parties to seek redress through the courts. Under CEQA, when an agency fails to implement its adopted mitigation measures, the public may seek recourse in a mandamus proceeding. (*Sierra Club*, *supra*, 6 Cal.5th at p. 532 ["Indeed, if the County were to approve a project that did not include a feasible mitigation measure, such approval would amount to an abuse of discretion, which could be corrected in a court mandamus proceeding"]; see also *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 727 [holding that dust control mitigation measures left to the county's discretion are enforceable through a judicial writ of mandate].)

Courts cannot enforce Measure 5.1-1's call for future legislative action, however, because mandamus relief is not available "to compel a legislative body to perform legislative acts in a particular manner." (*Bd. of Supervisors v. Cal. Highway Com.* (1976) 57 Cal.App.3d 952, 961.) "Were it otherwise, courts would be involved in 'an attempt to exercise legislative functions, which . . . is expressly forbidden.'" (*Sklar v. Franchise Tax Bd.* (1986) 185 Cal.App.3d 616, 624, quoting *French v. Senate* (1905) 146 Cal. 604, 607.) This separation of powers principle applies with equal force in the context of land use regulation by local governments. (*Banville v. L.A. County* (1960) 180 Cal.App.2d 563, 570 ["Under our law the legislative body cannot be forced to enact or amend a zoning ordinance"].) At least one court has denied a petition for writ of mandate seeking to compel a city to enact a land use ordinance. (See, e.g., *Tandy v. City of Oakland* (1962) 208 Cal.App.2d 609, 611-12.)

Indeed, this Court and the First District Court of Appeal both acknowledged as much in prior proceedings. In response to SPAWN's lawsuit in Case No. CIV 1004866, the trial court concluded it could not compel the dilatory Board to enact an SCA ordinance as required by the 2007 Countywide Plan. Addressing the SCA ordinance, the Court of Appeal took pains to acknowledge its powerlessness to direct the County to legislate. (*SPAWN*, *supra*, 2014 WL at p. *10.) The Court of Appeal explained, "we shall adhere to the trial court's reasoning, that it remains within the

discretion of the county to determine when to enact the required ordinance, and therefore that there is no basis to issue a writ of mandate compelling it to do so now." [7] (*Ibid.*)

By crafting the SEIR's core mitigation measure as a future legislative act, the County again dodges accountability and passes the buck to a future board. The County would like to have it both ways. On the one hand, it would like to rely on Measure 5.1-1 to satisfy its CEQA obligation to reduce the Countywide Plan's impacts on endangered salmonids to less than significant. (SAR 1256-57, 1263-64.) On the other hand, the County would like to avoid doing the hard work of actually adopting the necessary protections. While the County's ambitions for future legislation may be laudable, they are not legally adequate mitigation under CEQA.

II. Mitigation Measure 5.1-1 Is Unlawfully Deferred.

Even if the County could lawfully commit itself to legislating in a specific manner in the future and even if Measure 5.1-1 were legally enforceable, the mitigation would still be defective because it is improperly deferred. The County both failed to justify its decision to postpone enacting Measure 5.1-1 to a later date and failed to include specific performance standards in the measure to evaluate its effectiveness. Improperly deferred mitigation is a failure to proceed as required by law, and an abuse of discretion. (*Golden Door*, *supra*, 50 Cal.App.5th at p. 519; see also *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 49, disapproved on separate grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 451.) The harm from the County's continued delay is not merely academic; if the County continues to delay, the salmon may well pass the "ecological point[] of no return." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392.)

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[7] Although the Board of Supervisors did ultimately adopt an Interim SCA Ordinance (which the 2019 SEIR finds inadequate to reduce the impacts to salmonids from the Countywide Plan), it did so in 2013 – three years after SPAWN filed suit and a full six years after the Board certified its EIR and approved the 2007 Countywide Plan.

A. The County Cannot Justify Its Failure to Enact a Mitigation Ordinance Alongside Its Reapproval of the Countywide Plan.

The CEQA Guidelines prohibit agencies from deferring formulation of mitigation measures until after project approval except in strictly limited circumstances. (CEQA Guidelines § 15126.4, subd. (a)(1)(B).) An agency may develop the specifics of mitigation after project approval only "when it is *impractical* or *infeasible* to include those details during the project's environmental review." (*Ibid.*, emphasis added.) That is, "practical considerations" must "prevent[] the formulation of mitigations [*sic*] measures at the usual time in the planning process." (*POET, LLC v. State Air Res. Bd.* (2013) 218 Cal.App.4th 681, 736 (*POET*), citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-29 (*SOCA*).) Unless those considerations are "readily apparent," an EIR must explain an agency's decision to defer finalizing the specifics of mitigation. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.)

The County failed to justify deferring the adoption of a Mitigation Ordinance to a later, unspecified date. As the Center's comments on the SEIR explained, the County could and should have developed the Mitigation Ordinance during the supplemental review process. (SAR 21974.) Had it done so, the County could have adopted the Mitigation Ordinance concurrently with its certification of the SEIR and reapproval of the Countywide Plan – an approach suggested by the CEQA Guidelines for situations like this. (See CEQA Guidelines § 15130, subd. (c) ["With some projects, the only feasible mitigation for cumulative impacts may involve the *adoption* of ordinances or regulations rather than the imposition of conditions on a project-by-project basis"], emphasis added.)

When pressed by the public to explain why it had not prepared a draft Mitigation Ordinance for adoption at the time of project approval, the County equivocated. It claimed that "[i]nclusion of a complete Expanded SCA Ordinance as mitigation for future development under the Marin CWP (2007) is impractical because the latter requires a separate legislative process from the SEIR." (SAR 1293.) But this is merely a truism. Although the Board would need to adopt a Mitigation Ordinance via legislative action, nothing requires the County to develop and adopt a Mitigation Ordinance on a "separate" track. The County therefore identified nothing that "prevent[ed] the formulation of

mitigations [*sic*] measures at the usual time in the planning process." (*POET*, *supra*, 218 Cal.App.4th at p. 736.)

In sum, Measure 5.1-1 is unlawful because the County failed to justify why it was infeasible to adopt a Mitigation Ordinance at the time that it reapproved the 2007 Countywide Plan. The County has been dragging its feet for over 15 years of environmental review. Programmatic review of the Countywide Plan presented the perfect opportunity to study and implement watershed-wide mitigation. Instead and without justification, the County opted to repeat its previous strategy of passing off responsibility for developing and adopting streamside protections to future decisionmakers.

B. Measure 5.1-1 Failed to Include Specific Performance Standards to Gauge Recovery of Salmonid Rearing Habitat and Spawning Success.

Even where an agency's deferral of mitigation is justified, deferral is permissible only if the agency also "(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure." (CEQA Guidelines § 15126.4, subd. (a)(1)(B).) As explained above, the County did not "commit[] itself to the mitigation," and the SEIR is improperly deferred on those grounds. Equally glaring, the County failed to include any adequate performance standards in Measure 5.1-1.

A lead agency must adopt specific performance standards "for *evaluating the efficacy* of the measures implemented." (*POET*, *supra*, 218 Cal.App.4th at p. 738, emphasis added.) Whereas potential actions indicate *how* mitigation may be achieved, performance standards gauge *whether* mitigation is being achieved. (See *id.* at pp. 736-37.) This distinction between "performance standards" and "potential actions" is subtle, but courts consistently view them as fundamentally separate requirements. (See *id.* at p. 737 [characterizing the potential action prong as requiring "a list of the mitigation measures to be considered, analyzed and possibly incorporated in the mitigation plan"]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793 ["[I]t is sufficient to articulate specific performance criteria and make further approvals contingent

on finding a way to meet them"].) Deferred mitigation must satisfy both requirements. (CEQA Guidelines § 15126.4, subd. (a)(1)(B).)

Accordingly, an EIR must be set aside if it lacks specific performance standards to gauge the success of implemented mitigation measures. (See, e.g., *Golden Door*, *supra*, 50 Cal.App.5th at p. 520 [holding that an EIR improperly deferred mitigation because it lacked objective standards to measure the success of the ultimate mitigation plan].) In order to measure the success of mitigation, specific performance standards are typically quantitative. (See, e.g., *Cal. Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 622 (*CNPS*); *SOCA*, *supra*, 229 Cal.App.3d at p. 1022 [upholding deferred mitigation of parking congestion impacts where the city specified that "the overall level of parking utilization in the study area should not exceed 90 percent"].) In *CNPS*, a city approved a multi-use development that would impact vernal pools and the wetland plants and shrimp that rely on them. (*CNPS*, *supra*, 172 Cal.App.4th at pp. 608-9.) To mitigate habitat destruction, the EIR required replacing habitat off-site but deferred the selection of specific locations to future plans submitted by the developer. (*Id.* at p. 612.) The court upheld deferral, observing that the EIR required developers to preserve or create habitat "in a specific ratio to the habitat lost as a result of the Project." (*Id.* at p. 622.) In a recent, comprehensive appellate opinion addressing deferred mitigation, the *Golden Door* court characterized that standard – "replacement habitat in a specified ratio (2:1) to the habitat lost from the project" – as the type of "objective criteria" that satisfies the performance standard requirement. (*Golden Door*, *supra*, 50 Cal.App.5th at p. 524.)

Here, Measure 5.1-1 contains no specific performance standards that will allow the public or the County to "evaluate the efficacy" of the Mitigation Ordinance. (*POET*, *supra*, 218 Cal.App.4th at p. 738.) The County relies on Measure 5.1-1 to mitigate two impacts: "reduced survival of fry and juvenile salmonid life stages due to reduced winter rearing habitat" (SAR 1237) and "reduced spawning success due to elevated sediment delivery and increased high flow frequency and magnitude" (SAR 1257; see also SAR 1263-64, 2155 [Mitigation Ordinance's purpose is "to mitigate for the potentially significant impact of the Proposed Project on coho salmon winter rearing success"].) A sufficient standard might require, for example, that the County monitor the quantity and quality of winter rearing habitat in San Geronimo Creek or measure sediment delivery and flow

alterations in developed reaches of the creek. Instead, Measure 5.1-1 merely promises to impose certain restrictions on development practices in the SCA in the future – without any metrics to evaluate or ensure improvement in salmonid habitat. (SAR 1250-52 [standard management practices including replanting riparian trees]; SAR 1252-54 [low-impact development practices].) These development practices may constitute potential actions to help achieve mitigation, but they provide no standards for measuring improvements in the survival of young salmonids or the success of spawning.

SPAWN criticized the absence of performance standards in its comments on the SEIR. (SAR 1719-20 [comments on Draft SEIR]; SAR 2109-11 [comments on Final SEIR].) The County attempted to correct this failure by adding so-called "performance requirements" to the Final SEIR. (SAR 1297-98.) Accordingly, Provision 4 of the Mitigation Ordinance would now require developers to replace removed riparian trees "with native riparian trees onsite at a 2:1 ratio, or if on-site mitigation is not feasible," "off-site at a 3:1 ratio . . . ." (SAR 1250.) The County also adjusted existing requirements in Provision 5, which would impose "low impact development (LID) practices and designs that are demonstrated to prevent offsite discharge from events up to the 85th percentile 24-hour rainfall event." (SAR 1252.)

But these last-minute attempts to dress up Measure 5.1-1 cannot save it. The added requirements still do nothing to permit the public or the County to "evaluate the efficacy of the measures implemented." (*POET*, *supra*, 218 Cal.App.4th at p. 738.) Developers could replace riparian trees all day without actually realizing improvements in salmonid habitat. So, too, for reducing unnatural flows with discharge requirements. Absent *standards* to monitor habitat improvement – or at the very least, establish acceptable shade coverage, sediment levels, and flow fluctuations – neither the County nor the public can evaluate whether the practices are improving habitat.[8] Accordingly, the County's deferred mitigation for the Countywide Plan's significant impacts is inadequate under CEQA.

[8] The lack of performance standards is especially disturbing here because the County failed to revise or update its Mitigation Monitoring and Reporting Program ("MMRP") when it certified the SEIR. CEQA requires lead agencies to adopt MMRPs. (Pub. Res. Code § 21081.6; CEQA Guidelines §

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of mandate in Case No. CIV 1903709, directing the County to (1) set aside its 2019 re-approval of the Countywide Plan and certification of the SEIR, and (2) adopt valid, enforceable mitigation measures that comply with CEQA prior to approving the project. Petitioners also respectfully request that the Court deny the County's Return to Peremptory Writ of Mandate in Case No. CIV 1004866.

Dated: November 9, 2020

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 
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Attorneys for Petitioners

15091, subd. (d); 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont. Ed. Bar 2d ed. 2015) § 18.2.) The County did so in 2007 (AR 106-136), but failed to update the program despite revising its proposed mitigation measures.

PROOF OF SERVICE

At the time of service, I was over the age of 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305.

On November 6, 2020, I served the foregoing **PETITIONERS' OPENING BRIEF AND OPPOSITION TO RETURN TO WRIT** on the parties in this action as follows:

Brian E. Washington, County Counsel
Tarisha K. Bal, Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
CITY OF MARIN
3501 Civic Center Drive, Room 275
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BY E-MAIL OR ELECTRONIC TRANSMISSION: Pursuant to Judicial Council of California Emergency Rules related to COVID-19, Rule 12 – Electronic Service. I cause a copy of the document(s) to be sent from e-mail address anamv@stanford.edu to the person(s) at the e-mail address(es) above. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on November 6, 2020, at Stanford, California.

Ana Villanueva

Ana Villanueva