Case No. A137062

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SALMON PROTECTION AND WATERSHED NETWORK,

Petitioner and Appellant,

v.

COUNTY OF MARIN, et al.,

Respondents and Cross-Appellants.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of California, County of Marin
Case No. CIV 1004866
Hon. Lynn Duryee, Judge, Presiding

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rule 8.208, California Rules of Court.

Dated: April 26, 2013 Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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STATEMENT OF THE CASE

> "The plight of the salmon is inexorably tied to the story of the changing landscape. . . . Their dire status is a call for immediate action to prevent their extinction . . . The situation is daunting, but it is not hopeless."
>
> National Oceanic and Atmospheric Administration, *Recovery Plan for the Central California Coast Coho Salmon*, Volume I at x (Sept. 2012)

At the center of this case are the critically imperiled Central California Coast coho salmon and its only slightly less imperiled cousin, the steelhead trout. Both species have a unique lifecycle, hatching from eggs laid in fresh water streams, working their way to the ocean where they spend most of their adult lives, and eventually returning to their natal streams to spawn and die. (AR 8518-19 (coho); AR 8551-52 (steelhead).) This arduous life journey, amazing as it is, makes these anadromous species especially vulnerable to human disturbance. On the ocean side, salmon and steelhead face overfishing, marine pollution, and increasingly, climate-related ecological changes. On the land side, the species are significantly impacted by human development and streamside alterations that reduce necessary shade cover and add sediment-laden runoff to stream channels, smothering eggs and destroying essential spawning habitat. In some ways, it is miraculous that these species – which both feed and delight us, and

also play an important role in the larger ecosystem – have survived the human gauntlet for as long as they have.[1]

As it turns out, the County of Marin now plays a pivotal role in the survival or extinction of the Central California Coast coho population. Although all native coho streams along the California coast have experienced precipitous declines in returning salmon, the Lagunitas Creek watershed in west Marin has fared comparatively better than others, and federal wildlife managers have identified preservation of remaining coho habitat in this watershed as critical to the species' survival and recovery. Most development in this largely rural watershed is governed by the Countywide Plan, which establishes the goals and parameters – the basic framework – for any future build-out in unincorporated west Marin. In 2007, the County completed an overhaul and update of the Countywide

[1] While salmonids are rearing, "it is critical that the stream habitat provides an adequate food supply, calm water areas for protection from torrential downstream currents, shelter from predators, and deep pools of cool water refuge during hot summer months." (AR 11864.) During this life stage, the fish stick principally to backwaters, small creeks, and deep pools. (AR 12466.) The refuge provided by smaller tributaries is especially important during rainy winters, when young salmonids migrate out of larger streams to avoid higher flows and sedimentation. (AR 13005.) In ideal rearing habitat, large woody debris and dense riparian vegetation help juveniles hide from predators and avoid being swept away by fast-moving flows. (AR 12466-67.) Riparian vegetation also shades the streams it lines, preventing high water temperatures that can be harmful or even fatal to salmonids, and stabilizes stream banks, preventing undesirable erosion. (AR 15751.)

Plan that potentially opens the door to increased urban development in streamside habitat.

The Environmental Impact Report ("EIR") which accompanied this update acknowledges the precarious status of the salmonid species and the threat to their survival posed by further urbanization, especially in the San Geronimo Valley. But, ultimately, it fails to evaluate or analyze the cumulative effects caused by projected development on streamside parcels. The EIR could, for instance, have identified the remaining salmonid habitat, projected the likely additional loss of habitat and increase in impervious surface resulting from anticipated development, and evaluated the accumulating effect of that potential habitat loss and sediment loading on salmonid species survival. Had the County done so, it would have gained the information necessary to identify and adopt meaningful mitigation measures to address these impacts, as the California Environmental Quality Act ("CEQA") requires.

Instead, the EIR punts that critical analysis to later project-specific CEQA review. The problem with this approach is that such site-specific environmental review – when it happens at all, which is not always the case – does not adequately account for the accumulating effects of each new development added to the last. Indeed, it makes little sense for individual projects to evaluate all other development across the county. The EIR for the Countywide Plan is the proper – in fact, the ideal – place to analyze

cumulative watershed-wide development impacts and set in place mitigation measures (*e.g.*, streamside setbacks or development criteria) to address those impacts. It is precisely for this reason that CEQA and the CEQA Guidelines contemplate a robust cumulative impacts analysis for programmatic EIRs. Even the County recognized the deficiency in its EIR when it commissioned a supplemental cumulative impacts study shortly after adopting the 2007 Countywide Plan Update. Unfortunately, that post-decisional analysis has never seen the light of day and been part of any public review process; it cannot, therefore, satisfy the County's CEQA obligations.

Despite having deferred any meaningful cumulative impacts analysis, the EIR nevertheless concludes that the acknowledged significant adverse impacts to coho salmon and steehead populations from build-out under the Countywide Plan Update can be mitigated to a level of insignificance by a single measure – the County's continued participation in a multi-county recommendation-producing body. The County's prior participation in this voluntary regional entity, which recommends non-binding ideas for protecting and restoring habitat, has not prevented the continuing loss of fish habitat throughout the region or the dramatic decline in salmonid populations observed over the last few decades. And nothing this body may say or do in the future constitutes the kind of binding, enforceable concrete mitigation that CEQA requires.

Accordingly, Petitioner-Appellant Salmon Protection and Watershed Network ("SPAWN") sought a writ of mandate setting aside the EIR for: (1) failing to adequately evaluate and disclose the Plan's cumulative development impacts on habitat conditions and coho salmon and steelhead populations; and (2) failing to provide adequate mitigation to avoid or minimize those significant cumulative impacts. In addition and relatedly, SPAWN challenged the County's failure to adopt a Stream Conservation Area ordinance within the timeframe promised by the Plan and required by the EIR, which expressly relied upon such an ordinance to partially mitigate development impacts. Although the trial court denied SPAWN's petition for writ of mandate, Marin Superior Court Judge Lynn Duryee found that the Plan "mandates and relies upon the enactment of the expanded [Stream Conservation Area] ordinance" to protect Marin watersheds and thus enjoined the County from "approving any development application for building with [Stream Conservation Areas] until the ordinance is adopted. To do otherwise would read the County's acknowledged mandatory duty out of its own general plan." (AA 493.)

STATEMENT OF APPEALABILITY

SPAWN filed a Verified Petition for Writ of Mandate challenging the adequacy of the EIR on September 14, 2010[2] and subsequently

[2] This action was filed upon expiration of a series of tolling agreements entered by the parties to allow time for ultimately-unsuccessful settlement

amended the petition to assert an additional claim for the County's failure to timely adopt a Stream Conservation Area ordinance. On September 11, 2012, the trial court issued final judgment. (AA 469.) SPAWN timely filed a notice of appeal pursuant to California Code of Civil Procedure section 904.1. (AA 497.) The County cross-appealed. (AA 526.)

STATEMENT OF FACTS

I. San Geronimo Valley Salmonids

A. The Dire Status of Coho Salmon and Steelhead Trout

There is no serious dispute that Marin's coho salmon and native steelhead trout are in desperate straits. In 1996, the National Marine Fisheries Service ("Service") listed the Central California Coast coho, from Punta Gorda in northern California south to the San Lorenzo River, as "threatened" under the federal Endangered Species Act. (61 Fed. Reg. 56,138 (Oct. 31, 1996).) In doing so, the agency estimated that 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, primarily as a result of habitat degradation, overfishing, and water diversions. (*Id.*; *see also* AR 12442 (2004 Recovery Strategy for California Coho Salmon, explaining that "Coho salmon abundance, including hatchery stock, has declined at

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negotiations. This Court has already upheld the legality of these tolling agreements. *Salmon Protection and Watershed Network v. County of Marin* (2012) 205 Cal.App.4th 185.

least 70% since the 1960s, and is currently 6 to 15% of its abundance during the 1940s").) The protections of listing did not, however, stem the population decline, and in 2005, the Service "uplisted" the species to "endangered" status, concluding that the population was "in danger of extinction." (70 Fed. Reg. 37,160, 37,187 (June 28, 2005).) The Central California Coast steelhead was first listed as "threatened" in 1997 (62 Fed. Reg. 43,937 (Aug. 18, 1997)), and that status was reaffirmed in 2006. (71 Fed. Reg. 834 (Jan. 5, 2006).)

Although the County argued in the trial court that native fish "are showing signs of recovery," such statements simply are not true. Just a few months ago, the Service reaffirmed that California's central coast coho population is in "precipitous and ongoing decline" and is now "gravely close to extinction." (NOAA, *Recovery Plan for Central California Coast Coho Salmon* (Sept. 2012), Vol. I, at *v*, 40, 48.)[3] While there is no single culprit for this decline, "the destruction and modification of habitat over 150 years has been identified as a primary cause." (*Id.* Vol. I, at 18-19.) The coho population is now so small that it is increasingly vulnerable to

[3] Although the *Recovery Plan* post-dates the EIR, it includes the most recent population data on the species in question, and a draft version of the document was submitted by SPAWN below in connection with its non-record sixth cause of action and in response to the County's factually erroneous contention that native fish populations are stabilized and improving. In the accompanying Request for Judicial Notice, SPAWN asks the Court to take notice of the current and final version of this official agency document.

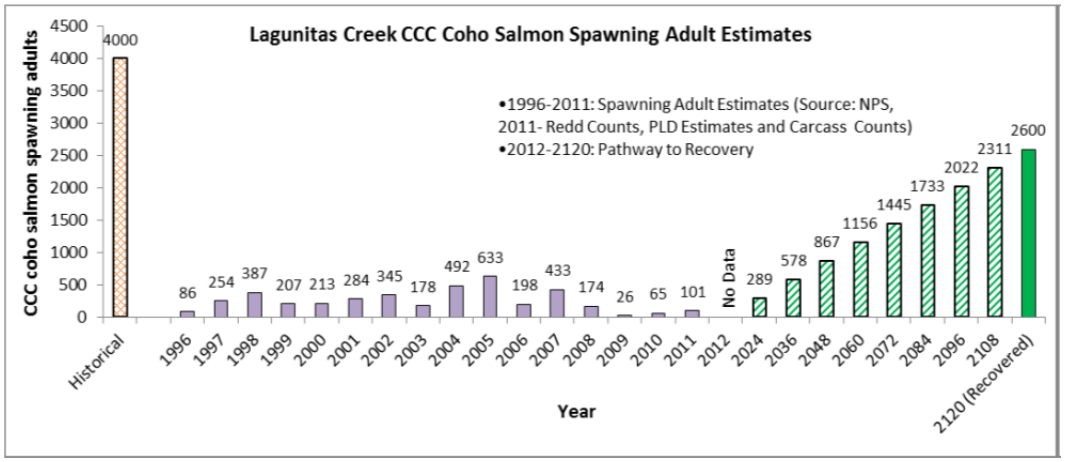
predators, environmental changes, and genetic bottlenecks, a mutually reinforcing process that the Service has characterized as an "extinction vortex." (*Id.* Vol. I, at 48-49.)

B. The Lagunitas Watershed and San Geronimo Valley

Of the 78 watersheds that historically supported central coast coho, the Service has singled out the Lagunitas Creek watershed in Marin as uniquely suited to help recover the species. (*Recovery Plan*, Vol. 1, at 40.) Coho in this watershed are sustained by a system of interconnected pools, streams, and creeks that begins just below Mount Tamalpais and winds through San Geronimo Valley before ultimately emptying into Tomales Bay. (AR 15746; AR 15750.) San Geronimo Valley, in particular, is "considered one of the most important spawning and nursery areas for [coho salmon and steelhead trout]," representing one-third of the Lagunitas coho spawning and rearing activity. (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.) Some of these tributaries are intermittent streams, which typically flow only during the wet season and provide valuable winter habitat lacking in most California stream systems. (AR 8547, 8564-65.) Such intermittent streams also create residual pools that can sustain salmonids through the dry summer months. (*Id*.) Even ephemeral-type intermittent streams, which flow only occasionally during and after strong rain events, sustain watershed health

by containing floods, maintaining water levels, trapping excess sediment, and preserving water quality. (*See* AR 8465; AR 8423-28.) Rare salmonids also benefit from the San Geronimo Valley's dense and varied riparian vegetation, including abundant alder and willow trees. (AR 15747.)

Even the Lagunitas watershed, however, has not avoided significant population declines. Despite ongoing restoration efforts by entities like SPAWN, the 2007-2008 coho run in the Lagunitas watershed was the "smallest run observed since annual surveys began," with a 70 percent drop in the number of nests compared to the parent generation – the smallest, that is, until 2008-2009. (*Recovery Plan*, Vol. I, at 40.) "Remarkably, as bad as the 2007/2008 spawning run was the 2008-2009 spawning run was worse, with only 40 fish returning from the ocean." (*Id.*) To put these numbers into context, the Service has set the floor at 1,300 spawning adults in the Lagunitas watershed for downlisting the species from endangered to threatened, and at 2,600 spawning adults for delisting the species entirely. (*Id.*, Vol. I, at 260 .) While the Service hopes this watershed will ultimately provide conditions for coho recovery, the current picture remains grim:



(*Recovery Plan*, Vol II, at 387.)

Urbanization and dam construction along streams within San Geronimo Valley have already destroyed or degraded half of the salmonid habitat needed to provide the diverse habitat conditions that sustain salmonids. (AA 281-85 (explaining basis for successive moratoria from 2008 until 2010 on building permits for streamside parcels in San Geronimo Watershed pending $300,000 salmonid study); AR 15750-51 (Lagunitas Creek and its tributary system once "provided spawning and nesting habitat for a productive salmon and steelhead population" that has since "suffered a substantial decline primarily due to siltation of gravel beds and pollution" and the " loss of riparian vegetation" and shade cover has caused warmer water temperature, "detrimental to the young salmon").)

As the record reflects, streamside development can harm salmonids in a variety of ways, creating a "cascade of changes in important geomorphic processes, habitat characteristics, species abundance, and population dynamics." (AR 8514.) Construction and grading activities

cause bank erosion and stream channelization, leading to higher levels of fine sediment and faster water flows. (AR 15750-51.) Impervious surfaces such as roads and rooftops intensify peak water flows and reduce groundwater absorption, degrading spawning habitat by eroding streambeds to leave "few pools or riffles" and filling the stream with "chronic high sediment loads" that smother nests and eggs. (AR 12490-91.)

Exacerbating these effects, developers often remove native vegetation to increase stream access and make room for lawns and ornamental plants, depriving stream ecosystems of vital nutrient inputs. (AR 12490.) By reducing overhead shade, native vegetation removal can also "increase water temperatures beyond the range tolerable to salmon and steelhead." (AR 18145.) Furthermore, the removal of woody vegetation along stream banks means less large woody debris in streams to provide refuge for coho and steelhead. (AR 18131-32.) Water pollution (AR 12486), barriers to migration (AR 12483), and insufficient water flow in certain streams (AR 18220) cumulatively add to these direct development impacts.

II. The Countywide Plan

Marin County has adopted four Countywide Plans since 1973. (AR 7516.) At least as far back as the 1994 plan, the County recognized the importance of local streams and creeks as habitat for coho and steelhead:

> Riparian systems, streams, and their riparian and woodland habitat are irreplaceable and should be officially recognized and protected as essential environmental resources, because of their values for erosion control, water quality, fish and wildlife, aesthetics, recreation, and the health of human communities.

(*The Marin Countywide Plan*, Jan. 18, 1994 ("1994 Plan"), at EQ-26 (Policy EQ 2.1.)[4] To protect riparian areas, the 1994 Plan established the concept of Stream Conservation Areas (or "SCAs"). In the Coastal and Inland Rural Corridors of the Lagunitas watershed, these SCAs cover the watercourse itself between the tops of the banks, as well as the strip of land extending away from the banktop to a width of 100 feet on each side of the stream. (*Id.* at EQ-26 to EQ-27, Policy EQ 2.3.) The 1994 Plan established numerous policies to protect Stream Conservation Areas. (*See id.* at EQ-30 to EQ-34.) Policy EQ-2.13, in particular, recognized the critical importance of Stream Conservation Areas to wildlife habitat: "SCAs are the most important land areas for wildlife, possessing greater numbers and variety than any other area. . . . Fishery resources are directly dependent upon the protection of SCAs to provide quality habitat. It is important that the wildlife habitat areas in streamside communities be permanently

[4] Because this relevant public document was not included in the Administrative Record below, SPAWN requested that the trial court take judicial notice of it. The full document is available on Marin's public website at http://www.co.marin.ca.us/depts/cd/main/fm/94CWP/94CW_01_Intro_v1.pdf

maintained and enhanced. Human use of these areas should be restricted as necessary to protect these communities." (*Id.* at EQ-31.)

To effectuate these objectives, the 1994 Plan required the County to implement Stream Conservation Area policies "through its established permit review processes and/or through adoption of specific new ordinances." (*Id.* at EQ-27.) Under the 1994 Plan, development was allowed in the Stream Conservation Area *only* where it could be "conclusively demonstrated" that either (1) the parcel to be developed fell entirely within the SCA or (2) development on any other portion of the parcel outside the SCA would have greater impacts on water quality. (*Id.* at EQ-27, EQ-30.) To satisfy this test, applicants proposing development within the Stream Conservation Area were required "to submit adequate information to determine whether the Stream Conservation Area policies are being met," and the plan provided that "[p]roposals which do not conform to Stream Conservation policies, and which cannot be modified or mitigated so they do conform, *shall be denied*." (*Id.* at EQ-27 to EQ-28 (emphasis added).)

The County adopted the 2007 Marin Countywide Plan ("Plan") in November 2007 to replace the 1994 Plan. It is intended as a "comprehensive long-range general plan for the physical development" of the County (AR 7514) and includes regulatory protections for "endangered" and "threatened" species. (AR 7545.) Across

unincorporated Marin County, including San Geronimo Valley, the Plan envisions almost 20 percent growth in housing units by 2030, accompanied by a nearly 40 percent increase in developed nonresidential floor area. (AR 1052-53.)

The Plan acknowledges problems. For example, "[r]egulatory standards are generally not available to define appropriate development setbacks necessary to protect sensitive resources." (AR 7549.) And urban growth pursuant to its policies will affect riparian habitat crucial to listed salmonids: "Intensive development and inadequate buffers threaten streams, shorelines, [and] wetlands." (AR 7549.) The Plan attempts to address these effects through "goals" that express relevant community values, "policies" intended to guide action by decisionmaking bodies, and "programs" designed to implement these goals and policies. (AR 7530.) The Plan relies on *future* project-specific "site assessments," however, to "confirm whether any sensitive resources could be affected, and to identify measures necessary to protect those resources and mitigate potential impacts." (AR 7545-46.) And setback criteria for protecting sensitive streams are to be implemented through "discretionary permit review processes," rather than firm and enforceable standards. (AR 7567.)

More specifically, the Plan subtly but importantly alters the Stream Conservation Area policies established in 1994. Although development with the Stream Conservation Areas of the San Geronimo Valley still must

be set back "the greater of either (a) 50 feet landward from the outer edge of woody riparian vegetation associated with the stream or (b) 100 feet landward from the top of bank" (AR 7567), the Plan includes no provisions for protecting the herbaceous and shrubby riparian vegetation that "provides essential functions of the riparian zone including soil stability, pollutant removal, and food control." (AR 1459.) Scientists recognize that riparian vegetation buffer zones help preserve riparian habitat benefits like regulating water temperatures, stabilizing stream banks, filtering runoff, and providing dissolved oxygen and food sources. (AR 16156.) They not only maintain the ecological functionality of stream areas, but also "protect private property from flooding and erosion." (*Id.*)

Yet the new Plan allows significant exceptions to its setback policy. For example, it exempts parcels where development outside the Stream Conservation Area is "infeasible" – a loophole that did not exist in the previous plan. (AR 7565.) This discretionary feasibility determination is to be made by officials undertaking individual site assessments as part of future permitting processes. (AR 7567; AR 7574.) But the Plan does not indicate how County officials would define or make findings under this infeasibility standard. Moreover, ephemeral streams, which flow only after strong rain events, are protected only if they "(a) support[] riparian vegetation for a length of 100 feet or more, and/or (b) support[] special-status species and/or a sensitive natural community type." (AR 7566.) If

an ephemeral stream does not meet this definition, the Plan provides only that a minimum 20-foot setback "should be required." (AR 7566.)

III. The Environmental Impact Review

Because general plans are projects subject to the California Environmental Quality Act, the County was required to prepare an Environmental Impact Report addressing the Plan's potentially significant environmental impacts. (Cal. Pub. Res. Code § 21100; CEQA Guidelines, Cal. Code Regs., tit. 14 § 15378(a)(1) (hereinafter "CEQA Guidelines").) An EIR is "an informational document" 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." (Cal. 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 University of California* (1988) 47 Cal.3d 378, 392.)

Agencies preparing an EIR are directed "first to identify the environmental effects of projects, and then to mitigate those adverse effects." (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.) The EIR must include an analysis of "cumulative impacts" that may result from "the combination of the project evaluated in the EIR together

with other projects causing related impacts." (CEQA Guidelines § 15130.) This evaluation must consider the "change in the environment" that results from the combination of projects which while individually minor, may cause collectively significant impacts over time. (CEQA Guidelines § 15355.)

Here, the County has elected to analyze the cumulative impacts of buildout under the Plan using a program EIR (AR 221; AR 1051), a tool to analyze "a series of actions that can be characterized as one large project" and are related by geography, logic, or a regulatory framework. (CEQA Guidelines § 15168(a).) A program EIR makes possible a "more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action," taking into consideration "cumulative impacts that might be slighted in a case-by-case analysis" and "program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (*Id.* § 15168(b).)

This program EIR's analysis is considered the first tier of environmental review with later project-specific EIRs incorporating by reference the program EIR's analysis. (AR 221; CEQA Guidelines §§ 15152, 15385.) If a cumulative impact is adequately addressed in a first-tier general plan EIR, the EIR for a subsequent individual project that is consistent with that general plan "should not further analyze that

cumulative impact." (CEQA Guidelines § 15130(e).) Tiering, however, is "not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause." (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 199 (rejecting deferred impacts analysis to later tiered phases of site-specific environmental review).) Similarly, classifying an EIR as programmatic "does not by itself decrease the level of analysis otherwise required in the EIR." (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 533.) Rather, a general plan program EIR "should focus on the secondary effects that can be expected to follow" from its adoption. And a program EIR should deal with the program impacts "as specifically and comprehensively as possible." (CEQA Guidelines § 15168(c)(5).)

In January 2007, the County released a Draft Environmental Impact Report (AR 2801-3671) which sparked significant concerns. For example, a comment letter from the California Regional Water Quality Control Board for the San Francisco Bay Region warned that the draft did not address the cumulative impacts of streamside setback exceptions, decreased ephemeral stream protections, and aggregated development under the Plan. (AR 1456-1460.) A September 2007 consensus letter signed by over 100 scientists confirmed this concern, highlighting habitat loss and degradation risks posed by near-stream development and recommending concrete

measures to protect salmonids. (AR 9121-28.) These concerns were not new to the County. In 2004, the State of California had concluded in its separate coho recovery plan 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 population. (AR 12574.) It also quantified suitable ranges for coho habitat requirements, including riparian cover, large woody debris, and water temperature. (*Id.*) And a 2003 U.C. Berkeley study had previously evaluated development risks in the Stream Conservation Area within San Geronimo Valley, providing numerical analysis of impacts to salmonids from various levels of impervious surface area and fine sedimentation and detailing stream parcel sizes and values. (AR 16109-17.)

Nevertheless, in November 2007, the County certified the Final Environmental Impact Report in substantially the same form as the Draft. (AR 210-1085.) The EIR analyzes development impacts to sensitive wildlife such as coho and steelhead principally through projections of new housing units and increases in nonresidential floor area (or "buildout") in large planning areas. (*See* AR 316-17, 344-349.) Thus, the EIR estimates buildout on parcels defined as overlapping with special-status species (AR 632), sensitive natural communities (AR 637-38), wetlands (AR 642), and wildlife habitat, primarily focused on stream areas (AR 644). For example, the EIR projects that of the 5,391 projected countywide housing units,

approximately 16.9 percent (or 913 units) will be developed on parcels in the sensitive streamside area. (AR 638.)

The EIR discusses cumulative impacts to biological resources, recognizing that development under the Plan will unavoidably decrease the amount and connectivity of existing habitat. (AR 647.) In particular, it "would result in a substantial reduction in existing habitat, would contribute to further fragmentation of remaining natural areas, and could substantially interfere with the movement of native fish and wildlife species." (AR 643.) This discussion makes clear that these effects on "wildlife habitat and movement opportunities" will cause "impacts to special-status species," *e.g.* coho and steelhead, as well as "sensitive natural communities, and streams." (*Id.*) Despite a range of supposedly compensatory policies and programs contained in the Plan and an additional mitigation measure proposed in the EIR, the EIR finds that these habitat impacts would be "cumulatively significant" and "unavoidable." (AR 646-47.)

The EIR also concludes that without further mitigation, land uses allowed under the Plan will significantly impact sensitive natural communities, including the riparian habitat that Stream Conservation Areas are designed to protect. (AR 636-41.) Specifically, insufficient setbacks and other human activity could "contribute to incremental loss and

incursion into the natural community types, again compromising their habitat value and eventually preventing natural regeneration." (AR 637.)[5]

Finally, and not surprisingly, the EIR concludes that development under the Plan, as originally proposed, will have cumulatively significant impacts on "special status species," a category that includes coho salmon and steelhead trout. (AR 636.) The EIR projects that approximately 300 new housing units and 33,000 square feet of nonresidential floor area would occur on parcels with special-status species. (AR 632.) This projection, however, is based on pre-existing mapping data which generally exists "either because of chance encounters or as part of past detailed surveys" and "does not represent all populations of special-status species in the county." (AR 635-36.) Thus, subsequent "parcel-by-parcel" assessments are necessary to accurately locate sensitive resources and assess the Plan's potential impacts. (AR 631.) Yet many land uses, including "construction of a single family home, garage and other associated buildings, or grading for a new driveway," would "require only a ministerial permit application and may receive little or no review" by officials. (AR 633.) As a result, even with implementation of the Plan's policies and programs, impacts to

[5] The EIR finds that development under the Plan will result in significant impacts to sensitive natural communities, but indicates that obtaining funding for Habitat Monitoring Programs – developing cumulative thresholds for habitat loss based on monitoring – would reduce this impact to less-than-significant (AR 641.) Nevertheless, the later-published CEQA Findings call this measure "infeasible" and conclude that it will remain a "significant and unavoidable" impact. (AR 53.)

special-status species will be significant, including "direct loss of individuals or localized populations, elimination or degradation of essential habitat, and isolation of disjunct occurrences or subpopulations due to habitat fragmentation." (AR 631.)

Accordingly, "[a]dequate mitigation measures would be required to ensure the protection of any sensitive resources and achieving 'no net loss' of sensitive habitat acreage, values and functions." (AR 629.) To this end, the EIR contemplates an additional mitigation policy not specified in the Plan itself: "Continue to actively participate in the FishNet 4C program and work cooperatively with participating agencies to implement recommendations to improve and restore aquatic habitat for listed anadromous fish species and other fishery resources." (AR 636.) FishNet 4C is a multi-county program founded to "facilitate" local actions in response to the Endangered Species Act listing of the coho salmon and steelhead trout in the 1990s. (AR 11824.) The EIR concludes that, with the addition of this single policy, the impacts on special status species will be reduced to less-than-significant. (AR 636.)

IV. Post-EIR Actions

Following certification of this flawed EIR in November 2007, the County attempted to avoid litigation by undertaking additional actions and studies. First, the County imposed a two-year development moratorium pending a $300,000 study of the San Geronimo watershed intended to fill in

the informational gaps in the Plan's analysis. (AA 86.) In adopting the temporary development moratorium, the County based its action on several findings:

> (1) The greater Lagunitas watershed has lost 49% of its salmonid habitat due to urbanization and dam construction;
>
> (2) The 2007-08 spawning salmon numbers are at their lowest in twelve years of measurement;
>
> (3) With streamside development comes increased impervious areas, decreased infiltration of stormwater, and decreased groundwater levels;
>
> (4) The loss of riparian vegetation can lead to increased sedimentation, increased stream temperatures, and loss of woody debris for in-stream habitat;
>
> (5) Studies are urgent and necessary to determine development restrictions;
>
> (6) Urgent action is required in view of the precipitous drop in the level of spawning populations; and
>
> (7) A development moratorium is imperative to protect riparian buffer zones.

(AA 283.)

The supplemental study to be prepared during the moratorium proposed to do the very analysis that should have been completed in the EIR. The County's January 23, 2008, Request for Proposals outlined the study objectives as follows: (1) determine the existing conditions of the San Geronimo watershed; (2) identify watershed health metrics; (3) develop a watershed enhancement plan; (4) conduct public outreach; and (5) prepare

CEQA documentation for the enhancement plan in the form of an Initial Study. (AA 290-96.)

In June 2008, the County entered into a contract with Stillwater Sciences to prepare a "Salmon Enhancement Plan." (AA 265.) In October 2008, the County commissioned Nichols Berman to prepare an Updated Cumulative Impact Evaluation for the Salmon Enhancement Plan. (AA 413.) As of June 2011, that cumulative impact evaluation, according to the County, was "substantially completed," and the only remaining scope of work was preparation of the necessary CEQA documentation to approve either an addendum or supplement to the EIR for the 2007 Countywide Plan. (AA 414.) But Thomas Lai, the Assistant Director of the Community Development Agency, testified during the trial court proceedings in February 2012 that the County was still "working on" the Updated Cumulative Impact Evaluation that began in October 2008. (AA 103.) As of today, the County has never released an updated cumulative impact analysis to the public or sought CEQA review for it.

Meanwhile, the outside contractors completed the Salmon Enhancement Plan in February 2010. (AA 110.) That Plan consists of two documents: an "Existing Conditions" report and a "Guidance Document." (AA 110, 112.) The Existing Conditions report presents a detailed discussion of habitat issues in the watershed, ranging from a deficiency of instream large woody debris to excess fine sediment and decreased riparian

canopy and bank cover. (AA 136-38.) It also identifies impervious developed surfaces in the watershed as a significant problem which already causes significant impacts on salmonid habitat and concludes that impervious surfaces are more common in the Stream Conservation Area than elsewhere in the San Geronimo Valley. (AA 138, 202.)

The County formally adopted the Guidance Document portion of the Salmon Enhancement Plan in February 2010. The Guidance Document concludes that action is necessary to correct adverse habitat conditions in the San Geronimo watershed, but leaves the formulation of an action plan, and the environmental compliance documents, to the next stage of the County's process, a process which has yet to occur. (AA 112-16.) The Guidance Document does, however, reaffirm important concerns about implementation of the Countywide Plan. For example, a sampling of parcels with below-average development revealed that impervious surface areas are high enough even on these less developed properties (above 10% imperviousness) to harm stream habitat quality. (AA 130.) The "average riparian canopy width was 44 feet, and, in most cases, it ended abruptly with not even isolated riparian trees in the remaining width of the [Stream Conservation Area], well below the proposed target of an 80-150 [feet] wide woody riparian zone with 75% cover." (*Id.*) The Guidance Document also recommends several policies to further protect salmonid habitat, including no net increase in effective impervious area, no net

increase in runoff in new or re-development, and no net loss in riparian vegetation. (AA 146, 149, 150, 167.) But it does not adopt any enforceable measures to implement these broad "recommendations," many of which depend on "voluntary implementation by homeowners." (AA 113.)

Together, the Existing Conditions report and the Guidance Document highlight the ongoing impacts of current and future streamside development and identify the gaps in the both 2007 Countywide Plan and accompanying EIR. But neither document is a regulatory tool or a CEQA-compliant review, and neither provides for implementation of concrete measures or actions. (AA 112 ("This Plan is not a regulatory document.").)

Relatedly, the County has yet to complete one particular action – the timely adoption of a more specific and protective stream conservation ordinance – that the EIR relied on to mitigate significant impacts. (AR 640-41 (sensitive natural communities); AR 643 (wetlands and other waters); AR 7573.) A draft ordinance was finally released in February 2013 and discussed at a public hearing in April 2013.[6] At this time, the ordinance is still undergoing revisions.

[6] Information on the ordinance is available at www.co.marin.ca.us/depts/CD/main/comdev/advance/SCA.cfm.

STANDARD OF REVIEW

On CEQA appeals, the appellate court reviews the agency action independently of and under the same standards as the trial court. (*See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) CEQA is a "comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Comm'n* (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." (*Id.*) For this reason, courts must interpret CEQA "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Id.* (quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259).)

The EIR process forms "the heart of CEQA." (*Laurel Heights*, 47 Cal.3d at 392.) In evaluating an EIR for CEQA compliance, the court reviews the agency's actions for prejudicial abuse of discretion. (Cal. Pub. Res. Code § 21168.5.) An agency abuses its discretion in certifying an EIR where (1) "the agency has not proceeded in a manner required by law" or (2) the decision "is not supported by substantial evidence." (*Id.* § 21168.5.) These two distinct grounds for finding an abuse of discretion have significantly different standards for determining error. (*See Vineyard Area Citizens*, 40 Cal.4th at 435 (noting that "a reviewing court must adjust its

scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts").) In evaluating claims that an agency failed to proceed in the manner required by CEQA, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforcing all legislatively mandated CEQA requirements.'" (*Vineyard Area Citizens*, 40 Cal.4th at 435 (quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564).) In contrast, to determine whether an EIR's conclusions are supported by substantial evidence, a court reviews the record to 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.)

In this case, the County failed to proceed in the manner required by law by certifying an EIR that fails as an informational document, thereby making the substantial evidence standard irrelevant. (*See Ass'n of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392 ("The existence of substantial evidence supporting the agency's ultimate decision . . . is not relevant when one is assessing a violation of the information disclosure provisions of CEQA."); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 ("[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if

based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.").) Even in situations where the Court might apply the substantial evidence test, such as in reviewing whether the EIR's finding that unenforceable mitigation of otherwise significant impacts is supported by the record, the document fails to pass muster. (*See Laurel Heights*, 47 Cal.3d at 392 ("Argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence.").)

ARGUMENT

The EIR fails to comply with CEQA's requirements in two key respects. First, while the EIR recognizes the precarious status of salmonids in the Lagunitas watershed, it does not *analyze or disclose* the cumulative impacts of development permitted by the Plan on riparian habitat or on coho and steelhead populations. Instead of evaluating these impacts, through either a quantitative or narrative analysis, the EIR relies on loose, development-friendly policies and future project-specific review.

Second and equally troubling, to reach the conclusion that otherwise significant adverse impacts on coho and steelhead can be reduced to less-than-significant levels, the EIR relies on a voluntary, unenforceable implementation program that provides no specific mitigation measures. Far from alerting the decionmakers "to environmental changes before they have

reached ecological points of no return," the EIR obscures the environmental risks associated with development under the Countywide Plan, leaving County officials and residents alike without the information necessary to determine, until it is too late, whether streamside development is creating irreversible damage to irreplaceable natural resources. (*Laurel Heights*, 47 Cal.3d at 392.)

I. The EIR Fails to Analyze the Plan's Cumulative Impacts on Coho Salmon and Steelhead Trout.

Under the Countywide Plan, there simply is no dispute that San Geronimo Valley will suffer further loss and degradation of increasingly precious salmonid stream habitat due to new development permitted in or near riparian areas. Under such circumstances, CEQA requires that the EIR analyze cumulative effects from the project or program, recognizing that "environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720 (citation omitted).) In particular, the EIR must evaluate and disclose the "environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it

will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights*, 47 Cal.3d at 396.)

Although the EIR here acknowledges that loss of existing salmonid stream habitat is unavoidable, it does not assess how much habitat will be adversely affected by implementation of the County's development policies, or where those impacts will likely occur. Instead of analysis, the County assumes that its discretionary setback and "no net loss" policies will assure that no significant harm comes to native fish or their natal streams from future development. But nothing in the Countywide Plan or the EIR's comforting mitigation language provides any such guarantee. To the contrary, given that the EIR defers all analysis and mitigation to future individual site-by-site permitting determinations, under a County policy that allows open-ended "infeasibility" and other discretionary exemptions to the setback requirements, additional salmonid habitat degradation is virtually certain to occur. That impact, however, is never estimated or evaluated anywhere in the EIR. Thus, the document does not fulfill its most fundamental purpose – "'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.'" (*Laural Heights*, 47 Cal.3d at 392 (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86).)

A. The County's Buildout Projections Do Not Constitute Analysis of Habitat Loss Under the Plan.

Although the County sprinkles the EIR with a number of (confusing and sometimes contradictory) buildout projections, it does not take the next logical and necessary step of analyzing the actual cumulative impacts from that projected development. Perhaps most relevant here are the projected housing units on parcels in the Streamside Conservation Area. The EIR anticipates approximately 913 new housing units will be built within the SCA; those 913 units represent 16.9 percent of all new housing units across the County. And development within Stream Conservation Areas will, by definition, encroach on riparian habitat. (*See* AR 1403 ("Areas qualifying as [Stream Conservation Areas] . . . are generally considered to support riparian habitat . . . .").) But the EIR does not discuss how much of this buildout will occur within the Lagunitas Creek watershed proper or San Geronimo Valley more specifically, despite statements elsewhere in the EIR highlighting the importance of the salmonid populations located there. (*See, e.g.*, AR 299 ("Lagunitas Creek supports the most important remnant population of federally threatened wild Coho salmon in central California").) At best, the EIR buildout projections provide some rough idea of how many houses might be built on streamside parcels, somewhere in the County.

But even more important, the buildout projections alone provide no clue as to how much salmonid habitat could actually be destroyed or degraded by new impervious surfaces (driveways, roofs, patios, etc.) or the expansion of existing structures. While conceding that sensitive habitat will be lost and fragmented as a result of this buildout (AR 644),[7] the EIR never attempts to identify how much of the San Geronimo Valley's spawning and nursing areas are at risk under the new Plan. The EIR fails, for instance, to determine what the projected buildout means in turns of new impervious surface, riparian vegetation loss, or additional silt runoff.

Moreover, the EIR dumps these buildout projections onto an unknown landscape, giving these numbers little meaning. A general indication of salmon on a map provides no context to evaluate the impacts of future development on the already-imperiled coho salmon and steelhead. (AR 609.) The EIR does not quantify existing populations of coho and steelhead in San Geronimo Valley, the Lagunitas Creek watershed, or the

[7] Not even the County disputes the impacts of developing impermeable surfaces, which increase sediment runoff to streams. The science clearly shows that good salmonid habitat contains plenty of small, clean gravels, which females use to build nests for eggs and newly hatched fish. (AR 8518 (coho), 8552 (steelhead).) The best spawning sites typically occur at the outlet of a pool or the head of a "riffle," where water flow is rapid enough to supply needed oxygen to eggs, but not so fast as to disturb gravel cover or the eggs themselves. (AR 12465-66.) Excess fine sediment, however, can block oxygen and waste disposal channels needed by eggs and juvenile fish. (AR 11863-64.) Eggs also stand better chances of survival in streams where riparian vegetation and large woody debris slow rushing water and prevent erosion. (AR 12465-66.)

County of Marin[8] or estimate the amount of remaining salmonid habitat. Nor does the EIR consider the role that already-depleted habitat conditions will play, (*e.g.*, no analysis or quantification of existing impervious surface area, sediment production, or instream shelter.) Especially shocking, the EIR even fails to mention that the federal listing of coho salmon was uplisted from "threatened" to "endangered" status in 2005. (*See* AR 609 (incorrectly listing coho salmon as threatened).)

An EIR "must include a description of the physical environmental conditions in the vicinity of the project, as they exist'" at the time of the analysis. (*Communities for a Better Environment v. South Coast Air Mgmt. Dist.* (2010) 48 Cal.4th 310, 320.) This description "is critical to the assessment of environmental impacts" and ensures that the potential effects are "considered in the full environmental context." (CEQA Guidelines § 15125(c).) Because "[k]nowledge of the regional setting is critical to the assessment of environmental impacts," the CEQA Guidelines direct that "special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project." (*Id.*)

[8] The closest the EIR comes to quantifying or analyzing coho and steelhead numbers in Marin County is a single sentence reference to a January 2003 report without any analysis in the EIR. (AR 226; AR 17869-18101.) This stale report, six years old at the time of the decision, was not updated during preparation of the Plan or EIR, and it cites coho and steelhead statistics from 1995 to 2001 when the number of coho nests in the Lagunitas Creek watershed (approximately half of the number of spawning adults) fluctuated between 86 and 254. (AR 17899; AR 17902.)

Without a proper baseline, the EIR cannot assess whether additional habitat loss or quality impairments, perhaps small in isolation, will tip Marin County's listed salmonids to "ecological points of no return." (*Laurel Heights*, 47 Cal.3d at 392.) Under CEQA, the "greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120). The EIR should address, and ideally quantify, the existing salmon problem – the dangerously low numbers of adult salmon returning to spawn – so that it can develop appropriate mitigation measures and policies going forward.

In short, while the EIR contains lots of numbers, it ultimately fails to include enough discussion, detail or analysis for County decisiomakers or the concerned pubic to meaningfully understand the amount or location of expected salmonid stream habitat loss, let alone its likely effects on species already spiraling downward in an extinction vortex.

B. The EIR Does Not Analyze the Irreplaceable Habitat Loss that Will Occur under the Plan's Development Policies.

Ultimately, the EIR eschews analysis and relies instead on general policies – the SCA setback policy and the "no net loss" policy – to mitigate impacts on stream and streamside habitat, but these policies allow for continued development in sensitive riparian zones. The setback policy

includes a blanket exemption from all Stream Conservation Area criteria and standards – including setback requirements – if developing a parcel entirely outside the Stream Conservation Area is "infeasible." Infeasibility is never defined in the Plan or EIR, but it will be implemented through discretionary site-by-site reviews (AR 7565-67), opening the door to considerable development within Stream Conservation Areas. This is particularly true in the San Geronimo Valley, where many streamside parcels are largely or entirely in the SCA. Yet the EIR makes no mention of how the setback exemption affects projected buildout, sensitive habitat, or salmonid populations, undermining the EIR's informational purpose. (*See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 660, 667 (invalidating reliance on empty promise of no increase in water consumption in the face of increased mining production; a "mitigation measure cannot be used as a device to avoid disclosing project impacts."

The setback policy also allows development near ephemeral streams unless they support riparian vegetation for 100 feet or more or hold sensitive species or communities. (AR 7566; AR 1464.) But those ephemeral streams that do not contain salmonids may still play crucial habitat-sustaining roles by providing food, water, and shelter to downstream fish as well as filtering and stabilizing larger streams' water supplies. Despite the Plan's recognition that ephemeral channels are

"important for maintaining healthy watersheds" and comments from the Regional Water Quality Control Board that "loss of protection for ephemeral streams related to their function in flood protection is significant in this case" (AR 1457), the EIR omits any discussion of impacts from exempting ephemeral streams from the setback policies

The other policy relied on by the County is equally, if not more, mercurial. The Plan and EIR both reference a policy of "achieving 'no net loss' of sensitive habitat acreage, values, and function" as a way to ensure the protection of habitat (AR 7556; AR 629), and in the proceedings below, the County relied heavily on this policy. While perhaps well-meaning, such a policy, standing alone without analysis or implementation measures, is purely illusory and does not satisfy the mitigation requirements of CEQA. In *San Joaquin Raptor Rescue Center,* for instance, the County failed to analyze the environmental impacts of increased groundwater pumping, relying instead on the promise of "maintaining the current Project consumptive use." (149 Cal.App.4th at 663-64.) The court rejected as misplaced the County's approach because an EIR may not "simply assume, without substantial evidence or reasoned analysis," that increased mining production would not increase water consumption. (*Id.* at 664.) Similarly here, the County's assumption that its "no net loss" policy will magically avoid future impacts cannot substitute for the admittedly-challenging work of evaluating impacts; that is, a "mitigation measure cannot be used as a

device to avoid disclosing project impacts." (*San Joaquin,* 149 Cal.App.4th at p. 663; *Vineyard Area Citizens,* 40 Cal.4th at 430-31 ("CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem.")

Simply put, the "no net loss" policy cannot succeed because buildout will inevitably occur the Stream Conservation Area of San Geronimo Valley – the last significant coho salmon habitat in Central California – and habitat lost to this permitted development cannot be replaced merely by planting vegetation elsewhere. (*See* AR 7572 ("Riparian habitats are irreplaceable, vital biological systems.").) Salmonids return to their natal streams through a complex series of events and processes that we do not fully understand; they do not merely pick up and move to a new neighborhood if their natural habitat is destroyed. Thus, when the functionality of habitat is destroyed or degraded, fish movement opportunities are unavoidably affected. (AR 647; AA 160 ("The ability for juvenile [salmonids] to move up and down a creek to seek and find refugia, shelter, and food is critical to their survival.").) In the end, a "no net loss" policy that allows development in one place to be mitigated by constructed habitat elsewhere will not save the coho salmon or steelhead trout.

The EIR catalogues "[p]otential impacts to special-status species," including "direct loss of individuals or localized populations" and "elimination or degradation of essential habitat." (AR 631.) It also warns

of the risk of "local extinction" due to habitat fragmentation, without more discussion. (*Id.*) But the EIR never attempts to analyze the cumulative impacts that may affect habitat quality components such as fine sediment levels, water temperature, and others that lead to further habitat fragmentation and possible extirpation of the species from the County. It thus leaves the reader "without any facts from which to evaluate the pros and cons" of the Plan. (*Vineyard Area Citizens*, 40 Cal.4th at 429 (citation omitted).)

C. Future Parcel-by-Parcel Review Will Not Identify the Cumulative Impacts of Countywide Development.

Equally troubling, to implement these elusive general policies, the EIR relies on future environmental review, evaluation, and mitigation to address any cumulative impacts. (*See, e.g.*, AR 631 ("A detailed, parcel-by-parcel assessment would be necessary in order to accurately locate sensitive resources and assess potential impacts resulting from development consistent with the [Plan].").) But the principal purpose of a program EIR is to consider cumulative impacts "that might be slighted in a case-by-case analysis." (CEQA Guidelines § 15168(b).) Indeed, later EIRs (or Initial Studies) tiered to a program EIR are directed *not* to discuss cumulative impacts already addressed in the previous EIR. (*Id.* § 15130.) Agency review of projects "consistent with" general plan policies must only address significant effects "peculiar to the project or its site." (*Id.* § 15183(a).)

That result is particularly likely where, as here, the programmatic EIR makes an erroneous finding that cumulative impacts will be mitigated to a level of insignificance by a paper policy like the FishNet 4C program (*See* AR 87-88.)

The result of the County's approach in the Plan EIR is that the cumulative impact of habitat degradation across multiple parcels, or across the greater San Geronimo Valley, will never be considered through subsequent parcel-by-parcel review; individual future projects will be assessed in isolation. This approach is "at odds with the concept of cumulative effect, which assesses cumulative damage as a whole greater than the sum of its parts." (*Environmental Protection Information Center v. Johnston* (1985) 170 Cal.App.3d 605, 624-25.)[9] Indeed, the County's approach here contravenes CEQA by improperly "chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." (*Lincoln Place Tenants Ass'n v. City of Los Angeles* ("*Lincoln Place I*") (2005) 130 Cal.App.4th 1491, 1507; *Vineyard Area Citizens*, 40

[9] The EIR does not analyze the cumulative impacts of many other streamside development activities – ranging from agricultural uses to the construction of single-family homes – that will be approved by "ministerial permit application and may receive little or no review by local, state, or federal authorities." (AR 633.) The Plan's streamside regulations require environmental review only when "incursion into [a Stream Conservation Area] is proposed and a discretionary permit is required." (AR 7568.)

Cal.4th at 429-30 (rejecting EIR that failed to analyze the impact of unknown water sources by relying on later-tiered reviews).)

Moreover, without a meaningful cumulative impacts analysis, the County cannot know when development reaches a "threshold of significance" that tips these species into local (and perhaps population-level) extinction. The Countywide Plan specifically recognizes the importance of establishing such thresholds, particularly on the question of habitat loss. (*See* AR 53 (Mitigation Measure BIO-1.b calling for a program to monitor "trends in habitat loss, protection, and restoration and to establish cumulative thresholds for habitat loss for particularly vulnerable natural communities and use as a basis for modifying standards for mitigation".) Yet nothing in the EIR address or analyzes the issue of significances thresholds for salmonid stream habitat degradation.

The proper time to adopt significance thresholds and complete a cumulative impacts analysis is not at the point where a project applicant wishes to build a structure, but at the planning stage, when the regulatory scheme that will govern that development is being established. The County's unwillingness to analyze such foreseeable future impacts constitutes a failure to proceed according to law. Courts have invalidated program EIRs that delayed analysis of foreseeable impacts to later tiered project review. (*See Stanislaus National Heritage Project v. County of Stanislaus*, 48 Cal.App.4th at 199 (finding that deferral of water supply

analysis to later phases of a multi-phase project violates CEQA and that tiering is "not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause"); *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 194 (requiring environmental review, at the general plan amendment stage, to determine whether the uses permitted by the amendment should be allowed, even though the later-issued permits would be subject to project-level environmental review).)

By disclaiming responsibility for analyzing the Plan's effects on listed salmonids, the County violated its CEQA duty to "use its best efforts to find out and disclose all it reasonably can." (*Stanislaus*, 48 Cal.App.4th at 206.) Cumulative impact analysis must be "substantively meaningful" and "understat[ing] the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective." (*Joy Road Area Forest & Watershed Ass'n v. California Dep't of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656 at p. 676.) While buildout projections are a start on understanding cumulative impacts, they are not the end point of the analysis. What matters in the end, especially to the salmon and steelhead, is the amount, location, and quality of suitable native habitat that will remain available for spawning adults and new juvenile salmonids preparing to return to the sea. In the absence of that information, the EIR fails as an informational document.

II. The EIR Improperly Relies on Continued Participation in FishNet 4C, Rather than Concrete Action, to Mitigate the Impacts of Development on Coho Salmon and Steelhead.

Despite the lack of cumulative impacts analysis for salmonids, the EIR nevertheless ultimately concludes that future buildout will not significantly impact these special-status species. (AR 632.) This determination, which is seemingly at odds with its finding of significant impacts on special habitat communities – where salmonids spawn and rear – is based on the County's continued participation in the FishNet 4C program. Because that program is nothing more than the regional body which makes policy recommendation, it cannot, as a matter of CEQA law, provide the kind of specific, concrete, and enforceable mitigation measure necessary to reach a finding of insignificance.

A. FishNet 4C Cannot Be Relied On as a Mitigation Measure Because It Requires No County Action.

Even with the above-described policies in place, the EIR finds future significant impacts to coho salmon and steelhead can only be avoided if the County adopts a new mitigation policy to continue participation in the FishNet 4C program. (AR 636.) According to the EIR, the addition of this single new policy somehow magically reduces the otherwise significant impact of development to less-than-significant. The mitigation measure states in its entirety:

> Continue to actively participate in the FishNet 4C program and work cooperatively with participating agencies to

> implement recommendations to improve and restore aquatic habitat for listed anadromous fish species and other fishery resources.

(*Id*.) The County reports that it is, and has been, participating in the FishNet 4C program during the last decade's precipitous decline in fish. Of course, the County's participation could be as basic as remaining on the membership roster and attending monthly meetings. But in any event, the EIR provides no information as to how or why its continuing participation will avoid significant habitat impacts, especially given that its past participation has not done so.

Mitigation measures provide the "core" of an EIR and must be formulated – and fully enforceable – if they will be relied upon to "minimize significant adverse impacts." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162; CEQA Guidelines § 15126.4.) The EIR here notes that the FishNet 4C program has, in the past, produced several recommendations. (AR 617.) Yet, the EIR does not commit the County to a single recommended action item or provide any details as to what the County's participate means. In fact, the FishNet 4C mitigation "policy" set forth in the EIR does not direct the County to *do* anything at all to avoid impacts on salmon. The County could, for instance, continue to debate how it will

implement the two prior FishNet 4C reports and call that satisfactory participation. [10]

To satisfy CEQA, an EIR must "specify performance standards" that will ensure that impact mitigation is feasible and will be accomplished. CEQA Guidelines § 15126.4(a)(1)(B). Mitigation measures need "specific and mandatory performance standards to ensure that the measures, as implemented, will be effective." (*See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94 (explaining that mitigation measures need "specific and mandatory performance standards to ensure that the measure, as implemented, will be effective").) If proposed mitigation measures "are loose or open-ended, such that they afford . . . a means of avoiding mitigation during project implementation, it would be unreasonable to conclude that implementing the measures will reduce impacts to less than significant levels." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 945 (upholding mitigation that required additional monitoring if performance criteria were not met; *see also California Native Plant Soc. v.*

[10] According to the record, FishNet 4C has produced two reports since its inception: (1) A 2001 report assessing effects of land use policies on salmonids, otherwise known as an "environmental report card" (AR 13586-829) and (2) a 2004 report on guidelines for local road maintenance. (AR 11815-12278.) While report cards and best practice guides are important, if these past efforts are any indication of the effectiveness of the County's proposed mitigation policy to continue participating as a way to avoid or reduce significant impacts, the FishNet 4C measure surely fails as CEQA mitigation.

City of Rancho Cordova (2009) 172 Cal.App.4th 603, 610-11 (approving habitat mitigation measures that included compensation ratios for habitat loss and "[p]erformance standards for success that will illustrate that the compensation ratios are met").)

Unlike *Rialto* and *California Native Plant*, the FishNet 4C mitigation policy measure does not contain any concrete action, much less articulate a performance standard. There is no evidence in the record about what future actions FishNet 4C plans to take, what specific impacts it intends to address, what the deliverables are, or when action items, if any, would be adopted by the County. There is nothing like a population or habitat loss threshold against which the mitigation measure can be judged by the public. In fact, continued participation in FishNet 4C is such a broad policy that the County can easily claim to be in compliance by merely attending meetings. Nothing more is required. Because implementation of any particular management measure recommended by FishNet 4C is utterly unenforceable, this mitigation policy measure cannot possibly satisfy CEQA or be used to avoid acknowledged significant adverse impacts. (CEQA Guidelines § 15126.4(a)(D)(2) (mitigation measures must be enforceable through legally-binding instruments).)

CEQA emphasizes upfront mitigation measures because "[a] study conducted after approval of a project will inevitably have a diminished influence on decisionmaking." (*Sundstrom v. County of Mendocino* (1988)

202 Cal.App.3d 296, 307; *see also Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281 (rejecting vague mitigation measures that were "subject to the discretion of the preserve manager" and "not guaranteed to occur at any particular time or in any particular manner"); *San Joaquin Raptor*, 149 Cal. App. 4th at 670 (rejecting a "generalized goal" as substituting for a mitigation measure because it "leaves the reader in the dark about what land management steps will be taken, or what specific criteria or performance standard will be met"); *City of Richmond*, 184 Cal.App.4th at 93 (rejecting a "generalized goal of no net increase in greenhouse gas emissions" because "[t]he only criteria for 'success' . . . is the subjective judgment of the City Council, which presumably will make its decision outside of any public process").)

In the final analysis, the EIR does not contain any verifiable, binding and effect measures to avoid or mitigation significant impacts to special-status salmonids as a result of future habitat loss under the Countywide Plan. The County retains complete discretion in determining how to identify and implement any hypothetical future FishNet 4C actions. The California Regional Water Quality Control Board shared this concern, finding that FishNet 4C would not adequately mitigate the impact to special-status species because it is a "strictly voluntary program and the County is not required to adopt their recommendations." (AR 1459.)

Even as a purely informational tool, the EIR fails to satisfy CEQA. An EIR must include "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights*, 47 Cal.3d at 405.) It must contain "facts and analysis, not just the agency's bare conclusions or opinions." (*Id.* at 404.) An EIR should disclose the County's "thinking process" because "[o]nly by making this disclosure can others, be they courts or constituents, intelligently analyze the logic" of the decision. (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1035.) Failing to abide by the informational requirements of CEQA is an abuse of agency discretion. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 356-7.) Here, at a bare minimum, the EIR must inform the public about what actions will result from the mitigation measure and how those actions ameliorate impacts. The document does neither. Instead, it requires "blind trust by the public" that the County will choose to implement FishNet 4C recommendations that mitigate the cumulative impacts of development on coho salmon and steelhead. (*Laurel Heights*, 47 Cal.3d at 404.) As currently written, therefore, the EIR fails to identify FishNet 4C-related actions the County plans to take, and must be set aside. (*See Vineyard Area Citizens*, 40 Cal.4th at 412, 442-445 (rejecting EIR because it "relied on information not actually incorporated or described and

referenced" in the EIR, requiring a reader "attempting to understand the County's plan . . . to rely on inference and speculation").)

B. The County Has a Mandatory Duty to Adopt a Stream Conservation Ordinance and Should Be Compelled to Do So Through a Writ of Mandate.

The Plan relies on the adoption of an ordinance to "implement the [Stream Conservation Area] standards for parcels traversed by or adjacent to" streams supporting coho and steelhead, (AR 7573), an implementation measure the EIR finds "necessary" to avoid significant impacts to special-status species (AR 640.) The County does not dispute that it has a binding duty under the Plan to adopt the ordinance. (Reporter's Transcript, p. 25, lines 10-11 (conceding that "the general plan mandates for us to adopt a Streamside Conservation Ordinance").). Accordingly, the County's failure to timely satisfy this mandatory duty is actionable under state writ statute. (Cal. Civ. Proc. Code § 1085(a) (writ of mandate may issue "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station).)

Indeed, timely adoption of the ordinance was made binding and mandatory by the EIR's reliance on its adoption as mitigation, creating essentially an "enforceable covenant." (*Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 449 (directing the issuance of a writ of mandate to compel a city to enforce a mitigation measure contained in an EIR).) Mitigation measures must be "fully

enforceable" so that they will "*actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded*." (*Federation of Hillside & Canyon Ass'ns* (2000) 83 Cal.App.4th 1252, 1261 (citations omitted) (emphasis in original).) The Plan evaluated by the EIR listed adoption of the ordinance as a "high-priority" and fully-funded measure to be adopted in the "short term" time frame of one-to-four years. (AR 7585-86.)

Almost six years since the EIR's certification, the County still has not adopted an ordinance, although the County claims one will be adopted this year. Petitioners have not fully briefed this failure to adopt the ordinance because of the existing injunction and the County's public statements that adoption is imminent. Accordingly, Petitioners expressly reserve the right to further brief this claim in its opposition to the cross-appeal/reply brief, if necessary.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court (1) reverse the trial court's judgment denying the writ of mandate, issue a preemptory writ of mandate setting aside the Plan EIR, and remand the matter to the agency for further consideration consistent with the Court's ruling; and (2) declare that the County has a mandatory duty to adopt a Stream Conservation Area ordinance and affirm the injunctive relief imposed by the trial court.

Dated: April 26, 2013 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), I certify that the text of this brief consists of 11,375 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: April 26, 2013 Respectfully submitted,

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APPELLANT'S CITATIONS TO ADMINISTRATIVE RECORD
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