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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' REPLY BRIEF

Date:	March 5, 2021
Time:	1:30 p.m.
Dept:	E
Judge:	Hon. Andrew Sweet
Case Filed:	September 26, 2019

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INTRODUCTION

The Central California Coast coho salmon and steelhead trout are on a fast track to extinction. (Supplemental Administrative Record ("SAR") 1193-94.) The number of Coho salmon that are born and return to spawn in the Lagunitas Creek watershed has plunged from a historical population of 4,000 to just a few hundred per year. (SAR 1193.) Counts of steelhead redds (nests) have similarly declined, with only 120 redds observed in the 2015-2016 spawning season. (SAR 1193-94.) Everyone agrees on the cause: residential and commercial urbanization, which has so degraded the salmonid populations that, absent affirmative human intervention, they will disappear forever. (SAR 1193-94, 1231; Respondent's Opposition Brief ("Resp. Br.") at 4.)

Nonetheless, Respondent County of Marin's ("County") 2007 General Plan Update ("Countywide Plan") allows further development in the Lagunitas Creek watershed and San Geronimo Valley. The County's Supplemental Environmental Impact Report ("SEIR") for the Countywide Plan recognizes that, left unmitigated, this development will significantly reduce the winter survival and spawning success of salmon and steelhead in the San Geronimo Valley, further impairing their recovery. To mitigate these impacts, the SEIR relies principally on Mitigation Measure 5.1-1, which requires the Marin County Board of Supervisors to adopt at some point in the future a Stream Conservation Area Ordinance ("Mitigation Ordinance") regulating development. The County argues that it has the legal authority to promise such legislation, that the courts and the public can enforce that promise, that it was unable to adopt the Ordinance in a more timely manner, and that the Ordinance specifies how the County will assess its performance.

We have been down this road before. As part of the first Countywide Plan update in 2007, the County committed to adopting a mitigation ordinance in one to four years. (Resp. Br. at 8.) After five years passed, Petitioner Salmon Protection and Watershed Network ("SPAWN") challenged the County's failure to satisfy this commitment. The County defended its inaction by asserting that SPAWN was attempting to "usurp[]" the County's "local policy-making authority"; that it had unreviewable discretion to decide when to pursue and adopt the ordinance, making a mandatory duty claim unavailable; and that "the County cannot do everything, given competing demands on County resources." (*See* Respondent's Request for Judicial Notice ["RFJN"], Exh. 2 at

41-44, 77-78.) Fourteen years later, the County maintains that adopting an ordinance is difficult, slow work that it may or may not complete in five years despite continuing development in the San Geronimo Valley.

Once again, the County has chosen to rely on mitigation that it has no authority to adopt, has no way to enforce, and had no reason to delay. Until this Court requires the County to fulfill the California Environmental Quality Act's ("CEQA") mitigation requirements, the coho salmon and steelhead in the San Geronimo Valley will continue their quiet march toward extinction.

ARGUMENT

I. Mitigation Measure 5.1-1 Violates CEQA Because the County Has No Legal Authority to Obligate a Future Board of Supervisors to Legislate.

Mitigation is lawful under CEQA only when it is within the lead agency's legal authority to adopt. (Public Resources ("Pub. Res.") Code § 21004; CEQA Guidelines (14 Cal. Code Regs.) § 15040; *Kenneth Mebane Ranches v. Super. Ct.* (1992) 10 Cal. App. 4th 276, 291.) But Mitigation Measure 5.1-1 (and Measure 5.2-1, which also relies on the Mitigation Ordinance) fails this most basic requirement—a conclusion that necessarily derives from two principles of law that the County concedes. (*See* Resp. Br. at 13.)

First, as the County concedes, CEQA confers no additional authority, beyond the authority an agency otherwise has outside of CEQA, to impose and implement mitigation measures. (Resp. Br. at 13; *see also* Pub. Res. Code § 21004 ["[A] public agency may exercise only those express or implied powers provided by law other than [CEQA]" to mitigate or avoid a project's impacts.].) Second, as the County also concedes, one legislative body cannot compel a future legislative body to enact legislation. (Resp. Br. at 13; *see also City & Cty. 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."].) Accordingly, in certifying the SEIR and re-approving the Countywide Plan in 2019, the County had no authority to obligate the Board of Supervisors, acting in 2024 or later, to adopt the Mitigation Ordinance. The County therefore is incorrect when it states that there is "no

principle of law—in CEQA or otherwise—that prevents a public entity from committing to take action through its elected representatives in the future." (Resp. Br. at 14.)

The County tries to escape this inevitable conclusion by relying on *Sierra Club v. County of San Diego* (2014) 231 Cal. App. 4th 1152. (Resp. Br. at 14-15.) That case is legally irrelevant and factually distinguishable. In *Sierra Club*, San Diego County certified an EIR for its general plan update. (231 Cal. App. 4th at 1161-63.) The EIR included a "County Climate Change Action Plan" as a greenhouse-gas mitigation measure, which the Board of Supervisors formally adopted nine months later. (*Id.* at 1156-63.) The plaintiff argued, and the court agreed, that the plan failed to meet the mitigation requirements in the EIR. (*Id.* at 1157, 1176.)

No one challenged, and the Court of Appeal did not rule on, whether San Diego County had the authority to commit its Board of Supervisors to adopt the future plan as mitigation. The plaintiff did not file suit until after the board had already adopted the plan on schedule. (*Id.* at 1163.) As the Court of Appeal explained, the suit had nothing to do with "the validity of the general plan update [program EIR] or the enforceability of the mitigation measures provided in that document." (*Id.* at 1166.) The case is therefore inapposite and provides no support for the County's claim that it has the authority to obligate a future Board of Supervisors to adopt the Mitigation Ordinance. Furthermore, the future action at issue in *Sierra Club* was the county's commitment to approve in less than a year an extended piece of its general plan update. (*Id*. at 1159-60.) That is qualitatively different from Marin County's commitment to enact in five years (or longer) new legislation; the latter dictates the Board of Supervisors' action in a way that the former does not.

Golden Gate Bridge District v. Muzzi (1978) 83 Cal. App. 3d 707 is irrelevant for the same reasons. In that case, a bridge district relied on its eminent domain power to condemn private property to be used as a dredge disposal site for a new ferry terminal. The opinion does not indicate whether the district had actually committed itself to the condemnation in an EIR. (*See id.* at 712-13.) Even if it did, condemnation is not legislation, and the court addressed not whether the district could be so bound, but rather whether eminent domain could be used as environmental mitigation. (*Id.* at 712-14.)

The County's remaining cases are even more off base. The mitigation measures at issue in *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal. 3d 376 and *Defend the Bay v. City of Arline* (2004) 119 Cal. App. 4th 1261 did not involve future legislative acts. In *Laurel Heights*, the Regents of the University of California certified an EIR committing the University of California-San Francisco (a component of the state university system) but not the Regents (the University of California's legislative body), to mitigation actions, including promoting group transportation programs on its campus to mitigate traffic and parking problems. (47 Cal. 3d at 389, 418.) Similarly, in *Defend the Bay*, the City of Irvine certified an EIR for a general plan update with adverse impacts on imperiled plants. (119 Cal. App. 4th at 1273.) As mitigation, the EIR incorporated by reference specific mitigation measures in a statewide habitat conservation plan, including "evaluation," "monitoring and management," and "coordinat[ion]" with other agencies. (*Id*. at 1275-76.) These measures were commitments to administrative action by city departments, not a promise by the city that its city council would pass specific legislation years later.

Finally, the County observes that its Board of Supervisors has the authority to pass land-use ordinances. (Resp. Br. at 15.) This fact is both correct and irrelevant, just as it was irrelevant that state law permitted the climate-change plan in *Sierra Club* or the condemnation in *Golden Gate*. The question here is whether the County has the authority to bind a future Board of Supervisors to taking legislative action five or more years in the future. It does not, and the County offers no authority showing otherwise.

II. Mitigation Measure 5.1-1 Violates CEQA Because It Is Not Enforceable.

CEQA requires that mitigation measures be "fully enforceable through permit conditions, agreements, or other measures." (Pub. Res. Code § 21081.6(b); *see also* CEQA Guidelines § 15126.4(a)(2); *Fed'n of Hillside and Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261.)

Mitigation Measure 5.1-1 is unenforceable. First, a mitigation measure cannot be enforced if it must be adopted and implemented by a party over whom an agency has no control. (*See* Petitioners' Opening Brief ("Pet. Br.") at 17; *King & Gardiner Farms, LLC v. Cty. of Kern* (2020)

45 Cal. App. 5th 814, 859-60.) As described above, the County Board of Supervisors cannot control or direct the legislative discretion of a future Board. Second, a mitigation measure is also unenforceable if the public, through the courts, cannot obtain relief against an agency for failing to undertake the measure. (*See* Pet. Br. at 18 [citing cases].) Because the Mitigation Ordinance is a future legislative act, the courts have no power to force the County adopt it. (*See id.*; *Salmon Prot. & Watershed Network v. Cty. of Marin* (2014) 2014 WL 845416, at *10 ("*SPAWN*") ["[I]t remains within the discretion of the county to determine when to enact the required ordinance."].) Thus, even if the County could obligate a future Board of Supervisors to enact the Ordinance, neither the public nor the courts could enforce that obligation and Measure 5.1-1 would be still be unlawful under CEQA. In fact, the County employed this limit on enforcement to avoid fulfilling its promise to pass a previous mitigation ordinance. (*See* RFJN, Exh. 2 at 36 [Adopting an ordinance "is certainly not the kind of ministerial or mandatory duty that has traditionally been actionable under Code of Civil Procedure section 1085."].)

The County makes three meritless counter-arguments. First, the County posits that because it adopted Measure 5.1-1 as part of the Countywide Plan, the measure is inherently enforceable. (Resp. Br. at 16.) But simply incorporating an unenforceable mandate into a general plan does not make it enforceable. *Cf. Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n* (1976) 17 Cal. 3d 785, 799-800 [contractual commitment to decline to exercise zoning authority was "invalid and unenforceable" as a matter of law].) Straining to show otherwise, the County misrepresents the facts and holding of *Sierra Club*, claiming that the plaintiff "was trying to *enforce* the county's promise to implement" the climate-change plan the county had committed to in its general plan update. (Resp. Br. at 17.) Not so. In that case, the plaintiff filed suit *after* the County had already adopted the climate-change plan. (*Sierra Club*, 231 Cal. App. 4th at 1163.) Accordingly, the plaintiff alleged only that "that the [plan] did not meet the requirements of Mitigation Measure CC-1.2" in the general plan update, not that the county had failed to adopt the plan in the first place. (*Id.*) For these reasons, the court made clear that the plaintiff was "not challenging the validity of the general plan update [program EIR] or the enforceability of the mitigation measures provided in that document." (*Id.* at 1166.)

Second, the County argues that it may relinquish its responsibility for carrying out mitigation, pointing to cases in which lead agencies delegated responsibility for undertaking mitigation activities to other agencies under Public Resources Code section 21081(a)(2). (*See* Resp. Br. at 18, citing *Mission Bay All. v. Office of Cmty. Inv. & Infrastructure* (2016) 6 Cal. App. 5th 160, 188-91 [upholding transportation mitigation measures that required future actions by third-party transit agencies] *and City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal. 4th 341, 363-64 [upholding contribution of funds to mitigation that would be undertaken by a third-party reuse authority].) In this case, however, the County is relying on its own legislative body to adopt Mitigation Measure 5.1-1. More importantly, the mitigation measures that the agencies in *Mission Bay Alliance* and *City of Marina* delegated were not legislative acts to be adopted by the other agencies' legislative bodies. The County's attempted analogy would hold only if a lead agency could commit another agency's deliberative body to adopting specific legislation in the future. It cannot.[1]

Third and finally, the County tries to argue that Measure 5.1-1 is enforceable based on statements the parties made in their briefs in prior proceedings eight years ago. (*See* Resp. Br. at 19, citing RFJN.) In those statements, SPAWN expressed its belief that the County's previous commitment to adopt a different mitigation ordinance was binding. The County agreed. However, SPAWN made those statements before the Court of Appeal concluded that "it remains within the discretion of the county to determine when to enact the required ordinance" (*SPAWN*, 2014 WL 845416, at *10); before the County once again approved the Countywide Plan without having in place the mitigation that the County's own SEIR says is required to reduce significant impacts to

[1] *Mission Bay Alliance* and *City of Marina* are distinguishable for other reasons. In both cases there were ample indicia that the mitigation would be undertaken. (*Mission Bay All.*, 6 Cal. App. 5th at 189-90; *City of Marina*, 39 Cal. 4th at 365.) And in *City of Marina*, the agency conceded that "ultimate implementation of the improvement program is under the responsibility of [the reuse authority], and cannot be controlled or assured by" it, and so cautioned that "the significant impacts . . . will remain significant and unavoidable." (*City of Marina*, 39 Cal. 4th at 364.) The County points to no such indicia of enforceability for Mitigation Measure 5.1-1, and it did not adopt a contingency plan in the event the Mitigation Ordinance is never adopted or fails to meet the requirements set forth in the SEIR. Quite the opposite—the County acknowledges that the Mitigation Ordinance could be larded with "exemptions." (SAR 1798.)

salmon; before the County admitted that the Mitigation Ordinance, once passed, might contain more exemptions than the version in the SEIR (SAR 1798); and before the County included a poison pill stating that the County would adopt the Ordinance within five years, but only "barring unforeseen delays caused by continuing, new, or threatened litigation related to the SEIR process and/or the Ordinance" (SAR 1248). Since making those statements eight years ago, SPAWN has learned the hard way that the County's commitments are not enforceable.

Mitigation Measure 5.1-1 fails CEQA's enforceability mandate. Even if the County had the authority to bind a future Board to specific legislative action, no court could enforce such a commitment.

III. Mitigation Measure 5.1-1 Violates CEQA Because It Is Unlawfully Deferred.

Lead agencies "shall not" defer the formulation of mitigation measures included in an EIR. (Pub. Res. Code § 15126.4(a)(1)(B).) The only exception is "when it is impractical or infeasible to include those details during the project's environmental review." (Pub. Res. Code § 15126.4(a)(1)(B); *see also POET, LLC v. State Air Res. Bd.* (2013) 218 Cal. App. 4th 681, 736.) The CEQA Guidelines recognize that the "only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations" (CEQA Guidelines § 15130(c)) but do not exempt such ordinances or regulations from CEQA's standards for deferred mitigation.

Here the County violated CEQA by deferring adoption and implementation of the Mitigation Ordinance without providing the justification that CEQA requires. As Petitioners explained in their comments on the SEIR, the County could easily have developed the Mitigation Ordinance during the supplemental review process. (SAR 21974.) Had it done so, the Board of Supervisors could have adopted the Mitigation Ordinance at the same time it certified the SEIR and re-approved the Countywide Plan. (*Id.*) Despite Petitioners' requests, the County never explained why adopting the Mitigation Ordinance concurrently with certification of the SEIR—in the way that CEQA anticipates—was "infeasible."

Instead, the County offers two rationalizations for waiting to adopt the Mitigation Ordinance: (1) The SEIR is part of a general plan, with future, project-specific study and mitigation

to follow, and (2) legislation takes time and effort. Neither justification withstands scrutiny.[2]

A. The County Could Have Adopted, and Therefore Was Required to Adopt, the Mitigation Ordinance at the Time It Certified the SEIR and Re-approved the Countywide Plan.

The County first opines that the "nature of general plans" is such that details are to be "worked out during implementation." (Resp. Br. at 21.) According to the County, the SEIR is merely a "first tier of environmental review" that provides a "foundation upon which future, project-specific CEQA documents can build." (*Id.*) Once the SEIR and the Countywide Plan are in place, the "County and other stakeholders can rely on them to address more specialized and localized activities, such as the process of developing and adopting the specific details of the SCA ordinance called for by MM 5.1-1 as they relate to the specific circumstances present in different areas of the County." (*Id.*)

This argument is a red herring. The County proposed the Mitigation Ordinance to mitigate the admittedly significant cumulative impacts of the 2007 Countywide Plan, not of particular site-specific projects. (SAR 1271-73.) The SEIR acknowledges that re-approving the Countywide Plan would yield significant adverse impacts on coho salmon and steelhead, and that adopting the Mitigation Ordinance would reduce those impacts to a less-than-significant level. (*Id.*) The SEIR's description of the Mitigation Ordinance runs nearly seven pages. (SAR 1248-54.) The County issued the SEIR at the tail end of two decades and many thousands of pages of study. The County offers no reason why it did not have enough information to adopt the Mitigation Ordinance at the same time it certified the SEIR.

The County's attempted reliance on the distinction between program and project EIRs is nothing more than a pretext. (*See Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal. App. 4th 511, 533, *as modified on denial of reh'g* (Aug. 21, 2000) ["Designating an EIR as a program EIR . . . does not by itself decrease the level of analysis

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[2] In the County's view, CEQA's substantial evidence standard of review governs whether the County unlawfully deferred Mitigation Measure 5.1-1. (Resp. Br. at 22, 24.) The County is mistaken. (*See Golden Door Props., LLC v. Cty. of San Diego* (2020) 50 Cal. App. 5th 467, 519 ["Where an EIR improperly defers mitigation, the approving agency abuses its discretion by failing to proceed as required by law."].)

otherwise required in the EIR."]; CEQA Guidelines § 15168(c)(5) ["A program EIR will be most helpful in dealing with later activities if it . . . deals with the effects of the program as specifically and comprehensively as possible."].) In each of the cases the County cites, the lead agency properly deferred mitigation because the agency needed to conduct further study that it had not and could not undertake earlier. (*See Sacramento Old City Ass'n v. City Council* (1991) 229 Cal. App. 3d 1011, 1028-29 [deferred parking-impacts mitigation was justified based on the specific need for a further transportation study]; *Defend the Bay*, 119 Cal. App. 4th at 1274-75 [upholding deferral of mitigation that required further study of whether an endangered species was present in the habitat area].) Even assuming the Mitigation Ordinance would benefit from further study or detail, the County does not explain what further studies, information, or details are necessary, or why it was impractical to conduct those studies or gather that information prior to certifying the SEIR. (*See Golden Door*, 50 Cal. App. 5th at 527 ["[T]he fact more precise information may be available during the next tier of environmental review does not excuse [the agency] from providing what information it reasonably can now." (quotation marks omitted)]; *Sacramento Old City Ass'n*, 229 Cal. App. 3d at 1028-29 [deferral of mitigation "known to be feasible" is permitted only where "practical considerations *prohibit* devising such measures" earlier (emphasis added)].)

The County is recycling a well-worn, and already-rejected, argument. In the initial round of this litigation, the County leaned on this same program-versus-project EIR rationale to avoid analyzing the Countywide Plan's cumulative impacts on salmon. (*See SPAWN*, 2014 WL 845416, at *6.) The Court of Appeal saw through this excuse, explaining that a "'program EIR is designed for analyzing program-wide effects, broad policy alternatives and mitigation measures, cumulative impacts and basic policy considerations,'" and that "the implication of the county's position is that no analysis of the cumulative impacts of development in the watershed will ever be made." (*Id.* at *6-7, quoting *Friends of Mammoth*, 82 Cal. App. 4th at 533–534.) As it was with impacts, so it is with mitigation: The County cannot wait for "more specialized and localized activities" (Resp. Br. at 21) to develop the *countywide* Mitigation Ordinance. The County could have, and therefore was required to, formulate and adopt the Mitigation Ordinance when it certified the SEIR and re-approved the Countywide Plan. Its failure to do so violates CEQA.

B. Administrative Burdens Did Not Make Adopting the Mitigation Ordinance Infeasible or Impractical.

Finally, on page 22 of its brief, the County reveals its real reason for deferring the Mitigation Ordinance until 2024 or later: The "sheer amount of resources that adopting the SCA ordinance requires" made earlier adoption "impractical." (Resp. Br. at 22.) The County points to its previous effort to adopt a mitigation ordinance, which included outreach to stakeholders, public hearings, and open houses. (*Id.*)

Petitioners are confident that the County can conduct environmental review and legislate at the same time. And this Court's writ of mandate, and CEQA, require it: The County shall "prepare and certify a Supplemental EIR with respect to salmonid impacts in San Geronimo watershed only that analyzes cumulative impacts . . . and that describes mitigation measures in conformity with CEQA Guidelines section 15130, subdivision (b) and the opinion of the Court of Appeal." (Peremptory Writ of Mandate, *Salmon Protection and Watershed Network v. Cty. of Marin* (Super. Ct. Marin County Apr. 2, 2015, No. CIV 1004866).) The County itself acknowledges that mitigation of the Countywide Plan's impacts must be timely, for salmon and steelhead in the San Geronimo watershed are "likely to become extinct in the foreseeable future." (SAR 1193-94.) What the County refers to as "Petitioners' specific agenda" (Resp. Br. at 22) is none other than the County's legal duty.

Moreover, the record belies the County's excuse. Just a month before the Board of Supervisors certified the SEIR in August 2019, a Marin County Planning Commissioner warned that "[t]he absence of a Stream Conservation Area ordinance, which is the main mitigation tool and thus the crux of the matter, concerned [her]." (SAR 21922-23.) Acknowledging this concern, Assistant Director of Community Development Tom Lai told the Board at its August 2019 meeting that the Ordinance could be completed in a "considerably shorter time frame" than five years from a "staff, . . . workload development schedule." (SAR 22369.) Though Mr. Lai attributed the need for a five-year timeline to public outreach, he said the County had "learned a lot" from its experience with the abandoned 2013 ordinance, "including how to engage our communities without having a long drawn out multiyear process." (SAR 22369, 22371.) Thus, even the County's own planning

department recognized that the Mitigation Ordinance could be developed contemporaneously with, or at least soon after, the SEIR and Countywide Plan.

In struggling to justify deferring the Mitigation Ordinance, the County puts the cart before the horse. When an agency develops mitigation measures "at the very end of the EIR process," the solution is "not to defer the specification and adoption of mitigation measures until . . . after Project approval, but, rather, to defer approval of the Project until proposed mitigation measures [are] fully developed, clearly defined, and made available to the public and interested agencies for review and comment." (*Cmtys. for a Better Env't v. City of Richmond* (2010) 184 Cal. App. 4th 70, 95.) Here, the County certified the SEIR even though, in the County's own words, "adoption of the 2007 CWP depends" on "enact[ing] the SCA ordinance." (Resp. Br. at. 18.) CEQA requires exactly the reverse: formulating and adopting mitigation before project approval, except in narrow circumstances where doing so is "infeasible." The County cannot evade this requirement by certifying the SEIR, re-approving the Countywide Plan, and relying on an inchoate plan to pass the Ordinance, some ordinance, at some point in the future. In the meantime, development in the San Geronimo Valley continues, often illegally, under decades-old rules that do little to protect salmon.

C. Measure 5.1-1 Lacks Legally Required Performance Standards.

Even where it may be justified, deferral of mitigation is legally permissible only when a lead agency "adopts specific performance standards the mitigation will achieve, and . . . identifies the type(s) of potential action(s) that can feasibly achieve the performance standard." (CEQA Guidelines § 15126.4(a)(1)(B).) That is, deferred mitigation measures must ensure that there is "some way to reduce impacts to less than significant levels." (*Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 234 Cal. App. 4th 214, 241.)

Mitigation Measure 5.1-1 does not contain performance standards, which measure *whether* mitigation is being achieved, not *how* mitigation may be achieved. (*See POET*, 218 Cal. App. 4th at 738 [Performance standards are "for evaluating *the efficacy of* the measures implemented." (emphasis added)].) Each of the standards to which the County points in its brief—the ratios for replacing riparian trees, the timeframe for monitoring those trees, the size of drainage structures, etc. (Resp. Br. at 23)—falls into the latter category. They are design specifications for how to

mitigate the adverse effects of development on salmonids; they do not and cannot measure whether those effects are actually being reduced. The County points to no performance standard that will measure the efficacy of Measure 5.1-1 because the measure contains none.

Measure 5.1-1 is much like the unlawful mitigation in *POET*. In that case, an agency deferred the mitigation measures it would consider for the project's potential increases in nitrogen oxide emissions. (*POET*, 218 Cal. App. 4th at 733-34.) The agency committed to a net-zero standard, but the court held that the deferral was improper because it "established no objective performance criteria for measuring whether the stated goal will be achieved." (*Id.* at 740.) Specifically, "it is unclear what tests will be performed and what measurements will be taken to determine that biodiesel use is not increasing NOx emissions." (*Id.*) Here, Mitigation Measure 5.1-1 sheds no light on how the County will determine to what extent, if any, the Mitigation Ordinance contributes to the recovery of salmon and steelhead in the San Geronimo Valley.

The County's legal authorities only highlight this shortcoming. The EIR in *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 612 ("*CNPS*") required replacement of vernal pool habitat at a specific ratio to the habitat lost. That measure allowed the agency to ascertain whether the impact identified in the EIR—loss of vernal pool habitat—was being adequately mitigated. (*Id.* at 621-22.) Measure 5.1-1 might be comparable if it required measurable improvements in salmonid habitat quality, survival rates of juvenile fish, or recovery of salmonid populations to a particular level, but it does not. (*See Golden Door*, 50 Cal. App. 5th at 524 ["[*CNPS*] is inapposite because [the mitigation measure here] lacks objective criteria to ensure mitigation is effective."].)

Meanwhile, the dispute in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal. App. 4th 884, 894-95, 898-99, centered primarily on what "less than significant" meant and whether measures to mitigate the impacts of an earthquake were feasible—an inquiry the *CNPS* court explained is separate from whether a mitigation measure contains performance standards sufficient for deferral under CEQA Guidelines section 15126.4(a)(1)(B). (*CNPS*, 172 Cal. App. 4th at 621-23.) Moreover, the mitigation at issue in *Oakland Heritage Alliance* established "specific performance criteria imposed by various ordinances, codes, and standards" for ensuring earthquake

resilience, and set forth detailed procedures for achieving that goal. (195 Cal. App. 4th at 910 (quotation marks omitted); *see also Golden Door*, 50 Cal. App. 5th at 519 [discussing why the mitigation in *Oakland Heritage Alliance* contained lawful performance standards].) Measure 5.1-1 has no such "performance criteria" for ensuring reduced impacts to salmon.

Thus, Petitioners' arguments do not, as the County claims, turn on the "specificity" of the Mitigation Ordinance's design or on whether there is "substantial evidence" the Ordinance will or will not "be effective." (Resp. Br. at 23-24.) Rather, the issue is whether the County and the public will have any way of knowing whether the Mitigation Ordinance, once it is in place, is actually working. Because Measure 5.1-1 has no standards for measuring the Ordinance's performance in reducing impacts to salmonid populations in the San Geronimo watershed, it violates CEQA.

A final point bears repeating here: The actual mitigation expected to be achieved by Measure 5.1-1 is far less certain than the mitigation expected in *Oakland Heritage Alliance* or any similar case. The open-ended legislative process for Measure 5.1-1 permits the County to consider and account for "social and economic" concerns. (SAR 1283, 1318.) Homeowners and other stakeholders in the San Geronimo Valley have already voiced strong opposition to the Mitigation Ordinance and demanded alterations to its draft requirements and exemptions. (SAR 21252-75.) The SEIR itself suggests that the County Board of Supervisors may respond to homeowners' economic concerns by easing the Ordinance's burdens. (SAR 1798.) The uncertainty of how and when the Mitigation Ordinance will regulate activities in the Lagunitas Creek watershed makes establishing objective performance standards upfront all the more important. Without them, "the timing and specific details for implementing" the mitigation required by the SEIR "are subject to . . . discretion," such that the mitigation is "not guaranteed to occur at any particular time or in any particular manner." (*Pres. Wild Santee v. City of Santee* (2012) 210 Cal. App. 4th 260, 281.) The County's deferral of required mitigation is unlawful under CEQA.

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: January 28, 2021

Respectfully submitted,

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Deborah A. Sivas
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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 January 28, 2021, I served the foregoing **PETITIONERS' REPLY BRIEF** on the parties in this action as follows:

Brian E. Washington, County Counsel
Brian C. Case, Deputy County Counsel
Brandon W. Halter, Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
CITY OF MARIN
3501 Civic Center Drive, Room 275
San Rafael, CA 94903
bwashington@marincounty.org
bcase@marincounty.org
bhalter@marincounty.org

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused 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 January 28, 2021, at Stanford, California.

Ana Villanueva

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