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13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 **BESS BAIR; et al.**)
18)
19 **Plaintiffs,**)
20 **v.**)
21 **STATE OF CALIFORNIA**)
22 **DEPARTMENT OF**)
23 **TRANSPORTATION, CINDY McKIM,**)
24 in her official capacity as Director of the)
25 State of California Department of)
26 Transportation,)
27 **Defendants**)

Case No. 10-CV-04360 (WHA)
PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF
Date: February 23, 2012
Time: 8:00 a.m.
Ctrm: 8
Judge: William H. Alsup

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1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 PLEASE TAKE NOTICE that on February 23, 2012 at 8:00 a.m. or as soon thereafter as
3 the matter may be heard, in Courtroom 8, 19th Floor, 450 Golden Gate Avenue, San Francisco,
4 California, before the Honorable William H. Alsup, Plaintiffs will and hereby move this Court
5 for summary judgment in Plaintiffs' favor on all of the claims asserted by Plaintiffs. This
6 Motion is made pursuant to Federal Rule of Civil Procedure 56 on the grounds that Defendants
7 have violated the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department
8 of Transportation Act ("Section 4(f)"), the Wild and Scenic Rivers Act ("WSRA"), and the
9 Administrative Procedure Act ("APA"). This Motion for Summary Judgment is based upon this
10 Notice of Motion and Memorandum of Points and Authorities, the Declaration of Sharon E.
11 Duggan and attached exhibits submitted therewith, all pleadings and records in this case, and
12 such oral argument and evidence as may be allowed by the Court at the time of the hearing.

13 **RELIEF REQUESTED**

14 Plaintiffs request that the Court grant summary judgment in Plaintiffs' favor on all
15 claims and remand the matter to the California Department of Transportation ("Caltrans") to
16 prepare a full Environmental Impact Statement ("EIS") in accordance with its obligations under
17 NEPA, as well as Section 4(f) and WSRA, or, in the alternative, remand the matter to Caltrans
18 to prepare a revised Environmental Assessment or, as necessary, a complete EIS.

19 **STATEMENT OF ISSUES TO BE DECIDED**

- 20 1. Was Caltrans' decision to issue a Finding of No Significant Impact ("FONSI")
21 rather than prepare a full EIS contrary to NEPA and the APA?
- 22 2. Alternatively to Issue No. 1, did the Final Environmental Assessment ("Final
23 EA") prepared by Caltrans violate NEPA and the APA?
- 24 3. Did Caltrans violate its obligations under Section 4(f) and the APA?
- 25 4. Did Caltrans violate its obligations under WSRA and the APA?

26 **INTRODUCTION**

27 The primary and dispositive issue here is straightforward: Should the California Caltrans
28 have prepared a full EIS concerning its proposed project to realign Highway 101 where it passes

1 through a grove of old-growth redwoods in Richardson Grove State Park (“Grove” or “Park”),
2 which Caltrans has dubbed the Richardson Grove Operational Improvement Project (“Project”)?

3 Plaintiffs Bess Bair *et al.* (collectively “Plaintiffs”) respectfully submit that the answer
4 to this question is equally straightforward: Yes. As discussed herein, after admitting that the
5 Project had the potential to significantly impact old-growth redwoods, Caltrans determined that
6 the Project would have no significant impact on these trees, yet provided no convincing set of
7 reasons in support. In fact, as demonstrated herein, while Plaintiffs need only raise a single
8 substantial question that the Project would have a significant environmental impact, numerous
9 such questions have been raised. Thus, Plaintiffs are entitled, as a matter of law, to judgment
10 that Caltrans’ decision to issue a FONSI was arbitrary and capricious under NEPA, 42 U.S.C. §
11 4321 *et seq.*, and the APA, 5 U.S.C. 701 *et seq.*, and to an order of this Court requiring Caltrans
12 to conduct a full EIS concerning the Project. Such a judgment and order properly resolves this
13 case. However, in addition and in the alternative, as discussed herein, Plaintiffs are also entitled
14 to a judgment as a matter of law that the Final EA violated NEPA and the APA.

15 Plaintiffs also have established as a matter of law that Caltrans violated Section 4(f), 49
16 U.S.C. § 303, and WSRA, 16 U.S.C. §1278. These violations, again, entitle Plaintiffs to an
17 order by the Court requiring Caltrans to re-examine the Project in compliance with both laws.

18 In short, the Project would place irreplaceable and rare majestic old-growth redwoods at
19 risk of significant and, in fact, mortal impacts, while also potentially causing several other
20 significant environmental impacts. The law requires, and the people of California and the nation
21 as a whole deserve, that Caltrans undertake a complete analysis of the Project’s impacts.

22 **BACKGROUND**

23 **I. Factual Background**

24 The Project would widen and realign a one-mile stretch of Highway 101 in Humboldt
25 County, California, the vast majority of which threads between the ancient redwoods of the
26 Park. *See* Joint Statement of Undisputed Facts (“Jt. Stmt.”) ¶¶ 1, 3; 1 AR 98.¹ The Project would
27

28 ¹ Citations to the Administrative Record use the following format: [volume number] AR [page number].

1 realign the existing roadway to provide 12-foot lanes and 2-foot shoulders within the Park and
2 as much as 4-foot shoulders outside of the Park; shift the highway centerline by as much as 17
3 feet in one location; install a 200-foot long retaining wall 10 to 13 feet in height; repair and
4 replace existing culverts; and repave the roadway. Jt. Stmt. ¶ 10; 1 AR 34-36, 81.

5 The Project will require significant ground disturbance, vegetation and tree removal, cut
6 slope excavation, placement of fill material, removal of lead-contaminated soils, culvert
7 removal and replacement, stream diversion, disposal sites, equipment staging areas, utility
8 relocation, right-of-way acquisition of Park lands, and temporary construction easements. 1 AR
9 295. Of particular concern are the Project's effects on the "structural root zone" of old-growth
10 and ancient redwoods in the Grove, which Caltrans defines as a circular area three times the
11 radius of a tree's "diameter at breast height" (or "DBH"), measured from the center of the tree.
12 1 AR 126. Caltrans' defines "old-growth" redwoods as those with a DBH 30" or greater. 1 AR
13 18. The Project calls for both cut and fill activities within the structural root zone, with
14 excavation at depths of approximately two feet and maximum fill depth of three and a half feet.
15 1 AR 59-60. This excavation will involve cutting the roots of old-growth redwoods, including
16 roots within the structural root zone. 2 AR 394-395. According to Plaintiffs' expert, UC
17 Berkeley Professor of Forestry and Landscape Architecture Dr. Joseph McBride, this work
18 would place at severe and, in fact, mortal risk thirty-five old-growth redwoods, Decl. of Joe R.
19 McBride in Support of Plaintiffs' Motion for Preliminary Injunction ("McBride Dec."), Doc.
20 No. 66, ¶ 38 and Ex. 3 (Doc. No. 69), including eight "giant ancient redwood[s]" greater than
21 10 feet in DBH. Supp. Decl. of Joe R. McBride in Support of Plaintiffs' Motion for Preliminary
22 Injunction ("McBride Supp. Dec."), Doc. No. 80, ¶11.²

23 The Project is not a safety project. 2 AR 436, 638. Rather, the Project's purpose is "to
24 adjust the roadway alignment" to accommodate two Surface Transportation Assistance Act
25 ("STAA") standard trucks passing in opposite directions. 1 AR 19. Caltrans believes the Project

26 _____
27 ² The Court may consider extra-record evidence to "determine whether the agency has considered all relevant
28 factors and has explained its decision." *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp.
2d 1247, 1274 (E.D. Cal. 2010) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443,
1450 (9th Cir. 1996)).

1 is necessary to prevent STAA trucks from “off-tracking” — straying outside the travel lane —
2 based on a computer program called “Autoturn” that Caltrans used to design the Project. 1 AR
3 21; 2 AR 435. There is no record of any STAA truck accidents in the Grove. 2 AR 485.

4 Caltrans issued a Notice of Preparation for a combined Environmental Assessment and
5 Environmental Impact Report (hereafter “EA/EIR” or “EA”) in May 2008. 15 AR 4822-4823.
6 Caltrans chose to develop an Environmental Impact Report (“EIR”) under the California
7 Environmental Quality Act “as a result of the high level of public interest and controversy
8 regarding construction of the project.” 8 AR 2282. However, Caltrans did not prepare an EIS
9 under NEPA, but rather opted to issue a FONSI and Final EA on May 18, 2010, and approved
10 the Project that same day. *Jt. Stmt.* ¶ 2, 1 AR 9, 10. The Draft EA was released on December 4,
11 2008 and a public hearing was held only nine days later. 15 AR 4827-28. Public comment on
12 the Draft EA closed on March 12, 2009. 15 AR 4832, 4835. Caltrans received more than 800
13 substantive letters and thousands of comments protesting the Project’s potential for impacts to
14 the environment. *See generally* AR vols. 2, 3, 22-30.

15 The Final EA contained both extensive changes to the Project and significant new
16 information concerning the Project’s effects. For example, the Final EA disclosed potential root
17 impacts to more than double (from 40 to 86) the number of trees, and identified for the first time
18 68 redwoods affected by cut and fill operations, *compare* 1 AR 128-29 (Table 9), 130-31 (Table
19 10) *with* 4 AR 1316-17 — though these still represent substantial undercounts. *See* McBride
20 Dec., ¶ 21. Despite these changes and repeated requests, *see, e.g.*, AR 24:7670-71, 7696-97, no
21 further opportunity for the public comment on the Final EA was provided.

22 **II. Procedural Background**

23 Plaintiffs filed this action on September 27, 2010. Document No. 1. This Court issued a
24 Preliminary Injunction (hereafter “PI Order”) and established a briefing and hearing schedule on
25 July 6, 2011. Document No. 84. Pursuant to stipulation and further order of the Court, the
26 briefing schedule was extended to facilitate settlement discussions that unfortunately did not
27 bear fruit. *See* Document Nos. 96, 100.

28

LEGAL STANDARD

Entry of summary judgment is appropriate where “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). Where, as here, there are no material facts at issue, summary judgment is the appropriate vehicle to resolve Plaintiffs’ claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986).

The Court’s review is governed by the APA. *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1205 (9th Cir. 2004); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003); *Conservation Law Found. v. FHWA*, 630 F. Supp. 2d 183, 200 (D.N.H. 2007). The Court must set aside Caltrans’ decision if it is “arbitrary, capricious, . . . or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In making this determination, the Court must conduct a “searching and careful” review of the agency decision to ensure the agency has articulated a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Caltrans Violated NEPA By Failing To Prepare An EIS

A. Caltrans Failed To Provide A Convincing Statement Of Reasons Why The Project Would Not Significantly Impact The Environment

Caltrans concluded the Project would have no significant environmental impact. 1 AR 10, “[T]here is too much evidence, however, the impact would be significant.” PI Order at 8.

Caltrans’ decision to issue a FONSI rather than prepare an EIS was arbitrary and capricious.

If an agency . . . opts not to prepare an EIS, it must put forth a convincing statement of reasons that explain why the project will impact the environment no more than insignificantly. This account [is] crucial to evaluating whether [an agency] took the requisite hard look at the potential impact of the [project].

Ocean Advocates v. United States Army Corps of Eng’rs (“*Ocean Advocates I*”), 361 F.3d 1108, 1124 (9th Cir. 2004); *see* 40 C.F.R. § 1508.13. Failure to do so makes the agency’s decision arbitrary and capricious. *Ocean Advocates I*, 361 F.3d at 1124. As the Court explained:

An EA is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem, or offer[s] an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

1 PI Order at 8. Moreover, while an agency has “discretion to rely on the reasonable opinions of
 2 its own qualified experts . . . courts . . . do not ignore an agency’s failure to address factors
 3 pertinent to an informed decision.” *Id.* (internal quotation omitted).

4 Here, Caltrans failed to provide a convincing explanation for its conclusion that the
 5 Project would not significantly impact old-growth redwoods or other elements of the Project
 6 area ecosystem, including two federally listed endangered species.

7 **1. Caltrans Failed To Present Convincing Statement Of Reasons Why**
 8 **The Project Would Not Significantly Impact Old-Growth Redwoods**

9 This Court recognized that “because Caltrans proposed construction activities within the
 10 root zones of redwoods, there is reason to believe that there would be significant injury.” PI
 11 Order at 8. Caltrans provided no convincing statement of reasons to the contrary. Rather,
 12 Caltrans *conceded* the possibility of significant impacts to old-growth redwoods in the Project
 13 Area, and then provided no convincing reasons at all why such impacts would not occur.

14 **a. Caltrans Conceded Soil Cutting & Filling In Root Zones Of**
 15 **Old-Growth Redwood Could Significantly Impact The Trees**

16 Caltrans conceded the impacts of Project cut and fill operations in the root zones of old-
 17 growth redwoods could be significant. In the Final EA, Caltrans conceded:

18 Several trees abutting the existing highway, the majority being redwoods, would
 19 also be affected by construction activities occurring directly adjacent to the trees.
 20 ... Construction activities in close proximity to these trees could result in impacts
 to the root systems.”

21 1 AR 59; *see also* 4 AR 1315 (acknowledging “construction activities [around the structural
 22 root zone] have the most potential for injury” to old-growth redwoods). In the Natural
 23 Environment Study appended to the Final EA, Caltrans admitted these activities “can have
 24 adverse impacts on [old-growth redwood] trees” and such effects “may be a significant impact
 25 to this unique natural community.” 1 AR 311. Caltrans also admitted in responses to comments
 26 that it couldn’t predict and didn’t know the impacts of construction on the trees. 2 AR 553.

27 Indeed, the administrative record is replete with evidence that the Project would have
 28 very significant impacts on the Grove’s redwoods. According to a State Parks Natural

1 Resources Handbook that Caltrans purportedly relied upon in preparing the EA:

2 Any intrusion into this [structural root] zone is accompanied by significant injury
 3 . . . [which will] shorten the useful life of the tree. . . . There should be no
 4 construction activities in the Structural Root Zone of a protected tree. This
 5 includes soil disturbance from 1 to 3 foot depth including trenching, grade
 6 changes, storage of vehicles and materials, or compaction caused by machinery
 traversing the zone. Any intrusion into this zone is usually accompanied by
 significant injury to roots further from the trunk; this will shorten the useful life
 of the tree in the developed area by reducing vigor and introducing root disease.
 Furthermore, damage to any structural roots may cause an already structurally
 compromised tree to become hazardous.”

7 18 AR 5601. Comments to the Draft EA submitted by Dr. Steve Sillett, Professor and Chair of
 8 Redwood Forest Ecology at the Forestry Department of Humboldt State University, whom
 9 Caltrans admits is a redwoods expert, 15 AR 4618, state:

10 Cutting woody roots of redwoods leads to decline and often die-back of the
 11 treetop and other portions of the crown, depending on the number of large roots
 12 cut and the proportion of the rooting zone impacted by construction. . . [C]utting
 13 large roots is a BAD IDEA if maintaining tree health and vigor is a goal. . .
 Thus, I urge Caltrans to abandon plans to widen Highway 101 in a way that
 necessitates cutting woody roots, because this will greatly compromise
 Richardson Grove State Park’s goal of protecting the giant roadside trees in this
 magnificent forest.

14 3 AR 1124.

15 Nowhere in the Final EA did Caltrans provide any convincing reasons for its conclusion
 16 that these effects would be less than significant. Caltrans offered only a profoundly flawed
 17 analysis, backed by the opinions of two arborists lacking redwood expertise who based their
 18 opinions on inadequate information.

19 **b. Caltrans’ Analysis of the Project’s Impacts Is Profoundly**
 20 **Flawed**

21 **i. Root Zone Impact Analysis Has Fatal Discrepancies**

22 First, Caltrans failed to identify over 20% of the trees whose root zones would be
 23 compromised by soil cutting and filling. The Final EA put the number of such trees at 74, 1 AR
 24 126, although Caltrans admitted in response to comments that it did not conduct any field
 25 studies of tree root systems. 3 AR 806. Plaintiffs’ expert, Dr. McBride, *did* conduct such a field
 26 study — and identified 108 trees in this category. McBride Dec., ¶ 21 and Ex. 3. Indeed, 9 trees,
 27 including a redwood 91” in DBH, do not show up on Caltrans’ maps at all. *Id.*

1 “abandon” the Project if it “necessitates cutting woody roots,” Caltrans stated it “does not
2 intend to cut any roots two inches or larger,” 3 AR 1124, but admitted elsewhere that even
3 larger roots might be severed. 2 AR 395. A redwood root becomes “woody” at only *one-eighth*
4 of an inch. McBride Supp. Dec., ¶ 8. Thus, Caltrans didn’t fully evaluate Dr. Sillett’s expert
5 opinion. *See Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir.1998).

6 **iii. Efficacy Of Minimization Measures Concerning Root**
7 **Zone Work Is Unsupported**

8 In the Final EA Caltrans leaned heavily on minimization measures — particularly, the
9 use of brow logs, root irrigation, and an “air spade” — in concluding the Project would not
10 significantly affect the root zones of old-growth redwoods. *See, e.g.*, 1 AR 127-133, 222, 317-
11 318; 2 AR 416. Although an agency may rely on mitigation measures to obviate further analysis
12 through an EIS, the mitigation measure must be identified and its effectiveness fully analyzed.
13 *See Nat’l Parks & Conserv. Ass’n v. Babbitt*, 241 F.3d 722, 733-36 (9th Cir. 2001) *abrogated on*
14 *other grounds*. Caltrans failed to provide enough information to analyze the efficacy of its
15 minimization measures — some of which appear likely to have detrimental impacts — and
16 conceded that certain measures would have limited use.

17 Caltrans intends to place “brow logs” against old-growth redwood trunks to lessen the
18 effect of fill. *See* 1 AR 134. However, Dr. McBride found “[n]o references in the literature” to
19 support this proposal, and concluded “use of this procedure would have negative effects” by
20 increasing distance of oxygen travel from the surface to the roots. McBride Dec., ¶¶ 30-31.

21 Similarly, Caltrans provided no information in the Final EA as to the efficacy of
22 irrigating the root zone. *See* 1AR-133. The record does not show that Caltrans reviewed any
23 literature specific to the irrigation of redwoods. Instead, Caltrans reviewed an Arizona
24 Cooperative Extension pamphlet regarding methods for analyzing soil moisture generally. 9 AR
25 2794. This pamphlet provides no support for any conclusion regarding the effect of irrigation on
26 redwoods. In fact, Dr. McBride concluded the proposed watering “would result in water logged
27 soils that can present serious problems for root respiration in the summer time.” McBride Supp.
28

1 Dec., ¶ 20. By failing to identify information necessary to evaluate the efficacy of this
2 mitigation measure, Caltrans risked actually *increasing* harm to the trees.

3 Finally, Caltrans highlighted its intended use of “air spades” (pneumatic excavators) for
4 digging in root zones. 1 AR 133. However, Caltrans admitted where the Project called for
5 replacing culverts, heavy equipment could be used in place of air spades within structural root
6 zones. 1 AR 132-133; 13 AR 3798. If roots are present in these culvert trench zones, they
7 “would certainly be removed/damaged by the excavator.” 8 AR 2390. In these same locations,
8 Caltrans admitted roots greater than 2” in diameter might be cut. *See* 2 AR 395. In addition, the
9 air spade will not be used for any work in the root zones of two old-growth redwoods and one
10 old-growth Douglas fir at the location of gabion wall on the northern end of the Project. 9 AR
11 2884-85. “Individual roots . . . will need to be cut.” 9 AR 2885. Caltrans failed to explain or
12 evaluate these substantial limitations on its most prominent minimization measure.

13 **c. Statements Of Unqualified Arborists Based On Inadequate**
14 **Analysis Are Not Convincing**

15 Caltrans attempted to gloss over the inadequacies in its analysis by offering “tersely
16 summarized statements from Arborists Darin Sullivan and Dennis Yniguez to conclude that old-
17 growth redwoods would not be substantially affected.” PI Order at 8; *see* 1 AR 129 (Final EA
18 reliance on reports); 6 AR 1880-83 (Yniguez report); 14 AR 4037-39 (Sullivan report). These
19 statements do not provide a convincing explanation for Caltrans’ conclusion that the Project
20 will not significantly impact old-growth redwoods. The Final EA lacks any detail concerning
21 the basis for the arborists’ opinions, and the opinions themselves are facially inadequate.

22 The arborists lacked relevant expertise. In a July 1, 2009 Caltrans meeting attended by
23 both arborists, Dennis Yniguez stated he was “not a redwood expert” and suggested Caltrans
24 should “ask someone like Steve Sillet [*sic*]” concerning issues related to soil moisture
25 measurement and redwood foliage. 15 AR 4725. Although the other arborist on whose opinion
26 Caltrans relies, Darin Sullivan, was in the same meeting, Mr. Yniguez did not include him
27 among the redwood experts with which Caltrans should consult. *Id.* In fact, it appears from the
28 notes of the meeting that Mr. Sullivan asked the question that Mr. Yniguez said only a redwood

1 expert could answer. *Id.* Elsewhere in the record, Caltrans not only conceded that Dr. Sillett was
2 a redwoods expert, but also worried that that he “could refute our conclusion.” 15 AR 4618. As
3 discussed above, he did. 3 AR 1124. This undermines Caltrans’ reliance on the opinions of
4 these arborists and renders their statements in support of the FONSI unconvincing. Moreover,
5 Caltrans’ failure to acknowledge in the Final EA the doubt expressed by Mr. Yniguez renders
6 Caltrans’ analysis arbitrary and capricious and evidences its failure to take the required “hard
7 look” at environmental impacts. *See Inst. for Wildlife Prot. v. Norton*, 174 Fed. Appx. 363, 366-
8 367 (9th Cir. 2006); *Or. Natural Res. Council v. BLM*, 470 F.3d 818, 822 (9th Cir.2006).

9 Both arborists’ analyses are further undermined by obvious shortcomings that reflect
10 their lack of expertise. The record reveals each arborist conducted only a cursory on-site
11 evaluation, did not conduct any tree-by-tree analysis, and did not inquire into the efficacy of the
12 proposed minimization measures that formed the basis of their conclusions. *See* 6 AR 1880-
13 1883; 14 AR 4037-4039. Dr. McBride viewed both arborists’ reports as “inadequate because of
14 their lack of reference to individual trees,” faulting them *inter alia* for not paying attention to
15 “the variation in the potential impacts to each tree” and for failing to distinguish between
16 impacts of cut and fill, compaction, and increased exposure to high-velocity winds. McBride
17 Dec., ¶ 20.

18 This is no mere difference in methodology. Messrs. Yniguez and Sullivan failed to
19 consider a critical component of the Project: the extent to which different trees would be more
20 or less severely affected depending on the extent of soil cutting and filling done in their root
21 zones. In fact, Mr. Sullivan recommended development of a file *for each tree* being impacted
22 by more than 10% and “a *step by step plan* to keep root loss below the 10%,” 8 AR 2560, but
23 this was not done.³ Thus, the arborists’ determinations “entirely failed to consider an important
24 aspect of the problem . . . [and are] so implausible that [they] could not be ascribed to a
25 difference in view or the product of agency expertise.” *Lands Council*, 537 F.3d at 987.

26
27
28 ³ Save the Redwoods League, in its comments to the Draft EA, similarly requested that Caltrans conduct a tree-by-tree analysis of the proposed project’s impact “in an EIS.” 2 AR 494.

1 **d. Final EA Omits Mention Of Increased Air Flow Impacts**

2 Caltrans also failed to address the impact of increased air movement on old-growth
3 redwoods. The Project calls for the removal of 54 trees, 1 AR 310, increasing the number of
4 large STAA trucks that pass through the Grove, and making road engineering adjustments that
5 could result in an increase of speed with which vehicles pass through the Grove. These changes
6 would increase air turbulence around the trees' foliage, causing desiccation and dieback in the
7 trees' tops—a phenomenon the Final EA entirely failed to address. McBride Dec., ¶¶ 32, 43.

8 **2. Caltrans Also Failed To Present A Convincing Set Of Reasons Why**
9 **Project's Other Environmental Impacts Would Not Be Significant**

10 **a. Protected Species**

11 The Project included authorization under the Endangered Species Act ("ESA") for
12 incidental "take" of two federally protected species, the Northern spotted owl and marbled
13 murrelet. 6 AR 1808-1809. The ESA defines "take" to include killing, injuring, or destroying
14 habitat so as to kill or injure, a listed species. *See* 16 U.S.C. § 1532 (19), 50 C.F.R. § 17.3. The
15 "take" authorization was necessary because the Project "[m]ay affect and is likely to adversely
16 affect" these two species. 1 AR 155, 156. In particular, the U.S. Fish and Wildlife Service's
17 Biological Opinion for the Project concluded construction "may result in harassment" of at least
18 one nesting pair of marbled murrelets in the Project's disturbance area. 1 AR 154. Nowhere in
19 the Final EA did Caltrans provide a convincing set of reasons why these effects on protected
20 species should not be considered significant, requiring analysis in an EIS.

21 **b. Water Quality**

22 In close vicinity to the Project Area is the South Fork of the Eel River, designated as a
23 Wild and Scenic River under California law (1972) and the Federal Wild and Scenic Rivers Act
24 (1981). 1 AR 228, 302. Three named watercourses cross Highway 101 within the project limits.
25 1 AR 302-303. Construction of the Project will result in areas of disturbed soil, with potential
26 for the soil to discharge to storm drain inlets and drainage ditches, and to be tracked and
27 transported off-site. 14 AR 4368. Based on this evaluation, the Project requires Construction
28 Site Best Management Practices ("BMPs"), not included in the Final EA. 1 AR 96, 13 AR 3955.

1 Nowhere in the Final EA is there a convincing set of reasons why these undisclosed BMPs or
2 any other action would prevent impact on water quality from being significant.

3 **c. Visitor Experience**

4 The Park provides nine miles of hiking trails, a picnic area, 170 year round campsites,
5 river access for swimming and fishing, a Visitor Center abutting Highway 101, and a variety of
6 interpretative/educational programs during the summer. 1 AR 58. The Final EA conceded the
7 Project could negatively affect visitor experience at the Park. 2 AR 363. Construction impacts
8 include noise, lights, traffic delays, air quality impacts from equipment emissions, and
9 interruptions to views that would affect Park visitors. 1 AR 60. Construction will occur at night,
10 and lighting will be used. *Id.* Construction-related noise will exceed noise level standards
11 established by Humboldt County. 1 AR 118-119. According to State Parks, this level of noise
12 “will result in significant adverse effects on campers within the park as well as park residents.”
13 2 AR 383. The noise from installation of the new retaining wall would “completely disrupt the
14 operations at Singing Trees,” a mental health facility. 9 AR 2760. Existing visual quality on
15 Highway 101 through the Grove is “very high.” 1 AR 262. In several places, large redwood
16 trees over 20 feet in diameter stand right next to the road 1 AR 80. Those who travel through or
17 visit the Grove have “very high expectation regarding scenic quality.” 1 AR 262. Caltrans
18 conceded, “Several trees abutting the existing highway, the majority being redwoods, would
19 also be affected by construction activities occurring directly adjacent to the trees.” 1 AR 59. In
20 addition, the Project will cause permanent impacts from vegetation removal, including the
21 removal of 30 trees. 1 AR 201. The Project includes cutting into a slope 40 feet uphill at its
22 highest point, 80 feet in length, and removing approximately 13 trees, which will open the
23 forested area. 1 AR 239. This cut will be visible from the road and from the trails. The EA
24 conceded that the Project activities here and elsewhere will result in low to moderate alteration
25 to the visual environment. 1 AR 262.

26 As the California State Parks Foundation commented, “An unknown factor is whether
27 the alignment of the roadway will result in a degraded park experience for park visitors, given
28 the reduction in understory vegetation in the redwood canopies, increased exposure to the

1 highway in areas of tree removal, and increased noise and light impacts.” 2 AR 408. Caltrans
2 failed to evaluate these unknown impacts to the experience of visitors to the Park.

3 **B. Caltrans Should Have Prepared an EIS in the First Instance**

4 Caltrans’ decision to issue a FONSI rather than a full EIS was arbitrary and capricious.
5 “An EIS must be prepared if substantial questions are raised as to whether a project may cause
6 significant degradation of some human environmental factor.” *Ocean Advocates I*, 361 F.3d at
7 1124 (internal quotations omitted). Regulations adopted by the Council on Environmental
8 Quality (“CEQ”), 40 C.F.R. § 1508.27, define “significantly” in terms of both the “context” and
9 “intensity” of the Project’s impacts. The regulations list ten factors relevant to the intensity or
10 severity of Project impacts; the presence of any “one of these [significance] factors may be
11 sufficient to require preparation of an EIS.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*
12 (*“Ocean Advocates II”*), 402 F.3d 846, 865 (9th Cir. 2005). However, a reviewing court is not
13 limited to considering these “CEQ factors” in determining whether a plaintiff has raised a
14 substantial question as to whether a project may cause significant impacts. *See Ocean Advocates*
15 *I*, 361 F.3d at 1127. Here, there are substantial questions as to whether the Project could
16 threaten the survival of some of the few remaining old-growth redwoods in the world. This
17 alone necessitates the preparation of an EIS without even considering the factors outlined by the
18 Council on Environmental Quality. An EIS is also required based on the consideration of the
19 CEQ factors, virtually all of which are implicated by the Project.

20 **1. There Are Substantial Questions as to Whether The Project Would**
21 **Significantly Impact Old-Growth Redwoods**

22 Dr. McBride identified 37 trees that would be so “severely impacted” by soil cuts and
23 fill that “deaths or ‘failures’” of particular trees would be “likely.” McBride Dec., ¶ 38;
24 McBride Supp. Dec., ¶ 12. Among these trees are eight “giant ancient redwood[s]” greater than
25 10 feet in DBH, McBride Supp. Dec., ¶ 11, and 35 trees meeting Caltrans’ definition of “old-
26 growth” (30” DBH or greater). McBride Dec., ¶ 38 and Ex. 3. Dr. McBride also identified many
27 of these trees among those that he concluded “would experience increased wind velocities in
28 their vicinities and related desiccation as a result of the road realignment project,” which in

1 combination with other impact would “result in the death of the tops of the trees” and cause tree
 2 failure. *Id.*, ¶ 41. Dr. McBride further identified seven trees that would be negatively affected by
 3 proposed culvert work, including three old-growth redwoods. *Id.*, ¶ 41; Ex. 3.

4 Dr. Sillett, whom Caltrans acknowledges is a “redwood expert,” 15 AR 4618, raised
 5 similar questions. Dr. Sillett stated unambiguously that any cutting of woody roots of old-
 6 growth redwoods by Caltrans as part of the Project would “greatly compromise Richardson
 7 Grove State Park’s goal of protecting the giant roadside trees in this magnificent forest.” 3 AR
 8 1124. As discussed above, Caltrans completely failed to refute this concern.

9 Indeed, Caltrans admitted in the Final EA that “[a]dverse effects to old-growth trees may
 10 be a significant impact to this unique natural community,” 1 AR 311, but as discussed, provided
 11 no set of convincing reasons why this would not be the case. On this basis alone, a full EIS was
 12 required. In light of the substantial questions raised by Dr. McBride’s and the unanswered
 13 concerns of Dr. Sillett, the need for an EIS is overwhelming.

14 **2. CEQ Factors Independently Demonstrate the Need for an EIS**

15 The “obvious severity of the impact” the Project will have on old-growth redwoods “is
 16 enough” to require Caltrans prepare an EIS. *Ocean Advocates I*, 361 F.3d at 1128. Many CEQ
 17 factors further demonstrate the Project’s impacts’ significance and thus the need for an EIS. *Id.*

18 **a. Project Area Contains Unique Characteristics and Resources** 19 **that May Be Lost or Destroyed by the Project**

20 In determining the potential severity of a Project’s impact, and thus whether an EIS is
 21 required, an agency must consider the “[u]nique characteristics of the geographic area [in which
 22 project would occur] such as proximity to historical or cultural resources, park lands, . . . wild
 23 and scenic rivers, or ecologically critical areas,” 40 C.F.R. § 1508.27(b)(3), as well as “[t]he
 24 degree to which the action may . . . may cause loss or destruction of significant scientific,
 25 cultural, or historical resources.” 40 C.F.R. § 1508.27(b)(8).

26 These factors are more than satisfied here. The Project would occur:

- 27 • within one of the world’s last remaining stands of old-growth redwoods, 23 AR 7483, 20
 28 AR 6278; 14 AR 4044; McBride Dec., ¶ 35

- 1 • within one of California’s oldest and most popular state parks, 1 AR 58, which has been
- 2 designated a “heritage park,” 2 AR 376, because of its scarce coastal old-growth and
- 3 ancient redwood trees, 2 AR 376, 403, 407, 429, 625; 13 AR 3759, and which gives
- 4 shelter to an abundance of wildlife, including the federally protected marbled murrelet
- 5 and Northern spotted owl, 1 AR 303-309;
- 6 • adjacent to the state and federally designated wild and scenic Eel River, 1 AR 302; and
- 7 • within and adjacent to important Native American archaeological sites. 1 AR 91; 2 AR
- 8 453; 20 AR 6008, 6029, 6039, 6040, 6409.

9 Indeed, Caltrans conceded that “[d]ue to the uniqueness of the old growth forest, *it is*

10 *virtually impossible to create or duplicate this ecosystem.*” 12 AR 3701 (emphasis added). State

11 Parks warned in its comments to the Draft EA that “[a]ny project that affects the historic patina

12 and the natural fabric of Richardson Grove State Park *can have far reaching impact to millions*

13 *of people as they enter the Redwood Region.*” 2 AR 376 (emphasis added). And in a meeting

14 held with the InterTribal Sinkyone Wilderness Council (“ITSWC”) after Project approval, the

15 ITSWC stated, “The Council and local Tribal peoples believe *the proposed highway-widening*

16 *project poses a serious threat to the integrity of the Grove’s cultural landscape and ecosystem*

17 *and to its irreplaceable spiritual and cultural qualities.*” Decl. of Sharon E. Duggan ISO Mot.

18 for Sum. Judg. (“Duggan Dec.”), Ex. 2 (emphasis added); *accord* 2 AR 453.

19 **b. Project’s Impacts On Redwoods Are Highly Controversial**

20 In determining whether the severity of a project’s impacts necessitates preparation of an

21 EIS, an agency must consider “[t]he degree to which the effects [of the project] are likely to be

22 highly controversial.” 40 C.F.R. § 1508.27(b)(4). A proposal is highly controversial when

23 “substantial questions are raised as to whether a project . . . may cause significant degradation”

24 of a resource, *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir.

25 1997), or when there is a “substantial dispute [about] the size, nature, or effect of the” action.

26 *Blue Mtns. Biodiversity*, 161 F.3d at 1212. Further, a “substantial dispute exists when evidence,

27 raised prior to the preparation of [a] . . . FONSI, casts serious doubt upon the reasonableness of

28 an agency’s conclusions.” *Nat’l Parks & Conserv. Ass’n*, 241 F.3d at 736. When such a doubt is

1 raised, “NEPA then places the burden on the agency to come forward with a ‘well-reasoned
2 explanation’ demonstrating why those responses disputing the EA’s conclusions ‘do not . . .
3 create a public controversy.’” *Id.* The Project’s impacts on old-growth redwoods are highly
4 controversial under this standard.

5 First, substantial concerns were raised by Dr. Sillett and a Registered Professional
6 Forester, Ross Carkeet Jr., concerning the adequacy of the Draft EA and its analysis of the
7 Project’s potential impacts on old-growth redwoods. *See* 2 AR 618; 3 AR 1124. Furthermore,
8 while Messrs. Sullivan’s and Yniguez’s analyses were never made available for public
9 comment, their conclusions are vigorously disputed by Dr. McBride. *See* McBride Dec., ¶¶ 20-
10 44. An action is “controversial” when “conservationists, biologists, and other experts” are
11 “highly critical” of an EA and “dispute[] the [agency’s] conclusion.” *See Sierra Club v. United*
12 *States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). Just such a dispute exists here.

13 Second, California’s Department of Parks and Recreation questioned both Caltrans’
14 conclusion that the Project would not significantly affect redwoods and the manner in which
15 that conclusion was reached. 2 AR 377. Once again, this renders the Project “controversial”
16 under NEPA. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1027-1033 (9th Cir. 2007).

17 Finally, the more than 800 public comments and thousands of postcards submitted in
18 response to Caltrans’ proposal, many questioning the stated impacts and the majority opposing
19 the Project, give rise to a controversy requiring an EIS here. *See Nat’l Parks*, 241 F.3d at 736
20 (noting 85 percent of comments received during administrative review opposed agency’s
21 preferred alternative). Indeed, the barrage of negative feedback from the public continued even
22 after comment closed, with letters and postcards urging Caltrans to abandon the Project filling
23 nearly 2500 pages. *See* AR Volumes 24-30. NEPA requires preparation of an EIS in this
24 context, both because of the controversy itself and because these disputes “cast[] serious doubt
25 upon the reasonableness of an agency’s conclusions” that the Project would have no significant
26 impact. *Nat’l Parks & Conserv. Ass’n*, 241 F.3d at 736; 40 C.F.R. § 1508.27(b)(4).

1 c. **The Project's Effects On Area's Old-Growth Redwoods Are, At**
2 **Best, Highly Uncertain**

3 Caltrans' analysis of the Project's impact on old-growth redwoods was profoundly
4 deficient, its proposed mitigation measures untested, and their effectiveness unexplained. These
5 factors cause the Project's effect on the area's old-growth redwoods to be, at best, "highly
6 uncertain [and] involve unique or unknown risks," 40 C.F.R. § 1508.27(b)(5), thus satisfying
7 another of the CEQ factors for preparation of an EIS. "Preparation of an EIS is mandated where
8 uncertainty may be resolved by further collection of data, or where the collection of such data
9 may prevent speculation on potential . . . effects." *Native Ecosystems Council v. United States*
10 *Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (internal citations omitted).

11 d. **There Is a High Degree of Probability the Project Would**
12 **Adversely Affect Endangered Species**

13 Among the factors that make the probable impact of a project on the environment
14 significant is "[t]he degree to which the action may adversely affect an endangered or
15 threatened species or its habitat that has been determined to be critical under the Endangered
16 Species Act of 1973." 40 C.F.R. § 1508.27(b)(9). An agency must fully and closely evaluate the
17 effects on listed species and issue an EIS if those impacts are significant. *Alaska Wilderness*
18 *League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008), vacated for mootness. Caltrans
19 conceded the Project may adversely affect the federally listed marbled murrelet and Northern
20 spotted owl, and even applied for and received a take permit for these species, but failed to fully
21 and closely evaluate in an EIS how significant the Project's impacts on these species would be.

22 e. **Project's Impacts Are Additionally Significant When Combined**
23 **with Impacts of Other Projects.**

24 In determining significance, an agency must consider not only the impacts of a project in
25 isolation but also in the context of the impacts of other actions. 40 C.F.R. §§ 1508.27(b)(7);
26 1508.25(a)(2). A cumulative impact is "the incremental impact of the action when added to
27 other past, present, and reasonably foreseeable future actions." *Id.* § 1508.7; *Ocean Advocates*
28 *II*, 402 F.3d at 870. The Final EA inadequately analyzed cumulative impacts.

1 First, the Draft EA failed to detail the “impacts associated with Caltrans projects
2 throughout the [Parks] District,” 2 AR 387, and the Final EA failed in the same manner. State
3 Parks had specifically requested that Caltrans list every project within Humboldt County within
4 the past 5 years, specifically identifying cumulative effects arising from other projects. 15 AR
5 4675. However, the Final EA mentioned only one past culvert replacement project within the
6 Grove, 1 AR 162, and other projects only within a *five-mile* radius of the Project. 1 AR 160-
7 161, a far smaller area than the whole of Humboldt County.

8 Second, Caltrans completely ignored other projects in Humboldt and Del Norte Counties
9 — which together would open the entire region to STAA traffic — and the cumulative effects
10 of those projects throughout the region in terms of energy use, growth and development, air
11 pollution, noise, and other environmental impacts. 2 AR 564-565. Caltrans acknowledged the
12 existence of these projects, but failed to provide any analysis of their cumulative effects. 2 AR
13 570; *see also* 2 AR 500, 695 (ignoring comment).

14 **f. Project Would Likely Affect Public Health And/Or Safety**

15 Caltrans also should have conducted an EIS because of the high degree of probability
16 the Project would affect public health and/or safety. *See* 40 C.F.R. § 1508.27(b)(2); *Bluewater*
17 *Network v. Salazar*, 721 F. Supp. 2d 7, 37-38 (D.D.C. 2010).

18 While Caltrans has admitted the Project is not a safety project. 2 AR 436, 638, the
19 Project Study Report claims the improvements will help other vehicles to travel safely through
20 the Grove. 14 AR 4429. In fact, there are substantial questions concerning the Project’s effect
21 on public safety. Between January 1, 2000 and June 30, 2010, there were *only seven* accidents
22 involving trucks in the Project area, and *only five* within the Grove, and there have been no
23 reported accidents involving trucks since June 21, 2005. Duggan Dec., Ex. 3. And while STAA
24 trucks currently travel the road, under legislative exemptions, *see* Cal. Veh. Code §§ 35401.5
25 (f), 35401.7, a memorandum of understanding with California Highway Patrol, and otherwise,
26 there have been *no* recorded accidents involving these trucks. 1 AR 32; 2 AR 485. Caltrans’
27 determination that the road was *unsafe* for STAA truck travel was based *solely* on a computer
28 program that Caltrans used to predict off-tracking. 2 AR 435.

1 Caltrans states the Project would ‘aim[]’ truck traffic through the grove.” 12 AR 3665.
 2 Yet the Project changes are not sufficient to meet Caltrans highway design standards. 2 AR 418.
 3 Rather, the Project includes mandatory design exceptions to highway design standards for
 4 minimum design speed and curve radii, shoulder width, minimum super-elevation rate, stopping
 5 sight distance, minimum distance to a fixed object and corner sight distance. 1 AR 38; 13 AR
 6 3758-3790. The Project also includes advisory exceptions to standards for alignment
 7 consistency, compound curves, super-elevation transitions, clearance to a fixed object within a
 8 “Clear Recovery Zone” and side slopes greater than 4:1. 1 AR 38; 14 AR 4040-4068. Thus,
 9 there are substantial questions whether the Project will actually make the roadway *less* safe.

10 In addition, the Project requires removal and roadside disposal of soils that contain
 11 hazardous levels of aeriially deposited lead. 1 AR 105-107; 20 AR 6074, 6078, 6081; 10 AR
 12 2986. However, no protocols are provided in the Final EA concerning how such waste will be
 13 handled; instead, the contractor is to prepare a “Lead Compliance Plan,” to include dust control,
 14 worker safety, and material disposal considerations. *Id.* The absence of the plan demonstrates
 15 that Caltrans has not evaluated public health impacts of handling such soils and raises
 16 substantial questions regarding the significance of those effects.

17 **g. The Project Threatens To Violate Several Federal And**
 18 **California State And Environmental Laws**

19 Finally, Caltrans was also required to prepare an EIS because of the Project threatens to
 20 violate the Federal Wild and Scenic Rivers Act and Section 4 of the Department of
 21 Transportation Act, as detailed below. *See* 40 C.F.R. § 1508.27(b)(10).

22 **II. THE FINAL EA ITSELF WAS INADEQUATE ON SEVERAL GROUNDS**

23 For all the above reasons, Caltrans should have prepared an EIS for the Project, and its
 24 decision not do so was arbitrary and capricious. However, in addition and alternatively, the
 25 Final EA is inadequate on several grounds, thus independently entitling Plaintiffs to a judgment
 26 as a matter of law on their NEPA claims. As the Ninth Circuit explained in *Ctr. For Biological*
 27 *Diversity v. Nat’l Highway Safety Admin.*, while, the proper remedy in most successful
 28 challenges of an agency’s decision to issue FONSI rather than conducting a full EIS, “[i]f the

1 court finds . . . that the EA is inadequate in a manner that precludes making the determination
 2 whether the project *may* have a significant impact, the court should remand the case to the
 3 agency to correct the deficiencies in its analysis.” 538 F.3d 1172, 1179 (2009). Examples
 4 include “an EA [that] is so procedurally flawed that [a court] cannot determine whether the
 5 proposed rule or project may have a significant effect,” *id.* at 1178, and an EA “where an
 6 agency determines that consideration of certain factors are legally irrelevant to the agency’s
 7 action, rendering it impossible for the reviewing court to determine the accuracy of the FONSI.”
 8 *Id.* at 1179. The record contains an overwhelming amount of evidence that the Project *may* have
 9 a significant impact, making a remand for preparation of an EIS appropriate here. However, in
 10 the alternative, the Final EA’s inadequacies at the very least mandate an order requiring
 11 Caltrans “prepare a revised EA or, as necessary, a complete EIS.” *Id.*

12 **A. Caltrans Failed To Take The Required Hard Look At Project’s**
 13 **Environmental Impacts In The Final EA**

14 An EA is required to “provide[] sufficient evidence and analysis for determining
 15 whether to prepare an EIS or a finding of no significant impact.” 40 C.F.R. § 1508.9. An agency
 16 cannot, however, simply argue that an EA is adequate because it “contains enough information
 17 to allow [the agency] to determine that the project would have no significant environmental
 18 impacts.” *Or. Nat. Res.*, 470 F.3d at 822. As the Ninth Circuit explained, such an “argument in
 19 effect says that the EA is sufficient ‘because we say it is,’” which is not in accordance with the
 20 law. *Id.* Rather, an EA must be prepared in accordance with the “proper procedure,” which
 21 includes the agency’s responsibility to take the “‘hard look’ required in a legally sufficient EA.”
 22 *Id.* The same factors that made unconvincing Caltrans’ statement of reasons why the proposed
 23 would have no significant environmental impacts also demonstrate that Caltrans failed to take
 24 the required “hard look” at those impacts in preparation of the Final EA.

25 **B. Caltrans Failed To Adequately Explore And Evaluate Reasonable**
 26 **Alternatives To The Project In The Final EA**

27 The *heart* of the NEPA process is an agency’s duty to consider “alternatives to the
 28 proposed action.” 42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(E) (agency must “study, develop, and

1 describe appropriate alternatives to recommended courses of action”). Accordingly, Caltrans
2 was required to “rigorously explore and objectively evaluate all reasonable alternatives.” 40
3 C.F.R. § 1502.14(a). Alternatives analysis “sharply define[s] the issues and provide[s] a clear
4 basis for choice among options by the decision maker and the public.” *Kootenai Tribe of Idaho*
5 *v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002) *overruled on other grounds*. NEPA requires
6 full consideration of all reasonable alternatives in an EA as well as in an EIS. *See Bob Marshall*
7 *Alliance v. Hodel*, 852 F.2d 1223, 1228-1229 (9th Cir. 1988).

8 In this context, the existence of a “viable but unexamined alternative renders” an
9 environmental analysis “inadequate.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d
10 800, 814 (9th Cir. 1999). Reasonable alternatives are those that are viable, feasible, meet the
11 stated goals of the project, or are reasonably related to the purposes of the project. *Idaho*
12 *Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). A plaintiff can show the
13 agency failed to comply with NEPA’s alternatives requirement by showing that the agency did
14 not discuss an alternative that would advance the purpose and need of the project. *Native*
15 *Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245-46 (9th Cir. 2005).

16 Furthermore, an agency may not short-circuit this requirement by stating a project’s
17 purpose and need in a way that compels the selection of the agency’s preferred alternative.

18 An agency may not define the objectives of its action in terms so unreasonably
19 narrow that only one alternative from among the environmentally benign ones in
20 the agency’s power would accomplish the goals of the agency’s action, and the
21 EIS would become a foreordained formality.
22 *Nat’l Parks & Conservation Ass’n v. BLM*, 586 F.3d 735, 746 (9th Cir. 2009) *as modified in*
23 606 F.3d 1058 (9th Cir. 2010) (internal quotations omitted). Rather, “agencies must look hard at
24 the factors relevant to definition of purpose,” as an agency’s “definition of the project’s purpose
25 will necessarily affect the range of alternatives considered, because when the purpose is to
26 accomplish one thing, it makes no sense to consider the alternative ways by which another thing
27 might be achieved.” *Id.* at 747 (internal quotation omitted). Accordingly, a reviewing court’s
28 “task is to determine whether the [agency’s] purpose and need statement properly states the
[agency’s] purpose and need . . . in a manner broad enough to allow consideration of a
reasonable range of alternatives.” *Id.*

1 The Final EA states that “[t]he purpose of the Project is to adjust the roadway alignment
2 to accommodate [STAA] truck travel, *thereby* removing the restriction of for STAA vehicles,
3 and improve the safety and operation of US Route 101 while also improving goods movement.
4 1 AR 11 (emphasis added). As the highlighted conjunction indicates, the true purpose and need
5 of the Project is “removing the restriction of for STAA vehicles, and improve the safety and
6 operation of US Route 101 while also improving goods movement.” *Id.* However, by phrasing it
7 in this manner, Caltrans guaranteed that no alternative except its preferred alternative involving
8 construction “to adjust the roadway alignment to accommodate [STAA] truck travel,” *id.*,
9 would be selected. Accordingly, in developing the Project, Caltrans evaluated only two
10 alternatives: the Project and the No Build Alternative. 1 AR 34-44. The No Build Alternative
11 was described in one paragraph. 1 AR 44. Caltrans rejected several alternatives without detailed
12 evaluation, including slower speeds, signalization, and continuing legislative exemptions for (or
13 permitting of) STAA truck access, principally on the basis that these alternatives did not fulfill
14 its improperly defined statement of the Project’s purpose and need. 1 AR 44-52; 9 AR 2692.

15 In fact, the origin of Caltrans’ decision to pursue the Project can be found in its decision
16 to abandon, in 2007, a “Goods Movement Feasibility Study,” in which increased STAA access
17 was only one of the options considered. 2 AR 404. *See* 1 AR 33; 7 AR 1940, 1943, 1968; 9 AR
18 2604. While Caltrans abandoned this study in favor of the computer simulation that ultimately
19 led to the Project, 7 AR 1968, the study’s approach was consistent with the 2002 Highway 101
20 Route Concept Report, which advised: “Where environmental or cost concerns exist in the
21 design of facility improvements to achieve this strategy, [Caltrans] *will seek other strategies* to
22 accommodate goods movement to support economic opportunities throughout the area.” 17 AR
23 5304 (emphasis added). Indeed, a 2001 Feasibility Study made clear that “[w]hile the ‘No
24 Build’ perpetuates existing problems, these problems do not warrant the environmental impacts
25 to the area.” 11 AR 3101. Caltrans has failed to meet its burden to show that the project is
26 necessary in the face of the environmental impacts to the area.

27 Caltrans’ decision to pursue increased access for STAA trucks through the Grove also
28 contradicted the findings of a 2003 Cambridge Systematics Study, commissioned by Caltrans,

1 in which widening the highway at the Grove was rejected in favor of “improvements on SR
2 299,” another road into Humboldt County, which “would provide a less disruptive solution to
3 [the] County’s access issues.” 17 AR 5379. Caltrans is currently pursuing STAA access projects
4 on Highway 299, see 2 AR 570, but did not evaluate whether doing so may be preferable to
5 expanding STAA access through the Grove.

6 **C. Caltrans Failed To Allow Adequate Public Participation In The EA Process**

7 Caltrans failed to “make diligent efforts to involve the public” in preparing and
8 implementing the EA. See *Cal. Trout v. FERC*, 572 F.3d 1003, 1016 (9th Cir. 2009). Failing to
9 meet this standard “undermines the very purpose of NEPA, which is to ‘ensure[] that federal
10 agencies are informed of environmental consequences before making decisions and that the
11 information is available to the public.” *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 970-
12 971 (9th Cir. 2003) (quoting *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th
13 Cir. 2000)). Here Caltrans failed to meet this standard by: (1) omitting significant information
14 from the Draft EA — including identification of a substantial number of old-growth redwoods
15 likely to be impacted by the Project and reports by two arborists concerning the Project’s likely
16 impact on old-growth redwoods — which was later added to the Final EA; and (2) failing to
17 meaningfully consider and respond to comments by submitted by the public on the Draft EA.

18 **1. Caltrans Made Substantial Changes to the EA After The Close Of**
19 **Public Comment**

20 “An agency, when preparing an EA, must provide the public with sufficient
21 environmental information, considered in the totality of circumstances, to permit members of
22 the public to weigh in with their views and thus inform the agency decision-making process.
23 *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng’rs*, 524
24 F.3d 938, 953 (9th Cir. 2008). Caltrans failed to meet this standard here.

25 Incredibly, Caltrans failed to publicly disclose the number of old-growth redwoods
26 likely to be affected until *after* the Project was approved. In the Draft EA, Caltrans listed 40
27 trees as having “Potential Tree Root Effects.” 4 AR 1316-1317, Table 9. In the Final EA, this
28 number more than doubled to 86 trees, the majority of which are old growth redwoods 30” or

1 more in diameter. 1 AR 128-129, Table 9. Moreover, after State Parks commented that the Draft
 2 EA lacked an assessment of cut and fill impacts adjacent to old-growth trees, 2 AR 383,
 3 Caltrans added basic information about these operations to the Final EA. 1 AR 130-131, Table
 4 10. However, because Caltrans did not release the Final EA for comment, the public was
 5 deprived of this information until *after* Project approval. Caltrans did not facilitate, but instead
 6 frustrated, the public's ability to inform the decision-making process here.

7 Caltrans also failed to provide the required public notice and opportunity for comment
 8 on the Section 4(f) analysis. 23 C.F.R. § 774.5 (b)(2). The Draft EA did not describe or identify
 9 the Section 4(f) lands to be exchanged and provided only a cursory consideration of feasible and
 10 prudent alternatives. 4 AR 1364-1372. Only in the Final EA did Caltrans outline the Section
 11 4(f) analysis and identify the Park properties that would be exchanged. *Compare* 1 AR 201-218
 12 *with* 4 AR 1364-1372. In this way, the public was deprived of the opportunity to understand and
 13 to comment on the Section 4(f) determination.

14 **2. Caltrans Failed To Adequately Respond In The Final EA To The**
 15 **Comments It Received After Circulation Of The Draft EA**

16 Despite these shortcomings, the public submitted numerous comments on the Draft EA
 17 raising significant scientific concerns, to which Caltrans made a woefully inadequate response.
 18 "It would not further NEPA's aims for environmental protection to allow [an agency] to ignore
 19 reputable scientific criticisms." *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir.
 20 1993) *overruled on other grounds in Lands Council*, 537 F.3d at 1001. Thus, an agency "must
 21 acknowledge and respond to comments by outside parties that raise significant scientific
 22 uncertainties and reasonably support that such uncertainties exist." *Lands Council*, 537 F.3d at
 23 1001.¹

24
 25
 26 ¹ Plaintiffs acknowledge that "NEPA does not require . . . agencies to assess consider and respond to public
 27 comments on an EA *to the same degree* as it does for an EIS." *Cal. Trout*, 572 F.3d at 1016 (internal quotations
 28 omitted; emphasis added). Plaintiffs respectfully, submit, however that this shortcoming, given the overwhelming
 implication of significance factors by the proposed project discussed above, further indicates the inappropriateness
 of Caltrans' decision to issue a FONSI rather than conduct a full EIS in this instance.

1 For example, when the California State Parks Foundation confronted Caltrans about
2 prematurely abandoning the Goods Movement Study, Caltrans simply ignored the comment.
3 *See* 2 AR 404, 415. The State Parks Department also challenged Caltrans' use of the Section
4 4(f) Programmatic Evaluation, which Caltrans entirely ignored. 2 AR 405 (not marked for
5 response). Caltrans also ignored EPIC's comments challenging the deficiencies in the Draft
6 EA's layout maps, 2 AR 432, 438, the necessity of the Project, 2 AR 433, and the need to
7 recirculate the document. 2 AR 424.

8 When the State Parks Department and others raised the issue of cumulative effects from
9 other projects, 2 AR 387-388, 564-565, 695, Caltrans ignored these concerns. 2 AR 397, 570,
10 698. Caltrans entirely ignored commenter Cynthia Elkins, who specifically asked, "[w]hat are
11 the cumulative effects of all four STAA proposals?" 2 AR 696; *see also* 2 AR 742.

12 On the issue of safety, the State Parks Foundation raised concern about the lack of
13 "traffic-engineering studies to support the conclusion that traffic safety will be enhanced." 2 AR
14 406 (comment # 16.). Caltrans ignored this concern. 2 AR 418 (response to comment # 16).

15 And lastly, a registered professional forester challenged Caltrans' failure to include
16 expertise from someone "involved with redwood protection and mitigation techniques." 2 AR
17 619. Caltrans does not respond to this assertion, but rather references its arborist's report, which
18 was created long after the opportunity for public comment and has no statement of expertise.
19 *Id.*; *see*, 14 AR 4037-4039.

20 Again, Plaintiffs respectfully submit that given Plaintiffs' convincing showing that there
21 are substantial questions going to the significance of the Project's impacts upon old-growth
22 redwoods in the project area and the multitude of significance factors implicated here and
23 discussed above, the Court should order Caltrans on remand to prepare an EIS. However, at the
24 very least, Plaintiffs submit that in light of the foregoing shortcomings in the Final EA, Caltrans
25 should be ordered to prepare a revised EA, and based on that revised EA revisit its
26 determination of no significant impact.

1 **III. Caltrans violated Each of Section 4(f)'s Fundamental Requirements**

2 The purpose of Section 4(f) is to protect the natural beauty and availability of parks and
3 other environmental and historic resources. 49 U.S.C. § 303(a). Section 4(f) is “a plain and
4 explicit bar to the use of federal funds for construction of highways [which use Section 4(f)
5 resources] — only the most unusual situations are exempted.” *Overton Park, Inc. v. Volpe*, 401
6 U.S. 402, 411 (1971), *overruled on other unrelated grounds*. Thus, when a road building project
7 would require the use of publically owned park land, Section 4(f) requires the road building
8 agency fulfill three fundamental requirements: (A) demonstrate that “there is no feasible and
9 prudent alternative to the use of such land”; (B) demonstrate that the Project “includes all
10 possible planning to minimize harm to such park, recreational area, wildlife and waterfowl
11 refuge, or historic site resulting from such use”; and (C) gain concurrence in these
12 determinations from the agency with jurisdiction over the lands that would be used, in this case
13 California State Parks Department. 23 U.S.C. § 138. “[N]o feasible alternative” means that “the
14 Secretary [of Transportation] must find that as a matter of sound engineering it would not be
15 feasible to build the highway along any other route.” *Overton Park*, 401 U.S. at 411. “[N]o
16 prudent alternative” means that the Secretary must “find [] that alternative routes present
17 unique problems.” *Id.* at 412. Caltrans has not satisfied any of these requirements.

18 **A. Caltrans' Use of the Programmatic Section 4(f) Evaluation Was Unlawful**

19 Caltrans did not conduct an individual Section 4(f) evaluation, but instead used a limited
20 “Programmatic” Section 4(f) evaluation. 1 AR 198. The use of a Programmatic Section 4(f)
21 Evaluation, in lieu of an individual Section 4(f) evaluation, is restricted to specific
22 circumstances. 23 C.F.R. § 774.3 (d); 20 AR 6309-6312. Among other things, it cannot be used
23 if the proximity of impacts will impair the Section 4(f) land for its intended purpose. 20 AR
24 6310, #4. It further requires that the officials having jurisdiction over the Section 4(f) land agree
25 in writing with the assessment of impacts and the proposed mitigation. *Id.*, # 5. And it may not
26 be used if an EIS is required for the project. *Id.*, #7. Moreover, it requires specific findings as to
27 alternatives, each of which must be supported by “circumstances, studies and consultations on
28 the project.” 20 AR 6310. Caltrans did not satisfy these criteria.

1 As established above, the Project will impair Park land, most particularly the old-
2 growth redwoods upon it, preservation of which is one of the chief purposes of the Park.
3 Moreover, State Parks did not *agree* with Caltrans' assessment of impacts and the proposed
4 mitigation. State Parks said nothing concerning Caltrans' ultimate determination of no
5 significant impact — though as discussed *supra* State Parks was highly critical of elements of
6 the Draft EA in that regard, which were not corrected in the Final EA — and it qualified its
7 agreement concerning mitigation measures with the phrase “*by your department.*” *Id.* (emphasis
8 added). Nor are the findings supported by circumstances, studies and consultation on the
9 projects. In fact, the background studies reveal a well-documented recognition that a no build
10 alternative is preferable to causing environmental harm. *See supra*, Section II(B). And finally,
11 as argued above, this Project requires an EIS, and under such circumstances, the Programmatic
12 Evaluation could not be used. Thus, Caltrans was required to conduct an individual Section 4(f)
13 analysis. 23 C.F.R. §§ 774.3 - 774.9; 21 AR 6832-6836.

14 **B. Caltrans Failed to Demonstrate Lack of Feasible And Prudent Alternatives**
15 **To Using Lands Of Park As Called For By The Project**

16 Under Section 4(f), if a feasible and prudent alternative exists for the Project, it must be
17 chosen. 21 AR 6778. Section 4(f) resources “may be ‘used’ for highway purposes only if ‘there
18 [are] truly unusual factors present in [the] case,’ if ‘feasible alternative routes involve uniquely
19 difficult problems,’ or if ‘the cost or community disruption resulting from alternative routes
20 [reach] extraordinary magnitudes.’” *Stop H-3 Ass’n v. Dole*, 740 F.2d 1442, 1449 (9th
21 Cir.1984), *quoting Overton Park*, 401 U.S. at 413, 416.

22 To satisfy the standard, Section 4(f) evaluations “shall include sufficient supporting
23 documentation to demonstrate why there is no feasible and prudent avoidance alternative.” 23
24 C.F.R. § 774.7(a). Caltrans failed to provide this documentation in its Section 4(f) analysis,
25 through its failure to adequately evaluate alternatives. Specifically, Caltrans failed to document
26 that the STAA access could not be provided on a different route or, if on the same route, under
27 certain restrictions without the alignment, and in either case, the no build alternative was
28 feasible and prudent.

1 As outlined above, the no build alternative is a more feasible and prudent alternative.
2 *See supra* Section II(B); *see also* 17 AR 5304. The 2003 Cambridge Systematics Study
3 established that providing STAA access on Highway 299 was preferable to causing impact to
4 Richardson Grove. 17 AR 5379. And Humboldt County recommended allowing STAA access
5 through the Grove during nighttime hours. 20 AR 5946. Caltrans did not explore these options
6 as part of the Section 4(f) analysis, but, instead, summarily rejected them. 1 AR 205.

7 Moreover, by narrowly stating the Project purpose, Caltrans eliminated consideration of
8 feasible and prudent alternatives as required by Section 4(f). It is clear that other alternatives for
9 goods movement using STAA access are available, such as using Highway 299 into Humboldt
10 County. The Section 4(f) evaluation in the EA does not even consider STAA access through
11 other locations. 1 AR 206-207. By ignoring this, Caltrans failed to support its finding that there
12 are no feasible and prudent alternatives.

13 Finally, Caltrans claims that State Parks concurred that there is no feasible and prudent
14 alternative to the proposed Project. 1 AR 212. Parks did not provide that concurrence; rather, it
15 merely *acknowledged* that Caltrans “has concluded there is currently no feasible and prudent
16 alternative to the proposed realignment.” 1 AR 219.

17 **C. Caltrans Failed To Demonstrate That The Project Includes All Possible**
18 **Planning To Minimize Harm To The Park**

19 The Section 4(f) analysis also fails to satisfy the requirement that all possible planning
20 be performed to minimize harm. 49 U.S.C. § 303. As Plaintiffs have outlined, Caltrans failed to
21 conduct an adequate evaluation of the Project’s impacts on the old-growth redwoods. This alone
22 defeats the finding that all possible planning was provided, because in the absence of an
23 adequate evaluation of impacts, it is impossible to know whether the Project includes all
24 measures to eliminate impacts. Indeed, Caltrans conceded that its proposed mitigation and
25 minimization measures are not supported by studies and technical data. 2 AR 416-417. To the
26 extent Caltrans relied on the two arborists to overcome its lack of technical support, there is no
27 evidence either is a redwood expert. Finally, Caltrans’ reliance on the State Parks letter is
28

1 misplaced, because that letter did not agree that all possible mitigation planning had been
2 included, but only all possible planning *as determined by Caltrans*. 1 AR 219.

3 Thus, Caltrans failed to meet its obligations under Section 4(f), and Plaintiffs are entitled
4 to judgment as a matter of law on this basis as well.

5 **IV. Caltrans Violated The Wild and Scenic Rivers Act**

6 Finally, Caltrans also violated the WSRA by failing to comply with Section 7 of the Act,
7 which provides that “no department or agency of the United States shall assist by loan, grant,
8 license, or otherwise in the construction of any water resources project that would have a direct
9 and adverse effect on the values for which such river was established.” 16 U.S.C. §1278(a). The
10 Project is subject to this provision because it is within one mile of the Wild and Scenic Eel
11 River. However, Caltrans contacted the National Park Service (“NPS”) only weeks before
12 Project approval. Caltrans provided only an abbreviated project description, a vicinity map,
13 depiction of culvert locations, and two pictures, 10 AR 3055-3058, and described the map as
14 “identifying the major features of the project and some of the sensitive environmental resources
15 present within the project limits.” 10 AR 3064. None of the information provided described
16 Park resources, old-growth redwoods, watercourses, or the recreational resources of the Eel
17 River to be affected by the Project, as required by Section 7 of the WSRA. Caltrans did not
18 provide detailed Project Plans, environmental analysis, information concerning tree impacts, cut
19 and fill, storm water impacts, or visitor impacts. In this way, Caltrans failed to comply with
20 Section 7(a), and Plaintiffs are entitled to judgment as a matter of law on this claim as well. *See*
21 *Duggan Dec., Ex. 5.*

22 **CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully submit that they are entitled as matter
24 of law to judgment in their favor that Caltrans violated NEPA, Section 4(f) of the Department of
25 Transportation Act, the WSRA, and the APA, and an order requiring Caltrans to conduct a full
26 EIS under NEPA and comply with the provisions of Section 4(f) and the WSRA.

27 Dated: December 5, 2011

GROSS LAW

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/s/ Stuart G. Gross

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